

III 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.

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

CASE # 5033, 5035

TRANSCRIPT OF THE EVIDENCE:

Trial

February 16-24, 1993

Volume 1 of 22 Volumes

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

APPEARANCES:

FOR THE STATE

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

FOR THE DEFENDANT SUTTON

MR. DAVID W. WEBB
Attorney at Law
140-A Court Avenue
Sevierville, Tennessee

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

MR. JEFFREY ZANE DANIEL
Attorney at Law
550 Main Avenue
Knoxville, Tennessee

FOR THE DEFENDANT DELLINGER

MR. EDWARD C. MILLER, P.D.
MRS. SUSANNA LAWS THOMAS, A.P.D.
P. O. Box 416
Dandridge, Tennessee

GENERAL INDEX

	<u>VOLUME</u>	<u>PAGE</u>
Miscellaneous Motions	1	8
Voir Dire	1	63
Miscellaneous motions	8	832

STATE'S PROOF:

JOHN BROWN

Direct Examination	9	883
Cross Examination (Miller)	9	898
Cross Examination (Webb)	10	907
Recross (Miller)	10	913
Redirect	10	914

TERRY LILLY

Direct Examination	10	917
Cross Examination (Miller)	10	921
Cross Examination	10	925
Redirect	10	927

CINDY WALKER

Direct Examination	10	928
Cross Examination (Miller)	10	934
Cross Examination (Daniel)	10	935
Redirect	10	939
Recross (Daniel)	10	941

KENNETH WALKER

Direct Examination	10	944
Cross Examination (Miller)	10	946
Cross Examination (Daniel)	10	947

SHARON DAVIS

Direct Examination	10	949
Cross Examination (Miller)	10	952
Cross Examination (Daniel)	10	954

STEVEN F. BROOKS

Direct Examination	10	958
Cross Examination (Miller)	10	963
Redirect	10	965

DREW ROBERTS

General Index (Continued)	<u>VOLUME</u>	<u>PAGE</u>
Direct Examination	10	966
Cross Examination (Miller)	10	970
Cross Examination (Daniel)	10	972
Redirect	10	975
Recross (Daniel)	10	976
SANDY HICKS		
Direct Examination	10	977
Cross Examination (Miller)	10	978
Cross Examination (Daniel)	10	979
ALVIN HENRY		
Direct Examination	10	979
Cross Examination (Miller)	10	989
Cross Examination (Daniel)	11	1008
Cross Examination (Miller)	11	1017
Redirect	11	1018
JENNIFER BRANUM		
Direct Examination	11	1035
Cross Examination (Miller)	11	1046
Cross Examination (Daniel)	11	1053
Redirect	11	1061
SANDY BRANUM		
Direct Examination	11	1163
Cross Examination (Miller)	11	1179
Cross Examination (Daniel)	11	1182
Recross (Miller)	11	1187
TIM NICHOLS		
Direct Examination	11	1089
Cross Examination (Miller)	11	1091
Cross Examination (Webb)	11	1093
DAVID DUGGAN		
Direct Examination	11	1099
Cross Examination (Daniel)	12	1104
Cross Examination (Miller)	12	1108
Redirect	12	1109
Recross (Daniel)	12	1110
HERMAN LEWIS		
Direct Examination	12	1115
Cross Examination (Miller)	12	1126

General Index (Continued)	<u>VOLUME</u>	<u>PAGE</u>
Cross Examination (Daniel)	12	1129
Redirect	12	1142
RAY HERRIN		
Direct Examination	12	1145
Cross Examination (Miller)	12	1149
Cross Examination (Daniel)	12	1151
Redirect	12	1159
Recross (Daniel)	12	1160
Redirect	12	1163
THOMAS DAVID DeFOE		
Direct Examination	12	1164
Cross Examination (Daniel)	12	1166
JASON McDONALD		
Direct Examination	12	1169
Cross Examination (Daniel)	12	1173
BRENDA McKEON		
Direct Examination	12	1174
ELAINE MAYES		
Direct Examination	12	1176
Cross Examination (Miller)	12	1194
Cross Examination (Daniel)	12	1197
Redirect	13	1207
Recross (Daniel)	13	1211
NANCY BRYANT		
Direct Examination	13	1212
Cross Examination (Miller)	13	1215
Cross Examination (Daniel)	13	1216
GARY SULLIVAN		
Direct Examination	13	1218
Cross Examination (Daniel)	13	1221
JAMIE MARIE FORSYTHE		
Direct Examination	13	1226
Cross Examination (Miller)	13	1241
Cross Examination (Daniel)	13	1243
Redirect	13	1258

General Index (Continued)	<u>VOLUME</u>	<u>PAGE</u>
TERRI LILLY		
Direct Examination	13	1260
Cross Examination (Miller)	13	1266
Cross Examination (Daniel)	13	1269
BARBARA ANN GORDON		
Direct Examination	13	1275
Cross Examination (Miller)	13	1281
Cross Examination (Webb)	13	1287
Cross Examination (Miller)	13	1293
Redirect	13	1294
THOMAS A. CARTER, JR.		
Direct Examination	13	1295
Cross Examination (Miller)	13	1296
JAMES WIDENER		
Direct Examination	14	1303
Cross Examination (Daniel)	14	1330
Redirect	14	1343
Cross Examination (Miller)	14	1374
Recross (Daniel)	14	1380
LARRY MUNSEY		
Direct Examination	14	1388
Cross Examination (Miller)	14	1391
Cross Examination (Daniel)	14	1393
Redirect	14	1395
LARRY MUNSEY (Recalled)		
Direct Examination	14	1398
Cross Examination (Daniel)	14	1400
JAMES R. GORDON		
Direct Examination	15	1401
Cross Examination (Miller)	15	1404
Cross Examination (Webb)	15	1406
GARY CLABO		
Direct Examination	15	1409
Cross Examination (Miller)	15	1422
Cross Examination (Daniel)	15	1442
Redirect	15	1460
Recross (Daniel)	15	1470

General Index (Continued)	<u>VOLUME</u>	<u>PAGE</u>
Redirect	15	1474
DR. WILLIAM H. BASS		
Direct Examination	15	1478
Cross Examination (Miller)	15	1489
Cross Examination (Webb)	15	1491
Recross	15	1498
MURRAY MARKS		
Direct Examination	15	1500
Cross Examination (Miller)	16	1502
Cross Examination (Daniel)	16	1502
Redirect	16	1504
LARRY McMANN		
Direct Examination	16	1512
Cross Examination (Miller)	16	1518
Cross Examination (Daniel)	16	1519
Redirect	16	1530
Recross (Miller)	16	1533
Recross (Daniel)	16	1534
DAVID DAVENPORT		
Direct Examination	16	1537
Cross Examination (Miller)	16	1542
Cross Examination (Webb)	16	1544
DAVID I. CARMEN		
Direct Examination	16	1588
Cross Examination (Miller)	16	1595
Cross Examination (Daniel)	16	1597
DEFENDANT DELLINGER'S PROOF:		
DR. WAYNE STEWART		
Direct Examination	17	1637
Cross Examination (Daniel)	17	1647
DR. ITTOOP T. MALIYEKKE		
Direct Examination	17	1649
Cross Examination (Daniel)	17	1654
Cross Examination (Schmutzer)	17	1662
MATTHEW COVERLY		
Direct Examination	17	1664

General Index (Continued)	<u>VOLUME</u>	<u>PAGE</u>
Cross Examination (Schmutzer)	17	1666
LINDA DELLINGER		
Direct Examination	17	1670
Cross Examination (Daniel)	17	1679
Cross Examination (Schmutzer)	18	1706
Redirect	18	1726
Recross (Daniel)	18	1727
Recross (Schmutzer)	18	1728
BILL COGDILL		
Direct Examination	18	1729
Cross Examination (Daniel)	18	1734
Cross Examination (Schmutzer)	18	1736
JOYCE TIPTON		
Direct Examination	18	1737
Cross Examination (Daniel)	18	1742
Cross Examination (Schmutzer)	18	1748
Redirect	18	1751
Recross (Daniel)	18	1752
Recross (Schmutzer)	18	1752
Recross (Daniel)	18	1756
ANGELA GRAY		
Direct Examination	18	1759
Cross Examination (Daniel)	18	1760
Cross Examination (Schmutzer)	18	1767
Recross (Daniel)	18	1770
CAROLYN WEAVER		
Direct Examination	18	1771
Cross Examination (Daniel)	18	1774
Cross Examination (Schmutzer)	18	1795
Recross (Daniel)	19	1803
DEFENDANT SUTTON'S PROOF:		
JIMMY SUTTON		
Direct Examination	19	1812
Cross Examination (Miller)	19	1839
Cross Examination (Schmutzer)	19	1840
DIANE SUTTON		

General Index (Continued)	<u>VOLUME</u>	<u>PAGE</u>
Direct Examination	19	1841
Cross Examination (Miller)	19	1849
Cross Examination (Schmutzer)	19	1850
Redirect	19	1851
 SHELLY LONGMIRE		
Direct Examination	19	1852
Cross Examination (Schmutzer)	19	1855
Redirect	19	1856
 REESE SUTTON		
Direct Examination	19	1858
Cross Examination (Schmutzer)	19	1861
 LEROY SUTTON		
Direct Examination	19	1861
 EARL SUTTON		
Direct Examination	19	1863
Cross Examination (Schmutzer)	19	1867
 AMY FRANKLIN		
Direct Examination	19	1869
Cross Examination (Miller)	19	1875
Cross Examination (Schmutzer)	19	1875
Redirect	19	1879
 KENT HATCHER		
Direct Examination	19	1880
 JUSTIN SUTTON		
Direct Examination	19	1886
Cross Examination	19	1890
 GARY WAYNE SUTTON		
Direct Examination	19	1899
Cross Examination (Miller)	20	1959
Cross Examination (Schmutzer)	20	1962
 RON DRINNON		
Direct Examination	20	1996
Cross Examination (Miller)	20	2000
Cross Examination (Schmutzer)	21	2001

General Index (Continued)	<u>VOLUME</u>	<u>PAGE</u>
MOTIONS	21	2007
REBUTTAL:		
GARY CLABO Direct Examination	21	2017
DON OGLE Direct Examination	21	2020
Cross Examination	21	2022
MARK TURNER Direct Examination	21	2023
Cross Examination (Daniel)	21	2028
WILLIAM MARTIN BARNES Direct Examination	21	2046
Cross Examination (Daniel)	21	2048
Redirect	21	2048
CLOSING ARGUMENTS	21	2063
CHARGE OF THE COURT	21	2099
VERDICT	22	2118
<u>BIFURCATED HEARING:</u>		
DEFENDANT DELLINGER'S PROOF:		
LINDA DELLINGER Direct Examination	22	1399
MARY RAMSEY Direct Examination	22	2133
MARGARET RAMSEY Direct Examination	22	2135
TIMMY DELLINGER Direct Examination	22	2137
DEFENDANT SUTTON'S PROOF:		
CONNIE KING		

General Index (Continued)	<u>VOLUME</u>	<u>PAGE</u>
Direct Examination	22	2139
DON OGLE		
Direct Examination	22	2142
RICKY HURST		
Direct Examination	22	2143
HAZEL SUTTON		
Direct Examination	22	2146
PAT SUTTON		
Direct Examination	22	2150
ANN MORRIS		
Direct Examination	22	2154
CLOSING ARGUMENTS	22	2159
CHARGE	22	2169
VERDICT	22	2177
SENTENCING	22	2177

GENERAL INDEX
VOLUME 1

	<u>VOLUME</u>	<u>PAGE</u>
Miscellaneous Motions	1	8
Voir Dire	1	63

INDEX OF EXHIBITS

<u>EXHIBIT #</u>	<u>ITEM</u>	<u>VOLUME</u>	<u>PAGE</u>
1	Handwritten note (Daniel)	3	259
2	Chart	9	885
3	Chart	9	891
4	Chart	9	895
5	Report	10	901
6	Map	10	911
7	Diagram	10	932
8	Two (2) Photographs	10	933
9	Complaint form	10	978
10	Two (2) Photographs of trailers	10	998
11	Page 2 of statement	11	1021
12	Chart of 9-1-1 calls	11	1028
13	Stipulation	11	1029
14	Phone records	12	1102
15	Phone records	12	1103
16	Fire fighter's report	12	1114
17	Intake card	12	1149
18	Page from journal	12	1171
19	Page from journal	12	1173
20	Statement of Forsythe	13	1260
21	Statement of Forsythe	13	1260
22	Photograph of truck	13	1280
23	Photograph	14	1305
24	Shell casing	14	1307
25	Shell casing	14	1307
26	Mossberg barrel	14	1326
27	Rifle	14	1326
28	Three (3) shell casings	14	1328
29	.12 gauge shotgun shell	14	1328
30	Photograph of fire barrel	14	1329
31	Rights waiver	14	1358
32	Wadding from Griffin body	14	1396
33	Photograph	15	1404
34	Board w/6 photographs	15	1412
35	Photographs of burned car	15	1418
36	Photograph of burned trailer	15	1442
37	Photograph of car	15	1448
38	Three photos of body in car	15	1483
39	Photos of smoked glass in car	16	1503
40	Shell casing	16	1513
41	Photo of scene	16	1519
42	Photo of scene	16	1520

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

Exhibit Index

Index of Exhibits (Continued)

<u>EXHIBIT #</u>	<u>ITEM</u>	<u>VOLUME</u>	<u>PAGE</u>
43	Admonition & waiver	16	1560
44	Handwritten statement	16	1564
45	Page 1 of Tipton interview	16	1569
46	Copy of medical records	17	1648
47	Records from Lakeshore	17	1654
48	Diagram	17	1686
49	Statement	19	1803
50	Statement	19	1803
51	Statement of Linda Dellinger	19	1806
52	Photograph of Camaro	19	1815
53	Photograph	19	1817
54	Photograph	19	1817
55	Photograph	19	1819
56	Photograph	19	1819
57	Headlight	19	1821
58	Headlight	19	1821
59	Headlight	19	1821
60	Headlight	19	1821
61	Photograph	19	1833
62	Photograph	19	1834
63	Photograph	19	1835
64	Photograph	19	1836
65	Videotape	19	1838
66	Jailer's log	19	1882
67	Jailer's log	19	1884
68	Radio log	21	2026
69	Log	21	2040

Bifurcated Hearing:

1	Valentine's card	22	2140
2	Letter	22	2148
3	Drawings	22	2156
4	Transcript	22	2174
5	Presentence Report (Dellinger)	22	2181
6	Presentence Report (Sutton)	22	2181

IN THE CRIMINAL COURT FOR SEVIER COUNTY
AT SEVIERVILLE, TENNESSEE, TENNESSEE

STATE OF TENNESSEE,

Appellee,

-vs-

GARY WAYNE SUTTON and JAMES
ANDERSON DELLINGER,

Appellant.

*
*
*
*
*
*
*
*
*
*
*

CASE #5033, 5035

1 **THIS CAUSE** came on to be heard and was heard on the 16th
2 through the 24th days of February, 1993, before the Honorable
3 Rex Henry Ogle, Judge, holding the Criminal Court for Sevier
4 County at Sevierville, Tennessee, to-wit:

5 **

6 **THE COURT:** We are going to do some preliminary matters
7 while jurors are still signing in.

8 This is the cases of State versus Gary Wayne Sutton and
9 State versus James Anderson Dellinger, numbers 5033, 5035. All
10 other cases that are on the docket for today will not be heard
11 except these cases. So if you are here on some other case, you
12 are free to go, except jurors, of course. Any other witnesses
13 in any other cases are free to go.

14 Now, I know in the courtroom we have several witnesses
15 who are scheduled to testify in the Sutton and Dellinger cases.

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

Preliminaries

1 We anticipate that it will take most of the day at least today
2 to pick a jury. Every witness who is under subpoena is going
3 to be allowed to leave this morning. You are under subpoena;
4 you are not excused from that subpoena, you are only released
5 from staying here all day. If you have been subpoenaed by the
6 defense, as you leave -- who are they to see?

7 GENERAL SCHMUTZER: Your Honor, we would suggest all
8 witnesses sign their name and phone number and address where
9 they could be reached.

10 MR. MILLER: Somewhere where they can be reached, so we
11 can call them, too.

12 THE COURT: Where are we to arrange that to transpire?
13 Jurors are still signing in at the window, so that's not going
14 to work.

15 GENERAL SCHMUTZER: Your Honor, I have asked that the
16 -- the State's witnesses, if they would, please, just to go to
17 my office, which is on the third floor of the old part of the
18 courthouse, and just take the elevator up one floor.

19 THE COURT: Except we have -- they're here subpoenaed
20 by both. This is our problem.

21 GENERAL SCHMUTZER: Well,...

22 THE COURT: Yeah, let's do it in the jury room.

23 GENERAL SCHMUTZER: I think you go out the door and
24 then...

25 THE COURT: Okay, every witness -- every witness who

1 has been subpoenaed either by the state of Tennessee or by
2 either of the defendants, or both, as you leave here this
3 morning go outside this door, down the hall to the...

