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R E P O R T E R ' S R E C O R D

VOLUME 27 OF 53

Trial Court Cause No. 380-80047-01

THE STATE OF TEXAS * IN THE 380TH DISTRICT COURT

V. *

IVAN ABNER CANTU * OF COLLIN COUNTY, TEXAS?

REPORTER'S RECORD
VOLUME 27 - VOIR DIRE
CAPITAL MURDER JURY TRIAL

COPY

ORIGINAL COPY

On the 24th day of September, 2001, from 9:15 a.m. to 6:00 p.m. the Voir Dire proceedings came on to be heard outside the presence of a jury, in the above-entitled and -numbered cause; and the following proceedings were had before the Honorable Charles F. Sandoval, Judge Presiding, held in McKinney, Collin County, Texas:

Proceedings reported by Computerized Stenotype Machine; Reporter's Record produced by Computer-Assisted Transcription.

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PROCEEDINGS

1 (Open court, venire present.)
 2
 3 THE COURT: All right. Ladies and Gentlemen,
 4 we're back on the record in Cause Number 380-80047; State of
 5 Texas versus Ivan Abner Cantu. There's one person missing.
 6 That's Anna Moore, and let's see, which number is she, Billy?
 7 THE BAILIFF: Number 159.
 8 THE COURT: Number 159, and so a Writ of
 9 Attachment will issue for Anna Moore.
 10 (Discussion off the record.)
 11 THE COURT: Billy, would you check and see if
 12 there's somebody at the door. See if it's Anna Moore. The
 13 court reporter thought she saw somebody.
 14 THE BAILIFF: Yes, Your Honor.
 15 THE COURT: No? All right, false alarm, so
 16 the Writ of Attachment will issue.
 17 Good morning, Ladies and Gentlemen, and welcome back
 18 to the Collin County Courthouse. You are the last one-third
 19 of the original 200 people that were summoned in this case.
 20 What we're going to do this morning is the attorneys on both
 21 sides will talk to you; Jami Lowry for the State and Matt
 22 Goeller for the Defense.
 23 MR. GOELLER: Good morning.
 24 THE COURT: And they're going to discuss some
 25 general principles with you so that you can kind of

1 contemplate them before you're called back for your individual
 2 voir dire. It appears that you've gotten your schedules with
 3 regard to when you come back. I think that there's only a
 4 very slim chance that we'll get too far into this group before
 5 we have the jury completed. So the farther you are to the
 6 back, the less of a chance that you would be seated here, and
 7 as I say, I expect to seat a jury out of the first or second
 8 row, but I could be wrong.
 9 I want to ask you, as you did when you first came
 10 here, to recall your oath. You'll remember that I
 11 administered an oath to the group of 200, and the oath was to
 12 tell the truth with regard to any questions propounded by the
 13 Court or by the attorneys. And I'll advise everybody about
 14 that once again when you come in for your individual voir
 15 dire, but just want you to keep that in mind. And I know
 16 that everybody takes seriously the business that we're about
 17 here, and I want you to know that we appreciate your taking
 18 the time to come and participate because this is a very
 19 fundamental exercise that we're about here. That's about all
 20 that I have to tell you folks. I want to thank you once again
 21 for coming, and, Ms. Lowry, would you like to go first?
 22 MS. LOWRY: May it please opposing counsel.
 23 MR. GOELLER: Ma'am.
 24 MS. LOWRY: Good morning, Ladies and Gentlemen.
 25 I know everyone in here is probably extremely excited to be

1 back today, and probably having to come back again even after
2 this. As the Judge said, we're hoping we won't get past the
3 second row. We're hoping to have a jury before that, so you
4 people in the back, I know you're excited.

5 First of all, I just want to start off by telling
6 you this is what we call general voir dire, and as the judge
7 said, it's a time for us to explain basically what the law is,
8 some general principles, things that you're going to learn
9 throughout the trial, things that you're going to be using
10 throughout the trial. I'm standing, of course, in the middle
11 of the room. Sometimes it echos, sometimes there are dead
12 spots, so if any of you can't hear me, just feel free to raise
13 your hand, let me know. If you don't understand a question
14 I'm asking or anything like that, just feel free to raise your
15 hand and let us all know.

16 First of all, I'd just like to add that anything
17 that's asked of any person individually that each of you take
18 it into consideration, think about it, and let us know what
19 you think about things. The only thing that we're asking you
20 here today is just to be honest with us. Give us your
21 opinions, give us your thoughts because that's what we need to
22 know in this process. What we're here doing today is trying
23 to find 12 people that are going to be the most fair and the
24 best juror for this type of case.

25 I'm not going to be able to talk to you after this.

1 I know that -- let me -- the lady on the back, let me get your
2 name. And I do have your names, so if I don't get it right,
3 please let me know. And I'll just ask that if anybody asks a
4 question or has anything to say, if you would say juror number
5 and your name so that the court reporter can get that down on
6 the record, okay?

7 THE COURT: Say, Ms. Lowry, I forgot to ask
8 you, would you like me to give you a ten-minute warning?

9 MS. LOWRY: Yes, Your Honor, that's fine.

10 THE COURT: Thank you.

11 MS. LOWRY: Anyway, I'll find it.

12 We can't talk to you after this, and basically the
13 reason for that is we have to keep the utmost look of
14 proprietary interest at heart. Does that make any sense? We
15 don't want -- we're not going to ride the elevators with you.
16 We're not going to talk with you, visit with you, anything
17 like that after today, and the reason for that is there are a
18 lot of people in the courthouse and if I ride up on the
19 elevator with you, someone sees us getting off the elevator
20 with you, you might have a reporter down the hall, maybe
21 someone else involved in the trial, and it just doesn't look
22 right, and that's why we do that. We don't do it to be rude,
23 or we don't do it because we don't want to visit with you or
24 anything of that nature. We just need to make sure that
25 everything looks like it's going the way it's exactly supposed

1 to, okay?

2 First, I want to talk to you just a little bit about
3 the trial process in general. In Texas we have what we call a
4 bifurcated trial system, and that is there are two phases of
5 the trial. The first phase is what we call the
6 guilt-innocence phase, and that's where you hear the facts of
7 this case and that type of stuff to where you can decide
8 whether or not the person is guilty or innocent. In that
9 phase of the trial, as you-all know, who's heard of what the
10 burden of proof is?

11 Ms. Cook, do you know what the burden of proof in a
12 criminal case is?

13 PROSPECTIVE JUROR: Yes. I believe that the
14 State has to prove guilt, rather than the defendant proving
15 his innocence.

16 MS. LOWRY: And, Ms. Eikhorn, do you know by
17 what amount of evidence we have to bring you for you to find
18 someone guilty?

19 PROSPECTIVE JUROR: It has to be proven beyond
20 a shadow of a doubt.

21 MS. LOWRY: Okay. It's beyond a reasonable
22 document. That's exactly right, and that is the State's
23 burden. That is the highest burden under the law, as it
24 should be, because we're talking about a criminal case.

25 During the guilt-innocence phase, the entire burden

1 is on the State. The Defense doesn't have to bring you any
2 evidence. They don't have to do anything but show up and
3 probably act nice. I think the Judge would certainly require
4 that.

5 So at this phase of the trial, the guilt-innocent
6 phase of the trial, is it clear to everyone that the Defense
7 doesn't have to do anything? Is there anyone that has a
8 concern about that? Okay, I see no hands.

9 Once you get past the guilt-innocence phase and a
10 guilty finding is made, you get to what we call the punishment
11 phase. And one issue that I want to address, and what we
12 focus on mainly because after this general voir dire we're
13 going to do what we call individual voir dire, and that's
14 where we talk to you one on one. Some people may think that's
15 going to make them more comfortable because then they can talk
16 freely, give us their opinions more freely. Others certainly
17 may like the group setting where it's not just you sitting up
18 in the witness stand with the six of us looking at you.

19 Let me go back and let me briefly introduce my
20 co-counsel. This is Bill Schultz. He's the First Assistant
21 in our office.

22 MR. SCHULTZ: Good morning.

23 MS. LOWRY: Gail Falco, she's one of the chief
24 felony prosecutors in our office. Seated at this table is
25 Matt Goeller, the Defense attorney.

1 MR. GOELLER: Good morning, Ladies and
2 Gentlemen.
3 MS. LOWRY: And seated next to him is Ivan
4 Cantu, the Defendant.
5 THE DEFENDANT: Good morning.
6 MS. LOWRY: Does anyone know anyone? Any of
7 the lawyers, the Judge, court reporter? Yes, ma'am, Ms. Lee?
8 VENIREPERSON: The Defendant.
9 MS. LOWRY: The Defendant, okay.
10 And I'm going to have to ask you to speak up a
11 little bit so the court reporter -- she's trying to take
12 everything down. And, Ms. Lee, what is your number?
13 VENIREPERSON: 105.
14 MS. LOWRY: 105, okay. Is that something you
15 want to talk about now, or do you want to talk about that
16 during your individual voir dire?
17 VENIREPERSON: Would it save me coming back
18 tomorrow to talk about it now?
19 (Laughter.)
20 THE COURT: Say, excuse me. Ms. Lee, I believe
21 you're Number 110; is that correct?
22 VENIREPERSON: Yes. I'm sorry.
23 THE COURT: So Stacie Lee is Number 110.
24 MS. LOWRY: That's something we'll talk about
25 whenever you come back.

1 Ms. Moore, did you --
2 VENIREPERSON: No. I just wanted to say I'm
3 105.
4 MS. LOWRY: Oh, okay. You're 110. I'm sorry.
5 Does anyone else know anyone, either the lawyers,
6 judges, maybe anyone else that's on the panel, either here
7 today, or that may have been here back in August?
8 Now, getting back to the trial process, most of the
9 questions and most of the things that we're going to talk to
10 you about are about the punishment phase, and that is because
11 this case is of such a serious nature because it involves the
12 death penalty. We've had some people that have had some
13 concerns about the fact that we focus so much on the
14 punishment phase, and the reason for that is because those are
15 the more ultimate issues and that's what we need to know from
16 you, how you feel about those issues, what your opinions are,
17 whether or not you can involve yourself in a process that
18 could result in someone's death. It's not because the
19 guilt-innocence phase is any less important. It's not because
20 we don't take the guilt-innocence phase any less seriously or
21 that's not going to be an important part of the trial. It's
22 just the death sentence and whether or not you can do that is
23 our main focus to make sure that -- because we don't get to
24 talk to you again after this. Once this is over, we start the
25 trial. You go through the guilt-innocence phase, and then

1 you're also going to go through the punishment phase. So we
2 have to know all of these things now so that we can fairly
3 determine whether or not you're going to be a fair and
4 impartial juror, okay? Is there anyone that has any concern
5 about the fact we're going to focus more on the punishment
6 issues? Okay. I see no hands.
7 Now let's talk a little bit about capital murder.
8 In Texas we have murder, and then you have capital murder.
9 Okay. I'm not very good with this thing, either, so... First
10 of all, can everyone see this okay? Murder -- the definition
11 of murder is, "A person commits an offense if he intentionally
12 or knowingly causes the death of an individual." Exactly what
13 you-all thought it was. It's just basic murder. They refer
14 to it as plain murder. We don't mean that -- that it's any
15 less or anything. It's just you have to have some way of
16 distinguishing it from capital murder.
17 With murder you have a punishment range of 5 to 99
18 years or life, and also if a person is eligible and proves
19 his eligibility he can also get probation. Why this is
20 important is because in a capital murder case there are
21 lesser-included offenses, and one of those could be murder.
22 You as a juror, to be qualified, have to be able to consider
23 all the possibilities. One of those possibilities is for some
24 reason capital murder is not proven, murder is a
25 lesser-included offense. You have to be able to consider

1 whether or not you'd give someone that you convicted of murder
2 probation.
3 You may all be thinking to yourselves, oh, my
4 goodness, what is she talking about? But the Legislature has
5 come up with this punishment range and the reason they have is
6 because there's so many different circumstances, so many
7 situations that could all constitute murder. For example, you
8 could have, let's say, Mr. Deeb, who is your favorite movie
9 star?
10 VENIREPERSON: Harrison Ford.
11 MS. LOWRY: Let's say you love Harrison Ford.
12 You go see all of his movies. If you ever got a chance to go
13 meet him, you would. He's just the greatest person in the
14 world. Let's say someone goes -- sees him on the street and
15 kills him. To you that would be bad because Harrison Ford is
16 your favorite movie star. Well, that's still plain murder.
17 And they could kill him in a way that was the most
18 gruesome murder in the world. They could -- a lot of these
19 things I talk about I don't mean to be amusing or funny, but
20 it's just to make the illustration in a way that makes it
21 clear and understandable.
22 They could knock him over the head with a baseball
23 bat, beat him until he's almost dead, and then maybe even set
24 him on fire, and I think we would all agree that is something
25 that is one of the most gruesome murders that you could think

1 of, to burn someone while they're alive. But even that,
 2 because it's just murder, doesn't have a death penalty as an
 3 option. Certainly you can see that would be on the more
 4 extreme end of murder and horrible circumstances, things of
 5 that nature. You might be thinking, well, I would never give
 6 that person probation. And you may not and that's fine. But
 7 what you have to be able to do is before you hear any of the
 8 facts, keep an open mind and be able to assure this Judge and
 9 all of us here that you could consider probation. As soon
 10 you hear the facts you may say, no, no way would I give him
 11 probation.

12 Another example would be, let's say you have an
 13 elderly couple, been married for 65 years and have promised
 14 each other all of their lives that they wouldn't let the other
 15 one live on life support, and it comes to that time. One of
 16 them is put on life support, and the spouse says, you know
 17 what, I promised all my life that I wouldn't let this happen
 18 and they pull the plug. It's still murder because they
 19 intentionally and knowingly caused the death of an individual.
 20 But you might think to yourself, you know what, that person
 21 might deserve probation. If he loved his wife, he wasn't
 22 doing it out of any type of violent act. He wasn't doing it
 23 out of hatred, or anything like that. He was doing it simply
 24 because he loved his wife. So, you can see there are
 25 certainly extreme ends of situations, circumstances that could

1 be involved. And what we ask of you is just to keep an open
 2 mind before you hear any evidence and be able to consider the
 3 full range, that being from probation all the way up to 99
 4 years or life. Does that make sense to anyone?

5 Okay. Now, when you're deciding between whether an
 6 offense is plain murder versus capital murder, as I said, it
 7 doesn't matter what exactly the circumstances are. It could
 8 be the most gruesome murder ever and it still not be capital.
 9 It doesn't matter who the victim is. It doesn't matter, you
 10 know, if the defendant is a much nicer person than the victim,
 11 or if you like the defendant better than the victim.

12 The difference between murder and capital murder --
 13 and the definition for capital murder is "A person commits an
 14 offense if he commits murder, and the person intentionally
 15 commits the murder in the course of committing or attempting
 16 to commit kidnapping, burglary, robbery, aggravated sexual
 17 assault, arson, or obstruction or retaliation. Or, the person
 18 murders more than one person during the same criminal
 19 transaction, or pursuant to the same scheme or course of
 20 conduct." So basically what capital murder is, it's murder
 21 plus something, plus some aggravating factor that makes it
 22 worse than just murder. These two, number one and two, are
 23 only two types of things that can make something capital.
 24 Other things that can make a murder capital is the victim is a
 25 child under six years of age, or if the victim is a fireman or

1 policeman who is killed during the course of their duties, in
 2 the course of doing their job. I'm sure you're all familiar
 3 with George Rivas, killed the officer while he was working.
 4 That's capital murder.

5 Some other variations are murder for hire. If
 6 you're the person hired or if you're the person doing the
 7 hiring.

8 And also murder in the course of escaping from a
 9 penal institution, things of that nature. All of those are
 10 capital. The main three -- or two that we're focusing on are
 11 these two, and specifically burglary and robbery.

12 Now, with capital murder, and as I said,
 13 guilt-innocence phase is not any less important, and you're
 14 going to be presented evidence and asked at the end of that
 15 phase to decide whether or not you believe beyond a reasonable
 16 doubt the person is guilty. And assuming you found someone
 17 guilty of capital murder, there are only two options in the
 18 punishment phase; life or death. And we don't ask you to go
 19 back there and circle life or death. The way it's done is you
 20 answer certain questions, and those questions, by the way you
 21 answer those, determine -- dictate -- let's throw that word
 22 out and try this again. Dictates to the judge what sentence
 23 is rendered. Does that make sense to everyone?

24 As far as the death penalty goes, we're not here to
 25 argue with you about what you think about the death penalty.

1 We're not here to advocate on behalf of it. They're not here
 2 to advocate against it, and we're not here to try to change
 3 your mind. What we need to know is, this is part of our law,
 4 and the law provides that if someone commits an offense that
 5 the Legislature has said this may be such a horrible crime
 6 that it deserves maybe giving your life, can you be involved
 7 in that process? And when we ask you these questions and we
 8 ask you to think about these things, we're not asking for you
 9 to answer the way we want you to, and we're not asking you to
 10 think, you know, I wonder what the Judge would like for me to
 11 say because that's not what we want to know. We want to know
 12 simply how you feel about it, how it's going to affect you,
 13 and whether or not you can be involved in this process, so
 14 that's what we ask of you. Does everyone think that's
 15 appropriate, okay for us to do that? Raise your hands if you
 16 think that's okay? I'm going to have you do jumping jacks in
 17 a minute.

18 How many people oppose the death penalty and would
 19 actually work to abolish it as a part of our law?

20 Let's see, is it Mr. Simms? Okay. What number are
 21 you, Mr. Simms?

22 VENIREPERSON: 139.

23 MS. LOWRY: 139. And there were also some
 24 hands in the back. Yes, sir, your name?

25 VENIREPERSON: Watts. I'm 174.

1 MS. LOWRY: 170 --
 2 VENIREPERSON: Four.
 3 MS. LOWRY: -- 4, okay.
 4 VENIREPERSON: Deanna DeYoung, 173.
 5 MS. LOWRY: And like I said, we're not here to
 6 change your minds about that, and we're not here to try to
 7 sway you and make you think the way that we do. We just ask
 8 that you basically decide how you feel about it and let us
 9 know, okay?

10 How many people are for it, think it's a good thing,
 11 and think we need it? That's too many hands for me to call
 12 out everybody's name. And like I said, they're not here to
 13 change your mind, and all we ask is that you be honest and
 14 tell us how you feel about it.

15 And how many are basically ambivalent, just, huh,
 16 whatever? I see two hands in the back.

17 All of these views are compatible with serving on a
 18 jury, and the reason that is is because you may be completely
 19 against it and would work to abolish it, or you may be
 20 completely for it and think that I would give it, you know, in
 21 almost every case and that's fine. What you have to do to be
 22 qualified as a juror is to follow the law, find whether or not
 23 he's guilty beyond a reasonable doubt and answer the questions
 24 based on the evidence without taking into account what you
 25 want to happen, and if you can follow the law and base all the

1 for some reason walks out the door, and the defendant never
 2 actually makes it inside, so he hasn't entered his habitation.
 3 He hasn't technically committed burglary. Maybe he just
 4 pulled a gun on him and said give me all your money and your
 5 watch, but never went in his house. So, there you know it's
 6 robbery because that's a person-to-person crime, but you don't
 7 have burglary because he never actually went inside the house.
 8 Does that make sense? And that's what that's for. That's
 9 just to allow for the flexibility of the evidence, and it
 10 allows the evidence to (inaudible).

11 Let's talk about effective consent. You may think
 12 that if a person opens the door and lets you in their -- or
 13 you let them in your house, that's effective consent.
 14 However, there are situations where, because of the person
 15 who's coming in the house, because their intent is malicious
 16 or because they intend to commit a crime once they get in the
 17 house, they render the consent to become ineffective.
 18 Sometimes you can tell that by the circumstances, by things
 19 that were found in the house, maybe by the lack of forced
 20 entry. One example is, let's say a Bible salesman comes to
 21 your door, knocks on the door and has his pamphlets and says,
 22 I want to come in and talk to you about this Bible that I'm
 23 selling. But all along, as he's knocking on your door, he
 24 knows he's going to come in and rob you and kill you. You let
 25 him in your house because you want to talk about the Bible,

1 questions and the answers to the questions on the evidence,
 2 you're qualified to be on this jury. Does that make sense to
 3 everyone?

4 Burglary is, "A person commits an offense if,
 5 without the effective consent of the owner, the person enters
 6 a habitation and commits or attempts to commit a felony." As
 7 I told you, capital murder can be a murder that's committed
 8 during the course of burglary; that being, someone breaks into
 9 someone's home and kills them during the process of
 10 burglarizing their home. Is there anyone who thinks that,
 11 other than the people who think the death penalty is never
 12 appropriate, is there anyone who thinks that's not an
 13 appropriate crime for the death penalty to be an option?
 14 Okay. I don't see any hands.

15 And with burglary, and as I said, we're focusing
 16 more on burglary/robbery and the double homicide situation,
 17 and that's just because that's what's pled in the indictment.
 18 There are three different things pled in the indictment;
 19 that's murder in the course of burglary, murder in the course
 20 of robbery and then the killing of two people. Now, you may
 21 ask why all three things are pled, and basically that's to
 22 allow for the flexibility of the evidence. We know what the
 23 evidence is. Sometimes we're not real sure exactly how it's
 24 going to come in. Like, for instance, burglary, you may have
 25 someone going over to another person's house, and the person

1 maybe even buy one. He comes in, there's a scuffle, he kills
 2 you, burglarizes your house, but in the course drops all his
 3 Bible pamphlets. When the police get there, they see them all
 4 there. There's no forced entry because you let him in your
 5 house, but that's still burglary because when he came to your
 6 door he knew what he was going to do, and he knew he was
 7 coming in to commit a crime. Does that make sense to
 8 everyone?

9 If I get to where I say "does that make sense" too
 10 much, feel free to tell me that, too. My husband does all the
 11 time.

12 Okay. Let's talk about robbery. Robbery is the
 13 more person-to-person crime. It's the more person-to-person
 14 crime. "A person commits an offense if, in the course of
 15 committing theft and with intent to obtain or maintain control
 16 of the property," he intentionally, knowingly or recklessly
 17 causes bodily injury to another, or intentionally or knowingly
 18 threatens or places another in fear of eminent bodily injury
 19 or death." It's what you think of when you think of somebody
 20 walking up to you on the street and pulling a gun on you and
 21 saying give me your money. That's robbery, person-to-person
 22 crime. It is capital murder to commit a murder during the
 23 course of robbery. Is there anyone who, other than -- like I
 24 said earlier, the ones I've already talked to, is there anyone
 25 who thinks that murder committed during the course of robbery

1 is not an appropriate offense -- or the death penalty as an
2 option? Okay. I don't see any hands.

3 And last, just intentionally. "A person acts
4 intentionally or with intent with respect to the result of his
5 conduct when it is his conscious objective or desire to cause
6 the result." And you're not going to be able to open up
7 someone's head, look inside and see whether or not they
8 intended to do something. You can infer that by their
9 actions, by the circumstances involved, and all we ask you to
10 do is bring in your common sense, the things that you use
11 every day to determine people's demeanor, and things like
12 that.

13 Special Issue Number 1, now this is for the
14 punishment phase. This is once you've found someone guilty of
15 capital murder, the jury is presented two questions during the
16 punishment phase. The first question is what we call the
17 future danger question, and that is whether there is a
18 probability that the defendant would commit criminal acts of
19 violence that will constitute a continuing threat to society.
20 And by this question, we're not asking you to predict the
21 future. We're not asking you to know for a certainty. This
22 question asks you whether a person is dangerous without regard
23 to where he is. Does he have a trait of dangerousness? With
24 this question there are several words that are not going to be
25 defined that you, as a jury, are going to be asked to come up

1 with a definition. Those are probability, criminal acts of
2 violence and society. And what we will ask you to do is, as a
3 juror, decide what you think those terms mean, just their
4 common-sense usage, things like that. Probability, the law
5 says it's more than a mere possibility, but somewhere less
6 than a certainty. Most people think it's more of a
7 likelihood.

8 Criminal acts of violence, we all know that as far
9 as violence goes murder, aggravated sexual assault, any type
10 of assault where you're hurting another person, things like
11 that, we all consider violence because you're hurting another
12 person. As far as criminal acts of violence go, when you're
13 talking about property, people differ in their ideas of
14 whether or not they think that's violent. For example, I
15 could get upset because maybe you didn't answer a question the
16 way that I wanted you to. Follow you outside, find your car,
17 beat your car up with a baseball bat. Some people say, hey,
18 you know what, that's against a car, that's not violence.
19 Other people say, well, you did it out of anger, and that's a
20 violent act to me. And that's up to you as a jury to decide.

21 VENIREPERSON: I feel like I'm getting sick.

22 MS. LOWRY: Okay.

23 VENIREPERSON: May I be excused for a minute?
24 I feel like I'm getting sick. It is so hot to me.

25 THE COURT: And let me ask y'all -- sometimes I

1 can't tell. I'm not very sensitive to these things, and to
2 other things, too, but is it reasonably comfortable.

3 (Venire respond "It's hot.")

4 THE COURT: Okay. I tell you what, as soon as
5 Billy gets back -- and I tell you why that is. This is Monday
6 morning. The air conditioners are off over the weekend, and
7 by 3:00 this afternoon we'll all be freezing in here, but as
8 soon as Billy gets back we'll tell him to turn down the air
9 conditioning.

10 MR. SCHULTZ: Can we approach the bench a
11 moment?

12 THE COURT: Come on up sidebar if you would,
13 please.

14 (Sidebar discussion had outside the hearing of the
15 court reporter and venire.)

16 THE COURT: Let's see, would you all refresh
17 my memory?

18 MS. LOWRY: Ms. Hunter.

19 THE COURT: That's Pamela Hunter, Number 133.
20 And I tell you what, with the permission of both sides we'll
21 just excuse Ms. Hunter from the rest of this general voir
22 dire. Is that agreeable to the State?

23 MS. LOWRY: Yes, Your Honor.

24 THE COURT: Is that agreeable to the Defendant?

25 MR. GOELLER: Yes, Your Honor.

1 THE COURT: All right, sir. Billy, I tell you
2 what, the jurors tell me that it's hot in here, which it
3 always is on Monday morning. Would you tell the -- try and
4 fix it?

5 THE BAILIFF: Yes, Your Honor.

6 THE COURT: Excuse me, Ms. Lowry. Please go
7 ahead.

8 MS. LOWRY: And I was talking about criminal
9 acts of violence, and it's up to you to decide what you think
10 violent is, and that's going to be what you decide as a
11 juror. It gets fuzzier still, and people have different
12 opinions on whether or not, like, drug selling, buying drugs,
13 taking drugs are criminal acts of violence. Maybe not
14 necessarily in and of themselves, but we all know drugs create
15 or cause people to be maybe more aggressive, cause people to
16 steal, maybe they need money to buy them, things of that
17 nature, could result in violence, and it's up to you to decide
18 whether or not you think these things are criminal acts of
19 violence.

20 There's still yet other crimes, maybe shoplifting,
21 maybe running from the police, things of that nature that
22 maybe aren't necessarily considered criminal acts of violence,
23 but they may help you in determining whether or not a person
24 would probably commit criminal acts of violence that would be
25 a continuing threat to society.

1 Society, as I said, is another word that's not going
2 to be defined for you. Usually, normally when we talk -- you
3 talk about society, you talk about our world that we live in,
4 people around you, people sitting in this room. The law tells
5 us that society in this context does include prison, because
6 as I said, with the two options that you get with the death
7 penalty -- I mean, with a capital murder case, it's either
8 life or death. So, you know the person is going to be in
9 prison, so it definitely includes prison society. Our view is
10 that it includes all of society. We pay for the prisons. We
11 pay for the people that are working in prisons. People get
12 sick out there. We send doctors in to take care of them. All
13 things of that nature. Plus, as you all know, people can
14 escape, people can be pardoned, the law could change, anything
15 of that nature, and that's what you have to determine, whether
16 or not the person has the trait for dangerousness without
17 regard to where he is. Because it certainly doesn't ask can
18 he safely be held in prison, or can we safely keep someone
19 locked up? So that's up to you to decide what you think
20 society is.

21 With this question, you take into account all of the
22 evidence, all of the evidence that you heard during the
23 guilt-innocence phase, plus any additional evidence that is
24 presented during the punishment phase. The burden of proof is
25 on the State once again. We have to prove to you beyond a

1 reasonable doubt whether or not the person is a future danger.

2 By virtue of this question and the Legislature
3 propounding this question for you to answer in a capital
4 murder case, they have certainly envisioned a situation in
5 which a person is convicted of capital murder, but maybe is
6 not a future danger. This is not an automatic answer simply
7 because you found someone guilty of capital murder. An
8 example of that would be you have a father whose child is
9 killed by two people. They go to trial and on some
10 technicality these two people get off, and they walk out the
11 door, right past that father and laugh at him because they
12 think it's funny, and he just can't take it. He goes out,
13 kills them both, and that's capital murder in Texas. And you
14 may think, you know what, he's been a great person all his
15 life, he just loves his child, and he's not necessarily going
16 to be a future danger. So, the Legislature has envisioned
17 situations in which a person may not be a future danger if
18 they're convicted of capital murder. To be qualified to sit
19 on this jury, you have to be able to consider that one, and
20 assure us that you're not going to answer this question "yes"
21 solely because you've convicted someone of capital murder,
22 okay? Does that make sense to everyone?

23 As I said, the burden of proof is on the State. We
24 have to present all the evidence to you beyond a reasonable
25 doubt, is the burden. The Defense doesn't have to present

1 anything to you. The answers to this question are yes -- if
2 we met our burden, we prove to you beyond a reasonable doubt
3 that the person is a future danger, then a yes answer is
4 required. If we fail to meet that burden, a no answer is
5 required.

6 To answer this question "yes," it has to be
7 unanimous to go on to the next question and continue towards a
8 death sentence. If ten or more people answer this question
9 no, then it is a life sentence. If a yes answer is given to
10 this question, then we go on to the second special issue. And
11 we don't know necessarily, like I said, how the evidence is
12 going to play out. In criminal cases, there's not what we
13 call reciprocal discovery. The State is required to turn over
14 certain things to the Defense about our case, our witness
15 lists, things of that nature, but they're not required to do
16 that in return. So, we don't necessarily know how the case is
17 going to play out on some issues. This special issue, we call
18 it guilty as a party, it's just basically asking you, did he
19 do it by himself, or was he just a party to it? Once again,
20 has everyone had a chance to read that? Am I in your way?

21 (Brief pause in proceedings.)

22 MS. LOWRY: Has everyone read it? Okay.

23 If you find that he did it by himself, that he's not
24 a party, then this question -- then you answer this no. I'm
25 getting all confused, excuse me. If you find that he did it

1 by himself, this question doesn't come into play so that's one
2 thing that will be determined when we get to the punishment
3 phase. The burden of proof, again, is on the State, same as
4 before; unanimous to be yes; ten or more to be no. And we
5 have to bring you the evidence on that.

6 The third question that we know that you'll get to
7 if you find that he is a future danger is the mitigation
8 question. Is it easier for y'all if I read it to you or just
9 let you read it, or do you care?

10 VENIREPERSON: I'd rather read it.

11 (Brief pause in proceedings.)

12 MS. LOWRY: Is everyone done?

13 (Venire nod their heads.)

14 MS. LOWRY: What this question asks is -- it
15 asks you basically about a Defendant's moral blameworthiness.
16 Is there anything about these circumstances, or the evidence
17 that we've heard -- once we found that he is guilty of capital
18 murder and he is a future danger, is there anything about
19 these circumstances or this person that would warrant a life
20 sentence over a death sentence, and that's what it's asking
21 you. It has to be based on the evidence. It can't be based
22 on just what you want to happen. You have to base it on the
23 evidence.

24 Mitigation usually means to lessen or to somehow
25 reduce. That's what it means in this context, and that's what

1 it's asking for. Is there anything out there that lessens
 2 this or reduces it? You, as a jury, will decide what you
 3 think is mitigating, what you think is not mitigating. No one
 4 is going to give you a list of mitigating factors. No one is
 5 going to give you a list of maybe something that is
 6 aggravating. (Inaudible), for example, drugs. Some people
 7 think if you take drugs and you're doing things that you
 8 wouldn't normally do if you weren't on drugs, that is
 9 mitigating. That's not you. You don't normally act that way,
 10 and if it weren't for the drugs, you wouldn't be. Other
 11 people say, you know what, no. We know from day one what
 12 drugs do to us and that you shouldn't take them, and we're
 13 told all of our lives that you shouldn't take them, so if
 14 you're doing that, that's your choice, and to me that's
 15 aggravating, and that's fine. However you want to look at it,
 16 it's up to you to decide what you think is mitigating, what
 17 you think is aggravating.

18 There is no burden of proof on this question. That
 19 means that we don't have to bring you evidence that shows
 20 there's nothing mitigating out there. The Defense doesn't
 21 have to bring you evidence that shows, yes, this is something
 22 that's mitigating out there. It's just one look back
 23 basically at the evidence. Is there any reason, because of
 24 these circumstances, or maybe because of the person, that they
 25 deserve a life sentence over a death sentence?

1 In cases like this, more with the first question
 2 than future danger question than with this question, sometimes
 3 you hear psychiatric testimony, sometimes you don't. It's up
 4 to you to decide whether or not you think that's important,
 5 whether or not you believe it, want to rely on it. That's all
 6 up to you as a jury to do that. What we need to know, and
 7 like I said, the next thing is just the burden of proof.
 8 There is no burden of proof on that question.
 9 What we need to know is whether or not you can
 10 involve yourself in this process. What the State intends is
 11 that we believe that during this trial that we will present
 12 evidence to you that will prove to you beyond a reasonable
 13 doubt that this person is guilty of capital murder and that
 14 you will find him so. We believe that during the punishment
 15 phase that we will present evidence to you that proves to you
 16 that he is a future danger, and we believe there will be no
 17 sufficient mitigating circumstances to warrant a life
 18 sentence. And what that means is at the end of this trial is
 19 that a death sentence is going to be rendered, that at some
 20 point in the future, a death warrant is going to be signed,
 21 the Defendant will be taken to TDC where he will await his
 22 execution date. That execution date will be set. He will be
 23 taken to the death chamber and strapped to a gurney. At that
 24 time they will inject him with a lethal substance until he is
 25 dead. And I don't explain this to you for any type of

1 dramatic flare or gore. The reason we explain this to you is
 2 so that you can understand what this process is. This is not
 3 seeing on TV some horrible crime and saying, this ought to
 4 happen. We're asking you to consider your thoughts, your
 5 feelings, your ideas about the law, and let us know whether or
 6 not you can be a part of this process and follow the law in
 7 this case.

8 Is there anyone who has any questions of me right
 9 now? I don't see any hands. Thank y'all for your time.

10 THE COURT: Thank you, Ms. Lowry. Mr. Goeller,
 11 are you ready to speak for the Defense?

12 MR. GOELLER: Yes, Your Honor.

13 THE COURT: All right. Please proceed.

14 MR. GOELLER: May it please the Court.

15 THE COURT: Yes, sir.

16 MR. GOELLER: Ms. Lowry, Ms. Falco,
 17 Mr. Schultz --

18 MR. SCHULTZ: Yes, sir.

19 MR. GOELLER: -- Ivan.

20 Good morning, Ladies and Gentlemen. Is it any
 21 cooler in here yet?

22 (Some venire respond no.)

23 MR. GOELLER: I know it's hot out there. It's
 24 hot here, too. I'll try to go as fast as I can.

25 I don't need to spend a whole lot of time. The

1 State has covered a lot of law. I'll try not to repeat
 2 anything they've said. We're going to be talking with each of
 3 you on an individual basis, so I'll save most of my questions
 4 for there, and I'll talk about some general legal principles
 5 at this point.

6 Ms. Lowry wrapped it up and put a little bow on it
 7 and told you, from their point of view, from their standpoint,
 8 essentially he's already dead; he being this kid right here.
 9 It's okay to look at him. I want you to look at him. If
 10 you're selected on this jury, I anticipate you'll see him
 11 every day, seven or eight hours a day, for three or four
 12 weeks, all right. He's a human being. He's not dead, and
 13 it's not quite as simple as the State would have you believe.
 14 That it's just going to be a trial, guilty, yes, no (snap),
 15 dead. Not going to be that way, folks.

16 Ms. Lowry stated -- she spent a lot of time on the
 17 punishment issues because they're the ultimate issues. Well,
 18 no, they're not. The ultimate issue is, is he guilty or not
 19 guilty of capital murder? That's the ultimate issue. She's
 20 right when she says she doesn't know how the evidence is going
 21 to play out, and I don't either, frankly. You wouldn't
 22 respect me if I told you I did. I don't have the burden of
 23 proof.

