

X No 40
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 8 of 22 Volumes

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

APPEARANCES:

FOR THE STATE

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

FOR THE DEFENDANT SUTTON

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

FOR THE DEFENDANT DELLINGER

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

CIRCUIT COURT	
FILED	
HOUR	9:30 A.M.
DATE	JAN 07 1994
<i>Helen P. Handley</i>	
CIRCUIT COURT CLERK SEVIER COUNTY, TENN.	

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

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1 individuals -- or two other individuals out on the Alcoa Highway
2 there fighting.

3 **GENERAL SCHMUTZER:** Your Honor, they cannot identify,
4 quite frankly...

5 **THE COURT:** I understand that part. Except they
6 identify this victim.

7 **GENERAL SCHMUTZER:** Ultimately, it turns out to be the
8 victim.

9 **THE COURT:** Right. Right.

10 **GENERAL SCHMUTZER:** You're correct.

11 **THE COURT:** And then these defendants' statements place
12 them out there on Hunt Road.

13 **MR. WEBB:** No, Your Honor.

14 **GENERAL SCHMUTZER:** No, they don't.

15 **THE COURT:** Their car, I'm sorry. Their car.

16 **MR. DANIEL:** No, not their car.

17 **GENERAL SCHMUTZER:** No, they don't -- they don't --
18 that's one thing they try to avoid. They say that -- their
19 statement on this is that they had gone to a place and bought
20 a case of beer, and when they bought the case of beer and they
21 came back out some girl---and they describe her---started
22 talking to Tommy wanting some blow or wanting some drugs, and
23 that he loaded up and left with her.

24 **THE COURT:** Okay.

25 **GENERAL SCHMUTZER:** And they hadn't seen him. So no,

1 they are -- they never did say that they -- they denied that
2 they were ever out on Hunt Road.

3 **THE COURT:** Okay.

4 **GENERAL SCHMUTZER:** And it's through circumstantial
5 evidence, Your Honor, that we prove the... These people can say
6 it was a dark colored Camaro. They say that there was a person
7 inside, at least one on the outside, they were fighting, and
8 they say that -- then someone come along right afterwards and
9 saw the guys fighting around in this same area. And they took
10 his shirt off. And then the officer ends up picking this guy
11 up, and it's the victim. It's been a few minutes.

12 **THE COURT:** Okay.

13 **GENERAL SCHMUTZER:** And, Your Honor, there is -- there
14 is also, further, that this was a -- of course, this was a dark
15 colored Camaro. When the couple -- the first couple saw the
16 Camaro there and the scuffle, and the officer testified when he
17 got Tommy he had a cut on his ear, fresh cut, and he appeared
18 to have been in a scuffle. That the husband turned back and saw
19 that this Camaro only had one light. One light was on, and the
20 defendant -- we can prove that independently, plus the
21 defendant, in his last statement to the officer, told them at
22 that time his Camaro had one light, that being Sutton.

23 **THE COURT:** Okay.

24 **MR. MILLER:** Your Honor, as to the excited utterance,
25 you're taking the statement that the State's trying to get in.

1 I don't think the Court's aware of the other things. It's not
2 placed in context for Your Honor to make the decision. This was
3 not a case where they walked up on a boy that was badly beaten,
4 without his senses, and made some excited utterance. He had
5 been in a fight, according to the State. He was not dazed, he
6 was not badly damaged from any fight. If he was dazed at all
7 it was because he was drunk and taking pills, and that's what
8 the proof will show. And he was very calm, according to the
9 police officer, and he was not excited at all. And, quite
10 frankly, didn't want to talk about it. And when questioned by
11 the officers, only then did he make the statement that the --
12 the State's trying to get in. That's not what I call excited
13 utterance.

14 MS. THOMAS: Your Honor, if I could just make...

15 THE COURT: Yes.

16 GENERAL SCHMUTZER: That -- I don't want to argue with
17 him, Your Honor, but that is not correct. When he first -- made
18 the first statement, he made it right off. And then -- then
19 afterwards he began -- he then shut up, when the officer pressed
20 him and says, "I can't tell you." When they asked him who's the
21 friend, Griffin says, "I just can't tell you." Said, "I'm
22 sorry." But he's not -- he's not drunk. In fact, I think --
23 the officer didn't smell alcohol on him, but he said he was
24 polite to him and talked to him, he was responsive to him. But
25 to say that this man is not excited, when he has just been in

1 a fight; he was left, in February, without his shirt on,
2 practically smack in the middle of nowhere, the Hunt Road
3 overpass, Alcoa Highway, in Blount County.

4 THE COURT: Now, folks on the Alcoa Highway may not --
5 might not think that's out in the middle of nowhere.

6 GENERAL SCHMUTZER: Of course, I'm talking about for a
7 Sevier County boy.

8 THE COURT: Oh, okay.

9 GENERAL SCHMUTZER: And...

10 THE COURT: Are you saying we don't know where Alcoa
11 Highway is?

12 GENERAL SCHMUTZER: In any event, Your Honor, you got
13 to take into consideration that this man, the proof will show,
14 he had a prosthesis on one leg; just had one...

15 MR. DANIEL: Your Honor, may I just very briefly...

16 MS. THOMAS: Well, he...

17 THE COURT: Ms. Thomas had the floor first.

18 MR. DANIEL: Your Honor,...

19 MS. THOMAS: You go ahead. Come back to me.

20 THE COURT: Okay.

21 MR. DANIEL: Your Honor, we -- the general says he was
22 not drunk. I think the proof will show that he was arrested for
23 public drunkenness and taken to jail, kept in jail for a period
24 of time. So if he wasn't publicly drunk, then he certainly --
25 he had no business arresting him. Somebody thought he was

1 drunk. They took him to jail. That's obviously the officers
2 in Blount County.

3 But we go back to the -- the real issue, Your Honor, is
4 there is no one who can say, with any certainty, that these two
5 defendants were the two people at that Camaro when they first
6 assault him there. They can't say with certainty -- people say
7 that that's the same person that was arrested later. It may be
8 an inference -- draw an inference that that was the same person,
9 but no one can say that's the same person.

10 The people who came back by and saw the vehicle later
11 cannot say with certainty that these two defendants were there
12 in that vehicle. And there's absolutely no proof that they were
13 there, other than some circumstances. And, more importantly,
14 the person who was arrested for public drunkenness, the Griffin
15 boy, didn't ever say that these were the two people that had...
16 So you're going to have to get an inference on an inference on
17 an inference. The first inference being that they're the
18 persons that was there; the second inference, that he's -- this
19 is the friends. He said he'd had some problems with some
20 friends; this is who he's talking about. I understand---I may
21 be wrong---but there may have been some questions about some
22 arguments in -- maybe in a bar earlier, I'm not sure about that.
23 I'm not going to say that for sure, but I just heard there could
24 have been some altercations earlier.

25 But what I'm saying, you have to infer from what he said

1 that this is the persons he's talking about. And then you've
2 got to -- you've got to then go further and show it's an excited
3 utterance, which it's not. And you've got to show that it --
4 that it something -- some relationship to this charge, and its
5 probative value outweighs the prejudicial effect. And that's
6 -- we can't see how remotely that that statement can be made to
7 prove anything. For that reason, Your Honor -- there are
8 several other reasons...

9 MS. THOMAS: Well, that led perfectly into what I was
10 going to say.

11 THE COURT: You all work so well together.

12 MS. THOMAS: The Court made the observation that this
13 statement was relevant on the issue of motive and intent. But
14 that would be probably the motive and intent to commit the
15 murder of Tommy Griffin, and that's not an issue that's before
16 this Court. It's not relevant on the issue of motive or intent
17 to kill Connie Branum.

18 GENERAL SCHMUTZER: It's relative on the...

19 THE COURT: I think that answers the reason why the
20 Court let the evidence -- is saying that the evidence comes in,
21 anyway. That's true. The Court's going to take a short recess
22 and look over the statement and ponder this momentarily.

23 MR. MILLER: Your Honor, I have an arrest report that
24 -- I don't know if this was the officer that made the statement
25 or not, but it may be beneficial to the Court as far as what his

1 shape...

2 THE COURT: Appearance was? Okay, thank you.

3 (The court is recessed.)

4 (The jury returns to the courtroom, the call of the jury
5 was waived by the parties, and the following proceedings
6 were had.)

7 THE COURT: Ladies and gentlemen of the jury, we have,
8 I promise you, been working steadily since 2:00. Or almost
9 steadily. We have concluded quite a bit of matters that had to
10 be dealt with after you were sworn -- or after you were seated,
11 and before the actual trial of this case begins. We have, as
12 I say, gone a long way towards concluding that.

13 However, there are still matters that I must rule on
14 before opening statements are made to you. Rather than making
15 you sit out there any longer, I'm sure that you would be much
16 more comfortable either eating and going on to the motel, and
17 of course you must make your arrangements. And, truthfully, all
18 of us want to make your time as well spent as possible here,
19 understanding that there will be several delays and things that
20 we have to deal with outside your presence for obvious reasons.

21 So we're going to send you on for supper, for hotel
22 accommodations, give these ladies and gentlemen, of course, time
23 and the opportunity to make all of their necessary arrangements,
24 either in the clerk's office or anywhere else that you deem
25 proper for that to take place.

1 Over the night and throughout this trial do not read any
2 newspaper, period. Do not listen to any television news
3 stories. If it comes on and you've been -- flip it off. And
4 do not listen to any radio broadcast news stories. Do not
5 discuss the case, don't anticipate anything. Don't let anyone
6 contact you about this case. Should that attempt to happen,
7 please contact the officers who are staying with you, and they
8 will deal with it then, and I will deal with it later. We --
9 I want to make you as comfortable as possible. Several of you
10 who have dealt with these court officers, I think, know them
11 very well, and they will do everything they can to make your
12 stay with us as comfortable as possible.

13 But I hope, after you leave here today, we will continue
14 to work until everything is resolved that has to be dealt with
15 before the opening statements and the trial of this case begins
16 in the morning. We will be here at 9:00, and we will start the
17 trial then. Any of you have any questions, anything you want
18 to bring to the Court's attention?

19 (No jurors respond audibly.)

20 **THE COURT:** Ladies and gentlemen, we thank you, and we
21 will see you in the morning.

22 (The jury is excused from the courtroom. The following
23 proceedings were then had.)

24 **THE COURT:** Turning now to the motion in limine that has
25 been filed by the defense in regards to the alleged statement

1 of Tommy Griffin, alleged to have occurred over on Alcoa
2 Highway, Hunt Road, in Blount County, Tennessee. And the Court
3 does have in its possession and does lay with the court files
4 that motion specifically filed by Mr. Webb, and of course
5 concurred in by counsel for Mr. Dellinger.

6 The Court must determine whether or not the alleged
7 statement given to Officer Drew Roberts by Mr. Tommy Griffin is
8 admissible as a hearsay exception under Rule 803(2). The Court
9 opines that the statement, along with the identification of the
10 vehicle, is a relevant and material issue in regards to the
11 motive and intent in the case of Tommy Griffin and in the death
12 of Tommy Griffin in Blount County, Tennessee. Because that has
13 been previously ruled by this Court to be a proper element of
14 evidence in this trial, it is therefore admissible. Under Rule
15 803, Subsection 2 as an excited utterance, or under Subsection
16 3 as being existing mental or emotional condition or physical
17 condition.

18 MR. MILLER: Would the Court have my copy of the
19 offense?

20 THE COURT: I sure do, Mr. Miller.

21 MR. MILLER: And I think we'll get into -- on the cross-
22 examination on that, probably renew our motion and...

23 THE COURT: Surely. That'll be fine. You sure may.
24 And, General Schmutzer, this is your copy.

25 GENERAL SCHMUTZER: Thank you, Your Honor.

1 **MR. DANIEL:** Your Honor, let the record reflect that we
2 would also (indiscernible). I presume, to save a lot of time
3 and trouble, since we have both filed motions...

4 **THE COURT:** Sure.

5 **MR. DANIEL:** ...and Your Honor has set all motions, as
6 far as relevant issues and stuff regarding that applies to one
7 defendant, so there's no need for us to object every time?

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

9 **MR. DANIEL:** Thank you, Your Honor.

10 **THE COURT:** Yes, sir, Mr. Schmutzer?

11 **GENERAL SCHMUTZER:** Your Honor, we do have some motions
12 in limine. We ask, in the motions that -- before any of these
13 matters are introduced in any way, and the statements to the
14 jury or in proof or whatever, that the defendants, through their
15 attorneys, first approach the bench, and out of the presence of
16 the jury take up the matter, give the State an opportunity to
17 object before admitting it to the jury.

18 One is, Your Honor, we have been furnished a lot of
19 medical records. I have agreed that they do not have to have
20 anyone here to authenticate those records to the extent -- to
21 the extent they're admissible. However, I did not agree to
22 their admissibility. Most of these records are on Connie
23 Branum, and I quite frankly can see where some of them might be
24 relevant; but I -- as to a lot of it, quite frankly, I don't
25 think it is. It goes back into just her medical history in the

1 past, and has nothing to do with her -- the problems she was
2 having just prior to this incident. And, quite frankly, I think
3 that they want it mainly to show that prior to this time she
4 tried to commit suicide just a few days before.

5 **THE COURT:** Surely.

6 **GENERAL SCHMUTZER:** And I can understand that. But
7 these things go way back, and have nothing to -- don't relate
8 to that at all. But I would ask Your Honor that we be given an
9 opportunity to object to the medical records, the admissibility
10 of whatever particular records they want to admit, before they
11 bring it to the jury's attention in any way, shape, or form, or
12 attempt to admit it.

13 Further, Your Honor, and I don't -- this wouldn't be a
14 motion in limine. I can't think, for me, one reason in the
15 world that her father's record, Ben Griffin's record regarding
16 his suicide sometime before this, would be admissible under any
17 circumstance. And I would move that at the very least you have
18 a motion in limine, but I just -- unless some statement can be
19 made as to why it would be relevant and material, I would ask
20 that the Court rule on it. Otherwise, we would ask that not
21 that even be mentioned until the Court's had an opportunity to
22 rule on it. The...

23 **THE COURT:** Okay, first of all, in regards to the
24 medical records of Ms. Branum, I know that counsel from both
25 sides are going to be meeting after this hearing here today in

1 order to go over aspects of both of the defendants' statements.