4 **GENERAL SCHMUTZER:** That door is locked, Your Honor.

5 **THE COURT:** Is it locked? Is there some way to unlock
6 that door? If you would presently unlock the hallway door so
7 that the witnesses may go down the hallway into the jury room,
8 there will be someone there to take your name, address, and
9 telephone number.

10 **GENERAL SCHMUTZER:** Your Honor, we would be happy to...

11 **THE COURT:** I understand that.

12 **GENERAL SCHMUTZER:** Unless the defense just wants
13 someone else there, too, we'll be happy to set Andrea in there
14 and let her take everyone that comes in and make the available
15 to the defense.

16 **MR. MILLER:** That's fine. I have no objection.

17 **THE COURT:** That's fine. So, Ms. Perkins of the
18 attorney general's office will be in the jury room. Go in
19 there, as I say, and sign your name, address, and telephone
20 number. And I repeat, you are still under subpoena; so,
21 therefore, you are not free to leave the jurisdiction of the
22 Court. I would suggest that you be somewhere that they can get
23 in touch with you. But, in order to clear out the courtroom
24 space for jurors and others, we are taking these steps so as to
25 avoid you from having to stay here all day and not even get to

1 testify here today.

2 Now, there are obviously some witnesses, officers who
3 are also involved in courtroom security. So obviously at this
4 point, at least, you do not have to leave. But all other
5 witnesses, except those involved in courtroom security, will
6 please now leave the courtroom. All witnesses. Do you have
7 some in here?

8 **GENERAL SCHMUTZER:** I have no idea, Your Honor.

9 **THE COURT:** Well, that's great.

10 **GENERAL SCHMUTZER:** I was afraid of that, Your Honor.

11 **THE COURT:** Well, if you would, just have the officers
12 go out and bring every witness in. Bring every witness in the
13 courtroom. Gentlemen, get your witnesses in the courtroom now.
14 Are the jurors still signing in at this time?

15 **MR. MILLER:** Your Honor, they appear to be.

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

17 **THE COURT:** Is there some innate reason why the
18 witnesses are not walking through the door?

19 **MR. MILLER:** Well, we have been excusing ours from the
20 courtroom.

21 **THE COURT:** I understand that. I understand that. Are
22 there other witnesses out there?

23 **GENERAL GREEN:** Judge, I've got a row of family. I know
24 they would not be considered as witnesses, but I've got
25 the Griffin family taking up another row, the second

1 row. And, of course, a few of them are, quote,
2 "witnesses." But they are in the courtroom. And do
3 you want the family of the victims to go?

4 THE COURT: Yeah. If -- until at least we get all the
5 jurors in here. Sure.

6 GENERAL GREEN: Okay.

7 THE COURT: There -- you know, there's just no room.
8 There's just no room.

9 GENERAL GREEN: Okay. I just wanted to know. I just
10 wanted to ask.

11 THE COURT: Okay. If all of you would just get your
12 witnesses out in the hall and direct them to go back
13 there. Let's do that. And then, as soon as you all do
14 that -- as soon as you do that, tell the court reporter,
15 and I'll hear your motion in chambers, okay?

16 MR. WEBB: That'll be fine.

17 THE COURT: Okay. Just go ahead and do that.

18 (Said bench conference being completed, the following
19 proceedings were had in open court.)

20 THE COURT: Ladies and gentlemen of the jury, because
21 of the large number of jurors who have been called, as I stated
22 earlier, we have a limited courtroom space. There are some
23 motions that the Court has to take up that are important to both
24 sides, before we start the jury selection process. I will do
25 those in chambers, rather than have you run in and out. So, I

1 will take a short recess. Feel free to either go out in the
2 hallway or to stay in the courtroom, as you desire. As soon as
3 I hear the motions and we get the witnesses better situated,
4 then we will come back in and start the jury selection process.

5 I want to say this at this time, so as to avoid any
6 further problems. We have had to issue subpoenas for a large
7 number of additional jurors than a normal and customary panel
8 involved. I have had several people contact the Court, contact
9 the clerk's offices who want to be excused from jury service.
10 I realize, as everyone does, that some of you may, in fact, have
11 to be excused for either health reasons or pressing business
12 reasons. And if it is, in fact, an emergency, the Court will
13 certainly accommodate you. However---and I don't want to be the
14 "Grinch that Stole Christmas"---but this is an important case
15 for everyone involved. It is an important case for our
16 community, it's an important case especially for these
17 defendants and their counsel. So, absent a compelling reason,
18 I must decline to let you go, because we must have a large pool
19 of jurors from which to choose 12 or 14 jury members. So,
20 again, if you -- as your name is called, if you feel like you
21 have a good reason not to sit on this case, advise us and I will
22 take that at the. But, also, it is anticipated that this case
23 will take several days to try. Because it is a felony case, the
24 jurors will be sequestered. That is, you will be spending the
25 night in a hotel or motel, and you will be away from home. Now,

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

Preliminaries

February 16, 1993

1 for those of you who are chosen to serve, we will make every
2 accommodation for you to contact your family, to make any
3 necessary base arrangements as far as calling your business,
4 letting people know the situation, any reasonable request from
5 family and so forth as far as getting your clothes and your
6 personal items. We will be as accommodating as possible on
7 that. So, have that in mind as your name is called. If you
8 have any special needs or requests, there will be both male and
9 female deputies to assist you. So, having said that, having
10 instructed counsel about the witnesses, the Court will take a
11 recess. As soon as you have made arrangements with your
12 witnesses, I will see counsel and the defendants in chambers for
13 the motion.

14 (The court was recessed.)

15 **

16 MISCELLANEOUS MOTIONS HEARING:

17 (The following motions were held outside the presence
18 of the jurors, to-wit:)

19 MR. MILLER: If you remember, we had a lengthy hearing
20 on the search warrant, validity of the search warrant,
21 and the Court ruled that the -- did not rule on the
22 search warrant, but held that the search was conducted
23 to a valid consent.

24 THE COURT: Right.

25 MR. MILLER: Therefore, no evidence will be suppressed.

1 **THE COURT:** Right.

2 **MR. MILLER:** And I don't know if the Court realized at
3 the time or if we made it clear to the Court---I think we were
4 in the middle of hearing motions all day---but that prior to the
5 defendant's wife, Mrs. Dellinger, arriving on the scene, the
6 officers conducted a search under the authority of the search
7 warrant. It is our position that when they passed that first
8 blade of grass on the Dellinger property, they were conducting
9 a search pursuant to this search warrant, and invalid search
10 warrant, and anything taken there, especially prior to
11 Mrs. Dellinger arriving and giving the consent, would be
12 suppressed. That amounts to the -- specifically the shells that
13 were found outside.

14 I think all the shells that the State intends to
15 introduce, as far as the ones that were sent to the lab for
16 comparison, were found outside during that search prior to any
17 consent being given. We move at this time that those items---
18 specifically, two shotgun shells and the 3-0-3 shell found
19 outside of the trailer prior to Mrs. Dellinger arriving on the
20 scene should be suppressed.

21 **GENERAL SCHMUTZER:** Your Honor, now, there is no proof
22 as to -- they didn't go into it, but the 3-0-3 shell was not
23 found there pursuant to any -- there was nothing ever found on
24 the record against that, pursuant to a consent to search by
25 Sevier County Sheriff's Department subsequent to the search.

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

Motions

1 There was no 3-0-3 shells found.

2 And it is my understanding, too, that the shells --
3 shotgun shells found at Angel Gray's trailer, which is all part
4 and parcel to this, Angel Gray being the stepdaughter of the
5 Defendant Dellinger, and that's -- and the officers had obtained
6 a consent to search from her, also, and they did not go into
7 that. But, to all of a sudden make the statements here that all
8 of these shells were obtained before a search -- you know,
9 consent to search warrant is simply not correct. Now, they did
10 not attempt to go in that building, but I think, in going back
11 and looking through that, in case they did attack the search
12 warrant, itself, and what was obtained, they basically -- they
13 went -- what was inside the house, obtained inside of the
14 trailer, and that's what we argued.

15 **THE COURT:** But, now, were there shells found outside?

16 **GENERAL SCHMUTZER:** Yes, Your Honor.

17 **MR. MILLER:** Your Honor, if I remember the officer's
18 testimony specifically, they had at least marked locations where
19 these shells were located. Look on the list of evidence seized.

20 Sent to the lab for comparison were: #1) bag containing
21 one shotgun shell; bag #2) bag containing one shotgun shell; #3)
22 bag containing shotgun shell, all found at Dellinger's
23 residence. And I believe what is running off the paper, it
24 looks to say "Dellinger's yard in Sevier county." Those were
25 shells that were sent to the lab for comparison with the shells

1 found at the scene in Blount County.

2 **THE COURT:** What is the position of the State?

3 **GENERAL SCHMUTZER:** The position of the State, Your
4 Honor, that we have argued this, we have -- the Court has ruled
5 on it. We had not been given any notice at all that they were
6 going to come back in here and try to rehash and re-go back into
7 the... We thought they were prepared to go to trial based upon
8 the Court's ruling. The Court ruled back some time ago that we
9 were going to have all these motions heard, including
10 specifically the motion to suppress, and we were going to go to
11 evidence before we got ready for trial, so we would know exactly
12 where we stood and exactly where we were going on the day we
13 announced for trial. Now they're coming back in here, they have
14 not notified us they were going to raise this and go back into
15 this. We certainly are entitled to at least a five day notice
16 of such things. We say it's too late. The Court has ruled on
17 all of this.

18 **MR. MILLER:** Well, this is one of those motions, Your
19 Honor, that has been ruled on; and back at the time we asked the
20 Court to rule on the search warrant specifically for this
21 reason, and we did raise that back in I think it was October.

22 **GENERAL SCHMUTZER:** And the Court has ruled.

23 **THE COURT:** Court has ruled. The Court ruled that any
24 problems, if any, associated with the search warrant, in the
25 Court's judgment, was cured by the consent that was given at the

1 scene; and, therefore, the Court doesn't deem it necessary to
2 rule on this motion. I've already ruled on it, and all that
3 evidence.

4 MR. MILLER: Just so it'll be clear for the record, Your
5 Honor: I understand the ruling is that Your Honor is including
6 the shells found outside the yard prior to...

7 THE COURT: Yes. And that any motions dealing with that
8 comes too late. That's the ruling of the Court. Next motion?

9 MR. WEBB: Good morning, Your Honor.

10 THE COURT: Mr. Webb.

11 MR. WEBB: Beg the Court's indulgence.

12 Your Honor, I have a motion to suppress, likewise, that
13 I'm going to file. And the Court has previously ruled that
14 these defendants will be tried jointly, as the Court has already
15 ruled that certain items of property that are intended to be
16 used by the State was taken from the property of Mr. Dellinger,
17 and I assume and believe and feel that the State will try to use
18 that evidence against Mr. Sutton, my client.

19 It's our position that anything that was found on
20 Mr. Dellinger's property has to pertain to him; it has no
21 bearing to us. And what I would ask the Court to do, I feel
22 that that is an issue that once again raises serious questions
23 of a fair trial for my client.

24 THE COURT: What motion are you asking the Court to
25 consider?

1 MR. WEBB: Severance.

2 THE COURT: I've already ruled on that.

3 MR. WEBB: Your Honor, we just feel that -- and I
4 understand your ruling, but this spill-over effect just cannot
5 be handled by instructions that the Court's going to try to give
6 I'm sure. But we would ask -- we would renew our motion to
7 sever.

8 THE COURT: Overruled.

9 MR. WEBB: Your Honor, that -- I really don't have any
10 particular order. I'm going to raise some motions to the Court
11 for the Court's consideration of -- in the form of motions in
12 limine. We -- and I guess we've already experienced the chaos
13 that's happened this morning. I think it will smooth out,
14 but...

15 THE COURT: I suspect when we get a jury picked, things
16 will...

17 MR. WEBB: What -- one of the problems that we saw---I
18 believe I even mentioned it to Mr. Green, the assistant attorney
19 general---the State has given us a witness list, now don't hold
20 me to the exact, but of around 90 witnesses. Of course, counsel
21 for the defense---and I'm speaking for both sides---you know,
22 we feel like we're under a duty to ask jurors of these
23 witnesses. And I am going to leave this as a suggestion for the
24 Court. I think the Court can readily see that if we get a
25 witness list of 90 witnesses, I feel like it is going to take

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

Motions

1 a lot of time. My suggestion to the Court is to allow someone-
2 --the clerk or whomever ---to furnish this witness list to all
3 jurors, and let them then determine whether or not they know any
4 particular State witness. And somehow, when they get in the
5 box, if they've already looked at that we can make that a part
6 of the record, and then obviously whoever voir dres, I don't
7 know whether it's going to be Mr. Daniel or Mr. Miller, that
8 question will be asked right up front at some point, or you
9 might ask that question. And then we can go into those details.
10 That's just -- I don't know if it's speculative or not, but I
11 thought I'd bring that to the Court's attention.

12 **GENERAL SCHMUTZER:** I would suggest, Your Honor, because
13 they have witnesses, too, and obviously all witnesses, not just
14 State witnesses, need to be gone into. I would suggest making
15 up the list now, having the Court read it one time, or let the
16 clerk read it one time to all of them, and tell them when
17 they're called up if they know any of these people be sure to
18 bring it to the attention of the...

19 **MR. WEBB:** That's fine.

20 **MR. DANIEL:** Your Honor please, I don't know that it'd
21 be proper for the State -- for the defense to give the witness
22 list to the State, because if you -- the defendants may call a
23 certain witness in their behalf, which they're not under
24 obligation to...

25 **THE COURT:** What the Court could do, with consent of

1 counsel, is just read a list of potential witnesses that the
2 State wished for the State, and defense witnesses if that's
3 agreeable.

4 **GENERAL SCHMUTZER:** I think that would be the best
5 thing, Your Honor. And make it known that they are potentially
6 -- well, they may not -- they probably all will be called,
7 though we expect to...

8 **THE COURT:** Because obviously, at this point, the State
9 of Tennessee, through public records, has the same access to who
10 has been subpoenaed.

11 **MR. DANIEL:** Subpoenaed.

12 **THE COURT:** And so I don't think it would make a whole
13 heck of a lot of difference.

14 **MR. DANIEL:** Nobody -- anything that's on the subpoena
15 list, Your Honor. But to make statements of some witness, and
16 then that witness maybe not be called, or...

17 **GENERAL SCHMUTZER:** Well, that wouldn't be -- Your
18 Honor's not going to be attributed, what the Court says, to
19 either side.

20 **THE COURT:** Right. It is my protocol, at least, is to
21 read the list of subpoenaed witnesses.

22 **GENERAL SCHMUTZER:** Subpoenaed.

23 **THE COURT:** Whether they be by State or defense. And
24 state that they may or may not be called.

25 **MR. WEBB:** Your Honor, once again let me object. Or,

1 not object. Let me say, they're in no particular order here,
2 so I'm...

3 Your Honor, we're going to ask the Court in several
4 particular instances to prohibit the general from asking
5 questions before the Court rules on their admissibility in the
6 form of a jury-out hearing. I think the Court has a general
7 idea of some things that may come into evidence, and I'd just
8 like to make sure of the cautions that those things will be
9 brought to the Court's attention before it's asked; and, of
10 course, if we get up and object there are going -- I mean, the
11 damage is done, if the Court does say it's inadmissible for
12 whatever reason.

13 **THE COURT:** To those matters we've already discussed:
14 in particular, the other crimes, this Court does have to have
15 a jury-out hearing on that, under the rules. I have to do that.

16 **GENERAL SCHMUTZER:** Frankly, Your Honor, I would suggest
17 that we do that before we start the trial. I mean, obviously
18 we're going to go into this, as we've already stated. You know,
19 that is...

20 **THE COURT:** It doesn't need to be -- I'm not going to
21 have the hearing on it until after the jury's picked, and so I
22 don't want you -- either side going into very specific areas of
23 emphasis in voir dire, because at this point there's no reason
24 for that, okay?

25 **MR. DANIEL:** Your Honor, there might be one reason, and

1 I'd like to bring this to the Court's attention. I hate to keep
2 interrupting, but it'd save us some time if we can...

3 THE COURT: I believe you get paid to do that.

4 MR. DANIEL: Your Honor, the radio this morning, I heard
5 coming up here statements made by -- I was listening to WIVK,
6 and that they had picked a jury, you know. It's on the news.
7 Your Honor probably knows -- I think someone from WIVK, and
8 maybe one or two -- it may be in the paper here. But it makes
9 reference to the fact of another charge in another county. And
10 those are a part of the theories of the State, and I think the
11 State if we can't do that until after the jury's picked, it
12 shouldn't be...

13 THE COURT: You may ask them about their knowledge of
14 other charges. That's certainly, you know, a relevant point.
15 And I will -- but, you know, that goes only to their knowledge
16 of the case.

