

XXIX No 90

IN THE CRIMINAL COURT FOR SEVIER COUNTY

AT SEVIERVILLE, TENNESSEE

STATE OF TENNESSEE,

Plaintiff,

-vs-

GARY WAYNE SUTTON, and
JAMES ANDERSON DELLINGER,

Defendant.

*
*
*
*
*
*
*
*
*
*
*
*

CASE #5033, 34-35, 1981

FILED
MAR 7 1994
SUPREME COURT CLERK

TRANSCRIPT OF THE EVIDENCE:

Suppression Hearing

November 13, 1992

Vol. 1

BEFORE THE HONORABLE REX HENRY OGLE, PRESIDING JUDGE,

APPEARANCES:

FOR THE STATE

GEN. AL SCHMUTZER, JR., D.A.
GEN. G. SCOTT GREEN, A.D.A.
Fourth Judicial District
Sevier County Courthouse
Sevierville, Tennessee

FOR THE DEFENDANT

MR. JAMES W. GREENLEE, JR.
Court Avenue
Sevierville, Tennessee

MR. DAVID W. WEBB
Court Avenue
Sevierville, Tennessee

CIRCUIT COURT
FILED
HOUR 9:30 A. M
DATE: JAN 07 1994
Henry H. Housley
CIRCUIT COURT CLERK
SEVIER COUNTY, TENN.

LASER STOCK FORM B

THE CORBY GROUP 1-800-255-5000

IN THE CRIMINAL COURT FOR SEVIER COUNTY

AT SEVIERVILLE, TENNESSEE

STATE OF TENNESSEE,

Plaintiff,

-VS-

GARY WAYNE SUTTON and JAMES,
ANDERSON DELLINGER,

Defendants.

*
*
*
*
*
*
*
*
*
*
*
*

CASE #5033, 34, 35, 36

TRANSCRIPT OF THE EVIDENCE:

1 THIS CAUSE came on to be heard and was heard on the
2 13th day of November, 1992, before the Honorable Rex Henry Ogle,
3 Judge, holding the Criminal Court for Sevier County at
4 Sevierville, Tennessee, to-wit:

5 **

6 THE COURT: General, I see you have a guest there
7 at your counsel table there with you this morning. General
8 Flynn, we're glad to have you from Blount County.

9 GENERAL FLYNN: Thank you, Your Honor.

10 THE COURT: We're here today to hear motions in the
11 Sutton and Dellinger cases, as I understand, numbers 5033 and
12 5034. Are there any preliminary matters that we need to take
13 up before we start hearing motions?

14 MR. GREENLEE: Your Honor, the order will probably

1 -- whatever the order is -- what I've got, I've prepared a
2 tentative proposal to the Court which is...may I approach the
3 bench?

4 THE COURT: Sure.

5 MR. GREENLEE: I've given a copy to the attorney
6 general. This consists of an order, and tries to list all of
7 the motions we have filed, as well as the State's motions, and
8 I've left space on there so that the Court could possibly,
9 contemporaneously with the hearings or rulings on these motions,
10 make its notes, then, perhaps, maybe make that part of the
11 record, and especially those motions that it does rule on write
12 granted or denied. Other more perplexed matters may not be able
13 to be put on this particular document, but some 60 motions --
14 I couldn't see how you would make any sense out of it without
15 some kind of a program.

16 THE COURT: Thank you.

17 GENERAL SCHMUTZER: He should have indexed it, Your
18 Honor. I think the state is correct, though, they tried to get
19 them all in.

20 MR. GREENLEE: Did I miss any?

21 THE COURT: Before we get started, I want to take
22 up a housekeeping matter that I hope will only take one time to
23 say. After the last hearing we had in this county in this
24 matter it was brought to the Court's attention that some
25 statements and comments were made out in the hallway. For some

1 reason in this county in the past couple of court sessions, I
2 have had problems with comments and exchanges between family
3 members of parties, and so forth, and I understand as well as
4 anybody the importance of what we're doing here, and I
5 understand the emotions involved on all sides. But when we come
6 to this courtroom it's all business, and it's serious business.
7 It's the people's business, and it's these defendants' business,
8 and I intend to see that our business is carried out in an
9 orderly, and a peaceful, and a calm manner, and I will not
10 tolerate any outbursts or any excitement in the courtroom or
11 outside the courtroom. We are here to decide legal issues, and
12 that's what we are going to decide, one way or another. So I
13 hope that suffices.

14 Mr. Webb, or Mr. Greenlee, or whomever wants to
15 proceed first on the defense as far as your motions.

16 MR. MILLER: Your Honor, I think we'll let Mr.
17 Greenlee proceed first, and we have filed a motion to adopt all
18 of the co-defendant's motions. We'd like the Court to consider
19 each motion that is brought to the attention of the Court by Mr.
20 Webb and Mr. Greenlee to be adopted by us and our client, unless
21 we notify the Court otherwise because a lot of the same motions
22 are filed.

23 THE COURT: Okay. As I stated to counsel in
24 chambers, it is my desire to proceed first with those motions
25 that do require proof, insomuch as we have a lot of people here

1 who, I'm sure, need to do other things as soon as they can.

2 So having said that, that's the mode that the Court
3 would like for us to proceed.

4 MR. GREENLEE: Would the Court indulge? I have
5 a brief opening remark I'd like to make to the Court...

6 THE COURT: Sure.

7 MR. GREENLEE: ...concerning the overall process
8 of what occurs today. We are here today to present numerous
9 arguments concerning motions filed in this case. The Court will
10 be asked to rule on as many motions as are timely.

11 A central theme should underlie every decision
12 today. It is this theme we ask the Court to consider: The
13 defendant should not be forced to take the chance that he would
14 be unfairly prejudiced by the admission of certain evidence in
15 this case. As an aside, I might -- this appears to be one of
16 the most complex evidentiary cases I've ever encountered.

17 The Court should not, in a capital case, allow the
18 State to make the defendant take the chance that the jury will
19 convict him on anything other than evidence that directly
20 relates to him. And if there is relevant evidence, we remind
21 the Court that if it is substantially more prejudicial than
22 probative, that when it involves certain rules of evidence like
23 404(B), 401 or 402, it should be excluded from this trial.

24 The threshold issues in this case, and we ask the
25 Court to recall that, first of all, did Gary Sutton act in any

1 way to contribute to the death of Connie Branum. If so, what
2 was his role in her death? Can the State prove to the exclusion
3 of all other degrees of homicide or first degree murder, was
4 there a motive, and only that evidence that Gary Sutton had a
5 motive should be admitted against Gary Sutton. Was there an
6 intent? Only evidence that Gary Sutton had a particular intent
7 should be admitted against Gary Sutton.

8 In this case, we ask the Court not to allow it to
9 be decided on highly prejudicial evidence of motive, intent,
10 common scheme, or plan, if any is presented and proven. This
11 things, even if proven, do not establish guilt of first degree
12 murder. Those elements are separate and apart.

13 At no time should the burden of proof shift to Gary
14 Sutton to prove his is guilty of anything. I'm sure the Court
15 knows a lot of this, but we want to try to get the Court's
16 attention focused on what we are trying to present.

17 The Court is charged with the duty to be sure the
18 Constitution is evident in this trial. The rights outlined in
19 the federal and state constitutions protect the citizens charged
20 with crimes, and which Gary Sutton is one. If he is to be
21 convicted, let it be on evidence that clearly shows what he is
22 guilty of without any evidence that may cloud the jury's mind.

23 Most of the motions here today, and in this case,
24 will be concerning how much prejudice versus how much probative
25 value a particular item offered by the State will have.

1 The ambiguous evidence the State has would be more
2 appropriate if there were some evidence of premeditation. What
3 I'm telling the Court is, this is a close circumstantial case.
4 As far as smoking guns, clear confessions, we don't have that
5 in this case, and that, we suggest in one of our motions, that
6 this is an increased, heightened standard of due process that
7 is in this case because it is a capital case. The evidence, and
8 what effect it will have on the jury has to be closely
9 evaluated.

10 One of the primary issues here, and one of the
11 linchpins as to whether this man gets convicted or acquitted,
12 the Court is to zealously guard against Gary Sutton being
13 convicted on evidence that should be only considered against his
14 co-defendant. Juries cannot be expected to separate evidence
15 with scalpel-like precision. That has been recognized by the
16 Supreme Court of the United States, and the Tennessee Supreme
17 Court on many, many cases.

18 When a reasonable danger exists that they cannot
19 distinguish between the guilt of two charged defendants, the
20 defendants should be tried separately. We will get into those
21 motions, and it's a little convoluted in the sense that they
22 were indicted separately, and the State filed a motion to
23 consolidate. Usually, it's a motion to sever that the Court
24 considers, and that's how most of the books have been written,
25 but we'll have to reverse our thinking a little bit. The same

1 standard applies.

2 What would be harmless in a strong case becomes
3 reversible error in a weak case, and if we are aware of that
4 from the very beginning, we can, perhaps, come out of this with
5 a trial without error.

6 THE COURT: Well, Mr. Greenlee, the Court -- that's
7 my primary job. I believe that's part of the oath I took at the
8 time I was sworn in, and I'll do my best to follow my oath, and
9 if I'm wrong, the court of criminal appeals or the state supreme
10 court, I think, can probably figure that out. I will follow the
11 law as best I understand it. I don't guarantee I'll be right;
12 I don't believe that was part of my oath, but I'll try my best
13 to be right.

14 MR. GREENLEE: I understand. No warranty came with
15 the job.

16 THE COURT: That's right.

17 MR. GREENLEE: We don't expect that, Your Honor,
18 and we don't mean to in any way do anything other than focus the
19 Court's attention on that this is a close case, circumstantial
20 evidence, and the likelihood of prejudice in a lot of this
21 evidence requires the Court closely examining some of the
22 evidence that otherwise might be admissible, but in this case,
23 would not.

24 THE COURT: Okay.

25 MR. GREENLEE: I think we'll start with the motion

1 to suppress the statements, and that will take care of the
2 testimonial part of the hearings today.

3 THE COURT: Okay.

4 MR. WEBB: Your Honor, on behalf of Gary Sutton,
5 counsel has filed a suppression motion on some statements.

6 THE COURT: Okay.

7 MR. WEBB: I think Mr. Miller, on behalf of Mr.
8 Dellinger, has filed a motion to question the validity of search
9 warrants. I think both of those matters will require some
10 proof.

11 THE COURT: Okay.

12 MR. WEBB: Your Honor, it's my understanding that
13 initially a defendant would bear the burden of requesting the
14 State to disclose the defendant's statement, and then filing an
15 appropriate motion to suppress those. I think then the burden
16 shifts to the State to establish the statement's admissibility,
17 which would be by a preponderance of the evidence that the
18 statement was either voluntary, that Miranda was complied with,
19 and that there was an appropriate waiver, so it's -- and I think
20 that's especially true in one of the statements you'll hear
21 about in this case that was made after this defendant asserted
22 his right to counsel.

23 Case law says that the burden is on the State to
24 show a waiver of counsel in any further interrogation...

25 THE COURT: Right. I believe our state supreme

1 court fairly recently addressed that issue.

2 MR. WEBB: What I would then submit -- we have
3 raised the issue through motion, and the burden would shift to
4 the State, and I submit that it's the State's burden to go
5 forward at this time.

6 THE COURT: Everyone that's going to testify -- I
7 take it the suppression hearings have the most witnesses
8 involved in them, as opposed to the search warrant issue,
9 doesn't it?

10 GENERAL SCHMUTZER: Probably about the same, Your
11 Honor.

12 MR. WEBB: Your Honor, I'm sorry, I didn't hear
13 that comment.

14 THE COURT: I was asking -- I stated the Court
15 assumed that there were more witnesses to be called in regards
16 to the statements given as opposed to the testimony surrounding
17 the issuance of the search warrant, so I was going to, I think,
18 proceed on the issue of the suppression of statements, so let's
19 do that one first.

20 MR. WEBB: That will be fine.

21 THE COURT: So everyone -- all witnesses who are
22 expected to testify about any matter here today, please stand,
23 and raise your right hand.

24 (WITNESSES SWORN)

25 THE COURT: Is the rule demanded?

1 MR. WEBB: Your Honor, I will demand the rule. I
2 have subpoenaed Chester Ownby, and he's not in the courtroom -
3 - okay, I'm sorry.

4 GENERAL SCHMUTZER: He's hard of hearing, Your
5 Honor. He'll probably need to be sworn, Your Honor, when he
6 comes in.

7 THE COURT: I'll do that when he comes in. All
8 witnesses except the State's first witness, and the
9 representative of the State, if you have one that's going to sit
10 with you, will be excluded until called. If you will ask Mr.
11 Ownby to step out as well.

12 GENERAL SCHMUTZER: Your Honor, if the Court
13 please, there is more than one statement involving both
14 defendants. These defendants, the proof will show, came in
15 together on February the 25th, on their own accord to the
16 sheriff's department here, and spoke to the investigators from
17 Blount County.

18 That they were not under arrest; they, in fact,
19 left after they spoke, and no advice of rights was given. They
20 gave exculpatory statements, and said they just simply wanted
21 to help the officers in trying to determine what happened to
22 Connie.

23 They left, and then came back on February the 28th.
24 On February the 28th, they were both, at that time, advised of
25 their constitutional rights. They both gave, essentially,

1 exculpatory statements at that time after being advised of their
2 rights.

3 Now, during the course of that, the defendant
4 Sutton, during the course of giving that statement exercised his
5 right to have counsel.

