

XXVII No. 90

IN THE CRIMINAL COURT FOR SEVIER COUNTY

AT SEVIERVILLE, TENNESSEE

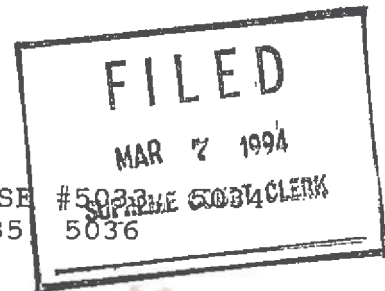
STATE OF TENNESSEE,

Appellee,

-VS-

GARY WAYNE SUTTON and,
JAMES ANDERSON DILLINGER

Appellant.



CASE #5035
5035 5036

TRANSCRIPT OF THE EVIDENCE:

Pretrial Motions

November 20, 1992

BEFORE THE HONORABLE REX HENRY OGLE, PRESIDING JUDGE,
AND JURY

APPEARANCES:

FOR THE STATE-

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

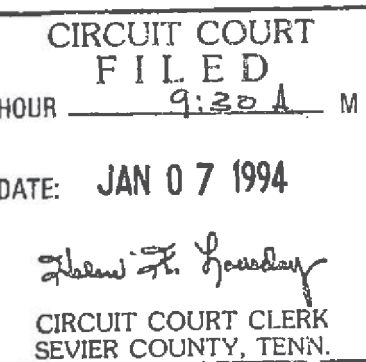
FOR THE DEFENDANTS

FOR THE DEFENDANT SUTTON:

EDWARD C. MILLER, P.D.
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1 two days ago with a search warrant brief prepared by Detective
2 Widener of Blount County detailing -- I think it's about five
3 or six pages detailing -- or a summary of his execution of this
4 search warrant.

5 THE COURT: Yes.

6 MR. MILLER: And we'd ask that be filed.

7 THE COURT: May I see it?

8 MR. MILLER: It will answer a lot of questions as
9 to how this search was conducted. Your Honor, I hastily
10 prepared a brief yesterday on the search warrant question, and
11 I would file a copy of that.

12 THE COURT: Okay. Thank you. Was this brief given
13 to the Magistrate at the time the warrant was issued, or do
14 you...

15 GENERAL SCHMUTZER: No, Your Honor. This was a
16 summary subsequently -- subsequent to the...

17 THE COURT: Okay.

18 GENERAL SCHMUTZER: ...search.

19 THE COURT: Okay.

20 (LATE FILED EXHIBIT #6 to hearing of 11/13/92 -
21 Search Warrant Brief; marked and filed.)

22 THE COURT: All right. Anything further in regards
23 to the search issue?

24 MS. LAWS: Yes. You had given me until this week
25 to provide the Court with some authority that we be entitled to

1 the statements and the transcript of the telephone conversation
2 that was recorded. I had requested a copy of that transcript,
3 and a copy of the entire statement.

4 THE COURT: Okay.

5 MS. LAWS: I have brought with me the Raymond on
6 Tennessee Practice which cites a case, Armstrong vs. State, a
7 Tennessee Criminal Appeals Court decision of 1977 that tells us
8 the defendant has a right to knowledge of any electronic
9 surveillance that's done in the investigation of a case, and
10 that the State would be obligated to provide us with a
11 transcript if a transcript has been prepared. I will tender
12 this book to the Court.

13 THE COURT: Okay. The electronic surveillance in
14 this case is...

15 MS. LAWS: Was a tape recorded telephone
16 conversation between Officer Hutchison and Linda Dillinger in
17 which Officer Hutchison testified that she, after the fact,
18 agreed with his statement that she had given consent to search.

19 THE COURT: Now I think -- I would certainly agree
20 that the defendant would be entitled to any electronically
21 intercepted statements by the defendant. I would categorically
22 agree with that statement.

23 GENERAL SCHMUTZER: I think that's what Armstrong
24 addresses, but I'm not sure. I haven't seen the case in a
25 while. I'm not aware of any case that says the defendant has

1 a right to electronic statements taken from third parties.

2 **THE COURT:** I think that the statements would be
3 -- statements of someone other than the defendant come within
4 the rules of the little Jenks provisions, as I understand the
5 law. So if you have your case, I will certainly review it, and
6 if the Court is wrong -- I'm not afraid to change my mind if I'm
7 wrong.

8 **MS. LAWS:** Your Honor, again, with respect to both
9 that transcript and the statement by Linda Dillinger that was
10 referred to, and which we were provided with a portion of, I
11 would further submit that we are entitled to that as being a
12 document which the officer -- each officer referred -- I believe
13 they were both -- David Hutchison referred to during the course
14 of his testimony, and we would be entitled to the entire copy
15 of that for that reason. It was a document that was referred
16 to, specifically, while that officer was on the stand.

17 **THE COURT:** General Schmutzer, as to that issue?

18 **GENERAL SCHMUTZER:** Your Honor, they were furnished
19 the relevant portion of what he referred to. He did not refer
20 to any other portion of the statement.

21 **MS. LAWS:** That's true...

22 **GENERAL SCHMUTZER:** And we would submit, Your
23 Honor, only to the extent an officer refers to a document would
24 that document become relevant, would it be -- that they would
25 have a right to it. If they can show in some way, or say in

1 some way that the other part had anything to do with -- and the
2 Court read it en camera...

3 **THE COURT:** Right.

4 **GENERAL SCHMUTZER:** ...and I think found that the
5 rest of it was immaterial and irrelevant to the issues.

6 **THE COURT:** Right. I hold at this point as I
7 previously did. The Court did review the statement, and the
8 portion that was provided to counsel is the only portions that
9 were relevant to the issue of the consent to search that we were
10 dealing with at that time. Obviously, if Mrs. Dillinger
11 testifies, the statement, of course, is certainly discoverable
12 pursuant to the little Jenks material.

13 **MS. LAWS:** Your Honor, the theory that I am
14 traveling under here is that under the rules of evidence when
15 a witness or an officer refers to a document while he is on the
16 stand, the cross examining party is entitled to a copy of that
17 entire document, not just the relevant portion.

18 **THE COURT:** And I certainly understand that aspect
19 of it. On the other hand, the rules of discovery in criminal
20 trials have, likewise, specific statutory guidelines, and under
21 the Jenks Act materials, at this point, that entire statement
22 is not discoverable.

23 **MS. LAWS:** Well, I'm not traveling under the
24 discovery rules, I'm traveling under the rules of evidence which
25 say that once it is referred to...

1 THE COURT: Okay, which rule?

2 MS. LAWS: Could I retrieve my book? I believe I
3 could find it more quickly. If you want to go on to something
4 else.

5 THE COURT: I would really like to rule on the
6 search warrant issue at this time. The Court -- although, I can
7 rule on the statements and the search issue at this point.

8 MS. LAWS: Here's the section in Raymond's.

9 THE COURT: Section 612 of the Tennessee Rules of
10 Evidence says as follows:

11 "If a witness uses a writing while testifying to
12 refresh memory for the purpose of testifying, an
13 adverse party is entitled to inspect it, to cross
14 examine the witness thereon, and to introduce in
15 evidence those portions which relate to the
16 testimony of the witness.

17 If it is claimed that the writing contains matters
18 not related to the subject matter of the testimony,
19 the Court shall examine the writing en camera,
20 excise any portions not so related, and order
21 delivery of the remainder to the party entitled
22 thereto."

23 GENERAL SCHMUTZER: We followed the rule precisely.

24 THE COURT: That's -- so that was the purpose of -
25 - Rule 612 of the Tennessee Rules of Evidence was the basis of

1 the Court's ruling.

2 MS. LAWS: Thank you.

3 THE COURT: Anything further on the search issue?

4 MR. MILLER: Is Your Honor prepared to rule on
5 that, or do you want any argument?

6 THE COURT: I'm prepared to rule. I will certainly
7 here any points that you wish to raise that have not already
8 been raised.

9 MR. MILLER: I don't think I have anything to raise
10 other than what was raised at the hearing, and then the brief
11 that I filed on that. The case, I think, that's right on point
12 is Bumper vs. State of North Carolina. It's almost on all fours
13 with this case. The State has referred the Court to Earls vs.
14 State which also is a very similar case, however, I think there
15 are a lot of distinctions in that case and the case that we have
16 here.

17 Basically what Bumper says is that, assuming that
18 the search warrant is defective, what Bumper says is that if the
19 consent is merely an acquiescence to some claim of authority
20 that it's no good. And I think that's exactly what we have
21 here.

22 I think, in reading the summary of Detective
23 Widener, which at no time mentions consent, he went through
24 detail by detail executing the search warrant all the way up to
25 the return to the Trial Justice Magistrate. I think the case

1 must rise or fall on the search warrant.

2 MS. LAWS: Your Honor, if I could address just
3 briefly the case that the State introduced in support of the
4 search warrant. The State claims that that case supported that
5 the -- a theory that a person's home would be a repository for
6 certain objects.

7 THE COURT: Yes.

8 MS. LAWS: That case is clearly distinctive, but
9 once it's read, there are two issues discussed in that case.
10 The first is the staleness issue, the time that had elapsed,
11 which is the subject, and the issue under which this person's
12 home was a repository for certain types of goods was considered.
13 In other words, the Court allowed a longer time to get a search
14 warrant for a person's home as opposed to some other things.

15 The issue as to whether or not there was a nexus
16 between the place described in the search warrant, and the crime
17 was addressed separately, and in the case that the State
18 provided, the nexus was clearly set forth in the affidavit in
19 that the defendant had gone to this home directly after the
20 crime, and that he lived in a house that was very close to this.
21 They could place him there shortly after the crime. There is
22 nothing in the affidavit of this search warrant to support a
23 nexus.

24 THE COURT: The Court, last Friday, heard the
25 testimony as it related to the search of the residence of the

1 co-defendant, James Dillinger. The uncontradicted testimony in
2 the record, and that is what the Court must base its ruling
3 upon, is that Mrs. Dillinger consented to the search. The Court
4 reiterates that on last Friday, Mrs. Dillinger was present in
5 this courtroom, was excluded as a witness, and was not called.
6 For that reason, the Court must find that the uncontradicted
7 evidence in this record supports that the search of the
8 Dillinger home was pursuant to, or is founded, at least, on one
9 theory, and finds that it is a consensual search. For that
10 reason, it will be admitted.

11 **MS. LAWS:** Your Honor, I'd ask you place a ruling
12 on the record concerning the validity of the search warrant.

13 **GENERAL SCHMUTZER:** I think that question is moot
14 at this point. The Court finds a voluntary consent, whether
15 they had a search warrant or not, it becomes irrelevant and
16 immaterial.

17 **THE COURT:** Let's see, I got affirmed the other day
18 that I was right for the wrong reasons, so I will stand on what
19 the Court has ruled upon.

20 **MR. MILLER:** Your Honor, I also submitted some
21 authority in my brief that the consent by the wife when the
22 defendant, the one charged, was available is not sufficient.
23 They should have gone to the defendant who was, I think, by the
24 testimony was being interrogated at the time. And to circumvent
25 him when he is available, and go to his wife, is improper.

1 **THE COURT:** The Court has ruled, counsel. The
2 Court wants to hear argument now on the issue of joinder of
3 offenses, in particular, I want to hear argument as to why the
4 joinder of the offense alleging the arson of the first trailer
5 or home should be joined in the other cases.

6 **MS. LAWS:** Your Honor, that's the State's motion.

7 **THE COURT:** Right.

8 **GENERAL SCHMUTZER:** This might be wrapped up, Your
9 Honor. We have taken up the statements. I think the only
10 objection left with regard to the statements is relevancy...

11 **THE COURT:** As to the statements, right.

12 **GENERAL SCHMUTZER:** The statements. I think that
13 they probably become somewhat -- to some extent intertwined --
14 maybe. I don't know. Does the Court want to finish up on that
15 first, and then go to that? I'm not...

16 **THE COURT:** I think the joinder of offense issue
17 we could probably take quicker.

