

XXX NO 9D

IN THE CRIMINAL COURT FOR SEVIER COUNTY

AT SEVIERVILLE, TENNESSEE

STATE OF TENNESSEE,

Plaintiff,

-VS-

GARY WAYNE SUTTON, and
JAMES ANDERSON DELLINGER,

Defendant.

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CASE #5033,34,35,36
SUPREME COURT CLERK

FILED
MAR 7 1994
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TRANSCRIPT OF THE EVIDENCE:

Suppression Hearing

November 13, 1992

Volume 2

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
Helen H. Housley
CIRCUIT COURT CLERK
SEVIER COUNTY, TENN.

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Courtesy of
Time of Death Podcast
by Beth Braden

1 Q. Okay. Now, if I understood your testimony, you do
2 recall that another inmate other than Gary Sutton had asked to
3 speak with the sheriff that day?

4 A. Another inmate that was there then -- I don't
5 recall his name, I didn't even know the boy. But he just asked
6 me if I would say something to the sheriff about it. But my
7 recollection, the boy was wanting a four hour pass to go to the
8 hospital. I don't think I even mentioned it to the sheriff.
9 As far as I know, I didn't.

10 THE COURT: Did you mention to the sheriff what Mr.
11 Sutton had asked you to say?

12 THE WITNESS: I did, but I -- it's -- you go
13 through there, and you don't recall all this stuff.
14 You understand, you know how it is. You're in
15 there, and you'd have to write it all down, and it
16 would take you a day to go through...

17 THE COURT: I understand.

18 BY MR. WEBB:

19 Q. Well, let me ask you -- there are many, many
20 inmates asking you to do things for them, is that correct?

21 A. I hear this tune every day, about it.

22 Q. Okay. And do you keep a written log of these
23 requests that these inmates make?

24 A. No, I don't. I don't keep no log because there
25 ain't time to keep a log. I've got other work to do.

1 Q. But you do know that the jailers keep a log?

2 A. Right.

3 Q. And that log sets forth the time and the nature of
4 the information that the inmate wants passed along?

5 A. Right.

6 Q. But whatever you don't recall, you didn't put it
7 in a log, did you?

8 A. No, I don't recall stuff...

9 THE COURT: What was that question? Whatever he
10 didn't recall he didn't write down? Okay.

11 BY MR. WEBB:

12 Q. You did not write anything about Gary Sutton asking
13 you to go to the sheriff, did you?

14 THE COURT: He's already said he didn't.

15 MR. WEBB: I think he did.

16 THE COURT: I know he did, twice.

17 BY MR. WEBB:

18 Q. Mr. Owenby, you cannot swear under oath that you
19 talked to Gary Sutton on March 7th, can you, sir?

20 A. I don't know the date, but he did mention something
21 about to me about it because...

22 Q. All right. Answer my question. Can you recall...

23 GENERAL SCHMUTZER: Well, Your Honor, he just
24 answered his question. He said he couldn't recall
25 the date.

1 THE WITNESS: You ain't trying me. I ain't on
2 trial.

3 MR. WEBB: I'm not attempting to do that. I just
4 want to know if you can recall if Gary Sutton...

5 GENERAL SCHMUTZER: This is repetitious, Your
6 Honor.

7 THE COURT: He's already said that Mr. Sutton asked
8 him to either talk to the sheriff or see the
9 sheriff, and he doesn't remember the date.

10 THE WITNESS: I don't recall how it was spoke now.
11 You go through all that -- you don't recollect all
12 this stuff.

13 BY MR. WEBB:

14 Q. Officer Owenby, do you recall giving a statement
15 on August the 26th of 1992 at approximately 11:00 a.m. to Jim
16 Lawson?

17 A. To Jim Lawson?

18 Q. Jim Lawson.

19 A. Well, they some over there, somebody did, and
20 questioned me, and when I was working, I was busy, and he asked
21 me if I knowed about this stuff, and I said, "I don't recall it
22 right at the time."

23 Q. Okay. So you do recall talking to Jim Lawson?

24 A. Yeah, I do.

25 Q. Okay. And that conversation was tape recorded, was

1 it not?

2 A. Yes, sir.

3 Q. And the question that was asked you, "Mr. Owenby,
4 you can't remember Mr. Sutton asking you to see the sheriff or
5 the detectives, is that right?"

6 A. One time he asked me -- it's like I told you, I
7 don't recall whether he said he wanted to talk to him or would
8 like to see him or how he mentioned, but he did mention
9 something about it.

10 Q. Your response to that question, sir, was it not,
11 was, "It's like I told you. The sheriff said that I have, and
12 I probably have, and just can't recall."

13 A. Right.

14 Q. Okay. And do you recall this question, sir? "But
15 you don't recall Mr. Sutton ever saying, 'Mr. Owenby, can I go
16 see the sheriff, or get the detectives up here. I want to make
17 a statement.'" And your answer, "No, he never did say nothing
18 about no detective to me.

19 A. He didn't say nothing about no detective. All that
20 that was ever said -- a word or two -- I don't take no time.
21 I go through, and the sheriff's name was mentioned, just like
22 I told you, and that's all I know.

23 Q. Basically, you just can't recall?

24 A. I just don't recall it. Stuff that happened over
25 there a week ago, I won't recall it because you can't keep up

1 with all this stuff.

2 Q. There's no criticism offered to that, Mr. Owenby,
3 but let me ask you this. Has the sheriff or any detective or
4 any attorney general asked you to recall this?

5 A. The reason it come to my mind, I got to studying
6 it. I thought about this boy that did ask me for a four hour
7 pass to get to go to the doctor, and that was the same day that
8 he mentioned it. I don't know what day it was, I didn't date
9 it. I don't keep it down because I don't have time to fool with
10 it.

11 Q. Could it have been after March 7th?

12 A. I don't know what day it was.

13 Q. Well, let me ask you this again. Has the attorney
14 general's office or any detective or agent told you things to
15 refresh your memory?

16 A. No.

17 Q. No one's talked to you about this?

18 A. No, I just happened to think about that, or he
19 talked to me about it -- how it come up.

20 Q. And the bottom line is that you get so many
21 requests from inmates that you can't recall?

22 GENERAL SCHMUTZER: That's repetitious, Your Honor.
23 He's been over this and over this, and he's already
24 testified what the man said, and what he recalls.

25 MR. WEBB: One moment, Your Honor.

1 THE COURT: Uh-huh (affirmative.)

2 MR. WEBB: That will be all.

3 THE COURT: You can come down, Mr. Owenby.

4 GENERAL SCHMUTZER: Call David Davenport.

5 **

6 DAVID DAVENPORT was called, and being duly sworn,
7 was examined, and testified as follows:

8 DIRECT EXAMINATION

9 BY GENERAL SCHMUTZER:

10 Q. Agent Davenport, state your full name and position.

11 A. My name's David Davenport. I'm a special agent
12 with the Tennessee Bureau of Investigation.

13 Q. How long have you been employed in that capacity?

14 A. 17 years.

15 Q. And I believe you are assigned to, among other
16 counties, Sevier County, is that right?

17 A. Yes, sir, I am.

18 Q. Back on March -- March the 9th of this year were
19 you in Sevier County assisting the sheriff's department in the
20 investigation surrounding the death of Connie Branum?

21 A. I was.

22 Q. On that date did you have an opportunity to
23 interview the defendant, Gary Sutton?

24 A. I did.

25 Q. How, sir, did that come about?

1 A. I received word from Sheriff Ogle that...

2 MR. WEBB: I'm going to object to the hearsay, Your
3 Honor.

4 GENERAL SCHMUTZER: Your Honor, it's not offered
5 for the truth, it is offered to show the
6 information this man had and...

7 THE COURT: Why he was there. I will allow it for
8 that purpose only.

9 BY GENERAL SCHMUTZER:

10 Q. You may answer.

11 A. Sheriff Ogle told me that Mr. Sutton wanted to
12 speak with officers, and I asked him how the information had
13 came to him, and he told me how it came to him. I then went
14 over to speak to Mr. Sutton.

15 Q. What was it he said -- how it came to him?

16 A. Through his jailer, and I've got the jailer's name.

17 Q. All right. What is it?

18 A. Chester Owenby.

19 Q. Okay, sir, and this was on the 9th day of March?

20 A. Yes, sir, it was.

21 Q. Once you received this information, what did you
22 do?

23 A. I went over, and got with Mark Turner, and had Mr.
24 Sutton brought to a visiting area of the jail, and at that time
25 I assumed that he'd been -- was being represented by Mr. Webb.

1 I told him -- well, I informed him of his rights -- read the
2 rights waiver to him, and I also told him that if he was being
3 represented by Mr. Webb that -- and he wanted Mr. Webb there,
4 that we would contact Mr. Webb. And at that time he told us
5 that he didn't want Mr. Webb there. Then later he said that Mr.
6 Webb wasn't representing him at that time.

7 Q. All right. Going back, sir, though, when you first
8 -- before you advised him of his rights, did you first ask him
9 anything about wanting to talk?

10 A. I most certainly did.

11 Q. What was it?

12 A. Well, I just asked him if he wanted to talk to
13 officers, and also, before -- when I read the waiver to him, I
14 put on there that "I have initiated this conversation with law
15 enforcement. I do not want David Webb present or any other
16 attorney at this time. I'm willing to talk to law enforcement
17 without an attorney present." And that was wrote on the bottom
18 of his rights waiver.

19 Q. All right. Was this after you advised him of his
20 rights?

21 A. Yes, sir, it was.

22 Q. Did he sign that?

23 A. No, sir, he did not.

24 Q. Did he say why he wouldn't sign it?

25 A. He just said he wasn't going to sign it.

1 Q. All right. Did he say to you -- well, when you
2 went -- when you first initiated this, and looking directly,
3 sir, at your report, before you read him his constitutional
4 rights, when you started talking to him, what was the first
5 thing you told him?

6 A. I told him that I understood that he had requested
7 to talk to officers, and stated that he had. I then read him
8 his constitutional rights, and added to the bottom of the waiver
9 that he did not request to have an attorney -- his attorney,
10 David Webb, present or any other attorney present.

11 Q. All right. Even though he at that point refused
12 to sign the waiver, did he indicate he still wanted to talk to
13 you?

14 A. Yes, sir. He stated that he understood his rights,
15 and that he didn't want -- and he wanted to talk, but he didn't
16 sign the waiver.

17 Q. Did you ask him whether he'd talked to David Webb?

18 A. Yes, I did. I asked him if he had talked to David
19 Webb, and he stated he'd talked to him on Friday, but that Webb
20 was not representing him.

21 Q. All right. Then what did you ask him?

22 A. I then asked Sutton what he wanted to talk to us
23 about, and he stated he had been locked up for something he had
24 never done, that he'd never killed anyone.

25 Q. All right. Did he -- from that point, did he

1 proceed to give you a statement?

2 A. Yes, sir, he did.

3 Q. Did you -- was this statement the result of
4 questioning on your part or was this a statement that he just
5 gave you?

6 A. I went in there and listened to Mr. Sutton. Unless
7 it was to clarify a point, I just listed to Mr. Sutton. He also
8 during that time complained about conditions in the jail. He
9 said that he was going on a hunger strike -- as far -- and also
10 that he wasn't involved in any murder. I set in there and
11 talked to him 30 or 45 minutes.

12 Q. Who was doing the talking?

13 A. Mr. Sutton was doing 95% of it.

14 Q. The -- did you then make -- write out an interview
15 on it?

16 A. Yes, sir, I did. I went directly to -- after we
17 talked to him, I went directly to another squad room of the
18 sheriff's office, and wrote it down verbatim the best I could
19 what we talked about.

20 Q. Immediately after you talked to him?

21 A. Yes, sir, I did.

22 GENERAL SCHMUTZER: You may cross examine.

23 BY GENERAL SCHMUTZER:

24 Q. Will you file that, sir, the advice of rights form
25 that you read to him? Did he acknowledge that he understood his

1 rights when you read that to him?

2 A. Yes, sir, he did.

3 Q. Did he acknowledge orally to you that he wanted to
4 talk to you and waive those rights?

5 A. Mr. Sutton was fully aware of his rights. He
6 acknowledged his rights, he still said that he was wanting to
7 talk to us, he had no problem talking to us. If he'd asked for
8 David Webb or any attorney we would have went and got him.

9 Q. But you knew about David Webb, and you knew that
10 he was representing him, and you specifically asked him about
11 it, is that right?

12 A. That's what I had been informed, and that's the
13 reason I asked him about it.

14 Q. Yes, sir.

15 GENERAL SCHMUTZER: Your Honor, may I file a copy
16 of his rights form?

17 THE COURT: Uh-huh (affirmative.) Is that also the
18 statement with it?

19 GENERAL SCHMUTZER: Yes, Your Honor, but I can
20 detach it. I may have a copy -- it might be better
21 to file a copy. Well, I thought I did, but I can't
22 put my finger on it. That's fine.

23 (EXHIBIT #6 - Advice of rights form; marked and
24 filed.)

25 GENERAL SCHMUTZER: You may cross examine.

1 CROSS EXAMINATION

2 BY MR. WEBB:

3 Q. Agent Davenport, good afternoon. When did you
4 first become involved in the investigation regarding the death
5 of Connie Branum?

6 A. I went to the crime scene. I became involved the
7 evening they found the body. Don't hold me to the exact date,
8 but that evening, and then I went back up there the next day.
9 So the day that they found the burned car and the body in Sevier
10 County.

11 Q. And that was prior to March the 9th?

12 A. Yes, sir.

13 Q. Now on March the 9th, did you receive a phone call
14 from someone?

15 A. No, I didn't receive a phone call. The sheriff -
16 - I was here, and the sheriff talked to me directly.

17 Q. Okay. What was your purpose for being here that
18 day?

19 A. My office is here, and I'm here quite a bit. I
20 have an office here. Specifically as being here on that day,
21 I don't recall.