2 MR. DANIEL: We've already done that, Your Honor, prior
3 to.

4 THE COURT: Okay. Then I'm going to -- I'm going to
5 give you an opportunity to further meet. I want you all to go
6 over those records and determine either what aspects of them
7 that you can agree on, or what aspects of them that you cannot
8 agree on, because...

9 GENERAL SCHMUTZER: If they'll merely furnish me with
10 what they want to use, Your Honor, we'll look at them as quickly
11 as possible and tell them what we object to, if anything.

12 THE COURT: Okay.

13 GENERAL SCHMUTZER: And that'll move things along.

14 THE COURT: Okay. Now, at first blush, in all candor
15 with you, I -- absent some expert opinion tying the illness,
16 alleged illness or otherwise of her father to her condition, I
17 cannot anticipate how that would be admissible as to any mental
18 illness he might have had.

19 MR. DANIEL: It's twofold, Your Honor.

20 THE COURT: Okay.

21 MR. DANIEL: First of all, I think the doctor will
22 testify, and people have probably even common knowledge that
23 suicidal tendencies are sometimes hereditary.

24 THE COURT: Okay.

25 MR. DANIEL: Secondly, there's proof that one of the

1 reasons she was contemplating suicide and her problems, and she
2 -- she did attempt suicide, not contemplated. She attempted
3 suicide approximately, like, four days. This happened, an
4 attempt in February; she was hospitalized in Lakeshore Mental
5 Institute on the 11th, released on the 14th with the diagnosis
6 that she had been -- she was suicidal, and she should report to
7 the Overlook Mental Hospital and outpatient care. She reported,
8 I think, the day of the 20th, before Tommy Griffin's
9 disappearance, so to speak.

10 **THE COURT:** Okay. I'll ask you this: Is -- in her
11 statements to her psychiatrist or to her physician did she make
12 reference, in that statement, to a condition of her father?

13 **MR. DANIEL:** Father's suicide. Yes. Yes, that's one
14 of the problems, one of the diagnoses.

15 **THE COURT:** Okay. Okay.

16 **GENERAL SCHMUTZER:** And I think, Your Honor, to the
17 extent that it's part of her record, possibly. But to go into
18 his record, that's -- totally independent of that, would not be
19 relevant and material.

20 **THE COURT:** Absent some expert opinion otherwise, making
21 it relevant.

22 Now, I do hold, and I do rule that statements she made
23 to her physician or psychiatrist for purposes of diagnosis or
24 treatment that include references to her father's illness or her
25 fears about her father's illness affecting her may be admitted

1 so far as they would otherwise be relevant in the trial of this
2 case.

3 MR. DANIEL: Your Honor please, so we won't misstate
4 something to the jury, I have those records and I'd like to
5 refer to those. She was admitted to Lakeshore Hospital on
6 February the 11th for a suicide attempt. She tried to OD on
7 pills.

8 THE COURT: Okay.

9 MR. DANIEL: The problem -- the diagnosis, the reason
10 for her suicide, first out of the barrel was her father's
11 suicide of 4-19-91, and that her marital problems she was
12 having, her mother's illness, alcohol abuse, and she lost her
13 job.

14 THE COURT: Okay.

15 MR. DANIEL: For the diagnosis for the reasons -- and
16 that's part of the reason she was suicidal, is because...

17 THE COURT: Statements made to her physician or
18 psychiatrist, which under our law is a physician,...

19 GENERAL SCHMUTZER: My objection had to do with
20 independent records, calling doctors with regard to Ben
21 Griffin's suicide, independently, going to something independent
22 of that.

23 THE COURT: Now, other than -- if -- I take it you all
24 agree her father committed suicide, is that -- is that agreed
25 upon? Okay, so there would be no reason for independent

1 evidence on that issue. As stated and ruled, I will allow that
2 testimony, Mr. Daniel, from her records. I sure will. I think
3 that's entirely correct.

4 MR. WEBB: Go ahead and quash the subpoena on Dr. Roach,
5 then, if the State's...

6 THE COURT: I tell you what, why don't you call
7 Dr. Roach, because...

8 MR. WEBB: Well, you call Dr. Roach.

9 THE COURT: Huh? Say what?

10 MR. WEBB: Please, Your Honor?

11 THE COURT: No.

12 MR. WEBB: I will.

13 THE COURT: That's what I said to start with. And he
14 -- because Dr. Roach called my home the other morning, who --
15 he happens to be my doctor, by the way, but he was calling me
16 to ask me when he had to be here, and I told him that was in
17 basically the confines of the ones who subpoenaed him. So I'll
18 let you all call him.

19 MR. WEBB: We'll do that.

20 GENERAL SCHMUTZER: Your Honor, the -- also a motion in
21 limine. We've been furnished a statement that Connie Branum
22 made on behalf of James Dellinger on his SSI claim. I don't
23 know what the relevancy is. I only ask that if it's going to
24 be admitted, that before they admit it they approach the Court
25 and give us an opportunity to object before they do that.

1 The -- we would ask Your Honor for reciprocal Jencks.
2 We have a right to it. We'll cooperate with them on Jencks if
3 they will cooperate with us. We'll be more than happy to do
4 that. They want to give us theirs ahead of time, we certainly
5 will work with them with ours.

6 **THE COURT:** Well, that seems fair. Both sides swap.

7 **MR. MILLER:** Your Honor, to the extent that we have
8 Jencks material, statements of witnesses adopted by them, we
9 will furnish it.

10 **THE COURT:** Sure.

11 **GENERAL SCHMUTZER:** The -- I take it, Your Honor, that
12 they have -- we have been advised of their alibi witnesses.
13 They would be limited to those witnesses that they have filed
14 and put them on notice of, including the one that was filed
15 late, and the Court said provisionally you would allow that
16 witness to testify, but they're not to go beyond that.

17 **THE COURT:** Now, you know, I -- absent some extenuating
18 circumstance on failure to discovery, but -- or failure to
19 discover, I have so ruled.

20 **GENERAL SCHMUTZER:** Your Honor, we would object to any
21 questions being elicited to officers that -- or any questions
22 made to officers that are specifically designed to elicit
23 hearsay. "Did your investigation not reveal so and so said such
24 and such," unless it -- it is something obviously -- if it was
25 -- so-and-so had testified, and they were going to impeach what

1 they had testified, that's one thing.

2 THE COURT: Prior...

3 GENERAL SCHMUTZER: But simply to go into their general
4 investigation, saying, "Didn't it show this person was a
5 suspect," and this, that, and the next, and, "You obtained this
6 information about so-and-so," would be totally irrelevant and
7 immaterial, Your Honor. We have furnished them all that we
8 have. I would say they'd have to call the witnesses on that.
9 But when you try to bring it in through the officers, would be
10 the rankest of hearsay, and we would object to that.

11 THE COURT: To ask an officer or any other witness,
12 other than an expert, conclusions of their investigations, or
13 for analysis on either side is improper.

14 GENERAL GREEN: Your Honor, that's not what he's...

15 GENERAL SCHMUTZER: Mine had to do, Your Honor, with
16 going to, "Did not your investigation reveal this or that."

17 THE COURT: Right.

18 GENERAL SCHMUTZER: And that would be...

19 THE COURT: In that form of question, that would be
20 objectionable.

21 GENERAL SCHMUTZER: Or that so and so -- I would object
22 to anything, Your Honor, to anything they attempt to bring out
23 that would be hearsay. Even statements of other individuals.
24 If they haven't taken -- there's no reason to bring it out,
25 other than they're just trying to bring it out through the

1 officer, rather than calling that individual, we'd object to it.

2 MR. DANIEL: Can he be more specific?

3 THE COURT: Well, I tell you what, I think I'll wait and
4 rule on that as it comes up.

5 MR. DANIEL: As it comes up.

6 GENERAL SCHMUTZER: Well, that's what -- that's what I
7 wanted, Your Honor, is a motion in limine; that before they
8 attempt to do that, they approach the bench and...

9 MR. DANIEL: Your Honor, I -- that'd be every question
10 we'd attempt up there.

11 GENERAL SCHMUTZER: Well, that's true. That's true.
12 I'll agree with that. I agree with that. We'll just make our
13 objection and let the Court rule on it.

14 THE COURT: I had a law school professor, when we would
15 ask him questions that he didn't think had anything to do with
16 it, he'd say, "That's sort of like the alligator; it hadn't come
17 up yet." So I'll just wait on that.

18 GENERAL SCHMUTZER: Your Honor, we would ask that no
19 one's criminal record be brought out or gone into unless they
20 first approach the bench outside the presence of the jury.

21 THE COURT: Both sides. That'll apply to both sides.
22 Surely.

23 GENERAL SCHMUTZER: That's -- both sides do that, as
24 required by law.

25 THE COURT: Yes.

1 **GENERAL SCHMUTZER:** Your Honor, that's essentially it.

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

3 **MR. WEBB:** Your Honor, I don't know if the Court -- it's
4 getting late, and I'm... I just want to make sure. I don't
5 know if the Court ruled. General Schmutzer indicated that in
6 his opening statement that he was going to make a reference to
7 an event that occurred---and the general knows; I don't know
8 ---but it was a long time before these events that we're at
9 trial about, wherein apparently Bill Griffin started a fight
10 with my client, and so a mutual combat situation arose, and
11 subsequent to that Bill Griffin had charged Gary with that
12 aggravated assault. The matter went up to the grand jury, the
13 state of Tennessee presented the witnesses that they had to
14 that, one being Detective Jeff McCarter and whomever else; the
15 grand jury heard that, ruled that by the self-defense or
16 justifiable, and they issued a no true bill. I can't see how
17 that could come into this case.

18 **THE COURT:** Now, is there an order by the grand jury
19 saying that?

20 **GENERAL SCHMUTZER:** Grand jury just says no true bill,
21 Your Honor. Doesn't say for what reason. And we're not
22 admitting it to show it's a bad act, we're showing to show the
23 blood, to show the bad blood, regardless of who started it or
24 anything else, whether it was justifiable or unjustifiable. The
25 fact that...

1 THE COURT: And you're not trying to show which side
2 started it?

3 GENERAL SCHMUTZER: Oh, no. We're not going to -- we're
4 not going to debate who started it, whose fault it was, or
5 anything else.

6 THE COURT: Simply to show that there had been a prior
7 altercation when...

8 GENERAL SCHMUTZER: There'd been a prior altercation
9 that caused the blood to...

10 THE COURT: And so now when was that?

11 GENERAL SCHMUTZER: Your Honor, I don't have the -- I
12 can get that for the Court.

13 GENERAL GREEN: I think, if memory serves me correctly,
14 Your Honor, it was approximately December the 28th of 1991,
15 which would have been...

16 THE COURT: Some few months?

17 GENERAL GREEN: ...some months and a half to two months
18 before these people's...

19 THE COURT: That may be shown.

20 MR. WEBB: Well, the general said he wasn't using it to
21 show a bad act, prior bad act, so I...

22 THE COURT: And, right. And so all -- all -- as I
23 understand what he is attempting to show is that there had been
24 an altercation between them. Not whose fault it was, or if it
25 was any...

1 **MR. DANIEL:** Your Honor please, I don't believe that
2 falls under the exceptions to the -- to allowing it in under a
3 bad act. If he can't show the bad act, you've got to have some
4 reason to bring it in. Got to be material...

5 **MR. WEBB:** In other words, you got to show it's
6 material, relevant, tends to prove some fact in issue and --
7 before you even get to 404(b), the exclusionary rule. The only
8 way you can get it in the exclusionary rule is to show a prior
9 bad act. So I...

10 **THE COURT:** Well, now, wait just a minute. I have that
11 rule right here. 404(b) says, "Evidence of other crimes,
12 wrongs, or acts is not admissible to prove the character of a
13 person in order to show an...with a character trait. It may,
14 however, be admissible for other purposes. The conditions..."
15 and, of course, we've all discussed that.

16 Now, gentlemen, you know, I don't write the rules, I
17 just try to interpret them. That's the rule.

18 **MR. DANIEL:** You know, we -- we don't interpret, to read
19 that...

20 **THE COURT:** I do.

21 **MR. DANIEL:** And that's with all due respect.

22 **THE COURT:** I know.

23 **MR. WEBB:** Your Honor, I need to know, with that
24 respect, is the general going to bring out things that these
25 boys did when they was babies? I mean, if this...

1 **THE COURT:** Well, now, Mr. Webb, now, in all candor,
2 now, something happened in December of '91, some three or four
3 months prior to these alleged incidents is not something in
4 their childhood. This is a material -- it goes to motive and
5 intent. In particular, as I understand it, it's been your
6 objection all along that the statement's made -- allegedly made
7 by Mr. Dellinger applies only to his intent. This act sought
8 to be proved goes directly to your client's intent.

9 **MR. WEBB:** What intent does it have, Your Honor? This
10 was a fight between him and a person other than either victim
11 in this case.

12 **THE COURT:** But it -- I understand that. But then, if
13 you combine that with the statement of Mr. Dellinger and their
14 subsequent association together thereafter, according to their
15 own statements, that's what makes it relevant. Not whether it's
16 true or not. But it makes it a relevant piece of evidence.

17 **GENERAL SCHMUTZER:** Your Honor, all -- it says --
18 McGowan versus State says that crimes are not limited to those
19 perpetrated against the victim, but can also include crimes of
20 violence perpetrated against the victim's family, which this
21 is...

22 **THE COURT:** It's always been the law.

23 **MR. WEBB:** Your Honor, there's a motion in limine that
24 I have before me. It's not been filed. I'll file it just as
25 soon as I make this argument.

1 We received a supplement report from Dr. William Bass,
2 state forensic anthropologist. He gives two statements in that
3 supplemental report that we would ask the Court to preclude
4 Dr. Bass from testifying as to -- in that he is not qualified.
5 The two statements are as follows: "I am positive some
6 accelerant was used," and then another statement, "This type of
7 burn did not result from Connie Branum smoking or dropping a
8 cigarette in her car." Dr. Bass is a very well qualified
9 forensic anthropologist, but I don't believe anyone here can
10 state that he is qualified to testify as an arson expert.

11 **THE COURT:** I believe I better wait until I hear his
12 qualification on that.

