

XVIII No. 90
IN THE CRIMINAL COURT FOR SEVIER COUNTY, TENNESSEE

AT SEVIERVILLE, TENNESSEE

FILED

MAR 7 1994

SUPREME COURT CLERK

STATE OF TENNESSEE,

Appellee,

-vs-

GARY WAYNE SUTTON and,
JAMES ANDERSON DELLINGER

Appellants.

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CASE # 5033, 5035

TRANSCRIPT OF THE EVIDENCE:

Trial

February 16-24, 1993

Volume 16 of 22 Volumes

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

APPEARANCES:

FOR THE STATE

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GEN. G. SCOTT GREEN, A.D.A.
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CIRCUIT COURT
FILED

HOOR 9:30 A M

DATE JAN 07 1994

Theresa L. Hensley

CIRCUIT COURT CLERK
SEVIER COUNTY, TENN.

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Courtesy of
Time of Death Podcast
by Beth Braden

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1 you could find, actually?

2 A. Yes, sir.

3 Q. And specifically, sir, did you find a shell casing
4 -- a 303 shell casing?

5 A. Yes, sir.

6 Q. And you turned that over to law enforcement
7 officers, is that correct?

8 A. Uh-huh (affirmative.)

9 Q. That were there at the scene?

10 A. Yes, sir.

11 Q. I'll show you what's already been filed as Exhibit
12 #38, and ask you, sir, if you would, calling your attention to
13 this picture right here, would you take this red pen and circle
14 the approximate area where you located that shell casing?

15 A. (Witness complies.)

16 THE COURT: For the record, that is the top left
17 photograph on that exhibit.

18 GENERAL SCHMUTZER: May this be passed?

19 THE COURT: Yes, it may.

20 GENERAL SCHMUTZER: You may cross examine.

21 **

CROSS-EXAMINATION

BY MR. MILLER:

Q. I didn't see where you circled, Mr. Marks. Is that under the front seat area?

A. It's more in the foot well region.

Q. Okay.

**

CROSS-EXAMINATION

BY MR. DANIEL:

Q. Mr. Marks, the General referred to this as a crime scene. You don't know whether or not there had been a crime committed up there or not, do you, sir? You were not qualified to give an opinion at that were you, sir?

A. No, sir.

Q. As I understand it you found this shell, and you also found some other items there with that shell?

A. Yes, sir.

Q. And that was some coins, is that correct?

A. Yes, sir.

Q. They had fused together?

A. I believe some of them had, yeah.

Q. And you just found those, and you turned them over to your professor, is that correct?

A. Well, I turned them over not to the professor, but to the law enforcement people.

1 Q. That were there?
2 A. Yes, and I believe some keys, also.
3 Q. Some keys and different things that was there that
4 you found?
5 A. Right.
6 Q. Did you see some glass that was smoked there in
7 that vehicle? I'll show you a photograph. Did you notice any
8 smoked glass that was shown in that photograph?
9 A. Yeah, there was glass on most of the inside of the
10 car, including on the body.
11 Q. And it was smoked?
12 A. Right.
13 MR. DANIEL: Your Honor, may we file that as the
14 next exhibit?
15 THE COURT: Sure.
16 (EXHIBIT #39 - Photograph of smoked glass in car;
17 marked and filed.)
18 MR. DANIEL: No further questions.
19 THE COURT: Any further questions?
20 MR. DANIEL: Just one second, Your Honor. That's
21 all I have.
22 GENERAL SCHMUTZER: One question, Your Honor.
23 **

REDIRECT EXAMINATION

BY GENERAL SCHMUTZER:

Q. Mr. Marks, did you make any specific examination of the glass in the car?

A. No.

Q. You were just sifting through the remains?

A. Right, right.

Q. That's all. Thank you, sir.

MR. DANIEL: Your Honor, everybody is wanting to go to lunch. We'll pass this after lunch.

THE COURT: Very well. The Court stands adjourned.

(COURT STOOD IN ADJOURNMENT FOR LUNCH)

MR. DANIEL: Your Honor, before the jury's brought in can we bring something to Your Honor's attention?

THE COURT: Sure. You may be seated. Yes?

MR. DANIEL: Your Honor, at this time, on the behalf of the defendant Sutton, and I presume I'm speaking for the co-defendant since all of our motions are joint, we would move the Court to order the attorney general's office to furnish us some what we feel is exculpatory material we feel they have in their possession, and it would be in the nature of a Jencks type material if the witness testified, but we think in addition to that it's exculpatory.

THE COURT: Okay.

MR. DANIEL: Your Honor has heard some proof or

1 some testimony has been elicited, at least, from State's
2 witnesses that the defendants were at certain places at certain
3 times, such as the jail over in Blount County at a certain time,
4 that there -- also that it came in at a certain time regarding
5 a fire that was over that at a trailer. We feel that the State
6 has in their possession statements, in particular, from a Linda
7 Dellinger, who is the wife of the defendant, James Dellinger,
8 and also a Carolyn Weaver, statements which would be
9 contradictory to this, and which would fall under the
10 exculpatory evidence provisions, and we would be entitled to it.

11 But they tell me they don't have any statements
12 that contradicts anything that's said here, and so forth, and
13 this would be a continuing motion from the rest of their proof.
14 But we have reason to believe they may have statements to that
15 effect.

16 **GENERAL SCHMUTZER:** Your Honor, no, we did not say
17 we had any contradictory. We told him that there is nothing
18 that would be subject to Brady, Your Honor. Brady only applies
19 in situations where the State has something that's peculiarly
20 or otherwise under its control, and not reasonably be obtained
21 by the defense counsel.

22 These two people are people they have listed as
23 their alibi witnesses. They are people that are actually under
24 their control, not the State's control. This is a wife and
25 girlfriend of these two defendants, and there is -- Brady simply

1 does not apply.

2 They have had access to them, they have had an
3 opportunity to talk to them, and they know what they'll say, I'm
4 sure, as well, if not better than we do. As to -- it would be
5 premature at this time, Your Honor -- obviously, they are aware,
6 or think they're exculpatory because they have listed them as
7 their alibi witnesses, so we have nothing that they're not aware
8 of, or should be aware of by the exercise of due diligence.
9 Brady does not apply here at all.

10 MR. DANIEL: The fact that the General -- I
11 understand you do have statements to that effect, am I correct?

12 GENERAL SCHMUTZER: I have statements from both of
13 those people.

14 MR. DANIEL: That would be contrary to evidence or
15 statements or witnesses that's testified here previously?

16 GENERAL SCHMUTZER: Not really, not too much.

17 MR. DANIEL: Well, not too much, that's the point
18 for exculpatory...

19 GENERAL SCHMUTZER: Well, I think, Your Honor, we
20 don't have anything here that would...

21 MR. DANIEL: They were subpoenaed and are listed -
22 - they are listed as State's witnesses, Your Honor.

23 THE COURT: As well as defense witnesses?

24 MR. DANIEL: We subpoenaed all of the State's
25 witnesses as our witnesses, too.

1 **GENERAL SCHMUTZER:** Your Honor, we simply furnished
2 him everyone that we had statements of, and that...

3 **THE COURT:** As I understand it, and I've had this
4 question come up before in almost the exact same scenario where
5 a side had a witness subpoenaed, and I do think that under the
6 law that Brady does only apply to those statements or witnesses
7 who are exclusively within the control, or statements in the
8 possession of the State that would be exculpatory, and I ruled
9 in the other case -- it doesn't make it right, but at least it's
10 consistent, that it did not apply. So if it's someone that you
11 have called, and that you've been able to talk with, and I'm
12 assuming, at least, absent other evidence to the contrary, that
13 Mrs. Dellinger is, at least at this juncture, a friendly
14 witness, so...

15 **MR. DANIEL:** Not as far as the defendant Sutton
16 goes, Your Honor, please. If we were trying one defendant, Your
17 Honor, I would tend to agree with you, but we have two different
18 cases to be tried here. We don't have any privity to the co-
19 defendants, and I won't say they're adverse, but I think you
20 could say sometimes that their rights are certainly adverse.
21 No two people are treated the same, you're trying two different
22 cases, and...

23 **GENERAL SCHMUTZER:** Your Honor, they have both
24 listed them as their witnesses -- their alibi witnesses that
25 they are relying upon as an alibi, so obviously, there is no

1 conflict, and they are...

2 MR. DANIEL: That's the purpose of exculpatory
3 evidence to determine, Your Honor, whether or not there's any...

4 GENERAL SCHMUTZER: Your Honor, Brady simply
5 doesn't apply.

6 THE COURT: I don't think it does, to be real
7 honest with you, Mr. Daniel. The Court doesn't think that Brady
8 does apply in this situation, and for that reason, the Court
9 would have to overrule that motion.

10 MR. DANIEL: We would then ask that in the event
11 these witnesses do testify, and they have statements that are
12 contrary to what they testify to that they not be entitled to
13 use those statements insomuch as we've not been furnished them,
14 if, in fact, they are exculpatory.

15 THE COURT: Except if you call them -- if you call
16 them as a witness, and I understand the reason for the motion --
17 - I've been there. If you call them as your own witness, then
18 the State may impeach a witness by a prior statement if, in
19 fact, it is inconsistent. And that's the purpose, as I
20 understand it...

21 MR. DANIEL: The co-defendant might decide to call
22 them. Then we've got the same situation.

23 THE COURT: That's -- it's a good point, and -- but
24 if you hadn't subpoenaed them as your own witness, I think it
25 would be a stronger motion.

1 MR. DANIEL: We can release a subpoena at any time.

2 THE COURT: You can now, but I just don't think
3 it's a Brady issue at this juncture. I just don't think it's
4 a Brady issue.

5 GENERAL SCHMUTZER: Your Honor, while we're talking
6 about Jencks material, and Brady, I still have not received
7 anything, and I have it on good information, in fact, I think
8 it's come out here during the course of the trial that Sutton's
9 attorney has hired a private investigator in this case, Gary
10 Litton, to investigate this, and that he, in fact, has taken
11 tape recorded statements of their witnesses, and I would expect
12 to have that before they begin their proof, ahead of time, just
13 as we supplied it to them pursuant to our agreement, Your Honor.

14 MR. WEBB: Your Honor, let me clear it up, and I -
15 - it's my understanding that Mr. Litton talked to State's
16 witnesses. I'll be very candid, I don't believe he's talked to
17 any defense witness. I may be wrong, and I will check on that,
18 but just for clarification, some of those statements he took
19 were tape recorded, and some were not.

20 If I can give the Court an example, Barbara
21 Gordon's testimony, I'm convinced he tape recorded...

22 THE COURT: She already testified, right?

23 MR. WEBB: She's already testified, and I don't
24 really have a problem giving that to the General if that's what
25 I'm supposed to do. I know that was tape recorded, and I could

1 look again, but there may be some others...

2 GENERAL SCHMUTZER: I asked for it for their
3 witnesses, and since they have it, I would ask that it be
4 supplied. I'm not asking for the witness that's already
5 testified.

6 MR. WEBB: Okay. Well, I guess what I'm asking,
7 just for clarification, if we call a particular witness, and we
8 have a tape recorded statement or a statement they've adopted,
9 signed, or handwritten, is that what we're talking about?

10 GENERAL SCHMUTZER: That's what we're talking
11 about.

12 THE COURT: As I understood the agreement that you
13 all announced to the Court a couple of days ago in talking about
14 the Jencks material, is that the State agreed that they would
15 provide in advance statements of their witnesses who were going
16 to testify if you all would do the same, and you all agreed to
17 that. So the Court, as a consequence of that agreement, orders
18 that. Okay.

19 MR. WEBB: I don't have any problems, Your Honor,
20 providing time will permit, with going over to my office, and
21 checking into that.

22 MR. DANIEL: Your Honor, the same ruling applies,
23 and we understand they've got certain witness' statements, and
24 they've not furnishing them to us, and they say we subpoenaed,
25 etcetera, so sauce for the goose should be sauce for the gander.

1 GENERAL SCHMUTZER: We've furnished them statements
2 of every witness that was required according to Jencks.

3 THE COURT: Right.

4 MR. DANIEL: And if we don't call the witness as
5 our witness, then as I understand it, we have no obligation to
6 furnish it.

7 THE COURT: If you're not going to call them as a
8 witness that's...

9 MR. DANIEL: If we don't call them.

10 THE COURT: Surely, that's exactly right. Exactly
11 right. Anything further?

12 MR. MILLER: Your Honor, I'll double check, but the
13 witnesses I intend on calling I don't have any Jencks material
14 on.

15 THE COURT: Okay. Bring the jury in, please. All
16 rise.

17 (JURY IN)

18 THE COURT: Waive the call for the State?

19 GENERAL SCHMUTZER: Yes, Your Honor.

20 THE COURT: For the defense?

21 MR. MILLER: Yes, Your Honor.

22 MR. DANIEL: Yes, Your Honor.

23 THE COURT: You may be seated. General Schmutzer,
24 you may call your next witness, sir.

25 GENERAL SCHMUTZER: The State calls Captain McMann.

26 **

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

3 DIRECT EXAMINATION

4 BY GENERAL SCHMUTZER:

5 Q. Captain McMann, if you will, please, sir, state
6 your full name and position.

7 A. Detective Captain Larry McMann, Sevier County
8 Sheriff's Department.

9 Q. And how long have you been employed with the Sevier
10 County Sheriff's Department?

11 A. Since September of 1990.

12 Q. In that capacity, sir, back on February the 28th
13 and 29th of 1992, were you at the scene of the vehicle that was
14 found burned out on Clear Fork which turned out to be the car
15 and remains of the body of Connie Branum?