24 It might just be, as one juror put it, there may be
 25 a shadow over the State's case. There may be a shadow over

1 their evidence. That may result in a not-guilty verdict on
 2 capital murder. That is the ultimate issue, and if there's a
 3 not guilty verdict on capital murder, we don't talk about
 4 those special issues. As the Judge told you about a month
 5 ago, there could be other things that may be considered in any
 6 capital murder case; lesser included offenses of murder,
 7 burglary, robbery, aggravated assault, things like that. But
 8 the Government is driving the train to death row, and I'm
 9 asking you folks don't jump on that train right now. You, as
 10 the jury, have no business being in the engine of that train.
 11 I see some folks shaking their heads. You have no business
 12 being in the engine. If they're the conductors and the
 13 engineers and they're running the train, I guess that's their
 14 right as being part of the Government train, but the jurors in
 15 this case don't ride in the engine. You're back with the
 16 passengers, all right? And maybe you call the shots on how
 17 the Government's driving that train. Don't let them think,
 18 for one minute, let them place you up there with your hands on
 19 the controls of that engine. It's not what this is all about,
 20 all right?

21 I want to talk very briefly about the logistics of
 22 this trial, what I anticipate because it's very important.
 23 We've talked to a lot of jurors so far, and I have found that
 24 maybe we need to talk about the logistics of the trial up
 25 front so you can be thinking about it when you come back. We

1 anticipate the trial getting underway sometime in the next two
 2 weeks roughly, and then after that, say, two weeks down the
 3 road, ten days to two weeks, and I'm not speaking for the
 4 Judge. The Judge knows I'm not. The Judge controls the
 5 schedule of the trial, but based on everything I've heard, I
 6 reasonably anticipate ten days to two weeks the trial
 7 beginning, and then from that point, probably three and a half
 8 weeks of the trial. So, if we're going to be in trial for
 9 three weeks, three and a half weeks -- I'd say minimum two and
 10 a half to three, outside four, four and a half, you never
 11 know. You just never know, but I think that's our best
 12 guesstimate. I think the State would probably agree with me
 13 on that. So kind of be thinking about the good part of
 14 October, think about your own personal schedules.

15 What I anticipate how the daily schedule would run
 16 would be Monday through Friday, 8, 9:00 in the morning to
 17 probably around 5 at night, hour for lunch. So be thinking
 18 about your own personal schedules, family schedules, personal
 19 business, day-care, the kiddos, upcoming events, important
 20 things that you may have scheduled in your life for the month
 21 of October.

22 Let me give you an example. We had a -- everybody
 23 has things going on in their life. We had a juror that said
 24 my company -- he was a key in his company, a small company.
 25 This is the most important time of the year for us between now

1 and getting the product out for Christmas. And he said if I'm
 2 selected as a juror in this case, I will come up here and
 3 serve my 8, 9 hours, whatever it is, just say 8 to 5, 9 to 5.
 4 Then I'm going to go home and take care of my family, and then
 5 I'm going to work, and I could put in 7 or 8 hours a night.
 6 And I said what kind of juror would you be in this case? And
 7 he was very honest. He said I'll be one tired juror, okay?
 8 And he was honest, and that's all we're looking for is
 9 honesty. Obviously, I think I can speak for the State, they
 10 don't want that kind of a juror. If you were sitting there,
 11 you wouldn't want that kind of juror. If it was your
 12 daughter, your son, your wife or your husband, or somebody you
 13 cared about sitting there, you wouldn't want that kind of
 14 juror. Who would? I thank God he was honest enough to say
 15 it, hey, I'm going to be one tired juror. That's just a
 16 commitment I have to keep, and I can't close my business down
 17 or -- so those are the kinds of things I want you thinking
 18 about for October, and then we can talk about those in a more
 19 private setting one or one, or you in here by yourself with
 20 just the attorneys and the Judge, okay?

21 Ms. Lowry stated something that I may have just
 22 heard it wrong, but -- or maybe it's her interpretation of it.
 23 She said those are the kind of things that the Legislature has
 24 determined the death penalty is appropriate for, all right?
 25 And she's an advocate; I'm an advocate. So, I'm not saying

1 she just misspoke, but the Legislature has never, ever
 2 determined what offenses or specific facts the death penalty
 3 is appropriate for, okay? No one, not the Judge, not the
 4 Legislature, not the lawyers for the State, no one can tell
 5 you legally what offense is worthy of the death penalty based
 6 on the specific facts of that offense. That is only for a
 7 jury to decide after they've heard all the evidence, okay?
 8 The reason why we have this individual voir dire, and some of
 9 you have served as jurors before, and you know normally you
 10 come down to the courthouse and for any other kind of case,
 11 DWI, possession of marijuana, shoplifting, you name it, from
 12 the time you get to the courthouse to the time you probably
 13 start hearing evidence always -- usually takes place in the
 14 same day and can be as little two, three hours from the time
 15 you get here you're listening to the first witness testify.

16 The individual voir dire in these mini-panels, as we
 17 call them, are only pertinent in a capital murder case where
 18 the State seeks the death penalty. The State seeks the death
 19 penalty, and I want to stress that because some jurors have --
 20 maybe had the false impression that somehow the judge was
 21 involved in that decision; absolutely not. That we are somehow
 22 involved in that decision; absolutely not. One person decides
 23 whether or not to seek the death penalty, and that's the local
 24 prosecutor, okay? One person makes that decision. Not a
 25 panel, there's no trial beforehand. Judges aren't involved.

1 Nobody is involved. One person makes that call, all right. I
2 want to make that clear. I know that sounds very -- I'm not
3 trying to insult anybody, but I say that only because I've
4 gotten that from jurors so far, and that's fine. That's okay.

5 VENIREPERSON: Who's the one person?

6 MR. GOELLER: The District Attorney in Collin
7 County, the local prosecutor.

8 Those questionnaires that you filled out about a
9 month ago, unlike any other legal document you would probably
10 ever execute under oath, do you remember the last page, under
11 penalty of perjury, you swore to your answers and you signed
12 your name. It's the only thing, I think, in your life that
13 you would ever sign under oath about what your feelings are,
14 okay? We all probably file income tax, right, and I think, if
15 I recall correctly, when you sign that last page on the 1040
16 it's a block for you, a block for your spouse, and you sign it
17 under oath. And what you're saying is the numbers I have put
18 down, the deductions, you know, the orthodontist bills, the
19 medical bills, all that kind of thing, they are good numbers,
20 Government, IRS. I swear that my numbers, or my tax
21 preparer -- he or she ought to be swearing with me that those
22 numbers are good. You're swearing to facts.

23 Just about everything you -- you know, when you go
24 down to DPS, and you apply for a driver's license, you're
25 swearing about your age, and you're swearing about your vision

1 may be uncorrected, or you're swearing about your out of state
2 driver's history, or whatever, but you're always swearing to
3 facts, and that document was the only thing where you ever
4 swear to how you feel. Was that a bit odd for folks to fill
5 all that out? I see a lot of heads going, yes, I'm swearing
6 to how I feel. And that's all -- and those things are subject
7 to change.

8 It's okay if you had feelings. We've had a lot of
9 jurors come back and say my feelings have changed since I
10 filled out that questionnaire. That's okay, perfectly okay.
11 Nobody can bind you to certain feelings you filled out on one
12 day, really not knowing anything about -- anything about this
13 case. You know, when you come back for individual voir dire,
14 if anything has changed, just tell us. Again, the thing I
15 want to stress is that there are no right or wrong answers
16 when it comes to jury service, only honest ones, all right?
17 Your oath to tell the truth during voir dire is only that and
18 nothing else. Just tell the truth about your feelings, about
19 how you feel about these things. It's all we require. Nobody
20 is going to debate you. Nobody is going to argue with you.
21 Nobody is going to try to convince -- you know, from my side,
22 I wouldn't convince you -- if you say, look, if somebody is
23 found guilty of capital murder, they need to die. Don't worry
24 about these special issues. That's the way I feel, okay. You
25 would be the juror I would thank and go with my blessing

1 because you're honest.

2 Don't answer questions based on -- we hear that term
3 "PC" a lot, "politically correct." I want to be politically
4 correct. I don't want to say anything that would offend the
5 State or offend the Defendant or offend the Judge or anything
6 like that. Don't worry about any of that because you won't,
7 and that's all right. As long as you tell the absolute truth
8 about how you feel about all these issues, then you're right
9 on. Everybody would appreciate your candor because some
10 jurors -- I think we've had some jurors that answer questions
11 based on what they think the Judge would want them to say, and
12 then they're not truth to your oath -- you're not true to your
13 oath, you're not true to your word, and it makes the past very
14 difficult. So, if you shoot straight with us, and I speak for
15 the State, I know on that -- in that regard, you'd be doing
16 your job well.

17 I think the presumption of innocence -- it's a tough
18 one for a lawyer. We've all heard about it. We know about it
19 since probably, I'm trying to think, 4th grade -- 4th or 5th
20 grade is when kids start learning some fundamentals about
21 American justice system. I have found that the more serious
22 the allegation, the more difficult it is for prospective
23 jurors to really believe in that presumption, not all, but
24 generally speaking. If you were up here today, and it was a
25 shoplifting case or -- you know, possession of marijuana or a

1 speeding ticket in the City Court, Allen or Plano or McKinney
2 or Wylie, just a speeding ticket, I think most folks can
3 really presume somebody innocent until proven guilty, okay.

4 And maybe the speeding ticket case is the best
5 example of why most people can walk into a courtroom -- of
6 course, a six-person jury in a local, city court, but most
7 people could say, yeah, they're innocent until proven guilty.
8 But because of that concept of motor vehicles and driving and
9 police officers and radar and school zones and where does it
10 begin and does it end, and I came out on this street and I
11 never saw a speed -- we've all been in situations some time or
12 another where maybe we weren't exactly sure, I wonder what the
13 maximum is on this particular stretch of road, okay?

14 Many of us, I won't ask for a show of hands. I'm
15 tempted. I'd love to ask, how many folks out there have ever
16 been cited for some kind of traffic citation? I didn't ask,
17 but there's some folks back there raising their hands. And
18 many times you didn't feel the citation was warranted, or you
19 weren't doing what they say you were doing, or did you see
20 that 18-wheeler going by me, or all sorts of things. But
21 anyhow, I think the point I'm trying to make is I need that
22 presumption of innocence in this case, too. You know, you're
23 coming up here to jury service, and capital murder, oh, my
24 God. He's got to be guilty. Why would they indict him for
25 capital murder? They, Grand Jury, don't get to be in there.

1 I don't, lawyers don't. The Grand Jury is another train
2 that's run by the State. They're in there. They run the
3 controls and they get to say who comes into Grand Jury and who
4 don't. And that's why the Judge will tell you, the fact that
5 somebody has been arrested, been indicted means nothing, means
6 absolutely nothing. It's merely a piece of paper that gets us
7 into one of these courts, okay?

8 But again, the point I'm trying to make, that
9 presumption of innocence, this is not a speeding ticket case.
10 Maybe, maybe he is on trial for his life. The ultimate
11 question, obviously in the first part of the trial, is he
12 guilty of anything? And he is innocent as he sits there. The
13 presumption of innocence is so important, and it's easy to
14 give it lip service. Had a few jurors say, look, if he's
15 here, probably did it. I'm not sure if I can give him that
16 benefit of the presumption of innocence. That's so important.
17 If you feel that way, again we'll talk about that on an
18 individual basis, but let me know that. Let me know that.
19 Again, I want you to think of all of this in terms of how
20 important it is if you were sitting there, or a loved one of
21 yours yourself was sitting there, and what kind of jurors you
22 want to be judging you, okay. So, I want to kind of just do a
23 mind shift here, get out of the engine, get back in the
24 train. Maybe the best thing -- the analogy is, let's bring
25 back the caboose and sit in the back of the train and watch

1 how the train is going down the tracks, and then you get to
2 judge.

3 I think the ability to be a proper juror and to
4 really breathe air into this criminal justice system is your
5 ability to vote your conscience, the ability to vote your
6 conscience. That may mean, well, not sure if the State proved
7 it, brought some evidence, might have done it, could have done
8 it, think he might have done it, or something, somehow
9 involved, but they haven't proved beyond a reasonable doubt
10 each and every element of the offense. And if you took your
11 oath as a juror, you're true to yourself, you're true to your
12 word, you're true to your Constitution and your country, you
13 had a doubt based on reason as to any element of the offense,
14 you'd have to say "not guilty."

15 The conscience is a funny thing, this human mind of
16 ours. Oh, you hear jurors all the time years later coming
17 forward, I don't know why I voted the way I did, either
18 pressure or wanted to get out of there, it was hot in the jury
19 room, and people weren't being nice to me. True to your
20 conscience, true to your word, true to your Constitution, and
21 I mean that. I mean that so -- I can't tell you how much I
22 mean that. Those are just words, but I want you to think
23 about them between now and when you come back for your
24 service, the individual service. That's what being a juror is
25 all about. The jury is the only independent body in a trial.

1 You are that buffer between the Government and the citizen
2 accused, right? You're the only thing.
3 As the State told you that -- and asked, I think,
4 for a show of hands, or a show of hands if you couldn't do it,
5 yes, the Judge would give you an instruction if the State
6 proves each and every element of the offense beyond a
7 reasonable doubt. The Judge will tell you you'd be instructed
8 to return a verdict of guilty. Likewise, if the State fails
9 to prove any element of the offense beyond a reasonable doubt,
10 you would be instructed to return a verdict of not guilty.

11 I won't ask for a show of hands. I won't ask for a
12 show of hands if you just -- that's not the way it all sits
13 with you. I doubt a hand goes up. That's pretty fundamental,
14 and what I've found in Collin County is not many folks --
15 although from time to time we do have folks that do not
16 believe in some of the fundamental principles, and that's
17 their right. I guess that's what makes this country go round.
18 Everybody is entitled to their opinion.

19 Juries in death penalty cases in Texas are what I
20 called "death qualified," okay. In order to be on a jury in a
21 capital murder case, you have to be able to state under oath
22 your ability to vote death, okay? That's why I call a jury --
23 a capital murder jury "death qualified," because our law
24 prohibits people that have conscientious duties from the
25 penalty of death from ever getting on a jury. Does that make

1 it difficult? Does that make it fair? We don't got time to
2 debate that, but the point I'm trying to make is, it is okay
3 to be against the death penalty. There are room for people
4 like that on this jury, okay.

5 Now, if you think about it, nobody would really want
6 to be part of a trial or live in a society where 12 folks were
7 going to maybe decide, ultimately, whether he lives or dies.
8 Nobody would want a jury packed with 12 people that will vote
9 to kill if they get the chance each and every time because
10 that's the way they want it to come out. That wouldn't be
11 fair. This would all be a sham and be a big waste of
12 everybody's time. But the fact remains, these juries in
13 capital cases are death qualified.

14 Now, I want to talk just briefly about those special
15 issues. I know it's hot, and I'm well aware of the
16 temperature in here, but I have heard the AC kick on so maybe
17 it will cool off in a minute. I won't have much more of your
18 time, folks.

19 THE COURT: In fact, let me just ask. It's
20 blowing pretty good up here. Is it improving back there?

21 MR. GOELLER: Feeling a little better back
22 there? I hear the blowers kicking on.

23 THE COURT: That means we'll be suffering on
24 the other side this afternoon.

25 (Laughter.)

1 MR. GOELLER: It will be a hundred in here by
 2 2:00, or 55 degrees. It was kind of nice this morning,
 3 actually.
 4 I have to spend some time on the special issues.
 5 That's just part of my job. I want you to remember this. In
 6 every single case where somebody has been found not guilty by
 7 a jury, the defense lawyer spent time on punishment. Think
 8 about that. Why? I'm not doing my job if I don't, and number
 9 two, we don't get a break. I don't get to say, well, all
 10 right, there's been a guilty verdict and now let's talk
 11 punishment, the issues. Don't have that opportunity. That's
 12 why the law forces us to do it now, but I want you to remember
 13 that. Every person that's been found not guilty by a jury, in
 14 the beginning of the trial the lawyer talked a lot about
 15 punishment, okay. Everybody see the point I'm trying to make?
 16 The most important words, and again, this first
 17 special issue, that's the one where the State has the sole
 18 burden of proof. The most important words have been left out.
 19 Somebody tell me what they are. They would go right up here.
 20 What's been left off this? Anybody, any takers?
 21 VENIREPERSON: Having been found guilty.
 22 MR. GOELLER: Right. That's necessary. You
 23 don't get to these until somebody has been found guilty of
 24 capital murder. But in regard to the special issue, what
 25 words ought to go in that top blank that have been left out

1 that ought to be there?
 2 VENIREPERSON: In your opinion.
 3 MR. GOELLER: Kind of, you're getting there.
 4 VENIREPERSON: Whether there is a distinct
 5 probability.
 6 MR. GOELLER: Getting closer. Do you find
 7 beyond a reasonable doubt, pretty important, isn't it? It's
 8 not just is there a probability. Has the State proved beyond
 9 a reasonable doubt that there's a probability, and I agree
 10 with Ms. Lowry, that means more than possibility. A lot of
 11 folks have said more likely than not. I do disagree with her
 12 when she says a juror can't say with a certainty, because a
 13 juror -- since it's undefined, you can put that in there if
 14 you want, whatever you think probability means. As long as
 15 you recognize probability means something more than
 16 possibility. Yes, sir.
 17 VENIREPERSON: Aren't you combining, though,
 18 the elements of the guilty verdict for the case, along with
 19 now the proof on the sentencing? You said reasonable doubt,
 20 but did we address that in regards to --
 21 MR. GOELLER: The first part of the trial?
 22 VENIREPERSON: -- the first verdict?
 23 MR. GOELLER: Right.
 24 VENIREPERSON: Now we're down to this is the
 25 standard for sentencing.

1 MR. GOELLER: Yes.
 2 VENIREPERSON: Okay.
 3 MR. GOELLER: The standard in the first part of
 4 a trial is, has the State proved their case be -- what we call
 5 the guilt-innocence phase, the first part. The standard is
 6 the State must prove beyond a reasonable doubt the offense, or
 7 any lesser offenses. They've always got to prove it beyond a
 8 reasonable doubt. The same burden of proof.
 9 VENIREPERSON: I think the law that you're
 10 citing there says probability, not a reasonable doubt.
 11 MR. GOELLER: Well, that was --
 12 VENIREPERSON: That was one of the burdens.
 13 MR. GOELLER: I'm glad you pointed that out
 14 because we talk about that a lot in individual voir dire.
 15 You're right, and it is odd because the Judge -- if a jury
 16 were to get to this question, the Judge would instruct you,
 17 the State has to prove this question beyond a reasonable
 18 doubt. A probability that the Defendant, not might commit,
 19 not maybe would committed, but would commit criminal acts,
 20 plural, acts of violence that would constitute a continuing
 21 threat, very important words in that special issue, and each
 22 one -- each phrase has significant meaning. Plural acts,
 23 continuing threat, okay? But again, the point I want to make
 24 here is beyond a reasonable doubt, and the State has the
 25 burden of proof on that question.

1 In order to answer that question unanimously, all
 2 12 -- and when you unanimously answer this "yes," all 12
 3 jurors would have to say "yes," we find beyond a reasonable
 4 doubt that there is a reasonable doubt, or if it's not
 5 answered unanimously, then a life sentence is imposed.
 6 Now, we know the presumption of innocence in the
 7 first part of the trial. The State doesn't prove their case
 8 beyond a reasonable doubt, the person is found not guilty.
 9 That presumption of innocence continues throughout the first
 10 phase of the trial. You get to these questions, we know the
 11 only two options are life and death. That's it. All right.
 12 By analogy, the State doesn't prove this beyond a reasonable
 13 doubt, life sentence automatic. We'll talk more about this on
 14 individual voir dire. Does anybody have any questions about
 15 that special issue? Okay.
 16 Third special issue, the mitigation question. Some
 17 folks call it the humanitarian question. Some call it the
 18 last-look question. We've had one juror call this question --
 19 he calls it the "break glass in case of emergency." You've
 20 all seen those fire alarms? You know, that little panel, you
 21 break the glass and pull the alarm, I guess just so the
 22 pranksters don't pull it. But I thought that was brilliant
 23 the way that juror thought of that question. Again, this
 24 question -- this is the only question that has no burden of
 25 proof, no burden of proof. We don't talk about beyond a

1 reasonable doubt. How many folks here have ever served on a
2 civil jury where you awarded damages? Ma'am, what was the
3 burden of proof? What did the plaintiff have to prove his or
4 her case by?

5 VENIREPERSON: They had to prove that the other
6 person was at fault, they damaged their property.

7 MR. GOELLER: Yeah, preponderance of the
8 evidence. Generally speaking, that's the burden of proof in a
9 civil case. Roughly speaking -- I don't know. Let's say, I'm
10 thinking of just a very common lawsuit. How many folks have
11 ever had leaks around their fireplace. The flashing where the
12 roof goes into the brick. It's called flashing, right?

13 You've had some leaks? You hire a -- what's your name, sir?

14 VENIREPERSON: Camdem Davis.

15 MR. GOELLER: Mr. Davis, you've had some leaks
16 around your flashing. Let's say you hired a roofing company
17 to come out and put a new roof on your house. The first rain
18 storm, you've got water running down the inside of your brick
19 onto your hearth, and the flashing wasn't -- I mean, you and I
20 could both -- we automatically know it's probably the
21 flashing, right? You've had that problem. You've got a
22 roof -- you've got water running down a fireplace, or anywhere
23 where something extends to the roof, or the roof joins, it's
24 probably a flashing problem. I only know a lot about it
25 because I used to work roofing detail sometimes when I was at

1 were starved. CPS went in and removed those children. Then,
2 they wanted to terminate the parental rights, all right?

3 In order to -- for the Government to take away
4 somebody's children permanently and forever, a total
5 termination of parental rights, the State would have to prove
6 the facts by what's called clear and convincing evidence.
7 That's more than a preponderance. We have a definition for
8 that and that's to a moral certainty. That's the burden. Do
9 you folks find to a moral certainty that the best thing for
10 these children is to never be with those parents again? To a
11 moral certainty, think about that. Well, guess what, burden
12 of proof is more than that, as far as beyond a reasonable
13 doubt goes. Beyond a reasonable doubt is above and beyond,
14 more than a moral certainty. So that's why I just don't pay
15 lip service to that, well, the State's got to prove their case
16 beyond a reasonable doubt. There's a lot of meaning in those
17 words, beyond a moral certainty.

18 THE COURT: Mr. Goeller, at this point you've
19 used about 35 minutes.

20 MR. GOELLER: Yes, sir. Thank you, Judge.

21 Which is good news for you folks because I've got to
22 sit down in ten minutes.

23 But anyhow, the first part of the trial and that
24 first special issue, that's what the State has got to bring
25 you evidence on all of that, beyond a moral certainty, beyond

1 school.

2 But -- so your carpet gets ruined, your drywall gets
3 ruined. The water runs onto your mantle and ruins that. Are
4 you going to sue the roofer?

5 VENIREPERSON: Probably.

6 MR. GOELLER: And you're going to say what?

7 VENIREPERSON: He didn't fix it right.

8 MR. GOELLER: You didn't do it right. The
9 flashing was bad. What do you want? You want it done right,
10 or you want money to do it right, right?

11 VENIREPERSON: (Nods head.)

12 MR. GOELLER: What Mr. Davis would have to
13 prove to a jury is those roofers were negligent, didn't do the
14 job right. And he's basically got to bring forward 51 percent
15 of the proof. He's got to tip the scales in his balance.
16 That's our lowest burden of proof in a court, called by the
17 preponderance of the evidence. Think of it as 51 to 49; 51
18 you win.

19 The next burden we have is clear and convincing
20 evidence. How many folks have ever heard of a case where
21 Child Protective Services -- we call it CPS in Texas, but
22 Child Welfare, some folks call it -- will move in and take
23 children from just an awful, awful home. Everybody heard
24 about those kids that were being kept in that closet? Turn
25 out, the people thought for weeks and maybe years, and they

1 a reasonable doubt.

2 Then we get to this question, no burden. The State
3 doesn't have the burden. The Defendant doesn't have the
4 burden. Taking into consideration all the evidence, including
5 the circumstances of the offense. Now, you might be able to
6 start talking about things like relationships and passion and
7 the why's. If an offense did take place, why did it take
8 place? Character, background, personal moral culpability, and
9 the interesting thing about this question is, again number
10 one, nobody has a burden, number two, there is no burden.
11 It's not beyond a reasonable doubt. It's not by a
12 preponderance. There is no burden. This question is truly a
13 question for each juror to look at the case as a whole, look
14 back, what's the right thing to do, life or death.

15 Sufficient, not defined. It could be just a little
16 or it could be a lot. It's whatever the individual juror
17 affixes to sufficient. Mitigating circumstance or
18 circumstances can be anything. The unique thing about this
19 question is that if this question is answered unanimously no,
20 all 12 jurors say no, Judge will sign a death warrant. Ten or
21 more jurors answer this question "yes," a life sentence comes
22 about. Or if the question can't be answered.

23 Now, the thing about it is, unlike the first part of
24 the trial and that first special issue, the jury -- all 12
25 jurors are focused on the same thing, the same elements of the

1 offense. They're focused on probability, criminal acts of
 2 violence, continuing threat, beyond a reasonable doubt. All
 3 12 jurors have to really focus on the exact same thing.
 4 This question is not that way. You could have 10 or
 5 11 or 12 jurors, each have their own definition of sufficient.
 6 Each have their own thoughts or definition of what was
 7 mitigating. Theoretically you could have, I don't know, 24
 8 different varieties of why a juror thinks a life sentence is
 9 more appropriate. That's very unusual because you could have
 10 all 12 jurors decide on something that's -- what was
 11 sufficient, and those same 12 jurors can decide on different
 12 circumstances. So, that's why I say maybe 24 different
 13 reasons, whereas the first part of the trial, it's all got to
 14 be focused on the same thing. But that's -- I heard somebody
 15 say, and I think they're right, that question is really for a
 16 jury. It's really for the benefit of the jury, okay?
 17 Anyhow, I know I'm just about out of time. I just
 18 wanted to cover some basics. I appreciate you folks. I know
 19 between one and two -- this is probably, what, you're third
 20 time down here maybe, second or third time down here. I
 21 appreciate it. I know it's inconvenient. It's never a good
 22 time. I know that when I get a jury summons it always seems
 23 to come at the worst time, but I want to thank you for your
 24 time and service. Think about the things I've talked about.
 25 Think about your schedule in October. Think about, as a

1 prospective juror, if you end up in this jury box, what do you
 2 bring to the table? What do you bring to the table? Thanks,
 3 folks.
 4 THE COURT: Thank you, Mr. Goeller. Could I
 5 ask the attorneys to step up here for a minute, please?
 6 (Sidebar discussion had outside the hearing of the
 7 court reporter and venire.)
 8 THE COURT: All right. Ladies and Gentlemen,
 9 I'm going to ask Stacie Lee to remain behind, and everybody
 10 else has your little schedule, so I'll ask you to return on
 11 the date and the time set forth on your schedule. And except
 12 for Stacie Lee, everyone else is excused for the day. Thank
 13 you for your service.
 14 Yes, ma'am?
 15 VENIREPERSON: Do we return back to this
 16 courtroom?
 17 THE COURT: Yes, ma'am. When you come back,
 18 you'll be coming back here.
 19 (Venire exits the courtroom.)
 20 MR. SCHULTZ: May the State speak?
 21 THE COURT: Yes.
 22 MR. SCHULTZ: With regard to Juror Lee, who is
 23 Number 110, off the record at the bench I made a proposal to
 24 the Defense that we excuse her by agreement. She's a five,
 25 which apparently seems to always -- to me that she'd never

1 become qualified, although we've been working these people and
 2 making the effort. A couple of things about her, and my
 3 proposal was simply out of kindness. She indicates on her
 4 questionnaire that her brother committed suicide back in May
 5 of this year, and there's one reference in her questionnaire
 6 to the fact that she can't even think about death because of
 7 all that.
 8 And I watched her -- I mean, my observations of her
 9 that she's extremely sad, and my proposal is that I just not
 10 mess with her because I think it will hurt her, but that's not
 11 really my call. I didn't even want to go into how she knows
 12 the Defendant or what their relationship is or any of that. I
 13 mean, I'll do it. I'm not afraid to do it. It was just a
 14 thought that we may want to let her go.
 15 THE COURT: Billy, could you see -- oh, okay.
 16 Oh, all right. Sorry to interrupt you.
 17 MR. SCHULTZ: That's fine.
 18 My proposal is to let her go, not for a legal
 19 problem, because I think with all of that I'll be able to get
 20 rid of her for cause. That's not the issue. She just seems
 21 like a nice lady that doesn't need to be put through that
 22 unnecessarily, but it may be necessary.
 23 THE COURT: All right.
 24 MR. GOELLER: Your Honor, I've consulted with
 25 my client, and we agree to release Stacie Lee.

1 THE COURT: All right. Is that your desire,
 2 Mr. Cantu?
 3 THE DEFENDANT: Yes, Your Honor.
 4 THE COURT: Would you tell Stacie Lee that she
 5 is finally excused, and she will not have to come back?
 6 THE BAILIFF: Yes, Your Honor.
 7 THE COURT: And I'll tell you what then, I
 8 guess we'll see you at 1:00 if there's nothing else from
 9 either side.
 10 MR. GOELLER: Can I talk to Mr. Schultz before
 11 the Court leaves the bench real quick?
 12 THE COURT: All right.
 13 MR. GOELLER: Thank you, Judge. I have
 14 nothing further for the Court.
 15 (End of general voir dire.)
 16 (Recess taken.)
 17 THE COURT: Robert Landry, Sr., who is
 18 Number 151, and he's scheduled for next Monday, October 1st,
 19 and he wants to go to Disneyworld, and he has three children,
 20 and these plans are very important to them, as well as me,
 21 meaning him. Money for the resort has already been paid and
 22 is non-refundable. And Lynnette Riggio -- R-I-G-G-I-O -- is
 23 Number 171. She's scheduled for next Wednesday, and she wants
 24 to fly to Seattle with her son, and then they're driving to
 25 Hamilton, Montana to see her son's grandfather.

1 MR. SCHULTZ: That's Ms. Riggio?
 2 THE COURT: Yes.
 3 MR. SCHULTZ: Refreshing the Court's memory on
 4 her, she's the one that's got two or three different things.
 5 She's sometimes the cop and she's sometimes the something
 6 else --

7 THE COURT: Oh, yes.

8 MR. SCHULTZ: And consistent to her, she's
 9 always -- whatever she always is, it's always something, I
 10 didn't want to come in, whenever we want her.

11 THE COURT: Whatever identity she has. Well, I
 12 tell you what, we probably are going to have to keep her on
 13 hold then just to see if we need her.

14 But think about Landry and -- because he is set for
 15 Monday. And it's conceivable to me that we won't have anybody
 16 on Monday, but anyway think about it and we'll talk later in
 17 the week.

18 MR. SCHULTZ: Is this as good a point as any to
 19 irritate the Court with my position? I mean, if there's a
 20 better time.

21 THE COURT: No, this is the best time.

22 MR. SCHULTZ: Not for me, because it doesn't
 23 make any difference to me, and I'm not even sure it's going to
 24 matter to anybody else. But I really think we would create
 25 untold resentment if we force some of these people -- because

1 MR. GOELLER: As to what jurors that have been
 2 seated have travel plans?

3 THE COURT: Yeah. I don't think there is
 4 anybody, do you, or do you know?

5 MR. GOELLER: I don't know.

6 THE COURT: Anyway, I tell you what, I think
 7 I'll look at the -- at least the questionnaire. They may have
 8 testified to something, but I've got all the questionnaires in
 9 one place here, so I'll review them as we talk to the first
 10 witness.

11 Anyway, so where does that leave us as far as we're
 12 concerned?

13 MR. SCHULTZ: Well, what I'm thinking is we end
 14 up telling the juror -- let's just say we -- let's say we're
 15 finished with jury selection by Wednesday, and as I understood
 16 your plan is to give us roughly a week off, give or take a
 17 day, so let's just say we started the following Wednesday,
 18 which is going to be what?

19 THE COURT: Going to be the 3rd, I think. Yes,
 20 the 3rd.

21 MR. SCHULTZ: I mean, even if you kicked it
 22 over to the 4th, I'll bet we're going to get some other
 23 people off that trial jury saying the same things. Maybe they
 24 didn't put it on in time. Maybe they hadn't even made those
 25 plans at the time, and I'm just wondering, what are we going

1 I know we've got people on that jury right now who are
 2 committed, just like some of these other people, for Spring
 3 Break. And we've talked about it, and I understand the
 4 Court's going to make that decision, but I really think, given
 5 how long it's been going on, anyway and as hard as everybody
 6 has been working, that is not a good time to be forcing them
 7 to go to work. And I agree with you that it's not a good idea
 8 to start this thing and then recess right in the middle. I
 9 think that's very awkward, and I'm really firm in my belief
 10 that that's not going to make for particularly --

11 THE COURT: So your inclination is with regard
 12 to the people that have travel plans, we need to let them go,
 13 right?

14 MR. SCHULTZ: No. I'm talking about the trial
 15 jury, or anybody that ends up on it is what I'm talking about.

16 THE COURT: With regard to the people that
 17 we've got on so far, did they have plans?

18 MR. SCHULTZ: I don't know that we ever really
 19 addressed that because many of them were August -- you know,
 20 late August kind of people. Maybe not many, but certainly
 21 some.

22 THE COURT: Let me tell you what I think, I
 23 don't think we've got any jurors with plans right now, but
 24 that's my sense. And if we do, it may be one, but I think we
 25 have none. But, do you have a feel, Mr. Goeller?

1 to do with a trial juror that says we bought tickets for
 2 Disneyworld, or I didn't see that part of the questionnaire.
 3 That's all I'm saying.

4 THE COURT: Okay, I understand.

5 MR. SCHULTZ: I mean, it seems to me -- it
 6 seems to me we just forge ahead because -- just because they
 7 got plans, doesn't mean from our point of view they wouldn't
 8 be good jurors. It's just -- and I don't know if I agree with
 9 Mr. Goeller. I'm not sure that forcing people that's going to
 10 -- on a case like this, I don't think it's going to make any
 11 difference in their decision. They're not going to kill
 12 somebody because they're mad for being here, and they're not
 13 going to spare his life because they're mad for being here. I
 14 don't think on something this (inaudible). I don't worry
 15 about the ultimate decision. I just worry about their basic
 16 comfort, and when it's so close -- when we maybe could
 17 accommodate it.

18 THE COURT: I tell you my feeling kind of is
 19 that it's already an inconvenience, and so it's -- I think
 20 what we're talking about is an inconvenience and a little bit
 21 more of one than -- if it were the difference between no
 22 inconvenience and an inconvenience, I'd say let's not
 23 inconvenience anybody. But we've already got an
 24 inconvenience. Do you have any philosophy?

25 MR. GOELLER: On this particular point, I agree

1 with Mr. Schultz for all the reasons he stated and for a
2 selfish reason with a kid in PISD with fall break coming, but
3 I would -- I would rather not have jurors in here if it's
4 going to interfere with any kind of great travel plan. From a
5 personal standpoint I'm not looking to be working during the
6 fall break, but that's where I stand.

7 THE COURT: All right. Shall we bring Shala
8 Jones in. She's number 122.

9 (Venireperson enters the courtroom.)

10 THE COURT: Are you Shala Jones?

11 VENIREPERSON: I am.

12 THE COURT: Perhaps you'll recall when all 200
13 jurors were assembled, I put all of you under oath, and the
14 oath was to tell the truth with regard to the questions that
15 are asked by the Court and by the attorneys on both sides; do
16 you recall?

17 VENIREPERSON: Yes.

18 THE COURT: I just want to remind you that
19 you're still subject to that oath and ask you to be seated
20 right here.

21 VENIREPERSON: Thank you.

22 THE COURT: All right, Mr. Schultz.

23 DIRECT QUESTIONS

24 BY MR. SCHULTZ:

25 Q. Good afternoon, ma'am.

1 MR. SCHULTZ: And next to him is Mr. Matt
2 Goeller, a private attorney engaged in the criminal practice
3 of law in Plano, Texas, board certified criminal law
4 specialist, and a very decent human being. He has a second
5 attorney with him, who's not here at the moment. That's
6 Mr. Don High. You may recall the other lawyer when you were
7 here before. Perhaps Mr. High will come in during your
8 examination, or perhaps not.

9 As we told you when you were here last, there really
10 are not any right or wrong answers to any of these questions.
11 The only wrong answer that could ever be given would be an
12 untruthful answer, because we don't do much background
13 investigation on the jurors, other than run a criminal history
14 because the law says certain convictions for certain crimes
15 you can't serve as a juror. Other than that, we don't ever go
16 out and talk to your neighbors and see if you're playing your
17 stereo loud and what that might mean to one side or the
18 other. We trust almost, very innocently, the fact that you'll
19 give us truthful answers, and really people do that.

20 People -- there's something sacred about the jury system, and
21 people really will give us honest answers and really dig down
22 and try to share that about themselves that we're interested
23 in, and it's a pretty simple process.