13 **GENERAL SCHMUTZER:** I think we ought to wait and hear
14 from him. The fact of the matter is, Your Honor, that as a
15 forensic anthropologist he's written some articles on burning
16 -- fire burnings, car burnings, studied the effect on bodies and
17 things like that.

18 **THE COURT:** Sure.

19 **MR. WEBB:** Ask for a jury-out on that, Your Honor.

20 **THE COURT:** Surely. Mr. Miller?

21 **MR. MILLER:** Your Honor, I have a motion in limine. I
22 have not filed any written motion, but I was furnished recently
23 with a copy of a criminal -- or some type of citation, I think,
24 for illegal hunting whereby Mr. Dellinger, I guess, was
25 ultimately convicted of illegal hunting. They put notice of a

1 witness, Tony Proffitt, who was a Wildlife Resource Agency
2 officer that cited him for illegal hunting, and I don't know
3 what it has to do with this case.

4 **GENERAL SCHMUTZER:** Your Honor, this took place within
5 a mile of where this happened. And this was about -- to show
6 that this... If we're not going to -- unless they open it up.
7 I furnished them all the information. All I'm going to ask the
8 officer, did he have -- has he ever had contact with this
9 defendant in the vicinity of where this crime occurred.

10 **THE COURT:** Except when did this contact occur?

11 **GENERAL SCHMUTZER:** This was in 1990, Your Honor. To
12 show he's familiar with -- this is a very remote area, Your
13 Honor.

14 **MR. MILLER:** Sand Mountain and Walden Creek. And I
15 don't know the area, but I've been told that's nowhere near this
16 place.

17 **GENERAL SCHMUTZER:** Well, that's -- you'll have to hear
18 that from the officer, Your Honor. His testimony...

19 **MR. WEBB:** Is that Tony Proffitt? I talked to
20 Mr. Proffitt the other day, or yesterday, day before; he said
21 he don't even think it's the same man.

22 **GENERAL SCHMUTZER:** Well, you can cross-examine him on
23 that. But he told us otherwise.

24 **THE COURT:** Well, if it happened out on Walden's Creek,
25 even though I probably can't take judicial note of this, I

1 actually know that Walden's Creek is not Happy Hollow or Clear
2 Fork.

3 **GENERAL SCHMUTZER:** Your Honor, what this is, is that
4 there's a ridge between this area, and it's not down on the
5 creek. This is up on Sand Mountain, and he agreed to all that.
6 It's on Sand Mountain. Sand Mountain butts up to this. All you
7 got to do is cross over the ridge and come down to where this
8 is. In fact, you probably -- with the four-wheel drive which
9 he had, you could drive into there. It's only to show -- we're
10 not going into the fact that he gave him a citation. He did
11 submit, and probably did tell them earlier he didn't think it
12 was the same man, because he used the wrong name. I'm not even
13 going to go into that. All I want to show is, is that this man
14 was in this area...

15 **THE COURT:** In 1990?

16 **GENERAL SCHMUTZER:** ...in 1990, just to show that he's
17 familiar with this area, Your Honor. 'Cause otherwise it's a
18 remote area, you don't have any signs going to it, it's not a
19 county road.

20 **THE COURT:** Gentlemen, the Court feels like that, based
21 on the fact that Mr. Dellinger lived in the area, that it is
22 unnecessary for Officer Proffitt to testify in chief about this,
23 and that -- that he was there in 1990 has obviously, as stated,
24 no bearing on any real issue in this case at this time. Now,
25 it could become relevant if the door is open, but at this time

1 I will grant your motion in limine on that, Mr. Miller. I sure
2 will.

3 **MR. MILLER:** Your Honor, I have -- want, at this time,
4 to renew my motion to suppress shotgun shells found pursuant to
5 a search warrant conducted -- when a search was conducted at the
6 Dellinger residence prior to any consent being given by Linda
7 Dellinger, prior to her being there. And I raise it again---I
8 know the Court's ruled on it, but I raise it again for this
9 reason. When we heard the motion the other day Mr. Schmutzer's
10 response was, "No, they didn't develop the proof. These shells
11 were found down at the Homer Gray residence." Today twice in
12 his proffer to the Court he said that these two shells that
13 compared to the shells found over in Blount County were found
14 in James Dellinger's yard.

15 **GENERAL SCHMUTZER:** Your Honor, there was one -- I was
16 talking in generalities. He owns both of those properties.
17 Angel Gray is a daughter, had -- was using one of the trailers.
18 Two were found down there at her place, my understanding, and
19 one was found up behind his place. This was all gone into; the
20 Court has ruled; they came back and the Court held that he came
21 too late. We heard that months ago, and he's waited, and he
22 came up and brought it back up to the Court I guess Tuesday.
23 The Court ruled again on it.

24 **MR. MILLER:** I just wanted to bring that to the Court's
25 attention, that the attorney general did represent today that

1 the shells that matched were found in the yard of James
2 Dellinger.

3 **THE COURT:** Okay. Anything further?

4 **MR. MILLER:** Your Honor, just so the record's clear, and
5 I think the Court may have ruled previously, I again ask the
6 Court to rule on the validity of the search warrant at this
7 time.

8 **THE COURT:** The Court declines to rule on the issue of
9 the search warrant, because I've already held the evidence is
10 admissible pursuant to a consensual search of the premises, and
11 that the other matter does come too late. Some---November,
12 December, January, February---some three months after the motion
13 hearing that I scheduled. Two motion hearings that I've
14 scheduled.

15 **GENERAL SCHMUTZER:** Nothing more from the State, Your
16 Honor.

17 **THE COURT:** The defense?

18 **MR. MILLER:** Just so I... I think the Court knows, just
19 so the -- we did raise and ask the Court to rule on the search
20 warrant at that time. My position, at no time when a man's life
21 is on the line and the due process standard is high, that
22 anything's too late, as long as it comes before the jury is
23 sworn.

24 **THE COURT:** The Court further holds that the evidence
25 in question, after the consent search, would have been found

1 anyway. That's what the Court holds.

2 Any further motions?

3 GENERAL SCHMUTZER: No, Your Honor.

4 THE COURT: Mr. Miller, Mr. Daniel, Mr. Webb,
5 Ms. Thomas?

6 MR. DANIEL: Nothing further, Your Honor.

7 THE COURT: Court stands adjourned 'til...

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

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

10 MR. WEBB: This is a housecleaning matter.

11 THE COURT: Yeah.

12 MR. WEBB: I'm sure the general has no objection. Both
13 these defendants have not been getting any sleep at
14 night. What had happened, and Sheriff Ogle had
15 explained this to us, and we had no objection at the
16 time. They had been removed from their normal cell,
17 wherever that happens to be, to a place closer up front.

18 THE COURT: (Inaudible).

19 MR. WEBB: Well, in the evening, with the
20 (indiscernible) and that type of thing. But the doors
21 open and shut. Gary told me he slept about an hour last
22 night. I can't speak for Mr. Dellinger, but...
23 Sheriff, would you come up, please. I'm talking about
24 something I need to make you a party to. And I
25 apologize, Sheriff. I started talking without you being

1 here, and I apologize.

2 Gary's advised that apparently the doors slam all
3 night, and he got about an hour's sleep last night.

4 **SHERIFF OGLE:** Listen, David, you've asked me to give
5 them their exercise at night; I'm doing it. I moved
6 them up front so I can watch them, make it more
7 convenient to get them in and out. It's costing me
8 valuable added man hours to provide you (sic). I've
9 done everything you've asked me. I cannot control the
10 doors.

11 **MR. WEBB:** Okay, I'm just making that... It's nothing
12 personal, Sheriff. I'm just bringing that to the
13 Court's attention.

14 **THE COURT:** Jails, by nature, I would -- from my own
15 experience, they're not a quiet place to live. I don't
16 know, gentlemen, what we can -- you know, and there's
17 certainly no way the Court (indiscernible) in this case,
18 that the sheriff's department is doing anything
19 intentionally to keep these defendants from sleeping,
20 because they have -- the sheriff has been extremely
21 cooperative...

22 **MR. WEBB:** Well, let me say, I hope that's not the
23 inference I raised.

24 **THE COURT:** No, it's not.

25 **MR. WEBB:** If it was, I'll certainly apologize to

1 everybody here.

2 **THE COURT:** No, sir. No, sir. No, sir.

3 **MR. WEBB:** That was certainly not the inference.

4 **THE COURT:** No, and I didn't take it as that, Mr. Webb.

5 **MR. WEBB:** I hope the sheriff didn't. I apologize if
6 you did, Sheriff.

7 **THE COURT:** But he has done everything...

8 **SHERIFF OGLE:** No, I just wanted to make my point.
9 We're doing everything we know to do.

10 **MR. WEBB:** I understand, Sheriff. And I just -- I
11 didn't want you to think we were criticizing. I just...

12 **THE COURT:** The Court certainly appreciates---and this
13 is not anything -- merely for gratuity---but I sincerely
14 appreciate the efforts of Sheriff Ogle and his staff
15 throughout this trial. The accommodations, the
16 courtroom security has been outstanding, and I -- I
17 appreciate that. You know, absent some extreme
18 circumstances to the contrary, the Court is not going
19 to get into the management or housing of the prisoners,
20 other than, as stated, and Sheriff Ogle agreed yesterday
21 to proved the hour of recreation, and I'm sure he's
22 doing everything he can to see that their time there is
23 as accommodating as possible. So that's...

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

25 (The bench conference having been concluded, the

1 following proceedings were had in open court.)

2 **THE COURT:** Court stands adjourned until 9:00 a.m. in
3 the morning.

4 (Whereupon, the court was adjourned at 5:25 p.m., to
5 reconvene on February 19, 1993, at 9:00 a.m.)

Courtesy of
Time of Death Podcast
by Beth Braden

1 **THE COURT:** Let the record reflect both defendants
2 are present with counsel. The Court has previously heard in the
3 record at other hearings the offered testimony in regards to the
4 other crimes evidence which is sought to be introduced by the
5 State of Tennessee, and as stated, I previously signed an order
6 back, I believe, in November or December stating the general
7 rule that other crimes evidence is admissible to prove other
8 matters of which we all know about under 404(b).

9 I have, as I said previously, had a hearing on the
10 offered testimony, and realizing that counsel, especially for
11 the defense, does not want to waive any issue as far as any
12 appellate review, should that become necessary, is there any
13 other evidence or matters that the Court needs to hear in order
14 to make that determination?

15 **MR. WEBB:** Your Honor, do you want the attorney
16 general's office to go forward?

17 **THE COURT:** Well, I'm first asking the defense.
18 Is there anything in addition that I need to hear for purposes
19 of making a determination about the admissibility of that? The
20 Court, of course, has read the Parton case, and the Court has
21 read the rules, 404(b), of course, in particular.

22 **MR. WEBB:** Your Honor, to begin with, I'm not the
23 utmost of a legal scholar, but I have tried to read the Parton
24 case. I think that is the case that talks about what we
25 generically call other crimes or prior bad acts. That's a 1985

1 supreme court case. And I do believe that this is the law that
2 you have to apply when looking at the rules of evidence, rules
3 401 through 404.

4 The way I understand things up to date, the
5 attorney general did make proffer of proof in the form of his
6 outline of what he believed that the State could prove. Of
7 course, the defense would object to that.

8 THE COURT: I understand.

9 MR. WEBB: Number one, we don't believe the State
10 can prove what he had verbally told you. But I do believe, Your
11 Honor, that -- and your statement in your order that other
12 crimes evidence can be used to show motive, intent, and some of
13 the other things that 404(b) talks about, perhaps that may be
14 true on occasions, and it may be true in this case, I don't
15 know. But I don't believe we're in the posture at this point
16 for the Court to rule because as Your Honor knows, the State of
17 Tennessee is going to try their case the way they see fit, and
18 we all may be in this room anticipating some things that the
19 State may attempt to offer into evidence, but until they
20 actually make that offer through a live witness being sworn in
21 and taking the witness stand -- until they do that, then the
22 defense can elect at that point to object or not object.

23 Obviously, if there's no objection, that testimony
24 will come in. If there is an objection, and the reason for that
25 objection is stated, such as, let's say, irrelevant, Your Honor,

1 or this has no relevance, I think at that point that the Court
2 then can consider, upon request of defense counsel, to have a
3 jury out hearing, and I think that's the key to what we're
4 talking about, is a hearing, a testimonial hearing from
5 witnesses outside the presence of the jury.

6 THE COURT: Let me ask you this. In your judgment,
7 is it necessary for the Court to hear each and every witness,
8 and make that witness testify subject to full blown cross
9 examination before I can make a ruling on the admissibility of
10 that evidence?

11 MR. WEBB: Your Honor, I do sincerely believe in
12 reading State v. Parton that the Court, to get this record
13 straight...

14 THE COURT: Let me see that.

15 MR. WEBB: I gave you a copy today. If I may
16 approach, Your Honor, I'll let you look at it. But that's the
17 way I read it. And in fact, in State v. Parton, that was
18 reversed, that case was reversed for that very reason.

19 THE COURT: It was reversed because the trial judge
20 did not have an out of jury hearing to determine the evidence,
21 correct?

22 MR. WEBB: Of course, I don't have the full
23 transcript of State v. Parton, but the way I understood it, the
24 judge did not have a jury out hearing, and did not hear
25 evidence, and because of that, the case was remanded -- was it

1 remanded? I believe the case was remanded.

2 THE COURT: General Schmutzer, in reading the State
3 vs. Parton case, what is the State's position on what the Court
4 must consider?

5 GENERAL SCHMUTZER: Your Honor, I don't think that
6 the case addresses that because that was not the issue. The
7 issue was the fact that they had not had a jury out hearing at
8 all. The Court had not heard any evidence beforehand -- you
9 know, that might -- whether it was proffered as we've done it
10 here, or whether they put on witnesses or not.

11 I think -- and I think it would certainly be up to
12 the sound discretion of the Court. In this case right here
13 you're talking about somewhere in the neighborhood of 25 to 30
14 witnesses. We are going to virtually try two thirds of the case
15 if we have to go forward with the proof on those two crimes.
16 Somewhere in that neighborhood -- maybe a little less, but more
17 than 20 for sure.

18 GENERAL SCHMUTZER: I do not believe that anywhere
19 in Parton does it say you have to have a mini trial, and the
20 Court decide whether or not that evidence is convincing, and
21 whether that evidence is material on one of the issues, such as
22 motive and intent.

