IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	**Supreme Court Case No. _____**
	)	
vs.	)	**Court of Criminal Appeals**
	)	**Case No. M2003-03073-CCA-R3-CD**
BRYANT GUARTOS,	)	
	)	
Appellant.	)	

RULE 11, T.R.A.P. APPLICATION FOR PERMISSION TO APPEAL FROM THE COURT OF CRIMINAL APPEALS

APPLICATION OF APPELLANT

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APPLICATION FOR PERMISSION TO APPEAL

This is a Rule 11, T.R.A.P. application to appeal by Mr. Bryant Guartos from his Davidson County convictions for conspiracy to commit aggravated robbery, first degree murder, especially aggravated robbery, and aggravated robbery for which he received a total, effective sentence of life plus 47 years. The Court of Criminal Appeals affirmed on January 24, 2006, and a Petition to Rehear was denied on March 15, 2006 (copies appear in the Appendix).

This case involved the robbery and murder of a security guard who was transporting Rolex watches to a vehicle. Multiple individuals were charged with this offense including Mr. Guartos. The trial court granted a severance from the other co-defendants. Mr. Guartos was tried and convicted. The two co-defendants were subsequently tried and their convictions have been affirmed by this Court. See *State v. Gomez and Londono,* 163 S.W.3d 632 (Tenn. 2005) Certiorari is pending in the Supreme Court of the United States, Case Number 05-296. That Court has granted review in a companion California case which raises the *Blakely* issue. *California v. Cunningham*, 2005 WL 880983, cert. granted, 05-6551, docketed for October oral argument. This Court should grant review here on the sentencing issues which are addressed at page 217 of this brief.

With respect to the other issues in Mr. Guartos' appeal, the case turned on the question of identity. Mr. Guartos categorically denied that he had anything to do with this robbery and murder and that he was the victim of a misidentification by Ms. Sloan, the only eyewitness who could allegedly identify him. During the hearing on the motion for trial, newly retained

counsel produced a "mug shot" taken contemporaneous with the date of the actual crime. The eyewitness was unable to identify the person in the mug shot as being the individual at the scene of the robbery. The mug shot, of course, was actually Mr. Guartos.

The other issues in this case concern a multitude of discovery violations. The State withheld police reports, witness statements and other documents which were unearthed by newly retained counsel. This included an exculpatory statement made by Mr. Guartos that the police neglected to provide to the district attorney.

This case presents important questions as to issues of establishing identity at a criminal trial where newly-discovered evidence calls into serious question the defendant's alleged complicity in the crime. Accordingly, this Court should grant review, reverse these convictions and grant a new trial.

DESIGNATION OF THE RECORD

The record in this matter consists of 12 volumes. The first five volumes contain what was previously known as the Technical Record. The remaining seven volumes contain the testimony of the trial, sentencing hearing and the extensive motion for new trial. All volumes will be designated by roman numeral. There are 59 exhibits. Subsequent to filing of the record with this Court, two additional exhibits from the sentencing hearing were located consisting of the presentence report and certified copies of prior convictions. They consist of exhibits 1 and 2 to the sentencing hearing.

The Court needs to be aware that the extensive Motion for New Trial contains page numbers keyed to the trial transcript. However, because of a number of serious omissions the court reporter had to redo the transcript after the motion was filed with the Court, and thus the numbers in the final transcript were altered. The brief refers to the current page numbers. (See Vol. X, pp. 743-746).

DESIGNATION OF THE PARTIES

The Appellant, Mr. Bryant Guartos will be referred to in this Application as the Defendant or, by his proper name Bryant Guartos. The Appellee will be referred to as the State or the State of Tennessee.

STATEMENT OF THE ISSUES

I. **WHETHER THE EVIDENCE FAILS TO SUPPORT THE VERDICT THAT MR. GUARTOS WAS GUILTY OF ANY OF THESE CHARGES.**

II. **WHETHER MR. GUARTOS SHOULD BE GRANTED A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE CONSISTING OF PHOTOGRAPHS AND MUG SHOTS TAKEN CONTEMPORANEOUS WITH THE CRIMINAL OFFENSE.**

III. **WHETHER THE DEFENDANT WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE IDENTIFICATION PROCEDURE UTILIZED HERE CONTAINED AN EARLIER PHOTOGRAPH WHEN A CONTEMPORANEOUS PHOTOGRAPH WAS AVAILABLE.**

IV. **WHETHER THE DEFENSE IS ENTITLED TO A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE CONSISTING OF NEWSPAPER REPORTS THAT MS. DEBORAH SLOAN WAS CROUCHED DOWN IN HER SEAT.**

V. **WHETHER THE DEFENDANT WAS DENIED DUE PROCESS BECAUSE THE STATE DID NOT DISCLOSE THAT MS. DEBORAH SLOAN HAD TINTED WINDOWS IN HER VEHICLE THROUGH WHICH SHE ALLEGEDLY SAW THE DEFENDANT.**

VI. **WHETHER MR. GUARTOS WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SUGGESTIVE AND INCORRECT LINEUP PROCEDURES CONDUCTED BY DETECTIVE TARKINGTON.**

VII. **WHETHER MR. GUARTOS WAS DENIED DUE PROCESS BY THE INCONSISTENT TESTIMONY OF DEBORAH SLOAN WHICH WAS CONTAMINATED BY PROSECUTORIAL MISCONDUCT IN POINTING OUT THAT MR. GUARTOS WAS IN THE COURTROOM PRIOR TO TRIAL.**

VIII. **WHETHER THE DEFENDANT WAS DENIED DUE PROCESS BY THE IN-COURT IDENTIFICATION OF MS. SLOAN AND THE OUT-OF-COURT IDENTIFICATION OF MS. SLOAN IN VIOLATION OF DUE PROCESS PROVISIONS OF THE TENNESSEE AND UNITED STATES CONSTITUTIONS.**

IX. **WHETHER MR. GUARTOS SHOULD BE GRANTED A NEW TRIAL BECAUSE THE WITNESS, KIMBERLY ALLISON, WAS TELLING DEBORAH SLOAN WHO MR. GUARTOS WAS DURING THE TRIAL.**

X. **WHETHER MR. GUARTOS WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WAS DENIED THE RIGHTS TO DISCOVERY UNDER RULE 26.2 OF THE TENNESSEE RULES OF CRIMINAL PROCEDURE BY THE FAILURE OF THE GOVERNMENT TO PROVIDE ALL OF THE STATEMENTS OF MR. NAGELE A CRUCIAL WITNESS FOR THE GOVERNMENT.**

XI. **WHETHER THE DEFENDANT WAS DENIED DUE PROCESS BY THE FAILURE OF THE STATE TO PRODUCE THE ENTIRE 911 CONVERSATION OF DEBORAH SLOAN, A KEY STATE WITNESS.**

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XIII. **WHETHER MR. GUARTOS WAS DENIED DUE PROCESS BY THE IN-COURT IDENTIFICATION OF BARBARA FRANKLIN.**

XIV. **WHETHER MR. GUARTOS WAS DENIED DUE PROCESS BY THE ALLEGED IN-COURT IDENTIFICATION OF STACEY BUTTS.**

XV. **WHETHER MR. GUARTOS WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE FAILURE OF THE STATE'S COURT REPORTER TO TRANSCRIBE THE CLOSING ARGUMENT OF THE DISTRICT ATTORNEY.**

XVI. **WHETHER THE ALLEGED STATEMENT TAKEN BY THE NASHVILLE POLICE IN MIAMI, FLORIDA WAS UNLAWFUL, BEING GIVEN IN VIOLATION OF MR. GUARTOS' FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE MR. GUARTOS REPEATEDLY REQUESTED TO SEE HIS ATTORNEY.**

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XXVI. **THE COURT ERRONEOUSLY IMPOSED THE MAXIMUM SENTENCES WHICH ARE IN VIOLATION OF *BLAKELY v. WASHINGTON*.**

XXVII. **THE CONSECUTIVE SENTENCES WERE IMPROPERLY IMPOSED AND, IN ANY EVENT, CONSECUTIVE SENTENCING HERE VIOLATED *BLAKELY v. WASHINGTON*.**

STATEMENT OF THE CASE

The robbery and murder of Mr. Rogers occurred on March 17, 1999. Mr. Guartos was indicted on June 30, 2000, by the Davidson County Grand Jury for the offenses of first degree murder and two counts of aggravated robbery. (Vol. I, pp. 1-5).

On February 8, 2001, Mr. Guartos' public defender was relieved and Michael Colavecchio was substituted as counsel of record. (Vol. II, p. 337).

On February 16, 2001, a superceding indictment was returned, charging Mr. Guartos with conspiracy to commit aggravated robbery, murder in the first degree, especially aggravated robbery and aggravated robbery. (Vol. II, p. 342). This indictment number is 2001-A-280.

Mr. Guartos, through his new attorney, Mr. Colavecchio, filed a request for discovery and/or inspection on January 24, 2001. (Vol. II, p. 286). The State filed a third discovery response on February 6, 2001. (Vol. II, p. 335).

The trial began on April 2, 2001, and on April 5, 2001, Mr. Guartos was convicted of conspiracy to commit aggravated robbery in Count 1, convicted of felony murder in Count 2, convicted of especially aggravated robbery in Count 3, and convicted of aggravated robbery in Count 4. (Vol. III, p. 441).

The State filed a motion for consecutive sentencing on April 12, 2001. (Vol. III, p.447). The State also filed a statement of alleged enhancement factors on April 12, 2001. (Vol. III, p. 445).

On May 16, 2001, the Court entered judgment on the sentences as follows:

October 15, 2004 With respect to conspiracy to commit aggravated robbery, the Court imposed a sentence of 10 years. With respect to especially aggravated robbery conviction, the Court imposed a sentence of 25 years. With respect to the aggravated robbery conviction, the Court imposed a sentence of 12 years. The conviction for murder in the first degree carried a life sentence. The Court ran all of the sentences consecutively for an effective sentence of life plus 47 years. (Vol. III, pp. 449-452).

An amended judgment was entered on June 12, 2001, correcting the judgment for especially aggravated robbery to reflect that the Defendant was a "violent" offender with a release eligibility of 100%. (Vol. III, p. 467).

A motion for new trial was filed on May 31, 2001, by newly retained counsel, Mr. David Raybin. (Vol. III, p.455).

An amended motion for new trial was filed on May 2, 2003. (Vol. V, p. 704). A second amended motion for new trial was filed on May 21, 2003. (Vol. V, p. 1033).

Appellate counsel would note to the Court that much of the delay in the hearing on the motion for new trial was attributable to the fact that the court reporter had not transcribed portions of the record and there were alleged inaccuracies in the trial transcript and the entire transcript had to be reviewed and certain corrections made. [1]

[1] The trial judge noted in the Rule 12 report that, "After the verdict, the Defendant hired David Raybin to represent him on the motion for new trial and appeal. Mr. Raybin requested that the transcript be prepared before he argued the motion for new trial. The lengthy delay was caused by the time required to prepare the transcript, and have a lengthy hearing on the motion for new trial." (Vol. V, p. 1067).

The Court conducted two evidentiary hearings on the motion for new trial and took same under advisement on June 4, 2003. (Vol. V, p. 1035).

On November 24, 2003, the trial court denied the amended motion for new trial in a written Order. (Vol. V, pp. 1036-1058).

A Rule 12 report was filed on November 25, 2003. (Vol. V, p. 1070).

On December 17, 2003, Mr. Guartos filed his notice of appeal. (Vol. V, p. 1071). The Tennessee Court of Criminal Appeals affirmed the convictions on January 24, 2006 and a petition to rehear was denied on March 15, 2006. Mr. Guartos is presently confined in the Tennessee Department of Correction pending his appeal.

STATEMENT OF THE FACTS AT TRIAL [2]

A. STATE'S PROOF

MARIE ROGERS

Ms. Marie Rogers lives in Pearland, Texas. Ms. Rogers was Roy Rogers' mother. Roy Rogers was 47 years old when he was killed. Mr. Rogers had been living in Fayetteville, North Carolina for the last three or four years. (Vol. VI, pp. 148-149).

Mr. Rogers was a Green Beret in the U.S. Army. Mr. Rogers had put in for his retirement and was on retirement leave and had the permission of the U.S. Army to accept his job as a security guard. (Vol. VI, p. 149).

Ms. Rogers learned that her son had been shot when her daughter-in-law called her on the phone and said that he had been shot and was in critical condition in the Vanderbilt hospital in Nashville, Tennessee. Ms. Rogers received the phone call about five o'clock in the afternoon and she was in Nashville by eight that night. (Vol. VI, pp. 149-150).

Mr. Rogers was in the hospital twenty-one days before he passed away. Ms. Rogers was in Nashville at that time. (Vol. VI p. 150).

KIMBERLY ANN ALLISON

Ms. Kimberly Allison is employed by Carlyle and Company which is a retail jewelry store. The store is located at the Mall of Green Hills on the second level, in Davidson

[2] Occasionally counsel will insert bracketed information from later or earlier in the trial to assist in understanding the facts.

County. Ms. Allison is the store manager and has been the manager for nine years. (Vol. VII, p. 151).

In March of 1999, Ms. Allison was the store manager. On March 16, 1999, the store had a special Rolex watch show. This was a "Rolex trunk show" where the store brings in a special selection of merchandise just the day of the show. There are anywhere from 75 to 150 pieces; five or six cases of watches. They have a Rolex technician in the day of the show and it is a special event that they have twice a year. The show will last usually from 11:00 to 7:00 for just one day. (Vol. VII, pp. 151-152).

The show was on March 16, 1999 [The robbery took place the next day]. There were a couple of advertisements in the newspaper and an easel sign in front of the store. (Vol. VII, p. 152).

The watches were transported to the store on dollies and they were in "little poly bags and bullet, like ammunition, big boxes, with padlocks on them." Mr. Roy Rogers and Mr. Gene Nagele brought the watches to the store anywhere from 8:30 to 9:30 in the morning. (Vol. VII, pp. 152-153).

The store opens to the public at 10:00 a.m. The mall opens for employees and people who want to walk in the mall around 6:00 a.m. (Vol. VII, p. 153).

Prior to the show on March 16, 1999, Ms. Allison had met Mr. Nagele at previous shows where he was the security guard. (Vol. VII, p. 153).

On March 16, 1999, Ms. Allison was not at the store when the watches came in; she came in later. (Vol. VII, p. 153).

When the store closed on March 16, 1999, the watches were put in the store vault for the evening until the next morning. The watches were supposed to be picked up the next morning on the 17th. Ms. Allison was not at the store the morning of the 17th when the watches were picked up. Ms. Delta Ogada (spelled phonetically) was there. (Vol. VII, pp. 153-154).

Ms. Allison was scheduled to work later that morning [on March 17, 1999] and arrived at the mall around 9:10. Ms. Allison parked probably three places under the covered parking in the parking garage. Carlyle and Company is on the second floor of the mall and it would take Ms. Allison about two or three minutes to walk from where she parked that day to the store. (Vol. VII, pp. 154-155).

When Ms. Allison arrived in the parking garage that day she saw something unusual. Two or three parking places up the ramp she saw Mr. Rogers laying there. He had been shot. There were no police or medical personnel on the scene at that time. Mr. Nagele had just gotten back to him, laying there. Ms. Allison ran over to him and was checking on him and asked if there was anything she could do. The police were on their way and she heard the sirens going. She remembers seeing that Mr. Rogers was shot in the chest and she started crying. Ms. Allison spoke to the police when they arrived. (Vol. VII, p. 155).

The approximate value of the watches that were taken was around $700,00.00 to $750,000.00. (Vol. VII, pp. 155-156).

[CROSS-EXAMINATION]

To Ms. Allison's knowledge, the show was advertised in the local papers but not outside the Nashville area. No advertisements on the radio or television. (Vol. VII, p. 156).

[REDIRECT EXAMINATION]

To Ms. Allison's knowledge, none of these watches were ever recovered. (Vol. VII, p. 157).

EUGENE E. NAGELE, JR.

Mr. Eugene Nagele currently does home maintenance in the Myrtle Beach area in South Carolina. Back in March of 1999, Mr. Nagele worked for Corpus Securities International for about six years. During his employment for Corpus Securities Mr. Nagele would do security work for Carlyle and Company. (Vol. VII, pp. 159-160).

In March of 1999, Mr. Nagele had an assignment for Carlyle and Company. Mr. Nagele was to escort Rolex watches to shows for Carlyle and Company. Mr. Nagele would pick up the watches in Greensboro, North Carolina which is the headquarters for Carlyle and Company. (Vol. VII, p. 160).

Mr. Nagele had a partner for this assignment whose name was Roy Rogers. (Vol. VII, p. 160).

Mr. Nagele and Mr. Rogers were in uniform when they were actually guarding the watches. While transporting the watches, whoever was going to be on the first shift was in uniform, and the other individual was in regular street clothes. (Vol. VII, p. 161).

Mr. Nagele was armed while transporting the watches with a .45 handgun. Mr. Rogers also had a .45 handgun. (Vol. VII, p. 161).

On March 16, 1999, Mr. Nagele and Mr. Rogers transported the watches to the Carlyle and Company store at the Mall of Green Hills. They both had been to other mall locations in Davidson County prior to Green Hills such as Cool Springs Galleria and Rivergate Mall, the most recent one being Cool Springs. (Vol. VII, pp. 161-162).

Mr. Nagele and Mr. Rogers arrived at the Green Hills Mall on March 16, 1999 with the Rolex watches at about 9:30. (Vol. VII, p. 162).

While guarding the watches one of them will stay at the location during the show, and as they leave later in the afternoon, the other guard will come back and both guards are there while the merchandise is being inventoried and secured. (Vol. VII, p. 162-163).

On March 16, 1999, Mr. Nagele had the early shift and Mr. Rogers had the evening, afternoon shift. Mr. Nagele came back that evening as the watches were being locked up. (Vol. VII, p.163).

Mr. Nagele had been to other cities before Nashville with this show. He had been on the road for about 17 days. Mr. Nagele and Mr. Rogers had two more shows in Nashville at Hickory Hollow and Bellevue and then they would go back home to North Carolina. (Vol. VII, p. 163).

On March 17, 1999, Mr. Nagele and Mr. Rogers came to the Green Hills Mall to pick up the watches and go to Hickory Hollow. They arrived at Green Hills at about 8:30 a.m. The vehicle used to transport the watches was a Jeep Cherokee which was a company

vehicle. The containers used to transport the watches were fifty (50) cal ammo boxes that are painted black and have padlocks on each side of them. The boxes are about 24 to 26 inches wide and about a foot-and-a-half tall. The boxes are heavy once they are loaded with the watches and are strapped on to a dolly to move. (Vol. VII, pp. 164-165).

When Mr. Nagele arrived at the Green Hills Mall he parked on the second level of the parking deck; the closest entrance to the mall that would lead them to Carlyle and Company. When they arrived there was no one in Carlyle's that he could see. The gate was still down and the lights were off. Mr. Nagele and Mr. Rogers walked around the mall and the parking area and then stood on the little walkway and had a cigarette while they waited for someone to arrive at Carlyle and Company. They waited about 30 minutes before a Carlyle and Company employee arrived at the store. (Vol. VII, pp. 165-166).

While walking around Mr. Nagele and Mr. Rogers looked around for things that might arouse their suspicion. At that time Mr. Rogers was in uniform. Mr. Rogers was the one who actually moved the watches. Mr. Nagele's job was to trail behind so he could see ahead of him and also act as a block between him and anyone going for the watches. (Vol. VII, pp. 165). The Jeep Cherokee was parked approximately 50 to 100 feet from the mall entrance. (Vol. VII, p. 165).

As Mr. Nagele and Mr. Rogers exited the mall into the parking garage Mr. Rogers turned towards the vehicle and Mr. Nagele trailed back a little bit and then unlocked the vehicle. Mr. Nagele then heard running steps behind him and as he started to turn, there was a thump on his back and then he heard a shot and he went down. (Vol. VII, p. 166).

Prior to being hit Mr. Nagele heard voices that were not English. At this point Mr. Nagele was unconscious. When Mr. Nagele regained consciousness he heard Mr. Rogers calling his name and saying that he had been shot. Mr. Nagele was about 20 feet from Mr. Rogers. Mr. Nagele moved as fast as he could to where Mr. Rogers was. He was not sure who was still there so he stayed low and when he reached Mr. Rogers side, Mr. Rogers was just saying "stop the bleeding, stop the bleeding." Mr. Nagele told Mr. Rogers that he was not bleeding. It was a small hole just below his heart in the chest area but it was clear liquid, but no blood. (Vol. VII, pp. 166-167).

Mr. Nagele did not see any of the watches or the ammo boxes. He did not see any suspects around. He did notice that his own weapon was missing. His weapon had been on his right hip, underneath his jacket, which was snapped into a regular holster. The weapon was not visible and was covered by his leather jacket. (Vol. VII, p. 168).

When Mr. Nagele went over to Mr. Rogers to try and help him there was a young lady trying to get her two children out of a vehicle. [Ms. Sloan] Mr. Nagele had seen that lady as they were coming out of the mall. She was just pulling up and she had two small children in car seats. (Vol. VII, p. 168).

Mr. Nagele did not get a look at the people who did this, only a very brief look of a hooded figure. He could tell that they were not light skinned. He only got a glimpse of one person. When Mr. Nagele heard footsteps coming up from behind him it sounded like more than one person. (Vol. VII, p. 169-170).

The police arrived a few minutes after Mr. Nagele regained consciousness. Mr. Nagele talked to the police when they arrived. (Vol. VII, p. 169).

(At this time Mr. Nagele is handed a diagram of the second floor of the parking garage where the incident took place- Exhibit 1).

Mr. Nagele indicated on the diagram where the mall entrance was that leads into Carlyle and Company which is located in the lower left hand corner of the diagram. Mr. Nagele also indicated where his vehicle was parked on the morning of March 17, 1999, which is circled on the diagram. (Vol. VII, p. 171).

Mr. Nagele indicated on the diagram where he and Mr. Nagele headed out to the vehicle. They both exited the mall entrance at the same time then Mr. Nagele proceed out in front of Mr. Rogers and then checked the stairwell and the elevator area. Mr. Nagele then indicated on the diagram the path he and Mr. Rogers took to the vehicle. Mr. Nagele was about 20 to 25 feet behind Mr. Rogers. (Vol. VII, pp. 171-172).

Mr. Nagele indicated on the diagram where he was when he was struck from behind (marked with a letter "A") and where Mr. Rogers was when he was struck (marked with a letter "B"). (Vol. VII, pp. 171-172).

Once Mr. Nagele regained consciousness Mr. Rogers was laying just a little bit up from where he was when he heard the footsteps. (On the diagram this is where the gun belt is depicted). (Vol. VII, p. 172).

Mr. Nagele did not see any suspicious behavior or vehicles while he was walking around or when he came out of the mall with the watches. (Vol. VII, p. 172).

(Mr. Nagele is shown a series of photographs which depict the area where he was walking when struck from behind, the dolly, the vehicle and where Mr. Rogers was laying.) (Vol. VII, pp. 173-175).

Mr. Nagele testified that the Jeep Cherokee's hatchback was locked when he and Mr. Rogers went into the mall. Mr. Nagele did not see Mr. Rogers open the hatchback. Mr. Nagele opened the hatchback after the police came. (Vol. VII, p. 176).

One of the photographs shown to Mr. Nagele depicts Mr. Rogers' duty belt with his weapon. (Vol. VII, p. 176). Mr. Nagele did not remove Mr. Rogers' duty belt. He did loosen the strap on it, but he did not remove it from around him. Mr. Nagele did not see who removed it. Mr. Rogers' gun was still in place when he saw the gun belt. (Vol. VII, p. 177).

Mr. Nagele's gun was a Colt, .45 semi-automatic. The value of the gun is approximately $1,500.00. (Vol. VII, pp.177- 178).

[CROSS-EXAMINATION]

Mr. Nagele testified that when he came out of the door from the mall, he moved forward and glanced down the stairwell. There was a wall right by the elevator with an empty handicapped parking spot. He looked around the wall and made his turn and headed back towards Mr. Rogers. (Vol. VII, p. 179).

Where Mr. Nagele fell in the parking garage there were parked cars nearby. Up past the stairwell and the elevator there were also parked cars. Mr. Nagele does not recall what type of cars were parked in these areas. To the best of Mr. Nagele's knowledge, there were also cars parked in the area where the cart was laying. (Vol. VII, pp. 179-180).

Mr. Nagele stated again that he heard steps from behind him and his back was to the stairwell but he is not sure from which direction. (Vol. VII, p. 181).

Mr. Nagele got a brief glimpse of one of the people but he has never identified that person. (Vol. VII, p. 181).

DEBORAH SLOAN

On March 17, 1999, Deborah Sloan was in the parking garage of the Mall of Green Hills when a robbery and shooting occurred. Ms. Sloan was at the mall to take her two children to Gymboree play class that started about 9:30. Ms. Sloan had her two children in the car with her at that time. One child is almost one and the other is two-and-a-half. (Vol. VII, p. 182).

Ms. Sloan parked by the second level of the garage and was about two spaces from the door into the mall. Ms. Sloan's tag number is "515 EKS." (Vol. VII, pp. 182-183).

Ms. Sloan had only been parked in that spot for about 30 seconds before something unusual happened. She pulled in and stopped and was just getting ready to get out. She had picked up her purse and put it in her lap. That is all she had done except for turning the car off. (Vol. VII, p. 183).

While coming into the parking garage, Ms. Sloan had seen some security guards coming out of the mall. At the time, however, she did not realize they were security guards. She recalls seeing two men pulling what looked like luggage out of the mall and at the time

she drove in they were on the "breeze way" just coming out of the doors of the mall. (Vol. VII, p. 183).

The first thing Ms. Sloan heard after she parked was some commotion and a lot of rustling around movement kind of noise, and then she heard a bang right behind the car. (Vol. VII, p. 184).

At that time Ms. Sloan did not realize what the bang was. When she heard the bang she turned around behind her van to see what it was. At this time she was still in her van and the door was closed. She saw a lot of commotion. She saw big black, silver boxes, lying on the ground, and a lot of men moving around. That is the first thing she noticed. She continued to watch and her first thought was that the boxes had fallen on top of one of the men because there was a man laying on the ground and another man was kind of leaned over toward the ground, on his hands and knees, a little bit further away, and then there were three men running around. Two men were picking up some of these black boxes, and then she saw a third man lean over and pick a gun up off the ground. (Vol. VII, pp. 184-185).

(Witness shown Exhibit 1 - Diagram of Parking Garage)

[A copy of the diagram is inserted on the next page for the Court's convenience.]

Ms. Sloan saw the two men pick up all the boxes and they ran back over this way (indicates on diagram). Ms. Sloan watched them as far as she could without turning the other way. They ran back behind her car. At the time, at first, Ms. Sloan did not realize where they had gone because she was watching a third man who leaned over and picked up a gun. The gun was laying on the ground beside the man who was on the ground. (Vol. VII, p. 185).

The man who picked up the gun ran behind the van as well, and at the time, Ms. Sloan was turned around and could not see him anymore. Ms. Sloan then turned the other way and that is when she saw all three of them get into a van. The van was parked at an angle (indicates on diagram) across the handicapped parking area and possibly into the little walkway as well. (Vol. VII, pp. 186-187).

The only man Ms. Sloan saw get into the van was the third man and he got into the van through the sliding door on the passenger's side. It was already open and, in fact, the van was already moving slowly, headed out and he jumped in the side, and they shut the door as they were moving. (Vol. VII. p. 186).

Ms. Sloan tried to stay very low and was not sure if they had seen her or if they knew she was there. She watched as the van pulled out until she could not see it any further. Once the van was out of her sight she looked back at the other two men and saw one that was lying on the ground and then knew for sure that he had been shot. At that time the other security guard was getting up and going to check on him. Ms. Sloan had a cell phone and called 911. (Vol. VII, pp. 187-188).

Ms. Sloan testified that the Defendant, Mr. Guartos, was one of the men that left the scene in the van. (Vol. VII, p. 187).

Ms. Sloan described what she saw the defendant do that day, after she realized what was going on. She believes she saw him pick up [Mr. Nagele's] gun and run back behind the car and jump into the van as it was pulling out. (Vol. VII, p. 188).

Ms. Sloan described the [robbers] as being in their late 20's and they all had on very baggy clothing, big jackets, and big pants. They all had dark hair and dark skin. It was difficult for her to tell whether they were African-American or Hispanic, but they were dark-skinned and their height and weight were average. Ms. Sloan did not think any of them were particularly tall or heavy. (Vol. VII, p. 188).