16 A. Yes, sir, I was.

17 Q. During the course of your investigation, sir, was
18 there a shell found by Mr. Murray Marks in the interior of the
19 automobile?

20 A. Yes, sir.

21 Q. And do you have that?

22 A. Yes, sir, I do, right here.

23 Q. All right, sir. And did you receive that from him?

24 A. Yes, sir, he handed me some items out of the car,
25 and I set them on top of the vehicle.

1 Q. All right, sir. What did you later do with that
2 item?

3 A. Took it back and labeled it as evidence and sealed
4 it.

5 Q. And then what did you do after that?

6 A. Carried it to the crime lab in Nashville.

7 Q. The Tennessee Crime Laboratory?

8 A. Yes, sir.

9 Q. For firearms examination?

10 A. Yes, sir.

11 GENERAL SCHMUTZER: May this be filed?

12 THE COURT: Yes, it may.

13 (EXHIBIT #40 - shell casing; marked and filed.)

14 BY GENERAL SCHMUTZER:

15 Q. How is it that you get to this crime scene? Where
16 did you go -- explain it for the Court and jury?

17 A. You get off Wears Valley and go up a road called
18 Clear Fork, and you turn up a logging type trail that winds back
19 in there around half a mile, I believe.

20 Q. This logging trail, if I can ask you, sir -- I'll
21 show you some aerial photographs, and ask you, sir, if you can
22 identify them?

23 A. Yes, sir, that's -- you go across the underpass,
24 the wrought iron structure, and go down approximately 100 yards,
25 and you take a left.

1 Q. Is it marked in anyway with a road sign or highway
2 sign?

3 A. No, sir, it's not.

4 GENERAL SCHMUTZER: Your Honor, this has previously
5 been filed as Exhibit #33, and that was as to one
6 photograph by Mr. Gordon, and I would ask that it
7 be admitted as to the other photographs.

8 THE COURT: So ordered.

9 BY GENERAL SCHMUTZER:

10 Q. And if you would, please, sir, would you step down
11 just a minute and step right around on that other side back far
12 enough to where everyone can see.

13 A. (Witness complies.)

14 Q. If you would, please, sir, looking at those two
15 photographs on top, would you point out first the underpass that
16 you were referring to?

17 A. I believe it's right in there somewhere, I believe,
18 sir.

19 Q. All right, sir. Do you see the road, sir, that
20 you're talking about where the car was found?

21 A. I believe it's this road right in here.

22 Q. All right, sir. It's difficult to see unless
23 you're right up to it. Would you draw an arrow to it? Can you
24 push it back in the light. Maybe you could put that back in the
25 light a little bit more.

- 1 A. I believe this is the road out through here, sir.
- 2 Q. Okay, sir. And would you put an arrow pointing to
- 3 that?
- 4 A. On the photograph itself?
- 5 Q. Yes, sir, on the photograph itself pointing down
- 6 to it.
- 7 A. (Witness complies.)
- 8 Q. Now, there's also shown below that a second road -
- 9 - that's not the road that we're talking about -- right in here?
- 10 A. That road?
- 11 Q. Yes, sir.
- 12 A. No, sir.
- 13 Q. Does this road come on up -- would you show where
- 14 it gets out on Clear Fork Road, the one that you just drew an
- 15 arrow to?
- 16 A. Right there, I believe, is the intersection.
- 17 Q. All right. And would you draw an "X" where the
- 18 vehicle itself was found on that road?
- 19 A. I believe it's in this opening right there. It's
- 20 hard for me to tell.
- 21 Q. Would you mark that, please, with an "X"?
- 22 A. (Witness complies.)
- 23 Q. Okay, sir. And would you circle the house that
- 24 belongs to the Guise's -- the house where the Guise's lived
- 25 where the people were staying?

1 A. I believe it's this right here.

2 Q. Subsequently, sir, have you been back up there with
3 Mr. and Mrs. Gordon?

4 A. Yes, sir.

5 Q. And I specifically call your attention to the
6 bottom photograph, the one that has the smoke in the background
7 -- green smoke?

8 A. This one, yes.

9 Q. All right, sir. Were you the one that was setting
10 off that smoke bomb?

11 A. Yes, sir, I drove up to the location where the
12 vehicle was found and detonated a smoke bomb.

13 Q. And that is a picture of that, is that correct?

14 A. Yes, sir. It was a green smoke bomb, I believe.
15 That looks to be a greenish tint on that smoke there.

16 Q. Did you -- from the place there, can you see any
17 of this road that goes in and out from Guise's house? Can you
18 see any portion of this that you just point out from...

19 A. From the vehicle?

20 Q. Yes, sir.

21 A. No, sir, I didn't see any.

22 Q. From where the Guice's were staying, sir.

23 A. Right here?

24 Q. Yes, sir. Can you see any portion of that road
25 where the car was found?

1 A. I don't believe so. I didn't look from this angle
2 here; I was up setting the smoke bomb off.

3 Q. You didn't go to that angle at all?

4 A. No.

5 Q. Okay, that's fine.

6 GENERAL SCHMUTZER: May this be passed, Your Honor?

7 THE COURT: It sure may.

8 BY GENERAL SCHMUTZER:

9 Q. Now during the course of your investigation did you
10 attempt to lift any tire impressions or tire prints back there
11 in the vicinity of the car?

12 A. At the crime scene?

13 Q. Yes, sir.

14 A. Yes, we tried to lift, but there were two casts,
15 and neither one came out with any...

16 MR. DANIEL: Your Honor, I object to what come out
17 unless he knows.

18 GENERAL SCHMUTZER: Well, he knows.

19 MR. DANIEL: He knows he lifted them, but if he's
20 qualified to give an opinion as to whether or not
21 they're...

22 BY GENERAL SCHMUTZER:

23 Q. Were you able to get casts, sir, of the print that
24 you saw? Did the print work out or not?

25 A. No, sir, we got casts, but no print.

GENERAL SCHMUTZER: You may cross examine him.

BY GENERAL SCHMUTZER:

Q. This was all in Sevier County, is that correct?

A. Yes, sir.

CROSS-EXAMINATION

BY MR. MILLER:

Q. Mr. McMann, you said you found a 303 shell in the vehicle. Did anybody in the sheriff's department or otherwise find the remains of a 303 bullet there in the car or the body?

A. No, sir.

Q. Mr. Schmutzer asked you -- well, maybe he didn't ask you that -- did you ever travel the road behind where the Gordons were staying out there as it leads to the logging trails?

A. From the house back, no, sir, I never did.

Q. You never went back in there. You did, in fact, actually lift tire impressions, is that correct -- made casts of them?

A. We had two casts, yes, sir.

Q. And the casts, whatever came out didn't match Mr. Dellinger's or Mr. Sutton's vehicle?

A. I was unable to ascertain any -- they were unidentifiable.

Q. Did you see any foot prints up there around the

1 area?

2 A. Not that I recall, sir.

3 MR. MILLER: I believe that's all, Your Honor.

4 THE COURT: Very well. Mr. Webb, Mr. Daniel?

5 **

6 CROSS-EXAMINATION

7 BY MR. DANIEL:

8 Q. Were you one of the first ones that was called to
9 the scene, sir?

10 A. Yes, sir.

11 MR. DANIEL: May I approach the witness, Your
12 Honor?

13 THE COURT: Yes.

14 BY MR. DANIEL:

15 Q. I'll show you a photograph -- was this photograph
16 made the first day that you all went there to the scene?

17 A. That was the next morning when it was light.

18 Q. The next morning.

19 MR. DANIEL: I offer that as the next exhibit, Your
20 Honor.

21 THE COURT: You sure may.

22 (EXHIBIT #41 - Photograph of scene; marked and
23 filed.)

24 MR. DANIEL: I also have another photograph here,
25 Your Honor.

1 THE COURT: All right, sir.

2 (EXHIBIT #42 - Photograph of scene; marked and
3 filed.)

4 BY MR. DANIEL:

5 Q. Mr. McMann, what we've marked as Exhibit #41, you
6 recognize that as being made the next morning there at the scene
7 when the car was found, is that correct, sir?

8 A. Yes, sir.

9 Q. And also what's been marked here as Exhibit #42,
10 this was also made that same day, is that correct, sir?

11 A. Yes, sir.

12 Q. And that's the area that shows the tire print --
13 shown on Exhibit #42, isn't that correct, sir?

14 A. That's the impression that we put the cast down
15 beside, yes, sir.

16 Q. You put the cast on there, and let me ask you to
17 look right up here, and I'll ask you, sir, isn't it true that
18 you can even see on that photograph prints -- the tire prints
19 and the treads that's in there?

20 A. There is a partial tread in there, but not enough
21 identifiable.

22 Q. Can you mark and circle this for the jury to look
23 at where you say the prints are? Make a big circle if you want
24 to around there.

25 A. (Witness complies.)

1 Q. What about right in here now? You circled a small
2 one, but what about those right there?

3 A. I can't make out whether they are tread or not.

4 Q. You don't see that as being tire tread right there?

5 A. It could or could not be. I couldn't tell you.

6 Q. That's the purpose for getting the print, isn't it,
7 where you take the area and put a cast, and when you pull it up
8 it shows exactly what the impressions is on the bottom, isn't
9 that correct, sir?

10 A. It tries to pick up if there's any impressions
11 there, yes.

12 Q. You say you made two different casts?

13 A. They was another cast poured, yes, sir.

14 Q. Of another tire track?

15 A. The place that we thought was a tire track or
16 looked similar to one.

17 Q. How close was this to there where this car was
18 sitting? It was actually right behind it, wasn't it?

19 A. No, sir, I believe it was about 10 or 15 yards
20 maybe, or somewhere in that vicinity behind the vehicle.

21 Q. And you're saying that these other markings that's
22 shown on Exhibit #42 are not tire prints then, in your opinion -
23 - are not tread marks?

24 A. They possibly could be, but I don't know.

25 Q. Did you send those off to the laboratory?

1 A. No, sir.

2 Q. So you made the prints, but you never sent them off
3 to the lab?

4 A. There was not enough there to identify.

5 Q. Well, is that your decision to make or the
6 laboratory's decision to make?

7 A. We just felt there wasn't enough there to identify.

8 Q. Is that the same conclusion on all the finger
9 prints that was found on different items that was around the
10 scene of the car there?

11 A. Do what, sir?

12 Q. Did you, in fact, make the same conclusion that
13 there wasn't enough points on the finger prints to make a
14 conclusion on those articles that were found around where the
15 car was burned?

16 A. We sent some items off to be finger printed, yes,
17 sir.

18 Q. And you found that there were finger prints that
19 were identifiable, and could be identified as a person's finger
20 prints, didn't you?

21 A. We found some back on the paved road approximately
22 100 yards each direction. We gathered cans, and I believe three
23 cans came back with some latents on them.

24 Q. Latent prints means that you can determine whose
25 hand it was, is that correct?

1 A. Specialist Bohanan of Knoxville City just advised
2 me they were three latents on three different cans.

3 Q. But what I'm saying is what we mean by latent
4 prints, that means prints that's identifiable, isn't that
5 correct?

6 A. Yes, sir.

7 Q. Which means that you have at least what, 10 or more
8 points on the finger print that you can identify with a known
9 print, isn't that correct?

10 A. I believe so, sir.

11 Q. And you can't tell us here today whose finger
12 prints those were, and who those finger prints belong to, can
13 you?

14 A. No, sir.

15 Q. Did you send those off to the F.B.I. lab?

16 A. No, sir.

17 Q. To the T.B.I. lab?

18 A. No, sir. I had specialist Bohanan from Knoxville
19 City look at them.

20 MR. DANIEL: May I pass these to the jury?

21 THE COURT: Yes.

22 BY MR. DANIEL:

23 Q. This area where you found these prints and where
24 you found this car is what's called Happy Hollow, isn't that
25 correct -- that's what it's referred to?

1 A. I'm not aware of the -- are you talking about the
2 logging road?

3 Q. Yeah, where -- the area where the car was found is
4 what's commonly referred to as Happy Hollow?

5 A. I'm not aware of -- I'm not aware that had even a
6 road name.

7 Q. You're not familiar with that area then, is that
8 correct?

9 A. No, sir.

10 Q. These prints that you did find on these cans or
11 that was found, and was found to be latent prints, you do know
12 that none of those prints belonged to either one of these two
13 defendants, don't you?

14 A. That is what the report from Mr. Bohanan said, yes,
15 sir.

16 Q. Did you -- were you present when they dusted the
17 car, Mrs. Dellinger's car for prints, which was the Oldsmobile,
18 I believe it is, that she owns?

