

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

AT SEVIERVILLE, TENNESSEE

FILED

MAR 7 1994
SUPREME COURT CLERK

STATE OF TENNESSEE,

Appellee,

-VS-

GARY WAYNE SUTTON and,
JAMES ANDERSON DELLINGER

Appellants.

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CASE # 5033, 5035

TRANSCRIPT OF THE EVIDENCE:

Trial

February 16-24, 1993

Volume 7 of 22 Volumes

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

APPEARANCES:

FOR THE STATE

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

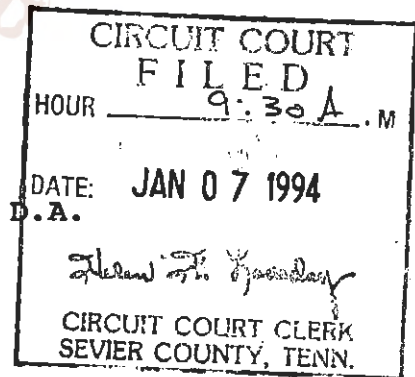
FOR THE DEFENDANT SUTTON

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

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



1 examinations, you don't hear the defense side 'til you get into
2 the courtroom. So that's the reason we've asked you about this
3 publicity. We just want to start fair. Can you look over there
4 at Gary Sutton right now and say, "Gary, you're innocent"? Can
5 you do that? Can you do it, Mr. Gibson?

6 **JUROR GIBSON:** Yes, sir, I can.

7 **MR. DANIEL:** Because that's the law, and you'd want that
8 same law applied to you or your -- if your family or somebody
9 was sitting over there, is that right?

10 **JUROR GIBSON:** (No audible response.)

11 **MR. DANIEL:** Thank you very much.

12 (Peremptory Challenge Slip #16 was submitted, and the
13 following juror was excused: Juror Taylor.)

14 (The following juror was called to fill the jury box:
15 Joyce Metcalf.)

16 **THE COURT:** Good morning, Ms. Metcalf. Still morning,
17 isn't it?

18 Have you heard all the questions that have been asked
19 by the Court and by counsel in this case?

20 **JUROR METCALF:** Yes, I have.

21 **THE COURT:** Do you understand, feel like you have a good
22 working knowledge of the standard of proof that the Court has
23 explained, about it being beyond a reasonable doubt and a moral
24 certainty? You understand that?

25 **JUROR METCALF:** (No audible response.)

1 **THE COURT:** Do you understand that these gentlemen are
2 here only because they've been indicted for a crime, do you
3 understand that? That's an accusation, only. Do you understand
4 they don't have any burden of proof. They don't have to prove
5 their innocence in this case.

6 **JUROR METCALF:** (No audible response.)

7 **THE COURT:** Have you read or heard anything about the
8 case before you came down here today?

9 **JUROR METCALF:** (Inaudible).

10 **THE COURT:** Okay. Based on what you've read or heard,
11 have you formed any opinion about the guilt or innocence of
12 either of these gentlemen?

13 **JUROR METCALF:** (Inaudible).

14 **THE COURT:** Okay, is that opinion such that it cannot
15 be changed by anything that came from the witness stand? In
16 other words, could you base your verdict, ma'am, and lay aside
17 your opinions, and base your verdict solely and completely from
18 the evidence that comes from this witness stand, and the law
19 that I would instruct you on at the conclusion?

20 **JUROR METCALF:** Yes.

21 **THE COURT:** Okay. Have you heard what the Court has
22 said about the death penalty?

23 **JUROR METCALF:** Yes.

24 **THE COURT:** Do you understand that just because I talk
25 to you about the death penalty doesn't mean that I think anyone

1 is guilty?

2 JUROR METCALF: (No audible response.)

3 THE COURT: And do you understand that I must talk to
4 you and ask you that question?

5 JUROR METCALF: Yes.

6 THE COURT: Okay. Do you have any moral or ethical
7 reservation against considering the death penalty as an option
8 in sentencing if someone is convicted of first degree murder?

9 JUROR METCALF: Yes, I do.

10 THE COURT: You do? Okay, could you consider it?

11 JUROR METCALF: No.

12 THE COURT: You could not consider it? We'll let you
13 go. Thank you.

14 (Juror Metcalf is excused.)

15 (The following juror was called to fill the jury box:
16 Howard Houck.)

17 THE COURT: Mr. Houck, I believe you were here
18 yesterday, weren't you?

19 JUROR HOUCK: I believe so.

20 THE COURT: And glad to be here today.

21 JUROR HOUCK: Always.

22 THE COURT: Okay. And you've heard all the questions
23 and comments for two days, I believe, haven't you?

24 JUROR HOUCK: (No audible response.)

25 THE COURT: Okay. Has there anything that's raised an

1 issue (sic) in your mind as to whether or not you could be fair
2 and impartial to both sides in this lawsuit?

3 JUROR HOUCK: No, sir.

4 THE COURT: Okay. Do you -- have you read or heard
5 anything about the case before you came here?

6 JUROR HOUCK: (Inaudible).

7 THE COURT: Okay. Have you formed an opinion about the
8 guilt or innocence of either of these gentlemen here based on
9 anything you've read or heard?

10 JUROR HOUCK: No.

11 THE COURT: Okay. Do you understand what the Court said
12 to you about the death penalty? I believe we talked about that
13 yesterday, as well, didn't we? I'll ask you again, sir: Do you
14 have any moral or ethical reservations about considering the
15 death penalty as an option in sentencing?

16 JUROR HOUCK: No.

17 THE COURT: Okay. And, on the other hand, sir, would
18 you automatically vote in every case to impose the death
19 sentence in a first degree murder case?

20 JUROR HOUCK: No, sir.

21 THE COURT: All right, sir. General Schmutzer, you may
22 proceed.

23 GENERAL SCHMUTZER: Mr. Houck, where do you live,
24 please, sir?

25 JUROR HOUCK: Kodak.

1 **GENERAL SCHMUTZER:** And your occupation?

2 **JUROR HOUCK:** Retired.

3 **GENERAL SCHMUTZER:** Okay. And where'd you retire from?

4 **JUROR HOUCK:** Peterbilt in Knoxville.

5 **GENERAL SCHMUTZER:** Thank you.

6 Any problems with the fact this is a circumstantial
7 evidence case? Cause you any problems at all?

8 The -- as an example in this case, the victim's body was
9 burned not only beyond recognition, but almost virtually
10 cremated. That, in looking at the body only, there's no way to
11 tell the cause of death; but in looking at the facts and
12 circumstances, things that were found, things like this, can
13 certainly infer the cause of death based upon the other
14 evidence. That is what circumstantial evidence is about.

15 **MR. DANIEL:** Object to him stating what the inference
16 is.

17 **THE COURT:** As has been stated, Mr. Houck, and to the
18 other members of the jury, and as I understand what General
19 Schmutzer has said, there is no direct evidence as to cause of
20 death. And the question is: Could you look at all of the
21 circumstances in the case, including, I take it, how the body
22 may have been found and other evidence, and base your decision
23 on that? Could you do that, Mr. Houck?

24 **JUROR HOUCK:** (No audible response.)

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

1 **GENERAL SCHMUTZER:** That's all. Thank you very much,
2 Your Honor.

3 Mr. Houck, would you -- we've talked about the burden
4 of proof here for awhile, and you've heard that. And would you
5 hold the State to that burden and no more? Not just any doubt,
6 but a reasonable doubt. And we find out what's reasonable by
7 using our reason and common sense, and it has to be based on
8 facts. The fact that something may be said doesn't necessarily
9 make it so. You know, you can take what's said and hold it up
10 other facts that you know, and it may be that whatever's said
11 just doesn't -- it's not there. It's wrong. Do you have any
12 problems with that? That's using reason and common sense. In
13 other words, don't speculate, don't guess.

14 I think sometime yesterday was talking about (sic),
15 "Well, experts may differ." If two experts take the stand here
16 and they differ in their testimony, I'm sure you'll consider
17 that and you'll look to both of them in determining closely as
18 to who's telling the truth. But if only one expert were to
19 testify, you would not go in the room and begin speculating,
20 'What about other experts?' when none testified. In other
21 words, you'd limit your consideration to what comes off that
22 witness stand. Could you do that?

23 (No jurors respond audibly.)

24 **GENERAL SCHMUTZER:** As you sit there, sir, can you think
25 of anything at all that would be in your way in being a juror

1 in this case?

2 (No jurors respond audibly.)

3 GENERAL SCHMUTZER: Thank you. Thank you, Your Honor.

4 THE COURT: Mr. Miller?

5 MR. MILLER: Thank you.

6 Mr. Houck, you said you retired from Peterbilt in
7 Knoxville?

8 JUROR HOUCK: Yes.

9 MR. MILLER: Work for Terry Bailey down there, is
10 that...?

11 JUROR HOUCK: Yes, sir.

12 MR. MILLER: How long have you been retired from there?

13 JUROR HOUCK: Last time, three years.

14 MR. MILLER: Do you know anybody on either side of this
15 case, or any of the witnesses that we called?

16 JUROR HOUCK: No, sir.

17 MR. MILLER: Have you ever been involved in law
18 enforcement in your past, or know anybody that's in law
19 enforcement?

20 JUROR HOUCK: My dad was sheriff a long time ago, deputy
21 sheriff.

22 MR. MILLER: Okay. Was that -- would that cause you any
23 problem? Would you believe an officer's testimony over anybody
24 else, just because they were an officer?

25 JUROR HOUCK: (No audible response.)

1 **MR. MILLER:** You've heard the questions, and the judge
2 talk about the burden of proof being on the State as to each
3 element of the case. They must prove each element beyond a
4 reasonable doubt. Can you give me your word that you would
5 follow that law?

6 **JUROR HOUCK:** Yes, sir.

7 **MR. MILLER:** And whatever you've heard about this case
8 through the media, can you lay that aside and base your decision
9 on what you hear from the witness stand?

10 **JUROR HOUCK:** (No audible response.)

11 **MR. MILLER:** Mr. Schmutzer talked about experts. And
12 if there's one gets up there and testify, then there can't be
13 any disagreement. But I think we talked about it yesterday.
14 Everybody understands that you don't have to agree with an
15 expert. You can use your common sense and look at the facts and
16 make your own decisions. Expert's going to render an opinion.
17 And you can have your own opinion, you don't have to accept what
18 the expert says.

19 Any reason, Mr. Houck, that you can think of why you
20 can't sit on this jury? Anything you need to tell me?

21 **JUROR HOUCK:** Not that I know of.

22 **MR. MILLER:** And you understand that it is a
23 circumstantial evidence case; they don't have any direct proof,
24 eyewitnesses, or anything like that?

25 **JUROR HOUCK:** Yes, sir.

1 MR. MILLER: And you'll follow the law as the judge
2 gives it to you on circumstantial evidence? That all evidence
3 must unerringly point at Mr. Dellinger's guilt, and exclude
4 every other reasonable way of how Ms. Branum died. And if the
5 State can't do that, your verdict must be not guilty. Can you
6 follow the law?

7 JUROR HOUCK: Yes.

8 MR. MILLER: Thank you.

9 MR. DANIEL: Mr. Houck, I'm Zane Daniel. Myself along
10 with David Webb, we represent Mr. Sutton over here. And just
11 want to ask you two or three questions. I didn't understand
12 what part of the county you live in, sir.

13 JUROR HOUCK: Kodak.

14 MR. DANIEL: Kodak? I'm sorry, I just didn't get it.
15 And you say you worked down at Peterbilt for many years, is
16 that...?

17 JUROR HOUCK: About eight years.

18 MR. DANIEL: Did you retire from there?

19 JUROR HOUCK: Yes.

20 MR. DANIEL: Is that when Terry Bailey was the owner
21 down there?

22 JUROR HOUCK: (No audible response.)

23 MR. DANIEL: In this case, they've -- you've heard --
24 could you hear the questions asked these other people?

25 JUROR HOUCK: Yes.

1 MR. DANIEL: Did you work on trucks, yourself?

2 JUROR HOUCK: Yes, sir.

3 MR. DANIEL: Were you a mechanic? You would probably,
4 in certain circumstances, qualify as an expert, then, on trucks,
5 fixing trucks. There -- well, that's what -- we use mechanics
6 as experts. My question is: Did you ever have a situation
7 where you might think something was causing a problem in some
8 other body that was -- worked with you thought it was --
9 something else was causing it, and you disagree on it, is that
10 right?

11 JUROR HOUCK: Right.

12 MR. DANIEL: I'm sure you've had that happen, when you
13 try to find out what's wrong with a truck.

14 Also, do you -- will you agree with me that experts can
15 disagree, or even experts come to different conclusions, such
16 as doctors. One doctor thinks something's causing an illness,
17 and the other one thinks something else is causing -- and
18 they're both qualified in their field, but they get -- they're
19 entitled to give an opinion. But just because an expert gives
20 an opinion, or somebody qualifies as an expert, doesn't mean you
21 have to take that as Gospel. You understand that, don't you,
22 sir?

23 (No jurors respond audibly.)

24 MR. DANIEL: You know of any reason why you couldn't sit
25 here and be fair, follow the law as the judge told you?

1 (No jurors respond audibly.)

2 MR. DANIEL: And you heard us talk about the
3 circumstantial evidence, and take the law as the judge tells you
4 what the law is.

5 Said your daddy was a deputy sheriff back -- what, has
6 that been several years ago?

7 JUROR HOUCK: It was back in the '60s.

8 MR. DANIEL: In the '60s? That wouldn't affect you one
9 way or the other, would it?

10 JUROR HOUCK: (No audible response.)

11 MR. DANIEL: Can you look over here at Gary Sutton right
12 now and say, "Gary, you're innocent, because the law says you're
13 innocent 'til they prove you guilty beyond all reasonable
14 doubt"? Can you look at him and say that, sir? You'd want that
15 same law applied to you or your family if they was over there,
16 wouldn't you?

17 JUROR HOUCK: Uh-huh (affirmative).

18 MR. DANIEL: Thank you, sir.

19 THE COURT: Approach the bench, counsel.

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

21 THE COURT: Before I make an announcement that we had
22 a jury, I wanted to ask you if that says, "None"?

23 GENERAL SCHMUTZER: That says, "None."

24 THE COURT: Okay. These guys that are left-handed, you
25 can't read them.

1 **GENERAL SCHMUTZER:** I'd point out, Judge, I think it
2 needs to go in the record they both ended up with
3 challenges left.

4 **THE COURT:** Sure. Sure. Surely. Each side has...

5 **GENERAL SCHMUTZER:** I think that takes care of their
6 venue question.

7 **MR. DANIEL:** Well, I...

8 **THE COURT:** Well, that'll be up to somebody else. But,
9 anyway, I note that there are additional challenges
10 left, four for each side -- all sides.

11 **GENERAL SCHMUTZER:** I think the State has -- what did
12 the State have left? Four or six?

13 **THE COURT:** Had four. You had five.

14 **GENERAL SCHMUTZER:** Yeah, I had five. Would point out
15 to the Court that, with the State having five challenges
16 left, would realize those in any of the situations where
17 jurors were hesitant about using the death penalty, if
18 they had not have otherwise been excused for other
19 reasons.

20 **THE COURT:** Sure.

21 **MR. MILLER:** I didn't understand that.

22 **MR. DANIEL:** I didn't understand that, Judge. I'm
23 sorry. If it's on the record, I think we ought to
24 know...

