

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

VOLUME 7 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 7
INDIVIDUAL VOIR DIRE
CAPITAL MURDER JURY TRIAL

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On the 23rd day of August, 2001, the Individual Voir Dire 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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2001 AUG 23 11:12
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1 PROCEEDINGS
 2 (Open court, jury not present.)
 3 THE COURT: This is Cause Number 8-double 0-47.
 4 Let the record reflect the defendant and the attorneys for the
 5 defendant and the attorneys for the State are present in this
 6 case. We've got four jurors waiting to be questioned
 7 individually. Does either side have anything for me to bring
 8 up?
 9 MS. FALCO: Yes, Your Honor. Before we bring
 10 the jurors in regarding the criminal histories of jurors, I
 11 was going to go ahead and put on the record through the first
 12 16, who don't have any criminal history based on our running
 13 of TCIC/NCIC.
 14 With regard to Juror Number 1, Clarence Harrison, he
 15 had a DWI in 1984 out of Dallas. Juror Number 12, Daniel
 16 Grath, he has -- and I don't know the finality of it, but he
 17 has passing a bad check, a misdemeanor, out of Georgia. That
 18 was 1996.
 19 And then Juror Number 14, Mr. Johnson, he was
 20 arrested in 1985 in San Antonio for a misdemeanor theft and
 21 received deferred adjudication. I don't have any follow-up to
 22 know whether he completed that deferred or whether he was ever
 23 revoked. In 1987 he was arrested in San Antonio for burglary
 24 of a hab with intent to commit theft, and I don't know the
 25 disposition of that. And in 1988 --

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1 MR. HIGH: I'm sorry, you're going too fast.
 2 MS. FALCO: I'm sorry. 1987, San Antonio
 3 arrested for burglary of hab; disposition unknown. And in
 4 1988 he was arrested in San Antonio for criminal trespass, but
 5 that was dismissed. And that's all I have through Number 16.
 6 MR. GOELLER: I believe I got (inaudible).
 7 THE COURT: Have we got anything else from
 8 either side?
 9 MR. GOELLER: Your Honor, before we start the
 10 individual voir dire, I had filed a Motion to Quash the
 11 Indictment. I was asking this court to declare the Texas
 12 death penalty unconstitutional for 22 reasons stated in my
 13 motion, and the court was going to defer ruling on that motion
 14 at some time. And I thought I might ask the court if I could
 15 get a ruling on each of the paragraphs in my motion before we
 16 start individual voir dire.
 17 THE COURT: It's overruled in it's entirety.
 18 MR. GOELLER: Thank you, sir. Will the Court
 19 reconsider declaring the Texas death penalty unconstitutional?
 20 THE COURT: Well, I'm terribly open minded,
 21 but I don't think that I would.
 22 MR. GOELLER: Thank you.
 23 THE COURT: But you can raise it again if you
 24 want.
 25 MR. GOELLER: Yes, sir.

1 THE COURT: I tell you what, the jurors have
2 all been sworn with regard to the questions they're going to
3 be asked. Is there anything else I need to say when they come
4 in, as far as y'all are concerned?

5 MR. SCHULTZ: The State can't think of
6 anything, Judge.

7 THE COURT: All right. Let's bring in our
8 jurist.

9 (Discussion off the record.)

10 MR. GOELLER: I'd ask the court to remind them
11 they are still under oath.

12 THE COURT: All right. Sounds good.

13 MR. SCHULTZ: I agree with your position.

14 THE COURT: We've got some common ground here.
15 Sir, are you Clarence Harrison?

16 VENIREPERSON: Yes.

17 THE COURT: Sir, I want to remind you that
18 you're still under oath.

19 VENIREPERSON: Yes.

20 THE COURT: Please be seated. Mr. Schultz.

21 DIRECT QUESTIONS

22 BY MR. SCHULTZ:

23 Q. Mr. Harrison, my name is Bill Schultz. I don't
24 guess we met yesterday, but we actually had a couple of words
25 spoken then. I am an Assistant District Attorney representing

1 the State of Texas in the capital prosecution of Ivan Cantu.
2 The lady to my immediate left is Gail Falco, who is the chief
3 felony prosecutor assigned to the 199th, on loan to this court
4 for this trial. And to her left is Ms. Jami Lowry, who is a
5 felony prosecutor actually assigned to this court. Moving
6 over to this table, you've already previously been introduced
7 to the defendant, Ivan Cantu, and then to his immediate left
8 is Mr. Don High, a board certified criminal law specialist
9 practicing law in Plano, Texas and a true gentleman, and to
10 his left is Mr. Matt Goeller, who is, I'm thinking, probably
11 the lead attorney on this case. Also, a Plano practitioner
12 and also board certified and also a very fine gentleman.

13 And I do this introduction to you again just because
14 as we go along with this process here today, I would
15 anticipate it would be friendly and laid back and the
16 interchange should just be fun because I think the lawyers
17 want to explain to you what your service might entail. I
18 know you would want to explain to us something about yourself
19 as it would relate to this case and your fairness to serve in
20 this particular type of a case. And I already understand you
21 don't know any of us, and that's probably fine.

22 I also know you understand what I said yesterday
23 about we're not unfriendly, but once we finish talking with
24 you here today if you are selected, you'll probably think
25 we're shying away from you, and we probably are, but you

1 understand the reasons for that. Those have been explained to
2 you.

3 Now, I have read the questionnaire and many times it
4 seems -- although you did a very good job on the death penalty
5 questions. Sometimes people not understanding exactly how the
6 death penalty scheme works in Texas will answer questions that
7 may seem to mean one thing, but they really don't. For
8 example, you might ask a juror the open-ended question, do you
9 believe a person in a capital murder case, if convicted,
10 should receive the death penalty? And if they put yes, that
11 might mean that they think it ought to be automatic, and I
12 think Mr. Goeller clearly talked to everybody yesterday about
13 the fact there is no automatic death penalty in Texas. It has
14 to do with what the jury finds in the second part of the
15 trial.

16 But it could also simply mean that in a juror's mind
17 not familiar with our language and our -- exactly how the laws
18 work, it just seems, well, if you're convicted of capital
19 murder that must mean a death sentence follows, and I think if
20 a death sentence is ordered one ought to be carried out. Do
21 you follow what I'm saying?

22 A. Yes, sir.

23 Q. I don't get a sense of that problem from your
24 questionnaire because it looks to me like you're directly on,
25 and as I read your observations about the death penalty they

1 all seem to fit what you indicated initially when you said
2 that you were not in favor of the death penalty because you
3 believe someone who has to serve the rest of their life in
4 prison is enough. And I'm sure that's still your position
5 because we're only talking about a couple of days since you
6 wrote that. Am I right on that?

7 A. I want to say yes. Naturally, I didn't know when I
8 came the other day what kind of case this was going to be
9 naturally.

10 Q. Sure.

11 A. So I've had a little time to think about it a little
12 more.

13 Q. Okay. Do you remember when I did what I did about
14 the death penalty -- it was early on -- when I asked everybody
15 to look at the defendant? Did you understand the point I was
16 trying to illustrate with that? Did that make sense to you
17 what I was doing?

18 A. Yes.

19 Q. And again, the reason I did that is not because I
20 think it's funny. Believe me, I don't get any thrill in
21 talking about these issues, and I don't take this lightly or
22 it's not funny just because it's -- I respect the defendant's
23 life. I believe the evidence is going to require that it be
24 taken in it an orderly fashion, but it doesn't mean that human
25 life is trivial to me. But I want everybody to understand

1 this is the real thing.
 2 It's almost like -- you were in Vietnam. I don't
 3 get the impression you were actually in combat; am I right?
 4 **A. I was for about two years.**
 5 **Q.** You were actually in combat. Did you see action?
 6 **A. Yes.**
 7 **Q.** Then I think you'll understand what I'm saying.
 8 It's very, very different, whether it's Vietnam or Bosnia or
 9 Normandy Beach. It's very much simpler when we're sitting in
 10 our living rooms thinking about what country we ought to go
 11 fight and what areas should be bombed when it's not us doing
 12 it. Do you know what I'm saying?
 13 **A. Sure.**
 14 **Q.** And all the sudden when faced with the reality, no
 15 matter what your view is, faced with the reality of having to
 16 drop bombs, whatever happens, a lot changes. And I'd be
 17 willing to bet with that -- without knowing, I'd be willing to
 18 bet a lot of your view about war and responsibility of
 19 soldiers and things might have been influenced by what you saw
 20 in Vietnam that you wouldn't have understood if you stayed at
 21 home and gone to college or had some deferment. Does that
 22 make sense what I'm saying?
 23 **A. Absolutely.**
 24 **Q.** And so because when you get into the real thing,
 25 because I know it changes people, that's why I did it. I want

1 you to really understand that if the State has it's way in
 2 terms of what we believe to be the correct evidence and the
 3 correct view of this case, if we have our way, he will
 4 ultimately die for the conduct -- if the jury finds him guilty
 5 of the conduct we allege?
 6 **A. Right.**
 7 **Q.** And I know I don't get a sense from you that that
 8 bothers you. You may think I'm a bad person because I speak
 9 frankly that way.
 10 **A. No.**
 11 **Q.** Even if you don't agree with the death penalty,
 12 there's room in our land for people to disagree. That's what
 13 makes America (inaudible). You've got one idea, and I've got
 14 another, and maybe out of the middle comes new law or new ways
 15 of thinking.
 16 When someone says to me that they think a life
 17 sentence is proper punishment for murder that -- through the
 18 years I've learned that can mean a couple of things. There is
 19 a body of thought that executions are perhaps too kind and too
 20 humane and that almost the punishment of it all gets lost.
 21 That's one view, and the thinking is, wouldn't it be better to
 22 let some of these people just have their carcasses rot slowly
 23 in some hole down in Huntsville, Texas, so they can watch
 24 their flesh age and decay, and think the reason I'm doing it
 25 in here is because of what I've done, and I'm never getting

1 out. That's one body of thought, okay?
 2 **A. Right.**
 3 **Q.** Another body of thought is simply perhaps that it's
 4 wrong of us as a society to take life because there's
 5 something almost inconsistent with the notion that, on the one
 6 hand, we're willing to execute people for their murders, and
 7 in a sense, it's almost like we're doing a murder ourself.
 8 That's another view, and that doesn't mean those are the only
 9 ones.
 10 Can you, in your own words, tell me what you mean
 11 when you say that you believe that someone who has to serve
 12 the rest of their life in prison is enough? Can you tell me
 13 what that means to you?
 14 **A. Well, like I said earlier I had -- I had time to**
 15 **think a little more on the situation.**
 16 **Q.** Uh-huh.
 17 **A. And I feel I've always been a Christian.**
 18 **Q.** Uh-huh.
 19 **A. I've had a lot of faith in God, and I feel that**
 20 **someone does something wrong, naturally the good Lord is going**
 21 **to take care of it, and that person has got to live within**
 22 **themselves.**
 23 **Q.** Okay.
 24 **A. So when I said someone is going to spend the rest of**
 25 **their life in prison, then they're going to be -- they're**

1 **going to be living, but they're going to be living with that**
 2 **thought hanging over their head for the rest of their life.**
 3 **Q.** Okay.
 4 **A. So that's a pretty big penalty right there, I would**
 5 **say.**
 6 **Q.** Okay.
 7 **A. But on the other hand, from knee thinking for the**
 8 **last day or so about capital murder, someone that deliberately**
 9 **does something intentionally, to take another life**
 10 **deliberately, I think they should be -- I think the death**
 11 **penalty should come into view.**
 12 **Q.** And, you know, it's interesting because it's
 13 possible for people to be opposed to the death penalty and
 14 still function well within the system and do their duty in a
 15 proper way. And ofne analogize it to military service, and I
 16 know it's not the same, but in many ways it is because I
 17 suspect most of the people that get into combat -- most of our
 18 military personnel that actually see action, probably would
 19 rather not be there, number one. And I know there are some
 20 exceptions, but I don't think decent people of conscience get
 21 a thrill out of killing. I don't care if you're 17 and all
 22 excited. If you stop and back off for a second, I doubt
 23 anybody gets a thrill out of killing another human being, no
 24 matter what the reason. I would hope it would be rare,
 25 because this is a good country.

1 But nevertheless it has to be done sometimes, and
2 I'll bet you knew a lot of people over in southeast Asia that
3 probably felt that way, and if given a choice would probably
4 prefer not to have been in a situation where they had to be
5 doing that. Is that a fair statement?

6 A. Yes, sir.

7 Q. And yet, they did their duty in a way that they
8 ought to be proud of and that society ought to be proud of,
9 don't you think?

10 A. Yes, sir.

11 Q. When you're in the military, you get to vote, and
12 you can vote for candidates that change what we're doing over
13 there if you want to, but if you believe in the system when
14 called upon to serve, it's not the service always of your
15 choosing. And I think that's important particularly in death
16 penalty cases because I haven't met the juror yet who comes in
17 here under oath and says, you know, Mr. Schultz, I hope the
18 evidence is strong enough for me to be able to kill this
19 person by my vote because that to me seems exciting. I've not
20 met a juror like that yet, and I bet I never will.

21 As a matter of fact, I've met jurors who would say,
22 I will do my duty, but I sure hope that the evidence doesn't
23 make me go that way, because if I had a choice between coming
24 out of here and keeping somebody alive or not, in my heart I
25 think I'd feel a little better about voting the life way. Do

1 you know what I'm saying?

2 A. Yes, sir.

3 Q. So, I don't get that sense from you, either. Let me
4 ask you this: Do you think being able to serve in a capital
5 case and vote in a way that causes the death penalty to be
6 imposed, do you consider that to be compatible with your
7 Christian values?

8 A. Yes.

9 Q. Because some people -- people can go both ways on
10 that, and I'm the last person on earth to be talking much
11 about this, but it relates to your service and you brought it
12 up is the only reason I'm going to talk about it. Some people
13 take literally the concept that thou shall not kill to apply
14 to almost all killings, because it doesn't have any
15 exceptions. It doesn't say, though shall not kill, except in
16 self-defense; thou shall not kill except in time of war, or
17 thou shall not kill as an executioner or a jury on an
18 execution case. It just says thou shall not kill. Some
19 people take it real seriously. You had medics in Vietnam that
20 took it seriously in the war context, for example.

21 Other people say, well, it's okay because it's the
22 law of the land, and my values teach me that obeying the law
23 of the land is part of Christianity because it's talked about
24 in scripture. Do you know what I'm saying?

25 A. Yes.

1 Q. So you could consider -- you'd still be able to
2 consider yourself true to your Christian teachings and vote
3 for a death penalty if we convince you that should be the way
4 the vote should be?

5 A. Right.

6 Q. Okay. By the way, we're not giving you a choice,
7 but if you had a choice, would you prefer to be on or off this
8 jury, Mr. Harrison? What do you want to do, and it's okay
9 with us.

10 A. I would say off.

11 Q. Okay.

12 A. And I could state my reason.

13 Q. Okay.

14 A. I recently last year had a stroke.

15 Q. Okay.

16 A. And my neurologist that I see said that a lot of
17 stress can cause a lot of problems in my situation, and
18 recently I had seen my neurologist. I had been having some
19 dizzy spells, and my heart was beating pretty fast at night
20 when I'd go to sleep. So, he sent me to a heart doctor where
21 I had a monitor put on me for a day, 24 hours. I haven't got
22 the results back from that, but I just feel that the intensity
23 of this type of case, a capital murder case, and the duration
24 of time that it would take, that the stress -- I wouldn't be
25 able to -- I wouldn't be able to hold up to what y'all are

1 looking for.

2 Q. Did you consider talking with Judge Sandoval about
3 that a couple of days ago? Did you think about that then?

4 A. Well, I did, but I didn't know when would be a good
5 time to -- you know, to mention it.

6 Q. Okay. Let's assume for a second that that doesn't
7 get you off. Let's just assume for a second. And that's not
8 my call, anyway. That's someone else's call. But let's
9 assume that does not get you excused from jury service.

10 Do you have a job now?

11 A. Yes, sir.

12 Q. What do you do for a living now?

13 A. I'm a technician with Raytheon.

14 Q. And where do you work, in McKinney?

15 A. Yes, sir, in McKinney.

16 Q. All right. Is that a stressful job?

17 A. To an extent, but not that bad.

18 Q. Have you been on any kind of disability leave or
19 anything like that from your job?

20 A. No, sir.

21 Q. And you're not missing work, and you're able to --
22 what time do you get to work each day?

23 A. I get to work at 6:30 every morning.

24 Q. That's pretty stressful to me just getting up that
25 time of morning. What time do you get off?

1 A. Usually 3. Sometimes I'll work an hour over.
 2 Q. Have you ever had any problems there at work?
 3 A. No.
 4 Q. If you are asked to serve on this jury, are you
 5 going to feel like you've been put upon or that people aren't
 6 sympathetic to your situation?
 7 A. Well, I mean I just told the truth of how --
 8 Q. I know you did.
 9 A. -- I really couldn't answer that. I don't know.
 10 Q. Well, even if you did I guess the more important
 11 question is, are you going to take that out on anybody,
 12 either the State or the defendant, the fact that you're here
 13 and you don't want to be? Are you going to punish somebody
 14 over that?
 15 A. No.
 16 Q. I mean, you wouldn't want, for example, to allow a
 17 dangerous person to go free because you were frustrated, and
 18 you wouldn't want to have someone executed that didn't need to
 19 be executed because you were frustrated? You wouldn't be like
 20 that, would you?
 21 A. No.
 22 Q. We're getting ready to explain to you the questions
 23 in a little bit more detail. I'm going to bring them up
 24 closer to you so you can see them in a second. The first part
 25 of the trial entails you listening to evidence as a juror and

1 determining whether or not the State, beyond a reasonable
 2 doubt, has proved the defendant's guilt of capital murder. If
 3 the State fails to prove beyond a reasonable doubt that he's
 4 guilty of capital murder, for sure he can't be convicted of
 5 that crime because we failed to prove it.
 6 It may be that he's guilty of something less than
 7 capital murder, like maybe regular murder. Perhaps for some
 8 reason we weren't able to demonstrate two people were
 9 killed. Perhaps we weren't able to satisfy your
 10 satisfaction a burglary or a robbery. For some reason, part
 11 of it's there, but not all. Does that make sense to you?
 12 A. Yes.
 13 Q. If part of it's there, but not all of it, then you'd
 14 consider the lesser-included offense, whether that be
 15 burglary, robbery or murder of one person. And there may be
 16 some other possibilities that I won't go into. I think them
 17 unlikely. You won't have any problem with that in following
 18 instructions to convict the defendant of what he's guilty of
 19 and nothing else. That wouldn't be a problem, would it?
 20 A. No.
 21 Q. Some people might say, well, you know, if I give him
 22 a lesser-included offense, I can't give him the death
 23 penalty. They kind of put the cart before the horse, and they
 24 say, what this man did was so awful, he ought to die for, and
 25 then they try to adjust what they find him guilty of to

1 facilitate that. Does that make sense?
 2 A. Yes.
 3 Q. And the judge told you that's not right. You
 4 already know that's not a right thing to do, but if he told
 5 you not to do that, you could follow that instruction,
 6 couldn't you?
 7 A. Yes.
 8 Q. The same thing is also true, if in your heart you
 9 listen to this evidence and say, gosh, I don't want to kill
 10 this guy, it's not right for you to adjust the crime down to
 11 something less than capital murder so that doesn't have to be
 12 an issue for you. Do you know what I'm saying?
 13 A. Right.
 14 Q. Are you a baseball fan by any chance?
 15 A. Not really.
 16 Q. How about football?
 17 A. A little bit.
 18 Q. What's your favorite sport?
 19 A. Golf.
 20 Q. I was hoping it wouldn't be something like Lacrosse.
 21 You understand the concept of baseball. Many times
 22 umpires are out there, and they've got to call balls or
 23 strikes in ways that are fair. And they're human beings
 24 like everybody else. You know, if you think about it, if
 25 you're the umpire, and Nolan Ryan is about the pitch his

1 seventh no hitter. And you've done so much for him that you
 2 want that next pitch to be that third strike so that he gets
 3 his no-hitter. Who cares about the sport. All anybody cares
 4 about, home team or visiting team, they just -- everybody
 5 wants to see him get his no-hitter. And there's tremendous
 6 pressure probably on the umpire hoping it will be that way,
 7 but they've still got to call a ball if it's a ball; do you
 8 know what I'm saying.
 9 And we have (inaudible) jurors, too, because there
 10 may be times where you want it to go one way or the another,
 11 but if you're true to your oath, you've got to vote according
 12 to that, right?
 13 A. Yes, sir.
 14 Q. And you think you're the kind of man who could do
 15 that?
 16 A. Yes.
 17 A. I'm sure I could.
 18 Q. I didn't ask you if you are the kind of man that
 19 wants to do that because I understand that part. But you're
 20 able do that?
 21 A. Right.
 22 Q. Now, a couple of questions, and this could be areas
 23 where I think maybe you didn't understand the question because
 24 everybody was raising a lot. You indicated that you trust the
 25 criminal justice system in Collin County. Is there anything

1 in particular that you think you of or just seems to you like
 2 it's going all right up here? Is there some special situation
 3 where you indicate that you strongly agree that you trust the
 4 criminal justice system? Is there something we do especially
 5 good up here that you like, or you just have a sense we do
 6 good work up here?

7 **A. I feel you are doing a good job and that you will**
 8 **continue to improve.**

9 Q. Okay. Absolutely, we all can. And you believe
 10 that criminal laws treat criminal defendants too harshly, and
 11 you disagree with that?

12 **A. Too harshly?**

13 Q. The question was, "Criminal laws, including
 14 sentences and punishment, treat criminal defendants too
 15 harshly." And you disagree with that statement, which I guess
 16 means that you don't that they're treated too harshly?

17 **A. No. I think they're right on what they should be.**

18 Q. So, that part seems to make sense to you. We're not
 19 too easy on them?

20 **A. Right.**

21 Q. We're not too cruel to them.

22 And here you put if someone is accused of capital
 23 murder he should have to prove his innocence. And you
 24 strongly agree with that, according to what you circled.

25 MR. SCHULTZ: May I approach the juror, Judge?

1 second, does that make sense to you that we're the ones that
 2 have to do the proving?

3 **A. Yes.**

4 Q. It seems to make sense for a couple of reasons.

5 Number one, the reason we're here in court, I suppose you
 6 could say, is the conduct of the defendant perhaps. But the
 7 true reason we're here in court is we did -- we did the
 8 accusing, and so if we're going to do the charging, it's kind
 9 of like they've got the right to say prove it. We say no, you
 10 prove it. They've got that right, and they can either say no
 11 by themselves. They can do it through their lawyer. Their
 12 lawyer can say on behalf of my client I say prove it. They
 13 don't have to say a word. They can just stand up there, and
 14 respectfully refuse to answer the judge's question how do you
 15 plead? They can stand there and won't answer the man, and
 16 that's okay. He wouldn't get mad. He could enter a plea of
 17 not guilty. Are you with me?

18 **A. Yes, sir.**

19 Q. We've got to do the proving of almost everything in
 20 this trial, and almost all of it we have to prove beyond a
 21 reasonable doubt. That's the law. That's my responsibility.
 22 I gladly accept that because that protects you and me if we're
 23 sitting over there some day, but that's our job. They don't
 24 have to prove anything if they don't want to. There may be a
 25 couple of areas where they've got some burdens to prove, and I

1 THE COURT: Yes.

2 ~~Q.~~ BY MR. SCHULTZ: I apologize for the yellow
 3 highlighting. Those are things that we noticed that we wanted
 4 to talk about, and we just did that so you'll know what we're
 5 talking about. See that question right there? Take a second
 6 if you want to go ahead and read it and get your glasses out.

7 **A. All right.**

8 Q. Now, absolutely there's no quarrel with anybody
 9 like Mr. Goeller said yesterday. Whatever your ideas are, we
 10 know they're fine and we want to know them. Who do you
 11 understand to have the burden of proof in a criminal trial?
 12 Who is that on, the burden of proving guilt or innocence?

13 **A. Well, I really don't know a whole lot about trials**
 14 **naturally, but the prosecutor is the person that's doing the**
 15 **proving, or bring out all of the facts, and the defense**
 16 **attorneys, of course, are going to try to say what they think**
 17 **happened or whatever. But when you get down to the bottom**
 18 **line, the proof of what happened will decide, to me, whether a**
 19 **person is guilty or innocent.**

20 Q. Okay. Who do you think should have -- and you're --
 21 that statement, I think we'd all agree with what you're
 22 saying. Who do you think should have to do the proving before
 23 there can be a conviction?

24 **A. Well, the prosecutor.**

25 Q. Okay. If you stop and think about it for just a

1 don't think they apply in this case.

2 For example, they have a burden on the insanity
 3 defense. There's been no indication that's going to be
 4 raised. There's been no notice of that. I'm assuming that's
 5 the case. But if there were an insanity defense, the defense
 6 has to prove that. Entrapment. There are certain thing that
 7 are what we call affirmative defenses, and they have to be
 8 proved. But mostly they have the right to just sit there and
 9 not ask any questions and not bring out anything. They can if
 10 they want to. The defendant doesn't have to testify. He can
 11 if he wants to, but he can just sit there and quietly observe,
 12 and the lawyers don't have to ask any questions at all. And
 13 still we have the burden of proof. Nothing ever changes that.
 14 Does that make sense to you?

15 **A. Yes.**

16 Q. If you would, go ahead and read that question
 17 again. I hope you didn't put your glasses too far away. Read
 18 that one I circled.

19 **A. If someone is accused of a capital murder he should**
 20 **have to prove his innocence.**

21 Q. After talking with me, is that your -- is that still
 22 your thought after we've thought about it for a while?

23 **A. Absolutely.**

24 Q. Well, if we have the burden of proof to prove he's
 25 guilty, how can you say he should have to prove his innocence?

1 **A. I see where you're coming from now. If you have the**
2 **prove then --**

3 Q. And by the way, it's okay -- if that's your
4 opinion -- if you think that's how our society should be, the
5 defendants have to come in and prove their innocence if we
6 charge them, you may keep that opinion and you could still be
7 qualified as a juror as long as you can set your personal
8 opinion aside and follow what the law is, all right?

9 And you're the only one that knows this, but tell
10 me, if the judge tells you that we have -- State has to prove
11 his guilt beyond a reasonable doubt and he has no burden at
12 all, he doesn't have to prove a single thing, will you follow
13 the law of Judge Sandoval, which is the law of the State of
14 Texas, or will you follow Mr. Harrison's law, which might be
15 in conflict with that?

16 **A. I'd follow the law of the State of Texas.**

17 Q. You wouldn't feel put upon, or you wouldn't feel
18 like anybody is being mean to you if they say you've got to do
19 it our way if you're going to serve as a juror?

20 **A. Right.**

21 Q. If you stop and think about it, doesn't that seem to
22 make sense? If we come up here and arrest you today and say
23 we're charging you with robbing the First National Bank of
24 Denton. We'd haul you into trial and we say, now, go ahead
25 and show us your innocent. Doesn't that seem kind of unfair?

1 How do you prove you're innocent of something? You don't do
2 that. You try to fight the State's proof you're guilty,
3 that's how the system works. Does that make sense to you?

4 **A. Yes, sir.**

5 Q. Can you assure everybody in the courtroom that
6 you'll hold the State to prove beyond a reasonable doubt that
7 Mr. Cantu, the defendant, is guilty of capital murder, and if
8 we don't do that, can you assure us you won't find him guilty
9 of that?

10 **A. Right.**

11 Q. Maybe a lesser offense if we prove that, or if we
12 don't prove anything you've got to find him not guilty. Are
13 you the kind of man that could do that?

14 **A. I guess.**

15 Q. You'll hold to us our proof, is what I'm asking?

16 **A. Yes.**

17 Q. Fair enough.

18 Let's assume now -- let's assume that you heard all
19 the evidence of the case, and you found the defendant guilty
20 of capital murder just like he is charged in the indictment.
21 You and 11 other people have voted guilty, so he's now a
22 convicted capital murderer, right, we're assuming that. You
23 know that doesn't mean automatic life -- that doesn't mean
24 automatic death or automatic life; you understand that? What
25 it means is we go to the next part of the trial, which is the

1 trial that will determine life or death. Does that make sense
2 to you?

3 **A. Yes, sir.**

4 Q. And you probably read about that or seen it on TV,
5 the juries deliberating on death sentences, and the jury came
6 back with a life sentence or a death sentence. I mean, you've
7 seen that on TV before, right?

8 **A. Right.**

9 Q. I don't know if it's better or worse how we do it,
10 and they didn't ask me anyway, you could argue that it's just
11 as easy to ask the jury, what should this man get; life or
12 death? And then in many ways it's the same as the way we do
13 it, especially when we get to this third special issue because
14 that's almost what that deals with, anyway. But we don't do
15 it that way. Instead, we ask the jury questions, which it's
16 hoped that that makes juries look at what the law says is the
17 important stuff, all right? And whether it does or not, I
18 guess might be in the eye of the beholder. I don't know.

19 But here's our first, what we call, special issue,
20 or special question.

21 MR. SCHULTZ: Can you see it over there?

22 MR. GOELLER: Yes, sir.

23 Q. BY MR. SCHULTZ: Can you see it, also, Mr. Harrison?

24 **A. Yes, sir.**

25 Q. Take a moment first and just to read it to yourself.

1 **A. Okay.**

2 Q. I guaranty you that if you're selected on this case
3 and you become a juror, you would be better without any legal
4 training, you would be better able to develop a question that
5 would hit at what needs to be hit at than what our Legislature
6 has done. And I guess I'm apologizing on their behalf, and I
7 think everybody would agree this is very confusing, and you're
8 going to get some evidence how confusing it is because I
9 suspect Mr. Goeller or Mr. High will have a different

10 interpretation of what I'm saying. And, frankly, nobody can
11 say either of us is wrong in how we want to interpret it.

12 In this question it will be asked to you, beyond a
13 reasonable doubt -- because it will be phrased in terms of do
14 you find beyond a reasonable doubt -- that there is a
15 probability -- that's the first area that's a little bit
16 difficult. Now, you work in a technical field, I understand,
17 and so you're probably more mathematical and kind of, shall we
18 say, measurement oriented than maybe somebody who painted
19 landscapes for a living, for example. Does that seem
20 reasonable?

21 **A. Yes.**

22 Q. Does your work ever entail actually using that term
23 probability? Is that anything -- part of what you do for
24 Raytheon?

25 **A. In a way. I mean, you know, things can change.**

1 Q. Okay. Do you hold a particular security
2 classification for your work because I know as a defense
3 contractor --
4 A. No.
5 Q. I'm assuming whatever kinds of things you deal with
6 they probably have failure rates?
7 A. Right.
8 Q. And everybody talks about failure rates --
9 A. Right.
10 Q. And the world's greatest ship is going to have a
11 certain percentage failure rate?
12 A. Right.
13 Q. And I guess in a sense that's a probability kind of
14 thing because you've got to figure what's the probability this
15 thing is going to fail? Probability may mean a number of
16 things for different people. I mentioned the weather
17 forecast. Some people talk about a 20 probability of rain. I
18 guess that's a probability. Many people will say probability
19 is more likely than not. People will say that probability is
20 a real distinct possibility, because a possibility is also a
21 probability. And that's not defined for you. Mr. Goeller may
22 have one idea what a probability means. I may have another.
23 I'd be very surprised if my ideas and perhaps lower than his
24 idea, but I can be wrong. I just guessing. But there's no
25 definition of probability. Could you use that word and try to

1 fashion a common-sense understanding if you're in the jury
2 room about what probability means for purposes in a criminal
3 trial? Could you do that?
4 A. Yes.
5 Q. And you do that with the help of 11 other people,
6 and that's one of your rights as a juror, okay? Whether
7 there's a probability that the defendant, that means
8 Mr. Cantu, would commit criminal acts of violence. Now, let's
9 think for a minute. And I'll set this down for a second.
10 That term, criminal acts of violence, that doesn't
11 get defined, either. So I want to -- when somebody says the
12 term "criminal acts of violence," what comes into your mind
13 just as you hear that term?
14 A. Someone just wanting to take over someone else.
15 Q. Okay.
16 A. In other words just --
17 Q. Okay. For example, how about, like, beating up on
18 wives. Does that seem like a criminal act of violence?
19 A. Yeah, definitely.
20 Q. Now, what are some other -- what are some other
21 things that you think would be criminal acts of violence? What
22 are some acts that come to your mind that seem like they would
23 be violent?
24 A. Someone robbing a store.
25 Q. Robbing. Maybe breaking -- what about violence to

1 property? Like, if I want to come into your house and I bust
2 your patio door so I can get in, is that an act of violence?
3 A. Yes.
4 Q. Maybe you're not home, so it's not an act of
5 violence on a person, but could that be an act of violence on
6 property?
7 A. Yes.
8 Q. What about something like drug dealing, because we
9 talked about that before. Do you believe that selling
10 somebody drugs is an act of violence, or can be?
11 A. Yes.
12 Q. How could you see that being an act of violence?
13 A. It's giving someone something that -- it's going to
14 make that person not be themselves; therefore -- they're doing
15 something illegal.
16 Q. Okay. And maybe --
17 A. And they know it's illegal.
18 Q. By the way on the subject of drugs, do you believe
19 that committing crimes while you're hopped up on drugs tends to
20 excuse what you've done?
21 A. No.
22 Q. I mean, the reason I ask that is because I think we
23 might all agree that if you're drunk on alcohol or high on
24 drugs, you're not in your right mind and your control is not
25 the same. Does that seem fair to you to say that?

1 A. Would you repeat that again?
2 Q. If a person is real drunk, for example, on alcohol
3 or real high on drugs, their behavior may be very, very
4 dangerous; is that true?
5 A. Absolutely.
6 Q. And maybe they're not exactly thinking about being
7 dangerous. They're just operating in that haze from the
8 alcohol or the drugs; do you know what I'm saying?
9 A. Right.
10 Q. Does that, in your mind, excuse it at all?
11 A. No.
12 Q. If you had a loved one that had been murdered --
13 it's kind of like I asked that other juror a couple of days
14 ago -- you came home, and they say, I'm sorry your loved one
15 had been murdered, Mr. Harrison. It's not so bad because the
16 guy was on cocaine, or even on methamphetamine at the time.
17 He didn't do it stone-cold sober. Does that make any
18 difference to you?
19 A. No.
20 Q. Now, the next thing we want to talk about is this
21 term "continuing threat to society," because it's probable
22 that the defendant would commit criminal acts of violence. We
23 talked about what those might be; murders, robberies, rapes,
24 burglaries, dope dealing, wife beating.
25 What about desertion from the military, by the way.

1 Would you consider that to be an act of violence -- criminal
2 act of violence?

3 **A. In a way. It's different.**

4 Q. How could you see that might be a criminal act of
5 violence to be a coward and a deserter with a yellow streak
6 down somebody's back?

7 **A. I'd like to change my mind on that because desertion
8 is -- maybe that person is just scared, and in other words,
9 they're really not -- they're committing a crime to the
10 country by leaving, but yet they're not harming anyone.**

11 Q. Right. That makes sense to me. That's good --
12 well, maybe or maybe not. They may be harming somebody.

13 **A. Well, who knows.**

14 Q. It might depend on whether they're in action or not,
15 whether their position is necessary or not?

16 **A. Right.**

17 Q. You wouldn't want a sentry deserting in an area, for
18 example, right?

19 **A. Right.**

20 Q. Now, these criminal acts of violence would
21 constitute a continuing threat to society. And I want to
22 first talk about the idea of continuing threat. There's no
23 definition for that, either. Do you see why I'm saying that's
24 such a terrible question for anybody. There's no definition
25 of continuing threat. I suppose you're free to say he has to

1 be doing one every day, or twice or three times a day, or
2 maybe you say every three months, when he needs money or when
3 he feels that way. Whatever you think is continuing threat is
4 kind of up to you. The idea is that we always have to be
5 worried about it. That maybe not today, maybe not tomorrow,
6 but it's always out there, right.

7 And then finally the last word that's confusing, and
8 there will be disagreement on, is this word "society," all
9 right. And I'll explain to you, as we go along, why that can
10 be confusing. Now, you don't get to that question unless you
11 have first found the defendant guilty of capital murder. If
12 you find him guilty of burglary or robbery or simple murder,
13 you're never going to see that question. You move into just
14 the question involving what his punishment is going to be.
15 Does that make sense to you?

16 **A. Yes, sir.**

17 Q. But if you find somebody guilty of capital murder,
18 if you, the jury, found him guilty of capital murder, what are
19 the -- what are the possible punishments he will get having
20 been convicted of capital murder? Tell me that.

21 **A. Well, death.**

22 Q. That's one.

23 **A. Or life.**

24 Q. Here's -- and here's why that question poses such an
25 interesting challenge to try to make sense out of it. You

1 know he that he's at least going to get a life sentence at
2 most, depending on how you view a life sentence. And
3 you read that question and see that term society, one rea
4 of that could be it must mean prison society. One readin
5 this question here might simply be to convert this whole
6 question into the question of can they keep him safely in
7 penitentiary? Is he going to hurt anybody if he's down in
8 pen? Do you see how you could look at the society, and
9 decided, well, I guess only the society we're talking about
10 prison society. Do you see how you could do that?

11 **A. Sure.**

12 Q. But this question doesn't have to be read that way
13 because it doesn't say anything about prison society. WI
14 this question may be asking the jury is to look at the
15 defendant's character as it exists, and say this a person w
16 would be dangerous under circumstances that allow that
17 to take place, whatever that might be. Do you understand
18 I'm saying?

19 **A. Sure.**

20 Q. In other words, it could be our society, too.
21 There's no limitation in that question. It is just as fair to
22 say, and one could certainly argue to you what that mea
23 could they safely hold him in the penitentiary as long as
24 there? They can do that. You can read it that way, or y
25 can say is this guy good enough to go walking down our

1 right now in our society? It's not limited to prison soc
2 It just says society. Does that make sense to you?
3 **A. Sure.**
4 Q. In other words, you could say, if I'm walking d
5 the street and I see the defendant I just convicted of ca
6 murder on the corner smoking a cigarette, do I cross to
7 other side of the street knowing what I know about him
8 that make sense to you?