19 A. Are you referring to when Blount County was at
20 their home?

21 Q. When Blount County went over there.

22 A. I was there, but I didn't observe if they got any
23 prints. I saw them dusting the car, yes, sir.

24 Q. You know that they did obtain finger prints from
25 the car, don't you?

1 A. No, sir, I'm not aware of that.

2 Q. You never saw any of the dust that showed the
3 finger prints up on them?

4 A. No, sir, they dusted the car, and I was -- that was
5 their case.

6 Q. Was Mrs. Dellinger or anyone else out there at the
7 time?

8 A. Yes, sir, she came.

9 Q. She was there. Any other persons other than law
10 enforcement officers?

11 A. I don't recall.

12 Q. Now, in addition to those casts that you lifted
13 which you say you never sent off, you also brought the truck
14 down here to -- Mr. Dellinger's truck down here to the sheriff's
15 department, didn't you, sir?

16 A. Yes, with a search warrant.

17 Q. With a search warrant. And put it under wraps, we
18 might call it, lock and key so that you all could make an
19 investigation of the truck, isn't that correct?

20 A. Yes, sir.

21 Q. And in that investigation you went through the
22 interior of the truck, which would be the front of it?

23 A. Yes, sir.

24 Q. And in that you searched, and you looked for blood
25 splatters, didn't you -- any signs of any blood?

1 A. We looked for any and all evidence.

2 Q. All evidence. And blood splatters, of course,
3 would be one of them, is that correct?

4 A. Yes, sir.

5 Q. And blood splatters will tell you whether or not
6 -- if there's somebody's blood on there, you can identify that
7 as being a certain person's blood, can't you?

8 A. I don't know, sir. You can get types, but I'm not
9 no expert on blood.

10 Q. Aren't you familiar with the fact that like on
11 paternity cases you can take blood tests and all, and determine
12 within 98% or 99% accuracy on a person's blood -- whether or not
13 it's that person's blood?

14 A. I believe you can send it off to the F.B.I. lab for
15 DNA, but -- you know...

16 Q. Okay. You also then went through the interior
17 looking for hair samples?

18 A. I was the recording of the evidence. I physically
19 didn't search the vehicle.

20 Q. Okay. But you were there, and as they would obtain
21 the evidence they would hand it to you, and you would record it,
22 is that correct?

23 A. Correct, sir.

24 Q. I'm not critical of you, I'm just asking you if
25 this is what happened.

1 A. Right.

2 Q. And you found no hair fragments?

3 A. No, sir.

4 Q. And you looked for cloth fragments or what they
5 call things that come off of clothes and carpets and things like
6 that -- what they call cloth fragments. You found nothing in
7 that truck of that nature, did you?

8 A. No, sir.

9 Q. You also took the mud and some dirt from in the
10 truck -- you dusted it out, and got some mud that was in the
11 floor board -- or dirt, didn't you?

12 A. I believe there was some soil collected from the
13 fender wells.

14 Q. What about the interior of the car?

15 A. All I have logged was the soils from the fender
16 wells.

17 Q. Okay. So you went to the fender wells, and that's
18 up under -- where the tires are, up under the fenders, is that
19 correct?

20 A. Correct, sir.

21 Q. And you took soil samples and dirt samples from
22 there?

23 A. Yes, sir.

24 Q. You also took some soil samples and dirt samples
25 from the tires, didn't you?

1 A. All I'm aware of is what was from the fender well.

2 Q. You don't recall getting any from the tires?

3 A. No, sir.

4 Q. And you put all of this together and sent it to the
5 laboratory, didn't you?

6 A. No, sir.

7 Q. That was never sent off?

8 A. No, sir.

9 Q. You know that there is a method by which you can
10 take soil samples from one area of a county or area, and match
11 it up with soil samples from another area, and either exclude
12 or -- exclude that, can't you, sir, or identify that?

13 A. I'm not aware of one. We didn't send the soil off
14 because it had been a week, and some time had passed -- you
15 know, it had been a week since -- that was the reason for the
16 soil sample not being sent.

17 Q. You say you just don't know whether or not it would
18 -- you have no proof that it matches, then, any soil that was
19 up there in that mountain or up in Happy Hollow, do you?

20 A. No, sir.

21 MR. DANIEL: Your Honor, may I approach the
22 witness?

23 THE COURT: Sure.

24 BY MR. DANIEL:

25 Q. I believe this gun is empty, Mr. McMann. You know

1 more about these than I do. Double check that so there'll be
2 no question about it.

3 A. Yes, it's empty.

4 Q. And you know that it is empty, is that correct?

5 A. Yes, sir.

6 Q. Now, when you have this gun, and if I -- I can't
7 close it for that thing...

8 MR. DANIEL: Can we take that off there at that
9 time, Your Honor?

10 THE COURT: For the purposes of your demonstration,
11 sure.

12 BY MR. DANIEL:

13 Q. I'll show you how -- when you eject a shell and
14 pull it, the shell goes back this way, doesn't it?

15 A. It ejects.

16 Q. Do you know which way it goes?

17 A. It usually ejects to the right.

18 Q. To the right and back?

19 A. Possibly. They eject different ways.

20 Q. And did you test fire this gun, or were you present
21 when it was test fired?

22 A. No, sir.

23 Q. How much does that gun weigh?

24 A. I don't know, sir.

25 Q. 15 pounds, 20 pounds?

2 MR. DANIEL: Your Honor, can we pass this to the
3 jury, and let them feel the weight of it?

5 BY MR. DANIEL:

10 A. No, sir.

12 THE COURT: Mr. Miller?

14 THE COURT: General Schmutzer?

16 **

18 BY GENERAL SCHMUTZER:

22 | A. Yes, sir.

23 Q. You mentioned about there was one beer can, or
24 there were some beer cans with some identifiable prints found,
25 is that right?

1 A. Correct, sir.

2 Q. That didn't match up to either one of these two
3 defendants?

4 A. That's correct, sir.

5 Q. Would you point out, sir, and mark on this
6 photograph where the approximate location of those cans were
7 found -- the one the had the prints on it?

8 A. Here on the main road around the overpass.

9 Q. None of those were up anywhere close -- it's been
10 testified already that it was four tenths of a mile, almost half
11 a mile in there where this car was, and none of them were up
12 there around the scene itself?

13 A. No, sir.

14 Q. That had the prints on them?

15 A. No, they were all down around the overpass.

16 Q. And you found -- how many cans in all did you
17 gather around through there?

18 A. Approximately 40 to 50 cans.

19 Q. I haven't asked you before, but can you -- it may
20 help even better on this one right here, that road that we're
21 talking about, because there's one that's real broad in there
22 that's not it.

23 A. Okay. This is the -- the vehicle was found in this
24 area. This is the road, and this is the overpass.

25 Q. If you'll make that with an "X" where the vehicle

1 was found -- the approximate area when the vehicle was found.

2 A. This is the road -- this would be the main road
3 there.

4 THE COURT: General Schmutzer, if you would,
5 please, retrieve the gun there.

6 GENERAL SCHMUTZER: I sure will.

7 THE COURT: Anything further of Officer McMann?

8 GENERAL SCHMUTZER: Just one second, Your Honor.
9 One other thing, yes.

10 BY GENERAL SCHMUTZER:

11 Q. He asked if you had -- let me show you this
12 photograph, sir, that was previously filed as Exhibit #22, and
13 ask you if you can identify that?

14 A. That's the truck that we executed the search
15 warrant from James Dellinger's.

16 Q. That's James Dellinger's truck?

17 A. Yes, sir.

18 Q. Did Mrs. Barbara Gordon have an opportunity to view
19 that truck?

20 A. Yes, sir.

21 Q. All right, sir. Specifically, sir, looking at that
22 truck, for the record, does it have a tool box on it?

23 A. Yes, sir, it does.

24 Q. And the tires, do they have any markings on them
25 or are they just black?

1 Q. And she never mentioned anything about a pickup
2 truck until you all took this picture to show it to her?

3 A. I'm not aware of that.

4 THE COURT: Mr. Daniel?

5 **

6 RE CROSS-EXAMINATION

7 BY MR. DANIEL:

8 Q. You also took some boots and shoes from these
9 defendants, didn't you?

10 A. Yes, sir.

11 Q. You took a pair of cowboy boots from Mr. Dellinger,
12 is that correct?

13 A. Yes, sir.

14 Q. And you took a pair of work boots from Gary Sutton?

15 A. Yes, sir.

16 Q. And you all found -- at the scene -- there was foot
17 prints up there at the scene, didn't you?

18 A. I don't recall.

19 Q. You don't recall seeing any foot prints?

20 GENERAL SCHMUTZER: He's answered once before, Your
21 Honor...

22 MR. DANIEL: I didn't ask about foot prints, Your
23 Honor, I asked about tire tracks.

24 GENERAL SCHMUTZER: You asked if there were any
25 foot prints up there, and he said no.

1 THE COURT: He said he didn't recognize any foot
2 prints, as I recall.

3 BY MR. DANIEL:

4 Q. Did you take -- did you send the boots off to the
5 laboratory so they could check them for mud or dirt or things
6 of this nature that would be -- to test them, or did you ever
7 send those off to the lab?

8 A. Yes, sir, I took those down to be tested for blood.

9 Q. For blood. And you found no blood?

10 A. The report came back inconclusive.

11 Q. Well, that means you found nothing positive that
12 you could identify anything, isn't that correct?

13 A. The lab report said inconclusive.

14 Q. Now, in the -- this gun that's here, this was taken
15 off -- you went over to Mr. Dellinger's house, and got that, is
16 that correct?

17 A. Which thing are you referring to?

18 Q. The gun that's been passed to the jury here, the
19 rifle.

20 A. The 303?

21 Q. Yes.

22 A. Blount County picked that up when they executed
23 their search warrant.

24 Q. And they got it from his house?

25 A. Got it from the trailer.

1 Q. Trailer, okay. You weren't there when that
2 happened?

3 A. Yes, sir.

4 Q. Mr. McMann, just one more question. We've got a
5 list of all these different cans and things you picked up at
6 different places. You can't tell us exactly where you picked
7 those two up that was sent in that had the finger prints on
8 them, can you?

9 A. Yes, sir.

10 Q. Do you have those marked?

11 A. They were marked in a bag Evidence #40 and #41,
12 picked up on side of Clear Fork Road on 2/29 by myself, and, I
13 believe, Detective Huskey.

14 Q. You found some other beer cans closer to the area
15 where this incident occurred?

16 A. Yes, there...

17 Q. There was actually beer cans right there at the
18 scene, wasn't there?

19 A. There were some different types of cans. I don't
20 know if they may have...

21 Q. When I say "where this occurred," do you know what
22 I mean? You know -- where you found the car.

23 A. In the proximity. There were some cans, but I
24 can't recall if they were beer cans or Mountain Dew cans. We
25 found different types of cans.

1 MR. DANIEL: Nothing further.

2 THE COURT: You may step down. Is he excused?

3 MR. DANIEL: Yes, Your Honor.

4 GENERAL SCHMUTZER: Call Agent Davenport.

5 **

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

8 DIRECT EXAMINATION

9 BY GENERAL SCHMUTZER:

10 Q. If you will, please, sir, state your full name and
11 position.

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

14 Q. And how long have you been employed in that
15 capacity?

16 A. 17 years.

17 Q. And is Sevier County one of the counties you are
18 assigned to?

19 A. Yes, it is.

20 Q. Did you come to Sevier County at the request of
21 Sheriff Ogle to assist his department in the investigation
22 surrounding the death of Connie Branum?

23 A. I did.

24 Q. During the course of your investigation did you
25 have an opportunity to talk with the defendant, Gary Sutton?

1 A. Yes, I did.

2 Q. And when and where was this?

3 A. It was March the 9th at the Sevier County Sheriff's
4 Department.

5 Q. How did that take place?

6 A. I was contacted by Sheriff Ogle who said that Gary
7 Sutton wanted to talk to officers.

8 Q. All right, sir. And when Sheriff Ogle told you
9 this, what did you do?

10 A. I went over to the Sevier County Jail, and met with
11 Mr. Sutton.

12 Q. All right, sir. When you met with him what was the
13 first thing that you talked to him about or advised him of?

14 A. The first thing I told him was that I understood
15 that he had requested to talk to officers, and he stated that
16 he had. I then read him his constitutional rights, and added
17 to the bottom of the waiver that he did not want or request to
18 have Attorney David Webb with him, or any attorney present.

19 Q. Did you know at that time, sir, that he, in fact,
20 had an attorney?

21 A. I didn't know that he had hired an attorney. I
22 thought he had, but he informed me that Mr. Webb wasn't
23 representing him at that time.

24 Q. That's what he told you when he came in there at
25 that time?

1 A. Yes.

2 Q. Who initiated this conversation, you or this
3 defendant?

4 A. Mr. Sutton.

5 Q. What did he say he wanted to talk to you about?
6 Well, let me ask you this. When you -- after you advised him
7 of his constitutional rights, and wrote that down on his waiver,
8 did he sign his waiver?

9 A. No, he didn't.

10 Q. Did he say that he didn't want to speak to you?
11 Did he change his mind, or what? What did he say?

12 A. No, he said he wanted to talk to us, but he just
13 wouldn't sign the waiver. I had a Sevier County detective with
14 me. But Mr. Sutton wouldn't sign the waiver.

15 Q. But he did state he still wanted to talk to you?

16 A. Yes.

17 Q. And did he, in fact, talk to you?

18 A. Yes, he did.

19 Q. What did he want to talk to you about? What did
20 he say to you?

21 A. I asked Mr. Sutton what he wanted to talk to us
22 about, and he stated that he had been locked up for something
23 he hadn't done.