25 **GENERAL SCHMUTZER:** I said that the State had five

1 challenges left. I wanted to put on the record that we
2 would have utilized those challenges on anyone who
3 expressed a doubt or hesitation about exercising the
4 death penalty if they weren't otherwise excused.

5 MR. DANIEL: Your Honor, I don't think that ought to be
6 part of the record. That's their decision to make.

7 THE COURT: Well, he -- it's in the record. It's
8 obviously not said to the jury, and they can make that
9 statement. And, as I said, there's challenges left for
10 each side. And so we'll go forward now and pick our
11 alternates, try to pick them as...

12 MR. DANIEL: How many do you get on alternates?

13 THE COURT: Okay, I have a couple of options as... What
14 I'm going to do, I'm going to pick two alternates. Each
15 side, each party has one challenge for each alternate
16 juror to be selected.

17 GENERAL GREEN: You just going to do one at a time?

18 THE COURT: Well, I will...

19 GENERAL SCHMUTZER: Well, that's the best way.

20 THE COURT: That's the way I've always done it, so I
21 guess that I'll...

22 MR. DANIEL: First alternate, second alternate, so you
23 know if somebody gets sick there's...

24 THE COURT: Right. Right. Right.

25 MR. DANIEL: As I understand, they get one challenge,

1 I get one, and...?

2 THE COURT: Right, on each alternate.

3 GENERAL SCHMUTZER: We get one per -- we get two.

4 THE COURT: Right. Right.

5 GENERAL SCHMUTZER: No, no, no, we get two -- we get one

6 per defendant. We've got two defendants, Your Honor.

7 Otherwise, that would be...

8 THE COURT: Do we? I missed that.

9 MR. DANIEL: Your Honor, we would move that they only

10 be allowed to have one per alternate.

11 THE COURT: Well, I'll have to follow the rule here,

12 whatever it says.

13 MR. DANIEL: That would be another reason we'd move for

14 severance.

15 THE COURT: Each side is entitled to one peremptory

16 challenge for each defendant.

17 GENERAL SCHMUTZER: So we get two?

18 THE COURT: Two.

19 GENERAL SCHMUTZER: I mean, that's the way it is for the

20 regular challenges. There wouldn't be any reason why

21 they'd make it different for the alternates.

22 THE COURT: Right. That's -- and we're sure we've got

23 two defendants?

24 GENERAL SCHMUTZER: I don't know, let me look.

25 THE COURT: Okay. Okay.

1 MR. DANIEL: (Inaudible) you have two, and he's got two
2 as to each...

3 THE COURT: I understand what you're saying, but...

4 MR. WEBB: We'd make a motion for severance, because if
5 these cases were severed we'd be on the same ground as
6 the State, they'd be on the same ground with us with
7 respect to the peremptory challenges. So we'd renew it
8 at this point.

9 THE COURT: Very good. Overruled again.

10 MR. WEBB: No disrespect intended.

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

13 THE COURT: We now have a jury. However, we must go
14 further and pick two alternates. An alternate would serve
15 throughout the duration of the trial. At the conclusion of the
16 proof and before instructions I would excuse you. So at this
17 time let's call one alternate down, please.

18 (The following juror was called to fill the jury box:
19 James R. Welch.)

20 THE COURT: Sir, have you heard all of the questions
21 that have been asked?

22 JUROR WELCH: I have.

23 THE COURT: Anything cause you a problem?

24 JUROR WELCH: All due respect, Your Honor, I do have an
25 opinion based on this case, due to the media, press, friends and

1 acquaintances I have in neighboring Blount County that I've
2 discussed, you know, before. And...

3 **THE COURT:** Could you be fair and impartial to both
4 sides in this case? I'm not going to ask you what your opinion
5 is, and don't tell me what it is.

6 **JUROR WELCH:** Okay.

7 **THE COURT:** But could you be fair and impartial to both
8 sides in this case?

9 **JUROR WELCH:** No, sir, I don't think so.

10 **THE COURT:** Okay, let you go, Mr. Welch. Thank you,
11 sir.

12 (Juror Welch is excused.)

13 (The following juror was called to fill the jury box:
14 Mary Tressa Morgan.)

15 **THE COURT:** Hi, Ms. Morgan. Yes, ma'am. Have you heard
16 all the questions?

17 **JUROR MORGAN:** Yes.

18 **THE COURT:** Anything causes a problem for you?

19 **JUROR MORGAN:** No, sir.

20 **THE COURT:** Okay. Have you read or heard anything about
21 this case before you came here today?

22 **JUROR MORGAN:** Yes.

23 **THE COURT:** Have you formed an opinion based on what
24 you've seen or heard?

25 **JUROR MORGAN:** No.

1 **THE COURT:** Okay. Do you -- have you heard the
2 statements that the Court has made about the death penalty?

3 **JUROR MORGAN:** Yes.

4 **THE COURT:** Do you have any moral or ethical
5 reservations about considering the death penalty as a sentencing
6 option in the event someone should be convicted?

7 **JUROR MORGAN:** No.

8 **THE COURT:** Okay, on the other hand, would you
9 automatically impose the death sentence in each and every
10 conviction for first degree murder?

11 **JUROR MORGAN:** No. **THE COURT:** You would not?

12 **JUROR MORGAN:** No.

13 **THE COURT:** Okay. General Schmutzer?

14 **GENERAL SCHMUTZER:** Ms. Morgan?

15 **JUROR MORGAN:** Yes.

16 **GENERAL SCHMUTZER:** Where do you live, please?

17 **JUROR MORGAN:** Pigeon Forge.

18 **GENERAL SCHMUTZER:** And your occupation?

19 **JUROR MORGAN:** I'm a maid at (indiscernible). I'm the
20 laundry person there.

21 **GENERAL SCHMUTZER:** Okay. Ms. Morgan, you've heard all
22 the questions. I'm not going to try to go back through all of
23 them. Any problems with anything you've heard that I've asked
24 here?

25 **JUROR MORGAN:** No.

1 **GENERAL SCHMUTZER:** Use your reason and common sense to
2 try this case? It's not beyond any doubt, it's beyond a
3 reasonable doubt. It's got to be based on the evidence, not
4 upon guessing or speculation. If it's not in evidence, then
5 it's not to be considered. No problems with that, I take it?

6 **JUROR MORGAN:** No, sir.

7 **GENERAL SCHMUTZER:** That's all. Thank you.

8 **THE COURT:** Mr. Miller?

9 **MR. WEBB:** Your Honor, can we approach the bench?

10 **THE COURT:** Uh-huh (affirmative).

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

12 **MR. WEBB:** I hate to bother the Court, but I just -- for
13 clarification purposes.

14 **THE COURT:** Sure, uh-huh (affirmative).

15 **MR. WEBB:** If this alternate juror is accepted at this
16 point...

17 **THE COURT:** No back striking.

18 **MR. WEBB:** Thank you, sir. Okay.

19 **THE COURT:** On alternate jurors, under the rule.

20 **MR. WEBB:** Okay, I think that's what we wanted to
21 clarify. Now, the second question is: If we
22 (indiscernible) on this juror, how many challenges does
23 the defense have at that point?

24 **THE COURT:** Each of you have one challenge.

25 **MR. WEBB:** Per all?

1 THE COURT: No, that's -- specifically said.

2 MR. WEBB: Well, that's what I -- you fellows may know
3 this before. I just wanted to clear that up.

4 GENERAL SCHMUTZER: Wanted to bring to the Court's
5 attention there's two defendants.

6 THE COURT: Two defendants. Thank you.

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

9 MR. MILLER: Ms. Morgan, are you connected with anybody
10 on either side of this case?

11 JUROR MORGAN: No.

12 MR. MILLER: Did you know any of the witnesses whose
13 names were called?

14 JUROR MORGAN: (No audible response.).

15 MR. MILLER: Are you associated with anybody that's
16 involved in law enforcement?

17 JUROR MORGAN: (No audible response.)

18 MR. MILLER: You heard the judge give instructions on
19 the burden of proof beyond a reasonable doubt, and that's on the
20 State at all times. Can you give me your word, as a juror, that
21 you would follow that law, and that you can presume that
22 Mr. Dellinger is innocent?

23 JUROR MORGAN: (No audible response.)

24 MR. MILLER: And it's been talked about circumstantial
25 evidence. The State must exclude all reasonable hypothesis of

1 how Ms. Branum died. And that's not our burden on that. They
2 must exclude them. That's their burden, beyond a reasonable
3 doubt and to your satisfaction. Can you follow that law?

4 JUROR MORGAN: (No audible response.)

5 MR. MILLER: Can you think of any reason why you should
6 not sit as a juror in this case?

7 JUROR MORGAN: No.

8 MR. MILLER: You understand your importance as a first
9 alternate in this case. Should somebody, during the course of
10 the trial, be unable to continue sitting, you would be placed
11 in their seat, ultimately render a decision on this case. And
12 you could follow the evidence just as closely as if you were
13 actually one of the 12 picked?

14 JUROR MORGAN: (No audible response.)

15 MR. WEBB: Ms. Morgan, I'm not -- I'm just going to ask
16 you one question. You've been here for, what, a day? All day
17 today?

18 JUROR MORGAN: Yes, sir.

19 MR. WEBB: You've heard all the questions?

20 JUROR MORGAN: Yeah.

21 MR. WEBB: You understand the questions?

22 JUROR MORGAN: (No audible response.)

23 MR. WEBB: Do you have anything you want to tell me or
24 the judge or General Schmutzer? Can you be fair and impartial?

25 JUROR MORGAN: (No audible response.)

1 **MR. WEBB:** If you were to vote right now, how would you
2 find Gary Sutton?

3 **JUROR MORGAN:** (Inaudible).

4 (Peremptory Challenge Slip #16 was submitted, and the
5 following jurors were excused: Juror Morgan.)

6 (The following juror was called to fill the jury box:
7 Brenda Cotter.)

8 **THE COURT:** Have you heard all the questions,
9 Ms. Cotter?

10 **JUROR COTTER:** (No audible response.)

11 **THE COURT:** Anything that's been asked or stated that
12 raises a problem for you, one way or another?

13 **JUROR COTTER:** (No audible response.)

14 **THE COURT:** Do you -- have you heard or read anything
15 about this case before you came here today?

16 **JUROR COTTER:** Well, I really don't know much about it.

17 **THE COURT:** Yes, ma'am.

18 **JUROR COTTER:** So -- but the car was found not too far,
19 from where I live. And, of course, we talked all about it.
20 But, I mean, I haven't formed any opinions because of that.

21 **THE COURT:** Okay.

22 **JUROR COTTER:** (Inaudible).

23 **THE COURT:** Right. Could you be fair and impartial to
24 both sides in this case, and do your job if called upon to pass
25 judgment?

1 JUROR COTTER: I think so.

2 THE COURT: Okay. Have you understood what the Court
3 has said about the death penalty, Ms. Cotter?

4 JUROR COTTER: Yes.

5 THE COURT: And you understand the only reason I ask you
6 about that is because I have to. And that just because I ask
7 you about the death penalty doesn't mean that I think either of
8 these gentlemen are guilty of anything, do you understand that?

9 JUROR COTTER: (No audible response.)

10 THE COURT: Do you have any moral or ethical reservation
11 against considering the death penalty as an option in
12 sentencing?

13 JUROR COTTER: (No audible response.)

14 THE COURT: Okay. On the other hand, would you
15 automatically impose the death sentence in each and every case
16 where someone is convicted of first degree murder?

17 JUROR COTTER: (No audible response.)

18 THE COURT: All right. General Schmutzer?

19 GENERAL SCHMUTZER: Ms. Cotter, you've heard all my
20 questions. Any problems with any of them, Ms. Cotter, at all?

21 JUROR COTTER: (No audible response.)

22 GENERAL SCHMUTZER: Okay. Any problems with the fact
23 this is a circumstantial evidence case? I take it there's none,
24 whatever.

25 JUROR COTTER: (No audible response.)

1 **THE COURT:** Not every doubt, it's a reasonable doubt
2 that you'd require the State to meet the standard. But same
3 token, it's not just any hypothesis, it's a reasonable
4 hypothesis based upon the facts. Just common sense. Use your
5 common sense in deciding this case. Thank you. Thank you, Your
6 Honor.

7 **MR. MILLER:** Ms. Cotter, you're not connected with
8 anybody one either side of the case, or any of the witnesses in
9 any way?

10 **JUROR COTTER:** I'm not connected. I know one of the
11 ladies that works in Mr. Schmutzer's office. But
12 (indiscernible).

13 **MR. MILLER:** What about law enforcement? Do you have
14 any connection with anybody involved in law enforcement?

15 **JUROR COTTER:** I have several friends that are on the
16 Gatlinburg Police Department. My brother-in-law is
17 (indiscernible).

18 **MR. MILLER:** And you heard the questions, of course,
19 whether you'd believe their -- a police officer's testimony over
20 anybody else's. Would you do that? Would you tend to do that?

21 **JUROR COTTER:** (Inaudible).

22 **MR. MILLER:** They're just like everybody else.

23 **JUROR COTTER:** (Inaudible).

24 **MR. MILLER:** I understand. Anything that you can tell
25 me you think you might need to bring to my attention why you may

1 not be able to sit as a juror in this case?

2 JUROR COTTER: (No audible response.)

3 MR. MILLER: Thank you.

4 THE COURT: Mr. Webb?

5 MR. WEBB: Ms. Cotter, what section of Wear's Valley do
6 you live in?

7 JUROR COTTER: I live about ten miles from Pigeon Forge.
8 It's right beside the First Baptist Church (indiscernible).

9 MR. WEBB: Okay. So the...

10 JUROR COTTER: That's where we attend.

11 MR. WEBB: Okay, so you know where Happy Holler, Clear
12 Fork,...?

13 JUROR MORGAN: (No audible response.)

14 MR. WEBB: Used to that area, know where that area is,
15 Happy Holler and Clear Fork?

16 JUROR COTTER: I know where it is. I don't know that
17 I've ever been in Happy Holler, but I know where it is.

18 MR. WEBB: You know where it's at?

19 JUROR COTTER: Yeah.

20 MR. WEBB: Okay. It's in the same area.

21 JUROR COTTER: Right, uh-huh (affirmative).

22 MR. WEBB: Yeah, I think that's what -- about all in one
23 area, Happy Holler, Clear Fork, that...

24 JUROR COTTER: Right. Right.

25 MR. WEBB: Okay. Okay. Any problem with any question

1 that's been asked everybody? And, of course, you've been
2 listening. Anything in your mind right now, the time it's going
3 to take to try this lawsuit, being away from the family, those
4 type things, any of that going to bother you?

5 JUROR COTTER: (No audible response.)

6 MR. WEBB: Give your full devotion to this case, start
7 out on even ground, fair and impartial? If you had to vote
8 right now, how would you vote for Mr. Sutton?

9 JUROR COTTER: Not guilty.

10 MR. WEBB: Okay, thank you.

11 (Peremptory Challenge Slip #17 was submitted, and the
12 following jurors were excused: Juror Cotter.)

13 (The following juror was called to fill the jury box:
14 Calvin L. Trentham, Jr..)

15 THE COURT: Have you heard all the questions about this
16 case?

17 JUROR TRENTHAM: Yes, sir.

18 THE COURT: Do you feel you have a comfortable grasp of
19 the law that the Court's tried to tell you about here this
20 morning?

21 JUROR TRENTHAM: Yes, sir.

22 THE COURT: Okay. Do you have any -- any previous
23 knowledge about this case, from reading it or hearing about it
24 or...?

25 JUROR TRENTHAM: Yes, I have.

1 **THE COURT:** Okay. Have you formed any opinion based on
2 that?