9 **A. Right.**

10 Q. And I apologize on behalf of the Legislature,
11 because they don't help anybody. You're free to consi
12 of that.

13 The one thing that the Legislature has focused o
14 as the purpose behind capital punishment is protection
15 society, because that's what the question is aimed at.
16 aimed at causing the execution of people who are goin
17 danger to us in the future, and it -- there's no -- there's
18 area in our law that says we need to execute people ju
19 retaliation for what they've done, like an eye for an ey
20 There's no question that deals with that. There's not e
21 deterrence question. There's no question that is going
22 say, Mr. Harrison, do you find beyond a reasonable d
23 killing the defendant will deter others from committin
24 similar crimes.

25 Because to the Legislature, that's a nonissue.

1 There may be a reason we like capital punishment in this
2 state, but they don't worry about deterrence. They don't
3 worry about retribution, eye for an eye. They don't worry
4 about that. The only thing the Legislature worries about in
5 terms of executions, as the reason for executions, is to
6 protect us as a society.

7 Now, all that having been said, how do you think you
8 go about answering a question like this? What kind of things
9 do you think you would fairly want to know in order to answer
10 that first question?

11 **A. Well, of course, I think it's all leading to how
12 violent that person is; in other words, will they do this
13 again?**

14 Q. The first thing, of course, you already know about
15 is what crime -- you found him guilty of capital murder so you
16 are going to know all the facts that are presented to you
17 about that and that will give you some clue, don't you think?

18 **A. Some.**

19 Q. Do you think it's possible that you could look at
20 some crimes, that because of one single crime that a person
21 did, that crime could be so horrible and so extreme and so
22 brutal that you, as a juror, could say to yourself anybody who
23 is capable of doing this horrible thing that this person has
24 done that I found him guilty of, anybody who does that will
25 always be a continuing threat to society?

1 he done other things like it leading up to this? Would that
2 be important to you?

3 **A. In a way.**

4 Q. Would you want to know about other acts of violence,
5 other than the capital murder you found him guilty of?

6 **A. Yes.**

7 Q. Do you understand sometimes it's possible that the
8 only crime that we can present to you is the capital murder,
9 either because that's where it all started, or I mean,
10 sometimes that's all there is. There may not be any other
11 crimes of any kind; do you understand that?

12 **A. Yes, sir.**

13 Q. And then it's up to you to decide whether the crime
14 is enormous enough to answer that question or not. The answer
15 may be no. It's not that the crime itself is not enough to
16 vote yes on that. Does that make sense?

17 **A. Yes, sir.**

18 Q. Okay. It's frequent in our -- in our criminal
19 practice to use psychiatric testimony, to bring in
20 psychiatrists on one side or the other to talk about the
21 personality traits of the accused, or by that time the
22 convicted person.

23 I'm sure you've probably seen on TV or heard on the
24 radio about psychiatrists testifying for this person, or the
25 State. Does that seem like that would be important to you?

1 **A. Yes, I could.**

2 Q. Some people think that -- the one that always comes
3 to mind, the one is everybody thinking on that subject is
4 perhaps is the Oklahoma City Courthouse bombing -- federal
5 courthouse up there, because it doesn't matter what kind of a
6 saint the bomber might have been other than that, when that
7 makes sense to you, when that's how you value human life, to
8 just to that to make some political statement, most people
9 would say, you know, anybody who could do that doesn't have
10 any kind of controls that we ought to be ever able to trust.
11 Does that make sense to you?

12 **A. Yes, sir.**

13 Q. Secondly, in addition to that you said maybe/maybe
14 not, you want to know other stuff, like background stuff, is
15 that true? You want to know things other than the crime
16 itself, maybe things about him?

17 **A. Yes.**

18 Q. Okay. And that might mean it's grown-up stuff, and
19 it may well be that if the defendant's choose, they might want
20 to bring you that kind of evidence. They might want to bring
21 you stuff about what he was like growing up, what happened in
22 his life. You might hear stuff like that, okay. And maybe
23 that's important to you, maybe it isn't. That's kind of up to
24 you, and you may want to hear more about things like, well, is
25 this an isolated event; has he ever done this before, or has

1 Just the way you're wired, is that something that would be
2 important evidence to you?

3 **A. Yes.**

4 Q. Do you think -- do you believe psychiatry to be a
5 precise science? Does it seem to have the same precision
6 as -- I don't know -- some of the propulsion formulas that
7 they use on this Raytheon business, for example? Does it seem
8 that precise to you?

9 **A. Not quite that precise.**

10 Q. Do you believe that a defendant, for example -- and
11 I'm not picking on this defendant. Do you think a defendant
12 could always find some psychiatrist to come in and say helpful
13 things about him?

14 **A. It's possible.**

15 Q. And do you think the State could go out and find a
16 psychiatrist to come in and say just the opposite of what
17 theirs did?

18 **A. Could be.**

19 Q. If they get three to say one thing, and we got three
20 to say another (inaudible). Does that make sense to you?

21 **A. Yes, sir.**

22 Q. Are you still willing to listen to that evidence and
23 see how much it helps you and how much light it sheds?

24 **A. Yes.**

25 Q. Okay. If you answer that first question no, your

1 work as a jury is over, and the reason it's over is because a
2 no answer to that question guarantees that a life sentence
3 will be the punishment imposed. And that means if you do it
4 because you've got a reasonable doubt or because you think
5 he's a safe fellow or society -- whatever the reason. If you
6 vote no, end of story; defendant gets a life sentence. With
7 me?

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

9 **Q.** If you vote yes, then we've got another question for
10 you. And that is perhaps, and I've got to talk about that
11 now. If you find the defendant did the capital murder by
12 himself, then this question really doesn't have any
13 significance to you. In other words, if it's like one person
14 that did it, if you find he was with somebody else -- do you
15 remember me talking a couple of have days ago, well, what if I
16 think you're in there -- you and I need some money, and I say
17 I'll drive the car. You go in there and steal some money out
18 of the safe, and the next thing I know you pull out a gun and
19 kill somebody. I didn't even know you had a gun. Remember, I
20 explained to you that I can't be executed for what you've
21 done?

22 **A. Right.**

23 **Q.** On the other hand, this just has to do with the
24 fact -- it might be I said, here's a gun, Mr. Harrison, and if
25 anybody moves in there you kill them, because if anybody sees

1 you, we don't want any witnesses. You kill them. Then, I
2 would be guilty, and I could be executed because I'm thinking
3 just like you. I didn't pull the trigger, but I'm with you.
4 We're in it together, and I know exactly what you're going to
5 do. So this one here just simply says if you're guilty as a
6 party to the offense, that means, like, me being outside, I'd
7 be guilty of capital murder.

8 Then, you'd have to ask the question whether I
9 actually caused the death of the deceased, or if I did not
10 actually cause the death of the deceased, but I intended to
11 kill the deceased, or another -- or anticipated that a human
12 life would be taken, then the answer to that question would be
13 yes.

14 Now, I don't anticipate -- and I don't know. I
15 don't anticipate that's going to be huge in terms of the
16 evidence in this case, but you never know, and I'd rather talk
17 about it now than have it be a surprise and think I didn't do
18 my job.

19 Remember what I told you a few minutes ago when I
20 said we might just as well be asking the jury should a guy get
21 life or death and get rid of all this special issue stuff
22 because this next question really does that, and I'm not
23 critical of it. It's probably a pretty neat thing, this
24 option be available. But I'm going to ask you take a moment
25 and read this one to yourself, and let me know when you're

1 finished.

2 **A. Okay.**

3 **Q.** Had you ever heard that term mitigation before a
4 couple of days ago? Is that a term you're familiar with?

5 **A. Yeah.**

6 **Q.** Okay. When you first read that question, let me
7 first of all tell you, just like anything else, we've got no
8 control over jurors except their conscience. That's the on
9 thing we can do with -- I mean, y'all can vote any way yo
10 want to. This question isn't an authorization just to avoi
11 death sentence because you wish it weren't so. It's not on
12 of those, do you want to do it, because I'm not sure -- I'm
13 not sure that we'd find 12 people that particularly want to
14 kill somebody?

15 **A. Right.**

16 **Q.** You don't want to kill him. That's not something
17 your heart you're just itching to do?

18 **A. No.**

19 **Q.** But like this other question, what it's asking you
20 to do is take into consideration all the evidence, includin
21 the circumstances of the offense, take into evidence the
22 defendant's character that's good or bad, by the way, and
23 personal moral culpability of the defendant. Now, I don't
24 quite know what that means, and maybe you'll figure it c
25 you're a juror, the personal moral culpability.

1 I don't know how you would intentionally commit a
2 capital murder and not have personal moral culpability. I
3 don't understand why they put that in there, because if you
4 didn't have moral culpability, it seems like you would have
5 been intentionally doing it. But they want you to take into
6 effect his personal moral culpability. And then ask yoursel
7 this question: Is there sufficient mitigating circumstance or
8 circumstances to warrant that a sentence of life imprisonm
9 rather than a death sentence be imposed.

10 So what does that mean? What I think it means
11 probably doesn't matter anyway because you're going to be
12 deciding it. It talks in terms of sufficient mitigating
13 circumstance, there must be something quantitative. There
14 must have to be a bunch of it. For example, suppose some
15 did a capital murder, and they said, you know, I've been up
16 all night, and I was just real tired, and I was kind of
17 grouchy because when I don't sleep I get grouchy. That's
18 come I did it. Most people would not think that's a
19 sufficient mitigating circumstance to excuse killing some
20 people. Do you follow what I'm saying?

21 **A. Right.**

22 **Q.** I guess you could. There's nothing you couldn't
23 say, gee, I've been sleepy myself, and I know how you ca
24 around killing -- no way to stop it. I'm just saying most
25 people would not say that's sufficient mitigating

1 circumstances. Make sense?

2 **A. Right.**

3 Q. And then we talk about things like accident or
4 self-defense or stuff like that, and while, I guess that would
5 be mitigating, you'd have never gotten to a capital murder.
6 Accidentally killing somebody may not be a crime at all. If
7 it's any crime, it's certainly not capital murder. So, if
8 it's not an accident, self-defense is no crime, if it's true
9 because you've got the right to kill or be killed is the law
10 of the land kind of thing.

11 So, probably that background stuff is pretty
12 important. I mean, they kind of focus you on that, and then
13 they ask you is that sufficient? Is that sufficient
14 mitigating evidence?

15 Remember I talked yesterday when I said, you come
16 home and your loved one has been murdered, and the officer
17 says it's not so bad because he had an unhappy childhood. I
18 don't remember exactly what your answer was or what your
19 thought was about that, but do you think when a person reaches
20 that old age the fact that maybe he didn't have everything
21 growing up that we think he should, do you think that has much
22 effect on --

23 **A. No.**

24 Q. -- holding him accountable?

25 **A. No.**

1 Q. What about drugs, because some people say -- we
2 talked about it a little bit. Some people say, well, drugs
3 are awful, they're everywhere, they affect people. Some
4 people might say drugs are mitigating; that if a crime is
5 committed on drugs that makes it less serious and, therefore,
6 it may be mitigating than if it wasn't committed on drugs? Do
7 you understand how that could be? Some people might think
8 that. Other people might say, you're worse than a regular
9 capital murderer because you're doing drugs, too. They might
10 think that's aggravating. It makes it all the worse; do you
11 know what I'm saying?

12 **A. Yeah.**

13 Q. So you could do both. The same evidence might, in
14 your mind, be mitigating and the fellow next to you might
15 think that's aggravating and there's room for both.

16 We talked yesterday, and I want you to think about
17 this some more, and why I did what I did yesterday and talked
18 about the victims, do you see anything in here that talks
19 about taking into considering the character of the victim?
20 Is there anything in that question that seems to deal with
21 that from what you can see?

22 **A. Well, that's saying the defendant's character.**

23 Q. Right. And the reason I say that is because I
24 guess you could say the circumstances of the offense, I
25 suppose, who he kills kind of factors in there a little bit,

1 but that question really doesn't direct your attention to the
2 character of the victim. Do you notice that? It wants you to
3 consider defendant's character because that's what it says.

4 How important in your mind is the character of the
5 victim in a capital murder case? Once you found that it was
6 an intentional double homicide or intentional burglary murder,
7 whatever it might be, as you sit there, how important do you
8 think the character of the victim is?

9 **A. It's really not that important. We all have to
10 speak for ourselves, and what you or I did growing up that
11 really doesn't have any bearing on what we're doing now. So,
12 that's how I look at that.**

13 Q. You know, we got places for drug dealers. We have
14 prisons. If we catch a drug dealer, we put them in prison.
15 We don't kill them for being a drug dealer. That's not our
16 law. That's not what we do with people. And I guess my
17 question is, does it make a real difference to you if somebody
18 intentionally kills -- just sits down and says, I want to kill
19 that person? He forms that intent that, I want to kill that
20 person, and I can pull out a gun and kill that person after
21 having thought about it, and then I got away. Does it make a
22 big difference who the victim was, whether I kill the saint or
23 whether I kill the sinner?

24 **A. No.**

25 Q. Why doesn't -- as you think about it -- because I

1 can tell you've done a lot of thinking about all this and what
2 both sides talked to you about. Why doesn't that make a
3 difference to you?

4 **A. We're all humans. Just because this person was a
5 nun or this other person is a drug dealer, sure, our society
6 does not accept the drug dealer. But that's a person, also.
7 A life's a life.**

8 Q. Okay. Just as there's no automatic death sentence,
9 there can be no automatic responses by jurors. They have to
10 be open to being able to apply all aspects of the law. It
11 doesn't mean that all jurors would be exactly the same in
12 terms of how they approached certain things. It merely means
13 that they're -- that they are open to anything that the law
14 requires, and that is the law from Judge Sandoval. For
15 example, you may be the kind of a man who, if he served on a
16 hundred capital murder juries, might only return a death
17 sentence one time out of a hundred. And the lady sitting
18 right next to you in the jury box may be the kind of person
19 that's probably going to view the evidence in capital cases so
20 that she comes back 75 times out of a hundred with a death
21 sentence. You both belong to the jury. There's not any
22 difference. That's just how y'all are, and that's all right,
23 because she would be able to say, I can vote for a life
24 sentence when I see it. Maybe not as often as Mr. Harrison
25 would, but 25 times out of a hundred, I do vote for a life

1 sentence so I can do it.

2 And you'd be the same way. You know, I can vote for
3 a death sentence when I see it. It's just 99 times they
4 didn't show it to me, and so I voted for a life sentence.

5 Does that make sense to you?

6 **A. Yes.**

7 Q. There's nothing wrong that. One side or the
8 other -- perhaps I would rather have the lady than you because
9 I think, well, she's -- I got better odds with her. Maybe I
10 wouldn't because maybe I'd be comfortable with you doing the
11 right thing and that would be fine, also. Same with the
12 defense, they might rather have you statistically, but maybe
13 not -- maybe they're rather work with you because they're
14 communicating better with you. Do you know that kind of idea?

15 **A. Sure.**

16 Q. The only people who aren't qualified to serve on the
17 jury are those people that say, I don't really care what the
18 law says. I am unable to follow certain portions of it. And
19 if they say that, they can't serve. And, you know, it's like
20 if you tell me, for example, I don't care what Judge Sandoval
21 tells me about mitigation, if I find somebody guilty of
22 capital murder and I find he's dangerous, nuts to -- you know,
23 I'll laugh at that whole concept. There's nothing on this
24 earth that would every mitigate that. It doesn't matter what
25 the circumstances are. I refuse to accept the idea that there

1 are some cases where the death sentence would be mitigated,
2 and a life sentence would be appropriate. If you are that
3 kind of an individual, which you certainly don't seem to be,
4 and you said, I don't care. I've decided that I don't like
5 this mitigation law, so I'm not going to follow it, then you
6 see why you couldn't serve on the jury because you'd be
7 unfair.

8 Just like if somebody comes in and says, I don't
9 care what you show me, I'll never vote for a death sentence,
10 no matter who it is. You know, Hitler gets life from me.
11 Timothy McVeigh gets life from me. They can't serve because
12 they can't recognize there are some cases where it's right.
13 Okay?

14 **A. (Inaudible).**

15 Q. I need to get you to answer out loud because --

16 **A. Yes.**

17 Q. You and I are communicating, but it needs to find
18 its way in the record so people know what you are saying.

19 **A. All right.**

20 Q. The law says because of that question that there are
21 cases where, even though it's a capital murder done by a
22 dangerous fellow, it's still -- a life sentence is still the
23 right thing to do. That's what the law says. There are
24 certain situations where that question should be answered in
25 order to grant a life sentence. It has to be important stuff,

1 we assume, because it talks about sufficient circumstan

2 As you sit there now, do you think that's a good
3 thing in our society to give the jury that knows this cas
4 better than anybody else the chance to do the right thin
5 without mechanically following the questions down the

6 **A. Yes.**

7 Q. I mean, nobody makes you mitigate the death
8 sentence, but wouldn't it be awful if you're sitting there
9 thinking this guy doesn't to die, but I voted yes because
10 my oath and walk out of this courtroom saying, gee, I f
11 the law, but the result was wrong. That doesn't make a
12 sense to anybody, does it?

13 **A. No.**

14 Q. Okay. So, even if you're not thinking of a
15 situation of mitigation, does it seem to you to be a good
16 thing, not only to the defendant, but to our whole socie
17 that jurors have that option?

18 **A. Yes.**

19 Q. And if you found such a situation, if you found
20 something in the defendant's character, background -- r
21 defendant, but I'm talking about a hypothetical case. Y
22 found something in the defendant's background and pe
23 and circumstances that made you feel that he shouldn't
24 death sentence or she shouldn't get a death sentence, w
25 is on trial, you could vote in a way that wouldn't happe

1 couldn't you? You're able to do that --

2 **A. Right.**

3 Q. -- by answering that mitigation question?

4 **A. Right.**

5 Q. And you'd feel like you did the right thing?

6 **A. Right.**

7 Q. Do you have an open mind to this case as you
8 there now?

9 **A. Well, I'm a little nervous. I guess I've never
10 involved in anything like this.**

11 Q. Well, what I'm asking is, you don't know any c
12 evidence in the case?

13 **A. No.**

14 Q. And it may seem to you like I'm trying to tell y
15 something about the case or something -- even if I am
16 whatever I've said isn't evidence, anyway. I wasn't the
17 any more than you were. The lawyers over there, they
18 there. None of us really know what happened and wh

19 Right now, do you presume the defendant's innoc
20 or guilty, as you sit there right now?

21 **A. I don't know.**

22 Q. I know you don't know, but when you hear ab
23 presumption of innocence, have you ever heard that te
24 before? Presumption of innocence?

25 **A. Something, I guess, in that nature. Somethi**

1 **proven guilty until whatever.**

2 Q. Innocent until proven guilty?

3 A. **Until proven guilty.**

4 Q. That's something the law requires. That's like the
5 burden of proof. It's the same thing. We did the accusing.
6 We have to prove it, and until and unless we do that, he
7 always stays innocent, because he's innocent right now under
8 the law. You got a problem with that idea?

9 A. **No.**

10 Q. Just like you would be, or your kids or -- you know,
11 your mom or dad, or whoever might be over there, they'd be
12 presumed innocent until the State could prove otherwise?

13 A. **Right.**

14 Q. Can you do that and hold us to that burden?

15 A. **Yes.**

16 Q. If he doesn't testify and doesn't offer any
17 evidence, you can't hold that against him, and Judge Sandoval
18 will tell you that. You can't say, well, he must be hiding
19 something since he didn't present any evidence because that's
20 not the way our system works?

21 A. **Right.**

22 Q. Can you just ignore that?

23 A. **Well, I mean whatever the court, you know --**

24 Q. It doesn't help him. I mean, you can't go figuring
25 what good stuff he might have offered if he chose to offer

1 know that this -- that seems to be -- that seems to be
2 inconsistent with the presumption of innocence, but I want to
3 make sure we clear that up.

4 A. **Okay.**

5 Q. The way the question is answered it -- it's,
6 essentially, to the effect that if evidence points to
7 somebody, then they have to prove their innocence?

8 A. **(Nods heads).**

9 Q. You understand -- maybe what you're saying is
10 perfectly right. In other words -- in other words, if the
11 State proves beyond a reasonable doubt that the person is
12 guilty, you've heard all the State's case and you're
13 satisfied, maybe it's okay to say, well, if anything is going
14 to change my mind, it's going to come from the defendant or
15 the defendant's side because I've been convinced beyond a
16 reasonable doubt from what the State's produced, and if that's
17 what you mean, that's okay. I mean, because once you're
18 convinced beyond a reasonable doubt, something has got to
19 change it, and if the State's done and nothing else would
20 change it. But you understand still, the burden of proof is
21 never on the defendant except in those areas that we talked
22 about?

23 A. **Right.**

24 Q. In other words, they're not obliged to produce
25 anything else. It's just if they want to roll the dice with

1 evidence, but you can't hold any of it against him?

2 A. **No.**

3 Q. And you understand, all defendants, just like any
4 other witness, can testify if they want to, but they're
5 a special kind of witness because they don't have to because
6 of the Constitution, and that's a good thing.

7 A. **Right.**

8 Q. Do you think jury service is an important thing for
9 our citizens to be doing?

10 A. **Yes.**

11 MR. SCHULTZ: May I approach the juror just to
12 get my questionnaire back?

13 THE COURT: Yes, sir.

14 Q. BY MR. SCHULTZ: I've done all the questioning, and
15 I know it hasn't been a whole lot of fun. Do you got any
16 questions of me about any of the things that we talked about
17 so far? Anything I need to go over again?

18 A. **I guess not.**

19 MR. SCHULTZ: Give me just a moment, Your
20 Honor, please.

21 THE COURT: All right.

22 MR. SCHULTZ: Approach one more time, Judge,
23 and then I'm done.

24 Q. BY MR. SCHULTZ: I think we've probably already
25 talked about this, but take a look at your answer there, and I

1 what's there now, then you've still got to look at all the
2 evidence and say is he guilty beyond a reasonable doubt?

3 A. **Right.**

4 Q. **Okay.**

5 MR. SCHULTZ: We pass the juror, Your Honor.

6 THE COURT: All right.

7 CROSS-QUESTIONS

8 BY MR. GOELLER:

9 Q. Good morning, Mr. Harrison.

10 A. **Morning.**

11 Q. Nice to see you again. Are you okay? Do you need a
12 break? You've been up there a little over an hour.

13 A. **I'm all right.**

14 Q. Can you hang in there for a little while longer with
15 me?

16 A. **Right.**

17 Q. **Semper Fi?**

18 A. **That's it.**

19 Q. I was lucky I guess to have served in the Corps
20 during peace time. You went in at --

21 A. **'66, 1966. I was 15 years old.**

22 Q. **San Diego or Paris Island?**

23 A. **San Diego.**

24 Q. **When did you get in country, Vietnam?**

25 A. **That same year in the summer of '66.**

- 1 Q. What unit were you in?
 2 **A. I was with the Third Marine Division.**
 3 Q. I appreciate you coming back up here today. As we
 4 talked about a couple of days ago, Mr. Harrison, no right or
 5 wrong answers, like Mr. Schultz told you as well. Just trying
 6 to -- obviously from our standpoint, a potential death penalty
 7 case, or a case where the States has announced they will seek
 8 the death penalty, and this is unusual, individual voir dire.
 9 We only do one-on-one's in capital murder cases just because,
 10 I suppose, it's such an important case where a human life may
 11 be on the line.
 12 So, with that in mind, where are you originally
 13 from?
 14 **A. Dallas.**
 15 Q. Born in Dallas. How many total years did you have
 16 in the Corps?
 17 **A. I was in for -- signed up for four years, and I got**
 18 **out on cut, so I was discharged a year earlier, three years.**
 19 Q. You spent a lot of time in Vietnam?
 20 **A. 29 months.**
 21 Q. In country?
 22 **A. Yes.**
 23 Q. You understand when the State said -- I think
 24 Mr. Schultz told you back on Tuesday that the State has
 25 announced that they will seek the death penalty?

- 1 **A. Right.**
 2 Q. Do you know what that means, who makes that
 3 decision?
 4 **A. Evidently the jury.**
 5 Q. No. I mean, the decision to seek the death penalty?
 6 **A. The State.**
 7 Q. And what does the State mean to you?
 8 **A. The State of Texas.**
 9 Q. Do you understand what it really means is the local
 10 District Attorney?
 11 **A. Okay. I didn't know that.**
 12 Q. Have you ever heard of a guy named Tom O'Connell?
 13 **A. No, I don't think so.**
 14 Q. He's the Collin County -- the local prosecutor. He
 15 has made that decision. One person has made that decision.
 16 **A. Yes, sir.**
 17 Q. And even though they represent the State -- the DA's
 18 office represents the State, the State of Texas hasn't made
 19 the decisions. Just one person in one county has made that
 20 call.
 21 **A. Yes, sir.**
 22 Q. Okay. I won't cover everything Mr. Schultz covered
 23 because I don't want to waste your time. On page 3 of your
 24 questionnaire, Mr. Harrison, there's a question that was
 25 asked, what makes a person dangerous? And I think your

- 1 response was when someone is out of control and somet
 2 do not know why. Can you explain that or go into a littl
 3 more detail for me?
 4 **A. Some people, I guess their tolerance, or their**
 5 **mental capability, they're not -- in our society, they'r**
 6 **capable of handling theirself.**
 7 Q. Right.
 8 **A. So, therefore, they're one person one minute, a**
 9 **then another person another minute.**
 10 Q. Okay. Ever thought -- given any thought as to ho
 11 those people end up like that?
 12 **A. It could have something to do with the way the**
 13 **raised.**
 14 Q. Do you ever know many -- have you ever had an
 15 family or friends or maybe coworkers whose kids have b
 16 involved with drugs?
 17 **A. No.**
 18 Q. Pretty lucky, you're a lucky man. You have a pr
 19 good idea, or I guess you just read the newspaper and fig
 20 out what drugs can do to people?
 21 **A. Oh, yes.**
 22 Q. Mr. Schultz was asking you about, along the line
 23 premeditation or sitting down or plotting out a killing. I
 24 we take that kind of person, someone that just plots out
 25 plans and clear-thinking and really, I guess, an assassin.

- 1 of thing, versus somebody who may be drunk, on drugs,
 2 a spur-of-the-moment reaction kind of thing, and they ei
 3 killing somebody, do you think there's a difference as fa
 4 being dangerous between those two people; the cold
 5 calculating, sit down, clear-headed, I'm going to plan --
 6 going to plan out a murder step by step because this is v
 7 want to do versus somebody who may be high, drunk --
 8 **A. I believe on that, sure, drugs and alcohol does**
 9 **change a person to some extent, but also they -- they**
 10 **in a way, they -- they've still got their senses.**
 11 Q. Right.
 12 **A. Is what I'm trying to say.**
 13 Q. Right, right.
 14 **A. Even though they're on something, they still l**
 15 **this is right and this is wrong.**
 16 Q. Absolutely. Okay. Have you ever -- do you ev
 17 drink alcohol?
 18 **A. Yes, occasionally.**
 19 Q. Do you ever -- I do, too. If you're like me,
 20 sometimes I drink what I should drink or less, or somet
 21 drink more than I should. Sometimes -- maybe my wif
 22 say I do or say things that I wouldn't normally do when
 23 got a snout full. Do you ever get that way yourself?
 24 **A. Sure.**
 25 Q. Do you ever know people like that?

1 A. Yes.

2 Q. Any kind of substance, alcohol I mean, we all know
3 some people drink, come home and have a drink, kind of take
4 the edge off. It's a social thing. You know, I'd say most of
5 the parties I go to, there's alcohol served. How people act
6 at the beginning of the evening and how they act the end of
7 the evening can be different?

8 A. Sure.

9 Q. Because they've been drinking, and alcohol, as we
10 all know, will alter your mind. And it's basically why we
11 drink it, I suppose.

12 But, have you ever known somebody that did something
13 while maybe intoxicated or on drugs -- and I'm not going to
14 the degree right now of a murderer or something really, really
15 bad -- but maybe said something to you, behaved in your home
16 or something like that where you said to yourself, either he's
17 drunk or he probably wouldn't have said that, but, you know,
18 he's drunk or he's intoxicated?

19 A. Sure, sure.

20 Q. And do you -- have you ever continued to have a
21 relationship or be friendly or see them in another social
22 occasion or something like that after that?

23 A. Yes.

24 Q. Are -- are you able to -- well, let me just cut
25 right to the chase. What allows you to maintain a friendship

1 ~~I~~ or a social relation with people who at one time you thought
2 maybe misbehaved because of a snout full or something?

3 A. I, again, probably like yourself and a lot
4 other people, I associate with friends and family that
5 occasionally have a drink. Sometimes one of our friends or
6 something might, like you said, if it's a holiday or
7 something, they might get a little blitzed. But if that
8 person was like that every time I saw them, then naturally I
9 wouldn't associate with them anymore.

10 Q. Right, right.

11 A. But knowing that it was a special occasion, or
12 whatever that, you know, I can accept that.

13 Q. Yeah. Do you think people who get themselves in a
14 situation where maybe they're doing too much drinking, they're
15 doing drugs, do you think they can ever change their life?

16 A. I think it's possible. Sometimes that person can't
17 do it theirself, naturally. They're going to have to have
18 help from a professional person.

19 Q. Right, I agree. I noticed we have a couple of
20 things in common. You shoot pool?

21 A. I have my own pool table, so, yes.

22 Q. You got your own?

23 A. Yeah.

24 Q. Brunswick or AMF?

25 A. It's a Brunswick.

1 Q. You go for the top stuff?

2 A. Right.

3 Q. Because, you know, I shoot pool, and I play golf,
4 and I don't do either very well I'll confess. But I can't
5 remember a time I've shot pool where I probably wasn't
6 drinking?

7 A. Right.

8 Q. You get guys together, and you know how that goes
9 sometimes.

10 I noticed in your questionnaire, do you attend a
11 church?

12 A. My wife and I have been looking for a church, and
13 we're, I guess you might say, procrastinating, like a lot of
14 people. We get up on Sunday morning and say we're going to
15 go, and our weeks been long, we're tired. After we read the
16 paper, we don't end up going. So, we feel bad about that, but
17 we do plan to find a church in Plano, is where we live. So, I
18 know there's plenty of them.

19 Q. Are you a Christian?

20 A. Yes.

21 Q. Well, the important thing is, I suppose, if you're a
22 Christian is not whether you get into the church, but how you
23 think about it and your relationship with God. What do you
24 think about Christianity in general and the death penalty?
25 It's a wide-open question; no right or wrong answer. I just

1 would love to hear what you have to say.

2 A. Well, I know that we have to have laws to abide by,
3 and if we didn't have that, we would be in terrible shape.

4 Q. Absolutely.

5 A. But like I said earlier, I've always believed that
6 the good Lord, he knows what each of us do, or have done. And
7 someone that's committed murder, they're going to have to live
8 with that theirself.

9 Q. Uh-huh.

10 A. And I just feel that God will punish them. Now, of
11 course, we have the death penalty in this State, and there's a
12 reason behind that. It was voted in, so, you know...

13 Q. What are your thoughts about people that try to
14 turn their way of thinking around, maybe a conversion to
15 Christianity, try to embrace God and that kind of thing?

16 A. You say turn theirself around?

17 Q. Yeah, at least spiritually.

18 A. I think that's between them and God.

19 Q. Okay. Do you think that can be a sincere thing?

20 A. Yes.

21 Q. Okay. In those special issues that Mr. Schultz was
22 going over with you, do you think any --

23 MR. GOELLER: In fact, can I approach the
24 witness, Judge?

25 THE COURT: Yes, sir.

1 Q. BY MR. GOELLER: This one -- this special issue,
2 Mr. Harrison, again is if -- if you find somebody guilty of
3 capital murder, then we know that's the first question you
4 have to answer, and then this will probably be the last
5 question you have to answer. Taking into consideration all of
6 the evidence, including the circumstances of the offense, the
7 defendant's character and background, do you think that
8 someone's, maybe, conversion to Christianity or embracing God
9 in a way that they can, do you think that might figure into a
10 defendant's character?

11 A. I would say so.

12 Q. Okay. This special issue here is very, very
13 different from all the other questions that you would be
14 asked. As Mr. Schultz told you, the State will have the
15 burden of proof, and they've got to prove to you beyond a
16 reasonable doubt all the elements of the offense. And if it's
17 not capital murder, they have same the burden of proof on
18 murder or robbery or burglary or anything like that. They've
19 always got to prove to you beyond a reasonable doubt. In
20 other words, if you had a doubt about the evidence or the
21 elements of the offense based on reason, the judge would tell
22 you you'd have to find somebody not guilty.

23 But, when we're talking about burdens of proof, and
24 we get to this special issue here, the probability the
25 defendant would commit criminal acts of violence, the State

1 has to prove that one beyond a reasonable doubt as well and,
2 of course, that has to be a unanimous verdict to answer that
3 question yes, okay? So, they have to prove to you beyond a
4 reasonable doubt -- what does that mean to you, by the way?
5 That's another one of those legal terms that Judge Sandoval
6 will give that term to you in his charge of the court. But
7 our present state of the law really doesn't define it.

8 What does that mean to you, "beyond a reasonable
9 doubt"?

10 A. In other words that they found this proof, and as
11 far as they can find there's nothing else -- you know, that's
12 the proof they've found.

13 Q. Okay.

14 A. It's solid, in other words, is what I'm trying to
15 say.

16 Q. I know in your questionnaire, I don't think you've
17 ever been involved in a lawsuit?

18 A. No.

19 Q. Have you ever had anybody come out to your house, a
20 roofer or plumber, or anybody do work on your house?

21 A. Yes.

22 Q. Have you ever been less than satisfied with some of
23 the work?

24 A. Absolutely.

25 Q. What sticks out in your mind?

1 A. What am I going to do next?

2 Q. Tell me about this type of repairman. Who was
3 or what kind of business were they in?

4 A. They was independent, Jack-of-all-trades, in
5 words, type of deal.

6 Q. What were you having them do?

7 A. I was having them -- I have a swimming pool,
8 was having some brickwork repaired on the wall beh
9 and brickwork along the border all the way around n

10 Q. Uh-huh.

11 A. And --

12 Q. Bad job?

13 A. Well, the guy came out and gave us an estimat
14 seemed like it wasn't going to be a problem to do the
15 that he was going to be able to do it pretty fast, and w
16 were satisfied with the figure and how long it was goi
17 take him. Well, the time got to be longer than what w
18 thought, and it was like I was begging him to please f
19 you know. So, I don't know whether he was going to
20 not eventually, I guess, you might say.

21 Q. What kind of job did he do?

22 A. Myself?

23 Q. No, the brick guy.

24 A. Oh, he did a good job. He did a good job in th
25 end.

1 Q. Let's say for a minute he did a bad job. The
2 was -- he didn't use enough water or too much lime,
3 much -- whatever --

4 A. Calk?

5 Q. -- you got bad mud. The bricks are coming
6 The mortar joints are falling out, but you paid this g
7 bunch of money, and you got a bad job. He won't p
8 money, or he won't give you any money back or wo
9 and make it right, so maybe you sue him. You know
10 really take it from him so I suppose you've got to go
11 court of law.

12 And you would have a burden of proof in tha
13 You've got to prove to a judge or a jury that he did l
14 and your burden of proof is what we call by a prepc
15 the evidence. You've got to tip the scales in your fa
16 to 49. Maybe you'd prove a lot more anyhow. And
17 theoretically if you do that, you should be awarded
18 should win that lawsuit. You proved 51. Your side
19 scales tipped more in your favor than his, so that a
20 would probably order that brick-layer or repairman
21 money. That's what we call by a preponderance of
22 evidence; 51 to 49. We'll call it that.

23 We basically have three kinds of evidence in
24 law, or burdens of proof. Have you ever heard ab
25 parents who maybe starve their kids. Remember th

1 that's been in the media, the couple that locked that kid in
 2 the closet for --
 3 **A. Right.**
 4 Q. -- I don't know if it was months or years. Well,
 5 the State obviously should move in and terminate those
 6 parental rights. I mean, those people should not parent that
 7 child anymore. So, the State would file a lawsuit to
 8 terminate the parental rights, and they've got to prove more
 9 than that 51/49 that preponderance. They've got to prove
 10 what's called by clear and convincing evidence. And we do
 11 define that, that's beyond a moral certainty, okay?
 12 And what does that mean to you, a moral certainty?
 13 **A. Well, we all have morals, standards to live by.**
 14 Q. That's a pretty --
 15 **A. Broad statement?**
 16 Q. Right.
 17 But if the proof has to be of such a nature that it
 18 really rises to a moral certainty, that's a lot of proof?
 19 **A. Yes.**
 20 Q. That's a high burden, because the State wants to
 21 take someone's children away forever.
 22 And we finally get to the burden of proof we're
 23 going to use in this case and that's beyond a reasonable
 24 doubt. We know, although it's not really defined, we know
 25 that it's higher than that clear -- we have preponderance of

1 the evidence. Then we have clear and convincing evidence in
 2 those other kinds of civil cases, and finally we have beyond a
 3 reasonable doubt.
 4 Are you getting a feel for how good the proof has to
 5 be?
 6 **A. Sure.**
 7 Q. It's a pretty high burden to meet.
 8 **A. Right.**
 9 Q. That's what we're kind of going to be dealing with.
 10 Now, getting back to that first special issue.
 11 Mr. Schultz asked you about probability, and I don't know if
 12 you said -- I can't remember. Did you say you used that word,
 13 or you come across that word in your work?
 14 **A. He mentioned about -- I guess you could say that in**
 15 **all positions you're going to have probability.**
 16 Q. Yeah.
 17 **A. And mine included, so...**
 18 Q. I think Bill mentioned that you probably -- and I'm
 19 sure you are -- I know you're better at math than I am. What
 20 does that mean, if you were going to use a scale of zero to
 21 100; 0 percent to 100 percent certainty, where does
 22 probability fit in there for you, Mr. Harrison?
 23 **A. Probably 30 percent.**
 24 Q. 30 percent?
 25 **A. Being it's something might not work, or could be a**

1 defect with whatever.
 2 Q. Okay. Do you think -- when you say 30 percent,
 3 somewhere around there. Obviously, it's less than 50 percent
 4 is how you think of that. Well, when this says when there is
 5 probability that the defendant would commit criminal acts of
 6 violence that would constitute a continuing threat to society,
 7 are you saying -- I'm trying to read you when you say 30
 8 percent.
 9 **A. Oh, okay. I see what you -- I guess it depends on**
 10 **the circumstance. I was using my work as an example, just due**
 11 **to every-day things that occur.**
 12 Q. So this may not fit in too well with hard sciences
 13 and mathematicians and physicists and things like that. I
 14 don't know if the Legislature was thinking about that or not.
 15 **A. On that particular statement, I would say 50**
 16 **percent. I'd raise it up to 50 percent because --**
 17 Q. Maybe more probable than not?
 18 **A. Yes, absolutely.**
 19 Q. Did you know what the weather forecast was going to
 20 be for today?
 21 **A. I heard yesterday it's going to be in the high 90s.**
 22 Q. Seems like that every day.
 23 Do you ever use an umbrella?
 24 **A. Yes.**
 25 Q. When do you use your umbrella? Let's say you get up

1 in the morning and you're fixing to go over to Raytheon, but
 2 it's not raining. The sun is out, like a lot of mornings.
 3 When does that -- when that weather forecaster tells you, you
 4 know, chance of rain today, X-percent chance of rain. When do
 5 you key in to maybe grab the umbrella and put it in your car?
 6 **A. Usually when it's about 50 percent. 40 to 50**
 7 **percent, I'd say.**
 8 Q. Okay. If we talk about that word "society," and
 9 Mr. Schultz told you we'll have a difference of opinion on it.
 10 Do you understand that if you get to this question, we already
 11 know it's either going to be life or death?
 12 **A. Right.**
 13 Q. No doubt about it if you get to these questions.
 14 What do you think society means then? If you know
 15 if you're answering this question it's either life or death,
 16 what does society really mean to you?
 17 **A. Well, I know that person is not going to be out.**
 18 **They're going to be in the prison system.**
 19 Q. Okay.
 20 **A. So, again, it's -- the society then is dealing**
 21 **strictly with the prison system.**
 22 Q. Okay. Do you think the prison system does a pretty
 23 good job of controlling people?
 24 **A. I feel like they do.**
 25 Q. Okay. Let's say in our business sometimes, as

1 Mr. Schultz said, sometimes people have to go to the
2 penitentiary for the crimes they commit. I'm trying to think
3 of a recent case. I had to represent a guy that had way too
4 many DWIs. It was his 4th or 5th one. He had to go to the
5 penitentiary.