24 Q. What else did he tell you?

25 A. He stated that he never killed anyone. He said

1 that he and James Dellinger were together all day Friday,
2 Saturday, Sunday, February 21, 22, 23, 1992, and that he did not
3 ever see James Dellinger shoot or kill anyone during the time
4 he was with him. He stated the last time he "Dooley" was when
5 they left him at the Blount County Courthouse after bonding him
6 out of jail on Friday night. Sutton stated on Friday night,
7 early, they, James Dellinger, Tommy Griffin, and him had been
8 driving his Camaro. Sutton also stated the Camaro did have one
9 head light out. They had left Tommy in the presence of a fat,
10 ugly girl near Maryville, and came back to Dellinger's house.
11 Sutton stated his car had trouble with the water pump, and that
12 he had left it at his brother's house, and drove his brother's
13 truck to Dellinger's.

14 Q. Go ahead.

15 A. Sutton denied any knowledge of setting fire to
16 Tommy Griffin's trailer. Sutton stated the first time he knew
17 Tommy was in jail was when Connie Branum called James asking him
18 to go bail Tommy out of jail. Sutton stated he and James drove
19 James' wife's car, an Oldsmobile, to Maryville to get "Dooley"
20 out of jail. After they got Griffin out of jail, the girl he
21 had left with before was outside the courthouse, and Griffin
22 left with her. He stated he did not know who the girl was.
23 Sutton said he and James came back to James' house, and picked
24 up his girlfriend, Carolyn, and James' wife, Linda, and went to
25 a new place in Pigeon Forge and ate, and came back home, and

1 went to bed.

2 On Saturday, Sutton stated he and James started
3 drinking early, and that they went to his trailer to check the
4 mail to see if a check he was expecting had come. Sutton stated
5 they again went riding around, and that they were in James'
6 white truck. Sutton stated they had met Connie Branum in
7 Townsend where Wears Valley meets the highway, and she had
8 turned around. Sutton and James agreed to help her go back and
9 look for Tommy, her brother.

10 Sutton stated they had went to a bar in Maryville,
11 shot a couple games of pool, and he danced one dance with
12 Connie. Sutton stated they asked at the bar if anyone had seen
13 Tommy, but no one had. He, Connie, and James stayed at the bar
14 for 45 minutes to an hour, then he drove the truck back to
15 Townsend, and they, James and Gary, let Connie out of her car.
16 Connie told them she had one more place to look for Tommy, and
17 they left her. Sutton stated he and James left driving
18 Dellinger's pickup truck, they drove back through Wears Valley
19 to Dellinger's home, getting there before 7:00 p.m.

20 Sutton stated he, Dellinger, Linda, and Carolyn
21 stayed in the rest of the night. Sutton stated he didn't own
22 a gun anymore, that he had sold the shotgun he had had. Sutton
23 did admit to shooting and target practicing at Dellinger's
24 house.

25 Sutton again stated he had not killed anyone. He

1 then started complaining about the conditions at the jail, and
2 threatened to go on a hunger strike. I told Sutton I would
3 relay his complaints about the jail to Sheriff Ogle.

4 Myself and Detective Turner informed Sutton that
5 if he wished to speak to law enforcement again, that he would
6 have to ask to speak with us. Sutton was advised when he
7 obtained a lawyer that if he wanted to speak with us with his
8 attorney, we would talk to him. Sutton again stated he had not
9 killed anyone, and then he was taken back to his jail cell.

10 Q. All right. Now what you just read is what you had
11 written out...

12 A. Yes, sir.

13 Q. When did you write this out?

14 A. I wrote it March the 9th immediately after I
15 completed the interview.

16 Q. I take it he was then put back in the cell, is that
17 right?

18 GENERAL SCHMUTZER: You may cross examine.

19 **

20 CROSS-EXAMINATION

21 BY MR. MILLER:

22 Q. Agent Davenport, during this investigation you had
23 an occasion to take a statement from a Herman Lewis, do you
24 remember that?

25 A. You'd have to show it to me, Mr. Miller, because

1 I took a number of statements.

2 MR. MILLER: Your Honor, please, I'll let them ask
3 their questions, and if I could reserve the right
4 to...

5 THE COURT: Sure.

6 GENERAL SCHMUTZER: May I approach the bench, Your
7 Honor?

8 THE COURT: Yes.

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

10 THE COURT: If you all will, lay that gun up on one
11 of the -- or put it somewhere else.

12 GENERAL SCHMUTZER: Your Honor, Mr. Lewis was never
13 questioned about anything that he made to David
14 Davenport -- the ground was never laid. The law
15 is clear that before you can impeach someone, you
16 first have to lay the proper groundwork, and give
17 the witness an opportunity to respond, and say
18 whether or not he made that statement to that
19 individual. That has never been done here. David
20 Davenport's name has never been mentioned or asked
21 during this entire trial.

22 MR. WEBB: That's not correct, Your Honor.

23 MR. MILLER: I remember specifically asking the
24 General if this was David Davenport's statement,
25 and he said, "I believe it is."

1 GENERAL SCHMUTZER: He asked me if it was his
2 statement.

3 MR. WEBB: Well, we asked -- we asked Mr. Lewis,
4 and he said he didn't know who he gave a statement
5 to, he gave it to whoever asked him.

6 THE COURT: Well, he may ask him if he took a
7 statement from Mr. Lewis, if he can identify that
8 as a statement he took from him, and ask him about
9 that.

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

12 **

13 CROSS-EXAMINATION

14 BY MR. WEBB:

15 Q. Mr. Davenport, your job is to investigate, is that
16 correct?

17 A. Yes, sir.

18 Q. And part of the investigation is to gather
19 incriminating evidence against the suspect whenever possible,
20 is that correct?

21 A. My job is to gather information. If it's
22 incriminating, it is, if I get incriminating evidence.

23 Q. I take it you take statements from anyone that you
24 know who has information about a particular crime you're
25 investigating?

1 A. Myself, yes, sir, or somebody else.

2 Q. And this was as an important an investigation as
3 you've ever been involved in, would you not agree with that,
4 sir?

5 A. Well, they're all important.

6 Q. And during the course of your investigation you
7 were in daily contact with Sevier County authorities and Blount
8 County authorities, is that not correct?

9 A. From probably the last day of February on, yes.

10 Q. And as of March 9th when you say you talked to Gary
11 Sutton, you were already aware that Gary Sutton had given two
12 statements to Blount County?

13 A. Yes, sir.

14 Q. And you were aware that he came in voluntarily and
15 gave those statements?

16 A. I was aware that he had given two statements.

17 Q. You were aware he was not under arrest when he gave
18 those statements?

19 A. No, he was not under arrest.

20 Q. You were aware that on the second statement, in
21 particular, that Detective Widener had mirandized Gary Sutton -
22 - read him his rights, you were aware of that, weren't you?

23 A. He probably had. I'm sure that he had.

24 Q. You know that?

25 A. I'm sure that he had. I've seen it, and I'm sure

1 that he had.

2 Q. In fact, not only did he mirandize him on the tape
3 recording he, independent of that, read a miranda warning, what
4 we call an admonition and waiver, and let him read it and sign
5 it. You are aware of that?

6 A. Well, Mr. Webb, I wasn't there, but like I said,
7 I'm sure that he advised him of his rights. I wasn't there the
8 first time he talked to Gary Sutton or the second time either
9 one.

10 GENERAL SCHMUTZER: I would object, Your Honor.
11 If it's hearsay, it would have to...

12 THE COURT: Well, he can't testify to what an
13 officer did at a session that he wasn't present at.
14 He could obviously testify as to what he's been
15 told, but he doesn't need to testify to that.

16 MR. WEBB: Okay, that will be fine.

17 BY MR. WEBB:

18 Q. As part of your investigation concerning Ms.
19 Branum's death you've had an occasion to talk to Jack Tipton and
20 Joyce Sutton, is that correct -- or Jack Sutton and Joyce
21 Tipton, excuse me?

22 A. I believe I did.

23 Q. Okay. And I believe this occurred on March the
24 4th?

25 A. Somewhere in that area. Without having the

1 statements I can't tell you the exact dates, but sometime during
2 that period I did talk to those two people.

3 GENERAL SCHMUTZER: I object, Your Honor, to what
4 they -- I take it you're not going to go into what
5 they said?

6 MR. WEBB: I'm going to go into it unless the Court
7 tells me not to.

8 GENERAL SCHMUTZER: I would object to that, it's
9 obvious hearsay, Your Honor.

10 MR. WEBB: It's part of his investigation, what
11 these people told him.

12 GENERAL SCHMUTZER: The Court has ruled...I'm
13 sorry.

14 THE COURT: Well...

15 MR. WEBB: I don't know if the Court has or not,
16 but I...

17 THE COURT: Now, have these people testified?

18 GENERAL SCHMUTZER: No, Your Honor.

19 THE COURT: Then it would be hearsay.

20 MR. WEBB: Okay. Your Honor, let me approach. I
21 want to make sure the Court understands what
22 we're...

23 THE COURT: Okay.

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

25 THE COURT: As the Court was getting ready to say,

1 absent some issue on a Brady type issue...

2 MR. WEBB: It's definitely Brady.

3 THE COURT: Well, except it wouldn't be in front
4 of the jury, see?

5 MR. WEBB: Well, let me ask this. If I can make
6 a proffer, and the General can disagree with me,
7 but as part of David Davenport's investigation he
8 talked to Jack Sutton and Joyce Tipton on March the
9 4th, and these two individuals told him that Mr.
10 Cogdill had made certain statements about...

11 THE COURT: Who?

12 MR. WEBB: Mr. Cogdill.

13 THE COURT: Okay.

14 MR. WEBB: ...and these statements were made before
15 the body of Connie Branum was found, and these
16 statements said that -- Mr. Cogdill tells these
17 people that she would be found, she would be found
18 dead, she would be found burned, she would be found
19 dead and burned in her car in Happy Hollow.

20 THE COURT: Okay.

21 MR. WEBB: And that's what he would -- that's what
22 his investigation showed him, and that's what he
23 was aware of, and obviously, that was supplied to
24 us through the attorney general's office as being
25 Brady material.

1 GENERAL SCHMUTZER: He's just with the wrong person
2 trying to get it in. He can't testify to what
3 Tipton and Sutton say. He can only...

4 THE COURT: As this juncture, he couldn't. He
5 could -- if you wanted to ask him if he was given
6 any information about any other witness or
7 whatever, he may state that, but as to what was
8 told to him that someone else may have said, at
9 this juncture, it would be inadmissible.

10 MR. WEBB: Well -- did I already go ahead -- I
11 asked him if he had took those statements. I
12 didn't ask him...just to get guidance from the
13 Court, I'm want to ask him as much more about that
14 as I can, and if this information he got told him
15 that there was a man that had information that only
16 someone who was involved in her death would have
17 had.

18 GENERAL SCHMUTZER: Not necessarily, Your Honor.
19 No, that's...

20 THE COURT: It would have to come in under either
21 803 or 804, and I don't -- under 803, of course,
22 it -- availability is immaterial, but I don't see,
23 at least at this juncture, any exceptions it would
24 come in under.

25 MR. WEBB: Pardon?

1 THE COURT: I don't see any exception under 803
2 that it would come in under, and then under 804,
3 of course, you must prove unavailability. So at
4 this juncture there's no foundation for
5 unavailability of a witness. Now, it could,
6 potentially, and I'm not ruling on that, but it
7 might come in under a prior statement of
8 identification, except that wouldn't go to what you
9 are wanting to show, see. It's not an admission
10 by a party - see...

11 MR. WEBB: Unless the Court lets this third party
12 complaint in...

13 THE COURT: Yeah. Now, this is the only way that
14 it might could come in if you prove the
15 unavailability aspect of it.

16 MR. WEBB: Unavailability of a particular witness
17 he talked to or something?

18 THE COURT: Right, a statement against interest.
19 That's the only way.

20 MR. WEBB: I don't know that we're there at that
21 point yet. They're under subpoena, so I don't...we
22 can take that up.

23 THE COURT: Right.

24 GENERAL SCHMUTZER: Your Honor, of course, this
25 couldn't be a statement against their interest

1 anyway. They are saying what a third party told
2 them, and...

3 THE COURT: Right, as to this witness. Exactly
4 right. All I was making reference to was the
5 statement allegedly made by Mr. Cogdill might come
6 in via someone else under that theory...

7 MR. WEBB: Unavailability.

8 THE COURT: Right.

9 MR. WEBB: Right, I understand.

10 THE COURT: Okay?

11 MR. WEBB: That will be fine.

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

14 BY MR. WEBB:

15 Q. I think before we went up to the bench you did say
16 that you had taken the statement of Joyce Tipton and Jack
17 Sutton, is that correct?