3 **JUROR TRENTHAM:** (No audible response.)

4 **THE COURT:** Is that opinion such that it could not be
5 changed by any of the evidence that would be offered in this
6 case? Or I'll ask it this way first: Could you lay aside your
7 opinion, any opinion you might have, and base your opinion
8 solely and unequivocally on the testimony that comes from this
9 witness stand?

10 **JUROR TRENTHAM:** (No audible response.)

11 **THE COURT:** Do you feel you could do that, sir?

12 **JUROR TRENTHAM:** I don't know.

13 **THE COURT:** You don't know? Okay, we'll let you go.
14 Thank you.

15 (Juror Trentham is excused.)

16 (The following juror was called to fill the jury box:
17 Robert Allen.)

18 **THE COURT:** Mr. Allen, you've been here for a day and
19 a half.

20 **JUROR ALLEN:** It seems a lot longer.

21 **THE COURT:** You, and you're also one of our regular
22 jurors. I'd say you've heard all the questions about law, and
23 you understand the burden of proof. I'd say you could probably
24 recite it to us backwards by now, couldn't you?

25 **JUROR ALLEN:** Almost.

1 **THE COURT:** I asked you last night if you'd heard
2 anything about the case. I believe you said you'd heard
3 something about the case, but hadn't formed any opinions, is
4 that correct?

5 **JUROR ALLEN:** Correct.

6 **THE COURT:** And you could start fresh and be fair and
7 impartial to both sides, is that correct?

8 **JUROR ALLEN:** Correct.

9 **THE COURT:** Do you have any moral reservations about
10 considering the death penalty as an option in sentencing?

11 **JUROR ALLEN:** No.

12 **THE COURT:** On the other hand, would you automatically
13 vote to impose the death penalty in each and every case of first
14 degree murder?

15 **JUROR ALLEN:** No.

16 **THE COURT:** All right, sir. General Schmutzer?

17 **GENERAL SCHMUTZER:** Mr. Allen, you've heard all the
18 questions I've asked. I'm not going to attempt to repeat them.
19 Any problems with anything I have asked for the last day or two?

20 **JUROR ALLEN:** (No audible response.)

21 **GENERAL SCHMUTZER:** I haven't asked this in a while, but
22 any connection with any of the attorneys that are involved in
23 the case? Mr. Reagan, I don't know, maybe he's involved, too.
24 Any connection with him?

25 (No jurors respond audibly.)

1 GENERAL SCHMUTZER: Thank you.

2 THE COURT: Mr. Miller?

3 MR. MILLER: Mr. Allen, do you know anybody on either
4 side of this case or any of the witnesses?

5 JUROR ALLEN: (No audible response.)

6 MR. MILLER: Are you involved -- have you been involved
7 in law enforcement, or know anybody that's involved in law
8 enforcement?

9 JUROR ALLEN: No, I don't. I'm retired from St.
10 Petersburg, Florida. I have a grandson who's (indiscernible).

11 MR. MILLER: And, of course, you know the question is
12 would you tend to believe an officer over anybody else just
13 because they wear a badge and a uniform?

14 JUROR ALLEN: No.

15 MR. MILLER: Any reason you could tell me why you maybe
16 shouldn't serve on this jury?

17 JUROR ALLEN: No.

18 MR. MILLER: You can presume that my client,
19 Mr. Dellinger, is innocent, is that correct? And you'll follow
20 the law as the judge gives it to you?

21 JUROR ALLEN: Yes, sir.

22 MR. MILLER: Thank you.

23 THE COURT: Mr. Webb? Mr. Daniel?

24 MR. DANIEL: Mr. Allen, you are what we call an
25 alternate juror, do you understand that, sir? In case someone

1 was unable to render a verdict or got sick, it would be up to
2 you to step into their chair. So it's very important that we
3 ask you the same questions, 'cause that has happened on
4 occasions. Not very often, but it has happened. And you
5 understand that you would listen to the evidence just like
6 everyone else, and you may ultimately be the one to make a
7 decision on this case along with some of these other jurors, you
8 understand that, sir?

9 JUROR ALLEN: Yes.

10 MR. DANIEL: Did you hear all these questions? I'm not
11 going to go over all that again.

12 JUROR ALLEN: Yes, sir.

13 MR. DANIEL: That's been asked of all these other
14 jurors. But you know -- can you -- will you try this case and
15 can we start out, and you can look at Gary Sutton right now,
16 say, "Gary, you're innocent." You can do that, can't you?

17 JUROR ALLEN: (No audible response.)

18 MR. DANIEL: You believe our rule -- or system of
19 justice, that the State must prove him guilty beyond all
20 reasonable doubt. You're not going to guess somebody guilty?

21 JUROR ALLEN: That's right.

22 MR. DANIEL: You've heard us talk about all this other
23 stuff, and what a circumstantial evidence case is, and you'll
24 follow the law as the judge tells you, is that right?

25 JUROR ALLEN: Yes, sir.

1 MR. DANIEL: Thank you, sir. Let me ask you, what did
2 you retire from?

3 JUROR ALLEN: I was a registered architect.

4 THE COURT: We have Alternate #1. Call one more.

5 (The following juror was called to fill the jury box:
6 Mark Woodham.)

7 THE COURT: Is it Woodham or Woodham (pronouncing)?

8 JUROR WOODHAM: Woodham.

9 THE COURT: If you're from East Tennessee it might be
10 Woodham, right?

11 JUROR WOODHAM: If you're from Sevierville.

12 THE COURT: If you're from Sevierville?

13 Have you heard all the questions, Mr. Woodham?

14 JUROR WOODHAM: Yes, sir.

15 THE COURT: Anything that's been stated that raises any
16 question in your mind, sir, about whether or not you could be
17 fair and impartial to both sides in this lawsuit?

18 JUROR WOODHAM: Not that I can think of.

19 THE COURT: Do you understand, sir, that these gentlemen
20 are here only because they've been accused of a crime, and that
21 they are presumed innocent, and that the burden of proof is on
22 the state of Tennessee to prove their guilt beyond a reasonable
23 doubt and a moral certainty.

24 Have you heard or read anything about this case before
25 you came down here today?

1 JUROR WOODHAM: Very little.

2 THE COURT: Okay. Have you formed any opinion?

3 JUROR WOODHAM: (Inaudible).

4 THE COURT: Okay. Have you heard what the Court has
5 tried to explain about the death penalty?

6 JUROR WOODHAM: I believe I do.

7 THE COURT: And do you understand that just because I
8 ask you about that doesn't mean I think they're guilty of
9 anything?

10 JUROR WOODHAM: (No audible response.)

11 THE COURT: Do you have any moral reservation about
12 considering the death penalty as an option in sentencing?

13 JUROR WOODHAM: (No audible response.)

14 THE COURT: Okay, you do not? On the other hand, sir,
15 do you automatically vote to impose the death penalty in each
16 and every case of first degree murder?

17 JUROR WOODHAM: No.

18 THE COURT: Okay. General Schmutzer?

19 GENERAL SCHMUTZER: Mr. Woodham, where do you live,
20 please, sir?

21 JUROR WOODHAM: Sevierville.

22 GENERAL SCHMUTZER: And your occupation?

23 JUROR WOODHAM: I work in Levi's factory, and I
24 (indiscernible).

25 GENERAL SCHMUTZER: Okay, thank you. Not going to

1 repeat all my questions, but going over what -- how we selected
2 these other jurors, they're there because they've indicated they
3 can be fair to both sides. I take it, from what you've said,
4 you can be, too?

5 JUROR WOODHAM: Yes, sir.

6 GENERAL SCHMUTZER: Have indicated they can use their
7 reason and common sense in deciding this case, and I take it you
8 can certainly do that.

9 JUROR WOODHAM: (No audible response.)

10 GENERAL SCHMUTZER: You'd hold the State to its burden
11 of proof, but no higher? In other words, you'd hold it to
12 beyond a reasonable doubt, but not to an -- would you hold us
13 to an absolute certainty of guilt?

14 JUROR WOODHAM: (Inaudible).

15 GENERAL SCHMUTZER: Would you make the State prove it
16 to an absolute certainty before you would convict?

17 JUROR WOODHAM: I'd like to be sure.

18 GENERAL SCHMUTZER: I understand about being sure.
19 Would you require the... The burden of proof is beyond a
20 reasonable doubt, not to an absolute certainty. In other words,
21 there's no absolutes.

22 JUROR WOODHAM: (Inaudible).

23 GENERAL SCHMUTZER: You wouldn't require us to do that,
24 I take it?

25 They -- they've indicated they could listen to all the

1 witnesses, and not dismiss any witness out of hand
2 automatically, but listen to all let proof.

3 Been some discussion about other crimes. If other
4 crimes evidence comes in can you consider that for the purposes
5 that the Court will instruct you that it can be considered for?

6 JUROR WOODHAM: (No audible response.)

7 GENERAL SCHMUTZER: Same with the law with regard to
8 aider and abettor, you understand that that we discussed here
9 earlier this morning? Any problems with that?

10 JUROR WOODHAM: (No audible response.)

11 GENERAL SCHMUTZER: The bottom line is, decide this
12 case, do your duty, whatever it might be, let it fall where it
13 falls. You don't have to explain to anybody. But you'll make
14 your decision based upon the facts only that come from this
15 witness stand, not guessing or speculating on what might or
16 could have been or... If it is not there, it's simply not
17 there. And the bottom line is, it has to be not from us
18 lawyers, but from the witness stand that you go by. Thank you.

19 MR. MILLER: Mr. Woodham, do you know any of the
20 witnesses whose names were called earlier?

21 JUROR WOODHAM: (No audible response.)

22 MR. MILLER: You have any connection with law
23 enforcement, or have friends or relatives involved in law
24 enforcement?

25 JUROR WOODHAM: (No audible response.)

1 MR. MILLER: You've heard the law is to -- the burden
2 of proof being on the State beyond a reasonable doubt, and the
3 presumption of innocence on behalf of the defendant. Can you
4 give me your word that, if selected as a juror ultimately, that
5 you would follow that law?

6 JUROR WOODHAM: Yes, sir.

7 MR. MILLER: Is there any other thing that I could bring
8 to my attention, that I should know, or maybe why you should not
9 serve as a juror?

10 JUROR WOODHAM: (No audible response.)

11 MR. MILLER: Thank you.

12 MR. DANIEL: Do you spell your name -- how do you spell
13 your last name?

14 JUROR WOODHAM: W-o-o-d-h-a-m.

15 MR. DANIEL: H-a-m? You understand you're an alternate,
16 and you'll probably be what we call second alternate. That if
17 something happens to two jurors, then you would be called. But
18 then the gentlemen here next to you, of course, would be the
19 first one, he's first alternate. That's the way -- they pick
20 them that way.

21 You understand that unless something happens, you would
22 not go back in the jury room and decide the case, but it would
23 be important for you to listen to the evidence, because should
24 you have to be chosen (sic), you understand that?

25 JUROR WOODHAM: Yes, sir.

1 **MR. DANIEL:** We hope nothing happens to anybody, but we
2 have seen things in the past that has happened, so I'm asking
3 you that.

4 You're also not supposed to discuss the case with each
5 other until all the evidence and the proof is in, and until you
6 go back and decide. So, for that reason, you probably won't be
7 much discussion (sic) about what's happening with the case,
8 unless you're called to deliberate. That's when you start
9 discussing the facts of the case, after all the evidence is in,
10 do you understand that?

11 **JUROR WOODHAM:** Yes, sir.

12 **MR. DANIEL:** And you'll listen attentively, and if you
13 are called you'll do your -- you'll follow the law as the judge
14 tells you it is.

15 **JUROR WOODHAM:** Yes, sir.

16 **MR. DANIEL:** Not going to go through all this other law.
17 You've heard that that was -- the statements that's been made,
18 and you understand what we're here trying, and that's one issue
19 that is the law, and can the State prove beyond all reasonable
20 doubt, through circumstantial evidence, that one or either or
21 both of these gentlemen killed Connie Branum. And that's the
22 issue, through circumstantial evidence, you understand that?
23 Not these other matters that may or may not come in. I don't
24 know what will come in yet, but we're just anticipating some
25 things. But you'll try it on that issue, alone? If you didn't

1 have -- if you weren't convinced beyond a reasonable doubt that
2 she even died as a result of some violence or something of this
3 nature, or that these boys killed her, then you would not
4 hesitate to return a verdict of not guilty, would you, sir?

5 JUROR WOODHAM: (No audible response.)

6 (Peremptory Challenge Slip #18 was submitted, and the
7 following jurors were excused: Juror Woodham.)

8 (The following juror was called to fill the jury box:
9 Michelle King.)

10 THE COURT: Have you heard all the questions, Ms. King,
11 that's been stated?

12 JUROR KING: (No audible response.)

13 THE COURT: Is there -- have you heard or read anything
14 about this case before you came down here today?

15 JUROR KING: (Inaudible).

16 THE COURT: Based on what you've seen or heard, have you
17 formed any opinion about the guilt or innocence of either of
18 these defendants?

19 JUROR KING: (Inaudible).

20 THE COURT: Do you think you could lay aside your
21 opinion, and if called upon to enter a verdict or decide on a
22 verdict, that you could base your decision solely upon the
23 evidence that comes from the witness stand, and the law that the
24 Court gives you?

25 JUROR KING: (No audible response.)

1 **THE COURT:** Have you -- have you heard what I have said
2 about the death penalty?

3 **JUROR KING:** (No audible response.)

4 **THE COURT:** Do you understand that the -- that just
5 because I ask you about that, I'm not assuming anyone's guilty
6 of anything. Only that I must ask you that.

7 **JUROR KING:** (No audible response.)

8 **THE COURT:** Okay. Do you have any moral reservation
9 about considering the death penalty as an option in a proper
10 case?

11 **JUROR KING:** Not particularly. The only question that
12 I have is about it being circumstantial evidence.

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

14 **JUROR KING:** And not having direct proof. I don't
15 understand exactly what (indiscernible).

16 **THE COURT:** Okay, I will read you that momentarily.

17 "The guilt of a defendant, as well as any fact required
18 to be proved may be established by direct evidence, by
19 circumstantial evidence, or by both combined. Direct evidence
20 is defined as that evidence which proves the existence of the
21 fact of issue -- in issue, without inference or presumption of
22 other facts. Direct evidence may consist of testimony of a
23 person who has perceived by the means of his or her senses the
24 existence of the fact sought to be proved or disproved.

25 "Circumstantial evidence consists of proof of collateral

1 facts and circumstances which do not directly prove the fact in
2 issue, but from which that fact may be logically inferred. When
3 the evidence is made up entirely of circumstantial evidence,
4 then before you would be justified in finding someone guilty you
5 must find that all the..." I'm sorry, "that all the essential
6 facts are consistent with the hypothesis of guilt as that is to
7 be compared with all the facts proved The facts must exclude
8 every other reasonable theory or hypothesis, except that of
9 guilt, and the facts must establish such a certainty of guilt
10 of the defendant as to convince the mind beyond a reasonable
11 doubt that the defendant is the one who committed the offense.
12 It is not necessary that each particular fact should be proved
13 beyond a reasonable doubt, if enough facts are proved to satisfy
14 the jury beyond a reasonable doubt of all of the facts necessary
15 to constitute the crime charged.

16 Before a verdict of guilty is justified, the
17 circumstances, taken together, must be of a conclusive nature
18 and tendency leading, on the whole, to a satisfactory
19 conclusion, and producing, in effect, a moral certainty that the
20 defendant, and no one else, committed the offense." So that's
21 the definition and interpretation of circumstantial evidence.