23 MR. WEBB: Your Honor, if I can respond. I don't
24 want to interrupt your train of thought, but this is a very
25 important issue...

1 THE COURT: Sure, it is.

2 MR. WEBB: And -- you know, it's our theory, and
3 the State has their theory. Our theory is that the State of
4 Tennessee wants to put in this evidence that we're talking
5 about, events that occurred on a Friday in Blount County and in
6 Sevier County primarily to inflame this jury.

7 THE COURT: I understand.

8 MR. WEBB: And not only to inflame, but to confuse,
9 and mislead. And Your Honor, there is no one in this courtroom
10 that would question that that evidence, if it comes in, it will
11 inflame, it will confuse and mislead, and what it ends up doing
12 is it ends up where the spill over effect is so great and so
13 prejudicial that these two men, and it matters not if they're
14 guilty or innocent of this crime in this county, they will never
15 get a fair trial. A jury simply cannot ignore that, and focus
16 on the really material issue in this cause in this case this
17 day, and in this county, and that is, did either or both of
18 these men have any direct, contributing cause to Connie Branum's
19 death. And that's the sole issue that we're here on today, Your
20 Honor.

21 Now, it's unfairly prejudicial -- it's terribly
22 prejudicial, and to allow that evidence in will taint our system
23 of justice here in this county. That's in all due respect to
24 the General and His Honor.

25 I think that what has to be done under State v.

1 Parton, if I read that case correctly, is that this trial must
2 begin, and the attorney general's office can call their
3 witnesses as they choose, and in whatever order they choose, and
4 counsel for these defendants must make a timely objection.

5 THE COURT: Sure.

6 MR. WEBB: And once that objection is made, I think
7 there's some things that just have to take place. And I think
8 the paramount thing is once the objection is made, that this
9 Court is under an obligation to have a jury out hearing, and
10 that testimony must be offered, not a proffer of proof. A
11 proffer of proof is no evidence, it simply is not.

12 And before this Court can go through the stages
13 that is required, you've got to hear the witness. You must.
14 You must first determine whether or not that -- whatever fact
15 that witness testifies to, you must determine whether or not
16 that is even relevant or material to any particular issue.

17 THE COURT: I understand that part. Now, let me
18 ask you this. At the previous two hearings we've had -- well,
19 the first bond hearing, and the bond hearing that was had
20 pursuant to the reversal of Judge Biers in the Court of Criminal
21 Appeals on the first bond hearing -- all of us heard the proffer
22 of proof, and the witnesses who were expected to offer that
23 proof, is that a fair statement?

24 MR. WEBB: Your Honor, it -- and I don't want to
25 rely on my memory. I'll rely on the record better than my

1 memory, but for purposes of attempting to answer your question,
2 the State called one witness, and I believe that was Mark
3 Turner, and I'll be honest with you, I don't know if he
4 testified to anything.

5 **THE COURT:** And then at the second hearing, General
6 Schmutzer approached the bench, and gave a scenario of the
7 evidence that he would expect to offer, is that a fair
8 statement?

9 **MR. WEBB:** Let me say this. I'll try to answer it
10 this way, and if the Court says I haven't answered it, please
11 direct me. General Schmutzer approached the bench, and asked
12 this Court to accept his proffer, his statements of what he
13 believed the proof would show in this case, and it may have even
14 been in written form; I think it probably was.

15 He asked you to put that under seal. If you will
16 recall, I objected to that. It was a timely objection, and you
17 overruled it.

18 **THE COURT:** Right.

19 **MR. WEBB:** Your question there was more in line of
20 a probable cause situation, if I'm correct, Your Honor, in
21 granting or denying bail.

22 **THE COURT:** It was on the issue of bail, but all
23 I want to know is, Mr. Webb, and obviously, the Court does not
24 want to put you, and will not put you in a position of having
25 to waive anything, and I don't want to do that. I understand

1 that.

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

6 MR. WEBB: Your Honor, let me, and I hope I'm
7 speaking on behalf of counsel -- everything in this case is
8 disputed, contradicted, controverted.

9 THE COURT: I understand that.

10 MR. WEBB: There will be no stone unturned. We
11 will dispute every issue raised by the State.

12 THE COURT: Okay.

13 MR. WEBB: Now, let me say it this way, Your Honor,
14 and please, I do this in all respect to Your Honor, and I know
15 you take that that way, but...

16 THE COURT: Sure.

17 MR. WEBB: ...I must -- this proceeding, what we're
18 here to do in our broadened sense is see justice done. Everyone
19 will agree with that. And in my mind, and with all candor to
20 this Court, I don't care if this trial takes a day or a year,
21 I really don't. And so in my mind, and I submit to Your Honor,
22 that to see justice is done, that there is absolutely no waste
23 of anyone's time to make sure it's done correctly.

24 THE COURT: I understand that.

25 MR. WEBB: I'll answer any other questions the

1 Court has.

2 **GENERAL SCHMUTZER:** Your Honor, you had asked me,
3 and looking back over this -- it's been sometime since we argued
4 -- actually, State vs. Parton never even addressed not only this
5 issue, but actually, it didn't even address -- it was not
6 reversed because they didn't have a jury out hearing. It was
7 reversed on the facts because they said that the crimes that
8 were proven...

9 **THE COURT:** Were not relevant.

10 **GENERAL SCHMUTZER:** ...were not relevant. They
11 just said they sent it back for a new trial. They did not send
12 it back because they didn't have a jury out hearing. There was
13 nothing in here that in any way addresses -- it's only the last
14 couple of sentences of the opinion where the Court notes the
15 fact that they didn't have this jury out hearing. It doesn't
16 say what has to be heard at all.

17 So to say that you have to have a full blown trial
18 in any trial, and judge the proof is stretching this case way
19 beyond what it actually says.

20 Now, if, in fact, and that's what we -- we should
21 be seeking justice, and honestly, justice in this case can only
22 come about if the jury hears an orderly presentation of all the
23 proof in this case, and it comes in such a way that they can
24 look at all that proof, put it together, and come to a decision,
25 whatever it is -- reach a decision.

1 Now, what they are suggesting to this Court is that
2 we called witnesses, and before that witness testifies to this
3 jury, we have a jury out hearing. We're talking about somewhere
4 in the neighborhood of 30 witnesses. Each time, we stop between
5 witnesses, and have a jury out hearing while the Court attempts
6 to rule on the admissibility of that particular evidence. Well,
7 this particular evidence is circumstantial.

8 There is no way this Court can judge a particular
9 witness' testimony until they have heard all the testimony
10 because some of these witnesses will have very little to say
11 about the scheme of things, but when you hear it in relation to
12 five or 10 other witnesses, it puts the whole picture together
13 because it is a circumstantial evidence case.

14 I do not believe under any circumstance that that
15 is required -- that the State would have to do that. To do that
16 would be -- he states -- the reason for wanting to introduce
17 this in part is to confuse the jury.

18 Anybody that has the burden of proof, and they're
19 setting out to confuse the jury, then they've got real problems.
20 It's obviously our -- that's the last thing we want to do, but
21 I submit to the Court it certainly would be the first thing we
22 would do. If we -- if this jury came, and before each witness
23 they had to go outside and sit down while the Court first heard
24 from that witness, and made a ruling, then it would stop the
25 order of the flow, and it would be a travesty to -- attempting

1 to justice in this case.

2 This Court has complete control over this case.
3 This Court can hear the proffered evidence, which it's already
4 heard. If this Court finds that the State has not met that,
5 this Court has any number of options it can do, because it has
6 control over this trial to see that justice is done. But I
7 think it would be supreme injustice that we stop -- and there
8 is no case anywhere that says -- I cannot find any case that
9 says that you have to hear from the actual witnesses, each and
10 every witness, and on the basis of those witnesses, make a
11 decision as to whether or not it is admitted.

12 We would have to do it on the -- and here's another
13 thing, Your Honor, that would completely, I think, be an
14 injustice in the case. Obviously, we've got to make opening
15 statements. How could anyone make a reasonable opening
16 statement when they have no earthly idea at this point what the
17 proof is going to be, as to whether or not any of this evidence
18 is going to be -- or which part of it's going to be admitted.
19 And certainly, it would even create more confusion if the State
20 were to stand up here, and tell the jury what it expected to
21 prove, and a half or two thirds of that turned up, and was never
22 proved. And of course, justice cuts both ways. It doesn't just
23 lie to the defendant. We've got to have it go both ways.

24 I think in the orderly presentation, Your Honor,
25 of this case, and seeing that justice is done, and it's

1 presented in such a way that this jury can make an informed and
2 intelligent decision on the guilt or innocence of these two
3 defendants there's only one way to proceed, and that's they way
4 has indicated it's going to proceed.

5 MR. WEBB: Your Honor, let me -- justice does cut
6 both ways, and due process cuts one way, and that's to afford
7 and protect any accused citizen. And I think the General is
8 trying to push this thing through, make this thing swift, make
9 it painless, and let's be done with it, there's other cases.
10 That's not what this Court should set and allow if this Court
11 doesn't feel that's correct.

12 Now, I'm wanting to make a couple of points to Your
13 Honor. The General said let all the proof in. Let's just take
14 it -- let's get our wheelbarrow of proof, let's bring it in
15 here, and let's dump it out, and let the jury decide. Give him
16 all these arguments about all these other things. But Your
17 Honor knows, and the Attorney General knows, and every defense
18 attorney, and every attorney in this land knows this, we're
19 talking about competent evidence, we're talking about relevant
20 evidence. We're not talking about all proof.

21 THE COURT: Let me ask you this, Mr. Webb, and the
22 first issue that the Court knows it has to address is whether
23 or not this other crimes evidence is relevant, and that's the
24 threshold question that I must determine.

25 MR. WEBB: Your Honor, let me ask you this question

1 backwards. How can you determine whether any evidence that
2 comes from this witness stand is relevant until you have first
3 heard it?

4 THE COURT: Let me ask you this question. How do
5 we determine at any pre-trial hearing whether something is
6 relevant or not, as if often the case?

7 MR. WEBB: I think that that...

8 THE COURT: Counsel gets up, tells me what their
9 offered evidence is going to be, and the Court makes a decision
10 on whether or not that evidence bears on a relevant issue in
11 this trial. Is that a fair statement of what...

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

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

25 Now, I disagree with the General on State v.

1 Parton. It's in black and white on the last page, and I read
2 it into the record.

3 THE COURT: I've got it.

4 MR. WEBB: It's very clear what State v. Parton
5 says. I feel that it is subject to no disagreement, and -- you
6 know, the General says -- he keeps talking about evidence.
7 There has been no evidence. We could write up, if the Court
8 would give us two or three minutes, we'll write up something,
9 and put it in there, but that's not evidence. It never has
10 been, never will be.

11 You have yet to hear any evidence, and if I'm
12 wrong, I want the Court to tell me I'm wrong. But I've been in
13 this for a year, and on this particular issue, I have heard no
14 evidence.

15 THE COURT: Okay.

16 MR. WEBB: And I'll be glad to talk to the Court
17 further. It's a very important issue, as the Court's aware.
18 And I just don't think we're right at the point in time that the
19 Court can competently make a fair decision. You're not there
20 yet.

21 THE COURT: Okay. Yes, Mr. Miller?

22 MR. MILLER: One point, Your Honor, I'd like to
23 make. I understand where the Court's coming from when we talk
24 about relevant evidence, and Your Honor, in every trial just
25 about, makes a decision based on what the attorneys tell him the

1 evidence will be, whether or not it's relevant.

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

10 I've had personal experience in the court of
11 appeals with evidence...

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

13 **MR. MILLER:** And what they mean by evidence is not
14 lawyer talk, is not proffers. General Schmutzer got up, and
15 said, "This is what we expect to prove," and we said, "We agree
16 -- we stipulate to that." I've even see that situation where
17 they do consider that evidence because there wasn't a physical
18 document or stipulation filed into the Court record. They
19 called it lawyer talk. You waive all that because it's lawyer
20 talk.

21 Especially when we do not agree, it cannot be
22 considered evidence, and when the supreme court said "evidence,"
23 I think they clearly meant, and would interpret that to be live
24 testimony.

25 **THE COURT:** Anything further?

1 **GENERAL SCHMUTZER:** Nothing, unless the Court has
2 some question of the State specifically. Your Honor, the State
3 has nothing more than what's been said. The Court has read
4 Parton, and I think you have your own idea as to what it says,
5 and I won't argue that anymore.

6 The Court knows the crimes the State intends to
7 rely upon, the Court knows the reasons why the State intends to
8 rely on them, and the reasons we want to rely on it. The Court
9 knows the proof -- has an outline of the proof that the State
10 would go forward with and prove, and show by clear and
11 convincing evidence these crimes were committed, and all that
12 would take some 30 witnesses to do, and obviously comes first.
13 That's the first thing the State would lead with in this trial
14 would be with the prior crimes leading up to this crime.

15 So I'm just -- you know, I find nowhere where it's
16 required to go forward, and put on each and every witness. The
17 Court make a ruling on whether or not that evidence is
18 admissible -- in the Parton case, the problem was not with
19 whether the evidence was clear convincing, and the other crimes
20 were committed. As I read it, Your Honor, it was simply that
21 it was not relevant and material to one of those issues such as
22 intent. It said that in the crime that was charged, intent was
23 not an element of the offense.

24 So they were saying that, basically, it didn't fit
25 one of the exceptions. So it really doesn't go to any kind of

1 jury out hearing.

2 MR. MILLER: Your Honor, in observing the Parton
3 case, it's clear in the last two paragraphs why it was reversed
4 because the trial judge didn't comply with those two of the
5 three prongs. Mr. Schmutzer, and I'll give him a chance to
6 answer this, but he's told Your Honor what all the Court knows.
7 The Court does not know that there's clear and convincing
8 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 think we know what their --
14 all their proof will be. They've given us what they're supposed
15 to, but that never includes everything, and...

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

20 MR. MILLER: I think that's a little bit more
21 difficult question. Of course, it would be my position that you
22 do, but I may be wrong on that. But I think you at least have
23 to hear the State's witnesses and cross examination.