17 MR. WEBB: Your Honor, let me interject, to make sure.
18 When these radio releases are aired and the papers are putting
19 things in, into -- for the public to read, they are talking
20 about facts that may or may not be proven on the witness stand.
21 And I think that puts us in a bind, in a sense, that people read
22 these and they say, "Well, that's a fact," and, you know, those
23 issues that they're going to be -- will be determined on the
24 witness stand. I think what -- I just want some guidance, and
25 I think all counsel does. We need to talk about...

1 **THE COURT:** If you want to ask them, as they are brought
2 in the box---and I'll certainly give all counsel an opportunity
3 to ask about their knowledge of any publicity---then I'm going
4 to talk to the jury about -- as I do in all cases, where you
5 have some pre-trial publicity, about the facts that the reports
6 are obviously based on what the reporter has been told, this of
7 which might be legally admissible, parts of which might not be,
8 part might be double or triple hearsay. So I will go through
9 that, and I will allow you to make limited -- or several
10 limitations, just to inquire about -- you know, voir dire is not
11 the place to debate with them about whether or not the evidence
12 is good, bad, or whatever. But I will let you inquire into
13 that.

14 **MR. WEBB:** I'd suggest perhaps the Court would consider,
15 in the publicity phase of this thing, the Court might want to
16 consider individual questioning of the...

17 **THE COURT:** I will see how it goes. If then --
18 depending on the extent of it... As I recall, in all candor,
19 there hasn't been that much publicity for a considerable length
20 of time. I saw an article in the Sunday or Monday's paper about
21 the scheduling of the trial, but really no significant facts.
22 In fact, we would have -- I have not seen today's paper or any
23 TV broadcast, nor have I heard any radio broadcasts.

24 **MR. WEBB:** Well, the radio broadcast, as I understand,
25 was -- they were very explicit, detailed; went into facts about

1 Blount County, and details of Blount County.

2 MR. DANIEL: Well, one point that was particularly
3 disturbing was that the news commentator made the statement that
4 it was the State's theory as to how the cause -- how the
5 deceased had died, it's my understanding.

6 MR. WEBB: I don't know who it hurts, Your Honor, when
7 they start talking about those things. It seems to taint the
8 process, or has that possibility. I won't say it will.

9 THE COURT: You know, it certainly has that, and that
10 is why that I will certainly go into that, give you counsel
11 every reasonable opportunity to go into that. And we'll see how
12 it goes.

13 MR. WEBB: Well, I think the general is of the same
14 opinion we are; that we don't need to talk about these facts and
15 other things until you make a ruling on it prior.

16 THE COURT: Until the Court can make a ruling on the...

17 GENERAL SCHMUTZER: The Court wants to do that
18 immediately after we get a jury picked, you say?

19 THE COURT: Yes. Before opening statements.

20 MR. WEBB: I have that in the form of a motion.
21 Your Honor, getting into some things that we expect that the
22 State may try to prove, and in reviewing some particular
23 witnesses' statements, there's an individual named Terri Lilly.
24 I know the State is aware of her, and the Court may not be. She
25 may have some information that might be relevant to this trial,

1 may not be.

2 But there was a statement that my client was alleged to
3 have made to her that had nothing to do with the facts of this
4 situation we're here on today, that have no bearing to this
5 case. You know, what we say, we can say, "Well, it wasn't
6 made," but let's assume it was made. And further, let's assume
7 that that statement was perceived by her to be a threat to my
8 client to her. And I don't know---the State can tell me if I'm
9 wrong---but if they're going to try to use that, I -- Your
10 Honor, I'm just saying that that is something that's irrelevant,
11 it really has no connection to this case. And certainly it has
12 very little probative value as to the issues in this case. And
13 if someone tried to argue and convince you that it had slight
14 probative value, if any, obviously it's highly prejudicial, and
15 I'd ask the Court to rule on that. We don't want that to come
16 in without having a jury-out at least on that issue.

17 THE COURT: Why don't you tell me exactly what it is.

18 MR. WEBB: The way I understand it, it was a there at
19 that Ms. -- that was allegedly made by my client to this lady,
20 or she perceived whatever he'd said to be threatening to her.

21 GENERAL SCHMUTZER: That would go to the -- go to the
22 state of mind, if this is a short time before this girl was
23 killed. I would think it would be relevant and material, Your
24 Honor.

25 THE COURT: What's the statement? I don't -- you're

1 going to have to tell me what it is for me to rule on it.

2 MR. WEBB: Can we approach the bench on that, Your
3 Honor, if you have no objection?

4 THE COURT: I have no...

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

6 MR. WEBB: Your Honor, I'm -- I just wanted to be
7 cautious about these things. I don't know -- are you
8 aware of this at all, Judge?

9 THE COURT: I think I am, but just -- you know, I think
10 we need it on the record what we're talking about.

11 MR. WEBB: Part of our investigation revealed that at
12 some point---and I'll be honest with you, I can't
13 remember if it was Friday or Saturday; I believe it was
14 Saturday---...

15 THE COURT: Before the incident in question?

16 MR. WEBB: This is a -- yeah, this is a -- I... I
17 believe it was Saturday, after about 7:15, it's our
18 position that the fire was spotted where she was burned
19 up to between 8:00 and 8:30. Okay, it was on the
20 Saturday, I do believe, Your Honor, but don't hold me
21 to that. But it was either Friday or Saturday; I
22 believe it was Saturday. And apparently there were some
23 conversations going on, and this potential witness,
24 Terri Lilly, gave a statement to our investigator that
25 at some point Gary Sutton said -- asked her if she was

1 married, noticed a ring on her hands. She said yes.
2 That at some point it -- he said words to the effect
3 that, "Wouldn't it be ashamed that your husband found
4 out that you came up missing," or something to that
5 effect. Is that the way we understand this thing?

6 And then, either before that or after that---and I
7 think it was after that---he tried to pick her up, and
8 wanted to date her or something. That's the inference
9 I drew from the conversation. But, you know, I don't
10 see that that has any relevant bearing to this case,
11 and I think the Court can see it's highly prejudicial
12 for the jury to hear that. It doesn't show any motive
13 or intent to do any harm to Connie Branum, it wasn't
14 made to Connie Branum, it was made to an individual
15 that's not a party. And for all those reasons -- I'll
16 discuss it further with...

17 MR. DANIEL: May I add something, after talking to co-
18 counsel here.

19 MR. WEBB: Uh-huh (affirmative).

20 MR. DANIEL: You can interpret that to mean that, "If
21 you show up missing," that if you take that in those
22 terms, that she would run off with him, date him or go
23 -- or there's just so many inferences that can be drawn.
24 And to drawn an inference from that, that will lead to
25 another inference, that would have -- you'd have to draw

1 an inference upon inference. It's just -- it's too
2 remote, it's not specific enough, it has nothing to do
3 with this case. And to allow that kind of evidence in,
4 with this being highly prejudicial, and no probative
5 value to this case.

6 **GENERAL SCHMUTZER:** Of course, it's highly probative,
7 Your Honor, to this man's state of mind just within
8 hours before this woman does turn up missing and dead.
9 As to the inferences, that goes to weight. If she can't
10 -- obviously she can't testify as to -- unless they ask
11 her. But, otherwise, it'd just be her opinion as to
12 what he meant. There's no way she could know what he
13 meant. They could ask her that, but beyond that, to say
14 that all of a sudden this part of the res gestae, this
15 is where it all transpired there, then our position --
16 and that's why I don't think that to exclude that would
17 be...

18 **THE COURT:** Based solely on what's been told to me about
19 what this thing was, the Court does not see any
20 relevance as to that statement at this time. Now,
21 granted, it could become relevant, either by what is
22 asked of other witnesses, but at this point a statement
23 to a certain woman who is -- who is not an alleged
24 victim of any violence, at this point I would think that
25 would be -- all in all, out of that testimony, it

1 just...

2 MR. DANIEL: It's just that we've kicked this around
3 for -- debating about it from all over, Your Honor, and
4 it's just -- everybody gets a different inference from
5 it, so you're going to have to draw an inference.

6 THE COURT: Well, the Court ruled. I think we need to
7 move along. But having heard the representation of what
8 you understand the statement...

9 MR. WEBB: Well, I'm going to ask the general...

10 THE COURT: ...the statements to be, that's the ruling
11 of the Court.

12 MR. WEBB: Is there anything else you think about that
13 statement? Did I misrepresent to the Court...?

14 THE COURT: And the Court's not saying you
15 misrepresented. All I'm saying is...

16 MR. WEBB: No, I didn't take it that way. But I wanted
17 to make...

18 THE COURT: But from what you understand the statement
19 to be, that's the ruling of the Court.

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

22 MR. WEBB: Your Honor, due to the large volume of
23 witnesses---and certainly the State's not told us who they're
24 going to call and who they're not, but we do know they've given
25 us -- I used the word or figure "90," it's -- it's somewhere in

1 that -- I'm not missing it back much, Your Honor. And perhaps
2 we had earlier filed this motion. I'm not sure. We are not...

3 What we want to do is to ask the Court to compel the
4 State to provide us Jenks material at the beginning of the
5 trial. And what we're going to accomplish by that, Your Honor,
6 it's going to make this thing run more efficient; it's going to
7 save some inconvenience and undue delay in this Court and this
8 jury. I think the Court can will imagine, and I -- once again,
9 I can't -- I don't know exactly what the State's done, but I'll
10 assume the State's got -- the statement of perhaps all their
11 witnesses. We're entitled to that technically after the witness
12 testifies. Obviously, you know, we're going to have to read
13 that statement, we're going to have to study on it, we're going
14 to have to use that statement to help us cross-examine those
15 witnesses. I can envision---and certainly it's up to the Court.
16 We can do it that way. But, you know, we're going to say,
17 "Judge, we need a recess," and -- and I don't want the jury to
18 get mad at me for asking for that. The Court knows we can do
19 that.

20 **THE COURT:** I think the jury's going to be mad at all
21 of us before we get done.

22 **MR. WEBB:** I hope they're mad at others than me, Judge.
23 I don't care if they're mad at you or the general, but I don't
24 want them mad at me. But that's a request; I know it's
25 discretionary to the Court.

1 GENERAL SCHMUTZER: I don't know that it is
2 discretionary.

3 MR. WEBB: The general may...

4 THE COURT: I don't know that I have any -- any
5 authority to supersede the Jenks -- I don't think that there...

6 MR. WEBB: We'd in the alternative, ask the Court to
7 maybe -- well, ask or suggest the Court (sic) that this jury
8 needs to know that there's going to be a lot of recesses, lots
9 of objections. And the recesses can be for this reason, or to
10 use the restroom, or whatever, you know, but I hope they
11 think...

12 Your Honor, got a motion; we believe that the State may
13 attempt to introduce particular evidence. We would ask the
14 Court to either rule now or give us a jury-out hearing first.
15 Apparently there was a lab report that reveals that a quantity
16 of zinc, which is an element or metal, was found in the left
17 shoulder of Connie Branum.

18 We also are of the opinion or belief that none of the
19 State's experts can opinion that this zinc had any connection
20 to her death, and we feel that the -- in that sense, wouldn't
21 have causal connection to this case, and it has nothing to do
22 with it. We just feel like that might be highly and unfairly
23 prejudicial if you just bring that out and the jury hears that,
24 and it can't be testified to by anybody that that was -- had
25 anything to do with her death. No one knows how it got in

1 there, but...

2 **THE COURT:** As to how the autopsy or any lab results
3 that are otherwise admissible come in, as to their contents, of
4 course, the Court really doesn't have any control over -- over
5 that, the findings of the body fluids or whatever found by
6 the... Of course, the autopsy reports are admissible, subject
7 to cross-examination by either counsel. I take it, if the --
8 if the examiner finds no link to the cause of death as a
9 consequence of the finding of zinc, I'm sure he can say that,
10 he or she could say that. So, I'm not going to get in, at this
11 point at least, to telling the physician what he can say he
12 found. You know, he or she has to give an opinion based on what
13 they have found, and I'm sure that will be brought out.

14 **GENERAL SCHMUTZER:** Your Honor, if -- and I assume that
15 we -- you know, we've got one side bringing up motions. If they
16 both file motions saying that they're incorporating each other's
17 motions, I assume those motions are still in effect. If they're
18 not going into the zinc, we have no reason to bring it in.

19 **MR. WEBB:** It just didn't have any -- I guess we
20 probably could have done this better, but General Schmutzer was
21 busy and I was busy. We were working our tails off on this
22 case, and I could have probably just called and asked him that,
23 and I apologize to the Court.

24 Your Honor, in reviewing some of the State's evidence,
25 Gary Clabo will be a witness for the State. We believe he did

1 an examination of some things, including the burned automobile.
2 In reviewing the discovery, the State provided us an audio tape
3 wherein Gary Clabo was -- is videoing and -- videoing the car,
4 and making certain comments and giving certain opinions and
5 making certain statements. The car, itself, I believe the
6 Court's going to rule that that can come into the video portion.
7 We'd reserve our right to object to that if we choose to,
8 especially with regard to his comments. All we would...

9 **GENERAL SCHMUTZER:** Not going to play the audio. If we
10 play the tape, we're not going to play the other.

11 **MR. WEBB:** Okay. Okay.

12 **THE COURT:** They did it in another case, you know, the
13 other arson type case, and... Different investigator, but same
14 problem.

15 **MR. WEBB:** Well, you all have been through that before
16 and I haven't. It just...

17 Your Honor, I don't know how you want to handle this.
18 As the Court is aware, each of these defendants---and I'm going
19 to speak on behalf of my client, but I'm sure Mr. Miller will
20 join in ---each of these defendants gave statements to
21 detectives Jim Widener and Dale Gorely of the Blount County
22 Sheriff's Department. Those were voluntary statements; each
23 were made -- one was made the 25th, and one was made the 28th
24 of February, last year. The statement of the 25th I'm guessing
25 is around 40 or 50 transcribed pages. The other one is not that

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

Motions

1 length.

2 But we've got a lot of things in those statements which
3 counsel feels are argument from the police officers, threats by
4 the police officers, statements by the police officers regarding
5 their theory, what they think happened. And perhaps certain
6 statements that are totally immaterial about, "If you don't tell
7 us, we're going to -- you're going to fry in the electric
8 chair," and things of that nature that has nothing to do with
9 this case. And then there is a lot of things that are
10 inaudible. You've got things that two or three people are
11 talking at the same time. We would ask the Court, prior to --
12 well, number one, we object to the State being able to admit
13 them in their case in chief; but, in the alternative, number
14 two, if the Court rules against the defense motion in that
15 regard,...

16 THE COURT: I believe I already have, haven't I?

17 MR. WEBB: I thought you did.

18 THE COURT: Well, I believe I did.

19 MR. WEBB: We'd renew that motion.

20 THE COURT: Overruled again.

21 MR. WEBB: Anyway, I think the Court sees my point. I
22 want the Court to look at these statements and...

23 THE COURT: What I would encourage both counsel to do,
24 because -- or all counsel to do... It is going to take a long
25 time to try this case. Obviously there are portions of this

1 statements that may not be relevant on any issues, and so, as
2 a consequence of that, I would encourage each side or each
3 attorney who is asking about these to obviously stick to the
4 points that they think are relevant, knowing, of course, that
5 the other side may ask such questions about other portions of
6 the statement that may be relevant, and I'll rule on those as
7 they come up. But that's the only way I know to do.

8 I've read them several times in preparation for previous
9 motion hearings we had. Obviously some portions of them have
10 -- have very little relevance, but -- but I can't anticipate,
11 at this juncture, how either side going to attempt (sic) to use
12 portions of those statements. So, I'll just have to rule on
13 that as it comes up, unfortunately.

14 **MR. WEBB:** It'll be a long trial. I suspect it will.

15 Your Honor, I've got a motion I want the Court to
16 consider. Apparently Tommy Griffin had made some statements to
17 the police officer when he was arrested out on Hunt Road. That
18 would have been Friday, the 21st of February of last year,
19 somewhere in the neighborhood of 7:15, 7:30. Certainly feel
20 that those statements should not be introduced in the trial.
21 It's obviously a pure and rank form of hearsay. We feel like
22 it's not relevant. We can't confront that statement or we
23 can't...

24 **THE COURT:** The statements made out of the presence of
25 these defendants?

1 MR. WEBB: Sure, it was made to...

2 THE COURT: General Schmutzer, what's your position
3 about that?

4 GENERAL SCHMUTZER: Your Honor, our position is that
5 they're not being offered to show the truth, but to show this
6 young man's state of mind. Basically, it's part of the res
7 gestae, it's the first thing when the officer got him out,
8 that's what he said to him.

9 THE COURT: Out of the presence of these...

10 GENERAL SCHMUTZER: Right, it was out of the presence
11 of these two individuals.

12 THE COURT: Why don't we take that matter up at the time
13 that we deal with these other issues, after the jury selection
14 and before the opening statements. Let's do that. That'll give
15 you time to do that. I'll have them all together. What
16 exception did you say that comes under, General? Under state
17 of mind?