24 We will ask you questions, some of which involves
25 explaining to you how the law works, and how you have to do

1 A Hi.

2 Q. My name is Bill Schultz. I'm one of the Assistant
3 District Attorneys representing the State of Texas in its
4 capital prosecution of Ivan Cantu. Next to me on my left in
5 the plaid blazer is Ms. Gail Falco, a chief felony prosecutor
6 from another district court, and next to her is Ms. Jami
7 Lowry. We will be the three prosecutors primarily that the
8 jury will be working with in this case. There is always the
9 possibility of a fourth prosecutor coming in for some special
10 reason, like I don't know of any young children witnesses in
11 this case, but if there were one -- if there were a six-year
12 old who, perhaps, who were an eyewitness to something or had
13 evidence, for example. Some prosecutors have more training
14 in how to deal with a child witness and how to make a child
15 more comfortable in what would obviously be difficult
16 surroundings. Sometimes you have some difficult scientific
17 issues that, for whatever reason, one prosecutor may have more
18 expertise than we do as general prosecutors.

19 But I think it will be the three of us. We may not
20 all three always be in here at the same time, but certainly
21 one or two of us will be, and most of the time all three will
22 be for most of this work.

23 At the defense table, the man on your left at that
24 second table, is the Defendant in this case, Ivan Cantu.

25 VENIREPERSON: Hello.

1 this, this, this and this in order to be a qualified juror.
2 We kind of ask the question, can you do that, is there any
3 reason, and some of it is very simple. Some of it might be if
4 the Judge tells you to get here at 8:30 in the morning, can
5 you do that? Well, sure. You might rather be here at 9, but
6 you can do 8:30 or any time. Some of it might be can you sit
7 for two hours at a time? Well, maybe you'd like to sit for an
8 hour, hour and a half at a time, but most people say, well,
9 sure, I can do that if called upon.

10 But some of it is more complicated because some of
11 it involves a willingness to embrace portions of the law that
12 you might not agree with, and we've all got those kinds
13 of laws.

14 THE COURT: Mr. Schultz, excuse me. I'm going
15 to ask you to pass the witness in about half an hour, and you
16 may get the juror back.

17 MR. SCHULTZ: Yes, sir. I'm with you there.
18 Thank you, Judge.

19 THE COURT: All right.

20 Q. BY MR. SCHULTZ: So for many of us that involves --
21 that can involve an objection that could be strong, but people
22 can still do it, and then there's some people who just can't
23 do it. There are things that people believe in, and it's
24 America so you can believe in whatever you want to. But,
25 sometimes asking somebody to do some things that are big to

1 them is more than they can do.

2 I'll give you an example of that. If you were a
3 lady that had a son that was on death row, for example. Your
4 son had been convicted of capital murder. A jury had fairly
5 considered whether to answer questions that would have given
6 him life or death, and the jury decided that the death
7 sentence was the appropriate sentence based on all the
8 evidence, and he's down on death row. There may be some moms
9 of kids on death row that could say, well, sure, that case is
10 different from this one, and I can be perfectly fair to the
11 State even though you've sent my son away to be killed. I can
12 still be fair and listen to what you have to say. And other
13 people say, how could I separate all that? How could I
14 possibly listen to evidence and not be thinking of my son,
15 every word that comes out of every witness' mouth? Does that
16 make sense to you?

17 **A. Uh-huh.**

18 **Q.** There may be people who are so passionate about a
19 particular issue that if a trial ever involved that particular
20 issue they could -- they could not even begin to be fair
21 because it's not that they are biased. It's just that they
22 are so fanatical about one particular thing that they really
23 couldn't keep an open mind.

24 So there are a lot of situations where, try as
25 people might, they can't overcome some of that. I mean,

1 advocates of capital punishment and strong opponents of
2 capital punishment provided those strong feelings, one way or
3 the other, don't interfere with their looking at the evidence
4 and evaluating it. Or I guess stated another way, it's okay
5 to be against the death penalty, for example, and serve on a
6 jury, as long as you're still capable of finding facts that
7 would result in the death penalty. Am I making sense to you
8 about that?

9 **A. You are.**

10 **Q.** And the same thing with your answer about capital
11 punishment, in general, that you are a strong supporter of it
12 and that you believe that it should be handed out in cases of
13 capital murder. The important thing is -- and let me ask you
14 about your first question. It's been a long time.

15 **MR. SCHULTZ:** And let me approach the juror a
16 moment, Judge?

17 **THE COURT:** Yes.

18 **Q. BY MR. SCHULTZ:** Let me show you your questionnaire.
19 It's not a trick. I apologize for the highlighting. We do --
20 we're going through hundreds of these, so we highlight things
21 that we think are important just to see. Do you see that
22 question where we've got that number one circled? Go ahead
23 and read that to yourself a moment?

24 **A. (Nods head.)**

25 **Q.** We give you these questionnaires really before

1 suppose it's somebody you knew. There is nothing in the law
2 that says if you were best friends with a defendant in, say, a
3 robbery case, there's nothing in the law that says you
4 couldn't serve as a juror in that case. Yet, how could you
5 possibly follow the instructions and give everybody a fair
6 shot and put all that outside of your mind. So, there's some
7 of that.

8 But particularly in death penalty law, there is a
9 lot of passion on both sides about the death penalty in our
10 society. I don't know that it's number one in terms of the
11 passion level in terms of our society. I tend to think of
12 things like race. Perhaps and to some extent there's a lot
13 passion, a lot of concern, depending on who's doing what, it's
14 not understood or it's misunderstood or things like that. A
15 lot of passion in our society about race. There's certainly a
16 lot of passion in our society about the whole issue of
17 reproductive issues, abortions and things like that, a lot of
18 passion about that, and good people on both sides believe
19 different ways. But I think the death penalty certainly
20 receives its fair share of controversy, and I think that's
21 probably good. I think we ought to be thinking about that all
22 the time.

23 I don't recall whether Mr. Goeller specifically said
24 it, but he often says, and he makes a point, there is legal
25 room on a jury to be made up of both people who are strong

1 anybody has explained the law to you, so it almost ends up
2 being, for many people, almost like an attitude kind
3 of a question. It's like, do you think police do a good job;
4 yes or no? Those kinds of attitude questions, and at the time
5 you fill them out, you probably have no reason to think that
6 answers to that have, perhaps, legal significance in terms of
7 what you're doing.

8 **A. (Nods head.)**

9 **Q.** But I know you now understand from the discussions
10 that we've had that capital murder is just another type of
11 crime. It's the most serious crime that we have in this
12 State, and I guess in the country for that matter. But, it is
13 a crime that has certain things to be proven. It has a
14 certain definition, the same way possession of marijuana may
15 have a definition, or burglary of a motor vehicle would have a
16 definition. There's certain things that are against the law,
17 and capital murder is just one form of crime. And like all
18 other crimes in Texas, if a person is convicted of capital
19 murder, there's a punishment range that the jury has to
20 operate within. Are you with me on that?

21 **A. Uh-huh.**

22 **Q.** Now, if it's something like burglary, the punishment
23 range might be from two years to ten years or two years to 20
24 years, or in certain unusual weapons-type situations, perhaps
25 five years to life, but the punishment range for capital

1 murder is life or death. Punishment has to be one or the
2 other. That is a range, and I guess it's a pretty big range
3 when you get right down to it.

4 So when the question is whether capital murder
5 should always carry a death penalty, whether that should be --
6 always be the result, our law says otherwise, because our law
7 says that capital murder will carry either a life or death
8 sentence, depending upon what evidence the jury has found at
9 the punishment phase of the trial. Are you with me on that?

10 **A. I am.**

11 Q. So that means, for example, if a person is convicted
12 of capital murder, and when we hear that we think, well, that
13 must mean capital punishment because it's capital murder.
14 He's just been convicted of another crime, and then we have to
15 decide in the second part -- the jury has to decide whether
16 it's going to be life or death, okay? Any problem with that
17 so far?

18 **A. No.**

19 Q. Okay. And I don't think you have a problem with
20 that concept because if I read the second page of your
21 questionnaire you say, I believe that life confinement in
22 prison is appropriate in some capital murder cases. You
23 indicate that on the questionnaire. Do you remember that?

24 **A. Right. Again, that was before.**

25 Q. Sure. And that's correct, because if our law gives

1 proving beyond a reasonable doubt that the Defendant is guilty
2 of capital murder, okay?

3 **A. (Nods head.)**

4 Q. And I need to get you to say yes or no because we're
5 taking down every word that's said in here, and you and I are
6 communicating, but it has to be in the record.

7 **A. Okay.**

8 Q. And that's true of any criminal case. If you were
9 in here on a car theft case, I'd say the same thing; the State
10 has to prove he's guilty of car theft beyond a reasonable
11 doubt. The Defendant is presumed innocent. Have you ever
12 heard of that before, the presumption of innocence?

13 **A. Yes.**

14 Q. Any problem with that in your mind? You could
15 presume him innocent as you sit there now, couldn't you?

16 **A. Yes, if the evidence proved so.**

17 Q. Okay. Well, right now he has this presumption of
18 innocence attached to him, just like you would, and it's very
19 fair. Just imagine yourself, if you leave today in the
20 parking lot and someone comes and arrests you and says, well,
21 ma'am, you've been indicted for capital murder. Now prove
22 you're innocent. I mean, how could you prove you're
23 innocent? State has to prove that you're guilty, all right?

24 And the Defendant, in this society, is always presumed
25 innocent. That means until -- the State has to do all the

1 a punishment range, it wouldn't mean a whole lot if the jury
2 said, well, yeah, I'll follow the punishment range, but the
3 way I'll follow it, it's always going to be life or always
4 going to be death, because then you're not making that
5 reasonable decision. You're not looking at evidence and
6 deciding.

7 Do you see yourself as the kind of fair-minded
8 person who could either vote for life or death through the
9 form -- through the way you answer the questions according to
10 the evidence? Could you go either way, depending on what
11 evidence was presented?

12 **A. Depending on the evidence, yes.**

13 Q. Okay. I kind of go both ways when I make this
14 statement. We don't directly ask a jury, does a person get
15 life or death. We ask a jury to measure evidence, and then
16 their answers to those questions that require them to measure
17 evidence really would determine whether a person gets life or
18 death, but especially when we get to the last question, it's
19 so close to asking you life or death that we could almost say
20 that it does. It's not quite what I'm talking about.

21 The first thing that we have to prove is the
22 Defendant is guilty of capital murder, and that's in this case
23 or any case or any case that's ever been prosecuted in Texas.
24 There's a prosecutor in El Paso, or Houston, or Tyler saying
25 the same things we're saying. The State has the burden of

1 proving. He doesn't have to do anything except be here and be
2 orderly. That's all the Defendant has to do. Do you have a
3 problem with that idea?

4 **A. No.**

5 Q. All right. And he doesn't have to -- he doesn't
6 have to testify. That's his right, just like it's your right
7 or my right. He doesn't have to testify, and I can't get up
8 to the jury and say, well, he didn't testify so hold that
9 against him, or he must be guilty or he'd have said something
10 else. I could never do that because the law is very clear.
11 That's a Constitutional right, and for me to comment on that
12 is undermining his Constitutional right to remain silent.
13 Does that make sense to you?

14 **A. It does.**

15 Q. The same thing for the jury. If he doesn't testify,
16 you're going to know it. It's not like the Judge is never
17 going to tell you to pretend he did testify, or to forget that
18 he didn't testify. The Judge is simply going to say that's
19 not evidence. Don't consider it for any purpose.
20 Keep it off the scales of justice. Can you do that?

21 **A. Yes.**

22 Q. Okay. The Defense doesn't have to put on any
23 witnesses if they don't want to. They may. They have the
24 same rights we do, but they don't have a burden of proof like
25 the State does, so they don't -- that's just a tactical

1 decision. They may or may not put witnesses on, and they may
2 prefer to do it a different way, and that's their right, and
3 you can't hold that against him. Any problem that?

4 **A. Can you explain that just a little more?**

5 Q. A lot of us figure -- let's say the State puts on
6 evidence. Let's say we put on 100 witnesses, and each witness
7 might have a little -- one little brick, which mortared all
8 together, might make the wall that we think is beyond a
9 reasonable doubt.

10 **A. (Nods head.)**

11 Q. And then it comes time, the Judge says, okay,
12 Mr. Goeller, call your first witness, or Mr. High call your
13 first witness, and the Defense stands up and says, well, we've
14 got no witnesses. We're not calling anybody. We rest. Are
15 you with me?

16 **A. Right.**

17 Q. If I'm sitting in a jury box, my first reaction is
18 to think, well, I wonder why they didn't call any witnesses,
19 right?

20 **A. Yes.**

21 Q. Wouldn't you think that, too?

22 **A. Yes.**

23 Q. That's probably okay to be wondering why, I suppose.
24 I mean, you can sort of sit there, but you can't use that as
25 evidence. That why, you can't try to figure that part out,

1 Q. Okay. Now, if we prove our case beyond a reasonable
2 doubt that the Defendant is guilty of capital murder, a juror
3 must find that person guilty of capital murder. That's the
4 law. If we prove it beyond a reasonable doubt, the jury must
5 vote guilty. I mean, I don't know how we make you. If you
6 say no, having said that, we don't get mad at you or something
7 and say, go find the person guilty, but that's the trust
8 factor. If we prove our case beyond a reasonable doubt, the
9 jury's verdict must be guilty. If we don't prove our case
10 beyond a reasonable doubt, the jury's verdict must be not
11 guilty. Does that seem to make sense to you?

12 **A. It does.**

13 Q. Okay. And again, I don't mind the burden of proof
14 being on us. I'd like the burden of proof on the State if I
15 got charged with a crime, and I know you would, too. You'd
16 want to State to have to prove it. We're the ones that made
17 these accusations.

18 Sometimes there's a lesser offense. Maybe for some
19 reason you can't find the person guilty of all of it, like of
20 capital murder, because there's a question of whether there
21 was a burglary or not or robbery or not, or whether two people
22 were killed, or whether only one person was killed. Sometimes
23 there are problems like that, and all we end up proving is
24 what's called a "simple murder," a noncapital-kind of murder.
25 Do you remember Ms. Falco talking with you about that last

1 because why they did or did not do anything is something that
2 we'll never know because they're not going to say. And since
3 they don't have to do anything anyway, we don't worry about
4 it. What's important is, does the State have enough on its
5 side of the scales to prove beyond a reasonable doubt that the
6 person is guilty? And you just -- you can't add something to
7 our side of the scales because they didn't offer any evidence.
8 Does that make any sense?

9 **A. It does.**

10 Q. Now, I don't know if they'll call witnesses or not.
11 They don't even have to cross-examine our witnesses. I know
12 that will happen. I know that Mr. Goeller or Mr. High will
13 vigorously cross-examine those of our witnesses they choose
14 to, and some of them they may not have any questions for.
15 They may not -- they may not have any questions for an
16 ambulance driver, say, that hauled some -- somebody from one
17 place to another, let's say. There might not be any questions
18 they want to ask of that person. Some other witness might be
19 important to them, and they can do what they want to do. You
20 just listen to all of them. And the burden is never on them
21 is the point I'm trying to make. Are you with me on that?

22 **A. I am.**

23 Q. And can you follow those instructions from the
24 Court?

25 **A. Yes.**

1 time, about capital murder is murder plus something else?
2 It's murder plus.

3 **A. Right.**

4 Q. It may be that that plus doesn't get proven beyond a
5 reasonable doubt to you for one reason or another, and that
6 can happen. Then you are given a punishment range, and that
7 punishment range is from five years to 99 years for regular
8 murder, and our Legislature says that that is the punishment
9 range within which a jury must be willing to work. It doesn't
10 mean that you would always give 99 years, or that you'd always
11 give five years. That's going to depend on the case. What it
12 means is that you'd be willing to say I will consider the
13 minimum and the maximum in every single murder case I'm ever
14 on as a juror, and if I'm convinced that the minimum applies,
15 I'll give the minimum. If I'm convinced that in the middle
16 applies, I'll give in the middle, and if I'm convinced that
17 the maximum applies, I'll give the maximum. Does that make
18 sense?

19 **A. It does.**

20 Q. And do you see yourself as that kind of person, that
21 could consider all of that range of punishment and that be
22 something you actually could do depending upon the
23 circumstances?

24 **A. Depending upon the circumstances, right.**

25 Q. Right. When we first hear about giving somebody

1 five years for murder, that sounds awfully little for the
2 crime of murder; don't you agree with me?

3 **A. I do agree, uh-huh.**

4 **Q.** And yet, when we discover what murder is, murder is
5 the intentional causing of the death of another person, there
6 may be cases where we'd say, you know, that really is a
7 minimum case. One example I often think of is what about a
8 father whose child has been murdered, and he comes to court
9 every day trusting in the criminal justice system to make
10 things just and right. And for some legal technicality, not
11 related to being guilty, the killer gets loose. The judge
12 says, well, I find the police didn't have a warrant, or I find
13 the police didn't say this or that, and you've seen the shows
14 on TV before where the killer gets loose and is turned free
15 again. Are you with me?

16 **A. I am.**

17 **Q.** You know, maybe that's more than a daddy could
18 undertake. Maybe he'd say I can't allow that to happen.
19 Maybe he'd say I don't want anybody else -- I don't want any
20 other innocent child murdered by this creature, so daddy gets
21 a gun, goes out and hunts this fellow down and kills him.
22 That's murder. You and I understand it. You might say -- in
23 our heart we might say society is better off for this having
24 happened, but it's still murder, and he has to be prosecuted
25 because you and I and daddy can't take the law into our own

1 hands. You can't do that in this society.

2 And yet when you look at all that evidence, you look
3 at his background, everybody says he's been a wonderful guy.
4 He loved his child, he goes to church, he works for a living,
5 he was in the Boy Scouts when he was young, he was in the
6 military and served with distinction. When you add all that
7 together and say, gosh, if I ever saw a minimum case, that's
8 got to be this one. Do you see how that could work?

9 **A. I do.**

10 **Q.** And do you see yourself as recognizing there may be
11 some minimum case where that's appropriate to give as little
12 as five years in a murder case?

13 **A. Yes.**

14 **Q.** It gets a little -- I'm going to test you just a
15 little bit more with my next line here.

16 **A. Okay.**

17 **Q.** The law also provides for something called
18 probation, and there are actually -- I used to say there are
19 two. There are actually three crimes in Texas where you can't
20 get probation. Every other crime, depending upon your
21 eligibility, you can get probation. Number one is a capital
22 murder, and there's no way to get probation for a capital
23 murder because you can't. Number two is if you're a police
24 officer, and you lie in a confession hearing, you can't get
25 probation for that, and number three, there are certain

1 commercial drug offenses which have a minimum punishment of 15
2 years, and if convicted of one of those you can't get
3 probation on them, and that's because the punishment range
4 minimum is higher than the maximum for somebody to be assessed
5 probation. But other than that, it doesn't matter what other
6 kind of case it is, whether it's murder, aggravated sexual
7 assault, aggravated kidnapping, arson, worst crimes you can
8 think of all have a possible punishment of probation.

9 And kind of what I said before, jurors have to
10 express a willingness to consider all the range of punishment
11 in order to be fair, even though it may never happen. We may
12 never have a lesser-included offense of murder that occurs out
13 of this case. We may just be talking abstract. But whatever
14 the law requires, if a juror could be faced with that
15 particular law, that juror must be agree to be willing to
16 consider it and to give effect to the law and decide whether
17 or not that law should be applied in the case they're sitting
18 as a juror on. Does that make sense?

19 **A. It does make sense.**

20 **Q.** Okay. And that means if our law provides that
21 probation may be an option for punishment for a crime that a
22 jury have to be willing to say, well, our Legislature has set
23 the law that probation must be an option for the jury, and we
24 send people down to Austin, Texas being a representative of
25 our position, and they have said -- in forming our society's

1 rules, they have said a jury in some cases must have, as an
2 optional punishment, probation even in murder cases, even in
3 robbery cases, even in arson cases, and that if I'm going to
4 follow the law and be the kind of juror that does follow the
5 law that means I have to be willing to consider as little as
6 five years probation in a murder case, in a kidnapping case.
7 It doesn't mean you would give it often. It doesn't mean you
8 particularly like even looking at it, but it does mean you
9 would give fair consideration to it, and then do what you want
10 to do, what you believe to be the right thing, having
11 considered the minimum and the maximum.

12 Now, if you tell us, I know better than the
13 Legislature, and I refuse to consider five years probation,
14 and if you put me on a murder case I will not consider it.
15 I'm not trying to change your mind, but I would submit that's
16 sort of what criminals do. Why they say, I don't -- I'm going
17 to do what I want to, rather than follow the law. Does that
18 make sense to you what I'm saying? You've got to have that --
19 if you don't, tell us the truth. If you're one of those
20 people that says, I don't care what the law is, I have decided
21 I will not consider probation. I will not even have my mind
22 open to consider whether that's a proper punishment in a
23 murder case. If you are, I mean, tell us and that's --

24 **A. Well, without actually having experienced these
25 types of situations or not having been a juror before, I would**

1 **say it would be very difficult for me to consider probation**
2 **for a murderer. It would be difficult.**

3 Q. Sure. It's kind of like it might be very difficult
4 to consider a death sentence for a seventeen-year-old. There
5 are things that are difficult both ways for jurors, but the
6 question is could you fairly consider it and keep an open mind
7 on it and listen to the evidence and recognize that our
8 Legislature has said there are some cases where that's
9 appropriate, or they wouldn't have given us that range?
10 That's what the Legislature really means, there are some cases
11 where five years probated for murder is appropriate. Could
12 you do that?

13 **A. It's hard to say.**

14 THE COURT: Mr. Schultz, I'm going to ask you
15 to pass the witness in about five minutes.

16 MR. SCHULTZ: Yes, sir.

17 Q. BY MR. SCHULTZ: Well, for example, that case that I
18 talked to you about, about the father, what if you were
19 convinced, for example, he was never going to be a problem to
20 our society? What if you were convinced, but for the actions
21 of that killer and what happened in that court, that would
22 never have happened in the first place and all his life had
23 been good, and there were people out there that needed him,
24 like other family members? I mean, are those kinds of -- are
25 they the kinds of things you could consider it deciding

1 juror; that is, to be able to consider all the law that
2 applies.

3 **A. Uh-huh.**

4 Q. But only you know whether or not you are open to all
5 the law, and we have to kind of -- I know you haven't done it
6 before, but we have to pin you down as best we can about what
7 you would do if given the chance. So, can you follow it or
8 not?

9 **A. I would think no at this point.**

10 MR. SCHULTZ: Judge, we'd challenge her for
11 cause.

12 THE COURT: All right. Challenge is granted.
13 You may step down, ma'am. You are finally excused.
14 (Venireperson exits the courtroom.)

15 THE COURT: Let's call Dennis Peters.
16 (Venireperson enters the courtroom.)

17 THE COURT: All right. Are you Dennis Peters?

18 VENIREPERSON: Yes.

19 THE COURT: I know that you've had some trips
20 to the courthouse.

21 VENIREPERSON: Quite a few.

22 THE COURT: And so we thank you for coming,
23 and I'll remind you that when all 200 jurors were assembled, I
24 swore everybody in and the oath was to give true
25 answers --

1 whether or not to give probation in a murder case, those kinds
2 of things?

3 **A. Well, again, without having experienced something**
4 **like that personally, whether we believe what happened was**
5 **right or wrong, it doesn't give us the right to go out and**
6 **murder someone.**

7 Q. Of course not. And that's why you found him guilty
8 of murder because we -- the State charged him, proved his case
9 beyond a reasonable doubt, and the jury agreed, and so now
10 you're going to convict him. We come to what's a proper
11 punishment for that case and for that defendant. And I agree
12 with you, nobody is saying that gives him the right to do it.
13 That's why you have a prosecutor.

14 What I am saying is the law obliges jurors, when it
15 applies, to fairly consider probation as a possible option for
16 punishment. Doesn't mean you have to do it. It doesn't mean
17 that -- like, the defense can't say, could -- will you give
18 him probation if he's found guilty? They could never say
19 that, anymore than I could say will you give somebody life if
20 you find him guilty? But what both sides are entitled to is a
21 juror who will say, I can consider the full range of
22 punishment the Legislature has created. And you're the only
23 one that knows whether you can do that or not.

24 **A. If that's what is required of me, then --**

25 Q. That's what's required of you if you are a qualified

1 VENIREPERSON: Uh-huh.

2 THE COURT: -- to any of the questions made by
3 the Judge or by the attorneys on each side. Do you recall
4 that oath?

5 VENIREPERSON: Yes, sir, I do.

6 THE COURT: All right. Sir, you're still
7 subject to that oath, and I'll ask you to be seated.

8 VENIREPERSON: Okay.

9 THE COURT: All right, Mr. Schultz.

10 MR. SCHULTZ: Thank you, Judge.

11 **DIRECT QUESTIONS**

12 BY MR. SCHULTZ:

13 Q. Good afternoon, sir.

14 **A. Hi.**

15 Q. My name is Bill Schultz. I'm one of the Assistant
16 District Attorneys representing the State of Texas in its
17 capital prosecution of Ivan Cantu, the Defendant. Next to me,
18 a person you met earlier during a general jury examination, is
19 Ms. Gail Falco, and then at the far end of our table is
20 Ms. Jami Lowry. We are all three Assistant District Attorneys
21 and felony prosecutors, and we'll be representing the State in
22 this case.

23 At the Defense table is Mr. Ivan Cantu, the
24 Defendant, and then next to him is Mr. Matt Goeller, a fine
25 man and a fine lawyer --

1 MR. GOELLER: Hello, sir.

2 MR. SCHULTZ: -- from Plano, Texas, who I've
3 known for many, many years. There is also a second attorney
4 assisting in the defense of Mr. Cantu. That's Don High, who's
5 not here now. I would think he may be here today, but it
6 doesn't matter. This is something that -- you know, one
7 lawyer is the only one that participates, anyway, and he's
8 going to be here and there.

9 It may be that from time to time one or more of the
10 State's attorneys will go and work on something else while
11 this process is going on, and as long there is somebody to be
12 here, it will all be fine.

13 It's been a long time since I looked at the
14 questionnaire here. I bet if I were to look, I think I'd know
15 what I'd find if the question -- if I went to the question
16 that said would you rather be on or off of this jury. I bet I
17 know the answer without even looking, but tell it to me now.
18 If you had a choice and nobody would get mad and you didn't --
19 the judge said we're got plenty of jurors, so it's up to you,
20 sir, what would your choice be?

21 A. **If I had a choice, I'd do it.**

22 Q. You'd rather be on the jury if you had a choice?

23 A. **Yeah. It's interesting.**

24 Q. There are a lot of different ways of looking at it.
25 Tell me what it is that you consider to be worthy of your

1 time, because this is probably going to be a three to four
2 week trial when it gets -- we're all guessing at that, but I
3 haven't met a lawyer yet that ever worked faster than he
4 claims. It's always -- you're going to hear this some time
5 during this trial, you're going to hear one lawyer -- you
6 heard it from me first, going to say I just have one more
7 question. You're going to hear that somewhere, and that's a
8 lie. Whenever you hear it, it will be a lie because there's
9 never been a lawyer on this earth that had just one more
10 question to ask, and that's why we can't exactly predict how
11 these trials are going to go and how long they're going to
12 take. But I figure three to four weeks. Mr. Goeller has been
13 saying about the same thing, and so that probably means five
14 weeks, but we'll do the best we can. We're not trying to
15 deceive you.

16 That's a lot of time. That's certainly a lot of
17 time for us. It's even more time for you because you don't --
18 this isn't your business. This isn't your usual occupation,
19 so why would you like to do it?

20 A. **For one thing, it's part of being a citizen.**

21 Q. Okay.

22 A. **When I first filled out the questionnaire, I had a
23 big project going on at work. With the things that happened
24 on September 11th, that project is on hold so I'm in a
25 position where I don't have much to do at work for the time**

1 being, and I could easily get away from it.

2 Q. Okay. Tell me about that project. Kind of what did
3 you do and how that runs.

4 A. Well, I work for an airline, Southwest Airlines,
5 and they've pretty much decided they're not going to spend any
6 money on anything until people start flying again. So, the
7 project I was on was going to spend about half a million
8 dollars. That's put on hold for several more months now. So,
9 I either start on something brand-new, or I just do little
10 bits and pieces of the other part until it can start up again.

11 Q. Maybe you can explain this to me because you keep in
12 the field more. Looks to me like probably the airline
13 industry was in some trouble even before this happened --

14 A. **Uh-huh.**

15 Q. -- just because -- it's like anything else, if
16 business is slow, you don't necessarily need to be spending
17 your people flying all over the place for small returns, and
18 everybody cuts corners here and there. I would imagine people
19 are -- I would think you do a lot more telephone calls than
20 you would flying when money is tight, that sort of thing. And
21 yet at the same time, it seemed like right after that happened
22 we got those planes grounded. Even for that short period of
23 time they were grounded, it seemed like the bottom dropped out
24 of that industry just all the sudden. Do you know what I'm
25 saying?

1 A. **Uh-huh.**

2 Q. How did that happen? What do you think?

3 A. **Most of the airlines had big layoffs and schedule
4 cuts and problems, anyway. Like I said, I work for Southwest,
5 and we had over a billion dollars cash on hand. We have more
6 major capital, and we haven't had any layoffs or cut any
7 schedules yet. The other ones cut routes that were
8 unprofitable. We don't have unprofitable routes. We don't go
9 into those. Essentially what you're saying is it's been bad
10 for six months, but they just took this opportunity to do them
11 all at once.**

12 Q. I've got it, but Delta flies for U.S. Air, and their
13 belief apparently in huge -- real short-term trouble they may
14 not emerge from.

15 A. **Uh-huh.**

16 Q. Why is Reagan Airport still closed?

17 A. **Too close to the capital and other buildings there.
18 It's considered a threat because if somebody were to do
19 something, it's too close to other buildings. The tourist
20 industry is too close. Personally we don't fly there, so we
21 don't care.**

22 Q. But you fly DWI?

23 A. **Right.**

24 Q. When you woke up this morning and realized you
25 could be picked for a death penalty case, even though

1 you have a time in your life that would be easier to serve
2 than other times, than when your project was going on, for
3 example, did you wake up with a thrill that this is an
4 opportunity for me to come, and if I'm selected on the jury,
5 one of the possible outcomes is someone could be executed?
6 Did you feel that way?

7 **A. I wouldn't call it a thrill. It was something in my**
8 **mind.**

9 Q. It's funny, and people make assumptions about
10 prosecutors, and I don't know what you think about
11 prosecutors. I'm going to tell you it's not thrilling for
12 me. I've done this a lot, and it's never really changed that
13 I would rather live in a society that there was no need for
14 the death penalty, if I had a choice. I think it would be a
15 better place to raise kids and take walks in the park, that
16 sort of thing than in a society where we believe we need the
17 death penalty for our protection.

18 That's not an apology for what I do, absolutely
19 not. But it is recognition as serious business and
20 recognition that we, as caring people, ought to take
21 recognition. I don't short-cut how we put on evidence. I
22 don't -- we've been doing this for five weeks. We started
23 this shortly after you filled out the questionnaires and have
24 been working almost every day, and we're up to Juror Number
25 120-something, I guess, maybe higher, and I don't want the

1 process shortened any. I want 12 people that are, in my
2 opinion, the most responsive and fairest to this issue. I'm
3 sure the Defense wants 12 people that will be the most
4 perceptive to their side. Whatever the evidence may be and
5 that the jury finds, both of us want to get a jury so that
6 nobody ought to walk out of here with any more complaints. If
7 the Defendant walks out of here -- Defendant goes out of here
8 with a death sentence, that's fine. He had a fair trial. If
9 he goes out of here with a life sentence, that's fair; he had
10 a fair trial. If he's found not guilty because we can't prove
11 him guilty beyond a reasonable doubt, that's our system, and
12 that simply means that, I guess, the case wasn't there.
13 That's how I look at it. And I'm not interested in having,
14 you know, a jury full of assassins. I'm interested in having
15 people that recognize the death penalty is our law, and they
16 support the concept, but still even though they think that --
17 even though they're in favor of the death penalty, they'll
18 still make the State do everything they have to do. They will
19 still almost be that arbiter between the power of the State
20 and the individual citizen, and that is the rule of the law;
21 that is, that we have to prove enough evidence to convince
22 you.

23 Do you see yourself as that kind of juror, if
24 selected, that could do that?

25 **A. Oh, yeah. I would not want to give any kind of**

1 **guilty sentence to somebody I didn't feel for sure was guilty.**

2 Q. But you wouldn't want to given a death sentence to
3 somebody that you didn't feel had it coming?

4 **A. Definitely, no.**

5 Q. I think most people are like that. Sometimes it
6 gets ugly because capital punishment is a red-hot issue in our
7 society, and it is. It gets interlaced with all kinds of
8 things that may or may not belong with it. It gets interlaced
9 with theology. It gets interlaced with concerns about racial
10 discrimination. It gets interlaced with concerns about the
11 propriety of eyewitness testimony. It gets interlaced with
12 the fact that there's no way to rehabilitate somebody when you
13 execute them, and it gets interlaced with what you said was
14 important to do.

15 What if we execute somebody that we find out ten
16 years from now wasn't guilty? I mean, what if Timothy
17 McVeigh, we find out, isn't the guy that did the bombing in
18 Oklahoma. He's starved for attention and talked like he was,
19 and what if we discover that in the next year or two years
20 from now, people have (inaudible) about that.

21 Do you attend church?

22 **A. No.**

23 Q. Has there ever been a time in your life that you
24 attended church or synagogue or some form of organized
25 religion?

1 **A. Yes.**

2 Q. Do you mind telling me about that?

3 **A. I grew up in Iowa and attended Protestant churches**
4 **up there and was a member of a church until I got a divorce.**
5 **And I got a divorce and ended up moving down here and never**
6 **did find a church down here.**

7 Q. And that's fine.

8 Some of the questions I ask you -- because some of
9 the questions I'm going to ask you, as we move along, I'm
10 going to ask you what your take on a defendant's claim of
11 conversion to Christianity and new-found religion, kind of
12 what your take might be on that.

13 **A. Okay.**

14 Q. You understand in Texas there is no automatic death
15 sentence, even if a person is convicted of capital murder?

16 **A. Uh-huh.**

17 Q. And you anticipate that because you circled that
18 number that indicates in some cases it's appropriate and in
19 some cases it's not, and you can look and weigh and decide
20 what the proper answers to questions are based on the
21 evidence, and that's still your position; is that right?

22 **A. Uh-huh.**

23 Q. And about your work, you do some kind of systems
24 analyst?

25 **A. Yeah.**

1 Q. So, I'm sure you do something similar in your work?
 2 A. I'm always reviewing facts and things like that.
 3 Q. The first thing that's going to happen if you're
 4 selected as a juror, the first thing is the State stands up
 5 and reads the indictment to the jury, and the jury will be
 6 told the Defendant's charged with murder, plus some other
 7 things; murder plus a burglary, alternatively murder plus a
 8 robbery, murder plus another murder, double homicide, in other
 9 words. Then, at some point the Judge will ask the defendant
 10 how the Defendant pleads, and I don't know how that gets
 11 answered. A defendant has right to pled guilty or not guilty,
 12 and that's certainly a right he has. A defendant has the
 13 right to have his attorney plead for him instead of him
 14 pleading.

15 For example, the lawyer can't plead guilty, but a
 16 lawyer can plead not guilty for a defendant. That's another
 17 variety. That seems a little unusual and sometimes awkward,
 18 and the Defendant doesn't have to say anything. He only has
 19 to answer the questions and be polite when the Judge addresses
 20 him. But when the Judge hears the defendant's entering a not
 21 guilty plea -- well, just based upon his silence, I don't know
 22 what the plea would be. If I were guessing man, I would enter
 23 a not guilty, which would make sense because he's presumed
 24 innocent, and that's the same, or the closest thing.

25 And once that happens, the State would make an

1 opening statement, and we would tell what we think the
 2 evidence is going to be, and the Defense gets to make an
 3 opening statement and tell us what the evidence will be in the
 4 Defense's mind. Then, we start calling witnesses, and we've
 5 got probably 180 witnesses listed on the witness sheet. Not
 6 all of them will testify. An ambulance maybe has three people
 7 in it, and we will list all three as potential witnesses. I
 8 don't think you need three people to come in and say we were
 9 carrying dead people in the ambulance. For example, I don't
 10 think you need more than one person to say that, even if that
 11 were so. But, it lists all the witnesses. And then if one of
 12 the ambulance drivers gets up and testifies, and Mr. Goeller
 13 makes him to look like a fool, and we'll put on somebody to
 14 make him look better, and it's important to put on a second
 15 one, and if he does it again, we got one more. We've always
 16 got somebody else so he can't make our witness look like a
 17 fool, and many times, at the same time, some of these
 18 witnesses won't be questioned by the Defense. Mr. Goeller
 19 might not think it's necessary to ask questions of the
 20 ambulance driver who hauled a body away, or he may. That's
 21 kind of up to him.

22 At some point we're finished, and the Judge will say
 23 call your next witness, and we would say we're out of
 24 witnesses and we rest. And the Defense would have an
 25 opportunity, if they so choose, to put on evidence, and the

1 Defendant doesn't have to testify. It's his Fifth Amendment
 2 right. You can't say, I wonder what he's hiding. I can't
 3 criticize him because that's beating him up with his
 4 Constitutional right. Make sense?