24 You are talking there -- again, what's the standard
25 of proof -- clear and convincing? Can the Court make that

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

7 THE COURT: Okay.

8 GENERAL SCHMUTZER: Your Honor, you didn't -- they
9 say, logically, that every time there's a case like this it
10 basically requires a trial?

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

17 I wish I could tell you that I knew world without
18 end 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.

23 The question, as it's been framed, at least, is how
24 far the Court must go in determining whether, in this case,
25 evidence of other crimes is admissible. I want to read you part

1 of the jury instruction, the T.P.I. Charge 37.05, that I would
2 give to a jury.

3 After the introductory part of it, it says,
4 "This evidence may only be considered by you for
5 the limited purpose of determining whether it
6 provides:

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

14 That cites the Mayes case. It's an old case -- and
15 the Ellison case that came after that in 1976.

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

23 As stated, the Court has previously heard the
24 proffered proof. Obviously, the Court has not heard all the
25 witnesses, and the Court realizes, and it's obvious that this

1 evidence, if it comes in, is damaging to the defense --
2 devastating to the defense in the sense of showing motive,
3 intent, maybe a common scheme or plan, or in completing the
4 whole picture of the evidence.

5 But the Court finds that the proffered evidence is
6 highly relevant evidence. And the first part of 404(b), is it
7 unfairly prejudicial -- unfairly prejudicial? In order to make
8 this determination the Court has to, at least in this case, make
9 the assumption that the State will be able to offer the proof
10 as stated in it's proffer of proof. Based on that, this Court
11 feels that the evidence is not unfairly prejudicial, and I
12 underline unfairly prejudicial.

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

21 Now, if the offered evidence comes in, and the
22 Court then determines in its judgment that the evidence should
23 not go to the jury, there are two ways, of course, it could be
24 dealt with. One is curative instruction. This Court is not
25 naive enough to believe that once that evidence comes in that

1 curative instructions could, in fact, cure it. I'm well aware
2 of that.

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

12 As I told counsel, I well understand and appreciate
13 the situation that both sides find themselves in. The purpose
14 of a trial is to be fair and impartial to both sides, and to
15 protect the rights of the accused.

16 The law has many remedies during the trial, and of
17 course, obviously, post trial, and I understand those, and as
18 I've told all of you many times, I certainly don't guarantee
19 that I'm right in every decision I make as a trial judge. I try
20 to be, but I make mistakes, and if I make them, people a lot
21 wiser than this Court can solve that problem.

22 I've wrestled with this issue, I promise you, as
23 much as anything that I have ever had to wrestle with on the
24 bench, and that is the ruling of the Court.

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

1 but I just want to clarify a few things.

2 THE COURT: Yes, sir, Mr. Miller. And before you
3 say that, now, by that ruling -- you know, just because a
4 witness, as stated to the Court, may be able to testify to
5 certain matters does not mean that anything that that witness
6 got up and said could not be objected to. All the other rules
7 of evidence would apply, the hearsay, and the -- all other
8 matters would apply, of course. I understand -- I feel
9 confident there will be other objections, and some of them very
10 well be on point. Now.

11 MR. MILLER: The Court has said it will declare a
12 mistrial if not satisfied of the clear and convincing nature of
13 the crimes.

14 THE COURT: Yes, sir.

15 MR. MILLER: Of course, I think the State is going
16 to try to put in evidence of two other crimes, an arson on the
17 trailer, and the murder of Tommy Griffin.

18 THE COURT: Right.

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

23 THE COURT: Not necessarily. I would have to
24 determine in my mind whether or not the other evidence outweighs
25 it, and, of course, I would assume that I would have to judge

1 that on the harmless error standards, as per the rule.

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

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

9 MR. MILLER: And the instruction the Court read,
10 if that's going to be the one the Court reads, I think it needs
11 to be -- the portions need to be deleted from there, such as
12 common scheme and plan, if that's not one of the issues.

13 THE COURT: Right.

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

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

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

25 MR. WEBB: Your Honor, in that regard, once again,

1 we are going to renew our motion to sever...

2 THE COURT: I understand.

3 MR. WEBB: And I would ask the Court to rule on
4 that.

5 THE COURT: I've already ruled on that, and I've
6 overruled your motion. I know that motive is one of the reasons
7 the State seeks to show this evidence. In relation to the other
8 aspect of it about the connection of the two, if you would state
9 your reasoning on that again, General Schmutzer.

10 GENERAL SCHMUTZER: Your Honor, of course,
11 obviously, the victim was a Griffin, Connie Griffin Branum.

12 THE COURT: Right.

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

25 It's our position that when they left, and they

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

7 This goes to their motive, Your Honor, obviously,
8 to do away with her to cover up their prior crimes. That she
9 was getting onto them. That she was actually coming on the fact
10 that they had done something to her brother, and I think that's
11 -- that's exactly what the State's position is.

12 We can't climb into their minds, obviously, but I
13 think that the statement that he'll get rid of that hill of
14 Griffins, without having -- the jury will decide what relevance
15 it will have. It's highly relevant on what they ultimately did
16 to Tommy Griffin, and what they did to Tommy Griffin is highly
17 relevant and material as to what they did to Connie Branum.
18 It's a two edged sword because, by the same token, she's a
19 Griffin, too. That's the State's position on that, Your Honor,
20 going to motive, going to intent, and what we've talked about
21 this being a circumstantial evidence case, it shows an intent
22 which, of course, is an element of this crime, first degree
23 murder, and it gives -- it paints the full picture. As Paul
24 Harvey says, "It's the rest of the story," and it's all falling
25 within a 48 -- really, about a 24 hour period.

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

12 But in this case, I feel that the statement
13 previously made by Mr. Dellinger offered to be -- or at least
14 expected to be testified to by Mr. -- made by Mr. Dellinger, is
15 relevant to motive, and therefore, the subsequent alleged acts,
16 if true, would be in furtherance of that motive, and that if the
17 evidence offered by the State is true, would be highly relevant
18 as to why Mrs. Griffin Branum was allegedly killed. And if also
19 true, could be shown to be a continuation of a plan to wipe out
20 that hill of Griffins. That is the reasoning of the Court as
21 to why it concludes that proffered evidence is admissible.

22 **MR. MILLER:** Just one further question, Your Honor.
23 Of course, that has given the jury two ways to go, and I
24 understand that, and that may be permissible -- was it part of
25 a common scheme or plan, or was it a cover up, okay? And if

1 they convict these boys, we don't know what they've based their
2 decision on, and of course, depending on what they've made their
3 decision on, the death penalty, as a matter of law, would not
4 be applicable. If they said it was common scheme or plan...

5 THE COURT: Sure. I understand that point, Mr.
6 Miller, but let me ask you this, and I'm not asking you to agree
7 with this, but it's the Court's feeling that evidence -- any
8 evidence in any case may be looked at by a jury in any number
9 of ways for any number of reasons as long as it's a legally
10 relevant reason, and it's properly admissible.

11 The conclusion they draw or the reasons they draw
12 those conclusions are generally not reviewable by either the
13 trial court in post trial hearing, or by the appellate court.
14 The standard of review is, is there sufficient evidence in the
15 record to sustain what the jury did. That's probably not
16 grammatically correct, but that's how it's looked at. So a jury
17 is free to draw all reasonable inferences from the proof,
18 whatever it is, and whomever offers it, and so they, as long as
19 there is evidence in the record to support a proper inference,
20 that's the jury's choice, isn't it, as the finder of fact?

21 MR. MILLER: I think Your Honor is correct there.
22 I just have a problem with the attorney general demanding the
23 death penalty by saying this is the elimination of a witness,
24 and they come back, and they say, "No, maybe it was part of a
25 common scheme or plan."

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

4 **THE COURT:** And it's certainly not an either/or
5 proposition, Your Honor. They could have more than one reason
6 to do any number of things -- you know, it could be that you've
7 got a kill two birds with one stone type situation. What --
8 what they have expressed concern is no concern at all because
9 the same jury in this trial will be the one that will do the
10 sentencing. They know whether or not -- if the State didn't
11 carry this burden with regard to the intent because they will
12 have already found that, and when they hear it on the sentencing
13 phase, they...

14 **THE COURT:** If we get that far.

15 **GENERAL SCHMUTZER:** Yeah. But they will be the
16 ones that will deciding -- we'll know from them how they decided
17 on the first instance by the decision on the second.

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

24 **THE COURT:** Correct.

25 **MR. WEBB:** I'd ask the reporter to type that up,

1 and we'll see later if that happens to be the proof that's
2 offered. Maybe Mr. Miller better ask that, I can't afford it,
3 but I'd like that typed up.

4 **THE COURT:** That proffer of proof is in the record
5 from the -- for sure, the second bond hearing, if not the first
6 one, completely.

7 **GENERAL SCHMUTZER:** Your Honor, it was offered in
8 the first one, and then we put a witness on, and presented it
9 again in the second one.

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

11 **THE COURT:** The Court's ruled.

12 **MR. WEBB:** Your Honor, maybe I missed the point.
13 If the General's theory in this case is that this co-defendant
14 made the statement that he's going to wipe out the whole hill
15 of Griffins, it appears to me, and if that was carried out, and
16 the State proves all that, then how can this Court then allow
17 the State of Tennessee to say that this lady was killed to cover
18 up -- because she was a witness to a crime. It doesn't make
19 sense to me -- it may make sense to my counsel here, but it just
20 -- I just cannot fathom that. It is just contradictory in
21 nature, and I'm going to move the Court at this point, if that's
22 what they're saying their theory is, I move the Court to dismiss
23 the enhancement or aggravating factor because they have just
24 stated on the record that she was not a witness, that she --
25 that the purpose was to carry out his statement and wipe them

1 all out.

2 If that is what their theory is, then how in the
3 world...

4 THE COURT: Well, now, they have -- and granted,
5 now, as defense counsel in my younger years, I can well
6 appreciate, and have disagreed many times with the State's
7 theory of their lawsuit, and many times the State of Tennessee
8 has come at me with different theories, alternative theories.
9 While I didn't always agree with that as trial counsel, even
10 sometimes as a trial judge I don't agree with that, but that is
11 not the trial judge's prerogative. That is the State of
12 Tennessee's prerogative in indicting a person under either
13 alternate theories, either -- as we all know, a person may be
14 indicted on felony murder, or in the alternative, premeditated
15 classic first degree murder, and any number of ways a person may
16 be indicted. And as I just stated, the theories that are
17 presented to the -- by the State, of course, must be shown by
18 the evidence. Then, after the evidence is in in a multiple
19 theory case, of course, the Court may, in its judgment, limit
20 them by either dismissing portions of the indictment that the
21 Court does not deem properly shown by the evidence, or any other
22 number of remedies.

23 But I don't have the authority under existing state
24 law to tell the State of Tennessee or defense counsel, for that
25 matter, what theories they may present to the jury, if, in fact,

1 those theories are recognizable under the law. So I am not
2 prepared to do that, and shall not.

3 Mrs. Thomas, I've not heard from you in some time.

4 MRS. THOMAS: If the Court would allow me to
5 comment on what Mr. Webb said. If the State is going to be
6 allowed to proceed on alternative theories, then they should be
7 required in their proffer of proof to state what evidence they
8 have that Mrs. Branum would be a witness to Tommy Griffin's
9 murder.

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

12 MRS. THOMAS: Your Honor, that's the basis of the -
13 - a witness in that case, that's the basis of the death penalty
14 phase here.

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

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

25 MR. WEBB: Your Honor, what we're talking about is

1 allowing the State to go through this whole ordeal...

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

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

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

12 GENERAL SCHMUTZER: Your Honor, what I stated a
13 minute ago?

14 THE COURT: No, as to the offered evidence that
15 would tend to show that Mrs. Branum was killed in furtherance,
16 or to cover up the death of her brother. State that for the
17 record.

18 GENERAL SCHMUTZER: All right, Your Honor. Do you
19 want me to start back at the...

20 THE COURT: Yes, sir.

21 GENERAL SCHMUTZER: Do you want me to start back
22 with the commission of the crimes against him?

23 THE COURT: Yes, sir, if you are prepared to do
24 that at this time, or if you need to review, the Court will give
25 you an opportunity to do that.

1 GENERAL SCHMUTZER: Well, I probably can, Your
2 Honor. I'll just be making an opening statement, I guess. What
3 you might want to do is hear opening statements, rather than
4 hearing it twice.

5 THE COURT: No, let's...

6 GENERAL SCHMUTZER: Your Honor, in this case we
7 would show that this defendant, James Dellinger, had an out
8 building shot into on February the 15th. The proof will show
9 that there was some bad blood at that time between the Griffins
10 and Dellinger, and his nephew, Gary Sutton.

11 That there had been a fight just prior to that time
12 involving Gary and one of the Griffin brothers by the name of
13 Bill Griffin, from which Bill Griffin was hospitalized with a
14 broken jaw, and was beat up pretty severely.

15 That when the officer went up there to investigate,
16 he asked him, "Who do you think did this?" He said, "The
17 Griffins." He said, "If I have to, I'll wipe out that whole
18 hill of Griffins."

19 Subsequently...

20 THE COURT: And you have an officer ready who is
21 going to testify to that statement?

22 GENERAL SCHMUTZER: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. WEBB: Your Honor, I'd like interject at some
25 point. I just heard the General -- how can the General come in,

1 and talk about a broken jaw of Bill Griffin by Gary Sutton? Is
2 that what you just said -- they had a fight, is that what
3 you...? Are you trying to prove that crime as well?

4 **GENERAL SCHMUTZER:** I expect to show it. I was
5 going to take that up with the Court, yes.

6 **MR. WEBB:** Your Honor, see, we're getting into
7 another matter. There are just so many we can defend, Your
8 Honor.

9 **THE COURT:** Go ahead, General Schmutzer.

10 **GENERAL SCHMUTZER:** We would further show, Your
11 Honor, that on the 21st of February, Tommy Griffin and these two
12 defendants were out riding around in Maryville -- in Blount
13 County, and they ended up in a bar called Howie's Hideaway, the
14 three of them. That they were in there for -- it was somewhere
15 in the neighborhood when they left, and the three of them left
16 together. That when they left, the -- something like 10 to 11
17 minutes later, or in that neighborhood, and it's hard to be
18 exact, but a short period of time later -- we have the exact
19 time that it happened, 7:11.