18 GENERAL SCHMUTZER: Yes, Your Honor, and res gestae.

19 THE COURT: Any other motions, gentlemen?

20 MR. WEBB: Yes, Your Honor. Your Honor, let me pause
21 this. I don't want to delay, but can I talk to counsel just --
22 for just a brief moment?

23 (Defense counsel confers.)

24 GENERAL SCHMUTZER: Your Honor, I would, while they're
25 doing that, make a note for the Court. General statement was

1 made that this is going to be a long trial. Obviously it is.
2 But the inference was that the State is going to attempt to
3 introduce all these various things. We've actually gone through
4 and tried to cut down, to the best we can, our proof. Now,
5 there's going to be a number of witnesses that are being called
6 because we have reached, you know, no agreement---which they
7 don't have to do---any agreement on stipulation on what's
8 apparently not going to be the true issues. But because of
9 that, such as identity of her body, things like this, we're
10 going to have to go into additional proof and...

11 **THE COURT:** General, before...

12 **GENERAL SCHMUTZER:** ...chains of evidence.

13 **THE COURT:** It is a complicated fact situation for both
14 sides. Ever how long it takes, obviously the Court and jury is
15 going to be here. That's our job, and we'll just deal with it.
16 It's -- that's just the facts of life.

17 **MR. WEBB:** Your Honor---and I appreciate the Court
18 giving us the opportunity. I don't mean to be repetitive or
19 trying to delay or anything like that. I want to get through.
20 But I feel like I need to ask the Court these things.

21 **THE COURT:** That's what I'm here for, Counsel.

22 **MR. WEBB:** Your Honor, we believe that a potential
23 witness may be Boyd Branum; that he's going to testify on the
24 night of February 21st he received a collect phone call from the
25 operator that said, "Collect call to Connie Branum from Tommy

1 Griffin." Mr. Branum told the operator that Connie was not
2 there; that he'd accept the call. When that happened, the
3 operator said, "Go ahead," and no one said anything, and they
4 just hung up.

5 This may -- well, this same series of events may have
6 happened through Viola Griffin's phone, as well. We feel that
7 the State will try to take that evidence and argue an inference
8 that one or both of these defendants made that telephone call.
9 I think, in our investigation, Boyd Branum told us that that's
10 his belief, and that they wanted to try to get her out to kill
11 her. That may be a theory, but it just simply cannot be proven.
12 It's conjecture; speculation; it's inferences upon inferences;
13 it's highly prejudicial; it'll taint this process if we let that
14 go in; it's hearsay, Your Honor. Simply stated, the State
15 cannot prove that. They may want to infer that, but they cannot
16 infer that. In fact, that call could have been made by anybody
17 in this county or in this world.

18 **THE COURT:** Does the State intend to try to show that?

19 **GENERAL SCHMUTZER:** We had, Your Honor, but we -- it
20 was just our position, Your Honor, both of these -- there were
21 calls made to Connie Branum, but she wasn't there.

22 **THE COURT:** And do you have any way of knowing -- of
23 where the calls...?

24 **GENERAL SCHMUTZER:** We have no idea where they were made
25 from; the calls weren't even placed through.

1 **THE COURT:** The Court will have to rule that that would
2 be inadmissible at this juncture, based on what they've said to
3 the Court.

4 **MR. WEBB:** Thank you, Your Honor.

5 Your Honor, I'll be honest with you. We've got -- I'm
6 looking, I'm flipping, and I'm skipping the jury instruction
7 matters, and I don't think the Court wants to take that up.

8 **THE COURT:** At least 'til we get a jury.

9 **MR. WEBB:** Your Honor, I have an objection I would like
10 the Court to entertain. What we want the Court to do is to bind
11 the State of Tennessee to certain representations it had made
12 at previous pretrial hearings; specifically the one of November
13 20th, '92. And I want to give you just a little history.

14 As the Court knows, we filed one or more bill of
15 particulars, motion for bill of particulars prior to that
16 hearing on July 8th that the State's brought to my office. And
17 in Paragraph 2 of that letter, it said, "This defendant is a
18 party to these offenses pursuant to TCA 39-11-401 et seq. Well,
19 that statute is a criminal responsibility statute, Your Honor.
20 There's about ten sections in it. I -- now, don't hold me to
21 that, but there's several sections in it.

22 Subsequent thereto, Your Honor, I filed another motion,
23 and said, "State, please be more particular to your previous
24 response. We need to know this." If you'll look at 39-11-401,
25 which does talk about the subject of criminal responsibility,

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

Motions

1 specifically 11-402, Paragraph 2, it talks about what we -- what
2 I still call and what used to be called aider and abettor, that
3 type of thing. Now, when we get to the hearing---and I'm going
4 to read it to you to refresh your memory, this is a verbatim of
5 the Court ---"Okay, now, let me ask you this: In regards to the
6 statement given by one of the defendants as to," then you say,
7 "I'm talking about the statement made at the time the officers
8 were first investigating allegations of a shooting sometime
9 before to this residence of their -- or someone, and the
10 statement of what one of these defendants might have to do."

11 And the general says, "What that defendant might have
12 to do for -- right." General Schmutzer: "The defendant, Your
13 Honor -- that statement did not in any way inculcate -- it would
14 be admissible, number one, against the defendant; number two,
15 be admissible against the other defendant because it does not
16 in any way inculcate the other defendant. It does not involve
17 the other defendant."

18 Court: "Okay."

19 General Schmutzer: "It's the State purpose -- it would
20 also go to a purpose, taken with all the other evidence, when
21 this other defendant was guilty as an aider and abetter, aiding
22 and abetting one -- the defendant who made the statement, aiding
23 and abetting him and carrying out an express purpose, whatever,
24 I would submit to the Court it would be admissible under either
25 circumstance."

1 Your Honor, we feel the State made an election in that
2 representation, and has answered our motion for bill of
3 particulars, and so do. And so we know how we're going to be
4 prosecuted in this action.

5 GENERAL SCHMUTZER: Your Honor, the State obviously
6 doesn't make any such election. We have no -- this is a
7 circumstantial evidence case. We don't know which one of these
8 men actually pulled the trigger or actually killed either one
9 of these people. It is our position we -- in making my
10 statements to the Court, I was pointing out to the Court how
11 that could come in, even though it was made by one defendant,
12 how it could come in as to another defendant. Because you had
13 -- it was our position they were working in concert. But to say
14 that simply because of that, that all of a sudden the State is
15 saying -- we're saying one of these defendants actually pulled
16 the trigger, and the only defendant only aided and abetted, we
17 can't do that. And we've never attempted to make an election
18 of that, because we're not in a position to do that. And to
19 make that statement would be totally wrong. We pointed out to
20 the Court what the theory could be that would make it
21 admissible, and that's all.

22 THE COURT: The -- now, at that time, the Court was
23 ruling on the admissibility of their statements, is that
24 correct?

25 GENERAL SCHMUTZER: You were -- I think that was the

1 statement that Dellinger made on the 15th to an officer, that
2 they were going to get rid of that Helen Griffin.

3 THE COURT: Okay.

4 GENERAL SCHMUTZER: And that was what that was in regard
5 to, and we were just simply arguing to point out to the Court
6 how that would still -- they were trying to say that that's not
7 admissible against Sutton. We were pointing out to the Court
8 how it obviously would be admissible against Sutton, since it's
9 our belief that they were together in the commission of this
10 crime.

11 THE COURT: As the Court understands the law, either of
12 them does not have to share the same exact either motive or
13 specific intent to commit a particular crime, as long as they,
14 knowing the other's intent or motive or whatever, acts to assist
15 them and promote them, sharing the intent to either do the exact
16 act, etcetera, under the definitions of a "knowingly and
17 intentionally" under the statute. It's a little different than
18 the old "aider and abettor." They do not have to share the
19 exact intent under the new statute, as I -- as I read. So --
20 so, I've already ruled on that, Mr. Webb. You know, I will
21 obviously do my best throughout the trial, and I'm sure with the
22 assistance of counsel, to tell the jurors of what items of
23 evidence may be considered as to one or both of these
24 defendants, and that's obviously the danger in trying them
25 together, and I understand that real well. But I've already

1 ruled on that matter. As I read the indictment, the State
2 charges them both with -- or as principals in this -- in this
3 case. And if the statute on the responsibility of one for the
4 acts of the other is appropriate after the evidence comes in,
5 of course, it will be charged.

6 MR. WEBB: Your Honor, let me -- and I don't want to
7 belabor, but obviously the State's going to bring this statement
8 in against Mr. Dellinger. And obviously the proof will show
9 that Mr. Sutton was in no way, shape, or form present when that
10 statement was made.

11 THE COURT: Correct. And -- and I will instruct the
12 jury at that time, at least, as with any other evidence, that
13 they will consider that statement at that time so as against
14 Mr. Dellinger. Now, as other evidence comes in, it may or may
15 not. But what...

16 MR. WEBB: And so what we're...

17 THE COURT: And that's only...

18 MR. WEBB: And so I understand the Court will give a
19 cautionary instruction, and... But what I'd like to remind the
20 Court again is the spilling over of this type of thing that's
21 going to taint my client, and I would once again renew my motion
22 for severance.

23 THE COURT: Overruled.

24 MR. WEBB: And, Your Honor, the last thing on that
25 point, not to belabor, but you're not going to call for the

1 State to make this election? What I'm trying to tell you or
2 suggest to you, under the rules, when we filed this motion for
3 a bill of particulars, and we asked this thing, the general was
4 under a duty to respond. He did respond; he made a separation;
5 he made a distinction between these two men; we've relied on
6 that since that date.

7 **THE COURT:** Well, now -- and again, the only evidence
8 that the Court has heard, obviously, is the evidence that was
9 adduced at the two days of motion hearings that we had. As I
10 understand, from what the State has said, they have no direct
11 evidence of either who actually did what as between these two
12 defendants. So they cannot make an election on something they
13 don't know. Is that a fair statement?

14 **GENERAL SCHMUTZER:** That might be put that way.

15 **THE COURT:** So -- so, I don't think they have elected;
16 they are entitled, as you are entitled in your defense, to rely
17 upon statute 39-11-402, on criminal responsibility for conduct
18 of another. So that's the law.

19 **MR. WEBB:** Your Honor, reference made to the same motion
20 hearing. General made this -- well, the Court asked the general
21 this: "Let me ask you. Of course, one of the statements in
22 this case contradicts the other in regards to the vehicle,"
23 General Schmutzer.

24 The Court: "Okay, so how does that affect the State's
25 position?" The Court said that. General Schmutzer said,

1 "Okay," and then you say, "So how does that affect the State's
2 position?"

3 General Schmutzer: "Your Honor, the State does not even
4 intend to prove that." It goes on, but that's the
5 representation made, and we rely on that, we have relied on
6 that, and we'd ask the Court to enter an order to that effect,
7 that the State is making a representation that they're not even
8 going to try to prove that. Obviously I think we can rely on
9 that, and then we can ignore a problem, or that it may or may
10 not have existed, and we have relied on that. If the State
11 doesn't intend to prove it, then why should we worry about it?
12 It's something that -- and we relied on that, ask the Court to
13 rule.

14 THE COURT: Overruled. We gave you that it could become
15 relevant in rebuttal, you know. Issues not brought up in case-
16 in-chief could become relevant in rebuttal, brought up in cross-
17 examination or -- by the defense, if some of it was. So, having
18 said that...

19 MR. WEBB: Yeah, I think that's where the defendant took
20 the stand, it would be...

21 THE COURT: Most of it.

22 MR. WEBB: We understand that. Well, I think my -- just
23 the case-in-chief is what I was talking about, so... Your
24 Honor, give me one second and...

25 THE COURT: How many more motions, Mr. Webb, do you

1 have?

2 MR. WEBB: That's what I'm looking at, Your Honor. I'm
3 hoping I'm -- hoping I'm through, but I want to make...

4 Your Honor, we have an order I'd like you to consider
5 approving, to allow us some further discovery. If we can
6 approach the bench, I think it's easier just to explain to
7 you...

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

9 MR. MILLER: We haven't received any -- to my knowledge,
10 we haven't received anything.

11 MR. WEBB: You haven't. I don't know if that has any
12 bearing in this case or not, but the State provided us
13 some information, and...

14 THE COURT: Is this something -- I can't tell, from
15 looking at your order, exactly what it is that you...

16 MR. WEBB: Let me see if I can clarify. The attorney
17 general's office, through their discovery, provided us
18 with a complaint card that charged someone with improper
19 lane usage at -- at and about the time that this event
20 supposedly was going on between...

21 MR. MILLER: The son, Mr. -- Gary Dellinger and Denton
22 Griffin.

23 MR. WEBB: And it was -- not only was it at or about the
24 time, it was in the same location. But the only
25 information on that car was a license number.

1 THE COURT: Okay. But if the State doesn't intend to
2 use it, how is that relevant to what...

3 MR. WEBB: Well, here's...

4 THE COURT: ...any issue that you might...

5 MR. WEBB: Let me say this, Your Honor: That person
6 may have information that could be exculpatory.

7 GENERAL SCHMUTZER: Why are we up here for a bench
8 conference, when you're talking loud enough for
9 everybody to hear you?

10 MR. WEBB: I wanted to explain this to the judge.

11 GENERAL SCHMUTZER: I realize that, but why are we up
12 here to a bench conference, when you're talking loud
13 enough for the press and everybody to hear you back
14 here. We might as well be back in our chairs if we're
15 going to have a bench conference, and...

16 THE COURT: Well, let's move on, now.

17 MR. WEBB: Does the Court grant that order?

18 THE COURT: If it is something that you might...

19 MR. WEBB: I don't know if it'd be anything, but I think
20 we're entitled to go forward on it.

21 THE COURT: Gentlemen,...

22 MR. WEBB: Your Honor, I'm going to try my lawsuit the
23 way I see it.

24 THE COURT: This -- is this going to be -- well, let's
25 don't get testy with each other this early, 'cause it's

1 going to be a long trial.

2 MR. WEBB: Well, I'm not testy, I'm just trying to get
3 along. But I don't appreciate...

4 THE COURT: Counsel doesn't need to address each other
5 in that way. You all don't need to...

6 MR. WEBB: He can try his lawsuit the way he wants to,
7 and that's the way I'm going to try mine.

8 THE COURT: That's what it is. Let's go.

9 GENERAL SCHMUTZER: Your Honor, just one second. It's
10 my understanding that a bench conference is to be taken
11 up so that we can take up things to the Court that ought
12 to be that -- by others in the courtroom (sic). If --
13 you know, if the four of them come up here and talk loud
14 enough, to where they can hear it, then I would submit
15 to the Court there's no need to have a bench conference.

16 MR. WEBB: Let me respond.

17 GENERAL SCHMUTZER: And I'm not trying to...

18 THE COURT: Gentlemen, no more. I will direct when --
19 if either party asks to approach the bench, I will
20 certainly let you, if I deem it appropriate. It's going
21 to be a long trial, and you guys are not going to go
22 back and forth with each other. Now, I'm not...

23 MR. WEBB: I don't...

24 THE COURT: Don't say anything further. I don't -- I'm
25 not going to put up with that by either side. Is that

1 clear? Back.

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

4 **THE COURT:** Anything further?

5 **MR. MILLER:** Your Honor, I have just a couple of brief
6 motions in limine. As Mr. Schmutzer stated earlier, we had
7 previously filed a motion to adopt all the other motions by co-
8 counsel, and then we've got a motion today -- or I again have
9 a motion to suppress the defendant's statement, or in the
10 alternative, to redact the statement; same motion Mr. Webb made
11 with regard to his client. Just pass that to the Court for the
12 purpose of filing.

13 **THE COURT:** Sure.

14 **MR. MILLER:** Again, there's some...

15 **THE COURT:** If you will, I'll let you take these motions
16 and just make sure they get filed in the court file, Mr. Miller,
17 since we're across the hall from the court files.

18 **MR. MILLER:** And I think the Court ruled that it will
19 rule later on those...

20 **THE COURT:** As those issues arise. Yes, Mr. Miller.

21 **MR. MILLER:** A motion in limine to exclude several
22 items. Again, the statement made by Tommy Griffin to the police
23 officer.

24 **THE COURT:** I'll rule on that at our next hearing.

25 **MR. MILLER:** Statements made by the detectives, Gorely

1 and Widener, during their interrogation of Mr. Dellinger. This
2 is, again, part of that relevancy question. On the statement
3 they refer to him as having a bad reputation, things of that
4 sort. We'd object to anything like that being gone into by the
5 State.

6 **GENERAL SCHMUTZER:** I think, Your Honor, we can clear
7 all this up. We're not going to go in -- these officers
8 testified to the pertinent parts of what these men have
9 testified -- talked to. And unless they go into it,...

10 **THE COURT:** The Court holds that each of you direct your
11 respective witnesses, set up your day.