(Ms. Sloan looks at a photograph depicting the area where this incident took place and where she was parked.) (Vol. VII, p. 189). Ms. Sloan believes she was parked a space or two past a white vehicle on the right side (indicates in photograph). Ms. Sloan indicates where the "action" took place and where the minivan was parked. (Vol. VII, p. 189). Ms. Sloan did not think that the van that was parked halfway in the handicapped space was there when the pulled up and parked. (Vol. VII, p. 190).

Ms. Sloan spoke with the police when they arrived and she told them what she saw. (Vol. VII, p. 190).

Ms. Sloan described the minivan as fairly new, probably a Town and Country or a very nice one. It had gold lettering on the name plates and on the wheels and looked a little fancier than normal. It was kind of a deep maroon, reddish color. The back windows were fairly tinted. (Vol. VII, pp. 190-191). Ms. Sloan was not able to get any part of the tag or state from the tag. (Vol. VII, p. 191). Ms. Sloan had just purchased a minivan and had spent a lot of time looking at them so she was fairly familiar with what she was looking at. (Vol. VII, p. 191).

Ms. Sloan was shown a photograph of a minivan and she stated that she had seen that minivan before and that it is very close to the same body style and coloring as the minivan she saw the men get into. The body style and color of the minivan in the photograph is exactly the same, in her opinion, as the one she saw the men get into on that day. (Vol. VII, pp. 191-192).

In July of 1999, Detective Tarkington of the Metro Police Department contacted Ms. Sloan about looking at a set of photographs. Ms. Sloan met Detective Tarkington at the West Sector of the Metro Police Department on Charlotte Avenue and was shown a set of six photographs which was the photo lineup. Ms. Sloan was asked to look at the photographs and tell Detective Tarkington if any of the people in the photographs looked familiar to her at all. Photograph number two looked familiar to her from the day at the mall. (Vol. VII, p. 193).

After "identifying" person number two in the photo line up from being at the scene, Ms. Sloan continued to look at the photos to try and pick out the other two men from that day. Some of the other photos had familiar hairstyles or features but she could not come up with anybody else that really struck her as someone that she had seen before. Ms. Sloan signed a photograph identification form. (Vol. VII, p. 194). Ms. Sloan is shown the photograph identification form and confirmed that it was her signature on the form. (Vol. VII, p. 195).

Detective Tarkington wrote some comments that accompanied Ms. Sloan's identification. Detective Tarkington's comments were, "number two looks familiar,"

"number three's face looks familiar but hair would be shorter," "she continued to look at photo number two." Ms. Sloan identified the person in photograph number two as Bryant Guartos. (Vol. VII, p. 195).

In October of 2000, Detective Tarkington asked Ms. Sloan to look at some additional photographs. Ms. Sloan met Detective Tarkington a second time at the West Sector of the Police Department on Charlotte and was shown another set of photographs. From this set Ms. Sloan identified one of the six persons in the photographs. Ms. Sloan believes she had seen the person in photograph number five at the Green Hills Mall parking garage. Again Ms. Sloan signed a photograph identification form in conjunction with her identification. (Vol. VII, p. 196). Ms. Sloan verified that it was her signature on the identification form. (Vol. VII, p. 197).

Detective Tarkington recorded Ms. Sloan's comments in conjunction with her identification. Detective Tarkington's comments were, "maybe number five," "he has more head features, same round head," "he picked up the last box." The name listed in photograph number five was Jonathan Londono [who would become a co-defendant]. (Vol. VII, p. 197).

Ms. Sloan looked at a third set of photographs and was able to identify someone she had seen before from that lineup which again, was number five. Ms. Sloan recognized number five from the Green Hills Mall parking garage. Ms. Sloan signed a photograph identification form that accompanied her identification which she verified was her signature. Detective Tarkington's comments which accompanied her identification were, "number five's hair looks similar," "from the face, he looks most familiar," "none of the others." The

name of the person in photograph number five that Ms. Sloan identified was Edwin Gomez [another co-defendant]. (Vol. VII, pp. 198-199).

Out of the three identifications that Ms. Sloan made over a year-and-a-half period, she was most certain about the first lineup which she identified as Bryant Guartos. (Vol. VII, p. 199).

Prior to Detective Tarkington showing Ms. Sloan the final two lineups, Detective Tarkington told Ms. Sloan to "look at these pictures and tell me if any of them look familiar in any way." (Vol. VII, pp. 199-200).

[CROSS-EXAMINATION]

Ms. Sloan said she was certain that Mr. Guartos' picture looked familiar and she is certain that Mr. Guartos is the man that she saw in the parking lot. (Vol. VII, p. 200).

Ms. Sloan also remembers when she first made a statement to the police that she indicated these were three black men. She was certain they were dark skinned and had dark hair. (Vol. VII, p.201).

In another statement Ms. Sloan made to the police she stated that she saw the man, who she says is Mr. Guartos, picking up a gun but she did not see a gun in his hand prior to him picking up the gun off the ground. She did not see any other men carrying guns. (Vol. VII, pp. 201-202).

[REDIRECT EXAMINATION]

Ms. Sloan explained that in the statement made to the police where she talks about "black" in trying to describe the race or the color of these men she put quotation marks

around the word black. She did this because she could tell that day that they were dark-skinned and that they all had dark hair and she was fairly sure that some of them had very shortly cropped dark hair. Her description that day was to indicate that they were not Caucasian so she put quotation marks to try to signify that and told the detective afterwards. (Vol. VII, p. 203).

CHRISTINA HUDSON

Christina Hudson has been employed at the Mall of Green Hills for almost six years. (Vol. VII, p. 204). Ms. Hudson's store is located about two or three stores down and across from the Carlyle and Company store. Ms. Hudson parks in the same garage that the employees from Carlyle and Company park. (Vol. VII, p. 205).

Ms. Hudson came to work on March 17, 1999, and parked in the garage that is located on the upper level which is the second floor. The parking garage has a total of three floors. (Vol. VII, p. 205).

Ms. Hudson arrived at the garage about five minutes to nine. She was supposed to be at her store at nine. Ms. Hudson stayed in her car for a period of time because the other girl had not gotten there yet and they usually wait for each other to get there and then walk in together. This was prior to her hearing about a shooting that had happened later in the day. (Vol. VII, p. 206).

(Witness shown Exhibit 1 - Diagram of Parking Garage)

Ms. Hudson had seen a copy of this diagram before and indicates where she parked that morning. (Vol. VII, pp. 206-207).

While waiting for her co-worker to arrive, Ms. Hudson noticed some unusual activity for the mall. She noticed a van either directly behind her or one space over. (Vol. VII, p. 207). At first Ms. Hudson did not see anyone in the van. The first thing she noticed was a person that came walking towards the vehicle and got in on the side and that is when she saw other people in the van. The van was backed in. The person who walked up got in on the passenger's side, either the front or back. She then noticed the other people in the van because they "raised up," and they were slouched down. From what she could tell there were three others in the van. (Vol. VII, pp. 208-209). The men were in the van for approximately five minutes before they exited the van. (Vol. VII, p. 216).

The four people remained in the van for about five minutes then three of them got out and walked back towards the right. (Vol. VII, pp. 209). One of the men came "this way." (Indicates). Everybody got out but the driver of the van. The driver started the car and drove "all the way around and then parked. . . somewhere, in one of those places." (indicates on diagram). (Vol. VII, p. 210).

Ms. Hudson remembers seeing a trunk opened on a red Cherokee that morning. (Vol. VII, p. 210). The Cherokee was parked in front of her, caddy-cornered to her. The driver of the van parked across from where the Cherokee was parked and he got out. Ms. Hudson said he took off on foot that way (indicates), up the ramp to the third level and was either walking fast or running. After all the men left Ms. Hudson got out and went inside. Ms. Hudson agreed that this was unusual behavior for the Green Hills Mall parking garage in the morning. (Vol. VII, pp. 210-211).

Ms. Hudson described the men as "dark-skinned, either Hispanic or black." It was hard for her to tell. They had on baggy clothes and one had on white tennis shoes and they were not real tall. The men were young, not past 30 and maybe younger. She does not believe any of the individuals were female. (Vol. VII, p. 211).

The minivan the men were in was "purplish," "dark maroonish" in color and looked really new and shiny. (Vol. VII, p. 212-213).

Ms. Hudson went into the mall to work and when she was walking to the bank she heard sirens. It was shortly after ten o'clock when she opened that she learned of what had happened. She contacted the police around eleven or shortly after to let them know what she had seen. (Vol. VII, p. 213). The police were still out in the parking garage investigating the scene when she talked to them first. (Vol. VII, p. 214).

Ms. Hudson was not able to get any kind of tag number or state off of the license plate of the van. She also did not get a good enough look at any of the men to be able to identify any of them. (Vol. VII, p. 214).

DEPOSITION OF DOROTHY DRAKE
(Read by Debbie Fisher)

Dorothy Drake was deposed on March 22, 2001, for the trial scheduled on April 2, 2001. (Vol. VII, p. 218). Ms. Drake had knee surgery scheduled on the day the trial was to begin and would not be able to appear at that time. (Vol. VII, p. 219). Ms. Drake was 76 years old at the time of the deposition. Ms. Drake was also wearing glasses and has worn them since she was 19 years old. (Vol. VII, p. 225).

Ms. Drake was at the Green Hills Mall on March 17, 1999, when the security guard was shot. She was there early in the morning, before the stores opened, to walk around the mall. She regularly walks at the mall. (Vol. VII, p. 219).

Ms. Drake parked in the parking garage that morning. As she went into the mall she saw something that caught her attention. She saw some young men standing at the door of the mall. She was not sure what race they were but she did know that "they were not American, our race." She said there were "several" of them but not sure of the exact number. She was in a hurry and did not look at them very close. (Vol. VII, p. 220)

Ms. Drake remembers they were young looking but she could not tell their age. She did not recall anything about the way they were dressed. At that time Ms. Drake went into the mall. She was in a hurry to get in because she was by herself and she wanted to get in there as quickly as possible. (Vol. VII, p. 221).

Ms. Drake was in the mall walking for about an hour. Ms. Drake heard people talking in the mall about what happened in the garage. When she came out of the mall she saw the policemen out there. She left the mall as soon as she could get her car out. At some point later the police contacted Ms. Drake to ask her questions about what she may or may not have seen that morning. The police got her tag number while she was in the mall. (Vol. VII, pp. 221-222).

Ms. Drake confirmed where she was parked by looking at a photograph of the garage area where she parked. Ms. Drake was parked along the right hand side up against the wall.

Ms. Drake indicated on the photograph how far she was from the men that she saw that morning. The men were standing by the entrance of the van. (Vol. VII, p. 222).

Ms. Drake confirmed that a detective did come to her daughter's house where she was babysitting and had her look at some photographs. Ms. Drake was not sure if it was in August, about five months later, or how long ago it was. Ms. Drake looked at the photographs and she believed that they were the set of photographs she was shown previously. (Vol. VII, p. 223).

Ms. Drake did not remember what she told the detective when she looked at those photographs. Ms. Drake was then shown a document with her signature. Ms. Drake verified that was her signature on the document which indicated that one of the people in the photograph looked familiar but she could not be sure. (Vol. VII, p. 224).

Ms. Drake was then asked in court, over two years after this incident on March 17, 1999, if she could say whether or not there was anyone in the courtroom who she saw in that group of young men as she went into the mall. She could not say. (Vol. VII, p. 225).

OFFICER THALES O. FINCHUM

Officer Thales O. Finchum has been employed by the Metro Police Department for almost 28 years. Officer Finchum was working as a Metropolitan police officer on March 17, 1999. During that time Officer Finchum was working as a patrol officer in the 12-zone, which is where he still works today. This area is part of Nashville, Davidson County,

Tennessee, the West Sector, which contains the Mall of Green Hills. (Vol. VII, p. 227). Officer Finchum has worked this area for about five years. (Vol. VII, p. 228).

On March 17, 1999, Officer Finchum was in route back to his assigned area when he answered a call out in the Green Hills Mall area. Officer Finchum is familiar with the Mall of Green Hills, where it is located and the various entrances and parking garages and when he received the call, he was familiar with where he needed to go. (Vol. VII, p.228).

When the call went out Officer Finchum told the dispatcher he was responding. The dispatcher was not aware that he was close, but he was. It took Officer Finchum about three or four minutes to arrive at the mall. When Officer Finchum arrived he was told the incident occurred near the entrance of Profitt's and he came by the front of the mall. There did not appear to be any excitement there so he went around on what he believes was Abbott-Martin, the road that runs down on the far side of the mall, and he pulled up in the parking lot. There he saw a female up on the parking garage, a couple of levels up, waving very frantically. At that point Officer Finchum entered the parking garage and drove up to the level where the incident had taken place. (Vol. VII, p. 229).

When Officer Finchum drove up in the parking garage he advised the dispatcher that it was in the parking garage and he went up a ramp that was going up towards the roof and there was a male subject laying on the ground. He was dressed in a guard's service uniform, and there were two or three people around him at that point in time. (Vol. VII, p. 230).

Officer Finchum got out of his car to determine exactly what had happened because the call went out as a 10-53, or an armed robbery, and a 10-52, which is a shooting. He

observed that the fellow laying on the ground was armed. He also had what appeared to be a bullet hole in his clothing. Officer Finchum asked him at that point what happened or who shot him and he said "a man." He said he was a mulatto and he had on a dark hood. (Vol. VII, p. 230).

The bullet hole appeared to be in the upper chest, on the left side of his chest. Officer Finchum really was not paying as much attention to that, other than to advise the dispatcher that he had a bullet wound to his chest and to have the ambulance signal-10 and that means you really want them there in a hurry. It appeared that the man had been seriously injured. At that point he was conscious but very weak and ashen. He appeared to be in pretty bad shape. Again, Officer Finchum told the dispatcher to have the ambulance signal-10. Someone had put a sweater or jacket up under his head and there were a couple of people attending to him at that point. There really was not anything Officer Finchum could do at that point. (Vol. VII, pp. 231-232).

Officer Finchum described the uniform that the guard was wearing as brown and khaki in color. It was one he recognized as a guard service uniform and again, he was wearing a gun belt and weapon. The gun belt and weapon was later taken off. [This is important because photos of the scene show the gun belt and one must know how the gun belt got off the officer.] Officer Finchum took custody of Mr. Rogers' weapon and secured it in the trunk of his car until he could turn it over to an ID officer. (Vol. VII, p. 232). Officer Finchum did not remove Mr. Roger's weapon himself but one of the MedCom people handed him the weapon. Officer Finchum was sitting on the back of the truck close to Mr.

Rogers. Officer Finchum was right up from where they were working on Mr. Rogers and he was watching what was going on while he was talking to Mr. Nagele. Officer Finchum had taken a statement from Mr. Nagele and was writing notes at the same time, trying to get information out over the radio so that other officers out in the field would have a shot at getting whoever this was that did this. (Vol. VII, pp. 242-243).

Officer Finchum questioned the guard trying to get as much information as he could from him. He realized at that point that he was not going to get a lot more from him other than that the robbers took three ammo boxes from him that had watches in them. (Vol. VII, p. 233).

At that point someone pointed out that Mr. Rogers had a partner there, Mr. Nagele. Officer Finchum had Mr. Nagele go over to the pick up truck, and sit on the tailgate, and Officer Finchum went to his car to get a recorder. Officer Finchum got a pad and pencil and established the Green Hills command at that point in time. Officer Finchum asked for several other cars, requested ID, armed robbery, and homicide units. Officer Finchum explained that the ID is the Identification Section of the Police Department, and they gather evidence, take photographs, do measurements, sketches of the scene and that sort of thing. (Vol. VII, p.234).

During Officer Finchum's investigation he discovered that Mr. Nagele had lost his gun. [It was taken by the robbers.] (Vol. VII, p. 244).

Officer Finchum turned over Mr. Roger's service weapon to Willie Merrill. Officer Finchum did not believe Mr. Rogers' weapon had been fired. It was still in the holster when

he arrived on the scene and he did not see any cartridges on the scene. Officer Finchum believes it was a semi-automatic, .45 caliber weapon. (Vol. VII, p. 234).

Officer Finchum was shown the weapon in court and identifies it as the weapon he turned over to Officer Merrill. Upon closer examination Officer Finchum notes the weapon is a Detonics, .45 caliber, semi-automatic weapon. (Vol. VII, p. 235).

Officer Finchum explained that if you fire a semi-automatic weapon, it ejects an empty shell casing, and that would be lying about. Officer Finchum looks for those sorts of things. Officer Finchum secured the scene when he came up there and blocked the ramp with his car. As other officers arrived he had them block further in the garage and we put up evidence tape. They were securing the scene to collect any kind of evidence, and shell casings, of course, would be evidence. (Vol. VII, p. 236).

Officer Finchum was not terribly concerned with looking for shell casings initially. He first wanted to secure the scene so that nothing got away from the scene that had not already left. He wanted to secure it for ID and for the investigators so that they did not lose any witnesses and evidence that was left there. (Vol. VII, p. 236).

Officer Finchum learned that the guard's name was Mr. Nagele. Mr. Nagele told Officer Finchum that he had been struck in the back of the head – "they came up and knocked him down." Mr. Nagele said there were three subjects and they came up and knocked him down and took his .45 caliber weapon. (Vol. VII, p. 237).

Officer Finchum is shown Exhibit 1, the diagram of the area that he responded to in the Green Hills Mall which contains notations of various objects that were found there and

vehicles. Officer Finchum, when he first got to the scene, tried to freeze the scene, and the diagram indicates where Mr. Nagele's gun belt was and where he was lying. Mr. Nagel's gun belt was loosened and they left it lying on the ground. Officer Finchum agreed that the diagram correctly depicted the way the scene was secured until the diagram was made. (Vol. VII, p. 238).

A number of detectives arrived at the scene from both the Homicide section and Armed Robbery section. The ambulance also arrived and began to treat the victim on the ground. (Vol. VII, p. 239).

Officer Finchum did not know Mr. Nagele. He had never met either guard before. (Vol. VII, p. 239).

As officers arrived at the scene, Officer Finchum had them cordon off the area using evidence tape and as people came to their cars he would tell them that they needed to stay and talk to the detectives. Officer Finchum had officers write out whatever the witnesses had seen, get their name, address, telephone number, and age so that they had the basic information on these witnesses. Officer Finchum had an officer assigned to do that and another to complete the offense report. He had other officers assigned to just maintain the scene and keep a record of who came in and out of the scene.

OFFICER CHARLES ANGLIN

Officer Charles Anglin has worked for the Metropolitan Police Department for 27 years. He is currently assigned to the Identification Section of the Police Department and has

been in that section for fifteen years. On March 17, 1999, Officer Anglin was working in that department. (Vol. VII, p. 248).

On that date Officer Anglin was called to assist with identification work at an area in the parking garage level of the Mall of Green Hills. Officer Anglin arrived at the location at approximately 9:45. At that time other officers had already arrived and set up a perimeter or a crime scene tape. Officer Anglin responded and arrived after Officer Merrill and he began to assist him in the duties that he wanted him to carry out. (Vol. VII, p. 249).

As an identification officer he responds to crime scenes and it is his responsibility to locate evidence. He will secure the evidence, take photographs of it in place, obtain measurements so that it could be replaced there if needed, make diagrams for courtroom presentation, and also packaging the evidence, if it is necessary. As an identification officer his unit also attempts to lift fingerprints and other identifying methods related to science and technology. (Vol. VII, pp. 249-250).

At the crime scene on March 17, 1999, Officer Anglin does not recall whether there were detective at the scene when he arrived. (Vol. VII, p. 250).

Under the direction of Officer Merrill, Officer Anglin was directed and was in charge of preparing the crime scene diagram. (Officer Anglin is shown Exhibit 1 which is the diagram he prepared of the crime scene.) (Vol. VII, p. 251).

Officer Anglin explained that the numbers and letters in the parking spaces on the diagram indicated the license plates of the vehicles that were in those parking spots. The luggage cart, cigarette pack, quarter, and gun belt were placed on the diagram by Officer

Anglin where he saw them when he arrived on the scene. At the time Officer Anglin did not know if those items were connected with this event or not. It was Officer Anglin's intent to incorporate anything that was within that area. (Vol. VII, p. 252).

Officer Anglin believes that the luggage cart and gun belt, once diagramed and photographed, were taken into custody as evidence. This was something that was part of Officer Merrill's duties. Officer Anglin (referring to the diagram) arrived at the "108 feet" and "92 feet" by using a tape measure. (Vol. VII, p.253). It was not Officer Anglin's responsibility to look for tire prints but he did attempt to lift fingerprints off of the cigarette pack and the luggage cart but he did not find any usable latent fingerprints on either of those items. (Vol. VII, p. 256).

The victim, Mr. Rogers, was not at the scene when Officer Anglin arrived. Where the victim was lying was pointed out to Officer Anglin by other people. (Vol. VII, p. 253-254).

Officer Anglin and his unit examined the entire second floor including underneath the cars and so forth. They were basically making an examination for anything that would be later identifiable, like shell casings or anything like that. Officer Anglin did look for shell casings or any type of projectile to indicate that a gun had been fired in that area. Officer Anglin was not able to find any shell casings. Finding a shell casing at the scene would tell whether the weapon was a handgun that ejects its empties or if it is somebody that has unloaded and reloaded. (Vol. VII, p. 254-255). No shell casings were found at the scene. (Vol. VII, pp. 255-256).

MICHELLE NICHOLSON

On March 17, 1999, Michelle. Nicholson came into town on Interstate 40 from west of Nashville where she lives. Ms. Nicholson was taking her son to school in Antioch at Woodbine. Ms. Nicholson was on Interstate 40 area near White Bridge Road around 8:05 a.m. Ms. Nicholson noticed a vehicle driving erratically on the Interstate. (Vol. VII, pp. 257-258).

Ms. Nicholson testified that this vehicle was weaving in and out of traffic, in front of her, behind her, to her left and to her right, driving crazy in rush hour traffic. The vehicle was a van, maroon, red in color. When the van was in front of her she saw two people in the very back and when she looked in her rearview mirror, when they were behind her, she saw the driver and a rider. Ms. Nicholson could not see if anybody was in the middle of the van. The people in the van looked Hispanic, young and all males. Ms. Nicholson's route took her in the same direction that the van traveled. They were going 40 eastbound and then got off at the Hillsboro Road exit which is the first exit going towards the Green Hills Mall. (Vol. VII, pp. 259-260).

Later that day, in the evening, Ms. Nicholson heard about a robbery and shooting that happened at the Green Hills Mall while watching the news. On the newscast they said they were looking for some Hispanics in a van. They never said what color the van was and that they had robbed in the Green Hills Mall area. When she heard that it drew her attention to what happened earlier. Ms. Nicholson called the police and told the officer that she was not sure if what she had to say was relevant or not to the case that she saw on the news. Ms.

Nicholson then told the officer what she had seen earlier and they were very interested in what she had to say. (Vol. VII, p. 260).

Ms. Nicholson was shown Exhibit Number 4 which was a picture of a minivan. Ms. Nicholson was asked to compare that picture to the one she saw the Hispanics in that morning. Ms. Nicholson said that it looked very similar. (Vol. VII, p. 261).

Ms. Nicholson did not see any females in the van. The two in the front and the two in the back were all male. Ms. Nicholson saw that the van had Florida plates and she would stake her life on it. However, she did not get the tag number off the plate. (Vol. VII, p. 261).

Ms. Nicholson spoke to Sergeant Stromatt when she phoned into the police department. Ms. Nicholson did not get a good enough look at the men in the van to be able to identify anybody in the courtroom. (Vol. VII, p.261). The van had tinted windows in the middle of the van. (Vol. VII, p. 262).

SERGEANT FREDDIE STROMATT

Sergeant Freddie Stromatt is with the Robbery Unit of the Metro Police Department. He has been with the department for 23 years and in the robbery Unit for a little over 10 years. He has been a Sergeant for approximately13 to 14 years. (Vol. VII, p. 263).

Sergeant Stromatt was working in the Robbery Division in March of 1999. On or about March 17, he was made aware of an incident that had occurred at the Mall of Green Hills. (Vol. VII, p. 263). Sergeant Stromatt is not sure exactly what time he got the page but he was told he needed to go to the Green Hills Mall because there had been a

robbery/shooting and a security guard had been shot and was in critical condition. (Vol. VII, p. 264).

Sergeant Stromatt and the Robbery Unit responded to Green Hills Mall in order to work the crime scene. When he arrived other officers and medical personnel were also there. One of the officers at the scene was Officer Thales Finchum. When Sergeant Stromatt arrived at the scene he talked to Officer Finchum who was the command officer and who had roped off the crime scene. Officer Finchum briefed Sergeant Stromatt on what had occurred. (Vol. VII, p. 264).

Officer Finchum had a list of witnesses that he knew were at the scene. Sergeant Stromatt began disbursing detectives in order to search the crime scene for any other evidence and talk with the witnesses that were there at the scene. There were also ID officers called in to assist in the crime scene investigation. Sergeant Stromatt believes there were homicide detectives sent to the hospital to keep them briefed on the condition of the victim. (Vol. VII, p. 265).

As the investigation began developing there were between six and eight detectives working with Sergeant Stromatt on the case that morning. Sergeant Stromatt was trying to gather information and identifying eyewitnesses. (Vol. VII, p. 265).

Sergeant Stromatt had officers on the scene searching for evidence and witnesses. He had investigators at the hospital keeping him apprised of the victim's condition and any statements he could make to help us. All of this information was being funneled back to Sergeant Stromatt. (Vol. VII, p. 266).

The media showed up on the scene and Don Aaron, the Public Relations Officer for the Police Department, gave a press conference as to information that had been received and what the police were looking for. The public's assistance was requested to help solve this incident. As a result of using the media to ask the public for assistance, the police did receive some information. (Vol. VII, p. 266).

The police received a lot of phone calls with different types of information; people wanting to relay things that they thought they had seen or that they had seen and thought may have been important to the investigation. (Vol. VII, pp. 265-266).

The next morning after the incident occurred, the police began receiving phone calls from a lot of different citizens. Sergeant Stromatt personally spoke with Michelle Nicholson over the phone when she called in. Ms. Nicholson had information that she believed to be very pertinent to the case and information that needed to be followed up on. (Vol. VII, p. 267). At the time Sergeant Stromatt spoke with Ms. Nicholson he had already gathered information from the various witnesses who were there as far as vehicle description and things of that nature. This is the type of information that had been requested from the public. (Vol. VII, p. 267).

At the time Sergeant Stromatt received Ms. Nicholson's call he felt the information was important enough that he requested extra detectives from the Homicide Unit to assist because they had so many phone calls coming in and were trying to follow-up on them.

Sergeant Stromatt sent a homicide detective out on I-40 to check motels at each exit from Charlotte Avenue back to Highway 70, to see if any Hispanic people had stayed there

the day before. Sergeant Stromatt received word back from the detectives that there had been four male Hispanics that had stayed at the Howard Johnson's Motel at I-40 and Charlotte and they had checked out the day of the robbery shooting at the Greens Hills Mall. Based on that information, additional officers were sent to the Howard Johnson to investigate that location. (Vol. VII, p. 268).

The information from the Howard Johnson revealed that the men filled out a registration card that had a tag number on it bearing a Florida license tag that was supposed to be registered to a van that had stayed there at the motel. Sergeant Stromatt felt that information was pertinent to the case and was going along with the evidence that they had. (Vol. VII, pp. 268-269).

Sergeant Stromatt sent Detectives Arendall and Whitehurst back out to the motel to talk with the management and see what they could tell them as far as the men who stayed in those rooms. The detectives were to talk with all the employees at the motel and any people that were still at the motel and any people that had stayed during the time frame that the men had also stayed there and see what evidence they could find. Sergeant Stromatt did not personally go out to the motel to look in any of the rooms or anywhere around the motel but under his direction it was done. (Vol. VII, p. 269).

Evidence brought to the robbery office included videotapes of the lobby of the motel and also the outside area of the motel that showed the men getting into and out of the two different vans that were parked in the parking lot. Also videotapes of the motel lobby talking with the guest clerks in the lobby. These videotapes were reviewed. Phone records from the

motel and copies of the registration card that had been filled out were also taken from the motel and brought to the robbery office. (Vol. VII, p. 270).

Detective Arendall reported back to Sergeant Stromatt while they were searching the actual room that the suspects had stayed in. There was evidence found in the room so at that time, they asked for the Identification Section to go out to the motel and process the room to try to obtain any fingerprints that may have been left in the room. (Vol. VII, p. 270).

The names of various clerks and/or personnel who worked at the motel were obtained. (Vol. VII, p. 270).

