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NO. 83-CR-194-A

THE STATE OF TEXAS X IN THE DISTRICT COURT
VS. X 28TH JUDICIAL DISTRICT
CARLOS DE LUNA X NUECES COUNTY, TEXAS

STATEMENT OF FACTS

PUNISHMENT
JULY 21, 1983

BEFORE: HON. WALLACE C. MOORE
 Sitting for the
 28th District Court
 Nueces County Courthouse
 Corpus Christi, Texas 78401

JUDGE PRESIDING

APPEARANCES; Nueces County District Attorney's Office
 Nueces County Courthouse
 Corpus Christi, Texas 78401

BY: MR. STEVE SCHIWETZ
 MR. KENNETH BOTARY

COUNSEL FOR THE STATE

MR. JAMES R. LAWRENCE
Attorney at Law
P. O. Box 8365
Corpus Christi, Texas

-and-

MR. HECTOR DePENA, JR.
Attorney at Law
2933 Norton, Suite 207
Corpus Christi, Texas 78415

COUNSEL FOR THE DEFENDANT

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1 On the 21st day of July, 1983, the above
2 entitled and numbered cause came on for hearing before
3 said Honorable Court, Wallace C. Moore, Judge presiding,
4 and the following proceedings were had:

5 THE COURT: Who's your first witness?

6 MR. SCHIWETZ: I call Gary Garrett.

7 THE COURT: Were you sworn earlier?

8 MR. GARRETT: No, sir.

9 (At this time the witness was sworn
10 by the Court.)

11 SGT. GARY GARRETT

12 having been called as a witness by the State and after
13 having been first duly sworn to tell the truth, the
14 whole truth, and nothing but the truth, testified upon
15 his oath as follows:

16 DIRECT EXAMINATION

17 BY MR. SCHIWETZ:

18 Q Would you please state your name for the jury, sir?

19 A Sgt. Gary Garrett.

20 Q And how are you employed?

21 A Police officer, Corpus Christi Police Department.

22 Q How long have you been with the police department?

23 A Thirteen years.

24 Q And in what capacity do you work now?

25 A Homicide Division.

1 Q And how long have you been in the Homicide Division?

2 A Nine years.

3 Q I want to ask you if you're familiar with the
4 Defendant in this case, Carlos De Luna.

5 A Yes, sir, I am.

6 Q Independent of this case, are you familiar with the
7 reputation he enjoys in this community for being a
8 peaceable and law-abiding citizen?

9 A Yes, I am.

10 Q Is that reputation good or bad?

11 A It's bad.

12 MR. SCHIWETZ: Pass the witness.

13 MR. LAWRENCE: No questions.

14 THE COURT: Thank you, sir. You may
15 step down.

16 MR. SCHIWETZ: Eddie Garza.

17 (At this time the witness was sworn
18 by the Court.)

19

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1 SGT. EDDIE GARZA,
2 having been called as a witness by the State and after
3 having been first duly sworn to tell the truth, the
4 whole truth, and nothing but the truth, testified upon
5 his oath as follows:

6 DIRECT EXAMINATION

7 BY MR. SCHIWETZ:

8 Q Would you please state your name for the jury, sir?

9 A My name is Edward Garza. I'm a Sergeant Detective,
10 City of Corpus Christi Police Department.

11 Q How long have you been in the police department?

12 A I'm in my twentieth year.

13 Q And how long have you been a detective?

14 A Been a detective for eleven years.

15 Q And what particular type of offenses do you inves-
16 tigate?

17 A Right now I'm assigned to the Major Crimes Division.

18 Q Are you familiar with the Defendant in this case,
19 Carlos DeLuna?

20 A Yes, sir, I am.

21 Q Are you familiar with the reputation he enjoys in
22 this community for being a peaceable and law-
23 abiding citizen?

24 A Yes, I am.

25 Q Is that reputation good or bad?

1 A It's bad.

2 MR. SCHIWETZ: Pass the witness.

3 MR. LAWRENCE: No questions.

4 THE COURT: Thank you, sir. You may step
5 down. You may step down, sir.

6 MR. SCHIWETZ: Could I get this marked as
7 a State's exhibit.

8 (State's Exhibit 41 was marked for
9 identification.)

10 MR. SCHIWETZ: Your Honor, at this time I
11 would like to tender what's marked as State's
12 Exhibit 41 as being a certified exemplified
13 record from the Texas Department of Correc-
14 tions.

15 MR. LAWRENCE: May we approach the Bench,
16 Your Honor?

17 THE COURT: Yes, sir.

18 (At this time the following discussion
19 was held at the Bench in the presence
of, but out of the hearing of the jury:)

20 MR. LAWRENCE: We have an objection only
21 to the point that it says over here his pre-
22 vious -- previous parole violator out of
23 Smith County would indicate that maybe he had
24 been in trouble before, and that if we excise
25 that, I have no objections to it being

1 admitted.

2 MR. SCHIWETZ: I have no objection to him
3 excising it; here's a pair of scissors.

4 THE COURT: Okay. Now, how would we
5 delete that?

6 MR. SCHIWETZ: I suggest with these.

7 THE COURT: I think one of these stamps
8 would do at the bottom, just blank it out.
9 It's right in the middle. See if that works,
10 and if it doesn't, we'll do radical surgery on
11 it.

12 MR. LAWRENCE: This part right here
13 (indicating).

14 MR. SCHIWETZ: Let's just cut that --

15 MR. LAWRENCE: Okay.

16 MR. SCHIWETZ: Judge, if you have no ob-
17 jection, I have no objection, I would like to
18 just cut off this portion (indicating).

19 THE COURT: Okay.

20 (At this time State's Exhibit 41 was
21 altered from its original form.)

22 MR. DePENA: There's two of those.

23 MR. SCHIWETZ: Huh-uh.

24 MR. DePENA: Okay.

25 (At this time the discussion at the

1 Bench was concluded, after which the
2 following proceedings were had:)

3 THE COURT: Do you have any further ob-
4 jection? It will be received. Pass this
5 among you without comment, please.

6 MR. SCHIWETZ: I would like to call
7 Floyd Bieniek.

8 (At this time the witness was sworn
9 by the Clerk.)

10 FLOYD BIENIEK,

11 having been called as a witness by the State and after
12 having been first duly sworn to tell the truth, the
13 whole truth, and nothing but the truth, testified upon
14 his oath as follows:

15 DIRECT EXAMINATION

16 BY MR. SCHIWETZ:

17 Q Would you please state your name to the jury, sir.

18 A Floyd Bieniek.

19 Q And how are you employed?

20 A I am with the Constable's Department now. I have
21 just retired out of the Police Department, twenty-
22 five and a half years service.

23 Q Which constable's office are you with?

24 A I'm in Precinct 1.

25 Q Okay. And where's that?

1 A With Johnny Alaniz.

2 Q Are you familiar with the Defendant in this case,
3 Carlos De Luna?

4 A Yes, I am.

5 Q Are you familiar with the reputation he enjoys in
6 this community --

7 A Yes, I am.

8 Q -- as being a peaceable and law-abiding citizen?

9 A Yes, I am.

10 Q Is that reputation good or bad?

11 A Bad.

12 MR. SCHIWETZ: Pass the witness.

13 MR. LAWRENCE: No questions.

14 THE COURT: Thank you, sir. You may step
15 down.

16 MR. SCHIWETZ: I call Gilbert Garcia.

17

18 GILBERT GARCIA,

19 having been called as a witness by the State and having
20 been previously duly sworn to tell the truth, the
21 whole truth and nothing but the truth, testified upon
22 his oath as follows:

23

DIRECT EXAMINATION

24 BY MR. SCHIWETZ:

25 Q Please state your name for the jury, sir.

1 A My name is Gilbert Garcia.

2 Q Are you the same Gilbert Garcia who testified in
3 this case a day or so ago?

4 A Yes, I am.

5 Q And you are still under oath.

6 A Yes, sir.

7 Q All right. Did you have an opportunity to super-
8 vise Carlos De Luna on parole?

9 A Yes, I did.

10 Q Can you tell the jury when Mr. De Luna was paroled
11 from the penitentiary?

12 A He was paroled the first time on 5/13/82.

13 Q And the second time, if you recall?

14 A 1/13/83.

15 MR. SCHIWETZ: Pass the witness.

16 CROSS EXAMINATION

17 BY MR. LAWRENCE:

18 Q Mr. Garcia, you said he was first paroled when?

19 A 5/13/82.

20 Q And what happened then?

21 A He picked up some additional charges on 5/15/82 and
22 absconded supervision.

23 Q Does your record reflect that he absconded on
24 5/14/82?

25 A No, my records reflect that he picked up new

1 charges on 5/15/82, and he left town on or about
2 -- I'm assuming 5/18, I don't have an exact date.
3 Q For all practical purposes, though, you don't know
4 it, in fact, he left on 5/14/82.
5 A No, I know he didn't leave on 5/14/82.
6 Q Did you see him on 5/14/82?
7 A No, sir.
8 Q Did you see him on 5/13/82?
9 A I saw him between -- I believe it was 5/14/82 I saw
10 him at home.
11 Q You believe you saw him, you're not for sure?
12 A I'm not on that, no, sir.
13 MR. LAWRENCE: Pass the witness.
14 MR. SCHWITZ: I don't have any further
15 questions.
16 THE COURT: Thank you, sir. You may step
17 down.
18 MR. SCHWITZ: Call Lucinda Garcia.
19 MR. LAWRENCE: Your Honor, may we
20 approach the Bench?
21 THE COURT: Yes, sir.
22 MR. LAWRENCE: I don't want this on the
23 record.
24 (At this time there was an off the
25 record discussion held at the Bench,
after which the following proceedings

1 ma'am?

2 A Lucinda Garcia.

3 Q Okay. And where do you live?

4 A 3630 Fairchild.

5 Q And how long have you lived there?

6 A All my life.

7 Q Who do you live there with?

8 A My mother.

9 Q And what's her name?

10 A Juanita Garcia.

11 Q And how old is your mother?

12 A Fifty-four.

13 Q I am going to ask you if you have a brother named

14 Marcos Garcia.

15 A I do.

16 Q Where does Marcos live now?

17 A He's in the penitentiary.

18 Q And he's been in the penitentiary once before,

19 hasn't he?

20 A Uh-huh.

21 Q And what was he in there for, if you recall?

22 A For DWI and chase of police officers or something

23 like that.

24 Q That's what he was revoked -- his parole was re-

25 voked for; is that correct?

1 A Uh-huh.

2 Q The first time he was in for robbery, wasn't he,
3 or something to that effect?

4 A (Witness nods head affirmatively.)

5 Q Now, direct your attention back to May the 14th --
6 May the 15th -- May the 14th of 1982 and ask you if
7 you saw your brother on that day.