12 **MR. MILLER:** There -- motion in limine to exclude the
13 testimony of a Herman Lewis that we expect, if called by the
14 State, to testify that he was up there in the area where
15 Mr. Dellinger lives on the night of this trailer fire. He saw
16 two individuals, who he can't identify, take something out of
17 a truck, which he can't identify what they took out, and put it
18 in a car. And we see how -- don't see the relevance of that
19 testimony, especially when he can't identify who the people
20 were, or what time it was. I mean,...

21 **GENERAL SCHMUTZER:** Your Honor, that's all -- we've got
22 other proof, and it's all circumstantial.

23 **THE COURT:** I suspect I'll be doing that at our next
24 hearing.

25 **MR. MILLER:** I'll renew then.

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

Motions

1 Approach the bench on the last question, Your Honor.

2 (A bench conference was held on the record, to-wit:)

3 MR. MILLER: Said to be a conversation of what is
4 supposed to be a sale of cocaine.

5 GENERAL SCHMUTZER: We furnished it to them, Your Honor.
6 We intend (inaudible) proof-in-chief. (Inaudible) if
7 they're going to attempt to try to open the door to make
8 (inaudible) cocaine, but going off on some other people
9 in on this (inaudible) have this tape recorded
10 conversation.

11 THE COURT: But you say that you're not going to offer
12 that?

13 GENERAL GREEN: Not in proof...

14 GENERAL SCHMUTZER: Not in proof-in-chief. We think --
15 we get the feeling they're going to make it...

16 THE COURT: If you make it...

17 GENERAL SCHMUTZER: ...relevant and material.

18 MR. MILLER: Well, I just asked if they'd approach the
19 bench before going into this.

20 MR. DANIEL: While we're up here, can I bring up one
21 other issue? I was looking to approach Your Honor on
22 -- about this same issue. This -- there is, in reading
23 the statement of Defendant Dellinger, which we have
24 seen, of course, the officer is making statements like,
25 "You have whipped other people. You're a bad man. We

1 know what kind of SOB you are," and stuff like this,
2 which is officer's statements which would not, under any
3 circumstances, be (inaudible) in trial. So that's part
4 of the tape recording or statements that they say when
5 they question him he made. And that's one of the big
6 problems developed. And in addition, as far as our
7 client goes, he makes statements -- they ask him about
8 -- they make their statements about our client, which
9 our client was not present when any of this happened,
10 and this is the reason, and we will put this on record,
11 I -- we need to get this statements cleaned up. They're
12 -- I don't see, under any strain of imagination,...

13 **THE COURT:** Also there's something, gentlemen, that --
14 all of you, I would suspect, know the matters contained
15 in those statements that are totally irrelevant. And,
16 you know, absent any other reason, I don't want to, at
17 this juncture, have to sit down with you and go through
18 each and every line of every statement. Of course, I
19 will if I have to, but I don't want to have to do that.
20 And so, you know,... And if you -- as each of you
21 examine about these statements, you know, please do it
22 understanding, hopefully, what's relevant and what's not
23 relevant.

24 **MR. MILLER:** Your Honor, could I make a suggestion?

25 **THE COURT:** Yes.

1 MR. DANIEL: Since they're going to attempt, I presume
2 ---now, if I'm wrong and you're not going to introduce
3 them, I'm just... If he's going to attempt to introduce
4 them,...

5 GENERAL SCHMUTZER: I'm going to introduce the
6 defendant's statements. But we're going to introduce
7 them in such a way that we're not going into all this.

8 MR. DANIEL: Okay, that's -- that's -- if he wasn't,
9 there was no need me telling this. But, in case they
10 are, I would make a suggestion that the State tell us
11 those portions of the statement that they feel like they
12 want to use, and then, so that -- save Your Honor a lot
13 of time, let us determine what portions we feel are
14 objectionable, and make our motions.

15 THE COURT: Well, gentlemen, the Court -- and I
16 understand, Mr. Daniel, not having been in the case all
17 that long the problem it causes for you. I've had two
18 days of motion hearings.

19 MR. DANIEL: I understand.

20 THE COURT: And I, in all candor, feel like I've gone
21 out of my way to give everybody every opportunity to
22 argue their motions. But at this point, with some 150
23 jurors sitting across the hallway here, I don't much
24 think I can, at this point, at this juncture, at
25 least,...

1 MR. DANIEL: Can we raise this later, then?

2 THE COURT: Sure you can. And -- and since we're not
3 going to be going to testimony here today---or I would
4 expect that---if there are certain areas that you at
5 least expect, General Schmutzer, that are going to be
6 objectionable, if we can deal with some of these matters
7 in advance, fine. But I can't tell the State, on the
8 front end, to tell you exact portions of their -- you
9 know.

10 GENERAL SCHMUTZER: Based on their representations, what
11 they're concerned about, Your Honor, I can't think of
12 any part that would... Other than, you know,...

13 MR. DANIEL: Also, we have the tapes versus the...

14 THE COURT: Sure.

15 MR. DANIEL: ...the transcript, and I presume we'd be
16 dealing with the tapes, because this is -- the
17 transcript is some secretary's or somebody's
18 interpretation of who said what, and who... And I've
19 noticed a couple of places they've got where the -- I
20 think the wrong person made the wrong statement. It
21 doesn't make any sense if you read it. So, for that
22 reason, we -- I -- maybe we can work on the tapes, and
23 prepare a tape that -- by agreement, that -- and take
24 out the important...

25 THE COURT: If it's something that you all can do by

1 agreement, fine. But if you can't,... I mean, either
2 of you are entitled to present your evidence that you
3 deem...

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

6 **THE COURT:** Okay, anything further? We will now
7 adjourn.

8 **MR. DANIEL:** Your Honor, I have an order putting myself
9 as co-counsel of record with Mr. Webb, and I've prepared that
10 order, and I'll file it with the Court. And there was two other
11 short motions. I don't know if I can -- it's on the record.
12 Okay, that's the record of the...

13 Your Honor, there was a motion filed to exclude some
14 witness testimony of the person who they gave us a statement on,
15 and we wanted to file -- we filed a motion to exclude that
16 testimony or that statement, because we just got it the other
17 day. We now want to file a motion to withdraw our motion. So
18 that will -- and since no orders are pending, Your Honor hasn't
19 ruled on it, I believe it's a moot question, but I think the
20 record should at least reflect that we filed a motion to
21 withdraw that, and order. I have an order for Your Honor to
22 sign.

23 And, Your Honor, also we have one other written motion
24 which was referred to by co-counsel, Mr. Webb, the motion for
25 severance. And, in addition to the things that he mentioned,

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

Motions

1 there was a couple of other matters that... We received some
2 information recently, from -- since the motion has been heard
3 by Your Honor at that prior date, we have received other
4 information which we think more so entitles us to a severance
5 in this cause, and we would like to make the record clear that
6 we want the written motion for severance filed, and that Your
7 Honor has overruled it. And this is the written motion for
8 severance which has already been gone over by the co-counsel.
9 That's all I have.

10 MR. WEBB: Your Honor, just a couple of housekeeping
11 things. The pictures and video tapes that show some graphic
12 things, we'd ask that those be excluded, or at least let you
13 look at them before... That's pretty standard stuff. And the
14 same about the (inaudible) going to the family or -- designed
15 to elicit passion, and would have no probative value. I'd like
16 the Court to consider that before it's offered.

17 THE COURT: Okay. Anything further?

18 GENERAL SCHMUTZER: Yes, Your Honor, the State has some
19 things.

20 Court please, at the 11th hour we were furnished a
21 witness -- we had, months ago, filed a motion, pursuant to the
22 rules, that -- setting out the approximate time and place where
23 this crime occurred, and asking that they provide us with alibi
24 witnesses. The Court remembers, we went around that for awhile
25 before we finalized it, though it went beyond any ten-day

1 limitation that had been given to us. It went way beyond it.
2 We finally got a list.

3 And then as -- I think just, what, three days ago we
4 got a letter telling us of another witness, alibi witness. We
5 have had our investigator all weekend long trying to find this
6 -- we cannot find this witness, Your Honor. We say this witness
7 comes too late, and we would ask the Court, under those
8 circumstances... This is coming outside the orders of the
9 Court, outside of when it was to be provided, and there's not
10 a lot -- we cannot find him. We've been...

11 THE COURT: Couldn't find a witness who is supposed to
12 testify?

13 GENERAL SCHMUTZER: Right, that we were furnished at
14 4:00 on Friday afternoon. We've been (inaudible) at 8:30 in the
15 morning to 12:00 at night, been working all weekend, Your Honor.

16 MR. WEBB: That would -- you can flip this thing around,
17 and we're getting discovery -- I can't represent we got any
18 yesterday, but, I mean, we're getting it all the time. We've
19 got to run out and find witnesses. What we've done, at the time
20 I filed the notice for alibi this witness was not made known to
21 me. Soon as it was made known to me, I made it known to the
22 general's office, and supplied an address and phone number. And
23 that's all I can tell you.

24 THE COURT: Well, is that witness here?

25 MR. WEBB: I have no idea.

1 **GENERAL SCHMUTZER:** They don't have an objection -- in
2 fact, on the one that we noticed them on, that they withdrew
3 their objection to, we furnished them that -- a copy of that
4 statement so they wouldn't be caught unaware. So we have not
5 been doing that to them. But we came up to this witness, and
6 we cannot physically find, and have spent a lot of time trying
7 to find, and it comes, as I say to the Court, way after the time
8 limitation imposed for giving alibi witnesses. And I don't
9 believe that...

10 You know, alibi is something that your client knows
11 about or your client's people know about. That's not something
12 that comes down out of the sky. So it's something they
13 reasonably should have had some idea was going to be alibi
14 months and months and months ago.

15 **THE COURT:** What's the rule under alibi?

16 **GENERAL SCHMUTZER:** I don't have it, Your Honor.

17 **THE COURT:** 12.1.

18 (Judge Ogle reviews certain material.)

19 **THE COURT:** Well, 6 and (c) says, "A continuing duty to
20 disclose. If prior to jury trial the party learns of an
21 additional witness who (inaudible) should have been included in
22 the information furnished under Subsection (a) or (b), the party
23 shall promptly notify the other party or his attorney of the
24 existence, and (inaudible)." That's the rule.

25 **GENERAL SCHMUTZER:** It's our position, Your Honor, that

1 this is not "promptly." That there's no way that this person
2 can just reasonably come up this close to trial and not have
3 been known beforehand as an alibi witness. By the very nature
4 of the fact it's an alibi, someone that's -- that your client's
5 going to have to know about. And, as I say, we even requested
6 at least to give us a copy of the statement, as we did with the
7 witness we furnished to them late, because we had come up with,
8 and they haven't even done that. But we would ask the Court...

9 **THE COURT:** Is this witness going to testify to alleged
10 facts that are similar to other alibi witnesses?

11 **MR. WEBB:** Your Honor, you know, these decisions will
12 be made during the course of trial, whether anybody testifies
13 or not. If that witness testifies, I would expect them to say
14 within the ballpark of what other alibi witnesses are going to
15 say. I mean, I think, by definition, the general is... I
16 represent to the Court, as soon as that witness came to my
17 knowledge I, you know, advised the general's office.

18 **THE COURT:** I will provisionally allow that testimony.

19 **GENERAL SCHMUTZER:** Can we have the statement, then,
20 Your Honor, of what she's going to say?

21 **THE COURT:** If you well, Mr. Webb, during recess or
22 after you go back across the way, tell the general maybe the
23 substance of that.

24 **MR. WEBB:** I believe I already talked to General Green
25 (inaudible).

1 **THE COURT:** Anything further for this Court?

2 **GENERAL SCHMUTZER:** Yes, Your Honor. The defense, late
3 last week---and I think it was either Thursday or Friday---
4 obtained an order from this Court requesting an independent
5 examination of the shells and shell casings in this case. We
6 worked with the defense counsel to make sure that was done; they
7 had it examined finally yesterday morning. I have talked to
8 them since then; they have refused to give me any reports. They
9 said, "We don't know yet whether we're going to use him or not."
10 I had obviously -- we were in a position where if he was going
11 to be used, we needed to find out what he was going to say, and
12 take whatever steps that we needed to take to rebut that or
13 whatever, Your Honor, and we're still up in the air as to what
14 this witness found, what he didn't find, or -- with regard to
15 that, or whether or not he's even going to be used. I submit
16 to the Court that it's -- we just need to know.

17 **MR. DANIEL:** In response, Your Honor, we have no written
18 report; that, as I understand it, we're obligated to turn over
19 any written report we have, or copy of it. We have none. Don't
20 know whether we will have one. If we do receive one, we'll give
21 him a copy.

22 **THE COURT:** Do you have a summary of an oral report?

23 **MR. DANIEL:** Do not have a summary of an oral report,
24 Your Honor.

25 **GENERAL SCHMUTZER:** The order you signed, Your Honor,

Courtesy of
Time of Death Podcast
by Beth Braden

1 was ---and I think rightly so; it was agreed and put into the
2 agreed order, Your Honor---that they would immediately furnish
3 me with a report. And that was written into that order that we
4 agreed to, that the Court signed in the 11th hour. And it did
5 not limit it to a written report, it -- we have received no
6 report.

7 THE COURT: State's entitled to know, gentlemen, what
8 the substance of his testimony...

9 MR. DANIEL: I don't have any report, I don't have any
10 -- I didn't sit down and take notes or make a report from him.
11 I don't have any way to...

12 THE COURT: Well, is he available?

13 MR. DANIEL: And also I might say... Yes, I gave the
14 general his -- where he could be located, and he's welcome to
15 talk to him.

16 GENERAL SCHMUTZER: We weren't able to locate him, Your
17 Honor. He was off yesterday. The thing is, Your Honor,
18 Mr. Daniel was there with him when he made this examination, and
19 we know, from our people that took this stuff down there, that
20 they had a conversation afterwards, and Mr. Daniel indicated to
21 me that he'd had a conversation, and he spoke to things about
22 that -- what had transpired, but he hasn't told me what it was.

23 THE COURT: If the defendant requests disclosure under
24 Rule 16, upon compliance with such a request by the State, that
25 the defendant, on request to the State, shall permit the State

1 to inspect and copy or photograph any results of reports of
2 physical or mental examinations, and of scientific tests or
3 experience may be commensurate with a particular case, or copies
4 thereof within the possession or control of the defendant. If
5 this man is available, if he doesn't, at this juncture, because
6 of the late date, have a written summary, in all fairness I
7 think it would be proper for the State to know at least an oral
8 summary of his findings.

9 MR. DANIEL: I told the general basically what things
10 that he found. I -- and the general brought the issue to my
11 attention. First, before, said he didn't want to let him go
12 look at this evidence because he wasn't competent, he wasn't
13 qualified to testify. And I said, "Well, that would probably
14 be a decision we'd have to make, but we're still entitled to
15 have somebody to look at it."

16 THE COURT: Sure.

17 MR. DANIEL: And so we had him look at it; basically,
18 for the purpose of trying to help me get some ideas of things
19 to cross-examine and to have the other -- their expert. Whether
20 he's used or not I don't know at this time, Your Honor. If --
21 but I don't have any written report from him. I didn't ask him
22 for a written report. I don't have any -- we had some general
23 conversations, but to tell him -- tell him basically what things
24 we talked about and all, I don't know that that would be...

25 THE COURT: Oh, no, sir. I'm certainly not ordering

1 you to tell General Schmutzer or anyone else the context of your
2 conversations. But if he has made findings of fact on relevant
3 issues concerning these ballistic tests, then under the rule I
4 think the State's entitled to know that.

5 MR. DANIEL: And I -- and I informed the general of one
6 finding that he advised me, that was of a specific finding which
7 I'm aware of that is -- far as me asking him questions that --
8 for the purpose of getting information for cross-examination,
9 I don't think that I...

10 THE COURT: I understand that. I understand. But if
11 he has made specific findings of fact about the types of
12 bullets, or if he is going to give an opinion on matters of
13 trial, I think the State's entitled to know that.

14 MR. DANIEL: Okay. If we decide not to call him, are
15 we obligated to give him that information then?

16 THE COURT: I think if he -- if he has made -- if he
17 has an oral report available, I think, under the rule, he would
18 be entitled to know that.

19 MR. DANIEL: Well, I -- that's the reason I say I told
20 the general he could call him and ask him. I have no trouble
21 with that. But, I don't wish to sit down and tell the general
22 our discussions about why -- these areas that are suspect in
23 terms of...

24 THE COURT: I understand that. Exactly right.

25 MR. DANIEL: And the same as the general telling me

1 what...

2 **THE COURT:** Approach the bench, will you, gentlemen.

3 (A bench conference was held on the record, to-wit:)

4 **THE COURT:** What areas are you concerned about,
5 Mr. Schmutzer?