6 THE COURT: Okay.

7 GENERAL SCHMUTZER: And they broke off any
8 interviewing with him, any interrogation, and he was given an
9 opportunity to call his lawyer at that time, and he did.
10 Subsequently, on a subsequent date, and I have to give the Court
11 that date -- on March the 5th he sent word through the jailer
12 to the sheriff -- in March, Your Honor. He sent word through
13 a jailer that he wished to talk to the sheriff, and the sheriff
14 relayed this on to David Davenport, the T.B.I. Agent who was
15 assisting in the case, and he spoke to the -- he went to him,
16 and verified that he had sent word, and that he wanted to talk
17 to the officers again, and they talked to him again.

18 He signed -- he did not sign the waiver. He was
19 given a waiver, and read the waiver, and said he understood it,
20 and would talk to them, but did not sign that specific waiver.
21 But he did proceed to -- he basically asked him -- he said,
22 "Well, what is it now that you wanted to tell us?" And he began
23 talking about what was on his mind. At that time he said that
24 David Webb was no longer representing him.

25 That's essentially what -- so you have as to the

1 two defendants you have two statements, and as to Sutton, you
2 will have a third one.

3 THE COURT: Okay. And you are seeking to suppress
4 all three statements in regards to Mr. Sutton?

5 MR. WEBB: Let me have one moment, Your Honor.

6 THE COURT: Okay.

7 MR. WEBB: Your Honor, let me attempt to clarify
8 just a moment. For purposes of this proceeding, the defense
9 will challenge the statements. I want to point out to the Court
10 that there was a statement made February the 25th by my client;
11 it was exculpatory in nature. I think the proof will show you
12 that my client voluntarily went to the Sevier County Sheriff's
13 Department, and did talk to Detective Widener. There was no
14 Miranda given.

15 Secondly, there was a statement given by my client
16 on February the 28th. I will apologize -- I said in my motion
17 he was not mirandized, but he was.

18 THE COURT: On February 28th?

19 MR. WEBB: On February 28th he was mirandized. And
20 as General Schmutzer stated, at some point during that interview
21 process, Mr. Sutton did invoke his right to counsel. There will
22 be some more proof offered as to what else happened, and I want
23 the Court to listen to that.

24 There was also a statement apparently made -- let
25 me strike, and back up just a little bit on the February 25th

1 and 28th statement, Your Honor.

2 THE COURT: Okay.

3 MR. WEBB: Those statements were taken by Blount
4 County authorities at the Sevier County Sheriff's Department,
5 and they were tape recorded, and counsel has been provided with
6 a transcript of the tape recordings, and certainly have the
7 right to listen to those. I think it's important for the Court
8 to know that those two were tape recorded.

9 THE COURT: Okay.

10 MR. WEBB: We'll get down -- there was a statement
11 allegedly given on March the 5th.

12 THE COURT: The third one, then?

13 GENERAL SCHMUTZER: That was the fourth one, Your
14 Honor.

15 MR. WEBB: That was the third one.

16 GENERAL SCHMUTZER: The third one.

17 THE COURT: Okay. So the third statement is
18 March...

19 MR. WEBB: March the 5th.

20 THE COURT: Okay.

21 MR. WEBB: And I wanted to -- the Court is going
22 to, I think -- you need to hear everything. Now, this March the
23 5th statement was an oral statement. Counsel will raise an
24 issue as to Miranda.

25 THE COURT: Is that the one given to Agent

1 Davenport?

2 MR. WEBB: No, that one was given to Detective Jeff
3 McCarter.

4 THE COURT: Okay.

5 MR. WEBB: We're also going to ask the Court to
6 focus the attention on that statement as to whether or not it
7 should remain in light of the fact that Mr. Sutton invoked his
8 right to counsel on February the 28th.

9 THE COURT: Okay.

10 MR. WEBB: We feel that there was an inducement and
11 an interrogation that went on without properly advising him of
12 Miranda, and also, violating or infringing upon his invocation
13 of right to counsel, which he did not waive that day.

14 THE COURT: Okay.

15 MR. WEBB: Now, the fourth statement, and, very
16 candidly, we will focus some attention on that, was on March the
17 9th, and that was a statement allegedly given to Agent Davenport
18 of the T.B.I., and was not tape recorded. Defense proof will
19 show that Mr. Sutton did not initiate that interrogation, if you
20 will.

21 THE COURT: Okay.

22 MR. WEBB: That he was took out of his room, and
23 basically asked questions after he had invoked his right to
24 counsel, a right that he did not waive.

25 THE COURT: Okay.

1 MR. WEBB: Your Honor, the -- we submit to you that
2 the State's burden is great. The Court must presume that...

3 THE COURT: Mr. Webb, let's hear the proof. I
4 don't mean to cut you off, but I'd rather hear the argument
5 after the proof.

6 MR. WEBB: Your Honor, one other comment I want to
7 make, and reserve this right. Should the Court feel that the
8 February 25th statement, and the 28th statement is valid, we
9 want to also, at some point, raise the issue with you that those
10 statements should still be not allowed into proof in the State's
11 case in chief on the grounds of relevance, and I'm going to let
12 Mr. Greenlee talk to you about that later.

13 THE COURT: Okay. Call your first witness.

14 GENERAL SCHMUTZER: The State calls Jim Widener.

15 MR. MILLER: Your Honor, if I may, while the
16 witness is coming in, we have been provided with two statements
17 made by Mr. Dellinger on the 25th and 28th, and we're not
18 attacking those except on the grounds as Mr. Webb stated as to
19 relevance, which, I take it, we will address at a later time.

20 GENERAL SCHMUTZER: Then I don't need to -- but you
21 are attacking the 25th and 28th statements?

22 MR. WEBB: Yes, I'm going to challenge all the
23 statements.

24 THE COURT: All right.

25 **

1 JAMES WILLIAM WIDENER was called, and being duly
2 sworn, was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY GENERAL SCHMUTZER:

5 Q. If you will, please, sir, state your full name and
6 position.

7 A. James William Widener. I'm a detective with the
8 Blount County Sheriff's Department.

9 Q. Back in February of this year, I believe your
10 department initiated an investigation surrounding the death of
11 a Tommy Griffin there in Blount County, is that right?

12 A. Yes, sir.

13 Q. And that was a shooting death that occurred there
14 in your county?

15 A. Yes, sir.

16 Q. During the course of your investigation, did you
17 have an occasion to come to Sevier County?

18 A. Yes, sir, I did.

19 Q. And specifically, on February the 25th, did you
20 have an occasion to talk with the defendants in this case,
21 Sutton and Dellinger?

22 A. Yes, sir, I did.

23 Q. How did -- just tell the Court how that came about.

24 A. Early on the morning of the 25th, we had worked all
25 night Monday night, and this was the next morning. We had gone

1 home, I had gotten about three hours of sleep. We received a
2 call, I did, specifically, and it was routed to me from Mr.
3 Dellinger saying that he and Mr. Sutton had some information
4 that they felt I should know or be aware of. This was sometime
5 after arriving at the office, and I got there about 7:00, so I
6 told Detective Worley, who was my supervisor, that we needed to
7 come up and talk to these boys. And I'd set up a meeting at the
8 Sevier County Sheriff's Department between myself and Mr.
9 Dellinger and Mr. Sutton. And we drove on up, and that's where
10 we met them at.

11 Q. Okay. And you met them where?

12 A. At the sheriff's department here.

13 Q. Sheriff's department.

14 A. Yes, sir.

15 Q. Did you -- did you take statements from both of
16 them?

17 A. Yes, sir, I did, and also to include Linda
18 Dellinger.

19 Q. All right. And did you have any reason to advise
20 them of their constitutional rights?

21 A. At that time, no, sir.

22 Q. And I take it you didn't?

23 A. No, sir.

24 Q. Did -- were either one of these men in custody?

25 A. No, sir.

1 Q. Were they free to go at any time?

2 A. Yes, sir, they were.

3 Q. In fact, did you say -- they were talking to you
4 at their request?

5 A. Yes, sir.

6 Q. Did they acknowledge in their statements that they
7 were there voluntarily to talk to you?

8 A. I believe so, sir.

9 Q. After you took these statements did they then
10 leave?

11 A. Yes, sir, they did.

12 Q. Did you have an opportunity after taking those
13 statements to have a conversation again with these two
14 defendants?

15 A. Yes, sir, I did. It was on the 28th, that same
16 week.

17 Q. And how did that come about?

18 A. After we had continued building the case in the
19 intervening days, and I developed Mr. Dellinger and Mr. Sutton
20 as suspects in the murder of Tom Griffin, and on the 27th, I
21 received a phone call that Mr. Dellinger and Mr. Sutton had left
22 or were leaving, and I sent out word to try to locate them, that
23 we definitely needed to interview them concerning the murder at
24 that point. And I was contacted the morning of the 28th by the
25 Sevier County Sheriff's Department saying that Mr. Dellinger and

1 Mr. Sutton were standing by at the sheriff's office, and I came
2 up for the interview.

3 Q. When you got there, did you -- who did you talk to
4 first, if you remember?

5 A. I talked to Mr. Dellinger, sir.

6 Q. And before talking to Mr. Dellinger, did you advise
7 him of his constitutional rights?

8 A. Yes, sir, I advised him on record -- on tape of his
9 constitutional rights. I also had him read the rights advisory
10 form and sign the waiver.

11 Q. Do you have the original advice of rights forms
12 with you?

13 A. Yes, sir, I do.

14 Q. Do you have them there?

15 A. No, sir, they're in my case file.

16 GENERAL SCHMUTZER: Your Honor, if we could -- I
17 have copies, and these have been furnished to
18 defense counsel.

19 THE COURT: All right.

20 BY GENERAL SCHMUTZER:

21 Q. Showing you first the one dated February 28th
22 signed by Dellinger, and ask you, sir, if you recognize that
23 copy?

24 A. Yes, sir, I do.

25 Q. And is that the copy of the advice of rights form

1 that you gave Mr. Dellinger?

2 A. Yes, sir, it is.

3 Q. Before he signed that, did you read that to him or
4 how -- how did you handle this advice?

5 A. I read that to him, and went over it with him on
6 tape.

7 THE COURT: This is the advice for whom?

8 THE WITNESS: For Mr. Dellinger, sir.

9 THE COURT: Okay. At the time -- on the 28th, was
10 he the only one that was present at the time you
11 took that statement, or was Mr. Sutton also there?

12 THE WITNESS: No, sir. We interviewed them both
13 separate.

14 THE COURT: Separate, okay.

15 BY GENERAL SCHMUTZER:

16 Q. And as you stated, after you read this over to him,
17 did you go over it with him more than once, or was it all done
18 on tape? Did you do it all at one time?

19 A. It -- everything was done on tape, sir.

20 Q. Okay, sir. And I believe that you do have a
21 transcript of that tape, is that correct?

22 A. Yes, sir.

23 Q. And referring to the portion of the tape, is the
24 one -- the transcription of the tapes that was made of them that
25 morning?

1 A. Yes, sir.

2 Q. Going to that first page, if you would, read that
3 in the record for the benefit of the Court and jury -- or Court.

4 A. Okay. This is myself speaking. "Before I ask you
5 any questions, you need to understand your rights. You have the
6 right to remain silent. Anything you say can and may be used
7 against you in court. You have the right to talk to an attorney
8 for advice before I ask you any questions, and have the attorney
9 with you during questioning. If you can't afford an attorney,
10 one will be provided for you before any questioning, if you
11 desire. If you decide to answer questions without an attorney
12 present, you retain the right to stop answering questions at any
13 time. Do you understand these?" "Uh-huh."

14 Q. And what did he say?

15 A. "Uh-huh."

16 Q. All right. He acknowledged he understood them.
17 What did you ask him then?

18 A. "Okay. Are you willing to talk to me this
19 morning?" "Yes." "Okay."

20 Dellinger: "That's why I came in."

21 Myself: "What we have -- if you're willing to talk
22 to me, you will effectively waive -- now, you've read this
23 statement or had it read to you of your rights, and 'I understand
24 what my rights are. I am willing to answer questions or make
25 a statement. I don't want an attorney at this time. I

1 understand and know what I'm doing, and I'm not under the
2 influence of alcohol or drugs, and no promises or threats have
3 been made to me, and no pressure or coercion has been used
4 against me.'"

5 Dellinger: "Yes."

6 Myself: "I'm going to sign my name here as the
7 investigator, and ask you to sign right here at the "X", James.
8 Let me just ask you right off hand. You know we had a pretty
9 good talk the other day." And then we go on into the interview.

10 Q. All right, sir. And that -- did he, in fact, sign
11 the waiver or rights?

12 A. Yes, sir, he did.

13 GENERAL SCHMUTZER: Your Honor, may it be filed as
14 an exhibit?

15 THE COURT: Uh-huh (affirmative.)

16 (EXHIBIT #1 - Advice of rights form; marked and
17 filed.)

18 BY GENERAL SCHMUTZER:

19 Q. And this is an exact copy of that, is that correct?

20 A. Yes, sir.

21 GENERAL SCHMUTZER: Your Honor, I'd ask further
22 that, if we could, to file that first page of the
23 interview. I don't think we need to file the
24 entire interview at this time.

25 THE COURT: All right.

(EXHIBIT #2 - First page of interview transcript;
marked and filed.)

BY GENERAL SCHMUTZER:

Q. Now, after talking and taking the statement from
the defendant, Dellinger, did you that same day have an
opportunity to talk to the defendant, Sutton?

A. Yes, sir, I did.

Q. And was it in the same place?

A. Yes, sir.

Q. Sevier County Sheriff's Department?

A. Yes, sir.

Q. And -- had they come in together?

A. I believe so, sir. I wasn't here when...

Q. They were already there when you got there, is that
right?

A. Right.

Q. All right, now. I'll ask you, sir, to -- before
talking to the defendant, Sutton, did you advice him of his
constitutional rights?