22 Q. Did you come for the purpose of discussing this
23 case with Sheriff Ogle?

24 A. I'm sure I did discuss the case, probably, but I
25 don't remember why I was here because I'm here quite a bit.

1 Q. But you do feel like you and Sheriff Ogle discussed
2 the case?

3 A. Well, from the time that lady was found dead, and
4 her brother was found dead until whenever, we discussed that
5 case. So that's entirely possible.

6 Q. Did Sheriff Ogle tell you that on February the 28th
7 that Gary Sutton had invoked his right to counsel?

8 A. I -- I assumed that you were representing him, Mr.
9 Webb. That's the reason I hadn't talked to him until he sent
10 word that he wanted to talk to officers. I was under that
11 assumption that you were representing him.

12 Q. Okay. Did Sheriff Ogle tell you that?

13 A. I don't know who told me, but like I said, I
14 understood that you were representing him.

15 Q. Some law enforcement official told you that I was
16 representing Gary Sutton?

17 A. Could have been. You didn't tell me, but somebody
18 told me.

19 Q. And have you ever talked to Detective Widener from
20 the Blount County Sheriff's Department?

21 A. I have talked to him, yes.

22 Q. Did he not tell you that on February 28th Gary
23 Sutton had invoked his right to counsel?

24 A. There again, I will tell you again, I thought you
25 were representing him. I thought that he had asked for you to

1 represent him, and I did not talk to him anymore until he said
2 that he wanted to speak to officers. So the answer to that
3 question is yes, Mr. Webb, I was under the assumption that you
4 were representing him.

5 Q. Let me ask you this. Did Detective Widener tell
6 you that he had made counsel promise not to interrogate Gary
7 Sutton any further without presence of counsel?

8 A. Well, I don't remember that -- him telling me that,
9 and, of course, I don't work for Detective Widener. If Mr.
10 Sutton had told me that he wanted you present, you can bet you'd
11 have been there.

12 Q. I take it you go to certain training seminars
13 advising you as to the status of the law?

14 A. I try to keep abreast of the law, sir.

15 Q. And you are aware that once a defendant invokes his
16 right to counsel that you are absolutely prohibited from
17 initiating any conversation?

18 A. I didn't initiate any conversation with Mr. Sutton.

19 Q. Are you aware of the law?

20 A. I wouldn't, and I don't, so yes, I am aware of
21 that.

22 Q. Okay. When did you arrive at the Sevier County
23 Sheriff's Department that day?

24 A. Ever what time is on the waiver, probably five or
25 10 minutes before then.

1 Q. Okay. Do you recall when you first saw Gary
2 Sutton?

3 A. When he came into the visiting room.

4 Q. What time was that?

5 A. The first thing I did was advise him of his rights,
6 and talk about having you present, so ever what time is on the
7 waiver, and I can read it to you -- it was sometime before noon.

8 Q. Okay. Let me ask you this.

9 MR. WEBB: If I may approach, Your Honor.

10 THE COURT: Sure.

11 BY MR. WEBB:

12 Q. I've got the copy of your waiver. You've written
13 down the time under where the defendant is supposed to sign,
14 11:40 a.m., is that correct?

15 A. That's right. That's when I started. I read all
16 that, added that on to it, asked him to sign it, he refused,
17 signed here as a witness, Mark Turner signed as a witness, and
18 I put the time down then. So it took me five minutes to read
19 the waiver, and add on the additional that "I have initiated
20 this conversation with law enforcement. I do not want David
21 Webb present or any other attorney at this time. I am willing
22 to talk to law enforcement without an attorney present." I
23 asked him to sign, he didn't, and we witnessed it then.

24 Q. So you started that at 11:40 a.m., and finished it
25 at 11:45 a.m.?

1 A. That's correct.

2 Q. And there's no question about that, is that
3 correct?

4 A. That's correct.

5 Q. Before asking him to sign the waiver, did you
6 engage in any conversation with him?

7 A. Not that I can --- I try to be awful careful because
8 I was under the impression that you were representing him, and
9 I was real careful about that.

10 Q. Was there anything that prohibited you -- you were
11 worried about protecting his constitutional rights, I take it?

12 A. I'm not -- I just am not going to violate -- if he
13 wanted you present, I would have had you present. So as far as
14 -- if he wants to talk to me, I will sit and listen to him all
15 day long.

16 Q. Was there anything prohibiting you from making a
17 phone call to my office to get me over there?

18 GENERAL SCHMUTZER: Objection, Your Honor. That's
19 not an issue here. This officer is under no duty
20 whatever to call him unless...the right is a person
21 right, and the case is clear, Edwards vs. Arizona
22 is clear that once a defendant invokes his right
23 to counsel, he can waive that if he initiates the -
24 - and he can waive all that, and counsel does not
25 have to be called under any circumstance, and this

1 officer has no obligation to contact counsel.

2 MR. WEBB: Your Honor, my response to that is when
3 Detective Widener promises me that they will not
4 engage in conversation with him unless they call
5 me to give me an opportunity to be present, that's
6 a promise, and there's case law to support that.
7 They are under a duty at that point to call me.

8 GENERAL SCHMUTZER: He have -- this agent right
9 here is investigating a different murder, different
10 crime, he's in a different agency. Detective
11 Widener cannot bind Tennessee Bureau of
12 Investigation, especially in a separate case that's
13 not even in that county.

14 THE COURT: It is obvious to the Court that if
15 Agent Davenport had been so inclined that he could
16 have picked up the telephone and called whomever
17 he wanted to call. But he chose not to, and as is
18 stated, the issue -- the legal issue is whether or
19 not Mr. Sutton initiated the contact, and whether
20 or not Officer Davenport proceeded properly
21 thereon. He -- you know, and to go a step further,
22 he is not bound by the statements of someone from
23 another agency.

24 BY MR. WEBB:

25 Q. Agent Davenport, you are telling this Court that

1 Mr. Sutton wanted to give a statement, is that correct?

2 A. Mr. Webb, I just listened to what he had to say,
3 and as far as giving a statement, I just wrote down what he
4 said. He gripped about the jail conditions. He also said that
5 he wasn't guilty of any murders, and went into detail about what
6 he had done. And that's what I listened to, and I wrote it
7 down. He didn't make any statement. I think that he's probably
8 said these things before to somebody -- I don't know. I mean,
9 I listened to him about his going with James Dellinger, and
10 doing this, and doing that, and I wrote down what he said.

11 Q. Yet he absolutely refused to sign his waiver of his
12 constitutional rights, is that not correct, sir?

13 A. That's correct.

14 Q. And even though he refused to sign a waiver waiving
15 his constitutional rights, you asked him questions?

16 A. I didn't really ask him any questions; I listened
17 to him. I might have asked him to clarify or something of that
18 nature. I've had several not sign the waiver.

19 Q. During this statement, did you make any rough
20 notes?

21 A. I don't believe I did. I went directly from the
22 interview, and went straight to the squad room, and wrote
23 exactly what happened verbatim the best I could remember.

24 Q. Once you wrote out this statement, did you go back
25 to Gary Sutton, and ask him to read it and sign it?

1 A. I did not.

2 Q. And you would agree with me that the long hand that
3 you have written is what you believe he said to the best of your
4 ability and recollection?

5 A. That's what he said, the best I can remember, and
6 I try not to leave anything out.

7 Q. But it could not, sir, be verbatim?

8 A. Well, it's not verbatim. It's what I wrote from
9 memory.

10 Q. And when you interview some charged with first
11 degree murder, you would agree that it is important to get down
12 just exactly what's been said?

13 A. If he'd confessed to committing a first degree
14 murder, you can bet I would have wrote it down verbatim, and
15 asked him to sign it.

16 Q. But since he didn't confess you never asked him to
17 review what you'd written down, and to sign the statement as
18 being true?

19 A. I wrote down what he told me, and that was the --
20 what we talked about while we were in the jail.

21 Q. But never gave him the opportunity to read it and
22 sign it?

23 A. No.

24 GENERAL SCHMUTZER: That's repetitious, Your Honor.

25 MR. WEBB: Well, they've not answered my question.

1 GENERAL SCHMUTZER: Well, they have. He said he
2 didn't.

3 THE COURT: He said he didn't take it back to him.

4 BY MR. WEBB:

5 Q. And you chose not to tape record this statement,
6 didn't you?

7 A. I don't tape record, sir.

8 Q. And I take it there are tape recording devices
9 available at the Sevier County Sheriff's Department, are they
10 not?

11 A. The sheriff's department has tape recording
12 devices. I don't carry one.

13 Q. In fact, it's the Sevier County Sheriff's
14 Department's policy to tape record statements, is it not?

15 A. I don't know what their policy is.

16 Q. Okay. And you had a Sevier County Sheriff's
17 Department officer there with you, did you not?

18 A. I did.

19 Q. And he did not tape record it either, did he?

20 A. Not that I know of, no, sir.

21 MR. WEBB: Your Honor, may we have one moment?

22 THE COURT: Sure.

23 MR. WEBB: Your Honor, just to clear up the record,
24 has the admonition and waiver and waiver of rights
25 been made an exhibit?

1 THE COURT: Yes, it is was an exhibit to his
2 testimony, yes.

3 GENERAL SCHMUTZER: May I approach the witness,
4 Your Honor, while he's asking?

5 THE COURT: Yes.

6 BY MR. WEBB:

7 Q. I want to make it clear, Agent Davenport, this is
8 your summary of what you believe was told you on this day?

9 GENERAL SCHMUTZER: Object, Your Honor,
10 repetitious. He's asked him that.

11 THE COURT: I'll let him answer. Go ahead.

12 BY THE WITNESS:

13 A. It's not what I believe, it was what was told to
14 me, and I wrote it down, and I wrote it down within five minutes
15 after I left him, myself and Mark Turner both, and Mark Turner
16 signed it, and we both went over it, and that's what he told us.

17 Q. But it is your summary?

18 THE COURT: He's already answered that.

19 MR. WEBB: Okay.

20 BY MR. WEBB:

21 Q. Now, are you telling the Court that all through
22 this you never asked any questions?

23 A. No, I'm not telling the Court that.

24 Q. Okay.

25 MR. WEBB: One moment, Your Honor.

1 THE COURT: All right.
2 MR. WEBB: That's all.
3 THE COURT: Anything further?
4 GENERAL SCHMUTZER: No, Your Honor.
5 THE COURT: You may step down. Any other
6 witnesses?
7 GENERAL SCHMUTZER: That's all, Your Honor.
8 THE COURT: Mr. Webb?
9 MR. WEBB: One moment, Your Honor. Your Honor,
10 call Kent Hatcher.
11 THE COURT: All right.
12 **

1 KENT HATCHER was called, and being duly sworn, was
2 examined, and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. WEBB:

5 THE COURT: Have you been sworn earlier, Mr.
6 Hatcher?

7 WITNESS: Yes.

8 Q. State your name, please.

9 A. Kent Hatcher.

10 Q. And your employment?

11 A. Sevier County Sheriff's Department.

12 Q. And what's your title there?

13 A. Lieutenant.

14 Q. What's your primary function?

15 A. Jail supervisor.

16 Q. Were you there on -- were you in that employment
17 on March the 7th, 8th, and 9th of this past year -- this year,
18 excuse me.

19 A. Yes, sir.

20 Q. Is it policy of the Sevier County Sheriff's
21 Department to keep a jailer's log?

22 A. Yes, it is.

23 Q. And the purpose of this log is to set down the
24 times and events regarding inmates?

25 A. Yes.

1 Q. And these events or activities include the movement
2 of prisoners, the visits they have, any unusual activity, and
3 requests to speak to the sheriff or detectives?

4 A. Yes.

5 Q. And I take it that you are especially concerned
6 with monitoring the activities of these gentlemen in that they
7 are charged with first degree murder, and held in maximum
8 security?

9 A. Yes.

10 Q. Okay. Now I asked you to bring with you your
11 records for the time period March 7, 1992. Did you do that?

12 A. Yes.

13 Q. Have you reviewed them?

14 A. Briefly, yes.

15 Q. Is there anywhere during that time period wherein
16 there is an entry that Gary Sutton asked a jailer to speak to
17 the sheriff or any other detective or person in law enforcement?

18 A. During that period, no.

19 Q. Okay.

20 MR. WEBB: I would like to make that an exhibit.

21 GENERAL SCHMUTZER: Why don't you file a copy of
22 it. Your Honor, we don't contest this. I think
23 Mr. Owenby testified he didn't log...

24 THE COURT: That's right.

25 MR. WEBB: Well, make that exhibit for the record.

1 THE COURT: Sure.

2 (EXHIBIT #7 - Jailer's log; marked and filed.)

3 BY MR. WEBB:

4 Q. Now, these jail logs are prepared when an event
5 occurs, is that correct?

6 A. Yes.

7 Q. And the times are set forth, and they are accurate,
8 is that correct?

9 A. Yes.

10 Q. And these logs are kept in the regular course of
11 business?

12 A. Yes.

13 Q. And let me show you, sir, the jail log for the
14 period March 9, 1992. Is that, sir, in fact, a copy of the jail
15 log for the time period 1992?

16 A. Yes, it is.

17 Q. And if you will, sir, read the entry on line #7
18 that's marked in yellow. I'd like you to state both the time
19 and the event.