8 A Okay. We picked him up in Houston on a Friday.

9 Q Okay. And where did -- where was he coming from?

10 A From Houston.

11 Q Had he just gotten out of the penitentiary?

12 A Yes.

13 Q Where did you take him?

14 A I took him home to Corpus.

15 Q And where was he going to be staying in Corpus?

16 A With my mother.

17 Q And that's the residence where you live?

18 A Yes, uh-huh.

19 Q Now, on May the 14th, 1982, did the family have a
20 little get together for Mr. Garcia, for Marcos?

21 A Yeah. Well, everybody was there, uh-huh.

22 Q Now, did any people who were not members of the
23 family come over there that day?

24 A He was supposed to meet Carlos De Luna there at the
25 house.

1 Q Did Carlos De Luna come over to the house?

2 A Yes, his parents brought him over.

3 Q And did your brother introduce you to Carlos
4 De Luna?

5 A Yes.

6 Q And was Carlos De Luna there for a fairly good
7 while that day?

8 A Yes.

9 Q Do you recall what he was wearing?

10 A A blue shirt, I can't exactly tell you what color
11 pants they were.

12 Q Did your brother leave that evening?

13 A Yes, they both left together.

14 Q When you say "they," who are you talking about?

15 A Carlos and my brother.

16 Q Okay.

17 A Marcos.

18 Q The Carlos De Luna that you're talking about, do
19 you see him in the courtroom today?

20 A Yes, that's him (indicating).

21 Q Is he the Defendant here?

22 A Uh-huh.

23 Q Did you introduce Carlos De Luna or point him out
24 to a woman named Connie Campos?

25 A I told her that that was Marcos' friend.

1 Q Did you tell her where he was a friend from?

2 A Yeah, from the penitentiary.

3 Q Where does Connie Campos live?

4 A Next door.

5 MR. SCHIWETZ: Thank you, ma'am.

6 Oh, let me ask you that.

7 Q (By Mr. Schiwetz) When they left that night, did
8 they indicate where they were going?

9 THE COURT: Who?

10 Q (By Mr. Schiwetz) Excuse me, Carlos De Luna and
11 your brother, Marcos Garcia.

12 A I'm not sure, but I think they were going to a
13 skating rink.

14 MR. SCHIWETZ: Pass the witness. Well, --

15 MR. LAWRENCE: Well, Your Honor, object
16 to this testimony. I don't know what --

17 MR. SCHIWETZ: Well, I'm --

18 MR. LAWRENCE: -- it has shown.

19 MR. SCHIWETZ: What I am doing is laying
20 a predicate for the future testimony.

21 MR. LAWRENCE: Does she have any more
22 information to relate?

23 MR. SCHIWETZ: That's all the information
24 that she has regarding this specific event.

25 I'm going to call her mother and Connie Campos

1 next.

2 MR. LAWRENCE: Could we then go ahead and
3 hear the rest of the testimony out of the
4 presence --

5 THE COURT: You may step down temporarily
6 then, Ms. Garcia. Don't discuss your testimony
7 with any person.

8 MR. SCHIWETZ: I call Connie Campos.

9 (At this time the witness was sworn
10 by the Clerk.)

11 THE CLERK: Please have a seat by the
12 Court Reporter.

13
14 CONNIE CAMPOS,

15 having been called as a witness by the State and after
16 having been first duly sworn to tell the truth, the
17 whole truth, and nothing but the truth, testified upon
18 her oath as follows:

19 DIRECT EXAMINATION

20 BY MR. SCHIWETZ:

21 THE COURT: When you have finished giving
22 your testimony, don't discuss it with any
23 other witness in this case.

24 THE WITNESS: Okay.

25 THE COURT: Until the case is finally

1 concluded.

2 Q (By Mr. Schiwetz) Would you please state your name
3 for the record.

4 A Concepcion Hernandez Campos.

5 Q And where do you live?

6 A At 3634 Fairchild.

7 Q And how long have you lived there?

8 A It will be two years in December.

9 Q Do you know Juanita Garcia?

10 A Yes, she's my next door neighbor.

11 Q And how long have you-all been neighbors?

12 A Well, since I moved in. I knew one of her sons,
13 you know, when I was going to school.

14 Q Do you know Marcos Garcia?

15 A Yes.

16 Q I want to direct your attention back to May 14th,
17 last year, 1982, and ask you if you had occasion to
18 see Marcos when he came out of the penitentiary.

19 A Yes.

20 Q Did you go over to the house and visit with
21 relatives and so forth over there?

22 A No, I saw him when they brought him, and I saw him
23 get down off the car, but I didn't go over there.

24 Q Were there a fairly good number of family members
25 coming back and forth that day?

1 A Yes. Well, most of them live there.

2 Q Now, did you ever have an opportunity to either
3 meet or see a man named Carlos De Luna?

4 A Well, I saw him, but I didn't know his name at that
5 time.

6 Q Okay. Did there come a point in time where you
7 knew his name?

8 A After they left.

9 Q Who told you his name?

10 A Sir?

11 Q How did you learn his name?

12 A I asked one of Marcos' sisters who he was because
13 I had never seen him there before.

14 Q Can you tell the Court what he was wearing that day?

15 A He was wearing black pants and a long blue sleeve
16 shirt, but he had it folded up so much (indicating).

17 Q Can you tell the Court how long he was there that
18 day, if you recall?

19 A I don't recall. I would say about two hours maybe.

20 Q Now, did there ever come a point in time when you
21 saw him again that evening?

22 A It was about -- it was after 12:00 I know because
23 we were outside, me and one of my brothers.

24 Q And where were you outside?

25 A On my front porch.

1 Q What were you and your brother doing out there?

2 A Well, we were just talking, because my husband was
3 out.

4 Q And tell the Court how it was that you came to see
5 Carlos De Luna.

6 A Okay. I was sitting there and then I saw him come
7 up to the house. He went to the back of the house,
8 well, I guess somebody was telling him, and then he
9 came back up, he just opened the door and he walked
10 in.

11 Q Okay. Which door did he walk into?

12 A The front door.

13 Q Okay. Were there any lights on in the house?

14 A The front porch and where I'm sitting in my front
15 yard, you can see -- through the window you can see
16 the bathroom light, and that was on. And then
17 about -- I would say about fifteen minutes after he
18 got in, the light went off and then I heard some-
19 thing drop on the floor. It was about 1:00 o'clock
20 when he came out. He came out with his shirt un-
21 buttoned, he -- well, when he walked in, his shirt
22 was pulled in and it was pulled out and it was open
23 from the front and he ran towards -- there's an
24 elementary school, Rose Shaw Elementary School.

25 Q Did you get a look at his face when he came out?

1 A I had seen him before earlier that day, I knew it
2 was the same guy.

3 Q Do you see that man in the courtroom today?

4 A Yes, right there (indicating).

5 MR. SCHIWETZ: Pass the witness.

6 CROSS EXAMINATION

7 BY MR. LAWRENCE:

8 Q Ms. Campos, you said you saw the -- you had seen
9 Mr. De Luna earlier that day.

10 A Yes.

11 Q Is that correct?

12 A Uh-huh.

13 Q And to answer that question, when he came out there
14 about 1:00 o'clock, like you said, did you actually
15 see him or were you just -- you saw a blue shirt
16 and you assumed it was him?

17 A No. No. Because he stood on the porch and he
18 looked toward the house where we were sitting and
19 that was him. I mean I can't -- I mean I see some-
20 body, I see him the following day, I'll recognize
21 him.

22 MR. LAWRENCE: Pass the witness.

23 MR. SCHIWETZ: I don't have any further
24 questions.

25 THE COURT: Do you have any other witnesses?

1 MR. SCHIWETZ: Yes, sir, I want to call
2 Juanita Garcia now.

3 THE COURT: All right. You may step down
4 and don't discuss your testimony, now, with
5 any other witness. You're not excused. We
6 will call you again in a moment, possibly.

7 MR. SCHIWETZ: May she take the oath from
8 her seat? She's feeling a little dizzy.

9 (At this time the witness was sworn
10 by the Clerk.)

11 JUANITA GARCIA,
12 having been called as a witness by the State and after
13 having been first duly sworn to tell the truth, the
14 whole truth, and nothing but the truth, testified upon
15 her oath as follows:

16 DIRECT EXAMINATION

17 BY MR. SCHIWETZ:

18 Q Could you please state your name for the record,
19 ma'am.

20 A Juanita Garcia.

21 Q And where do you live, Mrs. Garcia?

22 A 3630 Fairchild.

23 Q And how long have you lived there?

24 A About sixteen years.

25 Q Okay. And do you have a daughter named Lucinda?

- 1 A Yes, sir.
- 2 Q Do you have a son named Marcos?
- 3 A Yes, sir.
- 4 Q How many other children do you have?
- 5 A Three.
- 6 Q Now, I want to ask you if you remember back on May
7 14th of 1982, and remember seeing your son, Marcos,
8 on that day?
- 9 A Yes, sir.
- 10 Q Had Marcos just gotten out of the penitentiary?
- 11 A Right.
- 12 Q Did family members come by to see Marcos that day?
- 13 A Yes, sir.
- 14 Q Did people who were not family members come by to
15 see Marcos that day?
- 16 A No, sir.
- 17 Q Did any of his friends come by and see him that
18 day?
- 19 A Yes, sir.
- 20 Q What friend came by to see him?
- 21 A Carlos De Luna.
- 22 Q Now, had you known Carlos De Luna before?
- 23 A No, sir.
- 24 Q And how did you meet him that day?
- 25 A My son introduced him to me. He said, "Treat him

- 1 like my brother."
- 2 Q Okay. Was that Marcos that told you that?
- 3 A Right.
- 4 Q And when you met Carlos De Luna, can you tell the
5 Court what he was wearing?
- 6 A A light blue shirt and a black pants.
- 7 Q Did you get a chance to talk to him, to meet him?
- 8 A Yes, sir.
- 9 Q Was he there at your house for a while that day?
- 10 A Yes, sir.
- 11 Q Did there come a point in time when Marcos Garcia
12 and Carlos De Luna left your house?
- 13 A Yes, sir, but I really don't know at what time it
14 was.
- 15 Q Okay. Now, did there come a -- can you tell the
16 Court what time you went to sleep that night, about?
- 17 A More or less about 12:30.
- 18 Q And can you tell the Court who else was there at
19 the house besides you?
- 20 A Just my little grandson.
- 21 Q And how old was he at the time?
- 22 A He's two years old.
- 23 Q Now, when you went to bed, when you, yourself, went
24 to bed, what were you wearing?
- 25 A I was wearing a dress.

- 1 Q And did there ever come a point in time when some-
2 body else came in your bedroom?
- 3 A No, sir. Not in my bedroom, no.
- 4 Q Where did they come?
- 5 A Just -- when the accident happened.
- 6 Q Okay. Where were you when the accident happened?
- 7 A In my bed.
- 8 Q All right. And when you were lying there in bed,
9 when did you first notice there was somebody else
10 there?
- 11 A It was about -- I really don't know. It was about
12 thirty minutes later.
- 13 Q Now, when that person was there, who did you think
14 it was?
- 15 A My son.
- 16 Q Did you say anything to that person?
- 17 A I asked him, "Are you there, Marcos?"
- 18 Q And what did that person do?
- 19 A He jumped me on top of the bed.
- 20 Q And after he jumped on top of the bed, what did you
21 do?
- 22 A Then he start struggling and putting a pillow in my
23 mouth.
- 24 Q What else did he do?
- 25 A He said, "Don't holler, lady, or I'm going to kill

1 you."

2 Q Did the person say anything else to you?

3 A No, sir.

4 Q Did you recognize that voice?

5 A Yes, sir.

6 Q Whose voice was it?

7 A It was Carlos De Luna.

8 Q And could you see the man's clothes?

9 A I could not see it, but in the -- by the light of
10 the moon, it was a light brown -- a light blue
11 shirt and I could feel it, that it was the silky
12 one that he had been there before.