20 On the road to Maryville there was a dark Camaro
21 sitting on the side of the road. The proof would show that
22 these two defendants were driving Gary Sutton's Camaro. There
23 was an individual, at least one, outside the car, and one inside
24 the car, and that they were fighting, scuffling.

25 Another person comes by, and sees a man without a

1 shirt stumbling around in the same vicinity just right at that
2 same time. The officer -- it turned out the first car that saw
3 the scuffle had a -- was a part of rural metro, and called it
4 in, and the dispatcher dispatched an officer's vehicle out
5 there.

6 An officer went out, and when he first got there,
7 he didn't see anyone. He was supposed to along side the road
8 at the Hunt Road overpass. A truck began blinking his lights
9 towards them, and he sends another officer up there, and they
10 find the victim, Tommy Griffin, without his shirt on, been in
11 a fight -- evidence he'd been in a fight, sitting in the truck.

12 That he was taken in, and ultimately placed in jail
13 around 7:40. That in the neighborhood of 9:00, a neighbor who
14 lives between the defendant James Dellinger and Tommy Griffin -
15 - they both lived in the same hollow, and the neighbor lived in
16 between them on the other side of the road. His dog started
17 barking, and he looks out, and sees a light truck some distance
18 up from Tommy Griffin's trailer. He looks down, and sees the
19 passenger door close, and as it passes by him, he recognizes it
20 as Dellinger's truck, and it goes right on up, and pulls in
21 Dellinger's driveway. He looks back, and sees flames -- fire
22 coming out from Tommy Griffin's trailer.

23 He called 9-1-1, so the time is nailed down there.
24 He -- Your Honor, during that period of time, right about the
25 beginning when it was started, one of the Branum girls ran over

1 to tell them -- to tell the Dellingers that Tommy's place is on
2 fire because they're concerned that Tommy might be in there
3 because he did drink, and he was down there a lot alone, and she
4 saw these two defendants in Dellinger's home, and one made the
5 statement he was in enough trouble already, and couldn't come
6 down there, and the other one stated not to worry about Tommy,
7 or words to the effect that Tommy was in Maryville with a girl.
8 It turns out this was a statement they made to police later on.

9 Subsequently, one of the other daughters calls them
10 at the request of their mother, Connie Branum. She calls and
11 asks where Tommy is again, and they say that he is in the Blount
12 County Jail, that they're going to go get him. That was James
13 Dellinger.

14 The proof will show that they loaded up -- took a -
15 - one of them took a long object that was wrapped in something
16 out of the back of the truck, and out subsequent proof would
17 show that he carried it...

18 MR. MILLER: Let me stop him right there. He said,
19 "One of them" took an object out of the truck. They have no
20 proof of that fact, Your Honor. Nobody can identify one of them
21 as taking something out of that truck.

22 GENERAL SCHMUTZER: We can, Your Honor, through
23 circumstantial evidence. They got into a gray car belonging to
24 Linda Dellinger, and left the hollow, and went in the direction
25 of Maryville. That they took Tommy Griffin out of the jail

1 around 11:35 -- 11:25 -- bailed him out of jail. That, Your
2 Honor, 30 minutes later, nine miles away, two shots are heard
3 from the very vicinity where his body was later found, and it
4 was amazing that there was a young man who was writing in his
5 diary that night that lives around there, and he heard the
6 shots, recorded them, and put the time, and also recorded --
7 this was on a Friday night, and the body wasn't found until
8 Monday.

9 When he recorded that, the body being found,
10 ultimately, the following day, he called the sheriff's
11 department, and reported the shots because it came from what
12 they call Manning Lane or Blue Hole area.

13 The body was found, and had fallen off down a bank,
14 but didn't get all the way in the river. He's been shot once
15 in the back of the head, and there were two shells found on the
16 ground, and those shells turned up to match the shells that were
17 found in the yard of James Dellinger, that had been fired from
18 the same weapon. The weapon was never recovered.

19 I don't know -- I forgot, Your Honor -- do you want
20 me to go all the way to state every bit of my proof all the way
21 through, or how far do you want me to go?

22 **MRS. THOMAS:** Your Honor, the issue I had requested
23 was the proffer of proof on evidence that Connie Branum knew her
24 brother had been murdered.

25 **GENERAL SCHMUTZER:** Okay. Continue, General

1 Schmutzer.

2 MR. DANIEL: Your Honor, for the record, we would
3 object, and don't want to accept this as a proffer of proof
4 regarding these bad acts, and understand that this is not an
5 agreed -- this is in regards to her motion and Your Honor's
6 request regarding this. A lot of what the General is saying is
7 irrelevant, but he's got a right to say what he would say.

8 THE COURT: Sure. Thank you.

9 GENERAL SCHMUTZER: Your Honor, our proof would
10 show that the following day -- that Connie Branum stayed up that
11 night. These men didn't even get in until about 1:00 in the
12 morning, and she called immediately wondering where Tommy was.
13 They told her that he'd left with the girl again. That she then
14 called the jail herself trying to find him the next day. He
15 still hadn't show up, and she doesn't know where he is, and she
16 sets out with a picture of him going to the sheriff's
17 department.

18 She leaves her children with a neighbor, telling
19 them she would be right back, tells her mother she'll call her
20 as soon as she gets over there. She leaves, and goes over, runs
21 into these two defendants in Townsend -- Townsend Shopping
22 Center, and then end up, again, at Howie's Hideaway. And it's
23 there that she began making inquiries about her brother, and
24 without going into all the proof, the questions are such, and
25 the answers are such, especially from these defendants, that

1 what they even claimed to the officers happened is not what they
2 told her.

3 She then -- when she first gets there and makes
4 these inquiries she's very serious, she's sober, and as she
5 stays there she begins to get drunk. They had to help her out
6 of the place. They left there about 7:00, and at around 8:00
7 or 8:30, a fellow that was staying over in Clear Fork in someone
8 else's home saw this big fire burning in the Clear Fork area.

9 They go on -- they are leaving the house at the
10 time, and they hear all of this other that's come about, and the
11 fact that she's still missing. Five days later, the gentleman
12 goes back in there, and finds -- goes back where he'd seen this
13 fire, and finds the car.

14 Of course, there's other evidence, Your Honor. I
15 could go on, but that's essentially...

16 MR. WEBB: I would renew the motion to dismiss the
17 aggravating factor. If that's their evidence, I've not heard
18 that she was a witness or had any knowledge that her brother was
19 killed.

20 THE COURT: The Court, at this time, overrules the
21 motion to dismiss the aggravating factor. In the scenario of
22 the evidence, in regards to the statement allegedly given by Mr.
23 Dellinger to the officer up there after a fight, or something
24 like that, it would not be relevant to go through the entire
25 scenario of events of that alleged crime as to who caused what

1 or whatever. I think it would be sufficient only to show that
2 an officer went up there for purposes of investigating an
3 alleged incident, and that as a consequence of that, he
4 encountered Mr. Dellinger, and a statement -- it's not going to
5 be necessary, in the Court's judgment, to actually prove the
6 commission of that crime as a condition precedent for that
7 officer being there -- you know. An officer may go upon
8 someone's premises simply to investigate a reported incident.

9 Am I making myself clear, General Schmutzer? I'm
10 not...

11 **GENERAL SCHMUTZER:** I'm focused now on where the
12 Court's going, Your Honor. You're talking about February 15th,
13 when the statement was made?

14 **THE COURT:** Yes.

15 **GENERAL SCHMUTZER:** Are you saying that -- I'm not
16 going to go into any detail other than, Your Honor, to show that
17 there was this fight, people were upset over it, that there was
18 a later shooting, and he believed it was the Griffins shooting
19 into his place.

20 **THE COURT:** No, sir. All I'm saying is that when
21 the officer gets up there, it is not necessary for the officer
22 to tell each and every reason why he was up there.

23 **GENERAL SCHMUTZER:** Let me ask the Court this, and
24 make sure I'm right. The only thing he will testify to is that
25 he went up there answering this complaint, James Dellinger was

1 there, pointed out to him where this out building had been shot
2 into, and he simply asked him, "Who do you think did it," and
3 he said, "The Griffins."

4 THE COURT: That may be shown.

5 GENERAL SCHMUTZER: That's all that...

6 THE COURT: That may be shown.

7 GENERAL SCHMUTZER: And that he made the statement
8 about...

9 THE COURT: Sure. Anything further?

10 GENERAL SCHMUTZER: We have some other motions, but
11 we can wait until they're through.

12 MR. DANIEL: Your Honor, in that regard, I think,
13 basically, since Your Honor has -- as I understand Your Honor's
14 ruling regarding this statement made that now would be the
15 proper time for us to renew our motion for severance, and I want
16 the record to reflect that.

17 THE COURT: Sure, and I want to answer that, and
18 to state the Court's reasoning for that by making reference to
19 definitions in the statute. First of all, and I understand, and
20 it may be true, as a matter of fact, that the statement of Mr.
21 Dellinger at that time on February 15th, obviously, at that
22 point, only refers to any motive or intent he might have, and
23 I will instruct the jury accordingly on that.

24 Now, it is not necessary, in order to charge and
25 convict in this case, Mr. Sutton, that Mr. Sutton have the exact

1 same intent or motive because under the definition of --
2 contained in first degree murder, it includes intentional, and
3 all it says is that "intentional refers to a person who acts
4 intentionally with respect to the nature of the conduct, or a
5 result of that conduct when it is the person's conscious
6 objective or desire to engage in the conduct or cause the
7 result." That is the test.

8 Now, it may not be shown, but that is the issue the
9 jury has to decide. It's not whether or not Mr. Sutton had some
10 reason or not to share in the alleged motive or design of Mr.
11 Dellinger, but if, in fact, this lady was killed, did Mr.
12 Sutton, in regards to your motion, intend for that result to
13 occur. That's the issue.

14 MR. DANIEL: And while Your Honor is ruling on that
15 motion, Your Honor, I understand that the General says it's
16 regarding a fight that the defendant had had with someone prior
17 to this incident occurring. If we're going to go into that as
18 coming under the bad acts provision, the 403 exception -- it's
19 our understanding that what occurred on that was that there was
20 a charge brought, and the grand jury returned a no true bill,
21 so the grand jury has not even found probable cause to even
22 bring a charge against him, and I don't see how it can fall into
23 the bad acts.

24 THE COURT: Okay. What's your position on that,
25 General Schmutzer?

1 **GENERAL SCHMUTZER:** I don't think, Your Honor, that
2 that's a decision on finding clear and convincing evidence. I -
3 - the grand jury, and I would have to go back to the assistant
4 that handled that, but it's my understanding they had difficulty
5 in getting witnesses there to appear. I'm not going to state
6 that to this Court, and I'm not going to get into that, but we
7 have -- you know, one of the kids -- we're not going to dwell
8 on this, it only shows that there was some feeling, but it's all
9 part of the picture. You know, this bad blood starts building
10 up. We're not going to try to prove that he is guilty of crimes
11 -- other than beating this guy up, we're not going into whose
12 guilt it is. It's just to show a fight.

13 **THE COURT:** A fight.

14 **GENERAL SCHMUTZER:** Right. To show the animosity
15 between the Griffins and these two, and I'll ask the Court --
16 going back on the Court's limited instruction, say, with regard
17 to the statement about getting rid of the hill of Griffins.

18 **THE COURT:** Yes.

19 **GENERAL SCHMUTZER:** Would the Court -- I take it
20 the Court would make a statement that they can consider that as
21 to him, and they can also consider that along with all the other
22 proof in the case.

23 **THE COURT:** In the case, but at the time -- at
24 least at that time as it came in, it will be considered only as
25 to Mr. Dellinger.

1 **GENERAL SCHMUTZER:** Correct, Your Honor. It was
2 only later on that...

3 **THE COURT:** Any evidence may be considered as it
4 has bearing on any issue or any person in the case.

5 **GENERAL SCHMUTZER:** Let me ask you this, Your
6 Honor, because this -- I'm sure this is going to come up. From
7 that point on, the rest of the proof -- the proof is going to
8 be -- our proof is going to be Sutton and Dellinger were
9 together at all times material. Sutton had been staying up
10 there for about two weeks or so, staying up there at Sutton's.
11 He had a place on Douglas Dam, but he had been hanging around
12 up there, staying there. And the proof will show this.

13 And the proof will show, as I say, they were
14 together, and in his own statement, ultimately, to the T.B.I.
15 Agents is that he was with him day and night.

16 **THE COURT:** That places them together.

17 **GENERAL SCHMUTZER:** Places them together, links
18 himself irreparably together, so I would object to any attempt
19 on the part of the defense to try to get the Court to give
20 limiting instructions on all the evidence coming in because like
21 shells found at the Dellinger trailer -- the same place where
22 they'd both...

23 **THE COURT:** Right.

24 **GENERAL SCHMUTZER:** And things like this, and I
25 think that would be -- we would have to go through and start

1 sorting out every little thing to the jury, and you can consider
2 this to him because they're linked together. Either they're
3 both guilty, or they're both innocent.

4 **THE COURT:** And I want to state on the record, if
5 I've not already done it clearly -- at least at this juncture
6 to state it clearly. The reason the Court -- I realize that the
7 February 15th statement of Mr. Dellinger, at that juncture only
8 applies to Mr. Dellinger. However, the reason the Court
9 concluded to try these defendants together is that their
10 subsequent statements, and their subsequent admitted conduct in
11 their statements themselves places them together thereafter, and
12 that is the reason -- and I've also, of course, held that they
13 are not confessions under the fifth amendment standards, and
14 that, therefore, as a consequence of that, I have concluded, and
15 did so, that they should be tried together. That at least makes
16 sense to me. It may not make sense to anyone else or the court
17 of criminal appeals or supreme court, but that's why I did what
18 I did. Anything further?

19 **GENERAL SCHMUTZER:** Your Honor, the Court had
20 indicated that it wanted some authority on the statements made
21 by Tommy Griffin at the time he was picked up by the officers,
22 and I have that, Your Honor.

23 **THE COURT:** Okay, thank you. And I have already,
24 in all candor, I have looked at that on my own. I look at too
25 many things on my own.

1 **GENERAL SCHMUTZER:** I think it all goes to the
2 indicia of reliability, and -- may I approach?

3 **THE COURT:** Sure.