18 A. I did.

19 Q. And that was as part of your investigation, is that
20 correct?

21 A. That's correct.

22 Q. And if I understand correctly, Connie Branum's body
23 was found on February the 28th?

24 A. Was that Friday?

25 Q. Friday.

1 A. That's correct.

2 Q. And she was found just off the South Clear Fork
3 Road in the Happy Hollow area of Sevier County?

4 A. Yes, sir, it was up off of Wears Valley.

5 Q. Okay. And she was burned?

6 A. Yes, sir.

7 Q. And she was in her car?

8 A. That's correct.

9 Q. Okay. And these people that you had talked to told
10 you some things in that regard, haven't they?

11 A. Which people?

12 Q. Joyce Tipton and Jack Sutton.

13 A. Joyce Tipton and Jack Sutton gave me a statement,
14 yes, sir.

15 Q. About where her body would be found?

16 GENERAL SCHMUTZER: Your Honor, we -- this is
17 what...

18 THE COURT: I've already ruled on that aspect of
19 it, Mr. Webb.

20 MR. WEBB: Okay.

21 THE COURT: At this time, I sustain the objection
22 for the reasons previously stated at the bench.

23 MR. WEBB: That will be fine, Your Honor.

24 BY MR. WEBB:

25 Q. You had testified to this jury earlier that you

1 were aware that Gary Sutton had invoked his right to counsel on
2 Friday, February 28th, 1992, is that correct?

3 A. Sometime. I know that he had been brought when he
4 was arrested -- you know, like I said, I assumed at that time
5 that he had hired you as an attorney, so yeah, I assumed that
6 he was represented by someone.

7 Q. Okay. And you are familiar with the law that once
8 one invokes the right to counsel that you, nor any other law
9 enforcement officer could not talk to him unless he initiated
10 the conversation. You are aware of that, aren't you?

11 A. Mr. Sutton did initiate the conversation through
12 the sheriff of Sevier County.

13 Q. I understand, but to answer my question, are you
14 familiar with that law?

15 A. I'm familiar with that, yes.

16 Q. And so since you are familiar with that, you knew
17 that you couldn't talk to him unless he initiated the
18 conversation?

19 A. Mr. Webb, I wouldn't have talked to him had he not
20 sent word to me.

21 Q. I understand. But you are familiar with that law?

22 A. Yes, sir, I am.

23 Q. And at the time that you talked to Gary Sutton on
24 March the 9th, you knew that there was a witness that was going
25 to testify that whatever car was out on Hunt Road had a head

1 light out, is that correct?

2 A. I don't remember -- I didn't do anything on the
3 Blount County investigation with the exception of talking to the
4 detectives. I'm aware of that fact now, and to put that in a
5 proper time frame, I don't know if I found out about it then,
6 before or after, but I am aware of that fact.

7 Q. Okay. And I believe in your summary that you had
8 given, and of course, the State had furnished us, you made the
9 statement that "Dellinger and Sutton, in their statements to
10 Blount County detectives, stated they were together all the time
11 on Friday and Saturday." That's what you stated in your
12 summary, is that correct?

13 A. May I look at it?

14 Q. Yes.

15 MR. WEBB: May I approach, Your Honor.

16 THE COURT: Yes.

17 BY THE WITNESS:

18 A. Is that my summary?

19 Q. Yes.

20 A. Okay. This was dictated March the 12th, and I
21 interviewed him March the 9th, so that is a summary of what was
22 done. So yes, that's correct.

23 Q. But the fact of the matter is that nowhere in
24 either of these fellow's statements did they say that they were
25 together all day Friday or Saturday. I'm talking about the

1 statements to Blount County.

2 A. Well, like I said, I did that before March the
3 12th, and I interviewed him March the 9th, so he had already
4 told me that they were together on March the 9th.

5 Q. I understand. But your summary is very specific
6 that in their statements to Blount County detectives they had
7 stated they were together all the time on Friday and Saturday.

8 A. I don't know what -- I haven't listened to the
9 whole tapes. I did review certain parts of it -- certain parts
10 of the transcription. If I wrote that, that's what I wrote.

11 Q. Of course, the jury has heard, and you know that
12 that's not true. Nowhere in those statements to Blount County
13 detectives did either of these defendants state they were
14 together all the time Friday or Saturday.

15 A. I really don't know without reading the transcripts
16 over or listening to the tapes.

17 Q. Okay. Now, in your -- let's back up. You had
18 listened to these tapes of these defendants' statements prior
19 to March the 9th, haven't you?

20 A. Portions of them.

21 Q. And in fact, if you look at this statement that you
22 prepared on March 9th, it says, "Sutton stated that he and James
23 Dellinger were together all day Friday, Saturday, and Sunday,
24 February 21, 22, and 23, 1992." That's what your statement
25 says, doesn't it?

1 A. That's correct.

2 Q. And that statement is not in either of the prior
3 two statements that Mr. Sutton gave, is that correct?

4 GENERAL SCHMUTZER: Your Honor, this is
5 repetitious. He's been over this two or three
6 times.

7 THE COURT: He's answered that.

8 BY MR. WEBB:

9 Q. And the same with the head light. Sutton also
10 stated the Camaro did have one head light out. That's what your
11 March 9th statement says, doesn't it?

12 A. That's what it says.

13 Q. And that's not in any prior statements, is it, sir?

14 A. I don't know.

15 Q. Let's be candid with this jury. Those two things
16 were important to you when you went to talk to Gary Sutton on
17 March the 9th, weren't they?

18 A. No more important than everything Gary Sutton told
19 me.

20 Q. Okay. Now, I take as a T.B.I. agent you are on
21 call 24 hours a day?

22 A. Yes, sir.

23 Q. And if I understood correctly, on March the 9th you
24 were employed by Sevier County Sheriff Don Ogle that Gary Sutton
25 had requested to speak with officers on Saturday, March the 2nd,

1 is that correct?

2 A. That's correct.

3 Q. And you didn't find out about that until March the
4 9th, is that correct?

5 A. I did not.

6 Q. And I take it up to that one time you had never
7 even met Gary Sutton?

8 A. No, I had seen Gary Sutton.

9 Q. Had you ever talked to him before?

10 A. I had spoken to Mr. Dellinger a couple of times.
11 I don't know if I spoke to Mr. Sutton or not.

12 Q. And I take it there were what, 15, 20, 30 officers
13 involved in this investigation or more?

14 A. There were several officers involved.

15 Q. And I take it not one of these other officers would
16 go and talk to Gary Sutton on March the 7th or March the 8th or
17 March the 9th.

18 GENERAL SCHMUTZER: Your Honor, he doesn't know
19 this. He wasn't there; he came on March the 9th.
20 I object to this -- what the other officers did or
21 didn't do.

22 BY MR. WEBB:

23 Q. They didn't, did they?

24 THE COURT: Sustained as to what Mr. Davenport knew
25 about the other officers.

1 BY MR. WEBB:

2 Q. Well, you know that no one talked to him from March
3 the 7th until two days later on March the 9th, don't you?

4 GENERAL SCHMUTZER: Your Honor, I object to that.
5 There's no way he could no unless it was by
6 hearsay.

7 THE COURT: He -- well, and of course, he's
8 acknowledged that he knew of prior statements to
9 Blount County officers, but let's move on to
10 something else.

11 BY MR. WEBB:

12 Q. Wouldn't you agree that it's important in a murder
13 investigation for someone to talk to a murder suspect as soon
14 thereafter as he wants to talk?

15 A. I didn't know what he was going to say.

16 Q. Okay. And the first thing that you did was advise
17 him of his rights, is that correct?

18 A. That is correct.

19 Q. And do you have that advisement with you?

20 A. Yes, sir, I do.

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

22 THE COURT: Yes.

23 BY MR. WEBB:

24 Q. Is this a photocopy of the advisement?

25 A. No, that's the original, Mr. Webb.

1 Q. Okay. If we could, this -- it's called an
2 Admonition and Waiver on the top part, and a Waiver of Rights
3 on the bottom, is that correct?

4 A. That's correct.

5 Q. And you have penciled in some things. "I have
6 initiated this conversation with law enforcement. I do not want
7 David Webb present or any other attorney at this time. I am
8 willing to talk to law enforcement without an attorney present."
9 Is that correct?

10 A. That's correct.

11 Q. And you began advising him of his rights at 11:40
12 a.m., is that correct?

13 A. That's correct.

14 Q. And the time was important, is that correct?

15 A. Well, it's a record of when I started advising him
16 of his rights.

17 Q. And you got a witness over here where your
18 signature is, and Detective Mark Turner's signature, is that
19 correct?

20 A. I believe that's -- I wrote down Mark Turner's
21 name, but he was in the room with me.

22 Q. Okay. And you got a time of 11:40 a.m., is that
23 correct?

24 A. 11:45 a.m.

25 Q. 11:45 a.m. And is it your testimony that you began

1 reading his rights, and adding in this extra at 11:40 and
2 concluded at 11:45 a.m.?

3 A. Well, the way I do it is I read it to him, and then
4 when I'm finished with the type written, which is the waiver of
5 rights, "I have read the statement of my rights. I understand
6 what my rights are. I'm willing to make a statement and answer
7 questions. I do not want a lawyer at this time. I understand
8 and know what I'm doing. No promises or threats have been made
9 to me. No pressure or coercion of any kind has been used
10 against me." Then I added in ink, "I have initiated this
11 conversation with law enforcement. I do not want David Webb
12 present or any other attorney at this time. I'm willing to talk
13 to law enforcement without an attorney present." I gave him an
14 opportunity to read it and sign it if he desires, and then I put
15 the time.

16 Q. So you began advising him of his rights at 11:40
17 a.m., and concluded that at 11:45 a.m., is that correct?

18 A. That's correct.

19 Q. I don't know what else this is.

20 A. That's just a hand written...

21 MR. WEBB: I'm going to detach this, and mark this
22 as an exhibit. Would you mark that as an exhibit,
23 please?

24 (EXHIBIT #43 - Admonition and Waiver; marked and
25 filed.)

1 THE COURT: If you would, make sure that if that
2 original goes in the file that Officer Davenport
3 has a copy of it.

4 BY MR. WEBB:

5 Q. And to make sure I understand, and to make sure the
6 jury is clear on this, there was never any questions asked of
7 you, or any statements given from Gary Sutton until 11:45 a.m.?

8 A. The first thing that I would do in a situation like
9 that...

10 MR. WEBB: Your Honor, that's just a yes or no.
11 I asked him if that's correct.

12 THE COURT: Answer the question, and then explain
13 it as you...

14 BY THE WITNESS:

15 A. Would you rephrase the question?

16 Q. I'll rephrase it. To make sure everybody
17 understands, it was at least 11:45 a.m. before any questioning
18 began of Gary Sutton?

19 A. That's correct.

20 Q. All right. Now, I notice that you signed as a
21 witness, is that correct?

22 A. I advised him of his rights, yes, and signed it.

23 Q. And you signed it as a witness?

24 A. That's correct.

25 Q. And then you signed Detective Mark Turner's name

1 as a witness?

2 A. I wrote his name down, yes.

3 Q. And this is not Detective Mark Turner's signature?

4 A. I don't believe it is.

5 Q. Okay. And the way I understand it, what you're
6 witnessing is a signature, is that correct?

7 A. No, what we're witnessing is that I advised him of
8 his rights.

9 Q. Okay. The jury will see this in a minute. There's
10 a place where he can sign, is that correct?

11 A. That's correct.

12 Q. And you've marked that with an "X", is that
13 correct?

14 A. Yes, sir, I did.

15 Q. And there's nowhere that his signature is on this,
16 is there?

17 A. No.

18 Q. So really you weren't witnessing any act of his
19 signature, were you?

20 A. The only thing that I wrote is that I was saying
21 that I advised him of his rights starting at 11:40. That's what
22 I put down there.

23 Q. Okay. To answer my question, you did not witness
24 his signature, did you?

25 A. He didn't sign it, Mr. Webb.

1 MR. WEBB: Your Honor, at some point I'm going to
2 pass this to the jury.

3 BY MR. WEBB:

4 Q. And you are aware that on at least two prior
5 occasions he had signed his miranda...

6 GENERAL SCHMUTZER: Your Honor, I object, he's
7 already...

8 THE COURT: Sustained. He's already answered.

9 BY MR. WEBB:

10 Q. As a matter of fact, Mr. Davenport, you never even
11 presented this to him, did you?

12 A. Yes, sir, I did.

13 Q. Let me ask you this. This -- do you have a copy
14 of your hand written statements?

15 A. Yes, sir, I do.

16 Q. Okay.

17 A. Now that's the original, too.

18 MR. WEBB: If I may approach, Your Honor. What
19 we'll do, Your Honor, if you please, and I think
20 you've indicated, we'll make copies, and return the
21 originals to Mr. Davenport.

22 THE COURT: That will be fine.

23 BY MR. WEBB:

24 Q. Now Mr. Davenport, this is a statement in your
25 handwriting, is that correct?

1 A. That's correct.

2 Q. It consists of one, two, three, four, five pages,
3 is that correct?

4 A. For one portion, yes, sir.

5 Q. For one portion. This is in your handwriting?

6 A. That's correct.

7 Q. Is there anywhere on this where Gary Sutton has
8 signed or initialed?

9 A. No, there is not.

10 Q. Okay. And I believe...

11 MR. WEBB: Your Honor, if I could mark that as a
12 defense exhibit?

13 THE COURT: Yes, sir.

14 (EXHIBIT #44 - Handwritten statement; marked and
15 filed.)

16 BY MR. WEBB:

17 Q. I believe on a prior occasion you gave testimony,
18 and you said that you never even asked him to review this
19 handwritten statement of yours, did you?