20 A. 11:42 C.O. Clayton and Sergeant Mayes escorted Gary
21 Sutton to the interview room to see Chief VonCannon.

22 Q. And that was 11:42 when they escorted Gary Sutton
23 to the interview room?

24 A. Yes.

25 Q. Approximately how long would it take to get from

1 Gary Sutton's cell to this interview room considering the door
2 opening and closing routine that you all have?

3 A. Around five minutes.

4 Q. Okay. So the earliest Gary Sutton could have
5 gotten to the interview room, according to your testimony, is
6 11:47, is that correct?

7 A. I couldn't say that.

8 Q. But you do know that he was not even taken from his
9 room until 11:42?

10 'GENERAL SCHMUTZER: Your Honor, I think there's a
11 difference between asking this officer -- he's
12 asking what he knows of his own personal knowledge.
13 He can testify to what's in the records there, but
14 -- if he knows of his personal knowledge, that's
15 fine, but I don't think -- we need to make that
16 distinction.

17 MR. WEBB: Your Honor, we would ask this to be made
18 an exhibit.

19 THE COURT: So ordered.

20 (EXHIBIT #8 - Copy of jailer's log of 3/9/92;
21 marked and filed.)

22 MR. WEBB: That's all.

23 THE COURT: Any questions of this witness?

24 GENERAL SCHMUTZER: No, Your Honor, other than...

25 CROSS EXAMINATION

1 BY GENERAL SCHMUTZER:

2 Q. The records are accurate to the extent that people
3 make entries into the record, is that correct?

4 A. Yes.

5 Q. And it's dependent upon them making the entries
6 themselves accurately, is that right?

7 A. Yes.

8 GENERAL SCHMUTZER: That's all. Thank you, sir.

9 THE COURT: You may step down.

10 **

11 MR. WEBB: Your Honor, call Gary Sutton.

12 THE COURT: All right.

13 GARY SUTTON was called, and being duly sworn, was
14 examined, and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. WEBB:

17 Q. You were arrested on March the 5th?

18 A. That's correct.

19 Q. Either on March the 5th, March the 6th, March the
20 7th, March the 8th, or March the 9th, did you ask Chester Owenby
21 or any other jailer to tell the sheriff, the detectives, or any
22 other person associated with law enforcement that you wanted to
23 talk to them?

24 A. No, I did not.

25 Q. On March the 9th, were you taken from your cell to

1 an interview room?

2 A. Yes, I was.

3 Q. Did you know why you were taken there?

4 A. No, sir, I didn't.

5 Q. Once you got there, did you meet David Davenport
6 and Mark Turner?

7 A. Yes, I did.

8 Q. What did they say to you? Tell the Court who said
9 it, and what was said.

10 A. Well, I walked through the door, and Mr. Davenport
11 and Mark Turner -- that's the first time I'd ever met David
12 Davenport before -- was setting in the room, and they asked me
13 how was I doing, and I told them all right, and stuff. And Mr.
14 Davenport asked -- told me he would like to ask me a few
15 questions, and I said, "I don't know nothing that I can tell you
16 that I've not done told officials." And he said, "Well, I think
17 you do have something else that you can tell me." He said,
18 "I've come in here today to give you one chance to tell me --
19 if you know anything, to tell me what you know." And he said,
20 "I'm going to make it sort of brief in here with you." He said,
21 "I've been in law enforcement for nearly 20 years," and he said,
22 "I've never lost a case yet, and I have no intentions of losing
23 this case." And he said, "I'm going to tell you something
24 else." He said, "I hear that you've got a two year old
25 daughter," and he said -- he said, "Best just off the top of my

1 head that I can tell you..." And he was screaming and cussin'
2 and black dartin' and stuff to me, and...

3 Q. Did he use profanity?

4 A. Yeah, the "F" words, "GD" words, and he said, "If
5 you're lucky, you might be -- you'll probably be around the age
6 -- if you get lucky and don't go to the electric chair," said,
7 "You'll be probably around 86." He said, "Your daughter will
8 be in her 50's," and said, "That will be a good way to spend
9 your life with your daughter, won't it?"

10 Q. Well, let me stop you. While he was saying this
11 to you was he writing on a piece of paper?

12 A. Yes, he was.

13 Q. Let me show you this.

14 MR. WEBB: Let me have that exhibit, please, ma'am.
15 Your Honor, that will be Exhibit #5 -- no, strike
16 that. Your Honor, that will be Exhibit #6.

17 BY MR. WEBB:

18 Q. How long had you been there in minutes when you
19 were first handed this statement?

20 A. I was probably there 10 minutes, I guess, something
21 like that.

22 Q. Okay. Now, did you notice David Davenport writing
23 something on a piece of paper while he was talking to you?

24 A. Yes, I did.

25 Q. And whatever he was writing, did he hand that paper

1 to you?

2 A. He just -- well, he just pushed it out there, and
3 told me, he said, "If you got anything you want to say to me,"
4 said, "Sign this paper."

5 Q. All right. Is this the paper?

6 A. Yes, that is. That's the paper he pushed out
7 there.

8 Q. Did you sign it?

9 A. No, I didn't.

10 Q. Did you refuse to sign it?

11 A. Yes, I refused to sign it.

12 Q. Until yesterday had you even read what he had
13 written in there?

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

15 Q. Did you read it yesterday?

16 A. Yes, I did, when you give it to me yesterday.

17 Q. Let me ask -- did you at any time tell him that,
18 "I do not want David Webb present or any other attorney at this
19 time?"

20 A. No, I did not.

21 Q. Did you tell him that, "I'm willing to talk to law
22 enforcement without an attorney present?"

23 A. No, I did not.

24 Q. On February 28th, did you invoke your right to
25 counsel?

1 A. Yes, I did.

2 Q. Have you ever waived that right to counsel?

3 A. No.

4 Q. What did you tell him about your wanting a lawyer?

5 A. I told him -- he stated to me -- he asked me was
6 you representing me. I said, "Far as I know, he is representing
7 me. We're making arrangements to pay him now." I said, "But
8 he is -- he's helping me through this. He told me he would help
9 me until I could either see that -- you know, whether I got the
10 money to hire him or not." I said, "But he is helping me," and
11 I said, "He's done made it clear that you un's are not to talk
12 to me unless he is present." I said, "Best thing you can do is
13 take me back to my cell." And at that time, he got mad, he
14 jumped up, and he run out of the room, and was cussin', black
15 dartin', and screaming at the top of his lungs, and Mark Turner
16 when to talking to me, and he talked real nice, Mark Turner did.
17 Mark said, "I'm sorry, Gary. We just wanted to come in here and
18 ask you a few questions because we believe you've got some
19 things that you could tell us, that you're not telling us all
20 you know," and he said, "We're giving you this one chance to
21 tell us if you know anything." He said, "We're giving you this
22 opportunity to do it." He said, "They won't be no more
23 opportunities unless you tell us that you want to talk to us."

24 Q. Did you tell them that you wanted to talk to them
25 without counsel?

1 A. No, sir, I -- the whole thing is just a lie.
2 That's all it is. It's just a lie. I can't honestly believe
3 that they'd make it up, but it is. It's just a lie.

4 Q. And Officer Davenport is lying when Officer
5 Davenport says that you sat there, and talked in detail to him
6 about this crime, and about what all you had done, and talked
7 about the jail, and everything else to him, and that's a lie?

8 A. Sure is.

9 MR. WEBB: Your Honor, let me interject right now.
10 The question that the Court must decide is have
11 they abridged his right to counsel, not what he
12 said or what he didn't say, so I object on that
13 ground.

14 GENERAL SCHMUTZER: No, Your Honor, it goes to this
15 man's credibility as a witness. He is challenging
16 these officers.

17 THE COURT: Obviously there is a conflict between
18 their testimony as to the events, so I think you're
19 entitled to ask him.

20 GENERAL SCHMUTZER: Thank you, Your Honor.

21 BY GENERAL SCHMUTZER:

22 Q. The truth of the matter is that Officer Davenport
23 called you in -- had you come in there because you had sent word
24 to the sheriff that you wanted to talk to him about this?

25 A. No, sir, I never had even spoke to Chester Owenby

1 at the time. I never had even spoke to the man before.

2 Q. When you got in there that's the first thing they
3 asked you. "We understand you want to talk to us."

4 A. No, sir, it wasn't the first thing that was said.
5 The man wanted to know -- he said he'd come in, he said he
6 wanted to give me an opportunity to talk to him, that he
7 believed I had something I could tell him. There was never
8 nothing -- they all got fired up mad when I told them I wanted
9 my attorney present, and they refused to call my attorney.

10 Q. And that was it?

11 A. That was it. I told them to take me back to my
12 cell. I said, "I've not got nothing else other to tell you what
13 I done told officials," and I said, "You got anything you want
14 to ask me, call my attorney." I said, "He's done made the brief
15 -- the statement that I am not to be questioned unless he's
16 present."

17 Q. The fact of the matter is, too, that when they
18 asked -- they are the ones that asked you if David Webb was
19 representing you, and you said he was not representing you at
20 that time, you hadn't gotten around to paying him yet?

21 A. No, sir. No, that's -- I told them I was in the
22 process of getting the money up to hire him, that I hadn't paid
23 him yet, but he was representing me. That's the very words I
24 told him.

25 Q. So the statement that Davenport wrote out, some

1 five pages in length, is all just a lie and a concoction on his
2 part?

3 A. I hate to call the man just a liar to his face, but
4 I'd have to call him and Chester a liar because that's exactly
5 what it is, the whole thing. I never -- I was took out,
6 interrogated, cussed, told I was going to get my kid took away
7 from me, spend the rest of my life in prison.

8 MR. WEBB: Come down.

9 THE WITNESS: If I may say one more thing.

10 MR. WEBB: No, come on down.

11 GENERAL SCHMUTZER: No, let him talk.

12 MR. SUTTON: Well, I just want to say I hope God
13 may be with her, and I'd just like to say I feel hurt for you
14 and her, and I...

15 THE COURT: Mr. Sutton, Mr. Sutton. Don't be
16 talking after your attorney tells you to be quiet. Anything
17 further?

18 MR. WEBB: No, Your Honor.

19 THE COURT: Anything from...

20 MR. WEBB: The defense rests.

21 THE COURT: Anything from the State?

22 GENERAL SCHMUTZER: Call David Davenport back.

23 **

24 DAVID DAVENPORT was called, and being duly sworn,
25 was examined, and testified as follows:

DIRECT EXAMINATION

BY GENERAL SCHMUTZER:

Q. Agent Davenport, when you took this statement from the defendant, Sutton, or when you talked to him, did you, sir, begin -- rather than telling him that you had been told that he wanted to officers -- rather than telling him that, did you go in there, and just tell him that you wanted to give him one more chance to talk about this, and that's the reason why you were there?

A. If Mr. Sutton had not sent word that he wanted to talk, I would not have been there. He initiated...

Q. I understand that he initiated it.

A. Right.

Q. What I'm asking you, sir, did you...

A. I did not -- I started the conversation by advising him of his rights, and told him that I understood he was represented by Mr. Webb, and that he had asked to see officers. That's how it started. I didn't start anything.

Q. During the course of that, did you begin shouting at him, and cursing at him, and yelling at him, and getting up, and leaving the room at any time during this conversation with him?

A. I might have left the room. I did leave the room to get some coffee at one time. I never remember cursing him, or getting mad at him, or anything else. We weren't in the room

1 that long.

2 Q. Did he tell you that he -- that his lawyer was
3 David Webb, and that David Webb was representing him, and that
4 he wouldn't talk to you unless David Webb was present?

5 A. No, sir, he did not.

6 Q. All right. Did he then quit, and not say anything
7 to you, and then you made this statement up that...

8 GENERAL SCHMUTZER: I think we filed it, Your
9 Honor. Here's a copy.

10 BY GENERAL SCHMUTZER:

11 Q. This statement, and I'll have you look at it, sir,
12 is this a copy of the original statement that you took -- wrote
13 out?

14 A. You've cut some of the bottom off of this copy,
15 General Schmutzer, but it's...

16 Q. That's just from the Xerox, right?

17 A. Yes, it is, but it is a copy of it.

18 Q. All right, sir, and that -- when you took -- the
19 question is, sir, did you merely make that statement up, and
20 attribute it up to this man?

21 A. Certainly not.

22 Q. That's all.

23 THE COURT: Anything?

24 MR. WEBB: No.

25 THE COURT: You may step down.

1 GENERAL SCHMUTZER: May we file that, Your Honor?
2 (EXHIBIT #9 - Statement; marked and filed.)

3 THE COURT: Argument?

4 GENERAL SCHMUTZER: We'll waive opening. The Court
5 knows the law.

6 MR. WEBB: Your Honor, what the Court now knows,
7 and I think it is typified by General Schmutzer wherein they
8 have the attitude -- Gary Sutton wanted to give a statement, and
9 I said, "Gary, no," and General Schmutzer said, "No, go ahead,
10 and let him talk." That's what we have here.

11 We have a situation where these officers of law
12 know they need more to convict this fellow. We've got a
13 situation where they have chosen to reduce this crippled
14 statement, where his life hangs in the balance, to a swearing
15 contest.

16 Sure there's conflict in testimony. He says it's
17 this way, and Gary Sutton says it's another way. Who is the
18 Court going to believe; an honorable detective, or a man charged
19 with first degree murder? Someone is lying. Both sides have
20 a vested interest. We want to save our life; they want to take
21 it.

22 Don't let anybody kid you that David Davenport, and
23 these other agents do not have a vested interest; they do. The
24 Court can take notice more so where there's a situation where
25 their case is circumstantial and weak at best. They are

1 grasping at straws. They've come in here, they're going to let
2 this Court decide this man's fate based on a swearing contest.

3 What's the best corroboration this Court could
4 have? We wouldn't be here. Detective Widener knew what the
5 best corroboration was; a tape recording. He knew that two
6 times. One of the detectives from the Sevier County Sheriff's
7 Department knew that, and he told you, "That's the way we do
8 it." There's no doubt.