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

5 **GENERAL SCHMUTZER:** This is our research, if the
6 Court please. It goes to Rule 803.2, Excited
7 Utterance, Your Honor.

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

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

11 **THE COURT:** And so what you want to show by this
12 statement is the statements by Mr. Griffin that he'd been beat
13 up, is that...

14 **GENERAL SCHMUTZER:** Your Honor, his full statement
15 was, "I was with some friends, and they beat me up, and threw
16 me out."

17 **THE COURT:** All right.

18 **THE COURT:** As soon as the officer got up there,
19 he was shaken up, he...

20 **MR. WEBB:** Are we hearing a motion, Your Honor?
21 I'm sort of...

22 **GENERAL SCHMUTZER:** We will make it a motion.

23 **MR. DANIEL:** Your Honor, we had a motion, I think,
24 in limine to limit that...

25 **THE COURT:** Well, he's...

1 MR. WEBB: I raised that, what, yesterday or...

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

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

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

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

12 MR. DANIEL: Your Honor, one other thing that I
13 think ought to be brought to the Court's attention. The
14 statement is, of course, out of the presence of the defendant,
15 and there's no way to rebut it, number one. Number two, it's
16 allegedly from the decedent where there's no way to contradict
17 it in any way. Thirdly, it does not name the defendant anyway.
18 He said he was with some friends. According to the statements
19 that was made, the defendant said that he had left with a girl,
20 and was with a girl. How do we know the friend is not the girl,
21 friends are friends. It's not naming anyone, and...

22 THE COURT: All right. The Court feels -- first
23 of all, gentlemen, looking under Rule 803 of hearsay exceptions,
24 "The following are not excluded by the hearsay rule." It talks
25 about excited utterance, "A statement relating to a startling

1 event or condition made while the declarant was under the stress
2 of excitement caused by the event or condition.

3 Now, under that exception, whether the declarant
4 is available or unavailable is immaterial, isn't it?

5 MR. DANIEL: We agree on that, Your Honor. But
6 Your Honor, we also -- you've got to take this a bit further.
7 That might have some bearing on the case if you tried it in
8 Blount County, but we've got to go to another step to another
9 step, so...

10 THE COURT: I understand. Now, as I understand,
11 and the Court has ruled the other crimes evidence admissible,
12 so therefore, this piece of evidence would be material, and be
13 relevant to whether or not these defendants actually did that
14 act precedent to his death. That goes to motive, that goes to
15 intent. And so that, and I have understood the offered proof,
16 is that the State's witnesses saw this victim, and two
17 individuals -- two other individuals out on Alcoa Highway there
18 fighting.

19 GENERAL SCHMUTZER: Your Honor, they cannot
20 identify, quite frankly...

21 THE COURT: I understand that part. Except they
22 identified this victim.

23 GENERAL SCHMUTZER: Ultimately, it turns out to be
24 this victim. You're correct. These people saw it...

25 THE COURT: And these defendants statements place

1 them out there on Hunt Road.

2 GENERAL SCHMUTZER: No, they don't, Your Honor...

3 MR. DANIEL: No, they don't.

4 THE COURT: Their car, I'm sorry.

5 GENERAL SCHMUTZER: No, they do not -- that's one
6 thing they try to avoid. They say that -- their statement on
7 this is that they had gone to a place and bought a case of beer,
8 and when they bought the case of beer, they came back out, and
9 some girl, and she describes her, starts talking to Tommy wanting
10 some blow or wanting some drugs, and that he loaded up and left
11 with her, and they didn't see him after that.

12 THE COURT: Okay.

13 GENERAL SCHMUTZER: So, no, they never did say --
14 they denied ever being out on Hunt Road, and through
15 circumstantial evidence, Your Honor, that we prove it. It
16 doesn't -- these people can say it was a dark colored Camaro.
17 They said there was a person inside, and at least one on the
18 outside, and they were fighting, and then someone came along
19 right afterwards and saw the guy staggering around in the same
20 area with his shirt off. And then the officer ends up picking
21 this guy up, and it was the victim, and it was in just a few
22 minutes.

23 THE COURT: Okay.

24 GENERAL SCHMUTZER: And Your Honor, there is also -
25 - further, this was -- of course, this was at night, a dark

1 colored Camaro. When this couple -- the first couple saw the
2 Camaro there, and the scuffle, and the officer will testify that
3 when he got Tommy, he had a cut on his -- he had fresh cuts, and
4 he appeared to have been in a scuffle. That the husband turned
5 back, and saw that this Camaro had one light. And we can prove
6 that independently, plus the defendant in his last statement to
7 the officer told him at that time that this Camaro had one light
8 -- Gary Sutton.

9 THE COURT: Okay.

10 MR. MILLER: Your Honor, as to the excited
11 utterance, you're taking the statement that the state was trying
12 to get in, and I don't think the Court's aware of the other
13 things -- it's not placed in context for Your Honor to make the
14 decision. This was not an occasion where they walked up on a
15 boy that was badly beaten without his senses, and made some
16 excited utterance. He had been in a fight, according to the
17 State, he was not dazed, he was not badly damaged from any
18 fight. If he was dazed at all, it was because he was drunk and
19 taking pills, and that's what the proof would show.

20 He was very calm, according to the police officer.
21 He was not excited at all, and quite frankly, he didn't want to
22 talk about it. And when questioned by the officers, only then
23 did he make the statement that the State's trying to get in, and
24 that's not what I call an excited utterance.

25 MRS. THOMAS: Your Honor, if I could just make...

1 **GENERAL SCHMUTZER:** I don't want to argue with it,
2 Your Honor, but that is not correct. When he first made the
3 first statement, he made it right off, and then afterwards he
4 began -- he then shut up. When the officer pressed him, he
5 says, "I can't tell you." He asked him who the friends were,
6 and he said, "I can't tell you." He said, "I'm sorry." But
7 he's not drunk, and in fact, the officer did smell alcohol on
8 him, but he said he was polite to him, and talked to him, and
9 responded to him. The State contends this man was excited --
10 he had just been a fight, he was left in February without his
11 shirt on practically in the middle of nowhere at the Hunt Road
12 overpass on Alcoa Highway in Blount County...

13 **THE COURT:** The folks on Alcoa Highway might not
14 think that's out in the middle of nowhere.

15 **GENERAL SCHMUTZER:** I'm talking about for a Sevier
16 County boy.

17 **THE COURT:** Okay.

18 **GENERAL SCHMUTZER:** And plus...

19 **THE COURT:** Are you saying we don't know where
20 Alcoa Highway is?

21 **GENERAL SCHMUTZER:** In any event, Your Honor,
22 you've got to take into consideration that this man, as the
23 proof will show, he had a prosthesis on...

24 **MR. DANIEL:** Your Honor, may I just very briefly...

25 **MRS. THOMAS:** Well, he...

1 THE COURT: Mrs. Thomas had the floor first.

2 MRS. THOMAS: He can go ahead. Come back to me.

3 THE COURT: Okay.

4 MR. DANIEL: Your Honor, basically, the General
5 said he was not drunk, and I think the proof will show that he
6 was arrested for public drunkenness, and taken to jail, and kept
7 in jail for a period of time. If he wasn't publicly drunk, then
8 they certainly had no business arresting him. Somebody thought
9 he was drunk. They took him to jail, and obviously, the officer
10 from Blount County.

11 But we go back to -- the real issue, Your Honor,
12 is there is no one who can say with any certainty that these two
13 defendants were the people that were there when they first saw
14 him there. They can't say with certainty that that's the same
15 person that was arrested later. It may be an inference -- draw
16 an inference that that was the same person, but no one can say
17 that's the same person.

18 The people who came back by, and saw the vehicle
19 later cannot say with certainty that these two defendants were
20 there in that vehicle, and there's absolutely no proof that they
21 were there, other than some circumstances, and more importantly,
22 the person who was arrested for public drunkenness, the Griffin
23 boy, did never say that these were the two people that put him
24 out.

25 THE COURT: Right.

1 **MR. DANIEL:** So you're going to have to get an
2 inference on an inference on an inference, the first inference
3 being that they were the persons that were there, the second
4 inference that this is the friend -- he said he'd had some
5 problems with some friends, and this is who he's talking about.
6 I understand, and I may be wrong, but there may have been some
7 questions about some arguments, maybe, in a bar earlier. I'm
8 not sure about that, and I'm not going to say that for sure, but
9 I just have in the back of my mind that there could have been
10 some altercations earlier.

11 But what I'm saying, you have to infer from what
12 he said that this is the persons he's talking about. And then
13 you've got to go further, and show it's an excited utterance,
14 which it's not, and you've got to show that it has some
15 relationship to this charge, and it's probative value outweighs
16 it's prejudicial effect. And that's -- we can't see how that
17 statement remotely can be made to prove anything. For that
18 reason, Your Honor, and there's several other reasons, and...

19 **MRS. THOMAS:** Well, that led perfectly into what
20 I was going to say.

21 **THE COURT:** You all work so well together.

22 **MRS. THOMAS:** The Court made the observation that
23 this statement was relevant on the issue of motive and intent,
24 but that would be, properly, the motive and intent to commit the
25 murder of Tommy Griffin, and that's not an issue that's before

1 this Court. It's not relevant on the issue of motive or intent
2 to kill Connie Branum.

3 GENERAL SCHMUTZER: It's relative on the...

4 THE COURT: I think that answers the reason why the
5 Court let the evidence -- is saying that the evidence comes in
6 anyway. That's true. The Court is going to take a short
7 recess, and look over the statement, and ponder this
8 momentarily.

9 MR. MILLER: Your Honor, I have an arrest report
10 that -- I don't know if the officer made a statement or not, but
11 I think it may be beneficial to the Court as far as what his
12 shape was at the time.

13 THE COURT: Appearance was?

14 MR. MILLER: Yes.

15 THE COURT: Okay. Thank you.

16 (COURT STOOD IN RECESS)

17 THE COURT: All rise for the jury.

18 (JURY IN)

19 THE COURT: Waive the call for the State?

20 GENERAL SCHMUTZER: Yes, Your Honor.

21 THE COURT: And the defense?

22 MR. DANIEL: Yes, Your Honor.

23 THE COURT: You may be seated. Ladies and
24 gentlemen of the jury, we have, I promise you, been working
25 steadily since about 2:00, or almost steadily. We have

1 concluded quite a bit of matters that had to be dealt with after
2 you were seated, and before the actual trial of this case
3 begins.

4 We have, as I say, gone a long way towards
5 concluding that. However, there are still matters that I must
6 rule on before opening statements are made to you. Rather than
7 making you sit out there any longer, I'm sure that you would be
8 much more comfortable either eating and going on to the motel,
9 and of course, you must make your arrangements.

10 And truthfully, all of us want to make your time
11 as well spent as possible here, understanding that there will
12 be several delays, and things that we have to deal with outside
13 your presence for obvious reasons.

14 So we are going to send you on for supper, for
15 hotel accommodations, give these ladies and gentlemen, of
16 course, time and the opportunity to make all their necessary
17 arrangements, either in the clerk's office or anywhere else that
18 you deem proper for that to take place.

19 Over the night and throughout this trial do not
20 read any newspaper period. Do not listen to any television news
21 stories. If it comes on, flip it off. And do not listen to any
22 radio broadcast news stories. Do not discuss the case, do not
23 anticipate anything. Don't let anyone contact you about this
24 case. Should that attempt to happen, please contact the
25 officers who are staying with you, and they will deal with it

1 then, and I will deal with it later.

2 We want to make you as comfortable as possible.
3 Several of you who have dealt with these court officers, I
4 think, know them very well, and they'll do everything they can
5 to make your stay with us as comfortable as possible. But I
6 hope after you leave here today we will continue to work until
7 everything is resolved that has to be dealt with before the
8 opening statements and the trial of this case begins in the
9 morning. We will be here at 9:00, and we will start the trial
10 then.

11 Do any of you have any questions, or anything that
12 you want to bring to the Court's attention? Ladies and
13 gentlemen, we thank you, and we will see you in the morning.
14 All rise for the jury.

15 (JURY OUT)

16 THE COURT: You may be seated. Turning now to the
17 motion in limine that has been filed by the defense in regards
18 to the alleged statement of Tommy Griffin, alleged to have
19 occurred over on Alcoa Highway/Hunt Road in Blount County,
20 Tennessee. The Court does have in its possession, and does lay
21 with the court files that motion specifically filed by Mr. Webb,
22 and of course, concurred in by counsel for Mr. Dellinger.

23 The Court must determine whether or not the alleged
24 statement given to Officer Drew Roberts by Mr. Tommy Griffin is
25 admissible as a hearsay exception under Rule 803(2). The Court

1 opines that the statement, along with the identification of the
2 vehicle is a relevant and material issue in regards to the
3 motive and intent in the case of Tommy Griffin, and in the death
4 of Tommy Griffin in Blount County, Tennessee.

5 Because that has been previously ruled by this
6 Court to be a proper element of evidence in this trial, it is
7 therefore admissible under Rule 803(2) as an excited utterance
8 or under subsection (3) as being an existing mental or emotional
9 condition or physical condition.

10 MR. MILLER: Does the Court have my copy of the
11 opinion?

12 THE COURT: I sure do, Mr. Miller.

13 MR. MILLER: And I think we'll get into, on the
14 cross examination on that, probably renew our motion at the time
15 that it comes in.

16 THE COURT: Surely. That will be fine; you sure
17 may. And General Schmutzer, this is your copy.

18 GENERAL SCHMUTZER: Thank you, Your Honor.

19 MR. DANIEL: Your Honor, let the record reflect we
20 would also renew our motion. I presume, to save a lot of time
21 and trouble, since we have both filed motions, and as far as
22 relevant issues, that applies to one defendant and the other,
23 so there is no need for us to...

24 THE COURT: Yes, sir.

25 MR. DANIEL: Thank you, Your Honor.

1 THE COURT: Yes, General Schmutzer?

2 GENERAL SCHMUTZER: Your Honor, we do have some
3 motions in limine, and we ask in these motions that before any
4 of these matters are introduced in any way in statements to the
5 jury, or proof, or whatever, that the defendants, through their
6 attorneys, first approach the bench, and out of the presence of
7 the jury take up the matter, and give the State an opportunity
8 to object before submitting it to the jury.