The investigators went out to the motel several times within a two or three-day period and kept in touch with the clerks. Later, when they had developed suspects and had their names, they would obtain photographs of them. They were able to take these photographs back to the motel and show them to the clerks to try and get the men identified as staying in the motel. (Vol. VII, p. 271).

SUE MADAN

Sue Madan is the manager of the Howard Johnson Motel at 6834 Charlotte Pike. She has been the manager for about seven years. (Vol. VII, pp. 278-279).

On March 18, 1999, police officers came to the motel asking Ms. Madan questions about whether some male Hispanics had stayed there recently. Ms. Madan provided them with some information from the motel records. (Vol. VII, p. 279).

(Witness shown Collective Exhibit 15 - Registration Cards)

The first exhibit shown to Ms. Madan were the registration cards which Ms. Madan had given to the police officers at the motel. Each time a guest stays at the motel it is required that a registration card be filled out. Ms. Madan had provided these cards to the police when they asked her questions on March 18, 1999. (Vol. VII, p. 279).

Ms. Madan did not actually fill out any of these registration cards herself. There are clerks and personnel that work at the front desk they fill out the registration cards. The guest usually fills out all of the information on the top of the registration card. The only thing the motel employees put down on the card is the date of arrival, room number, check-out date, the rate and the signature of the clerk. The personal information is filled out by the guest. (Vol. VII, p. 280).

Ms. Madan testified that the motel has a method of keeping track of the phone calls made from a particular room. The system is called a "call accounting system" which shows all the calls. Ms. Madan provided the police with some of these records in connection with the investigation. (Vol. VII, p. 281).

(Witness shown Exhibit 16 - Calling Records)

According to Ms. Madan, the extension number that is listed on the calling record coincides with the room number. (Vol. VII, p. 281).

The motel also has five security cameras. There are cameras located at the "front desk, the first parking lot, the second area, the third entrance, and the hallway, one hallway." The views from these cameras are recorded on a tape for security purposes. Ms. Madan provided a couple of these tapes to the police in connection with their investigation. Ms.

Madan verified the videotapes in evidence were the videotapes the reviewed and provided to the police. (Vol. VII, p. 282).

Ms. Madan was at the motel at the time the Hispanic males came into the motel and she did speak with one of the gentlemen. Ms. Madan could not identify any of the men that were there at the motel. (Vol. VII, p. 283).

[CROSS EXAMINATION]

The motel registration Ms. Madan was shown indicated that someone by the name of Rafael Cruz had stayed in Room 204. Ms. Madan was shown another registration card and confirmed that Rafael Cruz was the name on the card and the front clerk's initials appeared on the card. Ms. Madan also confirmed that this card had room number 207 on it with a check-in date of 3/16 and a check-out date of 3/17. (Vol. VII, pp. 284-285).

TIFFANY DOZIER

Tiffany Lee Dozier-Christy (recently married) was employed at the Howard Johnson on Charlotte Pike back in March of 1999. Ms. Dozier was a front desk clerk. As part of her duties she checked people in, took their money, gave them a room, and that sort of thing. Ms. Dozier recalls the police coming to the motel to ask questions about some Hispanics who had stayed there. Ms. Dozier had dealt with these individuals as part of her job as a desk clerk. (Vol. VII, p. 287).

(Witness shown Exhibit 15 - Registration Cards)

Ms. Dozier recognizes Exhibit 15 as the forms you fill out when you are checked in at the motel. Out of the three cards, Ms. Dozier knows she processed two of them because her initials are on the cards. Ms. Dozier recalls that these people had stayed at the motel approximately three or four days. Ms. Dozier saw the men on more than one occasion. She particularly saw one of the men who acted as the spokesman for the group. He had come to the front desk several times. (Vol. VII, p. 288).

Ms. Dozier stated the man who came to the front desk was flirting with her and talking to her. The man was Mexican/Hispanic and he spoke English very well. Ms. Dozier said that there were at least five men who were in that group. There were no women with them. The vehicles the men were in were two vans. One van was maroon and one was white in color. (Vol. VII, p. 289).

(Witness shown Exhibit 4 - Photograph)

Ms. Dozier agreed that the van in the photo looked consistent with the van the men were driving. (Vol. VII, pp. 289-299).

(Witness shown Exhibit 5 - Photo Lineup)

Ms. Dozier was shown some photographs and these are the same photographs she was shown previously in August of 1999. From the photographs, Ms. Dozier remembers which person she identified which was number two. Number two was the person who she talked to a lot at the front desk of the motel. Ms. Dozier had signed a Photograph Identification Form identifying person number two. The comment the detective wrote on the card that Ms.

Dozier said was, "I remember number two as the person that kept coming to the front to flirt with me." (Vol. VII, pp. 290-291).

(Witness shown Exhibit 7 - Photos)

More recently, the detectives had Ms. Dozier look at some more photographs. From that set of photos Ms. Dozier made an identification and picked number five. Ms. Dozier signed a Photograph Identification Form. The comment the detective wrote on the card which Ms. Dozier said was, "He looks like one of them, pointing to photo number five. He would come to the desk with the guy wh spoke English." (Vol. VII, pp. 292-293).

When Ms. Dozier could not remember if she asked for any identification to verify the name when she filled out the room registration cards. (Vol. VII, pp. 293-294).

[CROSS EXAMINATION]

(Witness shown Exhibit 15 - Registration Cards)

Ms. Dozier indicated that she had filled out the second and third registration cards (the one at the bottom of the first page and the only one that is on the second page). The card indicates that Mr. Cruz stayed in room 210 and 212 on March 14 and March 15. On the second page, which Ms. Dozier filled out, Mr. Cruz was registered in room 207 on March 16 and March 17. The very first one, on the very first page, is a genuine registration card from the motel which indicates that Mr. Cruz stayed in rooms 202 and 204 on March 15. Ms. Dozier could not really make out the dates but she believed it looked like March 15 and March 17. (Vol. VII, p. 294-295).

ROBIN CAPPS

Robin Capps is employed in housekeeping at the Howard Johnson on Charlotte Pike. She has been there for eleven-and-a-half years. (Vol. VII, pp. 296-297).

Back on March 17, 1999, Ms. Capps and another housekeeper moved a seat from a room that had been left in room 204. They picked it up and took it to housekeeping upstairs. It was a "van kind of seat." (Vol. VII, p. 297).

A little bit later Ms. Capps learned that the police were interested in some people who had stayed in that room. Ms. Capps took the police to where the seat had been taken. The police took the seat at that point. (Vol. VII, pp. 297-298).

LILIANA GONZALEZ

Liliana Gonzalez currently owns her own business in Miami, Florida. Ms. Gonzalez provides technical support for different companies that have prepaid cards or calling cards, running their switches or any type of cabling work that needs to be done and sometimes programing. (Vol. VII, p. 299).

Back in March of 1999, Ms. Gonzalez worked for a company called Gloria Telecommunications in Miami, Florida. Gloria Telecommunications had a calling card. They called it the GT Card that they sold in different parts of the country, mainly in Miami, but they also extended to other parts of the country, and that was the majority of the business that was done. Ms. Gonzalez brought with her an example of a Gloria Telecom calling card. In order to make a call with a Gloria Telecom calling card you have to use 1-800 numbers.

You are then given two options: a Spanish number that will give you instructions in Spanish, and one in English. The two phone numbers are 1-800-791-0964 and 1-800-464-3139. (Vol., III, p. 300).

In April of 1999, Ms. Gonzalez responded to a subpoena from Davidson County, Tennessee, for records of calls made from certain telephone numbers here in Davidson County. Ms. Gonzalez identified some papers as a fax she had sent back responding to the subpoena. The fax contained calling card records for telephone calls that were made from the telephone numbers she had given. This is a "call detail report." (Vol. VIII, p. 301).

Ms. Gonzalez provided five different calling cards in response to the subpoena. (Vol. VIII, p. 302).

The first column on the calling card is the "Authorization Code." It is the authorization code that is given in the prepaid card; what you have to punch in after you dial the 800-number. It is like a PIN number on the card. It is usually a scratch off because it is covered when one originally purchased the card. (Vol. VIII, pp. 302-303).

The second column on the calling card is labeled "Source Number." This is the telephone number that the call was made from, so no matter which 800 number they called or they used to make the call, this number tells from where the person was making the telephone call. (Vol. VIII, p. 303).

The third column is the date and is self-explanatory. The fourth column is the "Time" and is in military time; the 24-hour clock. This is the time in which the call was placed which is Eastern time. It is where the company's switch is located which is Eastern time.

The fifth column is the "Length" which is the length of the call in seconds. (Vol. VIII, pp. 303-304).

The cost is provided by the "switch," calculating how much it costs for that call to take place. For example, if someone had a ten-dollar calling card, the card would last until that added up to ten-dollars. The final column is the destination; the number that was called. (Vol. VIII, p. 304).

(Witness shown a document)

As part of the information sent to Ms. Gonzalez in the subpoena there were four phone numbers that the police were interested in as being the Source Numbers for these calls. While looking at the document Ms. Gonzalez read out the four phone numbers: 615-352-7086, 615-352-7085, 615-352-7137, and 615-352-7136. The numbers listed on the document are the numbers listed on the subpoena. (Vol. VIII, p. 305).

[CROSS EXAMINATION]

Ms. Gonzalez confirmed that the Source Number that she was looking is where the call came from. Ms. Gonzalez believes this is a unique number to a certain telephone. The digits are sent to them, in this case, by World Com who provided the 800 number for them. Because there is a Federal law that states they have to have a surcharge on all toll free numbers they have to receive the digits where the call was made from so that they can know whether they need to charge that surcharge.

DETECTIVE JAMES ARENDALL

Detective James Arendall is employed by the Metropolitan Police Department as a robbery detective. Detective Arendall has been with the Metro Police Department for sixteen-and-a-half years. He has been in the Robbery Division for three-and-a-half years. Detective Arendall was working in that division back in March of 1999. (Vol. VIII, pp. 307-308).

Detective Arendall's sergeant is Sergeant Freddie Stromatt. At Sergeant Stromatt's directive Detective Arendall became involved in assisting in the investigation concerning the robbery and the shooting at the Mall of Green Hills. (Vol. VIII, p. 308).

The day of the shooting Detective Arendall and others responded to the scene at the Mall of Green Hills. It became Detective Tarkington's case, but they all were involved in different aspects of the case. During the whole day they were all chasing down different types of leads. They were calling people that were calling in and, on that afternoon, Detective Arendall took a report from a lady that had called in. The next day, on the 18th, Sergeant Stromatt received information and he sent them out to different areas of town to do different things. Detective Arendall was involved from the very beginning of the case as far as assisting in the investigation.(Vol. VIII, p. 308).

On March 18th, Sergeant Stromatt sent Detective Arendall to different malls around Nashville to see if the jewelry stores in that area had seen anything that looked suspicious, if they had any male Hispanics that had been around the store at that time, and if the malls had any video. Later that afternoon Sergeant Stromatt received some information and he sent

Detective Arendall to the "HoJo," which is the Howard Johnson on Charlotte to check out a lead that some suspects had stayed there. Detective Arendall, throughout the 17th and on into the 18th, was checking out leads and trying to investigate the case. (Vol. VIII, p. 309).

Detective Arendall and Detective Whitehurst went to the Howard Johnson on Charlotte Pike and talked to the people at the desk and questioned them as to what they had seen. The manager gave the detectives surveillance tapes of a few days before which were turned in to be reviewed and assessed with the other evidence. (Vol. VIII, pp. 309-310).

While at the Howard Johnson on March 18, the detectives went to room 204 to see how the room was and how it was left and if it was cleaned up. In the room by the sliding glass door there was what appeared to be a plastic card that had been cut up which they secured. While looking around the room, Detective Arendall looked on a shelf that was approximately six-foot, six-foot-one off the ground and on the top shelf, in the very back corner was a box that appeared to be ammunition. At that point Detective Arendall called his Sergeant and advised him what they had. Detective Arendall called ID to come and process the room. The box turned out to be a box of .357 ammunition. Detective Arendall did not touch anything. He just observed where it was at, called ID and they came out and processed it. Detective Arendall secured the room so the items would remain where they were. The Identification Officer that came to the room was Sergeant Hunter (Vol. VIII, pp. 310-311).

Detective Arendall testified that other items in room 204 included a TV with remote, a telephone and telephone book which were all processed. When the detectives looked

around the room, up under the bed when you raised the bedspread up, there were more little pieces of a plastic card that had been cut up on the floor beside the bed that had been pushed up under the bed. The pieces of cut up plastic card appeared to be similar to the ones they had found in the other section of the room although Detective Arendall did not inspect it himself. No other items of evidence were collected and/or viewed in the room that day. (Vol. VIII, pp. 311-312).

Detective Arendall testified that the maids had earlier found a seat from a car in the room which they had moved downstairs to a maid closet. Willie Merrill came out and photographed and tried to lift prints off the seat. Detective Arendall did look at the seat himself. (Vol. VIII, pp. 311-312).

(Car seat brought into court room)

Detective Arendall viewed the car seat and said he had seen it before. This was the seat that was in the maid's closet at the Howard Johnson. (Vol. VIII, pp. 212-213).

(Witness handed a sealed envelope)

Detective Arendall opened the sealed envelope and identified the contents as the Foot Locker tag that was found in the room. There was another bag given to the detective to open and he identified the contents as pieces of the calling card that were found in the room, four pieces. (Vol. VIII, p. 314).

Detective Arendall explained that the Police Department uses a complaint number to keep items together which are related to the same case. The Property Room uses a "UPS" code to keep the evidence all together. (Vol. VIII, p. 315).

Detective Arendall, to his recollection and by looking at the documentation, said that all of the evidence is connected with the case of the Green Hills robbery. (Vol. VIII, p. 316).

(Witness handed a bag)

Detective Arendall opens the bag and identifies the contents as the Police Department Property Sheet that is on every piece of property that is turned in. It is a property sheet which lists the complaint number, who turns it in, where it was turned in at, the charge, who the suspects are, the victims (if any) and then at the bottom of the sheet what it is that you are turning in. Detective Arendall stated that you have to sign and date the sheet at the bottom. This is a bag that ID uses. (Vol. VIII, p. 316). When detectives find any evidence they let ID tag and bag it. (Vol. VIII, p. 317).

(Witness shown Exhibit 25 - Box of Ammunition)

Detective Arendall did not open the box of shells himself but Sergeant Hunter opened it in his presence at the motel room. The box contains 50 rounds of ammunition with seven rounds missing, which one of the rounds was used for testing. Detective Arendall testified that one of the shells appears to have been taken apart for some type of reason but he was not sure why because he did not do it. (Vol. VIII, p. 317).

Detective Arendall continued to be involved in the case throughout the following weeks and months. In the summer of 1999, Detective Arendall had the opportunity to meet with Tiffany Dozier who worked at the Howard Johnson's. The purpose for this meeting was to let Ms. Dozier view a photo lineup. (Vol. VIII, p. 318).

(Witness shown Exhibit 5 - Photo Lineup)

Detective Arendall identified Exhibit 5 as the photo line-up he showed to Ms. Dozier. (Vol. VIII, p. 318).

Detective Arendall does not prepare the photo line-ups. (Vol. VIII, p. 319).

(Witness shown Exhibit 18 - Lineup ID Form)

Detective Arendall testified that Exhibit 18 is the printed form with all the writing on it and the person viewing the line-up does not see this part because they have no purpose in seeing that form. They may see it laying on the table as the officer is writing on it but it is not given to them to view or look at or to see the names or anything of that nature. If an identification is made then the form is presented to the witness for their signature. If the person has any comments to say then there is a comment section and whatever that person says the officer writes it down, the exact words. (Vol. VIII, pp. 320-321).

Detective said Ms. Dozier pointed to picture number two and remembered that the person in picture number two was the person who kept coming to the counter to flirt with her. Detective said those were her exact word: "Picture number two was Bryant Guartos." (Vol. VIII, p. 321).

[CROSS EXAMINATION]

Detective Arendall thinks it was room 204 he went to at the Howard Johnson. He does not recall going to room 210 or any other room in the motel. He did not recall going to rooms 207, 210, 212 or 202. Detective Arendall went to the room where the people said the people stayed. He did not investigate any other rooms in the motel at that time or any other time. (Vol. VIII, p. 322).

SERGEANT JOHNNY L. HUNTER

Sergeant Johnny Hunter has been with the Metropolitan Police Department for a little over 26 years. Sergeant Hunter is presently assigned to the Technical Investigation Section, which is part of the Identification Division. (Vol. VIII, p. 323).

Sergeant Hunter supervises and assists in the crime scene investigations which he has been doing for about 25 years. (Vol. VIII, p. 324).

Sergeant Hunter was trained by the Federal Bureau of Investigation in 1979 in fingerprint identification. He has had additional schooling in fingerprint identification through the Institute of Applied Science and has had numerous other specialized training in crime scene investigation. Sergeant Hunter has been qualified as an expert in the field of fingerprint identification in the courts of Davidson County, Tennessee. (Vol. VIII, p. 324).

[Sergeant Hunter is tendered as an expert witness]

Sergeant Hunter did not do any of the actual fingerprint comparison examinations in this case. He did do some of the latent fingerprint collection. (Vol. VIII, p. 325).

Sergeant Hunter is sometimes called upon to collect the evidence after it has been processed and takes photographs. He documents evidence through photographs, written reports, and diagrams, and then he will collect the evidence and then process that evidence for fingerprints. (Vol. VIII, p. 328).

(Witness shown Exhibit 26 - Series of Photographs)

Sergeant Hunter recognized the photographs (Labeled A through E) as photographs taken in connection with an incident originating at the Mall of Green Hills in March of 1999. (Vol. VIII, p. 328).

Sergeant Hunter was called to assist the detectives at the scene depicted in those photographs taken on March 18, 1999. The location depicted in the photographs is 6834 Charlotte Avenue which is the Howard Johnson's Motel and it is room number 204. (Vol. VIII, p. 329).

Sergeant Hunter was shown photograph "A" and identified it as the front of the Howard Johnson on Charlotte. (Vol. VIII, p. 329).

Sergeant Hunter was shown photograph "D" and identified it as room 204 at the Howard Johnson Motel. Sergeant Hunter identified photograph "B" as a photograph taken from the outside showing the inside of the motel room, a standard motel room. Photograph "C" is a photograph of the same room but just another angle. (Vol. VIII, p. 330).

Detective Arendall and Detective Whitehurst were present at the motel when Sergeant Hunter responded to their request. (Vol. VIII, p. 330).

Photograph "E" is a photograph taken depicting Detective Arendall pointing at an item of evidence. He is pointing at a box of live ammunition, .357 Magnum Remington cartridges which was found on the shelf above the hanging rack. (Vol. VIII, p. 330).

(Witness shown Exhibit 25 - Ammunition Box)

Sergeant Hunter photographed the ammunition box, collected it, and processed it at the scene, but he also took it back to the lab and did some additional processing there. The ammunition box was then turned in as evidence in the case. (Vol. VIII, p. 331).

[Witness shown Exhibits 23 (Calling Card) and 24 (Foot Locker Tag)]

Sergeant Hunter identified Exhibits 23 and 24 as items that he collected in room 204. Exhibit 23 is the four pieces of calling card that was found which he did collect. The pieces of the calling card were of sufficient size to process for fingerprints although he did not have any success in obtaining fingerprints from the calling card pieces. (Vol. VIII, p. 332).

The Foot Locker tag was processed as well and again Sergeant Hunter did not have any success in obtaining fingerprints off of the tag. (Vol. VIII, p. 332).

Sergeant Hunter did obtain fingerprints from the Remington cartridge box. The box was taken to the Latent Fingerprint Section of the Identification Division that actually makes the comparison and compares the unknown prints to the known prints. (Vol. VIII, p. 333).

Sergeant Hunter tested several items for fingerprints in room 204. All suitable surfaces in the room were processed for fingerprints and some of the items were taken back which included the phone book, the telephone, the box of ammunition, TV remote control, the vanity sink, the night stand, bathroom fixtures, sliding glass door, light switches and other things that he felt were suitable to retain fingerprints. (Vol. VIII, p. 333).

Sergeant Hunter testified that in addition to obtaining fingerprints from the ammunition box, fingerprints were obtained from the Yellow Pages of the phone book, the

telephone, the shell container box, along with the interior of the container box that was in the shell box. (Vol. VIII, p. 334).

(Witness shown Exhibit 27 - Fingerprint Lift Cards)

Sergeant Hunter identified the fingerprint lift cards as the actual latent prints that were developed on the pieces of evidence. He stated that with transparent lifting tape a print is lifted off the item and put on a fingerprint lift card which indicates the case number, what it came from, date and time that it was lifted, and the initials or name of the person who actually developed and lifted that card. (Vol. VIII, p. 334).

Sergeant Hunter had five fingerprint lift cards lifted from the outside of the Yellow Pages phone book. He explained that the back side of the fingerprint lift card will list the case number, complaint number, date and time the print was lifted and the name of the person who lifted the print. The other side of the lift card is the actual lift. This side of the lift card will have some writing on it from the latent examiner such as the "ident symbol" and the number of fingers on the fingerprint card it was identified to. The "NV" on the card means the fingerprints are of no value and did not meet the criteria for making an identification. (Vol. VIII, p. 335).

[CROSS EXAMINATION]

Sergeant Hunter verified that the fingerprint lifts were taken from room 204 and that no fingerprint lifts were taken from any other room at the motel. Sergeant Hunter does remember trying to get some fingerprint lifts off the card that was torn up. He also took some off of the inside box and the outside box of the cartridge box. Also prints were taken

from the phone book and the telephone. He does not recall taking any prints from the TV himself. (Vol. VIII, p. 337).

Sergeant Hunter was not successful in lifting any prints off the vanity, light switches and the TV remote. He did not examine or make the comparison of the prints after they were lifted. (Vol. VIII, p. 338).

OFFICER WILLIE MERRILL

Officer Willie Merrill is a police officer with the Metropolitan Police Department. He has been an officer for 28 years. (Vol. VIII, p. 342).

In March of 1999, Officer Merrill was in the Identification Section as a crime scene investigator. He has been with this particular division for 26 years. He was one of the officers who responded to a call at the Mall of Green Hills on March 17, 1999. (Vol. VIII, p. 343).

When Officer Merrill arrived at the Mall of Green Hills, patrol officers had already blocked and cordoned off the scene. (Vol. VIII, p. 343).

(Witness shown Exhibit 1 - Diagram)

Officer Merrill looked at the diagram and agreed that it was a fair and accurate representation of the location that he went to on March 17, 1999. (Vol. VIII, pp. 343-344).

With respect to the items depicted in the diagram, the gun belt and things of that nature, it was Officer Merrill's duty to collect those items of evidence and preserve them for later use. (Vol. VIII, p. 344).

(Witness shown Exhibit 28 - Cart)

Officer Merrill identified the cart as an item he collected from the parking garage. He was told that the cart was used to transport jewelry from the jewelry store to a vehicle. This item is referenced in the diagram (Exhibit 1). (Vol. VIII, p. 344).

(Witness shown Exhibit 29 - Gun Belt and Tie)

Officer Merrill identified the gun belt and tie as items he collected from the parking garage. These items are referenced in the diagram (Exhibit 1). (Vol. VIII, p. 344).

(Witness shown Exhibit 14 - .45 Automatic Handgun)

Officer Merrill was shown the .45 automatic weapon which he recovered from the scene. Officer Thales Finchum, one of the patrol officers, had recovered the weapon and was in charge of it, and that is who Officer Merrill recovered it from. (Vol. VIII, pp. 345-346).

Officer Merrill and other officers searched the area around the victim's vehicle, the ramp that the vehicle was parked on, and also the area from that vehicle to the mall itself for any shell casings or anything that may have been dropped or thrown down. (Vol. VIII, p. 346).

(Witness shown Exhibit 30 - Cigarette Pack and Quarter)

Officer Merrill opened the bag containing the cigarette pack and quarter which were found in the parking garage. Officer Merrill did not know if these were connected with the incident or not. Officer Merrill collected them just because they were there. (Vol. VIII, pp. 346-347).

It was Officer Merrill's understanding that this was a shooting incident. It is pretty standard at a shooting to investigate the scene for shell casings, which would give them an indication of the type of weapon that may have been involved. Had there been shell casings found, they could identify the caliber of the weapon, possibly the manufacturer of the weapon, and also know that it was a semi-automatic weapon rather than a revolver. However, no shell casings were found at the scene. (Vol. VIII, pp. 347-348).

(Witness shown Exhibit 31 - Series of Photographs A-D)

As part of Officer Merrill's duties at the crime scene he took photographs of the scene. (Vol. VIII, p. 348).

The first photograph, A, depicts part of the parking garage itself and a corridor that leads down to the entrance of the Mall of Green Hills. (Vol. VIII, pp. 348-349). Officer Merrill describes the location of photograph B in the parking garage and the ramp compared to photograph A. Photograph C is more of a straight on look into the mall as compared to photograph A. Photograph D depicts as you have entered the mall, the walkway that leads to Carlyle and Company Jewelry. (Vol. VIII, p. 349).

Once Officer Merrill's work was done at the crime scene itself and the various items of evidence were collected and turned in his involvement in the case continued several days after that. (Vol. VIII, p. 350).

On March 19, 1999, at approximately 12:15 p.m., Officer Merrill was dispatched to the Howard Johnson Motor Lodge on Charlotte Avenue. He was requested by Detective Norris Tarkington to dust for fingerprints on a car seat that had been left in one of the rooms.

The maids who work at the motel had removed the car seat from the room it was left in and carried it to their work area. At the work area, Officer Merrill dusted for latent prints. (Vol. VIII, pp. 350-351).

(Witness shown Exhibit 22 - Car Seat)

Officer Merrill understood that there were no prints that he lifted off the car seat that were identifiable. However, what he did collect was turned in to be further processed. (Vol. VIII, p. 351).

[CROSS EXAMINATION]

Officer Merrill did not dust for any fingerprints at the Green Hills Mall parking lot. While at the Howard Johnson, two days later, Officer Merrill did not dust anything else for fingerprints except the car seat. (Vol. VIII, p. 352).

DETECTIVE DAVE ACHORD

David Achord is a homicide detective with the Metro Police Department. He has been with the Department for eleven years. He has been working in the Homicide Bureau for three years. (Vol. VIII, p. 353).

In March and April of 1999, Detective Achord was working as a homicide detective. In April of 1999 he was requested to attend an autopsy performed upon Mr. Roy B. Rogers. At the request of other detectives in the case Detective Achord attended and witnessed the autopsy of Mr. Rogers. (Vol. VIII, p. 354)

Up until the time Detective Achord viewed the autopsy he had not been involved in this case. The autopsy was conducted at the Forensic Sciences Center on Hermitage Avenue in Nashville, Tennessee. (Vol. VIII, p. 354).

Detective Achord testified that his duties included witnessing the autopsy and also to receive and preserve any evidence that might be recovered from that autopsy. At the autopsy Dr. Levy recovered a projectile and a fragment of a projectile from the body of Mr. Rogers. Dr. Levy turned that evidence over to Detective Achord and he in turn documented it and turned it into the Property Room. (Vol. VIII, p. 355).

(Witness shown Exhibit 32 - Bullet and Bullet Fragment)

Detective Achord identified the documentation and the contents of Exhibit 32 as the bullet and fragment he recovered from the autopsy of Mr. Rogers which he turned into the Metro Property Room. (Vol. VIII, pp. 355-356).

STEVE SCOTT

Steve Scott is employed by the Tennessee Bureau of Investigation ("TBI") in Nashville at the Crime Laboratory. He works in the Firearms Identification Unit in the lab. Agent Scott has been with the Tennessee Bureau of Investigation in the Firearms Identification Section for fourteen-and-a-half years. (Vol. VIII, p. 357).

During Agent Scotts years with the TBI Crime Lab he has conducted thousands of examinations in connection with firearms identification. He has also testified as an expert in this field many times. (Vol. VIII, p. 359).

The TBI Crime Lab where Agent Scott works receives evidence from all the State agencies and all the city and county police and sheriff departments in the State of Tennessee. These agents collect the evidence and bring it to the TBI for analysis. Agent Scott tries to match fired bullets or fired cartridge cases back to a particular gun that is brought to them in the laboratory as evidence in criminal cases. (Vol. VIII, p. 360).

(Witness shown Exhibits 25 (Box of Shells) and 32 (Bullet))

Agent Scott testified that he received Exhibit 32, which contains the packaging or zip-lock bag and film cannister in the laboratory and did an examination on June 25, 1999. The film cannister contained a couple of very small lead fragments. They were too small to be of any use in any comparisons that he would have done. The zip-lock bag contained a fired .38 or .357 caliber bullet. Agent Scott said that particular bullet is manufactured by the Remington Peters Corporation or UMC. (Vol. VIII, pp. 367-368).