9 We didn't have a tape recorder; I wish we did.
10 They did, and chose not to use it. It is suspect from the word
11 go.

12 What's the next best evidence we have? We've got
13 two people saying two different things. What's our next best
14 evidence? The best evidence is the unsigned rights waiver.
15 Let's think about that.

16 Gary Sutton had signed them in the past, and in the
17 past, he had given statements. Think about it in a common sense
18 frame of mind. This man tells Chester Owenby, "I want to give
19 a statement," and he goes in there, and gives a statement. He'd
20 signed rights waivers in the past, and gave statements; why
21 didn't he do it this time? I'll tell you why he didn't:
22 Because he didn't waive the right to counsel that he had already
23 invoked.

24 There's a heavy burden imposed on this government,
25 and this Court must presume that he did not waive his rights,

1 and they must rebut that, and it is a heavy burden. And what
2 it comes down to, as I told the Court before, a swearing contest
3 that a man lives or dies by. They didn't use the police
4 procedures they should have, and they are the ones...

5 THE COURT: Mr. Webb, let me ask you about that
6 just a minute. Now, as to police procedure, now, all of us know
7 that each department adopts its own procedure, and -- but now,
8 obviously, as we all know, there is no constitutional
9 requirement that they be recorded. We all -- having stood on
10 the same side of the courtroom that you have most of my career,
11 I would certainly be making the same arguments that you are
12 making, but -- and there is some credence, I think, to the fact
13 that it might be better most of the time for, at least,
14 everyone's sake if they were recorded. That's a strong
15 argument.

16 But can you cite to this Court any case that
17 supports your position on that?

18 MR. WEBB: That it must be tape recorded?

19 THE COURT: Right.

20 MR. WEBB: Of course not. I can't, but maybe some
21 of my learned counsel can.

22 THE COURT: Well, you're getting a lot of help from
23 there, I see.

24 MR. WEBB: Well, we're talking about serious
25 issues, and we want all the help we can get. We want a little

1 help from the Court. But it's a matter of practicality, a
2 matter of insuring that truth and justice is followed to the
3 letter, a matter of scrupulously protecting a man's right to
4 invoke his right to counsel. What you've got is a swearing
5 contest that did not have to be. That's the point I'm trying
6 to make. Now, I want to move on, and talk about the documents
7 that we have of record.

8 The proof that you've heard is that this man, on
9 more than on occasion, signed a rights waiver, and gave a
10 statement. No problem. He didn't that day; he refused. Common
11 sense tells you if I'm going to give a statement, let's give
12 one. "Yeah, we'll sign that. No problem."

13 Common sense and logic tells you if I ain't going
14 to give one, I ain't going to sign that paper, period,
15 paragraph, move on. They ain't no guess work about that.

16 The law uses these rights waivers to corroborate
17 that a defendant's statement was voluntarily and
18 constitutionally given. Why cannot the same logic equally apply
19 that if this man refused to sign a rights waiver that he clearly
20 did not waive, or give up any constitutional rights that he has.
21 It makes sense to me.

22 Secondly, let's talk about the other documents.
23 David Davenport says, "I go in there, and I write down, best I
24 know, what he said." Fine enough. Why don't you give this man
25 whose life is on the line a chance to read it and sign it?

1 "Nope, ain't going to do that. Don't want to do it." I t ' s
2 suspect. Gary Sutton never adopted that statement, never signed
3 it, never asked to read it.

4 Let's look at some other documents. David
5 Davenport tells you at 11:40 a.m. Gary Sutton was in that room,
6 and he was being advised of his rights, and was waiving his
7 rights. Well, the jail log says they didn't even take him from
8 his cell until 11:42, and Kent Hatcher told you, and who is
9 better to tell you that, that it takes at least five minutes to
10 get there. It's going to be hard for me to figure this one out.

11 GENERAL SCHMUTZER: I object, Your Honor, to what's
12 going to be hard for him to do.

13 THE COURT: This is non-jury.

14 MR. WEBB: It's going to be hard for this Court to
15 figure out who David Davenport, at 11:40 a.m., could be advising
16 this man of his rights, and him waiving them, when he's not even
17 in the room. Thank you, Your Honor.

18 GENERAL SCHMUTZER: May it please the Court,
19 certainly somehow this time got to be apparently and seemingly
20 important. I submit to the Court that, obviously, different
21 watches say different times, and unless it is shown that the
22 individual, the one who is putting the time in the log, and the
23 one when David Davenport's taking the statement, their watches
24 are synchronized, or they are using the same watch, I submit to
25 you, is really immaterial. The bottom line is, I think you get

1 right down to it, what this man is saying is that Chester Owenby
2 and David Davenport are corrupt.

3 Any officer who would come in here, and swear a
4 lie, and not only that, but make up a statement, and attribute
5 it to this man that he never made, is flat out corrupt, and
6 there's absolutely no proof that these officers -- they don't
7 have -- this man right here is the one that's got the most at
8 stake. These officers -- you know, Chester Owenby has nothing
9 in it. You could tell he was really rather upset that he was
10 even over here. He certainly have nothing in it at all, whether
11 it falls one way or the next.

12 David Davenport, he'll be out and about regardless
13 of how this case comes out, and he'll still be working -- still
14 be investigating. Just look at the common sense. If these
15 officers were corrupt, and in particular, David Davenport, was
16 going to be corrupt, I submit to you that if he was going to lay
17 his character and integrity as an officer of 17 years -- T.B.I.
18 agent -- on the line, and his job on the line, you better
19 believe he wouldn't conjure up a statement that on its face is
20 exculpatory, and attribute it to this man right here. If he's
21 going to go that far, and be corrupt, he's going to attribute
22 to this man right here a confession, and he didn't do it.

23 This statement that they're so afraid of is nothing
24 more -- and you'll get into this later on -- they'll be telling
25 you how this statement is irrelevant and immaterial because it's

1 not a statement against interest. It is not a confession. It
2 is exculpatory, and on it's face, it is.

3 To suggest that Agent Davenport would go that far,
4 and then come up with something to exculpate this man in the
5 crime, and yet, he's wanting to see him put away, and that's his
6 motivation for making all this up? Your Honor, it's outside the
7 realm of believability.

8 Sutton is unbelievable. You saw it from the stand.
9 The man is -- I won't say any more, Your Honor. The proof is
10 there that this man initiated this contact. This follows the
11 law exactly. He initiated it through Chester Owenby by saying
12 that he wanted to talk to the sheriff, talk to the officers.
13 The sheriff got the word to David Davenport, and he come over,
14 and sat down with this man, and told him he understood he wanted
15 to talk to him. He advised him of his rights, and told him that
16 he knew he had Webb, and gave him an opportunity to have Webb
17 there. He even wrote it down.

18 This man is trying to play smart. He's obviously
19 no stranger to rights -- constitutional rights, law enforcement
20 officers. He says, "Well, I'd better hedge my bets here now
21 because I've got my lawyer over there. I'm going to give them
22 something that will pull my chips out of the fire here, and by
23 the same token, I'll hold back a little bit. I won't sign that
24 advise of rights form. But I'll tell them, yeah, I want to go
25 ahead and talk to you anyway, and talk to them." And he rambled

1 on and on in a five page statement.

2 If the Court will look at it, it's certainly
3 nothing that someone would go in, and make up, whose only
4 interest was to see this man go to the electric chair.

5 **THE COURT:** The Court has heard the testimony of
6 Officer Owenby, and Officer Davenport, and Mr. Sutton. It is
7 obviously -- there is obviously a conflict in their testimony,
8 but the Court must find that the overwhelming evidence is that
9 Chester Owenby was contacted by this defendant to -- that this
10 defendant either wanted to see, or talk to Sheriff Ogle.
11 Officer Davenport testified consistently with that, that he
12 received a call from Sheriff Ogle, that in response to that
13 telephone call, he went to the Sevier County Jail, and there met
14 with this defendant.

15 In all candor with you, gentlemen, the statements
16 that General Schmutzer made about the scope of the statement
17 that Officer Davenport took is most -- is most revealing and
18 most correct. The Court would have to assume that if Officer
19 Davenport set out to conjure up a statement by this defendant,
20 it would have been one more incriminating than the one in
21 question in this case at this time that, on it's face, is not
22 that incriminating.

23 The Court, for those reasons, and based on the
24 credibility of the witnesses, the Court must find and does find
25 that the statement was obtained as a result of being initiated

1 by this defendant, and after being advised of his rights again,
2 gave the statement in question. Therefore, it is admissible.

3 **GENERAL SCHMUTZER:** Thank you, Your Honor. What
4 does the Court want to go to next?

5 **THE COURT:** Let's see. As I explained to counsel
6 earlier, to be real honest with you, I don't want to -- I
7 haven't read the statements in total. The only aspects of the
8 statements I have seen were those aspects of them that I saw at
9 the bond hearing. Because of that, and because of their length,
10 I'm not going to hear motions on the relevant issue until I read
11 those statements in full. Therefore, I will go on to any other
12 motions that need to be addressed today. Some of them, in
13 looking over the list, some are cumulative, but I will go to
14 such other motions as necessary.

15 Let's take a short break, and then we'll come back.

16 (COURT STOOD IN RECESS)

17 **THE COURT:** Okay. The next motion is on the
18 suppression of evidence seized pursuant to a search warrant on
19 behalf of Mr. Dellinger by Mr. Miller.

20 **MR. MILLER:** Your Honor, please, there was, I
21 think, a total of two search warrants executed; one by Officer
22 Davenport, and one by Detective Jim Widener.

23 **THE COURT:** Okay.

24 **MR. MILLER:** The one by Agent Davenport, I think
25 everything seized pursuant to that is not going to be -- the

1 State is not going to seek to put that into evidence, so we are
2 not going to attack that search warrant.

3 THE COURT: Okay.

4 MR. MILLER: Which leaves the warrant executed by
5 Detective Widener.

6 THE COURT: Okay.

7 MR. MILLER: When Your Honor set the motion
8 deadline in this case, I began to frantically look at the
9 various issues, and, of course, the search warrant, and filed
10 a motion to suppress based on the search warrant, and set forth
11 a ground that I don't think holds a whole lot of water -- it's
12 based on hearsay, the warrant -- the affiant's hearsay.

13 I would like to be allowed to amend the motion to
14 suppress based on the search warrant to include additional
15 grounds, and seeing how a trial date has not been set, and I see
16 no prejudice that would occur to the State by this amendment,
17 I would ask the State -- that the Court allow these amendments.

18 I would like to amend the motion to suppress to
19 include the following grounds:

20 1. That the defendant was not personally served
21 with a copy of the executed search warrant as required by the
22 Rules of Criminal Procedure.

23 Also, and think the most compelling reason to
24 suppress this evidence is that Detective Widener went to the
25 trial justice judge, and set forth in a search warrant that he

1 was seeking a .12 gauge shotgun, model unknown, and a .12 00
2 shotgun shells, Remington Peters brand. He set forth in his
3 affidavit how they came to discover the death of Tommy Griffin,
4 and...

5 THE COURT: I'm sorry, say that again, Mr. Miller.

6 MR. MILLER: He set forth in his affidavit how they
7 discovered the death of Tommy Griffin, and other parts of their
8 investigation, including that they -- Tommy Griffin had been
9 seen with Mr. Dellinger and Mr. Sutton on this evening, and that
10 they had bailed him out of jail on a certain evening.

11 When they went and executed the search warrant,
12 when they went in, they seized, reading from the return, 10
13 shotgun shells -- it does not specify what size the ammunition
14 was -- six .357 shells, four 30-06 shells, two shotgun shells,
15 one box 303 shells, one .20 gauge shotgun shell, one box .20
16 gauge, all unfired, one box .20 Winchester, one British 303 1917
17 model rifle, and one, it looks to be, trunk mat. They did not
18 seize the .12 gauge shotgun or the 00 shotgun shells. There is
19 not showing, and I don't think there is any proof that these
20 items they did seize had any relevance to the crime that the
21 State was investigating.

22 While the case law clearly holds that they can go
23 in looking to see if certain specified items, and finding other
24 criminal instruments, can seize those, but there's no proof that
25 these had any connection at all to the criminal investigation

1 they were conducting, so we would move to suppress all that
2 evidence.

3 **THE COURT:** Let me ask you this, Mr. Miller. Are
4 you seeking to suppress on grounds of constitutional infirmities
5 in the execution of it, or are you seeking to suppress by means
6 of a motion in limine, in effect, the evidence seized as not
7 being relevant to the prosecution of this case?

8 **MR. MILLER:** Well, it's the prior ground, Your
9 Honor, and it's based on Rule 41, which sets forth:

10 "Property that may be seized by a warrant.

11 1. Property that constitutes evidence of the
12 commission of a criminal offense.

13 2. Contraband, the fruits of crime, or things
14 otherwise criminally possessed.

15 3. Property designed or intended for use, or which
16 is, or has been used as the means of committing a
17 criminal offense; and

18 4. Persons for whose arrest there is probable
19 cause, or who is unlawfully restrained."

20 **THE COURT:** Right.

21 **MR. MILLER:** None of those were present giving
22 grounds to seize these items they did seize. This officer went
23 in, and had no knowledge -- they were investigating a murder
24 that occurred with a .12 gauge shotgun, not with a British 303
25 1917 model rifle, or .20 gauge shells, or 30-06 shells, and had

1 no business taking these things.

2 I think when Mr. Slone was talking yesterday in
3 chambers about the seizure that was made pursuant to a drug
4 search warrant, and this man had thousands of dollars worth of
5 baseball cards, and they couldn't figure out any theory to take
6 those baseball cards under, I think it's the same situation
7 here. There's no reason -- they had no business taking these
8 other items.