6 Do you think the penitentiary -- and that man's
7 problem was -- it wasn't even beer. It was hard liquor, but
8 his problem was liquor, alcohol, and the judge felt that he
9 had a break the chain. The probations weren't working. The
10 AAs weren't working, so he went to the penitentiary. Do you
11 think the penitentiary would take -- solve some of his
12 problem?

13 A. Yes.

14 Q. Because he what?

15 A. Drank.

16 Q. Can't drink, can't get alcohol --

17 A. Yes.

18 Q. -- right?

19 I've seen movies where they make bathtub gin, but
20 generally speaking in the penitentiary you're not going to go
21 buy a bottle of Vodka, and you're not going to be able to
22 drink every day. Do you think that's kind of true of people
23 that use drugs, too?

24 A. Yes.

25 Q. They can't go get cocaine. They can't just buy it.

1 They can't be high all the time. Do you think the
2 penitentiary is good in preventing or helping people not get
3 access to the things that may ruin their life?

4 A. Right.

5 Q. On -- there's one question.

6 MR. GOELLER: Can I approach the witness?

7 THE COURT: Yes.

8 Q. BY MR. GOELLER: On, I think it's page 9,
9 Mr. Harrison. My copy may have been -- they just photocopied
10 these things. This one question I don't know -- I don't think
11 you circled one. You may have thought it was --

12 A. Oh, okay.

13 Q. It's not that important. I just thought I might
14 touch on it with you.

15 A. The one that you have here?

16 Q. Yeah, this one here. They're wanting you to circle
17 one of those.

18 A. Oh, okay.

19 Q. Not this first line or this second. But I guess you
20 read those four lines and circle which one applies to you.

21 A. Okay.

22 Q. Which one? When I make up my mind, I rarely change
23 it. All right.

24 If you were a juror in this case, I think the
25 judge -- the judge will instruct everybody that's a juror

1 that, you know, you can't make up your mind; in other v
2 you can't vote or really decide until you've heard everyt
3 Do you know what I'm saying?

4 A. Right.

5 Q. And if we get into the punishment phase of the
6 trial, then we're talking about these -- really these two
7 issues here. Are you -- do you work at Raytheon -- do y
8 work really by yourself or are you in a group or team?

9 A. Okay. I am in a group of about eight people,
10 work -- they are downstairs, and I work upstairs in
11 office-type environment.

12 Q. Okay. When you tell me -- when you circled the
13 answer. I guess I circled it for you, when you make up
14 mind, you rarely change it, are you able, though, to sit
15 down -- let's say you were a juror in this case, and you'
16 going to have 11 other people back in that jury delibera
17 room with you. Would you listen to other views, opinio

18 A. Yes.

19 Q. Is it possible someone could change your mind?
20 know after you hear them out and they hear you out, an
21 compromise and exchange ideas, that kind of thing?

22 A. I would say this here, that, again, I've never t
23 involved in anything like this, but --

24 Q. And hopefully you never will again.

25 A. What I was going to say is I -- on something c

1 nature, if it's -- were work-related or whatever, you know
2 listen to what others have to say. But this, I don't know
3 would change my mind from hearing the evidence of hear
4 some other person said. I don't know.

5 Q. Just going to have to wait to cross that bridge when
6 you get to it?

7 A. (Nods head.)

8 Q. That last special issue, if you were a juror that
9 you might be dealing with, when we say taking into
10 consideration all of the evidence, including circumstances of
11 the offense. If a killing indeed took place you would
12 probably want to know the why. Would that be important to
13 you?

14 A. Yes.

15 Q. And I know we -- Mr. Schultz discussed with you, ar
16 your answers were that all people, you know, human life -- i
17 I heard you right, human life is sacred. It doesn't matter
18 whether it's the nun or the drug dealer?

19 A. Right.

20 Q. I don't think anybody would -- I certainly hope
21 nobody would disagree with you that a human life is sacred.
22 But, the deceased, if you are dealing with the character of
23 the deceased, do you think that might come into play in this
24 special issue -- you know, the circumstances of the offense.
25 What the law says is you take into consideration all of the

1 evidence, including circumstances of the offense.
 2 Do you see -- let me ask you this. You read the
 3 newspaper and you watch television. Lots and lots of people
 4 out there lose their lives every day. People are murdered.
 5 People get in car accidents. Mr. Schultz mentioned Timothy
 6 McVeigh. I think you wrote you followed that trial a little
 7 bit?

8 **A. Right.**

9 Q. Of course, he sat down and over many months plotted
 10 and schemed to get those fertilizers and timing devices and
 11 ignition devices, loaded up the truck, parked in front of a
 12 federal courthouse where, apparently, he knew children were in
 13 there, and we know what happened.

14 **A. Right.**

15 Q. 168 people dead.

16 That's a good example of, really, premeditation.
 17 Not just intentionally and knowingly doing it, but lots and
 18 lots of thought and planning, hundreds of miles and spending
 19 hundreds of dollars, reading manuals to try to figure out how
 20 to get that device to do that kind of damage that it did.

21 That's a good example. Maybe other kinds of murders
 22 are, maybe between drug dealers or somebody that gets killed
 23 is a drug dealer himself, and they may get into an argument.
 24 Something may go wrong. Do you see a difference in the
 25 mentality or the premeditation, so to speak, between those two

1 kinds of people?

2 **A. Sure.**

3 Q. Do you think that could figure into -- you know, and
 4 I think Mr. Schultz alluded to it, a guy like Timothy McVeigh,
 5 when you're answering that first special issue, there may be a
 6 case like that where you could answer that question yes just
 7 based on the kind of thought process that had to go into
 8 blowing up that courthouse. Do you know what I'm saying?

9 **A. Yeah.**

10 Q. Do you think you could think about it differently,
 11 though, where maybe something was off the cuff, somebody was
 12 on drugs, the deceased was kind of a bad actor himself, drug
 13 dealer and maybe they had a relationship, who knows? But do
 14 you kind of see a difference between those two kinds of
 15 people?

16 **A. Yes, I can.**

17 Q. And do you think that might figure into both these
 18 special issues?

19 **A. It could, yes.**

20 Q. Okay, okay.

21 On the very first page of the questionnaire,
 22 Mr. Harrison, regarding your views of capital punishment, they
 23 kind of gave you five choices.

24 MR. GOELLER: Judge, may I have continuing
 25 permission to approach?

1 THE COURT: Yes, sir. Throughout the voir dire
 2 both sides can approach without saying.

3 MR. GOELLER: I apologize for walking up, not
 4 having asked before.

5 THE COURT: That's all right.

6 Q. BY MR. GOELLER: They kind of gave you five choices.
 7 I believe the death penalty should be imposed in all capital
 8 murder cases. It's appropriate in some, and I could give it,
 9 although I do not believe the death penalty should ever be
 10 imposed as long as the law provides for it, I could assess it
 11 under the proper circumstances. Kind of in the middle of the
 12 road out of five, and you chose three. Is that how you feel
 13 today?

14 **A. Like I said earlier, I'm not one that would have the
 15 enjoyment of seeing one -- someone put to death. I saw so
 16 much when I was in the war myself. But for someone to
 17 deliberately do something, to take a life deliberately it's
 18 different, and I don't really accept that. I would vote for
 19 the death penalty.**

20 Q. Because I -- I guess I want you to know that if we
 21 get -- if we get to these special issues, in order to answer
 22 these special issues, do you -- it will be -- you will have
 23 already found that somebody intentionally took another
 24 person's life, okay? Because that's -- you have to find that
 25 before you even get to these. The guilt-innocence phase of

1 the trial -- the first phase, you may be asked the question --
 2 well, do you find that this person intentionally killed this
 3 other person or persons in the course of either committing the
 4 robbery, burglary, or killing two people, something like that.

5 And the judge would tell you that you have to
 6 find -- to find them guilty, you'd have to find that the
 7 killing was done intentionally or knowingly, okay? And we use
 8 that word intentionally. I think you know what that means.

9 **A. Right.**

10 Q. The judge would tell you it's your intent, your
 11 specific desire to engage in the conduct that caused the
 12 result?

13 **A. Right.**

14 Q. So we've already found somebody intentionally killed
 15 somebody. So, then we get -- so they've been found guilty of
 16 capital murder. Then we move into guilt -- the punishment
 17 phase; life or death. Are you telling me that if -- and I may
 18 be reading you wrong, but it's really important I understand
 19 this. From what you just told me a minute ago, are you going
 20 to vote to impose the death penalty because you have already
 21 found that they intentionally killed somebody? Do you see
 22 what I'm saying?

23 **A. I'd be very strongly for that.**

24 Q. Okay.

25 **A. Just from my beliefs of life itself, I'd say to**

1 **myself, would I do that to another person? How could anyone**
 2 **do that to another person? And I say no, so it's hard for me**
 3 **to be on that person's side for life up against death when,**
 4 **you know, they chose that's what they wanted to do.**

5 Q. I know exactly --

6 **A. I can't sympathize, in other words, with that life**
 7 **sentence thing.**

8 Q. And like I told you, there are no right or wrong
 9 answers, and I'm -- I commend you for your service back in the
 10 '60s to begin with, and I commend you even more for your
 11 honesty.

12 What you're telling me the bottom line is, because
 13 you've already had to have found somebody intentionally took
 14 the life of somebody else, you really cannot fairly consider
 15 these questions because you believe that you will vote the
 16 death penalty anyhow?

17 **A. Yes.**

18 Q. Okay. All right, sir. I thank you for your
 19 honesty. That's exactly what I wanted to know. Okay. And
 20 that's -- like I said, it's absolutely okay to have that
 21 feeling because I think Mr. Schultz says only you know -- you
 22 know the position I'm in. I've got a life -- my life is
 23 dedicated to that kid right now, and I've got to know these
 24 things.

25 If you know going into this, I have found that the

1 defendant intentionally and knowingly took the life of another
 2 person or persons, and if I have found that and I find them
 3 guilty of capital murder, you cannot give -- you really can't
 4 consider those special issues because your mind is already
 5 predisposed, and you're going to vote the death penalty
 6 because of what they've already done, your guilty verdict?

7 **A. I'd feel very strong about it, yes.**

8 Q. Okay, okay. You're speaking to me from the heart
 9 and from the mind right now?

10 **A. Right.**

11 Q. And I already know, and that's why I wanted to ask
 12 you that question of the one that wasn't circled. Your
 13 mind -- that's way you feel. Your mind is made up on that
 14 issue, and no one is likely to change that because that's the
 15 way you feel and there's nothing wrong with that.

16 **A. That's the way I feel.**

17 Q. Okay. And --

18 **A. I'd say this here: I think I would be one of those**
 19 **people that if I voted without my gut instinct, whichever the**
 20 **way the trial ended, I would end up leaving feeling bad,**
 21 **myself that I didn't go with my own feelings.**

22 Q. Okay. And your feelings about this whole issue
 23 really don't consider the special issues. You're of the
 24 opinion that if somebody intentionally and knowingly committed
 25 capital murder, they should pay the ultimate price with the

1 death penalty?

2 **A. Yes.**

3 Q. And that the special issues for you personally dor
 4 figure into it? You really can't follow the law regarding
 5 mitigation and that probability of criminal acts of violenc
 6 because what you've told me is your mind is already mad
 7 you have found them guilty of capital murder already. Y
 8 don't need those special issues because your beliefs are th
 9 should get the death penalty?

10 **A. I'd have to go with my beliefs. I guess you cou**
 11 **just say I'm a very strong person on -- everyone -- all**
 12 **has made mistakes in our lives --**

13 Q. Right.

14 **A. -- including myself, and -- but taking another**
 15 **person's life deliberately, I have a hard time with tha**

16 Q. Okay.

17 **A. And, you know, being punished is one thing, b**
 18 **just don't believe in it.**

19 Q. Your personal beliefs in this area, having found
 20 somebody guilty of capital murder, and you used the wo
 21 "deliberately." I believe the word the judge would use is
 22 intentionally.

23 **A. Right.**

24 Q. They mean about the same thing to you?

25 **A. Yes.**

1 Q. Okay. Your personal beliefs would substantia
 2 impair your ability to fairly consider those special iss

3 **A. Yes.**

4 Q. Okay, all right. Okay.

5 Thank you, Mr. Harrison. Do you have any qu
 6 for me, by the way, about anything?

7 **A. No.**

8 Q. Okay.

9 MR. GOELLER: Thank you for coming do
 10 today, sir.

11 THE COURT: Anything else?

12 MR. SCHULTZ: Depends on what they do
 13 there's a challenge, then I'd probably be able to rehab
 14 the juror. If there's not a challenge, then we don't hav
 15 anything else.

16 THE COURT: Do you want to step down a
 17 minute? We'll see you in a minute.

18 VENIREPERSON: I've got one question to

19 THE COURT: Sure, absolutely.

20 VENIREPERSON: I noticed on there -- or
 21 said from the beginning of the first day, if you have h
 22 felony. and I stated on there that I did have a DWI ba
 23 1983.

24 THE COURT: Right.

25 VENIREPERSON: I was fined, never was

1 a jury or anything like that. I did my probation, learned my
2 lesson and paid my dues.

3 THE COURT: In fact, I think you told us on
4 Tuesday, didn't you?

5 VENIREPERSON: I don't believe I did.

6 THE COURT: You didn't?

7 VENIREPERSON: No, sir.

8 THE COURT: I thought you were the fellow that
9 had.

10 VENIREPERSON: I don't know if that
11 disqualifies me.

12 THE COURT: No. Where was the DWI?

13 VENIREPERSON: In Dallas.

14 THE COURT: And you got probation?

15 VENIREPERSON: That's all I had, and I paid a
16 fine and was on probation I think, like, six months or
17 something like that.

18 THE COURT: I appreciate that.

19 VENIREPERSON: And I learned my lesson from
20 that.

21 THE COURT: I appreciate that.

22 VENIREPERSON: Anyway --

23 THE COURT: We might have you back in a minute.

24 VENIREPERSON: Oh, okay.

25 THE COURT: All right. The juror is outside.

1 follow your instructions even -- in other contexts if he
2 didn't agree with them. For example, he apparently thinks the
3 burden -- or apparently did think the burden of proof was on
4 the defendant to show his innocence, but when couched in terms
5 of what if he had an instruction the other way, he seemed
6 willing to do it. We certainly have a right to rehabilitate
7 the juror.

8 THE COURT: You want to give it a shot?

9 MR. SCHULTZ: (Nods head).

10 THE COURT: All right. Let's bring him back
11 in.

12 (Brief pause in proceedings.)

13 THE COURT: All right. The juror is still
14 outside.

15 MR. GOELLER: I guess this is partly my fault
16 because I didn't talk about it with Bill and you beforehand,
17 but I want to avoid the situation where -- maybe I should have
18 spoken up. I wasn't -- didn't know what I was going to do
19 next.

20 Mr. Schultz asked the court if he's going to be
21 challenged, we want to rehabilitate, and I think the juror
22 heard that, and I want to kind of avoid that in the future.
23 I'm not pointing to him. It's probably my fault, but if we
24 could have a -- I think we need to discuss exactly how we're
25 going to do this so jurors don't hear that again.

1 MR. GOELLER: Yes, Your Honor, the defense
2 submits this juror as a challenge for cause. This juror is
3 classic, what we call, (inaudible) response juror. He's told
4 the court he will not give fair consideration to the special
5 issues based on his personal views in favor of the death
6 penalty. I approached the juror because his questionnaire was
7 incomplete, and low and behold he circles the answer once my
8 mind is made up -- he didn't circle it. He stated it. It's
9 on the record, once my mind is made up, I'm not changing, or
10 not likely to change it.

11 The juror is challenged for cause under Morgan
12 versus Illinois and having that juror on the panel -- or
13 excuse me. Not granting that challenge for cause violates my
14 client's Eighth Amendment rights and his 14th Amendment rights
15 of the United States Constitution.

16 Thank you, judge.

17 THE COURT: Anything from the other side?

18 MR. SCHULTZ: We'd like to talk to the juror
19 now on those issues.

20 If that's what he thinks, then that's fine. I
21 don't have any quarrel with it, but I think you saw the entire
22 proceeding, and I'm not sure at that point what his answers
23 are to those, and they were never couched in terms of you
24 giving instructions to these effect -- (inaudible). As a
25 matter of fact, I recall him pretty clearly saying he would

1 THE COURT: And I think there's not a
2 problem --

3 MR. SCHULTZ: Maybe just ask if the juror can
4 be excused.

5 THE COURT: And we hadn't discussed sequence.
6 Not looking too good for this juror staying on the panel, but
7 let's bring him back.

8 MR. SCHULTZ: Let's hear what he's got to say.

9 MR. GOELLER: Oh, I think he said it.

10 MR. SCHULTZ: But he's got more to say.

11 MR. GOELLER: He does?

12 THE COURT: All right. Mr. Schultz.

13 REDIRECT QUESTIONS

14 BY MR. SCHULTZ:

15 Q. Mr. Harrison, I want to make sure that what you said
16 in response to some of Mr. Goeller's questions where how you
17 really feel, and if they were, we've got no problems.
18 Everything is fine.

19 I know this process, sometimes you come out of here
20 almost feeling that people put words in your mouth. That
21 could be me, could be Mr. Goeller. I'm not picking on
22 anybody. We do a lot of talking, and sometimes it's almost
23 easier to go along than it is to -- especially when you're
24 tired. Do you know what I'm saying?

25 A. Yes, sir.

1 Q. Everthing I heard from you indicated to me that
2 you're a man that believes in following the law?
3 **A. Absolutely.**
4 Q. Okay. I don't know what your views were when you
5 went to Vietnam, and I'm not going to ask you. They're
6 probably different now than they were then for all I know, but
7 I suspect you were the kind of man that believed -- if you
8 were over there with Third Marine Division, your duty was
9 pretty clear what you had to do?
10 **A. Yes, sir.**
11 Q. And maybe if somebody made you general for a day,
12 you'd have a different view than what the general's were
13 doing. But nevertheless you followed the rules because that's
14 the kind of person that you are. Is that a pretty fair
15 statement?
16 **A. Yes, sir.**
17 Q. When you're on a jury -- when you come up as a
18 prospective juror it's pretty -- it's pretty regulated what
19 everybody can do. In other words, there are a lot of rules
20 that govern all of our conduct here, right? I don't know if
21 it would be illegal for me to come out tonight and have a
22 beer with you or not if you were on the juror. It would be
23 real bad form, and I wouldn't want to have to face the judge
24 or the grievance committee the next day with having done such
25 a thing. Doesn't mean I don't like you or that, you know, I

1 wouldn't like your company. You can't do stuff like that
2 because of the trial; do you understand that?
3 **A. Right.**
4 Q. And the judge -- you're not going to see much
5 arguing. The lawyers aren't going to get out of control.
6 He's not going to let the lawyers misbehave or fight or fuss
7 or treat people badly. There are rules that govern all that.
8 That's kind of how -- those are the rules that govern the
9 lawyers, and Mr. Goeller and I, and Mr. High and Ms. Falco and
10 Ms. Lowry, we all understand that. We follow those rules that
11 govern us.
12 It may not seem like it, but Judge Sandoval has
13 rules he has to follow. He has to answer to appellate courts.
14 He has to answer to oversight, kind of the divisions of the
15 judiciary and commission, so we all have to follow rules to
16 the best of our ability. And the judge can't just do what the
17 judge wants. I can't just do what I want. The court reporter
18 can't get tired taking down notes, and say, well, I'm tired
19 of this. I don't care if there's a record or not, even though
20 the law says I've got to be doing this. My fingers are tired;
21 I want a break.
22 **A. Right.**
23 Q. The bailiffs can't just leave the courtroom and
24 leave the courtroom unprotected. Everybody has got to follow
25 the rules.

1 **A. Yes, sir.**
2 Q. As a juror your duties are to follow the law the
3 judge gives you in answering questions, even if you d
4 agree with them. And you understand that idea?
5 **A. Sure.**
6 Q. You may be the kind of man in a trial that doe
7 like the insanity defense and thinks it has no place in
8 law, but if the judge tells you you've got to consider th
9 insanity defense, to be a good juror you have to give f
10 consideration to that.
11 Now, if you're the kind of juror that just says I
12 can't do that. I hate the insanity defense so much. I v
13 just got such strong feelings, and no disrespect to the
14 but I'm not going to follow his instructions. Then, tha
15 fine. That's not a problem if that's how you feel, but I
16 don't get the feeling that's what we're really talking ab
17 here, that you would disregard the law or disregard th
18 instructions because that doesn't seem like it's you to
19 **A. No, it's not.**
20 Q. Well, if I understood the way you were answe
21 Mr. Goeller's questions, I understood his question to y
22 be that you already found somebody guilty of capital
23 **A. Right.**
24 Q. -- at the first phase of the trial, which under o
25 law includes there has to be an intentional killing?

1 **A. Yes.**
2 Q. I believe his question to you was, in effect, are
3 you pretty much an automatic death penalty person aft
4 as a juror?
5 **A. Right.**
6 Q. I'm certainly paring down what he said, and the
7 are not his words, but that's the sense that I got from hi
8 that because of how you view the world, you're pretty
9 going to automatically give the guy the death sentence
10 though the law says you have to consider punishment
11 and the punishment issues. And I thought I heard you
12 to that being, yeah, that's right. Even though the law s
13 otherwise, I'm the kind of a man that believes if you d
14 capital murder, you're going to get death because that'
15 am. Is that what you were saying?
16 **A. Yes, it was.**
17 Q. And is that how you feel?
18 **A. I'm very strong on that. Like I said I -- I**
19 **would -- you know, I would hear -- in other words,**
20 **going to say that if I was on the jury I would go in t**
21 **because this person did capital murder they're -- I'**
22 **give them the death penalty.**
23 Q. Okay. That's what I thought. Remember what
24 that you might be -- you might be the one in a hundre
25 person. Your neighbor might be one in 50; you both l

1 Just because you might be harder or softer on punishment, as
2 long as you could go both ways according to the evidence.

3 **A. Right.**

4 Q. Are you telling me you couldn't go both ways
5 according to the evidence of the punishment phase?

6 **A. I could go both ways.**

7 Q. Okay. Then let's talk about it so we're clear on
8 these issues, because I thought that's what you were saying.

9 Let's say we've proved to you the person was a
10 capital murderer. He intentionally caused the death of two
11 people, or he intentionally caused the death of somebody while
12 he was robbing a place, all right? But what if we -- what if
13 the person is not dangerous now? What if the evidence is
14 clear that that individual is not a threat to society, what
15 would the answer to that question be, if he's not dangerous?
16 Is the answer no?

17 **A. He killed a person, right.**

18 Q. He killed somebody, but --

19 **A. And they're saying he's not a threat to society.**

20 Q. Well, you don't believe it. You're the juror and
21 you don't believe it. Let me give you an example --

22 **A. It had to be proven to me why he would not be a
23 threat to society.**

24 Q. Well, you understand there's a situation where that
25 would be the case, where a person wouldn't be dangerous even

1 though he did an awful crime?

2 **A. Rights.**

3 Q. What if, when the police arrested him, they shot him
4 in the spine and he's paralyzed from the eyebrows down, for
5 example? Can't be dangerous then, right?

6 **A. Right.**

7 Q. What if he had a massive stroke when he was in the
8 jailhouse awaiting his trial, and he's paralyzed completely,
9 right?

10 **A. Right.**

11 Q. There are situations where somebody would not be
12 dangerous.

13 What if the reason for the killing was one you
14 understood and made sense to you. Remember that example of
15 the guy that killed the killer of the child because the
16 criminal system let him down. Do you remember that?

17 **A. Yes.**

18 Q. That might be a capital murder, depending on how he
19 did it. That might exactly be a capital murder, but maybe
20 that person is not dangerous to society. Maybe he's been a
21 great guy all his life and will be again. Do you follow what
22 I'm saying?

23 **A. Yeah, I do.**

24 Q. The question is not whether or not you believe that
25 most capital murderers are probably going to be dangerous

1 because that might be how you think. You might think that if
2 you can do the conduct that amounts to capital murder, mostly
3 you're going to be a dangerous person because who else could
4 do that sort of thing? But you have to fairly recognize --
5 and I don't mean just agree with me. You have to fairly
6 recognize that there are situations where even somebody who
7 has committed a capital murder will no longer be dangerous, or
8 is not dangerous, except for that situation. And if you're
9 telling me -- if you're telling me you don't recognize that or
10 you can't do that, then I'm not quarreling with you. That's
11 kind of where we are.

12 **A. I see.**

13 Q. You're the one that knows. If somebody is found
14 guilty of capital murder are you going to just -- is the
15 State's job finished, and are we going to get a death sentence
16 out of you? Once you find him guilty, are you going to shut
17 down on the rest of the evidence?

18 **A. No.**

19 Q. Why not?

20 **A. I'd say that I'm a fair person.**

21 Q. Okay.

22 **A. That I would want to hear all the evidence.**

23 Q. Okay.

24 **A. And then I would base my opinion on that.**

25 Q. Okay. These questions we're asking you,

1 Mr. Harrison, does it seem to you like we're just asking
2 what's your opinion? Just tell us what you think without
3 giving you any guidance on how the law works? Do you have
4 that feeling?

5 **A. No. No, I don't.**

6 Q. Because the judge is going to tell you certain
7 things, and truthfully if you can fairly follow all the
8 instructions the Court gives you, you're a qualified juror.
9 You might not be the kind of juror the State would want on the
10 jury, but you're qualified. Then we have to do something else
11 with you because you're qualified. You might not be the kind
12 of juror the defense would want on the jury, but if you can
13 fairly follow all of the instructions of the Court, you are
14 entitled, as a citizen, to bring your strong views on
15 punishment or your strong views on rehabilitation or your
16 mercy or vengeance, or whatever you have, you can bring all
17 that here, but you have to be able to follow the Court's
18 instructions which deal with looking at the evidence and
19 applying the law to that evidence, all right?

20 **A. Can I say something?**

21 Q. You bet.

22 **A. And I said this earlier, I don't know if it has any
23 bearing. Anything where there's a lot of stress involved I
24 have a hard time with under my situation.**

25 Q. I understand.

1 A. My arm and my whole side tightens up. But, I thank
2 God I'm not as bad off as I could be, and I understand that.
3 But, being that it's this type of case -- and I'm a sound
4 person, or I wouldn't be working where I'm working. But I
5 don't know, to be honest -- I'm being honest.

6 Q. I know you are.

7 A. I don't know how I would hold up for the duration of
8 time that we're looking at on this to be a very good juror,
9 and I'm being honest about that. I can't really say how, you
10 know, stressful-wise -- I just look at the way that I feel on
11 that.

12 I believe in abiding by the law, and like I said,
13 sure, I'd want to hear all the evidence and everything else,
14 but I'm a strong believer that, you know, taking someone's
15 life deliberately, I just have a hard time with --

16 Q. I hope we all do.

17 A. -- of, you know...

18 So I understand everything that all of you have gone
19 over.

20 Q. Okay. Well, which is it then? Are you going -- are
21 you going to fairly consider the punishment evidence or are
22 you not, because you've said both? And I'm not fussing with
23 you. I'm just saying that's our difficulty because you tell
24 me --

25 A. I think, to be honest with you, I'm more in favor of

1 the death penalty.

2 Q. Okay.

3 A. If the evidence points towards that they
4 deliberately -- deliberately --

5 Q. All right.

6 A. -- took someone's life.

7 Q. And that may be (inaudible) intentionally. It used
8 to be; I don't know if it still is, but that may be different.
9 But whether you're -- whether you're more in favor of it, or
10 not, isn't the question. The question -- because you can be
11 more in favor of it or less in favor of it. You can be the
12 kind of person that would almost never do it and still be
13 qualified. Are you going to follow the Court's instructions,
14 or are you going to just say he did a capital murder so he's
15 going to get death?

16 A. No. I'd follow the Court's instructions.

17 Q. All right. Is what you're saying you just think
18 you're the kind of person that's going to be more likely to
19 give the death penalty than maybe somebody else? Is that what
20 you're saying?

21 A. Could be, to a certain extent, yes.

22 Q. Would you consider the evidence in mitigation and
23 see if you find sufficient mitigation evidence to warrant a
24 life sentence?

25 A. Yes.

1 Q. Would you do that?

2 A. Yes.

3 Q. And maybe you don't do it as much as the next guy,
4 but because of how you are, you don't do it as frequently.
5 But you could do it, if it's the right kind of case?

6 A. Yes.

7 Q. You're sure of that?

8 A. Yes.

9 Q. And maybe you would find a capital murderer
10 dangerous with more frequency than somebody else just be
11 of what they've done, right?

12 A. Right.

13 Q. But could you also find that they weren't dangerous
14 depending on the circumstances?

15 A. I have a hard time with that. With that question
16 have a hard time with that.

17 Q. All right.

18 A. See, I'm just -- I guess what you might say is I
19 have a hard time with someone taking someone's life
20 deliberately. You know, I'm taking it that that's what
21 capital murder is. So, I favor more that -- I don't know
22 life in prison would -- I don't know. I guess I'm mixed

23 Q. Okay. What we got to know is whether or not you
24 could make the State prove the Defendant is a continuing
25 threat to society; that is, going to be dangerous in the

1 future? Could you require us to prove it beyond a reason-
2 able doubt? Would you require that of us?

3 A. Yes.

4 Q. And that doesn't mean give me a wing and say you'
5 in, as long as we find him guilty, you've got me. That's not
6 what that means. You've got to give fair consideration to
7 that issue; do you understand that?

8 A. Right.

9 Q. And the fact that -- the fact that most of the time
10 you're going to view a capital murderer as a dangerous per-
11 son because of what they've done --

12 A. Right.

13 Q. -- is -- there's nothing wrong with that unless you
14 say it's automatic. Do you follow what I'm saying?

15 A. Yes.

16 Q. Because the person right next to you might say, but
17 anybody can make a mistake, even a big one, and that does
18 prove anything, and they can be okay, too. They can be on
19 the jury even though the results are going to be real
20 different most of the time between the two of you.

21 A. I see.

22 Q. Are we communicating?

23 A. Yeah, sure.

24 Q. So you've got that obligation to be fair to both
25 sides, and that means to give fair consideration and be

1 willing to consider both sides of all these issues. But it
2 doesn't mean you just have to be right down the middle in
3 order to be qualified. I mean, you might -- I think you've
4 been honest, and what you're saying is that doing a capital
5 murder is a whole, big part of the evidence moving along
6 towards being a dangerous person --

7 A. Right.

8 Q. -- right? But you know it's not automatic?

9 A. Right.

10 Q. And there are some situations where you wouldn't
11 vote that the person was a dangerous person, even though you
12 found capital murders?

13 A. Right.

14 MR. SCHULTZ: State resists this challenge,
15 Judge.

16 THE COURT: There's nothing from the other
17 side, is there, or is there?

18 MR. GOELLER: No, sir.

19 THE COURT: All right, sir. You may step down.

20 THE COURT: Say, I tell you what I think we'll
21 do, not only will we not indicate there was a challenge, but
22 we won't indicate resisting.

23 MR. SCHULTZ: I didn't even think of that. I
24 apologize. I didn't even think of that. Excuse me, Matt.

25 MR. GOELLER: I know you didn't do it

1 A. Yes, correct.

2 Q. You've never served on a jury before, at least in a
3 criminal case; is that correct?

4 A. Yes, that's correct.

5 Q. Now, we read your questionnaire, and a lot I won't
6 repeat, obviously, but some of them I need to repeat for you.

7 When we talked yester -- I'm sorry, when we talked,
8 I guess on Tuesday, a couple of days ago, you will recall that
9 I took some time during the course of the explanation and
10 asked everybody to take a look at the Defendant for a second
11 and actually realize what I was talking about, and what we
12 actually proposed in a very real sense, rather than maybe
13 the -- kind of the theoretical way that we think about these
14 issues in our living room, or when we see some bad crime on
15 television or something like that.

16 First of all, did your feelings -- were you in any
17 way affected, or did you feel a mood change within the room
18 when we talked about that that way? Did you notice any
19 difference, as far as you're concerned?

20 A. Do you mean my personal feelings now?

21 Q. Uh-huh.

22 A. I suppose that it does bring a certain reality to
23 it, rather than making it more abstract. Having the Defendant
24 in the room, I think, makes it more real to the audience.

25 Q. And you understood I wasn't trying to do that to be

1 intentionally.

2 MR. SCHULTZ: Or deliberately.

3 THE COURT: Mr. Harrison is stricken for cause.

4 All right. Let's bring the next person in, and if
5 you would tell Mr. Harrison that he's finally excused, and if
6 you'd bring the next person in.

7 (Recess taken.)

8 DIRECT QUESTIONS

9 BY MR. SCHULTZ:

10 Q. Mr. Rail, how are you?

11 A. Fine, thanks.

12 Q. My name is Bill Schultz. You remember me I'm sure
13 from a couple of days ago. I did the group discussion with
14 your panel. The lady to my immediate left is Ms. Gail Falco,
15 who is the chief felony prosecutor assigned to the 199th
16 judicial district court, and she's on loan to this court for
17 this trial. And to her immediate left is Ms. Jami Lowry, who
18 is a felony prosecutor, also assigned the 380th District
19 Court. The Defendant, moving to your right, is the gentleman
20 in the beige-colored shirt. To his -- to your right from the
21 Defendant, Mr. Don High, a refined private practitioner of law
22 in Plano, Texas, and at the far end of the table is Mr. Matt
23 Goeller, another fine practitioner of law, also working in
24 Plano, Texas and its environment. I don't believe you know
25 any of us, including the Defendant; am I correct on that?

1 entertaining or amusing? You understood how serious this all
2 is to everybody involved in this?

3 A. Yes, absolutely.

4 Q. Okay. Have you always -- looking back on your life
5 and as you've thought about it, have you always favored the
6 death penalty?

7 A. Yes, sir.

8 Q. As you were growing up, were their family members
9 that you believed had positions on the death penalty? Did you
10 discuss it with your mom or dad or uncle or somebody?

11 A. I'm trying to recall. I can't recall any specific
12 conversations. My impression is that my father would be pro,
13 and my mother would be more undecided.

14 Q. Everybody has different views of the death penalty.
15 If you had to pick one reason, and there may be many, but if
16 you had to pick the main reason that you favor the death
17 penalty, what's the main reason you're in favor of it?

18 A. I feel like some crimes there has to be an ultimate
19 punishment. I think that -- and I feel like it needs to be a
20 narrow set of crimes, of course. But I feel like that is the
21 ultimate, so, I guess that's kind of the way my mind works
22 around these issues.

23 Q. Okay. People advance several reasons that we have
24 for punishment in the criminal system for actual infliction of
25 some type of punishment, capital or not. One of those

1 purposes is retribution, or perhaps society's measured
2 response to the infractions against it. You know, if you --
3 if you overpark, you get probably a little fine for that. I
4 don't know what -- maybe 20 dollars, whatever parking tickets
5 cost now. The greater your crime, the greater the infraction,
6 the greater the penalty, kind of in a progressive fashion.
7 Until at some point, the crime becomes so enormous and so
8 unacceptable that to do so -- to do such an act is something
9 that should cost you your life. It's kind of society's
10 measured response to the offenders. Does that make sense to
11 you?

12 **A. Yes.**

13 **Q.** I believe on your questionnaire, and if I've got you
14 wrong, I apologize. I read it a while ago. I believe you
15 indicated that perhaps other crimes, other than murder, in
16 your judgment might be good candidates for capital punishment.
17 And I believe you indicated torture, and I guess that's almost
18 self-explanatory, and treason.

19 **A. Correct.**

20 **Q.** Am I right?

21 **A. That's what I wrote.**

22 **Q.** And treason certainly -- I mean, it hasn't been
23 tested for forever, but it's still assumed that treason is
24 still a capital crime. On the books it is, and the Supreme
25 Court hasn't had to do with issue of anything other than

1 murder for many, many years.

2 Torture probably clearly would not be
3 constitutional, except I'll just tell you, even though you
4 didn't ask. If it didn't result in death, maybe it ought to
5 be, but it wouldn't. I mean, you can boil somebody in oil,
6 but if they don't die it could not be a capital -- it could
7 not be a death penalty offense. The Supreme Court is limited
8 when asked to actually cause somebody's death, so...

9 If somebody said, like, say, maybe a child asked
10 you, you know, Dad, some people like the death penalty and
11 some people don't. Why do people not like the death penalty?
12 What's their opposition to it? What would you explain to the
13 child as probably the best reason why people in good
14 conscience oppose the death penalty?

15 **A. It seems like the best argument is mistaken identity
16 argument.**

17 **Q.** Okay.