18 **GENERAL SCHMUTZER:** Okay. May I suggest to the
19 Court possibly we take the joinder -- I think my statements with
20 regard to the joinder of the arson would be the same as with
21 regard to the murder of Tommy Griffin.

22 **THE COURT:** Sure.

23 **GENERAL SCHMUTZER:** I would suggest that we take
24 those together.

25 **THE COURT:** Okay, you may.

1 GENERAL SCHMUTZER: If we may, Your Honor, I would
2 like to start off with to approach the bench.

3 THE COURT: Okay, sure.

4 (A bench conference is held on the record, to-wit:)

5 GENERAL SCHMUTZER: Your Honor, I would like to
6 first make a statement of what the State expects
7 to prove in this case so the Court can have some
8 idea, I think, some framework with regard to the
9 joinder.

10 THE COURT: Okay.

11 GENERAL SCHMUTZER: Your Honor, it would be the
12 State's proof that on February the 15th an officer
13 went to the Dillinger residence to investigate a
14 shooting into an out building. Dillinger was
15 there, and when asked who did this, he told them
16 it was the Griffins who had done it. That there
17 had been a fight earlier between Sutton and one of
18 the Griffins.

19 The proof will show that during this period of time
20 Sutton was living with Dillinger at Dillinger's
21 residence here in Sevier County. And he made the
22 statement that, "If I have to, I will go and wipe
23 out that entire hill of Griffins."

24 On February the 21st, the last two people seen with
25 Tommy Griffin alive were these two defendants.

1 They left the jail sometime, we can pinpoint,
2 between 11:35 p.m. on the night of February 21st.

3 **THE COURT:** Okay.

4 **GENERAL SCHMUTZER:** Your Honor, within 20 or 25
5 minutes later, shots were heard -- two shots were
6 heard from where his body was later found the next
7 day on the river bank...

8 **THE COURT:** Okay.

9 **GENERAL SCHMUTZER:** ...which would have been around
10 11:55, right before 12:00 that night. That same
11 evening -- earlier that evening about 5:00, a
12 neighbor of Dillinger and Griffin -- Griffin and
13 Dillinger lived in the same hollow there. As you
14 come up the hollow, you past on your left Griffin's
15 trailer, and then you went on up the hollow to
16 Dillinger's trailer on the left. On the right is
17 a neighbor who overheard about 9:00 the dogs
18 barking -- barking for some four or five minutes.
19 He finally gets up and goes to the window to see
20 what's going on, looks down towards the Griffin
21 trailer which is on his left, sees a truck just up
22 from the Griffin trailer, and sees someone -- the
23 door on the passenger side open, and someone get
24 in, and the door close.

25 And then the truck drives up, and as it comes past

1 him, he recognizes that truck as the defendant
2 Dillinger's truck. It then pulls into the
3 Dillinger trailer, just a short distance. When it
4 pulls in, he looks back and sees flames coming out
5 of the Griffin trailer.

6 Later that evening, the two defendants are seen
7 loading something wrapped in white in another
8 different vehicle, a green vehicle or a gray
9 vehicle. I believe it was an Oldsmobile, I forget.
10 They loaded while this fire has occurred, and
11 leave. That would have been -- that was in line
12 with the time they went over and checked him out
13 of jail.

14 **THE COURT:** I'm sorry, say that again.

15 **GENERAL SCHMUTZER:** That they left, and went to
16 Blount County, and got him out of jail.

17 **THE COURT:** Okay.

18 **GENERAL SCHMUTZER:** And that's when he was last
19 seen alive, leaving with them from the jail at
20 11:35.

21 **THE COURT:** Okay.

22 **GENERAL SCHMUTZER:** The next day, Connie Branum was
23 out looking for her brother. She runs into the
24 Griffins over in -- she runs into these two
25 defendants. She is last seen alive with them

1 around 7:00, or a little after, leaving a joint
2 over in Blount County. About an hour and a half
3 later, a fire was seen up, and her body and vehicle
4 were found burned and charred -- or charred remains
5 and her vehicle were found back in a very remote
6 section of the county -- Sevier County.

7 **THE COURT:** Okay.

8 **GENERAL SCHMUTZER:** This is not an area that's
9 traveled in any way -- I mean, it's like a logging
10 road, very out of the way.

11 **THE COURT:** Is this the Happy Hollow section?

12 **MR. WEBB:** You turn on Happy Hollow Road...

13 **GENERAL SCHMUTZER:** You turn on Happy Hollow Road,
14 but it's off that.

15 **THE COURT:** Okay.

16 **GENERAL SCHMUTZER:** When the shells from
17 Dillinger's home -- well, the proof will show they
18 were both living there -- shells were taken from
19 the home. A shotgun shell was found that matches
20 one of the two shotgun shells that were found at
21 the scene of Tommy Griffin's body. 303 shells,
22 along with the 303 rifle taken from his home were
23 matched with the shell found in the vehicle that
24 Connie Branum was burned up in.

25 **THE COURT:** Okay.

1 **GENERAL SCHMUTZER:** These men on the 25th come in
2 voluntarily, and when asked about -- and at that
3 time, Connie, other than missing, no one knew she
4 was dead, and didn't know what happened to her.
5 In the course of their statements, they said they
6 hadn't seen her in two weeks. Both of them said
7 they had not seen her in two weeks.

8 **MR. WEBB:** What day are you say?

9 **GENERAL SCHMUTZER:** The 25th. February the 25th.
10 In fact, they had been with her only three days
11 before. Later, Sutton comes in later in March, and
12 the last statement that was taken, Sutton says that
13 he was with Dillinger during this entire period of
14 time, and Dillinger never killed anybody.

15 That is -- Your Honor, I could go into a lot more.
16 We have a lot more that fills in, but that's
17 essentially the State's case.

18 **THE COURT:** Okay.

19 **GENERAL SCHMUTZER:** I think the Court can see that
20 these are not unrelated crimes. These are -- the
21 State is not attempting to show -- it's the
22 position of the State that these are admissible
23 going to motive, to identity. This is purely a
24 circumstantial evidence case.

25 **THE COURT:** Identity of...?

1 GENERAL SCHMUTZER: The perpetrators of the crime.
2 They become intertwined. But motive is -- identity
3 -- "wiping out that hill of Griffins." So it's the
4 State's position that all of this evidence would
5 be admitted for those reasons.

6 THE COURT: Okay.

7 GENERAL SCHMUTZER: Once the evidence is admissible
8 in the case, then obviously, the cases should be
9 joined.

10 THE COURT: The arson?

11 GENERAL SCHMUTZER: The arson, right. As far as
12 the arson, obviously, the Blount County can't be
13 joined, but it is part and parcel of this whole
14 episode going to the death of Connie Branum.

15 THE COURT: Let me ask you this. I have -- I take
16 it it's your position on your death penalty notice
17 that the sole aggravating factor that you've
18 alleged is that the murder of Connie Branum was
19 done to cover up or to conceal or whatever, but how
20 does that comport with -- if this murder, as you
21 allege, is just as a common scheme or plan to clean
22 out the hill of the Griffins, and how does that
23 comport with the statement that her murder was done
24 in order to conceal the first one or to avoid...

25 GENERAL SCHMUTZER: I don't think the State would

1 be limited -- obviously, we're dealing with a set
2 of facts that we're having to infer, and I don't
3 think the State would be limited to one inference.
4 You know, I think that you'd have more than one
5 reason to kill someone.

6 **THE COURT:** Okay. Now why is motive -- under the
7 statute of first degree murder, why is motive
8 necessary?

9 **GENERAL SCHMUTZER:** Motive is not an element of the
10 offense, Your Honor. Motive is critical in a
11 circumstantial evidence case, and that is
12 recognized by the fact that motive is one of those
13 vehicles by which what is otherwise inadmissible
14 becomes admissible. One of the reasons set out as
15 an exception to the other crimes, inadmissibility
16 is to show motive for that very reason. You know,
17 if you have someone that saw it, if you have direct
18 evidence, then -- you know, their real motive
19 doesn't become important. But when you are saying
20 someone took someone's life, and the only thing you
21 have are inferences, what you have is a purely
22 circumstantial evidence case.

23 The first question any reasonable person would ask
24 is why, why did they do this? Why becomes
25 critically and extremely important. It would be

1 less important in other cases. And that is why,
2 Your Honor, rules of evidence provide for this
3 exception to other crimes, and that is motive.
4 Even though motive is not an element of the offense
5 -- we used to have the charge that they took out -
6 - you know, and even though the State doesn't have
7 to prove motive, but motive becomes extremely
8 important, and as I said, the rules recognize that
9 by having motive as one of the exceptions of
10 admissibility of other crimes.

11 **THE COURT:** Okay. What -- now I understand that
12 the -- if the defendant, either of them either in
13 separate trials or joined trials, if either of them
14 took the witness stand, and said that -- you know,
15 as I've read in the statements, "I had no reason
16 to kill Tommy Griffin. I had no reason to kill
17 Connie Branum." I can certainly see that for --
18 well, for impeachment purposes, and obviously, then
19 at that point, to prove motive, certainly that
20 would be admissible. If they get up on the witness
21 stand at that point.

22 Now, I understand what you are saying is that you
23 want to, as part of your case in chief -- okay --
24 could you not prove that just as well by admitting,
25 if I admitted that statement that James Dillinger

1 said if he had to he would clean out all those
2 Branums and Griffins up there. If it applied --
3 you know.

4 **GENERAL SCHMUTZER:** Is the Court asking me about
5 with regard to the admissibility of the two
6 statements? I'm sorry...

7 **THE COURT:** I'm sorry. Okay. For purposes of
8 motive, if you will, couldn't you prove that
9 element or show evidence of that element just as
10 easily by the admission of that statement that he
11 supposedly made about, "If I have to, I'll clean
12 out that hollow of Griffins," and then not have to
13 get into how the other crime was committed, in
14 Maryville, I'm talking about, and the arson of Mr.
15 Griffin's mobile home?

16 **GENERAL SCHMUTZER:** I think, Your Honor, we can
17 considerably, because she set out for the express
18 purpose of trying -- see, all this is intertwined.
19 Her reason for being with these guys was to -- any
20 time...

21 **THE COURT:** Please tell me that aspect again.

22 **GENERAL SCHMUTZER:** She, on that Saturday, when she
23 runs into them she is out there looking for her
24 brother.

25 **THE COURT:** Okay.

1 GENERAL SCHMUTZER: I mean -- you know, that and
2 that alone, you sever that, and there's no reason -
3 - you know -- she's looking for her brother. I
4 becomes muddy. A jury, as with anyone else, can
5 only make an informed decision if they have all the
6 facts, all the relevant and material facts. If you
7 begin cutting off facts and portions of facts, and
8 proving things that obviously tie back into these
9 other facts that aren't admitted, it leaves things
10 hanging. The whole thing -- it's a whole complete
11 picture over a 48 hour period of time.

12 MS. LAWS: If I could interject a question here.
13 We have asked in our bill of particulars for a
14 particular date and time of death on Connie Branum,
15 and he has said that we're talking about a 48 hour
16 time frame. I don't have anything that pins that
17 time of death down. Is there something that does?

18 GENERAL SCHMUTZER: I just stated what we had.

19 MS. LAWS: The what?

20 GENERAL SCHMUTZER: I just stated what we had. We
21 have within an hour and a half of a fire being
22 observed in the vicinity where this car was found
23 a week later. I don't want to argue with you about
24 the facts. I'm just telling the Court what we
25 have.

1 MS. LAWS: Well, you have no proof that she was -
2 - that that fire was here in the car.

3 GENERAL SCHMUTZER: We have -- the proof we have
4 inferentially is that was the only thing that could
5 have caused that. The whole case is inferential.
6 We don't have any eye witness.

7 MS. LAWS: Don't have any cause of death.

8 THE COURT: Well, I understand that part of it, but
9 I don't think that you can -- I am convinced that
10 under our law you do not have to show exact cause
11 of death.