9 THE COURT: Okay. General Schmutzer, what is the
10 evidence he's objecting to, i.e., the pistol, I believe you
11 said, and other rifles...

12 MR. MILLER: I don't think I mentioned a pistol.

13 THE COURT: I'm sorry.

14 MR. MILLER: Basically it's ammunition, fired and
15 unfired, and a rifle, a 303.

16 THE COURT: Okay. What is the State -- is the
17 State seeking to introduce that evidence? Is there any
18 connection...

19 GENERAL SCHMUTZER: The only evidence, Your Honor,
20 that we're seeking to introduce as a result of the search
21 warrant is a shotgun shell, and a shotgun barrel, and a 303
22 rifle.

23 THE COURT: Okay. So the other ammunition he's
24 talking about is not being asked to be admitted into evidence?

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

1 **THE COURT:** So what is your response in light of
2 that, Mr. Miller?

3 **MR. MILLER:** Your Honor, of course, I don't recall
4 the barrel being listed among these items, but any shells that
5 aren't those testified in the search warrant as being .12-00
6 shotgun shells, I don't think the State -- that may be what
7 they're trying to introduce, I don't know. But we object to any
8 other shells being introduced, as well as the 1917 model British
9 303 rifle.

10 **THE COURT:** Upon what basis does the State say they
11 can introduce the rifle?

12 **GENERAL SCHMUTZER:** Consent, Your Honor. The wife
13 gave consent for the officers to take it. This search warrant
14 was executed by Blount County officers, along with Sevier County
15 officers who were simply assisting them at that time in the
16 investigation of the Tommy Griffin murder in Blount County.

17 At that time, Connie Branum was missing, but she
18 had not been found. It wasn't until some three hours, or so,
19 after the search warrant was executed that her body was found.
20 So there was actually no investigation being conducted there.

21 Officer Widener went in looking for shotgun shells
22 and a shotgun, pursuant to this. He found no shotgun; he did
23 find a shotgun barrel, but not the weapon itself -- removable
24 barrel -- a Mossberg with the interchangeable barrels. While
25 looking, and the wife was cooperative -- Mrs. Dellinger was

1 cooperative, and was there, and he came on the 303, and said,
2 "Do you mind if we take this?" She said, "No, go right ahead.
3 You may take it."

4 At that time, there wasn't any connection between
5 that and the Tommy Griffin case, quite frankly, and it wasn't
6 until later on that in the investigation of the subsequent case
7 it became relevant.

8 MR. MILLER: Your Honor, one's prone to be
9 cooperative when the officer possesses the search warrant that
10 he's executing.

11 GENERAL SCHMUTZER: I think we'll show, Your Honor,
12 that it went beyond that, and we have a case directly in point.

13 THE COURT: Well, we need to go to proof -- okay.
14 Are you conceding, then, that they had no right to take it under
15 the terms of the search warrant.

16 GENERAL SCHMUTZER: The search warrant does not
17 specify a 303 rifle; that's correct, Your Honor.

18 THE COURT: And so, then, you base the foundation
19 for that on the consent of Mrs. Dellinger?

20 GENERAL SCHMUTZER: That's correct. I think -- so
21 I can get it straight, Your Honor, I think we've sort of shifted
22 gears here. Where we're going at this point is on the scope of
23 what they seized, and whether or not they can seize these items
24 -- the item we expect to introduce, in particular, the rifle as
25 a result of this search. And number two, we're going to -- I

1 guess that's it. No, you had another one you wanted to raise.
2 He just raised these...whether or not it was served on the
3 defendant.

4 MR. MILLER: Your Honor, one more issue I would
5 include is that the officer -- the agent, Detective Widener,
6 does not set forth in his affidavit sufficient facts, or did he
7 have knowledge of sufficient facts to establish probable cause
8 that he would find the shotgun and the shells in Mr. Dellinger's
9 residence, and that's the standard. He has to know that in Mr.
10 Dellinger's residence that gun is present, or that criminal
11 activity is afoot inside that residence, or he cannot -- or the
12 search warrant should not be issued.

13 THE COURT: Call your witnesses.

14 MR. MILLER: Your Honor, we would include the
15 Mossberg barrel in this motion to suppress. It's not on the
16 return, but if Officer Widener found it pursuant to this
17 warrant, we'd include that.

18 THE COURT: May I see the search warrant, or a copy
19 of the search warrant? Is this all of the affidavit, this one
20 page? General Schmutzer, what do you say about the affidavit
21 on the search warrant?

22 GENERAL GREEN: Your Honor, please, apparently Mr.
23 Miller's argument on the search warrant, the affidavit portion,
24 is premised upon the argument that probable cause does not exist
25 to search this particular residence. It would be the State's

1 position, and we have a case, Your Honor, if the Court wants to
2 see it, that in a case of this nature, i.e., a murder case, that
3 a person's home is a natural depository. The inference may be
4 drawn that such a residence is a natural depository for items
5 which would normally be kept, i.e., a weapon, clothing, or
6 something of that nature.

7 That case, Your Honor, is State of Tennessee vs.
8 Florence Smith and Oscar E. Smith, a Robertson County case,
9 which was affirmed earlier this year by the Court of Criminal
10 Appeals, June Session, 1991 -- excuse me, Your Honor. It would
11 be the State's position that the -- based on the inference, as
12 set forth in this Smith case, that certain Mr. Dellinger's house
13 would be a natural depository for items associated with facts
14 set in this warrant.

15 THE COURT: In all candor -- you know, in order to
16 jump to that, I think there has to be some legally sound basis
17 for that inference, and if that case so supplies that inference
18 as a matter of law, that's fine, because otherwise the affidavit
19 doesn't do it.

20 GENERAL SCHMUTZER: May we show the Court that
21 case?

22 THE COURT: Yes.

23 GENERAL GREEN: I think it would be worthwhile for
24 the Court if the Court could just look at the case.

25 GENERAL SCHMUTZER: May I approach the bench, Your

1 Honor?

2 THE COURT: Yes. I think you would agree that the
3 affidavit itself doesn't establish that.

4 GENERAL GREEN: The affidavit, I believe, you are
5 correct, Your Honor, does not make reference to Mr. Dellinger's
6 residence.

7 THE COURT: Right.

8 MR. MILLER: Is that a published opinion?

9 GENERAL GREEN: No, not to my knowledge it's not.

10 THE COURT: So the State's position is that an
11 officer is allowed to draw an inference that, in this type of
12 crime, the home is a natural repository. Is that what you're...

13 GENERAL GREEN: I think what that case says, Your
14 Honor, is the officer and the magistrate may draw that
15 inference.

16 THE COURT: Right.

17 GENERAL GREEN: Yes, sir.

18 THE COURT: The Court notes that it's an opinion
19 by our very respected former judge, Judge Duncan -- Joe Duncan
20 wrote that opinion. Bring the witness as to the consent issue -
21 - let's go ahead, and do that.

22 GENERAL SCHMUTZER: Call Jim Widener.

23 MR. MILLER: Your Honor, in that the defendant's
24 wife may be a witness in this particular hearing, she's in the
25 courtroom, and I guess she would need to be placed under the

1 rule.

2 THE COURT: Okay. Mrs. Dellinger, stand, and raise
3 your right hand, please, ma'am. (Witness sworn.) If you would,
4 please step outside the courtroom until you are called.

5 **

6 JIM WIDENER was called, and being duly sworn, was
7 examined and testified as follows:

8 DIRECT EXAMINATION

9 BY GENERAL SCHMUTZER:

10 Q. For the record, sir, you are the same Jim Widener
11 that testified here earlier, is that right?

12 A. Yes, sir.

13 Q. Sir, this time going to February the 28th of this
14 year, you had earlier testified that you were here in Sevier
15 County investigating the death of Tommy Griffin. I believe you
16 obtained a search warrant, is that correct?

17 A. Yes, sir.

18 Q. For the home of James Dellinger?

19 A. Yes, sir, I did.

20 Q. And when you obtained that search warrant, did you
21 then go to the home of James Dellinger?

22 A. Yes, sir.

23 Q. And it is stated on the affidavit as to where he
24 lived, is that right?

25 A. Yes, sir, it is.

1 Q. When you went up there were there other officers
2 with you that went with you?

3 A. Yes, sir, I had Chief Detective Gorley and Mr.
4 Munsey, our crime technician from our department, and then
5 representatives from the Sevier County department.

6 Q. At that time the Sevier County Sheriff's Department
7 was only assisting you all in your investigation?

8 A. That's correct, sir.

9 Q. At this time the body of Connie Branum had not been
10 filed?

11 A. No, it had not, sir.

12 Q. You were -- pursuant to this warrant you went to
13 this home. When you got there, was there anyone there?

14 A. No, sir.

15 Q. What did you do? Did you wait or did you go in?

16 A. We -- we did not go in the home, sir.

17 Q. All right. While you were there waiting did anyone
18 show up?

19 A. Linda Dellinger and Angel, her daughter, showed up
20 after a few minutes -- pulled in the driveway.

21 Q. When they showed up, just what occurred, what
22 happened, what did you do?

23 A. When Linda and Angel got out of the car they
24 started walking toward the back stoop there that led up to the
25 back door, and I was standing in the vicinity of the back door,

1 and I introduced myself again, and asked her if she remembered
2 me. I informed her -- I had the search warrant on the inside
3 pocket of my jacket, and I pulled the warrant out, and I said,
4 "Linda, I have a search warrant here. We're up here looking for
5 shotgun shells or shotguns, and we'd like to look in your
6 trailer."

7 Well, at this time -- while I'm talking to her
8 she's going up to the stoop to the door to unlock the door, and
9 that's when she turned around and said, "You don't need any
10 search warrant, you can come on in if you want to."

11 Q. And did you do that?

12 A. Yes, sir. Normally what I try to do is to read the
13 warrant to the person before I execute entry into the home.

14 Q. Were you able to do it on this occasion?

15 A. Well, I...

16 Q. ...or did she invite you on in?

17 A. She invited me on in, and I followed her into the
18 kitchen where I stopped her, and read the warrant to her and
19 what we were looking for.

20 Q. And what did she -- did she -- after you did that,
21 did she tell you anything about the weapons or...?

22 A. Well, she had stated that she was going in -- after
23 she had said, "Come on in. I don't know much about gun stuff,
24 but I'll show you where what I know is," or words to that
25 effect. And she had walked straight to the kitchen and opened

1 two overhead cabinets, and that's when I stopped her, and said,
2 "Linda, I'd like to read this warrant to you, and I want you to
3 stay with me when we go through the house -- not get ahead of
4 me."

5 Q. After -- what did you -- what was up in the closet
6 there in the kitchen?

7 A. There was some shells, I believe, sir -- different
8 types of shells.

9 Q. Did you all see some of those?

10 A. Yes, sir.

11 Q. Where did she take you then?

12 A. She started back to the back bedroom, and again,
13 I stopped her, and I said, "Let's go through the rooms between
14 here and there, and just stay with me while we do this." And
15 we eventually worked our way back to the bedroom.

16 Q. When you got to the bedroom -- now -- up to this
17 point -- you did finally get to read her the warrant, is that
18 right?

19 A. Yes, sir, I had read her the warrant in the
20 kitchen.

21 Q. All right. When you got back in the bedroom, where
22 did she take you?

23 A. She took me -- if you're walking in the bedroom
24 door, the bed's here in front of you. Directly across the bed
25 there was a closet, and I believe one of the closet doors was

1 open. I could see clothes when I walked in, and she walked
2 around into the closet, and I asked her just to wait and stay
3 with me while we went ahead and checked the closet.

4 Q. And what did she do?

5 A. She stood by to my left rear while I searched the
6 closet.

7 Q. And that's what she had pointed out to you? She -
8 - had she indicated to you going back that there were some other
9 weapons or something there??

10 A. Yes, there was some more gun stuff in the closet.

11 Q. And she had taken you to it?

12 A. Yes, sir.

13 Q. What did you find there?

14 A. I found some shells, a barrel for a Mossburg
15 shotgun, and in the left corner back behind some of the clothes
16 -- when I looked in, I could see the stock of a long gun from
17 about the trigger guard down, and when I reached in and moved
18 the clothes aside and brought it out it was a rifle.

19 Q. Now, at that point you weren't looking for a rifle,
20 were you?

21 A. No, sir, I didn't. She was standing to my left
22 rear, and as I pulled the rifle out she said, "That's James'
23 gun. He's had it for a long time. I think he bought it at an
24 auction."

25 Q. All right. What did you do?

1 A. I turned -- at that moment I turned and laid the
2 gun behind me on the bed where I'd laid the shells and shell
3 casings at.

4 Q. Did you have any more conversation with her about
5 that weapon?

6 A. Yes, sir, I did.

7 Q. And what was that?

8 A. After I finished clearing the closet I looked back
9 at her, and I said, "Linda, I'd like to also take this rifle if
10 I can."

11 Q. And what did she tell you?

12 A. She said, "Okay."

13 Q. Now -- what was the model of the rifle? What
14 caliber was it?

15 A. It was a 303 caliber.

16 Q. And you did take it?

17 A. Yes, sir.

18 Q. And I take it you also, during the course of that
19 search, found some shells also out in the yard?

20 A. Yes, sir, I found some spent shells that had been
21 fired at some time -- various caliber right there in that yard,
22 and Angel, who lives in the trailer next door, we requested
23 consent to search from her because we were finding shells all
24 around the yard and we wanted to check that out too, and she
25 gave us consent, and we also found shell casings in her yard.