9 One is, Your Honor, we have been furnished a lot
10 of medical records. I have agreed that they do not have to have
11 anyone here to authenticate those records to the extent that
12 they are admissible, however, I did not agree to their
13 admissibility.

14 Most of these records are on Connie Branum.

15 THE COURT: Yes.

16 GENERAL SCHMUTZER: I, quite frankly, can see where
17 some of them might be relevant, but as to a lot of it, quite
18 frankly, I don't think it is. It goes back to just her medical
19 history in the past, and has nothing to do with the problems she
20 was having just prior to this incident, and quite frankly, I
21 think they want it mainly to show that prior to this time she
22 tried to commit suicide a few days before. I can understand
23 that, but these things go way back, and don't relate to that at
24 all. But I would ask Your Honor that we be given an opportunity
25 to object to the medical records, the admissibility of whatever

1 particular records they want to admit, before they reach the
2 jury's attention in any way, shape or form, or attempt to admit
3 it.

4 Further, Your Honor, and I don't -- this wouldn't
5 be a motion in limine. I can't think of one reason in the world
6 that her father's records regarding his suicide sometime before
7 this would be admissible under any circumstances, and I would
8 move that, at the very least, we have a motion in limine, unless
9 some statement can be made as to why it would relevant material,
10 I would just ask that the Court rule on it. Otherwise, we would
11 ask that that not even be mentioned until the Court has had an
12 opportunity to rule on it.

13 THE COURT: Okay. First of all, in regards to the
14 medical records of Ms. Branum, I know that counsel from both
15 sides are going to be meeting after this hearing here today in
16 order to go over aspects of both of the defendants' statements.

17 MR. DANIEL: We've already done that, Your Honor.

18 THE COURT: Okay. Then I'm going to give you an
19 opportunity further meet. I want you all to go over those
20 records, and determine either what aspects of them that you can
21 agree on, or what aspect of them that you cannot agree on
22 because...

23 GENERAL SCHMUTZER: If they'll merely furnish me
24 what they want to use, Your Honor, we'll look at them as quickly
25 as possible, and tell them what we object to, if anything. That

1 will move things along.

2 **THE COURT:** Okay. Now, at first blush, in all
3 candor with you, I -- absent some expert opinion tying the
4 illness -- alleged illness or otherwise, of her father to her
5 condition, I cannot anticipate how that would be admissible as
6 to any mental illness he might have had.

7 **MR. DANIEL:** It would be two fold, Your Honor.

8 **THE COURT:** Okay.

9 **MR. DANIEL:** First of all, I think the doctor will
10 testify, and people, probably, even common knowledge that
11 suicidal tendencies are sometimes hereditary.

12 **THE COURT:** Okay.

13 **MR. DANIEL:** Secondly, there's proof that one of
14 the reasons she was contemplating suicide, and her problems --
15 and she did attempt suicide, not contemplating, she attempted
16 suicide. This happened the 10th of February, and she was
17 hospitalized in Lakeshore Mental Institute on the 11th, released
18 on the 14th with the diagnosis that she was suicidal, and she
19 should report to Overlook Mental Hospital for outpatient care.

20 **THE COURT:** Okay.

21 **MR. DANIEL:** She reported, I think, the day before
22 Tommy Griffin's disappearance.

23 **THE COURT:** I'll ask you this. In her statements
24 to her psychiatrist or to her physician, did she make reference
25 in that statement to a condition of her father...

1 MR. DANIEL: Her father's suicide, yes. That's one
2 of the problems -- one of the diagnosis, Your Honor.

3 GENERAL SCHMUTZER: I think, Your Honor, to the
4 extent that it's part of her records, possibly, but to go into
5 his records, that's totally independent of that, and would not
6 be relevant and material.

7 THE COURT: Absent some expert opinion otherwise
8 making it relevant. Now, I do hold, and I do rule that
9 statements she made to her physician or psychiatrist for
10 purposes of diagnosis or treatment that include references to
11 her father's illness or her fears about her fathers illness
12 affecting her may be admitted so far as they would otherwise be
13 relevant in the trial of this case.

14 MR. DANIEL: Your Honor, please, so we won't
15 misstate something to the jury, I have those records, and I'd
16 like to refer to those. She was admitted to Lakeshore Hospital
17 on February the 11th with a suicide attempt. She had tried to
18 O.D. on some pills.

19 THE COURT: Okay.

20 MR. DANIEL: And the diagnosis, the reason for her
21 suicide, the first being her father's suicide on 4/19/91, and
22 that her marital problems she was having, her mother's illness,
23 alcohol abuse, and she lost her job.

24 THE COURT: Okay.

25 MR. DANIEL: Part of the diagnosis, and part of the

1 reason, and that's part of the reason she was suicidal.

2 THE COURT: Statements made to her physician or
3 psychiatrist which, under our law, is...

4 GENERAL SCHMUTZER: My position has to do with
5 independent records -- independently going into something on
6 that...

7 THE COURT: Well, other than -- if -- I take it you
8 all agree her father committed suicide?

9 GENERAL SCHMUTZER: Sure.

10 THE COURT: Is that agreed upon? Okay. There
11 would be no reason for independent evidence on that issue. As
12 stated and ruled, I will allow that testimony, Mr. Daniel, from
13 her records. I sure will. I think that's entirely...

14 MR. WEBB: Let's go ahead and quash the subpoena
15 on Dr. Rose then, based on...

16 THE COURT: I tell you what. What don't you call
17 Dr. Rose...

18 MR. WEBB: You call Dr. Rose.

19 THE COURT: Say what?

20 MR. WEBB: Please, Your Honor.

21 THE COURT: No.

22 MR. WEBB: I will, Your Honor.

23 THE COURT: That's what I said to start with. Dr.
24 Rose called my home the other morning. He happens to be my
25 doctor, by the way, but he was calling me to ask me when he had

1 to be here, and I told him that was in, basically, the confines
2 of the ones who subpoenaed him. So I'll let you all call him.

3 MR. WEBB: We'll do that, Your Honor.

4 THE COURT: Your Honor, the -- also a motion in
5 limine -- we've been furnished a statement that Connie Branum
6 made on behalf of James Dellinger on his SSI claim. I don't
7 know what relevancy -- I only as if that's going to be admitted,
8 and before they admit it, they approach the Court, and give us
9 an opportunity to object before they do that.

10 We would ask, Your Honor, for reciprocal Jencks.
11 We have a right to it. We will cooperate with them on Jencks
12 if they want to cooperate with us. We will more than happy do
13 that. If they want to give us theirs ahead of time, we'll
14 certainly work with them with ours.

15 THE COURT: Well, that seems fair. Both sides
16 swap.

17 MR. MILLER: Your Honor, to the extent that we have
18 Jencks material, statements of witnesses adopted by them, we
19 will furnish them.

20 THE COURT: Surely.

21 GENERAL SCHMUTZER: I take it, Your Honor, that
22 they have -- we have been advised of their alibi witnesses, and
23 they would be limited to those witnesses that they have filed
24 or put us on notice of, and not beyond that.

25 THE COURT: Now, absent some extenuating

1 circumstance on failure to discover, I will so order.

2 **GENERAL SCHMUTZER:** Your Honor, we would object to
3 any questions being elicited to officers, or any questions made
4 to officers that are specifically designed to elicit hearsay,
5 "Did your investigation not reveal...", so and so said such and
6 such. Unless it is something -- obviously, if it was so and so
7 had testified, and they were going to impeach them that's one
8 thing, but simply to go into their general investigation, say,
9 and then show this person was a suspect and this, that, and the
10 next, and you obtained this information about so and so, would
11 be totally irrelevant and immaterial, Your Honor.

12 We have furnished them all that we have, and I say
13 they would have to call witnesses on that. To try to bring it
14 in through officers would be the rankest of hearsay, and we
15 would object to that.

16 **THE COURT:** To ask an officer or any other witness,
17 other than an expert, conclusions of their investigations or
18 analysis on either side is improper.

19 **MR. WEBB:** Your Honor, that's now what he's...

20 **GENERAL SCHMUTZER:** Mine has to do, Your Honor,
21 with going to, "Did your investigation not reveal this or that?"

22 **THE COURT:** Right. That's what the Court...

23 **GENERAL SCHMUTZER:** And that would be...

24 **THE COURT:** In that form of question that would be
25 objectionable.

1 **GENERAL SCHMUTZER:** I would object to anything,
2 Your Honor, they attempt to bring out that would be hearsay,
3 even statements of other individuals. If they haven't taken the
4 stand, and there's no reason to bring it out other than they're
5 just trying to bring it out through the officer rather than
6 calling that individual, we would object to it.

7 **MR. DANIEL:** Your Honor, can he be more specific?
8 I've never heard...

9 **THE COURT:** Well, I tell you what, I think I'll
10 wait and rule on that as it comes up.

11 **MR. DANIEL:** As it comes up.

12 **GENERAL SCHMUTZER:** That's what I'm wanting, Your
13 Honor, is a motion in limine that before they attempt to do
14 that, they approach the bench, and give...

15 **MR. DANIEL:** Your Honor, that could be every
16 question we...

17 **GENERAL SCHMUTZER:** Well, that's true. I'll just
18 object, Your Honor.

19 **THE COURT:** Okay.

20 **GENERAL SCHMUTZER:** I agree with that. We'll just
21 make our objections, and let the Court rule on it.

22 **THE COURT:** I had a law school professor when we
23 would ask him questions that he didn't think had anything to do
24 with it, he'd say, "That's sort of like the alligator. It
25 hasn't come up yet." So I'll just wait on that.

1 **GENERAL SCHMUTZER:** Your Honor, we would ask that
2 no one's criminal record be brought out or gone into unless they
3 first approach the bench outside the presence of the jury.

4 **THE COURT:** Both sides. That will apply to both
5 sides, surely.

6 **GENERAL SCHMUTZER:** Both sides will do that. That
7 is required by law.

8 **THE COURT:** Yes.

9 **GENERAL SCHMUTZER:** Your Honor, that essentially
10 covers it.

11 **THE COURT:** Okay. Mr. Webb?

12 **MR. WEBB:** Your Honor, I -- it's getting late, and
13 I'm befuzzled. I just want to make sure -- I don't know if the
14 Court ruled. General Schmutzer indicated that in his opening
15 statement that he was going to make a reference to an event that
16 occurred, and the General knows, I don't know, but it was a long
17 time before these events that are on trial now, where,
18 apparently, Bill Griffin started a fight with my client, and
19 sort of a mutual combat situation arose, and subsequent to that,
20 Bill Griffin had charged Gary with that aggravated assault.

21 The matter went up to the grand jury. The State
22 of Tennessee presented the witnesses that they had to that, one
23 being Detective Jeff McCarter, and whomever else. The grand
24 jury heard that, and ruled that to be self defense or
25 justifiable, and they issued a no true bill.

1 I can't see how that could come into this case.
2 **THE COURT:** Is there an order by the grand jury
3 saying that?
4 **MR. WEBB:** I'll rely on the...
5 **GENERAL SCHMUTZER:** The grand jury just issue a no
6 true bill, it doesn't say for what reason, and we're not
7 admitting it to show it's a bad act. We're going to show the
8 bad blood, but with regards to who started it or anything else,
9 whether it was justifiable or unjustifiable, the fact that...
10 **THE COURT:** And you're not trying to show which
11 side started it?
12 **GENERAL SCHMUTZER:** No, we're not going to debate
13 who started it, whose fault it was, or anything else. All we
14 want to show is that...
15 **THE COURT:** Show that there had been a prior
16 altercation.
17 **GENERAL SCHMUTZER:** A prior altercation that caused
18 the bad blood.
19 **THE COURT:** So when was that?
20 **GENERAL SCHMUTZER:** Your Honor, I don't have the
21 exact date. I can get that for the Court.
22 **GENERAL GREEN:** I think, if memory serves me
23 correctly, Your Honor, it was approximately December the 28th
24 of 1991, which would have been...
25 **THE COURT:** Some few months.

1 **GENERAL GREEN:** Some month and a half or two months
2 before this.

3 **THE COURT:** That may be shown.

4 **MR. WEBB:** The General said he wasn't using it to
5 show a bad -- a prior bad act, so I...

6 **THE COURT:** Right, so all -- as I understand what
7 he is attempting to show is that there had been an altercation
8 between them, not whose fault it was or if it was any...

9 **MR. DANIEL:** Your Honor, I don't believe that falls
10 under the exceptions under a bad act. If he can't show a bad
11 act -- you've got to have some reason to bring it in. It's got
12 to be material...

13 **MR. WEBB:** In other words, you've got to show it's
14 material, relevant -- attempt to prove some fact in issue, and
15 before you get to 404(b), the exclusionary rule, the only way
16 you can get it in the exclusionary rule is to show it by prior
17 bad act. So I...

18 **THE COURT:** Well, wait just a minute. I have that
19 rule right here. 404(b) says:

20 "Evidence of other crimes, wrongs, or acts is not
21 admissible to prove the character of a person in
22 order to show a ... with a character trait. It
23 may, however, be admissible for other purposes.
24 The conditions..."

25 Of course, we've all discussed that. Now,

1 gentlemen, I -- you know, I don't write the rules, I just try
2 to interpret them. That's the rule.

3 MR. DANIEL: We don't interpret it that way.

4 THE COURT: I do.

5 MR. DANIEL: We understand, with all due respect.

6 THE COURT: I know.

7 MR. WEBB: Your Honor, we need to know, with due
8 respect, is the General going to bring up things that these boys
9 did when they was babies. I mean, this is getting so...

10 THE COURT: Mr. Webb, now, in all candor, something
11 that happened in December of '91, some three or four months
12 prior to these alleged incidents, is not something in their
13 childhood. This is material. It goes to motive and intent.
14 In particular, as I understand it, it's been your objection all
15 along that the statement made -- allegedly made by Mr. Dellinger
16 applies only to his intent. This act sought to be proved goes
17 directly to your client's intent.

18 MR. WEBB: What intent does it have, Your Honor?
19 This was a fight between him and a person other than either
20 victim in this case.

21 THE COURT: I understand that, but then if you
22 combine that with the statement of Mr. Dellinger, and their
23 subsequent association together thereafter, according to their
24 own statements, that's what makes it relevant, not whether it's
25 true or not. It makes it a relevant piece of evidence.