5 A. Uh-huh.

6 Q. The Defense doesn't have to put on any witnesses.
 7 If they want to call witnesses, they can do it, like we can,
 8 but since they don't have to and they have that luxury, and
 9 that is they don't have to (inaudible) by the burden of proof
 10 because they have no burden of proof. Do you understand?

11 A. Yes.

12 Q. They can do it any way they want to. Sometimes the
 13 Defense likes to put on its case through cross-examination of
 14 the State's witnesses and that can be quite effective, and
 15 sometimes that's the way they wish to attack the State's case
 16 and approach their own situation by cross-examination. All
 17 these were up to them, and at some point the Defense is
 18 finished, also.

19 The Judge will prepare written instructions outside
 20 the jury's presence. You'd never know about this, but we've
 21 got one thing in here, and if one side objects and says, Your
 22 Honor, that's not the law, and the Judge agrees or disagrees,
 23 and we might run through three or four drafts of instructions.
 24 The jury will get -- and the Judge usually sends you home
 25 while we work on it. And you come back, and both sides argue

1 the case and our position, as you might expect it, that we
 2 have proved our case beyond a reasonable doubt and who said
 3 what.

4 The Defense doesn't have to argue, but I suspect
 5 they will, and I would imagine their argument isn't going to
 6 be more than -- he'd say, they've convinced me, along with
 7 you-all, but now here's our side. He's going to have
 8 observations about our evidence, and he's going to point to
 9 things that he thinks might establish reasonable doubt. And
 10 then the jury goes away and deliberates and decides whether or
 11 not we've proven our case beyond a reasonable doubt.

12 Doesn't mean we're not going to have mistakes,
 13 because that's going to happen. Doesn't mean we're not going
 14 to have times one of our witnesses is going to be fooled, and
 15 that always works that way, but the fact is Mr. Goeller can
 16 expose our witnesses for what he or she is. It may not have
 17 anything to do with the crime itself. Does that all make
 18 sense to you?

19 A. Yeah.

20 Q. And that's not the time for sympathy or feelings.
 21 You can have anger in you, or sympathy, or emotions, or
 22 whatever you may be feeling, but now is not the time to put
 23 those feelings into emotions because there's nothing in the
 24 Court's instructions that say, do you hate the Defendant or
 25 love the Defendant? Do you think the Defendant is a wonderful

1 person or a bad person? There's nothing like that in there.
 2 There's no concept of has the State put enough on its side of
 3 the case to prove he's a capital murderer beyond a reasonable
 4 doubt? And he can be the world's nicest or the world's worst;
 5 those aren't issues for the jury. Does that make sense to
 6 you?

7 **A. Uh-huh.**

8 **Q.** It is possible, sir, that the State will have proved
 9 evidence to the jury's satisfaction beyond a reasonable doubt,
 10 except one of those things that makes it murder plus. It is
 11 possible, for example, the State will have proved that murder
 12 and it can be clearly an intentional murder committed by the
 13 Defendant, but we're unable to prove that murder was in the
 14 course of a burglary. And I can't think of some -- I can't
 15 think of great examples of how that would be, but maybe, for
 16 example, the physical evidence indicates that there was never
 17 entry into a habitation. Maybe the fight seems like it
 18 occurred outside, like on the front doorstep, and the guy
 19 falls back in. Maybe there's that.

20 Maybe there's the legitimate issue by consent,
 21 because it's not burglary if the person burgled gives
 22 effective consent to come in. Now, it's possible to give
 23 effective consent -- let's say the air conditioning is broke
 24 in your house, and you had to come up here in McKinney, and
 25 you wanted your air conditioner fixed, and you tell the air

1 conditioning company I'm going to leave a key under the mat.
 2 When you're finished, lock it up and put the key under the
 3 mat. Are you with me?

4 **A. Uh-huh.**

5 **Q.** A guy comes in, and instead of fixing this air
 6 conditioner, he stole all your goods, but you gave him
 7 consent, not to come steal from you, but you gave him consent
 8 to come in. It's kind of like I come knocking at your door,
 9 and I have a Bible and I'm a preacher and you haven't been
 10 going to church since Iowa. And you say, come on in, and I
 11 come in and knock you in the head and steal from you. You
 12 didn't give me effective consent. It was induced by trick and
 13 induced by the representation that they were fine. Does that
 14 make sense to you?

15 **A. Yeah.**

16 **Q.** Let's say you have an issue about that, the plain
 17 murder, and then you have to be able to follow what would be
 18 the regular punishment range for murder, and it's as little as
 19 five years or as much as 99 years or life, or as little as
 20 five years probation. Some unenlightened people -- there are
 21 some people that are, frankly, refreshing because they can be
 22 analytic. But sometimes we have super-unenlightened jurors
 23 that say, no, I wouldn't -- my mind is closed to the notion of
 24 five years probation. I have decided that's too little for
 25 any kind of murder case; therefore, I will not consider it.

1 That happens sometimes, and I think you have to agree with me
 2 that when you first hear about the concept of giving someone
 3 as little as five years for murder, as you hear it that sure
 4 seems pretty light; don't you think?

5 **A. Probably would in most cases.**

6 **Q.** Sure. What we're thinking of -- when we think of
 7 murder, just pulling out a gun and shooting somebody, I think
 8 you used the term "in cold blood," if the person's killed in
 9 cold blood. When you think of murder, that's usually what you
 10 think of, and yet, there are all other kinds of things that
 11 are still murder, but may be qualitatively quite different.

12 I'll give you some examples. Suppose you're, like,
 13 the executioner down at the prison, and suppose you miss your
 14 paperwork, and you think some guy is supposed to die tonight
 15 at 7:00, and it turns out it's next week. I imagine every guy
 16 they take out to be executed says, can you wait for the
 17 Governor to call, or there's some evidence for DNA? And you
 18 have the time where some guy says, wait a minute. You're a
 19 week early. The guy says, no, no, I'm sure I'm right. He
 20 takes the guy and executes him a week early.

21 That may be murder. That may be the intentional
 22 killing of an individual, and that's the definition of murder,
 23 intentionally causing death, because it's pretty hard to claim
 24 it was justified. The guy is telling you you've got the wrong
 25 date, and you've got the paperwork that says it's supposed to

1 be October 1st. But, oh, no, you're going to do it on
 2 September 24th. That may be murder. That may be a technical
 3 kind of murder. Maybe that's a minimum kind of case. I'm not
 4 justifying and I'm not ghoulish, but that might be different
 5 than a cold-blooded killer. Maybe it's not murder or -- you
 6 know who Dr. Kevorkian is, right?

7 **A. Yeah.**

8 **Q.** What's your thoughts? Do you think if I've got my
 9 mind about me and I don't want to live anymore or -- and I
 10 don't want to live anymore, do you think I have a right to
 11 hire Dr. Kevorkian?

12 **A. Actually, I do.**

13 **Q.** Do you understand you and I may share an enlightened
 14 view, but there isn't a state in this society that says that
 15 you're with me on that?

16 **A. Yeah.**

17 **Q.** What's that mean if he comes in and does what you
 18 and I think, what does that mean?

19 **A. Breaking the law.**

20 **Q.** What law is he breaking?

21 **A. He's committing a murder.**

22 **Q.** We don't have mercy killing in our society. Maybe
 23 you and I recognize that's not the same thing as killing
 24 somebody that didn't want to be killed. You and I want to go.
 25 It's our time, and we know that. He may be a visionary.

1 Some people may call him a blood-thirsty savage. But other
2 people might say, no, he's performing a very humane service
3 for people. And some people would look at that, and they
4 could say, you know, that's a minimum case, and that's only a
5 technicality. That's a minimum case, and Kevorkian is a good
6 man. He ought to get five years probation. Do you see how
7 that can be?

8 **A. Uh-huh.**

9 **Q.** Not all murders are the same, and we can't paint
10 them all (inaudible) brush, and (inaudible) as little as five
11 years or as many as 99 years; is that true?

12 **A. Yeah.**

13 **Q.** And if you saw that as a probation case, you could
14 assess it?

15 **A. I think so.**

16 **Q.** But let's say now if you found them guilty of
17 capital murder -- and I do not in any way minimize our
18 enormous burden of proof -- you get to that first question.
19 Do you see that up there?

20 **A. Uh-huh.**

21 **Q.** Read that again, if you would, and let me know when
22 you're done?

23 **A. Okay.**

24 **Q.** Not all capital murderers get the death penalty. It
25 depends. All death-sentenced people have one thing in common:

1 Every single one of them has had that question given to a
2 jury, that top question, and that's been answered yes
3 unanimously by a jury. So, only people who get a death
4 sentence, who are capital murderers, who are probably going to
5 be a continuing threat to society because of their criminal
6 personality, their antisocial personality. Does that make
7 sense to you?

8 **A. Uh-huh.**

9 **Q.** In other words, it's kind of almost like society
10 drawing a line. We will first identify what crimes, in
11 theory, could cost you your life, and that's a crime involving
12 burglary/murders, robbery/murders and double murders. There's
13 some other, like murdering police officers and murdering
14 babies and stuff like that. But for our purposes, burglary,
15 robbery, double homicide, and then once we have identified you
16 as the type of an actor who were -- could be executed for your
17 crime, and the next thing we say is we will only execute those
18 people who will probably have the potential, or have the
19 probability of being dangerous in the future, and that is the
20 question that requires you to look into the future. We give
21 you whatever evidence, but it requires you to look into the
22 future. And you can see how it does that?

23 **A. Uh-huh.**

24 **Q.** Is that something you think you can do?

25 **A. Yeah.**

1 **Q.** We do that all the time. We make predictions when
2 we get married. I don't know what we're really thinking, but
3 I assume, if we haven't been drinking, most of us assume it
4 will work out fine, and deep down inside most of us have hopes
5 that it will last forever, and a bunch of us that it doesn't
6 last forever, and that's how it works. Maybe it's our fault,
7 maybe it's theirs, maybe it's bad choices going in, I don't
8 know. But whatever happens, it happens, and we were wrong,
9 even though it might have seemed like the sensible thing to do
10 at the time, right?

11 **A. Uh-huh.**

12 **Q.** And we probably watch other people get married?

13 **A. Yes.**

14 **Q.** Any of your kids married?

15 **A. One is.**

16 **Q.** We can watch our kids, and it's possible for our
17 child to be marrying somebody that is wonderful, and we think,
18 what a great boy, what a great girl, or maybe we don't think
19 so much of him. We may have to keep our own (inaudible), and
20 if we're smart, we're quiet, and I'll bet you know people that
21 you've looked at that and said there's no way that's going to
22 work. Have you ever done that?

23 **A. Uh-huh.**

24 **Q.** And maybe for all that -- all you're doing is making
25 predictions, but more often than not, you're more right than

1 not?

2 **A. Sometimes.**

3 **Q.** Same thing here. We don't have to prove with a
4 certainty. I don't have to prove to you with a certainty that
5 it is going to rain tomorrow. I can say I think it will. We
6 have to prove a probability, and probability means different
7 things. I guess we have different events that are probable.
8 Flipping a coin a hundred times, you figure the probability is
9 50/50 (inaudible). It isn't quite (inaudible) because it's
10 possible it could land on its edge. If I could do it long
11 enough, and my thumb didn't wear away to none, and maybe one
12 time I could get that coin to land on the edge. And that
13 means the probability is about 10 or 12 decimal places, but
14 it's still possible. But it couldn't be probable in the usual
15 sense of that word because it's never going to happen. Does
16 that make sense?

17 **A. Yes.**

18 **Q.** There are all kinds of things that I could show you
19 that are theoretically possible, but that doesn't mean that
20 they're probable within the meaning of the question. Let me
21 give you an example. Take the world's most dangerous killer,
22 and let's say he escapes and kills again and then kills some
23 more, and everybody agrees he's a dangerous killer. And you
24 first look at the question and say, well, yeah -- yes, if that
25 person had a shoot-out with the police when he was arrested

1 last time, and they hit him in the spine and paralyzed him
 2 from the scalp down, for example, so all he could do is lie
 3 around and couldn't even move his eyes, and he's basically
 4 just like a big old turkey or something. There he's laying,
 5 and we're feeding him mush through a straw because he can't
 6 chew, and maybe he's got some muscles alive in him, but
 7 there's no way that guy could be a danger to anybody in
 8 society. Are you with me on that?

9 **A. Yes.**

10 Q. I could find me some quack that would say, I've
 11 studied all this and I believe there's a treatment to turn
 12 this fellow into a -- you know, something a little better than
 13 what he was right now, and I could have him dancing in six
 14 months. But the guy is a quack, and we can look at him and
 15 know he's a quack. I guess it's possible this guy could treat
 16 the guy and make him well or dangerous again, but that's not a
 17 probability. Does that make sense to you?

18 **A. Yeah.**

19 Q. So it has to be something more than theoretical.
 20 It's got to be something that will happen in the real world.
 21 Some people say that's an impossible thing for me
 22 to do. I can't predict -- I can't predict anything. For
 23 instance, I'm out drinking until 3:00 in the morning. I can't
 24 predict whether my wife is going to be mad at me. Some
 25 people say, maybe she'll be sweet with it, and my experience

1 **just go into their house and kill them. Then, I don't need a**
 2 **psychiatrist to tell me that person is dangerous or not. If**
 3 **it was something -- they killed somebody while killing a**
 4 **friend or their daughter or something like that --**

5 Q. That wouldn't be capital murder, you understand?

6 **A. Right.**

7 Q. You understand that might be legal?

8 **A. Yeah.**

9 Q. Capital murder -- probably all capital murders are
 10 just awful. I mean, I have to stretch to identify a single
 11 capital murderer that isn't just God-awful in their conduct.
 12 Because if you had a defense, that would have prevented you
 13 from being convicted in the first place. You wouldn't be
 14 found guilty if you had a defense, because if I'm breaking
 15 into your house at night, you've got a right to kill me to
 16 protect yourself and your family. You've got the right to do
 17 that. You haven't committed a crime.

18 So we're talking about somebody who has been found
 19 guilty of capital murder, and then we're asking you to look at
 20 his personal character, consider what he did, consider the
 21 crime itself, and consider any evidence that either side
 22 brings to you and decide whether or not he will probably
 23 commit criminal acts of violence that would constitute a
 24 threat to our society. Do you see how that would work?

25 **A. Yeah.**

1 tells me it's not going to go so well, so I better not come
 2 home this way, or think of something that will be better than
 3 coming home drunk. You're making predictions about the
 4 future, and people can do that, can't they?

5 **A. Uh-huh.**

6 Q. Some people say, well, I need an expert to help me
 7 with that. I need a psychiatrist to come in and talk to me
 8 about personality and talk to me about how a personality is
 9 dangerous and is formed, and other people say that's just a
 10 basic question. I don't need to know the basis of whether or
 11 not he can be dangerous beyond a reasonable doubt. Are you
 12 the kind of person that wouldn't require psychiatric
 13 information and would say that it depends on what somebody is
 14 actually about?

15 **A. Coming home at 3:00 in the morning drunk, I could**
 16 **understand that without a psychiatrist, but other things I may**
 17 **need expertise on.**

18 Q. How about help, do you think it would assist you in
 19 that situation?

20 **A. If I knew what the person had done in the past?**

21 Q. Uh-huh.

22 **A. For example, if he always went out and randomly**
 23 **killed people --**

24 Q. Right.

25 **A. -- like elderly people is an example I can think of,**

1 Q. And the language is really funny because we don't
 2 have to prove that it will happen. We have to prove there's a
 3 probability it would happen, and that would kind of connect to
 4 the threat concept that it would happen, not that it will
 5 happen. Do you see how that question really is aimed at the
 6 personality of the capital murderer him or herself?

7 **A. Uh-huh.**

8 Q. When we use the term "society," society can include
 9 prison society because we make prisons just like we make
 10 hospitals, libraries. We pay for him and send civilians to
 11 work. When the air conditioning breaks down, we get
 12 repairmen. That's not yours and my society, but it's a
 13 society; do you agree?

14 **A. Yeah.**

15 Q. So in answering that question, you don't simply have
 16 to say can he be safely kept in prison, will he be a threat in
 17 prison, because that's only one part of society. You can
 18 consider that just like you can consider will he be safe in
 19 the library, will he be safe in a girl's dormitory, will he be
 20 a threat to the woman I started living with, or if I married a
 21 woman. You can consider whether he would be a threat in
 22 prison. You could consider that.

23 THE COURT: Mr. Schultz, I'm going to ask you
 24 to pass the witness in about 15 minutes.

25 MR. SCHULTZ: Yes, sir. Thank you very much.

1 Q. BY MR. SCHULTZ: You can ask yourself, what if he
2 gets loose, what if he escapes, those kinds of things, and
3 that's why society includes both in and out of prison.

4 First of all, it's not limited to prison, and
5 secondly, it's not an assurance the person would stay in
6 prison.

7 **A. I guess to get back to your question, it's like the
8 psychiatrists, I would listen to him because I'm sure I'd hear
9 it from both sides; one that says he will, and one that says
10 he won't.**

11 Q. That's almost cynical, but I'm sure he will.

12 **A. And I doubt if one side will say something and the
13 other side wouldn't.**

14 Q. Well, that's not cynical. There are capable people
15 who will testify for the State and capable people who will
16 testify for the Defense, and they will testify the next time
17 somebody gets their wallet out. That's not saying they're
18 charlatans or hucksters. That's saying they're sometimes
19 testimony for hire.

20 Some people say it's like going to the circus and a
21 tiger gets loose. You don't need a veterinarian to tell you
22 tigers are dangerous. We'd get our children and our date and
23 get out of there because of that personality. If you answer
24 that top question no, the State has not proved it beyond a
25 reasonable doubt, do you know what that means?

1 **A. Uh-huh.**

2 Q. You could have kids grow up in a household maybe,
3 and an event happens, a parent dies, and one of the kids is
4 much more affected by that, even though they're living in the
5 same house. Do you follow what I'm saying?

6 **A. Yes.**

7 Q. So, different people may have different tolerances,
8 but every one of us has got mitigating things that didn't
9 work out right. Some of us have had it better than others,
10 you know that. Was it flat --

11 I was thinking Iowa is kind of like mile-to-mile
12 corn fields. Is that the part of the state you were in?

13 **A. It was that, but there are rolling hills, like what
14 would be in corn bluffs, like in Omaha.**

15 Q. Okay. I think of that as being a pretty good place
16 to be raised as compared to at least down -- you know, in the
17 projects or something like that because the air has got to be
18 cleaner as (inaudible), or when you were growing up, well,
19 there wasn't a lot of drugs and stuff there?

20 **A. No.**

21 Q. Probably a little alcohol here and there?

22 **A. Oh, yes.**

23 Q. But even there, I bet you knew people that had a
24 bad life either because of poverty or abuse? You knew some
25 people growing up that had pretty bad lives, right?

1 **A. It would be life in prison.**

2 Q. And that makes sense because non-dangerous capital
3 murderers, our law accepts they don't get the death penalty.
4 That's just how that works. That's not a comforting thing to
5 those people who think that capital punishment is (inaudible)
6 of an eye for an eye, because that's not an eye-for-an-eye
7 concept. That's -- we only kill dangerous capital murderers
8 in our State. But if you answer that question "yes," we move
9 to that next question, which is on the bottom there, and take
10 a moment, if you would, to read that. Okay?

11 **A. Okay.**

12 Q. When you first read that, it almost seems like it's
13 asking the jury, what do you want to do and that's not as far
14 off as you might think in some respects. There's still an
15 aspect in there measuring because it requires you to find
16 sufficient mitigating evidence. That term "sufficient" is a
17 measurement, and why I guess that is important is every single
18 human being has some important evidence about him or her
19 that's mitigating. Every person who grows up has things that
20 don't work out right for them as kids. Of the things that
21 happen, some might not bother you, but the same may bother
22 somebody else so much. But for somebody else, you probably
23 can understand what I'm saying when I say the same event might
24 affect two different people differently, just depending on who
25 they are?

1 **A. Yeah.**

2 Q. And even though that can affect them and that might
3 have been mitigating, nevertheless most people say this stuff
4 we would call mitigating -- standard stuff isn't sufficient to
5 overcome an enormous, terrible kind of crime. Does that make
6 sense?

7 **A. Uh-huh.**

8 Q. Here's what I'm thinking, and about everybody has
9 heard this; Adolf Hitler. I'll bet if you look at Adolf
10 Hitler's life, I'll bet you find it was, in many ways, very
11 sad. Some of the things we know about the man historically is
12 they mistreated him growing up; he was frail, kind of small.
13 They used to taunt him and call him sissy and other things
14 worse than that. He decided since they're calling me sissy
15 all the time, I'll show them. He went to art school, and as
16 you might expect that intensified that corruption, and the
17 crushing blow came when he got booted out of art school. They
18 told him you don't have any talent.

19 His dad was drinking beer, like they do over there.
20 And all kidding aside, and it's pretty hard to say because
21 Hitler is so repulsive, he probably went to sleep at night
22 feeling pretty confused and isolated and unloved and wishing
23 he could fit in better than he did.

24 And even if that all got presented at Hitler's
25 trial, assuming he had lived, we start looking at this

1 question and start considering all the evidence. And we say,
2 well, he's killing people for religion; he's just
3 exterminating people like they were roaches or something.
4 Taking into consideration his character and background and
5 personal moral culpability, you know, I don't know what it
6 would take, but I'll bet I could never find somebody that
7 would say these are mitigating circumstances that Hitler
8 should get a life sentence for, rather than a death sentence.
9 Do you follow what I'm saying?

10 A. Yes.

11 Q. But there are some circumstances -- there are some
12 capital murders and some backgrounds of defendants that are of
13 such an amount of mitigation to be considered sufficient
14 mitigation -- I may not be able to think of one right now.

15 MR. SCHULTZ: How am I doing on time?

16 Q. BY MR. SCHULTZ: Maybe being a Medal of Honor
17 winner, what does that mean? That means --

18 THE COURT: That means you have seven and a
19 half minutes, but every moment is precious.

20 MR. SCHULTZ: Fleeting?

21 THE COURT: Yes.

22 Q. BY MR. SCHULTZ: It may mean that being a Medal of
23 Honor winner, even though the crimes are awful and the
24 circumstances are awful and his character has to be pretty bad
25 because you've found he's a danger, and (inaudible) tells

1 anybody about the guy's character. I'm not sure the question
2 on character ever gets answered right. I'm not sure there's
3 ever a case where the defendant gets a plus. That might be
4 (inaudible) bad thing that question focuses you on. If he's
5 got such a good character, why is he such a continuing threat?

6 But background seems to be where stuff comes in.
7 It's like you've got to look at all the bad things that
8 happened growing up. Some people say drugs is a bad
9 background. If you go out and do a lot of drugs, that's real
10 sad because it makes you mean, and you might not have been
11 mean if you had not been doing drugs. And other people say,
12 it's pretty mean to do drugs knowing what it's going to do
13 with you. And yet maybe with the Medal of Honor guy we'd say,
14 well, there are an awful lot of people that are alive because
15 he had the courage to jump into that burning oil and save
16 those sailors or because he jumped on a hand grenade and got
17 his guts blown out, and a lot of guys didn't get killed by it,
18 and he's still a capital murderer and still a member of our
19 society, but because of that Medal of Honor and gallantry,
20 I'll spare his life, and I'll find that's sufficient
21 mitigating evidence to spare his life, and I'll send him to
22 prison and hope they can keep him there and hope he doesn't
23 hurt the guards. Even though I know he's dangerous, I think
24 that's mitigating, to take that risk. Does that make sense to
25 you?

1 A. Yeah.

2 Q. As a Medal of Honor winner we could say what have
3 you done for us lately? Well, maybe he's got a cure for
4 cancer. Maybe he's the one guy that's discovered a way to
5 cure cancer and if you execute him, then his secret dies with
6 him. And maybe you say, you know, your background is that of
7 a brilliant scientist, and maybe we ought to have him cure
8 cancer and doing that stuff, and if we could find a lab for
9 him to work in, he should do that.

10 Some people say, well, if you found religion, and
11 I'm thinking more about Christian religion. What if you've
12 made some personal relationship with Jesus while in the
13 jailhouse before your trial, that's real positive stuff and
14 that's somehow a mitigating circumstance because that's
15 something that makes you have a good character.

16 By the way, do you think being a Christian
17 necessarily means your character is any good, just because
18 you're a Christian?

19 A. No.

20 Q. Do you believe a person, even a genuine Christian,
21 can still be dangerous?

22 A. I would say so. Everybody has got different hues of
23 their religion.

24 Q. Okay. Do you see yourself as a person who could
25 fairly apply that second question and if you found sufficient

1 mitigating circumstances you'd vote for a life sentence rather
2 than a death sentence?

3 A. I think I could.

4 Q. Do you think that looks like a good thing for a jury
5 to have, is an option, don't you think?

6 A. Oh, yeah. It's like a final chance.

7 Q. That's well-expressed. It's that last look at the
8 evidence to see if there's some reason why a death sentence in
9 this case is the wrong thing based on the sufficient
10 mitigating evidence.

11 Is there anything you can think that would be unfair
12 to either side in this case that I haven't asked you about?

13 A. Not that I can think of.

14 Q. If you had the opportunity to witness an execution,
15 would you take that opportunity?

16 A. I don't know. I don't know if I could.

17 Q. Do you consider yourself to be as involved in this
18 case as a juror as would be a warden that administers a death
19 sentence down the line?

20 A. If -- I mean, if they have found the person guilty,
21 I'd have to weigh the decision of life versus death, yeah.

22 Q. And that's something that you could participate in,
23 and you feel that going either way is a right and moral thing?
24 Either life or death are both moral and decent things to do,
25 depending on the evidence?

1 A. Yes.

2 MR. SCHULTZ: I'll pass the witness.

3 THE COURT: Mr. Goeller.

4 MR. GOELLER: Thank you, Your Honor.

5 CROSS-QUESTIONS

6 BY MR. GOELLER:

7 Q. Good afternoon, Mr. Peters. How are you?

8 A. Pretty good.

9 Q. I guess you were up on the second panel, maybe about

10 two weeks ago, three weeks ago?

11 A. Yes. I was one of the ones, they called in too

12 many, so I sat up here in the jury box.

13 Q. Do you recall me speaking to the group that day?

14 A. Uh-huh.

15 Q. What impressions did you form when I sat down, other

16 than thank God I sat down?

17 A. You're a good speaker. I was thinking if I ever had

18 to be in a murder case I'd want you as my lawyer because you

19 sounded like you do a good job.

20 Q. Well, thank you, sir.

21 When you filled out this questionnaire that was --

22 that's been over a month now. I think August 20th, 21st,

23 something like that, and the responses that you gave back

24 then, have you had time to -- have you thought about the death

25 penalty or capital punishment or the criminal justice system

1 since you filled this out in the last month?

2 A. Yeah. When I was filling that out, I had no idea

3 what I was here for. I figured somebody (inaudible) got loose

4 and damaged property, and I wasn't even halfway through. I

5 was getting an inkling what I was in here for.

6 Q. When did you figure out it was probably going to be

7 a capital murder case?

8 A. Somewhere about the middle of the questionnaire, it

9 started talking about that, and then my mind started going

10 crazy.

11 I know I have at least one wrong answer. My

12 daughter's maiden name is Daniel, and we were going to name

13 her (inaudible) and tall.

14 THE COURT: We'll keep that confidential.

15 VENIREPERSON: Yes.

16 Q. BY MR. GOELLER: What thoughts, in general, have you

17 had in the last month? What kind of thoughts have been going

18 through your head after the Judge talked about it and talked

19 about indictment and murder and alleging murder in the course

20 of burglary and murder in the course of robbery and double

21 homicide?

22 I don't recall if Mr. Schultz or Ms. Falco spoke

23 that day. I think it was Mr. Schultz. Then, I spoke and

24 after, and after the second panel, or mini-panel is what we

25 call those kind of things. Just in general, have you thought

1 about --

2 A. Whether or not I could actually do something like

3 that, to sit on a trial like that without being completely

4 crazy, or if I could make that kind of decision or not?

5 Q. What kind of things were you thinking about? Where

6 did you leave yourself with those kinds of questions?

7 A. It's not the type of a thing you would want to do

8 the wrong thing in. I would have to -- I told myself if I

9 were chosen for the jury, I would have to make sure I

10 listened, looked at all the evidence, looked at all the

11 testimony. I would have to make sure of what was presented.

12 Q. It's not the kind of decision that the majority

13 says, make sure we're doing the right thing because it's not

14 the type of thing you can make a mistake on and say, oops, fix

15 it later. Capital punishment is the worst punishment, I

16 suppose, known to man.

17 Do you think when the Government seeks to kill a

18 citizen in a capital murder case, do you think that decision

19 to seek that and then impose it should be reserved for really

20 the worst of the worst for society? I think for me to impose

21 it -- whether or not they choose to impose it, I have no idea

22 why they choose that. Actually, I may have worded that

23 poorly.

24 The Government can seek the death penalty. They

25 don't seek the death penalty against that particular client.

1 That's the local prosecution, and that's their call. Our

2 Legislature has set up a system where they get to seek the

3 death penalty and don't have to say why.

4 A. Uh-huh.

5 Q. But the only people that impose are jurors. The

6 Judge formally pronounces it, but the jury, in our system,

7 tells the Judge exactly what sentence he's going to announce.

8 And the way it really works, when the Judge turns to the

9 jury -- you know, if we were to get that far, our position is

10 he's not going to be found guilty of capital murder. But

11 assuming in a case a jury were to get that far, the Judge

12 would ask the presiding juror to stand and the Judge would

13 read that question -- through questions and questions, and

14 then ask the jury how they answered. Then everybody knows

15 right then and there what the sentence is; life or death.

16 So along those lines, what do you think about being

17 a juror whereby an individual vote, and then collectively, you

18 may have to decide life or death on something?

19 A. I think I could do it. It would not --

20 Q. Tell me why you think you could.

21 A. Because I think I could look at the situation. I

22 mean, I've been thinking about other cases that have happened

23 and, you know, it's like if that person got the death penalty,

24 I could have found a reason why I wouldn't have voted --

25 Q. If that person didn't get the death penalty, based

1 on what you know, could you have voted one way or the other?

2 **A. I think I could look at all the evidence. I think I**
3 **could be fair and give what I would feel is the correct**
4 **judgment.**

5 Q. Okay. In the cases you've been thinking about, what
6 cases would you have voted to give the death penalty?

7 **A. Like the one with George Rivas.**

8 Q. Okay.

9 **A. Especially after hearing a lot of testimony on TV**
10 **after he was found guilty, I think I could vote, but that**
11 **doesn't mean the other five of that group that are still alive**
12 **I would necessarily give them the death penalty. I think a**
13 **lot of it depends on what their involvement was, whether --**
14 **you know, they had a chance to get away from the group**
15 **afterwards or not. It depends on what they did afterwards,**
16 **and what their participation was that night, for example. If**
17 **I knew what that evidence was.**

18 Q. Any cases you've thought about where you would have
19 not voted to impose a death sentence?

20 **A. Like I said, there are the ones that haven't**
21 **occurred, but I could see reasons why I wouldn't have given**
22 **it.**

23 Q. Tell me about that.

24 **A. Rivas, for example, claimed he was the leader of the**
25 **group and that he had the people bring that setup for ambush,**

1 Q. Okay. It would be hard to argue how they couldn't
2 be, right?

3 **A. Uh-huh.**

4 Q. You say in your questionnaire, it says if a person
5 killed in cold blood, and the next page says what is your best
6 argument in favor of the death penalty? "Danger to
7 society, no hope of rehabilitation," and your argument against
8 it is, "Redeeming values and did not murder in cold blood."
9 But I've seen that term two or three times, "cold blood," in
10 your questionnaire, and I guess I'm not wrong to assume that
11 you put a lot of emphasis on that aspect of killing?

12 **A. Uh-huh.**

13 Q. I mean, Mr. Schultz gave you the example of
14 Kevorkian, and I don't know, maybe it is cold blood, but
15 certainly that is a mercy killing. That is euthanasia, as we
16 call it. That's certainly a far cry from robbery/murder,
17 burglary/murder, double murder, capital murder?

18 **A. Uh-huh.**

19 Q. Would you say that if somebody was convicted of one
20 of those three varieties; burglary/murder, robbery/murder and
21 double homicide, the very nature of the crime itself would
22 dictate how you would vote on punishment, whether it's life or
23 death?

24 **A. Not just the nature -- not just the fact that it was**
25 **one of those crimes?**

1 **even though he said he told them not to. I mean, I could see**
2 **that some of the other people may not have fired right away.**
3 **Maybe the testimony would show that some of the shots were**
4 **fired after the officer was dead. You know, it could have**
5 **been one of those things everybody has to shoot so we're all**
6 **in it together, that type of thing. I could see where some of**
7 **those people may be guilty of murder, but not deserving of the**
8 **death penalty in that case because I wouldn't see them as a**
9 **continuing threat. I wouldn't see it as something they**
10 **normally went out and did. They didn't do it after that.**

11 Q. Okay. Your questionnaire says, if you're in favor
12 of the death penalty. Yes. If a person killed in cold blood.
13 Tell me what your thoughts were.

14 **A. If there's somebody there and pleading for their**
15 **life, and a person goes ahead and shoots them without any**
16 **feeling, that to me is cold blood.**

17 Q. Okay. In the particular indictment in this case I
18 suppose that they are -- I guess by the very nature of the
19 characterization, they're cold-blood killings; killing in the
20 course of a burglary of a residence, killing in the course of
21 a robbery and then the double homicide.

22 **A. (Nods head.)**

23 Q. What do you think about those kinds of crimes? Are
24 they cold-blood crimes?

25 **A. Offhand, I would say yes.**

1 Q. Well, I mean cold blood.

2 **A. When I say "cold blood," the person is defenseless**
3 **and being shot. If it's -- for example, the person shooting**
4 **back and something is going on, gunfire back and forth, that**
5 **to me is not cold blood, but I still might find them guilty of**
6 **capital murder. I can't say I wouldn't, but it's -- I guess**
7 **I'm not quite sure what you're saying. If I see it as cold**
8 **blood, you know, the person is totally defenseless, begging**
9 **for their lives, and the person just shoots them while they're**
10 **looking at them and everything. It's like they have no**
11 **feeling at that point, and I consider that cold blood.**

12 Q. All right. And would that dictate how -- the
13 punishment that you would vote?

14 **A. That would make me lean towards that. But I mean,**
15 **if that's the only fact I know, I would say, yes, I would**
16 **probably say that I'd vote for execution there.**

17 Q. Okay. What do you consider yourself a part -- or
18 what religious denomination, if you had to put yourself in
19 one?

20 **A. Protestant.**

21 Q. Any particular --

22 **A. I was raised non-denominational. I went to Church**
23 **of Christ. My wife is Lutheran, and we were married in the**
24 **Lutheran church. They're all pretty much the same type of**
25 **religion, denomination.**

1 Q. Mr. Schultz asked you if you could vote a life
2 sentence, and would you go away feeling that you did the moral
3 thing -- the right, moral thing, or if you voted a death
4 sentence you could go away, as well, believing you did the
5 right, moral thing. Tell me your thoughts on voting a death
6 sentence and how it would be the right, moral thing to do.

7 A. I would have to feel deep down inside that was the
8 best thing that could have happened; that the person was, like
9 I said in my questionnaire, a cold-blooded murderer; that, if
10 they had the chance, they would probably do it again; that
11 they were a danger. I would have to be able to sleep at night
12 knowing that I made that choice and that I believed in it.

13 Q. Okay. When you write down best argument in favor of
14 the death penalty is a danger to society and no hope of
15 rehabilitation, tell me what you meant by that. Did you know
16 when you wrote that that somebody convicted of capital murder
17 cannot get -- cannot get probation?

18 A. No.

19 Q. Were those your thoughts along that line,
20 rehabilitation, probation and --

21 A. I mean, I was thinking at the time somebody commits
22 a murder for some reason, and it's the type of thing where you
23 think they probably would never do it again, but they do have
24 the opportunity to turn their life around, they aren't going
25 to be a danger. They do have a chance to be rehabilitated and

1 do something good.

2 Q. Okay.

3 A. I think that was one of the questions I answered
4 before I really realized what I was answering the questions
5 for.

6 Q. Yeah. Biggest problem with the criminal justice
7 system is inappropriate sentences, violent criminals released
8 too soon, nonviolent kept too long. Tell me your thoughts on
9 that. Is that from the media, or have you -- do you have any
10 personal insight into violent criminals being released too
11 soon?

12 A. I would say that would be probably mostly from the
13 media. The only real instance I have is my daughter's
14 ex-boyfriend had attacked my younger son, and he got
15 probation. I would have preferred to see him in jail.

16 Q. Who gave that to him; a judge or jury?

17 A. I think it was just a judge. I was living down here
18 in Texas, and that was back in Iowa.

19 Q. The death penalty in Texas is one of the fairest.
20 Tell me why you put that down there, I guess as opposed to all
21 the other states that have it?