A. Yes, sir, I did.

Q. And is that a copy of his advice of rights form
that you read to him?

A. Yes, sir.

Q. And is that an exact copy?

A. Yes, sir, it is.

1 Q. And is it signed by him?

2 A. Yes, sir.

3 Q. And witnessed by yourself and other officers, is
4 that right?

5 A. Yes, sir, myself as the investigator and Detective
6 Dale Worley as a witness.

7 GENERAL SCHMUTZER: May it be filed, Your Honor,
8 as Exhibit #3?

9 THE COURT: Yes.

10 (EXHIBIT #3 - Advice of rights form; marked and
11 filed.)

12 BY GENERAL SCHMUTZER:

13 Q. Did you further tape record your advising him of
14 those rights?

15 A. Yes, sir, I did.

16 Q. And do you have a copy of that -- a transcription
17 of that tape recording?

18 A. I do, sir.

19 Q. And would you read that for the benefit of the
20 Court?

21 A. Myself talking: "I have to advise you what your
22 rights are because I've come up here, and ask you to come in.
23 Let's go ahead and go over these things, okay? Before I ask you
24 any questions you must understand your rights. You have the
25 right to remain silent. Anything you say can and may be used

1 against you in court. You have the right to talk to an attorney
2 for advice before I ask you any questions, and to have an
3 attorney with you during questioning. If you cannot afford an
4 attorney, one will be provided for you by the court before any
5 questioning, if you wish. If you decide to answer questions now
6 without an attorney present, you retain the right to stop
7 answering at any time. Now, you understand what that is?"

8 Sutton: "Yeah."

9 Myself: "I want to talk to you today, and you know
10 I'm asking you to talk to me. Will you do so?"

11 Sutton: "Yeah, that's the reason I come up here -
12 - you know, that's the reason."

13 Myself: "Let me go over this waiver here. 'I've
14 read this statement of my rights, or had it read to me, and I
15 understand what my rights are. I'm willing to answer questions
16 or make a statement. I don't want an attorney at this time.
17 I understand and know what I'm doing. I'm not under the
18 influence of alcohol or drugs at this time. No promises or
19 threats have been made to me, and no pressure or coercion has
20 been used against me.' If you want to talk to me, I just need
21 you to sign right there." The time is 11:35.

22 Q. And did he at that time sign?

23 A. Yes, sir.

24 Q. And then that proceeds on into the statement?

25 A. Yes, sir.

1 GENERAL SCHMUTZER: Your Honor, may that first page
2 be filed?

3 THE COURT: It may.

4 (EXHIBIT #4 - First page of interview transcript;
5 marked and filed.)

6 BY GENERAL SCHMUTZER:

7 Q. During the course of taking that statement did the
8 defendant, Sutton, exercise his right to an attorney?

9 A. Yes, sir, he did.

10 Q. And did you all give him an opportunity to contact
11 or attempt to contact his attorney?

12 A. Yes, sir. When he asked for right to counsel we
13 terminated the interview, and I reached out and got a phone
14 book, and we looked up the number of his attorney. I allowed
15 him to call at that point.

16 Q. And I believe that also appears on the tape?

17 A. I believe that part does, sir.

18 GENERAL SCHMUTZER: You may cross examine.

19 **

20 CROSS-EXAMINATION

21 BY MR. WEBB:

22 Q. Good morning, Detective Widener.

23 A. Good morning, sir.

24 Q. I want to just take a little time, and make sure
25 I understood your testimony on direct. The statement given by

1 Mr. Sutton on 2/25/92 was without the benefit of Miranda
2 warning?

3 A. That's correct, sir.

4 Q. I think you testified that you received a phone
5 call the morning of 2/25?

6 A. Yes, sir.

7 Q. And was that phone from James Dellinger?

8 A. It was from Mr. Dellinger, sir.

9 Q. And so you personally talked to Mr. Dellinger?

10 A. Yes, sir.

11 Q. And I take it you set up a meeting with Mr.
12 Dellinger at the Sevier County Sheriff's Department later on
13 that morning?

14 A. Yes, sir.

15 Q. You had no conversation with Gary Sutton?

16 A. No, sir.

17 Q. After the meeting on 2/25, you took statements from
18 Gary Sutton and James Dellinger and Linda Dellinger?

19 A. Yes, sir.

20 Q. Okay. At that time, did you consider James
21 Dellinger and Gary Sutton to be suspects in Connie Griffin's
22 murder?

23 A. At that time, no, sir.

24 Q. At that time, had you -- did you have other
25 suspects?

1 A. At that time, sir, just about everybody in Blount
2 County and Sevier County were suspects. It was immediately
3 after -- we found Mr. Griffin at 4:35 the afternoon of the day
4 before these interview, so we really hadn't had time to
5 establish suspects.

6 Q. So Mr. Griffin's body was found at 4:35 p.m. on
7 February 24th?

8 A. Approximately, sir, yes.

9 Q. At that time there were other suspects?

10 A. Well, as I say, we had not established any suspects
11 at all. Everybody -- the list was pretty broad at that point.

12 Q. Let me ask you -- at that time, did you take
13 statements from other people?

14 A. These were actually the first statements that we
15 began taking.

16 Q. Do you know what time Gary Sutton arrived at the
17 Sevier County Sheriff's Department on that day?

18 A. No, sir. He and Mr. Dellinger were present when
19 we arrived. Mr. Dellinger later called Linda to have her come
20 by and talk to us, too. She was the only one not present when
21 I arrived.

22 Q. Before you had contact with either of these
23 defendants, did you have knowledge as to whether or not any
24 other officer, be it from Sevier County or Blount County or any
25 other law enforcement agency -- do you have any knowledge that

1 anybody else had had contact with these defendants or had spoken
2 to them?

3 A. No personal knowledge, sir.

4 Q. Okay. Do you recall where these two gentlemen were
5 questioned at?

6 A. Yes, sir. When you walk into the sheriff's office
7 over here or the jail building, whichever it is, they were
8 waiting there around the Coke machines for us when we got there.
9 And if you cut to the right, they have a meeting room or an
10 assembly room, and Sheriff Ogle let us use that for the
11 interviews.

12 Q. Did you interview both defendants in that meeting
13 room or assembly room?

14 A. Yes, separately, sir.

15 Q. Okay. And I believe Mr. Dellinger first?

16 A. And then Mr. Sutton, and then Linda.

17 Q. Okay. At that time your focus was investigating
18 the murder of Tommy Griffin?

19 A. Yes, sir. My main focus was gathering information
20 into the murder of Mr. Griffin, yes.

21 Q. Do you recall how long that interview took?

22 A. Not right off hand, sir, but it was a fairly good
23 interview.

24 Q. Was it an hour?

25 A. Probably -- probably even longer.

1 Q. Okay. But was it less than two hours?

2 A. I'd say so.

3 Q. Okay. During this interview process was there a
4 break or a recess taken?

5 A. I know we broke a couple of times to get some
6 coffee or go to the bathroom.

7 Q. Let me -- before I ask any further questions, I'm
8 focusing on the questioning of Gary Sutton at this point.

9 A. Okay. I believe that during the interview of Gary
10 that we broke for coffee at least once.

11 Q. Okay. Did Gary Sutton ever leave the interview
12 room once the interview started?

13 A. I don't believe so, sir.

14 Q. Before your questioning, did you tell him that he
15 was not under arrest?

16 A. I believe I did, sir.

17 Q. If you did, would it be on the tape recording?

18 A. I don't know if it would be on the tape or not.
19 I think we started the tape after we actually set down and got
20 to talking. At this point, we conducted the interview of a
21 witness. That's essentially all we had, and all we were looking
22 at was two boys that said that they had evidence or they had
23 some facts that they wanted to give us concerning the killing.
24 So we weren't looking at them as defendants or accused or
25 anything.

1 Q. Okay. Did you tell -- strike that. Did you tell
2 Gary that he didn't have to give a statement?

3 A. No, sir. I was up there under invitation. I
4 figured he wanted to talk to me.

5 Q. I understand. Did you tell him that he was free
6 to leave at any time?

7 A. I don't believe so, sir.

8 Q. I take it that he didn't leave under the
9 questioning was completed?

10 A. That's correct, sir.

11 Q. The -- let's focus our attention just a moment on
12 the February 28th statement.

13 A. Okay.

14 Q. You say that on February -- strike that. After the
15 statement of February 25th...

16 A. Yes, sir.

17 Q. ...you continued to build your case?

18 A. Yes, sir.

19 Q. And as you continued to build your case, and before
20 February 28th, you had focused in on both of these gentlemen as
21 suspects in the murder of Tommy Griffin?

22 A. Yes, sir.

23 Q. And your testimony was that you wanted to talk to
24 them again?

25 A. Correct.

1 Q. And that you had heard that they were leaving the
2 area, is that what you said?

3 A. We had heard that they had moved from the residence
4 there -- I believe it's Bluff Hollow Road, yes, sir.

5 Q. They had moved from that residence to somewhere
6 else?

7 A. I didn't know, sir.

8 Q. And you didn't know.

9 A. Right.

10 Q. And on February 28th, did you receive a call from
11 someone about these defendants?

12 A. It was, I think, the duty officer of the Sevier
13 County Sheriff's Department called and said that both Mr.
14 Dellinger and Sutton were there at the office.

15 Q. And I take -- with that knowledge, did you come
16 over to Sevier County?

17 A. Yes, sir, I did.

18 Q. Okay. On that occasion, and once again, I'm
19 focusing on Mr. Sutton, but you did -- strike that. Your
20 primary focus at that time was on these two defendants?

21 A. Yes, sir, it was.

22 Q. And you did consider them suspects?

23 A. Yes, sir.

24 Q. And therefore you Mirandized each of them before
25 taking their statements?

1 A. Correct, sir.

2 Q. And I noticed, I think, General had...

3 MR. WEBB: Can I look at the exhibits, Your Honor?

4 THE COURT: You sure may.

5 BY MR. WEBB:

6 Q. The General, as Exhibit #3, had introduced the
7 advice of Miranda rights and the waiver of Miranda rights
8 regarding Gary Sutton?

9 A. Yes, sir.

10 Q. Detective Widener, at this point, focusing your
11 attention on these two gentlemen as first degree murder
12 suspects, you took this very seriously, did you not?

13 A. Yes, sir.

14 Q. And I notice that we're very precise on time. It
15 was 11:35 a.m.?

16 A. Yes, sir.

17 Q. Was that the exact time that Gary Sutton signed
18 this advice of Miranda rights and waiver of Miranda rights?

19 A. That is the exact time that I began reading the
20 Miranda rights, sir.

21 Q. Okay. You feel it's important to put the time
22 down?

23 A. Yes, sir, I always try to.

24 Q. Okay. And you tape recorded both these statements?

25 A. Yes, sir, I did.

1 Q. Do you feel that when available it's better police
2 procedure...

3 GENERAL SCHMUTZER: I object, Your Honor, to the
4 way he feels or what his opinion is. He did what
5 he did, that's an opinion, and it wouldn't be
6 proper.

7 THE COURT: At this point, I don't see that that
8 would be a relevant issue, would it?

9 MR. WEBB: We think it is, Your Honor.

10 THE COURT: Well...

11 MR. WEBB: I'll ask it a different way.

12 THE COURT: Okay.

13 BY MR. WEBB:

14 Q. I take it you've been trained to take statements?

15 A. Yes, sir.

16 Q. You've been -- how long have you been involved in
17 police work?

18 A. 15 years.

19 Q. And you've been to training schools and so forth
20 about the taking of statements?

21 A. Yes, sir.

22 Q. And based upon your training and your experience,
23 do you feel that where and when available it's better police
24 procedure to tape record these statements?

25 GENERAL SCHMUTZER: Again, Your Honor, I object.

1 It's immaterial and irrelevant. One agency does
2 one thing, and one another.

3 THE COURT: He can ask him what his standard
4 procedure is.

5 MR. WEBB: I'll ask it that way.

6 BY MR. WEBB:

7 Q. Is it your standard procedure in important cases
8 such as first degree murder cases to tape record statements?

9 A. When I am outside of my office, sir, I always tape
10 record statements. Inside my office I take the statement,
11 transcribe it to writing, and have the person read it and sign
12 it.

13 Q. A couple of questions on the 28th statement. Did
14 you talk to any officers prior to taking Gary Sutton's
15 statement?

16 A. I'm sure I probably spoke to some people when I
17 came in to find out where we could set up a room at and if they
18 could make space available, but pertaining to the -- to Mr.
19 Sutton or Mr. Dellinger, no.

20 Q. Were you ever told -- strike that. Did you ever
21 speak to Detective Jeff McCarter before taking the statements
22 of Gary Sutton?

23 A. On that day I don't believe so, sir.

24 THE COURT: What was that, Mr. Webb?

25 MR. WEBB: Your Honor, I'd asked him had he spoken

1 with Detective Jeff McCarter prior to taking Mr.
2 Sutton's statement that day.

3 THE COURT: Okay, but this doesn't relate, at this
4 point, to Mr. McCarter's statement or the statement
5 that Mr. McCarter took?

6 MR. WEBB: No, it relates just to that day, Your
7 Honor.

8 THE COURT: Okay.

9 BY MR. WEBB:

10 Q. Were you told by anyone prior to taking Gary
11 Sutton's statement that an attorney had called earlier on Gary
12 Sutton's behalf?

13 A. No, sir.

14 Q. And I think that you -- well, I don't think, I know
15 that during the statement taking process Mr. Sutton did invoke
16 his right to an attorney?

17 A. Yes, sir, he did.

18 Q. And can you tell us the approximate time that
19 invocation to right of counsel was made?

20 A. Probably -- we had talked, I'd say, for 15 or 20
21 minutes, maybe a little longer, sir, and -- when he made the
22 request to contact his attorney.