Agent Scott testified that Remington loads the .38 caliber bullet and .357 caliber bullets, the projectiles themselves can be loaded in either the .38 Special cartridge or the .357 Magnum cartridge. The guns that are designed to fire those two particular cartridges, the .38 Special gun will only fire the .38 Special cartridge; however, the .357 Magnum gun can fire the .38 Special cartridge and the .357 Magnum cartridge. (Vol. VIII, p. 368).

Agent Scott testified that if he had the cartridge case itself, it would lend some believability to the fact that it was that particular kind of ammunition rather than one or the other. Agent Scott did not receive any spent cartridges or cartridge casings. (Vol. VIII, p. 369).

Agent Scott testified that he was able to say that the particular bullet was a Remington because that style has a lead core. On the outside of the bullet is a copper jacket and is actually pressed up around the sides of that lead core, and there are some particular design features in that copper jacket that are patented by Remington. (Vol. VIII, p. 370).

Agent Scott testified that the .357 Magnum is one of the most powerful cartridges for handguns available. (Vol. VIII, p. 370).

Based upon Agent Scott's training and experience, he said this particular bullet may have been fired from a Smith and Wesson, Ruger, Taurus, Sportarms, Kassnar, and then several other manufacturers. This bullet was fired from a revolver. (Vol. VIII, p. 370).

Referring to Exhibit 25, Agent Scott testified that he actually opened the box of ammunition, counted the number of cartridges that are there, and pulled one of the bullets out of the cartridges and compared it to the bullet from the autopsy or from the crime scene. There were 44 cartridges in the box when Agent Scott received it. There are 50 cartridges in a new or full box. Most revolvers will hold six cartridges. (Vol. VIII, p. 371).

Agent Scott testified that the bullet from Mr. Rogers is consistent with the remaining 44 cartridges in the Remington box. (Vol. VIII, pp. 372-373).

(Witness shown Exhibit 33 - Agent Scott's Ballistics Report)

Agent Scott prepared a report of his findings and submitted them to the Metropolitan Police Department. (Vol. VIII, p. 373).

[CROSS EXAMINATION]

Agent Scott determined that the bullet came from a revolver rather than a semi-automatic pistol because he is not aware of any semi-automatic pistol that fires .357 Magnum ammunition. He said there are a couple of rifles that are chambered in .357 Magnum and this ammunition could be fired in those rifles; however, when a bullet is fired in a revolver, there is a gap between where the bullet is and where the barrel actually begins and those particular slippage marks are very characteristic of being fired, having been fired in a revolver, and those marks are present on this bullet. (Vol. VIII, pp. 374-375).

Agent Scott testified that when a bullet strikes an object it can disfigure or mar the characteristics; however, in most cases, the nose of the bullet is what strikes first and he looks for characteristics along the sides of the bullet. Even when the bullet mushrooms as it strikes a target, and even the metal folding back over the sides of the bullet, it is quite normal for him to be able to fold the metal back up and those characteristics still be present. (Vol. VIII, p. 375).

Agent Scott testified that the bullet in this case was mushroomed when he received it; however, just from the sketch that he has of it here, it looks as if he did not have to actually peel the metal up. It did not completely fold back on itself. He said that the bullet could have been fired from either a .38 or a .357 and it could have been fired from a Smith and Wesson or a Ruger gun, several different types of guns. (Vol. VIII, p. 376).

TODD HAGEDORN

Todd Hagedorn is employed by Integraham St. Louis Seating who manufactures seats for the now Dyma Chrysler minivans. The company is located in Pacific Missouri right outside of St. Louis. Mr. Hagedorn is a customer QA liaison who represents the manufacturer at the vehicle assembly plant. (Vol. VIII, p. 377).

In his job, Mr. Hagedorn is familiar with the different types of seats that his company makes for the Chrysler Corporation. (Vol. VIII, p. 377).

Through contacts at the Chrysler Corporation, Mr. Hagedorn was asked to examine some photographs of a particular seat that was in Davidson County, which he did.

(Witness shown Exhibit 22 - Car Seat)

Mr. Hagedorn looked at the seat and identified it as being designed specifically for the Chrysler Town and Country LXI. It is for the 1996/1997 model year and was the top of the line seat type for that vehicle. He testified that this seat is located in the van in the middle row on the right side, so as you are in the vehicle it would be on the right side, directly behind the front seat passenger. (Vol. VIII, p. 378). He also stated there is a sliding door that opens up to that seat. (Vol. VIII, p. 379).

(Witness shown Exhibit 4 - Photograph of Van)

Mr. Hagedorn, after viewing the photograph of the van, determines that the van is a 1996 or 1997. The color of the minivan is consistent with the color of the seat which is gray. With that color van you could get two colors; the camel tan or the gray. (Vol. VIII, p. 379).

LORITA MARSH

Lorita Marsh is employed by the Metropolitan Police Department as a fingerprint analyst. She has been with the police department since 1997.

Throughout the course of Ms. Marsh's on-the-job training she has examined numerous fingerprints to compare latents with known prints. She has also testified to her findings in the courts of Davidson County. (Vol. VIII, p. 382).

(Ms. Marsh is tendered as an expert in the field of fingerprint identification)

(Witness shown Exhibit 27 - Fingerprint Lifts)

Ms. Marsh identified Exhibit 27 as fingerprint lifts that were provided to her for her examination. Ms. Marsh was also provided with the known fingerprints of Bryant Guartos, Edwin Gomez and Jonathan Londono. (Vol. VIII, pp. 382-383).

Ms. Marsh did her comparisons and examination in March of 1999 when they were submitted to her. (Vol. VIII, p. 383).

Ms. Marsh reduced her findings to typewritten form. The findings on Edwin Gomez was on April 28, 1999; Jonathan Londono on April 30, 1999; and Bryant Guartos on October 14, 1999. (Vol. VIII, p. 384). Ms. Marsh also received a number of elimination prints. (Vol. VIII, pp. 384-385).

Ms. Marsh testified that not all of the lifts taken by Sergeant Hunter and submitted to her were suitable for comparison. However, there were some prints that were sufficient quality to be identifiable. (Vol. VIII, p. 385).

Ms. Marsh testified that one of the lifts she examined was from a phone book, the Yellow Pages. (Vol. VIII, p. 386). She compared that latent lift with the known fingerprint of Bryant Guartos. An identification was made to the right index fingerprint. Ms. Marsh made that notation on the lift card and initialed and dated the card. (Ms. Marsh identified the various markings on the lift card). (Vol. VIII, p. 387).

Ms. Marsh matched Mr. Guartos' fingerprint and when he was booked into the police department she confirmed it when he was physically here in Nashville. (Vol. VIII, p. 388). She testified that Mr. Guartos' print was found at the 6834 Charlotte Ave., Room 204 location [on the phone book]. (Vol. VIII, p. 390).

Ms. Marsh was not able to find any other identifiable prints from the lifts that were turned in by Sergeant Hunter to match Mr. Guartos. (Vol. VIII, p. 389).

Ms. Marsh was able to match some of the latent lifts to the fingerprints of Edwin Gomez. She testified that at 6834 Charlotte Avenue, Room 204 a print was obtained from a telephone receiver. This print matched the right middle fingerprint of the known prints of Edwin Gomez. This was the only latent print that was found in the collection turned in that matched Mr. Gomez. (Vol. VIII, p. 389).

Ms. Marsh testified that Jonathan Londono's fingerprint matched one of the latent lifts that were turned in from the Remington cartridge box holder. It was Mr. Londono's right middle fingerprint. This was recovered from the same location, 6834 Charlotte Ave., Room 204. This was the only print of Mr. Londono's that was a positive match. (Vol. VIII, p. 390).

[Although the prints off the box of bullets belonged to Mr. Londono, the State claimed Mr. Guartos was the triggerman.]

Ms. Marsh received some latent lifts from Officer William Merrill identified as coming from a van seat. She testified that none of the lifts he turned in were suitable for comparison. (Vol. VIII, p. 390).

[CROSS EXAMINATION]

On the form Ms. Marsh filled out for the Metro Nashville Police Department she indicated that there were problems identifying both Mr. Gomez and Mr. Londono's fingerprints on the two items. On Mr. Gomez' form Ms. Marsh indicated that problem number four existed which means that she needed major case prints which are prints that are taken not only of the fingerprints but of the complete palm, different areas, the complete entire rolled finger. There were other prints that were unidentified because Ms. Marsh did not have certain parts of maybe a palm or a finger to be identified. (Vol. VIII, pp. 391-392).

Ms. Marsh testified that the problem with Mr. Londono's identification, problem number three, was his palm prints. Ms. Marsh did not have any palm prints on him. Ms. Marsh did not find any comparisons for Mr. Guartos on anything other than the phone book. (Vol. VIII, p. 392).

[REDIRECT EXAMINATION]

With respect to the prints that Ms. Marsh identified as being Mr. Londono, Mr. Gomez, and Mr. Guartos, these were definite identifications. At the time, Ms. Marsh had not yet received major case prints for Mr. Londono or Mr. Gomez. Once Ms. Marsh receives

those, if ever, she will examine and compare them with the remaining identifiable prints. (Vol. VIII, p. 393).

DR. BRUCE PHILLIP LEVY

Dr. Bruce Levy is a licensed physician currently serving as the Chief Medical Examiner for the State of Tennessee and the County Medical Examiner for the Metro Government. Dr. Levy has held the position of Chief Medical Examiner for Metropolitan Nashville since July of 1997 and Chief Medical Examiner for the State of Tennessee since March of 1998. (Vol. VIII, p.397).

Dr. Levy has performed personally over 3,000 autopsies and has supervised about 6,000 autopsies in Nashville, as well witnessing over 10,000 autopsies through his work in New York City. (Vol. VIII, p. 397).

Dr. Levy testified that he conducted the autopsy on Roy Rogers on April 7, 1999 at 10:00 in the morning. Mr. Rogers was declared deceased the day before on April 6, 1999 at 8:37 in the evening. (Vol. VIII, p. 401).

At the time of the autopsy Mr. Rogers was 73 inches tall, and weighed 232 pounds. However, as a result of some of the medical therapy Mr. Rogers underwent there was a lot of extra fluid in the tissues of the body so his actual weight at the time of the injury would have been somewhat less than 232 pounds. (Vol. VIII, p. 401).

Dr. Levy found both injuries to Mr. Rogers' body as well as evidence of extensive medical therapy. Mr. Rogers had a gunshot wound to the left lower portion of his chest.

There had also been abdominal surgery and based upon his conditions and the complications from the actual two surgeries he underwent, the surgeons had left the incision on his abdomen partly opened, but covered with special material to protect the internal organs to exposure to the outside environment. (Vol. VIII, p. 204).

Dr. Levy testified that with regard to the gunshot wound, the bullet traveled down the lower part of the chest into the abdomen, from the left side towards the middle of the body, and also from the front to the back. In the process, it had struck the stomach which has been surgically repaired by the physicians at Vanderbilt. It had struck the distal portion or the end of his pancreas, which had been removed by surgeons. It struck a vein coming from the left kidney, which had been repaired by the surgeons, and then had traveled into the lower portion of the spine where it injured the spinal cord and the bullet was recovered in several fragments from within the vertebrae or the backbone of Mr. Rogers. (Vol. VIII, pp. 402-403).

Dr. Levy testified the point of entry of the bullet was in the left lower portion of the chest. He concluded that Mr. Rogers died as a result of complications arising from the gunshot wound that injured all the organs in the abdomen. (Vol. VIII, p. 403).

Dr. Levy testified that it is not unusual that Mr. Rogers expired from this gunshot injury. He would have died very quickly after sustaining this injury without the medical therapy he received because it was a life-threatening injury. Dr. Levy stated with the bullet striking the stomach and the pancreas allowing the stomach contents and the pancreatic enzymes to leak into the abdomen, it was almost inevitable that some type of infection would

develop and despite very aggressive therapy by the physicians at Vanderbilt, they were just never able to get control of that infection, and he ultimately died as a result of the gunshot wound. Dr. Levy testified that he manner of Mr. Rogers' death was a homicide. (Vol. VIII, pp. 403-404).

(Witness shown Exhibit 32 - Projectile)

Dr. Levy advised that it is routine for a detective to present at all homicide autopsies. Dr. Levy reduced his findings from the autopsy to typewritten form which is the autopsy report (entered as Exhibit 35). (Vol. VIII, p. 405)

OFFICER STEVEN KAUFMAN

Steven Kaufman has been an officer with the Metro Dade Police Department in Miami, Florida, since September of 1996. Officer Kaufman is with the Police Operations Bureau which is a special unit for special details and he also teaches on a regular basis at the training bureau. (Vol. VIII, pp. 406-407).

On March 1, 1999, Officer Kaufman testified that he came into contact with Bryant Guartos and his girlfriend at their residence at 9551 Fontainebleau Boulevard, Apartment Number 102, phone number 305-228-8973, in Miami, Florida. (Vol. VIII, p. 407).

Officer Kaufman also obtained Mr. Guartos' girlfriend's work number is 305-640-2460. (Vol, IV, p. 408).

Officer Kaufman obtained the above information as a part of his official duty as a police officer and took these numbers and information down as part of an official report in his line of duty on March 1, 1999 (entered as Exhibit 36). (Vol. VIII, p. 410).

JAMES EDGAR SPEARMAN, JR.

James Spearman works for BellSouth Telecommunications. He is the Corporate Security Manager for middle Tennessee and also acts as the custodian of records for BellSouth. Mr. Spearman has been employed with BellSouth for 26 years. As custodian of the records, Mr. Spearman has occasion to come to court and testify occasionally for BellSouth. (Vol. VIII, p. 412).

Mr. Spearman testified that in December of 2000, BellSouth provided a list of information regarding subscriber information on a host of telephone numbers. Mr. Spearman was shown a packet of information which is material provided from BellSouth pursuant to a court subpoena. He testified that this information contains subscriber information for several phone numbers as of March 17, 1999. Subscriber information is who actually owns that telephone number and who BellSouth bills. This information also includes the address of where the phone is located (entered as Exhibit 37). (Vol. VIII, pp. 412-413).

Mr. Spearman testified that in March of 1999, BellSouth, in compliance with another subpoena, provided detailed calling records for a set of phone numbers associated with the Howard Johnson Motel on Charlotte Avenue in Nashville, Tennessee. Mr. Spearman reviewed the documents and confirmed that it is the information provided by BellSouth

pursuant to the subpoena which contains the detailed calling records for a period in the middle of March of 1999 from the Howard Johnson Motel (entered as Exhibit 38). (Vol, IV, p. 414).

Mr. Spearman is shown a document which contains a summary of some of the information contained in the previous two subpoenas. Mr. Spearman reviewed the document to make sure everything that is contained in that summary is contained in either one or both of the previous packets of information (entered as Exhibit 39). (Vol. VIII, pp. 414-415).

Mr. Spearman agreed that the chart and tables accurately summarizes the subscriber information that his company provided for subscribers on March 17, 1999. He testified that the last number 615-292-9207, provides that the location for that subscriber is Green Hills Court, 4004 Hillsboro Pike, in Nashville, Tennessee, which is a pay phone near the August Moon. (Vol. VIII, pp. 415-416).

Mr. Spearman testified that on another page in the middle, number 615-383-9824, provides that the location for that subscriber is the Mall of Green Hills, 2126 Abbott Martin Road, in Nashville, on the upstairs floor, which is also a pay phone. (Vol. VIII, p. 416).

Mr. Spearman is shown another document, which he stated he has seen before, and contains a summary of particular information from the detailed calling records from the Howard Johnson Motel from March 14 of 1999 to March 17 of 1999. Mr. Spearman has reviewed this information to make sure that all of the information in that chart is contained in the actual subpoena records that he previously testified to (entered as Exhibit 40). (Vol. VIII, pp. 416-417).

Mr. Spearman testified that Exhibit 40 contains the information in the detailed calling records are outgoing calls to two specific 800 numbers. He stated the 800 numbers are 800-464-3139 and also 800-791-0964. He stated there are four different numbers from the Howard Johnson that show outgoing calls to those two numbers over that time period. Mr. Spearman says it is not unusual for a business such as Howard Johnson or a motel to have several outgoing phone lines to handle the volume of call traffic from the motel. This chart shows that on a particular number, it was used to call one of the two 800 numbers, and it tells us the date, time, and the duration of that call. (Vol. VIII, pp. 417-418).

[CROSS EXAMINATION]

Mr. Spearman does not know what room these 800 numbers were made from at the Howard Johnson motel. (Vol. VIII, p. 418).

BARBARA FRANKLIN

Barbara Franklin was employed at the Carlyle and Company jewelry store in the Green Hills Mall in March of 1999. Ms. Franklin had learned about the security guard who was robbed and shot in the parking lot. (Vol. VIII, p. 419).

Ms. Franklin was working at the jewelry store the day before the shooting. Ms. Franklin encountered two Hispanic men at the store that day in the afternoon. That day the store was having a Rolex trunk show where they have a large number of Rolex watches come into the store for a one-day event. It is well advertised so that people can see a variety of watches than they normally keep in stock. (Vol. VIII, p. 420).

Ms. Franklin testified that one of the Hispanic men was taller, a big man, and the other one was a shorter man, maybe five-four, and he was the one who spoke with her. The other man did not talk. The men came into the store and talked with one of the other associates first and then left the store. She stated that not long after that they returned and asked her some questions. They were looking around and said they were thinking about getting a watch and they wanted to know if the store always had these watches (Rolex) in the store. Ms. Franklin told them that no, this was a special show and that the Rolex watches were here for one day. She stated that they then left the and just stood outside the store. Ms. Franklin said they came back in and had another question to ask and they went to the window and pointed to a Rolex watch in the window and asked if that watch was part of the show or was it always in the store. Ms. Franklin told them that it was part of the stock in the store. She told them that if they really wanted this watch and someone bought that one that the store could get them another one just like it. She said most of their questions were about what was in the store if the watches would be leaving or staying. (Vol. VIII, pp. 420-422).

Ms. Franklin testified that the smaller Hispanic man did all the talking and had broken English and the bigger man just smiled and shook his head and did not say anything. She stated that it was hard for her to understand him sometimes. He had a very soft voice and she had to have him repeat questions that he would ask her. Ms. Franklin identified the smaller man she spoke with in the courtroom as the man in the gray suit with the glasses. Ms. Franklin advised that he did not have glasses at the time she spoke with him at the store, but [at the time he was in her store] <u>his hair was pulled back like it is now</u>. (Ms. Franklin

identified the defendant Mr. Guartos). (Vol. VIII, pp. 422-423). [At the hearing on the Motion for New Trial the defense produced a mug shot of Mr. Guartos taken on March 1, 1999, just two weeks prior to the shooting. Mr. Guartos has a close-cut, military style haircut.]

Ms. Franklin testified that after the robbery and shooting happened and she heard the description of the people involved in the robbery, she brought this information to the attention of the detectives. (Vol. VIII, p. 423).

[CROSS EXAMINATION]

Ms. Franklin was never shown a photo lineup of anyone or asked to identify anyone. When Ms. Franklin said the man spoke in broken English she meant that he did not speak English very well and that he had a Spanish, Mexican, or Hispanic accent. She stated that he was hard to understand and did not have a very good vocabulary. Ms. Franklin is certain that this man is Mr. Guartos. (Vol. VIII, p.424).

STACY BUTTS

Stacy Butts was employed with Carlyle and Company in March of 1999. Ms. Butts still works there on a part-time basis. At some point in March of 1999, Ms. Butts learned that a security guard had been shot out in the parking garage. The day before the shooting Ms. Butts had contact with some Hispanic men at the store sometime in the early evening. (Vol. VIII, pp. 425-426).

Ms. Butts testified that there were two fairly clean cut gentlemen who came into the store [on March 16, the day prior to the robbery]. Ms. Franklin waited on them but Ms. Butts did notice that they were interested in Rolex watches and that was just about all. Ms. Butts stated that she did not actually talk to them herself but she overheard the conversation. She stated that one of them men was fairly tall and the other one was a little bit shorter. Ms. Butts identified one of the men she saw in the store as the gentleman sitting in the courtroom in the gray suit with glasses which is Mr. Guartos. At the time Ms. Butts saw Mr. Guartos in the store he was not wearing glasses and his hair seemed to be a little shorter. (Vol. VIII, pp. 426-427).

[CROSS EXAMINATION]

Ms. Butts does not recall if Mr. Guartos had a mustache at that time. (Vol. VIII, p. 427).

DETECTIVE HAROLD HANEY

Detective Harold Haney works for the Metro Police Department and is currently assigned to the Special Investigations Unit. During the time of the robbery and shooting in March of 1999, he was in the Armed Robbery Unit. Detective Haney has been with the police department for 20 years. (Vol. VIII, pp. 428-429).

Detective Haney testified that he was involved in the investigation from the beginning and went to the Mall of Green Hills along with the other detectives. (Vol. VIII, p. 429).

(Witness shown Collective Exhibit 17 - Videotapes)

Detective Haney testified that he dealt with the videotapes that were collected and turned in for analysis by the Detective Bureau. He watched the videos for many hours. The videos showed four different screens which show outside shots of the parking lot and inside shots of the lobby. He said the videos are on time lapse so you have to go frame by frame which he was able to have pictures made from the videos. He would take the image from the videotape and actually put it in a computer and then print out the picture. (Vol. VIII, pp. 430-431).

Detective Haney identified copies of the images that were downloaded from the videotapes. He said the video image showed the time, month, year, hour and minute. He stated that the time was actually an hour off due to daylight savings time but other than that it was correct to his knowledge. Detective Haney provided a heading topic and a description of what each photograph was (entered as Exhibit 41). (Vol. VIII, p. 432).

While viewing Exhibit 41, Detective Haney showed the jury where the time and date is located on the photographs. He testified that the first image depicts the subjects that he believed stayed in room 202 or 204 at the Howard Johnson Motel at 540 Charlotte and is dated 3/16/99 and the time is 7:35 (actually 6:35 due to daylight savings time). The second image depicts one of the subjects leaving the lobby in some kind of light colored pants and jacket. The third image depicts one of the subjects that was in the front lobby for about ten minutes and is dated 3/17/99 and since the time is an hour off it should be 8:07 instead of 9:07. (Vol. VIII, pp. 433-434).

Detective Haney testified that the next image is an outside shot showing a maroon van that is leaving the parking lot. There is also a white van that is parked in the lot and in the next frame the white van is also gone. The next image, during the morning hours, the subjects are apparently going out to the vans from the rooms. This image shows both vans and the subjects walking towards one of the vans. (Vol. VIII, p. 434).

Detective Haney testified that the next image he thinks shows a female walking with the subjects but he was not sure. The last image you can see actual persons standing next to the maroon van. You can also see these two people that are walking from one of the vans. (Vol. VIII, pp. 434-435).

Detective Haney testified that the next image shows the white van that had been moved and the maroon van with two subjects standing right next to the maroon van. The next image shows a person that came to the front desk which is dated 3/16/99. The next image shows the subjects getting into both of the two different vehicles. The next image shows there are actually four individuals that are standing right next the maroon van. The last sheet shows the two vans parked next to each other and it appears that the subjects are moving items from one van to the other. (Vol. VIII, pp. 435-436).

Detective Haney received these videotapes around March 18, 1999. Detective Haney began looking at them immediately thereafter. Detective Haney was not able to see a licence plate number on either of the vans or anything that would lead to identification of the van or any of the individuals at that time. It was almost a year later before Detective Haney

received information that actually corroborated a lot of this information that he had on the vans such as fingerprints and photo lineups. (Vol. VIII, pp. 436-437).

Detective Haney testified that about March 15, 2000, he went to Miami, Florida along with Detective Norris Tarkington. When they arrived in Miami they met with Bryant Guartos to discuss the incident of March 17, 1999. (Vol. VIII, pp. 437-438).

Detective Haney testified that when they met with Mr. Guartos they discussed with him the March 17, 1999 robbery and shooting at the Green Hills Mall. When they first talked to Mr. Guartos they told him that his fingerprints had shown up in Nashville and that there was an incident that occurred where there was a robbery and a shooting and they wanted to know if he had any information or knew what happened. (Vol. VIII, p. 438).

Detective Haney testified that Mr. Guartos' initial statement to them was that he had heard there were four guys and a girl who had come to Nashville in two different rented vehicles. He stated that Mr. Guartos described one of the guys and gave his first name as Julio, who he said later died two weeks after, or before the detectives had talked to him, and another guy by the name of Javier who he said was involved in the robbery in Nashville. Detective Haney stated that Mr. Guartos told them he thought they got about $200,000.00 for the jewelry. He stated that Mr. Guartos did not indicate that he had any involvement in the incident other than just hearing about it. (Vol. VIII, pp. 440-441).

Detective Haney testified that they continued to speak with Mr. Guartos and Mr. Guartos told them that he had not been in Nashville and he was not there during the time this robbery occurred and that he was somewhere else. (Vol. VIII, p. 441).

Detective Haney testified that they continued to talk with Mr. Guartos and his story went from one guy coming out of the mall, who was robbed and got hurt, to two security guards at a mall. He stated that Mr. Guartos told them that apparently one of the suspects took one of the guards down and the other suspect started to take the other guard down and the guard started to pull his gun and that is when the suspect shot him. At this point Mr. Guartos was still maintaining that he was not in Nashville and this was just something he heard. (Vol. VIII, pp. 441-442).

Detective Haney continued to speak with Mr. Guartos about the incident and he broke down and started crying. He had tears in his eyes. Detective Haney stated that Mr. Guartos made the comment to them that they knew who all was there and they had their names. Mr. Guartos put himself in Nashville and said he was there with Maria. Mr. Guartos also said Jonathan Londono, Edwin Gomez, Javier and another person that he only knew as Mosquito. Mr. Guartos made the comment that they had stayed at the Howard Johnson Motel and they were in two different rooms. Detective Haney stated that Mr. Guartos told them that they had rented two different vehicles from Miami. One was a maroon or wine colored van and the other was a white van. Mr. Guartos made statements that they got these vehicles for about $2,500.00. He also made the comment that he and Maria had actually taken the seat out of the white van to make more room. The detectives mentioned to him about fingerprints on the seat and he said there should not be any fingerprints because they had wiped the seat off. (Vol. VIII, pp. 442-443).

(Witness refers to his notes.) [At the Motion for New Trial, Detective Haney claimed he did not have any notes, Vol. VII, p. 904.]

Detective Haney testified that when he asked Mr. Guartos if any planning went into this he said they already had a buyer waiting for the merchandise, so once they got the jewelry or whatever they were getting at the time, they would take it straight to the buyer. The buyer would give them the money and then they would exchange and would be on their way. (Vol. VIII, p. 443).

Detective Haney asked Mr. Guartos about who the buyer was and Mr. Guartos said it was going to be someone out of the country and that they had a lot of dealings with Columbia and Miami and places like that. (Vol., IV, p. 444).

Detective Haney asked Mr. Guartos about any proceeds and Mr. Guartos told him that they got about $230,000.00 for the jewelry that was taken in the robbery. Mr. Guartos said he got about $40,000.00 which he used to buy a house in Miami. (Vol. VIII, p. 444).

Detective Haney testified that Mr. Guartos told him that the vans were actually taken back down to Miami and were dropped off at Fontainebleau Apartments and left there. Detective Haney stated that Mr. Guartos told him there was a gun that was also taken during this robbery and it was also disposed of but Mr. Guartos did not go into detail as far as that went. (Vol. VIII, pp. 444-445).

Detective Haney testified that he did not make any threats or promises to Mr. Guartos to have him tell him this information. He said he did not do anything physically or verbally

to cause any change in his demeanor or actions. Detective Tarkington was with Detective Haney during this period of time. (Vol. VIII, p. 445).

Detective Haney testified that Mr. Guartos advised him that he was in the maroon van with Maria about a block or block-and-a-half away from the Mall of Green Hills when the robbery and shooting occurred. (Vol. VIII, pp. 445-446).

[CROSS EXAMINATION]

Detective Haney said the interview with Mr. Guartos lasted for about three-and-a-half to four hours. Mr. Guartos confessed to all of this in probably the last hour. Detective Haney said Mr. Guartos gave him more information every time they talked. (Vol. VIII, p. 446).

Detective Haney testified that he did not get any of the conversation with Mr. Guartos on audiotape or videotape nor did he get a signed confession. Detective Haney stated that he did not get any documentation whatsoever. Detective Haney only has his notes from the interview with Mr. Guartos [which he later destroyed]. (Vol, IV, p. 447).