12 MS. LAWS: Well, we had asked for time of death.
13 He stated that we're talking about a 48 hour time
14 frame. There was no report that ties that in that
15 time frame.

16 THE COURT: I understand that, but I don't think
17 that you -- obviously, you don't have to state what
18 you don't know.

19 MS. LAWS: Well, I know, but I'm just trying to
20 point out that they don't know that this happened
21 in 48 hours...

22 THE COURT: I understand that, okay? All right.

23 GENERAL SCHMUTZER: I have some cases, Your Honor,
24 that I think would shed some light on this.

25 THE COURT: Okay.

1 **GENERAL SCHMUTZER:** Of course, you get into all
2 these things, and it all becomes -- you know, they
3 are intertwined.

4 **THE COURT:** The issue on the -- okay, even if we
5 did not join offenses, if it became relevant -- if
6 it is relevant, the evidence of the other crimes,
7 of course, could be admitted even without joinder.
8 I'm sure that your argument will be that if the
9 other crimes are admissible for relevance in the
10 trial, then there's no prejudice by joining the
11 offenses. I take it that would be your argument?

12 **GENERAL SCHMUTZER:** Right, Your Honor. The key is
13 not prejudice. If it didn't prejudice them, it
14 wouldn't be admissible. The key is whether it
15 unfairly prejudices them, and I think the cases
16 show that if the State intends to get in another
17 crime using one of these vehicles when, in fact,
18 one of these vehicles is not needed, that this
19 unfairly. I think, though, that in this situation
20 the State's -- it's critical to the State's case
21 for the jury to have this whole set of facts.

22 **THE COURT:** Okay. Now how about on the issue of
23 the severance of defendants in regards to the
24 statements? Now am I to understand that they are -
25 - that one or both of the defendants are not going

1 to take the witness stand?

2 MR. GREENLEE: Mr. Sutton, at this time, will not -
3 - we do not anticipate a circumstance where he will
4 take the witness stand.

5 THE COURT: Okay. Is Mr. Dillinger going to
6 take...

7 MS. LAWS: At this point, no.

8 THE COURT: Okay.

9 GENERAL SCHMUTZER: Are we dealing -- I'm sorry...

10 THE COURT: I have switched horses on you.

11 GENERAL SCHMUTZER: They are interrelated. I don't
12 want to address something the Court's not
13 interested in.

14 THE COURT: But the severance of the offenses and
15 the severance of trials, of course, are somewhat
16 related.

17 MR. GREENLEE: Your Honor, if we're going to argue
18 the substance of these motions here, or at least
19 at the bench conference, to avoid publicity, why
20 don't we close the courtroom?

21 THE COURT: I don't think I can do that.

22 MR. WEBB: Well, can we recess and go where we...

23 THE COURT: No. I am going to give you all, and
24 I want you to argue your motions, and you're
25 certainly entitled to do that in open court, and

1 if will not be done at a bench conference. What
2 the Court was wanting to do insomuch as it was
3 without objection, and I think everybody
4 understands this, that I wanted to hear a scenario
5 of the facts at a bench conference. So I will
6 certainly allow you all to argue your case, and
7 want you to argue your case, and it's entitled to
8 be in open court. That's the law. I'm not
9 prohibiting anybody from arguing their case. All
10 I wanted to know was a scenario of the facts.

11 MR. WEBB: Are we in good shape on that now,
12 General?

13 MS. LAWS: I would just like to point out one
14 additional thing, In the facts as the General has
15 put out, he stated that on the 21st that Tommy was
16 last seen with Dillinger and Sutton. It's my
17 understanding that that again is an inference.

18 GENERAL SCHMUTZER: No, they were last -- they were
19 the last people that saw him alive. They were
20 together.

21 THE COURT: I understand that is disputed, I take
22 it, from reading the statements, but I also take
23 it from reading the statements that the officers
24 confronted both defendants with the statement that
25 they had witnesses who saw Mr. Griffin on Alcoa

1 Highway, I believe.

2 MS. LAWS: I believe that has been testified.

3 GENERAL GREEN: That was before he was
4 incarcerated, Your Honor.

5 MR. GREENLEE: What I would suggest is the
6 statement "they were the last ones seen with her
7 alive" is a biased statement -- a more objective
8 way to say this -- they were seen with him or her
9 at this period of time, and she is evidently killed
10 at this period of time. The State doesn't know if
11 that's the last ones with her alive. That is a
12 slanted way to state it, and it puts an unconscious
13 state of mind in someone -- in the receiver's ear.

14 GENERAL SCHMUTZER: It will be interesting to see
15 what witnesses they come up with, Your Honor, that
16 think they saw her after...

17 MR. GREENLEE: The burden's not on us to put those
18 witnesses on.

19 MR. WEBB: That's not our burden, Your Honor.

20 THE COURT: Okay. All right.

21 GENERAL SCHMUTZER: The State's uncontradicted
22 proof will be they were the last people to see them
23 alive.

24 THE COURT: I guess we may need to bring in a
25 judge, and an ex-judge, and a referee.

1 (Said bench conference being completed, the
2 following proceedings are had in open court.)

3 MR. MILLER: Your Honor, I had a motion and a
4 clarification of the record on the search warrant question, if
5 you want to take that now before we move on, or I can do it
6 later.

7 GENERAL SCHMUTZER: I think the Court's already
8 ruled on that, Your Honor.

9 MR. MILLER: I'm not going to try to change the
10 Court's ruling. I just want to clarify the record, and make a
11 motion with regard in regard to those statements.

12 I think last Friday you heard a lot of evidence on
13 the search warrant question, and the Court called for briefs if
14 we would like to brief the issue. This morning I submitted the
15 brief and a late exhibit which I was just furnished two days
16 ago, and I think the Court was ready to rule when we got here
17 this morning, and obviously had studied on the question all
18 week, and without the benefit of having read the brief in its
19 entirety or the search warrant summary.

20 Also, in light of the Court's ruling on the search
21 warrant, we would ask the Court to certify that for
22 interlocutory appeal because it goes to the very bite of
23 critical evidence in this case.

24 THE COURT: Okay.

25 GENERAL SCHMUTZER: Does the Court want me to

1 respond or do you want...

2 **THE COURT:** I have ruled. As I have understood the
3 law in regards to interlocutory appeals by defense counsel on
4 the issues of search questions or statements or incriminating
5 evidence, as I have generally understood it, the appellate
6 courts have held that that is reviewable on appeal -- on direct
7 appeal in the event of a conviction. So at this point, the
8 Court would respectfully deny that request. You may proceed,
9 General Schmutzer.

10 **GENERAL SCHMUTZER:** Your Honor, I'll go back. Does
11 the Court want me to address the severance or the statements
12 themselves? I need to know in order...

13 **THE COURT:** The statements, probably. The
14 severance of trials, insomuch as it has been stated -- you know,
15 that one of the defendants, and probably both would not testify
16 in a joint trial.

17 **GENERAL SCHMUTZER:** Your Honor, in the -- to begin
18 with, we need to start off with the distinction. These
19 statements in and of themselves are not confessions.

20 **THE COURT:** I kind of figured that would be the
21 first statement out of your mouth this morning.

22 **GENERAL SCHMUTZER:** They are not, Your Honor, so
23 they are treated differently. We are not talking about Bruton
24 here; Bruton deals with confessions, and where statements are
25 admissions of guilt, and implicate a co-defendant.

1 That's not the case here at all. These are not
2 statements -- these are not confessions, but are statements.
3 They do turn out to be statements against interest when they are
4 put up against other relevant facts in this case, but standing
5 alone, they do not implicate each other or themselves.

6 There's a case, Your Honor, State of Tennessee vs.
7 Pass and Martin, two defendants. Both of these defendants had
8 given statements -- they were tried together, they gave
9 statements in which they had both admitted to being present at
10 the scene where the crime was committed, but denied committing
11 the crime -- denied that any crime occurred.

12 They also never mention the fact that -- that
13 after the crime was committed they had cleaned out one of the
14 defendant's cars. It was used to haul the body from the scene.
15 A witness that the State had saw them doing that, and of course,
16 they were able to show that -- you know, they had left that out.
17 They were supposed to give a complete narrative of what they had
18 done that evening, and what had occurred, and that was one thing
19 they had left out. And the State was able to go forward, and
20 show that that was inconsistent with the facts.

21 They held, Your Honor, that -- they said that one
22 of their grounds was that the State -- the Court erred in
23 refusing to grant a severance of the defendants. Both of the
24 defendants argued that the State was allowed to introduce at
25 their joint trials statements that each had given which had

1 implicated the other.

2 And the Court went on to say,

3 "The rule in Bruton does not apply to confessions
4 which do not implicate a non-confessing defendant.
5 Neither of the out of court statements of the
6 appellants implicates the other appellant beyond
7 the extent to which each appellant admits in his
8 own statement."

9 THE COURT: Let me ask you this. Of course, one
10 of the statements in this case contradicts the other in regards
11 to a vehicle.

12 GENERAL SCHMUTZER: Right.

13 THE COURT: Okay. So how does that affect the
14 State's position?

15 GENERAL SCHMUTZER: Your Honor, the State does not
16 even intend to prove that. We would not even attempt to
17 introduce that, number one. But number two, I don't think it
18 would affect this position because it still doesn't, other than
19 contradicting each other, does not directly implicate each
20 other. They explain that anyway by saying, "Well, we're in so
21 many cars, I thought we were in the other car." We don't put
22 that much -- you know, I think one of them said that during that
23 evening they were in the truck, and the other one said they were
24 in the car. So the State would not attempt to show that.

25 THE COURT: Okay.

1 GENERAL SCHMUTZER: Does the Court wish to see this
2 case?

3 THE COURT: Yes.

4 MS. LAWS: What's the citation?

5 GENERAL SCHMUTZER: It was filed January the 7th
6 of '92, Court of Criminal Appeals.

7 MR. GREENLEE: We'd like a chance to read that.

8 GENERAL GREEN: Your Honor, I've already provided
9 a copy of that case to Mr. Greenlee.

10 MR. GREENLEE: No.

11 GENERAL GREEN: Yes, I did.

12 MR. GREENLEE: Well, I haven't seen it.

13 GENERAL SCHMUTZER: Your Honor, another case that
14 the State would cite is Brady vs. State, a case out of this
15 court back in 1979.

16 THE COURT: Kodak bank robbery.

17 GENERAL SCHMUTZER: Right. George William Brady
18 and LeRoy Marshall. Among the errors assigned in that case,
19 Your Honor, was that the statement of Brady -- they were tried
20 jointly. The proof was that Brady made the statement that he
21 didn't know Marshall. He denied knowing him. Of course, there
22 was other proof introduced, and this didn't coincide with
23 anything Marshall had said. There was other proof introduced
24 to show that in fact they did know each other, they had been
25 together the night before, and things like this. In other

1 words, it was refuted -- you know, there was other evidence to
2 refute it.

3 Marshall contends that that was used at trial to
4 establish his guilt by association. The Court said that,

5 "It may have been to the interest of each that he
6 be tried along, but the orders of the court are
7 molded to protect rights, and not merely the
8 interest of persons accused of crime. The State,
9 as well as the persons accused, is entitled to have
10 its rights protected, and when several persons are
11 charged jointly with the same crime, we think that
12 the State is entitled to have the fact of guilt
13 determined and the punishment assessed in a single
14 trial, unless to do so would unfairly prejudice
15 the rights of a defendant."

16 It goes on to say that,

17 "Appellant Brady's statement does not inculcate
18 appellant Marshall, thus, there is no violation."

19 The -- Bruton ruled, and held that there was no
20 error.

21 THE COURT: Okay.

22 GENERAL SCHMUTZER: We're talking about statements
23 outside of the vehicle where they were in agreement. Their
24 statements are together. Here, of course, obviously, this was
25 a statement made only by one of the defendants, and the other

1 defendant did not -- Marshall never said he didn't know Brady.
2 Brady is the one that said he didn't know Marshall.