22 Now, in the eyes of the law it makes no difference as
23 to whether it is direct proof or circumstantial proof, so long
24 as there is enough of it to convince a juror and the jury beyond
25 a reasonable doubt and a moral certainty. Do you understand

1 that?

2 JUROR KING: (No audible response.)

3 THE COURT: Now, does that answer your question in
4 relation to the death penalty that I talked to you about?

5 JUROR KING: (No audible response.)

6 THE COURT: Okay. Anything else that you can think of
7 as to why that you could not sit as a fair and impartial juror
8 in this case?

9 JUROR KING: (Inaudible).

10 THE COURT: All right. General Schmutzer?

11 GENERAL SCHMUTZER: Ms. King, where do you live?

12 JUROR KING: In Pigeon Forge.

13 GENERAL SCHMUTZER: And your occupation?

14 JUROR KING: (Inaudible).

15 GENERAL SCHMUTZER: Thank you. Did that clear for you
16 about circumstantial evidence? Do you have any -- some people
17 have got a preconceived notion or idea, when they hear that --
18 the words, that they think, 'Well, there must be -- must not be
19 as strong.' You understand a circumstantial evidence case can
20 be every bit as strong as a direct evidence case. Is that --
21 do you understand that?

22 JUROR KING: Yeah, I understand that.

23 GENERAL SCHMUTZER: Okay. And, of course, that's
24 ultimately for you to -- you know, for the jurors to judge. And
25 I think the charge is based upon -- well, I think jurors would

1 do it anyway, whether it was charged or not. Because obviously,
2 if there was some other reasonable hypotheses, other than the
3 hypothesis of guilt, that creates a reasonable doubt right
4 there. But it has to be reasonable, not just any hypothesis.
5 Not guessing or speculation, it's got to be based on facts, it's
6 got to be based on evidence. You understand that?

7 **JUROR KING:** (No audible response.)

8 **GENERAL SCHMUTZER:** The -- basically what it means is
9 there are no eyewitnesses. The crime was committed in a remote
10 area when nobody else was around. There's no confession to it.
11 It's going to be...

12 **MR. DANIEL:** Your Honor, I'm going to object to that
13 statement. (Inaudible).

14 **GENERAL SCHMUTZER:** Your Honor, I have a right to state
15 where I think it was committed.

16 **MR. DANIEL:** I object to him commenting on evidence as
17 to where the crime was committed.

18 **THE COURT:** Well, he -- he...

19 **GENERAL SCHMUTZER:** I sure can. I've got them charged
20 with committing this crime on Clear Fork.

21 **THE COURT:** You may go ahead.

22 **GENERAL SCHMUTZER:** The -- it was committed in a remote
23 area of the county. There were no witnesses around. There's
24 not going to be any confession. If we were limited to only
25 murders that we -- we could only prosecute murders that involved

1 only confessions...

2 MR. DANIEL: Objection to that. He's not asking
3 questions.

4 THE COURT: Ask the question, General Schmutzer. Let's
5 move on.

6 GENERAL SCHMUTZER: Would you require -- would you
7 require the State -- or say that without a confession or an
8 eyewitness that you just couldn't find anyone guilty under any
9 circumstance?

10 JUROR KING: No.

11 GENERAL SCHMUTZER: Anything at all else I've talked
12 about causes you any difficulty or problems at all this morning?
13 If you're chosen you can just do your duty? I think the Court
14 will instruct you to fearlessly do your duty. Thank you.

15 THE COURT: Mr. Miller?

16 MR. MILLER: Ms. King, you say that you have formed some
17 opinions based on what you have read in the paper or heard on
18 the TV?

19 JUROR KING: (No audible response.)

20 MR. MILLER: Do you think you can put those aside and
21 leave them outside the door if you're selected to sit here
22 today?

23 JUROR KING: I think so.

24 MR. MILLER: Okay. You understand the dangers of
25 forming opinions based on what you hear, or hearsay, or what you

1 read in the paper, see on TV? Number one, because it's not
2 always true what you see on TV or read in the paper; number two,
3 you definitely haven't seen in the paper or seen on TV what the
4 defense has to offer as far as proof. You understand that?

5 JUROR KING: (No audible response.)

6 MR. MILLER: Mr. Schmutzer has made the statement ---I'm
7 sure he didn't mean to---that, "I've got these people
8 charged..." Actually, these people are here, Mr. Dellinger and
9 Mr. Sutton, because the grand jury found the indictment against
10 them. And an indictment is just a formal accusation. And at
11 the grand jury, the grand jury didn't hear evidence presented
12 by the defense, the defense was not there, the defense did not
13 cross-examine witnesses. And the grand jury didn't decide that
14 these boys were guilty of any crime, they only decided that
15 there should be a hearing on it for you all to decide. You
16 understand that?

17 JUROR KING: (No audible response.)

18 MR. MILLER: Just because they're charged, you know,
19 some people say, "They're here, they're charged, they must be
20 guilty." You don't feel that way, do you, ma'am?

21 JUROR KING: (No audible response.)

22 MR. MILLER: Thank you.

23 THE COURT: Mr. Webb or Mr. Daniel?

24 MR. DANIEL: Ms. King, you understand you'll be what
25 they call a second alternate juror, and it's like I explained

1 to the gentlemen that was seated where you are, you understand
2 that, don't you, ma'am?

3 JUROR KING: (No audible response.)

4 MR. DANIEL: Probably may not get to hear the case, but
5 it'll be important that you listen to all the evidence and can
6 sit here, and then if you are -- if you have to be one of the
7 jurors that goes back to the jury room, you'd have to make a
8 decision, you understand that?

9 JUROR KING: (No audible response.)

10 MR. DANIEL: So your job is very important. Are you --
11 did you tell us where you work?

12 JUROR KING: A New You.

13 MR. DANIEL: I'm sorry, ma'am?

14 JUROR KING: A New You. Hair salon.

15 MR. DANIEL: Okay. And are you married?

16 JUROR KING: No.

17 MR. DANIEL: Okay. Now, this -- this case involves, as
18 we said, circumstantial evidence. I'm not going -- you made
19 your statement about that, and the judge told you. Will you
20 follow the law as the judge tells you what the law is on that?

21 JUROR KING: (No audible response.)

22 MR. DANIEL: Have you ever sat on a jury before?

23 JUROR KING: No.

24 MR. DANIEL: First time you've ever been down here?

25 JUROR KING: I've never been in a courtroom.

1 **THE COURT:** Glad to be here?

2 **JUROR KING:** (No audible response.)

3 (Peremptory Challenge Slip #19 was submitted.)

4 **THE COURT:** We now have Alternate #2.

5 Ladies and gentlemen, for the few of you who are
6 remaining who have been called for jury service, you are free
7 to go. The Court thanks you, and the people of Sevier County
8 thank you for the time that you have taken to be here with us
9 and help contribute to this process. Thank you very much.
10 You're free to go.

11 (The remaining prospective jurors were excused.)

12 **THE COURT:** What the Court is going to do -- approach
13 the bench, gentlemen.

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

15 **THE COURT:** What I'm going to do is break for lunch.
16 I'm going to break for lunch, come back in roughly an
17 hour, and then hear the motions or the -- just deal with
18 the other issues we have to deal with before we start
19 the trial. Since it is 15 'til 1:00, don't you think
20 it would be safe for us to just have them bring the jury
21 back at, say, 3:00? Is that -- you know, if we've got
22 an hour to...

23 **MR. DANIEL:** I think that'll be all right.

24 **THE COURT:** Okay, that's what we'll do.

25 **GENERAL SCHMUTZER:** Of course that -- once we get

1 through all that, too, then we've got to get some stuff,
2 you know,...

3 THE COURT: Sure.

4 GENERAL SCHMUTZER: We're going to be ready, but we've
5 just got to bring some stuff in.

6 THE COURT: Sure. Sure.

7 GENERAL SCHMUTZER: I think 3:00 would be fine.

8 THE COURT: Okay, very good.

9 MS. THOMAS: In that same vein, about how long do we
10 plan on going tonight, just for plans.

11 THE COURT: For tonight?

12 MS. THOMAS: Yes.

13 THE COURT: Ms. Thomas, in all candor, really I don't
14 know the answer to that. I -- you know, if we get into
15 a good flow, if you will,...

16 MS. THOMAS: Yeah. We haven't hit it yet.

17 THE COURT: Right. I keep hoping we will. I would like
18 to go 'til 6:00 or 7:00 or possibly 8:00, you know.

19 MS. THOMAS: I just wanted to know what to plan.

20 THE COURT: I don't want to, I'll be real honest with
21 you. But because of the other problems associated with
22 the two and a half days picking a jury, I would like to
23 get as much testimony as is reasonably possible. Having
24 told you nothing, we'll see you.

25 MR. DANIEL: Can we ask (indiscernible).

1 GENERAL SCHMUTZER: We'll be giving you all our -- we'll
2 be giving you some of it ahead of time.

3 MR. DANIEL: Can we get some of it ahead of time, save
4 some time?

5 GENERAL SCHMUTZER: We're going to be giving it to you
6 ahead of time. It won't be right now, but it'll be
7 ahead of time. You'll get it before the witness
8 testifies.

9 THE COURT: I can't change the rules.

10 MR. DANIEL: No. Well, we can (indiscernible).

11 MR. MILLER: What time do you want us back?

12 THE COURT: About the 15 'til 2:00. Or 2:00. 2:00 will
13 be fine. 2:00 will be just fine, okay?

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

16 THE COURT: Friends and gentlemen of the jury, we are
17 going to let you go to lunch at our expense. We have -- I have
18 some other matters that I will have to take up before we hear
19 opening statements and hear the first witness in this case.
20 Therefore -- and it would also give you time, those of you who
21 were selected here this morning, to make arrangements with your
22 family or your business or someone else. So have the jury back
23 here by 3:00. After lunch, help them make arrangements for
24 their overnight stays and so forth, and then have them back in
25 the jury room by 3:00, okay?

1 Do you not discuss the case, any aspects of it; don't
2 let anyone talk to you about it. We will see you then at 3:00.
3 Thank you.

4 (The jury panel is recessed for lunch, and the following
5 proceedings were had.)

6 **THE COURT:** As you see, counsel, the Court has many,
7 many sheets of paper upon which the challenges have been
8 exercised by respective counsel. Based on the fact that there
9 were challenges left, is there any reason now for us to keep
10 these? Any reason that you all can think of?

11 **GENERAL SCHMUTZER:** Nothing for the State.

12 **THE COURT:** Okay. Anything?

13 All right, Ms. Newman, the Court directs that you may
14 destroy those, take those somewhere and destroy them. Also, I
15 will take this up with you at another time. There are other
16 charges available, jury charges, on the evidence of other
17 crimes, and we will be looking at that. I gave them the general
18 charge on evidence of other crimes. I will give you all
19 obviously an opportunity to look, as it develops, at each charge
20 that the Court intends to give. I will give those to you long
21 in advance of any jury argument, so that you can know exactly
22 what's going to be charged in the trial.

23 **MR. DANIEL:** Your Honor please, getting back to these
24 challenges, could we just hold them, put them in a sealed
25 envelope, something like that?

1 **THE COURT:** Sure. Sure.

2 **MR. DANIEL:** I don't know that anything would happen.

3 **THE COURT:** And, now, in all candor with you, I don't
4 know that I have all of them left. I may have thrown some of
5 them away yesterday. I don't know that I have, but I could
6 have. But I will keep...

7 **MR. DANIEL:** Well, what you have there, we -- I just
8 don't know...

9 **THE COURT:** Right. And I will also keep the Court's
10 list of challenges as exercised, and I will seal that, likewise.

11 **GENERAL SCHMUTZER:** Your Honor, I would point out I did
12 challenge someone (indiscernible) the first time I challenged
13 them the Court couldn't read my...

14 **THE COURT:** Writing.

15 **GENERAL SCHMUTZER:** ...writing. And misread it, so I
16 challenged it again.

17 **THE COURT:** All right, thank you. If you'll keep this
18 list, as well, Ms. Newman, keep that under seal, if you will.

19 So let's break and be back by 2:00, when we'll take up
20 the other matters and start then. If any of you want to look
21 at the Court's charge books in recess or whatever, feel free to
22 look through it. I don't have any objection to that.

23 **MR. DANIEL:** Judge, do you -- I just had a question,
24 because -- start a case off, we don't want to say something
25 that's wrong. You know basically -- you have a charge I know

1 you have to give. You've got one already (indiscernible)?

2 THE COURT: Yes, I do. My standard charge that I give
3 in every case.

4 MR. DANIEL: And your...

5 THE COURT: Yeah, I slip sheets.

6 MR. DANIEL: ...I figure you slip "experts" and...
7 That's the way I figured you'd do. If we could see the
8 standard, and then if we can decide what we think might become
9 -- such as "missing witness," all those different things that's
10 -- that might become...

11 THE COURT: I wouldn't let you talk about that in
12 opening statement.

13 MR. DANIEL: And I know. But, I mean, I'm just saying
14 to see what you've got.

15 THE COURT: Oh, sure. Some -- yes, sir. Yes. Yes.

16 MR. DANIEL: I'm just saying we know that some things
17 will be coming up, and we can decide, if there's something that
18 comes up, what you would charge on it, so that we won't misquote
19 it.

20 THE COURT: Sure. Sure. Oh, yes. Be more than glad
21 to.

22 (The court is recessed for lunch.)

23 A F T E R N O O N P R O C E E D I N G S

24 MISCELLANEOUS MOTIONS:

25 THE COURT: Counsel, the first motion that the Court

1 wants to -- or the first matter that the Court wants to take up,
2 whether in the form of a motion or otherwise, is the 404(b)
3 issues. We need to get that laid to rest one way or another.
4 We'll let the record reflect both defendants are present with
5 counsel.

6 The Court has previously heard, in the record at other
7 hearings, the offered testimony in regards to the "other crimes"
8 evidence which is sought to be introduced by the state of
9 Tennessee. And as stated, I previously signed an order, back
10 I believe in November or December, stating the general rule that
11 "other crimes" evidence is admissible to prove other matters,
12 of which we all know about, under 404(b). I have, as I said,
13 previously had a hearing on the offered testimony.

14 And realizing that counsel, especially for the defense,
15 does not want to waive any issue as far as any appellate review,
16 should that become necessary, is there any other evidence or
17 matters that the Court needs to hear in order to make that
18 determination?

19 **GENERAL SCHMUTZER:** Your Honor, do you want the attorney
20 general's office to go forward?

21 **THE COURT:** Well, I'm -- well, I'm first asking the
22 defense: Is there anything, in addition, that I need to hear
23 for purposes of making a determination about the admissibility
24 of that? Now, the Court, of course, has read the Parton case,
25 the Court has read the rules, 404(b), of course, in particular.

1 **MR. WEBB:** Your Honor, could I turn...

2 **THE COURT:** Better be careful about turning that around.
3 If you need to move a microphone over to one side or another
4 there, you can feel free so to do.

5 **MR. WEBB:** I think the Court can hear me.

6 Your Honor, to begin with, I'm not the utmost of a legal
7 scholar, but I have tried to read the Parton case. I think that
8 is "the" case that talks about what we generically call "other
9 crimes" or "prior bad acts." That's a 1985 supreme court case.
10 And I do believe that that is the law that you have to apply
11 when looking at the rules of evidence, Rules 401 through 404.