Detective Haney said they kept going over and over things with Mr. Guartos as far as some of the things he left out or that they thought he left out. (Vol. VIII, pp. 447-448).

Detective Haney stated again that he thought Mr. Guartos was in the maroon van which was about a block or block-and-a half away from the mall and the other four men were somewhere else. Mr. Guartos said he was with Maria in the maroon van and did not say who else was in the maroon van. Detective Haney does not remember if Mr. Guartos told him if anyone else was in the maroon van at the time. (Vol. VIII, pp. 448-449).

Detective Haney testified that according to Mr. Guartos' statement that all of them performed the robbery, even though Mr. Guartos was a block or block-and-a-half away, and that he had knowledge of what was going on and took proceeds from the robbery. (Vol. VIII, p. 449).

DETECTIVE NORRIS TARKINGTON

Detective Norris Tarkington works for the Metro Police Department in the Robbery Unit as an investigator. Detective Tarkington has been with the police department for nearly 22 years. He has been with the Robbery Unit for a little more than eight years. Detective Tarkington was working in the Robbery Unit in March of 1999. (Vol. IX, pp. 461-462).

Detective Tarkington, along with other officers, became involved in the investigation of the incident occurring at the Mall of Green Hills on March 17, 1999. Detective Tarkington responded to the mall that day. Detective Tarkington testified that during his investigation of this matter he showed certain individuals photo lineups. (Vol. IX, p. 462).

(Witness shown Exhibits 5 and 6 - Photo lineup and Identification Form)

Detective Tarkington identified Exhibit 5 and Exhibit 6 as items he used in connection with this case. He stated that this particular lineup was shown to Ms. Deborah Sloan. Detective Tarkington told Ms. Sloan that the person who is the subject of the investigation may or may not be in the lineup and that she needs to look at each of the pictures and tell him if she recognizes any of them. Detective Tarkington stated that he does not tell the person who to pick out or what their names are. (Vol. IX, p. 463).

Detective Tarkington explained that the printed form, Exhibit 6, is not presented to the person viewing the lineup while they are looking at the lineup. They only see that once they sign it and if they make an identification. Ms. Sloan did in fact make an identification and stated that number two looked familiar. Detective Tarkington wrote that information down verbatim. Ms. Sloan identified number two who was Bryant Guartos. (Vol. IX, p. 464).

(Witness shown Exhibits 7 and 8 - Photo Lineup and Identification Form)

Detective Tarkington testified that the six photos in the photo lineup were shown to Deborah Sloan. Ms. Sloan made an identification from that lineup. She stated "maybe number five," She also stated "he has more head features or same round head" and that "he picked up the last box." This lineup, containing Jonathan Londono's picture, was shown to Ms. Sloan on October 10, 2000, at approximately ten in the morning. Detective Tarkington is almost sure that the lineup containing Mr. Londono's picture was not shown at the same time as the lineup containing Mr. Guartos' picture. Detective Tarkington testified that the lineup containing Mr. Guartos' picture was shown on July 29, 1999, and the one which contained Jonathan Londono's picture was shown on October 10, 2000. (Vol. IX, pp. 464-465).

(Witness shown Exhibits 9 and 10 - Photo Lineup and Photo Identification Form)

Detective Tarkington testified that Exhibit 9 is a photo lineup also containing six color photographs and was shown to Ms. Deborah Sloan on October 10, 2000. This lineup contained a photo of Edwin Gomez. Ms. Sloan stated that "five's hair looked similar from

the face," and "he looks most familiar." This lineup was shown to Ms. Sloan immediately after the lineup containing Mr. Londono's photograph. (Vol. IX, p. 466).

(Witness shown Exhibit 12 - Photo Identification Form)

Detective Tarkington testified that the person who viewed this photo lineup was Ms. Dorothy Drake. Detective Tarkington went through the same procedure with her as far as telling her what to look at and what to do. He testified that Ms. Drake stated that "one looks more like him," and "I couldn't say positive," while pointing at the number two photo which was Bryant Guartos. This was shown to her on August 11, 1999 at 9:00 in the morning. (Vol. IX, p. 467).

(Witness shown Exhibit 19 - Photo Identification Form)

Detective Tarkington testified that Exhibit 19, the photo identification form, was shown to Ms. Tiffany Dozier Christy on January 9, 2001, at approximately 2:54 in the afternoon. She identified Jonathan Londono, the number five photo. She said "he looks like one of them," pointing to photo number five." She said "he would come to the desk with the guy who spoke English." (Vol. IX, pp. 467-468).

Detective Tarkington testified that during the investigation he was provided with a couple of telephone numbers to look for in the Mall of Green Hills. Detective Tarkington found out that one of the numbers was the August Moon and a little business park in front of the August Moon Restaurant which is at 4004 Hillsboro Road, which is not in the mall or on the mall property. (Vol. IX, p. 468).

Detective Tarkington testified that the other telephone number was from inside the mall, on the second floor across from Carlyle and Company, very close to Brooks Brothers Collection. (Vol. IX, p. 468). He stated that If you are standing at that telephone, looking out into the Mall, you would see the front of the Carlyle store straight ahead. He also stated that the area immediately in front of you is an open area and is right next to the American Café. (Vol. IX, p. 469).

During the investigation Detective Tarkington made several trips to Miami, Florida. On one of the trips Detective Dean Haney accompanied him. The detectives flew down to Miami. (Vol. IX, p. 469).

Detective Tarkington testified that neither he nor Detective Haney had any plans to interview or speak with Bryant Guartos before they got down to Miami. It was a very last minute decision to speak with him. (Vol. IX, p. 470).

When Detective Tarkington spoke with Mr. Guartos, Mr. Guartos agreed to talk with him and Detective Haney. Detective Tarkington confirmed that the man he spoke with was, in fact, the Defendant Bryant Guartos, (Vol. IX, pp. 470-471).

Detective Tarkington told Mr. Guartos that they were in Miami investigating an incident that happened in Nashville at the Green Hills Mall. Mr. Guartos stated to Detective Tarkington that he had been told about it. (Vol. IX, p. 471).

Detective Tarkington and Detective Haney stayed and continued to talk to Mr. Guartos for quite some time. The detectives told Mr. Guartos that his fingerprints had been lifted from a motel room in Nashville. Mr. Guartos initially denied being in Nashville, and

the detectives kept talking to Mr. Guartos about it over a period of several hours and Mr. Guartos later admitted that he was here in Nashville. (Vol. IX, p. 472).

Detective Tarkington testified that Mr. Guartos voluntarily talked with them and he could have stopped at any time he wanted to. Detective Tarkington and Detective Haney basically just asked him to tell them what happened, what he knew about the situation that happened in Nashville. Mr. Guartos would given them a statement about what he had heard, what he said he had heard and each time he would add a little bit more. Because Mr. Guartos kept giving more information to the detectives, they continued to talk to him.(Vol. IX, pp. 472-473).

Detective Tarkington testified that there came a point when Mr. Guartos acknowledged more personal participation in the incident. After speaking with Mr. Guartos for maybe two or three hours, they asked him if he had family in Miami and he said he did. The detectives asked him if he had any family in South America, and he stated he did. Mr. Guartos then put his head down, covered his head and eyes, and then raised his head and stated something along the lines of "if I tell you, they will kill my family" and he stated that "you already know who was there." (Vol. IX, pp. 473-474).

Detective Tarkington testified that Mr. Guartos told them that there where three of them. Mr. Guartos named himself, Edwin Gomez, whom he called Chatto as a nickname, Jonathan Londono, an individual named Javier and another nickname Mosquito. (Vol. IX, p. 474).

Detective Tarkington testified that Mr. Guartos told him that he and another individual, Maria, were in the wine colored van, and he stated that he was initially in the beginning, when he first admitted that he was there, about a block-and-a-half from the scene of the robbery. (Vol. IX, p. 474).

Detective Tarkington testified that Mr. Guartos then told him that, after the robbery and shooting, they went back to Miami with the watches and they sold the watches in Miami. Mr. Guartos told Detective Tarkington that the watches themselves brought $230,000.00 and his take was $40,000.00. Mr. Guartos told Detective Tarkington that he used his portion of the proceeds to buy a house in Miami. (Vol. IX, pp. 474-475).

Detective Tarkington testified that Mr. Guartos told him that there were two vans they got from Miami and they paid someone $2,500.00 for the vans. Once they got to Nashville and the morning of the incident, they took a seat out of one of the vans. Mr. Guartos told Detective Tarkington that he and Maria took the seat into the motel room. When Detective Tarkington told Mr. Guartos that his fingerprints were found on the van seat, Mr. Guartos told him that the could not have been because the others had wiped them off. (Vol. IX, p. 475.)

Detective Tarkington knew at the time that there were no fingerprints found on the seat. Detective Tarkington used that as a tactic to let Mr. Guartos know that they knew about the seat and he finally admitted that they did take the seat out of the minivan. (Vol. IX, p. 476).

[CROSS EXAMINATION]

Detective Tarkington testified that the interview with Mr. Guartos "lasted maybe four or five hours." He also said that questioning Mr. Guartos was a "very last minute decision." (Vol. IX, p. 477).

Detective Tarkington testified that he went to Miami to speak with someone else initially. Detective Tarkington did not audiotape Mr. Guartos' confession nor did he get a signed confession from Mr. Guartos. He documented the confession on a report once he got back to Nashville. He did not get Mr. Guartos to sign a confession or anything else. (Vol. IX, pp. 477-478).

THE STATE RESTED.

B. DEFENDANT'S PROOF

BRYANT GUARTOS

Bryant Guartos testified that he lived in Miami in March of 1999. In mid-March of 1999, Mr. Guartos made a trip to Orlando to buy a car at an auto auction. The auction was on Tuesday and he arrived in Orlando on Wednesday and missed the auction by one day. (Vol. IX, p. 480).

Mr. Guartos testified that near the auction was a gas station and he asked a guy at the gas station if there was an auto auction around there. The guy gave Mr. Guartos a list of auctions and told him that if he went to Jacksonville or Ohio you could get cheaper cars up there. Mr. Guartos testified that he was going to Louisville, Kentucky and on the way up he

stopped in Nashville. Mr. Guartos testified that a girl was with him and when they got to Nashville they looked around the town and then stopped by the Hickory Hollow Mall. While at the mall Mr. Guartos saw some people that he knew. (Vol. IX, p. 481).

Mr. Guartos testified that the people he met up with at the mall told him that they did not have any ID and they could not rent a room without ID. Mr. Guartos told them that they could have his and that he did not mind renting them a room. Mr. Guartos stated that they first went to eat and then they went to rent a room at the Howard Johnson Motel on Charlotte Pike. Mr. Guartos stated that he rented two rooms, one for them and one for him and the girl he was with. (Vol. IX, pp. 482-483).

Mr. Guartos testified that he stayed in room 202 and the other people stayed in room 204. After Mr. Guartos rented the rooms he went and got some beer with the girl he was with and he then decided to go knock on the door of the other people and they opened the door and said "hey, what's up?" Mr. Guartos wanted to see if they could go to a strip club or something around there. Mr. Guartos told them he would check the Yellow Pages and looked up an escort service. Mr. Guartos testified that when he travels that he sometimes goes to the Yellow Pages for an escort service. (Vol. IX, p. 484).

Mr. Guartos testified that he looked up the escort service in the phone book and he gave the other people some beers because he bought a 24-pack and then he left the room and went to his room. (Vol. IX, pp. 484-485).

(Interpreter sworn in for Mr. Guartos)

Mr. Guartos testified that the next day he was out looking for factories where they sell clothes cheaper. Mr. Guartos went back to the motel later that night but did not do anything with the people who he rented the room for. Mr. Guartos remembers that one of the men was called Javier and the other was called Julio. He said there were seven of them. (Vol. IX, p. 486).

Mr. Guartos testified that he left Nashville on Monday or Tuesday around 9:00 a.m. and headed north to Kentucky. Mr. Guartos looked for an auto auction in Kentucky but when he went over there it was closed. Mr. Guartos testified that the girl who was with him wanted to buy a car for herself and a friend so he drove around to show her where they were at. When Mr. Guartos left Louisville he went straight to Miami. Mr. Guartos does not remember how long that trip took. He stated he would stop and get fast food and eat and was driving a small compact car, a blue Nissan Sentra. (Vol. IX, pp. 487-488).

Mr. Guartos testified that he sold the Nissan Sentra to the girl that was with him because she was looking to buy a car. When they could not find a car he sold it to her because she liked it and it never gave them any problems on the trip. She told Mr. Guartos "why don't you sell me the car." Mr. Guartos sold it to her for $2,500.00. This was in March of 1999. Approximately a year later Mr. Guartos had a conversation with Detective Tarkington and Detective Haney. (Vol. IX, p. 488).

Mr. Guartos testified that he told the detectives that he rented a room and he just remembers a few names, the ones that he gave them. Mr. Guartos told them that if they showed him some photographs he might remember something. (Vol. IX, p. 489).

Mr. Guartos told the detectives that the people in the other hotel room were guys. He remembered that they smoked weed and they wanted to see if Mr. Guartos would drive them somewhere to buy some weed. Mr. Guartos told them that he did not know the town and that there was a lot of prejudice against the Latins and Hispanics and that you would get pulled over and messed up. Mr. Guartos told them he would not take them to buy any drugs and he did not go anywhere. (Vol. IX, p. 489).

Mr. Guartos told the detectives about what he knew about the robbery. He told them that he rented some people a room and he knew nothing else and he did not know what went on. All Mr. Guartos knew was that his lawyer from Miami told him they were looking for him in Nashville. Mr. Guartos said he had an Aerostar van, a 1986, and he rented it to some guy because he was not using it. He said the guy did something with the van and then dropped it off, clean and with gas. Mr. Guartos said at the time he was with his wife and daughter. When he came back the detectives were looking for him. Mr. Guartos talked to the detectives voluntarily. (Vol. IX, p. 490).

Mr. Guartos testified that in March of 1999, he had a flat top haircut and he never had a ponytail. (Vol. IX, pp. 490-491).

Mr. Guartos testified that he did not have a mustache back in March of 1999. (Vol. IX, p. 492).

Mr. Guartos testified that Detective Tarkington and Detective Haney got the wrong person at the wrong place and that is all there is to it. Mr. Guartos says he has been hearing this and that. First he hears the detectives say that he was a block-and-a-half away in a red

van and then other people say that there was a red van in the mall at the time that day. Mr. Guartos says "whew, I had a blue Nissan." (Vol. IX, p. 492).

Mr. Guartos testified that he did not socialize with the men that he rented the motel room for. He testified that he got them some beer and talked to them but did not socialize with them. Mr. Guartos said the guy named Mosquito was driving the red van when they left the mall. Mr. Guartos does not even know if they gave him their real names. He says he did not give them his real name. He told them his name was Rafael Cruz. (Vol. IX, pp. 492-493).

[CROSS EXAMINATION]

Mr. Guartos testified that back in March of 1999, he was living at 9551 Fountainbleau, Apartment 102. He stated when Officer Steven Kaufman from Miami Police Department testified about Mr. Guartos' address and phone numbers he was correct but, at that time Mr. Guartos had an argument with his wife and he had left the apartment and was not living there because they were separated at that time. However, on March 1, 1999 that was his residence and phone numbers associated with his residence. (Vol. IX, pp. 495-496).

Mr. Guartos testified that the reason he went to Kentucky to buy an automobile was because he felt he could get one for cheaper in Kentucky than in Florida. Mr. Guartos testified that the additional expense of driving up to Kentucky and staying in motels would overcome by the lesser cost of the vehicle and Mr. Guartos has a cousin who is a mechanic. (Vol. IX, p. 496).

Mr. Guartos testified that he was away from Miami for a whole week, seven days. The female who was with Mr. Guartos was named Sandra. He does not know her last name. Mr. Guartos met Sandra in Miami and has known her for about eight or nine months. Mr. Guartos would see Sandra at a pool place where they go every Friday or Saturday. Sandra did not know Mr. Guartos' real name either. (Vol. IX, p. 497).

Mr. Guartos testified that the people he ran into at the Hickory Hollow Mall he met in Atlanta a year-and-a-half, two years ago. There were seven of them. After talking with them he decided to stay in Nashville for a little while. Since they did not have ID he agreed to get them a room and they paid for his room. Mr. Guartos and Sandra stayed in one room and the other people stayed in the other room. (Vol. IX, p. 498).

While Mr. Guartos was on the road, from the time he left Miami to the time he got back to Miami, he called back to his wife at the Fountainbleau Apartments. Mr. Guartos testified that he did not have a phone card and he borrowed a phone card from the other people and called using that card. He made calls with the Gloria Telecom, GT calling cards to his residence in Miami and to the place where his wife worked. (Vol. IX, pp. 498-499).

Mr. Guartos' wife did not know where he was at the time because they had been in a fight. When they got into the fight he just picked up and left. Mr. Guartos testified that she has to love him too much for her to still be with him. (Vol. IX, p. 499).

Mr. Guartos testified that the testimony about him coming up to Nashville in the vans is not true and the testimony about him taking a car seat out of the van and being a block-

and-a-half away is also not true. He said the testimony about him getting $40,000.00 out of the robbery was not true. (Vol. IX, p. 500).

Mr. Guartos stated that the testimony the detectives gave about his involvement in the crime and what they said he told them is not true. Mr. Guartos told the detectives straight out that he rented a room to some people and there were seven of them. They were Hispanic and three of them were over 40 years old. Mr. Guartos said he never went anywhere with them and that he stayed with Sandra and the other seven people went on their way to do whatever they wanted to do. (Vol. IX, pp. 500-501).

Mr. Guartos testified that he does not remember going to the Green Hills Mall. He said he did not go to the Carlyle and Company store and ask about Rolex watches at the mall. Mr. Guartos said he never went into the parking garage of the Greens Hills Mall nor did he make any phone calls from the Green Hills Mall. (Vol. IX, p. 501).

Mr. Guartos remembers going to a flea market in Nashville and he does not remember if he went to any other malls other than the Hickory Hollow Mall. (Vol. IX, p. 502).

Mr. Guartos testified that when he left Nashville he went to Kentucky and when he called his wife from Kentucky he used coins. When he left Kentucky he drove straight through to Miami and did not stay in any motels. The only place he spent the night during his trip was in Nashville and Louisville, Kentucky. (Vol. IX, pp. 502-503).

Mr. Guartos testified that his mother is Maria Charry and that he knows a woman named Gabriella or Gabby. (Mr. Guartos is shown a picture of him and Gabriella). (Vol. IX, p. 503).

Mr. Guartos confirmed that on August 26, 1997, in Dade County, Florida, the 11th Judicial Circuit Court, Case Number 95019443, he was convicted of the crimes of burglary of an unoccupied conveyance and third degree grand theft. Also, in a separate case, Case Number 9721624, in Dade County, he was convicted of burglary of an unoccupied conveyance and third degree grant theft. (Vol. IX, pp. 503-504).

THE DEFENSE RESTED.

SENTENCING HEARING

STATE'S PROOF

MARIE ROGERS

Mrs. Marie Rogers is the mother of the victim, Roy Rogers. Mrs. Rogers testified briefly at the trial. (Vol. X p. 652). Mrs. Rogers reads aloud to the Court her statement. (Vol. X, p. 653).

(Witness shown Exhibit 1 - Pre-Sentence Report).

Mrs. Rogers reads aloud a letter from her daughter who lives in Alaska, Ann Lynn Lowe. (Vol. X, p. 657).

MARVIN ROSS ROGERS

Mr. Marvin Ross Rogers, Jr. is the brother of the deceased, Roy Rogers. (Vol. X, p. 659). Mr. Rogers reads aloud to the Court his statement. (Vol. X, p. 660). Mr. Rogers reads aloud to the Court a statement from Joan Elaine Rogers Hammond, his sister. (Vol. X, p. 670).

(Exhibit 2 Entered- Certified Copies of **CONVICTIONS)**

DEFENDANT'S PROOF

BRYANT GUARTOS

The Defendant, Bryant Guartos, makes a statement to the Court. Mr. Guartos stated that he did not commit this crime. (Vol. X, p. 681). Mr. Guartos admits that he had gone "wild" and had lost his home due to being an alcoholic. Mr. Guartos has never owned a weapon.

[CROSS-EXAMINATION]

Mr. Guartos testified that he has been convicted of burglary of two autos but, never a crime against a person. The burglaries were unoccupied burglaries. He has been convicted three times of these type crimes. There is one aggravated assault on his wife. (Vol. X, p. 683).

Mr. Guartos maintains that he was not present when Mr. Rogers was shot. Mr. Guartos explained that the call coming from the phone a short distance from the mall was made by two people whom he left his phone numbers with so they could contact him. (Vol. X, pp. 683-684).

MOTION FOR NEW TRIAL

DEFENDANT'S PROOF

(Exhibit 1 entered - Gomez Trial Transcript)

(Collective Exhibit 2 entered - Amended Motion for New Trial & Affidavit of David L. Raybin)

(Exhibit 3 entered for identification only - Affidavit of Kenneth Wiseman)

LORITA MARSH

Ms. Lorita Marsh testified at Mr. Guartos' trial. (Vol. X, p. 712).

(Witness shown Collective Exhibit 2 - Trial Exhibits)

Ms. Marsh testified that she examined the fingerprints or latents of Mr. Guartos. Ms. Marsh made an identification twice. The first identification was made on October 14, 1999. (Witness shown trial exhibit 27A).

Ms. Marsh identified exhibit 27A as a copy of the latent print card which she made an identification of the original card on October 14. 1999. Ms. Marsh testified that she did not need to put a date on that card because at that point it was the only identification made. There is no date of 1999 on that card. Ms. Marsh prepared a report on October 14, 1999 concerning that particular 1999 analysis. Ms. Marsh was shown trial Exhibit 34 which is a copy of her report which does not contain a date on the latent card. (Vol. X, pp. 712-714).

Ms. Marsh testified that the second latent card was examined by her on October 3, 2000. The date is on the latent card for this second identification. (Vol. X, p. 714). Ms.

Marsh testified that she has a copy of her report for this second identification. She stated that this report was faxed to the District Attorney around the same time the report was made. The District Attorney had this report prior to the trial in this case. (This report is entered into evidence as Exhibit 4). (Vol. X, p. 715).

Ms. Marsh testified that the latent print she examined was taken by Sergeant Hunter. (Vol. X, p. 716). The first comparison Ms. Marsh did was compared with prints submitted by Detective Tarkington dated September 21, 1999. The prints were marked as being from MDPD Identification Section, Miami Dade Police Department, Miami, Dade County, Florida. (Vol. X, pp. 717-718). (A copy of the prints were entered as Exhibit 5).

[CROSS-EXAMINATION]

Ms. Marsh testified that she recalls the case involved prints from three different men from a hotel out on Charlotte Pike, Mr. Guartos, Mr. Gomez and Mr. Londono. (Vol. X, pp. 719-720).

Ms. Marsh recalls that the ten known prints of these individuals were provided from another police department. As each of these men were extradited to Nashville the District Attorney contacted Ms. Marsh to compare the latent prints with the prints they gave when they were booked at the Metro Police Department. (Vol. X, p. 720).

Ms. Marsh testified that this second comparison of Mr. Guartos' prints was done after Mr. Guartos was brought to Nashville and fingerprinted by the Metro Police Department and the known prints were then the prints that he gave here in Nashville. (Vol. X, p. 720).

Ms. Marsh testified that the results of the examination in 1999 was the same as the results reached in 2000. (Vol. X, p. 721).

KIMBERLY ALLISON

Ms. Kimberly Allison was the manager of the jewelry store and she testified during the trial. At the new trial motion hearing she testified that she recognized Ms. Deborah Sloan in the courtroom [at the new trial motion hearing]. Ms. Allison first met Ms. Sloan after the robbery when they started getting ready for court. (Vol. X, p. 722).

Ms. Allison testified that she first arrived at court during jury selection and that she testified in the second trial [of the co-defendants]. Ms. Allison saw Mr. Guartos sitting in the courtroom during the trial. Ms. Allison testified that she does not recall pointing out Mr. Guartos to Ms. Sloan through the window. (Vol. X, p. 723).

Ms. Allison testified that she first saw Mr. Guartos when he came into the courtroom with his attorney and was sitting at the other table. Ms. Allison does not recall if this was before the jury was selected or not. Ms. Allison was in the courtroom when the jury was selected but was excluded from the courtroom and had to sit outside until she testified. (Vol. X, p. 724).

Ms. Allison testified that she had never seen Mr. Guartos at the jewelry store and that the first time she saw him was in the courtroom at the trial. Ms. Allison never identified Mr. Guartos. Ms. Allison knew he was Mr. Guartos because he was with the attorneys and he was being "charged." (Vol. X, p. 725).

Ms. Allison testified that she did not tell Ms. Sloan that Mr. Guartos was being charged or identified him in any way. (Vol. X, p. 726).

Ms. Allison testified that when she was outside the courtroom waiting to testify she looked through the window and saw Mr. Guartos. Ms. Allison does not recall if Ms. Sloan looked through the window. She believes they were all peeking in the window. Ms. Allison testified that she was peeking through the window because it was an uncomfortable situation and they wanted it over with. (Vol. X, p. 726).

MARIA CHARRY

(Interpreter Ms. Mason sworn in.)

Ms. Maria Charry lives in Miami, Florida and has lived there for 15 years. Ms. Charry understands English but does not speak it. Ms. Charry is Mr. Guartos' mother. Ms. Charry was at Mr. Guartos' trial here in Nashville from the first day the trial started. Ms. Charry was in the courtroom when Ms. Kimberly Allison testified in the hearing on the motion for new trial. Ms. Charry identified Ms. Sloan as currently being in the courtroom and she was also at the trial. Ms. Charry also saw Ms. Allison at the trial. Ms. Charry saw both Ms. Allison and Ms. Sloan outside the courtroom. (Vol. X, pp. 730-731).

Ms. Charry testified that she was sitting where the people waiting to be called are seated. The lady who she believed to be Ms. Allison was looking through the window of the door to the inside of the courtroom. Ms. Allison called another lady over there and was pointing into the courtroom with her finger. At this time Ms. Charry knew this was the court

where her son was going to be. She did not know who these ladies were who were pointing into the courtroom. When they left the door Ms. Charry went to take a look because she was trying to find out what was going on. Ms. Charry took a look through the window and sitting in front was her son Mr. Guartos. After the trial had started Ms. Charry was questioning why two persons who are going to be witnesses in the trial are talking outside to each other and talking about her son. (Vol. X, pp. 731-732).

The persons Ms. Charry identified as Ms. Allison and Ms. Sloan were in the courtroom and those were the two people who were talking to each other. (Vol. X, p. 732).

Ms. Charry knew they were witnesses because she heard them testify. (Vol. X, p. 732).

Ms. Charry did not testify at the trial. However, Ms. Charry did hear her name mentioned in the trial by a witness testifying. Mr. Guartos was asked who was Maria Charry and he answered "my mother." (Vol. X, p. 733).

(Witness shown page 11 from Collective Exhibit 2 - David Raybin's Affidavit)

Ms. Charry testified that her name was on the piece of paper and Bryant Guartos' name as well. Mr. Guartos was also in the picture. (Vol. X, p. 735).

[CROSS-EXAMINATION]

Ms. Charry testified that she was in the courtroom when the witnesses were introduced to the jurors. (Vol. X, p. 735).

Ms. Charry was in the courtroom when the Judge told everybody in the room that Mr. Guartos was the man standing trial. (Vol. X, p. 736).

[QUESTION BY THE COURT]

Ms. Charry testified that she was in court when the trial started, all the time. She was in court when the jurors were questioned. Ms. Charry recalled that there were thirteen people at first and then there were twelve and from that moment Ms. Charry was in there. Ms. Charry was in court whenever the Judge was in court. The first time Ms. Charry saw the ladies she pointed out was outside when the trial had not started yet and that is when Ms. Charry saw them pointing into the courtroom. Ms. Charry's son, Mr. Guartos was in the courtroom. It was about 8:30, 8:45 in the morning and no one was in the courtroom yet. At that moment the Judge was not in there. Mr. Guartos and his escorts and some other people were waiting for court and for the Judge. Ms. Charry was waiting outside for court to start and for her daughter who was downstairs. The ladies did not know who Ms. Charry was and she did not know who they were because nothing had started yet. (Vol. X, pp. 737-739).

WANDA HIETT

Ms. Wanda Hiett is the certified official court reporter in this case and she was the court reporter for the entire Guartos trial. (Vol. X, p. 741). [She was called as a witness to problems with the trial transcript.]