3 **THE COURT:** Okay. Now let me ask you this. In
4 regards to the statement given by one of the defendants as to -
5 - I'm talking about the statement made at the time the officers
6 were first investigation allegations of a shooting sometime
7 before this into the residence up there of someone, and the
8 statement of what one of these defendants might have to do.

9 **GENERAL SCHMUTZER:** What that defendant might have
10 to do.

11 **THE COURT:** Right.

12 **GENERAL SCHMUTZER:** That defendant -- Your Honor,
13 that statement did not in any way inculcate -- it would be
14 admissible, number one, against that defendant. Number two, it
15 would be admissible against the other defendant because it does
16 not in any way inculcate the other defendant. It does not
17 involve the other defendant.

18 **THE COURT:** Okay.

19 **GENERAL SCHMUTZER:** It's a statement of purpose.
20 It would obviously go to a purpose taken with all the other
21 evidence. When this other defendant was guilty as an aider and
22 abetter, aiding and abetting the one defendant who made that
23 statement, aiding and abetting him in carrying out his express
24 purpose, or whatever, I submit to the Court, it would be
25 admissible under either circumstance.

1 THE COURT: Okay.

2 GENERAL SCHMUTZER: In much the same way that --
3 it's certainly not hearsay because it is a statement against
4 interest. It comes under the exception to hearsay. And in the
5 past, and up until Bruton, even confessions under that rule was
6 admitted against -- co-defendant's confessions were admitted
7 against another defendant. It was only under Bruton that that
8 rule was done away with, but it was only as to confessions that
9 implicated the co-defendant, and that has always been, I think,
10 the rule, none of which we have here.

11 THE COURT: Okay.

12 GENERAL SCHMUTZER: Is there any other area -- I
13 don't want to start rambling along and wasting the Court's time.

14 THE COURT: I am clear, or I think I am relatively
15 clear as to the theory at this point, and the facts upon which
16 you want to proceed on those theories. I think I'm clear on
17 that.

18 GENERAL SCHMUTZER: Okay, Your Honor.

19 THE COURT: At this point, if you have that other
20 case, the Brady case there...

21 GENERAL SCHMUTZER: Yes, Your Honor.

22 THE COURT: Let me have that.

23 GENERAL SCHMUTZER: May I approach the bench?

24 THE COURT: Yes. Thank you. I'm surprised in this
25 Brady case that it's only six pages, all the issues raised in

1 that -- that was one of the most extensive trials ever been
2 tried in Sevier County.

3 GENERAL SCHMUTZER: Your Honor, there's another
4 case, on other case, and this one is a case that I also tried
5 some years ago, Jerry Allen LeQuire, on a conspiracy -- actually
6 it was just on a case where he was -- he conspired with a lawyer
7 who deceased before the trial took place in Jefferson County,
8 to blow up the homes of two councilmen. It was a circumstantial
9 evidence case.

10 We did not -- he was not ultimately prosecuted --
11 the Judge struck down the conspiracy count before it ever went
12 to trial, but proceeded anyway on the other crimes to allow in
13 the testimony of witnesses as to what was said by the dead
14 otherwise co-conspirator, Franklin Park, which went to his
15 motive. But he's the one that had the motive to harm these two
16 councilmen. The defendant who was on trial, LeQuire, didn't
17 himself.

18 We were able to show that Franklin Park wanted
19 these two councilmen blown up because they wouldn't get rid of
20 the chief of police, and he wanted rid of them, and then we tied
21 LeQuire to Franklin Park circumstantially, and found the
22 fingerprint of LeQuire on the inside of the face of one of the
23 mechanisms. They failed to go off, thank goodness, because it
24 rained that evening. Both mechanisms failed to blow, the six
25 sticks of dynamite on each.

1 It was only on that evidence -- Your Honor, we --
2 he Court held that that was not error for the statements of
3 Franklin Park to be admitted even though these were made outside
4 the presence of LeQuire, and even though they showed the motive
5 of Park and not Lequire.

6 **THE COURT:** I believe that's the case that Judge
7 Porter talks about where the defendant in that case, on a post
8 trial motion, refused to answer questions. Was that one?

9 **GENERAL SCHMUTZER:** That's the case, Your Honor,
10 that Judge Porter talks about the defendant was denied bond
11 pending appeal, and then I think a Justice with the Supreme
12 Court granted him bond, and he's made some comments about his
13 activities thereafter.

14 **THE COURT:** Okay. I was trying to remember the
15 case he's talked about that he sentenced some guy to multiple
16 life sentences consecutively, and...

17 **GENERAL GREEN:** That's Bennie Joe Welch.

18 **GENERAL SCHMUTZER:** That's Bennie Joe Welch. He
19 gave him 10 days, and then stacked on two life...

20 **THE COURT:** He ordered him to testify, and he
21 refused, and said, "What are you going to do to me, Big Boy, put
22 me in jail?"

23 **GENERAL SCHMUTZER:** This one, Your Honor -- this
24 one was interesting. They had -- the Judge denied him bond.
25 He had a prior felony conviction, and he was convicted on this

1 one, and the Judge denied him bond pending appeal, and he
2 appealed that, and I think the full panel denied it, and Judge
3 Galbreath, on his own, granted it, and allowed a bondsman from
4 over in middle Tennessee, and a fly by night bonding company
5 went bankrupt shortly thereafter, to make the bond, and he went
6 out, of course, and for four years raised havoc across the
7 countryside until they finally got him, and it cost the tax
8 payers millions of dollars trying to catch him. This is the
9 case, Your Honor, and this is that portion.

10 **THE COURT:** Okay. Has counsel for the defense had
11 an opportunity to see those or respond to them?

12 **GENERAL SCHMUTZER:** I don't think they have, Your
13 Honor.

14 **THE COURT:** I will certainly give you an
15 opportunity to respond in writing or any other cases that you
16 want to provide to the Court on those. I sure will.

17 I am not scheduled to hold court next week
18 anywhere, the first week in some time. I will -- this is
19 Friday. If counsel for the defense wants to submit a brief and
20 supporting cases, not just conclusions and briefs, but
21 supporting cases for the Court to study, next week is a great
22 opportunity for this Court to try to reach a reasoned decision
23 on these issues. So I will do that.

24 If you want to make any argument at this point, I
25 will allow you to do that.

1 GENERAL SCHMUTZER: Your Honor, I have one other
2 case.

3 THE COURT: Okay.

4 GENERAL SCHMUTZER: Getting off of the statements,
5 and going to the -- again, I think they are intertwined, the
6 admission of other crimes.

7 THE COURT: Okay. And I have studied that issue,
8 likewise, over the past week some, and have pulled some cases
9 on it on the Court's own initiative. I think the case law and
10 the court rules, of course, do recognize, and this Court
11 certainly recognizes that the original position by state law and
12 by the rules of evidence, of course, is not to admit those other
13 crimes evidence. There is a prejudice against those, and I
14 understand that issue.

15 GENERAL SCHMUTZER: Your Honor, this is the McGowan
16 vs. State case. This is a supreme court case, 427 S.W.2d 555,
17 and this is a case, Your Honor, that was a circumstantial
18 evidence, I believe, in part, dealing with the burning of an
19 automobile. The Court held that, "Evidence as to acts of
20 violence allegedly committed by the defendant towards members
21 of the family of the victims of the automobile in question..."
22 their family, not against the victims themselves, but against
23 their family who they were charged with burning, "...and
24 testimony regarding unnatural sexual activities between the
25 defendant and members of the automobile owner's family were

1 permissible for consideration on the question of motive for
2 arson an malicious intent."

3 THE COURT: Okay.

4 GENERAL SCHMUTZER: This has been Shepardized, Your
5 Honor.

6 THE COURT: Okay. Thank you. Ms. Laws or Mr.
7 Greenlee...

8 MS. LAWS: I think Mr. Greenlee was...

9 THE COURT: Okay. I have read the brief that was
10 provided to me in regards to the memorandum of law in opposition
11 of joinder of defendants and joinder of offenses. I have read
12 both of those.

13 MR. GREENLEE: Your Honor, as to the first ruling
14 the Court wanted to consider, the first motion was the motion
15 as to whether or not the arson of the trailer should be tried
16 together with the murder of Connie Branum.

17 THE COURT: Right.

18 MR. GREENLEE: I think there are six phases or
19 concepts in which cases can be joined for trial.

20 1. Multiple offenses which are identical, but
21 which are the same or less included offenses on the
22 other charge;

23 2. Crimes which are part of the same conduct, like
24 a kidnapping and armed robbery;

25 3. Crimes which are part of a criminal episode,

1 which could be kidnapping and armed robbery -- grab
2 them, take them off around back, and rob them;

3 4. Crimes which are part of a common scheme or
4 plan;

5 5. Crimes that are similar; and

6 6. Crimes that are totally unrelated.

7 Of those six, the first three are mandatory
8 joinder. Crimes that are a common scheme or plan or similar
9 offenses can be joined by permission, or are permissive by the
10 Court's discretion. And number six, it is the defendant's right
11 to sever absolute. It is the defendant's position that these
12 are totally unrelated offenses.

13 Gary Sutton's position is that this arson of the
14 trailer 24 hours away from the time he was supposed to have, or
15 allegedly killed Connie Branum. They don't have any modus
16 operandi similarities. They were not the same victims, they are
17 not the same place, they are totally unrelated.

18 In the trial of Connie Branum's murder, the proof
19 that her brother's trailer was burned the night before could not
20 be admissible. It has no relevance, logically...

21 **THE COURT:** Okay. Let me ask you this question.
22 In regards -- and I also understand the problems associated with
23 the statement of the co-defendant Dillinger given to officers
24 about a shooting that occurred earlier -- so what effect does
25 that have on your position?

1 MR. GREENLEE: At this point, it has no bearing
2 because that issue is primarily concerning if the defendants are
3 joined for trial. Then the amount of prejudice that spills over
4 onto Gary Sutton because of a statement made by Mr. Dillinger -
5 - that's where that becomes important. That's another argument,
6 we haven't even reached that issue yet.

7 THE COURT: Okay.

8 MR. GREENLEE: The first issue the Court wanted to
9 talk about is should the arson of the trailer and the murder be
10 tried together. Well, if they are totally unrelated crimes,
11 defense has a right, without any question, to have separate
12 trials. The fact that the State has an interest in trying them
13 together is not the rule that we follow. The fact that they
14 need it is no bearing.

15 THE COURT: I believe the balancing test contained
16 in 404 is somewhat...

17 MR. GREENLEE: And if the evidence of the arson of
18 the trailer is admissible, it would be admissible against Gary
19 Sutton under 404(b). The standard for proof is clear and
20 convincing. I think it's the State's burden now, if they are
21 going to go under common scheme or plan, to present or state
22 how, by clear and convincing evidence, not inference on
23 inference on inference, but by clear and convincing evidence,
24 that the arson of Tommy Griffin's trailer is another act under
25 404(b) that would allow that evidence to come in against Gary

1 Sutton.

2 Right now, that's all we're talking about. If we
3 try these two together, can Gary Sutton be tried together? We
4 submit there is no clear and convincing evidence of Gary
5 Sutton's participation in the arson of this trailer. Absent
6 that, you don't have clear and convincing evidence that he
7 committed that crime. Also, he has not been convicted of that
8 crime. There is clear authority in our briefs and otherwise
9 that talk about that.

10 The common scheme or plan, if they're going to go
11 under that, they would have to articulate, not theorize,
12 articulate factually, evidentially how the burning of this
13 trailer is a common scheme or plan that included the killing of
14 Connie Branum. Inference of theory without testimony and
15 evidence is merely that. And probably, it would be to the
16 State's best interest to be able to put these boys together, and
17 all these crimes together, because one of the most immediate
18 effects of that is confusion. After a while, the shadow of one
19 defendant covers the other, and you don't know exactly who is
20 guilty of what, but it looks like they are pretty bad guys.
21 They went out on a crime spree.

22 THE COURT: That's certainly what the rules are
23 intended to avoid, for slight evidence, especially, of other
24 crimes, to unfairly prejudice anyone's rights.