22 A. I feel in Texas they go to great lengths to make
23 sure the person is actually guilty because I just don't think
24 it's something where people get railroaded into a death
25 penalty sentence.

1 Q. Further on in the questionnaire, do you believe the
2 death penalty is applied fairly in Texas? You said "Yes. I
3 believe there are enough means to get appeals and new trials
4 that a person can get a wrong conviction overturned."

5 A. Yeah. If they -- especially with the DNA evidence
6 these days that it -- if somebody is found guilty and
7 something is not done, if they're on death row for years
8 before something happens and there's lots of time to find out
9 whether or not they're actually guilty or any evidence that
10 was missed.

11 Q. When I see folks who write regarding the
12 appellate system and new trials and that kind of thing, I
13 wonder in the back of my head if a jury or jurors would tend
14 to lean towards death because they think there's some
15 safeguards behind them. Do you see my concern?

16 A. Yeah. I wouldn't do that.

17 Q. Tell me why.

18 A. If I didn't feel death was warranted I would either
19 say life, or not guilty. I would never vote one way thinking
20 that they're going to fix it later on. I would vote based on
21 something that I heard, and if something came up later hope
22 that it would be corrected.

23 Q. You had mentioned that your son was attacked by
24 your daughter's ex-boyfriend?

25 A. Uh-huh.

1 Q. Why -- what was going on?

2 A. He claimed he was coming over to get his --

3 Q. I'm sorry?

4 A. -- to get his ring back -- he had given her a
5 chance (sic) ring.

6 Q. This is, like, a high school thing?

7 A. Yeah.

8 Q. Okay.

9 A. And she opened the door to let him in. He shoved
10 the door, came after my son.

11 Q. Why did he do that; do you know?

12 A. I think he wanted to knock my son out so he could
13 hurt my daughter.

14 Q. Wow.

15 A. She had the phone and called 911. He grabbed a
16 knife and was trying to stab my son just as the police came in
17 the door with their guns drawn, and that was that. We never
18 got the steak knife back, either.

19 Q. He could -- never got the steak knife back. Where
20 did they get in, through the kitchen?

21 A. Our back door goes into the kitchen.

22 Q. So that knife is in evidence?

23 A. Yeah. It's in evidence somewhere, and I moved to
24 Texas afterwards and my son never bothered to see about
25 getting it back. He figured he didn't need all those steak

1 knives, anyway.

2 Q. What was your degree in in college?

3 A. **Qualitative analysis, mostly statistics, so I**

4 **understood the probability questions he was talking about.**

5 Q. That's what I was going to go into next.

6 THE COURT: Probably understand better than

7 anybody in here, come to think of it.

8 A. **In statistics it's a probability, a certain set of**

9 **answers. Normally when you're flipping a coin you think of**

10 **only two answers, so you do have a 50/50 percent chance. In**

11 **really rare occurrences, it would it be more like poison**

12 **(inaudible) --**

13 Q. BY MR. GOELLER: A what?

14 A. **(Inaudible), P-O-I-S-O-N, poison.**

15 THE COURT: (Inaudible).

16 VENIREPERSON: Some Russian figured out --

17 Russian soldier being kicked in the head by a mule. So a

18 little bit of statistics trivia for you.

19 THE COURT: Are you a better, a gambler?

20 VENIREPERSON: I'm a horrible gambler. I don't

21 even try. I go to lose 20 bucks, and I'm done in five

22 seconds.

23 THE COURT: Because you know your chances of

24 recouping 20 bucks are pretty slim.

25 VENIREPERSON: Uh-huh.

1 THE COURT: I'm sorry, go ahead.

2 Q. BY MR. GOELLER: People who have an educational

3 background, such as yourself, understand probability in a much

4 different context than most of us would.

5 A. **Uh-huh.**

6 Q. How do you -- could you define that word in the

7 context of the legal arena without using the root word

8 "probability" for me?

9 A. **You mean in the first sentence there?**

10 Q. Yeah.

11 A. **When there's a likelihood as opposed to a**

12 **probability. If it's likely that the person might commit more**

13 **violent acts or criminal acts.**

14 Q. And likelihood -- I want you to put likelihood on a

15 scale of zero to 100 percent.

16 A. **In terms of what?**

17 Q. If you were to assign a percentage to the word

18 "likelihood," how would you do that? Where would you put it?

19 A. **I couldn't -- I mean, it would be in that range. I**

20 **would have to hear, for example, the actual things that I'm**

21 **trying to determine the likelihood of. I can see some things**

22 **where likelihood would be very low and other things where**

23 **likelihood would be very high.**

24 Q. And a very low likelihood would be a possibility,

25 correct?

1 A. **Yes.**

2 Q. And depending on how you answer that question, you

3 could go anywhere from possibility all the way up to high

4 likelihood?

5 A. **Or almost definite.**

6 Q. Yeah, almost definite.

7 When you look at that question, do you see that

8 question as more of a query of would somebody do these things

9 in the future, or would they do those things in the future?

10 A. **I would see it as would.**

11 Q. Okay. When you see the word "society," what do you

12 think that means?

13 A. **Other people -- I mean, when I first saw it, I was**

14 **thinking, like, back here in McKinney or in Texas or**

15 **something, you know. From what you've all said, I can see**

16 **where it can also include the prison. I hadn't thought of**

17 **prison society the first time I saw that.**

18 Q. Okay. Because we know -- before you get to these

19 questions, you know the minimum -- I guess the least, or worst

20 thing that would happen is life confinement or death.

21 A. **Uh-huh.**

22 Q. When we talk about the word "society," we're talking

23 about at least if somebody were to receive a life sentence --

24 was that gone over with you, what a life sentence really

25 means?

1 A. **Yeah. You were explaining --**

2 Q. 40 --

3 A. **-- nobody yet in the Texas prison sentence has**

4 **actually served a life sentence since it was raised to 40,**

5 **so --**

6 Q. That's right. Probably few of us will be around to

7 see if it can be done.

8 But threat to society, what do you think that means,

9 other than what it obviously says, but constitute a continuing

10 threat to society? If we know that somebody, no matter what,

11 has to get a life sentence and they're executed, what do you

12 think they're talking about?

13 A. **I don't know. Are they a threat to, for example,**

14 **the guards?**

15 Q. Okay.

16 A. **Are they a threat to --**

17 Q. Other inmates?

18 A. **-- other inmates.**

19 Q. Okay. That second special issue, the one on the

20 bottom flash card up there regarding mitigation, would you --

21 you know, those character and background, personal moral

22 culpability, Mr. Schultz talked about some common litigation

23 themes; poverty, abuse growing up. I could use, other than

24 abuse, bad things happening growing up, drug addiction. What

25 do you think about those kinds of things as far as mitigation

1 goes?

2 **A. In most cases I would have a hard time as seeing**
3 **those as changing my point of view.**

4 Q. Okay.

5 **A. I can't say never, but right now I can't think of**
6 **anything that would change my point of view on their**
7 **background.**

8 Q. Right. In other words, as you sit there right now,
9 those general types of mitigation areas, you wouldn't give
10 serious consideration to?

11 **A. I don't think I would.**

12 Q. Okay.

13 **A. If I heard something specific, I might, but not in**
14 **most cases.**

15 Q. As a general concept, background, character,
16 poverty, abuse, drug addiction, things like that?

17 **A. In most cases I don't see that as an excuse.**

18 Q. Okay. Camilla Parker Boles? I see some people --
19 some folks have put down bonny Prince Charles there, but I
20 haven't seen anyone put down her. Tell me why.

21 **A. And I couldn't think of anyone else, so I thought of**
22 **her.**

23 Q. Who do you think is worse; her or Monica Lewinsky?

24 **A. I'd say her.**

25 Q. Got Bill and Hillary down there. Tipper, don't see

1 THE COURT: Okay. You may step down and we
2 may have you back in a moment.

3 VENIREPERSON: Okay.

4 THE COURT: Thank you.

5 (Venireperson exits the courtroom.)

6 THE COURT: What says the State?

7 MS. FALCO: This juror is acceptable to the
8 State, Your Honor.

9 THE COURT: All right.

10 MR. GOELLER: Are you ready for me, Judge?

11 THE COURT: Yes, sir, I am.

12 MR. GOELLER: Thank you, Your Honor.

13 Comes now the Defendant, Ivan Abner Cantu, and we
14 move to challenge Juror Number 124, Mr. Dennis Edward Peters
15 on two grounds. First of all, he has a bias against the first
16 special issue in that he stated that he would assign the words
17 probability to as low as a possibility, which is in violation
18 of the laws laid out in 878 S.W. 2d, 142, the Texas Court of
19 Criminal Appeals, 1993.

20 Also, I would cite to the Court -- or I would inform
21 the Court that we have a second ground for challenge for cause
22 and that is because Juror Peters, Number 124, stated he would
23 give no meaningful consideration to those mitigation issues,
24 and the juror has to be at least willing to consider
25 meaningful -- let me say that again, a qualified juror must be

1 that much. You like Tipper Gore?

2 **A. Yeah.**

3 Q. Tell me why.

4 **A. I didn't like her husband, but she seemed to have**
5 **good values and didn't seem -- I can't recall her doing**
6 **anything to her discredit during his campaign.**

7 Q. Which may have been pretty good for that
8 administration. And Herb Kelleher, we know why you've got him
9 up there.

10 Somebody told me he smokes four packs a day?

11 **A. At least.**

12 Q. At least?

13 **A. That, and drinks a lot of Wild Turkey.**

14 Q. Like that Turkey? A hundred proof Turkey?

15 **A. I'm not sure.**

16 Q. I'll bet he goes for the good stuff. No messing
17 around with the 80-proof junk.

18 **A. Yeah.**

19 Q. Do you have any questions for me, Mr. Peters?

20 **A. No, not really.**

21 Q. Okay.

22 **A. I think you guys have done a pretty good job at**
23 **explaining what any of us would be getting into if we get into**
24 **this jury, so...**

25 Q. Okay. Thank you, sir.

1 willing to at least give meaningful consideration to a
2 defendant's background and character in answering the third
3 special issue. This juror is quite up front when he says he's
4 not going to do that, and that's in violation of Melda, 998
5 S.W. 2d, 239. So, for those two reasons we would challenge
6 Mr. Peters for cause.

7 And my third challenge for cause, Mr. Peters says he
8 has an overall bias against special issues regarding the
9 future dangerousness question and special issue -- because his
10 mind, based on what he's said, is pretty much made up. He
11 determines the killing was in, quote, cold blood, and we
12 explained what the indictment alleges; murder in the course of
13 burglary, robbery, or double homicide, and the jury agrees
14 those are in cold blood. And that ties back in with the
15 theory he's not going to give meaningful consideration to the
16 third special issues because, number one, he just doesn't
17 believe in those things, and we specifically talked about
18 poverty, abuse, drug addiction. Those are things the State
19 actually brought out, and that tied in with cold blood.

20 He certainly has a bias to consider that third
21 special issue, so for those reasons we would ask the Court to
22 grant our challenge for cause as to Juror Peters.

23 THE COURT: Deny the challenge for cause.

24 MR. GOELLER: At this time, Your Honor, the
25 Defense would exercise our 15th peremptory strike.

1 THE COURT: All right. Tell Mr. Peters he's
2 free to leave, and let's take a 15-minute recess.
3 (Recess taken.)
4 MR. GOELLER: Your Honor, before you call
5 Ms. Odom in, may I speak to the Court?
6 THE COURT: Yes.
7 MR. GOELLER: Your Honor, at this time comes
8 now the Defense, and we'd respectfully request the Court for
9 additional peremptory strikes. Previously during individual
10 voir dire, we made challenges for cause to at three least
11 jurors; Juror Stratton, Juror Cummings and Juror Odgar. Those
12 challenges for cause were denied, and the record should
13 reflect that we have used all 15 of our peremptory strikes.
14 We would also point out to the Court that Juror
15 Deborah Cole, Juror Tanya Burks and Juror Evelyn Poplin were
16 objectionable jurors that we were forced to take and did not
17 use peremptory strikes because we had three other peremptory
18 strikes that we were forced to use on Juror Odgar, Juror
19 Cummings and Juror Stratton. And the fact that we're getting
20 close to running out of peremptory strikes -- now that we've
21 used all 15 peremptory strikes, we would make a request for
22 additional peremptory challenges at this time.
23 THE COURT: Okay.
24 MR. SCHULTZ: May I address the Court before
25 you rule?

1 THE COURT: Yes, sure.
2 MR. SCHULTZ: It occurs to me that's a
3 premature request because at this point it may well be that
4 the next juror would be acceptable to both the State and the
5 Defense, in which case the Defendant would have no need for a
6 peremptory challenge. Additionally to that, it may well be
7 the next juror could be challengeable for cause either by the
8 State or Defense. In this case, there would be no need to
9 grant a peremptory challenge, and finally it may well be that
10 the State would exercise a peremptory challenge on the next
11 juror and obliterate the need for granting of a peremptory
12 challenge at this time.
13 Because there's been no demonstration -- for
14 example, if Mr. Goeller were to say I want to use a peremptory
15 challenge on this juror right now before we even begin, then I
16 suppose it would be timely. If he's already made his decision
17 that the next juror is -- the one coming up he wants to remove
18 from consideration, but unless we're there, I believe it's
19 premature at this point.
20 THE COURT: Good point.
21 What do you think about that, Mr. Goeller?
22 MR. GOELLER: I actually agree with
23 Mr. Schultz. It may be premature, and if the Court wanted to
24 reserve its ruling on my request until such time as the State
25 has made all five of its challenges or exercised peremptory

1 strike --
2 THE COURT: It's my understanding the next
3 juror is Rhonda Mary Odom, Juror Number 125.
4 MR. GOELLER: Sure. We could reurge our
5 argument and reurge the need for additional peremptory
6 challenges after the State has accepted the juror and moves to
7 challenge the juror for cause, or moves to challenge the jury
8 on -- if the State were to accept this juror, then I'd reserve
9 my right to reurge my argument and make a request for
10 additional peremptory strikes.
11 THE COURT: So I'm holding it in abeyance for
12 right now.
13 Let's bring in Rhonda Odom, Number 125.
14 (Venireperson enters the courtroom.)
15 THE COURT: Are you Rhonda Odom?
16 VENIREPERSON: Yes, I am.
17 THE COURT: I want to thank you for your
18 patience. I know you've thought about us over the weekend and
19 perhaps through the week. Perhaps you remember a little over
20 a month ago I administered an oath to the jury, and the oath
21 was to tell the truth with regard to any questions propounded
22 by the Court or by the attorneys on both sides. Do you recall
23 that?
24 VENIREPERSON: Yes.
25 THE COURT: I just want to advise you you're

1 still under that oath, and ask you to be seated right there.
2 VENIREPERSON: Yes.
3 THE COURT: Mr. Schultz.
4 MR. SCHULTZ: Thank you, Judge.
5 DIRECT-QUESTIONS
6 BY MR. SCHULTZ:
7 Q. Good afternoon.
8 A. Good afternoon.
9 Q. Ma'am, my name is Bill Schultz. I'm one of the
10 Assistant District Attorneys representing the State of Texas
11 in its capital prosecution of Ivan Cantu. To my left, the one
12 who spoke to you earlier, is Gail Falco. Moving further from
13 our table to your right is Ms. Jami Lowry. Most likely it's
14 the three of us that you will see if seated upon this jury
15 from the State of Texas. It may be from time to time one or
16 more of us will be outside the courtroom, from time to time.
17 The reason we have more than one lawyer is so that we can do
18 two things at once, and that's what that is.
19 The Defense has two attorneys representing him.
20 Mr. Don High is one of attorneys, who is not here at the
21 moment, and the gentleman to your left at the Defense table is
22 Ivan Cantu, the Defendant.
23 THE DEFENDANT: Hello.
24 Q. BY MR. SCHULTZ: And next to him is a fine, board
25 certified criminal law specialist, Mr. Matt Goeller. He's a

1 practitioner of law in Plano, Texas. My belief is you don't
 2 know any of the people in this case; is that right?
 3 **A. That's correct.**
 4 Q. And if you do know us, it's of such a casual
 5 connection that you don't remember us, or we don't remember
 6 you, correct?
 7 **A. That's correct. I hope.**
 8 Q. And if something comes to your memory --
 9 **A. I don't remember you. I'm hoping you don't**
 10 **remember me.**
 11 Q. Let's stick to that story.
 12 (Laughter.)
 13 Q. Now, if you had your choice, and nobody would be mad
 14 and you didn't come out of here feeling like you disregarded
 15 your civic duty somehow, would you rather be on or off of this
 16 jury?
 17 **A. I'd rather be off.**
 18 Q. I think we can probably think of a million reasons
 19 why somebody would want to be off. Just tell me some of
 20 yours.
 21 **A. Just amount of time away from work.**
 22 Q. Okay.
 23 **A. Well, I'm very fortunate, and I do have a federal**
 24 **job so I don't lose monetarily. I also know I have co-workers**
 25 **back there that are going to be picking up the slack for me**

1 **at the office. I have a 15-year old daughter who can call me**
 2 **at any given moment during the afternoon and ask me to pick**
 3 **her up from school and make special arrangements, so just**
 4 **normal things like that.**
 5 Q. Wouldn't you guess that's probably true of most, if
 6 not all, other jurors in some form or fashion?
 7 **A. Certainly.**
 8 Q. And I don't hear you saying that you're asking to be
 9 off. It's just if you had a choice and you were still doing
 10 your duty, you'd probably prefer that?
 11 **A. That's correct.**
 12 Q. I bet if you're to serve on a jury, you'd rather
 13 this have been a burglary case or some dentist yanked the
 14 wrong tooth, or rather it be that kind of case, rather than
 15 capital?
 16 **A. Absolutely.**
 17 Q. I'll bet -- if you think about it for a minute, I'll
 18 bet it isn't just the amount of time because I've got to
 19 believe that decent people in their hearts don't take any
 20 great thrill in the subject matter of this case. How do you
 21 feel about that?
 22 **A. You're absolutely correct. Just the thought of**
 23 **something like this and possibly being responsible for some**
 24 **sort of a decision is pretty overwhelming.**
 25 Q. Sure, sure. You know, it's funny because we as

1 Americans have such a high regard for human life that other
 2 people -- other countries would say it's almost an inefficient
 3 value we put on human life a lot of times. Let's face it,
 4 everything we know about the rescue efforts in New York City,
 5 that's probably -- everybody that's up there has known from
 6 about day two that's hopeless now. We can -- we can honor
 7 human life and work people until we drop, and we do that
 8 because we want to show that we go to that extra length.
 9 But the truth of the matter is, try as we might,
 10 that's not going anywhere, and yet we keep working and praying
 11 for that. Do you agree with that?
 12 **A. Yes.**
 13 Q. We worry about other human beings. We see homeless
 14 people on the street. Do you work downtown?
 15 **A. Yes, I do.**
 16 Q. What building do you work in?
 17 **A. One Dallas Centre.**
 18 Q. Is it on Main Street?
 19 **A. No. It's actually Bryan street and St. Paul.**
 20 Q. That's one that's got the federal courtrooms in it?
 21 **A. No. Grayhound has a lot of office space there.**
 22 **There's a lot of office space vacant.**
 23 Q. I know that area a little bit in Dallas. Certainly
 24 got homeless people there, and you get there in the mornings
 25 and see them in the -- homeless people out on the street. We

1 worry about people like that and their safety, and they get
 2 cold and we take them to shelters. We are an incredibly
 3 compassionate people.
 4 And then, if we think about all the people brought
 5 into courtrooms in a capital case, and I guess what we're
 6 ultimately asking those jurors to do is base their decision on
 7 the evidence and cause a result we're not used to doing at
 8 all. Because I don't know this Defendant personally, but I'd
 9 be willing to bet he doesn't want to die. I doubt seriously
 10 that it is his wish or choice that at some point in the future
 11 he ends up being executed. So, in a lot of ways it's not
 12 really him and what he wants. And so people think that's
 13 really inconsistent with our love of life in this society.
 14 That even after a trial we can say, well, we didn't cause it.
 15 We're not really responsible, but we got some participation in
 16 what happens. A lot of people say that's really inconsistent
 17 and a hard thing to do.
 18 Is that inconsistent to be in favor of the
 19 death penalty and care greatly about human life? Do you
 20 believe those two thoughts are inconsistent?
 21 **A. I find myself even sometimes having a difficult time**
 22 **rationalizing the two thoughts co-existing. So, yes, I think**
 23 **they are in conflict with each other.**
 24 Q. Now, I could look at your questionnaire -- we've
 25 gone through so many that I honestly don't remember yours.

1 Do you attend any organized religious services anymore?
 2 **A. Only recently, like over the past two months, my**
 3 **daughter and I began attending church, so we have begun doing**
 4 **that.**
 5 Q. And where do you attend?
 6 **A. Reunion Church. It's in downtown Dallas. It's**
 7 **non-denominational.**
 8 Q. Is it near any landmark?
 9 **A. Actually, they don't have a church building.**
 10 **They're meeting in one of the amphitheatres over in Dallas**
 11 **Convention Center.**
 12 Q. And how did you discover that particular church?
 13 **A. I attend on Thursday -- it's over at First Baptist**
 14 **Church in downtown -- a lunch talk, and one of the men who**
 15 **speaks at that particular event almost every Thursday is the**
 16 **pastor of this Reunion Church, and I found that I am very**
 17 **drawn to listening to him, and so that's the reason we've**
 18 **begun attending Reunion Church.**
 19 Q. Okay. I doubt, because I don't know your church,
 20 but it's my experience that most churches, particularly
 21 non-denominational don't have positions on the death penalty.
 22 When you learn about a church and its history and kind of what
 23 their missions are and things like that, the death penalty is
 24 not usually a part of -- and I bet you don't know of any
 25 position that your church takes on capital punishment?

1 **A. No, I don't, and I haven't been attending long**
 2 **enough to be that familiar with their doctrine.**
 3 Q. Some faiths do. Some faiths, like the Roman
 4 Catholic Church, it appears that the Roman Catholic Church has
 5 a strong position against capital punishment because the
 6 Pontiff speaks frequently on that subject. Many times he will
 7 request -- I remember one time when he most recently came to
 8 the United States he was in Denver, and I think somebody got
 9 sentenced to be executed because he requested, while in
 10 Denver, (inaudible) to those wishes. That church has
 11 opposition. The Quaker Society of Friends have opposition to
 12 the death penalty. But most faiths seem to leave that up to
 13 the individual conscience of its members because it's almost
 14 like that idea, almost like a separation of church and state
 15 idea. It's like there is a religious obligation of people and
 16 a citizenship obligation of people, and they kind of work
 17 independently. Do you see any conflict between having
 18 religious conflict and death penalty teachings?
 19 **A. I'll tell you that I'm not that familiar with the**
 20 **Bible. I was raised an Episcopalian and Bible study is**
 21 **something that was not really very strong in my background, so**
 22 **as far as I know right now, I see no conflict. But my**
 23 **experience as a Christian is kind of (inaudible.)**
 24 Q. How about the commandment against killing that says
 25 thou shalt not kill; do you think that's applying to what

1 we're doing here?
 2 **A. No.**
 3 Q. And this isn't a test, by the way. You probably
 4 know more about that than I do. Anyway, it seems pretty
 5 straight forward. Why do you think it not applies to
 6 executions?
 7 **A. Because I think that applies to me as an individual**
 8 **on whether or not I take somebody's life individually.**
 9 Q. How about war? If we go to war and drop bombs and
 10 kill people because that's what bombs do, and somebody is
 11 going to get killed, and probably when we start dropping
 12 bombs, some other person -- some child is going to get killed,
 13 don't you agree?
 14 **A. Yes.**
 15 Q. Is that wrong? Is that in violation of thou shalt
 16 not kill?
 17 **A. I think -- do I like to see it happen? No. I think**
 18 **it's very, very unfortunate. I would hope that we would never**
 19 **enter into another war and that we would never lose another**
 20 **life like that. Am I realistic enough to know that's going to**
 21 **happen? Yes. Do I think those people that are part of the**
 22 **military and participate in that are bound to go to hell for**
 23 **their part in that? No.**
 24 Q. Kind of the same thing, it's like -- almost like the
 25 State's business, which sometimes, even though it may not

1 conflict with the spiritual stuff, at least differ, right?
 2 **A. Yes.**
 3 Q. Well, you probably already knew before we spoke with
 4 you as a group, but in Texas capital murder is a crime that
 5 has a certain definition, like a lot of other crimes. I mean,
 6 if someone ever cared -- if you wanted to know what kidnapping
 7 is you can look up when -- and see when a person commits
 8 kidnapping and see elements A, B, C, and D, you're guilty of
 9 the crime of kidnapping. Same thing with capital murder.
 10 That means I intentionally caused that person's death, and
 11 there's some other aggravating aspects to that murder, like
 12 committing a crime while committing that murder, or maybe I
 13 kill two people instead of one, or I kill a police officer, or
 14 maybe I murder a child under the age of six, or maybe I murder
 15 people in prison or murder people while trying to escape from
 16 prison. We call that murder plus. Kind of shortening to
 17 change a regular murder into a capital murder.
 18 Of course, we're not concerned with all of the
 19 aspects of that, just as it relates to this case because this
 20 doesn't involve murdering a police officer or murdering a
 21 child. But the allegations are that -- in this case there was
 22 a capital murder because it was murder in the course of a
 23 burglary. That same murder was also murder in the course of
 24 robbery, because the same act can be more than one crime and
 25 can be -- I'll think of an example. If I take a brick and

1 throw it at somebody because I'm mad at them, that
 2 might be attempted murder, and if I'm aiming hard enough, it
 3 may be aggravated assault, in case the jury doesn't think I
 4 was trying to hit him and not hurt him. Aggravated assault if
 5 I was trying to hit him and scare him. The same act can
 6 embrace many acts. If I miss him and hit a window -- smash
 7 that window, that might be criminal mischief. That could even
 8 be a burglary. It was all part of my attempted entry into the
 9 house. Maybe breaking in, it might be some portion of that.
 10 Might be robbery. Or if I'm throwing a brick so I can knock
 11 him down to get his wallet, that's not saying I'm throwing a
 12 brick at the fellow, but depending on what was in my mind and
 13 exactly what the jury finds, the same act can be a lot of
 14 different crimes. Does that make sense to you?

15 **A. Yes.**

16 **Q.** Same thing with capital murder. There are many ways
 17 a crime could be capital murder. For example, if I enter
 18 somebody's habitation with an intent to rob them and then
 19 somebody gets murdered inside. I'm not saying I've murdered
 20 two people. That could be murder of two people because it was
 21 murder in the course of burglary. It could be murder in the
 22 course of robbery because I'm going to attempt to rob them, or
 23 it could be simply a double homicide, all of which it's
 24 exactly the same crime. I killed them the same way, but the
 25 same act could be several different varieties of capital

1 all three. It's still just one because it's one capital
 2 murder, however the facts proved that it happened.

3 **A. Okay.**

4 **Q.** Do you feel like you'd be as capable as the next
 5 person of sitting and listening to the evidence and deciding
 6 whether or not we can prove beyond a reasonable doubt the
 7 Defendant's guilty of capital murder?

8 **A. Yes.**

9 **Q.** A few things that apply that I'll bet you already
 10 know about, and the questionnaire seems to indicate that you
 11 do understand the Defendant is presumed innocent, and that
 12 doesn't mean he's actually innocent, but it's a starting place
 13 for the jury in weighing the evidence. It starts off with
 14 nothing on the State's scales at all to tip them in our favor.
 15 In other words, he's presumed innocent, and if we don't put
 16 anything on the scale, to remain otherwise -- he remains
 17 innocent and the only proper verdict would be not guilty.
 18 Does that make sense?

19 **A. Yes.**

20 **Q.** Now, there's nothing -- that's his sacred right.
 21 There's nothing special about it. Every single defendant
 22 in this land starts out presumed innocent. Every prosecution
 23 starts out the same way. Can you presume the Defendant
 24 innocent until we prove the State's case otherwise, and the
 25 juries are always made up of people who say, yes, of course, I

1 murder. Does that make sense to you?

2 **A. Yeah.**

3 **Q.** Might wonder why we do that. Might say why don't
 4 you make up your mind, pick one horse and ride on it kind of
 5 idea. We prefer to have the flexibility of having as broad an
 6 indictment as we can and of all probable ways to prove charges
 7 under the thinking that it would probably not be justice if --
 8 let's say we choose the burglary side only. It might not be
 9 justice for some technical reason. There's a question about
 10 the deed and who owns the residence there, and a question
 11 about did the killing occur on the doorstep, and did the guy
 12 fall back into house? Or maybe there's some issue about how I
 13 got in there, and did I live there because you can't burgle a
 14 place you live, that kind of idea?

15 **A. Yes.**

16 **Q.** The thing is, in our view, it would be real unjust
 17 if you found capital murder, and for bad luck that one was
 18 something that the jury had trouble with. So for as many
 19 varieties as we have proof we will put together an indictment,
 20 and then if the jury finds any one of them is true beyond a
 21 reasonable doubt, the instructions say find the Defendant
 22 guilty of capital murder. Does that makes sense to you, that
 23 concept, if we do that?

24 **A. Yes.**

25 **Q.** And it may well be with the evidence the jury finds

1 can do that and I'm sure can you can, too; is that right?

2 **A. Yes.**

3 **Q.** And furthermore, I imagine if you're sitting on this
 4 jury you would expect a vigorous, imaginative trial by both
 5 sides, wouldn't you? Just as you sit there, wouldn't you
 6 expect it's going to be involved and hard-fought and
 7 compassionate?

8 **A. Yes.**

9 **Q.** No doubt about that fact. But a lot of people say
 10 they expect the Defendant to prove his innocence, or to
 11 somehow prove that a lot of the State's case isn't any good,
 12 or somehow they put a burden on the Defense to do some kind
 13 of proving. Most people say if the State is going to do a
 14 lot of talking, and so we'd expect the Defense to do some to
 15 balance it all out. The Defense may have witnesses if it
 16 wants to. If the Defense wants to call witnesses, he may
 17 through his lawyers, but he doesn't have to because he doesn't
 18 have -- he's presumed innocent, and he's -- he doesn't have
 19 any burden of proof. The State must call witnesses to prove
 20 evidence, and we do have the burden of proof beyond a
 21 reasonable doubt. I would be very surprised if it were to
 22 happen that the Defense didn't call any. But in this case,
 23 did you know that the Defense doesn't have to do a single
 24 thing in a criminal case except be here? That's the only
 25 thing they have to do. They have to be here and be orderly.

1 They don't have to be polite and don't have to ask questions.
 2 Nearly as I can tell, they don't have to pay attention, and as
 3 long as they behave themselves, and all of that doesn't change
 4 the State's responsibilities at all. Do you see how that
 5 would be?

6 **A. Yes.**

7 **Q.** Now, that having been said, I'm quite confident that
 8 Mr. Goeller will have questions of some of the State's
 9 witnesses, and I'd like to say this: There are no perfect
 10 witnesses, and if you have a perfect witness -- if I were on a
 11 jury and nobody laid a hand on that witness, you could say
 12 that was a perfect witness. There wasn't anything about that
 13 witness that wasn't perfect. Well, none of us are perfect.
 14 Not one of us are ever flawless.

15 **A.** And sometimes we make mistakes about what time was
 16 it when you first heard the noise? And they said it was
 17 9:03 a.m. There better be a good reason why they think it was
 18 9:03. It could be they looked at their watch. Could be they
 19 had some kind of machinery where they made entry. Maybe the
 20 911 operator knew exactly what time the call was recorded
 21 because they make entries and they have records, and I'm sure
 22 Mr. Goeller would have legitimate questions of witnesses to
 23 either make a person look mistaken to illustrate from that
 24 witness something that Mr. Goeller thinks is important on
 25 their side of the case to demonstrate some bias, to

1 demonstrate some frailty of vision or hearing or thinking, or
 2 something like that and -- but he doesn't have to do
 3 anything. He doesn't have to ask any questions of witnesses,
 4 and I still have the burden of proof in this case. Does that
 5 make sense to you?

6 **A. Yes.**

7 **Q.** You could hold the State to a large burden of
 8 proving beyond a reasonable doubt, and, understand, that's
 9 your right and my right, if we ever need it.

10 **A. Yes.**

11 **Q.** If we prove beyond a reasonable doubt that the
 12 Defendant's guilty of capital murder, then we move into the
 13 punishment phase. If we fail to prove that he's guilty of any
 14 kind of murder, or any of the other crimes that went along
 15 with it -- let's just say we couldn't prove he killed anybody
 16 and we couldn't prove if he burgled anybody and robbed
 17 anybody. We couldn't tie him to any of these crimes, let's
 18 say.

19 **A. Yes.**

20 **Q.** What's your verdict? We can't tie him to any of
 21 this criminal activity, what's your verdict?

22 **A. Innocent.**

23 **Q.** We call it "not guilty," but innocent, that's the
 24 same thing. Sometimes we prove some, but not all of it.

25 Sometimes we can prove murder, but maybe we can't prove

1 burglary. It's not our fault. It's just not -- evidence
 2 isn't there. You think I'm right, but I don't know for sure,
 3 and I sure don't know beyond a reasonable doubt. Then you
 4 have to find the Defendant guilty of maybe a lesser-included
 5 offense. Have you ever heard that term before "lesser
 6 included?"

7 **A. Yes.**

8 **Q.** That's about what it says, it's lesser because the
 9 punishment for that crime is lesser. That's why they call it
 10 lesser. It really makes sense.

11 **A. Okay.**

12 **Q.** And the lesser included offense of capital murder,
 13 which is murder plus the lesser included, would be regular
 14 murder because we can't prove that plus part for some reason.

15 **A. Okay.**

16 **Q.** If that happens, then it's almost as though you
 17 start out being a regular murder case because then in the
 18 punishment part of the trial (inaudible) and the Judge says,
 19 well, I know we started out talking about all this stuff, but
 20 that doesn't apply. Because of the verdict, now we're going
 21 to deal with regular murder, and the punishment range for
 22 regular murder is from five years to 99 years, or life.
 23 That's the range that the Legislature has set for the jury to
 24 consider when deciding punishment.

25 **A.** Are you a sports fan, by any chance?

1 **A. No.**

2 **Q.** How about, like, the opera, ballet or symphony, or
 3 any of those kinds of things?

4 **A. Uh-huh, yes, I do.**

5 **Q.** Well, I don't do a whole lot of that, but I would
 6 imagine when you go to buy tickets -- do you like the
 7 symphony?

8 **A. Theater. I try to take my daughter to the theater.**

9 **Q.** What kind?

10 **A. Musicals, I've taken her to see a couple of plays on
 11 Broadway and gone to see things here.**

12 **Q.** I guess the first question you always ask when
 13 you're looking for a play is, can you get tickets?

14 **A. Correct.**

15 **Q.** Let's assume they say, yeah, the box office has
 16 tickets. What's the next question you ask?

17 **A. How much are they?**

18 **Q.** They could be enormous. They might be 150 dollars
 19 for really great ones, and maybe you can get really great
 20 seats up there for 20 bucks, that kind of thing, right?

21 **A. Correct.**

22 **Q.** Now, not everybody would ever likely go one way or
 23 another. I don't know if you've been in 150 dollar seats.
 24 Have you ever been in those kind of seats?

25 **A. No.**

1 Q. I'd like to -- I'm not saying I wouldn't, but the
2 likelihood of me letting loose with that kind of money is not
3 great.

4 (Laughter.)

5 MR. SCHULTZ: Shut up.

6 Q. BY MR. SCHULTZ: It's probably not great. But
7 nevertheless, I couldn't (sic) do that because it's
8 available. I would probably tend to see myself kind of in the
9 middle. I might not be seated way up here, but I might be in
10 the 50-dollar seats, if I afford that, or that's maybe where I
11 might be because they filled up the 20-dollar seats because
12 those sell out, and there's something for everybody.

13 And I get that theater seats range to accommodate
14 different tastes and different backgrounds and different
15 desires to come and see that play. Do you understand?

16 A. Yes.

17 Q. And if I were to say, well, would you ever pay 150
18 dollars for a ticket, your answer might be, well, I'd consider
19 it, but it's not real likely. I know what my other
20 obligations are. I've got a 15-year old daughter that wants
21 things, and I want to get things for her and that might be
22 more than I'd want to pay, but I'd consider it because it's a
23 possibility. And I'd consider the 20-dollar seats because
24 it's a possibility, but that doesn't seem where I'd want to
25 be, but that might end up being the right thing. Are you with

1 thing. Let me give you an example of what I mean. Have you
2 ever heard of the term of "mercy killing?"

3 A. Yes.

4 Q. Tell me what you think that to be.

5 A. Dr. Kevorkian is somebody who actually is
6 responsible for another person's death.

7 Q. Uh-huh.

8 A. But the end result of that is to avoid the -- any
9 remaining suffering that person would endure; that their
10 quality of life is so bad that the option is that they would
11 rather die.