18 **A. Where a person is falsely accused, and a justice
19 system has to build up confidence that they've taken all the
20 steps necessary. For instance, interviewing 189 people is
21 one example to make sure they're very thorough and very
22 serious.**

23 **Q.** Just parenthetically, do you think we're being
24 excessive with this process as you've been observing it so
25 far?

1 **A. You know, I don't know an awful lot about it, but
2 impression is no. I was pleasantly surprised because I
3 expected them to go right down the list and choose 12
4 right on Tuesday, so I was presently surprised at the
5 thoroughness, and that people would really interview ser
6 all the prospective jurors. So -- and I would expect tha
7 charge like this is not something that's given lightly. So
8 that's the balance that I'm talking about.**

9 **Q.** Okay. Some people have other -- have voiced other
10 objections to the death penalty. I'm just curious your
11 reaction to that. Some people say that, apart from the
12 defendant's life, it's not a good thing for our society to be
13 in the process of doing killings ourself, and even though
14 they're different because we give somebody a trial and find
15 lawyers and resources and notice and all that sort of thing,
16 and most of these murders, you don't give somebody -- be
17 you murder them, you don't give somebody a lawyer, give
18 somebody a trial. You just go kill them, that kind of thing.
19 Even so, some people say it's not good of society to
20 be doing that. What do you think of that? It's just ugly of
21 us or it's --

22 **A. It doesn't seem consistent, I think, is the
23 argument. You know, how can the State kill itself for
24 who killed. And I agree, it's a difficult -- it's just a real
25 debate, but I think on balance I just come up on the ot**

1 side, but I want to restrict it to very specific crimes.

2 **Q.** Okay. The ones that I talked about yesterday, the
3 being murder in the course of burglaries and robberies and
4 multiple homicides, do those seem reasonable to you, I
5 those are good candidates for the death penalty --

6 **A. Yes.**

7 **Q.** -- as a class of offenses?

8 **A. Right, the capital. Yes.**

9 **Q.** Okay. Another concern that's frequently voiced
10 our society is the fact that it appears that the death pena
11 falls disproportionately on certain classes of our citizen
12 often ethnic or racial. And the argument goes if you lo
13 numerically at the people that are on death row you find
14 much higher frequency of black people, Hispanic people
15 males than their representation in the population. And
16 assume that's accurate, that's really so, and that there is
17 that disproportionate representation on death row. In y
18 mind, does that mean that the death penalty has either
19 purposefully or inadvertently targeted minorities or ma

20 **A. I don't think so. I think that there's a danger
21 confusing causation with a correlation because I thi
22 because -- just because of -- I'm not a statistician, but
23 just seems like there may be more violent crime in l
24 income areas that are -- you know, it may be all con
25 certain ethnic groups, but I don't think that that ne**

1 proves the causation part, which is that we're only
2 prosecuting crimes in the ethnic communities. I don't buy
3 that necessarily. However, there are exceptions that can be
4 pointed to by, you know, rich people maybe get better
5 representation and get a better shake. You know, that's the
6 impression that people might have. But, I think that's
7 anecdotal. I don't know that's truly statistical.

8 Q. And I guess more importantly than all the people
9 that are really on death row now, I guess really more
10 important for our consideration is you, yourself, as a
11 prospective juror, do you see yourself as the kind of person
12 that would get caught up in what gender somebody is or what
13 race or what nationality or what religion somebody is in
14 deciding, first of all, whether they're guilty of capital
15 murder. Secondly, whether they're probably going to be
16 dangerous in the future and are amenable to the death penalty.
17 Do you see yourself as that kind of person that would consider
18 things like that?

19 A. No. I don't see that factoring in. I would just be
20 interested in the evidence I think.

21 Q. I don't know how -- some jurors have more interest
22 in the criminal justice system than others. My usual
23 experience, you seem like somebody that works hard and
24 probably doesn't have near enough free time for things that
25 are really important to you in the family, and so I doubt you

1 just spend lots of time reading about all of this stuff, or
2 you'd have probably decided you want to be a lawyer if you
3 want to read about all this stuff all the time.

4 Before you came in and started talking with us on
5 Tuesday, did you understand that in capital murder cases, even
6 if somebody is found guilty of capital murder, it's not an
7 automatic death sentence just because they've been found
8 guilty of that crime?

9 A. I think so. I think I knew life in prison was an
10 option, but one thing about your process that I wanted to
11 bring up now that you reminded me was that I felt like the
12 questionnaires were given out before people knew what capital
13 murder was -- the difference between capital murder and
14 murder. I wasn't clear on it until you gave your presentation
15 on the murder plus. I knew capital murder was if you killed a
16 police officer, for instance. I knew that much, but I wasn't
17 sure on all the distinctions.

18 So, when you're evaluating the questionnaires, I
19 think that's an important thing to remember. I don't know if
20 that's just by design or not, or if it's just an assumption on
21 your part that people are going to know more, but I consider
22 myself pretty average in that and I wasn't sure --

23 Q. Contrary --

24 A. -- of all the distinctions.

25 Q. I'm sorry. I didn't mean to be talking.

1 A. That's okay.

2 Q. Quite the contrary, in our case, and your point is
3 great, it would be nice if we could give the talk and then
4 give the questionnaires out, but then that sort of almost ends
5 up being a test on what the lawyers have been saying.

6 A. I would have the judge give the talk. That's how I
7 would do it, because if either side gives the talk then I
8 think that people immediately wonder, well, what angle does
9 the prosecution have telling me this. So, I would -- that's
10 how I would have -- I mean, that's just a procedural thing,
11 but it all works out.

12 Q. And it causes lots of confusion, and it causes the
13 jurors lots of confusion because it's like saying, you don't
14 know, and it almost looks like you're against the law somehow,
15 but all it is you just don't know how the law works, and
16 that's how you answered the questions, so your point is
17 well-taken.

18 Under our law, the first phase of the trial is the
19 guilt-innocence phase, and we do that in any kind of case,
20 whether it be a misdemeanor DWI or capital murder. The first
21 question is, are you guilty and if so, of what crime? And we
22 shouldn't call it capital murder. We ought to have a
23 different term for it, probably because then people wouldn't
24 have the same confusions. I would call it aggravated murder
25 or murder plus or something, and then they wouldn't have the

1 confusion of how can you find somebody guilty of capital
2 murder but not give capital punishment? But we don't do that,
3 and they didn't ask me about that.

4 The first phase is, is he guilty of capital murder
5 as alleged in the indictment, and that, for our purposes,
6 includes murder in the course of a burglary, murder in the
7 course of a robbery, or murder of two or more people in the
8 same criminal episode or transaction. And a lot of times you
9 might wonder, why do we charge all different varieties, why do
10 we have all three if it's the same people dead? And the
11 simple answer to that is it gives flexibility to the
12 prosecution in presenting it's case, and if, for some reason,
13 some defect arises under one theory, you've still got the same
14 dead people. You have the flexibility of being able to
15 approach it with another variety that will also meet the
16 proof. So I hesitate to use the term "insurance" because that
17 seems -- it almost seems like it's trivializing what we do,
18 but that's probably a fair representation.

19 If something -- I don't know. If it turns out the
20 habitation that he entered was one he owned. Let's say, he's
21 the landlord somehow, and he goes in there, and he does a
22 murder -- he being hypothetical Defendant. Maybe you don't
23 have a burglary anymore if he was the owner or something. So,
24 we've got these other theories, also. You only convict him
25 one time. It wouldn't be three separate capital murder

1 convictions. It would be submitted as A, B, or C theories is
2 how that works.

3 But if the Defendant is found guilty of capital
4 murder, and that means you have to find all the elements
5 beyond a reasonable doubt -- and the judge will tell you all
6 that in your instructions -- then we move into the second
7 phase of the trial.

8 Real briefly, in the first phase, we have to prove
9 beyond a reasonable doubt, which is undefined in term, but we
10 would all agree -- everybody in this room would agree, it's a
11 substantial, substantial amount of evidence that gives you
12 comfort in believing that the offense was really done by the
13 defendant as it's charged.

14 Then we get to the second phase of the trial in
15 which probably different evidence may be admitted by either
16 side than would be at the first stage because the issues are a
17 little bit different. Same jury, same obligation for
18 unanimity because to answer these questions yes, it has to be
19 unanimous, just like the first part of the trial. To answer
20 them no, there has to be ten or more people that vote no on
21 one of those questions.

22 But more evidence -- evidence that's admissible are
23 things like character evidence, going both ways. The
24 Defendant is entitled, if he wishes, to admit good character
25 evidence, things that are good in his life. Or he's also

1 entitled to admit background stuff that will help the jury
2 fairly in answering these questions. I mean, the trials and
3 tribulations of growing up; physical, mental problems,
4 whatever there may be. He's entitled to do that, if he wants
5 to.

6 We're entitled to do the same thing. We can offer
7 evidence about character, and we can offer evidence of bad
8 things that have occurred, if we do, if they exist. And then
9 ultimately, the jury then is retired and asked to answer
10 certain questions based upon the evidence presented to it, and
11 it's not just the evidence of the second phase of the trial.
12 You can also consider everything you heard in the first phase,
13 also, in answering those questions, which makes sense.

14 If you're going to try to figure if somebody is
15 dangerous, you kind of want to be able to consider the crime
16 he got convicted of as part of that evidence, right?

17 A. (Nods heads).

18 Q. Some other stuff that may occur, and I think you
19 touched on it in your questionnaire, psychiatric evidence is
20 admissible at that second phase of the trial, and I believe
21 I'm right. I won't say it was a cynical view, but it was
22 certainly an enlightened view of psychiatric evidence in your
23 questionnaire. Am I right about that?

24 A. Yes. I remember what I wrote.

25 Q. Okay. As I recall, it was something -- I can't

1 see -- it was something to the effect of, I guess that both
2 sides can hire psychiatric assistants, and what's that matter
3 anyway? They can hire three, and we can hire three.
4 two more; we get two more. Is that kind of a fair assessment
5 of what you were saying?

6 A. Yes. I think that they would just cancel each other
7 out as far as credibility goes.

8 Q. And that may be the case and how you do it, but
9 you'd still listen to it. You've got to be there anyway.
10 You'd listen to all the evidence, wouldn't you?

11 A. Of course.

12 Q. Okay. And then, you know, other evidence comes in
13 possibly -- all kinds of possible evidence can come in that's
14 relevant, and I've got to say in a capital murder case,
15 there's very little that gets excluded for either side, and
16 that's probably fair. The jury gets to hear about (inaudible
17 and (inaudible) in a capital murder case.

18 And then ultimately what happens is you get asked to
19 answer questions, the results of which you know are going to
20 affect whether the defendant gets life or death. And let's
21 say that this question -- we don't put it on there -- but the
22 question begins with, do you find beyond a reasonable
23 and then we move into this portion here. Whether there's
24 probability that the defendant will commit criminal acts of
25 violence that would constitute a continuing threat to

1 society.

2 Now, I don't know how anybody could have created a
3 more vague kind of question for somebody to understand than
4 that, but they didn't ask you, and they didn't ask me. This
5 is what we deal with. Juries across the state somehow manage
6 to get through this okay, so maybe -- it's certainly workable.

7 When you see the term the "probability" -- I know
8 you said you're not a statistician -- as you see that term,
9 what's that mean to you, probability?

10 A. Well, in that context I feel like it's intentionally
11 ambiguous because I'm looking for some modifier, like, is
12 there any probability or is there a high probability that,
13 which makes me think, by default, is there greater than a
14 percent probability. That's what I have to distill it down
15 to, and that's the guideline I would use in that.

16 Q. And that's certainly reasonable.

17 A. I think that there are intelligent people that
18 formulated this, and they would have had the same observation
19 So, I think they're making it somewhat flexible for a jury
20 to discuss. They don't want it to be, you know, look the answer
21 up in a book. You must discuss this. So, I just think when
22 you don't see a modifier in front of that, I'm thinking 50 percent
23 -- higher than 50 percent.

24 Q. Nothing wrong with that. Nobody can quarrel with
25 that. Other people might say more. They might want it to be

1 a higher standard; they might want it less. I mean, I hear on
2 the radio all the time there's a 20 percent chance of rain
3 tomorrow, that kind of thing, or 20 percent probability is
4 what you often hear. And I guess if it can happen, there's a
5 probability, you know -- so everybody can -- everybody is free
6 to define that?

7 I think we'd all agree it has to be more than
8 theoretical. I mean, lightening could strike the same place
9 twice. That's theoretically possible. I think we'd say
10 that's not probable from what we know.

11 **A. See, my mind would work this way. If they indeed**
12 **wanted it to be any probability at all, then they would say**
13 **"any," you know, to get that level of precision out to the**
14 **audience, because this isn't the first sentence they've**
15 **written, so I tend to think it's intentionally ambiguous.**

16 Q. I mean, you're absolutely free to do that, but the
17 person sitting next to you may have a different view of it,
18 and that's --

19 **A. Yeah, that's --**

20 Q. -- that's America, and it all works. That part will
21 work fine.

22 The second thing that's probably troubling in this
23 is criminal acts of violence. Is there a probability the
24 Defendant would commit criminal acts of violence? I guess we
25 all know what some of those kinds of things would be. I

1 **that. I think it's a serious offense, but I wouldn't consider**
2 **it violent. I think that it indirectly can lead to violence,**
3 **violent encounters like you illustrated on Tuesday.**

4 Q. How about a person that you transfer or deliver the
5 drugs to takes them? Is that going to do violence to that
6 person in your judgment?

7 **A. I guess I have a more narrow definition of violence.**
8 **That isn't really violence to me.**

9 Q. Do you think drug dealing is -- do you think even
10 if a crime or an act is not an act of violence itself, do you
11 think that could be probative evidence -- important evidence
12 in deciding whether that person is probably going to be
13 violent in the future? Do you understand my question?

14 **A. Yes. I don't -- you're asking if there could be a**
15 **nonviolent drug dealer, and I would say yes, that would be**
16 **possible. I think the environment they're in, it's probably**
17 **not probable, but if it's a hypothetical then...**

18 Q. Right. If you're looking -- if your question is who
19 is a dangerous person, I guess one of the things you would
20 probably look for is to see how well they obey law in
21 general. Would that be important in deciding whether somebody
22 is going to be dangerous in a situation?

23 **A. Right. The difference between dangerous and violent**
24 **are two different words. It says violent, I assume, for a**
25 **reason. If it was dangerous, then on the drug dealer question**

1 I think, like, murdering people is clearly a criminal act of
2 violence, right?

3 **A. Yes.**

4 Q. Rape, or what we now call sexual assault, is clearly
5 an act of violence.

6 What about acts of violence to property, like
7 busting in somebody's patio glass door to go inside and steal
8 stuff. Do you see that as an act of violence, that's not
9 directed at a --

10 **A. No. I would consider that a property crime.**
11 **Violence, to me, is against a person.**

12 Q. You understand other people might take a different
13 view. They might say, well, violence means doing force
14 against that which you shouldn't be doing force against. And
15 somebody else might say property damage could be an act of
16 violence?

17 **A. Okay.**

18 Q. I'm not quarreling with you. I'm just saying,
19 there's play of the joints of that issue for different people
20 to look at it. And your way is fine, and so might someone
21 else's way.

22 Q. What about someone like drug dealers? Do you see
23 any way that dealing strong, illicit narcotics would be a
24 crime of violence?

25 **A. Not in a strict sense. I wouldn't classify it like**

1 **I'd change my answer because, of course, that's dangerous.**

2 Q. Okay. Is it possible that you could do a crime that
3 would be nonviolent, but hearing about that behavior would
4 tend to make you think that the person would be violent
5 because of the behavior he was engaged in?

6 **A. I guess I'd need a better example. I guess, I can**
7 **think of just -- it's almost like violence by association kind**
8 **of thing, where you'd say, because you had these friends that**
9 **were violent, therefore, you're probably violent, and I don't**
10 **know that that always holds up. I think there may be a**
11 **probability, but I think I would necessarily draw that**
12 **conclusion.**

13 THE COURT: I'm sorry. I wanted to let you
14 finish your answer.

15 VENIREPERSON: I'm done.

16 THE COURT: I hate to do this, because let me
17 tell you continuity and flow mean so much in these matters,
18 but we're going to take a break for lunch.

19 Mr. Rail about 10 minutes ago I sent the other
20 jurors to lunch, and the reason I did that is I kind of want
21 to insulate you from them. It would be better if you didn't
22 talk to them. So, if you happen to run into them, I'll ask
23 you not to say anything that's been said so far.

24 VENIREPERSON: No. I've been very careful so
25 far.

1 THE COURT: So what we'll do is, I want to come
2 back promptly at 1 o'clock and we'll continue questioning, and
3 the State will have a chance to continue once again. And once
4 again, I apologize for the interruption, but it's something
5 that I think we should do, and the Defense, after the State
6 finishes, will have a chance to ask you a few questions. But
7 let's be in recess for one hour.

8 VENIREPERSON: Okay.

9 THE BAILIFF: All rise.

10 (Lunch recess taken.)

11 THE COURT: All right, sir. We're back on the
12 record in the State of Texas versus Ivan Abner Cantu, and the
13 attorneys for State are here, and the attorneys for the
14 defendant and the Defendant is present. And we had gone to
15 lunch right in the middle of the questioning of Mr. Rail, so
16 if we could, let's bring him back in, and, Mr. Schultz, you
17 can continuing asking him questions -- or continue with voir
18 dire.

19 THE BAILIFF: Yes, Your Honor.

20 THE COURT: Mr. Rail, as you know, you're
21 still under oath.

22 VENIREPERSON: Okay.

23 THE COURT: All right. Mr. Schultz.

24 MR. SCHULTZ: Thank you, Judge.

25 Q. BY MR. SCHULTZ: Did you get lunch, Mr. Rail?

1 A. Oh, just had a snack.

2 Q. As I read your questionnaire, you just try -- I
3 approach it a little bit differently just trying to get kind
4 of an idea of how each of the prospective jurors think.

5 I think it is -- I believe I'm clear that you
6 strongly favor the death penalty as a remedy in our society
7 for serious crimes. Would that be a fair thing to say, you
8 strongly favor it?

9 A. Yes.

10 Q. As you sit there now, can you think about anything
11 that would make you less than a fair and impartial juror in
12 deciding whether or not the defendant is guilty of capital
13 murder in the first part of the trial?

14 A. I don't think so, no.

15 Q. And here's what I'm getting at, and I don't believe
16 it applies to you. Obviously you're a thoughtful man and
17 intelligent man, and I don't think this applies, but it is
18 possible for people to be keeping in their minds the
19 punishment phase of the trial and the issues they're going to
20 have to deal with there in deciding whether or not the
21 defendant is guilty. Here's how that would work for some
22 people. Let's say, for example, that a person had a lot of
23 discomfort with the death penalty as a juror, but maybe not to
24 the extent that they were disqualified because there's room on
25 juries for strong proponents and weak proponents as long as

1 each juror could go either way on the death penalty, dep
2 on the evidence. And they could say that -- if it's sincer
3 they're both qualified, even though you might give it mo
4 often than somebody else might give it in the same situa
5 Does that make sense to you?

6 A. Yes.

7 Q. But sometimes what happens is people hear the
8 evidence, they'll be looking at it, and they will be so
9 appalled by the conduct of the Defendant that they might
10 to themselves, you know, I'm not sure about one aspect
11 case. Maybe I'm not quite sure it's a burglary, but if I
12 don't find the murder was in the course of a burglary, it
13 not be a capital murder. If I don't find capital murder,
14 there will not be the opportunity to vote in favor of a de
15 penalty for the defendant in the second phase, and as I'm
16 juror sitting here looking at this evidence, if anybody ne
17 the death penalty, this guy needs it. That visceral feelin
18 that you get as you listen to all the evidence.

19 And the notion is that people as jurors have the
20 absolute obligation to hold the State to its burden of pro
21 nothing more, just what our burden of proof is. And the
22 according to the evidence, and if it's capital murder, it's
23 capital murder. If it's not; it's not, and they should not b
24 concerning themselves by trying to either make the deat
25 penalty available as an option to themselves or avoid th

1 death penalty as an option at the second phase of the tri
2 Does that make sense to you? Do you know what I'm s

3 In other words, you seem to me clearly to be the
4 kind of person that could give the proper verdict of
5 guilt/innocence even if the down-the-road result might
6 different than what you sort of feel like ought to happer
7 in an overall justice kind of way. Are you that kind of
8 person that could do that?

9 A. I think so, yes.

10 Q. You know, it's like being the umpire. Some gu
11 a perfect game going, and he's running a 3/2 count, and
12 call it a ball, his perfect game is gone because a guy re
13 first base. If you call it a strike, he gets the perfect
14 game. Probably every umpire would want him to get t
15 strike because it's so exciting and a thrilling situation.
16 But the umpire -- to be a good umpire, it's a good one
17 calling it a ball, if it's a ball, kind of thing. That's kind
18 of what we ask of the jurors, same thing. Not look at t
19 result of the call, just make the call. Are you the kind
20 person that could do that in your mind?

21 A. Yes. There's a lot of baseball in law, isn't th
22 (Laughter.)

23 Q. I'll try Lacrosse if you prefer.

24 Once that occurs, and it is very possible as you
25 listen to that evidence, although you shouldn't be conc

1 with the result, it is quite possible and I suppose even
2 probable for many people, that the conduct would so appall you
3 and shock you that you would be greatly affected, and you
4 would carry that -- those feelings into the punishment phase
5 of the trial, all which is okay because you're entitled to
6 have emotions as a juror as long as you're making the
7 dispassionate decisions that you need to make.

8 But then when you get to the punishment phase of the
9 trial, and we get into these special issues the idea is that
10 you be able to answer them, like calling balls and strikes,
11 without regard to the ultimate outcome, even though you know
12 what the outcome is. You know if you answer this question no,
13 that's then end of the trial. He automatically gets -- then
14 he automatically gets life because there's been a no answer to
15 special issue. If you answer that question yes, then we move
16 on to at least one other question and possibly two other
17 questions.

18 And so the notion still is, if you answer those
19 questions fairly according to the evidence, even if the
20 truthful answer to those questions might give a result that
21 doesn't quite feel right to you under the circumstances. Does
22 that make sense to you what I'm saying?

23 A. Yes.

24 Q. When you see that term in that special issue -- I
25 should have just stayed up here. When you see this term

1 "society," what's that mean to you, a continuing threat to
2 society? When you see that word "society," what do you think
3 of?

4 A. Well, from your briefing on Tuesday, if it's at this
5 point, then it's in prison that becomes the society. That
6 is --

7 Q. That could be a society.

8 A. That isn't the first thing that I think of when I
9 read that, but either one or both of you pointed that out.

10 Q. Sure.

11 A. Which I don't think people were thinking that way,
12 because that's not typically how you think of society. You
13 think of all of society, not just prison society.

14 Q. One way, I suppose, of reading that, and once again
15 you're probably more charitable to the Legislature than I
16 suppose I would be. I'm not sure how much thinking about it's
17 practical application they really did when they created that
18 question. But one way of approaching that would be as
19 follows: I found him guilty of capital murder, along with 11
20 other people. He's going -- actually, he's going to one place
21 only and that's the pen, and the only question is does he go
22 to the life side of the pen or to the death row side of the
23 pen, but either way he's going down to prison. So, if you
24 make the assumption that what that question is asking is
25 prison society, since that's where he's going to go. That's

1 where he's been before the trial for some period of time
2 awaiting his trial, you almost can look at that question and
3 say, well, what they're asking is can this guy be safely held
4 in prison.

5 Because if -- if you make the determination that the
6 society they're referring to must mean prison society since
7 that's where he's got to be going, I suppose a person could
8 interpret that question to be prison society, ergot can he be
9 safely held in prison? Do you see how that is a construction
10 of that, at least, that is reasonable if not what you think it
11 is?

12 A. I understand that perspective. I guess if it's
13 prison society, I would think of, would this person be a
14 danger to other inmates? That would be the way I would
15 abbreviate it.

16 Q. Kind of in line with that earlier observation that
17 you made that, frankly, is one I never even thought of, and
18 that is when they don't define probability. Remember we
19 talked about that, that they obviously knew they could have
20 chosen to define probability if they wanted, but chose not to.
21 And if what they had meant was a particular percentage, that's
22 what they were looking at, a particular percentage they'd have
23 just said so, right?

24 A. Correct, yes.

25 Q. Do you think that same logic applies when they talk

1 about society; that if what they had meant was can he be held
2 safely in prison for a life sentence, that they would have put
3 that in there?

4 A. I think that their choice of words might not be what
5 they intended when they say society. I think they're talking
6 about a general definition, but I think that attorneys are
7 clever, and that in the general case that is a society, that
8 is a kind of society. So, you can cast that statement in the
9 form of the society of prison, and it becomes perfectly valid.
10 But if I had to guess at the Legislature's intention, I
11 wouldn't think that they have that -- that level of
12 sophistication to do that. Maybe I'm wrong, but I think that
13 is a valid interpretation. I don't think that was their
14 intent. But I do think they were intentionally ambiguous on
15 probability.

16 Q. I mean -- you know, legislative history, a lot of
17 times in Texas, is vague because it's not reported in CFRs and
18 stuff like that, a lot of federal legislation.

19 Also you could approach this question as really a
20 search for his present character towards violence, kind of
21 almost irrespective of what society we're talking about.

22 A. I would think that this kind of statement would be
23 more relevant if a person was eligible for parole.

24 Q. Well, for example, there are a lot of ways -- if you
25 limit -- if you limit the consideration of that to prison

1 only, that ignores a lot of -- not only does it not say it,
2 but it ignores the possibility he'll be loose instead of being
3 in prison?

4 **A. Right.**

5 Q. For example, maybe he gets pardoned. Maybe this
6 hypothetical defendant escapes. Everybody knows that
7 happens. Maybe at some point, although you can't speculate on
8 how it would apply in a particular case, you mentioned parole,
9 changes in laws, gubernatorial pardons, a whole host of
10 opportunities that you really -- you really can't deal with.
11 Do you see how you could also look at that question and
12 consider the free-world society and say, is this the kind of
13 person who's safe in the free world? You could approach it
14 that way?

15 **A. Uh-huh.**

16 Q. Does that make sense to you, that you could do that,
17 also?

18 **A. I think that's more sophisticated than what they're**
19 **after, but I think that the normal -- or the usual person is**
20 **just going to go with the -- they're not going to focus in on**
21 **a particular kind of society. They're just going to think of**
22 **life in Texas, for instance.**

23 Q. Do you think that's an answer that ordinary people
24 in the community are able to make if given evidence? Do you
25 think that's within the average citizen's ability to answer

1 analysis. And if the answer to that were yes, having be
2 convicted of capital murder, there was a death sentenc
3 was imposed, and if the answer to that was no, then a l
4 sentence was imposed, and I guess, depending on your
5 view -- but the law changed in an effort to avoid the
6 mechanical assessment of a death sentence by trial jur
7 answering special issues in a certain way, and I think i
8 like this. Wouldn't it be awful if a jury is just led down
9 the lane of answering questions based on evidence, and
10 answers to the questions are yes because they did that
11 truthfully? And then you say thanks very much for yo
12 service. This means a death sentence and discharged t
13 Wouldn't it be a tragedy if the thinking is that the jury
14 would not have a way to express their view, but
15 notwithstanding that answer, a death penalty was still
16 inappropriate. It was almost like a jury veto of the
17 mechanical effect of the special issues. And that went
18 U.S. Supreme Court, and they came up with this conce
19 mitigation, and we talked about it briefly on Tuesday.

20 **A. Uh-huh.**

21 Q. The notion being notwithstanding everything e
22 seeming to point to death penalty by yes answers to the
23 appropriate questions. I say yes answers, we used to h
24 special issues that always applied, and one that occasi
25 applied. Now we really, normally only have two. Thi

1 that question one way or the other?

2 **A. Yes.**

3 Q. Okay.

4 **A. I can --**

5 Q. I'm sorry. Go ahead.

6 **A. I was just going to say that I think that it's --**
7 **it's not specific so there's room for discussion and different**
8 **valid -- different valid opinions and so on. I would think**
9 **they could come to a decision on that.**

10 Q. In order for us to satisfy you beyond a reasonable
11 doubt that the answer to this question is yes, would you
12 require -- in answering that question, do you believe it's our
13 obligation in answering that question to prove there's no way
14 that prisons could ever safely hold a particular defendant?
15 Do you think that question requires us to prove that to you;
16 that the person is so wanton and so animal-like that no prison
17 could every safely hold him?

18 **A. No.**

19 Q. Until a few years ago -- a few. Now it has probably
20 been over ten, but it's still relatively few. Once a
21 determination was made that the crime was a deliberate one,
22 and then once further the determination was made that the
23 defendant would probably be violent in the future, would be a
24 continuing threat to society because of his violent
25 activities, that was the end of the -- that was end of the

1 one is the one that's answered yes or no beyond a reas
2 doubt.

3 The thinking was that there may be something
4 would mitigate, make less than appropriate a death se
5 taking certain things into account, primarily about the
6 Defendant and his conduct, and here's that question.
7 it on power point on Tuesday. Take a second if you
8 read it, and let me know when you're done. Okay?

9 **A. Yeah.**

10 Q. Whether taking into consideration all the evi
11 which means the first part of the trial and the second
12 the trial -- what they offer is perhaps good evidence
13 choose to do that. What we offer is bad evidence, if
14 choose to do that -- including the circumstances of t
15 offense, the Defendant's character and background ;
16 personal, moral culpability of the Defendant, whate
17 means. I mean, I don't know how you could be an
18 capital murderer without personal, moral culpabilit
19 assume that could somehow be because it's in the q
20 There is a sufficient mitigating circumstance or cir
21 to warrant the sentence of life imprisonment, rathe
22 death sentence.

23 Now, it's funny. You're probably not interest
24 the history of the capital murder statute. The reaso
25 into these questions in the first place was because

1 complained that it was so opened-ended that juries sort of
2 just did what they wanted. If you just say to the jury life
3 or death, that invited very different results, depending on
4 who the defendant was or how the jury was made up. So, they
5 came up with these questions. Hopefully, then 12 people in
6 this case would find the same way 12 people would somewhere
7 else with the same evidence because it's, like, a narrow --
8 it's a narrow one.

9 But then with this mitigation concept, we're almost
10 back again, and we're almost back the point of asking the jury
11 life or death. Do you see how that is, really? When you look
12 for mitigating circumstances, if the jury finds mitigating
13 circumstances that are sufficient then they impose a life
14 sentence, if they want to. And if they reject it, then it
15 stays as a death sentence because the answer to that question
16 would be no there aren't sufficient mitigating circumstances;
17 do you understand what I'm saying?

18 A. Yes.

19 Q. You never get to that mitigation question unless you
20 have first answered that violent question yes, because if you
21 answer it no, you don't worry about is there any mitigation
22 because it's an automatic life sentence because it's a no
23 answer.

24 A. I see.

25 Q. There are many terms for that, and none of them

1 that I consider disparaging. Some people call that mitigation
2 question the humanitarian question. Some people call it the
3 one-last look for the Defendant. Some call it the -- the jury
4 equity question, none of which do I say critically. I mean, I
5 think it might make sense in something like this. Does it
6 make sense to you that a jury have that option to correct an
7 injustice if they think it's an injustice that's being done
8 mechanically by the answer to a special issue? Does that make
9 sense to you?

10 A. Yes. I think it's pretty thoughtful. I can think
11 of cases where if the jury was convinced that the defendant
12 had inept counsel, and they felt like he was getting a raw
13 deal, I could see them trying to use this clause as kind of a
14 way to say, he got a raw deal; he shouldn't get death for
15 this.

16 Q. That might be so. I hope that isn't so because that
17 could be like a defense tactic to be real inept.

18 A. I know. I was just trying to think of
19 circumstances because the language isn't clear to me what
20 examples would really --

21 Q. It sure isn't.

22 A. -- a lot of the questions on the questionnaires had
23 to do with upbringing and environment and things like that,
24 and I think that those can be -- could be mitigating factors
25 to some.

1 Q. Absolutely.

2 A. But I'm not sure what exactly they're getting at,
3 but they're --

4 Q. And you know, further the -- what might be
5 mitigating to one person could be aggravating to somebody
6 else.

7 A. Right, right. When you were giving the statistics,
8 this is 10 people out of 12; you could have 2 that vote yes
9 for this, and it's valid. Remember the statistics you were
10 talking --

11 Q. No, no. What I said was, if 12 or more people -- if
12 12 people agree -- if 12 people unanimously agree that the
13 answer to that question is yes, then that verdict is accepted.

14 A. Yes.

15 Q. If 10 or more people vote no, then that answer is
16 acceptable. Now, 12 people can vote no if they want to. I
17 mean, it doesn't have to be less than unanimous. Does that
18 make sense?

19 A. Yeah, I guess it would be clear if you were to say
20 if 10 people voted for life, and 12 have to vote for death;
21 is that what you were saying?

22 Q. No. I was actually talking about the first special
23 issue.

24 A. Oh, I see.

25 Q. 12 yes votes or 10 no votes are an answer to the

1 question.

2 A. I see, okay. I'm clear.

3 Q. And the same thing with the mitigation question.
4 The mitigation question is a little bit different because
5 there's no -- nobody has the burden of proof, but it's the
6 same obligation on the voting.

7 Nobody can tell you what a mitigating circumstance
8 is because that's strictly up to you. You might be the kind
9 of person that might find less mitigation than another person.
10 To some people, an unhappy childhood might mitigate against
11 the death sentence. Perhaps in your mind it would not. It's
12 not a question; it's just an observation. Some people would
13 say drug addiction that resulted in criminal activity would be
14 mitigating. Other people might say mitigating, heck, that's
15 aggravating. It's bad enough that you do these crimes, and
16 going out and doing drugs and involved in that and everybody
17 knows what that causes, that's aggravating. That's even
18 worse because that's a choice -- that's like a choice to
19 become dangerous by drugs. It's almost like you made that
20 conscious choice.

21 Some people might say poverty could be mitigating.

22 You know, you grow up poor and never had the advantages of
23 life that a lot of us enjoy, maybe in Collin County and that
24 somehow that could be mitigating. Some people could say
25 absent fathers, and the whole host goes on. I mean, whatever

1 kinds of things people want to point. The bottom line is,
 2 it's up to the jury to say what is or what is not mitigating
 3 evidence, and then it's just is there any mitigating evidence.
 4 It has to be evidence of a sufficient quantify -- sufficient
 5 mitigating circumstance or circumstances that warrant, you
 6 know, life imprisonment rather than death. Do you feel like
 7 you could do that? Are you the kind of juror who could
 8 consider that mitigating evidence, and if you found it, you
 9 would vote in favor of a life sentence?
 10 **A. Well, yeah, I would imagine. I'm not clear on what**
 11 **that evidence would be, but I would like to hear the evidence**
 12 **before I decide on that. I wouldn't say I couldn't possibly**
 13 **say absolutely not. I mean, that -- wouldn't.**
 14 Q. Sure. I mean, nobody -- nobody would expect you to
 15 commit to something you don't know anything about. We can't
 16 commit you to anything about this case, anyway. It's not even
 17 possible.
 18 Are you -- are you accepting of the concept to
 19 consider things that might mitigate against what would
 20 otherwise be a death sentence? Are you accepting of that
 21 idea; that that's an okay thing to do?
 22 **A. Yes.**
 23 Q. Do you think drug addiction is any excuse at all
 24 for the criminal activity that is at least -- results
 25 indirectly from it if not directly? Do you think that's an

1 excuse?
 2 **A. No. I think it's a cause, but I don't think it's an**
 3 **excuse.**
 4 Q. I ask you this because some people would say if I
 5 had two people, and I'm trying to compare their culpability.
 6 One is high on drugs and does capital murder, and the other is
 7 just cold, stone sober and does capital murder, different
 8 people have different views on which one of them is worse.
 9 I'm not going to ask you that. Maybe one is worse than the
 10 other. I don't know. But I guess I'm wondering, do you think
 11 the guy that is high on drugs is in any way excused of his
 12 conduct, or that his conduct is any less because he's high on
 13 drugs?
 14 **A. No. I wouldn't say so.**
 15 Q. Do you think there's some people who can commit a
 16 murder and have no more concern about that than you or I might
 17 have about a flat tire or something like that? Do you think
 18 there's some people in our society that are like that?
 19 **A. Yes.**
 20 Q. Do you think there's some people that probably value
 21 some people of property, like a tire, just as much as they
 22 value human life, for example?
 23 **A. Yes.**
 24 Q. As a matter of fact, sometimes people get killed for
 25 their tires?

1 **A. Oh, sure.**
 2 Q. At what age do you think people learn that murder
 3 is wrong? Just tell me what do you think. How young do
 4 learn such a thing?
 5 **A. Well, I suppose it varies, but I would say under t**
 6 **age of 13.**
 7 Q. Now, you've indicated on your questionnaire that
 8 you thought one of the purposes of punishment, and obviou
 9 we're not talking about capital punishment because that
 10 doesn't apply. But I believe you indicated that high on you
 11 list, if I understand it right, was the concept of
 12 rehabilitation?
 13 **A. No. I did not indicate that.**
 14 Q. Huh?
 15 **A. We numbered one, two and three, and rehabilita**
 16 **I'm sure was my third.**
 17 Q. Okay. I see what you did. It's the first question.
 18 That's the lowest on your list. Deterrence is number one an
 19 punishment is number two. Those sound right to you?
 20 **A. Yes.**
 21 Q. There's nothing in those special issues that deals
 22 directly with the concept of rehabilitation. I suppose we
 23 could say that the mitigation question deals with the idea of
 24 rehabilitation because maybe that plugs in somehow into a
 25 defendant's background and personal, moral culpability. M

1 somehow the idea that he can be rehabilitated might plug into
 2 that. It may plug into the future danger aspect. Maybe,
 3 maybe not, because if a person can be rehabilitated, and we
 4 thought he or she would be, then that might mean they're not
 5 likely to be violent in the future. Do you know what I'm
 6 saying? If you can be rehabilitated that must mean you
 7 wouldn't be violent if you can be rehabilitated, right?
 8 **A. Yes.**
 9 Q. So that gets some effect that that notion of -- that
 10 notion of rehabilitation, there's nothing that gives effect to
 11 your idea of deterrence. By that, I mean you won't get a
 12 question saying if we execute this defendant will that deter
 13 others. We'll watch what happens with him, and say, I better
 14 not go kill people because I could be executed, too. There's
 15 no place for that actually to translate into answers to the
 16 question. Doesn't mean you can't have it. Doesn't mean I
 17 can't get up there and argue in favor of a death sentence
 18 saying it will deter crime. It's just that you don't get a
 19 question on that one, on deterrence.
 20 **A. Deterrence is sort of a double -- has a double**
 21 **meaning in this case because it could mean deterring the -- it**
 22 **could mean deterring the Defendant from doing the -- you k**
 23 **a crime again. Or it could mean making an example for soci**
 24 **as a deterrent. So again, it's an unclear question, so I --**
 25 Q. But what I'm saying is, whether your idea is deter

1 the defendant by killing him because he can't hurt anybody
2 else. You can kill him, or whether you mean, let's make an
3 example of him to everybody else. All I'm saying is there's
4 nothing in the questions that asks you about deterrence -- we
5 don't have to prove it would be a deterrent is what I'm
6 saying.