13 Q Now, how long was he in that --

14 A About twenty minutes.

15 Q Did he strike you while he was in bed with you?

16 A He strike with his fist my ribs.

17 Q Did he do any damage to your ribs?

18 A Three ribs, I had to go to Memorial Hospital.

19 Q And what happened to the three ribs?

20 A They were broken.

21 Q Okay. Was there any other kind of injury to you?

22 A No, sir.

23 Q Now, this man, did he do anything to rearrange his
24 clothes while he was in the bed with you?

25 A I didn't see it.

- 1 Q Did he keep his pants on?
- 2 A Yes.
- 3 Q Did he undo them at all?
- 4 A Yes, he did.
- 5 Q How did he undo them?
- 6 A He just zip -- zipped them off and pulled his pants
7 down.
- 8 Q Now, he didn't rape you, did he?
- 9 A No, sir.
- 10 Q Did he do anything to you? Did he kiss you or any-
11 thing like that?
- 12 A Yes, sir.
- 13 Q What did he do?
- 14 A He start stroking and he start kissing.
- 15 Q Did he take any of your clothes off?
- 16 A Yes.
- 17 Q What did he take off of yours?
- 18 A My half slip and my underwear.
- 19 Q Now, how long did you say he was there total?
- 20 A About twenty minutes.
- 21 Q After that happened, what did you do?
- 22 A After that I was sure that he had left the house,
23 I got to the door and then it was --
- 24 Q You go ahead and take a minute, Mrs. Garcia, that's
25 okay.

1 (At this time a brief recess was
2 taken, after which the following
proceedings were had:)

3 MR. SCHIWETZ: I'll pass the witness.

4 CROSS EXAMINATION

5 BY MR. LAWRENCE:

6 Q Mrs. Garcia, do you know if charges were ever filed
7 against Carlos De Luna?

8 A No, sir, because I never met him before.

9 Q Okay. But as far as you know, you've never had to
10 testify in court along these charges.

11 A No, sir. This is my first time.

12 MR. LAWRENCE: Pass the witness.

13 MR. SCHIWETZ: That's it, Your Honor.

14 That's the testimony we intend to offer.

15 MR. LAWRENCE: Your Honor, we would ob-
16 ject to it.

17 THE COURT: All right. Do you want to
18 excuse the witness, sir?

19 MR. BOTARY: Let me help you outside, Mrs.
20 Garcia.

21 THE COURT: All right. What was your --

22 MR. LAWRENCE: Your Honor, we're going to
23 object to the whole series of testimony from
24 Lucinda Garcia, Connie Campos, and Juanita
25 Garcia based upon the fact that there is no

1 final conviction; in fact, no charges have
2 ever been filed in this particular offense
3 that was supposed to have occurred back on
4 5/14/82 and we think it should be inadmissible
5 and would only go to prejudice and bias the
6 jury against my client.

7 MR. SCHIWETZ: Your Honor, under Furman
8 vs. Georgia and a number of United States
9 Supreme Court cases and a number of Texas
10 cases which I don't have readily at hand, both
11 aggravated and mitigating circumstances are
12 admissible in the second stage of a capital
13 punishment trial.

14 THE COURT: I'm concerned about an un-
15 adjudicated specific act of misconduct that
16 has not resulted in charges or conviction.

17 MR. SCHIWETZ: Yes, sir. There -- if the
18 Court would give me some time, I can bring
19 you some cases.

20 THE COURT: If you would.

21 MR. SCHIWETZ: Specific along this testi-
22 mony. Could I have about fifteen minutes?

23 THE COURT: Sure. We will be in recess
24 for fifteen minutes.

25 (At this time a recess was taken,

1 after which time the following pro-
2 ceedings were had outside the pres-
3 ence and hearing of the jury, before
4 the Court and with counsel for the
5 State, counsel for the Defendant and
6 the Defendant present:)

7 MR. SCHIWETZ: We'll call Lucinda Garcia,
8 please.

9 MR. LAWRENCE: Your Honor, before we do
10 that --

11 THE COURT: Yes, sir?

12 MR. LAWRENCE: We have an objection
13 before the Court and we would like to have it
14 ruled on on the record.

15 THE COURT: The objection you had refer-
16 ence to, the one you've already stated into
17 the record?

18 MR. LAWRENCE: That's correct, Your Honor.

19 THE COURT: Your objection is overruled.

20 MR. LAWRENCE: Note our exception. And
21 also could we ask the Court that once the jury
22 is brought in and all this testimony is -- is
23 brought forth again, that we have -- instead
24 of making the complete objection in front of
25 the jury --

THE COURT: Certainly.

MR. LAWRENCE: -- that our objection be

1 carried over and that we just make a general
2 objection and refer to it as such?

3 THE COURT: Certainly. Certainly. Bring
4 them in.

5 (At this time the jury was seated in
6 the jury box, after which time the
7 following proceedings were had:)

8 LUCINDA GARCIA,

9 having been called as a witness by the State and having
10 been previously duly sworn to tell the truth, the whole
11 truth, and nothing but the truth, testified upon her
12 oath as follows:

13 DIRECT EXAMINATION

14 BY MR. SCHIWETZ:

15 Q Could you please state your name for the jury,
16 ma'am?

17 A Lucinda Garcia.

18 Q Ms. Garcia, you're going to have to speak up a
19 little bit so everybody can hear you. Try and
20 project your voice so the last man in the jury over
21 there can hear you.

22 Can you tell the jury where you live?

23 A 3630 Fairchild.

24 Q And how long have you lived there?

25 A All my life.

- 1 Q And who do you live there with, ma'am?
- 2 A My mother.
- 3 Q And what's her name?
- 4 A Juanita Garcia.
- 5 Q Pardon me?
- 6 A Juanita Garcia.
- 7 Q And how old is your mother?
- 8 A Fifty-four.
- 9 Q And is she in good health?
- 10 A Not really.
- 11 Q What kind of physical problems does she have?
- 12 A She's got irregular heartbeat, and she's having
13 trouble with her kidneys.
- 14 Q Do you have a brother named Marcos Garcia?
- 15 A Yes, I do.
- 16 Q And where does Marcos live right now?
- 17 A He's in the penitentiary.
- 18 Q And was he in the penitentiary back in 1980 and '82?
- 19 A Yes, he was.
- 20 Q And how old is he now?
- 21 A He's 23.
- 22 Q Now, do you recall when Marcos Garcia, your brother,
23 got out back in May of 1982?
- 24 A Uh-huh.
- 25 Q Did you-all sort of have a little get-together for

1 him at your home over on Fairchild on May 14th,
2 1982?

3 A Yes, we did.

4 Q Members of the family come to that get-together?

5 A Yes.

6 Q Did you meet any of Marcos Garcia's friends at that
7 little get-together?

8 A Carlos De Luna.

9 Q And who introduced you to Carlos De Luna?

10 A My brother, Marcos.

11 Q And this Carlos De Luna that your brother intro-
12 duced you to, is he in the courtroom today?

13 A Yes, that's him right there (indicating).

14 Q And can you tell the jury what he's wearing?

15 A Black jacket with white shirt, gray pants.

16 Q Is he the man that's seated directly to my right?

17 A Yes.

18 MR. SCHIWETZ: Would the record reflect
19 she identified the Defendant, Carlos De Luna,
20 Your Honor?

21 THE COURT: Yes.

22 MR. SCHIWETZ: Thank you.

23 Q (By Mr. Schiwetz) Now, when your brother intro-
24 duced you or pointed Mr. De Luna out to you, did
25 he indicate to you that he was his friend?

- 1 A Yes, from the penitentiary.
- 2 Q And can you recall approximately how long Mr.
- 3 De Luna stayed at your home that day?
- 4 A About four or five hours, something like that.
- 5 Q I realize --
- 6 A During the daytime.
- 7 Q I realize it's been a good while back, but is it
- 8 fair to say it was more than an hour or so?
- 9 A Yes.
- 10 Q Did you see your brother leave that evening?
- 11 A No. He left with Carlos, but I didn't see him
- 12 leave.
- 13 Q Now, when you say "Carlos," you're talking about
- 14 the Defendant, Carlos De Luna?
- 15 A Yes.
- 16 Q Do you know where they were going?
- 17 A I heard that they were going to the skating rink.
- 18 Q Do you have a neighbor named Connie Campos?
- 19 A Yes, I do.
- 20 Q And where does she live in relation to your house?
- 21 A Next door.
- 22 Q Did you have occasion to discuss Carlos De Luna
- 23 with her on that date?
- 24 A Yes, I told her who he was and what relation he was
- 25 with Marco; that they were friends from the

1 penitentiary.

2 Q And what kind of clothes was the Defendant wearing
3 on this particular date when he was at your house?

4 A He was wearing a blue shirt, real, real fine
5 material, I don't know what color of pants he had
6 on.

7 Q Did you ever see Mr. De Luna again after that day?

8 A No, I didn't.

9 MR. SCHIWETZ: I will pass the witness.

10 Thank you, ma'am.

11 MR. LAWRENCE: No questions.

12 THE COURT: Thank you. You may step down.

13 MR. SCHIWETZ: The State calls Connie
14 Campos.

15 THE BAILIFF: He's not present.

16

17

CONNIE CAMPOS,

18 having been called as a witness by the State and having
19 been previously duly sworn to tell the truth, the whole
20 truth and nothing but the truth, testified upon her
21 oath as follows:

22

DIRECT EXAMINATION

23

BY MR. SCHIWETZ:

24

Q Could you please state your name for the jury,

25

ma'am?

1 A Concepcion Hernandez Campos.

2 Q And for the jury's benefit, you have already been
3 sworn in as a witness, have you not?

4 A Yes.

5 Q How old are you, ma'am?

6 A Twenty-three.

7 Q And are you married?

8 A Common law.

9 Q And who is your husband?

10 A Jose Noe Guerra.

11 Q And where do you live?

12 A 3634 Fairchild.

13 Q And how long have you live been living at Fairchild?

14 A It will be two years in December.

15 Q And do you know Juanita Garcia?

16 A Yes, my next door neighbor.

17 Q Okay. You're going to have to speak up a little.

18 A My next door neighbor.

19 Q And I want to direct -- well, back up just a
20 second. Do you know Lucinda Garcia?

21 A Yes.

22 Q She also a neighbor?

23 A Yes.

24 Q Do you know Marcos Garcia?

25 A Yes.

1 Q Do you remember back in May of 1982, when Marcos
2 Garcia came home from the penitentiary?

3 A Yes.

4 Q Do you remember the little get-together that the
5 people had next door for him?

6 A Yes.

7 Q Did you ever have an opportunity to see or meet
8 one of his friends there at that get-together?

9 A I saw a guy there, but I didn't know his name then.

10 Q Was his name ever told to you?

11 A Afterwards, after they left.

12 Q Okay. And who told you?

13 A It was one of his sisters.

14 Q One of whose sisters, ma'am?

15 A One of Marcos' sisters.

16 Q And who did she tell you the man was?

17 A Carlos De Luna.

18 Q Can you tell the jury what Carlos De Luna was
19 wearing on that day?

20 A He was wearing some black slacks and a long sleeve
21 blue shirt, light blue.

22 Q Do you see that man that you saw that day in the
23 courtroom today?

24 A Yes.

25 Q Would you point him out for the jury.

- 1 A He's right there, sitting there. (Indicating)
- 2 Q MR. SCHIWETZ: Could the record reflect
- 3 she pointed at the Defendant, Your Honor?
- 4 THE COURT: All right.
- 5 Q (By Mr. Schiwetz) Now, did you notice when that
- 6 fellow left?
- 7 A I don't recall what time they left.
- 8 Q Did you ever see him come back?
- 9 A Yes, about -- after 12:00 o'clock.
- 10 Q I realize it's been a while, but you're sure it was
- 11 after midnight?
- 12 A Yeah.
- 13 Q Now, was -- when he came back, where did he go?
- 14 A He went to the side of the house, to the back. I
- 15 guess he went to the back because you can't see,
- 16 you know, to the back -- to their back yard where
- 17 I was sitting.
- 18 Q Where were you sitting?
- 19 A On my front porch.
- 20 Q And when you saw him go back there, did you see him
- 21 again?
- 22 A Yes, he came -- he came up and he went in the
- 23 house. He didn't even knock or anything, he just
- 24 walked in.
- 25 Q Now, how did he get into the house?