Ms. Hiett relistened to the tapes of Mr. Nagele's testimony to determine if he said anywhere that he was crawling military style. She listened to the entire testimony. Ms. Hiett does not remember if he testified that he was "crawling, military style." Ms. Hiett testified

that whatever is in the transcript was said at trial. If it is not in the transcript then it was not said at trial. (Vol. X, pp. 741-742).

Ms. Hiett testified that if there is not anything in the transcript about Mr. Nagele carrying any boxes then Mr. Nagele did not testify to it. Ms. Hiett listened to every word of the testimony against the transcript. (Vol. X, p. 743).

Ms. Hiett recalls at some point in the trial the jury sent down a question and the judge answered the question and went on. The original question that came in was at the close of the day. Ms. Hiett believes there is some reference in the transcript to that question. Ms. Hiett testified that what was not included in the transcript she originally gave to Mr. Raybin,[3] was the Judge's response the following morning in court. When Mr. Raybin asked Ms. Hiett about that, she went back and checked and it was on the day's notes for that particular day in court. Ms. Hiett testified that if it was a Thursday it was probably a disposition docket and what she had done was take down that part of the Guartos trial in with that day's work of dispositions. She stated that is when she went back and put it in the transcript. It is a couple of pages of the Judge's response to the jury's question. She stated that Mr. Raybin now has a complete copy as far as she knows. (Vol. X, pp. 745-746).

Ms. Hiett testified that she does not have a transcript of the closing argument of General Moore. (Vol. X, p. 747). Ms. Hiett was in the courtroom taking down Mr. Colavecchio's closing argument on the Stenograph machine. At the same time there is an electronic recording being made on cassette of what is being said. (Vol. X., p. 747).

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[3] This explains why the page numbers in the motion for new trial are different from the final transcript.

Ms. Hiett testified that while Mr. Colavecchio was speaking to the jury she was using the Stenograph machine and the tape recorder was recording. Ms. Hiett only listened to the testimony when she was reviewing the transcript as far as comparing it to the tape. Ms. Hiett had available to her the tape while typing up the transcript. She also had her Stenographic notes. (Vol. X, p. 749).

When Mr. Colavecchio finished and sat down the recording machine errored. Ms. Hiett was busy trying to get it back working. Ordinarily, if it were during testimony, Ms. Hiett would have whoever is speaking stop and she would correct what was wrong. The recording machine is very sensitive and she has had people stop before. Ms. Hiett simply did not stop General Moore and tell him the tape recorder was not working. She was not taking it down on the Stenograph machine because it was not testimony. Ms. Hiett admits that she was clearly wrong here and there should be a record of General Moore's closing argument. (Vol. X., P. 749).

Ms. Hiett noted on the handwritten log sheet that she keeps that the length of General Moore's closing argument was 12 minutes and there were no objections. Ms. Hiett believes that when she thought the tape was working correctly that she just did not pick back up on the Stenograph machine because it would have been out of context with her starting in the middle. Since his closing argument was not evidence she did not take it down so there is no Stenographic recording of General Moore's closing argument. (Vol. X, p. 750).

Ms. Hiett is not sure if she told the judge when she realized the cassette recorder was not working. Ms. Hiett agreed that there is nothing that exists that could recreate General

Moore's closing argument in any way. Ms. Hiett had no independent recollection of what General Moore may have said. Her notes only reflect no objections were made and it was a 12 minute time span. (Vol. XI, p. 751).

Other than General Moore's closing argument the transcript is complete and correct to the best of Ms. Hiett's information and belief. (Vol. XI, p. 751).

GENERAL ROGER MOORE

Roger Moore testified that the only thing he remembers from his closing argument was regarding Mr. Colavecchio's statement that "we didn't prove how much the Rolexes cost." Mr. Moore remembers saying "they cost a good man his life." General Moore does not have any recollection if any objections were made to his closing argument. (Vol. XI, pp. 759-760).

DEBORAH SLOAN

Ms. Deborah Sloan was the only eyewitness who identified Mr. Guartos at the shooting. She testified that she met Mr. Raybin that morning and it was the first time she had met him. Mr. Raybin gave her a transcript of the 911 call and of her testimony from the first trial, the Guartos trial, to refresh her recollection. Ms. Sloan stated that she did not have time to look through everything Mr. Raybin gave her that morning. (Vol. XI, pp. 762-764).

Ms. Sloan testified that she remembers being at the Guartos trial, the first one. Ms. Sloan testified that she does not remember looking through the courtroom window. She says

"it didn't happen." (Vol. XI, pp. 764-765).

Ms. Sloan reviews pages 655 and 656 of the Gomez trial which was the second trial. Ms. Sloan testified that prior to the first trial she was made aware of fingerprint evidence. Ms. Sloan does not recall who made her aware of the fingerprint evidence. (Vol. XI, pp. 770-771).

Ms. Sloan testified that, as best she recalls, that morning of court of Guartos' trial she asked how long it was going to take and the response she was given was a couple of days or more. There were a lot of witnesses and the fingerprint people have been called. Ms. Sloan testified that it could have been her assumption that because she was told "fingerprint people" that there was fingerprint evidence. She does not believe anyone told her there was fingerprint evidence. (Vol. XI, p. 771).

Ms. Sloan agreed that the only person being tried at the first trial was Mr. Guartos. Ms. Sloan testified that she was "not sure who it was on" because by then she had already identified them, all of them, and she knew that all of them were involved, regardless of who was being tried that day. She stated that no one gave her the name of which it was on but she kind of assumed they were sort of all related. (Vol. XI, p. 772).

Ms. Sloan testified that she identified Mr. Guartos in a photo lineup at the police station maybe a year-and-a-half after the event. Ms. Sloan agreed that she told Detective Tarkington that the person she saw in the lineup was, in fact, one of the people in the robbery. (Vol. XI, p. 772).

(Witness shown Exhibit 6 - Photo Lineup)

Ms. Sloan testified that Exhibit 6 was familiar to her. (Vol. XI, p. 778). Ms. Sloan agreed that she signed that form, Exhibit 6, and identified Mr. Guartos in that photo lineup. (Vol. XI, p. 779-781).

Ms. Sloan testified that there was a place for her to sign where it said signature of person making identification, and that was all she was asked to do was to sign her name on that line after it was filled out. The detective wrote the words that she said and then signed it. The words were "number two looks familiar," "number three's face looks familiar but hair would be shorter," and "she continued to look at photo number two." (Vol. XI, p. 781).

Ms. Sloan agreed that on the other forms of the other individuals when she identified the other two men she had positive ID on them. (Vol. XI, pp. 781-782). Ms. Sloan testified that all she did was sign her name. She also stated that there were no names listed on the lineup when she signed them. She never saw the names until she came to court. She signed her name after she checked to make sure the words written were what she said. (Vol. XI, p. 782).

Ms. Sloan testified that she recalls when she used her cell phone at the mall that day to call the police. (Vol. XI, p. 784).

(The 911 tape is played in open court)

Ms. Sloan agrees that the voice on the tape is her voice. Ms. Sloan vaguely recalls the conversation.

(Exhibit 6, A and B entered into evidence)

Ms. Sloan testified that the police wanted to know the location of where she was so they could send the ambulance to a more specific spot and she tried to describe the route. (Vol. XI, p. 786).

Ms. Sloan is shown a photograph of Mr. Guartos which she states it looks familiar but she does not know for sure who it is. (Vol. XI, p. 800) [This photo was obtained by Mr. Raybin after the trial. It is a mug shot of Mr. Guartos taken on March 1, 1999].

(Photograph of Mr. Guartos is marked as Exhibit 7).

Ms. Sloan testified that she would not be surprised if she was told that was a picture of Mr. Guartos taken 14 days prior to the shooting. She stated that the picture looks familiar and that is what she was referring to from that day. She did not say it was Mr. Guartos because she did not know who he was or what his name was. (Vol. XI, p. 801).

Ms. Sloan testified that she is not sure if that man is the shooter but she believes she saw that man that day. (Vol. XI, p. 802).

Q. (Mr. Raybin) Ms. Sloan, I want to show you this photograph. Do you see that photograph?

A. (Ms. Sloan) I do.

Q. All right. Do you recognize the picture, the person in that photograph?

A. It looks familiar.

Q. All right. Do you know who it is?

A. I don't for sure.

Q. Ms. Sloan, if I told you that that was a picture of Mr. Guartos taken 14 days before this shooting, would that surprise you?

A. No, sir.

Q. Is that the person you saw at the mall?

A. That person looks familiar, that is what I was referring to from that day, yes.

Q. But you didn't say that that was Mr. Guartos; did you?

A. I didn't know who he was, what his name was.

Q. You know what my question was, Ms. Sloan, don't you? Is that the shooter? Is that the man that shot Mr. Rogers?

A. I'm not sure that is the shooter.

Q. Did you see that man that day?

A. Yes, I believe I saw that man that day.

Q. But you are not sure? Are you sure, Ms. Sloan - - Are you sure, Ms. Sloan? You said he looked familiar, but you didn't know who it was; did you?

A. By name?

Q. You know his name now, don't you, Ms. Sloan?

A. I do.

Q. You could have told me that was Mr. Guartos when you were testifying; couldn't you?

A. I'm sorry. I don't understand your question.

(Vol. XI, pp. 800-802)

[CROSS-EXAMINATION]

Ms. Sloan testified that on the day of trial the first opportunity she had to see Mr. Guartos was when she was sitting in court and Mr. Guartos was brought in and all the potential witnesses were introduced to the jury. (Vol. XI, p. 803).

[REDIRECT EXAMINATION]

Ms. Sloan testified that, as she recalls, the robbers at the mall were wearing oversized jackets with hoods but she does not recall if the hoods were on or not. She does not recall if the person she identified and believed to be Mr. Guartos had a hood on or not. She has no idea and does not remember. (Vol. XI, p. 805).

Ms. Sloan testified that the length of the person's hair might have been noticeable but not sure if it would have been memorable. (Vol. XI, p. 805).

(Witness shown Exhibit 6 - Lineup ID Form)

Ms. Sloan testified that in her comments on Exhibit 6 she said "number three's face looks familiar but hair would be shorter." When Ms. Sloan was asked if it was true that if you can see a person's hair, there would not be a hood on; she responded that it would depend on how long the hair was. Ms. Sloan testified that she is not sure if the person identified as Mr. Guartos had short hair or long hair at the robbery when she saw him. (Vol. XI, p. 806).

Ms. Sloan was told to see if anything looked familiar when looking at the photo lineups and she said number two looked familiar as having been there that day. Her degree

of certainty to number two was the same as the other two individuals she identified. (Vol. XI, pp. 806-807).

(Witness shown Exhibits 8 (Photo ID Form) and 10 (Lineup ID Form) Guartos Trial)

Ms. Sloan identified her signature on Exhibits 8 and 10 and where she identified the two other individuals. She stated that the words on the forms she did not write but she did say them that day and her signature is on the form. (Vol. XI, p. 809).

Ms. Sloan testified that the two forms she was just shown have her name and a number listed on them which shows a positive identification on the two individuals. On Mr. Guartos' form it just has comments on it. (Vol. XI, p. 809).

DETECTIVE NORRIS TARKINGTON

Detective Norris Tarkington testified in Mr. Guartos' trial and the second trial involving Mr. Gomez. (Vol. XI, p. 811).

(Witness shown Motion for New Trial and Amended Motion for New Trial)

Detective Tarkington testified that he created the document that says "action for the week of 7/12/99 through 7/16/99" which shows what Detective Tarkington did between those dates, roughly. (Vol. XI, p. 812).

Detective Tarkington testified that on the document it says "Debbie Sloan and another witness who was at the mall parking lot, stated he, Guartos, looked familiar and she continued to stare at the photo," which is dated 7/12/99 through 7/16/99. (Vol. XI, p. 813).

Detective Tarkington explained that the reason the date of the lineup was 7/29/99 and the date of his report that he turned into his supervisors was 7/12/99 through 7/16/99 was because nothing had changed over a period of time and he just did not change the date on his report when he turned it in. (Vol. XI, p. 814).

Detective Tarkington agreed that he showed Ms. Sloan a photo lineup on July 29, 1999. He was not sure if he knew that Mr. Guartos returned to Nashville in June of 2000. (Vol. XI, p. 814).

Detective Tarkington did not have a physical lineup of Mr. Guartos with Ms. Sloan. The reason was because they have a problem finding people within the Metro system who are willing to be in lineups. In the last year Detective Tarkington and his department have only conducted one lineup because they have difficulty because people are spread out over the city in different places. Detective Tarkington agreed that there are probably enough Hispanics but the problem is getting enough of them to do it. Detective Tarkington chose not to do a physical lineup and stuck with the photo lineup. (Vol. XI, p. 815).

Detective Tarkington testified that he remembers going to the jail in Miami to speak with Mr. Guartos. (Witness shown page 467 of Guartos Trial Transcript). Detective Tarkington agreed that he said he did not get a signed confession because he did not have a stenographer there with him and that he wrote out notes. Detective Tarkington wrote out his notes on a notepad that he carries with him. Detective Tarkington agreed that he came back to Nashville and typed up his report about his interview with Mr. Guartos. Detective Tarkington testified that once he reduced his notes to typewritten form then he probably

trashed his notes. That has been his practice from day one and there is no written rule that says he has to keep them once he completes his report. His notes should be about the same as the report and should be pretty much what Mr. Guartos said. (Vol. XI, pp. 817-818).

Detective Tarkington was asked about his testimony at trial about how long he interviewed Mr. Guartos and he stated four, maybe five hours. Detective Tarkington remembers being asked that question but does not remember how many hours he interviewed Mr. Guartos. (Vol. XI, p. 817).

Detective Tarkington recalls Mr. Raybin coming to his office and getting copies of the photographs that he used in this case for the lineup. Detective Tarkington gave Mr. Raybin copies of pictures that he had gotten from Florida for the photo lineup for Ms. Sloan. Detective Tarkington acquired these pictures from one of his trips to Miami but was not sure which one. (Vol. XI, p. 821).

Detective Tarkington testified that the date on the photographs is 5/26 at 10:08 a.m. and 5/26/99 at 10:06 a.m. which reflects when he received the pictures from Miami. There is also a computer name of some sort, Endoro (spelled phonetically) in the top corner. He stated that this indicates these pictures were transmitted to him by computer. (Vol. XI, p. 822). (Photographs marked as Exhibit 8, A and B).

Detective Tarkington testified that he was not aware that there was a more recent photograph of Mr. Guartos. Detective Tarkington is pretty sure that the photographs he was just shown was one of the pictures used in the photo lineup. (Vol. XI, p. 823).

Detective Tarkington testified that when he was down in Miami talking to Mr. Guartos that he did not give him his *Miranda* rights. (Vol. XI, p. 823).

Detective Tarkington is shown two documents which he identified as the movement sheets of the prisoners in Miami when they were checked out of the jail. Detective Tarkington's name appears on the sheet spelled "Tankerton." Detective Haney's name is also on the sheet spelled "Hauney." The other two officers whose names appear on the sheet are Detective Dan Capote of the Miami Auto Theft Unit, and Dan Mensker, the INS Officer. Detective Tarkington stated that these three officers, including himself, interviewed Mr. Guartos on 3/15. Mr. Guartos' was being held under the name of Hector Deleon (spelled phonetically). (Vol. XI, pp. 825-826).

Detective Tarkington is shown the "movement sheet" where it shows that Mr. Guartos was taken out of his cell at a certain time and brought back to his cell at a certain time, which is approximately two hours and ten minutes. (Vol. XI, p. 827). Detective Tarkington agreed that this interview could have lasted at most two hours. (Vol. XI, pp. 827-828).

(Movement Sheet marked as Exhibit 9)

Detective Tarkington is shown two copies of one of his police reports which appear to be the same report except one of them is signed and one is not. Detective Tarkington explained that he sometimes goes back and proofreads his reports and makes changes if there are any grammatical errors. (Vol. XI, p. 829). At this point he is just proofreading the report and not comparing it to his notes because he has already discarded his notes. (Vol. XI, p. 830).

(Witness shown Mr. Guartos' statement to the detective, p. 136)

Detective Tarkington is shown the statement where it says on 3/16, "Detective Haney and myself met with Special Agent Alexis Carpendy at her office to meet Dan Capote and get Maria Charry out of jail to interview her." Detective Tarkington explained that the person he actually interviewed was not Maria Charry, who is the defendant's mother, but was Gabriella who gave several different names. (Vol. XI, p. 830).

Detective Tarkington is not sure if the date on the statement is correct and he does not know if he interviewed Gabriella before he interviewed Mr. Guartos. (Vol. XI, p. 831).

Detective Tarkington testified at trial that he interviewed Mr. Guartos late and that they all caught a plane back to Nashville after they interviewed Mr. Guartos. However, Detective Tarkington now does not believe they caught a plane back that night. He believes they may have interviewed Gabriella the next day. (Vol. XI, pp. 831-832).

Detective Tarkington is shown a document which he identified as a letter that they use to try and contact people with after they have tried making phone calls to them and had no response. The letter is addressed to Barbara Franklin. (Vol. XI, p. 836). Detective Tarkington believes, based on the date of the letter, that it was when he was trying to meet with her to show her a lineup. (Vol. XI, p. 837) [He never did have any lineup].

(Letter entered as Exhibit 10)

Detective Tarkington is shown a statement from his supplemental report from when he and Detective Jenette went down to Miami to bring Mr. Guartos back. It also relates that on 6/26/2000 that he spoke with Mr. Guartos in his office. Detective Tarkington agreed that

this document somewhat links to a meeting that he had with Mr. Guartos in the police department here in Nashville. (Vol. XI, pp. 838-839).

(Statement introduced as Exhibit 11).

[CROSS-EXAMINATION]

Referring to the report for the week of 7/12 through 7/16, Detective Tarkington testified that the actual date he generated the report was August 12, 1999. He agreed that there was also other information in the report that did not occur during that week. For example, Dorothy Drake was shown the photo lineup on 8/11/99 and he had a conversation with Mr. Gomez' attorney on 8/11. (Vol. XI, pp. 841-842).

Detective Tarkington agreed that his report was dated August 12, 1999, which would have been after the 7/29/99 showing of the photo lineup to Ms. Sloan. (Vol. XI, p. 843).

Detective Tarkington agreed that as this case was going on and as people were arrested, the police department was still very interested in other suspects who might have been involved in the planning of this crime. Detective Tarkington was taking every opportunity he had to see if there might be somebody that could give more information so other suspects could be arrested. He agreed that Mr. Guartos did not want to tell him anything more than what he had told him down in Miami when he got to Nashville. (Vol. XI, pp. 843-844).

Detective Tarkington does not recall if he talked to General Gunn about statements Mr. Guartos made after he got back. He may have but he does not remember. Detective Tarkington says if he told General Gunn anything it would be whatever was written in the

report. He said Mr. Guartos was afraid to testify to anything. When Detective Tarkington brought Mr. Guartos to his office to read him his rights and, before they got started he did not want to talk so he was taken back to the jail. (Vol. XI, pp. 844-845).

MICHAEL COLAVECCHIO

Michael Colavecchio was Mr. Guartos' original lawyer. He testified that he was not aware of the second statement Mr. Guartos made to Detective Tarkington that was in his short report until Mr. Raybin brought it to his attention. (Vol. XI, p. 846).

Mr. Colavecchio was also not aware of the 1999 mug shot of Mr. Guartos which Ms. Sloan looked at and is now in the record until Mr. Raybin showed him as part of his motion. Mr. Colavecchio explained that he did not have time to acquire that mug shot because he was only on the case six or so weeks prior to when the trial started. (Vol. XI, 846-847).

Mr. Colavecchio also did not have the movement sheets where Mr. Guartos was in jail and moved around for some less than two hours. In reviewing the discovery that he did get from the court file and in talking to Mr. Guartos, the issue of the amount of time did not seem to occur to Mr. Colavecchio that it might have been more than what the detective had said so he did not look into that issue. The detective did not testify to the length of it until the trial itself. (Vol. XI, pp. 847-848).

Mr. Colavecchio testified that he was under severe time constraints to obtain discovery in this case. He had to get discovery from the court file or from the Public Defender. Mr. Colavecchio did not file a motion to continue because the judge told him

verbally that the case was going to be tried on the day it was set so he felt he did not have an option and had to get ready for the trial. (Vol. XI, pp. 848-849).

Mr. Colavecchio did listen to the 911 tape where Ms. Sloan's voice appears which was played in the courtroom. Ms. Sloan's voice does not appear anywhere else on the tape and it cut off during the middle of it. (Vol. XI, p. 849).

The government provided Mr. Colavecchio with a tape recording of Ms. Franklin and Ms. Hudson's interview. He also recalls that he was provided a video tape of Mr. Nagele's interview. Mr. Colavecchio never played Mr. Nagele's tape, Ms. Hudson's tape nor Ms. Franklin's tape for Mr. Guartos. This was due to the time constraints. Mr. Colavecchio was conducting a trial in another county and it took about two or three days and he had a few days to get ready for this case so he was kind of stuck in the middle doing some work on that trial and trying to get ready for Mr. Guartos' trial. (Vol. XI, pp. 850-851).

Mr. Colavecchio was aware that there were some identification issues in this case. Mr. Colavecchio testified that there was no one who could positively identify Mr. Guartos as being at the scene. From his recollection no one could identify Mr. Guartos at the shooting. (Vol. XI, p. 851).

Mr. Colavecchio testified that there were some people who could identify Mr. Guartos in the mall the day before in the store and at the hotel, but at the shooting there was not any positive degree of identification. (Vol. XI, pp. 851-852).

Mr. Colavecchio was not aware that Ms. Sloan had been asked prior to the trial if anyone looked familiar to her. He was not aware of the situation that happened in the courtroom. (Vol. XI, p. 852).

Mr. Colavecchio did not ask for any physical lineups in this case because again of the time constraints. Had Mr. Colavecchio had the mug shot that was introduced previously he would have used it to cross-examine Ms. Sloan. This would have created a situation where Mr. Guartos looked different, and obviously the jury would have needed to see that. (Vol. XI, pp. 852-853).

(Witness is shown Amended Motion for New Trial, p. 131).

(Exhibit 12 and 13 introduced - Police Report and Escort Service Information)

Mr. Colavecchio recalls that when Mr. Guartos was testifying about making phone calls that he was trying to call escort services and women. Mr. Colavecchio confirms that the police report substantiates that fact. Mr. Colavecchio testified that had he had that report he could have cross-examined the detective about that fact. (Vol. XI, pp. 855-856).

Mr. Colavecchio is shown a newspaper article that was written a few days after or possibly the next day after the shooting about the shooting and the watches, which is page 237 of Mr. Raybin's attachments. The article references Ms. Sloan. The first time Mr. Colavecchio saw this was in Mr. Raybin's motion. He did not see this prior to the trial. Had he seen it prior to trial he would have cross-examined Ms. Sloan about the statements she made in the article. (Vol. XI, pp. 858-859).

(Newspaper article admitted as Exhibit 14)

[CROSS-EXAMINATION BY THE COURT]

Mr. Colavecchio agreed with the Court that he was told that the case would not be continued and he would not be allowed to intervene in the case unless he was not only available but prepared to go to trial. Mr. Colavecchio felt like he was prepared to go to trial. (Vol. XI, pp. 860-861).

Mr. Colavecchio agreed that he did not file a motion with regards to the identification nor did he try to suppress the statement. He was not sure why at this point but was sure there were reasons at the time. It may have been a tactical reason. (Vol. XI, p. 861).

Mr. Colavecchio did file a motion about getting Jencks material and there were some motions in limine. Mr. Colavecchio believes that General Gunn gave him the Jencks material and tapes prior to trial and that he had adequate time to review those prior to trial. (Vol. XI, pp. 861-862).

Regarding the escort services report the woman who runs the escort service , in Mr. Colavecchio's opinion, might not be so forward to provide the truth to police officers. He believes she may have been more truthful had she talked to an investigator or someone else and he would have been interested in hearing that information. However, Mr. Colavecchio did not hire an investigator. (Vol. XI, pp. 862-863).

[REDIRECT]

Mr. Colavecchio was not aware that the police officer had destroyed his notes prior to Mr. Guartos' trial. Had he known that Mr. Colavecchio would have asked them to provide

or recreate the notes. This could have formed the basis of motions and further cross-examination. (Vol. XI, pp. 864-865).

BRYANT GUARTOS

(Witness shown Exhibit 7 - Mug Shot)

Mr. Guartos identified the mug shot picture as him when he was arrested in Miami, Dade County, for domestic violence on March 1, 1999. (Vol. XI, pp. 866-867).

Mr. Guartos testified that he did not tell Mr. Colavecchio about this mug shot picture because Mr. Colavecchio said no one could identify him since he was not at the mall when that shooting happened. (Vol. XI, p. 868).

When Ms. Sloan identified Mr. Guartos in the courtroom that was the first time he had heard about that and that is why he did not bring it up to Mr. Colavecchio prior to the hearing. (Vol. XI, p. 868).

When Mr. Guartos was arrested in Nashville (witness handed a picture) in 2000, his hair was long but short on the sides. His hair was longer at the trial than it was in the picture. Mr. Guartos' hair in the mug shot from 1999 is short. (Vol. XI, pp. 869-870).

(Witness shown Exhibit 36A from Mr. Guartos' domestic violence trial)

Mr. Guartos compared the number at the top of the complaint arrest affidavit with that of the mug shot. The number on the mug shot is 990017964. The number on the top of the exhibit that is already in evidence is 17964. And this is March 1, 1999. (Vol., XI p. 870).

When Mr. Guartos was in jail in the year 2000 under the name of Hector Deleon his lawyer was Kenneth Wiseman. (Vol. XI, p. 871).

(Witness shown extradition documents)

The extradition documents shown where Mr. Guartos was arrested in Florida and brought back to Tennessee. Mr. Guartos was arrested in Florida on February 25, 2000 and his mug shot was taken. (Vol. XI, p. 873).

(Witness shown mug shot from 2000)

(Extradition papers entered as Exhibit 15 and mug shot entered as Exhibit 16)

Mr. Guartos testified that Kenneth Wiseman has been his lawyer since 1994. Mr. Wiseman represented Mr. Guartos on three different cases. (Vol. XI, p. 874).

Mr. Guartos recalls that in March of 1999, while he was in Florida, Detectives Tarkington, Haney, Capote and Mensker came to interview him. (Vol. XI, p. 874).

Mr. Guartos was taken out of his cell he thought he was being taken to see his lawyer. Mr. Guartos has met with Mr. Wiseman in jail before. (Vol. XI, p. 875).

Mr. Guartos recalls that once he got "boxed in" in the interrogation room and he could not come out, he requested his lawyer as soon as they identified themselves. They did not give Mr. Guartos *Miranda* rights. According to the movement sheets, Mr. Guartos believes that they are correct in that he was in the interrogation room for about two hours and ten minutes. (Vol. XI, p. 876).

Mr. Guartos testified that he did not make the statements that Detective Tarkington said he did when he testified. He did not make those statements. (Vol. XI, p. 876).

When Mr. Guartos got back to Nashville, Detective Tarkington got him out of the jail and interviewed him some more. He did not give Mr. Guartos *Miranda* rights. Mr. Guartos also asked for a lawyer. (Vol. XI, p. 876). Detective Tarkington asked Mr. Guartos to relate to him what happened here in Nashville and Mr. Guartos told him he cannot talk to him because he did not have his lawyer. At that minute Detective Tarkington took Mr. Guartos back to his cell and gave him his card. (Vol. XI, p. 877).

(Detective Tarkington's card entered as Exhibit 17)

Mr. Guartos testified that at the present time his hair is short, military style. Mr. Raybin asked Mr. Guartos to cut his hair to that length so he looked the same as he did in the 1999 mug shot. This is the way Mr. Guartos' hair normally is worn. (Vol. XI, pp. 877-878)

Mr. Guartos is shown his resident alien card which has a picture on it. The date of the card is 1997. Mr. Guartos' hair in this picture is similar to the way it is now, short. The same way as in the 1999 mug shot. (Vol. XI, p. 878).

(Resident Alien Card entered as Exhibit 18)

Mr. Guartos testified that the picture that was used in his lineup was taken when he was arrested in Coral Gables in 1995 or 1996. This is the photo that the police used here in Nashville with Ms. Sloan and other people. (Vol. XI, pp. 879-880).

(1995 Mug Shot entered as Exhibit 19)

Regarding the escort service document, Mr. Guartos testified that his fingerprints were in Room 204 on the yellow pages because he went inside and called for an escort service or to look for a stip club. Mr. Guartos testified that he used the telephone book for that purpose

and that the police reports show that a call was made to the escort service. (Vol. XI, pp. 881-882).