12 Q. Let's say I've got a dreaded disease. It's not
13 terrible now. It's getting worse. I mean, I don't know how
14 much more pain I could have, and I've got a dreaded disease.
15 And the doctor comes and says he understands. He says you
16 ain't seen nothing yet. This is a good day. Is there
17 anything? No, I'm sorry. You're thinking my family is
18 watching me die. Bills are running up. I'm feeling less and
19 less like a human being, and all the time and it's hopeless
20 and not any fun. Not only is it not fun, I'm not doing any
21 good.

22 They bring some shrinks in, some psychiatrists to
23 talk to me, and what are they going to tell me? Cheer up.
24 It's not so bad. And I'm not getting any better, and they
25 bring some priest in to pray for me and tell me about the

1 me?

2 A. Yes.

3 Q. And if you're like most people, you end up in the
4 middle or not going at all, and that's why that happens.

5 In many ways that's where punishment ranges and
6 (inaudible) about five years for murder, I don't know if
7 you're like me, I first thought how in the world does somebody
8 get as little as five years for murder, and how could I give
9 somebody five years for murdering another human being? Do you
10 ever react like that?

11 A. I have reacted.

12 Q. It's not hard because it seems like you can give
13 them life or murder (sic). That seems to make more sense. We
14 kill somebody and give them a life sentence, that seems to
15 make more sense than five years, kind of closer than what I'm
16 about, although I could consider them. Do you follow what I'm
17 saying?

18 A. Yes.

19 Q. What I have learned, and I think from that you would
20 when you recognize it, that there are many kinds of murders
21 and just like no two people are the same, no two murders are
22 the same. And anything that we might call murder, because
23 they fit that definition, aren't quite what we think of when
24 we think of gangsters and cold-blooded shootings and those
25 kinds of things. They may be murder, but not the same kind of

1 afterlife. That's looking pretty good because this life isn't
2 good. But the doctors agree that I'm not -- I may be
3 depressed and saying, Doc, kill me. No, I can't do that.
4 Finally, I send for Dr. Kevorkian because either I'm
5 too weak to do it myself or too chicken. Either way, I can't
6 get it done myself. My family knows; they're with me. They
7 don't want me going, but they know I'm going one way or
8 another, and if this is how I want it, they're with me. Well,
9 they don't let Dr. Kevorkian into hospitals, so if he's going
10 to get into the hospital, because he isn't there for
11 treatment, so if he's going to get in, he has to break in and
12 come in, and so that could be a capital murder if he sneaks in
13 windows because it's a burglary kind of killing.

14 But let's say the jury is looking at that because
15 it's not really burglary, and say even though he comes in my
16 window, that's not my window because he comes in Mr. Schultz's
17 room and so that's okay. It's with the owner's consent. It's
18 technically murder, and so all the jury finds him guilty of is
19 regular murder, and now all the sudden we get into the
20 punishment range. And here's Dr. Kevorkian; he's dedicated
21 his life to the relief of suffering to the miserable human
22 beings, and he's every -- some people say he's a visionary and
23 almost an angel, and other people say he's a ghoul. And
24 anyway, the jury is looking at that, and in looking at the
25 punishment range of as much as five years, they may say what

1 he did is murder, or it's darn near capital murder, but you
2 don't deal with death issues (inaudible). But there are
3 people that say he's doing the right thing. There are people
4 that truly believe that it shouldn't be against the law.

5 I don't know how you feel about that. I'm not sure
6 how I feel about that, but there are people that say it
7 shouldn't be against the law. Do you also see how it should
8 be reasonable, and, yet, it shouldn't be a probation case?
9 I could understand how that could come about and maybe think
10 of other examples where it shows to be -- where probation
11 might be a bad thing, and it might be his background. You can
12 have someone who's done nothing but good, and one minute he
13 snaps because of something he wasn't -- he didn't cause it
14 himself. He didn't put himself in that position, and maybe
15 somebody murdered his child and he retaliated. Classic
16 example everybody uses is catching a spouse with another
17 person and something snaps. That's classic. I'm sure there
18 are others -- there are other circumstances.

19 The notion in that punishment range is you have to
20 be able to consider the full punishment range to be a fair
21 juror. Can you do that?

22 A. Yes.

23 Q. And it may be unusual for you to get five years.

24 Heck, it may be unusual to get 99 years, but if you're open to
25 the whole range of punishment, then you're qualified on that

1 some measure of accuracy that is a probability. Do you see
2 how it does that?

3 A. Yes.

4 Q. In your line of work, do you ever do anything that
5 you require -- that requires you to do some predicting about
6 the future?

7 A. Certainly.

8 Q. Tell me an example of what you're thinking of.

9 A. I'm an assessment auditor, so in a lot of instances
10 when I have to make a determination as to whether or not I'm
11 going to write an exception for a bank on the way they've
12 reported deposits. I do that based on whether or not I think
13 that was oversight or whether or not I think that was
14 intentional, whether or not I think it's going to be a
15 continuing problem, so that's predicting the future.

16 Q. And what -- when you're looking at that whether or
17 not kind of thing, do you look at in deciding whether it's
18 going to be an ongoing problem or not?

19 A. We look at previous audit reports. We look at
20 monetary size.

21 Q. Is it possible that error could be so enormous that
22 anybody that could make that error is going to be a problem in
23 the future?

24 A. Well, I have a -- I have an amount that's the
25 threshold almost. So we'll say, regardless of whether or not

1 issue. Does that make sense?

2 A. Yes.

3 Q. But let's assume that you've been -- you've been
4 convinced the Defendant's guilty of capital murder. You go
5 into the punishment phase of the trial. It's a brand-new
6 trial in many ways. We don't have the presumption of
7 innocence anymore, but there's still some burdens of proof on
8 the State, and the Defendant doesn't have to testify. He
9 doesn't have to testify at the second phase of the trial any
10 more than he had to at the first part of the trial. And he
11 still doesn't have to put on any evidence if he doesn't want
12 to put on any evidence, so all those rules are the same.

13 The first question that I get around -- by the way,
14 in this case the State will produce additional evidence,
15 evidence that might not have properly fit the first part of
16 the trial, which is more of a whether he did it and how he did
17 it kind of concept. But some additional evidence is
18 admissible at the second part of the trial, and the Defense
19 could give additional evidence. And in that top question,
20 take a moment and read that, if you would, and let me know
21 when you're finished.

22 A. Okay.

23 Q. We call that the future danger question, is what we
24 call it, and I think you can see that question really
25 invites -- requires the jury to try to predict the future with

1 it happened, this is the dollar amount cutoff, and if it's
2 that dollar amount, it will be an exception.

3 Q. If it's this amount or lower?

4 A. Oh, in my case this dollar amount or higher where
5 they've underestimated deposit liabilities.

6 Q. Is it possible that's big enough to get them in
7 trouble for that one account? Does that ever happen?

8 A. No.

9 Q. Why is it important to look at past history in
10 making assessments in the future?

11 A. Well, what you want to look to see is if you've
12 repeatedly told them not to do this and it continued with that
13 same pattern.

14 Q. Let's think about criminal law. Along with other
15 things, criminal law is the way we tell people not to do
16 stuff.

17 A. Yes.

18 Q. Speed limit signs tell you not to go faster.

19 A. Yes.

20 Q. No trespassing, they're pretty self-explanatory,
21 don't come on here?

22 A. Yes.

23 Q. Locking your door is a pretty good indication you
24 don't want people coming in, that kind of idea.

25 A. Yes.

1 Q. And when you do those things that's against criminal
2 law and everyone understands that idea, and they understand
3 doing drugs is against criminal law and beating up spouses is
4 against criminal law. Do you agree with me on that?

5 A. Yes.

6 Q. Do you see how that's kind of what you're talking
7 about; they've been repeatedly told not to be doing stuff, and
8 yet, they keep violating the law?

9 A. Yes.

10 Q. I think you're very wise because what that question
11 is looking at, what's this person's character for following
12 the law. When you're trying to figure out -- if you're trying
13 to figure out what a person is going to do in the future, if
14 the character for not following the law is established, that's
15 not real good for their side on that question; don't you
16 agree?

17 A. I would agree.

18 Q. Now, under our law, absolutely you're right, it can
19 be helpful to have past history, and yet, our law allows a
20 jury, all by evidence of the crime itself, that you find them
21 guilty of -- you know, that crime is so enormous that I
22 believe that anybody who could commit such a crime will always
23 probably be a threat to our society. The fact that person
24 could get to the point of callousness that would enable such a
25 crime to occur is the home run, in terms of proof, that he

1 will probably always follow that character trait. Does that
2 make sense to you?

3 A. Yes.

4 Q. Doesn't mean you have to, but when you're looking at
5 a situation, and you look at how big a departure from normal
6 something is, that can be a real challenge all by itself, and
7 you'd answer that question if you, the jury, think that it
8 will.

9 A. Yes.

10 Q. I'd like to use this example. You've got a 15-year
11 old daughter, but (inaudible) has gone through that, but not
12 many years. They certainly do some things that parents don't
13 think are wise, even the best of them; don't you agree?

14 A. Yes.

15 Q. And they know everything, and anything you try to
16 tell them wouldn't matter. Some guy could come up in a hot
17 rod and he's a big old thing, and you tell her to be careful
18 going out on a date, and she'd get mad at you and, you know,
19 you say it's dangerous because it looks like something
20 monsters would drive and off she goes. Are you with me on
21 that?

22 A. Yes.

23 Q. People when they're young -- you know, you made
24 mistakes when you were younger?

25 A. Absolutely.

1 Q. So that's true, and there are a lot of things that
2 we all do that we wonder how we got through. And yet, even in
3 that wild state, even in that, we hope they don't do drugs,
4 but statistics tell us they're liable to, but that's different
5 from capital murder. That's as different from being an
6 astronaut to being an auditor. Do you know what I mean?

7 A. Yes.

8 Q. And so anybody can drive too fast. Anybody can
9 violate drug laws. Anybody with youth can do a whole bunch of
10 bad things. Do you think anybody can go out and do a capital
11 murder? Do you think that's a rite of passage that they might
12 get in the wrong situation, and the next thing you know,
13 they're doing double homicides or robbery homicides?

14 A. Do I think that's a rite of passage?

15 Q. Do you think that anybody can happen -- or anybody
16 can do such a thing?

17 A. I would hope that wouldn't happen to everybody.

18 THE COURT: Mr. Schultz, I'm going to ask you
19 to pass this witness in about ten minutes.

20 MR. SCHULTZ: Wouldn't be any less than ten
21 minutes?

22 THE COURT: No.

23 (Laughter.)

24 A. I don't know that I've really thought about it, but
25 I would hope that's not a rite of passage for everybody.

1 Q. BY MR. SCHULTZ: You certainly don't hear that many
2 for our State's size, you don't hear that many kind of capital
3 murders numerically, right?

4 A. Correct.

5 Q. Some other things that can be used are psychiatric
6 evidence. I don't know if you've ever followed any other
7 trials, but it is not unusual for one side or the other or
8 both sides to call psychiatrists. For example, the State
9 frequently might call a psychiatrist to say I've studied the
10 records in this case, I've studied the police reports in this
11 case, I've talked with witnesses in this case. I've read and
12 studied all kinds of things about these types of crimes, and
13 it's my opinion as a professional doctor, I believe the
14 Defendant will probably be a continuing threat to society.
15 And the Defense can also have a psychiatrist that will come
16 in, equally qualified, equally honorable and say, you know,
17 the State's doctor is a decent human being, but I disagree. I
18 think this person will not be a continuing threat to society,
19 and they could get two, and we get two, and they get five, and
20 there are plenty of psychiatrists out there to testify; do you
21 believe that?

22 A. Yes.

23 Q. Do you think you need a psychiatrist to testify
24 because that's a human being? Kind of (inaudible) question
25 that I can answer without -- what do you think?

- 1 A. **The first question we're still talking about?**
 2 Q. Uh-huh.
 3 A. **I think that I'll have a gut-level reaction without**
 4 **a psychiatrist. I mean, I'll have a response, and I will**
 5 **react to it in some way, yes.**
 6 Q. Okay. You see a lot of people say if I went to the
 7 circus with my grandchildren, and a tiger escapes from the
 8 tiger act and starts running around the seats. I don't need a
 9 veterinarian -- an expert on animal science to tell me to get
 10 out of there. I already understand. Because I live on this
 11 planet, I understand what that means, and I know to leave that
 12 place when the tiger is loose?
 13 A. **That's correct.**
 14 Q. And I'll only take the analogy (inaudible) of
 15 expertise. We know lots more about things than we sometimes
 16 give ourselves credit for. You know all about ear infections
 17 from being a mom, even though you're probably not -- you're
 18 not a doctor, but you understand that stuff and develop
 19 instincts from living and make pretty good decisions based on
 20 that stuff, don't you think?
 21 A. **Yes.**
 22 Q. You knew when your child was younger, when she
 23 needed to go to the doctor and needed to stay in bed for five
 24 days. You knew the difference?
 25 A. **Yes.**

- 1 Q. If you answer that question no, automatically it's
 2 a life sentence. Does that make sense to you? It's the
 3 notion that capital murderers, that we think as a society,
 4 should be executed are those people who have done a capital
 5 murder, and will be, because of their personality, a threat to
 6 society or some part of society in the future.
 7 A. **Yes.**
 8 Q. Some people don't like that. Some people say, well,
 9 if you've committed a crime of capital murder, you ought to
 10 get the same done to you, and a lot of people feel that way,
 11 and I don't quarrel with it at all, but that's not our law
 12 because that question means that some capital murders will
 13 have a no answer to that question, and therefore will get a
 14 life sentence. And the real question for all of our jurors is
 15 can you fairly answer that question, even though you know what
 16 a "yes" versus a "no" means? Can you fairly answer that
 17 question according to the evidence and be comfortable that
 18 whatever your answer is it was based on the evidence and that
 19 meant you follow the law. Can you do that?
 20 A. **Not having been in that position before --**
 21 Q. Right.
 22 A. **-- I think I can.**
 23 Q. Most of the time lawyers will quarrel with you when
 24 you say I think I can, but everybody understands what you're
 25 saying. I mean, just like we can't predict the future with

- 1 certainty on that question, nobody can ever predict how
 2 they're ever going to react when they're serving as a juror.
 3 But as you sit there now and you know yourself, do you think
 4 you're as capable as any other human being in our State to
 5 answer that question fairly based on the evidence?
 6 A. **Yes.**
 7 Q. There can even be some circumstances that would make
 8 a person physically unable to -- well, I'm on a time limit.
 9 I'm going to pass on that note.
 10 Let's get to the second question, that mitigation
 11 question, because you only answer that question if you've
 12 answered that top question yes, because if you've answered the
 13 top question "no" the trial is over, and the Defendant gets a
 14 life sentence and goes to begin serving it. If you answer
 15 that second question, that mitigate question, only if you have
 16 a "yes" answer to that one, so read that one to yourself for a
 17 moment and let me know when you're done.
 18 A. **Okay. Okay.**
 19 Q. I like to call that question the
 20 take-one-more-look-at-the-evidence question. It's the same
 21 evidence that you considered at guilt-innocence, plus anything
 22 that was added at the second part of the trial. You've
 23 doubtless considered everything altogether on that first
 24 question out there, which is -- that first question really has
 25 to do with the Defendant's character. What you're really

- 1 doing is looking at his character for being a continuing
 2 threat to our society.
 3 A. **Correct.**
 4 Q. And so you considered that, but now they're saying,
 5 go back and take one more look at it. It's almost like when
 6 you lose something, I'm going to look one more time, and I'm
 7 going to give up, you know? Look one more time at this
 8 evidence, take into consideration the following things, all
 9 the evidence -- well, that's not very helpful, including the
 10 circumstances of the offense, that means what you found him
 11 guilty of, the Defendant's character, and this may well mean
 12 this stuff up here, that he's a dangerous person, and the
 13 Defendant's background and his personal moral culpability.
 14 And taking all that into consideration, it's asking you to
 15 first determine whether there's any mitigating evidence,
 16 mitigating circumstance, kind of lessening evidence, in other
 17 words.
 18 A. **Yes.**
 19 Q. And I'm going to tell you that there always is.
 20 There is in this case; there is in every case. And then ask
 21 yourself the second question, is that mitigating evidence
 22 sufficient to make a life sentence the proper verdict rather
 23 than a death sentence? I think that question is really for
 24 the benefit of the jury and for the peace of mind of the jury,
 25 is what I believe. I think that gives them -- I don't want to

1 say an out. It's not an out. It requires a measurement of
 2 evidence, but it gives the jury the chance to consider all the
 3 sympathetic stuff and see if that's enough to cause a life
 4 sentence rather than a death sentence, which would otherwise
 5 happen by finding him guilty in that first question up there.
 6 What do you think of that idea?
 7 **A. I agree. I mean, I think it's an opportunity to**
 8 **look at the evidence again and to take all types of things**
 9 **into consideration in making a determination as to whether or**
 10 **not -- what the appropriate sentence would be.**
 11 Q. It may in part -- what's sufficient may really
 12 depend on how bad the crime is in many times -- in many ways.
 13 Can you see how that would be?
 14 **A. Yes.**
 15 Q. I mean, if we're dealing with Adolf Hitler and
 16 prosecuting him for his crimes --
 17 MR. SCHULTZ: How much time do I have, Judge?
 18 THE COURT: You've got about two minutes.
 19 MR. SCHULTZ: I may take an extra 30 seconds.
 20 THE COURT: That's all right.
 21 Q. BY MR. SCHULTZ: If we're prosecuting Adolf Hitler
 22 for his crimes, I don't care how sad a story he would tell, I
 23 don't care how many beatings he got as a little boy. I don't
 24 care how many men came in and abused him. I don't care how
 25 many times his old, alcoholic dad came in and beat up his mom

1 in his presence. I don't care how many times they made fun of
 2 him in art school. I don't care how many women spurned his
 3 advances. I don't care any (sic) that stuff. Nobody on this
 4 earth would probably ever find that any of that stuff could be
 5 sufficient, mitigating circumstance to give -- sufficient
 6 mitigating circumstance to warrant a life sentence for Hitler.
 7 Do you follow what I'm saying? .
 8 **A. Yes.**
 9 Q. On the other hand, if it's Dr. Kevorkian, and
 10 Dr. Kevorkian has been found guilty of capital murder, and you
 11 decided, well, he's going to do it again. He's going to keep
 12 on violating society's rules, maybe his crimes of the mercy
 13 killing, because they don't seem quite as bad as Hitler's
 14 crimes to most of us, maybe less mitigating evidence would be
 15 enough for Dr. Kevorkian. Do you see how that could work?
 16 **A. Yes.**
 17 Q. He's an awfully ugly looking fellow, and I imagine
 18 they've made fun of him for being ugly all his life. That
 19 could be mitigating. Whether that's mitigating enough, it
 20 might depend on the circumstances. Do you follow what I'm
 21 saying?
 22 **A. Yes.**
 23 Q. Do you have any questions of me, ma'am?
 24 **A. No.**
 25 MR. SCHULTZ: Thank you so much for your time.

1 We'll pass the juror.
 2 THE COURT: Mr. Goeller.
 3 MR. GOELLER: Thank you, Your Honor.
 4 CROSS-QUESTIONS
 5 BY MR. GOELLER:
 6 Q. Good afternoon.
 7 **A. Good afternoon.**
 8 Q. It's pronounced Odom?
 9 **A. Odom.**
 10 Q. And do you prefer Ms. or Mrs.?
 11 **A. Ms.**
 12 Q. Because you're single?
 13 **A. I'm single, yes.**
 14 Q. Okay, okay.
 15 THE COURT: Do you mind if I ask you a few
 16 questions and that way I'll -- because there are some things
 17 I'm curious about, perhaps you are, too.
 18 Say, you had a couple of relatives that were
 19 prosecuted for antitrust violations; is that correct?
 20 VENIREPERSON: That's correct.
 21 THE COURT: How were they related to you?
 22 VENIREPERSON: One was my grandfather; one was
 23 my uncle.
 24 THE COURT: Okay. Were you close to them?
 25 VENIREPERSON: Yes.

1 THE COURT: Were they prosecuted out in
 2 Lubbock?
 3 VENIREPERSON: Yes.
 4 THE COURT: What was the nature of the
 5 antitrust violations?
 6 VENIREPERSON: They owned liquor stores, price
 7 fixing.
 8 THE COURT: So, was it federal prosecution?
 9 VENIREPERSON: Yes.
 10 THE COURT: Were there a lot of other
 11 defendants --
 12 VENIREPERSON: Yes --
 13 THE COURT: -- other liquor dealers out there?
 14 VENIREPERSON: Yes.
 15 THE COURT: And how many defendants were there,
 16 if you remember?
 17 VENIREPERSON: You know, I want to say five or
 18 six total.
 19 THE COURT: Did they go to trial, or did they
 20 just plead; do you know?
 21 VENIREPERSON: I believe they just all pled. I
 22 was pretty young. I think everybody just pled.
 23 THE COURT: Was there a jail sentence involved?
 24 VENIREPERSON: Yes.
 25 THE COURT: And I would assume it would be

1 around five years, but I don't know. Do you know how long the
2 jail sentence was?

3 VENIREPERSON: I think it was about five years
4 for my uncle. My grandfather was actually placed on
5 probation.

6 THE COURT: Okay. Was there anything about
7 that prosecution that would make you distrust the prosecution
8 in the case?

9 VENIREPERSON: No.

10 THE COURT: Did you feel like it was justified?

11 VENIREPERSON: I didn't at the time. I was
12 about 16 years old. As I've gotten older and looked back on
13 things and found information that I didn't know at the time, I
14 think it was probably justified.

15 THE COURT: I notice you work for the FDIC,
16 right?

17 VENIREPERSON: Yes.

18 THE COURT: So I would assume you've had some
19 contact with some prosecutions that were actually brought by
20 the FDIC?

21 VENIREPERSON: You know, very limited because
22 of the role that I play on the -- I deal mainly with live
23 banks, live institutions so -- as opposed to ones that have
24 failed where we would have prosecuted someone. So on the side
25 that I work at, certainly I've been aware of some

1 treated for bipolar condition that would in any way affect the
2 way that you might look at this case or any other case?

3 VENIREPERSON: Not the way that I -- I don't
4 believe that it would the way I do. I think there are some
5 prejudices by society, so I do have some concerns about that.
6 But as far as from my perspective and the information that
7 I've read, there are a lot of people walking around out there
8 that are bipolar and are depressed that are not treated. So,
9 I think from my perspective, at least I know where I am and
10 I'm being treated for it, when I think there are a lot of
11 people that don't know that that's going on in their life.

12 THE COURT: Was there anything you wanted to
13 ask me before I passed you to the Defense?

14 VENIREPERSON: I don't think so.

15 THE COURT: Kind of piqued my curiosity, and I
16 thought I'd ask you.

17 VENIREPERSON: Sure.

18 THE COURT: Okay. Mr. Goeller, I'm out of the
19 loop.

20 MR. GOELLER: Thank you, Honor.

21 Q. BY MR. GOELLER: Ma'am, is your last name spelled
22 O-D-O-M or N?

23 A. M.

24 Q. M, okay. These photocopies sometimes give it a
25 little --

1 prosecutions, but I've not had any direct dealings with any of
2 them.

3 THE COURT: Those that you have been aware of,
4 did they seem to make sense to you?

5 VENIREPERSON: Yes.

6 THE COURT: That they were righteous
7 prosecutions?

8 VENIREPERSON: Yes.

9 THE COURT: All right, let me ask you just one
10 other question. With regard to -- you put down in your
11 questionnaire that you were bipolar; is that correct?

12 VENIREPERSON: Yes.

13 THE COURT: And you're taking medication for
14 that?

15 VENIREPERSON: Yes.

16 THE COURT: I can see from your work records
17 that it's well under control.

18 Do you -- has that changed the way you look at
19 psychiatrists or their testimony?

20 VENIREPERSON: No.

21 THE COURT: Okay. Would you say that you have
22 more faith in them than the ordinary person might?

23 VENIREPERSON: No. I would hope not. I mean,
24 my reaction is no.

25 THE COURT: Is there anything about having been

1 You're from Odessa?

2 A. I was born in Odessa.

3 Q. Okay. And I know you've lived a good part of your
4 life in Lubbock, right?

5 A. Yes.

6 Q. What have been your thoughts since you've filled
7 this questionnaire out back on August 21st, I believe it was?
8 Have you thought much about the issues that you thought might
9 be coming up in this case, general terms as far as capital
10 punishment and crime and punishment, any thoughts at all
11 since --

12 A. Since I filled that out?

13 Q. Yeah. When you came back, I think you came in here
14 for a talk a couple of weeks ago, about three weeks ago. Tell
15 me what you've been thinking about.

16 A. I guess I really had to sit down -- you respond to
17 that survey, just at a gut level, when you sit down and
18 respond to it, and then you walk away, and I know that I, at
19 least, look back and thought, okay, are these really answers?
20 This is how I respond to things, and this is how I live
21 theoretically in a world, but if I were asked to actually put
22 that theory into practice, could I do it? So, certainly
23 that's been something I have had to sit down and re-look at
24 and re-evaluate.

25 Q. Okay. And tell me -- tell me your thoughts along

1 those lines.

2 A. I was reading an article. I think there's one thing
3 that -- some things that didn't occur to me. I was reading an
4 article in a magazine that had to do with -- actually, it
5 wasn't even an article. I was reading letters to an editor,
6 and I can't even tell you what magazine it was, and the
7 article that the readers were responding to were -- I guess it
8 was an article that was that was based on an interview of a
9 man who served as a juror on a murder trial. And so the
10 letters ran the gamut from this is why after reading the
11 article certain readers believe that represented exactly why
12 we ought to have professional jurors and that nobody from
13 society should ever be put in position -- the normal person
14 that is not familiar with the process should ever be put in
15 the position of having to sit down and deal with that kind of
16 decision.

17 And the other end of the gamut was all the way to
18 this is exactly why, you know, we have the process that we do
19 and why we're judged by 12 men and women who are our peers.
20 So -- and I just ran across that by sheer accident. I have
21 no idea why.

22 So, you know -- and it also alluded to things that I
23 hadn't taken into consideration. Our own emotional baggage
24 and luggage that we bring in and our birth order, and how
25 those things play out in a jury room. So other than the time

1 that I've spent, I guess, reading articles and thinking about
2 the World Trade Center situation, you know, there's certainly
3 been lots of moments that I've considered this process.

4 Q. Okay.

5 A. And whether or not I still felt the same way that I
6 did when I initially responded, and as I recall my responses
7 right now I don't believe that there's any that I would
8 change.

9 Q. Are you still in favor -- and when I first looked
10 at the questionnaire, I looked at that question, "Are you in
11 favor of the death penalty?" It just seemed -- that's just a
12 normal, basic question, "Are you in favor of it?" And then I
13 think a juror actually piqued my interest in the word "favor,"
14 and a juror that is pro capital punishment said I'm not in
15 favor of it --

16 A. I support it.

17 Q. Support it, yeah. Do you still support capital
18 punishment?

19 A. I still support capital punishment.

20 Q. Tell me why.

21 A. I think there are individuals that are not going to
22 be able to be rehabilitated, and I think that there are
23 probably instances where crimes were so horrific that
24 punishment was just.

25 Q. What kind of things -- let's talk about the

1 rehabilitation aspect first. When you say rehabilitated, tell
2 me what you mean now that you know what the sentencing scheme
3 is for capital?

4 A. When I think of some -- when I think of somebody who
5 is a prime candidate for -- well, not a prime candidate. What
6 I think of capital murder, I think of somebody that probably
7 should have received the death sentence. I think of a Charles
8 Manson. There are certain images in my mind, there are
9 certain people that I think of the crimes that were committed,
10 how horrific they were in nature, the number of people
11 involved.

12 Q. Timothy McVeigh?

13 A. Timothy McVeigh.

14 Q. Charles Manson, people like that?

15 A. Yes.

16 Q. When you say that they're not capable of being
17 rehabilitated, tell me what your thoughts are on that.

18 I don't mean the Mansons and the Jeffrey Dahmers and the
19 Timothy McVeighs of the world, because I think most people are
20 going to have a hard time trying to rehabilitate -- even the
21 concept of a bona fide rehabilitation effort on the part of
22 society for the likes of Charles Manson?

23 A. Well, I think if we -- I think that if you've
24 determined that somebody is going to be -- or has the
25 potential for being a continual threat to society, then in my

1 mind the ability to rehabilitate them, those two ideas don't
2 go hand in hand.

3 Q. Right. When you think of rehabilitation, do you
4 think of rehabilitation in the form of probation or prison
5 sentence?

6 A. When I think of rehabilitation, I think of being
7 able to -- rehabilitation -- I guess I'm not sure I understand
8 your question, because rehabilitation, to me, means being able
9 to almost change a thought process.

10 Q. Okay, okay. And the reason I was asking you that
11 is, of course, if somebody is convicted of capital murder --

12 A. Uh-huh.

13 Q. -- and our position is he will not be convicted of
14 capital murder, and, therefore, you won't have to answer these
15 questions?

16 A. Okay.

17 Q. But that's why we have this individual voir dire.

18 The law requires us to talk about really those two issues up
19 there. That's the whole purpose of this part of the voir
20 dire.

21 When we talk about the punishment scheme for a
22 person convicted of capital murder, we're obviously talking
23 about only two alternatives; life in the penitentiary or
24 death.

25 A. Right.

1 Q. That's the only -- if somebody is convicted of
2 capital murder, there's only two things that could come out of
3 it. So, some people say, well, a life sentence in the
4 penitentiary, can a person be rehabilitated serving life? If
5 that were the question posed to you, can somebody rehabilitate
6 serving a life sentence for capital murder, what are your
7 thoughts on that?

8 **A. Can someone be rehabilitated? It would depend on
9 the circumstances. It would depend on the individual as to
10 whether or not they could be rehabilitated.**

11 Q. Okay. Tell me more. I'm trying to figure out where
12 you're going with that. You understand there are no right or
13 wrong answers, and I'm not --

14 **A. No. I mean, I guess I'm not sure. Are you asking
15 me if I think that's the State's role to try to rehabilitate?**

16 Q. No. I think the State would probably tell you up
17 front the job is not to rehabilitate.

18 **A. Okay.**

19 Q. They probably recognize that, at least in a capital
20 murder case, okay. And in this case in particular, they have
21 told you they don't want to rehabilitate. They want to kill
22 him.

23 **A. Okay.**

24 Q. Simple as that. But tell me what your thoughts are
25 about rehabilitation within the penitentiary doing a life

1 sentence. Any thoughts along those lines?

2 **A. No, I really don't because I don't -- well, not
3 about, in particular, the State of Texas or the Texas prison
4 system. Certainly I have heard news pieces. I guess one was
5 on just the other night on A&E. There was a Jane -- what is
6 her name -- Lunden, and she had gone into one of the prison
7 systems. It was a women's prison system and was interviewing
8 various people that were in there, you know, some that were in
9 there and on death row. So it's not as if I don't know about
10 it. I certainly have heard things about it. I just don't
11 know that I know anything about the Texas system and how it
12 would work.**

13 Q. When we usually think about rehabilitation, it's a
14 concept that, through means available to the Government and
15 perhaps the convicted, that they would somehow -- it is the
16 hope of society that they some day would be released back into
17 society having been rehabilitated.

18 **A. Yes.**

19 Q. Of course, we don't have that traditional concept of
20 rehabilitation in a capital murder because, you know, minimum
21 40 years. By the time somebody got back into society, if they
22 could even live 40 years in a Texas prison, is probably not
23 the thrust of that form of punishment, you know. Can we fix
24 somebody theoretically so that if they do enter society 40
25 years down the road; do you know what I'm saying? That's not

1 the traditional concept, the thrust of the State's goals in
2 punishment of a capital murder case.

3 Now, rehabilitation, I suppose, could be from
4 something within, that maybe during 40 years somebody could,
5 as you said, that's what I want to get at. You talked about a
6 change of the thought process.

7 **A. Yes.**

8 Q. Is that important, do you think?

9 **A. Do I think it's important?**

10 Q. Yeah, that self-rehabilitation, changing the
11 thought process.

12 **A. I think it's important. I don't necessarily believe
13 that everyone is capable of it.**

14 Q. Right, right. Okay. You told me that you believe
15 in the death penalty because, I think your primary reason,
16 some crimes, such as Manson as a defendant and McVeigh, the
17 crime itself is so terrible that we need the death penalty.

18 **A. The crime -- yeah, given the number of people that
19 were -- that were murdered, the circumstances under which it
20 was committed where there had been, you know, to my knowledge
21 no contact with these people before. It wasn't a crime of
22 passion.**

23 Q. Right, right.

24 **A. It was a different set of circumstances.**

25 Q. In your best argument in favor of the death

1 penalty, "capital murder is premeditated when carried out
2 during the commission of a felony, and I don't believe anyone
3 can plan a murder or to murder to get away with the crime can
4 be rehabilitated." Tell me what you meant.

5 **A. I cannot -- I cannot understand how somebody can
6 actually plan the taking of another human life and carry that
7 plan out. And then whatever -- and that I could ever hope
8 that that individual's thought process would change, without
9 any intervention from any other source.**

10 Q. Okay. Are your thoughts there along the lines
11 of what you've previously stated? You mention the word
12 "passion" and a relationship between people. Do you see a
13 distinction between that type of homicide versus the Manson
14 and the McVeigh's where their victims are strangers to them;
15 they don't know them? Do you see what I'm getting at?

16 **A. Do I see a distinction between those two types of
17 murders?**

18 Q. Yeah.

19 **A. Yes.**

20 Q. Tell me why you make that distinction?

21 **A. I think that one is whether or not one's planned.
22 Timothy McVeigh actually planned this out, knew very well, or
23 had a very good idea of how many people were going to end up
24 dead as a result of his actions. If I were married and I went
25 home and I caught my spouse cheating on me with somebody else**

1 **and I reacted to that, I think that's a completely different**
2 **set of circumstances.**

3 Q. Right. Your best argument in opposition of the
4 death penalty, and it's couched in terms of, perhaps, innocent
5 people being sent to death row?

6 A. Uh-huh.

7 Q. Assume for a moment that you weren't allowed to put
8 down the best opposition -- the best argument in opposition to
9 the death penalty was innocent folks, could you come up with
10 another argument I'm curious, other than just innocent folks
11 possibly being wrongfully executed? But can you think of some
12 reasons against the penalty on philosophical grounds, moral
13 grounds, ethical grounds?

14 A. I don't -- I don't -- I think that the system that
15 we have in place is the best system there is in the world.

16 Q. Okay.

17 A. I don't -- the reality is that I don't expect that
18 any individual relishes the idea of ever being in a position
19 of passing judgment on another human being. I know I don't.
20 So I think just from that standpoint it's -- it's why it's a
21 problem.

22 Q. You circled an option under the subtitle "life
23 confinement" that you believe that life confinement in prison
24 is appropriate in some capital murder cases, and you could
25 return a verdict resulting in life confinement in a proper

1 case. Tell me what your thoughts were when you chose that
2 one. Your choices were life confinement is never appropriate.
3 Second choice was it's never appropriate in any murder case.
4 It's never appropriate in any capital murder case. And the
5 third choice was -- the option was you think it is appropriate
6 and could return a verdict in a proper case of life
7 confinement. Tell me why you chose that one than the first
8 two, which basically you'd never choose.

9 A. I think that mitigating circumstances can come into
10 play.

11 Q. Okay.

12 A. I think that those being, maybe the childhood of the
13 person who's been accused, you know, things that have happened
14 to them, circumstances -- I mean, I think that you could walk
15 in with the intention of burglarizing a house and have events
16 unfold that would cause other things to happen, but they
17 weren't planned.

18 Q. Yeah. You've done a lot of thinking on this,
19 haven't you?

20 A. I really have.

21 Q. I can tell. I can tell because you're very tuned in
22 to these issues, a lot more so than almost all the other
23 jurors we've had when it comes to that. So you -- it seems
24 like you obviously recognize the difference between those
25 predatory type of serial killers and serial rapists and people

1 that would abduct children and hurt them, molest them, rape
2 them, kill them, bury them and do it over and over again until
3 they get caught. And guys like Dahmer killed many, many
4 people and had a torture chamber, I think, in his home, in his
5 basement, and then would perform cannibalism and actually ate
6 his victims, and McVeigh who planned, what, a year in the
7 making?

8 A. Yes.

9 Q. You know, renting the truck and buying the
10 fertilizer and the timing device or the ignition device, and
11 when would the federal building be most full of people and
12 where to pull it up by the building and get away so he
13 wouldn't be recognized. You seem to recognize the difference
14 between those individuals and the person who maybe has had
15 some kind of relationship, some type of passion, some type of
16 ignites maybe a situation?

17 A. Yes.

18 Q. Okay. Do you think that type of -- those types
19 of circumstances or situations actually carry over into that
20 first special issue on future dangerousness?

21 A. The different between the two?

22 Q. Yeah.

23 A. Absolutely.

24 Q. Okay. Okay. I think you're right.

25 Criminal defense attorneys are over-worked and

1 under-appreciated. Amen.

2 (Laughter.)