12 The what I understand things up to date, the attorney
13 general did make a proffer of proof in the form of his outline
14 of what he believed that the State could prove. Of course, the
15 defense would object to that.

16 **THE COURT:** I understand.

17 **MR. WEBB:** Number one, we don't believe that the Court
18 -- or the State can prove what he has verbally told you. But
19 I do believe, Your Honor, that -- and your statement in your
20 order that "other crimes" evidence can be used to show motive,
21 intent, and some of the other things that 404(b) talks about,
22 perhaps that may be true on occasions; it may be true in this
23 case. I don't know. But I don't believe we're in the posture
24 at this point for the Court to rule. Because, as Your Honor
25 knows, the state of Tennessee's going to try their case the way

1 they see fit, and we all may be in this room anticipating some
2 things that the State may attempt to offer into evidence, but
3 until they actually make that offer through a live witness being
4 sworn in and taking the witness stand, until they do that, then
5 the defense can elect at that point to object or not object.

6 Obviously, if there are no objection (sic), that
7 testimony will come in. If there is an objection, and the
8 reason for that objection is stated, such as, let's say,
9 irrelevance with Your Honor,...

10 THE COURT: Sure.

11 MR. WEBB: ...or, "This has no relevance," I think at
12 that point that the Court then can consider, upon request of
13 defense counsel, to have a jury-out hearing. And I think that's
14 the key to what we're talking about, is a hearing, a testimonial
15 hearing from witnesses outside the presence of the jury.

16 THE COURT: Well, let me ask you this: In your
17 judgment, is it necessary for the Court to hear each and every
18 witness, and make that witness testify subject to full-blown
19 cross-examination before I can make a ruling on the
20 admissibility of that evidence?

21 MR. WEBB: Your Honor, I do sincerely believe, in
22 reading State v. Parton, that the Court, to get this record
23 straight... I gave you Parton today.

24 THE COURT: I know. It's in my Jeep.

25 MR. WEBB: If I may approach, Your Honor. I'm going to

1 have to rely on that, when I come to it, but I'll let you look
2 at it. But that's the way I read it. And, in fact, in State
3 v. Parton, it was reversed -- that case was reversed for that
4 very reason.

5 **THE COURT:** It was reversed because the trial judge did
6 not have an out-of-jury hearing to determine the evidence,
7 correct?

8 **MR. WEBB:** I think to hear the evidence. I -- of
9 course, I don't have a full transcript of State v. Parton, but
10 the way I understood it, the judge did not have an jury-out
11 hearing, and did not hear evidence, and because of that the case
12 was remanded. Or -- was it remanded? I believe the case was
13 remanded.

14 **THE COURT:** General Schmutzer, in reading the State
15 versus Parton case, what is the State's position on what the
16 Court must consider?

17 **GENERAL SCHMUTZER:** Your Honor, I don't think that the
18 case addresses that, because that was not the issue. The issue
19 was the fact that they had not had, I think, a jury-out hearing
20 at all. The Court had not heard any evidence beforehand that
21 -- you know, that might -- whether it was proffered, as we've
22 done it here, or whether they put on witnesses or not. I think
23 that -- and I think it would certainly be up to the sound
24 discretion of the Court.

25 In this case right here you're talking about somewhere

1 in the neighborhood of 25 to 30 witnesses. They're going to
2 virtually try two-thirds of the case, if we had to go forward
3 with the proof on those two crimes. Somewhere in that
4 neighborhood, but maybe a little less. But more than 20, for
5 sure.

6 I don't -- I do not believe that anywhere in Parton does
7 it say that you have to have a mini-trial before you decide
8 that, whether or not that evidence is clear and convincing, or
9 whether or not that evidence is clearly along one of the issues,
10 such as motive and intent, that would allow it to be admitted.

11 MR. WEBB: Your Honor, if I can respond, I don't want
12 to interrupt your track of thought. This is a very important
13 issue.

14 THE COURT: Sure it is.

15 MR. WEBB: And, you know, it's our theory -- the State
16 has their theory. Our theory is that the state of Tennessee
17 wants to put in this evidence that we're talking about, events
18 that occurred on a Friday night in Blount County and in Sevier
19 County, primarily to inflame this jury.

20 THE COURT: I understand what...

21 MR. WEBB: And not only to inflame, but to confuse and
22 mislead. And, Your Honor, there is no one in this courtroom
23 that would question that that evidence, if it comes in, it will
24 inflame, it will confuse and mislead. And what it ends up doing
25 is, it ends up where -- where the spillover effect is so great

1 and so prejudicial that these two men---and it matters not if
2 they're guilty or innocent of this crime in this county---they
3 will never get a fair trial. A jury simply cannot ignore that,
4 and focus on the really material issue in this cause, in this
5 case, this day, and in this county. And that is that either or
6 both of these men have any direct, contributing cause to Connie
7 Branum's death. And that's the sole issue that we're here on
8 today, Your Honor.

9 Now, it's unfairly prejudicial; it's terribly
10 prejudicial. To allow that evidence in will taint our system
11 of justice here in this county. Now, I -- and that's in all due
12 respect to the general and His Honor. I think that what has to
13 be done under State v. Parton, if I read that case correctly,
14 is that this trial must begin and the attorney general's office
15 can call their witnesses as they choose, and in whatever order
16 they choose. And counsel for these defendants must make a
17 timely objection.

18 **THE COURT:** Sure.

19 **MR. WEBB:** And once that objection is made, I think
20 there's some things that just have to take place. And I think
21 the paramount thing is, once the objection is made, that this
22 Court is under an obligation to have a jury-out hearing, and
23 that testimony must be offered, not a proffer of proof.

24 A proffer of proof is no evidence. It simply is not.
25 And before this Court can go through the stages that is

1 required, you've got to hear the witness. You must. You must
2 first determine whether or not that -- whatever fact that
3 witness testifies to, you must determine whether or not that is
4 even relevant or material to any of the particular issues.

5 THE COURT: I understand that part.

6 MR. WEBB: Okay.

7 THE COURT: Now, let me ask you this: At the previous
8 two hearings we've had, one as a consequence of the -- well, the
9 first bond hearing, and the bond hearing that was had pursuant
10 to the reversal of Judge Biers in the court of criminal appeals
11 on the first bond hearing, all of us heard the proffer of proof
12 and the witnesses who were expected to offer that proof, is that
13 a fair statement?

14 MR. WEBB: Your Honor, if -- and I don't want to rely
15 on my memory. I'll rely on the record better than my memory.
16 But for purposes of attempting to answer your question, the
17 State called one witness.

18 THE COURT: I understand.

19 MR. WEBB: I believe that was Mark Turner.

20 THE COURT: Right.

21 MR. WEBB: And I'll be honest with you, I don't know if
22 he testified to anything.

23 THE COURT: And then, at the second hearing General
24 Schmutzer approached the bench and gave a scenario of the
25 evidence that he would expect to offer, is that a fair

1 statement?

2 MR. WEBB: Let me -- let me say this. I'll try to
3 answer it this way, and if the Court says I haven't answered it,
4 please direct me. General Schmutzer approached the bench and
5 asked this Court to accept his proffer, his statements of what
6 he believed the proof would show in this case, and it may even
7 be in written form, I don't know. I think it probably was. He
8 asked you to put that under seal. If you'll recall, I objected
9 to that. It was a timely objection; you overruled it.

10 THE COURT: Well,...

11 MR. WEBB: Your question there was more in line of a
12 probable cause situation, if I'm correct, Your Honor. I -- in
13 granting or denying bail.

14 THE COURT: Well, it was -- it was -- it was on an issue
15 of bail. But all I want to know is, Mr. Webb, and obviously the
16 Court does not want to put you and will not put you in a
17 position of having to waive anything. And I don't want to do
18 that. I understand that.

19 But, conversely, the Court doesn't want to waste
20 everyone's time if certain of the facts offered in this area are
21 uncontradicted and undisputed, or if you don't have any evidence
22 to the contrary.

23 MR. WEBB: Your Honor, let me -- and I hope I'm speaking
24 on behalf of counsel. Everything in this case is disputed,
25 contradicted, controverted.

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

2 **MR. WEBB:** There will be no stone unturned. We will --
3 we will dispute every issue raised by the State.

4 **THE COURT:** Okay.

5 **MR. WEBB:** Now, let me say it this way, Your Honor, and
6 please -- I do this in all respect to Your Honor.

7 **THE COURT:** Sure. Sure.

8 **MR. WEBB:** And I know you take that that way. But I
9 must -- this proceeding, what we're here to do, in our broadened
10 sense, is to see justice done. Everyone will agree with that.
11 And in my mind, and I -- with all candor to this Court, I don't
12 care if this trial takes a day or a year.

13 **THE COURT:** I know. Sure.

14 **MR. WEBB:** I really don't. And so, in my mind, and I
15 submit to Your Honor, that to see justice is done, that there
16 is absolutely no waste of anyone's time, to make sure it's done
17 correctly.

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

19 **MR. WEBB:** I'll answer any other questions the Court
20 has.

21 **GENERAL SCHMUTZER:** Your Honor, you had asked me, and
22 I -- in looking back over it, it's been some time since we'd
23 argued this. Actually, State versus Parton never even addressed
24 not only this issue, but actually it didn't even address -- it
25 was not reversed because they didn't have a jury-out hearing.

1 It was reversed on the facts, because they said that the crimes
2 that were proved...

3 THE COURT: Were not relevant.

4 GENERAL SCHMUTZER: ...were not relevant. And they just
5 -- they just said they were sent back for a new trial. They did
6 not send it back because they didn't have a jury-out hearing.
7 There's nothing in here that in any way addresses -- it's only
8 in the last couple of sentences of the opinion where the court
9 notes the fact they didn't have a jury-out hearing. It doesn't
10 say what has to be heard at all. So, to cite Parton as saying
11 that you have to have a full-blown trial, mini-trial, and to
12 judge the proof is stretching this case way beyond what it
13 actually says.

14 Now, if, in fact -- and that's what we should -- we
15 should be seeking justice. And obviously, justice in this case
16 can only come about if the jury hears an orderly presentation
17 of all the proof in this case, and it comes in such a way that
18 they can look at all that proof, put it together, and come to
19 a decision, whatever it is, and reach a decision.

20 Now, what they're suggesting to this Court is that we
21 call a witness, and before that witness testifies to this jury,
22 we have a jury out hearing. We're talking about somewhere in
23 the neighborhood of 30 witnesses. Each time we stop between
24 witnesses and have a jury-out hearing, while the Court attempts
25 to -- to rule on the admissibility of that particular evidence.

1 Well, this particular evidence is circumstantial. The Court --
2 there's no way this Court can judge any particular witnesses
3 testimony, until it has heard all of the testimony. Because --
4 and some of these witnesses will have very little to say about
5 the broad scheme of things, but when you hear them in relation
6 to five or ten other witnesses, it fits the whole picture
7 together, because this is a circumstantial evidence case.

8 I do not believe, under any circumstance, that that is
9 required, that the State would have to do that. To do that
10 would be -- it's stated that the State's reason for wanting to
11 introduce this, in part, is to confuse the jury. Anybody that
12 has the burden of proof, if they're setting out to confuse the
13 jury then they've got real problems. It's obviously our --
14 that's the last thing we want to do. But I submit to the Court
15 it certainly would be the first thing we would do if we -- this
16 jury came in, and before each witness they had to go outside and
17 sit down, the Court first heard from that witness and made a
18 ruling, and it would stop the orderly flow and it would do a
19 travesty to attempting to do justice in this case.

20 This Court has complete control over this case. This
21 Court can hear the proffered evidence, which it's already heard.
22 If this Court finds that the State has not met that, this Court
23 has any number of options it can do, because it has control over
24 this trial, to see that justice is done. But I think it would
25 be a supreme injustice if we found that they're playing games.

1 And there's no case, there's no case anywhere that says
2 -- I cannot find any case that says that you have to hear from
3 the actual witnesses, each and every witness, and on the basis
4 of those witnesses make a decision as to whether or not it's
5 admitted. And we would have to do it on -- and the thing is,
6 too -- heres another thing, Your Honor, that would completely,
7 I think, be an injustice in the case, is that obviously we've
8 got to make opening statements. How can anyone make a cogent,
9 reasonable opening statement when they have no earthly idea, at
10 this point, what the proof is going to be? As to whether or not
11 any of this evidence is going to be -- or which part of it is
12 going to be admitted. And certainly, it would even create more
13 confusion if the State were to stand up here and tell the jury
14 what it's expected to prove, and a half to two-thirds of that
15 turned up was never proved. And, of course, justice cuts both
16 ways. It doesn't just lie to the defendant. We've got to have
17 -- it can go both...

18 I think in the orderly presentation, Your Honor, of this
19 case, and seeing that justice is done, and that it's presented
20 in such a way that this jury can make an informed and
21 intelligent decision on guilt or innocence of these two
22 defendants, there's only one way to proceed, and that's the way
23 the Court has indicated it's going to proceed.

24 MR. WEBB: Your Honor, let me -- justice does cut both
25 ways, but due process cuts one way, and that's to afford and

1 protect any accused citizen. And I think the general's trying
2 to push this thing through, make this thing swift and make it
3 painless and let's be done with it, there's other cases. That's
4 not what this Court should sit and allow, if this Court doesn't
5 feel that's...

6 I'm wanting to make a couple of points to Your Honor.
7 The general says, "Let all the proof in. Let's just take it,
8 just get a wheelbarrow of proof, just bring it in here, and
9 let's dump it out, let the jury decide, give him all these
10 arguments about all these other things." But Your Honor knows,
11 and the attorney general knows, and every defense attorney and
12 every attorney in this land knows this, we're talking about
13 competent evidence, we're talking about relevant evidence.
14 We're not talking about all proof.

15 **THE COURT:** So let me ask you about this, Mr. Webb, and
16 the first issue that the Court knows it has to address is
17 whether or not this "other crimes" evidence is relevant. And
18 -- and that's the threshold question that I most determine.

19 **MR. WEBB:** Your Honor, let me -- let me ask you this
20 question back. How can you determine whether any evidence that
21 comes from this witness stand is relevant until you have first
22 heard it?

23 **THE COURT:** Let me ask you this question.

24 **MR. WEBB:** Okay.

25 **THE COURT:** How do we determine at any pretrial hearing

1 whether something is relevant or not? As is often the case...

2 MR. WEBB: I think that that...

3 THE COURT: Wait just a minute.

4 MR. WEBB: Okay.

5 THE COURT: As is often the case, counsel gets up, tells
6 me what their offered evidence is going to be, and the Court
7 makes a decision on whether or not that evidence bears on a
8 relevant issue in this trial. Is that a fair statement of what
9 would happen?

10 MR. WEBB: I'm not sure that is in this case or not,
11 Your Honor, because what we're talking about, we're talking
12 about -- I mean, we don't want to jump from your -- the first
13 question is determining whether or not something is relevant,
14 and then just leap frogging to 404(b). There's some things that
15 have to be done before you get to 404(b). And the Court knows
16 this.

17 404(b) is a rule of exclusion. It's a rule that says,
18 "Evidence will not come in unless certain things are proven to
19 Your Honor's satisfaction. Now, how can Your Honor rule that
20 the State, for instance, has proven by clear and convincing
21 evidence a particular fact is linked to this particular accused
22 person 'til you hear it?

23 Now, I disagree with general on State v. Parton. It's
24 in black and white on the last page, and I'll read it into the
25 record.

1 **THE COURT:** I've got it. I've got it.