Mr. Guartos testified that he never heard the tape recording of Mr. Nagele until Mr. Raybin provided it to him. There was a long videotape and a short one. Mr. Colavecchio did not play either one for him. (Vol. XI, p. 882).

Mr. Guartos did not hear the tape of Ms. Hudson or Ms. Franklin until Mr. Raybin provided them to him. (Vol. XI, p. 884).

Mr. Guartos testified that when he was being questioned by Detective Tarkington and Haney that they were writing something down on paper. Mr. Guartos has never seen what they have written. (Vol. XI, p. 887).

(Referring to Exhibit 8A)

District Attorney Bret Gunn had previously shown Mr. Guartos a picture and asked him if it was Maria Charry. Mr. Guartos told him that it was not Maria Charry. Maria Charry is Mr. Guartos' mother. The woman in the picture is Gabriella Seraja. (Vol. XI, p. 888).

[CROSS-EXAMINATION]

Mr. Guartos recalled that a deposition was taken a few weeks before his trial where Ms. Drake testified. Mr. Guartos stated she picked him out of a photo lineup but in court she could not identify him. (Vol. XI, p.889). Mr. Guartos stated that she may have testified it at the deposition but his lawyer did not advise him. He did not know at that time that he was

going to be sitting in the courtroom and being identified by a witness that was going to be out of court because of surgery. (Vol. XI, p. 890).

Mr. Guartos agreed that he heard at the trial Ms. Sloan identify him as one of the people at the mall. (Vol. XI, p. 890).

Mr. Guartos agreed that Officer Kaufman from Miami, who was the arresting officer on his domestic violence case, was not asked by Mr. Guartos' attorney at trial what Mr. Guartos' hairstyle was like the day he was arrested. (Vol. XI, p. 891).

DETECTIVE HAROLD HANEY

Detective Haney recalls going to Florida to interview Mr. Guartos. Detective Haney had a pad of paper to write on when he went down to Florida. Detective Haney recalled that he testified at the Guartos trial that the interview lasted three-and-a-half to four hours. Detective Haney agreed that the interview could have only lasted two hours. (Vol. XII, p. 899).

Detective Haney agreed that he was taking notes on a note pad while interviewing Mr. Guartos in Florida. He does not think it was a lot, maybe one or two pages at most. A lot of his notes was just scribbling names down and things like that. (Vol. XII, p. 900).

Detective Haney still had the notes with him when he went back to Nashville. Detective Haney looked at his notes and compared them to the supplement that Detective Tarkington had prepared and basically the notes were very similar to what he had already typed up. Detective Haney then discarded his notes. (Vol. XII, pp. 900-901).

Detective Haney testified that the notes were probably discarded sometime after the trial. However, Detective Haney did not have his notes with him at the trial. (Vol. XII, p. 901).

(Witness shown transcript, pages 447, 449, 453, and 454)

Detective Haney testified that he probably had his notes back at his office in one of the files and that he just did not have them with him. (Vol. XII, pp. 901-903).

Detective Haney testified that he was referring to the supplement that Detective Tarkington had while he was on the witness stand. Detective Haney agreed that at some point between the trial and when Mr. Raybin interviewed him at the police station, months or two or maybe a year or so later, he destroyed his notes. (Vol. XII, p. 903).

Detective Haney testified that he destroyed his notes because they were very similar to the supplement that Detective Tarkington had typed up and there was nothing that he could have added or taken away from it. (Vol. XII, p. 903).

Detective Haney believes that the file in this case is the kind that is kept in binders but since he is not the lead detective on this case he is not sure. (Vol. XII, pp. 903-904).

Detective Haney testified that the file for this case is rather large and voluminous. He also stated that the only thing that would have been destroyed were his personal notes and that is it. (Vol. XII, p. 904).

Detective Haney agreed that there was no recording of any of the interviews with Mr. Guartos. He agreed that there was no videotape, no shorthand, no memorandums, nothing except his recollection and his notes which he destroyed. (Vol. XII, pp. 904-905).

Detective Haney agreed that the trial transcript at [what is now] page 443 references him looking at his notes while testifying. However, Detective Haney's recollection is that he did not take his notes up to the stand. Detective Haney stated that he would not have brought his notes up to the stand because he would put his notes into the supplement that is already typed up and then would destroy his notes. (Vol. XII, pp. 905-906). Detective Haney does not recall telling the District Attorney at any time that he destroyed his notes. (Vol. XII, p. 907).

Detective Haney agreed that if there was some dispute later and his notes are gone that there would be no way to compare the typed up report with his notes. (Vol. XII, p. 906).

Detective Haney cannot recall if he was in the courtroom when Mr. Guartos testified. (Vol. XII, p. 906).

Detective Haney does recall one of the pieces of evidence in the case being a fingerprint that was taken off a phone book. During his investigation he recalls interviewing some of the escort services and spoke with a lady at the escort service. He recalls that there was a call to the escort service but not girls were sent out. (Vol. XII, pp. 906-907).

[CROSS-EXAMINATION]

Detective Haney testified that when he went to Miami and saw Mr. Guartos he did not have on a watch and took off everything he had except his car keys and a note pad and pen. There was not a clock in the cell. Detective Haney recalls that he was handed a supplement which he referred to while on the witness stand to refresh his recollection. (Vol. XII, pp. 907-908).

Detective Haney used documents from the file to refresh his recollection. He also did not prepare any supplement with respect to his meeting with Mr. Guartos. Detective Haney does not recall being asked or volunteering any information about where his notes were or if they existed. (Vol. XII, p. 909).

[QUESTIONS BY THE COURT]

Detective Haney does not recall talking to Mr. Colavecchio prior to trial. He just vaguely remembers him representing Mr. Guartos. (Vol. XII, p. 910).

Detective Haney testified that the phone numbers from the escort service were requested by subpoena from Howard Johnson checking on the phone numbers that were coming into those room numbers. Detective Haney recalls that the number was an outgoing call in one of the two rooms and it came back listed to an escort service. Detective Haney just followed up to see where this place was and actually went out there and talked to the people. There were no detailed records but no one was sent out. (Vol. XII, pp. 910-911).

Detective Haney recalls that the escort service was a pretty small place on Lafayette Street, like a little hole-in-the-wall place. He does not think the escort service had any recollection of anything but said no one was sent out to that address. (Vol. p. 912).

[REDIRECT EXAMINATION]

Detective Haney agreed that, depending on what side you are on, an escort service is a euphemism for potentially a prostitution outfit. He also agreed that an escort service would probably not be so forthcoming about whether a girl went out or not. (Vol. XII, p. 912).

Detective Haney testified that the phone number for the escort service came from one of the two rooms but is not sure which without looking at the phone records. He agreed that escort services tend to advertise in phone books. (Vol. XII, p. 913).

(Discovery Responses entered as Collective Exhibit 20)

GENERAL BRET GUNN
(By the State)

Bret Gunn is the Assistant District Attorney and has been for about seven years with the Davidson County District Attorney's office. (Vol. XII, p. 915).

General Gunn, along with General Moore, was assigned to prosecute Mr. Guartos in case number 2000-B-170. General Gunn had the primary responsibility in dealing with defense attorneys as far as providing discovery and obtaining various documents and evidence that was ultimately used in Mr. Guartos' trial. (Vol. XII, p. 916).

(Witness shown State's Response to Defendant's Motion for New Trial - Exhibit 21)

General Gunn testified that he disclosed all of the descriptions in the various discovery responses of potential suspects. General Gunn disclosed every bit of the descriptions that they gave be they vague, general or specific. If it referenced a potential suspect it was included in one response or another, or anyone that could have been construed as a suspect was turned over. (Vol. XII, p. 918).

General Gunn testified that he had never seen the Miami arrest photo of Mr. Guartos prior to Mr. Raybin attaching it as an exhibit to his motion for new trial. (Vol. XII, p. 918).

General Gunn has never heard anymore of the 911 tape that was played in court where it abruptly cuts off Ms. Sloan's call. No one else who has requested the tape has ever gotten anymore of that tape to his knowledge. (Vol. XII, p. 919).

With respect to the testimony about the detectives and their destroyed notes, General Gunn does not recall any discussion about whether they had any written notes, it never came up. General Gunn testified that because of all the cases he has had that it appears to be that the police officers, once they write a report or their partner writes a report and the conclude what it is in the report and they conclude that what is in the report accurately reflects their notes, they throw them away. So in this case, as in most of them, it never comes up, so he never asks about it. (Vol. XII, p. 920).

General Gunn did not know, until Detective Haney just testified, about his notes either being in existence or not in existence or anything. He did not tell Detective Haney to destroy his notes or ask him if they even existed. (Vol. XII, p. 920).

General Gunn testified that the first time he recalls seeing Detective Tarkington's report concerning the attempt to interview Mr. Guartos after he was extradited was in Mr. Raybin's motion for new trial. General Gunn was not aware that Detective Tarkington had even gone to see Mr. Guartos. He does recall, however, at some point Detective Tarkington telling him that he might have tried to talk to somebody, but they would not talk. General Gunn does not know which defendant it was that would not talk. General Gunn never had any discussions with Detective Tarkington where he told him anybody said anything to him when they were brought back to Nashville. (Vol. XII, p. 921).

General Gunn testified that the initial files were brought to his office in preparation for the indictment and that was all the paperwork that had been generated to that point. Since Mr. Guartos had to be extradited, this report that he saw would not have been in the file that his office was initially given. The only way General Gunn would have ever had that report would be if Detective Tarkington had sent it to him or if he knew to ask for it or something. (Vol. XII, pp. 921-922).

General Gunn does not have any recollection one way or the other of anything coming up volunteered by Detective Tarkington that he talked to Mr. Guartos on another occasion. General Gunn probably would have used that statement if he had known that it existed because it corroborates what was said down in Florida and give an explanation as to why Mr. Guartos would not be forthcoming here and might say something different than he did down in Florida. General Gunn would have used it had he known it existed. (Vol. XII, p. 922).

General Gunn testified that had he known the statement existed he would have made defense counsel aware of it. He would have provided it in discovery as soon as he knew about it and probably would have used it. (Vol. XII, p. 923).

General Gunn testified that he never questioned Ms. Sloan about her vehicle's tinted windows. It was not in any of the reports and he did not know anything about it. There was never any indication that she was not able to see out of her vehicle. (Vol. XII, p. 923).

General Gunn explained that the microcassette which contained Officer Finchum's short interview with Mr. Nagle was not initially turned over because when he requested from the property room a copy of all of the tape recorded materials associated with this case they

did not copy this tape because they do not have the capability of copying microcassettes. The property room did not disclose this to General Gunn. After the second trial General Gunn was sorting through everything and he saw the microcassette that contained this short interview which he had never seen before and did not know it existed. That is why the microcassette tape was not turned over to the defense. (Vol. XII, pp. 924-925).

After General Gunn obtained the microcassette he listened to the interview. Had he known the tape existed there would have been no reason why he would not have provided it to the defense. (Vol. XII, p. 926).

General Gunn testified that the phone records in this case were voluminous and they were included in the discovery. These records were contained in the printouts from Howard Johnson that pertained to the two specific rooms. General Gunn thinks there were two local calls, outgoing calls, from these two rooms, and the number to the escort service was provided. (Vol. XII, p. 926).

General Gunn did not believe Mr. Guartos was being untruthful about calling the escort service and that he did not see how that really mattered. (Vol. XII, p. 927).

[CROSS EXAMINATION]

(Witness shown Trial Exhibits 2A and 2B - Photographs)

General Gunn does not recall that Mr. Nagele introduced these exhibits during his testimony at trial. General Gunn does not recall asking Mr. Nagele to mark where he was when he was knocked down. General Gunn does not recall which witness he got these

exhibits in with but it sounds logical that they came from Mr. Nagele and that he would have asked him questions about them. (Vol. XII, pp. 927-928).

(Witness shown Exhibit 13 - Escort Service Report)

General Gunn agreed that he had not shown Mr. Colavecchio Exhibit 13. (Vol. XII, p.929).

General Gunn believes he did tell Mr. Raybin that if he wanted any photographs that were not developed or not disclosed that he could get them from the I.D. section. General Gunn is shown a picture that he does not know if he has looked at it before but believes it is taken from the parking garage in the Green Hills Mall. General Gunn cannot identify Ms. Sloan's vehicle from the picture because he does not know what it looks like. General Gunn states that all the pictures were available for the defense attorney if he wanted them. (Vol. XII, pp. 930-931).

General Gunn agreed that it was his intention to ask Ms. Sloan if she could identify Mr. Guartos as one of the robbers. General Gunn would imagine that either he or General Moore or Ms. Jones, the victim witness person, after everybody was introduced to the jury and everybody was in open court, that when they were excused, that he or somebody would have asked Ms. Sloan if she was able to recognize anybody from the day of the incident. (Vol. XII, pp. 933-934).

General Gunn did hear Ms. Sloan testify earlier [in the Gomez trial and in the motion for new trial hearing] that somebody did ask her before Mr. Guartos' trial if she recognized anyone. General Gunn did not disclose this to the defense prior to her actually testifying that

that inquiry had been made. General Gunn also agreed that when the trial started and Mr. Guartos was in the courtroom and Ms. Sloan and some of the other eyewitnesses were in the courtroom and were identified that Mr. Guartos was identified as being Mr. Guartos, the defendant. (Vol. XII, p. 934).

(Witness shown pages 128 and 129, attachments to Mr. Raybin's Affidavit)

General Gunn agreed that he has seen pages 128 and 129 of Mr. Raybin's Affidavit before. General Gunn believes they would have been disclosed to Mr. Colavecchio prior to the trial because he went through and tried to disclose every description that anybody gave anybody. They may not have been in full because of the potentially exculpatory part would be a description of people. But without sitting down with the discovery response and looking through it and saying this is in there in its entirety or it is in there in part, he cannot answer that. (Vol. XII, pp. 936-937).

General Gunn agreed that these two pieces of paper could be physically compared with what is already in the record to determine whether they were disclosed or not. (Vol. XII, p. 937).

(Documents mentioned above were entered as Collective Exhibit 22)

General Gunn agreed that the transcript of the microcassette was accurate. (Vol. XII, p. 939). General Gunn did not know what he said that was not important but it seemed to him, after listening to the tape, that it did not contain much, if any, additional information that was not on the extensive videotape statement or the written statement that Mr. Nagele had given. (Vol. XII, p. 940).

In the transcription of the microcassette tape Mr. Nagele says, "He had a hood on." General Gunn does not remember if he said that but he recalls that Mr. Nagele was not able to give much of a description of anybody. General Gunn does not believe that it would be an important point whether there was a hood or not. (Vol. XII, p. 940).

General Gunn testified that he never requested the notes from the officers. General Gunn was aware that there was no tape recordings of any sort of the "so-called confession." General Gunn agrees that the "contemporaneous" notes would be corroborative of a conversation. (Vol. XII, p.941).

General Gunn testified that he does not think he has ever had a case where an officer has kept his notes or had notes after they made a report or after their partner made a report. (Vol. XII, p.942).

[QUESTION BY THE COURT]

General Gunn testified that the phone number of the escort service was on the list of numbers from the Howard Johnson and was made available to Mr. Colavecchio. (Vol. XII, p. 943).

DEBORAH SLOAN
(Rebuttal Examination by Defense)

Ms. Sloan identified her vehicle in two of the photographs shown to her. Ms. Sloan testified that her vehicle has tinted windows. (Vol. XII, p. 945).

(Photographs were marked as Collective Exhibit 23).

(Exhibit 24 - Tape of Mr. Nagele's Interview).

REASONS FOR GRANTING REVIEW

I. THE EVIDENCE FAILS TO SUPPORT THE VERDICT THAT MR. GUARTOS WAS GUILTY OF ANY OF THESE CHARGES.

There is no question in this case that there was a robbery and that Mr. Rogers was shot and killed. The trial judge, in her report as to the data concerning the trial of the offense, stated:

> On March 17, 1999, at the Green Hills Mall, security guards were moving Rolex watches valued at approximately $700,000.00. They were ambushed by three-four male Hispanics. One guard was shot and killed during the robbery. The defendant, Bryant Guartos, was one of the male Hispanics. (Vol. V, p. 1059).

The State will undoubtedly point to two pieces of evidence which allegedly implicate Mr. Guartos in this robbery and killing. The first alleged piece of evidence is a statement Mr. Guartos made to Detective Tarkington where Mr. Guartos allegedly said that he had been a block-and-a-half from the scene of the robbery. (Vol. IX, p. 474). Secondly, the State produced the testimony of Ms. Sloan who was an eyewitness to the robbery and shooting. Ms. Sloan identified Mr. Guartos as being one of the men that left the scene in the van and that he was the one who picked up the pistol which the security guard, Mr. Nagele, dropped on the ground. (Vol. VII, pp. 187-188).

When shown a photo lineup, Ms. Sloan allegedly identified the person in the photograph number two as Bryant Guartos. (Vol. VII, p. 193). As will be noted later, Mr. Guartos was pointed out to her in court prior to her in-court identification.

Ms. Sloan's identification was virtually useless given that she had originally identified the robbers as three black men! (Vol. VII, p. 201). Of course, as this Court will also resolve later, following the trial the defense produced a contemporaneous mug shot of Mr. Guartos taken just two weeks prior to the robbery and Ms. Sloan was unable to positively identify Mr. Guartos.

Given the extremely meager evidence surrounding the State's proof it should be obvious to anyone that the case was established, at best, by circumstantial evidence. There was not one shred of actual proof that Mr. Guartos robbed or shot anybody.

It is true that a conviction may be based upon circumstantial evidence. *State v. Tharpe*, 726 S.W.2d 896 (Tenn.1987). In reviewing a conviction based upon circumstantial evidence the Court must look to determine if the circumstantial evidence is sufficient for a finding of guilt beyond a reasonable doubt. Initially, Mr. Guartos insists that the evidence is legally insufficient because it merely establishes the presence of Mr. Guartos at the scene of the crime. Mr. Guartos contends that the trial court should have granted the motion for a judgment of acquittal. A person may be found criminally responsible for the conduct of another if "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." Tenn.Code Ann. § 39-11-402(2).

Here, Mr. Guartos moved for a judgment of acquittal. The standard by which the trial court determines a motion for judgment of acquittal is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction. That is,

"whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Tenn.R.App.P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Obviously, the trial court concluded that the standard had been satisfied and later, after the entry of the verdict, refused to grant an acquittal.

On appeal, of course, the State is entitled to the strongest legitimate view of the evidence, and all reasonable inferences which may be drawn therefrom. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn.1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn.Crim.App.1978). A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the state and resolves all conflicts in the proof in favor of the State's theory. *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn.1978).

An offense may be proven by circumstantial evidence alone. *Price v. State*, 589 S.W.2d 929, 931 (Tenn.Crim.App.1979). The scope of review on appeal is the same when the conviction is based upon circumstantial evidence as it is when it is based upon direct evidence. *State v. Brown*, 551 S.W.2d 329, 331 (Tenn.1977); *Farmer v. State*, 208 Tenn. 75, 343 S.W.2d 895, 897 (1961).

In convictions such as those here, where the evidence is entirely circumstantial, the jury must find that the proof is not only consistent with the guilt of the accused but inconsistent with his innocence. There must be an evidentiary basis upon which the jury can

exclude every other reasonable theory or hypothesis except that of guilt. *Pruitt v. State*, 3 Tenn.Crim.App. 256, 460 S.W.2d 385, 390 (1970). Like all other fact questions, the determination of whether all reasonable theories or hypotheses are excluded by the evidence is primarily a jury question. *Marable v. State*, 203 Tenn. 440, 313 S.W.2d 451, 457 (1958); *State v. Tharpe*, 726 S.W.2d 896 (1987).

The jury is governed by four rules when testing the value of circumstantial evidence: (1) the evidence should be acted upon with caution; (2) all of the essential facts must be consistent with the hypothesis of guilt; (3) the facts must exclude every other reasonable theory except that of guilt; and (4) the facts must establish such a certainty of guilt as to convince beyond a reasonable doubt that the defendant is the perpetrator of the crime. *Marable*, 313 S.W.2d at 456.

Even when the scope of review is so limited, however, there is precedent for overturning verdicts which are not supported by sufficient circumstances:

> In order to convict on circumstantial evidence alone, the facts and circumstances must be so closely interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone. A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt....
> ..... We cannot speculate a defendant into the penitentiary or permit a jury to do so.

State v. Crawford, 225 Tenn. 478, 470 S.W.2d 610, 613 (1971).

The cumulative evidence indicated the probable guilt of the defendant as to the robbery. Probable guilt, however, is <u>not</u> enough. *State v. Knight*, 969 S.W.2d 939, 942

(Tenn.Crim.App.1997). There is no evidence that Mr. Guartos ever knowingly robbed or killed anyone. There was no direct evidence of his participation in a plan or a scheme.

Even under the theory of criminal responsibility for the acts of another, mere presence during the commission of the crime is not enough to convict. See *Flippen v. State*, 211 Tenn. 507, 365 S.W.2d 895, 899 (1963); *Anglin v. State*, 553 S.W.2d 616, 619 (Tenn.Crim.App.1977). Presence and companionship with the perpetrator of a felony before and after the commission of the offense are circumstances from which one's participation in the crime may be inferred. No particular act need be shown. It is not necessary for one to take a physical part in the crime. Mere encouragement of the principal is sufficient. *State v. McBee*, 644 S.W.2d 425, 428 (Tenn.Crim.App.1982).

In order to be guilty of the crime, however, one must intentionally promote or assist in the offense. *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn.Crim.App.1994). While Mr. Guartos allegedly made some statements that he was near the offense, while incriminating, is not necessarily assistance in or encouragement of the crime. The evidence was insufficient to show a shared, preconceived intent to commit the robbery and killing. Thus the convictions should be reversed and dismissed.

II. MR. GUARTOS SHOULD BE GRANTED A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE CONSISTING OF PHOTOGRAPHS AND MUG SHOTS TAKEN CONTEMPORANEOUS WITH THE CRIMINAL OFFENSE.

The shooting of Mr. Rogers occurred on March17, 1999. Mr. Guartos was described as a person with having long hair. Witnesses Sue Madden and Tiffany Dozier both described

the person they claimed to have been Mr. Guartos as a person having long hair on top and average on the sides. The evidence concerning this description comes from police reports which appear at page 125 to the Affidavit of David L. Raybin which appears as Collective Exhibit 2 in the Motion for New Trial. See also the testimony of Barbara Franklin who said that Mr. Guartos "had his hair pulled back." (Vol. VIII, pp. 422-423).

In fact, Mr. Guartos did not have long hair in March of 1999. The records from Florida establish that Mr. Guartos was arrested on March 1, 1999, and charged with assault and battery in Miami. (Exhibit "B" to the Affidavit of David L. Raybin) (See also Vol. XI, page 870). Mr. Guartos had very short hair on that date as evidenced by a mug shot taken of him on or about March 1, 1999. (See Exhibit "A" to the Affidavit of David L. Raybin at page 2, Collective Exhibit 2 to the Motion for New Trial).

Indeed, these mug shots and relevant photographs are so critical that copies appear on the next pages. Counsel has placed dates near these photos to reflect the testimony dating each one. These photographs also appear as exhibits in the Motion for New Trial.

[SEE MUG SHOTS AND PHOTOGRAPHS APPEARING ON THE FOLLOWING PAGES]

As the Court can see, the photograph depicts Mr. Guartos with very short hair just some two weeks prior to this crime occurring in Nashville. Mr. Guartos was also arrested in 2000 and his hair is substantially longer which is reflected in the mug shot taken from that date. (Affidavit of David L. Raybin, p. 15) (See also Vol. XI, p. 873). Thus, the Court can see that this is significant evidence showing Mr. Guartos' true appearance contemporaneous with the offense.

This was key evidence in Mr. Guartos' case and could have been shown to the jury to demonstrate the true appearance of Mr. Guartos. The evidence was not acquired by his prior attorney but was acquired by undersigned counsel.

During the hearing on the motion for new trial, Mr. Guartos' original trial lawyer, Mr. Michael Colavecchio, testified. He said that he was not aware of the 1999 mug shot of Mr. Guartos until Mr. Raybin showed him this as part of the motion for new trial. Mr. Colavecchio explained that he did not have time to acquire the mug shot because he was only on the case six weeks or so prior to when the trial started. (Vol. XI, p.486-487).

Mr. Guartos testified at the hearing on the motion for new trial. Exhibit 7 to that hearing is the March 1, 1999, mug shot. (Vol. VI, pp. 866-867). Mr. Guartos testified that he did not tell Mr. Colavecchio about the mug shot picture because Mr. Colavecchio said no one could identify him since he was not at the mall when the shooting happened. When Ms. Sloan identified Mr. Guartos in the courtroom that was the first time he had heard about that and that is why he did not bring it up to Mr. Colavecchio prior to the hearing.

Mr. Colavecchio testified that he was not aware that anybody would identify Mr. Guartos from the morning of the shooting. (Vol. XI, pp. 851-852). The lawyer said he certainly would have used the 1999 mug shot to impeach Ms. Sloan. (Vol. XI, pp. 852-853). He said "obviously the jury would have needed to see that." (Vol. XI, p. 853).

When Mr. Guartos was arrested in Nashville in 2000 (on the outstanding arrest warrant for the current case), his hair was long but short on the sides. His hair was longer at the trial than it was in the picture. Mr. Guartos' hair in the mug shot from 1999, is very short. (Vol. X, pp. 869-870). Mr. Guartos also identified exhibits showing that the 1999 mug shot was taken on March 1, 1999. Mr. Guartos was arrested in Florida on February 25, 2000, on the robbery and murder charges, and his mug shot was also taken when he got to Nashville. (See Exhibit 16 to the hearing on the motion for new trial) (See Vol. X, pp.869-874).

The relevancy to all of this, of course, is that the only alleged eyewitness to this robbery was Ms. Sloan who made her "identification" at the trial off of mug shots which were taken many, many years ago when Mr. Guartos was much younger. The oldest mug shots appear as Exhibit "C" to page 9 of Mr. Raybin's Affidavit. This photograph came from the Miami police department. The detective testified that the very old 1995 mug shot was used for the photo spread shown to Ms. Sloan. (Vol. XI, p. 823).

Mr. Guartos testified that the picture used in his photo lineup was taken when he was arrested in Coral Gables, Florida in 1995 and 1996. This is the photo that the police used in Nashville with Ms. Sloan and the other people. (Vol. XI, pp. 879-880). To "complete the

picture," Mr. Guartos was shown his resident alien card which dates from 1997. (Exhibit 18 to the Motion for New Trial). In this photograph his hair is similar to the way it is now, short, which is the same way as it was in the 1999 mug shot. (Vol. XI, p. 878).

The significance of these various mug shots became apparent when Ms. Sloan was called to testify at the hearing on the motion for new trial. She was shown Exhibit 7 which is the 1999 mug shot of Mr. Guartos taken contemporaneous with the robbery. She says that the face looks familiar but that she does not know for sure who it is! (Vol. XI, p. 800). This is astounding testimony because she cannot positively identify Mr. Guartos as the person who is the robber and she is looking at a picture of him taken contemporaneous with the robbery yet she identifies a photograph taken many years earlier when Mr. Guartos' hair is obviously much longer and Mr. Guartos is much younger. The 1999 mug shot is powerful evidence and more than qualifies for newly discovered evidence.

Apart from the ability of the 1999 mug shot to impeach Ms. Sloan, the mug shot had other important evidentiary values. This was a key piece of evidence which would have demonstrated the true appearance of Mr. Guartos as it relates to those who claim to have seen Mr. Guartos the day before the robbery. Recall that they said Mr. Guartos had long hair. (Vol. VIII, pp. 422-423). All speculation about what Mr. Guartos might have looked like at another time and place would have been removed by this March, 1999 mug shot. Everyone could have focused on the truth but, instead, everyone was focusing on horrible recollections and ancient photographs.

The newly discovered evidence here is tested by the rule which inquires whether a new trial should be granted for impeachment evidence which is newly discovered. In *State v. Arnold*, 719 S.W.2d 543 (Tenn. Crim. App. 1986) the Court noted that "in order to justify the granting of a new trial on the basis of newly discovered evidence, it must be shown that the testimony of the witness sought to be impeached was so important to the issue and the impeaching evidence was so strong and convincing that a different result at trial must necessarily follow."

In *State v. Goswick*, 565 S.W.2d 355 (Tenn. 1983) the defendant was convicted of aggravated rape based on the testimony of the woman who stated that she awoke to find a man in her apartment armed with a knife. The defendant was convicted, but upon his motion for a new trial, produced the testimony of a witness who had a telephone conversation with the woman during the time the woman was apparently unconscious according to her trial testimony. The telephone call itself consisted of nothing more than the fact that the witness called the woman who stated that she would not be able to talk right then. This matter was considered by the Trial Judge who denied the motion for new trial finding that the evidence was "merely impeaching" in nature.