6 **GENERAL SCHMUTZER:** Your Honor, I have no idea what his
7 findings are. I need to know what his findings are and
8 what his conclusions are, that's pure and simple. Your
9 order that you signed, it specifically said they would
10 immediately give me a report. It was in the order. And
11 because it was coming late,... He knows exactly what
12 he has. They're playing games.

13 **MR. DANIEL:** We're not playing games.

14 **GENERAL SCHMUTZER:** Well, you are, too, because, you
15 know, this, "Well, hey, I didn't get a written report."
16 He could have had this man make a report, or even write
17 out an oral report, giving his findings and conclusions.

18 **MR. DANIEL:** Well, I don't have to do that, Judge, to
19 make him do that. Now, I don't know of any rule that
20 says that I have to...

21 **GENERAL SCHMUTZER:** The Court says you were to
22 immediately supply me with a report. I would think that
23 the Court order...

24 **MR. DANIEL:** I don't have a report, General. I didn't
25 get a report.

1 **GENERAL SCHMUTZER:** Well, the implication is you're to
2 supply one if you're going to use him. Now, the thing
3 is,...

4 **MR. DANIEL:** If I don't use him,...

5 **GENERAL SCHMUTZER:** Well, how do I know if you're going
6 to use him or not? Your Honor, I have an opportunity,
7 beforehand, to take a look at and decide...

8 **THE COURT:** I will say this -- I will say this: If the
9 man is going to testify, the State is entitled to know
10 a summary of his conclusions and findings.

11 **MR. DANIEL:** Absolutely.

12 **THE COURT:** And -- and to have an opportunity to rebut
13 his conclusions. So I direct that, if he is available,
14 that a summary of his findings and conclusions be made
15 available to the State by the end of this day.

16 **MR. DANIEL:** Is that my interpretation of what he's told
17 me? And I presume that's all we have, because I don't
18 have a written report, and I don't have a...

19 **GENERAL SCHMUTZER:** I don't want his interpretation, I
20 want...

21 **THE COURT:** It's his. It's his.

22 **GENERAL SCHMUTZER:** Right.

23 **MR. DANIEL:** I have to get him to do this?

24 **THE COURT:** Well, if -- right, if...

25 **MR. DANIEL:** I have to make him put it in writing?

1 THE COURT: If you're going to use him as a witness,
2 yes. As to his findings, expert findings on the
3 ballistics issues. True. Well, I -- that's...

4 MR. DANIEL: Well, Your Honor, I just -- I don't have
5 anything at this time, and...

6 THE COURT: Well, and -- and I take it, if you didn't
7 have anything, that you weren't going to call him as a
8 witness, is that a fair statement?

9 MR. DANIEL: Well, I never -- I always -- when I talk
10 to a witness, I don't always take a written statement.
11 Maybe I should. I mean,...

12 THE COURT: Well, only -- you know, only if he's going
13 to be called as a witness does it come within the
14 purview of this rule.

15 MR. DANIEL: As an expert?

16 THE COURT: Right. Right.

17 MR. DANIEL: If he's not called, then I don't -- it's
18 no big deal.

19 GENERAL SCHMUTZER: Well, Your Honor, it's my
20 understanding, then, if he doesn't provide me with a
21 summary of his findings...

22 THE COURT: He can't call him as a expert witness.

23 GENERAL SCHMUTZER: ...and conclusions by the end of
24 this day, he cannot be called?

25 THE COURT: He can't call him as an expert witness.

1 MR. DANIEL: Not even in a rebuttal situation?

2 THE COURT: He can't be called as an expert witness,
3 right. Okay?

4 MR. DANIEL: Let me ask you one other question.

5 THE COURT: Okay, right.

6 MR. DANIEL: I want to get it pinned down. If -- if he
7 was called and not qualified as an expert, but what --
8 there's some things he had seen which a person can look
9 -- if we had a microscope and looked at some things on
10 there, but he's not qualified as an expert, but
11 testifies as to things that he has seen on a shell,
12 would that be within the -- if he's not qualified as an
13 expert?

14 THE COURT: But if he has made examinations about these
15 shells or whatever, he obviously knows what he has seen.
16 And, so, I think he would have to disclose that, if
17 it's...

18 But the point I understand, with all the evidentiary
19 matters, that you and he can't determine each and every
20 relevant issue, but generally I would say that his
21 examinations should come within the purview of his area
22 of expertise. And, so, if he's made findings about
23 that, in order for him to testify about that he has to
24 come within this rule. That's -- that's as I understand
25 it. Okay?

1 MR. DANIEL: Yes, sir.

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

4 THE COURT: All right, anything further, General
5 Schmutzer?

6 GENERAL SCHMUTZER: That's all, Your Honor.

7 THE COURT: Okay, Court stands adjourned.

8 (The Court is recessed.)

9 **VOIR DIRE:**

1 THE COURT: Ladies and gentlemen, I apologize to you
2 for the delay we have had this morning. As I told you, we are
3 here today on cases of State versus Gary Wayne Sutton and James
4 Anderson Dellinger. They are charged with first degree murder,
5 and the setting or the arson of an automobile.

6 I want to talk to you about several things before we
7 get started. During the course of this trial I anticipate that
8 there will be several bench conferences, there will be several
9 hearings that I will have to have, and ask you who are selected
10 to step outside. There is no easy way to do that. It will take
11 time, it came cause delay. I don't apologize for that, but I
12 just tell you that on the front end; don't get frustrated with
13 the attorneys or with the defendants in this case. If you want
14 to get mad at the Court, that's fine. That's what they pay me
15 for. But it is going to take some time here today and over the
16 next few days, so we ask your indulgence.

1 Also, at some point during the juror examination I or
2 someone else will read to you a rather length list of potential
3 witnesses. That list of witnesses will be read to you so as --
4 as for you to know who they are, so you can tell the Court and
5 counsel whether or not you know these witnesses. They may or
6 may not be called. Just because they were lengthy does not mean
7 they will be called, so understand that.

8 As the trial goes on, I will be, throughout it,
9 instructing you on various issues of law pertaining especially
10 to evidence that you will have to pay close attention to. As
11 in every criminal case, this case is here because the grand jury
12 has returned an indictment. And indictment is an official
13 accusation only. It is not evidence, it raises no burden of
14 proof on the defense in this case. They have to offer no
15 evidence -- strike that, they don't have to offer any evidence,
16 if they choose not to. The burden of proof in every criminal
17 case is on the state of Tennessee, who must prove each and every
18 element of the crime charged to your satisfaction, beyond a
19 reasonable doubt and a moral certainty. As stated, the defense
20 has no burden of proof. These defendants are presumed innocent,
21 and that presumption stays with them throughout the trial of
22 this case.

23 At the conclusion of this case I will -- if, in fact,
24 it goes to the jury for a final determination, I will instruct
25 you on the law to be applied in this case. I would also say

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

Voir Dire

1 that -- and questions will be asked of you concerning the law
2 in this case. Whether or not you or I agree with this law in
3 this case as it pertains to this case is immaterial. Whether
4 we think the law is too harsh or not harsh enough is not for us
5 to determine here. I will ask you and tell you that it is your
6 job and my job to apply the law as it is written, and to do it
7 fairly and impartially.

8 I can also promise you, as I've said to so many other
9 jurors, that regardless of what you do or what I do here,
10 somebody is going to disagree with us. That, again, is our job,
11 however; to do our very best to reach a just conclusion in this
12 case, and not worry about what everybody else thinks, because
13 everybody else doesn't know or won't hear the same facts in this
14 case that you hear. So everybody has an opinion, but often
15 their opinion is not based on the evidence. So it requires us
16 all to have courage to do our jobs according to the oaths that
17 we take. Each of you who sit on this jury, of course, will take
18 an oath to do your job, and I expect you to do that. I know
19 that you will do that. Every day that I sit as a judge
20 increases my faith in our jury system. It works. People do
21 their best on juries, and I -- and I know that you will do that.

22 As you are called down here as a prospective juror,
23 attorneys for the state of Tennessee, attorneys for the
24 defendants, for each of them, will ask you questions. The
25 purpose of those questions are to determine if you have any

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

Voir Dire

1 prejudices or biases, or some other reason why you should not
2 sit as a juror in this particular case.

3 All of us, by human nature, have opinions about things.
4 Some of them -- or some things automatically cause us to be
5 upset. Just because you have opinions or certain prejudices
6 about certain things doesn't automatically exclude you as a
7 potential juror. It's whether or not those biases or prejudices
8 can keep you from being fair or impartial to both sides in this
9 case.

10 Now, after you come down here certain questions will be
11 asked of you about whether or not you have read any articles
12 about this case, if you've seen any TV broadcasts about this
13 case, or if you have heard or seen anything otherwise about this
14 case. Now, just because you have read or heard something about
15 this case doesn't automatically exclude you, because we live in
16 a media world, instant communications, either by TV, radio,
17 print, fax machines, telephone. So it's hard to avoid
18 information in our world. If you'll ask all the presidential
19 candidates who have to answer to all of it, I'm sure they can
20 tell us all about that.

21 But the issue here is whether or not you have formed an
22 opinion based on what you have read or heard about this case,
23 and understanding that a reporter who does a story on a set of
24 facts only bases their story on what they have heard. And you
25 must understand that the person giving that information may not

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

Voir Dire

1 know what they're talking about, may have limited information,
2 may have limited access to information. I hope none of us
3 automatically believe everything we see or hear.

4 Likewise, some of the information that has been reported
5 in stories may or may not be testified to. So the only
6 information that you, as jurors, can base your decision on is
7 what you see or hear from this witness stand and the law that
8 I give you as to how it should be viewed. So, again, just
9 because you have read something about it or heard something
10 doesn't automatically exclude you. Now, if you have an opinion
11 based on what you've heard, we'll have to deal with that at that
12 time.

13 The second thing that I want to talk to you about is
14 the penalty for first degree murder in Tennessee is either life
15 in the penitentiary, a life sentence in the penitentiary, or
16 death. Those are options. Those are sentencing options. No
17 jury is required to automatically sentence someone to death just
18 because they might find him guilty of first degree murder. You
19 will be asked questions about that.

20 If you are a person who automatically says under no
21 circumstances would you consider the death penalty as an option,
22 then you cannot sit as a juror in this case.

23 Likewise, if you are a person who feels that under every
24 circumstance a person convicted of first degree murder should
25 suffer the death penalty, you likewise cannot sit on this case.

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

Voir Dire

1 Tennessee law, as written by our legislature and approved by the
2 Tennessee Supreme Court, gives certain aggravating and certain
3 mitigating circumstances which you must find in considering the
4 death penalty. And, so, in order to sit on this jury, you must
5 be willing to consider it as an option, only, saying that you
6 will follow the law as it is written, not whether you like it
7 or don't like it. So you will be asked further questions about
8 that. Be honest with us, because those are issues of conscience
9 and those are issues of morality. And people of goodwill don't
10 always agree on those issues. So if you have a firmly held
11 belief either way, please tell us without any shame, whatsoever,
12 and no one here is not going to respect you for that.

13 So all the jurors please stand and raise your right
14 hand.

15 (The entire jury venire receives the oath.)

16 **THE COURT:** Because of the large number of jurors and
17 the large number of challenges available in this case, I am not
18 going to ask you back there as many questions as I have on
19 previous occasions. I'm going to go ahead and call 12 of you
20 down into the box, and we will ask questions thereafter. As you
21 sit in the back, if questions are asked that raises something
22 in your mind, then, as you are called down here, please bring
23 that to our attention.

24 I first of all want to introduce to you, first of all,
25 the defendants, Gary Wayne Sutton. If you'll stand up, please,

1 Mr. Sutton. Mr. Sutton is represented by Mr. David Webb, of the
2 Sevierville bar, and Mr. Zane Daniel of the Knoxville bar.
3 Thank you, gentlemen.

4 Also, Mr. James Dellinger. If you will stand,
5 Mr. Dellinger. He is represented by Mr. Ed Miller and
6 Ms. Susanna Laws Thomas. Thank you.

7 The state of Tennessee is represented by General Al
8 Schmutzer, Attorney General Al Schmutzer, and assisted by
9 Assistant Attorney General Scott Green. Thank you.

10 At this time we will call 12 into the box. As you are
11 called, start on the back row in the corner.

12 (The following jurors were called and were seated in
13 the jury box: #1-Dayle A. McCarter; #2-Kyle Underwood;
14 #3-Tommy Lee Parton; #4-Wade Breeden; #5-James L. Webb;
15 #6-Andy L. Seaton; #7-Lee R. Williams; #8-Charles E.
16 McCarter; #9-Richard J. Young; #10-Bruce J. Gaps; #11-
17 David McClellan; #12-Jay Ogle.)

18 **THE COURT:** Have all of you heard the statements made
19 by the Court earlier here this morning? Have any of you in the
20 box -- how many of you in the box have ever served on a
21 criminal jury before? If you would, just raise your hand.

22 (Certain jurors respond.)

23 **THE COURT:** Only one of you? The -- how many of the
24 others of you are on the regular jury panel? Let me ask you
25 this way: How many of you have just been called as prospective

1 jurors for this case only? If you will, raise your hands.

2 (Certain jurors respond.)

3 THE COURT: Okay, most of you. Okay. Normally, when
4 we pick a jury panel at the start of a term of court, Judge
5 Holt, who starts off a term, he goes through the various
6 responsibilities of jurors, various obligations, and the
7 different burdens of proof. I want to talk about that to you
8 briefly, now.

9 In a civil case everyone starts off even, and the person
10 or persons having the burden of proof in a civil case has to tip
11 the scales ever so slightly in their favor in order to prevail
12 on a point. That's what we call a preponderance of the
13 evidence.

14 In a criminal case, because of the rights involved and
15 the seriousness of a case involved, our U.S. and state
16 constitutions say that in order to convict someone of a crime
17 you must prove -- in other words, the government must prove
18 beyond a reasonable doubt and a moral certainty the elements of
19 the crime, and that the defendants charged are the ones who
20 committed the crime. That is as it should be. It's only proper
21 that that happen. But that is a much higher standard of proof
22 than a mere preponderance of the evidence, and as we go along
23 I will instruct you about that further. Does anyone have a
24 problem with that concept?

25 (No jurors respond audibly.)

1 **THE COURT:** Do any of you have a problem with the
2 concept that the defendants are presumed innocent, and have no
3 burden of proof?

4 (No jurors respond audibly.)

5 **THE COURT:** As you sit there right now I would hope, if
6 you had to vote, that you would vote not guilty because you've
7 not heard any proof. It takes proof in order to do that.

8 In regards to the questions I've posed about the -- any
9 pretrial publicity, how many of you sitting in the box have seen
10 or heard anything about this case before you got here today?
11 How many of you? If you would, raise your hand.

12 (Certain jurors respond.).

13 **THE COURT:** Almost all of you. Starting with Mr. Gaps:
14 Generally, what have you seen or heard about this case, sir?

15 **JUROR GAPS:** On the way driving in the Sevierville area
16 I heard something about it on the radio, and then I read the
17 newspaper this morning, and that's all I know.

18 **THE COURT:** And are just glad to be here, no doubt.

19 **JUROR GAPS:** Well, yes, sir.

20 **THE COURT:** Did you form an opinion, based on what you
21 heard or read, as to the guilt or innocence of anybody in this
22 case?

23 **JUROR GAPS:** No, sir.

24 **THE COURT:** Have you formed an opinion about any
25 evidence in this case, based on what you've seen or heard?

1 JUROR GAPS: No, sir.

2 THE COURT: Okay.

3 Mr. Young, same question for you, sir.

4 JUROR YOUNG: I seen it on TV last spring.

5 THE COURT: Okay.

6 JUROR YOUNG: Seen a little bit in the newspaper.
7 That's all.

8 THE COURT: Have you formed an opinion about anything?

9 JUROR YOUNG: No.

10 THE COURT: Just based... And I ask this of all of you
11 sitting in the box, if you've seen or heard anything about this
12 case. If you had read or seen something and it didn't come from
13 the witness stand, would you use what you saw or heard in
14 determining the guilt or innocence of anyone in this case?

15 (No jurors respond audibly.)

16 THE COURT: I hope you would not. If you feel like that
17 you couldn't put that out of your mind and base your case or
18 your verdict solely on what you see and here from this witness
19 stand, then we need to know that. Anyone have a problem with
20 that?

21 (Certain jurors respond.)

22 THE COURT: All right, sir. Yes, Mr. McCarter?

23 JUROR CHARLES McCARTER: I have a friend in Blount
24 County; I've heard a lot there. And I've been counseling with
25 a lady that's -- maybe it's not proven that this involved her

1 son's death, and maybe -- but counseling with her and praying
2 with her through this, that I'm afraid that -- I'm just afraid
3 that I wouldn't be fair. If it was my son sitting over here,
4 I wouldn't want someone with the opinions I've got already
5 judging my son. That's as fair as...

6 **THE COURT:** That, Mr. McCarter, is why I have faith in
7 humanity, because of what you just said. That's why I believe
8 in our system, because I believe people tell us why. And I
9 appreciate your honesty; I know everyone in this courtroom
10 appreciates your honesty. And because of what you said, I take
11 it -- I take it that you wouldn't feel comfortable sitting on
12 this jury?