25 MR. GREENLEE: Also, I would like to caveat that

1 we would like to look at this cases to see if they apply, and
2 if prior success of the State should apply to this case.

3 THE COURT: You are certainly entitled to.

4 MR. GREENLEE: You know, it's interesting that they
5 -- if they succeeded in another case with another set of facts,
6 but I think we would like to have the opportunity to see whether
7 or not the holdings, as a matter of law, would apply to the
8 scenario of this case.

9 The defendant is entitled to severance of offenses
10 where it can be shown he would be prejudiced if they were tried
11 together, or where it would be in the interest of justice that
12 they be tried separately. The argument against joinder is that
13 the defendant may be prejudiced for one or more of the following
14 reasons:

15 1. He may be compounded in presenting separate
16 defenses.

17 I don't think that that's terribly applicable at
18 this time because right now, from what we have seen, the State
19 is saying Gary Sutton made a statement on the 9th that basically
20 said three words all the time. They have a witness that puts
21 the co-defendant at the scene of the trailer fire. Now, that
22 witness at the scene of the trailer fire that puts Dillinger at
23 the scene of the trailer fire allows an inference to be drawn
24 that Dillinger did it. It's possible. There's no witness that
25 puts Sutton at the trailer fire.

1 We want to guard against the jury using the
2 evidence of one of the crimes to infer guilt in another. We are
3 sort of confused -- we're sort of in a quandary here because we
4 don't see where there's any real guilt or proof of either crime.
5 At the very most under the best scenario, if you gave the State
6 every benefit of every inference, you have mere presence that,
7 as the Court knows, it's been over and over, and mere presence
8 doesn't prove guilt of anything. But if you give them every
9 benefit of the two or three, maybe four inferences in which they
10 build their case, you have mere presence.

11 We are suggesting to the Court that the jury
12 cannot, after the second or third inference, with surgery-like
13 precision, divide these defendants, and we would ask for -- we
14 appreciate the time and the chance to talk about it now, but
15 we'd like to contribute or respond to...

16 THE COURT: I want you to.

17 MR. GREENLEE: ...these cases before any ultimate
18 ruling. It's our position that the joinder of offenses can be
19 ruled upon without any real regard to the big picture that may
20 be presented to the Court.

21 The joinder of defendants is another issue that I'm
22 not arguing at this time because the State has not argued it
23 yet. I would like to be able to come back, and argue the
24 joinder of defendants.

25 The State has filed a motion asking for the

1 admissibility of statements in the joint trial. It's our
2 position that that's premature. They want to know what the
3 Court is going to do if they do this. I think the rule reads
4 they can join these defendants, I think under Rule 8, if they
5 are charged with the same crimes and the same conduct, they can
6 join them. And then Rule 14 talks about whether or not we can
7 sever.

8 They would like the benefit of knowing what you're
9 going to do, Judge. "Are you going to let us put in these
10 statements? If you are, we might join them." I think they need
11 to join if they are going to under Rule 8, and then once they
12 have, we will object, we will show why we are entitled to a
13 severance, especially under subparagraph (c) of Rule 14, and at
14 that point, the State would elect -- I think they have an
15 election to admit the statements because we don't know if they
16 are going to try and admit -- what statements -- whatever, and
17 if they are going to be admitted, that they be redacted.

18 If they can't be admitted, the Court won't admit
19 them, and if they can't be redacted successfully, the State
20 would then come back, and say, "Well, we'll try them
21 separately." They have that in the last sentence of Rule 14 -
22 - that right to do that. So they don't really lose anything.

23 The admissibility of the statements is a premature
24 motion, just as we filed a motion in limine saying keep out
25 certain evidence like Blount County -- in all candor, I don't

1 see how the Court can rule on any item of offered evidence
2 until, one, it's offered, two, what theory, and what's the
3 context of the issue that it's trying to resolve or it's
4 relevant to.

5 The Court will have to rule on those things,
6 probably, at the time.

7 THE COURT: As to portions of those, there is the
8 possibility that the Court might defer on certain evidentiary
9 issues until the trial. I understand the danger of that. I
10 understand also -- as I was reading some of the cases last night
11 and the night before on the -- actually, the Court asking the
12 State to put on proof of its entire case, and then pass upon the
13 admissibility certain aspects of the evidence that we've talked
14 about. That is an option, if the Court determined that it was
15 admissible. So...

16 MR. GREENLEE: I think the evidentiary issues will
17 begin to become simpler if the issues about joinder of offenses
18 is decided. Once that is ruled upon, then it becomes a little
19 clearer. If the issue of the joinder of defendants is ruled
20 upon, the issues become -- the problems become clearer. It is
21 only when we begin with no rulings on any issues that we have
22 such -- what is an apparently a complicated situation, and we
23 can break it down to make simple.

24 Whether or not the trailer and the murder can be
25 tried together is governed by the rules. Unless the State can

1 show that they are part of a common scheme plan, or they can
2 show the evidence is admissible one to the other, it doesn't get
3 joined. And that's simple. Once you have separate offenses
4 tried, separate trials, then you can go into whether or not
5 Dillinger and Sutton are tried together. That's a whole other
6 set of issues we can talk about. We will talk about them, and
7 the Court will make a ruling, and at that point, the issues of
8 admissibility on relevance, motions in limine, and we filed on
9 to keep out a autopsy report of Tommy Griffin as having no
10 bearing on Gary Sutton's guilt on Connie Branum. Those kinds
11 of issues will become a lot simpler and easier to decide.

12 **THE COURT:** The joinder of offenses, in all candor,
13 is the easier of the motions for the Court to rule upon. I will
14 rule on that momentarily.

15 Based on what the Court has been advised by both
16 counsel, or counsel for all sides, the issue of the arson --
17 strike that, let me back up.

18 There are certain evidentiary issues that have been
19 presented to this Court. There are certain portions of evidence
20 that may be relevant as to each of the crimes charged to both
21 defendants, and may be admissible, whether or not they are tried
22 -- all offenses are tried together or not. So I want you to
23 understand that before I make the ruling on the joinder of
24 offenses, because the trial of the case, and the evidence
25 presented as the case proceeds, obviously, affects that issue

1 very clearly.

2 The Court feels that the charge of the arson of the
3 home of Tommy Griffin should not be tried together with the
4 issues and the issues and the offenses charging the death and
5 arson of the car of Connie Branum. So for that reason, I do not
6 join those. Those will not be tried together.

7 Now having said what I just said, the admissibility
8 of certain aspects of evidence, the Court at this point is not
9 ruling upon, and quite frankly, some of the issues do depend on
10 the evidence presented at trial. And so I am not passing upon
11 that issue at this time.

12 The arguments presented by the State in regards to
13 motive may -- it may end up that if the Court determines that
14 is appropriate, then certain evidence associated with the
15 alleged arson of Tommy Griffin's home might very well be
16 admissible. I don't know at this point. But I can -- you can
17 make one great argument that if evidence of one is admissible,
18 then why shouldn't they be tried together. I think that's a
19 strong and compelling argument. But in fairness, I feel like
20 it would be better not to have to deal with the entire element
21 of that alleged crime in this trial. So for that reason, the
22 Court does sever those, or refuses to join those two trials.

23 Let's take a short break.

24 MS. LAWS: Do you have an inclination of what you
25 want to take up next?

1 THE COURT: No, I don't. I'm sure there's plenty
2 for us to do, so why don't we take a break.

3 (COURT STOOD IN RECESS)

4 THE COURT: What are the other motions that the
5 Court needs to...

6 GENERAL SCHMUTZER: Your Honor, could I -- the
7 Court had made a statement with regard to some portion of
8 evidence that was indicated in the statements...

9 THE COURT: Yes.

10 GENERAL SCHMUTZER: Could I approach the bench
11 because in making the statement to the Court, I didn't go into
12 that, and then maybe make some argument with regard to that just
13 for the record.

14 THE COURT: Sure, you may.

15 (A bench conference is held on the record, to-wit:)

16 GENERAL SCHMUTZER: On the evening of the 23rd of
17 February, the proof will show, number one, these
18 men were in a dark blue Camaro. A dark blue Camaro
19 was seen on the side of the highway -- Alcoa
20 Highway. I guess at that point, I would call that
21 as being Maryville -- Townsend. It was on the
22 Alcoa Highway.

23 THE COURT: Near Hall Road?

24 GENERAL SCHMUTZER: Hunt Road. A dark Camaro with
25 two men seen pulling the third one out. The third

1 one didn't -- it looked like they were fighting.
2 One didn't have on a shirt. Subsequently, an
3 officer came and picked up that individual, and it
4 was Griffin. That's how Griffin ended up in jail.
5 Though the person could not identify who these
6 were, this contradicts the statements that Tommy
7 Griffin had left these two individuals back at the
8 store with some fat girl. It's extremely
9 important, because obviously, if the evidence is
10 admissible, and we submit that it is, then -- well,
11 I can go into that in argument here, but I wanted
12 to state that for the record.

13 **THE COURT:** Okay. Very well.

14 (Said bench conference being completed, the
15 following proceedings are had in open court.)

16 **GENERAL SCHMUTZER:** Your Honor, we have some
17 officers here that we brought back. We didn't know if the
18 subpoenas extended or not. I take it we are through with the
19 evidentiary matters, and if they are, I would like to ask that
20 they be excused. We've got one that's going to be up all night
21 tonight.

22 **THE COURT:** Are there any other evidentiary matters
23 contemplated by counsel for the defense at this time -- that's
24 requiring testimony? I'm sure there are evidentiary matters,
25 but those that might require testimony?

1 MR. WEBB: We don't anticipate that, Your Honor.

2 THE COURT: Okay. The officer, upon motion, then
3 is free to go.

4 GENERAL SCHMUTZER: Thank you. There are a number
5 of officers, Your Honor, that were involved.

6 THE COURT: Okay. Each of them are free to go.

7 GENERAL SCHMUTZER: Your Honor, assuming, and as
8 the State has pointed out to the Court, obviously, and I think
9 the Court has indicated that this is a complex set of facts.
10 I think the reason why it is complex is because it is so
11 interrelated. If you begin going in and trying to carve out
12 certain sets of facts, then you leave out, as Paul Harvey says,
13 "the rest of the story," because they are so intertwined.

14 It is -- especially in the situation where the
15 State always has the burden of proof beyond a reasonable doubt
16 and to a moral certainty, any time the State finds itself unable
17 to prove the entire story, especially in a circumstantial
18 evidence case, it finds itself at a great disadvantage in trying
19 to meet that burden of proof. If these crimes were truly
20 unrelated, if they didn't go to motive, if they didn't go to
21 common scheme and plan -- if they were totally unrelated, it
22 would have been an easy matter. It wouldn't be so complex
23 because there wouldn't be this intertwining that we have
24 involved.

25 Particularly with regard to what transpired out on

1 the Alcoa Highway, that contradicts -- number one, contradicts
2 the statements of the defendants. The State -- if the State
3 goes forward with other crimes, we have to show it by clear and
4 convincing evidence. And the explanations of the defendants in
5 their statements is contrary to what transpired out on Alcoa
6 Highway. And not only that, You Honor, but again, it goes to
7 the motive, it goes to the common scheme and design, it goes to
8 the malice that was being shown by these defendant against the
9 Griffins.

10 THE COURT: Okay.

11 GENERAL SCHMUTZER: And I think, Your Honor, for
12 that reason, if the Court finds that the other crimes are
13 admissible, and I think the Court has not ruled on that yet.

14 THE COURT: Right.

15 GENERAL SCHMUTZER: That because of the State's
16 burden, and knows, though it be less than beyond a reasonable
17 doubt, it's still by clear and convincing evidence -- you know,
18 you take the whole entire set of facts, and you go through that
19 period of time, and showing who was with whom, what was -- you
20 know, what was being done, and you begin to carve out some of
21 those sets of facts, and the whole thing begins to unravel.