- 1 A Well, through the front door.
- 2 Q Front door or back door?
- 3 A The front door.
- 4 Q Were there any lights on in the house when he
5 walked through that front door?
- 6 A The outside light and the bathroom light was on.
- 7 Q Okay. Now, how long was it before he -- after he
8 went in there that you noticed anything unusual
9 happen in the house?
- 10 A It was about fifteen minutes after he walked in.
11 I could see from where I was sitting through the
12 windows, the front window, you could see the bath-
13 room light on and then it turned off and I saw
14 something fall on the floor, and I told my brother,
15 "I think something is going on in there."
- 16 Q Did you actually do anything to see if anything was
17 going on?
- 18 A No.
- 19 Q Now, did there come a point in time when you saw
20 the Defendant leave that house?
- 21 A Yes, it was about 1:00 o'clock.
- 22 Q Did his appearance look any different when he left
23 than when he went in?
- 24 A Well, he looked scared when he walked out because
25 he came out and his shirt was all unbuttoned from

1 the front and he just ran, so --

2 Q Did you get a look at the man's face when he came
3 out?

4 A I looked at him, and I noticed that that was the
5 one that was there earlier when I had saw him there,
6 I mean, when they came.

7 Q How far away was that person when he came out of
8 there from you?

9 A It's not too far, it's probably where that door is
10 (indicating), my front porch to that lady's front
11 porch.

12 Q To the door of the jury room?

13 A To where that door is. (Indicating)

14 Q And was the light still on on the front porch?

15 A Yes.

16 MR. SCHIWETZ: Pass the witness.

17 MR. LAWRENCE: No questions.

18 THE COURT: You may step down. Thank you.

19 MR. SCHIWETZ: Call Juanita Garcia.
20
21
22
23
24
25

1 JUANITA GARCIA,
2 having been called as a witness by the State, and
3 having been previously duly sworn to tell the truth,
4 the whole truth and nothing but the truth, testified
5 upon her oath as follows:

6 DIRECT EXAMINATION

7 BY MR. SCHIWETZ:

8 THE COURT: This witness was also sworn
9 in your absence, ladies and gentlemen.

10 Q (By Mr. Schiwetz) Could you please state your name
11 for the jury, ma'am.

12 A Juanita Garcia.

13 Q And where do you live?

14 A 3630 Fairchild.

15 Q And how long have you lived there?

16 A More or less about sixteen years.

17 Q Who do you live there with, ma'am?

18 A My son and daughter.

19 Q And who's your daughter?

20 A Lucinda Garcia.

21 Q And your son?

22 A Martin Garcia.

23 Q Are you a married lady?

24 A No, sir, I'm a widow.

25 Q And how long has your husband been gone?

- 1 A Three years.
- 2 Q Now, I want to direct your attention back to May
3 the 14th --
- 4 A Yes, sir.
- 5 Q -- of 1982, the day that Marcos came home from the
6 penitentiary. Do you remember the get-together
7 that your family had that day?
- 8 A Yes, sir.
- 9 Q Did you get to meet any of Marcos' friends that
10 day?
- 11 A No, sir, just one.
- 12 Q Who was that?
- 13 A Carlos De Luna.
- 14 Q And had you ever known him before?
- 15 A No, sir.
- 16 Q And how did you come to meet him that day?
- 17 A Because Marcos said that he was coming home, to
18 treat him like his brother.
- 19 Q Did he actually introduce him to you?
- 20 A Yes, sir.
- 21 Q And did -- did Carlos De Luna stay there at the
22 house that day for a while?
- 23 A Yes, sir.
- 24 Q Did he eat there?
- 25 A No, not that I remember.

1 Q Did you have a chance to talk to Carlos De Luna?

2 A Yes.

3 Q Get to meet him?

4 A Yes.

5 Q Now, I want to direct your attention --

6 A Yes.

7 Q -- to later on that night, past midnight, into the

8 next day, May 15th. When you laid down to go to

9 sleep, who else was in the house that you know of?

10 A Just my grandson.

11 Q And what's his name?

12 A Roel Garcia.

13 Q And how old is Roy (Sic.)?

14 A Two years.

15 Q And is it Roy or Raul, I'm sorry?

16 A Roel, R-o-e-l.

17 Q And he was two years old?

18 A Yes.

19 Q Now, when you laid down to go to sleep yourself,

20 where did you lay down?

21 A In the bed, the front room.

22 Q Is that where your grandson was?

23 A Yes.

24 Q Did your grandson go to sleep?

25 A Yes. And I took him to his bed.

1 Q Then what did you do?

2 A I went to sleep.

3 Q And where did you go to sleep?

4 A In the front room, the bed where I was.

5 Q Now, were you wearing a nightgown then?

6 A No, sir.

7 Q You were wearing your regular street clothes?

8 A Yes.

9 Q And when you laid down, did you go to sleep immediately?

10

11 A No, sir.

12 Q Did there ever come a point in time when you thought

13 there was somebody else in the house?

14 A About twenty minutes later.

15 Q And what made you think there was somebody else in

16 the house?

17 A Because I saw a shadow.

18 Q Who did you think that was?

19 A Marcos.

20 Q Marcos?

21 A Yes.

22 Q Your son?

23 A My son.

24 Q Did you do anything or say anything?

25 A Yes, I -- I asked him, "Is that you, Marcos?"

- 1 Q And what happened then?
- 2 A It was when this boy or whatever he is jump on top
3 of the bed.
- 4 Q And what did he do to you?
- 5 A He put my -- the pillow in my mouth, in my face.
- 6 Q And how long did he put the pillow in your face?
- 7 A Oh, I -- I wouldn't remember.
- 8 Q Okay. Did you try and struggle?
- 9 A Yes, sir.
- 10 Q Okay. What else did he do?
- 11 A He said if I would start screaming or yelling, he
12 would kill me.
- 13 Q Did he hurt any other part of your face?
- 14 A Well, I was all bruise up from my face.
- 15 Q Did the man hit you at all?
- 16 A My ribs.
- 17 Q Did he do any damage to your ribs?
- 18 A Three.
- 19 Q What did he do to those three ribs?
- 20 A They told me in the Memorial Hospital that there
21 were three broken ribs.
- 22 Q Did that hurt a lot?
- 23 A It did.
- 24 Q Now, did this man do anything with his clothes to
25 rearrange his clothes?

1 A Well, no, not exactly because he just pull down his
2 pants and that was it. He didn't took it --

3 Q Okay.

4 A -- took them off.

5 Q Now, the man didn't rape you, did he?

6 A No, sir.

7 Q Did he remove any of your clothing?

8 A Yes.

9 Q What clothing of yours --

10 A My underwear and my half slip.

11 Q Did he kiss you or anything like that?

12 A Yes, sir.

13 Q Can you tell the jury what kind of shirt the man
14 was wearing?

15 A A baby blue.

16 Q Did you recognize the man's voice?

17 A Yes, sir.

18 Q Whose voice was it?

19 A Carlos De Luna.

20 Q How long did Carlos De Luna stay there in your
21 bedroom with you that night?

22 A About twenty minutes.

23 Q Was there anything about the shirt that you reocg-
24 nized other than its color?

25 A The -- it was a silky shirt.

1 Q After about twenty minutes or however long it was,
2 what did the Defendant do?

3 A He just went -- walked -- he just walk out.

4 Q Walked out of the bedroom?

5 A Out of the house.

6 Q Did you ever see him again after that?

7 A No, sir.

8 MR. SCHIWETZ: I will pass the witness.

9 MR. LAWRENCE: No questions.

10 THE COURT: You may step down, Mrs.
11 Garcia.

12 MR. SCHIWETZ: May this witness be ex-
13 cused?

14 THE COURT: You may be excused.

15 MR. LAWRENCE: Your Honor, may we approach
16 the Bench?

17 THE COURT: Yes, sir.

18 (At this time the following proceed-
19 ings were had at the Bench, in the
20 presence of, but outside the hearing
of the jury:)

21 MR. LAWRENCE: Your Honor, we would re-
22 urge our objection as we previously stated --

23 JUROR MORALES: Excuse me, Your Honor.
24 May we have a recess, sir, please?

25 THE COURT: Certainly. We will be in

1 recess.

2 (At this time the jury was excused from
3 the courtroom, after which time the
4 following proceedings were had outside
5 the presence and hearing of the jury,
6 before the Court with counsel for the
7 State, counsel for the Defendant and
8 the Defendant present:)

9 MR. LAWRENCE: We would reurge our objec-
10 tion that was made earlier.

11 THE COURT: It's overruled.

12 MR. LAWRENCE: Note our exception.

13 THE COURT: Yes, sir.

14 (At this time a recess was taken,
15 after which time the following pro-
16 ceedings were had outside the presence
17 and hearing of the jury before the
18 Court with counsel for the State,
19 counsel for the Defendant and the
20 Defendant present:)

21 (State's Exhibit No. 42 was marked
22 for identification.)

23 MR. SCHIWETZ: Your Honor, outside the
24 presence of the jury, the State would like to
25 tender for the record only what's been marked
as State's Exhibit 42, which is three pages
of the offense reports relating to offense No.
820515 -- excuse me, that's 047, which in-
volves the rape or attempted rape or assault,
whatever it was on Juanita Garcia. It's
three pages long. In the lower right-hand

1 corner of the first page are the initials of
2 Mr. James Lawrence and the date, 6/1/83, indi-
3 cating when he saw this document.

4 MR. LAWRENCE: Your Honor, we would ob-
5 ject to the admittance of that State's Exhibit
6 to be shown or to be just made part of the
7 record. I have been advised by my client,
8 Carlos De Luna, that if this exhibit is going
9 to be admitted, that it be admitted for all
10 purposes and in front of the jury, and I would
11 like the record to reflect also that Mr.
12 De Luna agrees with what I have just said to
13 the Court. Is that correct, Mr. De Luna?

14 THE DEFENDANT: Yes, it is.

15 THE COURT: Overruled before the jury,
16 it is the clearest kind of hearsay, would not
17 be admissible even by agreement, and hearsay
18 is -- has no weight of an evidentiary nature
19 whatsoever. So submitting it to the jury
20 won't prove anything; but for the limited pur-
21 post of the record not to be shown to the
22 jury, but simply to show that the State did
23 make this available to the defense counsel
24 some while prior to time of trial, for that
25 purpose only, it will be received.

1 (At this time the jury was excused
2 from the courtroom, at which time the
following proceedings were had:)

3 MR. LAWRENCE: Your Honor, if I may, I
4 have had an opportunity to look at the pro-
5 posed Charge by the Court on punishment, and
6 I have this date here filed objections to the
7 Charge on punishment before its being read to
8 the Court and before we have argued, and I
9 would submit my objections to the Charge on
10 punishment hearing in writing before the Court.

11 THE COURT: All right, sir.

12 MR. LAWRENCE: And I would also advise
13 the Court that I am abandoning Paragraph 3 in
14 my objections, and going with Paragraphs 1 and
15 2.