1 Q. And did you -- specifically, did you find some 12
2 gauge shotgun shells?

3 A. Yes, sir, I did.

4 Q. And did you see some shotgun shells?

5 A. Yes, sir, I did.

6 Q. And after you were through did you serve a copy of
7 the warrant on anyone?

8 A. On Linda, before I left.

9 Q. All right. Now, the defendant, James Dellinger,
10 was not there, I take it?

11 A. No, sir, he wasn't.

12 Q. Did he ever show up while you were there?

13 A. I did not see him there, sir. I believe he was
14 back here along with Gary at the sheriff's department, as far
15 as I know.

16 Q. And then you brought the warrant back where you
17 made a return?

18 A. Yes, sir, the next day.

19 GENERAL SCHMUTZER: You may cross examine.

20 **

21 CROSS-EXAMINATION

22 BY MR. MILLER:

23 Q. Detective Widener, had you gathered up some shells
24 there in the yard before Linda and Angel had come up?

25 A. We hadn't removed any, sir, but we had seen some,

1 and marked the spots where they were at.

2 Q. You were there on their property in their yard
3 looking at various shells?

4 A. Yes, sir.

5 Q. You had not been invited onto the property?

6 A. No, sir.

7 Q. So by what right did you place yourself on that
8 property searching and looking for those shells?

9 GENERAL SCHMUTZER: I think, Your Honor, that's a
10 legal question and not one for the officer. The
11 Court will decide what happened.

12 THE COURT: Right.

13 BY MR. MILLER:

14 Q. And I think you testified that you were actually
15 on the back steps there at the door when Linda pulled up?

16 A. No, sir.

17 Q. Well...

18 A. I was standing out from the back stoop. She
19 proceeded up the back stoop, sir.

20 Q. How close to the back door were you?

21 A. I was about eight to 10 feet away.

22 Q. And I believe you said the first thing you did was
23 show her the search warrant?

24 A. Yes, sir. I had reached inside my pocket. It was
25 still folded up. I brought it out as I was talking to her.

1 Q. She never gave you consent to come in prior to you
2 showing the search warrant?

3 A. No, sir, she had her back to me as I was bringing
4 it out of my pocket talking to her, and she had unlocked the
5 door and said, "You don't need that, just come on in."

6 Q. "No" would be the answer to my question? She did
7 not consent to let you into the house prior to seeing the search
8 warrant?

9 A. No, sir, she didn't unlock the door for us.

10 Q. Do you have a signed written consent form that she
11 consented to let you in the house?

12 A. No, sir.

13 Q. Is it your normal policy when searching pursuant
14 to a consent to search to have such a form filled out and signed
15 by the person who is consenting?

16 A. Could you rephrase that, sir, I lost you on it?

17 Q. Is it normal policy of you or your department to
18 obtain a written signature giving consent to search?

19 A. When requesting consent to search, yes.

20 Q. And you did not do that this time?

21 A. No, sir.

22 Q. Why not?

23 A. For what she had said to me at that moment, plus
24 the fact I was holding a search warrant.

25 Q. And you did fully execute the search warrant by

1 reading it to her?

2 A. Yes, sir.

3 Q. You seized certain items and reported those items
4 on the officer's return on the search warrant?

5 A. Yes, sir.

6 Q. Did you leave an inventory of any type with Mrs.
7 Dellinger on what you'd taken?

8 A. We left a -- the copy of the search warrant with
9 the return filled out, and I don't know if my crime tech, the
10 man that was with me and in charge of actually taking physical
11 custody of the evidence -- I don't know if he left a written
12 inventory of that or not, sir.

13 Q. When you search pursuant to a consent to search,
14 is it normal policy to leave an inventory sheet?

15 A. We leave the receipt for what we take, sir, yes.

16 Q. And no such receipt was left that you know of?

17 A. Pursuant to a consent to search, no, sir.

18 Q. I take it -- you said Linda and Angel arrived
19 together, is that correct?

20 A. Yes, sir. I believe Angel had her child with her,
21 also.

22 Q. And was she coming in the house with Mrs.
23 Dellinger?

24 A. Yes, sir.

25 Q. And she, of course, saw the search warrant, also?

1 A. Yes, sir.

2 Q. And it was shortly thereafter after she had seen
3 the search warrant and after you all had searched the trailer
4 that you went over to her yard?

5 A. It was probably, I'd say, about 30 or 45 minutes
6 from that time.

7 Q. Why did you seize the rifle?

8 A. Sir, we had received word the night before when I
9 was drafting the warrant that the folks were moving out of that
10 trailer and leaving, and when we got up there, I really didn't
11 expect to find anything except maybe some hulls out in the yard.

12 Q. Why did you seize the rifle?

13 A. It was a weapon. I was investigating a murder.

14 Q. What was your information as to what type of weapon
15 was used to commit the murder?

16 A. A shotgun, sir.

17 Q. Why did you seize a rifle?

18 A. It was there, and I didn't know how long it would
19 be there.

20 MR. MILLER: Does the Court have that -- I need a
21 copy of the return, if the Court has that.

22 GENERAL SCHMUTZER: I believe I've got it.

23 BY MR. MILLER:

24 Q. I believe you also seized some British 303 shells?

25 A. Yes, sir, the ammunition that we found inside the

1 trailer.

2 Q. Did you seize some .20 gauge shotgun shells?

3 A. I believe so, sir.

4 Q. Some 30.06 shells?

5 A. Yes, sir.

6 Q. Some .357 shells?

7 A. Yes, sir, those may have been shell casings.

8 Q. And you list 10 shotgun shells without listing the
9 caliber or anything. Do you know what...

10 A. Those were wrote down in caliber on the lab
11 submission. Those were the ones found outside.

12 Q. Okay. If you can, tell me why you seized any of
13 these items that you list on your return in connection with this
14 investigation?

15 A. Sir, we had come there looking for shotgun shells
16 or...

17 Q. What gauge shotgun shells?

18 A. .12 gauge.

19 Q. Why did you take the 30.06 shells and .357 shells?

20 A. In the outside -- out in the yard, we found a large
21 number of various caliber shell casings intermingled with a .12
22 gauge. I didn't know if it would be relevant or not, but I was
23 there, and we were there to execute a warrant, and from the
24 information I had received, I didn't know if anything in the
25 trailer would be there the next day or not.

1 Q. You did not know that these items were relevant to
2 the homicide you were investigating?

3 A. No, sir.

4 Q. But you took them anyway?

5 A. Yes, sir.

6 Q. In swearing out this warrant, I take it it was you
7 personally -- you went before Judge Sexton?

8 A. Yes, sir.

9 Q. Did you swear to him that your information was that
10 Tommy Griffin was involved in a fight with James Dellinger and
11 Gary Sutton?

12 A. Yes, sir.

13 Q. You do not say you know that to be a fact, or
14 certainly at that time, did not know that to be a fact, is that
15 correct?

16 A. I had received information through witnesses, sir,
17 at that time, yes.

18 Q. Who was the witness that told you that there was
19 a fight between these people?

20 A. I had a total, I believe, of four witnesses -- they
21 are on the witness list -- that described an altercation and
22 described physical appearance and vehicle -- vehicle owned by
23 Mr. Griffin -- or Mr. Sutton, and the physical appearance of Mr.
24 Sutton and Mr. Dellinger.

25 Q. Let's not take anything out of context, Detective,

1 and tell the Court just the way it was. Nobody saw a fight
2 between these men, nobody told you about a fight between these
3 men, is that correct?

4 A. Pardon?

5 Q. Nobody saw these men fighting, and nobody told you
6 they had been fighting?

7 A. They didn't tell me that it was a Mr. Dellinger and
8 Mr. Sutton fighting, no, sir.

9 Q. Yet you swore out, raised your hand, I take it, and
10 swore to the Judge that these men were involved in a fight?

11 A. Yes, sir.

12 Q. These witnesses that you've mentioned that told you
13 about a fight, none of these people can identify James Dellinger
14 or Gary Sutton, is that correct?

15 A. The ones that actually the altercation taking
16 place, I don't believe so, sir.

17 THE COURT: So you had no basis, in fact, to say
18 that these -- Sutton and Dellinger had been in a
19 fight with anybody, did you?

20 THE WITNESS: I can put them together 11 minutes
21 before the fight.

22 THE COURT: I'm sorry?

23 THE WITNESS: I can put all three together 11
24 minutes before the fight...

25 THE COURT: Right.

1 THE WITNESS: ...and then the description of the
2 car at the location of the fight. That's
3 essentially what I had to go on.

4 BY MR. MILLER:

5 Q. It would be speculation on your part to say that
6 these three men were fighting, and not a fact that you could
7 swear to?

8 A. I can only swear to those facts I stated, sir.

9 MR. MILLER: That's all, Your Honor.

10 GENERAL SCHMUTZER: You may come down. Call Larry
11 McMahan.

12 LARRY McMAHAN was called, and being duly sworn, was
13 examined, and testified as follows:

14 DIRECT EXAMINATION

15 BY GENERAL SCHMUTZER:

16 Q. You are the same Larry McMahan who testified here
17 earlier, is that correct, sir?

18 A. Yes, sir, I am.

19 Q. Back on February the 28th, did you go with Jim
20 Widener and other officers to Blount County to execute a search
21 warrant at the home of James and Linda Dellinger here in Sevier
22 County?

23 A. Yes, sir, I did.

24 Q. When you all got there -- was anybody home when you
25 first got there?

1 A. No, sir, there wasn't.

2 Q. Did you all wait around, or go on in?

3 A. We were out in the yard for five or 10 minutes, and
4 Linda Dellinger came to the property.

5 Q. You didn't go into the house before she got there?

6 A. No, sir.

7 Q. When she got there, were you present when Mr.
8 Widener told her that he had a search warrant, and what he was
9 looking for?

10 A. She came up -- he was standing at the door, and he
11 said, "I have this search warrant," and she said, "You don't
12 need nothing. You can go on in the house." She unlocked the
13 door, and they went on into the trailer.

14 Q. You overheard -- you heard her say that?

15 A. Yes, she said, "You can come on in..."

16 MR. MILLER: I object to the form of the question.
17 He's leading the witness.

18 THE COURT: He'd already answered it before he
19 asked the second time.

20 MR. MILLER: The last question he asked was
21 leading, also.

22 THE COURT: You have to object to that one at the
23 time.

24 MR. MILLER: I'm objecting to the one he just
25 asked.

1 THE COURT: Sustained as to form.

2 BY GENERAL SCHMUTZER:

3 Q. Did you go in there with them?

4 A. They went ahead, but I went on into the trailer.
5 He went into the kitchen area, and Linda opened up, I believe,
6 a cabinet or something, and he said, "Wait, here's the warrant,"
7 and started reading it.

8 Q. That's all. Thank you.

9 MR. MILLER: No questions, Your Honor.

10 BY GENERAL SCHMUTZER:

11 Q. Hold it just one second. Of course, you're with
12 Sevier County Sheriff's Department. At that time, were you
13 aware that, or had Connie Branum's body been found?

14 A. No, sir, I was just assisting Blount County. At
15 that time, our body had not been found.

16 Q. You were not conducting any investigation?

17 A. Not at all. I was just helping Blount County.

18 Q. Now, I think it was some few hours later that here
19 body was found here in Sevier County?

20 A. It was -- that afternoon I was with them, and it
21 was about dark when they found the body, if I remember right.
22 But out body hadn't been found.

23 Q. Thank you. That's all.

24 THE COURT: You may step down. Wait a minute.

25 BY GENERAL SCHMUTZER:

1 Q. For the record, sir, Linda Dellinger is the
2 defendant's wife?

3 A. Yes, sir.

4 GENERAL SCHMUTZER: The State calls David Griswald.

5 **

6 DAVID GRISWALD was called, and being duly sworn,
7 was examined, and testified as follows:

8 DIRECT EXAMINATION

9 BY GENERAL SCHMUTZER:

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

11 A. William David Griswald.

12 Q. And your position?

13 A. Special agent with the Tennessee Bureau of
14 Investigation.

15 Q. In that capacity, sir, did you come to Sevier
16 County back in March of this year to work with Blount and Sevier
17 County officers regarding the death of Tommy Griffin and Connie
18 Branum?

19 A. Yes, sir.

20 Q. On March the 5th of 1992, did you have an
21 opportunity to talk to Linda Dellinger?

22 A. Yes, sir.

23 Q. Specifically, did you -- during the course of that
24 conversation, who was present with you at that time?

25 A. Investigator Hutchinson with your office.

1 Q. During the course of talking to her, did you have
2 any conversation with her about the British 303 rifle that had
3 earlier been taken from her home by Blount County officers?

4 A. Yes, sir.

5 Q. And what was the nature of...

6 MR. MILLER: I object to the relevance of this
7 testimony at this part of the hearing. He's
8 testifying about something that happened after the
9 items were seized, and would have no relevance at
10 this time.

11 GENERAL SCHMUTZER: It goes, Your Honor, to
12 consent.

13 THE COURT: Okay, let me hear the testimony. I
14 don't -- at this point, I don't know.

15 MR. MILLER: Consent after the fact certainly
16 doesn't have any relevance.

17 GENERAL SCHMUTZER: Well, Your Honor, this is not
18 consent after the fact, this is acknowledging what
19 she had done back at the time.

20 THE COURT: Okay, continue.

21 BY GENERAL SCHMUTZER:

22 Q. Going, sir, to that portion of the statement that
23 was relative to that, what did she tell you?

24 A. "I told Blount County/Sevier County that they had
25 permission to search our house when it was searched. I told

1 them, Blount County Deputies, and Sevier County Deputies, that
2 they could take the British 303."