20 A. I did not.

21 Q. Okay. And when you took your statement, you took
22 no rough notes?

23 A. When I took the statement I asked Mr...

24 Q. Yes or not? It's a yes or no. Did you take rough
25 notes?

1 A. No, but I asked Mr. Sutton if he wanted to give a
2 written statement, and he declined to do so.

3 Q. Okay. So there was nothing written by you
4 contemporaneous with this interview you had with Gary Sutton?

5 A. No. I went in there prepared to write a statement
6 from Mr. Sutton, but Mr. Sutton declined to sign a written
7 statement.

8 Q. I think you just testified, Mr. Davenport, that you
9 never even presented this statement to him.

10 A. I didn't.

11 Q. Okay. Now, what you've done is write this down as
12 best you could remember, is that correct?

13 A. That's correct. After I finished interviewing him,
14 I went out and wrote that.

15 Q. And so you'll agree with me that it cannot be
16 verbatim?

17 A. I don't -- as far as being verbatim, that is the
18 best that I can remember what Gary Sutton said while we were
19 sitting in there.

20 Q. And you'd agree with me that in a first degree
21 murder case it's important to get down exactly what's stated,
22 isn't that true?

23 A. As far as that statement there pertaining to
24 anything about Tommy Griffin or Connie Branum that is what he
25 told me.

1 Q. Mr. Davenport, try to answer my question if you
2 can. Isn't it important in a first degree murder case to get
3 down everything as exactly as you can? It's a very simple
4 question.

5 A. That's correct, sir.

6 Q. And what this jury's heard, apparently, that your
7 statement that you wrote down has two things that appears to be
8 crucial to this case, that is, the fact that Gary Sutton told
9 you that they had been together all day Friday, Saturday, and
10 Sunday, and that one head light was out on his vehicle.

11 GENERAL SCHMUTZER: I'm going to object, Your
12 Honor, to the form of the question being asked,
13 what's crucial and not crucial. This jury will
14 decide what's crucial or not crucial to this case.

15 THE COURT: As to that form of the question, Mr.
16 Webb, the Court would sustain it.

17 BY MR. WEBB:

18 Q. What you're saying is that Gary Sutton comes in,
19 he's been accused of murdering his best friend, and the first
20 thing he says to you is that he was with James Dellinger all day
21 Friday, Saturday, and Sunday, and by the way, you need to know
22 this, my head light's out?

23 A. I didn't say that.

24 Q. That's what your statement says, doesn't it?

25 A. That's what the statement says, but I don't think

1 anywhere that I said...

2 Q. And that's what you want the jury -- it's your
3 statement, you wrote it.

4 A. No, sir, that's Gary Sutton's statement.

5 Q. Is there any writing -- signature by Gary Sutton?

6 A. I've already said there wasn't, no, sir.

7 Q. "And by the way, my head light's out."

8 A. No, I didn't say "by the way." I think I asked him
9 if his head light was out or I might have asked him to clarify
10 matters.

11 Q. Okay. You did not tape record this statement, did
12 you?

13 A. No, sir, I did not.

14 Q. And in fact, in answering questions in your earlier
15 testimony you made an answer, "I don't tape record."

16 A. I don't. As a policy, I don't tape record
17 statements.

18 Q. Of course, we wouldn't be here if you'd simply tape
19 recorded this statement, would we?

20 GENERAL SCHMUTZER: I would object to that. That's
21 argumentative.

22 THE COURT: Sustained.

23 BY MR. WEBB:

24 Q. I take it tape recording devices are available at
25 the Sevier County Sheriff's Department?

1 A. I don't work for Sevier County Sheriff's
2 Department, sir. I...

3 GENERAL SCHMUTZER: Your Honor, he's testified it's
4 not his policy. It wouldn't matter if there was
5 one there or not. I object to it.

6 THE COURT: Sustained.

7 BY MR. WEBB:

8 Q. This jury has already heard testimony that Blount
9 County detectives tape record their statements.

10 A. Sir, I don't tape record statements. It's the
11 T.B.I.'s policy not to. Also, the tape malfunctions. I've had
12 tapes malfunctions, and you can't hear what's said on the tapes.
13 I don't tape record statements. I can't answer...

14 MR. WEBB: Could I approach, Your Honor?

15 THE COURT: Yes.

16 BY MR. WEBB:

17 Q. I'll ask you if you can review this, and...

18 A. Yes, sir, but it was also tape recorded by Mike
19 VonCannon.

20 Q. Let's read it to the jury if we can.

21 A. Okay.

22 Q. It says, "To." Tell the Court what that says.

23 A. "To T.B.I., 5/13, from myself. Interview, tape
24 recorded, Joyce Tipton, 3/4/92."

25 Q. Who is D.D.'s signature?

1 A. D.D. is me.

2 Q. Read that to the jury, please.

3 A. "This will be a taped interview of Joyce Tipton,
4 New Arrow West, Sevierville, Tennessee." May I finish reading,
5 please?

6 Q. That's fine.

7 MR. WEBB: I'd like to mark that as an exhibit,
8 Your Honor.

9 (EXHIBIT #45 - Page one of interview of Joyce
10 Tipton; marked and filed.)

11 BY MR. WEBB:

12 Q. So you do tape record statements, don't you?

13 A. That statement was recorded by Mike VonCannon of
14 the sheriff's department.

15 Q. Whose -- I may have missed that. Let's look at
16 that again. You are D.D., is that correct?

17 A. That's correct.

18 Q. And D.D. says, "This will be a tape recorded
19 interview of Joyce Tipton." Is that not what it says?

20 A. Sir, above that there's the initials M.V. that
21 says, "Testing, one, two, three," on it.

22 Q. The point is, you do tape record statements, and
23 that's proof of it, Officer Davenport.

24 A. That was tape recorded by the Sevier County
25 Sheriff's Department.

1 Q. So it appears to me sometimes you tape them, and
2 sometimes you don't.

3 GENERAL SCHMUTZER: Object, Your Honor, to what
4 appears to him. That's improper.

5 THE COURT: Sustained.

6 BY MR. WEBB:

7 Q. And I believe that's why you told Gary Sutton that
8 you would do whatever it took to win this case. You told him
9 that, didn't you, sir?

10 A. I don't believe I told Mr. Sutton anything of that
11 nature. I'm certain of that.

12 Q. Now, on a prior occasion you heard Gary Sutton deny
13 he told you any of these things you've just testified to.

14 GENERAL SCHMUTZER: I object to this, Your Honor.
15 That...

16 MR. WEBB: If he knows.

17 THE COURT: Well...

18 GENERAL SCHMUTZER: If we're going to get into that
19 -- I mean, that's improper to say that he heard -
20 - to begin with, Your Honor, he would have been
21 under the rule.

22 THE COURT: At this juncture, that question is
23 sustained. You may ask him any statements he's
24 supposedly made, and then, of course, go further.

25 BY MR. WEBB:

1 Q. Do you recall the prior occasion where Gary Sutton
2 testified in this Court?

3 A. I wasn't in here.

4 Q. You were not here?

5 A. I was here, but I wasn't in here when Gary Sutton
6 testified.

7 Q. Okay. And you are aware that he denied making
8 these statements?

9 GENERAL SCHMUTZER: I object to this, Your Honor.

10 THE COURT: Sustained.

11 GENERAL SCHMUTZER: If we're going to get into
12 this, I'd like to also get into...

13 THE COURT: That just opens up a lot of stuff we
14 don't need to get into.

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

16 THE COURT: Yeah.

17 BY MR. WEBB:

18 Q. Is this an interview that you took of Herman Lewis?

19 A. That's correct.

20 Q. And in Herman Lewis' -- this is your statement of
21 what you say Herman Lewis told you, is that correct?

22 A. That's Herman Lewis' statement.

23 Q. Okay. If you will read the area marked in green
24 to this jury, would you, please?

25 A. Just in green?

1 Q. Yes.

2 A. "He thought it was a 70's model Buick, dark green
3 color, which may have belonged to Eddie Blair."

4 Q. Okay. And that's what you're telling this jury
5 Herman Lewis told you, is that correct?

6 A. That's what the statement says, yes, sir.

7 Q. Okay. And I think another statement that you had
8 given regarding the testimony of Jerry Sullivan, do you recall
9 that?

10 A. Without seeing it, no, sir, I don't.

11 Q. Okay, we'll let you look at it.

12 A. I don't know if I interviewed Jerry Sullivan or
13 David Griswald interviewed Jerry Sullivan.

14 Q. A T.B.I. agent interviewed him?

15 A. Somebody interviewed Jerry Sullivan. I don't know
16 if I did or David Griswald did.

17 Q. This is your statement, is it not?

18 A. That is my summary.

19 Q. And read to the jury..

20 **GENERAL SCHMUTZER:** I object, now, Your Honor, to
21 a summary, unless he actually talked to him. This
22 is his summary of his case report where he just
23 goes through in a narrative form, Your Honor, and
24 puts everything down...

25 **MR. DANIEL:** I object, Your Honor, to the General

1 making -- he's made his objection.

2 **GENERAL SCHMUTZER:** I'm just telling the Court why
3 I'm objecting.

4 **MR. DANIEL:** Well, if you'd approach the bench.

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

6 **MR. DANIEL:** Your Honor said if we were going to
7 make objections we object. I set here and
8 listened, and the General has said -- this is about
9 the third time, and I haven't said anything, but
10 I feel like it's time. If he's going to object,
11 say "Objection," and if it needs to be, Your Honor
12 can rule on it.

13 **GENERAL SCHMUTZER:** I think, Your Honor, the rule
14 is that you can't just object. You have to object,
15 and give your reasons.

16 **MR. DANIEL:** You can say "hearsay," or you can say
17 whatever, but...

18 **THE COURT:** What -- if he can identify that, Mr.
19 Webb, as a statement that he took from that person
20 then he may be examined about it.

21 **MR. WEBB:** Well, let's see who is playing games,
22 Your Honor. They furnished this to me. It's in
23 his handwriting. He makes an affirmative statement
24 about a witness, and then he comes up and says it's
25 -- he didn't take -- or he don't know who took

1 that statement. I mean, either -- if he didn't
2 take it, why did he put it in his report?

3 THE COURT: Well, ask him.

4 GENERAL SCHMUTZER: Ask him. He summarized...

5 MR. WEBB: Then we have to put up -- we have to get
6 David Griswald, and David Griswald says, "Well, I
7 didn't take that statement."

8 GENERAL SCHMUTZER: I don't know what he's going
9 to say. You've got the statement from Jerry
10 Sullivan.

11 MR. WEBB: Well, somebody's playing games.

12 GENERAL SCHMUTZER: I object to that, Your Honor.

13 MR. WEBB: Well, that's just not right.

14 GENERAL GREEN: While we talking about speech
15 making, Your Honor...

16 THE COURT: Am I going to have to get out Roberts
17 Rules of Order on speech making?

18 MR. WEBB: No, Your Honor.

19 THE COURT: Come on, guys, let's go.

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

22 BY MR. WEBB:

23 Q. This is your handwriting?

24 A. Yes, sir, that's correct.

25 Q. And you've made a statement about Jerry Sullivan's

1 testimony, is that correct?

2 A. Yes, sir, that's correct.

3 Q. And are you telling this jury that you didn't talk
4 to Jerry Sullivan?

5 A. I'm telling you I don't know who talked to Jerry
6 Sullivan. That is a narrative that I wrote on March the 12th,
7 which was after these gentlemen had already been charged, which
8 was sent to my case file as a summary of the events leading up
9 all the way to when they were arraigned before the Court.

10 Q. Okay. So you don't know who made that statement?

11 A. I don't know who talked to Jerry Sullivan. I might
12 have talked to him.

13 Q. But you know that you talked to Herman Lewis, and
14 the jury has already heard him testify, and he says that he...

15 GENERAL SCHMUTZER: I object, Your Honor.

16 BY MR. WEBB:

17 Q. ...never...

18 THE COURT: Sustained.

19 GENERAL SCHMUTZER: I object, Your Honor...

20 THE COURT: Sustained. Mr. Webb? Fellows, here
21 we go again, as President Reagan says. I told you
22 if you're going to make objection -- if an
23 objection is made, stop talking until I have a
24 chance to rule on it. Do not, at this juncture,
25 ask that question in that form about Mr. Lewis.

1 Whatever Mr. Lewis has said, this jury has heard
2 it.

3 MR. WEBB: I understand, Your Honor.

4 THE COURT: Direct your attention to any statement
5 you want to ask this gentlemen that he either took
6 or he made.

7 MR. WEBB: Very well. Thank you. Your Honor, if
8 I could at this time, I would like to have the
9 exhibits passed to the jury.

10 THE COURT: Sure.

11 MR. WEBB: Where are they?

12 GENERAL SCHMUTZER: May we approach the bench, Your
13 Honor, about one?

14 THE COURT: Yes.

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

16 GENERAL SCHMUTZER: I object, Your Honor, to this.
17 This contains in the body things that are outside
18 what he testified to. If he wants to xerox that
19 out, and...

20 MR. WEBB: I'll xerox it out.

21 THE COURT: Okay.

22 MR. WEBB: That's what I'll do, Your Honor.

23 THE COURT: Are you finished with your examination
24 of Officer Davenport?

25 MR. WEBB: I think so. I want one moment.

1 THE COURT: Okay. If we do, this would be a good
2 time for a break.

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

5 MR. WEBB: Nothing further, Your Honor.

6 THE COURT: Is Officer Davenport excused?

7 GENERAL SCHMUTZER: Yes, Your Honor.

8 THE COURT: Okay. Ladies and gentlemen, this is
9 a good time to take a break.

10 MR. DANIEL: Your Honor, subject to recall on those
11 issues if they become material.

12 THE COURT: Okay, subject to being recalled,
13 Officer Davenport. The Court stands in recess for
14 10 minutes. All rise.