23 Q. And at that point you asked no further questions
24 of Mr. Sutton regarding your investigation of the Tommy Griffin
25 murder?

1 A. Other than what his attorney's name was so I could
2 find it in the phone book, no.

3 Q. Okay. And what name did he give you?

4 A. Mr. Webb, I believe, sir.

5 Q. You were calling me?

6 A. Yes, sir.

7 Q. And you did look up the telephone number of David
8 Webb, and gave him that number?

9 A. Yes, allowed him to use the telephone in the
10 interview room.

11 Q. At that point he told you he did not want to give
12 any further statements until David Webb, his attorney, was
13 present?

14 A. Correct, sir.

15 Q. Do you recall what time -- I can say David Webb or
16 I can say myself. Do you recall what time I came over to the
17 interview room?

18 A. It wasn't probably more than just five or 10
19 minutes at the most.

20 Q. And do you recall that along with myself was Mr.
21 Greenlee?

22 A. Yes, sir.

23 Q. And you, Mr. Greenlee, and myself talked?

24 A. Yes, sir, out in the hall.

25 Q. And at some point during this meeting, you were

1 told by me that this defendant would not be giving any other
2 statements?

3 A. I believe the wording was he won't be giving any
4 further statements -- you know, to me or to law enforcement
5 without you being present.

6 Q. Okay. And I diplomatically asked you not to
7 question him any further?

8 A. Yes, sir, and I seem to remember I told you it was
9 my policy that once the attorney is contacted, I talk solely to
10 you, and not to the client.

11 Q. In fact, we had a nice, cordial conversation about
12 invocation of right to counsel?

13 A. Yes.

14 GENERAL SCHMUTZER: Of course, we object, Your
15 Honor. It's getting to the point where he's
16 putting himself in the posture as a witness anyway,
17 but...

18 MR. WEBB: I may be one, we'll see.

19 GENERAL SCHMUTZER: Well, if he is, Your Honor, he
20 can't -- if he thinks he's going to be a witness,
21 he's going to have to step down right now, and get
22 under the rule.

23 MR. WEBB: I'm not going to be a witness in this
24 matter.

25 GENERAL SCHMUTZER: Well, if he's going to be a

1 witness at all on this matter, he has to be under
2 the rule. He can't participate as an attorney in
3 this trial and turn around and make himself a
4 witness. He's demanded the rule. If he's a
5 witness, he's got to go under the rule now, and we
6 would ask for the rule.

7 MR. WEBB: Your Honor, I'd like to take that matter
8 up with you.

9 THE COURT: I will let you proceed. At such time,
10 however, Mr. Webb, as it becomes clear that you are
11 going to have to be a witness, if in your judgment
12 you are going to have to be a witness, then the
13 rules, of course, would require you to withdraw
14 from representation in the case. So...

15 MR. WEBB: I don't think we're -- Mr. Widener --
16 Detective Widener has agreed with everything we're
17 saying at this point...

18 THE COURT: Right. I understand that, and that's
19 what the Court is saying...

20 GENERAL SCHMUTZER: I don't have any objection to
21 that, Your Honor. He had just made the indication
22 -- representation that he may very well be a
23 witness in this, and...

24 MR. WEBB: Well, we may want to take that up.

25 THE COURT: Well, all I'm saying is, and the Court

1 is ruling that at such time as you determine that
2 you have to become a witness, then you would have
3 to withdraw as counsel, and testify, and make your
4 choice.

5 MR. WEBB: Right.

6 THE COURT: That is a danger raised by asking
7 questions pertaining to what you said. The
8 officer, of course, has, I think, straightforwardly
9 testified as to what he was told, and that only
10 goes to his notice of Mr. Sutton's representation
11 by counsel. And so for that reason, I don't think
12 it's necessary at this point to go into that. He's
13 acknowledged that, and testified he told you that
14 it was his policy not to deal with anyone other
15 than counsel after being advised of representation,
16 so there's nothing to go into at this point.

17 GENERAL SCHMUTZER: Your Honor, my concern is that
18 -- let's say that in this situation he had not been
19 agreeable with what he was saying, and that there
20 was, in fact, a conflict.

21 THE COURT: Right.

22 MR. WEBB: He's placed in a position where he's
23 getting to ask the questions, putting himself in
24 the position of hearing what his answers are, and
25 then removing himself from the case, and coming in

1 and testifying, something no other witness gets to
2 do.

3 THE COURT: Well, I understand that, General...

4 GENERAL SCHMUTZER: Even rebuttal witnesses have
5 to be outside this courtroom.

6 THE COURT: Well, but otherwise, he could not --
7 no attorney could stay or could involve himself in
8 a case where he has talked to an officer. So to
9 require Mr. Webb to, at this point, elect -- I
10 don't think it is mandated by law. So I'm going
11 to allow him to proceed, and then if there is a
12 conflict, if Mr. Webb feels he has to be a witness,
13 then he will have to withdraw.

14 MR. WEBB: Thank you, Your Honor.

15 BY MR. WEBB:

16 Q. I don't know where we left off. You agreed that
17 you would not question this defendant further?

18 A. Yes, sir.

19 Q. Okay. And I take it you did not question him any
20 further?

21 A. No, sir.

22 Q. And when was this defendant allowed to leave that
23 day?

24 A. It was later on that -- later on in the evening,
25 I believe, sir.

1 Q. Was it several hours after?

2 A. It very well could be, sir. I wasn't present at
3 the exact time.

4 Q. Do you know why he was detained after our
5 conversation?

6 A. No, sir, I'm only aware as to the facts. I do know
7 that we had determined that they were suspects in a murder case.
8 Of course, I was off doing other things at this time, also.

9 Q. When did you leave the Sevier County Sheriff's
10 Department that day?

11 A. About 3:00 that afternoon.

12 Q. And was Mr. Sutton still at the Sevier County
13 Sheriff's Department?

14 A. I believe so, sir.

15 Q. Okay. And did you advise other officers that Mr.
16 Sutton had invoked his right to counsel that day?

17 A. I can't remember specifically who I informed. I
18 believe I told the sheriff for sure. That's the only one I can
19 be positive of exactly stating that Mr. Sutton had invoked his
20 rights.

21 MR. WEBB: Your Honor, if I could have one minute
22 with co-counsel?

23 THE COURT: You may.

24 BY MR. WEBB:

25 Q. When the conversation took place between yourself

1 and me and Mr. Greenlee, were there other officers from the
2 Sevier County Sheriff's Department present?

3 A. Sir, it seems that there were one or two setting
4 there in the same area where we were at. I know Detective
5 Worley and, I believe we brought up Crime Technician Munsey, and
6 they were also there in the area.

7 Q. Do you recall Jeff McCarter being present?

8 A. If he was, I believe he was setting -- it's an open
9 bay office right in where we were at. We were in the closed off
10 office with the walls. I believe he could have very well been
11 right down the hall from us.

12 MR. WEBB: Your Honor, I believe that's all I have
13 of Detective Widener, and I thank you for answering
14 my questions. If it's proper, Your Honor, I would
15 like to reserve the right to recall him later as
16 need be, in all candor, for further examination by
17 co-counsel.

18 THE COURT: You may.

19 **

20 CROSS-EXAMINATION

21 BY MRS. THOMAS:

22 Q. Detective Widener, with respect to the two
23 statements that you took from Mr. Dellinger, both of those were
24 taken pertaining to the Blount County investigation into the
25 death of Tommy Griffin, weren't they?

1 A. Yes.

2 Q. And in neither of those statements Mr. Dellinger
3 confessed to any participation in any crime to you, did he?

4 A. No.

5 MRS. THOMAS: Thank you.

6 THE COURT: Now, Ms. Laws, as I understood Mr.
7 Miller's statements, you, on behalf of Mr.
8 Dellinger, are not seeking to have his statements
9 suppressed, only at some point...

10 MRS. THOMAS: On the grounds of relevance, and
11 that's what those questions were.

12 THE COURT: Very good. Thank you.

13 MR. WEBB: Let me, if I can, General, and I
14 apologize...

15 **

16 CROSS-EXAMINATION

17 BY MR. WEBB:

18 Q. The statements that you took on February 25th and
19 February 28th were exculpatory in nature?

20 A. Sir, that's a legal term that I really don't get
21 into.

22 Q. All right. Let me phrase it a different way.
23 Neither of those statements confessed to having any involvement
24 in the murder of Tommy Griffin?

25 A. That's correct, sir.

1 Q. And your focus on those two statements was on the
2 investigation of Tommy Griffin?

3 A. That's correct, sir.

4 Q. Okay.

5 **

6 REDIRECT EXAMINATION

7 BY GENERAL SCHMUTZER:

8 Q. In fact, sir, was the body of Connie Branum even
9 found at the time you took those statements?

10 A. No, sir, it was not. It was not found until later
11 on that evening after we'd already taken the statements.

12 Q. That was on the 28th?

13 A. The 28th, yes, sir.

14 Q. And for the record, Connie Branum, was what
15 relation to the victim, Tommy Griffin?

16 A. Sister.

17 Q. Now, I believe you've stated that both defendants
18 were released on the 28th, is that right?

19 A. I believe so, sir. That took place outside of my
20 knowledge, but from my understanding, it was later on in the
21 evening.

22 Q. You didn't place any charges against either one of
23 these individuals that day...

24 A. No, sir.

25 Q. ...relative to the death of Tommy Griffin?

1 A. No, sir.

2 Q. Now, when you got there on the 25th, where were
3 these two men? Do you remember where they were when you walked
4 in?

5 A. When you walk in the front door, sir, if you turn
6 to the right, I believe there's some seats and a sofa and snack
7 machines, and they were right there in that area.

8 Q. Is there any -- there's no bars or anything? They
9 weren't in custody at all?

10 A. Oh, no, sir.

11 Q. This area where this meeting room is, do you have
12 to go behind bars to go to it?

13 A. No, sir, you just go through a door.

14 Q. And that door leads into the corridor that goes
15 right out the front door?

16 A. Yes, sir. Once you enter into it, it's like an
17 assembly room, and when you come out, you walk straight out the
18 door, and take a few steps, and turn left, and you're outside.

19 Q. That's all.

20 **

21 THE COURT: The Court's going to take a short
22 recess.

23 (COURT STOOD IN RECESS)

24 THE COURT: In regards to the procedures here,
25 because we have so many statements, unless there's some

1 strenuous objection, what I would like to do is deal with these
2 statements first.

3 GENERAL SCHMUTZER: Yes, sir. I think that would
4 be a good idea.

5 THE COURT: If you have evidence that you want to
6 offer on these two statements taken by this officer, because we
7 have different statements by different agencies, I would like
8 to deal with them as a group if I could.

9 MR. GREENLEE: There's no further evidence we
10 would...

11 GENERAL SCHMUTZER: Your Honor, I have one other
12 witness.

13 THE COURT: Right.

14 MR. WEBB: On these two statements?

15 GENERAL SCHMUTZER: Yes.

16 MR. WEBB: Okay. Let me go ahead, then...

17 THE COURT: I think that would at least help the
18 Court as far as I would have both of those statements in my
19 mind, and I could rule accordingly on those. So you may call
20 your next witness, General Schmutzer.

21 GENERAL SCHMUTZER: Okay. Call Larry McMahan. I
22 think what the Court said is to narrow our focus to the 25th and
23 28th statements at this time?

24 THE COURT: Right.

25 GENERAL SCHMUTZER: And then we'd go to the others?

26 **

1 LARRY McMahan was called, and being duly sworn, was
2 examined and testified as follows:

3 DIRECT EXAMINATION

4 BY GENERAL SCHMUTZER:

5 Q. State your full name and position, please, sir.

6 A. Detective Captain Larry McMahan, Sevier County
7 Sheriff's Office.

8 Q. In that capacity, sir, and while working with the
9 sheriff's office -- were you employed with them back in February
10 of this year?

11 A. Yes, sir, I was.

12 Q. Were you present there at the sheriff's department
13 back on February the 25th when these two defendants came to the
14 sheriff's department?

15 A. Yes, sir.

16 Q. And how did they get there?

17 A. In their private vehicle.

18 Q. Did they come in voluntarily? Were they with
19 officers, or did they just come in on their own?

20 A. They came in on their own.

21 Q. Okay, sir. On the 28th, how did they come in at
22 that time?

23 A. By private vehicle.

24 Q. Had you all sent out word that you wanted to talk
25 to them? Do you know off hand if any word was sent out to them?

1 A. Not to my knowledge. They came in on their own,
2 as far as I know.

3 Q. Were you there that day on the 28th?

4 A. Yeah, they came in the building, yeah.

5 Q. That's all.

6 CROSS EXAMINATION

7 BY MR. WEBB:

8 Q. Detective Captain McMahan, is it the policy of the
9 Sevier County Sheriff's Department where and when available to
10 tape record statements?

11 A. We don't have a policy. We try to if we can.

12 Q. Thank you.

13 THE COURT: Anything further?

14 GENERAL SCHMUTZER: Nothing, Your Honor. You may
15 come down, sir.

16 THE COURT: You may step down.

17 GENERAL SCHMUTZER: That's all Your Honor, with
18 regard to those two statements.

19 THE COURT: Do you have any witnesses that you want
20 to offer?

21 MR. WEBB: Let me think a minute, Judge.

22 MS. LAWS: Nothing regarding Mr. Dellinger.

23 MR. WEBB: One moment, Your Honor.

24 THE COURT: Okay.

25 MR. WEBB: Your Honor, no proof on those.

1 THE COURT: Okay. Any argument?

2 MR. WEBB: Your Honor, I'm going to let Mr.
3 Greenlee argue.

4 MR. GREENLEE: Your Honor, the primary reason, and
5 we'll break it down, and I guess, try to make it one at a time.
6 We're asking the Court -- let me put it this way. We have been
7 given in discovery both statements of Mr. Dellinger, and both
8 statements of Mr. Sutton on those days. We are objecting to the
9 use of, and the admissibility of Mr. Dellinger's statements in
10 the State's case in this county first.