16 THE COURT: All right, sir. All right.
17 Your objections are overruled.

18 MR. LAWRENCE: Note our exception.

19 MR. SCHIWETZ: Judge, excuse me. I was
20 looking on the next to last page. We use the
21 forms the same as we used in another trial.
22 It looks like that's someone's signature on
23 Judge Presiding.

24 THE COURT: That's my signature; nobody
25 can read it.

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ALL right. How much time do you want,

gentlemen?

MR. SCHWITZ: Your Honor, if we could

be permitted forty-five minutes, we can give

most of it back, I think. I just don't want

to feel the pressure of time on me. I gave

you, what, back fifteen minutes yesterday? I

think I can probably give you fifteen back

today, too.

THE COURT: You talking about, then,

roughly thirty minutes?

MR. SCHWITZ: Roughly.

THE COURT: Okay.

MR. LAWRENCE: That's fine, Your Honor.

THE COURT: All I'll do then, if you go

beyond thirty minutes is tell you, "That's

thirty minutes," but I'm not going to stop you

or you're not going to be bound.

MR. LAWRENCE: All right, fine, Your

Honor.

THE COURT: All right, bring them in.

(At this time the jury was returned

to the jury box, at which time the

Charge of the Court was read and the

following proceedings were had:)

THE COURT: Gentlemen?

3A 1 MR. SCHIWTEZ: Ladies and gentlemen of the
2 jury: I want to first thank you for the verdict you
3 returned yesterday. When we were questioning you on
4 voir dire, we told you that the questions we asked you,
5 though you couldn't get them wrong, that they weren't
6 going to be easy; and as you see, sitting on a case
7 which involves issues like this one is not easy. No-
8 body said it was going to be easy. Nobody said it was
9 going to be fun. And I trust that none of you have
10 found it easy, and none of you have found it fun. It's
11 the hardest kind of work that a human being can be
12 called upon -- the hardest kind of work that a civilized
13 human being can be called upon to do. I respect you
14 for your verdict yesterday, and I want to talk to you
15 a little bit about what you're going to be charged with
16 doing today.

17 The Charge in this case, in this portion of
18 the trial, is very short. Basically, as we told you on
19 voir dire, as we told all of you on voir dire, there's
20 going to be two questions for you to ask -- for you to
21 answer, excuse me.

22 When you-all were first called up here three
23 weeks ago, there were a bunch of people called for this
24 case, sixty-odd people, something like that, and you
25 were the product of the whittling down process. One

1 person after another came in here, talked to the Judge,
2 talked to myself and Mr. Botary, and talked to the
3 defense attorneys. Many were called, and you were
4 chosen. You were chosen because every single one of
5 you told us that you could listen to the facts, decide
6 what the facts were, and decide the case on the evi-
7 dence. You could decide whether this man was guilty or
8 innocent beyond a reasonable doubt on the evidence.
9 You promised us that you could answer all these ques-
10 tions based upon the evidence. We told you that there
11 was going to be some inflammatory evidence in this
12 case, and there was. But you promised us, every one of
13 us, and you took an oath that you would answer these
14 questions based upon what you believe the answers
15 should truly be, not on whether you wanted to see Carlos
16 De Luna die, not on whether you were against the death
17 penalty or what-have-you; simply on the basis of what
18 the evidence showed. You all promised that. One after
19 another you came in here and said that you would decide
20 the case on the basis of the evidence. You swore an
21 oath, and you promised us all that, and now you're
22 going to be asked to answer two pretty simple questions.

23 The first one: Was the conduct of the Defend-
24 ant, Carlos De Luna, that caused the death of the
25 deceased, Wanda Lopez, committed deliberately and with

1 the reasonable expectation that the death of the deceased
2 or another would result. That term "deliberately" is
3 not defined in here for you, but it's really pretty
4 simple. Deliberately basically means the same thing as
5 intentional. You were charged yesterday, you had to
6 find this Defendant intentionally caused the death of
7 Wanda Lopez. And the Court defined intentional for
8 you, saying a person acts intentionally with respect to
9 the nature of his conduct or to a result of his con-
10 duct when it is his conscious objective or desire to
11 engage in that conduct or cause that result. That's
12 intentional. He intended to stick that knife in her
13 ribs. He intended to engage in that conduct. He in-
14 tended to cause that result. It was deliberate.

15 The alternative, of course, was that knowingly
16 was charged in the murder case, when you know that your
17 conduct is reasonably certain to cause the result. An
18 example I always like to use of that is if you go up
19 and you stab somebody in the lung or the heart or what-
20 have-you, you are intending, you're acting intention-
21 ally. If you go out and you're intending to cause a
22 result, you're intending to do it; whereas, if you go
23 out an hour before services and you set a bomb in a
24 church and you set it to go off at 1:15, you really
25 don't know who you're going to kill, that's knowingly.

1 Knowingly, your conduct is reasonably certain
2 to cause the result. But this Defendant deliberately
3 and with the reasonable expectation that the death of
4 the deceased or another would result, deliberately
5 killed that girl. And you can listen to that tape
6 again, if you want to. You can listen to her begging
7 for mercy. You can hear that scream when he stabbed
8 her, or you can take that knife and look at it, open it
9 up and try and imagine what effect that would have
10 sticking it in the lungs or the heart and trying to
11 decide whether that was all done deliberately. I sub-
12 mit to you that shouldn't be too hard.

13 The second question, as we told you, was the
14 one that was really the gist of the whole matter.
15 That's the one that Mr. Lawrence kept referring to in
16 voir dire as being the nitty-gritty. Is there a pos-
17 sibility that the Defendant, Carlos De Luna, was commit
18 criminal acts of violence that would constitute a con-
19 tinuing threat to society. And as we told you, that
20 doesn't mean is he going to go out and go into gas
21 stations and continue stabbing people and stealing a
22 hundred forty-nine dollars from them. It's criminal
23 acts of violence that constitute a continuing threat.

24 We have put on some evidence in this case that
25 I suggest to you shows beyond a reasonable doubt that

1 he would. You have State's Exhibit 41, which is the
2 pen pack, and if you will take a look at it and look at
3 the dates on here, you will see that on June the 19th,
4 1980, the Defendant attempted to rape a woman in Dallas
5 County. Then on July the 26th, 1980, convicted -- he
6 was stealing a car, unauthorized use of a motor vehicle,
7 that's also in Dallas. He got three years for that,
8 and he went to the penitentiary. When you go to the
9 penitentiary the first time, there's two ways you can
10 look at what happened to you; there's two general ways
11 you can approach that experience.

12 You can say, like any civilized human being,
13 "This is horrible, I hate this place, it's full of
14 scum, I don't want to ever come back here again. The
15 place is full of murderers, rapists, thieves, armed
16 robbers, child molesters, and God only knows what else.
17 I don't belong here. I'm not coming back." You can
18 say, "I'm sorry for what I did, I'm never going to do
19 anything like that again. I don't ever want to come
20 back here again."

21 Or you can become mentally a convict. You can
22 mentally adopt the convict attitude, the convict
23 psychology. "Us guys here in the pen, them out there."
24 You can become a member of the group that's in the
25 penitentiary and deserves to be there, or you can

1 distance yourself from that and try not to ever go back.

2 Carlos De Luna had that opportunity, just like
3 everybody else that goes to the penitentiary for the
4 first time. And on 5/13/82 he got parole. He got out
5 the first time. Gilbert Garcia was his parole officer.
6 He testified that it was 5/13/82. May the 13th, Carlos
7 De Luna comes out of the penitentiary to start his new
8 life. Carlos De Luna gets to decide whether he wants
9 to go back to the penitentiary or whether he wants to
10 live like a civilized human being. And in the early
11 morning hours of May 15th, 1982, two days later, Carlos
12 De Luna let the world know what to expect from him.
13 He let the world know about the probability of future
14 acts of violence which would constitute him a continu-
15 ing threat to the civilized people of the world, be-
16 cause Carlos De Luna went over and tried, I submit to
17 you, tried to rape his best friend's mother. That says
18 about everything you need to say about Carlos De Luna.

19 He went back to the penitentiary. You can see
20 he stayed there for less than eight months on that
21 parole revocation. Eight months, he's back down in the
22 penitentiary, again, he can go through that same mental
23 process. "I was out for two days, do I want to spend
24 the rest of my life here? Do I belong here? Or do I
25 want to go out and try and get my life back in decent

1 shape and turn into a civilized human being, someone
2 that my family can be proud of, someone who can go out
3 and start leading a normal life."

4 So January 13th, right after the start of a
5 new year, Carlos De Luna gets turned loose on the
6 civilized world again. And people made an effort to
7 help him this time. His stepdad got him a job out
8 there, Mr. Waychoff put him on, didn't pay him a whole
9 lot of money, but it's a decent wage, three seventy-
10 five an hour, he's working regular, living with his
11 folks, there's no reason why he can't survive on that.
12 There's no reason why he couldn't continue like his
13 stepfather and continue working out there. But --
14 excuse me, that was '83 he got out.

15 Let's see, this would be eighteen days --
16 twenty-two days, just a little bit over three weeks
17 later, well, he got to meet Wanda Lopez. And Wanda
18 Lopez got to find out whether Carlos De Luna here would
19 probably commit future acts of violence which would
20 constitute him a continuing threat to society. And she
21 found out, just as Juanita Garcia found out and just as
22 the fellow who owned the car up in Dallas found out,
23 and just as the lady whom he attempted to rape up in
24 Dallas found out, that Carlos De Luna doesn't care
25 about anybody else.

1 I would submit to you that when Carlos De Luna
2 got convicted the first time, got paroled, and then two
3 days later tried to rape his best friend's mother, that
4 you could have taken this question and answered it
5 right then. Is there a probability that after going to
6 the penitentiary and being convicted of attempted rape
7 and car theft, and then getting out and trying to rape
8 your best friend's mother, is there a probability that
9 you will commit criminal acts of violence that would
10 constitute a continuing threat to society?

11 That question was effectively answered back
12 on May 15th, 1982, but he got out again. And Wanda
13 Lopez got to be another link in the chain that gives
14 you the answer to that second question.

15 I would submit to you that there isn't a
16 reasonable doubt on the question of deliberateness.
17 There is not a reasonable doubt or any other kind that
18 there is a probability that he will commit criminal
19 acts of violence in the future. He is a continuing
20 threat to society.

21 Under the oath you took you promised that you
22 would answer these questions according to the evidence.
23 We have picked you for this jury. They left you on,
24 and we left you on because we believed you, that you
25 would answer the questions according to the evidence

1 honestly, that you would put emotional things aside and
2 decide it just on the evidence. We believed you then,
3 and I believe you now. And I know it's not the easiest
4 thing in the world to do, but I want to ask you to go
5 back there and answer both questions "yes."

6 MR. LAWRENCE: May it please the Court,
7 Counsels for the State, ladies and gentlemen of the
8 jury: Let me say this will be the last time that I get
9 to get up here and talk to you, and I know even though
10 your verdict came back with capital murder, that you
11 took some of the things I said and thought through them
12 very carefully before you made your decision, so I
13 don't feel like I'm wasting my time by coming again
14 before you and saying what I have to say. I know you
15 will take what I say, that you will listen very care-
16 fully and then make your decision as to the two issues
17 that we have presented to you. We respect your
18 decision for finding my client guilty of capital mur-
19 der, but we have one thing here in this great society
20 of ours that we're very thankful for; that no matter
21 what decisions are ever made and by whom they are made,
22 that we, as individual citizens, have a right to dis-
23 agree. We respect your decision for capital murder,
24 but I can also disagree with it. I know you thought
25 through it carefully, and I think we look back and I

1 have to reflect a little bit back on it because I need
2 to talk about those two issues.