22 THE COURT: Okay.

23 GENERAL SCHMUTZER: So I think that -- that was -
24 - I think there was some mention made about the Alcoa Highway
25 incident, and it's relevant -- I think its highly relevant, both

1 as to the fact that it's contrary -- it contradicts what they
2 say, and number two, it, along with the arson and the murder,
3 shows this malice, this motive, the intent, common scheme and
4 design against the Griffins.

5 **THE COURT:** Okay. And let the Court state that in
6 regards to its ruling on the severance of offenses in regards
7 to the alleged burning of the home of Tommy Griffin, the Court -
8 - the primary reason that the Court doesn't feel that that is -
9 - it is best to try those together is that the Court doesn't
10 want to get the jury bogged down, especially in deciding the
11 issue of guilt or innocence on that as to both defendants, based
12 on the statements of the facts that the State expects to show,
13 especially as it relates to one of these defendants. That is
14 the primary basis for the Court's ruling on that very narrow
15 issue.

16 **GENERAL SCHMUTZER:** Right, Your Honor. I was not
17 attempting to go back into that.

18 **THE COURT:** I understand.

19 **GENERAL SCHMUTZER:** I was not attempting to go back
20 into that, or question the Court on that ruling.

21 **THE COURT:** Except I did want to state, and to
22 reiterate that just because I have severed that case does not
23 mean at this point the Court would not, under any circumstance,
24 allow certain evidence on that. You know, I have not made a
25 ruling on that yet.

1 Does anyone want to respond on what General
2 Schmutzer has said?

3 MR. GREENLEE: Briefly, Your Honor. We would just
4 like to point out to the Court that yes, this is Sevier County,
5 and not Blount County's murder that we're trying. The proffer
6 of this incident on Alcoa Highway, when it is offered, will have
7 to accompany -- be accompanied by a theory...

8 THE COURT: Correct.

9 MR. GREENLEE: Say, this happened. You may be able
10 to show that this happened, and then they will have to show how
11 it relates to intent, motive, common scheme or plan as to Gary
12 Sutton.

13 Now the fact that they can show it to a co-
14 defendant does not in any way assist the State in carrying the
15 burden as to whether or not it is admissible as a prior act
16 under 404(b).

17 THE COURT: Okay, let me ask you this. In regards
18 to that, if that allegation of facts about what occurred either
19 out there or especially the statement of one of the co-
20 defendants earlier, Mr. Dillinger, as it relates to your
21 client's motive or intent -- now, granted, while that,
22 obviously, in and of itself does not directly prove a motive of
23 your client -- that statement in and of itself, why would it -
24 - or couldn't he also, if they showed presence and activity and
25 conduct by him, prove a shared intent or whatever, arguably?

1 MR. GREENLEE: Number one, you have a factual
2 incident, an encounter, and then you have words that
3 characterize that incident, and you have a statement by the
4 deceased that's somewhat consistent with that. I will find the
5 case, but under 404(b), when you are talking about other crimes
6 or other acts, the other act must directly relate to an issue
7 at trial. The State should not be allowed to get a conviction
8 on guilt by association. They should have to show Sutton's
9 culpability entirely independent of Dillinger.

10 THE COURT: I don't think it has to be entirely
11 independent, but obviously, there has to be proof in regards to
12 Mr. Sutton that is -- you know, as it relates to him.
13 Obviously, and it's always been a law, that just because he was
14 in the presence of the other co-defendant, that certainly
15 doesn't convict him. They must show more. There's no doubt
16 about that.

17 MR. GREENLEE: To show -- this Highway 129 or Alcoa
18 Highway incident, first, the decision the Court must make under
19 401 or 402, is it relevant to an issue in Connie Branum's trial
20 -- motive, intent.

21 THE COURT: Right.

22 MR. GREENLEE: And you've got to realize this --
23 Connie Branum's not involved in this.

24 THE COURT: Right.

25 MR. GREENLEE: One possible, and the Court is well

1 aware of this, is the statement made on the 15th. That only
2 attaches to one of the defendants. There's nothing to say,
3 nothing that says this intent was shared. So the most that
4 you've got is, first you decide is it logically relevant to
5 Sevier County's murder case, number one. Number two, is it
6 proved under 404(b) by clear and convincing evidence?

7 Then the State must show to the Court that the
8 probative value of that other act, 51% outweighs the prejudicial
9 effect. What effect with that have in the minds of the jury.
10 On a scale of one to 10, the probative value is maybe two or
11 three, we submit. If the prejudicial value is even one step
12 higher, under 404(b) it doesn't come in.

13 THE COURT: Right.

14 MR. GREENLEE: Under 403, it's a different
15 standard.

16 THE COURT: Substantially, I believe is the
17 language in 403.

18 MR. GREENLEE: The prejudice must substantially
19 outweigh the probative value.

20 THE COURT: Right.

21 MR. GREENLEE: If the Court will distinguish that
22 we are not talking about 403 relevancy, we are talking about 404
23 bad act, or another act.

24 THE COURT: Right.

25 MR. GREENLEE: And by looking at it that way, it

1 doesn't got a lot to prove Gary Sutton committed first degree
2 murder of Connie Branum. But the prejudice of it is enormous.
3 We would submit that -- I guess it's really a premature
4 argument. The General made a preliminary statement about that,
5 and I think we just wanted to balance that out, and when the
6 time comes, we'll try to be very clear in trying to present that
7 in the proper context, or respond to it in the context in which
8 it's presented.

9 **GENERAL SCHMUTZER:** Your Honor, I think what the
10 difficulty is, and of course, what the defendant would like the
11 Court to do is to go through here, and try to pick out each
12 little piece of evidence, and look at it separately, and try to
13 weigh it separately as it applies to each defendant, when in
14 fact you can't do that.

15 The only way you can do it is take the evidence as
16 a whole -- that's the way the jury is going to receive it.
17 There would be no trials of defendants being tried jointly if
18 their theory were true. If someone states a purpose, a design,
19 and the proof shows later joins up with him, and is with him for
20 whatever reason, aids and abets, or present, ready, and willing
21 to aid and abet, then, of course, he is part and parcel of it.

22 So to try to go back and say -- you know, "this
23 doesn't apply to our defendant," well, if you take the statement
24 alone and isolate it with no other proof, you could arguably
25 say that, but when you take in all the other proof that's there,

1 it's a whole different ball game. I think that's where we run
2 into these problems.

3 THE COURT: You know, a co-defendant, under the
4 law, doesn't have to share the same exact motive or intent as
5 the other co-defendant. That's clear.

6 GENERAL SCHMUTZER: They do not have to share the
7 same motive, Your Honor, but I think they have to share the same
8 intent.

9 THE COURT: Same intent for the actual act itself.

10 GENERAL SCHMUTZER: Right, but not the motive, the
11 general motive or reason for committing it. He does not have
12 to. The Court is correct, and -- you know, I think that is the
13 problem that we're having with all of this because it is so
14 interrelated. It is so intertwined. Obviously, the jury is
15 going to be told to look at the evidence as it applies to each
16 defendant individually, which I'm sure they will do following
17 the Court's decision, but they are asking the Court to try to
18 take this evidence piece by piece, and say what applies to one
19 as opposed to the other.

20 THE COURT: And as I advised counsel, what I am
21 going to do in my written order in regards to the evidence of
22 other crimes is to make a general evidentiary ruling. Whichever
23 way the Court rules on that issue -- you know, if during the
24 trial of the case other issues come up, of course -- you know,
25 I cannot say that under no circumstances any piece of evidence

1 will be admitted or excluded. So I'm not doing that even in my
2 written order, but I am going to try to give counsel, in my
3 written order, a general guideline of what the Court is going
4 to allow or exclude. And that's all I'm doing on that issue.
5 That's all I can do, except to pre-try the lawsuit, and of
6 course, we can't do that without the jury.

7 **GENERAL SCHMUTZER:** I understand. And that's all
8 the State is seeking. Obviously, if we can't go into those
9 other crimes, we'll have other witnesses here, and we're going
10 to making opening statements about it. By the same token, if
11 we do, we need to be prepared, and ready to go.

12 **THE COURT:** Right. Sure. I really appreciate all
13 counsel in this because this is -- I have not seen, as a lawyer
14 or a judge, or have been involved in one as a lawyer or a judge,
15 one any more complicated on the legal issues, and I certainly
16 appreciate the efforts of all counsel. This is a -- it's a most
17 unusual fact situation for the Court, and I'm sure counsel, and
18 the legal issues -- I'm proud of all of you. I really
19 appreciate what you all are doing.

20 **GENERAL SCHMUTZER:** We appreciate your indulgence,
21 Your Honor.

22 **MR. GREENLEE:** May I respond briefly to General
23 Schmutzer?

24 **THE COURT:** Yes.

25 **MR. GREENLEE:** Two points, Your Honor. First, the

1 General says that the jury needs the whole picture. They will
2 be told to look at the whole picture, but the only thing they
3 are allowed to look at...

4 THE COURT: Is relevant evidence.

5 MR. GREENLEE: ...is relevant evidence. Maybe the
6 Court has seen, and I hope it has seen the commercial where IBM
7 is talking about solving problems, and the IBM gets bigger and
8 smaller, and changes. When it finally gets to a wall, it breaks
9 into little pieces, and goes through that wall and rejoins on
10 the other side.

11 The only thing that gets through the wall is
12 relevant evidence, evidence that doesn't unduly or unfairly
13 prejudice. The admissibility of the little pieces of this
14 picture is governed by our rules and our courts' decisions, and
15 all we're wanting to do is have the Court follow the law. It's
16 not the Court or us -- the jury has to get whatever picture they
17 get from admissible, relevant evidence. If it's not admissible
18 and not relevant, it's not part of the picture.

19 THE COURT: Sure.

20 GENERAL SCHMUTZER: We're in agreement on that,
21 Your Honor.

22 MR. GREENLEE: I think that's pretty clear. And,
23 of course, the State is an advocate, and wants as much in...

24 THE COURT: As you all want out.

25 MR. GREENLEE: ...as we want out, but the guidance

1 is not -- the guidance is not what the State wants or needs, or
2 what we want or need.

3 THE COURT: Right.

4 MR. GREENLEE: It's the law. I want to point out
5 one case, Blankenship vs. State. I looked hard to find
6 something that tried to help us out. It's 410 S.W.2d 159, a
7 Supreme Court of Tennessee case in which the Court says,

8 "Doubts as to whether the erroneous condition of
9 evidence was prejudiced should be ruled or rendered
10 in favor of the accused."

11 THE COURT: I think that's a concept of 404(b) or
12 404.

13 MR. GREENLEE: The idea is -- we don't want -- in
14 other areas of the law, the defendant doesn't have the benefit
15 of the doubt. But when we're talking about things that aren't
16 smoking guns, the danger of their misuse in the minds of the
17 jury is too great to sacrifice.

18 THE COURT: Okay. If you will submit your case -
19 - please submit your cases by Monday over at the -- at my
20 office. Now, I will not be in the office on Monday, but if you
21 will leave your packet downstairs there at the reception desk,
22 and leave it with that secretary there, the Court will get it.

23 MR. GREENLEE: What is the Court's pleasure on the
24 motion for joinder of defendants?

25 THE COURT: I think that -- doesn't that depend on

1 what the Court rules as to whether or not a Bruton problem
2 exists?

3 MR. GREENLEE: No, Your Honor. Only a little bit
4 of this problem is resolved by deciding whether or not Bruton
5 applies. The other part of joinder in 14(c) talks about the
6 factual prejudice that may exist as a result of joinder of
7 defendants, and that's an entirely separate analysis.

8 THE COURT: Okay. Now as to the factual prejudice,
9 explain to the Court your position on that. Are you making your
10 motion on the severance because of the prejudice of the out of
11 court statement of the co-defendant?