11 Secondly, although we are objecting to the use of
12 Mr. Sutton's statements on these two dates because they do not
13 deal with the investigation of Connie Branum's death. They deal
14 with -- they were not taken by Sevier County authorities, and
15 we suggest to the Court they are not relevant, do not tend to
16 prove any fact or consequence, or any material fact that is
17 pending before this court in the trial concerning the death of
18 Connie Branum.

19 THE COURT: Okay, now. I thought the issue that
20 you had raised -- I thought you had moved to suppress the
21 statements because of constitutional infirmities. Is that...

22 MR. GREENLEE: We had not...

23 MR. WEBB: Your Honor, the statement of 2/25 was
24 without the benefit of Miranda. We raised that issue, and we're
25 going to let the Court rule on that on proof presented. There's

1 no need to argue that.

2 THE COURT: Okay.

3 MR. WEBB: The 2/28 statement was with Miranda.
4 We're not going to question that statement on constitutional
5 grounds. I did -- in my opening, I wanted the Court to be aware
6 that we were going to raise objections to the admissibility of
7 the statements on relevance grounds.

8 THE COURT: Okay.

9 MR. WEBB: And for the reasons Mr. Greenlee stated,
10 the Court needs to understand that those statements are not
11 confessions, they are considered exculpatory, and we submit the
12 State should not be able to submit those statements in its case
13 in chief for the purpose -- for the sole purpose of using those
14 statements later to impeach these defendants' testimony if they
15 should elect to testify. That would infringe on their
16 constitutional rights.

17 THE COURT: So you are raising a constitutional
18 infirmity?

19 MR. WEBB: Well, if the State wants to use these
20 statements which are exculpatory, put them in their case in
21 chief, and I'm going to let Mr. Greenlee expound on that, but
22 the comment that I have to the Court is that it's improper to
23 let them bring these statements in, and then use them solely to
24 impeach either of these defendants when they testify, if they
25 should.

1 THE COURT: Okay.

2 MR. WEBB: I'm going to let Mr. Greenlee go forward
3 on that. He's better prepared to argue that issue than I am.

4 MR. GREENLEE: It might assist everyone if the
5 Court will rule individually on whether or not as to are Gary
6 Sutton or Mr. Dellinger's statement against -- those two
7 statements admissible against Gary Sutton. That is the first
8 ruling we request.

9 The second ruling on these two statements is, are
10 these statements taken by Blount County authorities about a
11 Blount County matter admissible in the trial of the Connie
12 Branum case. The grounds for both of them would be, first of
13 all, relevance, and secondly, they are all self serving and
14 exculpatory type statements. They do not incriminate Gary
15 Sutton as to...

16 THE COURT: Well, obviously, in its case in chief,
17 the defense could not use the statements if they are exculpatory
18 and self serving in nature, in your case in chief. That's
19 settled law. Now, as to the issue, General Schmutzer, of the
20 relevance -- of course, I think that -- well, as to the
21 relevance of those statements, if you will...

22 GENERAL SCHMUTZER: Your Honor, they're highly
23 relevant and material because even though they denied any
24 involvement, they made statements that turned out to be contrary
25 to facts of the investigation as it developed, and I would like

1 to approach the bench if the Court wants me to go into some of
2 those facts, because, obviously, I'd like to keep as much of the
3 facts of the case out of the papers as I could in order that we
4 can get a jury in this county.

5 THE COURT: Are you talking about, now, using them
6 in your case in chief?

7 GENERAL SCHMUTZER: That's correct, Your Honor.

8 THE COURT: Okay. First of all, as to the -- any
9 constitutional questions about the -- as Mr. Webb dealt with the
10 issue on the first statement given without the advice of
11 rights...

12 GENERAL SCHMUTZER: That got me sort of confused.
13 I thought we had drawn the line with regard to their
14 admissibility and suppression because of the lack of rights,
15 Your Honor. The law is clear on that, obviously. Miranda
16 applies in a custodial setting, and a custodial situation.
17 That, obviously, was not present there.

18 THE COURT: Especially as to the first statement.

19 GENERAL SCHMUTZER: That's the one on the 25th.

20 THE COURT: Right.

21 GENERAL SCHMUTZER: On the 28th, they were advised
22 fully of their rights. The Court heard that advice, heard they
23 acknowledged and understood them, and even said in their own
24 statement, "That's what we came in here for." That was on the
25 28th, and the testimony was they came in that day. They were

1 not brought in by officers, but they came in again in their own
2 private vehicle, and both of them stated, after being advised
3 of their rights, that not only they understood them, but they
4 wanted to talk -- they said that's what they came in there for
5 was to talk to them again.

6 THE COURT: Okay.

7 GENERAL SCHMUTZER: And so there's certainly no
8 question, but on the second one they were fully advised,
9 understood those rights, and so mirandized. There's no
10 violation of Miranda there. Even if -- they were in custody -
11 - they weren't held -- they were held afterwards, but nothing -
12 - no other questions were presented to either one of them during
13 that time, and there's nothing that's being objected to during
14 that time they were in custody as far as anything being obtained
15 from them personally while there at the jail.

16 THE COURT: Okay.

17 GENERAL SCHMUTZER: That all occurred after these
18 statements were taken on the 28th.

19 THE COURT: Okay.

20 GENERAL SCHMUTZER: Now, that goes to...

21 THE COURT: Admissibility.

22 GENERAL SCHMUTZER: Admissibility. On relevancy,
23 as I stated to the Court, the statements themselves are highly
24 relevant in that they, even though they are exculpatory, they,
25 when put up against other facts -- known facts, are

1 inconsistent, not only with the Tommy Griffin case, but also,
2 in particular, with the Connie Branum case. If the Court would
3 indulge me, I would like to approach the bench, if the Court
4 needs me to elaborate on that any further.

5 MS. LAWS: May I clarify before we get to that
6 point?

7 THE COURT: Yes.

8 MS. LAWS: There are two motions before the Court
9 on the admissibility of these statements. One is the
10 suppression motion filed by the defense, and the other is the
11 State's motion to admit these statements in their case in chief,
12 and I think we're getting those two issues mixed up here.

13 With respect to Mr. Dellinger, we object to the
14 State's use of these case -- to these statements in their case
15 in chief, and before we would even get to the weigh the issues
16 on relevance, I think it would be beneficial if the State could
17 represent to the Court under what theory these statements would
18 be admissible because if it's an admission against interest, I
19 think we need to look at the rule on that before getting into
20 facts.

21 THE COURT: Okay. First, the Court wants to deal
22 as to the issue of the -- as to whether or not the statements
23 were constitutionally received by the officers, and then we'll
24 deal with the relevance issues secondly.

25 MS. LAWS: Okay. That issue has not been raised

1 for Mr. Dellinger.

2 THE COURT: Right. That's as I understood it.
3 Okay. As to the constitutional issue, and I don't know if all
4 counsel has had an opportunity to see this opinion, but it is
5 an opinion by our state supreme court that came down recently
6 in the case of State of Tennessee vs. Wayne Lee Bates. It's an
7 opinion by Justice O'Brien very similar in one sense in that you
8 had statements obtained by different law enforcement agencies
9 of this state. And it dealt primarily, at least on the issue
10 of statements, as to what is constitutionally required by our
11 state supreme court after someone invokes their right to
12 counsel.

13 So I would -- it was published on January 14th of
14 1991, and I think at some point I would suggest that all counsel
15 look at this opinion because they go through the requirements
16 as set forth by Edwards by the United States Supreme Court, and
17 it's a fascinating case insomuch as you have about three
18 different agencies involved.

19 But in regards to the statement of February 25th,
20 1992, the Court finds that that statement, the first statement
21 given to Officer Widener was totally and completely in a non-
22 custodial environment, and was initiated at the request of, or
23 at least first of all by Mr. Dellinger. Both of the defendants
24 appeared at the Sevier County Sheriff's Department, and
25 voluntarily gave statements. Officer Widener testified that at

1 that point he was there solely in response to the invitation of
2 these defendants as witnesses, people who had information about
3 this case, or about the case in Blount County. That statement
4 must be held legally admissible.

5 The second statement of February the 28th, 1992 is
6 in somewhat of a different light, although not greatly. That -
7 - but it is clear that Officer Widener properly advised the
8 defendants of their constitutional rights; they voluntarily
9 signed waivers, and so that statement of February the 28th, the
10 Court finds to be constitutionally admissible.

11 The -- the Court does not that Officer Widener
12 properly followed the mandates of the Bates decision and the
13 Edwards decisions, and as soon as he was advised by counsel, and
14 by the defendant that no statements would be given thereafter,
15 except through counsel, or in the assistance -- or with the
16 assistance of counsel, that he cut off any further
17 interrogation. So those are constitutionally correct.

18 Now, the relevance issue...

19 MS. LAWS: Your Honor, before we get to weighing
20 that issue, I think it would be proper for the State to set
21 further under what theory they consider these statements
22 admissible in their case in chief.

23 GENERAL SCHMUTZER: Your Honor, I think we getting
24 all balled up here. I think we need to go through -- our
25 position about relevancy will also apply in the other two

1 statements, depending upon whether the Court finds they are
2 admissible. I think we need to determine that...

3 THE COURT: I think the relevance issue, to be real
4 candid, it can come up in any number of situations. It can come
5 up, obviously, in the area of impeachment. If one or either of
6 the defendants took the witness stand -- now, I understand what
7 your objection is, of course, is to them using them in their
8 case in chief.

9 MS. LAWS: Yes, but I don't think that we've
10 reached the area where we need to make that relevance
11 determination because the only theory that I can see that the
12 State could proceed on is that these statements were admissions
13 against interest, or statements against interest, and I think
14 that that -- once we look at the rule on that, we'll find that
15 they are inadmissible as not being statements against interest,
16 that the indicia of reliability is not there, and we will never
17 need to reach the relevance question with regard to those
18 statements.

19 THE COURT: Okay. Let's go ahead, and go on to the
20 next two statements as far as the constitutional issue goes, and
21 then after all the statements are in, I will hear you on the
22 relevance issue. I may not make a determination today on the
23 relevance issue. I want to further look -- I have -- I think
24 I have advised counsel -- the Court has been considering these
25 issues that have been raised for some several weeks now, and I

1 have done some of my own research on those days when I'm not
2 holding court or doing something else, and I may ask you all to
3 submit some briefs on the relevance issue. But I will hear you
4 today, and all I'm telling you is I may not make a decision on
5 that issue today.

6 MS. LAWS: The final thing I would like to say at
7 this time is that it is our position that these statements are
8 not statements against interest, and don't meet that, and we
9 need to determine that.

10 THE COURT: I understand. You may call your next
11 witness.

12 GENERAL SCHMUTZER: Your Honor, the State calls
13 Jeff McCarter.

14 THE COURT: Okay. Also, there is another case that
15 I would refer counsel to that deals with questioning after an
16 indication by the defendant of a wish for counsel, and that is
17 our state supreme court case of State vs. Crump. It was filed
18 on May 18th of 1992, and it's an opinion by Justice Anderson,
19 and I would refer you to that one as well.

20 MR. WEBB: Your Honor, do you have the cite of
21 State v. Crump? I was aware of the Bates case, and...

22 THE COURT: All I have is the slip opinion that
23 they send to the trial courts.

24 MR. WEBB: Okay.

25 THE COURT: I'm sorry. I have the number of the

1 case, if that helps you. I don't have the Southwestern cite.

2 MR. WEBB: I didn't know if it had been published
3 or not. I'd say it has been, but...

4 THE COURT: Yes, both of them are for publication,
5 so you should have them.

6 MR. WEBB: Well, we've got the Bates case cited.

7 THE COURT: Okay.

8 **

9 JEFF McCARTER was called, and being duly sworn, was
10 examined and testified as follows:

11 DIRECT EXAMINATION

12 BY GENERAL SCHMUTZER:

13 Q. State your full name, please, sir.

14 A. Jeff McCarter.

15 Q. And your position?

16 A. I'm a detective, Sevier County Sheriff's
17 Department.

18 Q. And that capacity, back on March the 5th of this
19 year, did you participate in the arrest of these defendants, in
20 particular, the defendant Sutton?

21 A. Yes, sir, I did.

22 Q. What was he -- what was that arrest on, what
23 charge?

24 A. Murder.

25 Q. Of who?

1 A. Connie Branum.

2 Q. Was that any charge at that time placed against him
3 with regard to the murder of Tommy Griffin in Blount County?

4 A. No, I don't believe so.

5 Q. All right, sir. When he was arrested, were they
6 advised of their constitutional rights, either one of them, to
7 your knowledge?

8 A. Yes, they were.

9 Q. By whom?

10 A. That took place at the residence down on 411. I
11 don't remember exactly which officer advised them of their
12 rights.

13 Q. Were you present when this advice of rights was
14 made?

15 A. I was there.

16 Q. Did you overhear the advice of rights being given
17 to them?

18 A. Yes, sir, to the best of my knowledge, I do
19 remember them having their rights read to them there.

20 Q. Did you have any contact, or any -- with the
21 defendant Sutton?

22 A. Yes, I did.

23 Q. What was that.

24 A. After he was arraigned, myself and Detective Turner
25 accompanied him back to the jail, and we were in a holding room

1 awaiting the jailers to come out, and take him into custody.
2 We set there with him during that time.