15 (JURY OUT)

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

17 OFFICER MCGINNIS: That's what I was trying to say
18 up there when I was...

19 THE COURT: Okay. Did she show this to anybody out
20 there?

21 OFFICER MCGINNIS: Sutton's girl -- I think she's
22 been going out there and talking to her. But she
23 did go talk to one girl, and she said, "I think
24 they've caught me, and I'm fixing to go to the car
25 right now.

1 THE COURT: Did you overhear that?
2 OFFICER MCGINNIS: I could read her lips.
3 THE COURT: Okay. If you'll take her pocketbook
4 back to her. Who was this pocketbook taken from,
5 is she in the courtroom?
6 OFFICER MCGINNIS: Not right now.
7 THE COURT: Have her come in the courtroom.
8 (Said bench conference being completed, the
9 following proceedings are had in open court.)
10 THE COURT: What is your name, ma'am?
11 MS. JENKINS: Brenda Jenkins.
12 THE COURT: Ms. Jenkins, I've been handed a
13 notebook here by officers which contains, as the
14 Court can see, a summary of the testimony of Dr.
15 Bass and Larry McMann, is that correct? Have you
16 shown this to any witness?
17 MS. JENKINS: It wouldn't have been in the
18 courtroom if I'd been showing it to anybody.
19 THE COURT: I'm sorry?
20 MS. JENKINS: I wouldn't have left it in the
21 courtroom if I'd been trying to show it to anybody.
22 I went out to get a Roloids for heartburn. I'm
23 hoarse, I can't hardly talk.
24 THE COURT: Have you talked to Ms. Linda Dellinger
25 or anyone else here?

1 MS. JENKINS: Now?

2 THE COURT: Since you've been...

3 MS. JENKINS: No. I mean -- I just walked out --
4 I talked to Jimmy Sutton, but we were talking about
5 the wreck that just occurred right out here to the
6 side. My little girl was at the car, and when I
7 heard there was a wreck, I went to the car my
8 little girl was in.

9 OFFICER MCGINNIS: What did you do with the pieces
10 that was in there Thursday?

11 MS. JENKINS: Thursday?

12 THE COURT: Have you been...

13 MS. JENKINS: I've taken notes, but I didn't -- is
14 it against the law?

15 THE COURT: No, ma'am, it's not against the law to
16 take notes, but it would be a violation of this
17 Court's orders to talk to any witness or potential
18 witness about anything that's been testified here
19 to.

20 MS. JENKINS: But I haven't -- I didn't have -- I
21 had no reason to. I mean, I'm a friend, that's
22 all.

23 THE COURT: Officer McGinnis, raise your right
24 hand, please, sir.

25 (OFFICER SWORN)

1 THE COURT: Last Thursday she was taking notes, and
2 I told her to put her note pad up, do not take
3 anymore notes.

4 MS. JENKINS: Excuse me.

5 THE COURT: Well, hold on. I will give you an
6 opportunity.

7 OFFICER MCGINNIS: I set there and watched her take
8 notes, and she went out and talked to Mr. Sutton's
9 girlfriend. She told somebody out there, she says
10 -- I'm standing about four or five feet from her,
11 and on her lips, she said, "I've got to go out to
12 the car. I believe they've caught me."

13 MS. JENKINS: No, I did not.

14 OFFICER MCGINNIS: After that, she went outside.

15 MS. JENKINS: I'm sorry, but I don't know what you
16 would think I'd -- if I was doing something wrong,
17 would I sit in the courtroom in front of you?

18 OFFICER MCGINNIS: Remember, Thursday I told you,
19 "Do not," and...

20 MS. JENKINS: No, sir. What you told me when I
21 left this courtroom the other day was not to make
22 gestures because a man had set down with me, and...

23 THE COURT: Okay, hold on. Time out.

24 GENERAL SCHMUTZER: Your Honor, I think the other
25 officer ought to testify, too, because she

1 apparently witnessed it, too.

2 **THE COURT:** Okay. Come down, please, ma'am. Raise
3 your right hand.

4 (OFFICER SWORN)

5 **THE COURT:** If you will, tell the Court what...

6 **OFFICER:** She went out, and walked straight down
7 to the railing by the stairway where Mrs. Dellinger
8 was sitting, and two other witnesses to testify,
9 and she...

10 **MS. JENKINS:** I asked them if they had anything for
11 heartburn.

12 **THE COURT:** Okay.

13 **MS. JENKINS:** So help me, that's all I was doing.

14 **THE COURT:** Did you see her open this book or show
15 this book?

16 **OFFICER:** No, the purse stayed in the courtroom
17 this afternoon.

18 **THE COURT:** Okay.

19 **OFFICER:** When she left, the purse stayed in the
20 courtroom this afternoon. But this morning's notes
21 -- there's no notes in there from this morning.

22 **THE COURT:** Okay.

23 **MS. JENKINS:** I didn't enter the courtroom this
24 morning until after 10:00.

25 **THE COURT:** I understand.

1 MS. JENKINS: And honestly, Judge, I did not know
2 that it was against the law for me to sit there and
3 write -- I mean...

4 THE COURT: It is not against the law for you or
5 anyone else to sit in this courtroom and write,
6 it's certainly not. And I can't prohibit you from
7 doing that, and wouldn't if I could. The only
8 thing is that if -- and I'll be real honest with
9 you, and I'm not making any findings right now, but
10 if you or any other witness discuss this case or
11 show this testimony to any other witness outside
12 this courtroom, that would be a violation of this
13 Court's order, do you understand that?

14 MS. JENKINS: Yes, sir.

15 THE COURT: Okay. If the -- anything from the
16 State on this?

17 GENERAL SCHMUTZER: No, Your Honor. It was just
18 brought to our attention, and we -- I didn't know
19 if they had seen her go out earlier this morning -
20 - go out and talk to individuals or not.

21 THE COURT: I think you can understand, can you
22 not, that...

23 MS. JENKINS: Yes, sir, I sure can.

24 THE COURT: ...that it would cause anyone some
25 concern if they see you sitting and taking notes,

1 and then going out and talking with the...

2 MS. JENKINS: Can I make one statement?

3 THE COURT: You sure may.

4 MS. JENKINS: I wouldn't do anything to jeopardize
5 this hearing in any way.

6 GENERAL SCHMUTZER: You might ask her where the
7 notes are on the other witnesses that testified
8 earlier today. Apparently she's been taking them
9 all day.

10 THE COURT: Have you made other notes other...

11 MS. JENKINS: Yes, sir, I have.

12 THE COURT: And so...

13 MS. JENKINS: They're at my house, and I can run
14 up there and get them and bring them to you. I've
15 took notes all the way through it because I didn't
16 realize there was anything wrong with it.

17 THE COURT: Well, and there's nothing wrong with
18 that, okay? And I'm not jumping on you, but I
19 don't want -- you know, if we have witnesses who
20 are being talked to, see, I have no control over
21 a witness -- where a witness goes after court, or
22 anything like that. And if they see you taking
23 notes and going out and talking to witnesses, that
24 obviously raises a question.

25 MS. JENKINS: Of course.

1 THE COURT: It's just like the lady that
2 accidentally touched the juror -- well, she didn't
3 accidentally touch a juror the other day, but
4 unthinkingly touched a juror. And so -- you know,
5 I have to protect this record the best I can, and
6 so I would just caution you -- as I say, I cannot
7 keep you from taking notes, and wouldn't want to,
8 but if you show these notes or if you discuss it
9 or anyone else discusses witness testimony, I will
10 have to deal with that. Okay?

11 MS. JENKINS: I understand that.

12 THE COURT: Very good.

13 MS. JENKINS: But sir, we didn't talk...

14 THE COURT: Well, it's -- I'm done. If the State
15 wants to make copies of these, I will certainly
16 allow you to do that.

17 MS. JENKINS: I'll give you the book.

18 GENERAL SCHMUTZER: Not at this time, Your Honor.

19 THE COURT: Thank you. The Court stands in recess.

20 (COURT STOOD IN RECESS)

21 THE COURT: Be seated a moment, please. It has
22 been brought to the Court's attention that there have been phone
23 calls made, potentially threats made to certain witnesses. I
24 don't know which side, I don't really care at this juncture.
25 All I can say is, as I've said before, a courtroom -- a court

1 proceeding is where people come in and litigate their issues,
2 hopefully in an environment that's as relaxed as possible under
3 the circumstances, an environment that is free from outside
4 influence.

5 This is truly the people's business that goes on
6 here. I try the best I can to give everyone their fair day in
7 court, and to get every piece of evidence in that is admissible.
8 And I want it to be in that kind of environment. The people
9 deserve that. These defendants deserve that. The public
10 deserves that. The Court is not going to be chaos.

11 If I catch -- if it is proven to this Court, or I
12 suspect any court in this jurisdiction, whether it be me, Judge
13 Holt, Judge Porter or Chancellor Rainwater, that a witness has
14 intentionally set out to intimidate or threaten another witness,
15 I can promise you that you will be dealt with in the harshest way.

16 The same goes for any counsel, any investigator,
17 any officer. There's no place in our system for that type of
18 conduct, and I'm not going to tolerate it, and I caution
19 everyone. You know, it's easy to put yourself in a situation
20 where you might be thought to be influencing someone or
21 attempting to influence them. Think about that. Don't do that.
22 Hopefully we can conclude this matter here in a proper
23 environment.

24 I hope that solves any problems, but I will deal
25 very harshly with anybody who threatens any witness in this

1 lawsuit on either side. I'm not going to put up with that. As
2 I've said many times, I may not be here but one term, but as
3 long as I'm on the bench, I'm going to conduct this courtroom
4 in a proper manner as best I know. Anything further?

5 MR. WEBB: I want the Court to look at this last
6 exhibit. General, you might want to come up to make sure it's
7 on the record.

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

9 MR. WEBB: That's an exhibit we filed, and the
10 General appropriately stated that everything else
11 should -- what I've done -- I've got you a copy,
12 Al.

13 THE COURT: That's what you propose to pass to the
14 jury?

15 MR. WEBB: Right, and I don't know if...

16 THE COURT: So that's the part he testified to,
17 wasn't it, General Schmutzer?

18 GENERAL SCHMUTZER: Yes, sir.

19 MR. WEBB: Does she need to mark that filed then,
20 or...

21 THE COURT: Either one that you want to file...

22 GENERAL SCHMUTZER: Can we take this off, maybe?

23 MR. WEBB: I think the General was correct. That
24 other had some extraneous matters in it.

25 THE COURT: You may show that to the jury.

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

3 THE COURT: You may bring the jury back.

4 (JURY IN)

5 THE COURT: Waive the call for the State?

6 GENERAL SCHMUTZER: Yes, Your Honor.

7 THE COURT: And the defense?

8 MR. DANIEL: Yes, Your Honor.

9 THE COURT: You may be seated.

10 MR. WEBB: Your Honor, can I approach the jury with
11 this latest exhibit?

12 THE COURT: You sure may, Mr. Webb.

13 GENERAL SCHMUTZER: I'd like to bring it to the
14 Court's attention, too, Your Honor, that during the break the
15 Court has instructed us to make copies of the originals that
16 were filed by Agent Davenport, and we did that, Your Honor.

17 THE COURT: Sure. That's fine. Also, I was asked
18 during the break to allow a juror to make a phone call to a
19 business or home, and ladies and gentlemen, I certainly
20 understand that it's a hardship on all of you to be away from
21 your business or your family for this period of time, so please
22 free -- if you feel like during the proceedings that you need
23 to call home or your business on an important matter, please
24 bring that to our attention, and we'll do everything we can to
25 accommodate you.

1 You may call your next witness, General Schmutzer.

2 GENERAL SCHMUTZER: The State calls Agent Carmen.

3 **

4 DAVID I. CARMEN was called, and being duly sworn,
5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY GENERAL SCHMUTZER:

8 Q. If you will, please, sir, state your full name.

9 A. Donald I. Carmen.

10 Q. And with whom are you employed?

11 A. I'm employed by the Tennessee Bureau of
12 Investigation at the T.B.I. Crime Laboratory located in
13 Donelson, Tennessee.

14 Q. And in what capacity?

15 A. I'm a special agent with the Tennessee Bureau of
16 Investigation assigned as a forensic scientist at the crime
17 laboratory.

18 Q. As a forensic scientist what, specifically, are you
19 called upon to do?

20 A. I do forensic drug analysis and forensic firearms
21 identification.

22 Q. What is your background and -- well, first, what
23 is your educational background?

24 A. I received a bachelor of science degree from
25 Eastern Kentucky University in Forensic Science, and a double

1 major in chemistry. I did my internship for my forensic science
2 degree at the University of Kentucky Medical School in clinical
3 pathology and toxicology. I am currently finishing my master
4 of science degree in chemistry at Middle Tennessee State
5 University.