2 **MR. WEBB:** It is very clear what State v. Parton says.
3 I feel that it is subject to no disagreement. And, you know,
4 the general says -- he keeps talking about evidence. There has
5 been no evidence.

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

7 **MR. WEBB:** We could write up -- if the Court'll give
8 us two or three minutes, we'll write up something and put it in
9 there, but that's not evidence. Never has, never will be.

10 You have yet to hear any evidence. And if I'm wrong,
11 the Court can tell me I'm wrong. But I've been in this for a
12 year, and on this particular issue I have heard no evidence.
13 And I'll be glad to talk to the Court further. It's a very
14 important issue, as the Court's aware of. And I just don't
15 think we're right at the point in time that the Court can
16 competently and -- can make a fair decision. You're not fair
17 yet.

18 **THE COURT:** Okay.

19 **MR. WEBB:** And I believe Mr. Miller...

20 **THE COURT:** Yes, Mr. Miller?

21 **MR. MILLER:** Just one point, Your Honor, I'd like to
22 make. I understand where the Court's coming from when we talk
23 about relevant evidence, and Your Honor often, in every trial,
24 just about, makes the decision based on what the attorneys tell
25 them the evidence will be, whether or not it's relevant.

1 The basis behind 404(b), assume you've got -- I think
2 you're assuming up front you've got a crime that's committed;
3 Your Honor determines, if you assume that crime was committed,
4 whether or not that's admissible. I think you can make -- may
5 be able to make that decision. What Parton says is that you
6 have to hear evidence to determine if there is clear and
7 convincing proof of that other crime, and that's the reason for
8 hearing the evidence. And I've had personal experience with the
9 court of appeals with evidence.

10 **THE COURT:** I have, too.

11 **MR. MILLER:** And what they mean by "evidence" is not
12 lawyer talk and not proffers. If General Schmutzer got up and
13 said, "This is what we expect to prove," and we said,

14 "We agree. We stipulate to that," I've even seen that
15 situation where they didn't consider that evidence, because it
16 wasn't a physical document or stipulation filed in the court
17 record, they called it "lawyer talk," and waived all that,
18 because it's lawyer talk.

19 But especially when we do not agree, it cannot be
20 considered evidence. When the supreme court said evidence, I
21 think they clearly meant and would interpret that to be live
22 testimony.

23 **THE COURT:** Anything further?

24 **GENERAL SCHMUTZER:** Nothing -- nothing, unless the Court
25 has some question of the State specifically, you want us to go

1 to... Your Honor, I -- the State has nothing more, other than
2 what's been said. The case -- the Court has read Parton, and
3 I think you have your own ideas of what it says, not going to
4 argue that anymore. The Court knows the crime the State intends
5 to rely on, the Court knows the reasons why the State intends
6 to rely on them, the reason why we want to rely on it. The
7 Court knows the proof, has an outline of the proof that the
8 State would go forward with to prove, that would show by clear
9 and convincing evidence these crimes were committed, and all
10 that would take some 30 witnesses to do. And obviously comes
11 first. First thing the State would lead to in this trial would
12 be with the prior crimes, leading into this crime. So it -- I'm
13 just -- you know, it's -- I find nowhere where it's required
14 that we have to go forward and put on each and every witness for
15 the Court to make an intelligent ruling on whether or not that
16 evidence is admissible.

17 In fact, in this -- in the Parton case, the problem was
18 not with whether the evidence was clear and convincing the other
19 crimes were committed. As I read it, Your Honor, it was simply
20 that it was not -- it was not relevant and material to one of
21 those issues, such as intent. It said that in the crime that
22 was charged intent was not an element of the offense, that they
23 were prosecuting it on. And so they were saying that basically
24 it didn't fit one of the exceptions, not that it wasn't clear
25 and convincing. So it really doesn't go to any type of jury-

1 out hearing was required.

2 MR. MILLER: Your Honor, in interpreting the Parton
3 case, it's clear, from the last two paragraphs, why it was
4 reversed; because the trial judge didn't comply with those two
5 of the three prongs of Parton. Mr. Schmutzer -- I'll give him
6 a chance to answer this. He's told -- told Your Honor what all
7 the Court knows. But the Court does not know that there is
8 clear and convincing evidence of these crimes.

9 THE COURT: Okay, let me ask you this, Mr. Miller.
10 Suppose -- and I think at least that you would agree I have
11 heard what the State's proof is expected to be on the "other
12 crimes" evidence, is that a fair statement?

13 MR. MILLER: I don't -- I don't think we've probably
14 heard -- I don't think we know what their -- all the proof will
15 be. He's given us what they're supposed to, but...

16 THE COURT: Okay. Okay.

17 MR. MILLER: ...that never includes everything.

18 THE COURT: Okay, let me ask you this: Suppose that
19 they put their proof on and you cross-examine them. Then does
20 the Court have to hear countervailing evidence that your clients
21 might offer in a motion hearing on a -- on a...?

22 MR. MILLER: I think that's a little bit more difficult
23 question. Of course, it'd be my position that you do. And I
24 may be wrong on that, but I think you at least have to hear the
25 State's witnesses and cross-examination. You're talking, there

1 again, once the standard of proof, clear and convincing, can the
2 Court make that decision based on -- of course you can't do it
3 based on proffer. Can you do it based on testimony from the
4 State's witnesses only? I don't think you can. I think they
5 can make a prima facie case based on their witnesses, but to
6 answer the Court's question, I think you have to hear all of the
7 facts to determine if there's clear and convincing evidence.

8 **THE COURT:** Okay.

9 **GENERAL SCHMUTZER:** Your Honor, if you just -- they say
10 logically, then, that every time that you came up with this it
11 basically would require a trial.

12 **THE COURT:** I have considered this issue since November
13 1992. It -- in fact, even before that time it became apparent
14 to the Court, based on the motions that have been filed and the
15 information that had been provided to the Court by counsel, that
16 this was obviously a crucial and important issue in this trial.

17 I wish I could tell you that I knew, world without end,
18 the right answer to this question, but I do not. I'm,
19 unfortunately, very human. The most important thing that I want
20 to do here in this trial is to make sure that these defendants
21 receive a fair and impartial hearing. That is my most important
22 job here. The question, as its been framed, at least, is how
23 far the Court must go in determining whether, in this case,
24 evidence of other crimes is admissible.

25 I want to read you part of the jury instruction, the TPI

1 Charge 37.05, that I will give to a jury. After the
2 introductory part of it, it says, "This evidence may only be
3 considered by you for the limited purpose of determining whether
4 it provides:

5 "A) the complete story of the crime. That is, such
6 evidence may be considered by you where the prior
7 crimes and the present alleged crime are logically
8 related or connected, or are part of the same
9 transaction, so that the proof of the other tends or
10 is necessary to prove the one charge, or is necessary
11 for a complete account thereof."

12 That cites the Mayes case. It's an old case. And the Ellison
13 case that came after that in 1976.

14 "It may also be shown to prove a scheme or plan. That
15 is, such evidence may be considered if it tends to establish
16 that the defendant was engaged in a common scheme or plan for
17 the commission of two or more crimes so related to each other
18 that the proof of one tends to establish the other." And, of
19 course, motive and intent.

20 As stated, the Court has previously heard the proffered
21 proof. Obviously, the Court has not heard all the witnesses.
22 And the Court realizes, and it's obvious that this evidence, if
23 it comes in, is damaging to the defense, devastating to the
24 defense in the sense of showing motive, intent, maybe a common
25 scheme or plan, or in completing the whole picture of the

1 evidence.

2 But the Court finds that the proffered evidence is
3 highly relevant evidence. And then, the first part of 404(b)
4 is: Is it unfairly prejudicial? Unfairly prejudicial. In
5 order to make this determination, the Court has to, at least in
6 this case, make the assumption that the State will be able to
7 offer the proof as stated in its proffer of proof. Based on
8 that, this Court feels that the evidence is not unfairly
9 prejudicial. And I underline "unfairly prejudicial."

10 The next thing, of course, is how far the Court must go
11 in determining whether or not it is shown by clear and
12 convincing evidence. In the normal case I think the Court could
13 have a jury-out hearing and hear a single witness, two
14 witnesses, three witnesses, maybe even ten witnesses. To ask
15 a trial court to have two or three days of hearings on that
16 issue I don't think is mandated by the rules of evidence in the
17 state of Tennessee.

18 Now, if the offered evidence comes in, and the Court
19 then determines, in its judgment, that the evidence should not
20 go to the jury, there are two ways, of course, it could be dealt
21 with. One is curative instructions. This Court is not naive
22 enough to believe that, once that evidence comes in, that
23 curative instructions could, in fact, cure it. I'm well aware
24 of that.

25 The issue, then, would be what would the Court do, what

1 could the Court do to remedy the situation? That is obvious to
2 this Court, that in the event -- and I state this as part of my
3 ruling, and therefore it is cautionary, as well. That should
4 the evidence as offered, not be clear to the Court as to its
5 convincing nature, the Court would then declare a mistrial.
6 That is the option that the Court retains, obviously, and that
7 is the option that the Court would unhesitatingly adopt if it
8 is not proved as stated.

9 As I told counsel, I will and -- understand and
10 appreciate the situation that both sides find themselves in.
11 The purpose of a trial is to be fair and impartial to both
12 sides, and to protect the rights of the accused. The law has
13 many remedies during the trial, and of course obviously post-
14 trial. And I understand those. And as I've told all of you
15 many times, I certainly don't guarantee that I'm right in every
16 decision I make as a trial judge. I try to be, but I make
17 mistakes, and if I make them people a lot wiser than this Court
18 can solve that problem.

19 But I've wrestled with this issue, I promise you, as
20 much as anything that I've ever had to wrestle with on the
21 bench. And that is the ruling of the Court.

22 MR. MILLER: Your Honor, I understand the Court.

23 THE COURT: Yes.

24 MR. MILLER: Just want to clarify a few things.

25 THE COURT: Yes, sir, Mr. Miller. And, before you say

1 that: Now, by that ruling, you know, just because a witness,
2 it is stated to the Court, may be able to testify to certain
3 matters does not mean that anything that that witness got up and
4 said could not be objected to. You know, all the other rules
5 of evidence would apply, the hearsay and the -- and the -- all
6 other matters would apply. So I understand that you -- I feel
7 confident there'll be other objections, and some of them very
8 well may be on the point. Now,...

9 MR. MILLER: And the Court has said it will declare a
10 mistrial if not satisfied...

11 THE COURT: Yes, sir.

12 MR. MILLER: ...with the clear and convincing nature of
13 the crime. Of course, I think the State is going to try to put
14 in evidence on two other crimes: the arson of the trailer...

15 THE COURT: Right.

16 MR. MILLER: ...and the murder of Tommy Griffin.

17 THE COURT: Right.

18 MR. MILLER: If I understand the Court, if they -- maybe
19 they prove the murder of Tommy Griffin to the Court's
20 satisfaction; they don't prove the trailer fire to the Court's
21 satisfaction, is that a mistrial?

22 THE COURT: Not necessarily. I would have to determine
23 in my mind whether or not the other evidence outweighs it; and,
24 of course, I would assume that I would have to judge that on the
25 harmless error standard as per the rule, so...

1 MR. MILLER: Okay. Also, the Court ruled that the
2 evidence was relevant, highly relevant. And the Court may have
3 done this by previous order, but if it will state, if it hasn't
4 already done so, the issues to which the evidence of other
5 crimes is relevant?

6 THE COURT: Okay, the Court will try its best to do
7 that.

8 MR. MILLER: And the instruction the Court read, if
9 that's going to be the one the Court reads, I think it needs to
10 be -- the portions need to be deleted from there...

11 THE COURT: Oh, I...

12 MR. MILLER: ...such as "common scheme and plan," if
13 that's not one of the issues.

14 THE COURT: Right. Right.

15 MR. MILLER: I suspect, to preserve our record, we're
16 going to be objecting every time that's offered.

17 THE COURT: I understand that, Mr. Miller, and I've --
18 as I've told you and other counsel, you never have to apologize
19 for representing your client.

20 General Schmutzer, if I could ask you to restate for the
21 Court -- I know the State intends, and the Court has already
22 ruled admissible the previous alleged statement by Mr. Dellinger
23 stating what it was he was going to do. As I recall it, "Clean
24 out that hill of Griffins," or something to that effect. And
25 I -- and I know that motive is...

1 **MR. WEBB:** Your Honor, in that regard, once again we're
2 going to renew our motion to sever.

3 **THE COURT:** I understand. I understand.

4 **MR. WEBB:** Something about -- and ask the Court to rule
5 on that.

6 **THE COURT:** I've already ruled on that, and I've
7 overruled your motion.

8 I know that motive is one of the reasons that the State
9 seeks to show this evidence. In relation to the other aspect
10 of it about the connection of the two, if you would state your
11 reasoning on that again, General Schmutzer.

12 **GENERAL SCHMUTZER:** Your Honor, the -- of course,
13 obviously the victim was a Griffin, Connie Branum -- Connie
14 Griffin Branum.

15 **THE COURT:** Right. Right.

16 **GENERAL SCHMUTZER:** But I think more importantly, Your
17 Honor, the evidence regarding the crimes committed against Tommy
18 Griffin go to their motive in killing Connie Branum, because the
19 proof will show that on the day after they had set fire to
20 Tommy's trailer and murdered him, she was out in Blount County
21 looking for him, and making inquiries. And our proof will show
22 that they got together with her, while she was making these
23 inquiries, and based upon the way she was making the inquiries,
24 and what was being asked -- and what was being said by these
25 defendants, they had not been truthful to her as to what had

1 transpired and what the facts will show had gone on the night
2 before.

3 That it is our position that when they left---and they
4 were the last people that were seen alive with her---when they
5 left at around 7:00 from over there, that was the last time she
6 was seen alive. And we can put this fire that -- where her car
7 was burned up occurring between 8:00 and 8:30 that same evening,
8 being seen by witnesses, who later -- five days later walked up
9 and found the thing.

10 That this goes to their motive, Your Honor, obviously
11 to do away with her to cover up their prior crime, that she was
12 getting on to them, that she was actually, you know, coming on
13 the fact that they had done something to her brother. And I
14 think that's exactly what the State's position is.

15 Now, we can't climb into their minds, obviously, but I
16 think that the statement that he'll get rid of that hill of
17 Griffins, without being -- without -- certainly not having to
18 elect, because the jury will ultimately decide what relevance
19 it will have, Your Honor. It is highly relevant on what they
20 ultimately did with Tommy Griffin. And what they did to Tommy
21 Griffin is highly relevant and material as to what they did to
22 Connie Branum.

23 Plus -- as I say, plus the fact that this is a two-edged
24 sword because, by the same token, she's a Griffin, too, you
25 know. But that would be -- that's the State's position on that,

1 Your Honor, going to motive, going to intent. And certainly
2 we've talked about this before, it is a circumstantial evidence
3 case. It shows a lack of a mistake; it shows an intent, which,
4 of course, is an element of this crime, first degree murder; and
5 it gives -- it paints the full picture. As Paul Harvey says,
6 "It's the rest of the story," and it's all falling within a 48
7 -- really, about a 24 -- 24 hour period.

8 **THE COURT:** As stated by the Court, I have considered
9 this issue for several months now. And I thought that if the
10 first alleged murder was totally unrelated, or say, in a
11 hypothetical case, say that a person robs a store in Chattanooga
12 and kills someone, and then comes to Knoxville County and eats
13 supper and has a few beers and drives out and runs over and
14 kills someone, and charged with vehicular homicide. It is
15 obvious to this Court that the incidents in Chattanooga would
16 have no bearing on any relevant point in the case in chief
17 against that defendant. That, I think, is the purpose of 404's
18 exclusionary policy, is what I feel.