3 Q. All right. While you were sitting there, was
4 anything said?

5 A. Yes, sir, there was.

6 Q. What was that?

7 A. Mr. Sutton started talking to me. He said -- I
8 can't quote you exactly what he said, but something like, "Jeff,
9 you've known me for a long time." I believe the first comment
10 he may have said was something to the effect of, "I don't know
11 how they can charge me with this." Then he said, "Jeff, you've
12 known me for a long time. You know I wouldn't do nothing like
13 that." And at that time I told him -- you know, I said, "Gary,
14 you don't have to make any statements to me," and I said, "The
15 only thing I know is you are just going to have to do some soul
16 searching." At that time, he started telling me events that
17 had happened.

18 Q. When he started talking to you, what did you all
19 do? Had he -- at this point, had either you or Mark Turner
20 advised him of his constitutional rights?

21 A. I hadn't, no, sir.

22 Q. Had anyone...

23 A. Not in that room, no.

24 Q. But Mark Turner was with you?

25 A. Yes, he was.

1 Q. And you say he began talking to you at that time?

2 A. Yes, he did.

3 Q. What did you do? Did you tape it, write it down,
4 or what?

5 A. No, I did not tape it. I didn't write it down at
6 the time, but I reduced to writing after they took him into
7 custody, and I went back over to my office, and reduced to
8 writing.

9 Q. Were you aware at the time you were sitting there
10 that he was going to begin talking to you?

11 A. No, I was not.

12 Q. Were you prepared to take a formal statement from
13 him?

14 A. No, sir, I was not.

15 Q. Did you go in there intending to take a formal
16 statement from him?

17 A. No, sir, I was not.

18 Q. Now, this did not have anything to do with what
19 he'd previously been talking about, and that is, the murder of
20 Tommy Griffin; is that correct? This had to do with the murder
21 of Connie Branum; that's what he was arrested for?

22 A. Will you allow me to look at my...

23 Q. Sure.

24 THE COURT: Officer McCarter, at the time that you
25 were at the jail with this defendant on the 5th,

1 now, he was at that time charged in the murder of
2 Miss Branum; is that correct?

3 THE WITNESS: Yes, sir.

4 THE COURT: Okay.

5 BY THE WITNESS:

6 A. Okay. Could you repeat your question again,
7 General?

8 Q. He had been arrested, I think, as the Court said,
9 with regard to Connie Branum, but did you attempt at any time
10 during that time to interrogate him, that is, to begin asking
11 him questions about this, or did he just begin talking to you?

12 A. No, sir, I did not ask him any questions.

13 Q. The statements you made to him is what you've
14 already told the Court, that he didn't have to talk to you, and
15 ought to do some soul searching?

16 A. That's right. I included it in my -- when I
17 reduced this to writing, and I told him that he didn't have to
18 make any statements to me.

19 Q. You may cross examine.

20 MR. WEBB: One moment, Your Honor.

21 **

CROSS-EXAMINATION

BY MR. WEBB:

Q. Good morning, Detective McCarter. You were -- let me take you back to February 28th. You were aware on that date that Gary Sutton had invoked his right to counsel; is that not true?

A. I was not in the room when that happened. I don't recall if I knew that or not.

Q. Are you telling the Court that you were not aware on February 28th that this man had invoked his right to counsel?

A. I was not involved in any of the statements that was took from either of these defendants.

Q. I understand. The question I'm asking you is: Were you aware that on February 28th, Mr. Sutton had invoked his right to counsel?

A. On February the 28th?

Q. Which was a Friday.

A. I don't remember.

Q. Let me ask you this. Were you aware that Detective Widener from Blount County was over in the Sevier County jail facilities taking the statement of Gary Sutton?

A. I know that Blount County authorities were over here more than one time. Which day are you talking about?

Q. February 28th.

A. No, sir, I don't recall which date they would have

1 been here.

2 Q. Okay. Let me ask you -- if you are having problems
3 on days, were you aware that Jim Widener took a statement from
4 Gary Sutton on more than one occasion?

5 A. Yes, I am.

6 Q. Are you aware that he took a statement from Gary
7 Sutton on two separate occasions?

8 A. I believe that's correct, yes, sir.

9 Q. And on the second occasion, are you not aware that
10 Gary Sutton invoked his right to counsel?

11 A. I think on that particular day, I came into the
12 sheriff's office investigation division, and they were there.

13 Q. Okay. Let me ask you this. Do you recall seeing
14 myself and Mr. Greenlee there?

15 A. You all came just shortly after I did.

16 Q. Okay. Did Sheriff Ogle never tell you, either on
17 that day, or after that date that Gary Sutton had invoked his
18 right to counsel?

19 A. Did Sheriff Ogle tell me that? He may very well
20 have.

21 Q. The point I'm trying to get, if you know, do you
22 know whether or not Gary Sutton invoked his right to counsel
23 that day?

24 A. Yes, I believe I did, because I did not go in there
25 that day with the intent to interrogate him, or take a

1 statement.

2 Q. Okay. Do you recall a telephone conversation from
3 me to you on that morning?

4 A. I recall talking to you. I don't remember if it
5 was in person or by telephone.

6 Q. And do you recall that during that conversation
7 that we talked about my representation of Gary Sutton?

8 A. I remember you asking me if they were brought in,
9 or if they came in, to notify you.

10 Q. Okay.

11 MR. WEBB: Let me have one moment, Your Honor.

12 THE COURT: Sure.

13 BY MR. WEBB:

14 Q. Detective McCarter, let's focus our attention on
15 March the 5th, okay?

16 THE COURT: Before you start that, let me ask this
17 question. Before you took the statement of Mr.
18 Sutton on March 5th, you had information from some
19 source that he had previously invoked his right to
20 counsel?

21 THE WITNESS: Yes, sir, that's correct. I can't
22 remember when I was told, or who I was told by, but
23 yes, to the best that I can recall, yes.

24 BY MR. WEBB:

25 Q. All right, I want to ask you a few questions about

1 March 5th, and I don't mean to repeat, Your Honor, but I want
2 to make sure I'm clear on some things. Were you present when
3 Gary Sutton was arrested?

4 A. Yes, I was.

5 Q. Where was this arrest?

6 A. In an apartment building on Highway 411 in the
7 Seymour community of Sevier County.

8 Q. What time did the officers arrive to arrest these
9 two gentlemen?

10 A. I can't testify to that; I don't have that
11 information here with me.

12 Q. Let me ask you this: Were you one of the first
13 vehicles to arrive, or did you come in later?

14 A. We all arrived simultaneously. There were four or
15 five cars.

16 Q. Okay. And how many police officers were there?

17 A. I can't answer that question, and be correct about
18 it. I could give you a guess, but I can't answer that question,
19 and tell you exactly how many officers were there.

20 Q. Few or many?

21 A. They were a few.

22 Q. Okay. At the time of the arrest, and at the time
23 you first came in contact with either of these defendants, and
24 specifically, Gary Sutton, did you mirandize?

25 A. No, sir, I did not.

1 Q. How long were you there before you left?

2 A. Approximately 30 minutes; that's a guess. I don't
3 have those records in front of me to show you the exact time.

4 Q. Who transported Gary Sutton to the Sevier County
5 Sheriff's Department?

6 A. I don't remember.

7 Q. You didn't?

8 A. I don't recall transporting him; no, sir.

9 Q. You may have, but you don't recall?

10 A. I don't remember transporting him.

11 Q. And I don't know if I asked you this, and I
12 apologize if I did, but what time was this arrest?

13 A. As I stated earlier, I don't have the records here,
14 and I can't give you the time.

15 Q. Was it morning?

16 A. Mid-day, somewhere -- I can't give you the exact
17 time. When I say mid-day -- let me re-phrase that -- it was
18 around noon, give or -- around noon, some after. I'm basing
19 that on the time that I have here. I know it was before that,
20 so...

21 Q. Did you take Gary Sutton to be arraigned?

22 A. There were several of us, yes, sir, who came over
23 here to the courthouse when he was arraigned.

24 Q. And you took him back to the Sevier County
25 Sheriff's Department to be booked?

1 A. Yes, sir.

2 Q. Okay. Now, this statement that you wrote...

3 A. Yes, sir.

4 Q. I take it you wrote down exactly what happened to
5 the best of your memory?

6 A. That's -- yes. This was reduced to writing after
7 the conversation, and yes, it's to the best of my memory the
8 events that took place.

9 Q. For the record, read in the first two sentences of
10 your statement.

11 A. "Approximately 3:30 p.m. on the above date, which
12 is 3/5/92, myself, Detective Mark Turner, and Gary Sutton were
13 sitting in the waiting room at Sevier County Sheriff's
14 Department waiting for Sutton to be booked."

15 Q. And would you read the second sentence, please?

16 A. "I told Sutton that he did not have to make any
17 statements to me, and told him to do some soul searching about
18 this incident."

19 Q. Okay. You asked Gary Sutton to do some soul
20 searching about this incident?

21 A. I made a statement to him, yes.

22 Q. And I take -- and in asking Gary Sutton to do some
23 soul searching about this incident, you wanted a response from
24 him?

25 A. No, sir, I had already told him that he didn't have

1 to make any statements to me.

2 Q. Well, this statement, "I want you to do some soul
3 searching," was designed to elicit some response?

4 A. No, sir.

5 Q. Well, let's put it this way. It's not a statement
6 like, "How are you doing?" "How's the family?" "How's the
7 weather?" It wasn't an analogous statement like that, was it?

8 A. As I testified to earlier -- it's not here in this
9 statement. Gary had initiated a conversation with us that had
10 nothing to do with this case. He said -- well, it did, it had
11 something to do with this case. He said something to the effect
12 of, "I don't know how you all..." or "they," or -- I don't know
13 exactly the words he used, but he said, "You know, Jeff, you've
14 known me for a long time." That's not a quote, but -- you know,
15 "I wouldn't do nothing like that," or something to that effect.
16 And that's when I told him that he would just have to do some
17 soul searching about the incident.

18 Q. Now, you didn't write down what you've just
19 testified to, did you, sir?

20 A. No, I did not write down the first part of the
21 conversation that took place.

22 Q. You wrote down what you thought was important?

23 A. Yes, sir.

24 Q. And you did ask him to do some soul searching?

25 THE COURT: As I understand it, you're -- is this

1 just your summary of what transpired, or is this
2 something that he signed? Is this a signed
3 statement?

4 **THE WITNESS:** No.

5 **GENERAL SCHMUTZER:** No, Your Honor. I think
6 there's a misrepresentation. This is not a
7 statement. These men were simply sitting, waiting
8 for him to go into a cell. They weren't -- they
9 didn't have any writing materials, they didn't have
10 a tape recorder. He makes this statement to the
11 officer, and the officer says, basically, "You need
12 to do some soul searching," and then he begins
13 talking to them. It's my understanding, and I
14 think it's been testified in the proof in chief
15 that this was not interrogation. He did not ask
16 him questions. He did the talking later. He set
17 down, and wrote this up afterwards. He had nothing
18 to write on at that time.

19 **THE COURT:** Okay.

20 **MR. WEBB:** Well, Your Honor, I -- there's no
21 misrepresentation made by defense counsel. What
22 we're asking the Court to consider -- there's no
23 question this man was in custody. I think the
24 question the Court is going to have to decide is
25 two or three fold. This man invoked his right to

1 counsel, and there was a form of interrogation.
2 You don't have to -- interrogation can take many
3 forms, and it does not have to be point blank
4 questioning.

5 THE COURT: You may inquire into that aspect of it.
6 You are entitled to do that.

7 MR. WEBB: As long as the Court knows what we're...

8 THE COURT: Sure.

9 MR. WEBB: Okay.

10 BY MR. WEBB:

11 Q. You did not mirandize Gary Sutton at any time
12 before, during, or after this statement?

13 A. No, sir, I did not.

14 Q. Okay.

15 MR. WEBB: May I have one moment, Your Honor?

16 THE COURT: Yes, sir.

17 MR. WEBB: That will be all.

18 THE COURT: Anything further of Officer McCarter?

19 GENERAL SCHMUTZER: No. You may step down, sir.
20 Call Detective Mark Turner.

21 **

1 MARK TURNER was called, and being duly sworn, was
2 examined and testified as follows:

3 DIRECT EXAMINATION

4 BY GENERAL SCHMUTZER:

5 Q. State your full name, please.

6 A. Mark Turner.

7 Q. Back in February and March of this year, you were
8 employed with the Sevier County Sheriff's Department?

9 A. Yes, sir.

10 Q. In what capacity?

11 A. Detective.

12 Q. And were you present, and did you assist in the
13 arrest of the defendant Sutton on the 5th of March?

14 A. Yes, sir, I did.

15 Q. Were you also present with Jeff McCarter on that
16 afternoon of the 5th when this defendant made some statements?

17 A. Yes, sir.

18 Q. Before that time, had you advised this defendant
19 Sutton of his constitutional rights?

20 A. Yes, sir, I did.

21 Q. Now, how long was it before...

22 A. I advised him approximately at 1:40 p.m.

23 Q. And where was this?

24 A. It was in the detective's office.

25 Q. And when you advised him of his rights, did he

1 acknowledge he understood those rights?

2 A. Yes, sir, he did.

3 Q. And did he sign a waiver of those rights?

4 A. Yes, sir, he did.

5 Q. Did you attempt at that time to talk to him in any
6 way, or interrogate him?

7 A. No, sir.

8 Q. And that was at 1:40?

9 A. Yes, sir.

10 GENERAL SCHMUTZER: And I have a copy, Your Honor.
11 May I file this as an exhibit?

12 THE COURT: Yes, sir.

13 (EXHIBIT #5 - Admonition of rights; marked and
14 filed.)