13 **JUROR CHARLES McCARTER:** I wouldn't.

14 **THE COURT:** All right, sir, I'll let you go,
15 Mr. McCarter. Thank you.

16 (Juror Charles McCarter is excused.)

17 **THE COURT:** Mr. Williams, that same question, sir.

18 **JUROR WILLIAMS:** Well, I've read a lot about it, got a
19 lot of friends that talk about it, so...

20 **THE COURT:** Okay. Have you formed an opinion?

21 **JUROR WILLIAMS:** Yes, I have.

22 **THE COURT:** Is -- is that an opinion that you don't feel
23 could be changed by the evidence in this case?

24 **JUROR WILLIAMS:** No.

25 **THE COURT:** All right, sir, I'll let you go. Thank you.

1 (Juror Williams is excused.)

2 THE COURT: Ms. McCarter, have you seen any...?

3 JUROR DAYLE McCARTER: No, sir, the only thing that I
4 heard was that a lady had been, you know, in an accident or, you
5 know,... That's the only news. I don't watch the news or read
6 the newspaper.

7 THE COURT: Okay. They won't make a lot of money
8 selling you newspapers, then, will they?

9 JUROR DAYLE McCARTER: No. They can't even give them
10 away to me.

11 THE COURT: Okay. I take it, then, you've not formed
12 an opinion?

13 JUROR DAYLE McCARTER: No, sir.

14 THE COURT: Okay.

15 Mr. Underwood, same thing.

16 JUROR UNDERWOOD: At the time that it happened I did
17 hear it on the radio and TV.

18 THE COURT: Sure.

19 JUROR UNDERWOOD: The basis of the charges. And I did
20 see it in this morning's newspaper, the Journal.

21 THE COURT: Okay. Have you formed an opinion about the
22 guilt or innocence of anyone?

23 JUROR UNDERWOOD: No, I don't even know the technical
24 part of either one of them.

25 THE COURT: Okay. All right. Okay, thank you.

1 Mr. Parton?

2 JUROR PARTON: Yes, sir, I've seen it on the news and
3 in the newspapers. I haven't formed an opinion, but I still --
4 I don't know if I'd feel comfortable in being on the jury.

5 THE COURT: Based on the opinion that you've formed?

6 JUROR PARTON: Yes, sir.

7 THE COURT: And you do not think that you could base
8 your verdict solely on what you see and hear from this witness
9 stand?

10 JUROR PARTON: Right, sir.

11 THE COURT: Okay, we'll let you go, Mr. Parton. Thank
12 you.

13 (Juror Parton is excused.)

14 THE COURT: Mr. Breeden, have you...?

15 JUROR BREEDEN: I've heard about it (sic) on the news
16 and the newspapers ever since it happened.

17 THE COURT: It's been some time since we had any
18 extensive coverage about it. I understand there've been some
19 articles in today's papers.

20 JUROR BREEDEN: Yeah.

21 THE COURT: Have you formed an opinion about anyone's
22 guilt or innocence based on what you've seen or here?

23 JUROR BREEDEN: Yes, I have.

24 THE COURT: Do you feel that you could base your verdict
25 in this case, if you were called upon to make a verdict, based

1 solely on the evidence that comes from this witness stand?

2 JUROR BREEDEN: I don't -- I don't think I could be
3 fair.

4 THE COURT: All right, sir, we'll let you go,
5 Mr. Breedon. Thank you.

6 (Juror Breedon is excused.)

7 THE COURT: Mr. Webb?

8 MR. MILLER: Your Honor, at some point we'd like to
9 approach the bench.

10 THE COURT: Well, just a moment.

11 JUROR WEBB: Yes, I've read the newspaper articles and
12 seen the TV news on it quite some time back.

13 THE COURT: Have you formed an opinion about the guilt
14 or innocence of any party?

15 JUROR WEBB: No, I have not.

16 THE COURT: Okay. All right, sir. And Mr. Seaton?

17 JUROR SEATON: I've -- I've formed an opinion. I even
18 know stuff that the boys done before they ever committed the
19 crime.

20 THE COURT: Well, now, don't say anything about what --
21 anything else. All we can base our verdict on, in this case,
22 is only then as it comes from the witness stand.

23 JUROR SEATON: Yeah, but I've formed an opinion.

24 THE COURT: And you don't think that could be changed
25 by an evidence in this case? In other words,...

1 JUROR SEATON: Not being innocent, I don't believe.

2 THE COURT: I'm sorry?

3 JUROR SEATON: Don't occur as them being innocent, it
4 couldn't be formed.

5 THE COURT: We'll let you go, Mr. Seaton.

6 (Juror Seaton is excused.)

7 MR. DANIEL: Your Honor, could we approach the bench?

8 THE COURT: Surely. Sure.

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

10 MR. DANIEL: This is the very reason we asked for
11 individual voir dire. This is just poisoning the rest
12 of this jury. This is not fair. He's talking about
13 things these boys have done, and my boy doesn't even
14 have a record. He doesn't have a felony record. Am I
15 right, Al? My boy doesn't even have a felony record,
16 and he's talking about things they've done before this.
17 And here he's done blurted out things they've done, and
18 we'd ask...

19 THE COURT: Well, he didn't say specifically what they
20 did.

21 MR. DANIEL: Yeah, but...

22 THE COURT: He's already -- I understand.

23 MR. DANIEL: We would ask again for severance, and ask
24 Your Honor to excuse the rest of these jurors that's
25 heard this, because this is just no way these boys are

1 ever going to get a fair trial under these
2 circumstances. And I'm not faulting Your Honor for
3 starting to try it this way, but I'm just saying we're
4 to the point that -- that there's no way. A man speaks
5 up and says, "I can't be -- tell them innocent (sic).
6 I know things they've done before this." Well, the
7 jury's going to think that my man's got a criminal
8 record, been into crimes. They've give us some
9 information the co-defendant has done, and things that
10 he's done. But it's tainting our client. And there's
11 just no way you can sit back here and listen to all this
12 stuff and be fair, and us start with a fair -- a fair
13 state.

14 **GENERAL SCHMUTZER:** Your Honor, I don't have anything
15 to add. I don't think at this point that there's any
16 problem. I do think that maybe they need to be
17 instructed not to say what they know about it.

18 **MR. WEBB:** Your Honor, what the problem is, is the
19 damage is already done. Everybody's heard it.

20 **THE COURT:** Well, Mr. Webb, I understand that you don't
21 want to try this case here today, and I understand you
22 want it severed, and I understand all that. But
23 Mr. Seaton---I believe it was---did not say anything --
24 exactly what it was he knew or didn't know. He said he
25 had an opinion, and he was excused.

1 Now, you know, I think these jurors have been -- at
2 least the ones that we've talked to here have been
3 honest with us, and I've excused 1, 2, 3, 4, 5. So, I
4 will deal with it. I'm going to continue at this point
5 to bring them into the box and ask them the questions
6 as it now stands. Thank you.

7 (The bench conference having been concluded, the
8 following proceedings were had in open court.)

9 **THE COURT:** Ladies and gentlemen of the jury, and the
10 jury panel in the courtroom, as I stated earlier, all people,
11 whether it's jurors or judges or lawyers or whoever have various
12 opinions about things. If you have formed an opinion about
13 guilt or innocence, I want you to tell us that fact, but do not
14 tell us what your opinion is.

15 Also, if you think you might know something about one
16 of these defendants that might have a bearing upon your opinion,
17 tell us that; but do not tell us the particulars of it.
18 Because, otherwise, we do not want anyone else to form an
19 opinion about any facts that you may or may not know. So do not
20 express your opinions, but just tell us the fact of an opinion.

21 Now, in regards to the jurors who are still in the box,
22 on the issue of the death penalty do any of you have any moral
23 reservations that would prohibit you from considering the death
24 penalty as an option in sentencing? Any of you who are sitting
25 in the box now? If you do, raise your hand.

1 (No jurors respond audibly.)

2 **THE COURT:** Do any of you feel that just because someone
3 is convicted, might be convicted of first degree murder, would
4 you automatically sentence them to death? If you would, raise
5 your right hand.

6 (Certain jurors respond.)

7 **THE COURT:** Okay, Mr. Webb, as I understand what you
8 have indicated, if you -- if you found someone in any case---
9 it's not just this case, but in any case---guilty of first
10 degree murder, it's your feeling that they would suffer the
11 death penalty?

12 **JUROR WEBB:** Yes, sir.

13 **THE COURT:** All right, sir. We'll excuse you, Mr. Webb.
14 Thank you.

15 (Juror Webb is excused.)

16 **THE COURT:** Anyone else? All right.
17 General Schmutzer, you may proceed.

18 **GENERAL SCHMUTZER:** Thank you very much, Your Honor.
19 Good morning.

20 (Certain jurors respond.)

21 **GENERAL SCHMUTZER:** Let me make sure I have the names
22 in the right place, have you all named right, and if I can, get
23 your occupations and where you live rather quickly. I'd sure
24 appreciate it. Is it Ms. McCarter?

25 **JUROR McCARTER:** Dayle.

1 GENERAL SCHMUTZER: Okay. And where do you live?
2 JUROR McCARTER: Maryville.
3 GENERAL SCHMUTZER: All right. And your occupation?
4 JUROR McCARTER: Hostess.
5 GENERAL SCHMUTZER: Okay. And where is that?
6 JUROR McCARTER: Cracker Barrel.
7 GENERAL SCHMUTZER: Okay, thank you.
8 Mr. Underwood?
9 JUROR UNDERWOOD: I'm Kyle Underwood. I live in Sevier
10 County; Strawberry Plains is the mail route.
11 GENERAL SCHMUTZER: All right, sir. And your
12 occupation, sir?
13 JUROR UNDERWOOD: I sing Gospel music, and I work part-
14 time as an insurance agent.
15 GENERAL SCHMUTZER: Okay. Do you work with a -- any
16 particular company, or are you independent agent?
17 JUROR UNDERWOOD: I'm independent with AFLAC. I just
18 work part-time with them. I got (indiscernible) here sometime
19 back, and I just work very limited in insurance now. I sing
20 most of the time.
21 GENERAL SCHMUTZER: Sing most of the time? Okay, sir.
22 Thank you very much.
23 Let's see, I had on this Mr. Ogle, is that correct?
24 JUROR OGLE: (No audible response.)
25 GENERAL SCHMUTZER: And where do you live, please?

1 JUROR OGLE: (Inaudible).
2 GENERAL SCHMUTZER: And your occupation?
3 JUROR OGLE: I'm a full-time student, and I also work.
4 GENERAL SCHMUTZER: Where are you a student, sir?
5 JUROR OGLE: Walter State Community College.
6 GENERAL SCHMUTZER: Okay. And what are you studying?
7 JUROR OGLE: Going to get a general degree, and I
8 haven't decided which one.
9 GENERAL SCHMUTZER: You haven't made up your mind yet.
10 Okay. You say you're also employed? Where is that?
11 JUROR OGLE: (Inaudible).
12 GENERAL SCHMUTZER: Okay, thank you, sir. And
13 Mr. McClellan?
14 JUROR McCLELLAN: Right.
15 GENERAL SCHMUTZER: And where do you live, please?
16 JUROR McCLELLAN: Sevierville. And I'm a computer
17 salesman.
18 GENERAL SCHMUTZER: Thank you, sir. Mr. -- is it Gaps?
19 JUROR GAPS: G-a-p-s, Gaps, yes, sir.
20 GENERAL SCHMUTZER: And where do you live, please, sir?
21 JUROR GAPS: Seymour.
22 GENERAL SCHMUTZER: And your occupation, sir?
23 JUROR GAPS: Car salesperson, Riverside Motors.
24 GENERAL SCHMUTZER: Thank you, sir.
25 Mr. Young?

1 JUROR YOUNG: I live in Sevierville.

2 GENERAL SCHMUTZER: Okay. And your occupation, sir?

3 JUROR YOUNG: Retired.

4 GENERAL SCHMUTZER: Okay.

5 JUROR YOUNG: Well, I'm on disability.

6 GENERAL SCHMUTZER: Okay, sir. And you retired from...?

7 JUROR YOUNG: Ross Aluminum Foundry, Sidney, Ohio.

8 GENERAL SCHMUTZER: Okay, sir. Thank you very much.

9 To start right off the bat, and if I can, those of you,
10 if you can hear me, if you'd listen to my questions it might
11 shorten things some as we go along. If you can -- if you have
12 a particular answer to it, needs to be brought to our attention,
13 if you would just remember that when you come down, I would sure
14 appreciate it.

15 Any of you all -- this case, as His Honor's indicated,
16 is going to last some time, quite frankly. It's not going to
17 be over and done with today. It's going to last a number of
18 days. Any of you have any difficulties or problems with that,
19 being tied up in this case during that period of time? I know
20 everybody has problems. I don't mean -- we all do. I know it's
21 going to be an inconvenience. But I'm talking about something
22 that would keep you from having your entire attention riveted
23 on the evidence here and the law as given to you by the Court
24 in trying this case and doing -- and doing justice? You started
25 to raise your hand, Mr. Ogle?

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

Voir Dire

1 JUROR OGLE: Yes, sir, 'cause I have school on Monday,
2 Wednesdays, and Fridays.

3 GENERAL SCHMUTZER: Obviously, you know, you'd have to
4 miss school, or some parts of school. Do you think that would
5 be such that you'd be sitting here worried about or thinking
6 about school, rather than paying attention to the evidence in
7 the case?

8 JUROR OGLE: Yeah.

9 GENERAL SCHMUTZER: You do?

10 THE COURT: What are you looking at me for?

11 GENERAL SCHMUTZER: Court may have...

12 THE COURT: Oh, okay. Having been a professional
13 student most of my life, I can well appreciate the problems that
14 that'll put you in, Mr. Ogle. And -- and, without some prior
15 arrangement, I would suspect most professors would not look
16 kindly upon your absence, would they?

17 (No jurors respond audibly.)

18 THE COURT: Are you asking me to let you go?

19 JUROR OGLE: Yes.

20 THE COURT: You got it.

21 (Juror Ogle is excused.)

22 GENERAL SCHMUTZER: Did anyone else raise their hand?
23 Mr. Underwood?

24 JUROR UNDERWOOD: You was talking about the time frame.
25 How long do you think, as far as the jury would be tied up, you

1 know, like for...?

2 **GENERAL SCHMUTZER:** I honestly wish I knew, but it'll
3 be days.

4 **JUROR UNDERWOOD:** Is it -- on the weekends I told you
5 that's where my work was, that's where we -- I am tied up on --
6 like on Saturdays and Sundays, just... I don't -- not even
7 familiar with the court. It run through the weekends, too,
8 or...?

9 **THE COURT:** If -- if the case did conclude by, say,
10 Friday, I would hold court on Saturday; I would not hold court
11 on Sunday. But if you are a member of this jury panel, of
12 course, you would not be free to leave.

13 **JUROR UNDERWOOD:** I'd run into complications with that,
14 as far as my work.

15 **THE COURT:** Do you have other people who can -- who can
16 fill in for you? I mean, our -- our problem, Mr. Underwood, to
17 be real honest with you---and it's why we had to call this large
18 number of people here---is that we understand that, but we have
19 to have a large pool from which to draw jurors. Now, if it's
20 some real compelling business reason, I can let you go. But
21 just because you might have to miss some work, I can't let you
22 go on that occasion. So, you tell me.

23 **JUROR UNDERWOOD:** Why did you have to put it like that?
24 No, I've got -- there's -- say there's no exception. I -- there
25 is avenues I can take, but it would be...

1 THE COURT: Sure.

2 JUROR UNDERWOOD: ...I can see where it could be
3 difficult.

4 THE COURT: I understand that, sir.

5 JUROR UNDERWOOD: But it -- I mean, as far as saying
6 there's nobody that I couldn't do, I do have. But, I mean, it
7 would be very hard to...

8 THE COURT: If this going to expose you to a personal
9 liability on a breach of contract or something like that, I
10 could consider that, Mr. Underwood. If it's just going to
11 inconvenience you, you know, in all honesty I can't -- I can't
12 do it. I'd like to. I'd like to turn all of you loose, but I
13 just can't do that. So you...

14 JUROR UNDERWOOD: Well, I can't honestly say I --
15 because I've had occasions where there's been sickness, that
16 I've had to work around it.

17 THE COURT: Sure.

18 JUROR UNDERWOOD: It's going to be very inconvenient
19 for me.

20 THE COURT: I understand that, Mr. Underwood, and I
21 certainly appreciate that. And I say, I'd like to let everybody
22 go, but I can't. All right, General.

23 GENERAL SCHMUTZER: I take it, Mr. Underwood, you
24 understand, then, and -- obviously, though it might be an
25 inconvenience, if you were inconvenienced if you were selected

1 as a juror and that did happen, you wouldn't let that stand in
2 your way of trying this case and listening to the evidence and
3 reaching a just verdict, whatever that might be?