12 MR. GREENLEE: Partially.

13 THE COURT: Okay.

14 MR. GREENLEE: It's not just out of court
15 statements, but that is to be considered.

16 THE COURT: Okay.

17 MR. GREENLEE: The difference in the strength of
18 the two cases; weaker against Gary Sutton than against James
19 Dillinger, creates a situation of a spill over of evidence onto
20 Gary Sutton, and would result in confusion to the jury, and an
21 unfair trial. The State, in the prosecution against James
22 Dillinger, is relying on 404(b) to get certain things in.

23 Aside from 404(b), the Court has to know and
24 consider what items of evidence are going to come against
25 Dillinger that would not be admissible against Sutton, and have

1 to think about, and evaluate whether or not a jury instruction
2 will be effective.

3 One of the items --- of course, we know about the
4 statement on the 15th; admissible as to Dillinger, not to
5 Sutton. That is probably the strongest piece of evidence that
6 has got.

7 **THE COURT:** The statement of March -- the last one?

8 **MR. GREENLEE:** To Deputy John Brown. It think it
9 was John Brown. The statement made to Deputy John Brown after
10 a shooting into a dwelling.

11 **GENERAL SCHMUTZER:** February 15th.

12 **MR. GREENLEE:** February 15th.

13 **THE COURT:** Okay.

14 **MR. GREENLEE:** That statement is not admissible
15 against Gary Sutton, Your Honor. The Court will have to make
16 the instruction to the jury when that evidence comes in, "Jury,
17 you are not to listen to that, and use it in any way as proof
18 against Gary Sutton." Sum me up -- if I'm misstating, I'm sure
19 the General will correct me. But then basically, it's not
20 admissible against Gary Sutton.

21 **THE COURT:** To show Gary Sutton's motive or...

22 **MR. GREENLEE:** Intent, or more precisely,
23 premeditation. It will go to an element -- an issue at trial
24 which 401 and 402 talks about, in order to be relevant, it has
25 to be addressing an issue, and one of the issues is

1 premeditation. In order to get first degree murder, you must
2 premeditatedly do the act of homicide.

3 THE COURT: No, I don't think that's the
4 definition.

5 MR. GREENLEE: You mean you can get a first degree
6 murder conviction without premeditation?

7 THE COURT: Well, intentionally, under the
8 definition of the statute.

9 MR. GREENLEE: But anyway, I think the Court sees
10 that's not evidence that's admissible against both defendants
11 equally.

12 Secondly, there's a 303 shell found in Connie
13 Branum's car. Now aside from the arguments of admissibility
14 based on relevance, and we contest it's not relevant, but
15 assuming that that argument is won by the State, and if it comes
16 in that there's a 303 fired shell in Connie Branum's car, they
17 match that up.

18 THE COURT: Right, with shells found in the home
19 of Mr. Dillinger.

20 MR. GREENLEE: They found a 303 case in Dillinger's
21 house, a 303 rifle in Dillinger's house, a 303 case found on
22 Creek Road.

23 THE COURT: Okay.

24 MR. GREENLEE: And a 303 case found in Connie
25 Branum's car, and in lab number 92102163, they determined that

1 all of those shells were fired from the 303 rifle taken from
2 Dillinger's home.

3 That is evidence against Dillinger, not 404(b).

4 THE COURT: Right.

5 MR. GREENLEE: That is evidence from which you can
6 infer presence. Whether weak or strong is not the question now.
7 It's not evidence against Gary Sutton.

8 The jury would have to be told to apply it only as
9 it's admitted.

10 THE COURT: Okay.

11 MR. GREENLEE: And on a 404(b) status, at Tommy
12 Griffin's crime scene, a shotgun shell was found -- two of them,
13 Exhibit 6993 and 6994. A fired shotgun shell found in James
14 Dillinger's trash can, and those three match. That's 404(b)
15 because it's not -- this is the Blount County situation.

16 But if that comes in by clear and convincing
17 evidence, it is only admissible against the person where they
18 were found, James Dillinger, not Gary Sutton.

19 THE COURT: Right.

20 MR. GREENLEE: The jury will have to be instructed
21 on that. And again, how many of these instructions that are
22 going to be made -- be put before this jury, and how much do we
23 expect of them in being able to divide up this evidence and it's
24 application?

25 THE COURT: Okay.

1 MR. GREENLEE: I have not been told that they will
2 use this against Dillinger, but the statement given in discovery
3 from a Devon Mayes, and which is evidently a statement that
4 indicates that James Dillinger carries around a shotgun --
5 carries it with him all the time. That may, if it's offered,
6 come in against Dillinger. The jury will be told that it's only
7 proof against Dillinger.

8 THE COURT: I believe that's more habit evidence,
9 isn't it?

10 MR. GREENLEE: All I know is it's in here, and I
11 look at it, and if I were a prosecutor, I would like to have
12 this in. I'd like to be able to show that he carries around a
13 shotgun.

14 THE COURT: Okay.

15 MR. GREENLEE: These items of such evidence in a
16 joint trial would be devastating to Gary Sutton, even though
17 they would not be introduced as evidence against him, and the
18 jury would be so instructed. This is why it is our position
19 that a joint trial clearly runs the risk of convicting an
20 innocent citizen, and separate trials do not.

21 THE COURT: Okay.

22 MR. GREENLEE: If I may, the State has said that
23 this is not a Bruton situation. Both defendants here have given
24 statements, and not just the statements to law enforcement, not
25 the statements given to the officer, and not any other evidence.

1 They are not confessions, but they are proof of some elements
2 of the crime of first degree murder. They will be admitted to
3 prove some things.

4 We suggest that they do come under a Bruton
5 analysis based on the case of State v. Elliot.

6 **THE COURT:** Will you provide that case to me, Mr.
7 Greenlee? The Court has read your brief several times, to be
8 real honest with you.

9 **MR. GREENLEE:** And basically, one statement puts
10 the other non-testifying co-defendant in more jeopardy, and more
11 likely to be convicted than his own. Then you have a prejudice
12 problem, maybe not so much Bruton, but under Elliot, and the
13 cases that have talked about it, they talk about how -- and most
14 recently, Cruze vs. New York in 1987.

15 **THE COURT:** But the test on that aspect, even if
16 you -- and it's not a confession as both sides admit. Then you
17 get into the issue, really, of unfair prejudice as opposed to
18 just prejudice, right?

19 **MR. GREENLEE:** It is analogous to a lack of
20 confrontation. If Dillinger's statement comes in, and it's more
21 extensive, the State will be able to bring in a string of
22 witnesses to impeach that statement. We can't impeach it.

23 **THE COURT:** But if it -- okay.

24 **MR. GREENLEE:** And you get into where the Court
25 will be just reading over and over again to this jury to

1 separate evidence, and how much -- the State has always said,
2 "Jurors can follow the instructions." Courts, on the other
3 hand, have realized, from the Supreme Court of the United States
4 to our State Supreme Court, juries have limitations.

5 THE COURT: Well, it's our role here to try to
6 structure the case, and the submission of the evidence in such
7 a way that a jury can make a reasoned decision on the evidence
8 they get not to give one side an advantage or place a
9 disadvantage on somebody else, but to try to have a reasoned -
10 - a reasonable basis for them to make their decision. So that's
11 the Court's role to structure that process, and I will do the
12 best I can.

13 If you will submit those two cases to me, and any
14 other cases cited in your brief, insomuch as the Court doesn't
15 have access immediately to the U.S. Supreme Court Reporter. I
16 could stay upstairs all weekend, but I really don't want to do
17 that. So if you'll provide me the cases, I'll appreciate it.

18 GENERAL SCHMUTZER: May I respond, Your Honor?

19 THE COURT: Yes.

20 MR. GREENLEE: I was responding to him.

21 GENERAL SCHMUTZER: Well, I think that I have the
22 burden, I think I would have the last -- he brought up things
23 that we hadn't gone into, Your Honor.

24 To begin with, this statement about going through
25 each piece of evidence, and trying to say you are to accept this

1 as to one and not the other is simply not the case. Your Honor,
2 with the statement on the 15th, it goes -- right, it goes to the
3 defendant Dillinger, and is attributed to him. It does not
4 inculcate Mr. Sutton at all. It's only later that Mr. Sutton
5 inculcates himself by tying himself directly to this man on the
6 times in question when the murders occurred.

7 By the same token, and again, looking at all of the
8 facts, that would be admissible. If two men go out and commit
9 a crime -- it's just like the case that we submitted with regard
10 to LeQuire. In fact, the co-defendant was dead, but all of his
11 statements where it showed motive were admitted because there
12 was no motive with regard to LeQuire, but LeQuire was tied to
13 him.

14 Now the 303 shells and the shotgun shells, yes,
15 they were found at Dillinger's. The proof is also going to show
16 that Sutton was living with Dillinger at that time. The proof
17 will also put both of those men together there on the night on
18 the 21st, shortly after this arson occurred.

19 That's the -- you know, when you start trying to -
20 - those are facts the jury can consider against one and both.
21 The same thing with the statements, Your Honor. The statements
22 of Dillinger, number one, doesn't inculcate this man, and number
23 two, in no way adds anything to it. The most inculpatory
24 statements made as far as statements against interest are made
25 by Sutton himself on the 9th, and those obviously are admitted

1 against him. The Court has already ruled that, so they come in.

2 But to say all of the sudden that the Court is
3 going to have to go through with a surgical knife and separate
4 these facts, and tell the jury, "Now, you can only consider..."
5 Obviously, you'll given them a general charge to consider the
6 evidence only as it relates, but it will be up to them to decide
7 what relates to whom.

8 **THE COURT:** You know, in regards to particular
9 statements, especially the first one that Mr. Dillinger gave in
10 response to the officer, obviously, the Court would give, at
11 that time of its admission, an instruction as to what it is to
12 be considered for at that time.

13 **GENERAL SCHMUTZER:** Right.

14 **THE COURT:** But I can't go through in a pre-trial
15 motion hearing, and say as to each piece of evidence, because
16 otherwise, I won't need to be at the trial. Submit your cases.

17 Any other motions now that we need to take up?

18 **MR. GREENLEE:** Your Honor, and I'm not sure that
19 I'm ready to argue, but we filed a motion -- because I don't
20 know the State's response yet. We filed a motion asking for a
21 bill of particulars, not only as to the offense -- amended
22 motion wanting to know the manner and means by which Gary Sutton
23 was to have killed Connie Branum, and his involvement, as
24 opposed to the involvement of Mr. Dillinger.

25 We also filed a motion for bill of particulars as

1 to the notice of death penalty, and I think that there is some
2 authority we have that I would like to present, and put it in
3 our package to the Court. We are seeking, basically, a
4 preliminary hearing, some proffer of facts that would amount to
5 a factual basis for the notice. If I could go ahead -- I have
6 written a memorandum on it, but if we could just put that in our
7 packet for review by the Court, and at some point get a ruling.

8 **THE COURT:** Okay. As to the issue of the bill of
9 particulars, I think the matters that the Court took up at the
10 bench earlier on generally -- well, pretty specifically, I
11 think, answered, certainly, the Court's questions about the
12 State's theory, and the scenario of events.

13 **MR. GREENLEE:** In all candor, Your Honor, what they
14 have done, if you want to imagine for a moment a pile of brush
15 and some snow, they have allowed tracks to get close to the
16 brush...

17 **THE COURT:** Well, I understand that, gentlemen.

18 **MR. GREENLEE:** But they haven't gone to the point
19 of saying how it happened and who did what to who.

20 **THE COURT:** Well, if they weren't there, how can
21 they say that?

22 **GENERAL SCHMUTZER:** To tell the truth, if I had
23 one, I'd show it to them.

24 **MS. LAWS:** Well, Your Honor, specifically, we need
25 some indication to show that Connie Branum was a witness to the

1 murder of Tommy Griffin because that's what...

2 THE COURT: I don't think they have that proof, do
3 you?

4 MR. MILLER: Your Honor, I have a motion that
5 addresses that as far as the legal aspect, and that's one I'd
6 like to bring up at this time.

7 THE COURT: Okay.

8 MR. MILLER: We moved the Court, and filed a motion
9 to strike the death penalty on this precise issue. The one
10 aggravating factor the State has filed reads that the murder was
11 committed for the purpose of avoiding, interfering with, or
12 preventing the lawful arrest or prosecution of the defendant or
13 another.