15 BY GENERAL SCHMUTZER:

16 Q. And you say you did not attempt to talk to him --
17 what were you all actually doing with the defendant around, I
18 believe it was around 3:00 or 3:40, when he began talking, or
19 making these statements that were later written down by
20 Detective McCarter?

21 A. We were in the process of waiting for him to be
22 booked in the Sevier County Jail.

23 Q. Were you attempting at that time to interrogate him
24 in any way?

25 A. No, sir.

1 Q. You may cross examine.

2 **

3 CROSS-EXAMINATION

4 BY MR. WEBB:

5 Q. Detective Turner, the first time that this
6 defendant was given Miranda was in your office by you; is that
7 correct, sir?

8 A. Yes, sir.

9 Q. And that was 1:40 p.m.; is that correct, sir?

10 A. Yes, sir.

11 Q. Correct me if I'm wrong, but you gave him Miranda
12 at 1:40 p.m., yet you asked no questions?

13 A. Yes, sir.

14 Q. So I take from that that your purpose in
15 mirandizing him at 1:40 p.m. was for some reason other than
16 interrogating him?

17 A. Yes, sir, he was under arrest at that time.

18 Q. Is that a policy that you have, or a procedure that
19 you follow?

20 A. Yes, sir, when he was under arrest; yes, sir.

21 Q. What time was he arrested?

22 A. I can't remember exactly the time; it was a little
23 bit before 1:30, around 12:50, or something like that.

24 Q. Okay. Now, he was arrested in the Seymour area?

25 A. Yes, sir.

1 Q. Did you make any rough notes of this statement?

2 A. Which statement?

3 Q. We're talking about March 5th at approximately 3:30

4 p.m.

5 A. I just wrote down little notes about the
6 conversation that went on between myself, Mr. Sutton, and
7 Detective McCarter.

8 Q. Okay. Would you produce those, please, sir?

9 A. Yes, sir, I've got them.

10 MR. WEBB: Your Honor, if I could approach; I'd
11 like to have an opportunity to review them.

12 THE COURT: Sure.

13 BY THE WITNESS:

14 A. The notes that I had must be in my other file.
15 I've got another file on the same case.

16 MR. WEBB: I'd like to look at them, Your Honor.

17 THE COURT: Are they at the jail?

18 THE WITNESS: Yes, sir.

19 THE COURT: Can someone else get them for you, or
20 is it something you have to do to go get them?

21 THE WITNESS: I have them in my personal file.

22 THE COURT: Okay. The Court will have to take a
23 recess, and let him go get those, then, if you...

24 MR. WEBB: Thank you, Your Honor.

25 (COURT STOOD IN RECESS)

1 THE COURT: If Officer Turner will retake the
2 stand. There's Officer Turner. Gentlemen, you may proceed.

3 MR. WEBB: Your Honor, I apologize for the delay.
4 Detective Turner has provided counsel with his rough note
5 statements concerning the questioning of March the 5th.

6 BY MR. WEBB:

7 Q. Officer Turner -- Detective Turner, were you
8 present on February 28th when Gary Sutton invoked his right to
9 counsel?

10 A. No, sir, I don't believe that date.

11 Q. Let me ask you this: Were you aware that on
12 February 28th Gary Sutton had given a statement to Detective Jim
13 Widener of the Blount County Sheriff's Department?

14 A. No, sir, I wasn't.

15 Q. Okay. Had Sheriff Ogle, or any other officer, or
16 law enforcement official told you that Gary Sutton had invoked
17 his right to counsel on February 28th?

18 A. No, sir, I can't recall.

19 Q. Were you aware that on the date of his arrest, and
20 before that date that he was represented by myself and Mr.
21 Greenlee?

22 A. No, sir.

23 Q. Were you present at the time of Gary Sutton's
24 arrest?

25 A. Yes, sir, I was.

1 Q. Did you mirandize Gary Sutton at the time of his
2 arrest?

3 A. In Seymour?

4 Q. Right.

5 A. I think Sheriff Ogle did.

6 Q. But your not sure?

7 A. No, sir, I'm not.

8 Q. Okay. Do you or any other personnel of the Sevier
9 County Sheriff's Department have a signed rights waiver signed
10 by Gary Sutton on March 5th, 1992 at the time of his arrest?

11 A. On March the 5th?

12 Q. At the time of Gary Sutton's arrest.

13 A. At the time he was arrested, no, sir, I don't.

14 Q. Okay. Is it not policy that when you arrest
15 someone that you mirandize that person?

16 A. Yes, sir.

17 Q. And you have no information to tell this Court
18 today that that was done?

19 A. I couldn't recall it, no, sir.

20 Q. Okay. Now, you do recall that at 1:40 p.m. you
21 read the admonition and waiver to Gary Sutton; is that correct?

22 A. Yes, sir, I did.

23 Q. And that he indicated to you that he understood his
24 rights, and did, in fact, sign a rights waiver?

25 A. Yes, sir, he did.

1 Q. And the time, 1:40 p.m., is that the exact time
2 that this took place?

3 A. Yes, sir.

4 Q. Now, from 1:40 p.m. until 3:30 p.m., were you in
5 the presence of Gary Sutton?

6 A. Yes, sir, I was.

7 Q. And during that time period did you ever attempt
8 to interrogate Gary Sutton?

9 A. No, sir.

10 Q. Gary Sutton was being charged with first degree
11 murder, and are you telling the Court that you had to desire to
12 interrogate him?

13 A. Not at that time, no, sir, I didn't.

14 Q. So there was no reason for you to mirandize him if
15 you were not going to try to take his statement?

16 A. Yes, sir, he was under arrest.

17 Q. He was under arrest in Seymour at approximately
18 noon?

19 A. Give a little -- close to it there.

20 Q. Why did you wait until 1:40 p.m. to mirandize him?

21 A. Like I said, I don't recall if the sheriff
22 mirandized him or not down where we arrested him at.

23 Q. The question is: What reason did you have at 1:40
24 p.m. to mirandize him?

25 A. I was told by Sheriff Ogle to mirandize him when

1 he got to the Esso.

2 Q. Got to where?

3 A. To the Sevier County Esso.

4 Q. So other than being told, you would not have
5 mirandized him?

6 A. Yes, sir, I would have.

7 Q. But the reason that you mirandized him was because
8 you were told by the sheriff to mirandize him?

9 A. I would have anyway, yes, sir.

10 Q. But that's the reason you did mirandize him?

11 A. Yes, sir.

12 Q. And so does that make you believe that he was not
13 mirandized earlier?

14 A. Like I said, I was inside the building; I couldn't
15 tell you whether or not he was.

16 Q. And are you clear on the fact, to the best of your
17 knowledge, that Sheriff Ogle never told you at any time from and
18 since February 28th until the time of his arrest on March 5th
19 that he had invoked his right to counsel?

20 A. No, sir, I don't.

21 Q. Were you present when Detective McCarter stated,
22 "I told Sutton that he did not have to make any statements to
23 me, and I told him to do some soul searching about this
24 incident?"

25 A. Yes, sir, I was.

1 Q. And in response to that, he gave a statement, is
2 that correct?

3 A. He just started talking.

4 Q. In response to that statement by Jeff McCarter, he
5 started talking; is that not correct?

6 A. Well, not really. He just set there for a few
7 minutes, and then he started talking.

8 Q. Okay. But before that he had not talked, had he?

9 A. We had carried on a casual conversation, yes, sir.

10 Q. Was it a conversation not involving this
11 investigation?

12 A. Yes, sir, it was.

13 Q. Was it or wasn't it?

14 A. It didn't involve this investigation.

15 Q. Sort of talking about the weather...

16 A. We talked about hunting, and stuff like that; yes,
17 sir.

18 Q. Okay. When this statement was made by Jeff
19 McCarter to Gary Sutton, that was for the purpose of eliciting
20 a response from Gary Sutton; is that not correct?

21 A. Yes, sir.

22 MR. WEBB: One moment, Your Honor.

23 THE COURT: Uh-huh (affirmative.)

24 BY MR. WEBB:

25 Q. Detective Turner, at 1:40 p.m. you read Gary Sutton

1 his rights?

2 A. Yes, sir, I did.

3 GENERAL SCHMUTZER: This is repetitious, Your
4 Honor.

5 MR. WEBB: Just one more thing, Your Honor.

6 THE COURT: Okay.

7 BY MR. WEBB:

8 Q. And you had no intention of interrogating him?

9 A. No, sir.

10 Q. So the purpose of doing that was to make sure Gary
11 Sutton understood his rights?

12 A. Yes, sir.

13 Q. That will be all.

14 THE COURT: Anything further?

15 GENERAL SCHMUTZER: Yes, Your Honor, just a couple
16 of questions.

17 **

18 REDIRECT EXAMINATION

19 BY GENERAL SCHMUTZER:

20 Q. Officer Turner, when you were sitting there in the
21 room with him, and he made these statements to you all, had you
22 gone in there with the intent -- or while you were there, did
23 you decide that you wanted to try to take a statement from him?

24 A. No, sir.

25 MR. WEBB: Your Honor, the intent is irrelevant.

1 What he did -- he's already stated that the purpose
2 of this statement about doing some soul searching
3 was to elicit a response. That's what the
4 testimony was.

5 **THE COURT:** Well...

6 **GENERAL SCHMUTZER:** He didn't make this statement,
7 Your Honor. That calls for an opinion on the part
8 of this officer who didn't even make that
9 statement. That statement was made by Jeff
10 McCarter, who already testified it wasn't his
11 purpose.

12 **THE COURT:** He has been asked about his intentions
13 by defense counsel, and I will allow you to ask
14 about his intentions.

15 **BY GENERAL SCHMUTZER:**

16 **Q.** When this -- had there been some statements made
17 to Detective McCarter by the defendant...

18 **MR. WEBB:** Objection to leading, Your Honor.

19 **GENERAL SCHMUTZER:** I just asked, Your Honor, if
20 any statements had been made to him.

21 **MR. WEBB:** It's been asked and answered.

22 **THE COURT:** Overruled.

23 **BY GENERAL SCHMUTZER:**

24 **Q.** ...to Detective McCarter before he made this
25 statement about -- and I believe you stated he told -- did he

1 also tell him that he didn't have to make any statements to him?

2 A. Yes, sir, he did.

3 Q. And what was that in regard to? Had the defendant
4 started to make some...

5 MR. WEBB: I'm going to object to the leading, Your
6 Honor.

7 THE COURT: Sustained as to form.

8 GENERAL SCHMUTZER: Okay.

9 BY GENERAL SCHMUTZER:

10 Q. Before he made that statement, had this defendant
11 made any statements, or attempted to make any statements to you
12 all...

13 MR. WEBB: It's been asked and answered, Your
14 Honor.

15 THE COURT: Overruled.

16 BY THE WITNESS:

17 A. Yes, he started to.

18 Q. And it was only after he started that this
19 statement was made about, "You don't have to talk to me, but you
20 ought to do some soul searching?"

21 A. Yes, sir.

22 Q. Did -- after he began talking to you, did you all
23 interrogate him, that is, did you ask him questions, or did you
24 just listen to what he had to say?

25 A. We never did ask him no questions, we just listened

1 to him.

2 Q. That's all you did?

3 A. That's all we did, yes, sir.

4 Q. Thank you.

5 MR. WEBB: One moment, Your Honor.

6 THE COURT: And what time, again, was it, in the
7 holding cell over here that he started this
8 conversation, or that these statements were made?

9 THE WITNESS: It was around 3:30 p.m.

10 **

11 RE CROSS-EXAMINATION

12 BY MR. WEBB:

13 Q. Officer Turner, we don't want to beat a dead horse,
14 but you were not going to interrogate him, is that correct?

15 A. Yes, sir.

16 Q. You read him his rights to make sure he understood
17 those rights?

18 A. Yes, sir.

19 Q. And you didn't care if he waived those rights, or
20 not; is that correct?

21 A. No.

22 GENERAL SCHMUTZER: Object, Your Honor, to what
23 has been asked.

24 MR. WEBB: You may ask.

25 GENERAL SCHMUTZER: No questions, Your Honor.

1 THE COURT: You may step down. Any further
2 witnesses?

3 GENERAL SCHMUTZER: Not on that statement, Your
4 Honor.

5 THE COURT: Argument or evidence from the defense?

6 **

7 MR. WEBB: Your Honor, if the Court please, I'm
8 getting a little confused about what evidence I would like to
9 present. I would ask the Court if we could go into this next
10 statement, and then give me the right to come in, and offer my
11 defense proof on both these statements. I don't want to get
12 confused, but on the same token, I don't want to jumble it up
13 for the Court.

14 THE COURT: Well, as I said earlier, I would --
15 insomuch as the first two statements primarily involve the
16 actions of Officer Widener, the Court wanted to deal on those
17 two statements at that time. Now, it is my preference to deal
18 on this statement here, as I understand that Officer Davenport
19 is involved in the next statement separately. So I would like
20 to conclude this statement, if at all possible.

21 MR. WEBB: Your Honor, let me say this; I believe
22 it helps the Court. I don't have any great problem in making
23 my argument on this statement right now, but the problem I may
24 have it not knowing what proof, if any, that I want to offer on
25 this statement, and I would like to -- my preference would be

1 to let's go ahead, and let's talk about this next statement, but
2 I will attempt to make argument on this one, and I don't intend
3 to put any proof on with this one. I think our proof's been -
4 - if that makes any sense.