3 Q. All right. Did she sign that statement?

4 A. Yes, sir.

5 Q. And before she signed it, was she given an
6 opportunity to read it over and initial it?

7 A. Yes, sir.

8 Q. And she did that?

9 A. Yes, sir.

10 Q. You may cross examine.

11 MR. MILLER: No questions.

12 THE COURT: Would you file that as part of the
13 record?

14 GENERAL SCHMUTZER: Yes, Your Honor, we can make
15 a copy of it, if you don't mind.

16 THE COURT: If I could see that.

17 GENERAL SCHMUTZER: Maybe I could just do it here,
18 Your Honor.

19 THE COURT: Okay. Is that a copy?

20 GENERAL SCHMUTZER: It's a copy. This is the last
21 page, Your Honor, that he testified to.

22 (EXHIBIT #1 - Last page of Consent to Search Form;
23 marked and filed.)

24 MRS. THOMAS: I have just one question of the
25 agent.

1 THE COURT: Okay. Have you all seen this?

2 MRS. THOMAS: No, we have not.

3 MR. MILLER: No, we haven't, Your Honor, and while
4 it's being filed, and the Court is looking at it,
5 I'd note my contemporaneous objection is a little
6 bit late, but anything Mrs. Dellinger said in a
7 statement or to these officers is hearsay, and I
8 would ask the Court not to consider that testimony.

9 THE COURT: It would obviously be hearsay as to
10 your client, but as to what her testimony would be
11 as to her giving consent, it would certainly not
12 be hearsay, would it? That's just her -- cannot
13 they impeach...

14 MR. MILLER: If her credibility is placed in issue,
15 which, at this time, she had not taken the stand,
16 and it's not at issue.

17 GENERAL SCHMUTZER: Your Honor, this is admissible
18 just as it was admissible earlier when Jim Widener
19 testified as to what she said. Obviously, the
20 officers in going to consent, they have to testify
21 to hearsay, especially in this situation where you
22 have someone who has sole authority, and sole
23 custody of the home. I submit to the Court it is
24 admissible. It's not inadmissible hearsay in this
25 procedure.

1 THE COURT: Overruled.

2 MR. MILLER: I would further object to this piece
3 of evidence in that the State has not complied with
4 the rules of discovery, and that that would be --
5 evidence of a consent would be discoverable
6 information, and we have not been provided with
7 that.

8 THE COURT: How would that, at this point, until
9 you raise that issue, how would it be subject to
10 disclosure? She is a potential witness who is,
11 obviously, more in your control than the State's
12 control.

13 MR. MILLER: Your Honor, the State has -- they
14 furnished us one consent to search, and obviously,
15 they thought that was -- I don't know why they
16 wouldn't furnish...

17 THE COURT: Well, I have no reason -- I can't
18 fathom all the reasons why they would or wouldn't
19 do it, but all I'm saying is that they would
20 certainly be allowed, to the issue on consent,
21 since you've raised it, to be able to show that,
22 I would think. Let it be filed.

23 (EXHIBIT #2 - Copy of Consent to Search and Waiver;
24 marked and filed.)

25 **

CROSS EXAMINATION

BY MRS. THOMAS:

Q. Agent Griswald, just briefly, I take it from your testimony that you were not present when the search warrant was executed at the Dellinger home?

A. No.

Q. Did you give Mrs. Dellinger any Miranda warnings, or any advice of rights prior to taking the statement from him?

A. Yes.

Q. And did she waive those rights?

A. Yes.

Q. Did she do that in writing?

A. She waived the search -- the search waiver is what she signed.

Q. Is this a document that has not yet been introduced?

A. I have a copy here.

MRS. THOMAS: I would ask that be filed, and that we be provided with a copy because I don't believe we previously have been.

THE COURT: You may.

BY MRS. THOMAS:

Q. Was the purpose of your interview with Mrs. Dellinger on the 5th to verify her consent to a previous search?

A. No, it was to cover the background from beginning

1 to end. My statement covered from when they first met the
2 victim on through what happened during the course of the three
3 or four days, and at the end of the interview, that was included
4 in that.

5 Q. And you will provide us with a copy, and file a
6 copy with the Court?

7 A. Yes.

8 MRS. THOMAS: We'll have those copies made.

9 GENERAL SCHMUTZER: Your Honor, we would object to
10 any portions being filed other than what's
11 relevant, and I think we filed that. Now, she's
12 asked for a copy of the consent on the search, and
13 of course, we have no objection to that.

14 MRS. THOMAS: And the waivers that you...

15 GENERAL SCHMUTZER: Right.

16 MRS. THOMAS: Waived the search issue.

17 THE COURT: Right, that's what I thought we were
18 addressing here was the waiver. Isn't that what...

19 MRS. THOMAS: That was my understanding also, and
20 those documents that were pertinent to this, and
21 apparently there are two separate documents; her
22 statement that she did give consent, and a waiver.

23 BY THE WITNESS:

24 A. The waiver I'm referring to is when I was there the
25 second time. I'm not referring to anything that happened during

1 their initial search.

2 Q. So you conducted a search on the 5th?

3 A. Yes.

4 Q. And she gave a consent to search at that time?

5 A. Yes, yes.

6 Q. Okay.

7 MRS. THOMAS: We would ask that those be filed, and
8 we be provided a copy. Also, I think we need to
9 make as part of the record the original search
10 warrant they returned that has been the subject
11 of...

12 THE COURT: Sure.

13 (EXHIBIT #3 - Search Warrant and Affidavit; marked
14 and filed.)

15 MRS. THOMAS: Does the Court have a copy?

16 THE COURT: At this point, all I have now is the
17 original affidavit. I don't have the return. I
18 believe you...

19 MR. MILLER: That's a copy; it's not an original.

20 THE COURT: Right. As I said, all I have is a copy
21 of the affidavit and the return, and you picked up
22 the Court's copy of the return. So do you want the
23 original filed, or a copy?

24 MRS. THOMAS: I would object to having a copy
25 filed.

1 BY MRS. THOMAS:

2 Q. Agent Griswald, why did you find it necessary to
3 take a statement from Mrs. Dellinger if she had earlier given
4 her consent to other officers?

5 A. Given her consent to other officers...

6 Q. When her home was searched prior to your being
7 there.

8 A. Well, I did not come into this investigation until
9 -- it was not until the gentlemen were picked up that I was
10 involved in the questioning of her. I do not know about
11 previous statements at that time.

12 Q. But you did -- you did question her about this
13 previous search?

14 A. I questioned her about everything that had taken
15 place from the point of the individual being missing, up and
16 through that week.

17 Q. Okay. Nothing further.

18 GENERAL SCHMUTZER: You may come down.

19 **

20 MRS. THOMAS: Your Honor, before we proceed, I'd
21 like to have an opportunity to look at those statements and
22 waivers.

23 THE COURT: Okay.

24 MRS. THOMAS: Your Honor, just for efficiency, is
25 the State totally abandoning the search warrant at this point...

1 GENERAL SCHMUTZER: The State is not abandoning
2 anything. We're bringing all the -- they raised some questions
3 about the 303, and everything else, Your Honor, and I think that
4 it's very important to show this consent. We're not abandoning
5 anything. We're saying that the search warrant is good based
6 upon the law we've furnished the Court. We're saying further
7 that this lady, on top of that, she gave consent. We've got a
8 case here on all fours that shows that this consent would be
9 independent of the search warrant, and we're also saying that
10 she, in the process, gave the consent to take the 303 rifle.
11 That's what we're saying.

12 Does this officer -- Your Honor, he's supposed to
13 be on his way to Memphis. Do you need him to stay?

14 MRS. THOMAS: It could be, because I haven't had
15 an opportunity to see any of the things that he's provided me,
16 and I would ask that he stay until I have a chance to look it
17 over.

18 GENERAL SCHMUTZER: Will you just let us know,
19 because we'd like to release him.

20 MRS. THOMAS: Yes.

21 GENERAL SCHMUTZER: The State calls David
22 Hutchinson. One second, Your Honor, one second. David
23 Davenport -- I mean Hutchinson.

24 THE COURT: Hutchinson. Counsel, before Officer
25 Hutchinson testifies, I want everybody to look at their

1 calendars if you have them.

2 GENERAL SCHMUTZER: I don't, Your Honor. I need
3 to send for mine, if I may.

4 THE COURT: Okay, if you'll do that.

5 MR. WEBB: I'm in the same posture on that, Judge.
6 What month are you looking for?

7 THE COURT: Well, I'm looking in November.

8 MR. WEBB: November 13th.

9 THE COURT: This is November 13th, yeah. And
10 December -- let's look at November and December for...

11 GENERAL GREEN: Your Honor, could I suggest the
12 Court giving a couple of dates, and then let me run up there,
13 and confirm that on my calendar as well?

14 THE COURT: Okay. What I'm thinking about is
15 November 20th -- no, wait a minute. Yeah, November 20th.

16 GENERAL GREEN: A week from today?

17 THE COURT: Yes.

18 GENERAL SCHMUTZER: We could maybe call up there,
19 and find out quicker.

20 MR. WEBB: What were your days, Judge?

21 THE COURT: November 20th, December 8th, December
22 9th, December 11th.

23 GENERAL GREEN: Does Your Honor know what -- I
24 think that's the week we're having jury trials here in front of
25 Judge Porter. Does Your Honor know what the schedule is across

1 the hall, and obviously, we could accommodate...

2 THE COURT: In that week of December? Is there any
3 way you can check?

4 GENERAL GREEN: Am I not right about that, Mrs.
5 Newman? Isn't that first week Judge Porter's week, the week of
6 the 7th?

7 MRS. NEWMAN: Yes, that's right.

8 THE COURT: If you thought half a day would do it,
9 I could possibly do it on Friday, December the 4th after lunch.

10 GENERAL SCHMUTZER: I'll be in Nashville, Your
11 Honor, at a D.A.'s conference.

12 GENERAL GREEN: Could we just take five, Judge, and
13 make some phone calls, and get some dates?

14 THE COURT: Okay, let's do that before we start,
15 because we are going to have to reschedule some additional days.

16 (COURT STOOD IN RECESS)

17 THE COURT: All right. Has Mr. Webb...

18 MRS. THOMAS: He was just here.

19 GENERAL GREEN: Maybe Mr. Greenlee has checked the
20 calendar for Mr. Webb. Is the 20th okay?

21 MR. GREENLEE: Fine, unless we're in the supreme
22 court or somewhere, I...

23 THE COURT: Is the 20th okay with your calendar,
24 Mr. Webb?

25 MR. WEBB: Your Honor, what I'm going to do, if

1 that's all right with everybody else, I'm going to -- whatever
2 I've got that day, I'm going to reschedule.

3 THE COURT: Okay. So we will meet here again...

4 MR. WEBB: The General may have to accommodate me
5 on that. I may have some trial justice court matters.

6 THE COURT: I'm sure they will.

7 MR. WEBB: I know for a fact I've got some trial
8 justice court preliminary hearings, but we'll reschedule.

9 THE COURT: All right. Let's proceed to complete
10 this motion.

11 GENERAL SCHMUTZER: Call David Hutchinson.

12 MRS. THOMAS: I do have a motion concerning these
13 other matters. These statements -- I'd like to bring it to the
14 Court's attention because there was an officer who was wanting
15 to leave. I was provided with part of a paragraph which was an
16 exhibit to Special Agent Griswald's testimony, the statement of
17 Linda Dellinger, and I would ask the Court to allow me to have
18 a copy of that statement in its entirety. They are talking
19 about guns -- all I got was that part of a paragraph, and it's
20 my position that I would be entitled to the statement in its
21 entirety if the State intends to rely on it.

22 GENERAL SCHMUTZER: Your Honor, that was the only
23 part that he testified from. The other part did not relate to
24 this weapon. If the Court wants to read the entire statement
25 en camera, and see that, that's fine, but we say she would not

1 be entitled to it because it does not relate to what he
2 testified to.

3 MRS. THOMAS: Apparently there is a second portion
4 of a paragraph -- it's not an entire paragraph.

5 THE COURT: Let me see the statement.

6 MRS. THOMAS: This is just the -- that's all I ever
7 had.

8 GENERAL SCHMUTZER: Right, that's all he testified
9 from.

10 THE COURT: Let me see the entire statement, if
11 it's...

12 At this time, the remaining portion of the
13 statement does not deal with the issue of the search, and that
14 the portion of the statement that has been filed is the only
15 portion of the statement that contains anything about the
16 search.

17 MRS. THOMAS: Your Honor, I would ask that a copy
18 of that statement in its entirety be filed under seal with the
19 record.

20 GENERAL SCHMUTZER: I have no objection, Your
21 Honor. We'll make a copy of it, and the Court can file it under
22 seal.

23 (EXHIBIT #4 - Statement of Linda Dellinger; marked
24 and filed under seal.)

25 DAVID HUTCHINSON was called, and being duly sworn,

1 was examined, and testified as follows:

2 DIRECT EXAMINATION

3 BY GENERAL SCHMUTZER:

4 Q. State your full name, please.

5 A. David Hutchinson.

6 Q. And your position?

7 A. Criminal Investigator with the District Attorney's
8 Office.

9 Q. Back on March the 5th of this year did you go with
10 T.B.I. Agent Griswald to talk with Linda Dellinger?

11 A. Yes, sir, I did.

12 Q. And she is the wife of the defendant, James
13 Dellinger, is that right?

14 A. That's correct, sir.

15 Q. After -- have you had an opportunity to see the
16 statement -- a statement was taken that she signed, I believe,
17 at that time?

18 A. That's correct.

19 Q. And without going into it, I believe there was some
20 discussion had about the search that occurred back earlier on
21 the 28th of February, and whether or not she had given consent?