3 Q. You said the same thing for the prosecutor, so --
4 okay.

5 A. I don't envy anyone in this room.

6 Q. Yeah. Voluntary intoxication in our State is never
7 a defense. You can't say, well, I did something because --
8 you can't convict me for DWI, folks, because, well, I was
9 drunk. It's not my fault. I didn't mean to drive drunk, or
10 any kind of intoxication is -- voluntary intoxication, which
11 is almost always what it is, is never a defense to criminal
12 activity, but -- you've never served as a juror before?

13 A. No.

14 Q. Have you ever studied any criminal law?

15 A. No.

16 Q. Do you know any criminal lawyers or prosecutors or
17 anybody?

18 A. I know a judge.

19 Q. Who's that?

20 A. Over in Fort Worth, Diane Haddock.

21 Q. She used to be a --

22 A. She's in family law.

23 Q. Yeah, I was going to say, wasn't she a family
24 lawyer?

25 A. I think so.

1 Q. Because when you answered this questionnaire under
2 your please explain, you recognize voluntary intoxication
3 never constitutes a defense for the commission of crime, and
4 you agreed and you're right, that's the law. You said,
5 however, it should be taken into account during the punishment
6 phase. And if I didn't know you and didn't see the rest of
7 your questionnaire, I'd have thought you might have been a
8 judge or a lawyer or worked in this business.

9 A. No.

10 Q. Tell me about that.

11 A. Again, I think it goes to mitigating circumstances
12 sometimes.

13 Q. Have you ever talked to Judge Haddock about
14 punishment and criminal jurisprudence in general?

15 A. No.

16 Q. Have you read a lot of books about it?

17 A. No.

18 Q. Because you seem to really know a lot.

19 A. No.

20 Q. This was an interesting answer down here. You said
21 you believed the death -- do you believe the death penalty is
22 applied fairly in Texas. You circled "yes." You said, "I
23 believe the State has tried to be extremely fair by executing
24 both men and women." Tell me what you meant by that. And I
25 tell you why I ask the question, very, very few women are

1 prosecuted and convicted of capital murder and receive the
2 death penalty, very few. I was just kind of wondering --

3 A. I think that's changing. I think given -- and I
4 can't even tell you the lady's name that was just recently --
5 within the last couple of years.

6 Q. Carla Faye Tucker?

7 A. Yes. So I think that -- I think the State of Texas
8 has recognized -- at least from my perspective, the State
9 of Texas has recognized the fact that they -- that maybe they
10 haven't been fair in that area and have -- and are making
11 great strides to try to change that.

12 Q. Okay. As a woman sitting on a jury where a man is
13 accused of a capital murder case, what -- this may sound like
14 a very odd question, but there's reason in my madness. What
15 are your thoughts about men? If you could give me three words
16 to sum up the male species, what would they be? Maybe I don't
17 want to hear this, but maybe I need to hear this.

18 A. I've had good experiences and I've had bad
19 experiences. I lost my father two years ago. I loved him
20 very much. He was the best man I've ever known in my life.
21 I'm raising a daughter because the man who -- her father
22 walked out, so I think there's some out there that are scum.
23 But I mean, I don't think that -- I don't think that my -- I
24 think that I'm objective. I think I still have the ability to
25 look at male human beings and, say, oh, well, I'll give him a

1 chance.

2 Q. I think you listed somewhere in your questionnaire
3 that you -- are you recently divorced?

4 A. Yeah.

5 Q. How long has it been?

6 A. Well, I've been married twice. This last time I was
7 divorced four years.

8 Q. Okay. Tell me about your marriages. Anything I
9 need to worry about representing a man?

10 A. The -- well, my daughter is -- I was not married
11 when I had my daughter, so I was single when I had her. I've
12 raised her by myself. I did get married prior to that time.
13 I was married when I was 19 and divorced by the time I was 20,
14 so my father said that one didn't count, and he was paying for
15 my divorce before he ever finished paying for my wedding.

16 Q. Tell me what happened.

17 A. I just married the wrong guy. Everybody was getting
18 married when I got out of high school. I thought I needed to,
19 and it was just a terrible mistake. It was just -- didn't
20 work. I didn't love him, and I knew that when I walked down
21 the aisle. I just didn't have the guts to admit it to
22 anybody.

23 Q. Anything really bad during the marriage?

24 A. No.

25 Q. Okay. Anything really bad during any of your

1 marriages?

2 A. The second marriage was pretty rough.

3 Q. Tell me about that.

4 A. He was an alcoholic.

5 Q. Okay.

6 A. He had been working here in Dallas. I was working
7 in District of Columbia at the time, so he quit his job here,
8 moved up there. Of course, I didn't know he was an alcoholic.

9 Q. You didn't know when you married him?

10 A. No.

11 Q. Did he hide it, kind of?

12 A. Yeah. I think that in hindsight, I lived there for
13 about four years, and I was just desperately reaching out for
14 anybody and anything familiar. He was somebody I had known
15 briefly before in Texas, and we had a lot of the same
16 memories. He grew up in Lubbock. So I didn't know him well
17 enough to marry him, is the truth, when I got married. And he
18 was not very good with my daughter. I've had a lot of guilty
19 moments over that where he said some pretty ugly things and
20 gave her some spankings and some things that he shouldn't
21 have. But we've put that behind us and moved on.

22 Q. Is he the one that walked out on you?

23 A. No, huh-uh. Actually that was somebody altogether
24 different when I was 30.

25 Q. So you've got some experience now with -- well,

1 you've got a lot of -- I don't want to say the word
 2 "experience," but I think you mentioned when Judge Sandoval
 3 was talking about some earlier prosecutions with some family
 4 members. Your family was in the liquor business?
 5 A. They were. They're not any longer, yeah.
 6 Q. So were you around alcohol a lot?
 7 A. Yes. I -- my grandfather had liquor stores.
 8 Q. When you say you worked in a retail -- a family
 9 retail setting --
 10 A. Yes.
 11 Q. -- was that the liquor stores?
 12 A. Yes.
 13 Q. In Lubbock?
 14 A. Yes.
 15 Q. And then you were married to an alcoholic?
 16 A. Yes.
 17 Q. What do you think about substance abuse and that
 18 kind of sickness or addiction or disease?
 19 A. Well, I also have a grandfather -- I had two
 20 grandfathers. One was an alcoholic when he died. My
 21 grandfather on my mother's side was a recovering alcoholic. I
 22 think it's a disease. I think it's very sad.
 23 Q. It is.
 24 A. I would hope that, as I do with any kind of
 25 dependency on any kind of substance whether it be alcohol or

1 anything like that, I think people have predispositions for
 2 those types of things, and I would hope --
 3 Q. You said you had a grandfather that died as an
 4 alcoholic?
 5 A. Uh-huh.
 6 Q. Did the alcoholism --
 7 A. Have any anything to do with his death?
 8 Q. Yeah.
 9 A. No.
 10 Q. Okay. That's what I was curious about.
 11 A. Yeah.
 12 Q. Do you think most alcoholics know the booze is bad?
 13 A. Sure.
 14 Q. Why do you think they -- knowing it -- knowing it
 15 will ruin their life, knowing it may ruin their liver and ruin
 16 relationships and bring them down and those around them, what
 17 is it that keeps putting the bottle up to the lips? Have you
 18 ever thought about that?
 19 A. I think it's -- I think it's an inability, to some
 20 degree, and then the remainder is just an unwillingness to
 21 admit that you have a problem and to seek help.
 22 Q. Do you think -- I hate to talk about your
 23 grandfather, but I know it's personal to you and you can
 24 relate. Could he have been helped, do you think? Of course,
 25 he didn't die from it.

1 A. He didn't want to be helped. I mean, he didn't
 2 perceive it as a problem, and it probably wasn't. I mean, it
 3 didn't cause any -- to my knowledge, it may have caused a
 4 great deal of hardship for my grandmother. She never talked
 5 about it. We didn't lose anything, we didn't lose the family
 6 business over it.
 7 Q. Yeah. Did he work in the liquor store?
 8 A. He's one that owned the liquor store.
 9 Q. He owned it?
 10 A. I think later in life it caused some problems with
 11 exercising judgment.
 12 Q. Yeah.
 13 A. But --
 14 Q. Was he the one that was prosecuted?
 15 A. Uh-huh.
 16 Q. Okay. That would be Herbert or Kenneth?
 17 A. Hubert --
 18 Q. I'm sorry.
 19 A. That's all right. -- was my uncle -- Kenneth was my
 20 uncle. Hubert was my grandfather; Kenneth was my uncle.
 21 Q. They used an attorney Jan Foust?
 22 A. Uh-huh.
 23 Q. She was -- she was mostly a family lawyer, wasn't
 24 she?
 25 A. It's a man. He was, I think. I don't know how to

1 spell it, if it's a male version of Jan, but it's a male.
 2 Q. He defended them in a criminal setting?
 3 A. He defended them -- began the defense on them. I
 4 don't know how -- you know, I was 16, I think, at the time all
 5 this was going on. So, I think that my grandfather and my
 6 uncle actually accepted some plea bargains --
 7 Q. Okay.
 8 A. -- before it all went to trial.
 9 Q. Do you ever go back out to Lubbock?
 10 A. Uh-huh. I've still got family there.
 11 Q. Is -- is he still out there as a lawyer, Jan?
 12 A. I don't know.
 13 Q. Okay, okay. I know you've used a lawyer -- well,
 14 that's Judge Haddock.
 15 THE COURT: I tell you what, it occurs to me
 16 it's unlikely, you were 16 at the time and you're 45 now, and
 17 he could have been a very young lawyer at the time, I suppose,
 18 and still be in practice but --
 19 VENIREPERSON: Jan Foust?
 20 THE COURT: Yeah.
 21 VENIREPERSON: Like I say, I just have no
 22 idea. My mother lives there. I have two sisters that live
 23 there, but I really don't ever have any reason to look
 24 for lawyers when I go out there. I hope I don't.
 25 Q. BY MR. GOELLER: Where did you go to school,

1 college?

2 **A. Texas Tech.**

3 Q. In Lubbock?

4 **A. In Lubbock.**

5 Q. You follow Tech football or anything like that?

6 **A. No, not really.**

7 Q. What did you get your degree in?

8 **A. Finance.**

9 Q. Finance, okay.

10 I want to ask you some questions about those
11 special issues a little bit. And actually, before we get to
12 that, what do you think about the presumption of innocence?

13 **A. I believe in it. I think that society and the press
14 makes it very difficult for most people to believe in that
15 concept.**

16 Q. Why?

17 **A. Just the way things are represented, just the way
18 they're presented to the world. For the most part, when
19 somebody is picked up and arrested and, you know, the
20 references that are made, I think it makes it difficult for
21 most people to keep that in mind. It does for me. I mean, I
22 have to remind myself.**

23 Q. That first special issue up on top, Ms. Odom,
24 what's been referred to as the future dangerousness issue, do
25 you know who has the burden of proof on that issue?

1 **A. I would assume the State does.**

2 Q. Okay. You're exactly right, and only the State has
3 the burden on that first special issue. Do you know what
4 their burden is by, or what's the quantum of proof they must
5 produce to prove that question?

6 **A. Beyond a reasonable doubt.**

7 Q. There you go again. And you've never done anything
8 in the law business?

9 **A. Never.**

10 Q. Yeah, but you're exactly right. They have to prove
11 beyond a reasonable doubt that there's a probability.

12 How would you define probability? If I had to -- if
13 you had to take a quiz -- if you were back in college and the
14 professor said give me a one paragraph description of the word
15 "probability," but you're not allowed to use the root word
16 "probable," go, and you've got one minute?

17 **A. I guess it would come down to percentages, you know,
18 the chance -- the likelihood, whether that be greater or less,
19 that somebody is going to, you know, commit criminal acts of
20 that nature again in the future.**

21 Q. And what kind of percentage would you assign? If it
22 comes down to percentage for you, where would you put that
23 from zero to, I guess, 100?

24 **A. If I had to make it a percentage?**

25 Q. Yeah.

1 **A. I mean, to me it's 51 percent versus 49, I guess.**

2 **Are the odds greater or less.**

3 Q. Okay, okay. When you look at that, let's go with
4 what you said, say 51. Are you with the 51 or the 49 when you
5 define probability in that context?

6 **A. The probability -- the 51 would be that the
7 probability is that they would commit that type of criminal
8 act again in the future.**

9 Q. Okay. So it's -- if I said to you 51 to 49 -- in
10 other words, where you are is right around the middle; 51 it
11 would, 49 it wouldn't?

12 **A. Well, I think it's a judgment. That's just -- if I
13 have to reduce it to words, that's how I would reduce it to a
14 definition.**

15 Q. If it's really almost 50/50, 51/49 in the way you
16 call it, are we talking about a possibility?

17 **A. Could be.**

18 Q. Okay.

19 **A. I mean, I guess the way I've defined it, yes.**

20 Q. You would use the word "possibility"?

21 **A. No. I'm not saying I would use that word, but that
22 may have been what I defined more than what a probability is.**

23 Q. Got you, got you. Would you say the word
24 "possibility" is interchangeable with that word probability?

25 **A. No.**

1 Q. Why?

2 **A. Because it's possible -- anything's possible, but
3 not everything is probable.**

4 Q. Okay. Now, we'll go one step further. When the
5 burden on that question is beyond a reasonable doubt --

6 **A. Uh-huh.**

7 Q. -- the State's got to prove beyond a reasonable
8 doubt there's a probability that the Defendant could commit --
9 would commit criminal acts -- acts being plural -- of
10 violence, continuing threat to society. Tell me what your
11 thoughts are on that now that you know they've got to prove it
12 beyond a reasonable doubt that probability that the Defendant
13 would, not might, would commit criminal acts, plural, of
14 violence? Where do you think -- what are your thoughts in the
15 proof necessary to prove something like that?

16 **A. I wouldn't even have any idea how to begin to tell
17 you what that would be. I mean, I really wouldn't. I -- not
18 having been through the process and not knowing what the
19 circumstances are and not knowing, you know, anything about
20 it, I just -- I have no idea. It is so subjective, I think
21 that there would be no way for me to anticipate what that is.**

22 Q. Right. What kind of things would you be interested
23 in knowing in order to answer a question like that?

24 **A. I think that I would want to know -- I would want to
25 know what kind of a criminal history, if any, a defendant had.**

- 1 Q. Why is that important?
- 2 A. A pattern.
- 3 Q. Okay.
- 4 A. To establish a pattern.
- 5 Q. Okay.
- 6 A. I think I would want to know if there had been any
- 7 evidence of physical or psychological abuse in that person's
- 8 life.
- 9 Q. Okay.
- 10 A. That would be important to me to know. I don't
- 11 know. Those are the two things that come to my mind.
- 12 Q. That's fair, that's fair.
- 13 What do you think continuing threat to society
- 14 means?
- 15 A. The likelihood that they're going to harm someone or
- 16 some thing.
- 17 Q. Okay. It's -- as Mr. Schultz stated, the way our
- 18 system is set up is a person can be found guilty of capital
- 19 murder and be found to be that future danger --
- 20 A. Uh-huh.
- 21 Q. -- and still receive a life sentence. Why do you
- 22 think that is?
- 23 A. And that's, I think, when the mitigating
- 24 circumstances --
- 25 Q. Uh-huh.

- 1 A. -- would come into play.
- 2 Q. What do you think the Legislature was thinking
- 3 about? Okay, we have somebody that's been convicted of
- 4 capital murder, and they've been found that they'll be a
- 5 future danger, but we're going to put them in the penitentiary
- 6 for 40 years? What do you think their thoughts were along
- 7 those lines?
- 8 A. I think that -- I guess what -- to me it would boil
- 9 down to whether or not there were incidences in somebody's
- 10 life. I mean, that's the thing that comes to my mind right
- 11 now is incidences in somebody's life or events that occurred
- 12 that weighed very heavily and the actions that were taken.
- 13 Q. Right. Would you be of the opinion that the
- 14 Legislature -- I mean, something as important as this where
- 15 they've set up a system where possibly somebody who has been
- 16 convicted of capital murder and is going to be a future danger
- 17 would be serving a life sentence in the penitentiary, do you
- 18 think they were thinking about penitentiaries and what kind of
- 19 penitentiaries and what kind of places within the
- 20 penitentiary, all that kind of thing, do you think that
- 21 figured into it? In other words, do you think the Legislature
- 22 and the scholars that drafted these laws thought about the
- 23 ability of the penitentiary to house and hold dangerous
- 24 capital murderers?
- 25 A. I don't know.

- 1 Q. Okay. Well, we do it, though, don't we?
- 2 A. Yes, we do.
- 3 Q. What are your thoughts on that?
- 4 A. On housing and holding?
- 5 Q. Dangerous -- somebody that's been determined to be a
- 6 future danger, having been convicted of capital murder, not
- 7 getting the death penalty? What are your thoughts in general
- 8 about that?
- 9 A. Oh, I think it's acceptable.
- 10 Q. Tell me why.
- 11 A. Again, it would just depend on the circumstances.
- 12 There's a lot of -- in my mind, there are a lot of things that
- 13 can come into play and can come to bear on how each individual
- 14 ought to be treated.
- 15 Q. Okay. And I think you're exactly on point because
- 16 that second special issue, the mitigation special issue, the
- 17 one on the bottom there --
- 18 A. Uh-huh.
- 19 Q. -- that's an individual juror's assessment of the
- 20 individual defendant.
- 21 A. Yes.
- 22 Q. Okay. What's interesting about that question is --
- 23 do you know who has the burden of proof on that question?
- 24 A. I would assume the State.
- 25 Q. Well, it's the first time you've been --

- 1 A. Oh, no --
- 2 Q. Go ahead.
- 3 A. Well, I mean, to bring in mitigating circumstances
- 4 would be your job.
- 5 Q. Might be. You're right, because you said them and
- 6 me, and I think you're still right. I thought maybe I could
- 7 get you one time. You haven't been wrong yet in your voir
- 8 dire, but you're exactly right because nobody has a burden of
- 9 proof on that question.
- 10 Now, I think logically you would just assume, if the
- 11 State's told you going in that they want to kill him --
- 12 A. Uh-huh.
- 13 Q. -- they're not going to bring you mitigating
- 14 evidence to try to stop that, right?
- 15 A. Correct.
- 16 Q. I mean, Mr. Schultz wouldn't disagree with me. So
- 17 maybe that does kind of fall on the Defendant, that burden,
- 18 and that's okay. Since there is no burden, our law says you
- 19 can put a burden wherever you want, believe it or not. But
- 20 you're exactly right, there is no burden, although logically,
- 21 you would think that would come from the Defense, but it could
- 22 come from the State as well, not intentionally. The State
- 23 could bring you evidence in the first phase of the trial, the
- 24 second phase of the trial that they may have never thought
- 25 about it in terms of mitigation, but you can consider it,

1 because, you know, the things that you would probably think
2 would classically, I suppose, come from a defendant;
3 character, background, personal moral culpability, you think
4 that would come from the Defendant. But circumstances of the
5 offense, that may come from the State. In fact, all of that
6 might come from the State, maybe not intentionally. They may
7 not put forward, and put it forward in terms of this special
8 issue, but throughout the whole trial these things may be
9 building. Do you see what I'm saying?

10 A. Yes.

11 Q. So you're still right. I was going to see if I
12 could trip you up one time before I let you go today.

13 But getting back to your comment that's an
14 individual consideration, you're so right because this term
15 "sufficient" is not defined. Each juror -- all 12 jurors can
16 have their own definition of sufficient, okay.

17 Mitigating circumstance, or circumstances, could be
18 singular, could be plural. All 12 jurors, or at least ten
19 jurors -- 10 or 11 or 12 can each have 10, 11 or 12 ideas
20 about what is mitigating. So, I like to think of it as there
21 are 24 possible combinations to answer that question to give a
22 life sentence. Twelve people, or -- 10, 11, 12 people all
23 deciding what is sufficient in their own minds and it could be
24 different. Mitigating circumstance or circumstances, they
25 could all be different, too. So, it's truly an individual

1 juror's assessment of what ought to be done. What is the
2 right thing to do in that case; life or death.

3 And it's so different from this question and the
4 questions at the first phase of trial, because in all those
5 questions all 12 jurors have to be focused on the exact same
6 thing, really. They're all focused on the elements of the
7 offense, and they're all focused on that specific issue.
8 Although, I will say in this special issue here as well, there
9 can be differences of opinion. All 12 jurors have to find
10 beyond a reasonable doubt to answer that question yes. Ten
11 jurors or more can answer that question no, but everybody can
12 have their own definition of criminal acts of violence.
13 Everybody can have their own definition of continuing threat
14 to society, and finally as you well know, everybody may have
15 their own definition of probability. So, really when I think
16 about it, both questions are total individual responses of
17 each individual juror. Do you see what I'm saying?

18 A. Yes.

19 Q. If ten jurors voted no to that question, each juror
20 could say, well, I voted no because probability to me meant
21 this and continuing threat meant this to me and criminal acts
22 of violence meant this to me. Do you see what I'm saying?

23 A. Yes.

24 Q. So I guess both of these are very different from the
25 first part of a trial, because the first part of a trial the

1 judge tells you exactly what you-all must agree on to arrive
2 at a verdict. Could be not guilty, too. In Texas a not
3 guilty verdict is a unanimous verdict as well, but you're
4 focused on specific, you know, those elements of the offense
5 that were gone over with you. Any questions about those?

6 A. No.

7 Q. Okay. In response to the question what makes a
8 person dangerous, you wrote lack of a conscience. Tell me
9 some more about that.

10 A. To me that's just how I define someone who is
11 dangerous. I mean, I think that -- and I guess by dangerous,
12 I'm thinking not to a specific individual, but to society as a
13 whole.

14 Q. Okay.

15 A. So I guess that's the difference, what I read into
16 that that it's not written there.

17 Q. Okay. Does that kind of get back to your earlier
18 thoughts about, you know, the predatory type of people, the
19 child abductors and molesters, and on a serial basis -- or the
20 likes of McVeigh that would indiscriminately kill hundreds --
21 kill 178 people, something like that.

22 A. I think it does.

23 Q. Okay. Versus maybe the person that was killed out
24 of passion or due to a relationship or some circumstance or
25 specifics of a relationship between people, a known

1 relationship, somebody that's known each other, two people
2 that have known each other.

3 A. Yeah.

4 Q. Does that kind of get back to the lack of a
5 conscience?

6 A. Yes.

7 Q. You draw the distinction between those two types?

8 A. I think the same distinction as between somebody who
9 sat down and went through and planned something out as opposed
10 to reacting to something or -- yeah.

11 Q. Okay. You mentioned that your sister, Martha, had
12 some contact with the Lubbock DA's office, and that was over a
13 child support matter?

14 A. Yes.

15 Q. Was that -- tell me about that. What happened?

16 A. She was just -- she and her husband divorced when
17 my niece was fairly young, and he went from job to job to job,
18 and so she went through the process of obtaining child
19 support. That's like -- it was pretty routine.

20 Q. Okay. Psychiatrists, psychologists and other
21 mental health professionals are not taken seriously enough by
22 our society. I think you touched on that. Do you think that
23 we, as a society, still are somewhat in the dark ages about
24 mental health in that we tend to -- tend to -- if somebody
25 said -- you know, the old analysis that if, like, a

- 1 businessman or a businesswoman, if a man had a heart attack
 2 because he was a type-A personality; he worked and worked and
 3 worked, and then had a heart attack because of all his
 4 successes and long work hours, how do most people look at
 5 that?
 6 **A. It's a tragedy.**
 7 **Q. Tragedy, you know, tough break, great guy. God, I**
 8 **hope he gets back on his feet. He needs to cut back a little,**
 9 **you know, maybe not drink so much, maybe not smoke, something**
 10 **like that. But it's kind of like we don't attach any stigma**
 11 **to that, do we?**
 12 **A. No.**
 13 **Q. But if that same guy has, for lack of a specific**
 14 **medical term, say, a nervous breakdown. He ends up in a**
 15 **mental health institution, you know what the talk will be**
 16 **around the water coolers, right?**
 17 **A. Uh-huh.**
 18 **Q. He lost it, he went wacko, he's crazy. You can just**
 19 **imagine. Are you in tune with that? Do you understand? Is**
 20 **that what you were thinking of when you talked about how**
 21 **society, we're not there yet? We don't treat the brain like**
 22 **we do the heart.**
 23 **A. No. I think it comes down to visually being able to**
 24 **see a scar as opposed to not being able to see one.**
 25 **Q. Right, right. I'm with you there.**

- 1 Just out of curiosity, I haven't seen this one
 2 before on least respected people, Barbara Streisand?
 3 **A. I don't -- I just -- I don't know. I think she's**
 4 **got a beautiful voice. I don't care for her --**
 5 **Q. Her politics?**
 6 **A. Her politics, her attitude. There's just --**
 7 **Q. She's a little --**
 8 **A. She's a little lofty.**
 9 **Q. Yeah. She thinks -- well, I don't think I can say**
 10 **that in the courtroom. But she's -- you're right, she's**
 11 **pretty lofty. Hillary, Bill, Al, I understand those.**
 12 **Colin Powell, President Bush, Barbara Bush. Jackie Kennedy,**
 13 **don't see that too often. Why do you admire Jackie?**
 14 **A. I just think that given the tragedies that she went**
 15 **through in her life, and the amount of grace that she was able**
 16 **to exhibit, going through those things that she went through**
 17 **and raising her family, I just think she's a pretty remarkable**
 18 **woman.**
 19 **Q. Yeah, she did go through a lot, didn't she? She**
 20 **seemed to carry a lot of class along with her.**
 21 Just a few more questions. Have you ever been deer
 22 hunting?
 23 **A. Yes.**
 24 **Q. Have you ever shot a deer?**
 25 **A. Yes.**

- 1 **Q. Tell me about that; how many times, how old.**
 2 **A. The first time I ever went deer hunting, I was -- I**
 3 **don't know, 10, 11 years old. It wasn't a real pleasant**
 4 **experience because the deer was on the other side of a ravine,**
 5 **and my father decided that I was going to shoot, so I got this**
 6 **deer, and I did. It was on the 15th shot, I think. I was**
 7 **black and blue from ear to ear.**
 8 **Q. What did you have, a machine gun?**
 9 **(Laughter.)**
 10 **A. It was terrible.**
 11 **Q. Oh, my goodness.**
 12 **Should I be worried about putting you on this jury?**
 13 **A. Not as long as I don't have a gun.**
 14 **Q. Do you know why I ask that question?**
 15 **A. No.**
 16 **Q. Because I've had lawyers tell me watch out for**
 17 **jurors that have killed deer?**
 18 **A. Oh, I have.**
 19 **Q. Should I have a concern about you? I don't, but I**
 20 **just thought I'd ask.**
 21 **A. Would I do it again now as an adult? No.**
 22 **Q. Okay.**
 23 **A. It was something that I have no desire to now. It**
 24 **was something that -- my father was a sportsman. I also went**
 25 **trout fishing a lot and cleaned a lot of trout and have**

- 1 **absolutely no desire to sit down and clean very many trout**
 2 **anymore.**
 3 **Q. Probably like you have no desire to field dress a**
 4 **deer, either?**
 5 **A. No.**
 6 **Q. Did you have to field dress it?**
 7 **A. No.**
 8 **Q. Did your dad make you do that?**
 9 **A. No.**
 10 **Q. Well, you didn't get the whole experience.**
 11 **A. I just had to watch. I didn't have to participate.**
 12 **Q. Okay. I want to talk to you just a little bit, and**
 13 **to be honest with you it's been such a long day I can't**
 14 **remember if Mr. Schultz talked to you about this or not. We**
 15 **anticipate the trial would start in about, say, ten days to**
 16 **two weeks away, something like that, approximately where the**
 17 **trial would actually start. And then we anticipate the trial**
 18 **lasting probably somewhere between three and four weeks, okay?**
 19 **A. Okay.**
 20 **Q. So we were really talking about a good part of the**
 21 **month of October.**
 22 **A. Okay.**
 23 **Q. I would anticipate the daily routine for trial would**
 24 **be Monday through Friday, approximately some time between 8**
 25 **and 9 in the morning until 5, 5:30, probably 6 at the latest,**

1 generally. That would be the routine for that three and a
 2 half, four weeks. Kind of thinking about your personal
 3 situation in the month of October, tell me what's going on.
 4 Tell me what your thoughts are along those lines.
 5 **A. I will be at the office. My daughter has a week
 6 off, Spring Break, the very first week of October.**
 7 Q. You mean fall break?
 8 **A. Plano does --**
 9 Q. A lot of people say spring.
 10 **A. They do. It's fall break. Well, I don't know
 11 what -- I think it's just a week to confuse parents and so
 12 that they don't have anything else to do with their kids, I
 13 guess. I don't know because -- I know very few people that
 14 are able to take that week off with their kids, but I guess
 15 some do. That's really about all I can think of. I mean, we
 16 really didn't have any big plans to go anywhere or do
 17 anything. Well, we did. I thought we were going to go to
 18 Lubbock one weekend, but they moved fall break from the week
 19 that it has always been in Plano Independent School District
 20 to a different week, so we will not be leaving town.**
 21 Q. How old is your daughter?
 22 **A. 15.**
 23 Q. Okay. In the home it's you and your daughter?
 24 **A. Uh-huh.**
 25 Q. Just the two of you?

1 **A. Uh-huh.**
 2 Q. What would be -- what would be her routine during
 3 that week if you were to serve as a juror?
 4 **A. Same that it is while I'm working; she would stay in
 5 bed and sleep as late as she possibly could.**
 6 Q. Girls do that?
 7 **A. Well, I think probably guys do a pretty good job of
 8 it at that age, don't they?**
 9 Q. You know, you're probably right. I was always one
 10 of those nuts that was up when the sun got up.
 11 **A. You were the guy out mowing the lawn.**
 12 Q. Yeah, my neighbors hated me for it. I have a
 13 neighbor now that hates me. If I cut that lawn before 10 a.m.
 14 on Saturday, he's out. He's a big guy, so I usually shut it
 15 off.
 16 Do you have any questions -- any questions for me
 17 about anything?
 18 **A. No.**
 19 Q. Okay. I just actually have one -- the Judge thought
 20 he had me, but I'm not done yet.
 21 Mr. Schultz talked about those mitigating
 22 circumstances, or those general areas of mitigation on this
 23 third special issue, and we were talking about people that
 24 maybe had bad childhoods growing up, bad things that happened
 25 to them, broken families, maybe drug addiction, poverty,

1 youth, maybe mental health issues, all those kind of things.
 2 Are you the kind of juror that can give meaningful
 3 consideration to mitigating issues on that third special
 4 issue?
 5 **A. I believe I am.**
 6 Q. Some jurors say I'll listen to it, you know? And
 7 our law contemplates more than a listen. It contemplates
 8 meaningful consideration, and are you the kind of juror that
 9 can do that?
 10 **A. I believe that I am. I mean, I am -- I know that
 11 there have been certainly been mitigating circumstances in my
 12 life.**
 13 Q. All right, okay. One last chance for any --
 14 anything at all that maybe Mr. Schultz or I haven't brought
 15 out as to why you should be a juror, why you shouldn't be a
 16 juror, anything like that, or any lingering questions that
 17 could possible ask us -- or cause us to ask you a bunch of
 18 more questions?
 19 **A. Gosh, I hope not.**
 20 MR. GOELLER: Okay. Thank you, Ms. Odom. I'm
 21 going to ask you to step down for a few minutes, and perhaps
 22 we'll have you back in.
 23 VENIREPERSON: Okay.
 24 THE COURT: What says the State?
 25 MR. SCHULTZ: Any chance we could get about a

1 ten-minute recess to figure this one out?
 2 THE COURT: Yeah. I tell you what, let's do
 3 take a ten-minute recess. Both sides work on it, and let me
 4 tell you something, after this witness we have a number one
 5 and a number five.
 6 (Discussion off the record.)
 7 THE COURT: With regard to Juror Number 125,
 8 Rhonda Odom, what says the State?
 9 MR. SCHULTZ: Judge, we'll exercise Peremptory
 10 Challenge Number 9 on this juror.
 11 THE COURT: All right. Then let's call in
 12 Number 126, Terrence Morton, and I believe the Defendant would
 13 go first on this one, right?
 14 MR. GOELLER: Yes, Your Honor, I would
 15 appreciate that.
 16 (Venireperson enters the courtroom.)
 17 THE COURT: Yes, sir. Are you Terrence Morton?
 18 VENIREPERSON: Yes.
 19 THE COURT: I just want to advise you, about a
 20 month ago when all the other jurors were here I administered
 21 an oath to the jurors, and the oath was to tell the truth with
 22 regard to any questions asked by the Court and the attorneys
 23 on either side. Do you remember that?
 24 VENIREPERSON: Yes, sir.
 25 THE COURT: I just want to remind you, sir,

1 you're still subject to that oath. Please be seated right
2 here. Go ahead.

3 MR. GOELLER: Thank you, Your Honor.

4 DIRECT QUESTIONS

5 BY MR. GOELLER:

6 Q. Good evening, Mr. Morton. How are you, sir?

7 A. All right.

8 Q. I know you've been back there a while, and it's
9 probably frustrating to be back there. If it's any solace,
10 we've been working hard at it since 8:45 this morning up
11 here.

12 MR. GOELLER: May I approach the juror very
13 briefly?

14 THE COURT: Yes, sir. And I'm going to ask you
15 to pass the witness in about 25 minutes.

16 MR. GOELLER: Yes, sir.

17 Q. BY MR. GOELLER: Again, for the record your name is
18 Terrence James Morton?

19 A. Right.

20 Q. Okay. Mr. Morton, let me just show you, for the
21 record, what -- I believe I've been given a copy of your jury
22 questionnaire, and ask is that your signature?

23 A. Yes.

24 Q. And did you read the penalty of perjury oath before
25 you signed it?

1 A. Yes.

2 Q. Understand that self-defense, if somebody were to
3 take a life in self-defense, they wouldn't be convicted of
4 anything? That's not a crime, but outside of that you feel
5 that if somebody commits capital murder, the appropriate
6 penalty is the death penalty?

7 A. Well, depending upon how they killed someone, I'm
8 not going to say just because they killed someone they should
9 get capital punishment is what they should get.

10 Q. Okay. I feel if someone takes someone's life for no
11 legitimate reason, their life should be taken, also?

12 A. Well, I'm saying, like, a drive-by, if somebody
13 kills somebody in a drive-by, I feel they should get the death
14 penalty. But if something happened where someone was killed,
15 it doesn't mean they should get the death penalty.

16 Q. Okay, okay. They asked you which of the following
17 statements -- and just so I understand. In the drive-by, you
18 think if somebody does a drive-by shooting and somebody ends
19 up dead that should be capital murder?

20 A. As in innocent people --

21 Q. Yeah.

22 A. -- they do a drive-by, and an innocent person is
23 killed, yeah, I feel they should get the death penalty.

24 Q. Okay.

25 A. But if some type of altercation occurs and someone

1 A. Yes.

2 Q. Okay. Back on, when was it, August 21st, about a
3 month ago?

4 A. (Nods head.)

5 Q. Is there anything in your questionnaire that you can
6 recall that sticks out that you would change about any of the
7 answers that you gave?

8 A. Not that I can remember.

9 Q. Okay, super. I won't take too much of your time.
10 Mr. Morton, I want to thank you. I think you're the kind of
11 person when you filled out this questionnaire, you spoke from
12 the heart. You spoke what you really felt. I can look at a
13 questionnaire and tell if somebody was trying to be PC,
14 politically correct, be middle of the road, put down what
15 maybe they think the judge would want them to put down or what
16 the lawyers wanted to hear. I think you cut right to the
17 chase.

18 You do believe in the death penalty, correct?

19 A. Yes.

20 Q. And your answer was, I feel if someone takes
21 someone's life for no legitimate reason, and you put in
22 self-defense and we'll talk about that, then their life should
23 be taken, also. Is that the way you felt on August 21st?

24 A. Yes.

25 Q. Is that the way you feel today?

1 gets killed, I don't feel they should get the death penalty
2 just because somebody was killed.

3 Q. Tell me a little bit more, an altercation. I know
4 you put in self-defense; is that what you meant?

5 A. Right. Like, if someone -- if someone attacks you.

6 Q. Right.

7 A. And you need to defend yourself and you end up
8 killing them, I don't feel you should get the death penalty
9 for killing that person.

10 Q. Okay, I agree. I think I understand what you're
11 saying, and I agree 100 percent. In fact, our law, and a
12 legitimate goal of our Code of Criminal Procedure in our penal
13 code is actually to protect -- let's say I attacked you.
14 We'll just cut right to the chase here. I attack Mr. Morton
15 unlawfully, and I'm going to hurt you, okay? You exercise --
16 you exercise self-defense and you end up killing me, our law,
17 a legitimate interest in our law, is to keep you from even
18 being charged because you have done nothing wrong.

19 MR. SCHULTZ: Excuse me, a moment, Judge. I'm
20 going to object to Mr. Goeller's remarks. It doesn't
21 contemplate the possibility that the force Mr. Goeller used
22 was unlawful, non-deadly force, in which case the right to
23 deadly force and self-defense would not be authorized.