6 Q. All right, sir. What is, specifically, your
7 training and background with regard to firearms identification?

8 A. In November of 1981 I was employed by the Tennessee
9 Bureau of Investigation as a forensic drug chemist where
10 approximately in November of 1985 I underwent additional
11 forensic training in the area of firearms identification. This
12 involved a one year on the job training program under the
13 guidelines of the Association of Firearm and Toolmark Examiners,
14 which involved the microscopic examination of fired bullets,
15 cartridge cases, shot shells, and other ammunition components
16 from the weapons from which they'd been fired from.

17 I was also trained in the actions, safety systems,
18 and lock mechanisms of a variety of firearms, gun shot distance
19 determination, which is the distance determination from the end
20 of a muzzle of a weapon to the target or garment someone is
21 wearing, other than flesh.

22 I was also trained in the serial number
23 restorations of serial numbers on firearms. I have been to
24 most, if not all, of the firearms manufacturers and the
25 ammunition manufacturers principally located in the northeast

1 United States to see first hand the tooling process that are
2 involved in making firearms. The importance of this is for the
3 forensic examiner to see first hand how these processes --
4 tooling processes are placed on the firearms themselves.

5 I have been trained on numerous occasions by the
6 Federal Bureau of Investigation located in Quantico, Virginia
7 regarding forensic firearms examination. One of these courses
8 was specifically on safety mechanisms of various firearms, which
9 is just an enhancement of what I had at the T.B.I. Crime
10 Laboratory. The other was gun shot distance determination, and
11 then again, just a cumulative training. And the other was
12 advanced specialized techniques in firearms identification.

13 This involved microscopic examination of mutilated
14 bullets, center fire, cartridge cases, shot shell cases, and
15 other ammunition components to various firearms. This was a
16 highly selective forensic course, and is considered to be the
17 highest form of forensic training in the United States for a
18 forensic firearms examiner.

19 I am a member of two professional forensic
20 associations, those being the Southern Association of Forensic
21 Scientists, and the Association of Firearm and Toolmark
22 Examiners, both which are important as a forensic examiner in
23 that these organizations keep the examiner up to date on the
24 methodology and technical developments in their field since the
25 examiner does not always have time for research and literature.

Jenny S. Brookshire, OCR
Fourth Judicial District, State of Tennessee

Testimony of: Carmen
Direct Examination by: Schmutzer

1 I have testified over -- a little over 200 times
2 regarding forensic evidence, more specifically, around 75 times
3 regarding forensic firearms evidence all across the State of
4 Tennessee, out of the State of Tennessee, and also in federal
5 court.

6 **GENERAL SCHMUTZER:** Your Honor, I would like to
7 offer Special Agent Carmen as an expert in firearms
8 identification.

9 **THE COURT:** So ordered.

10 **BY GENERAL SCHMUTZER:**

11 **Q.** Agent Carmen, what -- firearms identification --
12 what exactly can you do with regard to firearms identification?
13 Is it possible, sir, to take a shell -- a fired shell, and
14 determine whether or not it has been fired from a particular
15 weapon?

16 **A.** Yes, sir, it is.

17 **Q.** Does the weapon leave what would be, in effect,
18 finger prints, or can leave what, in effect, is finger prints
19 with regard to that shell that can exclude all other weapons?

20 **A.** Yes, sir. I would describe it as a mechanical
21 finger print. The two types of examinations are not the same
22 at all, but it just goes to show you the uniqueness of that
23 particular examination.

24 **Q.** And this is done at a microscopic level, is that
25 correct?

1 A. Yes, sir, it is.

2 Q. Also, are you able to look at various spent
3 cartridges when you don't have a firearm, and determine whether
4 or not those spent cartridges were fired from the same weapon?

5 A. Yes, sir, it involves the same process.

6 Q. Now, I'll ask you, sir, if you received, first,
7 from Officer Munsey of the Blount County Sheriff's Department
8 Exhibit #25 and Exhibit #24 previously identified as two spent
9 cartridges, .12 gauge shot gun shells found at the scene of
10 Tommy Griffin?

11 A. Yes, sir. These have my seal on them -- crime
12 laboratory evidence tape with my initials across the tape.

13 Q. Okay. And specifically, did you perform an
14 examination to see whether -- for the record, what type of shot
15 shells are these, and what gauge?

16 A. May I take these out?

17 Q. Sure.

18 A. These here are two .12 gauge Remington .00 buck two
19 and three quarter inch shot shells.

20 Q. Did you make an examination of those, and were you
21 able to determine whether or not they had been fired from the
22 same gun?

23 A. Yes, sir, they were fired from the same gun.

24 Q. Were you also furnished three shot -- three spent
25 shot gun shells that have been previously identified as coming

1 from the yard of Angel Gray, the stepdaughter of this defendant
2 who lived just below him?

3 A. Yes, sir, these all have my initials on them. I
4 recognize them.

5 Q. All right, sir. And were you able to determine if
6 any one of those three shot shells were fired from the same
7 weapon that fired these Remington Peter shots found at the
8 scene?

9 A. Yes, sir. I determined that two of these fired
10 shot shells were struck by the same firing pin as these two .12
11 gauge shot shells here.

12 Q. I'll ask you, sir, if you also received from Blount
13 County a spent shot gun shell that's previously been testified
14 to here as coming from a can -- a trash can out behind defendant
15 James Dellinger's trailer?

16 A. Yes, sir, this shot shell has my initials on it.

17 Q. And were you able to determine whether or not it
18 was fired from the same weapon that fired the two shot shells
19 found at the crime scene?

20 A. Yes, sir, I was. This particular shot shell here
21 was fired by the same firing pin as all these other shot shells
22 here.

23 GENERAL SCHMUTZER: If I may, Your Honor, I need
24 those two containers -- plastic containers there.

25 BY GENERAL SCHMUTZER:

1 Q. I'll show you, sir, what's also been testified to
2 earlier as being, I think, some wadding and pellets that were
3 extracted from the back of the head and the skull area of the
4 victim, Tommy Griffin, and ask you, sir, did you have an
5 opportunity to examine those?

6 A. Yes, sir, I did.

7 Q. And what did you find that they contained?

8 A. In these two plastic containers is a .12 gauge
9 filler wad -- shot filler wad, and two pellets which are
10 consistent with the size and weight specification of .00 buck
11 shot, and one .12 gauge over the powder wad -- plastic wad.

12 Q. Would those be -- those items be consistent with
13 the wad and shot that would come out of the -- either one of
14 these Remington Peter shells?

15 A. Yes, sir, they would be. They are consistent with
16 normally being loaded -- factory loaded into these particular
17 shells here, .00 buck Remington.

18 Q. I'll ask you, sir, if you also received from Larry
19 McMann -- no, I take that back -- also from Officer Munsey a 303
20 rifle, as earlier testified to, that came from the residence of
21 the defendant Dellinger?

22 A. Yes, sir, it has my initials inscribed into the
23 receiver area here, and also the evidence tape with my initials
24 here.

25 Q. All right, sir. And specifically, did you receive

1 -- just for the record, what kind of weapon is that, and what's
2 the manufacturing name, and the caliber?

3 A. This particular rifle here is a 303 British caliber
4 rifle. It's a bolt action, it is also a Lee Infield type bolt
5 action rifle, and it is made by Lithco Manufacturing, which is
6 an Australian arsenal.

7 Q. Did you also receive from Detective Larry McMann -
8 - Captain Larry McMann of the Sevier County Sheriff's Department
9 a spent 303 cartridge that's been testified to as coming from
10 the passenger side of the Connie Branum vehicle?

11 A. Yes, sir, it has my initials on the cartridge case.

12 Q. All right, sir. Did you -- were you able to
13 determine, sir, whether or not that cartridge was fired from
14 that 303 Infield rifle?

15 A. Yes, I was.

16 Q. And was it or wasn't it?

17 A. It was.

18 GENERAL SCHMUTZER: You may cross examine.

19 **

20 CROSS-EXAMINATION

21 BY MR. MILLER:

22 Q. Mr. Carmen, the -- did you do any tests on that 303
23 rifle to determine the last time it may have been fired?

24 A. No, sir. I did look inside the chamber to see if
25 there were any positive debris in there -- if there was unburned

1 gun powder inside, and there were, but as far as any test to
2 determine when it was last fired, there is no test I know that
3 could render that.

4 Q. You can't test that powder in the barrel to
5 determine when the last time it was fired?

6 A. Not to my knowledge, no, sir. We do not have that
7 test.

8 Q. You don't know of any test that there is to
9 determine how -- when the last time a weapon was fired?

10 GENERAL SCHMUTZER: Object to that, Your Honor.
11 He testified that he doesn't know...

12 THE COURT: He said he didn't know.

13 GENERAL SCHMUTZER: He said they didn't have it.

14 BY MR. MILLER:

15 Q. And these shells that you've talked about as being
16 fired, how did you determine that? Was that by the pin strike,
17 I think you said, is that correct?

18 A. Yes, sir. There was the firing pin impression in
19 the primer of the shot shell. It was compared against each
20 other under a comparison microscope.

21 Q. There was nothing you can show us or show the jury
22 here today any distinguishing features that they could see with
23 their eyes to make a determination of their own, is there?

24 A. No, sir. If you are referring to photographs or
25 anything like that, no, sir, I did not take any photographs.

1 Q. You usually do take photographs, don't you, to show
2 this so the jury can tell for themselves whether or not they
3 match?

4 A. No, sir, we have a policy at our T.B.I. laboratory
5 not to take photographs for the specific reason that our
6 identifications are made under three dimensional space. A
7 photograph shows two dimensional. It's very, very critical that
8 when you're looking under a microscope that depth of field, and
9 incident angles into the metal are crucial for making your
10 determination for identification.

11 Q. You don't have anything in here today that the jury
12 can look at to see if these pin strike marks are similar or
13 identical?

14 A. No, sir.

15 MR. MILLER: That's all I have, Your Honor.

16 THE COURT: Mr. Daniel?

17 **

18 CROSS-EXAMINATION

19 BY MR. DANIEL:

20 Q. Mr. Carmen, there are many ways that you can -- at
21 least four different ways that you can look at a -- do tests on
22 shells to determine if it's been fired by a certain gun, isn't
23 that correct, sir, and I'm referring specifically to breach face
24 markings -- you're familiar with that?

25 A. Yes, sir.

1 Q. Tell the jury what breach face markings are.

2 A. Breach face markings are the tooling impressions
3 that are transferred over onto the primer of the cartridge case,
4 whether you have rim fire or center fire or a shot shell. Due
5 to the pressure, when a shot shell is fired in a shot gun, it
6 slams back up against the breach face. Those tiny tooling
7 impressions are transferred over onto the primer, and that's one
8 of the ways to determine.

9 Q. And actually, wouldn't you agree with me that
10 that's probably the most important method -- distinguishable
11 marks that you can have on a shell?

12 A. I would say that's important, but not the most.
13 I would say it was equally as important as a firing pin
14 impression.

15 Q. You found no breach face mark impressions on these
16 shells that you could identify or connect in any way, did you,
17 sir?

18 A. No, sir, I did not.

19 Q. I discussed with you by phone one day recently, do
20 you recall that?

21 GENERAL SCHMUTZER: I object, Your Honor, now, to
22 what he discussed on the phone. I object to him
23 as a possible witness, Your Honor.

24 THE COURT: Sustained as to the form.

25 MR. DANIEL: Okay.

1 BY MR. DANIEL:

2 Q. So if this is a shell, what you're saying is when
3 the hammer hits it, for every action you have that recoil action
4 -- like it hits your shoulder if you get the shock out of it,
5 is that correct? And that's when your breach face markings are
6 made on there, isn't that correct?

7 A. That's correct. If there are breach face
8 impressions on the breach face itself they will sometimes
9 transfer. However, there are some brands of shot guns that have
10 very, very smooth breach faces, and are characteristically that
11 way.

12 Q. Okay.

13 MR. DANIEL: May I approach the witness, Your
14 Honor?

15 THE COURT: Sure.

16 BY MR. DANIEL:

17 Q. So we can understand, breach face markings you can
18 feel by running your fingers around the -- sometimes you can
19 feel the indentations, can't you -- those little markings right
20 in there? Can't you do that often with your fingers?

21 A. Well, that would be on the rim. Breach face is on
22 the primer which is directly in the center of the...

23 Q. Inside of this, is that correct?

24 A. No, sir. It's right here on top.

25 Q. Okay. But you found no breach face markings on

1 that, did you?

2 A. No, sir. However, all of the shot shells have
3 smooth breach face, which is a characteristic of that particular
4 shot gun.

5 Q. What shot gun was it fired from?

6 A. There was never no shot gun presented to me that
7 I identified it with.

8 Q. So the point is, you can't tell us what shot gun -
9 - what type of shot gun or model of shot gun or make of shot gun
10 -- you can tell us the model because it will be a .12 gauge, but
11 other than that, you can't tell us what he make of this shot gun
12 was, can you, sir?

13 A. No, sir. I really couldn't even tell you the
14 model. I could tell you the gauge, of course.

15 Q. You can't tell the model, and you can't tell the
16 make, is that correct?

17 A. That's correct.

18 Q. You can't tell whether it's American made or
19 foreign made, could you?

20 A. No, sir.

21 Q. And how many shot guns are there, would you
22 estimate -- .12 gauge shot guns sold per year in the United
23 States?

24 A. Just as a general guess, several thousand.

25 Q. Several thousand each year?