5 THE COURT: Okay.

6 MR. WEBB: I don't mean to...

7 THE COURT: Well, as to -- of course, obviously,
8 as to what evidence you present, that, of course, obviously is
9 within your sound judgment as trial counsel. But I would not
10 think that any statements made to Officer Davenport on the
11 statement taken on March 9, 1992 would have any relevance or be
12 material as to the admissibility of the statement of March 5th.
13 Now, I could see where if the Court ruled this statement of
14 March 5th inadmissible, for any reason, that there might be an
15 issue as to the admissibility of the statement of March 9th, but
16 the two -- it would not be reversed -- I could not fathom a
17 situation that they would be -- the statement of March 5th is
18 conditional upon my ruling on the statement of March 9th.

19 MR. WEBB: Your Honor, I won't belabor, but I
20 reserve the right, once again -- it's not necessary to re-argue,
21 but I feel that when interrogation -- strike that.

22 The law imposes a heavy duty on the State to
23 demonstrate that any subsequent statement by the defendant was
24 given with the knowing and intelligent waiver of his privilege -
25 - his constitutional rights.

1 THE COURT: Right.

2 MR. WEBB: The Court must presume that a defendant
3 has not waived his rights, and the prosecution burden is great
4 to prove otherwise. Now, what we have here from the testimony
5 you've heard today to this point in time, Detective Widener --
6 this man invoked his right to counsel. Detective Widener tells
7 Sheriff Ogle, clearly communicated, "This man has invoked his
8 right to counsel. Don't talk to him unless counsel is there."

9 Neither of these detectives, according to their
10 testimony -- well, strike that. I think Jeff McCarter knew
11 that.

12 THE COURT: I believe that was his testimony.

13 MR. WEBB: Mark Turner did not know that.

14 THE COURT: Right.

15 MR. WEBB: But they should have known.

16 THE COURT: I think it's immaterial based on the
17 Crump case as to whether they knew or didn't know. So I think
18 that's to your benefit.

19 MR. WEBB: Okay. So the right has been invoked.
20 He is arrested on March 5th at approximately noon. That's the
21 best we can get. And the way I understood the testimony was
22 they think someone else may have mirandized him at the time of
23 arrest. Their policy is that, but they can't tell you that.

24 Mark Turner tells you that he mirandized Mr. Sutton
25 at 1:40 p.m. I think it's very important the reason for this.

1 The reason was to make sure he understood what his rights were,
2 and not for him to waive those rights. It makes sense. He told
3 you that. Okay?

4 Now, so the purpose being not for him to waive
5 these rights, just to let him know what they were. I think
6 that's an important consideration for the Court.

7 Now, he's in custody, no question there. Is there
8 interrogation after invocation of the 6th amendment right? I
9 submit that there is an interrogation. Rhode Island v. Ginnis,
10 "The prohibition against further questioning by the police
11 includes any form of interrogation, which is questioning or its
12 functional equivalent."

13 Now, they're setting there for two hours -- 10
14 minutes less than two hours, and here's what's said to this man.
15 He can't go nowhere, he's scared to death. "You don't have to
16 tell us anything, but you need to do some soul searching about
17 this." What was the reasoning behind that? Mark Turner
18 candidly told you, "We wanted to see what he was going to say."
19 That equals interrogation.

20 We feel that -- I submit to the Court that under
21 these facts, where this man has invoked his right to counsel,
22 they interrogate him, vis-a-vis, this question or statement
23 designed to elicit some response; that's interrogation. They
24 told you candidly they didn't get him to waive his rights, he
25 didn't waive his rights, his right to counsel was in effect.

1 THE COURT: Let me ask you this, Mr. Webb. What
2 does an officer -- if someone is in custody, what is the test
3 for the Court to determine on subsequent statements given by
4 someone who has indicated that they want a lawyer? What's the
5 test for the Court to determine as to whether or not those
6 rights have been scrupulously honored?

7 MR. WEBB: After a defendant invokes his right to
8 counsel?

9 THE COURT: Right.

10 MR. WEBB: It just like what I argued with, Your
11 Honor. Miranda says when he requests that right, it must cease
12 until counsel is present, and that interrogation or its
13 functional equivalent would violate. I think the State has the
14 burden of showing that this -- that he waived his rights
15 knowingly and intelligently, and that by their own admission
16 they did not seek a waiver of his constitutional rights.

17 THE COURT: Okay, let me ask you this. If a
18 defendant gives a statement, or starts talking after being
19 advised of his rights, or after invoking his right to counsel,
20 what does an officer have to do? Does an officer have to run
21 from him?

22 MR. WEBB: I don't think that it's the officer's
23 burden to do anything, but it's the Court's burden to suppress
24 it if it has been obtained in violation of his constitutional
25 rights, to wit: An invocation of right to counsel, no waiver

1 of that right to counsel, as the proof showed you.

2 THE COURT: Well, I think that's the test, isn't
3 it, if he voluntarily waived it.

4 MR. WEBB: I think that's the State's burden.

5 THE COURT: Right.

6 MR. WEBB: Any by their own admission, they did not
7 mirandize him. They mirandized him, "Do you know your rights?"
8 They did not seek a waiver of his rights; therefore, he did not
9 waive his rights. That's the testimony I heard.

10 THE COURT: Okay.

11 MR. WEBB: Let me have one moment with counsel.

12 THE COURT: Sure.

13 MR. WEBB: Here's what counsel told me, and I think
14 it's a good point. I'm not smart enough to think of all these
15 things. We invoke our right to counsel, and it's the State's
16 burden to honor that, scrupulously, to remain silent, and don't
17 put him on a guilt trip as this testimony has shown you. Okay?

18 THE COURT: General Schmutzer?

19 GENERAL SCHMUTZER: Your Honor, I think we need to
20 begin first by looking at the fact that on February -- number
21 one, there is no question about this defendant understanding his
22 constitutional rights. He had been advised of his
23 constitutional rights on the 28th, just a few days before, and
24 he understood them well enough to not only acknowledge that, but
25 he exercised them. That was in regard to the Tommy Griffin

1 murder.

2 Subsequently, he's arrested, not for the Tommy
3 Griffin murder, but for the Connie Branum murder, a separate
4 offense, in this county, not in -- before, that had been Blount
5 County conducting the investigation.

6 Sevier County then takes him into custody. He's
7 advised again of his constitutional rights, and signs a waiver
8 saying he understands those rights. Again, that has been filed,
9 and has been uncontradicted. That's the proof in this record.

10 What the officers may have subjectively intended
11 to do, or whether they intended to interrogate him, or go
12 further with it is of no consequence. He was again advised
13 fully of his rights. They make no attempt, and I submit the
14 physical facts showed us, they were not there trying to get this
15 man beforehand, or cajole, or to entice him to give a statement.

16 They didn't have anything to take a statement with;
17 they didn't have a tape recorder; they didn't have paper to
18 write anything down on. They didn't write anything out. They
19 are sitting around talking -- he initiates, and that's the key.
20 He initiates this by starting to talk about it, by starting to
21 say, "You know that I wouldn't do something like this." Then
22 the officer admonishes him, "You know you don't have to make a
23 statement," and then told him he ought to do some soul
24 searching. But the initial contact with regard to talking came
25 from this defendant, and both officers testified to that, Your

1 Honor.

2 To continue to show that these officers were not
3 doing that, they didn't even ask him any questions. They just
4 let him ride along, and it was later that they wrote this out,
5 after they left there. He wrote it out.

6 Your Honor, I submit to the Court that there has
7 not been a violation of his -- you're talking about a separate
8 offense -- a different offense; you are talking about a
9 situation where he had been fully advised of his rights, and not
10 once complained, and obviously understands his rights. There
11 is no question about the voluntariness of it; no question that
12 he initiated it.

13 THE COURT: As the Court stated to Mr. Webb, in the
14 Crump case, Justice Anderson points out that it is immaterial
15 that an officer from one agency may not have known that someone
16 had invoked their right to counsel before it comes within the
17 gambit of that -- of the mandates that a defendant's invocation
18 of his right to counsel must be scrupulously honored. So it
19 makes no difference.

20 However, again, the Court refers counsel back to
21 the Bates decision, which is, I think, in this case very
22 appropriate. In the Bates case, you had an agent, I believe,
23 first of all, from the Tennessee Bureau of Investigation, and
24 in that case the Court held that the defendant's rights were
25 violated, in that case, as to one statement. Then later on, as

1 the defendant was giving hair samples to an officer of the
2 F.B.I., he, on his own, initiated discussion with the officer,
3 and the officer, thereafter, went further than was here. But
4 in that case, the Supreme Court held that his subsequent
5 statement, even after one involuntarily given, was admissible
6 as to -- or the second statement was admissible.

7 So I think we have to look at it -- I think the
8 Court in Bates, and in Crump, looked to the voluntariness of the
9 statement, and the fact that he was being charged in this county
10 for a separate offense, I don't think lessens the requirement
11 that officers scrupulously honor that previous request. But in
12 this case, he was mirandized again. He was in a holding cell
13 there some two hours later with the officers. Obviously, he was
14 in custody; it was a custodial environment, and giving rise to
15 the inquiry of the Miranda violations, but I cannot say, and do
16 not hold as a matter of law that the statement was obtained in
17 violation, especially in light of Bates.

18 Here, he had been mirandized at least three times.
19 He had invoked his right to counsel, but this statement was not
20 prompted by the officers. It was voluntarily initiated by the
21 defendant Sutton, and the officers thereafter gave him an
22 opportunity to talk, and he talked. But it was without
23 prompting, and it was certainly given after being advised of his
24 rights. For that reason, the Court must hold that the statement
25 given is admissible.

1 GENERAL SCHMUTZER: Are you ready to proceed, Your
2 Honor, on the next one, or do you want to break for lunch.

3 THE COURT: It's 12:00. How long will it take us
4 on the other one?

5 GENERAL SCHMUTZER: I'd say it will take longer,
6 Your Honor. It's probably a good time to break.

7 THE COURT: Okay. We will break, then, for lunch,
8 and...

9 MR. WEBB: Your Honor?

10 THE COURT: Yes?

11 MR. WEBB: Let me -- just for housekeeping, could
12 we lock the courtroom where we can keep our things here?

13 THE COURT: That will be fine.

14 MR. WEBB: What time do you want us back?

15 THE COURT: 1:30 will be all right.

16 (COURT STOOD IN RECESS FOR LUNCH)

17 THE COURT: Call your next witness.

18 GENERAL SCHMUTZER: The State calls Chester Owenby.

19 THE COURT: Now, I take it this is relating to the
20 last statement?

21 GENERAL SCHMUTZER: The last statement.

22 THE COURT: Okay.

23 **

24 CHESTER OWENBY was called, and being duly sworn,
25 was examined, and testified as follows:

DIRECT EXAMINATION

BY GENERAL SCHMUTZER:

Q. Mr. Owenby, if you will, please -- can you hear me all right?

A. Yeah, I can hear you pretty good.

Q. Okay. State your full name.

A. Chester Owenby -- Chester F. Owenby.

Q. And your occupation?

A. I work over at the sheriff's department.

Q. Okay. What do you do over there?

A. Well, I just work for them. They's a clean up bunch.

Q. Okay. So you work over in the jail part then?

A. Yeah.

Q. Okay. How long have you been working there?

A. Well, roughly, I believe I started in June or July -- well, I've been there going on two years, I'll put it that way.

Q. Okay. You were working there back in February and March of this year then? Were you working over there then?

A. Yeah.

Q. Do you know or know of this defendant, Gary Sutton?

A. I know him, yeah.

Q. He's an inmate there, I take it, at the jail?

A. Yeah, he's an inmate.

1 Q. Okay. And back in March of this year, did he at
2 any time contact you or say anything to you about what he wanted
3 you to do?

4 A. Well, I'll put it like this. You know, when you
5 work in a place like that you don't recall all this stuff, and
6 I didn't recall all this stuff until it was brought to me.

7 Q. All right.

8 A. But he did mention one time something about the
9 sheriff, but I put it like this, I ain't going to say either way
10 whether he wanted to -- I ain't going to say he wanted to talk
11 to the sheriff or he wanted to see the sheriff. That's all I
12 know about it.

13 Q. Are you saying he either wanted to see the sheriff
14 or talk to him, you can't remember the exact words?

15 A. I don't -- I don't recall how he spoke it.

16 Q. Okay. Did you relay that on to the sheriff?

17 A. Well, I couldn't recall until it was brought up,
18 and there was another boy in there -- inmate in there on that
19 same day that wanted me to talk to the sheriff about a four hour
20 pass -- some of his people was in the hospital. And that's all
21 I know.

22 Q. I understand. But I'm talking about Gary Sutton.
23 Did you relay on to the sheriff that he wanted either to see or
24 speak to the sheriff?

25 A. I did mention it to the sheriff.

1 Q. You did tell the sheriff that?

2 A. Right.

3 Q. And was that -- I take it that was while he was in
4 custody over there as a prisoner?

5 A. Yeah.

6 GENERAL SCHMUTZER: You may cross examine.

7 CROSS EXAMINATION

8 BY MR. WEBB:

9 Q. Mr. Owenby, I'm not sure that I understood your
10 testimony. Now, can you hear me? I'm going to talk a little
11 louder. Can you hear what I'm saying?

12 A. Right.

13 Q. Okay. Now, you've sworn to tell the truth here,
14 is that correct?

15 A. That's right -- the stuff that I can recall.

16 Q. I understand.

17 A. But there's a lot of this stuff you don't recall.

18 Q. Mr. Owenby, under oath, can you recall whether or
19 not you were even at work on March the 7th?

20 A. I was working. I don't know I was on March the
21 7th, I didn't put it down. I don't know what day it was he
22 asked me this, but he said something to that effect.

23 Q. But you don't know what date it was?

24 A. No, I don't know what date it was because I don't
25 date it and keep it down.