19 But in this case, I feel that the statement previously
20 made by Mr. Dellinger, offered to be -- or at least as expected
21 to be testified to by Mr. -- made by Mr. Dellinger, is relevant
22 to motive. And, therefore, the subsequent alleged acts, if
23 true, would be in furtherance of that motive. And that if the
24 evidence offered by the State is true, would be highly relevant
25 as to why Ms. Griffin-Branum was allegedly killed. And if --

1 if also true, could be shown to be a continuation of a plan to
2 wipe out that hill of Griffins. That is the reasoning of the
3 Court as to why it concludes that proffered evidence is
4 admissible.

5 MR. MILLER: Just one further question.

6 THE COURT: Yes, sir, Mr. Miller.

7 MR. MILLER: Of course, that's giving the jury two ways
8 to go, and I understand that, and that may be admissible.

9 THE COURT: Well,...

10 MR. MILLER: But as far as a common scheme or plan, or
11 as a cover-up, it's okay. And once they've made their decision,
12 if they convict these boys, we don't know what they base their
13 decision on. And, of course, depending on what they've made
14 their decision on, the death penalty, as a matter of law, would
15 not be applicable. If they said it was common scheme or
16 plan,...

17 THE COURT: Sure, I understand your point, Mr. Miller.
18 But let me ask you this, and I'm not asking you to agree with
19 this. But it's the Court's feeling that evidence, any evidence
20 in any case, may be looked by a jury in any number of ways, for
21 any number of reasons, as long as it's a legally relevant reason
22 and it's properly admissible. The conclusions they draw or the
23 reasons they draw those conclusions are generally not reviewable
24 by either the trial court in post-trial hearings, or by the
25 appellate court.

1 The standard of review is: Is there sufficient evidence
2 in the record to sustain what the jury did? That's probably not
3 grammatically correct, but that's how it's looked at. And, so,
4 a jury is free to draw all reasonable inferences from the proof,
5 whatever it is and whomever offers it. And, so, they -- as long
6 as there is evidence in the record to support a proper
7 inference, that's the jury's choice, isn't it, as the finder of
8 fact?

9 **MR. MILLER:** I think Your Honor's correct there. I just
10 have a problem with the attorney general demanding the death
11 penalty, saying he demands the death penalty because this is an
12 elimination of a witness; then they come back and they say, "No,
13 maybe it was part of a common scheme or plan."

14 **THE COURT:** I understand the problem it presents for the
15 defense, but any number -- any set of facts could lead to any
16 number of different conclusions in a proper case.

17 **GENERAL SCHMUTZER:** And it's certainly not an either/or
18 proposition.

19 **THE COURT:** Right.

20 **GENERAL SCHMUTZER:** We frequently have more than one
21 reason to do any number of things.

22 **THE COURT:** Right.

23 **GENERAL SCHMUTZER:** And it could be that -- you know,
24 it can be that you, to use a pun, "Killed two birds with one
25 stone," type situation. Plus, the -- what they have expressed

1 concern about is no concern at all, because the same jury will
2 -- in this trial will be the one to do the sentencing. They
3 know whether or not they -- if the State didn't carry this
4 burden with regard to the intent, because they will have already
5 found that, and when they -- when they hear it on the sentencing
6 phase...

7 **THE COURT:** If we should get that far.

8 **GENERAL SCHMUTZER:** Yeah. So, I think they are the ones
9 that will be deciding -- we'll know, you know, that -- from them
10 how they decided on the first instance by probably the decision
11 on the second one.

12 **THE COURT:** Mr. Webb?

13 **MR. WEBB:** Your Honor, I'm a little slower than others,
14 I suppose. I do realize that this is a capital case, and
15 because of that this case calls for heightened standards of due
16 process. If I understood what just transpired, the Court is
17 going to assume that the attorney general's proffer of proof
18 will be the evidence that comes into this cause.

19 **THE COURT:** Correct.

20 **MR. WEBB:** I'd ask that the reporter to type that up,
21 and we'll see later if that's happens to be the proof that's
22 offered (sic). Maybe Mr. Miller'd better ask that; I can't
23 afford it, but I'd like that typed up.

24 **THE COURT:** That proffer of proof is in the record from
25 the -- if -- for sure the second bond hearing, and the -- if not

1 the first one completely.

2 **GENERAL SCHMUTZER:** Your Honor, it was offered in the
3 first one, and we put a witness on and presented it again in the
4 second.

5 **MR. WEBB:** Of course, that's hearsay, but anyway...

6 **THE COURT:** Well, I was there.

7 **MR. WEBB:** ...the Court's ruled on it.

8 **THE COURT:** Yeah.

9 **MR. WEBB:** Your Honor, maybe I missed the point. If the
10 general's theory in this case is that this co-defendant made a
11 statement that he was going to wipe out the whole hill of
12 Griffins, it appears to me -- and if that was carried out and
13 the State proves all that, then how can this Court...?

14 **THE COURT:** Go ahead.

15 **MR. WEBB:** How can this Court then allow this State --
16 the state of Tennessee to say that this lady was killed to cover
17 -- as -- because she was a witness to a crime? It doesn't make
18 sense to me, and I -- maybe it makes sense to my counsel here,
19 but it just -- I just cannot fathom that. It is just
20 contradictory in nature, and I'm going to move the Court at this
21 point, if that's what they're saying their theory is, I move the
22 Court to dismiss the enhancement or aggravating factor because
23 they have just stated on the record that she was not a witness,
24 that she -- that the purpose was to carry out his statement to
25 wipe them all out. And I that is what their theory is, then how

1 in the world...?

2 THE COURT: Well, now, they have -- and granted, now,
3 as -- as defense counsel in my younger years I can well
4 appreciate and have disagreed many times with the State's theory
5 of their lawsuit. And many times the state of Tennessee has
6 come at me with different theories, alternative theories. While
7 I didn't always agree with that, as a -- as trial counsel, even
8 sometimes as a trial judge I don't agree with that, but that is
9 not the trial judge's prerogative. That is the state of
10 Tennessee's prerogative in indicting a person under either
11 alternate theories, either -- as we all know, a person may be
12 indicted on felony murder; or, in the alternative, premeditated,
13 classic first degree murder; and any number of ways a person may
14 be indicted.

15 And as I just stated, the theories that are presented
16 to the State -- or by the State, of course, must be shown by the
17 evidence. Then, after the evidence is in in these -- in a
18 multiple theory case, of course, the Court may, in its judgment,
19 limit them by either dismissing portions of the indictment that
20 the Court does not deem properly shown by the evidence, or any
21 other number of remedies. But I don't have the authority, under
22 existing state law, to tell the state of Tennessee or defense
23 counsel, for that matter, what theories they may present to the
24 jury if, in fact, those theories are recognizable under the law.
25 So I am not prepared to do that, and shall not.

1 Ms. Thomas, I've not heard from you in some time.

2 MS. THOMAS: No. If the Court would allow me to follow
3 up on what Mr. Webb said.

4 THE COURT: Yes.

5 MS. THOMAS: If the State is going to be allowed to
6 proceed on alternative theories, then they would be required,
7 in their proffer of proof, to state what evidence they have that
8 Ms. Branum would be a witness to Tommy Griffin's murder.

9 THE COURT: I don't think it's ever been stated that she
10 was a witness to his murder.

11 MS. THOMAS: Your Honor, that's the basis of the -- or
12 a witness in that case. That's the basis of the death penalty
13 phase here.

14 MR. WEBB: Your Honor, what we're talking about is of
15 the greatest concern. We're talking about the aggravating
16 factor that they filed. We're talking about sentencing issues
17 here. We're not talking about...

18 THE COURT: Okay, let me ask you this: Since the issue
19 that you talk about goes to sentencing, I believe I've heard the
20 statement of putting the cart before the horse? And don't you
21 think we might ought to wait and see if these defendants are
22 convicted before we start talking about...?

23 MR. WEBB: Well, Your Honor, what I -- what we're
24 talking about is allowing the State to go through this whole
25 ordeal...

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

2 MR. WEBB: ...to get a death qualified jury...

3 THE COURT: I've already ruled on that issue, Mr. Webb.

4 MR. WEBB: Just for the purpose of a death qualified
5 jury, they use this aggravating factor. I agree with
6 Ms. Thomas, allow the State, through their proffer of proof...
7 I can't defend that. I can't cross-examine that. But since
8 we're having this situation go on, I'd like the State to state
9 in their proffer what their evidence is that would constitute...

10 THE COURT: General Schmutzer, state that for the record
11 again, please sir.

12 MR. WEBB: ...that aggravating factor.

13 THE COURT: State that again, for the record.

14 GENERAL SCHMUTZER: Your Honor, what I just stated a
15 minute ago?

16 THE COURT: No, as to the offered evidence that would
17 tend to show that Ms. Branum was killed in furtherance or in --
18 to cover up the death of her brother. State that for the
19 record, please, sir.

20 GENERAL SCHMUTZER: All right, Your Honor. Do you want
21 me -- do you want me to start back at the...

22 THE COURT: Please. Please. Yes, sir, if you...

23 GENERAL SCHMUTZER: All right, do you want me to -- I'm
24 sorry. Do you want me to start back with the commission of the
25 crimes against him?

1 **THE COURT:** Yes, sir. Yes, sir. If you -- if you are
2 prepared to do that at this time, or if you need to review it,
3 the Court will give you an opportunity to do that.

4 **GENERAL SCHMUTZER:** Well, I probably can, Your Honor.
5 I basically will be making an opening statement, I guess. You
6 know, what you might want to do is hear opening statements,
7 rather than hearing it twice, if you want me to go into that
8 detail.

9 **THE COURT:** Well, no, let's -- let's...

10 **GENERAL SCHMUTZER:** Your Honor, of course, in this case
11 we would show that this defendant, James Dellinger, had his --
12 an outbuilding shot into on February the 15th. The proof will
13 show that there was some bad blood at that time between the
14 Griffins and Dellinger and his nephew, Gary Sutton. That there
15 had been a fight prior to that time involving Gary and one of
16 the Griffin brothers by the name of Bill Griffin, in which Bill
17 Griffin was hospitalized with a broken jaw, beat up pretty
18 severely.

19 That when the officer went up there to investigate, he
20 asked him did he think -- did he know who -- who did he think
21 did this. And he said the Griffins. He said, "If I have to,
22 I'll wipe out that whole hill of Griffins."

23 The -- subsequently, the...

24 **THE COURT:** And you have an officer ready who is going
25 to testify to that statement?

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

2 **THE COURT:** Okay.

3 **MR. WEBB:** Your Honor, I'd like to interject at some
4 point. I just heard the general... How can the general come
5 in and talk about a broken jaw, Bill Griffin, by Gary Sutton,
6 is that what you just said? That they had a fight? Is that
7 what -- are you trying to prove that crime, as well?

8 **GENERAL SCHMUTZER:** I expect -- I expect to show it.
9 I'm going to take that up with the Court, yes.

10 **MR. WEBB:** Your Honor, see, we're getting into another
11 matter. There is just so many we can defend, Your Honor.

12 **THE COURT:** Go ahead, Mr. Schmutzer.

13 **GENERAL SCHMUTZER:** The -- further show, Your Honor,
14 that on the 21st of February Tommy Griffin and these two
15 defendants were out driving around in Maryville, in Blount
16 County, drinking. They ended up in a bar called Howie's
17 Hideaway, the three of them. That they were in there 'til
18 somewhere in the neighborhood of 7:00 p.m.; when they left, the
19 three of them left together. That when they left the --
20 something like ten or 11 minutes later, or in that neighborhood
21 ---and it's hard to be exact---but a short period of time later,
22 7:11, on the road to Maryville there was a dark Camaro seen on
23 the side of the road. The proof will show that these two
24 defendants were driving Gary Sutton's Camaro. There was an
25 individual, at least one outside the car and one inside the car,

1 that they were fighting, scuffling. And another person comes
2 by and sees a man without a shirt stumbling around in the same
3 vicinity, just right at that same time.

4 The officer -- turned out the first car that saw the
5 scuffle had a -- was a part of Rural Metro, and called it in,
6 and the dispatch dispatched an officer's vehicle out there. An
7 officer went out, and when he first got there he didn't see
8 anyone. They were supposed to be alongside the road at the Hunt
9 Road overpass. But he -- a truck began blinking his lights
10 towards them, and they -- he sends another officer up there and
11 they find the victim, Tommy Griffin, without his shirt on, been
12 in a fight, evidence of being in a fight, sitting in the road.
13 That he was taken in and ultimately placed in jail around 7:40.

14 That in the neighborhood of 9:00, the neighbor who lives
15 almost equidistance between the defendant, James Dellinger, and
16 Tommy Griffin---the all both live in the same hollow---and the
17 -- a neighbor lived in-between on the other side of the road.
18 His dog starts barking, and he looks out and sees a white truck
19 some distance up at Tommy Griffin's trailer. He looks down and
20 sees the passenger door closed, and as it passes by he
21 recognizes it as Dellinger's truck. It goes right on up and
22 pulls in Dellinger's driveway, and he looks back and sees
23 flames, fire coming out of Tommy Griffin's trailer. They call
24 911, so the time is nailed down there.

25 He -- Your Honor, during that period of time, right

1 about the beginning when it was -- when it was started, one of
2 the Branum girls runs over to tell them, to tell the Dellingers
3 that Tommy's place was on fire, because they were concerned that
4 Tommy might be in there. Because he did drink, he was down
5 there a lot alone. And she saw these two defendants in
6 Dellinger's home, and one made the statement that, "He's in
7 enough trouble already, couldn't come down there," and the other
8 one stated, "Not to worry about Tommy," or the words to the
9 effect that Tommy was in Maryville with a girl. Turns out this
10 was the statements they made to the police later on.

11 Subsequently, a -- one of the other daughters called
12 them at the request of their mother, Connie Branum, calls and
13 asks where Tommy is again, and they say that he is in the Blount
14 County Jail, and that they're going to go get him. And that was
15 James Dellinger. The proof will show that they loaded up --
16 took a -- one of them took a long object that was wrapped in
17 something out of the back of the truck, and our subsequent proof
18 would show that he carried a weapon all the time in the back of
19 that truck.

20 **MR. MILLER:** Your Honor, if I can stop him right there.
21 He said one of them took an object out of the truck. They have
22 no proof to that fact, I don't believe. Nobody can identify one
23 of them as taking nothing out of that truck.

24 **GENERAL SCHMUTZER:** I can, Your Honor. There'll be
25 circumstantial evidence as to which one, and I think the

1 (indiscernible) to guide him to a gray car belonging to Linda
2 Dellinger, and left the hollow and went in the direction of
3 Maryville. That they took Tommy Griffin out of the jail. It
4 was around 11:35 -- 11:25.

5 **THE COURT:** Bailed him out of jail?

6 **GENERAL SCHMUTZER:** Took him, bailed him out of jail.
7 That, Your Honor, 30 minutes later, nine miles away two shots
8 are heard from the very vicinity where his body was later found.
9 And it was -- it was amazing, but there was a young man who was
10 writing in his diary that night, that lives around there, and
11 he heard the shots, recorded them, and put the time. And also
12 recorded -- the body -- this was on a Friday night. The body
13 wasn't found 'til Monday, when he recorded that, also, the body
14 being found, and also recorded the following day he called the
15 sheriff's department and reported the shots, because they came
16 from what they call Matting Lane or Blue Hole area, where
17 there's a big swimming hole.