24 THE COURT: All right. Sustained.

25 Q. BY MR. GOELLER: If I come at you with a gun, okay,

1 and I level that barrel of that gun at you, and I'm coming
2 after you for no reason -- no good reason, and I'm -- would
3 you agree that I'm about to use deadly force on you?

4 A. Yes.

5 Q. Unlawful, illegal deadly force, correct?

6 A. Yes.

7 Q. The law entitles you -- you don't have to sit around
8 and wait and see if I pull the trigger. You don't have to sit
9 around and wait and see if I beat you over the head with that
10 handgun. You can use whatever deadly force you have at
11 your -- that's available to you to stop me, kill me, okay? Do
12 you see what I'm saying?

13 A. Yes.

14 Q. And Mr. Schultz was right. He made me fine-tune my
15 scenario, because if I'm -- if I'm -- if I'm Mother Theresa,
16 and I've got nothing in my hands, or I'm a little old lady and
17 I start coming up to you, you probably just can't kill her
18 dead because you probably wouldn't perceive a little old lady
19 with a handbag -- you know, you're going to use unlawful
20 deadly force. He's right in his objection.

21 But outside of that, though, now that you understand
22 that self-defense is a defense to crime, and that lawful
23 self-defense to repel unlawful deadly force, you shouldn't
24 even be prosecuted. So taking that away, the self-defense, do
25 you feel that if someone takes someone's life for no

1 legitimate reason their life should be taken, also?

2 A. Like the example I give, if someone does a drive-by
3 and they kill innocent people or innocent kids --

4 Q. Okay.

5 A. -- yes, their life should be taken.

6 Q. In the next set of options that we asked you to pick
7 certain options amongst five scenarios, the option you chose
8 was, I believe the death penalty should be imposed in all
9 capital murder cases.

10 A. At the time when I took this questionnaire, I didn't
11 even know what was a capital murder, so...

12 Q. I can narrow it down to the indictment in this
13 case. The indictment alleges a murder in the course of a
14 burglary, a murder in the course of a robbery, and then a
15 multiple murder, a double homicide, two people being killed,
16 okay. Those are capital murders, amongst a few others;
17 killing a very young child, murder for hire, murder for
18 remuneration, killing a police officer, fireman, those kind of
19 things. But those are the very common ones; the
20 murder/burglary, murder/robbery and the double homicide.

21 With that in mind as being capital murder, when you
22 circled the statement I believe the death penalty should be
23 imposed in all capital murder cases, is that still your
24 statement or your feelings today?

25 A. For those particular incidents, yes.

1 Q. Okay, all right. And following up on that, in a
2 capital murder situation regarding life confinement in prison,
3 you circled I believe that life confinement in prison is never
4 appropriate in any capital murder case. Is that your feeling
5 still today?

6 A. Yes.

7 Q. Okay. Those were your sworn answers to those
8 questions back on August 21st of this year, correct?

9 A. Yes.

10 Q. And those are your sworn answers on how you feel
11 regarding those issues today as well?

12 A. Yes.

13 Q. Okay. In response to the question, what is the best
14 argument in favor of the death penalty, no person should be
15 allowed to live for taking someone's life for no legitimate
16 reason. Is that still your feelings?

17 A. Yes.

18 Q. All right. And what is the best argument in
19 opposition of the death penalty. And you wrote, I do not have
20 one, correct?

21 A. That's correct.

22 Q. Would that be your position today, that you do not
23 have a best argument in opposition of the death penalty?

24 A. That's right.

25 Q. Considering everything that you've said, and I

1 appreciate your honesty. I mean, you're probably sitting
2 there thinking, you know -- you know that the only two options
3 for one convicted of capital murder is life in the
4 penitentiary, meaning could be as little as 40 years, or
5 death. And you're probably sitting there wondering, based on
6 your answers, obviously, I would have some reservations about
7 having you on a jury. But remember what I told you way back
8 on August 21st, if you shoot straight with me, you get my
9 gratitude and my thanks for being the kind of person that
10 takes an oath seriously like you have. Because you could have
11 put anything down there to make yourself politically correct
12 or middle of the road, and then maybe bad things would have
13 come out of it, but I sure appreciate your honesty. I wish
14 more people were like you.

15 But anyhow, when we talk about capital murder, and
16 the only two options if one is convicted of capital murder of
17 being life confinement and the death sentence, it's your
18 position today that if they are convicted of capital murder,
19 the only appropriate punishment is death for those types of
20 capital murders --

21 A. Yes.

22 Q. Robbery, burglary, double homicide, correct?

23 A. Correct.

24 Q. Okay. And that issues regarding the mitigation
25 or -- in other words, evidence and advocacy to try to -- an

1 attempt to bring about a life sentence would really fall on
2 deaf ears with you because you've made up your mind that if
3 they -- if they've been found guilty beyond a reasonable doubt
4 of capital murder, the only appropriate penalty is death?

5 A. That is correct.

6 Q. Okay. And therefore, logically you would not
7 consider -- give meaningful consideration to any mitigation,
8 background, character, those types of issues because, as a
9 juror, you've already determined the only appropriate
10 punishment is the death sentence for capital murder?

11 A. If it falls in those incidents that you give, yes.

12 Q. Yes. Murder in the course of burglary, the murder
13 in the course of robbery or double homicide?

14 A. Yes.

15 Q. And those were your feelings back on August 21st.
16 Those are your feelings here today, and nothing is going to
17 change your opinion about that? That's your sworn true
18 feelings under oath here today?

19 A. Yes.

20 Q. And your position on the death penalty?

21 A. Yes.

22 Q. Okay. Thank you, Mr. Morton.

23 THE COURT: All right. Mr. Schultz -- is it
24 Mr. Schultz?

25 MR. SCHULTZ: May I confer with Mr. Goeller a

1 VENIREPERSON: Yes, sir.

2 THE COURT: I want to ask you if you recall a
3 little over a month ago, when all 200 jurors were assembled, I
4 administered an oath to the jurors.

5 VENIREPERSON: Yes, sir.

6 THE COURT: Do you recall that the oath was to
7 give truthful answers to any questions propounded by the Court
8 or by the attorneys on either side?

9 VENIREPERSON: Yes, sir.

10 THE COURT: I just want to remind you that you
11 are still under that oath and ask you to be seated right here.

12 VENIREPERSON: Okay.

13 THE COURT: Thank you, sir.

14 MR. SCHULTZ: Do you have any cups up there?

15 THE COURT: Yes, I do.

16 Are you going to take this juror?

17 MR. SCHULTZ: Hi.

18 VENIREPERSON: Hidy.

19 DIRECT QUESTIONS

20 BY MR. SCHULTZ:

21 Q. Mr. Starnes, my name is Bill Schultz. I'm one of
22 the Assistant District Attorneys representing the State of
23 Texas in its capital prosecution of Ivan Cantu, the Defendant.
24 Next to me is Ms. Gail Falco, a chief felony prosecutor, and
25 further at the end of our table is Ms. Jami Lowry, a felony

1 moment?

2 THE COURT: All right.

3 (Discussion off the record.)

4 MR. SCHULTZ: Judge, may we request Mr. Morton
5 be briefly retired?

6 THE COURT: All right, sir. Would you step
7 down for just a moment?

8 MR. SCHULTZ: I think the State and Defense has
9 negotiated excusals by agreement on Jurors 126 and 127.

10 THE COURT: Is that correct, Mr. Goeller?

11 MR. GOELLER: Yes, Your Honor.

12 THE COURT: Is that your desire, Mr. Cantu?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: That I excuse both of those jurors?

15 THE DEFENDANT: Yes.

16 THE COURT: Would you tell Mr. Morton and
17 Shelia Lovelace, Number 126 and 127, that they are finally
18 excused.

19 THE BAILIFF: Yes, Your Honor.

20 THE COURT: If you would, please thank them for
21 their service. And would you invite Michael Starnes to come
22 in?

23 THE BAILIFF: Yes, Your Honor.

24 (Venireperson enters the courtroom.)

25 THE COURT: Are you Michael Starnes?

1 prosecutor. We will be the three most likely representing the
2 State throughout these proceedings, and if you are seated as a
3 juror in this case you'd be working with us. You probably
4 recall the group examination that occurred in this very
5 courtroom a few days ago; is that right?

6 A. Yes, sir.

7 Q. And did you find Mr. Goeller and Ms. Falco easy to
8 understand in their positions? Was that hard to see?

9 A. Yes, sir.

10 Q. I will try my best not be repetitive of the things
11 they talked about. The real purpose of this portion of
12 examination is to talk about the death -- excuse me -- the
13 death penalty issues because for many people those issues get
14 all intertwined with religion and their own personal morality
15 sometimes even with familiar situations. And I don't -- I
16 don't -- until I've talked with you a little bit more, I'm not
17 sure I'll understand how that might apply in your situation.
18 When you do enough of this, and this is the fourth one of
19 these I've ever been involved in, in a death penalty case,
20 when you do enough, you get some understanding of just how the
21 public thinks about these issues and how -- and some of the
22 things that they approach this issue with, and it changes from
23 time to time. I think a lot depends, for example, on what's
24 happening in our society at a particular time. How people
25 feel, and at the same time, I think something that doesn't

1 change is I've not ever met a juror who took delight in the
 2 possibility that, number one, they would be on a capital
 3 murder jury for the adventure of maybe being able to cause
 4 someone to be put to death. We run into jurors who say if
 5 given a choice between being on or off this jury, I'd say most
 6 of them say I'd rather be off, and that's for a couple of
 7 reasons. But some say I'd rather be on, and those who want to
 8 be on or those who want to be off, both recognize that it's
 9 important work; that it's absolutely necessary to our orderly
 10 society. And they say, you know, if you look around the world
 11 and see how many nations have a jury system, there are really
 12 very few. And they say, if you stop and think about it for a
 13 minute, there's a correlation, there's a parallel between the
 14 freedoms of those nations that have jury systems and those
 15 that don't, because -- and it's true, by the way. You go find
 16 the places that have juries, and you will find societies that
 17 tend to be free, and if you find the societies that don't have
 18 juries, and maybe the opposite that actually apply.

19 But most people say they'd rather not be on the jury
 20 for one of two reasons. One, the responsibility is pretty
 21 awesome to most people. When you get right down to it, no
 22 matter how strongly you favor the death penalty, if the
 23 responsibility of living the rest of your life having served
 24 on a jury obliges you to be very careful and very solemn about
 25 what occurs they say. What do you think about that? Do you

1 agree with that? Do you think serving on a death penalty jury
 2 is a large responsibility?

3 **A. Certainly.**

4 **Q.** And I think it would be for me, too. I've never
 5 been on a jury, but I've prosecuted. I don't know what you
 6 think about prosecutors in general, but I will say that we
 7 don't want any breaks in this case. We don't want a jury
 8 that -- you know, that's just going to say -- tell us what you
 9 want us to do and we'll do it. I mean, I live in this land,
 10 too, just like you do, and I have a life other than the
 11 professional life, and I want a society where human life has
 12 value, both in the sense of the victims and in the sense of
 13 defendants, and I want jurors that will treat it seriously,
 14 and I hope you're that kind of juror. Do you think you are?

15 **A. Yes, I think I would be.**

16 **Q.** Now, you've been asked on your questionnaire, and I
 17 know this questionnaire was asked to be filled out before any
 18 of the lawyers had a chance to talk with you. So, in many
 19 ways some of the questions were almost attitudinal because you
 20 didn't understand the procedure. You probably understood,
 21 just from watching television or the radio, that even if a
 22 person is convicted of capital murder in Texas that the result
 23 may be life or death depending upon what the jury sees as the
 24 evidence. I imagine you understood that just from -- we have
 25 so many capital murders that are on the TV and radio now.

1 Probably a lot of people understand that, and you do, right?

2 **A. Yes, sir.**

3 **Q.** Perhaps what you didn't understand is the jury
 4 doesn't directly say life or death. Instead it answers
 5 questions that have that result that come from how they answer
 6 those questions. You may not have understood that if you
 7 haven't worked in this business before. Do you understand
 8 that now?

9 **A. The fact that --**

10 **Q.** It's a -- the question is really rather than what do
 11 you want to do for punishment, it's questions the jury gets
 12 answered that really will determine what happen?

13 **A. Yes, sir, I understand.**

14 **Q.** And some people like that process. Some people say,
 15 you know, as a juror it helps me to focus on what the law says
 16 is important, and it gives me some measure of detachment from
 17 the result, because I can honestly to myself say, well, I'm
 18 measuring evidence and that's what I'm being asked to do, and
 19 I can do that and I can feel perfectly confident in my ability
 20 to do that, and then I can allow the results of my answers,
 21 since I did that fairly, to determine what happens to the
 22 defendant. Other people say, well, it doesn't really make any
 23 difference since I know the results of my answers. I'm doing
 24 it anyway. Do you see the questions as being easier for
 25 jurors in general, rather than just saying we give them life

1 or death?

2 **A. I would tend to agree with what you said, the**
 3 **sentence before that, that the juror would know the results of**
 4 **his answers, anyway.**

5 **Q.** And that's kind of -- that's kind of how I see it.
 6 It's -- I have a theory, and maybe I'm right and maybe I'm
 7 wrong. I have a theory that in a death penalty case, once a
 8 jury has heard the evidence even before they start answering
 9 questions, if they find a defendant is guilty of capital
 10 murder, depending on what kind of a capital murder it was; in
 11 other words, what the facts were and just exactly how callous
 12 it was and how bad it was, and once they've heard the evidence
 13 about the defendant's background and character, both good or
 14 bad, whatever it's going to be, I think juries form an opinion
 15 within themselves about whether this person ought to be
 16 executed or not. I think, without even thinking about it, I
 17 think it comes to them just as consciousness. And then I
 18 think probably what happens is because of how they've reacted
 19 to that evidence, that's going to lead them to the answers to
 20 those questions, and they're still basing it on the evidence
 21 because that reaction came from the evidence. Does that make
 22 sense to you?

23 **A. Yes, sir.**

24 **Q.** In other words, what I'm saying is if -- I believe
 25 if a juror finds somebody guilty of an awful atrocious capital

1 murder, and they see it and they see the facts and they say,
 2 my goodness, how could anybody do such an awful thing? What
 3 kind of person could do that? I think probably the same
 4 process that has so incensed them about the evidence is the
 5 concept that will answer that first special issue up there,
 6 and that is, is this person a probable danger to our society
 7 in the future. In other words, stated another way, if the
 8 capital murder were relatively understandable and not so
 9 shocking, it's still a capital murder, but maybe not so
 10 shocking, I think sometimes that would also answer that
 11 question almost internally. Do you understand what I'm
 12 saying?

13 **A. I think so.**

14 **Q.** Let me give you an example. The Oklahoma City
 15 Courthouse bombing, I'm thinking to myself if a jury is
 16 sitting there, they see what he did, they see this little baby
 17 blown apart, they see innocent file clerks just getting
 18 destroyed all because this guy has some complaint with the
 19 Federal Government and how they handled some criminals down in
 20 Waco, or how they handled an arrest scene up in Idaho, or
 21 whatever that was, and they look at that evidence and that
 22 fact, I think the same thing that would shock them with that
 23 evidence, that shocked them into that guilty verdict, is
 24 probably going to carry over, that same shock and that same
 25 reaction, to answering those questions. It's not dishonest to

1 to court every single day and watch every single minute of the
 2 proceedings and want to be there for all of it and watch it.
 3 And picture the dad that watches this happen, watches maybe
 4 two people go -- there were two killers, the abductors and
 5 killers of his child, go out of court. They're smirking, and
 6 he says to himself, you know, those guys are going to do it
 7 again. They didn't have any controls on them when they did my
 8 child. They'll do it again, and I'm never going to let
 9 another parent go through what I'm going through. Those
 10 people are not fit to live. I've made that determination, and
 11 I'm going to get them.

12 **And he starts thinking about where they live. He**
 13 **starts investigating. He gets a gun that he didn't have**
 14 **before, for example, stalks them maybe for days until he can**
 15 **find them both together and got a clear shot. He doesn't want**
 16 **to kill anybody else because he doesn't want to hurt anybody**
 17 **innocent. But those -- he's made the determination those**
 18 **people must die for what they've done, and he does it. And he**
 19 **shoots them both, drops the gun, surrenders to the police, and**
 20 **is not dangerous to anybody else. As a matter of fact, he**
 21 **purposefully went to great lengths to make sure he wouldn't**
 22 **endanger anybody else. That's why he followed these guys so**
 23 **long so he could get a clear shot at them and not hurt**
 24 **somebody else. Get him examined by a psychiatrist, and they**
 25 **say the guy is not sane (sic). He's depressed, but he's not**

1 the evidence because that shock came from the evidence. It
 2 didn't come from any other place. Do you understand what I'm
 3 saying?

4 **A. Are you saying if -- the more horrific looking the**
 5 **crime that would have more of an effect, as if you're**
 6 **prosecuting for the same crime, however it didn't look as**
 7 **horrific?**

8 **Q.** Uh-huh. What do you think?

9 **A. I wouldn't make that distinction.**

10 **Q.** You would not?

11 **A. Huh-uh.**

12 **Q.** Let me give you an example of a capital murder case
 13 that is truly capital murder. We've all watched these
 14 television shows before where someone's child is abducted and
 15 murdered, and then when the trial comes there's some technical
 16 problem in the trial so that the killers, although they've
 17 been caught and clearly identified, for some search reason or
 18 some confession reason or some legal reason, the evidence gets
 19 suppressed and the case gets dismissed and the killer or
 20 killers get to walk free. Have you seen TV shows like that?

21 **A. Sure.**

22 **Q.** Picture the situation of parent -- do you have kids?

23 **A. Yes, sir.**

24 **Q.** You'd understand. Picture the situation, if a
 25 person's child was murdered, I'm sure that parent would come

1 insane. He's not crazy, and that's a capital murder. That's
 2 a double homicide and by definition, that is a case which
 3 carries a potential death penalty.

4 **The jury would hear that evidence, and let's assume**
 5 **the evidence was overwhelming. We had his fingerprints on the**
 6 **gun. We had eyewitnesses that were unimpeachable. Let's say**
 7 **he freely admitted. He didn't have to, but let's say he did,**
 8 **he's got to be guilty of capital murder. That would be the**
 9 **only option for the jury, if they follow their oath, to find**
 10 **him guilty of, and everyone in that jury box may understand**
 11 **what he's going through. I'll bet -- you and I are parents.**
 12 **We're dads. We'd understand maybe some of those feelings,**
 13 **although we wouldn't understand all of it if we'd never been**
 14 **through it. And what I'm saying is that's a capital murder**
 15 **offense, and yet as you hear it, does that seem to you equally**
 16 **shocking as somebody who just goes and murders a couple of**
 17 **people in a robbery or drive-by shooting or something like**
 18 **that, for no reason, just wantonness? Does it seem the same to**
 19 **you?**

20 **A. It's not as shocking, no, because I could put myself**
 21 **in his shoes and see what he's feeling.**

22 **Q.** What I was saying is that it seems to me that
 23 ability, as you're evaluating all that evidence and making
 24 your take as a juror on that evidence when you're deciding did
 25 he do it or not, is he guilty, may well be the same kind of

1 process that you use on this first special issue up here.
 2 What I'm saying is, you know, the likelihood of that guy ever
 3 being a danger to our society again may well be very remote.
 4 Not only is it not probable, it might almost be not possible.
 5 What do we know about him? Always behaved before, loved his
 6 child. Let the system work, he thought. The system, at least
 7 in his mind, let him down terribly. He's thinking about
 8 protecting other children. That's his focus. It's not just I
 9 want to be dangerous. When you get right down to it, he's
 10 trying remove a continuing threat from society, and that's
 11 kind of what his motivation was, and why would he ever do it
 12 again? He never did it before, and but for what happened, he
 13 wouldn't have done it that time. Everybody might agree on
 14 that. Do you follow what I'm saying? I'm not saying it would
 15 be, but it may well be the answer to that question is no. No,
 16 he's not probably going to be a continuing threat to our
 17 society. Do you follow what I'm saying?

18 **A. Yes, sir.**

19 **Q.** Likewise, if the crime is just horrific, and I'm not
 20 saying in any kind of double homicide or any burglary/homicide
 21 isn't horrific, but some are worse than others. Hitler seems
 22 like -- Hitler was a worse murderer than maybe somebody that
 23 does a single robbery homicide, just because of sheer numbers
 24 if nothing else. The crime can be so severe and so
 25 unacceptable that our law says the jury may answer that

1 question yes solely on the facts of the crime itself, even if
 2 there's not any other evidence presented, just on the very
 3 crime itself. Not saying you have to; it's just saying that
 4 you may. Can you see how that could be -- anybody that could
 5 do these acts is someone who is so far off of our charts of
 6 what's normal that person is always probably going to be
 7 dangerous?

8 **A. Yeah. I mean, that's a hard question to answer**
 9 **because we can't see what's going to happen tomorrow.**

10 **Q.** Absolutely. And you are absolutely right, and some
 11 people have trouble with that question because they say, how
 12 can you predict the future? I've known good people who have
 13 gone bad; I've known bad people who have turned out good. And
 14 some people say that question is not capable of being
 15 answered. What do you think? Do you think you could answer
 16 that question as well as the next person?

17 **A. Yeah. On your father example --**

18 **Q.** Uh-huh.

19 **A. -- you paint the picture where it doesn't seem like**
 20 **he'd be a continuing threat until someone walks away for**
 21 **killing his wife, then he might do the same thing under**
 22 **similar circumstances.**

23 **Q.** And you make a good point, and we know he has the
 24 ability to do that because he's done it once before. And
 25 that's the kind of analysis that we're talking about. It's

1 not precise. Nobody can tell for sure. Tell me what line of
 2 work you're in?

3 **A. Sales.**

4 **Q.** Sales?

5 **A. Yes, sir.**

6 **Q.** You know, you can -- I'll bet you've gone to people
 7 and put on a great presentation and you think it's going good.
 8 You talk to your boss, and say, I think he's going to be in,
 9 he really likes our product, whatever that is. And it turns
 10 out you're wrong. He doesn't buy. You've had that happen,
 11 right?

12 **A. Certainly.**

13 **Q.** Have you ever gone to places and you figure that's
 14 hopeless. I wish I hadn't set this appointment up, and two
 15 days later the guy says I'm in for 500,000. Have you ever had
 16 things like that happen?

17 **A. Yes, sir.**

18 **Q.** Your analysis was probably okay both times. It
 19 didn't always prove to be accurate. In other words, one time
 20 you thought you weren't going to make a sale and you did, and
 21 another time you thought you had it and you didn't. And yet,
 22 in terms of probabilities, you were probably right. That one
 23 situation may not have panned out how you thought it was, but
 24 you get a feel for how that works, and you can do those sorts
 25 of things. You can make predictions based upon experience and

1 that sort of thing, right?

2 **A. Uh-huh.**

3 **Q.** And I imagine if you've been doing it for a while,
 4 you're also pretty good at knowing how to make those
 5 adjustments or to try to figure out -- because that's what you
 6 you do. You figure out customers. Isn't that part of sales?

7 **A. Yes, sir.**

8 **Q.** And you figure out -- you learn about the person's
 9 personality, you learn about what seems to be important, and
 10 the longer you do it the more sophisticated you might get
 11 about it. That's how you get better. But that's the
 12 predicting thing that you do.

13 **People do that with marriages. People may -- have**
 14 **you ever had a friend that was getting married, and you said,**
 15 **boy, those two people, there's no way they're going to work?**
 16 **Have you ever had that happen?**

17 **A. Uh-huh.**

18 **Q.** Give me an example. I don't need the names. Kind
 19 of tell me what you're thinking of.

20 **A. Good friend of mine thought he needed to follow the**
 21 **rules and go to college and find a wife, and you marry them**
 22 **shortly thereafter, and that's what his plan was, and the**
 23 **people weren't compatible. Yet, it was within his time frame**
 24 **to get married, and it lasted nine or ten months.**

25 **Q.** Could you tell this just by being around them?

1 Could you tell?

2 **A. I'm not the authority on all those things, but in**

3 **my opinion I didn't think it was going to work.**

4 Q. Were you right, by the way, did it work?

5 **A. No, it did not.**

6 Q. We do that all the time and don't even -- don't even

7 think about it, not in evaluating people's personalities, but

8 we that -- you probably do that with customers. You've

9 probably got some customers you trust with their handshake

10 because of past experience, and other people you'd be a little

11 bit more weary of; is that so?

12 **A. Certainly.**

13 Q. And so a lot of times what that question is asking

14 you to do is use your basic human experience and evaluate the

15 personality of the Defendant at this time. Now, you've

16 already found him guilty of capital murder, and in many ways

17 that question probably is nothing more than a benefit for the

18 Defendant, the first special issue, because what it really

19 says is we will not execute all capital murders. In our

20 society, in order to be executed, a jury must be convinced

21 beyond a reasonable doubt that you are probably going to be a

22 danger in the future; that there is a probability that you

23 will be a continuing threat to our society. And once we

24 provide that question, which in a sense is an additional

25 hurdle for the State to overcome, in addition to proving you

1 guilty of capital murder, it's very fair and we will do our

2 best to make the determination about you and about your

3 personality, but that question can't hurt -- that question

4 never hurts a defendant. I mean, worst case scenario is you

5 decide he's going to be a danger in the future, in which case

6 he gets a death -- he gets executed for a capital murder. If

7 you don't find beyond a reasonable doubt he would be a danger

8 in the future, then he doesn't get executed for capital

9 murder.

10 So, some people say, well, I'd hate to answer that

11 question because it could turn out down the road that I was

12 wrong, that he wasn't dangerous. Maybe he's -- the day before

13 the execution, maybe it's ten years and he doesn't hurt

14 anybody while he's in prison waiting for his execution. Or

15 maybe he's down in prison and gets converted to some religion.

16 Maybe he -- maybe he gets real sick, or maybe he -- maybe a

17 lot of things that later on he's not dangerous anymore, even

18 though he was dangerous at the time of trial.

19 How do you feel about that possibility that somebody

20 could have some change over the next ten years while awaiting

21 an execution? Does that make you unable to do a fair job on

22 that question there knowing that you could be wrong down the

23 line?

24 **A. Probably to the contrary. I think you'd have a**

25 **harder time convincing me, no matter what the case was, if you**

1 **convict him of capital murder, I'm leaning towards they could**

2 **do it again, a continuing threat.**

3 Q. I mean, fair enough. And that is certainly

4 acceptable for you to feel that way, and it is probably -- and

5 to be leaning one way or the other, doesn't make you unfair.

6 You might think that everybody ought to be right -- no

7 opinions, no knowledge, never thought out about it any

8 before. Not so. To be fair what you have to be able to do is

9 go both ways on any issue that the law presents you, depending

10 upon the evidence. In other words, I understand what you're

11 saying, that you think if you can do a capital murder one time

12 that greatly influences, in your mind, your danger in the

13 future. Is that what you're saying?

14 **A. Yes, sir. I don't know how you could rule it out.**

15 Q. Exactly. And that's how come you gave me that

16 answer. It was -- I hadn't thought of it. How come you gave

17 me the answer, what's going to happen when the kid -- when the

18 daddy's wife gets murdered, is he going to go out again?

19 Remember that John Bronson series; did you ever see that?

20 **A. I think I've seen a couple of them, yes, sir.**

21 Q. You're a little young to remember them. I remember

22 when they came out.

23 THE COURT: Charles Bronson.

24 MR. SCHULTZ: Is that his name? What did I

25 say?

1 THE COURT: John.

2 MR. SCHULTZ: That's his cousin. He made some,

3 too. Charles Bronson.

4 Q. BY MR. SCHULTZ: And that raises a point that

5 question -- necessary to that question is the Legislature's

6 belief that there are some worthy answers yes and some worthy

7 answers are no, otherwise what's the point of giving a

8 question, right?

9 **A. Right.**

10 Q. Okay. It's rare -- it's especially rare in Collin

11 County, because the jurors are very educated here, but there

12 are jurors that say I don't care what the law requires of me,

13 I'm going to answer the questions the way I want to because

14 I'm free, and that's just how it is, and you don't seem like

15 that kind of person to me. You seem like a person that would

16 follow the law and the instructions the Court would give you

17 based on the law, but I don't know you real well. Just what

18 we picked up on here.

19 I'll give you some examples of how -- I'll get you

20 on this one. I'll give you some examples of how the answer to

21 that question would have to be no, no matter what. Suppose,

22 for example, you've got a very dangerous capital murderer who

23 commits a capital murder, gets arrested by the police and in

24 the course of the arrest he shoots at the police because he's

25 dangerous as dangerous can be. He's trying to kill them

1 simply because they're trying to do their job and arrest him.
 2 They shoot him, they hit him in the spine, and they paralyze
 3 him from the scalp down. All they can do is stretch him out
 4 on a board or something all day. They don't have to worry
 5 about strapping him down because he's not going to be able to
 6 roll anywhere. He's just there, like a sack of something, and
 7 they feed him through some kind of a tube, some kind of mush
 8 that goes in that's just enough to keep his cells alive, but
 9 he has absolutely no anything else, and the doctors all agree
 10 he's never going to get any better because it's a spinal cord
 11 injury. Are you with me?

12 A. Yes, sir.

13 Q. You look at that evidence and say to yourself, all
 14 right, taking all the evidence into consideration, there's no
 15 probability this defendant is ever going to commit criminal
 16 acts of violence that's going to constitute a continuing
 17 threat to society because he's nothing but a turnip or a
 18 gourd, or whatever he would be in that vegetative state. Are
 19 you with me on that?

20 A. Yes, sir.

21 Q. Do you see how, for example, in that case, the
 22 answer would have to be, no, he's not a continuing threat to
 23 society?

24 A. I would agree.

25 Q. Okay. Now, that would be a rare circumstance. I

1 A. Unless -- if he's -- yeah, maybe it is unless we've
 2 got a spinal cord injury where the person can't physically
 3 harm anybody. Now -- but I'm not going to break the law,
 4 either. If you're telling me but that's not -- that's
 5 something for me to decide. How is that unlawful -- how is
 6 that unlawful for me to decide -- how is that against what the
 7 Court's asking if I decide that's going to be a continuing
 8 threat?

9 Q. Because you've already decided, from a practical
 10 point of view.

11 Are you a baseball fan?

12 A. Yes, sir.

13 Q. Let's say they ask you -- you're in a Little League
 14 game one day, and they say will you come umpire this game for
 15 us because the umpire -- you know how that always happens in
 16 Little League games, the umpires don't show up when they're
 17 supposed to. You say, sure, but I need to tell you, every
 18 pitch I'm going to call a strike. And they look at you and
 19 say, well, why? Speeds up the game. I think pitchers need to
 20 be motivated. I think they need the encouragement from a lot
 21 of strikes. I think having batters not swinging at pitchers
 22 is bad for batters, and that's my opinion. I think kids need
 23 to be swinging at anything they can reach, and I think
 24 pitchers ought to be rewarded with having the courage to be
 25 able to throw. So, every pitch is going to be a strike. I

1 don't -- and I suppose the State, in its zeal, could go get
 2 some quack to come in and say, well, I think I've got some
 3 medicine that can cure this thing. I can make him dance
 4 again, but it would be have to be a quack under those
 5 circumstances, and that wouldn't be enough evidence to
 6 convince you beyond a reasonable doubt that the guy is ever
 7 going to be a danger in the future. Are you with me?

8 A. Yes, sir.

9 Q. Now, that's the extreme case to illustrate a visible
 10 inability to do that. But our law certainly doesn't limit
 11 itself to that extraordinary circumstance that I described.
 12 Rather, the law recognizes that not all capital murders are
 13 the same and that jurors have to be willing to give a
 14 defendant and the State a fair hearing on all those questions.
 15 Now, if what you're telling us is that no matter what the
 16 Court's instructions are all the State has to prove is he's
 17 guilty of capital murder, and then you're on auto pilot all
 18 the way to a death sentence, I'm not going to quarrel with the
 19 answer. It's not following the law because you have to give a
 20 fair hearing to both that first special issue, and then if
 21 it's answered yes, the second special issue, but I'm not here
 22 to change your mind. If that's what you're telling me, all
 23 I've got to do to get an execution is to get him convicted and
 24 that's the end of the trial with you, I guess -- is that what
 25 you're saying?

1 don't care if it's in the dirt or the backstop. I don't know
 2 what I'm going to do if the batter gets hit. I guess I can't
 3 call that a strike. Except for that, everything else is going
 4 to be a strike, all right. But I'll be, I'll be a fair
 5 umpire. If you've already predetermined what everything is
 6 going to be, you're not being fair. If you already
 7 predetermined that a person who is convicted of capital murder
 8 will be a danger in the future, you're not a fair juror
 9 because you are not able to call balls and strikes and fairly
 10 evaluate the evidence.

11 So, no, the law -- the law requires you to fairly
 12 consider the evidence. That's what the law requires, and if
 13 you're not able to fairly consider the evidence -- you're not
 14 a criminal. You don't get in trouble for it. You're gone.
 15 Neither side could allow a juror to sit that has already made
 16 up his mind, if that's where you are. So, let me make sure
 17 we're communicating.

18 The Judge will instruct you, if you're seated on
 19 this jury, to base your answer to that question on that
 20 evidence, number one, and, number two, require the State to
 21 prove that beyond a reasonable doubt, or your answer would
 22 have to be no. In other words, if we don't prove yes to you
 23 beyond a reasonable doubt, you have to answer that question
 24 no. That's our -- that's our burden of proof. We don't need
 25 any help with it. In other words, we don't need -- it's not

1 an automatic answer to that question. We don't need any help
2 from anybody because that's not right.

3 If our cause is right in this case, we ought to be
4 able to prove it to you and 11 other people. If our cause
5 isn't right, the State doesn't want a ringer on there that
6 will -- that tells me all you've got to do is prove he's
7 guilty, and you've got me in your corner. Do you follow what
8 I'm saying?

9 A. Yes, sir.

10 Q. You're the only one that knows. Are you able to
11 give us a fair hearing on that question? Are you able to give
12 the Defendant a fair hearing on that question and see whether
13 or not even if he's found -- if he's found guilty of capital
14 murder, see whether or not he's probably going to be dangerous
15 in the future and make that determination and make us prove
16 it? Can you do that or not?

17 A. Depending on -- if it's self-defense or a situation
18 like you said, I probably couldn't be fair in the sense you're
19 talking, no.

20 MR. SCHULTZ: Do you want to agree on him?

21 MR. GOELLER: Yes.

22 MR. SCHULTZ: We'd excuse him by consent, or
23 challenge him for cause by consent.

24 THE COURT: Is that your desire, Mr. Cantu?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Mr. Cantu, is that your desire to
2 let Judith Hoffman, Number 167, be released from this case?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: All right. Then Judith Hoffman is
5 agreed to be released by both sides, and tell her that she is
6 finally excused.

7 And both sides are excused in this case, and we'll
8 see you at 8:45 in the morning. Anything else from either
9 side?

10 MR. GOELLER: No, Your Honor.

11 THE COURT: All right. We'll see you in the
12 morning.

13 (End of Volume 27.)

1 THE COURT: All right. Then, Mr. Starnes, you
2 are finally excused. Thank you for your service.

3 VENIREPERSON: Thank you, sir.
4 (Venireperson exits the courtroom.)

5 THE COURT: Let's invite Judith Hoffman in.
6 (Discussion off the record.)

7 THE COURT: Is that what both sides want to do?

8 MR. GOELLER: Yes, sir.

9 MR. SCHULTZ: Yes, sir.

10 MR. GOELLER: And I apologize if I didn't
11 communicate that with the Court this morning. No, you asked
12 me. I'm right on this one.

13 THE COURT: It could be.

14 MR. GOELLER: I'm not letting you off the hook
15 on this one.

16 THE COURT: My recollection is I said, okay,
17 are we going to go on Judith Hoffman? My understanding is
18 that you said "yes."

19 MS. FALCO: My understanding is Matt said let
20 her go.

21 MR. GOELLER: Like Moses, let my people go.

22 THE COURT: And well, we could have a hoard of
23 locusts upon us.

24 MR. GOELLER: Actually, I kind of want to let
25 their people go.

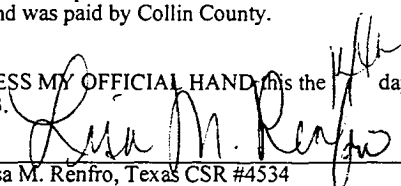
1 REPORTER'S CERTIFICATE
2 THE STATE OF TEXAS *
3 COUNTY OF COLLIN *

4
5 I, Lisa M. Renfro, Official Court Reporter in and
6 for the 380th District Court of Collin County, State of Texas,
7 do hereby certify that the above and foregoing contains a true
8 and correct transcription of all portions of evidence and
9 other proceedings requested in writing by counsel for the
10 parties to be included in this volume of the Reporter's
11 Record, in the above-styled and -numbered cause, all of which
12 occurred in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of the
14 proceedings truly and correctly reflects the exhibits, if any,
15 offered by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is contained in
18 Volume 53 and was paid by Collin County.

19 WITNESS MY OFFICIAL HAND this the 11th day of
20 January, 2003.

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