7 A. Right.

8 Q. And the defense doesn't have to prove that it would
9 be a deterrent. There's not any place in the questions that
10 deals with deterrence; do you follow what I'm saying?

11 A. (Nods head.)

12 Q. The thing that's most -- and there's really nothing
13 in there about the retribution, the idea of pure punishment.
14 That's my word, but I think you made that, like, number two,
15 the idea of punishment?

16 A. Yes.

17 Q. There's nothing that says in there directly, is the
18 death sentence what the defendant ought to get just to teach
19 him a good lesson, like the punishment aspect? You're not
20 asked is punishment something that ought to be meted (sic)
21 out on the defendant just simply for the sake of punishment?
22 Instead you're asked the question -- it's designed to protect
23 society, about the future danger aspect of him?

24 A. Uh-huh, that's part of it, yeah.

25 Q. Okay. If you had a choice, and you don't. You

1 don't have a choice. But if you had a choice, would you
2 choose to be on or off of this jury?

3 A. Well, I have some mixed feelings about it, but I
4 would choose to be off just because, you know, work pressures
5 mostly. But that's the, you know, same song you hear from
6 lots of people. I'm no different.

7 Q. Sure. I have an impression just because we've
8 worked with them so many times and it's so dense in Collin
9 County, I have the impression that EDS is extremely supportive
10 of jury service of its employees. Do you consider that
11 accurate?

12 A. You know, I really don't have anything to compare it
13 to.

14 Q. Would this be your first time on a jury if you're
15 selected?

16 A. Right, right. I mean, as far as how supportive
17 other corporations with their employees, I couldn't really
18 tell.

19 Q. I can't imagine why anybody would want to be on a
20 jury like this. I mean, for no other reason, just the reasons
21 that you've indicated. If selected, will you serve cheerfully
22 and do the best you can?

23 A. Oh, of course.

24 Q. And you do realize it's an important function of
25 citizenship?

1 A. Yes. I'm very serious about it.

2 Q. You indicated that you had followed the O J. Simpson
3 trial on TV, and that might have been just little news clips?

4 A. Sure.

5 Q. I wouldn't assume that you watched it televised each
6 day and watched all of it?

7 A. No. I think my wife was more interested than I was.

8 Q. What impressions from that trial occur to you, just
9 as you sit there? What were some of your impressions of it?

10 A. I guess the cameras pretty much corrupted the
11 process in my opinion, and it dragged on much too long. And
12 it got to be kind of a -- kind of a freak show, I think, after
13 a while. It was just a ridiculous mockery.

14 Q. Do you think substantial justice was done in the
15 trial as far as you can tell?

16 A. You know, not having heard everything, I can't say
17 for sure. But my impression is that, no, justice was not
18 served.

19 Q. How much chess do you think you play a week?

20 A. Oh, maybe a dozen games.

21 Q. Did you ever play that fast chess like they do on
22 the streets of New York? Have you ever done that sort of
23 thing?

24 A. Yeah, that's why I can play a dozen games a week,
25 Blitz.

1 MR. SCHULTZ: Pass the juror, Judge.

2 THE COURT: All right.

3 MR. GOELLER: Thank you, Your Honor.

4 CROSS-QUESTIONS

5 BY MR. GOELLER:

6 Q. Good afternoon, again, Mr. Rail. You probably
7 remember, my name is Matthew Goeller and Don High, and we
8 represent Ivan here. Thanks for coming down here. I know
9 you've just about put in almost two full days now on this
10 case, and I want you to know we appreciate that. I don't know
11 whether you will wind up on this jury or not. I know if I had
12 to just take two days out of my schedule I wasn't planning on
13 totally unrelated to what I do for a living, it would throw a
14 monkey wrench in the works, so you do have our thanks.

15 We got copies of your questionnaire. The clerk
16 staff made copies so we could have this. In one of your
17 comments or answers to one of the questions, you talked a
18 little bit about the role of the participants in this trial,
19 so to speak, and you made comments about what you thought
20 about prosecutors and defense lawyers and people like that.
21 What is your impression of a criminal defense lawyer? Speak
22 right from the heart because I promise you, whether it's good
23 or bad, it wouldn't hurt my feelings.

24 A. I guess it depends. I'm sure it varies. I think
25 it's a difficult job, and I think the substance of my comment,

1 if I recall, is something about the guilty feelings someone
2 could feel when they have to represent someone that they know
3 is, you know, a violent threat to society and just because of
4 the nature of the system. I think I was trying to put myself
5 in that position as how I would feel having that job, and I
6 think it's a difficult position.

7 Q. Do you think that Don and I think Ivan is violent
8 or a threat to society?

9 A. No. I don't think it as specifically about you. I
10 don't know about you.

11 Q. Okay.

12 A. It has to do with a composite of, you know, the
13 impression I have of defense attorneys, which has to be mostly
14 from television.

15 Q. Yeah.

16 A. And we know how far off that might be.

17 Q. Right.

18 A. But it's just a -- it's just a question. I felt
19 like a lot of questions were hypothetical.

20 Q. They are.

21 A. And it's just looking at my impression, but I wasn't
22 thinking about any specific person. I was just trying to
23 answer truthfully.

24 Q. If you would, just think to yourself a person, any
25 person that you love very dearly, you care about who's been

1 accused of a very serious crime. Would you want them to have
2 good representation?

3 A. Of course, yes.

4 Q. Why?

5 A. Well, just because a person committed a crime or
6 whether they're alleged to commit a crime, doesn't mean that
7 your feelings about them change. I can, depending on how
8 heinous the crime might be. But just in the hypothetical, I
9 would think that you still care about this person, and you
10 want them to get the best result for them. That's sort of a
11 selfish, personal view over society's view.

12 Q. Right.

13 A. But when you personalize it, obviously my impression
14 can change.

15 Q. Throughout a trial -- and let me back up just a
16 second. Your degree is in business and --

17 A. Computers.

18 Q. -- computers. Do you consider yourself more of a --
19 kind of a hard science person than a soft science maybe? And
20 I tell you why I say that. I look at what you do, who you
21 work for, your educational background. One of the comments
22 you made about testifying psychological experts.

23 A. Uh-huh.

24 Q. Just speak freely. Tell me where Peter Rail sits as
25 far as looking at science versus maybe more of a

1 humanity-type, maybe not hard science?

2 A. You know, that's a difficult question because I feel
3 like I'm pretty well balanced. I have an interest in science
4 and hard stuff, but I'm interested in music and humanities,
5 too. So maybe a more specific question, if you can come up
6 with it, will give you what you want. I'm not sure.

7 Q. I think you just gave it to me. You have
8 appreciation of the fine arts?

9 A. Sure.

10 Q. Music, art, and all of it's various forms. I think
11 I noticed from your questionnaire, are you Episcopalian?

12 A. I was raised that way. I don't really have any
13 particular affiliation now.

14 Q. Do you consider yourself -- are you Christian?
15 Tell me a little bit about your religious beliefs, and what
16 you kind of follow on that. Normally -- again, I keep
17 forgetting to say this. The questions I ask you are very
18 personal. I know that. Do you see why I ask you these kinds
19 of questions?

20 A. I think so. I think you would be trying to get at
21 whether, on religious grounds, I would oppose the death
22 penalty perhaps.

23 Q. Just personal questions in general.

24 A. I wouldn't consider myself religious at all. In
25 fact, I'm more scientific when it comes to things like that

1 mostly because of the corruption I see in the Catholic church,
2 for instance because I'm much more on the science side when it
3 comes to that. Much more Darwin than God stuff.

4 Q. What kind of corruption in the church? Were you
5 ever Catholic?

6 A. No, but I grew up in Albuquerque, and it's a huge
7 Hispanic population there, a lot of Catholic people.

8 Q. Right. Financial corruption?

9 A. Yeah, I think all kinds. And then a lot of the
10 child molestation cases, and the violations of trust there, I
11 think, bother me a lot.

12 Q. Yeah. Obviously in any normal case, a regular
13 felony case, a DWI felony case, a speeding ticket case.
14 Somebody broke into somebody's car and somebody took their
15 radar detector, something like that, we never do this
16 individual voir dire. The whole thing from the time the jury
17 hits the courthouse from the time they end up in the box is
18 maybe a couple of hours when we get 12 jurors. I have had in
19 the past jurors that I felt were offended by some of the
20 personal questions I asked them. I want you to know the only
21 reason I ask. I've got to try to figure out the kind of jury
22 we're going to get, and I have to make decisions with the
23 judge and Mr. Schultz over what may boil down to truly a life
24 or death situation. So, I want you to appreciate the why as
25 to all the personal questions I ask you. Do you understand

1 that?

2 **A. Sure. I don't mind. I'm not offended. It's just**
3 **some of the questions aren't things that I think about very**
4 **much.**

5 Q. Who would think about this kind of stuff normally?

6 **A. Yeah.**

7 Q. Do you consider yourself -- I know I asked you this
8 already. I'm trying to keep up with thinking about questions
9 I'm going to ask you and thinking about your answers. Do you
10 consider yourself a Christian?

11 **A. I wouldn't say so. I think I was raised that way,**
12 **but lapsed Christian, say.**

13 Q. Okay. Are you more of an Old Testament kind of
14 person or New Testament? The only reason I ask that is the
15 eye for an eye?

16 **A. Right. When it's asking what's the best argument**
17 **for the death penalty, and I don't know if that's necessarily**
18 **my best argument for the death penalty, but that's one that I**
19 **hear periodically. So I -- you know, it was 17 pages.**

20 Q. I noticed -- I remember you because I remember where
21 you were sitting. I think you were sitting right in front of
22 me.

23 **A. Number two.**

24 Q. And I noticed you were -- you spent a lot of time on
25 the questionnaire, and I think out of 200 people, you were the

1 196th to leave, which that gives everybody, I think, a good
2 feeling because there were some people I think went through
3 that questionnaire, get out of there and get to lunch. And if
4 somebody goes through a 17-page questionnaire on a death
5 penalty case and they're out of there in 20 minutes, I wonder.
6 It could be just telepathic; they already knew what the
7 questions were. But you spent a lot of time on your
8 questionnaire, and just from the time you spent and the
9 answers that you wrote down, everybody can tell that you put a
10 lot of thought into it.

11 Prior to showing up on Tuesday morning at 8:30,
12 whatever time y'all were told to be there, what were your
13 feelings about capital punishment before you ever got into any
14 of this?

15 **A. I guess I felt like for certain crimes, it's**
16 **appropriate.**

17 Q. What kind of things are you thinking about?

18 **A. I was thinking about people who kill cops.**

19 Q. Okay. That's certainly one of the criteria in Texas
20 for capital, you bet.

21 Mr. Schultz gave a very thorough rendition of our
22 penal code as far as what capital murder is. Have your
23 feelings about capital murder changed at all as you sit there
24 right now considering everything you've heard from the judge
25 from Bill -- Mr. Schultz and myself?

1 **A. I guess there are certain hypotheticals that might**
2 **be difficult. For instance, the idea of someone's**
3 **participation -- a group of people involved, and they charge**
4 **them all.**

5 Q. Yeah.

6 **A. And just because -- I guess the example that he gave**
7 **was you wait outside while your buddy robs a liquor store,**
8 **did you know he had a gun, that sort of situation, and should**
9 **those people be held to the same level? So, there's some gray**
10 **area where I think --**

11 Q. Outside of that where there may be multiple persons
12 charged, I think we'll spend -- I'll spend most of my time
13 with you on, let's just assume none of that's there.

14 **A. Okay.**

15 Q. I don't know if the judge ultimately will give a
16 charge on that or not based on the evidence. In your
17 questionnaire, and I think I know the reason why you wrote
18 this down. It says are you in favor of the death penalty?
19 Yes. Explain. It's the appropriate penalty for murder.

20 **A. Uh-huh.**

21 Q. What did you mean when you wrote that down?

22 **A. I meant it's the appropriate penalty -- I probably**
23 **should have been more precise. Not being briefed on what**
24 **capital murder was, I was thinking premeditated.**

25 Q. Do you think it's -- the death penalty is

1 appropriate for any -- let me back up just a little bit.
2 Mr. Schultz may have gotten into this with you -- I don't
3 recall -- before the lunch break. We don't really use the
4 word "premeditation" in Texas. We use another word called
5 intentionally. I don't know what the difference between the
6 two is. I don't think our courts ever knew what the
7 difference between the two were. We used to use a term called
8 deliberately and all this kind of thing, but I think, suffice
9 it to say, hair splitting to get a bunch of -- you'd have to
10 get some lexicographers and some experts in the English
11 language to maybe sit down and really hack out the difference
12 between intentionally, deliberately, premeditated. I think
13 for sake of argument, they're really all the same as far as a
14 jury goes and probably as far as lawyers go. I don't know
15 what the difference is. But if we could use that word
16 intentionally and premeditated synonymously.

17 A murder -- a noncapital murder -- you know, again,
18 I'm like Mr. Schultz, I hate to use that word simple or plain
19 vanilla murder, but when we talk about capital being murder
20 plus --

21 **A. Right.**

22 Q. -- policeman or the course of a burglary, a
23 robbery --

24 **A. I remember.**

25 Q. -- or two or more people?

1 **A. Right.**

2 Q. And the indictment in this case, I think as you
3 were told by Judge Sandoval on Tuesday, alleges murder in the
4 course of a robbery, murder in the course of a burglary and
5 murder of two people, okay? If I -- I'll kill my partner here
6 for a minute. Him and I just get into it. We get a big
7 disagreement, whatever it's over. I'm not robbing him. I'm
8 not breaking into his house or anything. I just decide to
9 kill my partner here and gun him down in my parking lot,
10 that's murder. I can't get the death penalty for that,
11 although I could get life.

12 **A. Sure.**

13 Q. When you say the death penalty is appropriate for
14 murder --

15 **A. Uh-huh.**

16 Q. -- with the things I just told you in mind, are you
17 of the opinion that the death penalty is appropriate for cases
18 of less than capital and regular murder?

19 **A. My personal opinion? I feel like I'm more educated
20 now after just the five-minute briefing. I probably would
21 have to say no.**

22 Q. Okay.

23 **A. This is why I think it's so important to give your
24 presentation to introduce the concepts before the
25 questionnaire because I just used the shorthand murder because**

1 You probably recall, you know, I think it was planned out for
2 months, maybe since he got out of the Army. I don't know. I
3 guess that had been over a year. But months of planning,
4 casing out the building, buying tons of that fertilizer
5 farmers use and getting fuse devices and timing devices and
6 renting Ryder trucks, all that went into it. Months and
7 months of meticulous, detailed planning. You have that kind
8 of killer. And then maybe somebody who's high on drugs, gets
9 into a fight, say, a drug dealer in a drug deal gone bad,
10 something happens. There's a personal relationship between
11 the deceased and the accused, something of that nature. Do
12 you see a difference in the mental status, the mental state of
13 those -- the McVeigh versus maybe a drug deal gone bad?

14 **A. Well, yes, I would say there's a difference.**

15 Q. Talk to me a little bit about that difference as you
16 see it, in your own words. What significance would that have
17 with you?

18 **A. Well, it seems like in the first case there would be
19 someone who's -- who's warped and plans for months, and in the
20 second case it might be someone was acting impulsively. And,
21 you know, it may have been an intentional murder, but it
22 wouldn't be what I would call premeditated murder. That would
23 be the way I would split those hairs.**

24 Q. Okay. And I think you're right on point there. I
25 think you're rare in that you can see maybe the difference

1 **I wasn't as versed in the nuances. But there were some good
2 hypotheticals that the prosecution came up with about mercy
3 killing and things like that. And, of course, you can always
4 come up with one where someone is going to say, yeah, you're
5 right. But when you ask the question and what comes to mind,
6 you know, you write your answer. You can't reflect on it or
7 so on.**

8 Q. Right. If, for example, the jury finds the
9 Defendant guilty of capital murder, and either he killed two
10 people or killed in the course of a robbery or killed in the
11 course of a burglary, are you pretty comfortable in knowing
12 what the options are at that point as far as punishment goes?

13 **A. Yes. I understand that's when you go into the --
14 you know, the two questions phase, correct?**

15 Q. That's right, that's right. To get to that point,
16 if you find somebody guilty of capital murder, if the jury
17 were to find -- we, the jury, find the Defendant guilty of
18 capital murder, if you have found necessarily that they
19 did an intentional killing?

20 **A. Uh-huh.**

21 Q. Intentional can take into consideration all sorts of
22 factors, I suppose. In other words, whenever we start
23 splitting hairs again, do you see a difference between, as far
24 as the mental state goes, the mind working? Take a guy like
25 Timothy McVeigh. I think he was mentioned on Tuesday, okay?

1 between those two terms. I mean, you can fill up this room
2 with case law about, in the past, appellate courts and the
3 U.S. Supreme Court and everybody trying to figure out
4 premeditated versus intentional, but I think -- I've never
5 heard anybody get it so quick because I couldn't, and I'm a
6 lawyer.

7 I noticed in your questionnaire, do you recognize
8 there may be situations where a person's mind is impaired?
9 And I'll cut right to the chase. You put down you have a
10 family member who is bipolar. You have some friends or
11 somebody's friend who is severely depressed and required
12 antidepressants or psychoactive meds?

13 **A. Sure.**

14 Q. A lot of people that I come into contact will not
15 recognize mental impairment, either through something organic
16 or through the use of drugs; cocaine, methamphetamine,
17 ecstasy, crack, pot, you name it.

18 **A. Uh-huh.**

19 Q. But I think -- I don't think you fall in that
20 category. Do you recognize mental illness and things that can
21 happen to the human brain due to substances we put in our
22 bodies either legally or illegally?

23 **A. Sure, that's reasonable.**

24 Q. Does that -- can that tie back into the topic we
25 were talking about before, kind of the intentionally versus

1 premeditated and all that kind of thing, too? Do you kind of
2 see maybe a connection, too?

3 A. You're saying, you know, your uncle is violent when
4 he drinks, that sort of thing?

5 Q. Yes.

6 A. Change personality?

7 Q. Yes.

8 A. Yes. I can see that one causes the other, but
9 again it's not necessarily an excuse.

10 Q. Oh, no.

11 A. And I think it's sometimes difficult to prove the
12 extent that, you know, a mental disorder has, and I think that
13 in some cases it can be slight and just being used as a shot
14 at mitigation.

15 Q. Right.

16 A. And I think that, as a juror, I would be very
17 suspicious of that card being played. It would have to be
18 very strong evidence.

19 Q. Right. I think there's a high likelihood in this
20 case if you're selected as juror you would hear from mental
21 health experts, psychiatrists or psychologists, and both sides
22 may call mental health experts. Am I -- with the comment that
23 you made, and again, remember I told you on Tuesday not going
24 to -- won't argue with you at all.

25 A. Uh-huh.

1 Q. And you understand what I've got to do in this case
2 and what my job is. Am I doing that kid at the end there a
3 disservice if you were to be on -- if I let you to be on this
4 jury? I don't mean "let." It's not really my call, but --
5 and I call mental health experts?

6 MR. SCHULTZ: Excuse me, Judge. I would
7 object to him trying to commit the juror to his reaction to a
8 particular event or factor strategy in this case. It's
9 improper. It's like me asking if I bring on a police officer
10 from some department, how will you react to him? He can't do
11 that.

12 THE COURT: Why don't you ask the question a
13 little differently.

14 MR. GOELLER: Okay.

15 Q. BY MR. GOELLER: With your comments that -- the
16 comment that you made in the jury questionnaire regarding
17 psychiatrists or mental health experts, how do you -- how
18 would you receive such?

19 A. I think, as I said earlier, I think that -- I think
20 that if one side does it, the other side will feel compelled
21 to do the same thing, and the effect is that, on the average,
22 I think it would cancel -- one side would cancel out the
23 other.

24 Q. Tell me why you think one side would cancel out the
25 other.

1 A. Well, if you had two supposed experts opposing each
2 other and their viewpoints of a defendant saying he was
3 impaired and the other one said he was not impaired, I think
4 that it becomes a wash, unless one of the experts is, you
5 know, clearly inferior to the other one. I don't think it
6 has -- I think it might have a different affect on the jury --
7 on some jurors if they cared about -- if they were looking for
8 something to help with their justifying to themselves their
9 mitigation. If they get to a point in the trial where they
10 feel like I want to hear something like that, I think that the
11 medical experts can help. But I just think that it's -- if
12 one side does it and the other side doesn't, then I think that
13 says something.

14 Q. What?

15 A. I think that they're -- they're not providing an
16 expert to refute the other expert. So, I think that it nets
17 to zero.

18 Q. Do you think that the calling of the an expert is
19 strictly to refute the other side?

20 A. I guess I think more of the strategy of the
21 courtroom, and that's what I think it would be. In some cases
22 I think it is really germane to the case, and in other cases,
23 and this would be one, where mitigation is an option. I think
24 that's a strong card that the defense can try to play.

25 Q. In a trial in Texas, a criminal trial, we always --

1 the Defense, we always have to go last if we choose to go.
2 Theoretically the Defendant has the option to put on no
3 evidence, no witnesses, nothing. But do you see my concern
4 when you say "refute"? I don't want you to think that I
5 always -- since I always have to go last --

6 A. Right.

7 Q. -- and they have the burden of proof, and the reason
8 why our law is set up that way, we have no burden, no burden
9 whatsoever of any phase on anything in this trial.

10 A. Right.

11 Q. But if we decide to put on evidence, I'm always
12 going second, and I'm always going to go last.

13 A. Sure, I understand.

14 Q. So my concern is when you say "refute," could you
15 see a situation where I may put on an expert or a witness?
16 I'm not trying to refute. I'm maybe trying to bring you some
17 evidence.

18 A. Well, it could be additional evidence, sure. But I
19 was just trying to visualize what would typically happen is
20 one expert might say judging by the drug levels in a certain
21 person this should not have impaired him to this level.

22 Q. Right.

23 A. And the other one would say, well, I have a diploma
24 from Columbia, and I say it's enough. And then it's up to the
25 jury to decide which medical expert do they trust, and that's

1 **what I meant by refuting. I was trying to visualize what**
2 **might happen.**

3 Q. In most cases, those kinds of battles would usually
4 be fought if somebody is not competent, or they're going to be
5 claiming an insanity defense, or something like that. I don't
6 anticipate anything like that in this case.

7 Normally if a juror hears from expert witnesses,
8 mental health expert witnesses, it's usually in the punishment
9 phase, those special issues.

10 A. Sure.

11 Q. Probably maybe both special issues. So, it's not
12 really -- and I want to tie this back in. I've heard you use
13 the word excuse a couple of times. If we get to the
14 punishment phase in this case, as you already know it's life
15 or death. That's it if he's convicted of capital murder. And
16 when we look at those special issues -- when I think of
17 excuse, I think of -- I guess under our law we have maybe
18 justifications or some kind of excuse, yes, I killed these
19 people, or I killed during the course of a burglary or
20 robbery, but don't find me guilty because I have an excuse.
21 When you were using the word "excuse," what phase of the trial
22 were you thinking about, if you even were?

23 A. Well, I think it had to do with the prosecutors
24 asking if a person's background or whether they were on drugs
25 excused this behavior.

1 Q. Okay.

2 A. And that was the context I was thinking of.

3 Q. Yeah. I would guess Mr. Schultz was not -- and I
4 don't recall exactly what was said. I doubt that was his
5 point because excuse the behavior, there's -- whether
6 something excuse -- excusal of the behavior is a non-issue in
7 the punishment phase. Somebody has already been found that
8 they intentionally --

9 A. Right.

10 Q. -- are guilty of capital murder. So, I want to
11 discuss with you, why don't we take them one at a time. This
12 special issue here, again getting -- what this question does
13 really is asks the jury to predict what? The future; would
14 you agree with me?

15 A. Right, the likely --

16 Q. Probability?

17 A. -- another violent -- violation.

18 Q. Up until this question everything is a look-back.
19 You know, obviously they're going to bring forth evidence, or
20 we wouldn't be sitting here today. Everything is a look-back
21 to the date alleged in the indictment. for the most part. And
22 then if the jury comes back with a guilty verdict on capital
23 murder, this first special issue is really just a look
24 forward. It's asking the jury to predict the future, agree?

25 A. Uh-huh.

1 Q. Then get into that word probability and acts of
2 violence, continuing threat. So just logically any -- nobody
3 would disagree this is a let's-look-down-the road. Does the
4 word excuse, how does that figure into this for you, or does
5 it?

6 A. No, not that one. I think excuse is more in the
7 mitigation question. I don't see excuse over here.

8 Q. Okay. You drive an automobile, right?

9 A. Yes.

10 Q. Pay insurance?

11 A. Yes.

12 Q. Probably don't like paying that insurance, right?

13 A. Don't remind me.

14 Q. Whatever you pay I think your youngest is three,
15 right? So, you've got a lot of years you don't have to worry
16 about. When did you get your driver's license, Mr. Rail, 16,
17 17?

18 A. Yeah, 16 probably.

19 Q. Do you remember what you used to pay back then up
20 until you were 21?

21 A. Not exactly, no.

22 Q. It was a lot?

23 A. Yeah. It was very high.

24 Q. And as you've gotten older, your rates probably have
25 fallen, maybe not as much as you'd like them to but --

1 A. Yeah.

2 Q. Do you think that 18-year old kids should pay more
3 in auto insurance than you should? Let's assume you're a good
4 driver. You know, you haven't had a bunch of wrecks and DWI's
5 and that kind of stuff.

6 A. Right, right. Yeah, I would say -- we're getting
7 back to the statistics of the situation.

8 Q. You bet.

9 A. And, yes, kids have less experience and they're
10 likely to have more accidents and drive unsafely.

11 Q. Who's your insurance company?

12 A. Farmer's Insurance.

13 Q. Farmer's Insurance. Would you agree with me that
14 they base your premiums on claims made for A, you personally,
15 and B, particular demographics that you fit in?

16 A. I think it's partly that. I think it's more
17 complicated. I think it has to a lot more to do with profits
18 this quarter and hail storms in Texas than it has to do with
19 me specifically. But there are actuarial tables that they're
20 going to use, or whatever statistics, to try to figure out
21 based on traffic accidents, for instance, where the highest
22 risk lies.

23 Q. If we take out those kinds of other factors,
24 sometimes I think they throw in zip codes, too, but if we take
25 out hail storms and factors, and it's just what rate is

1 Farmer's going to charge this 16 or 17-year old kid that just
2 got his driver's license versus Peter Rail, who's your age and
3 married, children. You're not driving some hopped-up Mustang
4 or Corvette, or something like that. I don't know if you are.
5 What do you drive?

6 A. I drive a Honda.

7 Q. Okay. All right. Do you think those actuarial
8 tables and statistics that they gather on claims made, do you
9 think that's a fair way of going about setting the premiums --
10 to set the premium of you versus the kid that just got his
11 driver's license and is driving a -- mom and daddy went out
12 and got him a brand-new Trans Am?

13 A. Yes. Short answer is yes. I guess, it's really
14 the only practical means that they have because they can't do
15 an interview like this --

16 Q. Right, absolutely.

17 A. -- with the kid to say, do you promise -- you seem
18 like the kind of kid who won't drive like that, but they all
19 drive like that.

20 Q. You live in Plano, right?

21 A. Yeah.

22 Q. You see them.

23 Getting back to that special issue of kind of
24 predicting the future, is what it really is. How would you
25 go about answering that question, just off the top of your

1 reality, you know, that if the prosecution puts on a case for
2 capital murder, and the defense puts on no case, I think that
3 would just be -- that would be inept, to get back to that word
4 because -- and I think one of the questions on the
5 questionnaire, when I was answering it I was thinking, oh,
6 they'll probably think this is inconsistent, because I
7 understand the principle that, you know, we've heard it over
8 and over, but there are realities that it is expected, and
9 especially -- maybe not in lesser cases, but we're talking
10 about a capital case where it's not frivolous. You know, it's
11 not --

12 Q. Of course, because the State puts on evidence, that
13 doesn't mean it's any good, right?

14 A. Not necessarily.

15 Q. It could be worthless?

16 A. Yes. I think in a hypothetical case -- I'd like to
17 think that between the police department and the prosecution
18 that -- I mean, you have to make certain assumptions because I
19 know nothing about the case, but it seems like in order to
20 make it to this point they feel like they have a strong case,
21 and they're not going to waste their time. These are
22 professional people. They're -- so, again, the reality sets
23 in, and I make, I guess, some shorthand assumptions about
24 what's really going on without knowing all the facts. But,
25 that's kind of how my mind works is that I feel without you

1 head?

2 A. Well, if I were evaluating a person to try to guess
3 their future behavior, I would have to look at their history.

4 Q. Okay.

5 A. Do they have a violent history? Do they have a
6 violent juvenile record. I don't think you can necessarily do
7 it based on friends or the part of town they came from.

8 Q. Right.

9 A. But I think that you have to do it that way. And I
10 know that just from what I've seen on television, often the
11 judge will limit what the jury sees because, oh, that's
12 irrelevant, what happened before. But in the mitigation
13 phase, is that something that does come in?

14 Q. It very well could. I think Mr. Schultz said
15 that -- I think it was with you. Typical in capital cases,
16 just about everything comes in.

17 A. Okay.

18 Q. Just about everything.

19 Getting to this other special issue, of course,
20 this one here the State has the burden of proof to prove that
21 to you beyond a reasonable doubt?

22 A. Yes.

23 Q. Did you already know that?

24 A. Yes. I've heard it over and over, but I guess that
25 I understand the philosophy behind it, but then there's also a

1 telling me, in order for them to go for a capital case, there
2 has to be a good chance that they have the evidence to support
3 that, and then reverse of that is that I expect that the
4 defense has to respond with, you know, counter-arguments
5 because I'm thinking -- I know that's just the reality of the
6 situation for me. But I understand the principle, and I think
7 I agree with the principle.

8 Q. And I appreciate that because that's what I got to
9 get at is the reality with you because all the theory and all
10 the imprinciple and all that kind of thing really doesn't
11 make -- individual voir dire in a death penalty case, the only
12 thing that's important to me is at least is the reality with
13 you.

14 Do you think the defendant has some kind of burden
15 of proff, or the obligation to bring you evidence?

16 A. Legally, no; but realistically, yes.

17 Q. Okay.

18 A. Because of what I just explained.

19 Q. Okay. Are you pretty firm in that opinion?

20 A. Well, yes. Yes.

21 Q. Okay. That second special issue -- oh, that's all
22 right. I'll just hold it.

23 When we talk about the mitigation, taking into
24 consideration call the evidence, including the circumstances
25 of the offense --

1 A. Uh-huh.
 2 Q. -- do you think that may take into consideration the
 3 victim?
 4 A. Well, certainly not consciously. I think this goes
 5 back to the prosecutor's opening when he said does it matter
 6 if it was a drug dealer killed or the nun in the parish. And,
 7 no, that doesn't matter.
 8 Q. And I think that's a correct statement for the first
 9 part of the trial.
 10 A. Uh-huh.
 11 Q. For capital murder whether the person -- the
 12 character of the person as to whether or not the offense is
 13 capital murder probably doesn't figure into it, either, even
 14 in my book.
 15 A. Uh-huh.
 16 Q. But when we get to this special issue, consideration
 17 of all the evidence, including circumstances of the offense,
 18 do you see where maybe that kind of evidence becomes somewhat
 19 pertinent? You know, the nun praying in church who -- who's
 20 killed for absolutely no reason, children that were in that
 21 day-care in that Oklahoma federal courthouse, versus maybe a
 22 drug dealer and a drug deal gone bad, do you see how that may
 23 make a difference in this question?
 24 A. Yes.
 25 Q. I think of -- again, it's some hypotheticals on the

1 -- I guess on extreme ends where he talks about the revenge
 2 killing and the courthouse, for the murder of his kid. You
 3 know, that's a perfect example, but I don't know that would
 4 even get to capital murder, so it's hard to say.
 5 A. But there are hypothetical that I'm sure you could
 6 construct that I would agree there are circumstances around
 7 the offense that would affect the penalty phase.
 8 Q. Back when you were using the term "excuse," tell me
 9 what you think about that word, and everything you've told me
 10 and how it fits into this special issue.
 11 A. Well, I think it has to do with the background of
 12 the defendant, not so much the character, which is -- sort of
 13 comes from the background. I think in some cases the defense
 14 might be this is an underprivileged kid who didn't know any
 15 better. Look at where he grew up, and we'll say oh, yeah,
 16 that was terrible, but is that an excuse? It could be a
 17 correlation. Could be a lot of crime in that area, but I
 18 don't believe that caused it. So that would be where I see
 19 it.
 20 Q. Of course, again assume a person is found guilty of
 21 capital murder, State's got to prove this beyond a reasonable
 22 doubt with a unanimous verdict on this issue, and then we get
 23 to that -- that look at everything, looking at all, anything
 24 and everything?
 25 A. Again there's no burden of proof that the

1 prosecution doesn't have one?
 2 A. The defense doesn't have one on this burden of
 3 proof. It has to be answered unanimously no or 10 yes.
 4 Q. I guess what I'm struggling with when I hear you
 5 use the word excuse. By this phase of the trial there is no
 6 excuse.
 7 A. Uh-huh.
 8 Q. Somebody is found guilty of capital murder, period.
 9 Could you -- you can see that if I just kind of lay it there.
 10 Can you read that?
 11 A. I think I memorized it by now.
 12 Q. Yeah, I bet you have. I bet you have. In one of
 13 the questions I believe that life confinement in prison is
 14 never appropriate in any capital murder, and you crossed out
 15 case or penalty, and I know -- I know what you were thinking
 16 because obviously that has to do with punishment/penalty, and
 17 I think that's why you wanted to clarify that, right?
 18 A. Right. I don't think the question was really worded
 19 the way I wanted it, so I just changed it.
 20 Q. Well, I'll tell you you worded it better. Thank
 21 you.
 22 (Discussion off the record.)
 23 Q. That's what you believe and that's how you feel?
 24 A. Well, again I think this is before I knew exactly
 25 the parameters around capital murder, and this has to do --

1 hope you don't have to go through this with every panelist or
 2 every juror. But I think my definition, when I'm reading
 3 this, at the top of the questionnaire it says, "This is a
 4 capital murder," and it gives me the context for the whole
 5 thing, and I'm thinking, oh, you know, someone killed a police
 6 officer here, and I'm going through with that thinking of
 7 that. So, I may have been stronger than I would have been if
 8 I would have had the briefing before the questionnaire.
 9 Q. Right. In the situation we have right now, if -- if
 10 a jury were to find this defendant guilty of capital murder,
 11 it will have had to have found that he intentionally killed
 12 in the course of committing a burglary, a robbery or killed
 13 two people.
 14 A. Uh-huh.
 15 Q. One of those three things would have to be found
 16 unanimously beyond a reasonable doubt by the juror -- jury to
 17 get to this punishment phase. With that in mind, how would
 18 you -- would your answers still be the same, "I believe that
 19 life confinement in prison is never appropriate in any capital
 20 murder penalty"??
 21 A. I think I would -- I think I wouldn't have gone
 22 that strong on that answer.
 23 Q. Okay.
 24 A. But when I look at the answers to the questions, I
 25 think that was one I struggled with because I was looking for

1 gradations, and there weren't really -- I think knowing more
2 about it now, I think any reasonable person has to hear the
3 evidence to hear if there are mitigating circumstances.

4 Q. Okay. What are mitigating circumstances to you?
5 When we look -- when we look at that and -- because I have to
6 know for my own mind -- I'm struggling with your word
7 "excuse," and if I'm hearing you right nothing -- nothing
8 really excuses the conduct, the killing for example, correct?

9 A. Nothing I can think of. Like I said, you guys went
10 to law school so I imagine there are hypotheticals you can
11 give where I might change my mind, but --

12 Q. Well, that's part of the problem. We can't qualify
13 you, or tell the judge that you are -- you're legally
14 qualified getting you to commit to a particular hypothetical.

15 A. Well, I guess that --

16 Q. But I really don't need a hypothetical. I'm just
17 wondering when you look at that last special issue, the
18 mitigation special issue, could you ever envision a case where
19 there's mitigation evidence that may involve things about
20 character, background, the crime itself, circumstances
21 surrounding the crime?

22 A. Yeah. The last one I could think of the case --
23 should I say what that is?

24 Q. Sure, that's fine.

25 A. I could mitigating circumstances that had to do

1 with the circumstances around the case that had to do with the
2 involvement of the accused. For instance --

3 Q. The deceased or the accused?

4 A. The accused.

5 Q. Okay.

6 A. For instance, if there was, say, a group of three
7 people that were involved, I think that you would have to
8 study whether the trigger man was the one who is the -- who
9 gets death versus maybe some other people who were involved to
10 a lesser extent might be considered for life in prison.

11 Q. What about when we don't have multiple defendants or
12 co-defendants?

13 A. I can't -- that was one that came to mind. I don't
14 think I would -- I don't think I would consider background or
15 character. I think I would -- it would be more tied up in
16 the details of the case itself.

17 Q. Okay, okay. And that's -- that is absolutely
18 perfectly your right to believe that. Now, that is probably
19 in conflict with the law that the judge would give you, the
20 special issue.

21 MR. SCHULTZ: Excuse me. Judge, I'm going to
22 object to that representation. There's nothing that makes
23 that in conflict with the law at all, and I'd object to that
24 assertion.

25 THE COURT: Well, let me just say that the law

1 you're going to take from the court, and so at the close of
2 the trial I'll tell you what the law in the case is, and
3 you'll also pick it up as we go along. But I'll allow him to
4 ask the question.

5 Q. BY MR. GOELLER: This is the law, I would submit to
6 you the judge would give you, whether taking into
7 consideration all the evidence including circumstances, the
8 defendant's character and background.