3 I see that in finding my client guilty of
4 capital murder, you had to have found that he went into
5 that Sigmor station with the specific intent to rob and
6 kill Wanda Lopez. That he specifically intended to do
7 it when he was there; otherwise, you could not have
8 found him guilty of capital murder. Was there a ques-
9 tion in your mind at that time as to whether there was
10 specific intent and, if so, what does that mean, or
11 what in the world do we mean by knowingly? You heard
12 Mr. Schiwetz get up here and said to him knowingly --
13 his best description of knowingly is you plant a bomb
14 and you walk away and it blows up later. Well, I like
15 to give the example, "Hey, if you pull a knife or if
16 you pull out a gun, you know something bad is going to
17 happen. Who is to say, who amongst us is to say that
18 if we assume, and evidently you did, that my client
19 went into that Sigmor service station and robbed her,
20 that he had a knife, but that during the struggle we
21 know she was stabbed, we know the knife was dropped,
22 if, in fact, it was the murder weapon. Was there
23 really specific intent or was that really knowingly?
24 That he should have known if he pulled a knife on some-
25 body and there's a struggle, there's a good possibility

1 that some kind of injury could occur, even death. Could
2 that have been what happened? It's a possibility.
3 Evidently you didn't think of it that way, but there's
4 a possibility. Nevertheless, keep that in mind. What
5 do we do now?

6 As Mr. Schiwetz says, we have two simple,
7 simple questions. How can a man's, woman's life be
8 simple? My goodness. Let's look at these questions,
9 these issues, and you will have them there before you
10 in the jury room. I call the first one ridiculous and,
11 again, I have the right to disagree, just as you do
12 with any law. I must follow it, of course, just like
13 you do, but I have a right to disagree.

14 I call the first one ridiculous because it
15 says did he do it deliberately. Well, pray tell, if
16 you find with specific intent, how can you not find
17 deliberate; right? Why have that question in there?
18 I am going to give you the answer why they have it in
19 there: because that's a ridiculous question.

20 And then we get to the second question, and
21 before we get to it, we look at the concept of what
22 we're here for today, punishment. And you say, "Why
23 do we have punishment?" Well, this is the way human
24 beings are taught from the very beginning. This is
25 the way you teach a small child. This is the way we

1 live. How do we look at punishment? Different ways.
2 We can look at it, we can say, "Well, we use punishment
3 in our criminal justice system to deter crime." We can
4 say, "Well, we also use it as just straight punishment,
5 you shouldn't have done this." We also look at it as,
6 "Hey, we need to protect society from this individual
7 who doesn't want to conform." And somewhere, some-
8 where, God help us, some of us put in there that we use
9 it to rehabilitate. But, oh, that somewhere gets lost
10 all the time, all the time.

11 Mr. Schiwetz made a beautiful point in that he
12 said, "Who wants to live in prison?" I believe he said,
13 "Scum." You have a right to decide, "I want to go back
14 there, I want to live the rest of my life like that."
15 Horrible place to be. He made that point because, I
16 would assume from what he said, from the evidence
17 there is no rehabilitation there. This is where the
18 problem lies. But yet, we're the first to condemn,
19 we're the first to say that's what he got, if you
20 don't like it, that's tough. That's all we've got.
21 We're going to look at other things in our society to
22 gripe about, and worry about. Not only that, our
23 society has put us into a situation where we're only
24 concerned with ourselves. We have become a selfish,
25 individualistic society. We don't care no more, and

1 that's where we're headed. You want to cut down on
2 everything and just worry about ourselves, let someone
3 else worry, let someone else do this, let someone else
4 do that. If people can't be the same way I am, throw
5 them in prison. Get rid of them. Do something else
6 with them.

7 Let me ask you: What purpose does death serve?
8 What purpose? What are you showing the world? Has
9 death ever been the answer to anything in this world?
10 You list how death is the answer when punishment is
11 concerned. What has it solved? What will it ever
12 solve? We go to the end product. We kill somebody for
13 what they did. We don't go to the beginning and say,
14 "Well, let's see where the problems lie." We don't
15 have the time. What does it serve? We have just
16 resolved ourselves to a society that again believes an
17 eye for an eye, a tooth for a tooth. You took a life,
18 therefore you must give up yours. It doesn't make any
19 difference whether you've got a record or not, because
20 the first question is ridiculous and it would seem
21 that the only way you could answer the second question
22 is you would have to be a perfect citizen. Nothing,
23 no record, Boy Scout, the whole bit. That seems like
24 the only avenue for a person that's found guilty of
25 capital murder to receive a life sentence. The only

1 way. I can't think of any other way, can you?

2 Look how absurd a society we have. We get all
3 bent out of shape at the national Congressional level.
4 We talk about the right to live, the right to live.
5 I don't want any individual telling me if I can have
6 children or not have children. I have the God-given
7 right to procreate. I don't want nobody to interfere
8 with that. I think most of all because that's your
9 personal private life that we're talking about, and you
10 don't want anyone to interfere with it; right? I think
11 everybody would agree with that. We cherish the right
12 to life. And yet we also, at the same time, seem to
13 tell ourselves, "Hey, if we have the right to create
14 life, we have the right to destroy life." And we have
15 these state laws that say a person can receive the
16 death penalty under the following situation. Look how
17 above God we're getting. I have the right to create
18 life, I have the right to destroy life. Who are we?
19 Mere human beings trying to act like supreme beings.
20 Who are we kidding? We create laws that say we can
21 take life, and then we justify that law by saying we're
22 not just going to do it to anybody, we're going to let
23 you answer two issues. The first one is ridiculous;
24 the second one could only apply to the perfect person
25 that made one mistake in his life and it happened to

1 have been capital murder; therefore, he could get life.
2 See how we're limiting and we're just making ourselves
3 destroyers of life, that's all we're doing. But that's
4 the law.

5 I don't know where society went wrong. Maybe
6 we've been in too many wars; maybe we've become just
7 too callous; maybe we're just, like I told you a little
8 bit earlier, too engrossed in our personal lives that
9 anything else is immaterial. When we get into this
10 particular area of determining whether one person
11 should live or die, we're treading in an area that we,
12 as human beings, have no right to be.

13 Why are we here? If, as Mr. Schiwetz says,
14 life in the penitentiary is so horrible, who would
15 want to live a life there; is that punishment enough?
16 Isn't that worse than death? How many times do you
17 ask yourself, and how many times have you experienced
18 that you did something wrong and you told yourself,
19 "Given another chance, I'll try to do better." And
20 sure enough, in the twinkling of an eye, we're human
21 beings, we do something wrong again. Continuously
22 throughout our lives. How many of you have lived a
23 perfect life? If you have, talk to me after this
24 trial is over; I want to know the secret.

25 How many times do you say -- and I'm sure the

1 whole question has been brought here before you by Mr.
2 Schiwetz saying, "How many times are we going to tell
3 someone that we're going to give you another chance?"
4 How many more people like Wanda Lopez are going to be
5 hurt out there if, in fact, you give him life; if you
6 answer the issue, one of those issues "no"?

7 At what point -- let me ask you this: At what
8 point did we, as a society, determine that a person
9 cannot be rehabilitated any more, that's it, we give
10 up? At what point, I ask you? If any of you have ever
11 been a teacher and you gave up or you felt like giving
12 up but you never did, so exasperating to try. You're
13 a parent; how difficult? Did you give up on your child
14 right away? You didn't do it as a parent; you, your-
15 self, didn't do it as an individual. Yet we are here
16 asking you to give up on Carlos De Luna. Give up,
17 look what he's done, get rid of him, he's no use to
18 our society any more. That is a callous way of think-
19 ing. How can you give up? How -- why should we draw
20 the line on certain crimes, on certain individuals, on
21 certain ages.

22 Here we've got a person that's 21 years of
23 age, has he ever had a real chance? You found him
24 guilty; he says he's not. Be that as it may, has he
25 ever really had a chance? Will he ever have a chance?

1 Gosh, I don't know. I know one thing. He certainly
2 won't if you answer those two issues "yes." I can
3 guarantee you that. Because there's no coming back.
4 All there is is giving up by us. We don't care no more.
5 Let's get rid of this -- there's no reason to continue.
6 We've given him all the chances. Besides, he's an
7 individual unknownst to you, your looking at him prob-
8 ably started out objective, and then it only got sub-
9 jective to the point where you're told about these
10 other incidents, and that has caused anger, resentment,
11 whatever, whatever emotions you may have; it's cer-
12 tainly not good. Right? You're looking at him in that
13 light and with that in mind, you're being asked to take
14 his life. And, of course, being in that frame of mind
15 is so much easier for you. I hope that you think about
16 that very, very carefully. That you examine what is
17 right, in a proper case.

18 I hope that this portion of the trial will
19 weigh upon your mind and your deliberations more so
20 than anything else you have ever experienced in your
21 life, because I know unless you're ever brought back in
22 here again in a situation like this, you will never
23 have to make a decision like this ever again.

24 Look at those two issues again. I told you I
25 called the first one ridiculous, the second one

1 impossible. That's the law. And we have a right to
2 disagree. I'm not going to say too much more. What
3 can I say? It's in your hands. All I ask is that you
4 give it careful consideration, think about that guilt
5 or innocence phase of the trial again, reconstruct it
6 back in your mind again. You have a right to do this.

7 I would ask you to look at those questions in
8 the light, the way I discussed them here with you. I
9 don't see how any evidence could ever be presented
10 beyond a reasonable doubt that would get a jury to
11 answer those questions "yes." It's unconceivable be-
12 cause of the ridiculous first question and the im-
13 possible second question. Think about it.

14 Thank you again.

15 MR. DePENA: Could the Court advise me how
16 much time we have?

17 THE COURT: You have approximately ten minutes
18 at this time before your thirty minutes, that is not a
19 deadline.

20 MR. DePENA: That's fine, thank you.

21 Ladies and gentlemen of the jury: I would
22 like to thank you. And I realize that each one of you
23 has given this case consideration and possibly during
24 the original deliberation you may have faced a great
25 deal of consternation in reaching the decision that you

1 did.

2 My observation, as co-counsel for the Defend-
3 ant in this particular case, leads me to believe that
4 the amount of time that was taken in your initial de-
5 liberation in reaching your decision in this case
6 obviously tugged on each and every one of you in trying
7 to determine whether or not you reached the right
8 decision in your verdict of finding the Defendant guilty
9 of capital murder. And I think that that decision was
10 probably somewhat based or at least the time it took
11 in your deliberation on some of the obvious, tough
12 legal questions which -- and each one of you has a
13 copy of the Charge, and I'm sure that each one of you
14 took the time to read through it initially in trying
15 to reach a determination of the verdict that you
16 particularly reached.

17 I don't know, but it seems that possible some
18 of you were troubled, and this is the reason that I
19 feel like it's necessary for me to try and point out a
20 couple things, because as impossible as the first issue
21 might be, as co-counsel seems to think, seems to indi-
22 cate, I'm sure that one of the factors that needs to be
23 considered and I think that Mr. Schiwetz will probably
24 argue my point, is the question of whether your're
25 going to consider equivalency of the words, and we're

1 playing a word game here.