14 In all of the cases in which the death penalty has
15 been sought and obtained and reviewed by the supreme court, this
16 aggravating factor has applied only to witnesses. And here, as
17 Your Honor just stated, they don't have proof that she was a
18 witness to anything.

19 THE COURT: Okay.

20 MR. MILLER: That's the exact thrust of the
21 argument. I think they are stretching this aggravating factor,
22 and I don't think they can demonstrate, number one, that she
23 even knew of the death of her brother at the time that she died.
24 And if she did not know of the death of her brother, how could
25 she be a witness or participate in any way to cause the arrest

1 of these people?

2 I cite in my memorandum that is in the file all the
3 Tennessee cases in which this aggravating factor has been
4 sought, and the death penalty obtained on the basis of, and all
5 the cases are people who are either eye witnesses or police who
6 are trying to apprehend the subjects, and they are killed so
7 that these people can either eliminate a witness that saw some
8 criminal activity, or they are killed because the person is
9 fleeing from arrest.

10 Because of the lack of proof that the State has
11 that Connie Branum had any knowledge that could lead to the
12 arrest of these men, the aggravating factor simply should not
13 apply as a matter of law. And to allow -- I'm sure we could say
14 that's a jury question, but I don't think it applies as a matter
15 of law, and I'm sure the State would much rather try this case
16 with the death penalty being demanded than simply as a first
17 degree murder case with no death penalty demanded. That's
18 basically it, Your Honor.

19 **THE COURT:** As to whether or not it would apply
20 solely to an eye witness, of course, -- or to a police officer,
21 in just reading the statute, I think that is probably an
22 incorrect assumption of the statute. You know, all of us can
23 envision circumstances where a person might, if someone was
24 looking or making inquiry about a crime -- another crime, it
25 could be applicable in that situation if that person were

1 killed, couldn't it?

2 MR. MILLER: If they were looking into a crime?

3 THE COURT: If the victim of a crime for which the
4 death penalty is being sought was looking into the facts or
5 evidences or the whereabouts of someone else, a victim of
6 another crime, and she was killed for that purpose, would that
7 be an applicable factor for the jury to consider?

8 MR. GREENLEE: If it's true that...

9 THE COURT: I understand that.

10 MR. MILLER: Well, you're assuming a lot of things.
11 You're assuming criminal conduct.

12 THE COURT: Granted. I'm assuming, for purposes
13 of this discussion, what the theory of the State has been solely
14 in regards to the purpose of the factors for consideration of
15 the death penalty.

16 MR. MILLER: That's exactly my point. That is
17 their theory; they have no proof. I think Mr. Greenlee was
18 arguing that that's their theory, and to be able to try a case
19 to the jury with the death penalty based on a theory, when the
20 proof is not going to substantiate that, and certainly not on
21 appeal, I don't think it's fair to these defendants.

22 THE COURT: Okay.

23 MR. MILLER: Demanding the death penalty for the
24 sake of having a death qualified jury, etcetera.

25 THE COURT: Okay. Any other motions?

1 MR. MILLER: Your Honor, I did have a brief motion
2 -- I'm not sure the State intends to rely on any of this
3 information. Some statements made by the deceased, Tommy
4 Griffin, about what was going on between him and possibly these
5 two men -- we would move in limine that those statements not be
6 admitted for any purpose.

7 MR. GREENLEE: It's strictly hearsay, Your Honor.

8 THE COURT: General Schmutzer?

9 GENERAL SCHMUTZER: Your Honor, the only time I can
10 think those might be admissible would be at the time he was
11 picked up by the officers, and I think the Court ought to hear
12 that at the time, and make -- we would not go into it until we
13 had an opportunity to approach the bench, and let the Court know
14 -- give the Court an opportunity to rule on it outside the
15 presence of the jury. I think what he's asking for is a motion
16 in limine as opposed to ruling on the admissibility right now,
17 and we don't have a problem with that.

18 THE COURT: Okay.

19 GENERAL SCHMUTZER: I would say one thing, Your
20 Honor, I would like for the record to reflect that he has made
21 a statement that the State is simply seeking the death penalty,
22 and somehow we are going to get some advantage of it. To the
23 contrary, when the State is seeking the death penalty in any
24 case, it puts the State at a disadvantage. We give up a lot of
25 different things. All of the sudden a case that would normally

1 -- you know, in the normal course of events would be tried and
2 handled fairly easily, it becomes quite difficult.

3 THE COURT: As has this case.

4 GENERAL SCHMUTZER: Yeah, it really does. It also
5 creates a situation where issues that normally wouldn't be
6 issues become critical sometimes. It just places the State at
7 a disadvantage to ask for the death penalty.

8 THE COURT: I believe it puts all sides in a...

9 GENERAL SCHMUTZER: They don't execute them anyway,
10 but I follow the law, and I intend to follow the law in this
11 case, and in every case.

12 THE COURT: It makes what we all do here so much
13 more important, and I -- yes?

14 MS. LAWS: I would like to back track to what I had
15 mentioned earlier in the bill of particulars for the State to
16 provide any evidence they have in support of that aggravating
17 factor. We had filed a motion asking for the State to provide
18 any evidence that they had that Connie Branum knew of her
19 brother's death or had any reason to have access to any
20 information that would lead to the prosecution of anybody.

21 THE COURT: I -- other than what is contained in
22 the statements or in the matters that have already been heard
23 by the Court and by all counsel, have you any other evidence,
24 General Schmutzer?

25 GENERAL SCHMUTZER: Your Honor, I could go over it

1 with you. You know, we've got a lot of evidence. This is a
2 discovery motion. There is no such rule that requires that.
3 You know, we've given them a list of every witness we intend to
4 use. We've given them a list of all the evidence we intend to
5 introduce. We've given them a list of everything that we have
6 in this case. Now that's what we're supposed to do under the
7 law. It's up to them to figure out what we're relying upon, but
8 I don't think the State has to go back, and begin to set out
9 verbatim what it intends to show with regard to this, or how it
10 is going to show this, or how it's going to show that. That
11 will come with the proof itself.

12 I don't know of any rule that says that. The only
13 thing with regard to a bill of particulars has to do with the
14 time the crime was committed, and when it occurred. They have
15 gone way beyond that, and wanting to know -- you know, exactly
16 how it happened, and who did what, and...

17 MS. LAWS: Well, we did ask for a cause of death.

18 GENERAL SCHMUTZER: That's a thing -- you know,
19 they need to...

20 THE COURT: I believe they've already stated, as
21 all of you have the copy of the autopsy on this victim, I think
22 that speaks for itself. So I overrule the motion for a further
23 bill of particulars other than what you've already been
24 provided. Next motion? Anything further?

25 GENERAL SCHMUTZER: One second, Your Honor.

1 MR. GREENLEE: Your Honor, does this ruling
2 preclude -- a little earlier, I had asked the Court to give me
3 an opportunity to present authority about the bill of
4 particulars, and attaching the notice. Can we still do that?

5 THE COURT: Any authority -- I never preclude you
6 from submitting authority.

7 GENERAL SCHMUTZER: I take it, Your Honor, we would
8 get a copy of any authority.

9 THE COURT: I would hope you do.

10 GENERAL SCHMUTZER: We haven't been.

11 THE COURT: Any briefs or cases provided to the
12 Court, either a copy or at least a style and the citation, shall
13 be submitted to the -- to all counsel.

14 MS. LAWS: Your Honor, we also had filed a motion
15 for a trial date.

16 THE COURT: I don't have one yet.

17 MS. LAWS: Do you have any idea when that might be?

18 THE COURT: I don't -- not here today. All of us
19 have discussed that. I don't have any special setting time
20 unless can get another judge to come in and hear my civil docket
21 or other criminal docket. The State has our calendar.

22 MR. MILLER: I'm sure the Court is aware that the
23 time has run for the speedy trial, and I think the motion has
24 been filed.

25 THE COURT: Now wait a minute? The time has run

1 for the speedy trial?

2 MR. MILLER: I think you are entitled to trial 180
3 days after indictment.

4 THE COURT: Upon motion, aren't you?

5 MR. MILLER: Upon motion. I think motion has been
6 filed.

7 THE COURT: I think those were brought to the
8 Court's attention last Friday, weren't they?

9 MR. MILLER: I believe they were.

10 THE COURT: Okay. Those were argued last Friday,
11 and filed when?

12 MR. MILLER: I couldn't tell the Court off hand.

13 MS. LAWS: Your Honor, I can check the Court file.

14 THE COURT: If you will, please. What dates did
15 I tell you -- I mentioned some dates in December, I know, didn't
16 I, General Schmutzer?

17 GENERAL SCHMUTZER: The only dates, Your Honor, you
18 mentioned in December, I think, was the second week of trials
19 here -- criminal trials in Sevier County, which is the week
20 before Christmas.

21 THE COURT: Okay. When was this case indicted, do
22 you know?

23 GENERAL SCHMUTZER: In March, Your Honor.

24 MR. WEBB: March 5th, Your Honor, or somewhere in
25 early March.

1 THE COURT: Okay.

2 MR. MILLER: Your Honor, while she's looking for
3 that, I have one further matter. Mr. Greenlee and Mr. Webb have
4 filed a notice of alibi on behalf of Gary Sutton.

5 THE COURT: Okay.

6 MR. MILLER: We, inasmuch as -- we have not filed
7 one at this time. Inasmuch as there is no trial date set, and
8 I don't think there would be any prejudice to the State since
9 the alibi notice would be the same, we are hereby adopting the
10 exact notice they have filed as being ours. Mr. Dillinger will
11 file that in writing if need be, but I don't think there would
12 be any prejudice to the State.

13 THE COURT: Do you have any response, General
14 Schmutzer?

15 GENERAL SCHMUTZER: No.

16 THE COURT: Okay. So ordered.

17 MS. LAWS: Your Honor, the earliest thing I found
18 is a motion for a trial date was requested on March the 25th -
19 - was filed on March the 25th.

20 GENERAL SCHMUTZER: Yes, I do have one response,
21 Your Honor. Obviously, that shows even more added reason why
22 these need to be tried together. They are obviously relying
23 upon the same witnesses, and the same defense in this case, and
24 the same motions.

25 THE COURT: Anything further?

1 GENERAL SCHMUTZER: That's all for the State, Your
2 Honor.

3 THE COURT: Anything further from counsel for the
4 defense?

5 MS. LAWS: No, Your Honor.

6 THE COURT: Okay. This Court stands adjourned.

7 (END OF REQUESTED TRANSCRIPT)

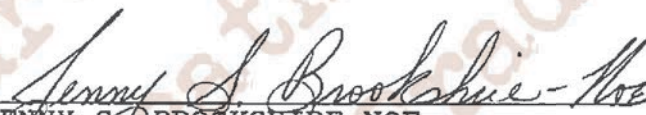
Courtesy of
Time of Death Podcast
by Beth Braden

CERTIFICATE

I, the undersigned, JENNY S. BROOKSHIRE-NOE, Official Court Reporter for the Fourth Judicial District of the State of Tennessee, do hereby certify that the foregoing is a true, accurate, and complete Transcript of the Evidence, or portion thereof as the case applies, of the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Circuit Court for the captioned county on the 23rd day of July, 1993.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

This 11th day of November, 1993.


JENNY S. BROOKSHIRE-NOE
Official Court Reporter
Fourth Judicial District
State of Tennessee

CERTIFICATE OF THE COURT

This is to certify that the Transcript of the Evidence adduced at the trial of this case has been filed with the Clerk on _____, 1993, in accordance with Rule 24 of the Tennessee Rules of Appellate Procedure.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the Transcript of the Evidence is hereby approved by the Court, and the Clerk is hereby ordered to make the Transcript of the Evidence part of the Record on Appeal in this case.

Entered this 7 day of JUN, 1994.


JUDGE

Courtesy of
Time of Death
by Beth Braden