4 JUROR UNDERWOOD: No.

5 GENERAL SCHMUTZER: You wouldn't hold either side
6 responsible that the case went on?

7 JUROR UNDERWOOD: Just hold it against the judge.

8 THE COURT: I understand.

9 GENERAL SCHMUTZER: Thank you.

10 Was there anyone else? I think that was it, that raised
11 their hand.

12 This case---and this is part of the reason why this case
13 is going to take some time---is a circumstantial evidence case.
14 Basically, what that means is, there's not going to be anyone
15 take the stand and tell you that they're an eyewitness to this
16 crime. The murder took place in a very remote area where there
17 wasn't anybody else around.

18 His Honor, at the appropriate time, will go into you --
19 with you the law pertaining to circumstantial evidence. The
20 law basically is that the State can rely upon and you, as
21 jurors, can convict on circumstantial evidence; and that, and
22 that alone. And it goes on and tells you what circumstances you
23 can do that. Any of you, as you sit there, think that you could
24 not find someone guilty based upon circumstantial evidence, even
25 though the law says that you can? Just flat-out, on the front

1 end says, "No, I can't do that"?

2 (No jurors respond audibly.)

3 **GENERAL SCHMUTZER:** I take it by your silence none of
4 you feel that way.

5 As His Honor mentioned, the burden of proof is with the
6 State to prove both of these defendants guilty; and the burden
7 is beyond a reasonable doubt. It's not absolute certainty. The
8 State does not have to prove this case to an absolute certainty.
9 Been said, and you've probably heard it, the only certain things
10 in life are death and taxes. But you understand that? There
11 is a difference. Do any of you think that you would hold the
12 State to something more than what is required, and that is
13 beyond a reasonable doubt?

14 And the key word to that is "reasonable." Not just any
15 doubt; not a captious nor imaginary doubt; but an honest doubt,
16 after you've looked at all the evidence. And "reasonable" means
17 by using your reason and common sense, you then -- you have a
18 doubt. But not absolute certainty. Any of you think that you'd
19 require the State to prove it to an absolute certainty?

20 (No jurors respond audibly.)

21 **GENERAL SCHMUTZER:** I take it you wouldn't. You'll
22 follow the law, whatever that is His Honor gives you with that
23 regard.

24 There's going to be evidence of drinking, drinking beer
25 in this case, by both the defendants and the victims. As you

1 sit there, do any of you feel so strongly about the use of
2 alcoholic beverages that you think it would stand in your way
3 in being fair in this case? We're not taking a poll on whether
4 you're for or against drinking or for or against the consumption
5 of alcoholic beverages. But some people are so opposed, say,
6 to the use of alcohol that they just -- they can't dismiss that,
7 they can't... They can -- obviously you're going to consider
8 that to the extent it may be relevant in the case, itself. But
9 if one of you say, "Well, if some -- you know, I just -- that's
10 something that would cloud my ability to decide the case," that
11 is, the use of alcohol in the case?

12 (No jurors respond audibly.)

13 **GENERAL SCHMUTZER:** I take it, by your silence, none of
14 you have a problem with that.

15 The -- in this case the State expects to show the motive
16 for this killing, for this murder. However, the State is
17 legally under no obligation to do so. Motive is not an element
18 of the offense. The State only has to show that it was done --
19 that the murder was done deliberately, premeditatedly. Any of
20 you think that you understand that; that motive, though the
21 State expects to go forward with that, is not an element of the
22 offense. That, even if you had some question about the motive,
23 if the State otherwise carried the burden of proof on the
24 elements of the offense, then legally they're guilty, even
25 though you may still say, well -- you know, because quite

1 frankly it's hard sometimes to fathom true motive. You can't
2 crawl into people's minds. But any of you have any difficulty
3 with that, understanding that and separating the two in this
4 case?

5 (No jurors respond audibly.)

6 **GENERAL SCHMUTZER:** I take it by your silence you don't.

7 I had asked about -- about any problems, you know, with
8 sitting as jurors. Let me ask you this: I guess I'm fairly
9 loud; His Honor is; but there'll be some witnesses that won't
10 be quite so loud in this courtroom. Do any of you have any
11 hearing problems or any hearing difficulties?

12 (Certain jurors respond.)

13 **GENERAL SCHMUTZER:** Okay, if you'll make that known when
14 you come down, I would sure appreciate it, sir. Ma'am. 'Cause
15 I may forget it in the meantime.

16 That's important, obviously, that you be able to hear
17 all the evidence, because you can't make a decision unless you
18 have it all in front of you. But same token, any problem say
19 with seeing? There'll be some charts and picture -- photographs
20 passed around to you from time to time. Any of you have any
21 difficulties with seeing?

22 (No jurors respond audibly.)

23 **GENERAL SCHMUTZER:** I take it by your silence you don't.

24 And for those of you in the box, there's no problem with
25 hearing, either?

1 (No jurors respond audibly.)

2 **GENERAL SCHMUTZER:** As you all sit there right now, and
3 particularly the five of you all, can you think of any reason
4 or anything that comes to mind that you'd think you'd need to
5 bring to our attention, the attention of defense counsel, or the
6 Court that might cause you some difficulty in being a juror in
7 this particular case?

8 **JUROR UNDERWOOD:** It was earlier, when the judge was
9 talking awhile ago, when he was talking about capital punishment
10 or how the laws are written in this state.

11 **GENERAL SCHMUTZER:** Yes, sir.

12 **JUROR UNDERWOOD:** I do not have a definite either way,
13 but there are, even when he was talking, in my mind I was
14 thinking about there may need -- there have been certain cases
15 where it was first degree, premeditated under certain conditions
16 where maybe some person had been harassed or whatever, but
17 there's certain things, as far as this premeditated, senseless,
18 that I just have a problem with anything besides the death
19 sentence.

20 **THE COURT:** Let me ask you this, Mr. Underwood.
21 Tennessee law has certain factors that, if you first find
22 someone guilty of first degree murder, then there would be a
23 separate sentencing hearing, okay? I would charge you and the
24 other members of the jury on the statutory mitigating factors
25 that you must consider. And I would charge you on the

1 applicable aggravating factors that -- in a particular case that
2 you should consider. Do you tell me, sir, that you could follow
3 that law in determining whether or not you would consider the
4 death penalty applicable in this case?

5 JUROR UNDERWOOD: Yeah, I understand what you're saying.

6 THE COURT: Yes, sir.

7 JUROR UNDERWOOD: The only reservation that I have about
8 myself...

9 THE COURT: Yes, sir.

10 JUROR UNDERWOOD: ...is, you know, I -- what you -- what
11 everything you're saying I don't know exactly what circumstances
12 would be leading up to this.

13 THE COURT: Right.

14 JUROR UNDERWOOD: You're getting to the hypothetical.

15 THE COURT: All through the case, exactly.

16 JUROR UNDERWOOD: But it'll get in -- you know, I can
17 honestly say that there were certain cases where I don't -- I
18 don't think that everyone of them would have to be death
19 penalty.

20 THE COURT: Right.

21 JUROR UNDERWOOD: But just about every case that I have
22 just read about extensive, and formed an opinion, premeditated
23 murder, to me, is a very serious thing.

24 THE COURT: Well, sure it is.

25 JUROR UNDERWOOD: And I don't think it was meant to --

1 for an eye for an eye, I think it's a deterrent for crime in
2 this country that... I just think it's the only deterrent that
3 we really have in court, so...

4 THE COURT: Okay, well, let me ask you this. As I say,
5 as I said earlier -- as I asked you earlier, would you
6 automatically impose the death sentence in every case of first
7 degree murder?

8 JUROR UNDERWOOD: (No audible response.)

9 THE COURT: Okay. Okay. And -- and then, would you
10 just consider it as an option in sentencing, and follow the law
11 that the Court gives you?

12 JUROR UNDERWOOD: Yeah.

13 THE COURT: All right, sir. Thank you.

14 GENERAL SCHMUTZER: Anyone else have anything they
15 needed to bring to... Thank you, Mr. Underwood.

16 Ms. McCarter?

17 JUROR McCARTER: I don't know if it has anything to do
18 with the case. I mean, it has nothing against -- to do with me.
19 My husband works at the same place as the victim's husband.

20 GENERAL SCHMUTZER: Okay.

21 JUROR McCARTER: We don't know him. We don't -- I don't
22 know anybody -- I don't know the defendant, I don't know the
23 victim.

24 GENERAL SCHMUTZER: Up at Cherokee?

25 JUROR UNDERWOOD: Right. I'm just -- you know, for

1 anybody -- you know, I don't have any...

2 THE COURT: Thank you.

3 GENERAL SCHMUTZER: Sure.

4 THE COURT: Is there anything about that that would
5 cause you a problem, one way or another, if you were called upon
6 to act as a...?

7 JUROR McCARTER: I don't know anything about the case.
8 I don't -- you know,...

9 THE COURT: But you wouldn't feel obligated to explain
10 your verdict to any person, whatsoever?

11 JUROR McCARTER: Right.

12 THE COURT: Okay.

13 JUROR McCARTER: And we -- it's not -- it's just that
14 I just wanted to let you know that...

15 THE COURT: Thank you.

16 JUROR McCARTER: ...you know, that he -- he does work
17 -- he doesn't even know them, they just work at the same
18 company.

19 THE COURT: Sure. Okay. Thank you.

20 GENERAL SCHMUTZER: Appreciate that. Anyone else?

21 (No jurors respond audibly.)

22 GENERAL SCHMUTZER: I guess not. Thank you, Your Honor.

23 MR. MILLER: Approach the bench, Your Honor?

24 THE COURT: Yes.

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

1 **MR. MILLER:** Renew the motion again for independent voir
2 dire, that allowing the juror, Mr. Underwood, to talk
3 about the deterrent of the death penalty, and this is
4 the only deterrent there is in such a case, that taints
5 jurors, taints the entire panel. And I think we need
6 individual voir dire on those issues.

7 And also, I think Mr. Underwood doesn't understand
8 the law, doesn't understand the difference what's
9 premeditated murder and first degree murder. He was
10 unequivocal, I think, when talking about premeditated
11 murder, that all cases of premeditated murder deserve
12 the death penalty.

13 **THE COURT:** No, I think he -- he didn't say that. He
14 said that he had seen cases in which he had formed an
15 opinion of premeditation, that he thought that they
16 should have received the death penalty. But he answered
17 under oath that he would not automatically sentence
18 someone to death just because of a finding of first
19 degree murder, and that's the standard that the
20 Tennessee law requires to...

21 **MR. MILLER:** It was just my impression that he was
22 confusing, I thought, that first degree murder and
23 premeditated murder were two different things.

24 **THE COURT:** If you want to inquire further of him on
25 examination, the Court will let you do that. Okay?

1 Let's move on.

2 MR. MILLER: Your Honor want to rule on my motion to...

3 THE COURT: Overruled. Overruled.

4 (The bench conference having been concluded, the
5 following proceedings were had in open court.)

6 THE COURT: Who's going to proceed, first? Are you,
7 Mr. Miller?

8 MR. MILLER: Got up here barely just in time to say good
9 morning. Didn't know if we were going to make it or not.

10 As His Honor has told you, the process we're now going
11 through is called voir dire, which basically means to speak the
12 truth. Each of you jurors have raised your hands and sworn to
13 the Court and to us attorneys and to our clients that you will
14 truthfully answer the questions that we ask you.

15 It's a very cumbersome process, very uncomfortable for
16 you all and for us attorneys. And if you feel uncomfortable,
17 I feel twice as bad, twice as uncomfortable than you do, if that
18 makes you feel any better.

19 I've got a long list of questions. A lot have already
20 been covered either by Mr. Schmutzer or His Honor, and I'll try
21 not to be repetitious, and I apologize if I do.

22 Mr. McCarter, is it? Excuse me, Mr. Underwood, I didn't
23 get your first name.

24 JUROR UNDERWOOD: Kyle, K-y-l-e.

25 MR. MILLER: Kyle? There was a little bit of possibly

1 misunderstanding when the judge was talking to you. Was it your
2 position of every case of premeditated murder, the person
3 deserves the death penalty? Was that your position?

4 JUROR UNDERWOOD: No, they -- if I understand
5 premeditated, it's where it's not spontaneous, it's where
6 somebody lays a definite plan to murder somebody. And I have
7 seen cases where I thought where they had been -- either that
8 person maybe had -- that was even murdered had harassed a person
9 and pushed him to a point where they premeditated.

10 MR. MILLER: I understand.

11 JUROR UNDERWOOD: And that's the only case...

12 THE COURT: Okay, let me ask you this, then,
13 Mr. Underwood. Based on your understanding of premeditation as
14 I've heard you explain it, would you automatically, in every
15 case, feel that someone who -- who might be found guilty of
16 that, should have the death penalty in every...?

17 JUROR UNDERWOOD: Talking about just premeditated, not
18 looking at any circumstances?

19 THE COURT: Right.

20 JUROR UNDERWOOD: No.

21 THE COURT: Okay. All right, sir.

22 MR. MILLER: Mr. Schmutzer and Mr. Green were introduced
23 to you all earlier. Does anybody have an association or
24 relationship with them of any kind, you now in the box? Have
25 they ever assisted you in prosecuting a case; have you ever

1 filed a report with their office?

2 (No jurors respond audibly.)

3 MR. MILLER: How many of you now sitting in the jury
4 box have been victims of any type of crime?

5 JUROR UNDERWOOD: I just had my house broke into one
6 time. Never did know who done it.

7 MR. MILLER: Okay. Did you file a report on that?

8 JUROR UNDERWOOD: No.

9 MR. MILLER: Anybody else been a victim of break-ins or
10 thefts or anything like that?

11 (No jurors respond audibly.)

12 MR. MILLER: Have any of you all ever testified as a
13 witness in any type of case, civil or criminal?

14 (No jurors respond audibly.)

15 MR. MILLER: Do any of you now in the box have close
16 association with anybody that's involved in the law enforcement
17 field? Close friends or relatives?

18 (No jurors respond audibly.)

19 MR. MILLER: Mr. Underwood?

20 JUROR UNDERWOOD: No.

21 MR. MILLER: Okay. And the reason I ask that question
22 is, none of you would give their testimony any more credibility
23 than you would anybody else, just because they happen to wear
24 a uniform or a badge, would you? They're just like everybody
25 else; the uniform doesn't change them. Do we all agree on that?

1 (No jurors respond audibly.)

2 MR. MILLER: The charge, as you well know by now, is
3 first degree murder. The burden of proof on the State, as
4 you've heard by now, is beyond a reasonable doubt. That's
5 beyond a reasonable doubt the State must prove each and every
6 element of first degree murder. Now, there are several elements
7 the State must prove. If they fail to prove any of those
8 elements, they have not proven their case beyond a reasonable
9 doubt. Can each of you follow that law, and if they don't prove
10 each element beyond a reasonable doubt, by itself, you'll find
11 our clients not guilty? Can you follow that law? Can you hold
12 the State to that burden?

13 (No jurors respond audibly.)

14 MR. MILLER: Nobody feels that burden's too tough?

15 (No jurors respond audibly.)

16 MR. MILLER: You all understand why the burden is that
17 tough on the State, to protect innocent people.

18 First degree murder basically has four elements: #1)
19 the State must prove that the defendants unlawfully killed the
20 victim. Now, that particular element has, as I see it, several
21 sub-elements that you can break down.

22 First of all, have they proved that the defendants did
23 this beyond a reasonable doubt? They must prove that beyond a
24 reasonable doubt. They also have to prove that the victim died
25 as a result of some criminal agency, as opposed to it being

1 accidental or any other thing. Can you -- will you hold the
2 State to the burden on that issue? And thirdly, within that
3 first category, that the killing was unlawful.

4 Second element to the first degree murder is that the
5 killing was an intentional killing; third, that it was a
6 deliberate killing; and, fourth, that it was premeditation
7 (sic). The State must prove all these things: that the murder
8 was premeditated, and intentional, and deliberate. And if they
9 fail to prove any of these four elements, you must find
10 Mr. Dellinger and Mr. Sutton not guilty. Will each of you
11 follow the law as the judge gives it to you on those elements,
12 and hold the State to that burden?

13 (No jurors respond audibly.)

14 MR. MILLER: A fourth -- or a fifth element that's
15 necessary for the State to prove in every case, and it's by a
16 little bit different standard of proof, the State must prove
17 venue by a preponderance of the evidence. In other words, they
18 must prove not only that somebody was killed; that these people
19 did it; that they did it intentionally, premeditatedly, and with
20 deliberation; they must prove that they did this act in Sevier
21 County. Everybody understand it? Can you follow that law of
22 venue? If it wasn't done in Sevier County, a Sevier County
23 jury, you people, can't render judgment on that.

24 His Honor has told you Mr. Dellinger and Mr. Sutton are
25 presumed innocent. That's what the law requires, and again for