9 A. Sure. I think you can take that into account, but I
10 think your question was did I -- could I think of a case where
11 that would matter and -- or would tip the balance.

12 Q. Uh-huh.

13 A. And I couldn't think of a case for that, but for
14 circumstances around the case itself then, you know, I
15 would -- you know, without knowing more, it's really hard to
16 say exactly because I'm trying to think of an example that has
17 to do with character or background, and I don't see that. I
18 don't think that factors in consciously. It might have a
19 subconscious affect on people, but I can't picture myself
20 giving that much weight.

21 Q. Okay.

22 THE COURT: I tell what you we're going to
23 take a five-minute recess at this time, and let me ask you to
24 step down. And once again, if you would, please don't say
25 anything to the others.

1 (Recess taken.)

2 THE COURT: Mr. Goeller, go ahead.

3 Q. BY MR. GOELLER: Mr. Rail, when we look at that
4 third special issue the way it's phrased, character and
5 background, are they not going to figure into it for you?

6 A. You know, I can't really imagine how they would at
7 this point. Like I said circumstances would --

8 Q. Tell me why. Expound on why they wouldn't figure
9 into it for you at this point?

10 A. You know, without having more details to draw on,
11 I'm not real clear how I can answer that. I feel like the
12 circumstances -- for instance, during the break I was thinking
13 about a circumstance where suppose there was a drug deal and a
14 shoot-out ensued. To me that's -- that's a lot different
15 circumstance than a premeditated killing.

16 Q. Okay.

17 A. That's more reactive, and I think that's the kind of
18 thing I'm thinking about when I'm talking about
19 circumstances. Now, whether that makes a difference between
20 death penalty or life in prison, I'm not sure. But that's an
21 example of something I thought about that would be really
22 germane to this kind of question.

23 Q. Of course, circumstances in that special issue deal
24 with the actual offense I think?

25 A. Correct, yeah.

1 Q. When we say character and background of the
2 defendant we're not talking about -- we're really not talking
3 about the circumstances of the offense?

4 A. I understand.

5 Q. And you've told me that wouldn't really figure into
6 it for you, or you couldn't think of anything, and that's what
7 I'm getting at. Can you explain to me why circumstances and
8 background --

9 A. **Circumstances count, but I don't think**
10 **background --**

11 Q. Background and character. I misspoke. I apologize,
12 Mr. Rail. It's getting long in the day for us. Background
13 and character?

14 A. **I guess if -- I guess there could be a situation**
15 **I'm thinking of where a person has always been -- you know,**
16 **you have a retired police officer who has been in the**
17 **community for years and has a track record of behaving a**
18 **certain way, and then once there's an incident where he -- and**
19 **now he's charged for capital murder, I think that would be a**
20 **case of someone with strong character, and that would**
21 **influence -- you know, any reasonable juror would be**
22 **influenced by that. It would have to be very strong character**
23 **like the example I gave. It wouldn't have to be, you know,**
24 **Johnny was in the Boy Scouts? It's like, so what. It's --**
25 **the weight is much less to me than the circumstances.**

1 Q. Can you articulate to me factors that you would
2 consider mitigating?

3 MR. SCHULTZ: Excuse me, Judge. We'd object
4 to that question. It calls for the juror to be committed to
5 particular -- it's improper to ask the juror what factors he
6 would consider mitigating, any more than it would be proper
7 what -- how much evidence would you require to convict
8 somebody of a crime, or anything else. He's trying to commit
9 him to what are mitigating factors.

10 MR. GOELLER: I'm not trying to get him to
11 commit to anything. In order to exercise --

12 THE COURT: I thought the question was can you
13 think of any circumstances that would be mitigating?

14 MR. SCHULTZ: No. He asked him to list
15 mitigating factors. It's not the same thing. It's like me
16 asking him what would it take for you to find the Defendant
17 guilty? What facts would you require? He can't -- for
18 example -- that's the problem. He can't -- how can he ask him
19 to identify what factors are mitigating, any more than ask
20 what factors would you require to give somebody a life
21 sentence, for example, if we were trying a regular case. Or
22 what factors would you require for probation?

23 THE COURT: Well, I don't think he's asking him
24 what would he require. I believe the questions so far have
25 talked in terms of perhaps drugs to be both aggravating and

1 mitigating; that being one possible factor, right? So, we've
2 talked about one factor, drugs, right, or haven't we? Did I
3 miss something?

4 MR. SCHULTZ: His question is what factors are
5 mitigating to you, is what he's asking the juror.

6 THE COURT: Okay. Well, let's not ask it that
7 way. I understood the question to be what -- can you think of
8 factors that were mitigating, but ask another question and
9 let's see if there's an objection.

10 Q. BY MR. GOELLER: Can you think of any factors,
11 Mr. Rail, that may fall under the category mitigating?

12 A. **Well, we've alluded to the drug --**

13 MR. SCHULTZ: Excuse me, just a moment --

14 A. -- issue.

15 MR. SCHULTZ: -- Mr. Rail. Judge, that's
16 nonresponsive. The question calls for a yes or no. Can he
17 think of factors that are mitigating, not what they are? They
18 gets us down to the same problem again.

19 THE COURT: Overrule the objection.

20 Q. BY MR. GOELLER: Go ahead.

21 A. **I don't think drugs are mitigating. I think**
22 **circumstances could be mitigating, and I thought that in the**
23 **case of character or background, very slightly it would have**
24 **to be someone of very strong character in order to influence**
25 **me.**

1 Q. Would you please say that the bottom line is you
2 really have a bias against that phase of the law, character
3 and background? From what I hear you saying, other than
4 someone just having a very strong, good character, things such
5 as drug use and any other things you can think of really are
6 not going to factor into it?

7 A. **Well, I was trying to think of an example, but --**

8 Q. And I don't -- you know, you don't have to think of
9 an example. I'm not allowed to sit here and force you to
10 think of an example.

11 A. **Yeah, I think that would help because it is somewhat**
12 **vague, you know, what you mean by character and background. I**
13 **guess it could go two ways. I was trying to think of someone**
14 **who had a particularly good background being put in a**
15 **difficult position and that would be sympathetic to a jury.**
16 **And the other kind is someone who had just a terrible**
17 **background and terrible upbringing, and someone would feel**
18 **sympathy or say -- but, see, I don't really think in the**
19 **second way. I don't feel that that -- I can see how one**
20 **contributes to another having difficult upbringing, but I**
21 **don't think it is any reason to get one penalty over another.**

22 Q. Okay. And do you feel that way generally about
23 mitigation or that third special issue? From what I hear you
24 say, and again I'm not trying to put words in your mouth.
25 This special issue is not really important to you. This is

1 the important special issue in determining whether somebody
2 gets life or death?

3 **A. I wouldn't say that. I think second one is.**

4 **Q. Tell me why that's important to you in**
5 **determining --**

6 **A. You focus on character and background, and I focus**
7 **more on the circumstances of the offense.**

8 **Q. Okay.**

9 **A. That's where our weights are different. I'm trying**
10 **to think of cases where character would factor into my**
11 **decision. I tried to give one example, but circumstances is**
12 **what's going to be most important to me in this phase.**

13 **Q. So this won't -- this particular phrase, "the**
14 **Defendant's character and background," that's not going to**
15 **figure into the formula for you? You are going to -- from**
16 **whether to offense is what you would focus on, and what you**
17 **really have is -- bias is a strong word. We tend to connect,**
18 **I guess today, bias is kind of a negative, but I have bias**
19 **against Ford products. It don't mean they're bad. But what**
20 **you're telling me is that you have a bias against that type of**
21 **issue and the evidence that would go to it, and you would --**
22 **you have bias for consideration of all the evidence,**
23 **considering the circumstances of the offense?**

24 **A. Right. I don't know if I'd phrase it exactly that**
25 **way, but I think that you understand how I'm thinking.**

1 **Q. Okay.**

2 **A. I think what would help me is if you were free to**
3 **give me some sort of example of what you're talking about when**
4 **you say Defendants's character or background and how in the**
5 **world that would figure into this phase. Is it -- there's an**
6 **underprivilege background, therefore this person should just**
7 **get life over death, or is that an example that you're**
8 **thinking of?**

9 **Q. I can't qualify you on specific examples. They are**
10 **right about that.**

11 **A. I think that we would be much clearer about what**
12 **we're talking about, because I'm not sure if we're talking**
13 **about the same thing all the time.**

14 **Q. What do you think about a person who is a drug**
15 **addict and been on drugs a long time?**

16 **A. Well, I would need more detail to know how I feel**
17 **about that. I think that there are -- there's a stereotypical**
18 **drug addict, and then there are drug addicts in the suburbs.**
19 **I'd have to know what you meant by that. Again, the**
20 **circumstances, I think, are really important to me.**

21 **Q. In one of the answers in the questionnaire you put**
22 **down, Mr. Rail, if a person is brought to trial on murder**
23 **charges that person is probably guilty, and you wrote agree?**

24 **A. Uh-huh. Not strongly agreed.**

25 **Q. No. I didn't say you put down strongly agreed,**

1 because that was another choice.

2 **A. Right, because I remember the question.**

3 **Q. But you agree. Tell me about that. Talk to me**
4 **about that.**

5 **A. I guess it has do with the confidence in the**
6 **professionalism of the legal system more than any, you know --**

7 **Q. The legal system or law enforcement?**

8 **A. Well, they're -- to me they're sort of one and the**
9 **same, but I don't have that fine distinction maybe because**
10 **that -- from your perspective. But again, I was just thinking**
11 **from practical matters in order for a case to proceed to this**
12 **point, I feel the police and the prosecutor feel they have a**
13 **very good case. They're not going to waste their time.**

14 **Q. I know. You've told us that before.**

15 **A. And that's kind of the way my mind was thinking when**
16 **I was filling out that question. You know, could have circled**
17 **neutral, which I think is kind of the --**

18 **Q. Say your last word again.**

19 **A. I could have circled neutral. You know, I lingered**
20 **over that question, but then I thought, well, what I truly --**
21 **I was just trying to be honest. I truly think that because of**
22 **the way the process works.**

23 **Q. That's all I want you to be, is just honest.**

24 **A. It's just I thought that was the whole point, not to**
25 **try to give you the right answer.**

1 **Q. Exactly.**

2 **A. But you're asking me what I think, because I know**
3 **the right answer should be, you know, "neutral, the right**
4 **answer." But I think the way the system works, that was my**
5 **opinion, yeah.**

6 **Q. Okay. Is that more so the kind of case we're**
7 **sitting here on? Let's say you got called to jury duty on, I**
8 **don't know, shoplifting, DWI, something like that.**

9 **A. Right.**

10 **Q. And you were asked, do you think the defendant sits**
11 **there innocent -- presumed innocent until proven guilty?**
12 **Would you have a harder time -- would you have an easier time**
13 **saying, yes, on this Driving While Intoxicated or the**
14 **shoplifting case, I could say the defendant is innocent until**
15 **proven guilty? Could you say that easier in those kind of**
16 **cases than this kind of case?**

17 **A. Yes. I think you're seeing the way I'm thinking.**

18 **Q. Okay. And I'm trying hard, because I've only known**
19 **you for a couple of minutes.**

20 **A. I don't know that I'm not unusual, but when I**
21 **hear --**

22 **Q. You're not?**

23 **A. -- the capital murder, I know that law enforcement**
24 **has been doing their homework. They would not go for that if**
25 **they didn't have a good case. So, again, the reality of it**

1 versus the principles that you've been talking about.
 2 Q. And that's what I want to get at is the reality
 3 because that's the only thing that really counts here. But
 4 because of -- and do you believe because it's a capital murder
 5 case more resources were put into the case?
 6 A. You know, I don't know anything about their
 7 procedures, but I know that cases -- I assume they try to
 8 settle cases for lesser charges, you know, to avoid all the
 9 effort. So, my assumption can only be that the prosecution
 10 has very good evidence.
 11 Q. Okay. Meaning?
 12 A. More resources, yes, to answer your question.
 13 Q. To get back to the actual question, the answer is
 14 probably guilty, honestly?
 15 A. Yes.
 16 Q. Okay. You know that -- I know we went over the
 17 three ways that he's been charged; murder/burglary,
 18 murder/robbery, double homicide. Let's take the double
 19 homicide, for example. If you think he's -- and this is kind
 20 of, I guess, my ultimate question for you. If you were to
 21 find somebody guilty of capital murder based on a double
 22 homicide and coupled with your comment, and again, don't --
 23 you know, I'm not taking issue with this. I just have to get
 24 through this, that he's probably guilty as he sits there, do
 25 you see yourself giving any credence to that mitigation issue?

1 A. Well, yes, I would certainly consider mitigation.
 2 Q. Tell me how.
 3 A. Well, I would have to understand all the
 4 circumstances around the double murder.
 5 Q. Okay.
 6 A. I would have to understand in more detail what
 7 actually happened because without giving me any facts, it
 8 would -- you know, it's difficult to think of circumstances
 9 where you'd say, you know, I can think of mitigating
 10 circumstances. But, in asking this question I assume that you
 11 must have some you want to present, so, I feel like to be
 12 responsible I'd want to hear those. It's hard to answer these
 13 questions without enough information.
 14 Q. I know. And that's the catch-22 we find ourselves
 15 in. I can't tell you, and Mr. Schultz is not allowed to say
 16 in this case, the facts are this because we're not -- we
 17 weren't there. That's part of the problem. Number two, we
 18 can't try the case until the judge swears the witnesses in,
 19 that kind of thing.
 20 A. Yeah.
 21 Q. But from what I hear you telling me, because of the
 22 nature of the case, even though the judge -- and I think you
 23 hit the nail right on the head, we have the theory and the
 24 reality. In theory, the judge could tell you you must presume
 25 him guilty until proven innocent. In theory, the judge will

1 tell you the State has the burden of proof. They have to
 2 prove all the elements beyond a reasonable doubt before you
 3 can find him guilty. In theory you have to take the witness
 4 or take the juror chair over in that jury box preassuming
 5 actual innocence, but the reality of it is for you based on
 6 this kind of offense, as you sit there now, you have sworn
 7 under oath he is probably guilty.
 8 A. Yeah, that's my reality.
 9 Q. Okay. Okay, Mr. Rail, I thank you very much, sir.
 10 And I noticed one other -- no matter how that's put
 11 to you or anybody else asks you questions, you're not going
 12 to change your mind about that? That's the reality for Peter
 13 Rail at this point?
 14 A. Sure, sure. I would say that.
 15 Q. And you've marked when I make up my mind, I raise
 16 change it?
 17 A. Yeah, ask my wife.
 18 Q. Okay, sir.
 19 MR. GOELLER: Thank you, Judge. I think I need
 20 a sub rosa hearing.
 21 MR. SCHULTZ: Before we do that, how about
 22 letting me ask some questions, and then we could have that
 23 hearing. Would that save some time, do you think?
 24 THE COURT: Seems like it would.
 25 MR. GOELLER: It doesn't matter to me.

1 MR. SCHULTZ: I want to ask him one time or
 2 another, I guess is what I'm saying.
 3 THE COURT: I don't know that you need to, but
 4 go ahead.
 5 REDIRECT QUESTIONS
 6 BY MR. SCHULTZ:
 7 Q. I want to make sure we're communicating, and as
 8 bright as you are, I think we are. I don't think that's the
 9 problem at all.
 10 You make the assumption, I guess statistically
 11 speaking, that defendants are generally guilty by the time
 12 comes to court; is that pretty much a fair statement?
 13 A. Well, I'd like to narrow it some more to say in a
 14 capital murder case, that's really my attitude.
 15 Q. Okay.
 16 A. For lesser cases, like the DWI that -- I don't think
 17 I would feel that way necessarily.
 18 Q. Well, let's assume for a second that, first of all,
 19 you're correct. Let's assume, in general, capital murder
 20 cases, most of the time capital defendants are guilty. Let's
 21 assume that's correct, okay?
 22 A. Okay.
 23 Q. We're not talking about this case in particular. I
 24 don't even think you're in a position to know anything about
 25 the evidence in this case. The real question is not what you

1 abstract opinions are in general, like, for example, whether
2 police are good or bad, or whether defendants get their
3 rights. The real question is can you come in and fairly weigh
4 evidence that's presented. That's the real question for your
5 qualifications as a juror. And by that I mean, it may well be
6 you'll come in on some case, and you'll think that the law is
7 terrible that's applied in the case for whatever reason. It's
8 too harsh; it's not harsh enough.

9 The real question is, can you follow the law and the
10 instructions given to you by the court? For example, you
11 understand what we mean by presumption of innocence?

12 A. Of course.

13 Q. You understand that that is a -- it's really a
14 procedural device that commences the trial that obliges the
15 State to put on large quantities of evidence, whatever the
16 size of that evidence necessary to prove its case beyond a
17 reasonable doubt. Are you with me on that?

18 A. Yes. I understand the principle, but --

19 Q. And if we fail, the fairly treated defendant must
20 have a jury that would return an acquittal, return a not
21 guilty verdict. That's required under our law. If we fail to
22 prove case beyond a reasonable doubt, then the only verdict a
23 jury can return is not guilty. Do you understand that?

24 A. Yes.

25 Q. Okay. And I want to make sure that your ability to

1 Mr. Goeller's concern might be, well, if I have got somebody
2 coming into this court that figures the odds are my client's
3 guilty, then I'm not going to get a fair shake from this
4 juror. Do you see how he could interpret that?

5 A. I can understand that, yeah. I don't think that's
6 true in my case. Like I've said over and over, I'm interested
7 in hearing the evidence, and I would only make up my mind once
8 I have more details.

9 Q. So your belief in general about who's guilty and
10 who's not isn't going to give the State any edge in this
11 particular case at all. Is that what you're saying? That's
12 not going to help us any. We still have to prove the same
13 thing we always do?

14 A. Well, of course, yeah. I don't think I meant that
15 at all. It's just in the question --

16 Q. It didn't seem like you, but I thought I better make
17 sure.

18 A. No.

19 Q. Now, let's move along to these issues in
20 mitigation. First of all, I see nothing in the question that
21 says you have to independently be able to just say, well, the
22 defendant's character would be enough, or that the defendant's
23 background would be enough. It directs you to take into
24 consideration a whole number of things.

25 A. Right.

1 do that is compatible with your earlier statement. If it is
2 your view that since you figure most capital defendants are
3 guilty, which you could be absolutely correct on that
4 statistically speaking, I don't see anything wrong with you
5 having that opinion as long as that doesn't somehow put some
6 weight on our scales of proof that don't belong there.
7 That's the problem. That's the question that we have.

8 A. You're asking if I would expect you to -- I would
9 put less burden on you to prove it --

10 Q. Yes. Since you figure --

11 A. -- because I have these assumptions.

12 Q. Probably he's guilty, are you still going to
13 require us prove him guilty beyond a reasonable doubt?

14 A. No. I don't think that means that at all. I just
15 think in the absence of facts since you can't, for whatever
16 reason, tell us more, I try to fill in the gaps as to why
17 we're here. I know that a capital crime is not frivolous.
18 Law enforcement and the legal system isn't going to just do
19 that. So when I fill in the gaps and then I answer that
20 question, it makes me sound like, you know, when he said, oh,
21 you know, you're ignorant if you don't understand innocent
22 before proven guilty, and it's not that at all. I mean, that
23 is a great principle. But then there's the reality of the
24 situation.

25 Q. Well, you understand what his concern might be?

1 Q. And these are not the only ones you can consider.
2 They're just some of the things that you can consider,
3 including the circumstances of the offense, the Defendant's
4 character and background, personal moral culpability of the
5 Defendant. First of all, on the issue of character, I mean,
6 you're right on when you talk about the Defendant being a
7 former police officer, medal of honor winner, missionary that
8 did great work, whatever great things, because I don't think
9 the law requires you to consider the Defendant's bad character
10 as mitigating. I mean, for example, I don't think a defense
11 lawyer can say, well, if the evidence shows he's been a
12 criminal all his life, would you consider that in mitigation?
13 Obviously, it's got to be good character that would be
14 mitigating; do you agree with that? It would never be bad
15 character.

16 A. Well, I don't know that would -- I think I would go
17 a step further and say that in the case of the defense, they
18 might not just show good character, or they might just be --
19 not no character, but no bad character. In other words, the
20 position might be this person is so young that, you know, he's
21 never done anything bad. No previous offense doesn't mean
22 good character. It just means no previous offense. It means
23 not no character, but no character as a sense that you were
24 using it, like a medal of honor winner, et cetera.

25 Q. And it may be to some people that would be very

1 important that nobody had done another crime before, and maybe
2 to you that's not important; is that what you're saying? You
3 may react to it differently than somebody else.

4 **A. Yeah. I would think that you don't get any pluses
5 or minuses for that. I think that people would be interested
6 at this point of knowing about juvenile history, you know,
7 previous violent offenses, that sort of thing.**

8 Q. Now, you mentioned, of course, earlier that the
9 mitigation issue you would maybe expect or assume they would
10 produce some of that mitigating evidence. First of all, you
11 understand they don't have a legal obligation to do that if
12 they don't want to? Now, I'm perfectly permitted to say, why
13 didn't they produce the mitigating evidence. They've got as
14 much burden as we do on that issue. We have an equal burden,
15 which is, I guess, almost no burden. I don't have to prove no
16 mitigation; they don't have to prove mitigation, but that's
17 just produced from whatever. That's the one question that has
18 no burden of proof on it. It's just out there.

19 **A. It seems like the jurists might surmise some
20 mitigating circumstances from hearing the evidence.**

21 Q. And that's from the facts of the offense, for one
22 thing?

23 **A. Right.**

24 Q. Are you saying that there is not -- are you saying
25 you can't think of a circumstance where the Defendant's

1 background would mitigate a sentence or would be important to
2 you, or are you saying there is no such thing; that there
3 could never be anything that would mitigate?

4 **A. No. You gave the example of the positive character,
5 the medal of honor winner, the former police officer. That
6 would be a strong example that would be factored in, of
7 course. But, I couldn't think of any -- many, and just the
8 average citizen, you know, just paying his bills on time and
9 holding down a job, I don't think that necessarily indicates
10 particularly good character that would even be considered.**

11 Q. Whether you can think of it or not, are you open to
12 the whole concept of mitigation? Earlier when I talked with
13 you, you said that might be a good device for the jury to have
14 that as an option to be able to consider. Do you still feel
15 that way; that the mitigation question is a decent thing for
16 us to have in our society in this capital litigation that we
17 do?

18 **A. Yes.**

19 Q. And you're open -- you are open to the concept of
20 mitigation. You're just saying that you, in your mind, it
21 would take an awful lot to mitigate against those kinds of
22 facts. Is that a fair statement?

23 **A. Generally, I think that's what I mean. I don't know
24 what you mean by "an awful lot." But, I think that if I knew
25 more details I would know pretty quick if there were any**

1 **mitigating circumstances that I might consider, so this is a
2 hard process.**

3 Q. But you're open to the idea. You just --

4 **A. Oh, of course. I think it's a natural evolution.
5 Maybe they were -- I can see how this could happen, that they
6 would add this additional mitigation later.**

7 MR. SCHULTZ: That's all the question I have,
8 Judge.

9 THE COURT: Anything from the other side?

10 MR. GOELLER: No, sir.

11 THE COURT: All right. Would you step down for
12 a moment, please?

13 (Venireperson exits the courtroom.)

14 THE COURT: All right. The juror is outside
15 the courtroom.

16 MR. GOELLER: Your Honor -- may I proceed?

17 THE COURT: Yes.

18 MR. GOELLER: Your Honor, the defense would
19 subject -- submit the juror to a challenge for cause. The
20 juror stated specifically that because of this kind of case,
21 in effect, the juror cannot presume my client innocent. I
22 went through that whole thing with him, Judge, about if this
23 were shoplifting or DWI, he could presume and follow the
24 Court's instruction on the presumption of innocence.

25 And what I'd ask the Court to key in on

1 Mr. Rail's testimony, he is very specific. He used the words
2 "in principle, in theory, but the reality," and the type of
3 individual he is, it's hard to dig that reality out of him,
4 but I think I did.

5 He says my client is probably guilty. That is in
6 direct contradiction of the presumption of innocence. I even
7 asked him -- I said, if the Court gave an instruction that the
8 Defendant is presumed innocent until proven guilty, and that
9 the State must prove each and every evidence -- all the
10 elements of the offense beyond a reasonable doubt, taking that
11 into consideration. But, the way you sit there right now, and
12 he said yes -- in principle, that's one thing, but the reality
13 is -- and even on his questionnaire, and also, Judge I'd ask
14 that Mr. Rail's questionnaire be made a part of the record, he
15 stated, quote, he is probably and -- a person is brought to
16 trial on murder charges, that person is probably guilty. He
17 had five options; strongly agree, agree on certain, disagree,
18 and strongly agree -- strongly disagree. He circled agree.

19 And then he went on to further state that the
20 politically -- he didn't say politically correct. I think he
21 said the average person should probably come in and circle
22 uncertain because that's the answer that I think y'all want to
23 hear, or what we should give.

24 But he is an intelligent person, Judge. He
25 admitted, I am not going to give the Court, or at least the

1 lawyers, the answer they want to hear. I'm going to give you
2 the reality, and that's why I did not circle uncertain. I
3 changed it to agree, he's probably guilty. So, therefore, I'd
4 ask the Court to sustain my challenge for cause on Mr. Rail.
5 Secondly, I'd submit to the Court, my second
6 cause -- reason for challenge for cause on Mr. Rail is he does
7 have a bias or prejudice against the phase of the law on which
8 we are entitled to rely. The way this special issue reads,
9 Judge, it says taking into consideration all of the evidence,
10 including circumstances, comma, the Defendant's character and
11 background, comma. That's mandatory language. That says
12 including.

13 Now, I'd site again to the Court that the reverse on
14 the Witherspoon case, it's that Morgan Illinois case, which is
15 really the (inaudible) case in this area, Justice White of the
16 U.S. Supreme Court wrote, Your Honor, any contrary -- when
17 they talk about sufficient, and obviously the Illinois statute
18 talked about this word sufficient, and Justice White
19 specifically said, "Statute plainly indicates that a lesser
20 sentence is available in every case where mitigating evidence
21 exists; thus, any juror who would invariably impose the death
22 penalty upon conviction cannot be said to have reached this
23 decision, but based on all the evidence getting back to that
24 word sufficient being biased against the phase of the Illinois
25 statute, which is pretty similar. And he wrote on, while

1 Justice Scalia chooses to argue that such a, quote, unquote,
2 merciless juror is not -- although not a lawless one, he is in
3 error, for such a juror will not give mitigating evidence the
4 consideration that the statute contemplates. Our statute
5 contemplates character and background, and he obviously has a
6 bias against that phase of that statute.

7 He tried to rehabilitate himself by saying a
8 long-time retired police officer maybe, but I don't think
9 that's sufficient. He clearly has a bias against that phase
10 of the law, Judge.

11 So, again, number one, we're already in the hole.
12 My client is already guilty with him. I can't ever fight that
13 battle with that juror. Number two, he has a bias against
14 that phase of the law. So, I'd ask the Court to sustain my
15 challenge for cause against that particular juror.

16 THE COURT: All right. Challenge is denied.

17 We need to, I suppose, what we tell the juror is
18 simply that we'll be getting back to him, period, right?

19 MR. SCHULTZ: No. We bring him back in, and
20 you ask the State what we say and we'll either accept him or
21 use a peremptory challenge. And if we use a peremptory
22 challenge, he's gone, and if we accept him, then he's tendered
23 to the defense for their decision.

24 THE COURT: Do you want to do that at this
25 time?

1 MR. SCHULTZ: Uh-huh.

2 THE COURT: Okay. Let's bring him back in.

3 (Venireperson enters the courtroom.)

4 THE COURT: Please be seated. All right. What
5 says the State?

6 MR. SCHULTZ: This juror is acceptable, Your
7 Honor.

8 THE COURT: And the defense?

9 MR. GOELLER: Submit the juror.

10 THE COURT: All right. You may step down, sir.
11 Is there anything else from either side before we
12 release him?

13 MR. SCHULTZ: No, Your Honor.

14 MR. GOELLER: No, sir.

15 VENIREPERSON: So I can leave now?

16 THE COURT: Yes, sir, you may leave.
17 Please be seated, ma'am.

18 Ma'am, you wrote a memorandum and delivered it to
19 the court. I showed both sides. Basically you indicate your
20 husband's name is Glen Strain and that -- that the Defendant
21 here was a former student of your current husband, and that he
22 knows the Defendant here from late 1980s, and there was a past
23 link between your husband and the Defendant. And you wanted
24 us to be aware of this indirect knowledge.

25 Here's what I need to ask you: Do you remember my

1 admonition yesterday about discussing the case with anybody?

2 VENIREPERSON: Sure.

3 THE COURT: What did I tell you?

4 VENIREPERSON: I didn't discuss the case with
5 anyone.

6 THE COURT: Okay. Tell me how this came up.

7 VENIREPERSON: Okay. My husband, how was
8 court? And I said well, it was -- I explained my day and said
9 it was a capital punishment case, and that's all I said. He
10 went to work the next day.

11 THE COURT: Which was yesterday?

12 VENIREPERSON: Right. He called me from work
13 and said, don't say a word, but I'm going to tell you
14 something. I just read the Plano paper. We don't even take
15 the Plano paper at our home, but at work he had it. And he
16 read the paper. And he said if indeed that is the case that
17 you were hearing you need to notify the court that I know him,
18 and that's all there was to it.

19 THE COURT: How long have you been married to
20 Mr. Strain?

21 VENIREPERSON: Seventeen years.

22 THE COURT: All right. So you got married in,
23 what, '88?

24 VENIREPERSON: I married him?

25 THE COURT: Yes.

1 important that nobody had done another crime before, and maybe
2 to you that's not important; is that what you're saying? You
3 may react to it differently than somebody else.

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8 Q. Now, you mentioned, of course, earlier that the
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10 produce some of that mitigating evidence. First of all, you
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20 you ask the State what we say and we'll either accept him or
21 use a peremptory challenge. And if we use a peremptory
22 challenge, he's gone, and if we accept him, then he's tendered
23 to the defense for their decision.

24 THE COURT: Do you want to do that at this
25 time?

1 MR. SCHULTZ: Uh-huh.

2 THE COURT: Okay. Let's bring him back in.

3 (Venireperson enters the courtroom.)

4 THE COURT: Please be seated. All right. What
5 says the State?

6 MR. SCHULTZ: This juror is acceptable, Your
7 Honor.

8 THE COURT: And the defense?

9 MR. GOELLER: Submit the juror.

10 THE COURT: All right. You may step down, sir.
11 Is there anything else from either side before we
12 release him?

13 MR. SCHULTZ: No, Your Honor.

14 MR. GOELLER: No, sir.

15 VENIREPERSON: So I can leave now?

16 THE COURT: Yes, sir, you may leave.

17 Please be seated, ma'am.

18 Ma'am, you wrote a memorandum and delivered it to
19 the court. I showed both sides. Basically you indicate your
20 husband's name is Glen Strain and that -- that the Defendant
21 here was a former student of your current husband, and that he
22 knows the Defendant here from late 1980s, and there was a past
23 link between your husband and the Defendant. And you wanted
24 us to be aware of this indirect knowledge.

25 Here's what I need to ask you: Do you remember my

1 admonition yesterday about discussing the case with anybody?

2 VENIREPERSON: Sure.

3 THE COURT: What did I tell you?

4 VENIREPERSON: I didn't discuss the case with
5 anyone.

6 THE COURT: Okay. Tell me how this came up.

7 VENIREPERSON: Okay. My husband, how was
8 court? And I said well, it was -- I explained my day and said
9 it was a capital punishment case, and that's all I said. He
10 went to work the next day.

11 THE COURT: Which was yesterday?

12 VENIREPERSON: Right. He called me from work
13 and said, don't say a word, but I'm going to tell you
14 something. I just read the Plano paper. We don't even take
15 the Plano paper at our home, but at work he had it. And he
16 read the paper. And he said if indeed that is the case that
17 you were hearing you need to notify the court that I know him,
18 and that's all there was to it.

19 THE COURT: How long have you been married to
20 Mr. Strain?

21 VENIREPERSON: Seventeen years.

22 THE COURT: All right. So you got married in,
23 what, '88?

24 VENIREPERSON: I married him?

25 THE COURT: Yes.

1 **running through my mind. It's just --**

2 Q. Okay. So, a man's on trial for his life, and you
3 couldn't give that full attention because you'd be thinking
4 about your vacation; is that kind of where we are with that?

5 A. **No. This is a duty that I would serve, but at the
6 same time, I'm also a family man, too.**

7 Q. Sure, I understand.

8 A. **That I'm not a single person anymore and that I
9 have to consider the other side, even though, you know, this
10 is very important. There's no doubt in my mind it is. Just
11 that, I don't believe that I would be in full attention, you
12 know?**

13 Q. Okay. Well, then where do you work now?

14 A. **I'm with Genuity (phonetic).**

15 Q. Huh?

16 A. **I'm with a telecom company, Genuity, in Irving.**

17 Q. If something happened, and they had some phone
18 problem and they had to cancel cancel vacation. They said,
19 we've got to have you here; there's no choice.

20 A. **Well, that wouldn't be part of my package. My
21 vacation is approved, and I'm all set to go.**

22 Q. Well, they don't have authority to cancel it if they
23 need to?

24 A. **No, no.**

25 Q. Okay.

1 A. **All I'm saying is, I want you guys to pick the
2 right person and that under circumstances I feel like I can't
3 give my 100 percent, but in this case here it just
4 unfortunately falls into this time frame.**

5 MR. GOELLER: May I have just a second, Judge?

6 MR. SCHULTZ: Judge, I think both sides need
7 somebody with higher values than this juror, so we have an
8 agreement.

9 THE COURT: All right. And your client
10 concurs, as I understand?

11 MR. GOELLER: Yes, Your Honor.

12 THE COURT: All right. Mr. Ratsavong, you are
13 finally excused.

14 (Venireperson exits the courtroom.)

15 (Venireperson enters the courtroom.)

16 THE COURT: All right, sir. Are you Thomas
17 Calhoun?

18 VENIREPERSON: Yes, sir.

19 THE COURT: And I understand you go by Jeff; is
20 that correct?

21 VENIREPERSON: Yes, that's correct.

22 THE COURT: And you remember that you were
23 sworn with regard to the responses that you made?

24 VENIREPERSON: Yes.

25 THE COURT: That you are to be making in this

1 case?

2 VENIREPERSON: Yes.

3 THE COURT: All right. Mr. Schultz, go ahead.

4 MR. SCHULTZ: Thanks, Judge.

5 DIRECT QUESTIONS

6 BY MR. SCHULTZ:

7 Q. Mr. Calhoun, my name is Bill Schultz. To my left --
8 and I'll speed up the introductions -- is Ms. Falco, and
9 further to my left is Ms. Lowry. We are all Assistant
10 District Attorneys representing the State in its capital
11 prosecution of the defendant, Ivan Cantu, who's seated at the
12 defense table in the beige shirt. The man immediately to his
13 right is Mr. Don High, and then at the far right of that
14 table, that being your far right, is Mr. Matt Goeller. Both
15 of those gentlemen are fine practitioners of law in Plano,
16 Texas. They're both board certified criminal law specialists
17 and all-around good people.

18 You don't know any of us personally; is that
19 correct?

20 A. **No, I don't.**

21 Q. When I talked on Tuesday pretty graphically about
22 what we proposed to do, the portion of my talk when I asked
23 you to look at the defendant for a moment. Just take a moment
24 to consider what we were doing and realize that it is our
25 purpose and our commitment to present the sufficient evidence

1 that will ultimately result in his death. Did you understand
2 I wasn't trying to be entertaining, or I wouldn't do that to
3 be amusing in any regard about what we're doing here?

4 A. **I didn't take that as an amusing statement, no.**

5 Q. Did you notice -- did you notice anything about the
6 rest of the jury when we did that, did you find a different
7 kind of tone or something like that? Did you notice a change
8 in just the whole atmosphere when we talked that way? Do you
9 feel that?

10 A. **The point -- I'm not sure if I -- the point in time
11 that you're referring to wherever you asked folks to raise
12 their hands if they were in favor of the death penalty, I
13 think that's when I recognized the change that you're
14 referring to.**

15 Q. Okay. Now, it would seem to me -- I don't know; I
16 can't speak for everybody else -- but it would seem to me, if
17 I were sitting where you were, knowing that my decision was --
18 assuming I find the person guilty of capital murder, because
19 if he's not found guilty, we don't worry about anything
20 because he walks out of the courtroom because he's not guilty.
21 You with me on that?

22 A. **Yes.**

23 Q. And you've had prior jury service?

24 A. **Yes.**

25 Q. Was that a criminal case?

1 A. No.

2 Q. Civil case?

3 A. Civil case.

4 Q. Okay. But assuming he's found guilty of capital
5 murder, everybody that's going to be on that jury will know
6 there are only two choices, and that's life or death, and that
7 should be decided according to the evidence, really, that's
8 presented.

9 My question to you is, would you feel better coming
10 out of the end of a trial like that finding the evidence that
11 pointed toward a life sentence or a death sentence, or would
12 it matter to you?

13 A. At this point I couldn't answer that question
14 because I know nothing of the evidence.

15 Q. I guess what I'm thinking is if I were sitting where
16 you were; I mean I'm -- regardless of my position on the death
17 penalty, I think I would wish the evidence would be such that
18 it wouldn't require voting in a way that caused the death
19 penalty, because I think we're probably, generally, a pretty
20 caring people?

21 A. Absolutely.

22 Q. Would you agree with me?

23 A. I hate that anyone has to be subject to it.

24 Q. Me, for example, if I a choice between this being a
25 capital murder or a regular murder that I was trying, I think

1 through his attorneys, to present any evidence at all in this
2 case?

3 A. Yes.

4 Q. And if he chooses and they choose not to present any
5 evidence at any portion of this case, you can't hold against
6 them that failure to produce any evidence?

7 A. Uh-huh.

8 Q. Now, at the same time you don't give them any
9 benefit for that. I mean, you can't say, well, I'll bet they
10 had some good evidence. They just chose not to put on, and
11 you can't speculate what they might have put on if they wanted
12 to. You kind of just don't consider it. It's like -- it's
13 almost like you don't put anything on the scales because the
14 judge says that doesn't go on the scales of justice, their
15 failure to produce evidence. Can you do that okay?