18 The body was found. It had fallen off the -- down a
19 bank, didn't get all the way in the river. Been shot once in
20 the back of the head, and there was two shells found on the
21 ground. Both shells turned up to match shells that were found
22 in the yard of James Dellinger. The -- as having been fired
23 from the same weapon. The weapon was never recovered.

24 The -- I don't know, I forgot, Your Honor, how far --
25 you want me to go all the way to say every bit of my proof all

1 the way through, or how far do you want me to go?

2 MS. THOMAS: Your Honor, the issue I had requested was
3 the proffer of proof on evidence that Connie Branum knew her
4 brother had been murdered.

5 THE COURT: Okay, continue, General Schmutzer.

6 MR. DANIEL: Your Honor, for the record we would object
7 and don't want to accept this as a proffer of proof regarding
8 these bad acts.

9 THE COURT: I understand.

10 MR. DANIEL: Understand that this is not an agreement.

11 THE COURT: I understand that.

12 MR. DANIEL: And that this is -- in regards to her
13 motion and Your Honor's request regarding this.

14 THE COURT: I understand that, Mr. Daniel.

15 MR. DANIEL: And, too, this issue -- a lot of what he's
16 saying is irrelevant, but he's got a right to say what he wants
17 to say.

18 THE COURT: Sure. Thank you. Go ahead.

19 GENERAL SCHMUTZER: Your Honor, the -- our proof would
20 show that the following day -- that Connie Branum stayed up that
21 night, and these men didn't get in 'til about 1:00 in the
22 morning, she called immediately, wanted to know where Tommy was,
23 they told her that he had left with a girl again. That she then
24 called the jail, herself, trying to find him. The next day
25 she's still -- he still hasn't shown up, she doesn't know where

1 he is. She sets out with a picture of him, going to the
2 sheriff's department. Leaves her children with a neighbor and
3 tells them she'll be right back. Tells her mother she'll call
4 her as soon as she gets over there.

5 She leaves and goes over, runs into these two defendants
6 in Townsend, Townsend Shopping Center, and they end up again in
7 Howie's Hideaway. And it's there that she begins making
8 inquiries about her brother, and as I tell the Court, without
9 going into all this proof, the questions are such and the
10 answers are such, especially from these defendants, that what
11 they even claimed to the officers happened is not what they told
12 her.

13 The -- she then -- when she's there -- when she first
14 gets there, makes these inquiries, she's very serious, she's
15 sober. As she stays there, she begins to get drunk. They have
16 to help her out of the place. They leave at about 7:00. At
17 around -- between 8:00 and 8:30 a couple who was staying over
18 in Clear Fork in someone else's home saw this big fire burning
19 in the Clear Fork area. The -- they go on, they're leaving the
20 house at the time, and they hear all this other that's come
21 about, and the fact that she's still missing, and five days
22 later the gentleman goes back in there and finds -- goes back
23 where he had seen this fire and finds the car.

24 Of course, there's other evidence, Your Honor. I could
25 go on. But that's essentially what it's going to say.

1 **MR. WEBB:** I renew the motion to dismiss the aggravating
2 factor. I -- if that's their evidence, I've not heard that she
3 was a witness or had any knowledge that her brother was killed.

4 **THE COURT:** Well, the Court at this time overrules the
5 motion to dismiss the aggravating factor.

6 The -- in the scenario of the evidence, in regards to
7 the statement allegedly given by Mr. Dellinger to the officer
8 up there after -- after a fight or something like that, it would
9 not be relevant to go through the entire scenario of events of
10 that alleged crime, as to who caused what or whatever. I think
11 it would be sufficient only to show that an officer went up
12 there for purposes of investigating an alleged incident, and
13 that as a consequence of that he encountered Mr. Dellinger, and
14 a statement. It's not going to be necessary, in the Court's
15 judgment, to actually prove the commission of that crime as a
16 condition precedent for that officer being there. You know, an
17 officer may go up on someone's premises simply to investigate
18 a reported incident. Am I making myself clear, General
19 Schmutzer? I'm not?

20 **GENERAL SCHMUTZER:** Well, Your Honor, I'm focused now
21 on what the Court's talking about. We're talking about
22 February 15th, the statement that's made?

23 **THE COURT:** Yes. Yes, sir.

24 **GENERAL SCHMUTZER:** Are you saying that I'm not going
25 to go into any detail, other than, Your Honor, to show that

1 there was a fight, people were upset over it, that there was a
2 later shooting, and he believed it was the Griffin shooting into
3 his place.

4 THE COURT: I'm -- no, sir, all I'm saying is, is that
5 when the officer gets up there, he -- it is not necessary for
6 the officer to tell each and every reason why he was up there.

7 GENERAL SCHMUTZER: Would it be -- let me ask the Court
8 this, make sure I'm right. The only thing he will testify to
9 is, is he went up there answering this complaint, James
10 Dellinger was there, pointed out to him that this outbuilding
11 had been shot into. He simply asked him, "Who do you think did
12 it?"

13 And he said, "The Griffins."

14 THE COURT: That may be shown.

15 GENERAL SCHMUTZER: That's all that we were...

16 THE COURT: That may be shown.

17 GENERAL SCHMUTZER: And that he made the statement
18 about...

19 THE COURT: Sure. Anything further?

20 GENERAL SCHMUTZER: We have some other motions, but I
21 can wait 'til they're...

22 MR. DANIEL: Your Honor, in that regard, I think
23 basically, since Your Honor -- as I understand Your Honor's
24 ruling, that regarding this statement made by the co-defendant,
25 Dellinger,...

1 THE COURT: Yes.

2 MR. DANIEL: ...now would be the proper time for us to
3 renew the motion for severance.

4 THE COURT: Okay, and let me.

5 MR. DANIEL: We want the record to reflect that.

6 THE COURT: Sure. And I want to answer that, and to
7 state the Court's reasoning for that by making reference to
8 definitions in the statute.

9 First of all -- and I understand, and it may be true,
10 as a matter of fact, that the statement of Mr. Dellinger at that
11 time, on February 15th, obviously at that point only refers to
12 any motive or intent he might have. And I will instruct the
13 jury accordingly on that.

14 Now, it is not necessary, in order to charge and convict
15 in this case Mr. Sutton, that Mr. Sutton have the exact same
16 intent or motive, because under the definition in -- contained
17 in first degree murder, it includes intentional. And all it
18 says is, is that, "'Intentional' refers to a person who acts
19 intentionally with respect to the nature of the conduct, or a
20 result of that conduct when it is the person's conscious
21 objective or desire to engage in the conduct or cause the
22 result." That is the test.

23 Now, it may not be shown, but that is the issue the jury
24 has to decide. It's not whether or not Mr. Sutton had some
25 reason or not to share in the alleged motive or design of

1 Mr. Dellinger. But if, in fact, this lady was killed, did
2 Mr. Sutton, in regards to your motion, intend for that result
3 to occur. So that's the issue.

4 MR. DANIEL: And while Your Honor's ruling on that
5 motion, Your Honor,...

6 THE COURT: Yes.

7 MR. DANIEL: ...I understand that the general says that,
8 regarding a fight that the Defendant Sutton had with someone
9 prior to this incident occurring, they're going to go into that
10 as coming under the bad acts provision and exception, 403
11 exception. It's our understanding what occurred on that, that
12 there was a charge brought and the grand jury returned a no true
13 bill. So, the grand jury has not even found probable cause;
14 there wasn't probable cause to even bring a charge against him.
15 I don't see how it can fall under the bad acts exception.

16 THE COURT: Okay, what's your position on that, General
17 Schmutzer?

18 GENERAL SCHMUTZER: I don't think, Your Honor, that
19 that's the decision on finding clear and convincing evidence.
20 I think that the grand jury -- and I would have to go back to
21 the assistant that handled that, but it's my understanding that
22 they had difficulty in getting witnesses there to appear. But
23 I don't know -- I'm not going to state that to this Court. I'm
24 not going to get into that.

25 THE COURT: Well,...

1 **GENERAL SCHMUTZER:** But we -- we haven't -- you know,
2 one of the kids -- we're not going to dwell on this, and it only
3 shows that, you know, there's some feeling. But it's all part
4 of the picture. I mean, you know, this bad blood starts
5 building up. We're not going to try to prove that -- that he's
6 in jail -- that there were crimes other than beating this guy
7 up. We're not going to go into whose guilt it is, it's just to
8 show this animosity.

9 **THE COURT:** A fight? A fight?

10 **GENERAL SCHMUTZER:** Right, to show this animosity that's
11 between the Griffins and these two. And I would ask the Court
12 on that -- going back to the statement on the Court's limiting
13 instruction, say, with regard to the statement about getting rid
14 of the hill of Griffins.

15 **THE COURT:** Yes. Yes.

16 **GENERAL SCHMUTZER:** Would the Court -- I take it, would
17 -- would make a statement that they can consider that -- they
18 can consider that as to him, but they can also consider that,
19 along with the all the other proof...

20 **THE COURT:** In the case. But at the time -- at least
21 at that time, as it came in, it would be considered only as to
22 Mr. Dellinger.

23 **GENERAL SCHMUTZER:** Right. That is correct, Your Honor.
24 It was only later on...

25 **THE COURT:** Any other -- any evidence may be considered

1 as it has bearing on any issue or any person in the case.

2 **GENERAL SCHMUTZER:** Let me ask I this, Your Honor,
3 because this -- I'm sure this is going to come up. From that
4 point on, the rest of the proof -- the proof is going to be --
5 our proof is going to be Sutton and Dellinger were together at
6 all times material. Sutton had been staying up there for about
7 two weeks or so. Staying up there at Sutton's. He had a place
8 on -- on Douglas Dam, but he had been hanging around up there,
9 staying. And the proof will show. And the proof will show, as
10 I say, that they were together. And his own statement,
11 ultimately, to the TBI agents, is that he was with him day and
12 night.

13 **THE COURT:** Places them together?

14 **GENERAL SCHMUTZER:** Places them together, linked himself
15 irrevocably together. So I would object to any attempt on the
16 part of the defense to try to get the Court to give a limiting
17 instruction on all the evidence coming in, because like shells
18 found at the Dellinger trailer is the same place where they
19 bought...

20 **THE COURT:** Oh, right.

21 **GENERAL SCHMUTZER:** Things like this. And I think that
22 would be... Because we wouldn't like to go through and start
23 sorting out every little thing and say, "Now, jury, you just
24 consider this to him, this to him," because they're linked
25 irrevocably together. Either they're both guilty or they're

1 both innocent.

2 **THE COURT:** And I want to state on the record, if I've
3 not already done it clearly, at least at this juncture to state
4 it clearly, the reason the Court -- I realize that the February
5 15th of Mr. Dellinger, at that juncture only applies to
6 Mr. Dellinger. However, the reason the Court concluded to try
7 these defendants together is that their subsequent statements
8 and their subsequent admitted conduct in their statements,
9 themselves, places them together thereafter. And that is the
10 reason.

11 And I've also, of course held that they are not
12 confessions under the Fifth Amendment standards; and that,
13 therefore, as a consequence of that, I have concluded, and did
14 so, that they should be tried together. And that at least makes
15 sense to me. It may not make sense to anyone else, or the court
16 of criminal appeals, or the supreme court. But that's why I did
17 what I did. Anything further?

18 **GENERAL SCHMUTZER:** Your Honor, there's -- the Court had
19 indicated that it wanted some authority on the statements made
20 by the -- Tommy Griffin, at the time he was picked up by the
21 officers.

22 **THE COURT:** Yes. Yes.

23 **GENERAL SCHMUTZER:** I have that, Your Honor.

24 **THE COURT:** Okay, thank you. And I have already -- in
25 all candor, I have looked at that on my own. May be my trouble,

1 I look at too many things on my own.

2 GENERAL SCHMUTZER: I think it all goes to -- into
3 indicia of reliability. And may I approach?

4 THE COURT: Sure.

5 GENERAL SCHMUTZER: This is our research, if the Court
6 please. It goes to Rule 803(2), "Excited utterance," Your
7 Honor.

8 THE COURT: I think you're right. Thank you.

9 And so what you want to show by this statement is the
10 statements by Mr. Griffin that he'd been beat up, is that...?

11 GENERAL SCHMUTZER: Your Honor, his full statement was,
12 "I was with some friends. They beat up and threw me out."

13 THE COURT: Right.

14 GENERAL SCHMUTZER: It's marked there, Your Honor.

15 THE COURT: Okay. Now,...

16 GENERAL SCHMUTZER: And that was about as soon as the
17 officer got up there. He was shaken up, he was...

18 MR. WEBB: Are we hearing a motion, Your Honor? I'm
19 sort of...

20 GENERAL SCHMUTZER: Yeah, I'm about to make a motion.

21 THE COURT: As I...

22 MR. DANIEL: Your Honor, we had a motion, I probably
23 time, in limine to limit that. One of our motions.

24 THE COURT: Well, he's...

25 MR. WEBB: I raised that yesterday or the day before.

1 **GENERAL SCHMUTZER:** Well, the judge said he'd rule on
2 it now, and we gave him our evidence. He asked if there was
3 anything else to hear, and I brought that to the Court's
4 attention.

5 **THE COURT:** He's asking me to admit it, and you're
6 asking me to exclude it, I take it.

7 **MR. DANIEL:** Yes, and Your Honor...

8 **MR. WEBB:** Well, we asked that the other day, Your
9 Honor.

10 **THE COURT:** Well, I know, but I can only rule as it
11 comes up.

12 **MR. DANIEL:** Your Honor, one other thing I think ought
13 to be brought to the Court's attention. A statement like this,
14 of course, out of the presence of the defendant, no way to rebut
15 it. Number two, it's allegedly from the decedent, where there's
16 no way to contradict it in any way.

17 **THE COURT:** Sure.

18 **MR. DANIEL:** Thirdly, it does not name the defendants
19 in any way.

20 **THE COURT:** Right.

21 **MR. DANIEL:** Says he was with some friends. According
22 to the statements that was made, the defendants said that he had
23 left with a girl, and was with a girl. How do they know the
24 friends was not the girl? Friends are friends. There's no --
25 does not name them, and therefore...

1 THE COURT: That's it -- okay, I'm sorry.

2 MR. DANIEL: Okay, that's -- that's my point.

3 THE COURT: The Court feels, first of all, gentleman,
4 looking under Rule 803 of hearsay exceptions: "The following
5 are not excluded by the hearsay rule,..." and it talks about
6 "excited utterance." "A statement relating to a startling event
7 or condition may, while the declarant was under the stress of
8 excitement caused by the event or condition..." Now, under that
9 was -- exception, whether the declarant is available or
10 unavailable is immaterial, isn't it? Is that...?

11 MR. DANIEL: We agree on that, Your Honor. But, Your
12 Honor, we also -- you got to take that a step further. That
13 might have some bearing on the case to be tried in Blount
14 County.

15 THE COURT: Well,...

16 MR. DANIEL: But we've got to go -- step to there, to
17 step, to another step, to another step. So you've got to go and
18 start...

19 THE COURT: I understand. And, now, as I understand --
20 and the Court has ruled the "other crimes" evidence admissible.
21 So, therefore, this piece of evidence would be material and be
22 relevant to whether or not these defendants actually did that
23 act precedent to his death. That goes to motive, that goes to
24 intent. And, so, that -- and as I have understood the offered
25 proof, is that the State's witnesses saw this victim and two