2 As the Court has pointed out to you, and you
3 will see in this Charge which you get in the punishment
4 stage, there is no definition to deliberateness, and
5 there is no definition basically for the question of
6 whether there's a propensity -- may I borrow the ver-
7 dict? The second issue, which -- as to whether there's
8 a probability. You don't have definitions for these
9 particular words. The probability that Carlos De Luna
10 would commit criminal acts of violence that would con-
11 tinue -- that would constitute a continuing threat to
12 society. And the only way that I can do this is
13 basically, I feel, by example.

14 You, in your determination or finding that
15 Carlos De Luna was guilty of capital murder, basically
16 came up with what I feel is the decision that Carlos
17 went into that gas station was a preconceived plan,
18 with a specific intent that in the course of this
19 robbery, as you have found that he intended to commit
20 or attempted robbery that he intended to commit, that
21 he intentionally -- talking about preconceived plan,
22 that he intentionally went in there with the intention
23 of robbing the place and specifically intended to end
24 that robbery, kill Wanda Lopez. Specific intent.
25 Deliberate, specific intent. That was what you had to

1 find.

2 You also had the alternative in here to find
3 whether or not, if you didn't find that he specifically
4 intended to kill, we use the term intentional, planned
5 objective to go in there and rob the place and kill in
6 the end.

7 You also had the alternative of going in and
8 finding -- going in and making a finding presumably
9 that he knowingly, rather than intentionally, killed
10 Wanda Lopez. The difference, we're talking about
11 differences, but the difference is this: that Carlos
12 De Luna may have specifically intended to go in and rob
13 the place, he may not have specifically intended to go
14 in and kill Wanda Lopez. But in the course of the
15 robbery, for whatever reason, fear, whatever the case
16 may be, anger, whatever, he pulls a knife and stabs
17 her, not knowing whether he's going to necessarily
18 cause her death at that point in time or whether he's
19 going to just injure her seriously, but knowingly, be-
20 cause of the fact that with means used, that there was
21 going to be some knowing consequence, whether it was
22 serious bodily injury or whether it was death.

23 Now, your finding in this particular case,
24 when you found Carlos De Luna guilty of capital murder,
25 was that you reached or you concurred in a finding

1 that he had planned, that he had conceived, that he had
2 intended -- intended to commit the robbery and that he
3 went in there already with the preconceived idea that
4 he was going to specifically or specifically intended
5 to kill Wanda Lopez or the clerk. I'm sure he didn't
6 probably know -- we're not dealing with names. But
7 that he specifically intended to kill her.

8 So we go back to the first question that
9 you're going to have to answer, the first special issue
10 which you're going to have to answer, and that is: was
11 the conduct of the Defendant, Carlos De Luna, that
12 caused the death of the deceased, Wanda Lopez, com-
13 mitted deliberately and with the reasonable expecta-
14 tion that the death of the deceased or another would
15 result.

16 Mr. Schiwetz wants you to equate deliberate-
17 ness with your finding that he specifically intended to
18 kill Wanda Lopez. I would ask you that if now, at this
19 point, if there's any question in your mind as to
20 whether or not at this point, and that opportunity is
21 still here, if there's any question in your mind for
22 you to have made the decision as to whether or not
23 this was a knowing act or whether or not this was an
24 intentional act, that you resolve that, at least to the
25 extent of whether or not this was done deliberately.

1 I don't think there's a conflict there. I
2 think that basically if you reconsider that particular
3 issue and you can determine whether or not this was
4 done deliberately or was it done knowingly. And if so,
5 then was it deliberate or was it something that occurred
6 just as a result of the total circumstances surrounding
7 the death of Wanda Lopez. Please consider that.

8 I -- I -- I know that issue, you know, that
9 this is something that possibly weighed on your mind at
10 the time because it was a decision and I know that even
11 though you have conclusively at this point or at least
12 you all concurred in the finding of capital murder and
13 had to make a specific finding on a specific intent,
14 that maybe there was a question in one of your minds
15 or any of your minds as to whether or not he specific-
16 ally intended to do this, or whether he knowingly did
17 it, but not with a specific intent. And thus was it
18 deliberate?

19 The second thing I would like to bring out is
20 you-all require on the voir dire, the Court tried to
21 point out to you, as each one of you were charged and
22 as each one of you were picked on the jury, that the
23 process that is used here was to attempt to avoid anger
24 or a decision based on anger at the circumstances
25 surrounding the case. And that's difficult to do, and

1 we all knew and some of you indicated that there was --
2 there was a difficulty in making the differentiation
3 once -- once you heard all the facts. In trying to
4 separate what actually happened, why Carlos De Luna was
5 on trial here in this court before you and then to
6 separate that from the conduct of the past. I think
7 you can obviously recognize, at least as Mr. Schiwetz
8 has so -- in such an ordering fashion, has attempted
9 to present to you in such an organized fashion, has
10 attempted to present to you Carlos' life for the last
11 two and a half years. But I think there's a question
12 and I -- I think you should seriously consider whether
13 or not Carlos is going to constitute a continuing
14 threat to society. You have basically a situation
15 where you have five officers who have come in here and
16 who have just -- basically have testified to you that
17 this young man has the reputation in the community,
18 what his reputation is for being a peaceable and law-
19 abiding citizen and they have come in and answered that
20 as bad. That's a process that we go through. An
21 officer just states his own opinion as to whether or
22 not Carlos is a peaceful and law-abiding citizen. It
23 doesn't really go into any real or doesn't really give
24 you -- shed any light on whether or not this person is
25 a live person or whether he's going to really be a

1 threat to society. What is a probability? Is it like
2 the horse races? Is it like a bet? Are we going to
3 bet that Carlos De Luna is going to continue to be a
4 continuing threat to society?

5 What do you base it on? Well, Mr. Schiwetz
6 would just base it on the fact that: Look at what he's
7 done in the last three years. I submit to you that
8 that's not necessarily a total barometer for somebody's
9 conduct. There are probably people that you may know
10 who presumably had a very rugged early years. We can't
11 blame it on anything in particular. We don't know
12 whether you're going to blame it on society, you say,
13 "Well, this guy has had an opportunity to pull himself
14 up by the bootstrings, apparently he hasn't done so,"
15 you know, maybe somebody should have done something
16 somewhere along the way, whatever the reason, there's
17 probably a thousand and one reasons why somebody or
18 somebody's act or somebody's conduct is such during a
19 period of time.

20 We all have our rough years, our, you know,
21 years of turmoil, whatever the case may be. But I
22 don't think, as co-counsel has said, I don't really
23 think that we can find that this is an unsalvageable
24 situation. Can we really say that Carlos De Luna's
25 life is unsalvageable, that nothing can be done, that

1 he won't learn a lesson, if we want to call it trying
2 to teach somebody a lesson? Or do we treat this as,
3 "Well, we're just going to make an example of him"?
4 I realize that all of what you have heard here prob-
5 ably has a great -- probably there's great weight, but
6 is it really a barometer? Can you really forecast the
7 future on Carlos De Luna at age 21 and say, you know,
8 "You have no more to offer society, we don't need you
9 any more." I ask you to give that great consideration.

10 One of the things I have noticed here and I
11 have asked, as I prepare to sit down and let Mr.
12 Schiwetz come back and talk to you, is that what we
13 have said up here, granted it's argument and it's not
14 evidence to you. You can weigh it in whatever propor-
15 tion you may want to. We all have, both Mr. Schiwetz,
16 all of the parties here, we probably all have our own
17 opinions concerning the law, concerning the objectives
18 and the trial, the process, and each and every one of
19 us is entitled to our own opinion and I would ask that
20 when you go into that jury room, that you, as you were
21 asked during the original voir dire, whether you're in
22 a minority or not, to stick to your convictions in
23 terms of what you feel these issues should be answered.

24 If any of us, myself, co-counsel, Mr. Schiwetz,
25 if we have said anything to offend you personally, I

1 ask that you overlook that, but don't hold it against
2 Carlos De Luna. Obviously sometimes we make objections
3 and we say things to you and they may be said in such
4 a fashion as they may offend you; and, like I said, we
5 each have our own personal feelings as to how things
6 should be done. We all have our own pet peeves, but I
7 would ask you to not to do it in terms of this and if
8 anything I have said, which might offend you from what
9 we have said, don't take it personally and for God's
10 sake, don't take it out on my client. Please consider
11 both of these -- these questions. As I said, you do
12 have a chance to go back in there and resolve any
13 differences that you may have had in your original
14 finding and make a determination, whether you really
15 believe that this was a deliberate act or was it just
16 knowingly.

17 Thank you.

18 MR. SCHIWETZ: Please the Court, co-counsel,
19 Mr. Lawrence, Mr. DePena, a couple of things that were
20 said that I want to address specifically, that Mr.
21 Lawrence and Mr. DePena said, a couple of things stuck
22 out in my mind. Mr. Lawrence said that our society is
23 absurd, that we all have grown too selfish and too
24 callous. That we're punishing people for not conform-
25 ing. Is that what we've got here? I mean, is that --

1 is Carlos De Luna just a non-comformist; is that what
2 this is all about? Are we absurd, as a society, as a
3 whole, for trying to do something about people like him?
4 Are we callous because we try to protect people like
5 Wanda Lopez? I submit to you that their argument was
6 patently ridiculous.

7 They also make another argument which I
8 thought was rather cute, saying isn't the penitentiary
9 worse than death itself? That's what I like to call
10 the brier patch argument. You remember the Br'er Fox
11 story and Br'er Rabbit. Br'er Fox catches Br'er Rabbit
12 and Br'er Rabbit says, "Oh, please, please don't throw
13 me in the brier patch. Please don't throw me in the
14 brier patch," the reason being that that's where he
15 wants to go. It's better than being eaten or whatever
16 the alternatives were. And I submit to you Carlos
17 De Luna right now wants nothing more -- he would be
18 absolutely delighted with life in the penitentiary. He
19 doesn't mind the penitentiary. He kind of likes it,
20 he's done absolutely nothing to stay out of it, he's
21 been in there twice already and he would just as soon
22 kill to get back in there.

23 They have got a threshold problem over here
24 in talking about intent and knowing and deliberate,
25 that threshold problem is what was this Defendant trying

1 to accomplish when he stabbed Wanda Lopez? What was
2 his specific intent? Talking about definite, specific
3 intent to go in there and kill her; was it preconceived.
4 In other words, when he's standing out there by that
5 ice machine, was he saying, "I'm going to go in there
6 and kill that girl and rob her." Well, that's a ques-
7 tion based upon the evidence that we don't know, the
8 only person that probably knows that for sure is Carlos
9 De Luna, but that's not what you were charged with
10 yesterday. You were charged with did he intentionally
11 kill her while in the course of committing robbery.
12 I submit to you that he decided to kill her when he
13 realized that she was on the phone to the police and
14 that she would be able to describe him.

15 Specific intent when he committed the offense,
16 not when he was outside planning to commit the robbery.
17 They keep saying intentionally and knowingly. I submit
18 to you he intended to kill her because she was on the
19 phone. The alternatives are what they haven't talked
20 about, and I think those are real interesting. If he
21 didn't intend to kill her when he stuck that knife in
22 her, what was he trying to do? Was he just trying to
23 wound her a little bit? She was going to give him the
24 money. He's got the money right there, you know.
25 What did he do? Pull out the knife and start -- say,

1 "I think I'll just cut off her a little bit for laughs"
2 It wasn't necessary. There was no purpose in just
3 cutting on her. She would still be able to identify
4 him.