16 A. I'll judge whatever evidence is presented.

17 Q. And the burden of proof is always upon the State to
18 prove the Defendant's guilty of capital murder in one of those
19 varieties that we talked about, and we have to do that beyond
20 a reasonable doubt. And if we don't do that, then it's the
21 jury's duty to acquit the Defendant. And you're okay with
22 that?

23 A. Uh-huh.

24 Q. Right?

25 A. Yes.

1 I would like it if I thought the facts were such that a death
2 has resulted (sic). We're all human. We prize human life.
3 Do you understand what I'm saying about that? Do you feel
4 that way?

5 A. Yes. I feel that way. I wish there weren't any
6 deaths happening that weren't natural.

7 Q. Okay. So you've never been divorced then?

8 A. No. No, I haven't.

9 Q. In a serious vein, when given evidence in a capital
10 case the jury only has choices of how it's going to vote on
11 special issues. It doesn't answer the ultimate question of
12 life or death, okay?

13 A. Uh-huh.

14 Q. It doesn't say we assess life; we assess death.
15 What you do is answer questions. The results of the answers
16 is going to determine what happens in the case, and I kind of
17 went over that on Tuesday, and I'm going to do a little bit
18 more of it pretty soon. But, before I do that let me ask you,
19 first of all, do you presume that the Defendant is innocent at
20 this point since no evidence has been presented?

21 A. Sure.

22 Q. Can you follow that preassumption of innocence?

23 A. Yeah.

24 Q. And you understand, not only is he presumed
25 innocent, but he doesn't have an obligation, either himself or

1 Q. And there's not a definition of beyond a reasonable
2 doubt. I mean, we would all agree it's substantial, large
3 amount of evidence, but there's not a specific definition
4 you're ever going to get that's going to tell you how much
5 evidence has to be beyond a reasonable doubt. That's
6 something you would just define yourself as a juror. You will
7 decide what that is, okay?

8 A. All right.

9 Q. Any problem with that?

10 A. No.

11 Q. Sometimes -- I'm not saying this will be one of
12 those cases. But sometimes there's situations in which the
13 State proves part of the case, but not all of it. For
14 example, let's say it's a dope case, and let's say we have
15 alleged more than five pounds of marijuana was possessed by a
16 defendant. And let's say that when the evidence comes in,
17 because of how the lab did its analysis or what percentage of
18 the marijuana was perhaps inert or something like that, it
19 turns out that the jury believes we didn't prove it was more
20 than five pounds; we proved it was three pounds, for example,
21 okay?

22 A. Okay.

23 Q. There are lesser-grade offense according to the
24 lesser quantities; in other words, we wouldn't, perhaps, have
25 a second-degree felony. We might have some kind of a state

1 jail felony, or something even less than that, depending on
2 how much we proved. Do you follow what I'm saying? It's
3 called a lesser-included offense?

4 **A. I'm not familiar with the degrees of felonies, but I**
5 **do follow you.**

6 Q. And you've probably seen it, like in homicide
7 cases, as you're watching TV show. Maybe somebody starts out
8 charged with murder, and the next thing you know they get
9 found guilty of some kind of manslaughter, which is something
10 lesser. Have you ever seen that on TV?

11 **A. No. Most likely just a cheap shot when someone is**
12 **tackled or blocked is about the closest I come to that,**
13 **because I watch football.**

14 Q. Okay. I don't know quite what to say to that one.
15 Let me think for a minute.

16 If we prove beyond a reasonable doubt that the
17 defendant's guilty of capital murder, and we go into the
18 punishment phase of the trial where some new evidence can be
19 offered that probably wasn't appropriate at the first part of
20 the trial. For example, character evidence, both good and bad
21 is admissible, where it might not be admissible at the earlier
22 phase of the trial. In other words, we can put on evidence in
23 a capital case of a defendant's bad character, some of the
24 other bad things he's done in his life, if there are such a
25 thing. The Defendant, if he chooses, can put on evidence of

1 favorable about him, do you think that would be a difficult
2 thing to find, generally speaking?

3 **A. Say that again, please.**

4 Q. Do you think, for example, if a defendant wanted to
5 higher a psychiatrist to say favorable things about him or his
6 personal or background, do you think it would be difficult to
7 find a psychiatrist to come in and testify about that if they
8 wanted to?

9 **A. Just to say they thought he was a good guy?**

10 Q. Uh-huh. He had a good personality, was amenable to
11 treatment, whatever might be used during the trial?

12 **A. I suppose that's possible.**

13 Q. And in fairness, do you think the State would
14 probably find another psychiatrist who would say just the
15 opposite, and we bring that psychiatrist into this?

16 **A. I think that's possible as well.**

17 Q. They get two; we get two, that kind of idea?

18 **A. Not that it would be any kind of conspiracy, but I**
19 **think that's possible.**

20 Q. Right, right. Especially when you're dealing with
21 experts -- what kind of a civil case were you the foreman on?

22 **A. It was a traffic accident.**

23 Q. Was anybody hurt in it?

24 **A. Yes.**

25 Q. Were the injuries serious; do you recall?

1 good things that he's done or good circumstances. We can
2 learn about his background, both good and bad. They're free
3 to put on evidence how he was growing up, what his high school
4 years were like, who his mom and dad were, where they lived
5 and that kind of thing. We can do similar things, and in
6 reality, almost anything relating to the Defendant and his
7 situation is admissible. I mean, that's a shorthand way, but
8 almost everything gets brought in at the second phase of that
9 trial that either sides wants to bring in. That's how it is,
10 and then the jury decides how that works and how important
11 that all is.

12 It may be that you get psychiatric evidence
13 presented by one side or the other. And I'll ask you,
14 Mr. Calhoun, as you sit there now, what do you think about
15 psychiatric evidence that's presented in criminal trials? Do
16 you have an opinion about that one way or the other?
17 **A. It's a pretty broad thing. As far as -- like in the**
18 **questionnaire, there was a question similar to that. You may**
19 **be looking at it now. I don't remember how I answered it,**
20 **but I think the field of psychiatry is valid, and I think it's**
21 **applicable in certain cases, and perhaps used more loosely in**
22 **others. It would depend on the circumstances.**

23 Q. I know you don't work in this field and probably
24 have no desire to. Do you believe that if a defendant, for
25 example, wanted to go find a psychiatrist to say something

1 **A. The injuries were presented as being serious,**
2 **presented as being perhaps a little more serious than what**
3 **they were.**

4 Q. Do you recall whether the plaintiff, that's the guy
5 claiming the injuries, did he or she have some kind of expert
6 come in and talk about the injuries?

7 **A. Yes.**

8 Q. Probably a medical doctor?

9 **A. And psychiatry, yes.**

10 Q. And then did the other side get a psychiatrist and
11 some medical doctors to come in and say other things; do you
12 remember?

13 **A. I don't remember anything pertaining to psychiatry,**
14 **but I really don't remember any of that kind of evidence from**
15 **the other side, no.**

16 Q. Okay. And I'm guessing you probably ruled for the
17 plaintiff, but probably for less money than they were
18 asking --

19 **A. Yes. That's real similar. It was a two-phase**
20 **claim, and one was actually zero, which should have been one**
21 **dollar as the judge told us afterwards. But the second one,**
22 **there was some reward, yeah.**

23 Q. Did you enjoy that experience?

24 **A. It was enjoyable.**

25 Q. About how long did trial last?

1 **A. I believe it was three days total. I believe two**
 2 **days worth of trial, and then we came back the next day to**
 3 **deliberate, and it was pretty brief. I think maybe four or**
 4 **five hours we discussed it, and then we reached a verdict.**

5 Q. If somebody were to ask you -- do you have kids?

6 A. Yes.

7 Q. What are their ages?

8 A. **My son is 20, and my daughter is 14.**

9 Q. Okay. If your daughter came to you and said, Daddy,
 10 what do you think of the death penalty? And you'd say, well,
 11 I'm in favor of it. And she'd say, why are you in favor of
 12 it? How would you explain to her what you think the main
 13 purpose of the death penalty is?

14 A. **That's a tough question, and it's a tough issue. I**
 15 **think really it's just the backbone, the foundation for all**
 16 **the things that I believe in. It would take me a long time to**
 17 **explain all those, but I think that -- just my personal**
 18 **beliefs as far as spiritual beliefs, my beliefs on the**
 19 **validity of the world in the Bible, and what I've learned**
 20 **throughout my life all lends itself to support that in -- in a**
 21 **reasonable way. It's a very serious thing, and it's something**
 22 **that I, actually, never thought I'd have to deal with.**

23 Q. You know, it's interesting because as I've talked to
 24 people who go through this, it's easy in your armchair to say
 25 I'm in favor of capital punishment, and it looks real good,

1 too, when we see these atrocious crimes committed. But,
 2 there's just something different about being involved in it
 3 that maybe doesn't change your mind, but it's a different
 4 feel; do you think?

5 A. **It is a different feeling, yes.**

6 Q. It's like soldiers. I mean, it's easy to run around
 7 the living room to talk about where we ought to bomb or what
 8 country we ought to invade. It's a lot different if you or
 9 somebody you love is over there doing it. You may still
 10 believe in it, but it's got a different feel to it than just
 11 that abstract, I think.

12 Q. Suppose you're further having a conversation with
 13 your daughter, and she said, well, Daddy, there's some good
 14 people, people that seem to be people of good will and
 15 conscious and faith, and they're against the death penalty.
 16 Why would they be against the death penalty? What would that
 17 be? What do you think are some of the legitimate, reasonable
 18 arguments against the death penalty in your mind?

19 A. **Well, the death penalty could be and is considered**
 20 **by some folks -- you know, in high school and college this**
 21 **issue came up a lot. People view it -- some people view it as**
 22 **murder, rather than a form of punishment, taking God's role in**
 23 **their own hands. I would suppose that those would be probably**
 24 **the two things that I've heard the most.**

25 Q. Now, I believe I understand that you are a strong

1 supporter of the death penalty. Do you have it in your
 2 personality, do you have respect for people that disagree with
 3 you on that?

4 A. **Sure, I do.**

5 Q. They could still be your friends, and you wouldn't
 6 say they're dumb or foolish or anything like that?

7 A. **No, absolutely not. No.**

8 Q. Okay. Now, before you came to court and had the
 9 explanation primarily from Judge Sandoval, and probably
 10 Mr. Goeller touched on it more than I did, did you think that
 11 any time someone was convicted of capital murder that a death
 12 sentence would result if they were convicted of that?

13 A. **No. No, I didn't.**

14 Q. So you understood that even -- that capital murder
 15 is just another kind of crime, and then you still have to have
 16 the punishment phase to see whether it's going to be life or
 17 death?

18 A. **I did. The only thing that I knew about capital**
 19 **murder is that it is murder plus another crime. That's the**
 20 **extent of my knowledge walking in the day before yesterday.**

21 Q. And it's funny, because years and years ago, we
 22 used to ask jurors who had found somebody guilty of capital
 23 murder, what's his sentencing? It's blank for life and then
 24 blank for death, and that's how they did it.

25 And then we got more complicated maybe that the idea

1 was to be simple, and we started, instead of doing that, we
 2 asked questions of the jurors; yes or no kind of questions
 3 based on the evidence. Part of the thinking was that jurors
 4 would find them a little more comfortable if they just
 5 answered questions rather than saying those words "life or
 6 death." Part of the reason was, it was thought if you asked
 7 jurors to consider certain questions there would be more
 8 uniformity of results. In other words, it wouldn't depend on
 9 which jury you got in a particular fact situation, whether you
 10 got the death penalty or not. The thinking was it ought to be
 11 about the same. In fact, if different juries are considering
 12 the same factors, then the same kinds of crimes ought to get
 13 the same kinds of results, and that was considered to be
 14 enlightened.

15 And in many ways we have now come back very close to
 16 juries having a chance to say life or death by operation of
 17 one of these questions that we deal with. Let me first show
 18 you the first -- what we call the first question and first
 19 special issue, and this is only going to be true if you found
 20 the Defendant -- if he's guilty of capital murder, and you go
 21 into the second phase. Then you deal with this question here,
 22 and that is whether there is a probability that the Defendant
 23 would commit criminal acts of violence that would constitute a
 24 continuing threat to society. And by the way, we've got to
 25 prove that the answer to that question is beyond a reasonable

1 doubt. We've shortened it a little bit. Is there a
2 probability that the defendant will be a continuing threat to
3 society.

4 Now, when we use the term "probability," we will not
5 define it for you because the law doesn't let us define that.
6 You obviously know the term probability. It's in our
7 language. It's a part of what we talk about from time to
8 time. What does probability mean to you as it might apply to
9 that question?

10 **A. Well, possibility is one level, probability is**
11 **another level, and propensity is another level, and the**
12 **possibility may apply to all of us. The probability would**
13 **apply to someone who's more apt to do that.**

14 Q. Now, there are a number of things that you may
15 consider in answering that question. When I say you, I mean
16 the jury, may consider in answering that question. What kinds
17 of things would you -- what kinds of things -- let's do it
18 this way. If I were to -- there's one of our prosecutors
19 sitting back there in the white shirt. If I were to say,
20 Mr. Calhoun, that fellow back there in the white shirt, is he
21 probably going to commit future acts of violence against our
22 society? You don't know him. You've never seen before in
23 your life?

24 **A. No.**

25 Q. What kinds of questions would you want to ask to be

1 **A. I don't know that I could properly answer that. I**
2 **don't know -- never been around anyone who's committed capital**
3 **murder.**

4 Q. Right.

5 **A. And I just, I guess, the facts speak for themselves.**
6 **I just don't know.**

7 Q. Do you think there are some crimes are so awful --
8 some fact situations that are so awful that that would prove
9 to you the probability of danger of the Defendant all by
10 themselves?

11 **A. I do. And the questionnaire that you have there, I**
12 **made reference to the Oklahoma City bombing.**

13 Q. Sure.

14 **A. I had -- had Timothy McVeigh lived, I would never**
15 **let my daughter ride with him to Dairy Queen.**

16 Q. And that's not the only -- that's not the only
17 fact -- you've heard of other horrible crimes. That's not the
18 only one you could ever think of where that would prove it all
19 by itself, right? Aren't there some other kinds of cases?

20 **A. Sure.**

21 Q. When we are use term "society" in this question,
22 this -- this isn't something we created here in Collin County.
23 This is state law, and I've got to say, it's very poorly done
24 in my judgment. Juries get through this all the time, so
25 they're able to work with it. It's -- every capital murder

1 able to tell me whether he's probably going to be violent in
2 the future or not? What would you want to know?

3 **A. Well, I'd want to know what he's done in the past.**

4 Q. Okay.

5 **A. I'd want to know a little bit about his**
6 **disposition --**

7 Q. Okay.

8 **A. -- right now.**

9 Q. Right.

10 **A. Determine whether he is by nature a violent person.**

11 Q. Okay.

12 **A. And that's where the psychology comes into play.**

13 Q. Okay. Now, unless he had a committed a capital
14 murder, this would just be like an academic discussion.

15 **A. Uh-huh.**

16 Q. If he had committed a capital murder, do you think
17 the facts of that case would be really important to you in
18 deciding whether he was probably going to be a danger in the
19 future or not?

20 **A. The facts of the capital murder would be, yes.**

21 Q. Kind of the thinking goes like this: If somebody
22 could do -- if somebody could do such a thing as a capital
23 murder under these circumstances, how could that person ever
24 be anything but probably violent if the controls had broken
25 down that much, that kind of thing, or were nonexistent?

1 case that you ever hear about in Texas, the jurors are talked
2 to just like we are with you, and they deal with this question
3 the same way. But we've got this term here, "continuing
4 threat to society." Do you see that term society. Now, when
5 you think of society what comes to mind as it would relate to
6 a capital murder? We're trying to figure, will this capital
7 murderer be a continuing threat to society? What do you think
8 of when you say society?

9 **A. Well, you covered this day before yesterday; society**
10 **being that environment by which we live. If this young man**
11 **ended up in prison, that would be his society, and he would be**
12 **subject to those laws in his society, which are different than**
13 **laws in our society now.**

14 Q. I think we would -- would you agree with me that
15 prison could be considered a society?

16 **A. Sure, it is.**

17 Q. Now, why that question is troubling is because it
18 doesn't ask the question, can he be safely held in prison? It
19 doesn't say, will he be a continuing threat to prison
20 society? It doesn't limit itself to prison society. So,
21 would you agree that question could conclude society that we
22 live in, also?

23 **A. That's pretty well the way I explained it, yes.**

24 Q. Now, sure, we know having been found guilty of
25 capital murder, we know he's going to prison somewhere,

1 assuming we get him there. He's either going to go to the
2 life side or the death row side of prison. Those are the only
3 two options. But you can read that question as what's his
4 character right now. Is he -- is he a threat -- is he a
5 threat to society, for example, if he walks out the door, or
6 if the Governor pardons him or he escapes, or they
7 accidentally lose him on way to the penitentiary, those kinds
8 of situations?

9 **A. Uh-huh.**

10 Q. Because it doesn't say prison society; does that
11 make sense to you?

12 **A. It does.**

13 Q. And it might be that he would be dangerous to one
14 part of society and maybe dangerous to another part of
15 society, but maybe less in some circumstances. But, that
16 question doesn't say do you find that there's no way that they
17 could hold him safely in the penitentiary. It just simply
18 says is he probably going to be a continuing threat to
19 society. Do you think you could work with that question and
20 hold us to our burden of proof and decide whether that
21 question should be answered yes or no. I think so. I think
22 ultimately the question is will he kill again if he's been
23 proven to kill to begin with.

24 Q. If not killed, it doesn't have to be limited simply
25 to killing again. It could be other crimes of violence. I

1 mean, getting beat up bad might be better than being killed,
2 but, for example, that's still a crime of violence?

3 **A. Beating up bad?**

4 Q. Yeah.

5 **A. That's violence, yes.**

6 Q. If somebody were to tell you -- do you remember my
7 example when I said you come home and a loved one has been
8 murdered, and the officer said it's not as bad. And I think
9 the example I used then -- and I wasn't trying to be funny or
10 amusing then. It was to be contextual about this. What if
11 the officer said, it's not as bad as it seems, Mr. Calhoun,
12 because the killer was a drug addict. Would that -- would
13 that make any difference to you? Would that seem like it
14 wasn't quite as awful a thing that happened to your loved one
15 maybe?

16 **A. I think initially out of -- out of being in this
17 environment sitting at home, it's easy to say that if bad
18 people kill each other, that's okay.**

19 Q. Right.

20 **A. But I think when it comes down to determining what
21 really should be done about it, a human life should be worth
22 the same regardless of what choices they've made in my
23 estimation.**

24 Q. Okay.

25 **A. Because I'm not one -- I'm not the one to judge the**

1 **value of the soul.**

2 Q. And maybe somebody else would come along, and
3 they're not going to like what you are. Maybe they're going
4 to say this Mr. Calhoun's a bad guy and according to their
5 values, and we can't have our society -- everybody doing that,
6 can we? We can't have people being killed because other
7 people just don't think they're good people or not worth while
8 or something?

9 **A. I'm not sure I understand.**

10 Q. Well, most of us would agree that drug dealers
11 aren't very wonderful people. I think most --

12 **A. I agree with you on that.**

13 Q. I mean, I -- in our heart of hearts, I mean, if we
14 see on TV a drug dealer got run over by a train, I doubt we'd
15 get the same amount of concern for that as, you know, some Boy
16 Scout leader or something like that, for example, that's
17 trying to do something good for society. Does that seem fair
18 to you?

19 **A. Yes, in that context.**

20 Q. It might not be up to you or me. There might be
21 somebody else that needs to judge the relative worth of us
22 all, and it probably shouldn't be you or me, but we still feel
23 that way just as people living on this planet?

24 **A. Right. I think most people do.**

25 Q. I guess my question, though, is do you see why we

1 have to look at the Defendant for responsibility more than who
2 he killed. He may have reasons he killed a person, but if
3 it's a murder, if we get all caught up in whether he murdered
4 somebody good or bad, that's missing the mark of what we have
5 to do for responsibility in our society. Is that kind of how
6 you feel?

7 **A. I think so.**

8 Q. Do you think being a drug addict is an excuse for
9 the crimes you commit when you're doing those drugs?

10 **A. No. We have to -- no one is exempt to the law
11 unless they're placed in another society, in my opinion. If
12 there's someone who's not mentally competent to live freely
13 enough in this society, then they should be limited in this
14 society so that perhaps the rest of the people would be
15 protected. But for someone to voluntarily adulterate their
16 minds does not make one exempt to the laws of our society.**

17 Q. If you found a defendant guilty of capital murder,
18 you move into the second part of the trial. We already know
19 that you know it's not an automatic death sentence. It's
20 going to depend on the evidence. It's going to depend on what
21 you think of the evidence and the crime, number one, because
22 you get to consider that, and any other evidence that might be
23 presented to you, number two. And then you decide, first of
24 all, is the person going to -- likely to be a continuing
25 threat to society? And let's say you decide yes. Let's say

1 you and 11 other people vote yes for that beyond a reasonable
2 doubt. If you don't vote yes, we don't worry about the death
3 sentence anymore because if it's a no answer to that question,
4 then it's an automatic life sentence, and we don't worry about
5 anything else. No means life.

6 **A. Right.**

7 **Q.** But if you answer yes, like I said, we're almost
8 back to asking the jury the life or death question. We get
9 this second, this mitigation question, and if you would, just
10 take a moment just to read it so you're familiar with it again
11 for me?

12 **A. Okay.**

13 **Q.** What the question seems to be asking is even though
14 it's a capital murder and even though the answer is this
15 person is probably going to be a future danger, probably going
16 to commit acts of violence in the future, even with all of
17 that, is there something, taking everything into account,
18 about his background, his character, the circumstances of the
19 crime, his moral culpability, whatever that means, looking at
20 all of that, however you look at it, is there something about
21 the evidence that makes you think death isn't the right thing
22 for this defendant in this case? That's what the question is
23 really aimed at. And it has its critics, but I've got to say
24 that I think it would be real weird for a jury to mechanically
25 vote yes on that future danger question, and then go walking

1 into that jury room and saying, you know, even though we voted
2 yes and voted capital murder, that's an awful thing. That
3 person doesn't need to be killed in our opinion. We've been
4 watching this case better than anybody else around. We don't
5 think it should be a death sentence. And that question is
6 almost like a humanitarian question that gives the jury the
7 opportunity in its collective wisdom and conscience to spare
8 a life against the possibility of that mechanical allocation
9 of the death penalty. Am I making sense to you, what that
10 does?

11 **A. Uh-huh.**

12 **Q.** I don't know how you feel about it. To me it seems
13 like that's a good thing, not a bad thing. What do you think
14 about the jury having that option to do the right thing
15 depending on how much mitigating or explanatory evidence it
16 believes?

17 **A. The ability to reduce the sentence --**

18 **Q. Uh-huh.**

19 **A. -- to life in prison.**

20 **Well, I think that's what a jury is all about.**
21 **Twelve people concluding to what really should be done, and I**
22 **think once all the evidence has been seen in a case, like in**
23 **the civil case that I was involved in, then I was just like I**
24 **am now. I don't know anybody in here. I didn't know who he**
25 **was whenever we walked in the room day before yesterday. I**

1 **had no reason to believe anybody who was in the room. But, I**
2 **guess -- I don't know. I'm losing track of where I'm going**
3 **with this.**

4 **Q.** I don't doubt. It's been a long, long day for us
5 all.

6 **A. You've had a longer day than I have. I've been**
7 **reading Texas Monthly.**

8 **(Laughter.)**

9 **A. I don't know anything about any of these people**
10 **going in. I have to weigh the evidence and determine what the**
11 **background is and what kind of threat I feel, and then I think**
12 **it's good that 12 people have the possibility of doing that.**

13 **Q.** Okay. Now, you may be the kind of person that would
14 almost never find that somebody who had been convicted of
15 capital murder and was probably going to be violent in the
16 future, the chance of you voting for a life sentence using
17 that question might be pretty rare, and it might not, because
18 I don't know you, and you probably don't even know yourself in
19 this context because it's not what you do for a living. It's
20 not your life. And that's okay, and maybe the person sitting
21 next to you in the jury box would be the kind of person that
22 would often do it. Maybe that person would say, oh, that's
23 sad, you know, his dad wasn't around to teach his lessons,
24 that's, and mitigating. He caught up in drugs when he was
25 little, and that's mitigating. And there's room for

1 everybody's opinion in the jury as long as each juror can
2 assure both sides that you would consider that question, and
3 according to your best conscience, decide whether or not
4 whatever evidence was presented was enough to mitigate against
5 the application of a death sentence. Does that make sense to
6 you?

7 **A. Uh-huh.**

8 **Q.** Like I said, I don't know you. You might be someone
9 who would often find mitigation. You might be someone who
10 would rarely find mitigation. But you tell me you're somebody
11 whose mind is open to the concept that there may be mitigating
12 circumstances; is that right?

13 **A. I believe so. I'm walking in here blind. I know**
14 **nothing about this. I haven't watched a courtroom drama in**
15 **years. I trust judicial system and the reason for it being**
16 **there.**

17 **Q.** Okay. Now, what you think -- what one person might
18 think is mitigating, another person might think is not
19 mitigating at all. In fact, another person might think it's
20 aggravating. Let me give you an example of what I mean.
21 Suppose it was presented to you in the trial that the
22 Defendant was, say, a high school dropout?

23 **A. Uh-huh.**

24 **Q.** Well, everybody in our society knows that your
25 chances of succeeding and going a good life are probably

1 better if you stay in school and get your education. We all
 2 know that, right?
 3 **A. Right.**
 4 Q. If you don't do that, that means you probably are
 5 going to have less advantage unless you -- I guess, if you're
 6 a rock star or something, you probably don't need to go to
 7 high school. But other than something like that, your chances
 8 are going to be less if you drop out of school, right?
 9 **A. I agree.**
 10 Q. Some people might say, well, he's a high school
 11 dropout. He never could make any money, and they might think
 12 that's mitigating. They might think that somehow that
 13 lessens -- maybe not all by itself, but they might put that on
 14 the mitigating scale and say, well, that's something for him.
 15 And other people might just take the opposite view. They
 16 might say, you know, there wasn't any reason for him to drop
 17 out. His parents worked for a living. He could have stayed
 18 in school, but he didn't want to. He wanted to do whatever he
 19 wanted to do. And they might think that's -- the fact that he
 20 dropped out of school could be aggravating, make it even
 21 worse. Do you follow what I'm saying?
 22 **A. I do.**
 23 Q. That's up them. Neither one of them is wrong. The
 24 one that thinks it's mitigating, that person is not wrong.
 25 The one that thinks it's aggravating, the same thing.

1 That's true of drugs. Some people might think being
 2 a drug addict is mitigating. Other people might say that's
 3 extra bad. You know, you deliberately take something that you
 4 know is liable to make you mean, how could it be worse than
 5 that? It's almost like premeditated if you're going to take
 6 something that makes you mean. They might say that's
 7 aggravating. Do you understand, everybody could see things
 8 differently in whether it's mitigating or not?
 9 **A. I see opposing views every day.**
 10 Q. Absolutely. And the question is do you realize that
 11 there could be some cases where you would vote in favor of a
 12 life sentence, depending upon what mitigating evidence was
 13 presented to you?
 14 **A. Would I challenge those people who were in favor of
 15 the mitigating circumstances; is that what you're asking?**
 16 Q. Right. Or could you join them? Depending on the
 17 facts of the case, would you be capable of maybe saying I
 18 agree with them on this particular case; it's mitigating?
 19 **A. Yes, I guess. All this is so hypothetical it's
 20 difficult to determine. I could walk in front of a truck in a
 21 minute. That certainly could happen, too. I just don't know.**
 22 Q. You're absolutely right. We can't talk specifics
 23 about this case. That's why we have to do it the way we're
 24 doing, because if we start talking about this case, then we'd
 25 start asking questions like, do you think he's guilty, or do

1 you think he's innocent? And it's just the way the system
 2 works. We can't do that.
 3 **A. Yeah, I understand. I understand that people have
 4 opposing point of views and people can mitigate --**
 5 Q. Could you do that? Could you vote in favor of
 6 mitigation, depending on what evidence was presented?
 7 **A. Yes, I guess I could. Yeah.**
 8 Q. Okay.
 9 **A. If there's circumstances that lend themselves in
 10 special -- you know, especially to -- I deal with that in
 11 business all the time. If the shipment didn't get there
 12 because the truck had a wreck, there's not much way we could
 13 have gotten the shipment there on time. So, the truck wreck
 14 would be a mitigating circumstance.**
 15 Q. What kind of business are you in?
 16 **A. Well, we make dog and cat food, and I go out and
 17 make sure the economy is well-stimulated by that.**
 18 Q. I asked this before, and you didn't say anything
 19 then. I don't have any reason to think you will now. There's
 20 nothing in your background that makes you think you need to
 21 tell us something that would make you unfair to either side in
 22 this case, right?
 23 **A. Not really. I've lived a pretty boring life as far
 24 as that's concerned. Not that I'm volunteering or anything.
 25 Don't misread me.**

1 Q. No, I didn't get that from you.
 2 **A. Good.**
 3 Q. But in fairness, you would certainly serve proudly
 4 if you're selected; is that right?
 5 **A. Well, I'm a citizen of the United States, and I'm a
 6 patriot and I'll do what I need to do.**
 7 MR. SCHULTZ: Moment please, Judge?
 8 THE COURT: Yes.
 9 Q. BY MR. SCHULTZ: You indicated that you had a
 10 relative involved in some type of rehabilitation program for
 11 people charged with a crime. You circled yes for that?
 12 **A. I did.**
 13 Q. Can you tell us what that is?
 14 **A. Yeah. When I was a teen-ager my mom worked at the
 15 Girl's State School in Brownwood.**
 16 Q. Uh-huh.
 17 **A. And that's where I grew up. It's a place for, I
 18 guess, juvenile delinquents that committed a crime that --
 19 where they had to be incarcerated to a small degree, and they
 20 were sent to this school. That's the way I understood it. I
 21 just remember not getting dinner sometimes over it.**
 22 Q. How long did your mom do that?
 23 **A. I think two or three years.**
 24 Q. From what you can remember, did she seem to like
 25 that kind of work?

- 1 A. No, she didn't.
- 2 Q. Well, what did she seem to object to about it?
- 3 A. I think she objected to work in general. But the --
- 4 Q. A lot of that going around.
- 5 A. I'm leaning in that direction. She -- it was
- 6 stressful to her because the girls were -- as I recall, which
- 7 is vague, she had discipline problems that she had to deal
- 8 with, and I can remember she brought them home -- a few of
- 9 them home one time, and I met them. I just saw them. Really
- 10 we went to a Hawaiian luau. Everything went well. That's
- 11 really all I remember; a pig with an apple in its mouth.
- 12 That's about it. I hope that's enough for you.
- 13 Q. She's laughing, but I don't know why.
- 14 A. I didn't eat the apple.
- 15 (Laughter.)
- 16 Q. Any relatives in law enforcement, other than your
- 17 mom in that context?
- 18 A. No. And she wasn't involved in law enforcement.
- 19 She was just kind of a dorm mother, I believe, is what they
- 20 called her.
- 21 Q. Now, your son was recently robbed during his sleep.
- 22 Tell me about that.
- 23 A. No. He was burglarized. We made that clear day
- 24 before yesterday.
- 25 Q. I should have talked with you before the

- 1 questionnaire.
- 2 A. Should have been a little more educated before we
- 3 were given the test, yes.
- 4 Q. He wasn't robbed; he was burglarized?
- 5 A. He was at South Padre Island. He went to sleep,
- 6 and he woke up without a watch and a wallet and his cell
- 7 phone.
- 8 Q. And his story is what?
- 9 A. His story -- that was his story.
- 10 (Laughter.)
- 11 Q. All right.
- 12 A. Yeah. I don't know -- I didn't see the police
- 13 report. I'm not going to question him. He's a college
- 14 student.
- 15 Q. Just take what he gives you.
- 16 A. That's good enough for me. Good Dad, right, yeah.
- 17 Now, when you get to the part where I gave my
- 18 favorite role models for men and women, I'd like for you to
- 19 skip over that, please. I was hypoglycemic and low in blood
- 20 sugar. Let's go ahead point that out so we can call our
- 21 attention to it.
- 22 Can I ask you a question?
- 23 Q. Yeah. It's going to be up to the judge whether I
- 24 can answer it, but you can sure ask it.
- 25 A. Why would you put such a ludicrous thing on the

- 1 questionnaire?
- 2 Q. What's that?
- 3 A. Yes.
- 4 Q. Don't you think that tells something about people's
- 5 personalities?
- 6 A. Not in this case.
- 7 Q. You don't like Fidel Castro?
- 8 A. Not partial to Fidel, no.
- 9 Q. Or Saddam Hussein?
- 10 A. No, or Ted Turner. I couldn't think of anybody.
- 11 So, there's a part where you can ask that that be stricken
- 12 from your record. That's what I'd like.
- 13 THE COURT: Sorry. You were under oath.
- 14 VENIREPERSON: But I was low in blood sugar.
- 15 THE COURT: All right. You were not
- 16 functioning, all right.
- 17 Q. BY MR. SCHULTZ: Anything else you can think of that
- 18 you think might just be relevant to our decision whether to
- 19 seat you on this jury or not that I haven't asked you?
- 20 A. Well, I have probably the same selfish reasons that
- 21 everyone else does. I travel all the time. I'm responsible
- 22 for a lot of money and this would -- this would hurt.
- 23 Q. I understand. You know, I was probably -- I was
- 24 probably a little too flippant in what I said about too bad.
- 25 I don't really mean that. I guess what happens in this

- 1 business, this is big stuff. I mean, it's not just big stuff
- 2 to my side. It's big stuff to that side of the courtroom,
- 3 also, of course. And I suspect that you'd have to admit that
- 4 what we're asking you to do if you're selected isn't anything
- 5 compared to the people that have died for this exact same
- 6 thing we're dealing with now. That was kind of my point, and
- 7 I probably said it wrong.
- 8 A. Well, yeah.
- 9 Q. And I'm not being generous with you losing money. I
- 10 mean, that's not where I'm at, but you understand that. This
- 11 is -- if you had -- if you had somebody you cared about
- 12 sitting over there charged with a capital crime, you'd -- I
- 13 think your priorities would be just where everybody else's are
- 14 on this. I'm sure they would be.
- 15 A. Well, I'll be dead serious about this.
- 16 Q. All right.
- 17 A. I've never been called to anything like this
- 18 before. I don't know what the possibility of me further
- 19 participating in this are. But this is a very serious issue,
- 20 and I take it very seriously.
- 21 Q. I know you do.
- 22 A. And three weeks of my life optimistically isn't a
- 23 great percentage. And anybody can live through this, even the
- 24 guy who's self-employed. And I would hate to think that
- 25 anyone would not have a fair trial, especially something to

1 **this degree.**
 2 MR. SCHULTZ: I appreciate that. We'll pass
 3 the juror, Judge.
 4 THE COURT: All right.
 5 MR. HIGH: Judge, I'm going to do this one.
 6 THE COURT: All right.
 7 CROSS-EXAMINATION
 8 BY MR. HIGH:
 9 Q. Mr. Calhoun, pleasure to meet you. My name is Don
 10 High, and it's just like it sounds, like up high in the air,
 11 H-I-G-H.
 12 A. Okay.
 13 Q. You and I are about the same age, and I want to
 14 introduce myself because we've been asking you a bunch of
 15 questions. We sure don't mean to pry or get too personal, but
 16 we've got to get somewhat personal with you. I hope you
 17 don't mind that, but that's part of our job.
 18 A. I'll let you know if I do.
 19 Q. And we're also trained to ask questions. That's
 20 what we do as lawyers, I guess. So, I'm going to ask you a
 21 few questions, but I think I'll have you out of here by 5. I
 22 can do that. Is that fair enough?
 23 A. **4:45 would be more fair. If we're setting the**
 24 **scale, let's get it established.**
 25 **(Laughter.)**

1 Q. Maybe we can do that. We'll see.
 2 You understand that it's the State of Texas that's
 3 prosecuting this young man here --
 4 A. I do.
 5 Q. -- Ivan Cantu.
 6 Do you understand who the State of Texas is?
 7 A. Yes.
 8 Q. How do you understand that; what do I mean by that?
 9 A. **Testing me. The State of Texas representing the**
 10 **District Attorney.**
 11 Q. Absolutely, and it's not a trick question. The
 12 District Attorney's office generally prosecutes criminal cases
 13 on behalf of the State of Texas, and there are district
 14 attorneys all over the state. The one in our area is assigned
 15 to Collin County, and his name is Tom O'Connell. Do you know
 16 Tom O'Connell?
 17 A. No.
 18 Q. Okay. His name was mentioned in your questionnaire,
 19 and you checked no. He's an elected official. He's an
 20 elected district attorney, and it wasn't the State of Texas
 21 that decided to seek the death penalty in this case. It was
 22 Mr. O'Connell. Are you aware of that?
 23 A. **No. I didn't know that it was Mr. O'Connell who**
 24 **made that decision to go that route.**
 25 Q. Okay. Well, he's -- you know, as the elected

1 District Attorney he has the authority and the
 2 responsibility, if you will, to decide when and if to seek the
 3 death penalty?
 4 A. Right.
 5 Q. That's not uncommon. I mean, there's district
 6 attorneys in Dallas and Houston and San Antonio, and they're
 7 confronted with a case, and they've got to make the decision. We
 8 hear it on radio and TV, the State will seek the death
 9 penalty. And it's because, you know, the man where the buck
 10 stops, he's the one that has to make that decision. So, I
 11 just wanted you to understand that. We're not the ones that
 12 decided this, not us, not the judge. It's not really anybody
 13 in this courtroom. It's the elected district attorney; is
 14 that clear?
 15 A. **Uh-huh. I had a haphazard understanding of that.**
 16 Q. I noticed you're originally from Brownwood. How
 17 long did you live in Brownwood?
 18 A. **Oh, gosh. If you want me to tell you every place**
 19 **I've lived, it will take us well past 5:00.**
 20 Q. Okay.
 21 A. **I was born in Brownwood, and I lived there the first**
 22 **2 or 3 years of my life and moved back in grade school, and**
 23 **was there until in I was a junior in high school.**
 24 Q. Okay. So, a large part of your life was spent in
 25 West Texas?