22 A. That's correct.

23 Q. Subsequently, on that same date, did you have a
24 telephone conversation with her?

25 A. Yes, sir, I did.

1 Q. And when you contacted her, did you call her back
2 with regard to that consent to search?

3 A. Yes, sir, I did.

4 Q. And about the 303 rifle?

5 A. Yes, sir.

6 Q. And specifically, with regard to the 303 rifle and
7 consent to search, what did she tell you over the phone at that
8 time?

9 MRS. THOMAS: Your Honor, I would object to that
10 hearsay.

11 THE COURT: Ms. Laws, can you explain to this Court
12 how that I can determine whether or not she gave
13 consent to search your client's and her household
14 unless I hear what she said?

15 MRS. THOMAS: Your Honor, the State can call her
16 as a witness. The State has the burden of showing
17 consent.

18 THE COURT: Overruled.

19 BY THE WITNESS:

20 A. She told us that she had given those officers from
21 Blount County and Sevier County permission to search.

22 Q. Did you make a tape recording of the statement --
23 of what she said?

24 A. Yes, sir, I did.

25 Q. Did you have it transcribed?

1 A. Yes, sir, it was.

2 Q. And do you have that with you?

3 A. Yes, sir.

4 Q. Will you go to the portion of that transcription,
5 sir, of that conversation, and read precisely what it was she
6 said to you about...

7 A. "Hutch: Okay. Well, that's what I was wanting to
8 clear up. Now, we're talking about the same gun,
9 the one that you gave those officers that night.

10 Linda: Yes, that's the only 303 he ever owned.

11 Hutch: One more thing. Did he ever mention who
12 he sold the gun to the two weeks before this
13 happened?

14 Linda: Well, I can tell you probability -- with
15 all certainty that he did even know the man. Like
16 I said, we were just at the flea market -- you
17 know, the guy...

18 Hutch: Was it the great big -- the old building
19 on the Alcoa Highway?

20 Linda: Yeah, Green Acres.

21 Hutch: All right.

22 Linda: Yeah, he probably did not know the guy --
23 who the guy was.

24 Hutch: But you're sure it's the same weapon?

25 Linda: Yes, he knew his gun.

1 Hutch: Okay, well, I don't think there's anything
2 else. Oh, let me clear up one more thing with you
3 one more time. When those Blount County boys come
4 that had the Sevier County officers with them, they
5 told you they had a search warrant, but they did
6 not break in your house? They were waiting on you,
7 and you told them right then, 'You don't need this.
8 Come on, right on,' and you even showed them where
9 the weapons were at; is that correct?

10 Linda: Yes.

11 Hutch: Okay. Did -- they did not threaten you
12 with a search warrant, or threaten anything to you;
13 you just cooperated with them, and gave it to them?

14 Linda: Yes.

15 Hutch: You said they did not need the warrant?

16 Linda: Yes."

17 Q. Thank you, sir. You may cross examine.

18 CROSS EXAMINATION

19 BY MRS. THOMAS:

20 Q. Were you present when this search warrant was
21 executed?

22 A. No, ma'am.

23 Q. And I lost track of what date this conversation
24 with Mrs. Dellinger was tape recorded.

25 A. March the 5th, '92 at 4:26 p.m.

1 Q. Do you have other taped conversations with Mrs.
2 Dellinger?

3 A. No, ma'am.

4 Q. And did you have that conversation transcribed in
5 its entirety?

6 A. Yes, ma'am.

7 MRS. THOMAS: I would ask to be provided with a
8 copy of that transcript, Your Honor.

9 GENERAL SCHMUTZER: Again, Your Honor, it would be
10 supplied to the extent that it's relevant and
11 competent -- what he read.

12 THE COURT: At this point, I will allow only those
13 portions into the record as dealing with the search
14 question. However, the entire statement may be
15 filed under seal, and if you can find me some case
16 law between now and next Friday authorizing the
17 release of that, I'll let you have it.

18 MRS. THOMAS: Thank you, Your Honor, I was going
19 to ask for that opportunity.

20 (EXHIBIT #5 - Transcript of conversation with Linda
21 Dellinger; marked and filed under seal.)

22 THE COURT: Yes.

23 GENERAL SCHMUTZER: You may come down, sir. May
24 I have a moment, Your Honor?

25 THE COURT: Okay.

1 4th, but let me be sure, Your Honor, we developed information
2 from one James Sutton, and also from others, that this defendant
3 owned a 303 weapon, and that he carried it with him most every
4 place he went, and that he fired the weapon from time to time
5 in his yard, and also at another place near the home.

6 Based on this, obviously, the State would have had,
7 coupled with the information that the Blount County officers
8 had, and coupled with the information that the statement had put
9 them together with her -- the last people being seen with her
10 alive, that the State would have had more than enough probable
11 cause to search that home, and would have gotten that weapon
12 only a few days later. It was just a fruituitous circumstance
13 that Blount County asked for the weapon, and took it.

14 **THE COURT:** So what is that theory again?

15 **GENERAL SCHMUTZER:** Inevitable discovery, Your
16 Honor.

17 **THE COURT:** Do you have some case law on that,
18 General?

19 **GENERAL SCHMUTZER:** Yes, Your Honor, we do.

20 **THE COURT:** In all candor, and there's a lot I
21 don't know, but that's the first time since I've been practicing
22 law that I've heard that theory, in all candor with you.

23 **GENERAL SCHMUTZER:** Yes, Your Honor. The theory
24 is, Your Honor, is that -- if something is found -- the whole
25 thrust of it, if something is found, and we can give the Court

1 some authority -- if something is seized illegally, but it can
2 be shown that it was inevitable that it would have been
3 discovered anyway on down the line, then that does not -- that
4 seizure does not -- I mean, that unlawful seizure does not keep
5 that from being admitted into evidence under the inevitable
6 discovery rule.

7 I think here, Your Honor, in particular, would be -
8 - obviously, it would be a situation where the Sevier County was
9 finding themselves saddled -- you know, with Blount County
10 getting -- of course, the whole reason for exclusion rule is to
11 keep police from overreaching -- you know, to punish police for
12 infringing on people's constitutional rights. If Sevier County
13 had done that -- they weren't conducting any investigation at
14 this point, and so they didn't even have an opportunity to...

15 THE COURT: But you would agree, however, if it's
16 inadmissible -- if there's no -- if it's inadmissible due to
17 conduct of the Blount County, it would still be inadmissible
18 here, absent some exception.

19 GENERAL SCHMUTZER: Absent that exception, Your
20 Honor.

21 THE COURT: You may proceed.

22 MRS. THOMAS: Your Honor, given the time of day,
23 and the fact that I was totally unaware of the fact that the
24 State was traveling under this consent to search theory until
25 they walked into their proof this afternoon, I would ask the

1 Court that we be allowed to continue the hearing on that consent
2 issue until next Friday when I can provide the Court with some
3 law on consent after a search warrant has been presented.

4 THE COURT: I would like to go ahead, and hear the
5 witness, and then if you desire to brief that issue for the
6 Court, I will refrain from making that decision on that today.
7 But I would like to go ahead, and hear the witness, because that
8 surely would change -- that aspect of it would.

9 MRS. THOMAS: Well, Your Honor, what might change
10 is whether or not we would call her, and I would like to have
11 an opportunity to research that issue, and the issue of consent
12 has never been provided in any of the discovery material that
13 we were given to date. I don't feel like I can make an informed
14 decision of whether or not to even put Mrs. Dellinger on the
15 stand until I've had an opportunity to look at that, and the
16 issue was raised for the first time after lunch today.

17 GENERAL SCHMUTZER: Your Honor, it was raised by
18 them when they came out with the weapon, and that was based on
19 their amendment, Your Honor. We came in here, and they've been
20 shifting gears -- they've shifted it three times in the course
21 of the day as to where they were going. What they filed with
22 us originally, they said they wanted two other things to attack
23 it, and then they got into this business about it being outside
24 the warrant, and of course, we had to come with consent at that
25 point, and we submit to the Court that in a large part it was

1 brought about by their changing their defense elements the day
2 of the hearing.

3 MRS. THOMAS: Your Honor, our defense was based on
4 the search warrant that we were provided with. We were not
5 provided with any copies of a consent to search signed by Mrs.
6 Dellinger on that day, or any other day.

7 GENERAL SCHMUTZER: We don't have a consent to
8 search signed by her on that day, and none has been provided
9 because we have none, Your Honor, but that does not preclude the
10 State from relying upon consent under any circumstance. And she
11 is someone that's under their control; she is a wife of this
12 defendant, of course, they are the ones that have changed horses
13 in the middle of the stream, and added -- amended their -- what
14 they had originally said they were going to rely upon. So I
15 submit to the Court that if they are going to go further with
16 proof -- because we've got a situation now where these witnesses
17 are under the rule. Obviously, she is a potential witness. To
18 break now, and wait a week, Your Honor, I submit to the Court,
19 would taint her testimony because, obviously...

20 THE COURT: I'd like to go ahead, and hear the
21 witnesses on this issue here now, and then I will defer entering
22 an opinion on the search, and give you an opportunity to
23 research it, and present any law you want to.

24 MRS. THOMAS: Your Honor, may we have a brief
25 recess to decide whether or not to call Mrs. Dellinger, or just

1 a conference here at the table?

2 MR. WEBB: Let us step outside.

3 THE COURT: That will be fine. Ms. Laws, you may
4 proceed.

5 MRS. THOMAS: Thank you. Your Honor, in light of
6 the fact that I am -- did not anticipate this consent issue, and
7 had no prior notice by the State of anything pertaining to
8 consent, and in light of the Court's ruling, I will not be
9 presenting any witnesses at this time.

10 However, I would like to make a brief argument on
11 the search warrant, understanding that we may submit authority
12 on the consent to search subsequently.

13 THE COURT: Well, let the Court note, for the
14 record, that Mr. Miller advised the Court that he would -- of
15 the potentiality, at least, that Mrs. Dellinger would be called
16 as a witness. She was sworn and excluded from the hearing at
17 his request, and that you have her available to you to call as
18 a witness, and that you are hereby choosing not to call her as
19 a witness.

20 MRS. THOMAS: That is correct.

21 THE COURT: Very well.

22 MRS. THOMAS: Your Honor, with regard to the search
23 warrant itself, the General stated a few moments ago that the
24 purpose of the exclusionary rule was to punish police officers,
25 and it's our position that that is not the case. The purpose

1 of the exclusionary rule is to protect citizens from unlawful
2 searches and seizures, and violation of the United States
3 Constitution, and the State of Tennessee Constitution.

4 We have attacked this search based on the search
5 warrant, pursuant to which certain items were seized, including
6 this 303 shotgun.

7 MR. MILLER: Rifle.

8 MRS. THOMAS: Rifle, pardon me. I am ballistically
9 embarrassed. The Court is bound by the four corners of the
10 warrant. I have read the case carefully that the General has
11 provided to the Court. There are two issues addressed in that
12 case.

13 The first is concerning staleness, and it is under
14 that issue that certain items are found to be, perhaps, more
15 subject to be maintained and kept in a household than others.
16 The issue that we have raised is the fact that there is not,
17 within the four corners of this warrant, a nexus between the
18 crime and the property to be search, and that is the second
19 issue that is addressed in this case.

20 There is case law which I could provide to the
21 Court next week providing that there must be a nexus contained
22 in the four corners of the search warrant that connect the crime
23 to the property. On the copy of this case provided to the
24 Court, this issue is discussed at the bottom of page five, and
25 this Court specifically found in the affidavit of the court

1 that, "The affidavit established a suspect's connection to the
2 defendant's premises by alleging that on the night of the murder
3 he went to this home after leaving the residence, the scene of
4 the crime. Additionally, the affidavits establish that the
5 suspect resided nearby in a house trailer on a gravel road which
6 leads to this home."

7 THE COURT: Right.

8 MRS. THOMAS: There is nothing within the four
9 corners of the warrant before the Court today that establishes
10 that requisite nexus. Nothing about this case changes that
11 requirement for a nexus in the affidavit, and the search warrant
12 would be invalid for that reason.

13 THE COURT: Okay, let me ask you this, and the
14 point that I want you to brief, if you have anything on it --
15 I would grant to you, as I stated earlier, that the affidavit
16 in the search warrant is not as particular as I'm sure any of
17 us would draft, but what -- it makes statements, and it makes
18 an assumption, if you will, or at least an inference, that the
19 deceased was last seen alive in the presence of these co-
20 defendants, and that he was killed with a shotgun.

21 Then, it leaps from that inference -- the inference
22 is created by that to an inference that the weapon might be in
23 his home. That is the issue that I want some help on.

24 MRS. THOMAS: I will provide that to the Court next
25 week.

1 THE COURT: Okay. Are there any other brief
2 motions that we can dispose of?

3 GENERAL SCHMUTZER: Your Honor -- you know,
4 regardless of the warrant, we submit to the Court there is valid
5 consent...

6 THE COURT: Right, I understand that.

7 GENERAL SCHMUTZER: There's a case -- can we
8 furnish the Court that case?

9 THE COURT: Sure.

10 GENERAL SCHMUTZER: It's Earl vs. State, Supreme
11 Court of Tennessee, 496 SW2d 464, and here there was a search
12 warrant issued. The officers went up there with the search
13 warrant to search -- armed with the search warrant, and the
14 sheriff and five other officers went to the home of the
15 defendant. The sheriff handed him a copy of the warrant, and
16 began reading the original to him, and the sheriff was reading,
17 and the defendant threw his copy on the ground, and said, "You
18 needn't have brought a search warrant; you're welcome to search
19 anywhere on the premises you want to search, and take anything
20 you can find."

21 The court later found that the search warrant
22 itself was invalid, but found that it was possible to give valid
23 consent to a search even after the existence of a warrant is
24 made known, and it's up to the State to show by clear and
25 convincing evidence that consent is not based on a warrant, and