5 Mr. DePena even argued that he said, "Did he
6 intend to kill her, or was he just trying to cause
7 serious bodily injury." He really said that. You
8 know, he intended to kill her to shut her up so she
9 couldn't identify him. Unfortunately for him, some
10 other people saw him.

11 They also make a big thing about this deliber-
12 ate business. I don't know, I kept expecting to hear
13 him argue that knife went off accidentally or something
14 like a gun. You know, if you stick a knife in some-
15 body's lungs or in their heart, isn't that deliberate?
16 Mr. Lawrence talks about how I didn't talk about re-
17 habilitation, that rehabilitation is an important con-
18 sideration in the law. And that's true. I talked
19 about rehabilitation. I talked about when a person
20 goes to the penitentiary, it's tough, but rehabilita-
21 tion comes from the heart, comes from the mind of the
22 person. I can't make anybody behave themselves, and
23 neither can you. They have to decide that here (indi-
24 cating). They have to feel it here (indicating). He
25 didn't do that. He didn't think rehabilitation; he

1 didn't feel rehabilitation.

2 He talks about don't give up on him; don't
3 give up on him. Give him another chance. Don't
4 answer yes to that second question until he's killed
5 somebody else, I guess. He said: You didn't give up on
6 your children when they misbehaved. There's a big
7 difference. There's a big difference. You're around
8 your children all the time. You have some control
9 over them. You can watch them, you can keep an eye on
10 them. We don't live in a society that's like a big
11 family where somebody follows people like him around
12 and just watches them all the time. We can't follow
13 him from work; we can't put a police officer on him and
14 follow him from work over to the Avalos' house and then
15 from there to the skating rink and from there to
16 wherever he went and there to the gas station. We
17 don't -- we don't live in a police state. We punish
18 people after they have committed crimes, not before.

19 That analogy he made was spurious. He said:
20 Has death ever been an answer to anything. I submit to
21 you that you can look back in recent history, I think
22 specifically an instance back in the 1940's where the
23 death of some individuals, a few key individuals, would
24 have made a difference to a lot of people. Sometimes
25 the death of one person does make a lot of difference

1 to a lot of people. It does settle things.

2 Basically what Mr. Lawrence and Mr. DePena
3 are arguing is against the death penalty. They're not
4 saying that the facts aren't -- aren't sufficient.
5 They really didn't talk about the facts very much.
6 They didn't talk about all of this very much. What
7 they're saying is, "Well, we're not going to argue
8 about the answers. We're just going to criticize the
9 questions. One of them is impossible, and the other
10 one is ridiculous."

11 Like Mr. Lawrence pointed out, he has a right
12 to disagree with the law, but they don't even talk
13 about the evidence. And there's a reason why: because
14 the evidence is overwhelming that he did kill that girl
15 deliberately, and the evidence is overwhelming that
16 there is not just a probability, but almost an inevit-
17 ability that he will continue to constitute a threat
18 to society.

19 Basically, what they're trying to do in their
20 closing arguments is appeal to your emotions. We
21 talked to you about that in voir dire. This is the
22 kind of case that is emotional. It is dramatic.
23 That's why it has the kind of punishment attached to
24 it that it does. I'm not going to ask you to put
25 aside those emotional things. We have tried to keep

1 this thing as low key as we could, considering the
2 evidence. We didn't drag in a bunch of bloody clothes;
3 we didn't have Melissa Lopez up here running around on
4 the front row through the whole trial; we're trying to
5 keep it just tied to the evidence, to decide these
6 questions just on the evidence, like you promised to
7 and like we believed you would.

8 Thank you.

9 THE COURT: I will ask you now to go with
10 your -- with your Bailiff to your jury room. Let me
11 ask you at this time whether or not you want lunch
12 brought in or would you like to go to lunch? Make that
13 your first decision when you go back and then knock on
14 the door and let the Bailiff know what it is. Fine.
15 If you wish to remain, then, I will give you the Charge
16 and send it in to you.

17 (At this time the jury retired to the
18 jury room to begin consideration of
19 their verdict, during which time the
20 following proceedings occurred out-
21 side the presence and hearing of the
22 jury, before the Court, counsel for
23 the State, counsel for the Defendant,
24 and the Defendant:)

22 THE COURT: Gentlemen, I would certainly like
23 to commend both sides individually for the manner in
24 which you tried this case.

25 MR. LAWRENCE: Thank you, Your Honor.

1 MR. SCHIWETZ: Thank you, Your Honor.

2 (At this time, court was in recess
3 pending the verdict of the jury, until
4 the following proceedings were had
5 outside the presence and hearing of
6 the jury, before the Court and with
7 counsel for the State, counsel for the
8 Defendant and the Defendant present:)

9 MR. DePENA: Your Honor, we would like the
10 record to reflect that on this particular day it was
11 brought to my attention, as counsel for the defense,
12 Hector DePena, Jr., that the -- that a juror by the
13 name of Mrs. --

14 THE COURT: Jimenez.

15 MR. DePENA: -- Jimenez had been, while
16 serving as a member of this jury, had been robbed,
17 possibly at knifepoint sometime during the course of
18 her jury duty, specifically possibly the -- what was
19 that, the -- what was the date? I had my calendar in
20 my pocket. The 15th day of July of 1983. Some search
21 was made, through the efforts of the State's -- State's
22 attorney, Mr. Steve Schiwetz, as well as counsel for
23 the defense, Hector DePena, Jr., and although no evi-
24 dence was found at that time, that a robbery had
25 occurred or that this -- that the juror was involved,
we felt, for the purpose of protecting the record, this
matter be -- and it having been discussed in chambers
with the Judge, that this matter be left on the record

1 as a possibility, should any further information be
2 found.

3 THE COURT: All right. I think you have
4 stated as of this date, I believe we did it yesterday
5 morning.

6 MR. DePENA: Yesterday, yes.

7 THE COURT: This is the 21st; it would have
8 been the morning of the 20th, prior to the time that
9 the jury received the Charge on guilt.

10 MR. DePENA: Okay.

11 THE COURT: Or innocence.

12 MR. DePENA: Thank you, Your Honor.

13 THE COURT: Certainly.

14 (At this time Court was again in re-
15 cess pending the deliberations of the
16 jury, until such time as the jury was
17 returned to the jury room and the
18 following proceedings were had in the
19 presence and hearing of the jury,
20 before the Court and with counsel for
21 the State, counsel for the Defendant,
22 and the Defendant present:)

19 THE COURT: Mr. Morales, would you give the
20 -- your verdict sheet and the Charge to the Bailiff,
21 please.

22 JUROR MORALES: Do you want the rest of the
23 information that was requested and also -- everything
24 else? Okay. That's complete.

25 THE COURT: The jury has answered Special

1 Issue No. 1: Yes. And the jury has not answered and
2 left blank Special Issue No. 2.

3 Let me ask you, Mr. Morales, as Foreperson, do
4 you think that with further deliberations you could
5 resolve what difficulty you were having with that issue?

6 JUROR MORALES: I would -- Your Honor, I would
7 have to say that we certainly could give it a try.

8 THE COURT: What is your thought in the matter?
9 Could you resolve what difficulties you're having and
10 arrive at a verdict, either yes or no on it?

11 JUROR MORALES: We have exhausted both avenues,
12 sir, and I think that it would be rather difficult to go
13 back in there and try and make a decision, sir.

14 THE COURT: All right. Mr. Gonzales, what is
15 your thought in the matter?

16 JUROR GONZALES: We might.

17 THE COURT: Mr. Rasmusson?

18 JUROR RASMUSSON: Possible.

19 THE COURT: Mrs. Dahlman?

20 JUROR DAHLMAN: We might.

21 THE COURT: Mr. Vickers?

22 JUROR VICKERS: It's possible, sir.

23 THE COURT: Mr. Perez?

24 JUROR PEREZ: I think we could.

25 THE COURT: Mr. Botelho?

1 JUROR BOTELHO: Possibility.

2 THE COURT: Mrs. Gavlik?

3 JUROR GAVLIK: Possible.

4 THE COURT: Mrs. Jimenez?

5 JUROR JIMENEZ: I think we could.

6 THE COURT: Ms. Kurtz?

7 JUROR KURTZ: I don't think so, Your Honor.

8 THE COURT: Mrs. Bradley?

9 JUROR BRADLEY: It's possible, Your Honor.

10 THE COURT: Mr. Abernathy?

11 JUROR ABERNATHY: It's possible.

12 THE COURT: All right. In view of that
13 answer, then, let me ask you to continue your deliber-
14 ations. What would you like to do at this time?
15 Would you like to be taken to dinner, or would you like
16 dinner brought in to you?

17 JUROR MORALES: Prefer to go out, Your Honor.

18 THE COURT: All right. Those arrangements
19 will be made, and just as quickly as we can, and I will
20 stay here with you as long as you want to work tonight.

21 (At which time the jury retired to
22 the jury room to continue deliberat-
23 ing their verdict, during which
24 deliberations a recess was taken for
25 the evening meal, after which time
deliberations continued until they
were concluded, and the following
proceedings were had outside the
presence and hearing of the jury,

1 before the Court with counsel for the
2 State, counsel for the Defendant, and
 the Defendant present:)

3 THE COURT: Ladies and gentlemen, again, let
4 me admonish you, please, whatever the verdict is, not
5 to have any obvious approval or disapproval. Are you
6 ready for the jury? Bring them in.

7 (At which time the jury was seated in
8 the jury box and the following pro-
 ceedings were had:)

9 THE COURT: Mr. Morales, has the jury arrived
10 at a verdict of this phase of the case?

11 JUROR MORALES: Yes, Your Honor.

12 THE COURT: Would you give it to the Bailiff,
13 please.

14 The jury has answered both special issues in
15 the affirmative. Each special issue is signed by the
16 Foreman, Mr. Morales, and the answers to the special
17 issues submitted is also signed as their verdict by Mr.
18 Morales.

19 Anything else before I discharge this jury?

20 MR. LAWRENCE: Your Honor, the defense would
21 ask that the jury be polled.

22 THE COURT: All right. Let me ask you, then,
23 again individually: Mr. Gonzales, is that your verdict
24 in this case?

25 JUROR GONZALES: Yes, sir.

1 THE COURT: All right. Mr. Rasmusson?

2 JUROR RASMUSSON: Yes, sir.

3 THE COURT: Mr. Morales?

4 JUROR MORALES: Yes, sir.

5 THE COURT: Mrs. Dahlman?

6 JUROR DAHLMAN: Yes.

7 THE COURT: Mr. Vickers?

8 JUROR VICKERS: Yes, sir.

9 THE COURT: Mr. Perez?

10 JUROR PEREZ: Yes, sir.

11 THE COURT: Mr. Botelho?

12 JUROR BOTELHO: Yes, sir.

13 THE COURT: Mrs. Gavlik?

14 JUROR GAVLIK: Yes, sir.

15 THE COURT: Mrs. Jimenez?

16 JUROR JIMENEZ: Yes, sir.

17 THE COURT: Ms. Kurtz?

18 JUROR KURTZ: Yes, sir.

19 THE COURT: Mrs. Bradley?

20 JUROR BRADLEY: Yes, sir.

21 THE COURT: Mr. Abernathy?

22 JUROR ABERNATHY: Yes, sir.

23 THE COURT: Thank you very much. No speeches.

24 I know you're tired and I realize how you have agonized

25 over this terrible responsibility, and I just want to

1 say that I do appreciate your service. I know what
2 you've been through, and I'm glad you had the courage
3 of your convictions and you may be excused with my
4 thanks.

5
6 (END OF VOLUME)
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