1 A. **The biggest part of my life was spent in Brownwood.**
 2 Q. And those are some of the best people on earth,
 3 aren't they, people in West Texas?
 4 A. **They were, yeah. I'm assuming they still are.**
 5 Q. I'm originally from Midland.
 6 A. Okay.
 7 Q. And I have a lot of family out there.
 8 A. **I made that assumption after that last statement.**
 9 Q. We know that. We understand that because we've
 10 experienced it.
 11 I'm going to go through your questionnaire here. On
 12 page 2, you indicate that with respect to life confinement in
 13 prison, I believe that life confinement in prison is
 14 appropriate in some capital murder cases, and I could return a
 15 verdict resulting in life confinement in a proper case.
 16 Now, you've had a couple of days to think about
 17 capital murder, the death penalty, and you've had some time
 18 today, and you've had some time in the courtroom this
 19 afternoon. Is that still your position, or would you change
 20 that? Is that still the way you think on it?
 21 A. **I've had other thoughts pass through my mind besides**
 22 **this. If I'm chosen as a juror, I'm sure those thoughts will**
 23 **accelerate. But I don't think, no, my opinion on that hasn't**
 24 **changed, no.**
 25 Q. So it's fair to say that in the right case, in the

1 proper case, life confinement would be a satisfactory result
2 for you?

3 **A. Again, another vague situation, yeah. A very
4 hypothetical, gray area.**

5 Q. I understand. One of -- these questions are very
6 interesting on page 3 that deal with the criminal justice
7 system. I was interested in your answer on the bottom of page
8 3 that there's a question here that says, what makes a person
9 dangerous? And your answer is, lack of self-control under
10 many circumstances. So I wanted to ask you if you could
11 elaborate on that for me a little bit, and then I want to
12 discuss it with you.

13 **A. Okay.**

14 Q. So elaborate first, and then we'll discuss.

15 **A. Well, people can be provoked into doing things.**

16 Q. Fair enough.

17 **A. Okay. Depending on the severity -- tell me again
18 what the question -- how exactly it read.**

19 Q. It says what makes a person dangerous?

20 **A. Right, dangerous. And there's different degrees of
21 danger. If I walk out of here, and somebody punches me in the
22 nose, that's a dangerous person. But if I had said something
23 to aggravate him to the point of punching me in the nose, I
24 probably deserved it. But there's a point where you draw the
25 line, because it's still acceptable to punch people in the**

1 **A. -- at the time that I answered that question.**

2 Q. Okay. Do you think a person could be dangerous at
3 one point in time because they punch you in the nose, but when
4 they get some food in their stomach and they get back rational
5 again, they could then become safe? They could then not be
6 dangerous anymore? I guess what I'm saying is, once brought
7 back under control, I mean your answer assumes lack of
8 self-control.

9 **A. Uh-huh.**

10 Q. Once they're brought back under control again, could
11 they no longer be dangerous?

12 **A. The question is after they're brought back under
13 control, do they still have a problem with lack of
14 self-control? Because when you're out of control, you were in
15 control at one point.**

16 Q. That's right.

17 Okay. Now, I want to jump to something real quick.
18 I'm going somewhere with this. One of those special issues
19 that you're going to have to consider is future dangerousness.
20 Did you get enough chance to look at this earlier?

21 **A. Yeah. I've got to see that several times.**

22 Q. Whether there's a probability that the Defendant
23 would commit criminal acts of violence that would constitute a
24 continuing threat to society. Obviously that's requiring you,
25 as a juror, to look in the future, right?

1 nose. That's okay. Does that answer your question at all?

2 Q. To some extent.

3 **A. I know you're going to come back with --**

4 Q. I think we talked about in that situation, maybe
5 this guy has got a bone to pick with you. Maybe he carries a
6 grudge. Maybe he's mad about something. Maybe he asked you
7 too many questions up here today. Temper plays a part, the
8 relationship of the parties plays a part, obviously.

9 **A. Uh-huh.**

10 Q. Maybe if that gentleman hadn't had anything to eat,
11 and he was hypoglycemic and low on blood sugar, and maybe you
12 looked at him wrong and he punched you in the nose?

13 **A. Uh-huh.**

14 Q. That's a possibility. Maybe he was doing drugs.

15 **A. Uh-huh.**

16 Q. You know, and when he saw you coming, he saw you
17 plus something else, a hallucination of some sort. Who
18 knows? Maybe that person is paranoid schizophrenic, and they
19 hit everybody in the nose. They think everybody is out to get
20 them. Is that kind of what you're talking about, you know, a
21 lack of self control, there's many circumstances why a person
22 could be dangerous?

23 **A. No. That's not exactly what I was talking about. I
24 was not considering any kind of mental condition --**

25 Q. Okay.

1 **A. Uh-huh.**

2 Q. And evaluate the Defendant and see, based on the
3 evidence that you hear in this courtroom, if he's going to be
4 a continuing threat to society?

5 **A. Right.**

6 Q. Now, if you heard evidence that the defendant had
7 taken measures to bring himself back under control; in other
8 words, if you heard evidence in this trial that there was a
9 lack of self control, but you also hear evidence that, you
10 know, he's taken measures to bring him back under control,
11 would you consider that in answering that special issue? Let
12 me be more specific. I know I'm sounding real vague here, but
13 let's say that he was a drug user at the time these murders
14 occurred and then he stopped using drugs?

15 **A. Uh-huh.**

16 Q. Okay. Let's just use that as an example. Would you
17 consider that if you were answering this special issue?

18 **A. Would I consider drug use as a mitigating
19 circumstance in case where --**

20 Q. That's not really my question. My question is --
21 and we're not really talking about mitigation here. What
22 we're talking about is future dangerousness.

23 **A. Okay.**

24 Q. And I'm assuming -- I'm trying to anticipate what
25 you meant when you answered the question about what makes a

1 person dangerous.

2 **A. Uh-huh.**

3 **Q. Do you want me to rephrase it?**

4 **A. No, no. Yeah. Yeah, I do want you to rephrase**
5 **that.**

6 **Q. Okay. In other words, it's your opinion that a**
7 **person is dangerous if he lacks self-control under many**
8 **circumstances. And I assume you'd agree with me that if a**
9 **person is on drugs, doing drugs, doing alcohol, they're**
10 **lacking self-control?**

11 **A. I'd agree with that.**

12 **Q. And that probably makes them dangerous?**

13 **A. Right.**

14 **Q. Now, with respect to answering that question about**
15 **what they're going to do in the future --**

16 **A. Uh-huh.**

17 **Q. -- and you heard evidence in this courtroom that**
18 **they stopped using drugs, or they stopped using alcohol.**
19 **They've made an affirmative attempt or effort to stop that,**
20 **would you consider that kind of evidence in answering that**
21 **special issue**

22 **A. I would consider it. I would consider it, but if a**
23 **person was violent under the use of drugs and not**
24 **under -- and not violent when they're not using drugs, it's --**
25 **I think it's a safe assumption to think that if they ever used**

1 **drugs again they would become violent again, and I don't think**
2 **it's a fair assumption that they would never use drugs again,**
3 **unless there was some pretty substantial evidence.**

4 **Q. Okay.**

5 **A. Does that answer your question?**

6 **Q. Yeah, absolutely. And I'm not trying to be tricky**
7 **or cute with you. Do you understand that if and when we get**
8 **to this first special issue, there's already been a conviction**
9 **for capital murder. And you also understand, I think**
10 **Mr. Schultz went through it with you, that if there's a**
11 **conviction for capital murder, we're talking life in the**
12 **penitentiary or death?**

13 **A. Right, I understand.**

14 **Q. Okay. And I guess it's a fair assumption if the**
15 **Defendant is going to spend life in the penitentiary, it's**
16 **unlikely he's going to have access to the drug of his choice?**

17 **A. I would hope so.**

18 **Q. We can't guaranty that, but it's a pretty good**
19 **assumption, wouldn't you say?**

20 **A. I guess, yeah.**

21 **Q. All right. So let's kind of add that into the mix.**
22 **Let's say that -- let's say that we have a defendant convicted**
23 **of capital murder. You know he's going to the joint, at least**
24 **for life, unless he gets the death penalty. And so we know**
25 **that the chances of him having ready access to the drug of his**

1 choice, we can remove that from the equation. It's less
2 likely -- and you know that -- you've heard evidence that he's
3 tried to kick his drug problem. He's affirmatively tried to
4 lick it, and he's not going to have access to drugs in the
5 penitentiary. Would you be able to factor all those pieces of
6 evidence if you were a juror and you had to consider that
7 question in rendering your answer to that question? Do you
8 get where I'm going with this?

9 **A. I do. All the evidence should be considered, and**
10 **however the evidence applies itself to the situation is going**
11 **to determine it's validity.**

12 **Q. Sure, okay. I want to go to page 5 of your**
13 **questionnaire, right in the middle, and I'm going to read this**
14 **to you. The law in the State of Texas says that a person**
15 **convicted of capital murder can receive the death penalty**
16 **solely because of the facts and circumstances of the crime,**
17 **even if he has committed no other crimes. Do you agree with**
18 **this law? Yes, please explain. Murder stands alone.**

19 **And can you elaborate on that? I'm not sure I fully**
20 **understand that answer.**

21 **A. Sure. Let me think how I could. Well, I don't**
22 **think that being a criminal is a building process. I don't**
23 **think that you have to earn a degree to be a hard-earned**
24 **criminal. I think you can do that in a matter of seconds.**
25 **It doesn't matter to me whether a person drove too fast or**

1 **robbed a bank, or what have you. If someone commits a**
2 **serious, violent crime, they're subject to the same laws as**
3 **somebody who drives too fast, or somebody who has robbed a**
4 **bank, regardless of what they've done in the past and**
5 **regardless of their position.**

6 **Q. The fact that they've committed no other crimes in**
7 **the past and this is their first brush with the law, would**
8 **that be of any consequence to you?**

9 **A. I wouldn't consider murder a brush with the law.**

10 **Q. Well, I mean -- you know, I understand what you're**
11 **saying. Murder is very, very serious. But, you know, a**
12 **person that has lived their life without committing a serious**
13 **crime, and right off the bat they're charged and convicted of**
14 **murder, I mean would their background and the way they've**
15 **lived up to that point be of any consequence to you?**

16 **A. Let me back up. If they're charged with murder,**
17 **doesn't mean they committed murder.**

18 **Q. That's right.**

19 **A. If they've been found guilty of murder, then, no, it**
20 **doesn't matter. I never really considered how serious murder**
21 **is until I found myself here faced with the possibility of**
22 **determining whether someone dies for a crime that they've**
23 **committed because either way it's taking a life.**

24 **Q. That leads me to my next issue that's the second**
25 **special issue. In the event he's committed -- convicted of**

1 capital murder, and you-all answer this question yes --
 2 **A. Okay.**
 3 Q. -- okay, then you would get to this question. And
 4 have you had enough time to look at this? This is pretty long
 5 and drawn out.
 6 **A. That's the one I read before.**
 7 Q. That's right.
 8 **A. Uh-huh.**
 9 Q. Whether taking into consideration all of the
 10 evidence, including the circumstance of the offense, the
 11 defendant's character and background, and the personal moral
 12 culpability of the defendant, there is sufficient mitigating
 13 circumstance or circumstances to warrant that a sentence of
 14 life imprisonment, rather than a death sentence, be imposed.
 15 Now, it specifically points out the Defendant's
 16 character and background. And I've given you the situation
 17 where a person hasn't been in trouble before, you know, and
 18 they've now committed a heinous crime. They've now committed
 19 murder, and they stand before you. You've answered this first
 20 special issue yes, and now it's time to decide if there's
 21 evidence of mitigation that would mitigate against imposition
 22 of the death penalty.
 23 **A. Uh-huh.**
 24 Q. The law says you're to consider his character and
 25 his background. Can you do that? I mean, the fact that he

1 hasn't been in trouble before, or are you saying you can't do
 2 that?
 3 **A. I don't remember before when you were asking me**
 4 **about committing crimes prior to this.**
 5 Q. Right.
 6 **A. I don't remember you referring to capital punishment**
 7 **at that point.**
 8 Q. Okay.
 9 **A. You weren't referring to capital punishment. Am I**
 10 **correct?**
 11 Q. Okay. Maybe I wasn't. I'm thinking about this,
 12 obviously. Maybe I wasn't.
 13 **A. Two separate things.**
 14 Q. Okay.
 15 **A. Okay.**
 16 Q. Okay. Can you -- could you consider the fact that
 17 a person hadn't been in trouble, his character and his
 18 background, when deciding this special issue. I guess that's
 19 what I'm getting at?
 20 **A. I think it's my obligation to do that.**
 21 Q. Okay. And you can?
 22 **A. Sure.**
 23 Q. Okay.
 24 **A. That's why -- that's why it's provided, right?**
 25 Q. Well, it's provided and it's required, and you've

1 got to be able to do it before you're proper to sit on this
 2 jury, and that's why we're getting real direct with you.
 3 **A. Uh-huh.**
 4 Q. And you're telling me you could do it?
 5 **A. I am, yes.**
 6 Q. Okay. I'm going to go to page 11 of your
 7 questionnaire, and you reference the Stonebriar Church of
 8 Frisco. Is that Charles Swindal's church?
 9 **A. It is.**
 10 Q. How long have you been a member there?
 11 **A. Not a member there. We've been visiting there for**
 12 **about a year now. We haven't joined.**
 13 Q. Did you see me visiting there one Sunday?
 14 **A. No. I don't recognize you.**
 15 Q. We probably sat next to each other. I've visited
 16 there once or twice.
 17 **A. Well, you and I and 600 other people.**
 18 Q. That's right. He's got quite a following. He's
 19 quite talented and capable. And I believe he -- isn't he a
 20 seminary professor at TDS?
 21 **A. He was. I don't think he is anymore. He was for**
 22 **quite some time.**
 23 Q. It's a fairly fundamental bible believing church;
 24 is that fair to say?
 25 **A. I think so, yeah.**

1 Q. I haven't attended there, but I listen to him on
 2 the radio, and he teaches forgiveness and deep spirituality, a
 3 lot of things taught in the gospel?
 4 **A. He's very deep and philosophical, studies it very**
 5 **deeply.**
 6 Q. Prior to attending this church, you were a Baptist?
 7 **A. Yes.**
 8 Q. Did you grow up a Baptist?
 9 **A. Yes. Didn't grow up in a lot of church. But, yeah,**
 10 **I was a Baptist and pretty active in the Baptist church before**
 11 **we came here.**
 12 Q. Is that Southern Baptist?
 13 **A. Yes. I'm not a Baptist anymore.**
 14 Q. Are you a born-again Christian?
 15 **A. Yes.**
 16 Q. And do you -- if you're a born-again Christian then
 17 you place a special emphasis on the fact of conversion, do you
 18 not?
 19 **A. Explain conversion.**
 20 Q. Okay. If all things are past away, behold all
 21 things become new. You're a new creation in Christ Jesus?
 22 **A. Yes.**
 23 Q. And I can go on and on, but I --
 24 **A. Just wanted to make sure we're on the same page.**
 25 Q. Pretty much we are.

1 A. **Okay.**

2 Q. Because I still am a Baptist. I haven't made the
3 transition yet.

4 A. **I don't know that's a scale. Whatever.**

5 Q. Those of us who believe in Christianity and being
6 born again, we believe in the brand of sinner's prayer and
7 accepting by faith, salvation, and we believe that He comes in
8 and makes a new person.

9 A. **Uh-huh.**

10 Q. We become new; is that right?

11 A. **Right, right.**

12 Q. Okay. And we believe in the concept of grace, do we
13 not? It's not by anything that we've done to earn salvation.

14 A. **God's grace?**

15 Q. That's right.

16 A. **Yeah.**

17 Q. Because He gives it to us freely?

18 A. **Right.**

19 Q. Do you believe that there are good people that
20 accept grace and are saved? By the same token, there are also
21 some people that are bad, or have done bad things that accept
22 God's grace and are saved?

23 A. **No, I don't believe that. I believe everyone who
24 accepts God's grace has been bad.**

25 Q. That's better said. In other words, we're all

1 sinners?

2 A. **Correct.**

3 Q. We've all fallen short?

4 A. **Yes.**

5 Q. Okay. But some people are comparatively worse than
6 others, though, right?

7 A. **In our eyes.**

8 Q. In our eyes. Do you believe that someone who has
9 been charged with a capital murder offense could have accepted
10 God's grace and become a Christian?

11 A. **I hope they all do.**

12 Q. If you were to hear evidence of it in a criminal
13 trial, I'm sure you're being a born-again Christian, you would
14 look at that very closely, would you not? I mean, make sure
15 that the conversion experience is real?

16 A. **It's not my call. That's another courtroom that
17 we're not in.**

18 Q. Okay.

19 A. **No. If I understand where you're going with this,
20 I -- we have no control over where the soul goes, and that's
21 what really matters. The decisions that I make in my life,
22 and the decisions we all make in our lives will take our
23 bodies wherever we take our bodies.**

24 Q. Absolutely.

25 A. **The soul is judged by a higher power.**

1 Q. Maybe I'm not being very clear today, but let me
2 try it again another way. I know what you're talking about,
3 and I know you know what you're talking about, but when you
4 hear somebody else say, look, I've become a Christian. I've
5 become converted. I believe in Jesus. I mean, you have an
6 idea of what that's about, and you can listen to them, and you
7 can understand -- you can see if it's real. You have a vague
8 understanding probably of -- or you may have a better
9 understanding of whether it's real or not. Wouldn't that be
10 fair to say?

11 A. **I don't know. I'd like to say that if someone told
12 me that, I'd like to say that people aren't blasphemic, but
13 some people are. And I don't know that I could judge the
14 difference between that lie or any other lie.**

15 Q. Okay.

16 A. **Because I don't think there's going to be a
17 spiritual bolt of lightning to hit me to tell me whether that
18 is the truth or a lie as compared to whether somebody ran into
19 my car and didn't tell me about it.**

20 Q. Have you ever heard the phrase "jailhouse
21 conversion"?

22 A. **I think so, yeah. I've heard there's no atheist in
23 fox holes, too.**

24 Q. That's right.

25 A. **Kind of the same deal.**

1 Q. Are you particularly skeptical of a jailhouse
2 conversion?

3 A. **No. I have no reason -- I'm not skeptical to any of
4 these things that you're pondering here, because again, it's
5 not for me to judge, and I wouldn't dare do it.**

6 Q. I understand. Are you at least open to the idea
7 that a person could have a conversion experience, and they've
8 changed the way they think and look at the world, and they've
9 changed the way they think and look at God?

10 A. **Sure. People could be doing it right now for all I
11 know in this room.**

12 Q. Absolutely.

13 A. **Who knows.**

14 Q. With respect to the third -- the second special
15 issue, the defendant's character and background and personal
16 moral culpability of the defendant, there is a sufficient
17 mitigating circumstance to warrant a sentence of life rather
18 than death be imposed. Let's say that you've heard evidence
19 that there's a life-changing conversion that went on. I don't
20 know that that's particularly delineated in that special
21 issuing, and I don't know that it's even addressed in case
22 law.

23 A. **Uh-huh.**

24 Q. Okay. But you and I both know the change that it
25 can make in your life. As a juror would you be -- would you

1 be open to that kind of evidence and consider that as
2 mitigation with respect to that issue?
3 MR. SCHULTZ: Excuse me, Judge. We're going to
4 object to trying to commit the juror to what particular
5 evidence would be mitigating.

6 THE COURT: Sustained.

7 Q. BY MR. HIGH: What do you think about the
8 conversion experience? Do you think that, in essence, could
9 be mitigating evidence -- it could mitigate against death?

10 A. If your --

11 MR. SCHULTZ: Judge, same objection, same
12 thing. Trying to get the juror to commit to what he says
13 would be mitigating evidence is an improper invasion and just
14 fact-finding responsibilities.

15 THE COURT: I believe the question was could
16 he, and I think that -- I think asking it as a possibility is
17 appropriate, which is -- does not commit him to say that he
18 would or that he wouldn't, I believe. That's not your take on
19 it?

20 MR. SCHULTZ: No, sir. I think if you ask him
21 could he consider that as mitigating, I think to say that is
22 like giving -- if I produce evidence that A, B and C happened,
23 would that be evidence that you would find somebody guilty. I
24 think it's attempting to commit the juror to a particular fact
25 situation on an issue which he ultimately has to vote on.

1 effective assistance of counsel to make those kind of
2 decisions.

3 MR. SCHULTZ: And I say they don't need to know
4 that, anymore than I need to know what evidence he needs to
5 convict a man. I can't say. I mean, I can say I need to
6 know what kinds of proof he needs to find a man guilty so I
7 know whether to use a peremptory challenge on him or not.
8 But, that doesn't authorize me to ask him how he would vote
9 with a particular fact situation, or is that enough evidence,
10 or what he would do. And that's what they're trying to do.
11 They're trying to get him to say what would be or what would
12 not be mitigating in his mind, and there's no authority for
13 doing that because they're committing him to a fact situation.

14 THE COURT: Do me a favor. Tell me the
15 question one more time.

16 MR. HIGH: I think I recall it. Could he
17 consider the fact of a conversion experience to be mitigating
18 against the death penalty within the context of special issue
19 number two?

20 MR. GOELLER: For example, youth? Youth in
21 and of itself is mitigating. It's been error for a court to
22 refuse to allow counsel to ask a juror their feelings about
23 youth. Could they consider youth, and do they consider youth
24 a mitigating circumstance? There's nothing wrong with asking
25 a juror if they believe certain types of evidence is

1 MR. GOELLER: There have been some statements
2 to jurors: You could see how drugs could be mitigating; do
3 you agree? People could think that's mitigating. Oh, yes, do
4 you see how it could be aggravating? This is the same thing,
5 Judge. This is the exact same thing. Mr. High is not
6 attempting to commit the juror -- get him to say I would
7 consider this in that special issue as evidence. No.

8 Mr. High is probing at the prospective juror's
9 thoughts about particular types of evidence, which we are
10 certainly entitled to do.

11 MR. SCHULTZ: They can ask the same question:
12 Do you see how some people can consider that as mitigating? I
13 don't have a problem with that. It's trying to commit this
14 juror and what he thinks a particular bit of evidence is
15 mitigating, and that's not the same thing.

16 THE COURT: So to you, if he said, can you see
17 how some people would --

18 MR. SCHULTZ: Sure, that's fine.

19 THE COURT: -- that would be appropriate.

20 MR. GOELLER: But I'd submit to the court, in
21 exercising peremptory it's really irrelevant and useless to
22 have jurors talking about what some other jurors might. We
23 have to know how this juror feels. That's the only way we can
24 intelligently exercise the peremps, and if we don't know his
25 feelings on these types of things it denies us -- or client's

1 mitigating. Now, it would be -- I'd agree with Mr. Schultz if
2 Mr. High was saying, if we prove this, would you give it
3 weight and what kind of weight. The character of the
4 mitigation evidence is not what's important. Mr. High is not
5 allowed to box him in and say, what weight would you give it,
6 and would you answer that a certain way. I admit that would
7 be improper. That's not what Mr. High is doing.

8 MR. SCHULTZ: Do we have a cite on the case
9 that says they're entitled to ask a juror if youth is a
10 mitigating circumstance?

11 MR. HIGH: Can I go with my next question,
12 Judge?

13 THE COURT: But the question is could you
14 consider a conversion experience to be a mitigating
15 circumstance?

16 MR. HIGH: That's right.

17 THE COURT: Then go on, and let's hear your
18 cite, and we'll take up the case.

19 MR. HIGH: Because I'm almost done.

20 VENIREPERSON: You're more than done.

21 (Laughter.)

22 Q. BY MR. HIGH: Now, I'm going to do something you
23 asked me not to do. These people that you listed on --

24 A. I thought I asked for that to be stricken from the
25 record.

1 THE COURT: I can't rule on that.

2 A. Are we past all that other stuff now, or are we

3 going back?

4 Q. BY MR. HIGH: We may have to come back to that one

5 question.

6 A. I have -- okay, sorry.

7 Q. I notice that you list Jane Fonda now, that you most

8 respect her, and you list Jane Fonda before; that you least

9 respect her. And I'm assuming you're talking about a

10 conversion experience, are you?

11 A. No, I'm not. A conversion experience was part of

12 what she did. What I'm talking about is really needing to go

13 to Schlotzsky's. In fact, I may have been the one that he

14 looked at when he said some of you completed this in 20

15 minutes. I was blank. I just couldn't come up any names.

16 So, I tried to come up with some kind of contrast to make it

17 easy.

18 Yeah, I do respect her because she had a position.

19 She changed her mind, and she had the guts to present it to

20 the public. People change their minds all the time, but the

21 way that she did it was admirable to me. I still can't get

22 over the old Jane Fonda. But it did come to mind. I don't

23 know why. I'm surprised anything came to mind.

24 Q. But you lost me, though. Does it have anything to

25 do with her conversion experience? I mean, Ted Turner --

1 A. It does. It does, yeah.

2 Q. And now the new Jane Fonda, she's come out very

3 public about her Christianity and her Christian beliefs?

4 A. Yes. And I admire her for that. Wasn't that the

5 question, admirable? I thought it said admirable, most --

6 Q. It says list two men and women you most respect.

7 It says Lynn Russell. I guess that's because of her hobbies

8 and her sports, right?

9 A. I think she's a pretty cool gal.

10 Q. She is cool. And then what about Oprah Winfrey,

11 what's the deal with that? You least respect her.

12 A. I've got to be honest on that -- I mean, I will be

13 honest. I'm honest on everything here. I couldn't think of

14 anybody, and I -- the lady next to me had her as her most

15 respected, and I thought, you know --

16 THE COURT: You were cheating on the exam?

17 (Laughter.)

18 A. It was plagiarism, but I did it in an opposing

19 manner so that makes it okay, right? I don't like Oprah. I

20 just don't. Maybe it's her weight fluctuating like it does.

21 I just have no idea what it is. I just don't like Oprah.

22 Q. Back to Jane Fonda, is it fair to say, at least in

23 your opinion, that Jane Fonda is a better person now than she

24 was before?

25 A. I think she probably is.

1 I know where each side is going with this question,

2 but I don't know how to address it or even if I should.

3 Q. That's fine. You don't have to?

4 A. I've got a clear opinion, but whatever.

5 MR. HIGH: Judge, I believe I'm through with

6 my questions, except for the one we're researching.

7 THE COURT: I tell you what, I'll allow you to

8 ask the question. Could you consider a conversion experience

9 to be a mitigating experience, and that's the question, right?

10 MR. HIGH: Yes, sir.

11 THE COURT: Okay. Go ahead and answer the

12 question.

13 A. In the context of initiating a penalty for something

14 done as a human being on the earth, no. I believe that we

15 have to be responsible for our actions. I've always been held

16 responsible for mine. I've never earned anything. I've

17 never been given anything. I've had to bleed or sweat for

18 everything I've gotten. I think we have to pay our debts. I

19 believe there's a higher power, I believe that life is

20 eternal, and I believe we're given an opportunity to live a

21 good, eternal life, but I believe we have to pay our debts.

22 Is that fair enough?

23 Now, what those debts are, I'm not predetermined at

24 this point, because I don't know. You know, there's a lot

25 going on here. I don't know anything about this case.

1 Q. So you're saying that a conversion experience would

2 not be mitigating evidence?

3 MR. SCHULTZ: Now it's not whether he can

4 consider it. He's obviously trying to pin him down on that,

5 which, frankly, doesn't even matter anyway because -- whether

6 he says yes or no. So, he can do what he wants to

7 mitigation-wise.

8 THE COURT: Let me ask, I suppose what is

9 mitigating and what is not is in the eye of beholder, right?

10 MR. SCHULTZ: In just about every context,

11 yeah.

12 THE COURT: And I suppose in a sense

13 everything can be mitigating?

14 MR. HIGH: I believe so.

15 THE COURT: All right.

16 MR. SCHULTZ: Threats to do it again, I guess,

17 could be mitigating if the juror thinks it is. I don't know.

18 Right? Give me a life sentence so I can escape and kill some

19 more people. I guess somebody could say it's mitigating. I

20 don't know how -- I don't guess we get any instruction.

21 MR. HIGH: Or, Judge, he may want escape and

22 save some souls because he's had a conversion experience.

23 MR. SCHULTZ: And that might be aggravating.

24 MR. HIGH: That may be aggravating or

25 mitigating, depending on how you look at it. He may become a

1 preacher and save the world.

2 MR. SCHULTZ: But the point is trying to pin
3 him down on what he says is mitigating is what -- our renewed
4 objection, and that's our continuing objection.

5 MR. HIGH: And our objection would be that --

6 MR. SCHULTZ: Could I please finish?

7 MR. HIGH: Well, I'm going to have a chance to
8 rebut that.

9 MR. SCHULTZ: When he asks you, could you -- is
10 this mitigating, are you telling us that would not be
11 mitigating is asking a juror to commit to his vote to a
12 particular fact situation, and that's improper.

13 THE COURT: Yes, go ahead. You wanted to
14 respond.

15 MR. HIGH: Judge, I believe he's repeatedly and
16 redundantly talked about drugs and how they aggravate on the
17 one hand and mitigate on another. He's talked about the
18 hyped-up, hopped-up person on drugs, whether it's mitigating
19 and whether it's aggravating. And we're just simply talking
20 about a change in a person's life. And that, I think, bears
21 directly on mitigating evidence against a life sentence -- I
22 mean, against a death sentence, whether it would mitigate a
23 death sentence and change in a person's life. What could be
24 more mitigating than that? So, that's all I'm trying to ask,
25 is if this juror would consider a spiritual change. Would he

1 right. To this juror it's mitigation; to that one it's not.

2 MR. HIGH: Sure.

3 THE COURT: And this one is no more qualified
4 than that one, given any issue. Am I right on that? Both
5 sides agree with that.

6 MR. GOELLER: I agree with that.

7 MR. SCHULTZ: But it's like guilt/innocence.

8 They have got discretion on how they find the evidence, but we
9 can't ask them, do you find a trained police officer
10 testifying about his opinion would you support a guilty
11 verdict and then do something with it. We can't commit them
12 to stuff like that.

13 That's what they're attempting to do by asking him,
14 would this or that be a mitigating circumstance.

15 THE COURT: I tell you what I'm going to find.
16 I'm going to find that the question was asked and answered.
17 So let's ask the question.

18 MR. HIGH: All right.

19 Q. BY MR. HIGH: The next question is this then:

20 Obviously there's a difference why Jane Fonda moved from the
21 person you least respected to a person you most respected, and
22 that was I think the fact of the change in her life had a lot
23 to do with that, is that correct, in the conversion?

24 A. Well, yeah. Again, I hope you don't put a whole lot
25 of weight in that because I was really searching for something

1 give that legal affect towards mitigation against the death
2 penalty? That's all I'm asking.

3 I'm not asking him about a particular case. I'm not
4 asking him with respect to this defendant, and I'm not asking
5 within the context of this particular trial. I'm asking --

6 THE COURT: Actually, I believe the question
7 was asked and answered, though, but my recollection of the
8 answer was no. So, where do we go from here?

9 MR. HIGH: I just want to make sure I
10 understand his answer. That's all I'm trying to do.

11 MR. SCHULTZ: And I'd like a ruling on the
12 objection. I never asked a juror do you think drugs are
13 aggravating or mitigating? I never asked about poverty being
14 aggravating or mitigating. I used that as examples of how
15 some people could see, and that's been my -- I've never asked
16 a juror do you believe that being a drug addict is a
17 mitigating factor or aggravating?

18 By the way, I can't imagine the establishment clause
19 of our Constitution in allowing the defendant to challenge a
20 juror because he couldn't give effect to some Christian
21 teachings that -- that effectively he's asking you to
22 establish by virtue of your ruling.

23 THE COURT: Say, I would imagine a juror has
24 pretty much unfettered discretion with regard to whether or
25 not he considers something mitigating or not mitigating,

1 to put on there.

2 Q. Okay.

3 A. But it does perhaps reflect something about me,
4 which is obviously what you guys are looking for. I do
5 respect that she had the -- that she did change and that she
6 was open about that and presented herself to the public eye
7 and was not ashamed of herself. I guess it's the fact that
8 she wasn't ashamed of herself that I respect the most.

9 MR. HIGH: Just a moment, Judge.

10 VENIREPERSON: I can't believe I'm sitting here
11 talking about Jane Fonda.

12 MR. HIGH: Judge, we're going to pass the
13 juror.

14 THE COURT: Do you have any other questions at
15 this time?

16 MR. SCHULTZ: No, sir.

17 THE COURT: Let me ask you to step down for
18 just a minute, please.

19 (Venireperson exits the courtroom.)

20 THE COURT: This is Number 21, Mr. Calhoun, and
21 what says the State?

22 MR. SCHULTZ: We need him back -- could we have
23 the juror back?

24 THE COURT: Oh, you've got some questions?

25 MR. SCHULTZ: No. But he needs to be here so

1 we can make our decision whether to exercise a peremptory
2 challenge, and then if we accept him, then we tender him to
3 the defense.

4 THE COURT: All right, sorry.
5 (Venireperson enters the courtroom.)

6 MR. SCHULTZ: This juror is acceptable to the
7 State, Your Honor.

8 MR. HIGH: Your Honor, it's acceptable to the
9 defense.

10 THE COURT: All right. All right. Then you
11 may step down, sir. We'll be getting back with you. I
12 appreciate it.

13 (Venireperson exits the courtroom.)

14 THE COURT: Just so y'all understand if you've
15 got your pencils out. Tomorrow we've still got Mr. Aston,
16 Mr. Hand and Mr. Biggs coming in the morning.

17 MS. FALCO: What about Mr. Flaherty?

18 THE COURT: Mr. Flaherty has been rescheduled
19 to August 27th. And let me tell you something else, we've
20 got -- okay. So we've got -- we've also got Collin Quigley
21 and Stanley Johnwell and Dierdra Williams and Samuel Gragg
22 coming tomorrow.

23 Okay. So -- and here's the twist. We've got some
24 jurors on standby. They are Nancy Ballard, Gregory Johnson,
25 Diane Kerr and Hilda Laurielo. All right. That's one of the

1 would not be qualified. Additionally, we'd agree to excuse
2 her for that reason.

3 MR. GOELLER: Gail, did you say your appellate
4 attorney said one way or the other.

5 MS. FALCO: John Stroud. Jami talked to him
6 this morning, and he said there wasn't --

7 MR. GOELLER: There's no case law?

8 MS. FALCO: Right. He just briefly looked, and
9 he didn't find case law.

10 MR. GOELLER: Is he any good?

11 MS. FALCO: John?

12 MR. GOELLER: Yeah, I don't know him.

13 MS. FALCO: He was in the appellate division of
14 Tarrant County for 12 years before he came here.

15 THE COURT: He's sharp as a tack I can tell
16 you. But anyway take a look and see if you agree. If you
17 agree, then it doesn't matter.

18 MR. GOELLER: I guess you've been affirmed on
19 everything he's done his briefs on, huh, Judge? Is that why
20 he's sharp as a tack?

21 (Laughter.)

22 (Discussion off the record.)

23 THE COURT: Anyway, if you agree, then it
24 doesn't matter, I suppose. But if you don't agree, then I
25 need to decide. And we've got a few days, but it is coming

1 things I need to tell you. Oh, and also we've got -- we've
2 also got Bruce Tisdale for tomorrow. I don't think I gave you
3 that one.

4 But here's something I want y'all to think about,
5 and I don't know the answer to this so you-all either tell me
6 what it is or research it and tell me what is it. Number 25
7 is a woman named Valerie Tacy. She was a resident of Collin
8 County and is a resident at this time. She's moving to Denton
9 County on the 1st of September, and her new address has been
10 confirmed, but she currently lives in Collin County. Now, I
11 guess there's two questions. First of all, is she qualified
12 because she certainly wouldn't be a resident of Collin County
13 on the -- on the first day of trial, but she --

14 MR. GOELLER: She's a resident on the day she
15 appeared in the general panel.

16 THE COURT: Yes. And she would also be a
17 resident on the day she's scheduled to appear right now. And
18 I don't know the answer to that. And the second question
19 becomes, does that matter to y'all in terms of excusing her or
20 not excusing her.

21 MS. FALCO: Our position would be -- and I
22 don't know that there's direct case law on point. We talked
23 to our appellate attorney, but our position would be that she
24 would not be qualified at the time she is sworn as a juror,
25 which would be right before we started testimony so that she

1 up.

2 MR. GOELLER: Yeah. We'll certainly talk about
3 that, Judge.

4 THE COURT: Okay. Let me tell y'all something
5 else. As you know we've got another -- right now at least,
6 another 56 people schedule to come in on September 4th, and
7 there are some people who want to reschedule that meeting.
8 And I'm assuming that that is not a possibility, but I wanted
9 to run it by y'all. Think about it, and let me know how you
10 feel about it because they have commitments or vacations or
11 something else. If they don't get qualified on that day, at
12 least if I don't give them my -- well, the only thing that
13 remains is from each side because I've done my thing with all
14 200. But if we let a few people go that day they will not
15 have heard your two-hour pitch from yesterday --

16 MR. GOELLER: And my 20-minute pitch.

17 THE COURT: Assuming that's something they need
18 to hear, I want you-all to think about that and tell me how
19 you feel about it, okay? Everybody understand? And let me
20 know how you feel first thing tomorrow morning about September
21 the 4th.

22 Let me tell you something else, Matt and Don need to
23 get their three boxes of questionnaires out of our office
24 tonight. So, you have got three big boxes in there. You
25 don't have to do it tonight, but you have to do it pretty

1 quick.

2 MR. GOELLER: I'll use this guy right here.

3 THE COURT: That's all I've got. Is there
4 anything from anybody from me?

5 MS. FALCO: No.

6 MR. GOELLER: This doesn't have to be on
7 record.

8 (End of proceedings at 5:30 p.m.)

9 (End of Volume 7.)

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1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS *

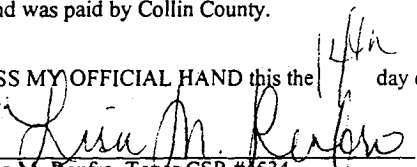
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4
5 I, Lisa M. Renfro, Official Court Reporter in and
6 for the 380th District Court of Collin County, State of Texas,
7 do hereby certify that the above and foregoing contains a true
8 and correct transcription of all portions of evidence and
9 other 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
14 I further certify that this Reporter's Record of the
15 proceedings truly and correctly reflects the exhibits, if any,
16 offered by the respective parties.

17
18 I further certify that the total cost for the
19 preparation of this Reporter's Record is contained in
20 Volume 53 and was paid by Collin County.

21
22 WITNESS MY OFFICIAL HAND this the 14th day of
23 January, 2003:

24
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