On appeal, the conviction was reversed. The Court held that the decision to grant or deny a new trial on the basis of newly discovered evidence is a matter which rests in the sound discretion of the Court. The "question is not what the jury might do, but supposing all the evidence new and old to be before another jury, whether they ought to return a verdict more favorable to the defendant than the one returned on the original trial." 565 S.W.2d, at

539. *Goswick* held that the evidence from the witness who made the telephone call "goes beyond mere impeaching testimony." Consequently on the strength of a single telephone call made to an alleged rape victim, this Court granted the man a new trial based on the newly discovered evidence.

Undoubtedly, the State will cite many cases which hold that newly discovered evidence is not grounds to justify a new trial if it is merely "impeaching" in nature. When "impeachment evidence" eventually becomes material is unquestionably in the eye of the beholder. There are some basic rules here. First, new evidence must have been of the sort that would have been admissible at the outset. See for example, *Taegue v. State*, 772 S.W.2d 915 (Tenn. Crim. App. 1988). The evidence of the "mug" shot certainly meets the test.

With regard to the nature of the proof, courts have considered whether the witness who is impeached is the only material witness to the case. *Bivens v. State*, 474 S.W.2d 431 (Tenn. Crim. App. 1971). Courts also consider whether the new evidence exonerates the defendant although that is not the only criteria for consideration. See, *State v. Lequire*, 634 S.W.2d 608 (Tenn. Crim. App. 1981). In our case the mug shot impeaches the only actual eyewitness to the case.

In *State v. Burns*, 777 S.W.2d 355 (Tenn. Crim. App. 1989) the Court found that the defendant was entitled to a new trial based on additional proof that three jail inmates testified that another inmate admitted to committing the crime and "bragged" that the defendant had been convicted in his place.

In *State v. Singleton*, 853 S.W.2d 490 (Tenn. 1993) the Court held that while it was true that newly discovered impeachment evidence will not normally constitute new grounds for new trial, if the impeaching evidence is so crucial to the defendant's guilt or innocence that its introduction will probably result in an acquittal, a new trial may be ordered. In considering this question the Court must consider the "closeness" of the issues at trial.

The "closeness of the case" is of relevance in almost all prejudicial events occurring during a trial. For example, in *State v. Brown*, 29 S.W. 3d 424 (Tenn. 2000), the Court was concerned with the admissibility of statements of a third person that the child had sex with a third person. *Brown* found that the denial of that critical testimony was fatal to the conviction. The Court also considered the fact that the evidence was extremely close and that the added testimony would have made a huge difference in the outcome of the trial. This is precisely why the Court reversed the conviction. [4]

Here, the issues of credibility was razor thin. There was no other evidence of any sort that supported the government's theory that Mr. Guartos was actually present at the robbery. Obviously, the test here is whether there is any additional evidence of the crime beyond the allegation of the eyewitness. As has been repeatedly demonstrated there is no such "extra" evidence here. Thus, where there is no other evidence a new trial should be granted.

[4] Where the evidence is not overwhelming and the issues are close, a prejudicial error will not be considered harmless. *State v. Francis,* 669 S.W.2d 85, 90-91 (Tenn. 1984) (sexual battery conviction); *State v. Martin*, 702 S.W.2d 560 (Tenn. 1985); *State v. Suttles*, 767 S.W.2d 403 (Tenn. 1989) (issues were very close and, thus, the procedural errors assume an importance which they might not have if the proof of the State against the defendant was overwhelming); and *State v. Deuter*, 839 S.W.2d 391 (Tenn. 1992). An "evidentiary error" will be deemed harmless in direct proportion to the degree of the margin by which the proof exceeds the standard to convict. *Delk v. State*, 590 S.W.2d 435, 442 (Tenn. 1979).

The defense asserts here that this Court should review this case under the standard by which we would inquire as to whether the new evidence would create a reasonable doubt in the mind a jury. For example, this standard applies where a trial lawyer renders ineffective assistance of counsel in failing to develop critical evidence. In *State v. Burns*, 6 S.W.3rd 453 (Tenn. 1999) the lawyer failed to find two witnesses who would have testified that there were other individuals plotting to kill the deceased. The conviction was reversed because there was minimal evidence against the defendant in that the proof of the alternative plot to kill the victim "would have raised a reasonable doubt in the minds of the jury as to the defendant's involvement in the scheme."

Burns is better known for the lesser-included offense issue. However, the case is also valuable because it demonstrates that where there is marginal proof against the defendant, new evidence will justify a new trial where the new evidence might have raised a "reasonable doubt" in the mind of the jury if the jury had heard the evidence at the trial.

In *Fields v. State*, 40 S.W.3d 450 (Tenn. 2001), the Court discussed the standard of review which applied to ineffective assistance of counsel claims. With respect to issues of law, the standard of review is *de novo*. In matters of fact, the appellate court is to accord "those factual findings a presumption of correctness, which is overcome only when the preponderance of the evidence is contrary to the trial court's finding of fact." 40 S.W.3d, at 456. In footnote 5 to the *Fields* opinion, the Court stated that when the "trial judges fail to make specific findings of fact, [the appellate court] will review the record on its own to determine the preponderance of the evidence." 40 S.W.3d, 457, footnote 5.

Given the state of the record here, the defense arguably must show that the evidence preponderates against the finding of the trial The defense suggests, however, that more is involved than just a "mere" factual finding such as where a suspect has either been given his *Miranda* warnings. The defense suggests that this may be more in the nature of a mixed question of law and facts because the trial judge here is, in realty, trying to assess what the jury would have done with the testimony of the mug shot. This is a different question.

It should be noted that *Fields* discussed *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999) at great length. Apart from addressing the standard of review, *Burns* is also very helpful here because the case also involved an instance where there were two witnesses whom the trial judge found to be incredible. Yet, the Court rejected the trial judge's "factual" finding and found that the lawyer rendered ineffective assistance of counsel in failing to call these witnesses.

In *Burns*, the lawyer had available to him information about two witnesses both of whom testified at the hearing on the motion for new trial in that case. The Court held that:

> In our view, the evidence preponderates against the trial court's diminution of Blankenship's credibility. Whatever the [trial] court's impression of her on the witness stand, her prior reports to law enforcement and the additional affidavit from Decker cannot be ignored.

State v. Burns, 6 S.W.3d , 463, Footnote 6.

The defense suggests that standard addressed in *Fields* and *Burns* should also apply here since this standard of review is really not that different from the traditional rule governing newly discovered evidence. It all comes down to the basic question of "materiality." It is akin to harmless error, but in reverse. Was the mug shot critical? Was

it material? Does it show that Mr. Guartos is innocent? Absolutely! Nothing could be more damaging to the State's case than that sort of evidence. This is precisely why another jury must hear this proof and why a new trial is required.

Mr. Guartos respectfully submits that the newly discovered evidence consisting of his mug shot taken virtually contemporaneous with the robbery is more than sufficient to justify a new trial here. This constitutes a violation of his Due Process rights under the Fourteenth Amendment to the United States Constitution and the Sixth Amendment right to a fair trial. This is critical evidence which should be seen by another jury. This Court should reverse and remand for new trial.

III. THE DEFENDANT WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE IDENTIFICATION PROCEDURE UTILIZED HERE CONTAINED AN EARLIER PHOTOGRAPH WHEN A CONTEMPORANEOUS PHOTOGRAPH WAS AVAILABLE.

As noted in the above issue, a photograph existed of Mr. Guartos which was taken in Coral Gables, Florida in 1995 and 1996. As also noted, a photograph existed in Miami, Florida, dated March 1, 1999, which was taken but two weeks prior to the crime.

At the hearing on the motion for new trial the detective testified that he showed Ms. Sloan a photo lineup on July 29, 1999, which contained the 1995 or 1996 photo of Mr. Guartos. (Vol. XI, p. 814). Detective Tarkington agreed that he got the picture from the photo lineup via computer and it was sent to him from Miami which he had ordered from one

of his trips to Miami. (Vol. XI, p. 821). He said that the older 1995 picture was used in the photo lineup. He said he was not aware that there was a more recent photograph of Mr. Guartos. (Vol. XI, p. 823).

It is unknown why the Nashville police department chose to use a much older photograph when a far more accurate picture was available. Mr. Guartos was denied Due Process because the photograph identification of him was made with a much older picture (1995), when, in fact, a far more accurate picture was available (1999). Since Mr. Guartos was not the person who committed the crime, having an inaccurate picture would have increased the probability of a misidentification. Clearly then, this violated his Due Process rights under the Fourteenth Amendment to the United States Constitution. This also establishes, yet again, why that 1999 mug shot constituted newly discovered evidence.

With respect to the identification issue, it is clear that Due Process applies to pretrial identifications. If a pretrial identification process was unduly suggestive, the issue is whether it was so impermissibly suggestive to give rise to "a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). There are five factors to evaluate when determining whether in the totality of the circumstances an identification should come in after an unduly suggestive lineup. The factors to be considered in evaluating the likelihood of misidentification are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's description; (4) the witness's level of certainty; and (5) the time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199(1972); *Forbes*

v. State, 559 S.W.2d 318, 322-23 (Tenn.1977). The view here was only seconds. The witness was hiding in her car and saw the robbery in a covered parking garage; she was looking through tinted windows. She described the killers as black men. The certainty was doubtful. The in-court identification was a year-and-a-half later; the photo spread was four months after the robbery.

The State is relying too heavily on the eyewitness identifications in this case. Justice Brennan, in *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), addressed the very real danger of a mistaken identification arising from eyewitness testimony:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.... A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. (Footnote omitted.)

Concerning the relationship between a suggestive procedure and the risk of misidentification, Justice Brennan several years later observed in *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972):

> It is, first of all, apparent that the primary evil to be avoided is a "very substantial likelihood of irreparable misidentification." ... It is the likelihood of misidentification which violates a defendant's right to due process .... Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Since *Neil* was decided, additional social science research, as well as actual cases, have taught us much about the fallibility of eyewitness identification and the danger of relying too heavily on eyewitness identification as absolute proof of a defendant's guilt. Reviewing social science research pertaining to eyewitness identification, Clinical Professor of Law Connie Mayer of Albany Law School has written on the subject of the unreliability of and inherent problems with eyewitness identifications. See Connie Mayer, *Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays*, 13 Pace L.Rev. 815 (1994). [5] As Professor Mayer explained in general, there is a high risk of misidentification:

> [W]hile a great deal of credibility is given to eyewitness identification, empirical studies have shown that eyewitness identification can actually be extremely unreliable. Given the weight afforded eyewitness identification, it is not surprising that studies have shown that approximately fifty percent of those wrongly convicted were convicted based on eyewitness identification evidence. This makes mistaken identity the factor most often responsible for wrongful conviction.

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[5] In this article, the author reviewed the following articles or studies on the reliability of eyewitness identification: Arye Rattner, Convicted But Innocent, 12 L. & Hum. Behav. 283, 289 (1988); Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil & Criminal, 25-26 (1987); Brian L. Cutler et al., The Reliability of Eyewitness Identification, 11 L. & Hum. Behav. 233, 244 (1987); Elizabeth F. Loftus & Edith Green, Warning: Even Memory for Faces Can be Contagious, 4 L. & Hum. Behav. 323, 332-34 (1980); Gary L. Wells et al., Accuracy, Confidence and Juror Perceptions in Eyewitness Identification, 64 J. Applied Psychol. 440, 446 (1979); Elizabeth Loftus, Eyewitness Testimony, 144 (1979); Brian R. Clifford & Ray Bull, The Psychology of Person Identification, 194 (1978); Robert Buckhout et al., Eyewitness Identification: Effects of Suggestion and Bias in Identification of Photographs, 4 Bull. Psychonomic Soc'y 71, 71-72 (1975); Elizabeth Loftus, Restructuring Memory: Incredible Eyewitness, 8 Psychol. Today 116, 118 (1974); Robert Buckhout et al., Determinants of Eyewitness Performance on a Lineup, 4 Bull. Psychonomic Soc'y 191, 192 (1974); Ruth Ellen Galper & Julian Hochberg, Recognition Memory for Photographs of Faces, 84 Am. J. Psychol. 351, 351, 353-54 (1971); Patrick M. Wall, Eyewitness Identification in Criminal Cases, 66-68 (1965).

What makes eyewitness identification unreliable? When crime victims attempt to recall faces of strangers they have seen for only a brief period of time, many factors affect their ability to accurately remember what they have seen. Factors that may affect reliability of the identification include: lighting conditions; the duration of the event; violence; the age, sex and race of the perpetrator; the length of time between the event and the identification and the acquisition of post-event information that may distort the memory.

Id. at 819(footnotes omitted).

In specifically discussing photographic arrays, Professor Mayer explains:

In addition to these factors, special problems exist with respect to the identification of a person from a photographic array. After a crime has been committed, it is often standard police procedure to construct a photographic array to show a witness. One danger inherent in the reliability of an identification from such an array relates to the expectation on the part of the eyewitness that the suspect is, in fact, in the photographic array. The eyewitness, believing the suspect is present in the array, will often identify the person that looks most like the criminal, rather than choosing no one.

The number of photographs in an array and the physical characteristics of the participants are also factors bearing on the reliability of the photographic identification. But in addition, the photograph is merely a two-dimensional depiction of a person. Often a witness cannot discern the height and weight accurately from a photograph.

Id. at 820 (footnotes omitted).

With regard to a subsequent live lineup, the dangers of suggestibility as a result of the prior photographic lineup are substantial:

A subsequent corporeal line-up, which includes a suspect already selected from a photographic array, compounds the problems inherent in the use of photographs by creating what researchers have called a photo-biased line-up. After being shown a photographic array, a witness will often be asked to view a corporeal line-up. The witness often chooses the person who looks most familiar, believing that the person is familiar because of the crime. Studies have demonstrated that viewing a suspect's photograph after a crime but prior to a corporeal line-up dramatically increases the chances of identification of that particular suspect at the subsequent line-up. This finding casts serious

> doubt on the reliability of pretrial and in-court identifications when a photographic array has first been displayed to the witness.
>
> Id. at 820-21 (footnotes omitted).

It is obvious that for an identification to be reliable the photographs used for the identification must also be reliable. Here, the same police department (Miami) that provided the much older, 1995 photograph had within its files the much more recent, 1999 photograph. It is not unreasonable to expect the police department in Nashville to ask for the most recent photograph and not run the risk of a misidentification which is what obviously occurred here. Indeed, one need not attribute the problem to the Miami police department. Rather, the proof shows the Nashville police were in Miami interviewing Mr. Guartos who was said to have "confessed" to the crime. For all these reasons, this Court should find that Mr. Guartos was denied Due Process by the fact that the police used an inaccurate, older photograph for the photograph identification of Ms. Sloan. Accordingly, the conviction should be reversed.

IV. THE DEFENSE IS ENTITLED TO A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE CONSISTING OF NEWSPAPER REPORTS THAT MS. DEBORAH SLOAN WAS CROUCHED DOWN IN HER SEAT.

V. THE DEFENDANT WAS DENIED DUE PROCESS BECAUSE THE STATE DID NOT DISCLOSE THAT MS. DEBORAH SLOAN HAD TINTED WINDOWS IN HER VEHICLE THROUGH WHICH SHE ALLEGEDLY SAW THE DEFENDANT.

Mr. Guartos presents two companion issues which, once again, goes to the critical issue of the identification by Ms. Sloan. Following the trial of Mr. Guartos, the undersigned

counsel was retained to represent Mr. Guartos. He consulted with the attorneys representing the co-defendants. As noted in the Affidavit of David L. Raybin, filed as an exhibit to the Motion for New Trial, Mr. Raybin located a newspaper article which provides, in pertinent part, "A woman was about to unload her two young children from her van when she heard the shot at about 9:15 a.m. and called the police from her cellular phone. She said she crouched down in her seat, told her boys to be quiet and hoped the men would not see her." As noted in the Affidavit of David L. Raybin, this newspaper article was given by the undersigned counsel to Mr. Glenn Funk, defense counsel in the second trial, and was used to good advantage by him to cross-examine Ms. Sloan, who was the person quoted in this newspaper article as she admitted in the second trial. (See Gomez Trial, p. 127).

Secondly, during the trial of Mr. Gomez the defense learned that Ms. Sloan had tinted windows in her car from which she observed the shooting. This was also a matter that was developed by counsel in the second trial to good advantage. (See Gomez Trial, p. 129).

Neither the newspaper article nor the fact that there were tinted windows were disclosed to the defense lawyer representing Mr. Guartos. Arguably, a newspaper article is not something within the knowledge or possession of the State but it certainly was learned after the trial and thus falls within the concept of newly discovered evidence.

The original trial lawyer, Mr. Colavecchio, testified that he was under a severe time constraint to obtain discovery in this case. He had to get discovery from the court file or from the public defender. Mr. Colavecchio did not file a motion to continue the case because the judge told him verbally that the case was going to be tried on the day that it was set so

he felt he did not have an option and had to get ready for trial as best he could. (Vol. XI, pp. 848-849).

Mr. Colavecchio was shown a newspaper article that was written a few days after or possibly the next day after the shooting which appears at page 237 of Mr. Raybin's Affidavit. This article refers to Ms. Sloan. Mr. Colavecchio said the first time he had ever seen it was in Mr. Raybin's motion and he did not see it prior to trial. Had Mr. Colavecchio seen it prior to trial he would have cross-examined Ms. Sloan about the statements she made in the newspaper article. (Vol. XI, pp. 858-859). The newspaper article appears as Exhibit 14 to the hearing on the motion for new trial.

Exhibit 23 consists of collective photographs of Ms. Sloan's tinted windows. Ms. Sloan testified at the hearing on the motion for new trial that this was her vehicle and that same had tinted windows. (Vol. XII, p. 945).

What has been said about newly discovered evidence bears repeating here. The trial lawyer was not aware of the newspaper article and thus the newspaper article clearly constitutes material evidence which falls within the "newly discovered evidence" doctrine. Of more concern, of course, is the tinted windows.

First, Mr. Colavecchio was aware that there was some identifications in the case but, prior to trial, he was of the view that there was no witness who could positively identify Mr. Guartos being at the scene. (Vol. XI, p. 851). One has but to compare the cross-examination of Ms. Sloan at the co-defendant's trial with the brief cross-examination in this case to see what a difference the tinted windows and newspaper articles had on the trial.

Why did the State not disclose that Ms. Sloan had tinted windows? Obviously this was a matter uniquely within the knowledge of the State. Obviously, the State suppressed this evidence which was highly material to this case.

Every criminal defendant is guaranteed the right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the "Law of the Land" Clause of Article I, section 8 of the Tennessee Constitution. *Johnson v. State*, 38 S.W.3d 52, 55 (Tenn.2001). "To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment." *State v. Ferguson*, 2 S.W.3d 912, 915 (Tenn.1999). This fundamental principle of law is derived from the landmark United States Supreme Court case, *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87.

Our Supreme Court has said, "Evidence 'favorable to an accused' includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the state's witnesses." *Johnson*, 38 S.W.3d at 55-56 (citing *State v. Walker*, 910 S.W.2d 381, 389 (Tenn.1995); *State v. Copeland*, 983 S.W.2d 703, 706 (Tenn.Crim.App.1998)).The "prosecution is not required to disclose information that the accused already possesses or is able to obtain," but its duty to disclose "is not limited in scope to 'competent evidence' or 'admissible evidence.' "*State v. Marshall*, 845 S.W.2d 228, 232-33 (Tenn.Crim.App.1992)

(quoting *United States v. Gleason*, 265 F.Supp. 880, 886 (S.D.N.Y.1967)). A prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf of the case, including police."*Johnson*, 38 S.W.3d at 56 (quoting *Strickler v. Green*, 527 U.S. 263, 275 (1999)). While the State has this obligation, there is no requirement that it make a complete and detailed accounting to the defense of all police investigatory work on a case. *Walker*, 910 S.W.2d at 389.

The Tennessee Supreme Court has held that in order for a defendant to establish that a *Brady* violation has occurred, four elements must be shown. Those elements are as follows:

1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);

2) that the State suppressed the information;

3) that the information was favorable to the accused; and

4) that the information was material.

Johnson, 38 S.W.3d at 56.

The defendant bears the burden of proving a *Brady* violation by a preponderance of the evidence. *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn.1995).

Information that is favorable to the defendant exonerates the defendant, corroborates the defendant's position in asserting his innocence, or would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the defendant killed the victim. *Johnson*, 38 S.W.3d at 55-56. The Tennessee Supreme

Court has articulated the standard for favorable evidence as, "Evidence is favorable to an accused where it exculpates the accused, mitigates the punishment, or impeaches the prosecution's witnesses." *Smaple v. State*, 82 S.W.3d 267, 270 (Tenn.2002). In other words, information is favorable if it "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." *Johnson*, 38 S.W.3d at 56-57.

Evidence is "material" when there is a "reasonable probability" that the result of the proceeding would have been different had the exculpatory evidence been disclosed. *Johnson*, 38 S.W.3d at 58; see *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "reasonable probability" is a probability sufficient to "undermine ... confidence in the outcome" of the trial. *Bagley*, 473 U.S. at 682. Materiality does not demand a showing by a preponderance that the suppressed evidence would have resulted in the defendant's acquittal. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Materiality is also not a sufficiency test. *Johnson*, 38 S.W.3d at 58. Furthermore, once a constitutional error has been found, there is no need for further harmless-error review. *Kyles*, 514 U.S. at 435. Suppressed evidence is to be considered collectively, not item by item to gauge the materiality. Id. at 436. As stated by the United States Supreme Court, establishing materiality requires "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435.

Taken individually or in combination it is apparent that the State failed to disclose material evidence concerning the tinted windows. If one adds to the next the important testimony about the fact that Ms. Sloan was crouching down in her car to protect her children then, of course, her identification becomes even less reliable. Given that she was the only alleged eyewitness to the shooting who could allegedly identify Mr. Guartos, her testimony is crucial and critical and any significant evidence which cast doubt upon this should have been disclosed and made available to Mr. Guartos. Alternatively, the evidence constitutes "newly discovered evidence" which justifies a new trial. Mr. Guartos should receive a new trial where this new evidence will become relevant to another jury.

VI. MR. GUARTOS WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE SUGGESTIVE AND INCORRECT LINEUP PROCEDURES CONDUCTED BY DETECTIVE TARKINGTON.

This ground will refer to three documents attached as Exhibit "FF," p. 163 which appears as part of the police reports to documents attached to the amended motion for new trial. These three documents were identified by Detective Tarkington. (Vol. XI, pp. 812-815). Detective Tarkington says the action for the week of July 12 through July 16, 1999, shows what he did between those dates. He admitted that the same document says "Debbie Sloan and another witness who was at the mall in the parking lot stated that he, Guartos, looked familiar and she continued to stare at the photo." This notation is dated July 12, 1999

through July 16, 1999. Detective Tarkington also showed Ms. Sloan a photo lineup on July 29, 1999. (Vol. XI, p. 814).

Detective Tarkington explained that the so-called discrepancy between the date of the lineup on July 29, 1999 and the date of his report that he turned into his supervisors on July 16, 1999, mentioning this very same lineup was because "nothing had changed over a period of time and he just did not change the date on his report when he turned it in." Again, these three pertinent documents appear at pages 164, 165, and 166 of the amended motion for new trial and were identified by Detective Tarkington.

[PAGES 164,165 AND 166 OF AMENDED MOTION FOR NEW TRIAL APPEAR ON THE FOLLOWING PAGES]

It is critical to an analysis of this issue that Detective Tarkington filed his report for the week of July 12, 1999 through July 16, 1999, which indicated that a photo lineup had been conducted with Deborah Sloan. However, the actual lineup was conducted by Detective Tarkington on July 29, 1999. Thus, at the time of the July 12-16 report, the lineup with Ms. Sloan had not even taken place! Had Mr. Guartos been provided with these contrary documents prior to trial, then the inconsistency could have been put before the jury and could have also been used to impeach the credibility of Detective Tarkington as a witness.

The legal doctrines regarding suggestive and impermissible lineup identification procedures have previously been addressed. Mr. Guartos raises separately here, the identical legal ground that the discrepancy in the identification procedures of Ms. Sloan raise serious question as to the legality of these procedures thus impacting the fairness of this trial. Accordingly, this Court should find that Mr. Guartos was denied his right to Due Process under the Fourteenth Amendment to the United States Constitution and the right to a fair trial under the Sixth Amendment to the United States Constitution.

VII. MR. GUARTOS WAS DENIED DUE PROCESS BY THE INCONSISTENT TESTIMONY OF DEBORAH SLOAN WHICH WAS CONTAMINATED BY PROSECUTORIAL MISCONDUCT IN POINTING OUT THAT MR. GUARTOS WAS IN THE COURTROOM PRIOR TO TRIAL.

As has been noted in this Brief, Deborah Sloan was called as an alleged eyewitness to the March 17, 1999, robbery and shooting. She testified that she had been in the parking lot adjacent to where the incident occurred for only about 30 seconds. (Vol. VII, p. 183).

Ms. Sloan stated that when she heard the commotion and loud bang, she turned around to see what it was. This statement would indicate that she had not seen any of the events leading up to the gun being fired, given that this is what caused her to turn around in the first place. This would have been after Mr. Nagele was taken to the ground. This also indicates at the time of the initial "bang" she was not fearful for her life nor that of her children. It was at this time that Ms. Sloan indicates that she observed one man lying on the ground (Rogers) and another man (Nagele) was kind of leaned over on the ground on his hands and knees a little bit farther away. (Vol. VII, pp. 186-187).

This testimony differs from Mr. Nagele's testimony, as he states he was rendered totally unconscious. (Vol. VII, p. 172). Ms. Sloan testified that two of the robbers gathered the black boxes while the third man picked up a gun off the ground. Then she says that three men got into a van and exited the area. (Vol. VII, pp. 186-187).

Ms. Sloan testified that one man (Nagele) was getting up and going to check on the other guard (Rogers). (Vol. VII, pp. 187-188).

Ms. Sloan was given an opportunity to identify Mr. Guartos from a photo lineup in which she could not identify anyone for certain although she claims she identified Mr. Guartos. However, after a year had passed, she makes an in-court identification which was highly suggestive and prejudiced Mr. Guartos.

In this context Mr. Guartos assails the in-court identification here. Ms. Sloan originally told the authorities that she had seen a black man. This statement was made while faces were

fresh in her memory. (Vol. VII, p. 201). At some later time, she changes her mind and says the alleged perpetrators were either black or Hispanic and men with dark complexions. According to the trial testimony, Ms. Sloan did not know at first the bang she heard was even a gun shot. She thought the boxes had fallen off the cart, causing noise. It was only then that she knew that someone had been shot. (Vol. VII, pp. 184-185).

Ms. Sloan then identified Mr. Guartos in court as being one of the men who left the scene in the van. (Vol. VII, p. 187). The defense asserts here that the in-court identification was contaminated by the fact that Ms. Sloan had identified Mr. Guartos prior to the trial in the courtroom. She had actually seen Mr. Guartos. Ms. Sloan testified at the trial of the co-defendant that she had seen Mr. Guartos in the courtroom prior to her identification in front of the jury. (See Gomez Trial at p. 147).

Ms. Sloan testified at the hearing on the motion for new trial. She reviewed portions of the trial of the co-defendant Gomez. (Vol. XI, pp. 764-765). At the Gomez trial Ms. Sloan testified that when she arrived in court for Mr. Guartos' trial the authorities asked her to look at him and see if Mr. Guartos looked familiar and she recognized him. (See Gomez Trial at p. 147). Ms. Sloan admitted that the police told her that there was "fingerprint evidence" in the case. At the hearing on the motion for new trial Ms. Sloan said she did not recall who made her aware of the fingerprint evidence. (Vol. XI, pp. 770-771).

Ms. Sloan testified at the hearing on the motion for new trial, as best she recalls, that morning of court with Mr. Guartos she asked how long it was going to take and she was told it was going to take several days. Significantly, Ms. Sloan testified that on the day of Mr.

Guartos' trial, the first opportunity she had to see Mr. Guartos was when she was sitting in court and Mr. Guartos was brought in and all the potential witnesses were introduced to the jury. (Vol. XI, p. 803). Naturally, being the only one on trial, Ms. Sloan identified Mr. Guartos.

Q. [Mr. Raybin at Motion for New Trial hearing] In the second trial, you were asked some questions by the lawyers about the fact that you had identified Mr. Guartos in the first trial; do you recall that?

A. [Ms. Sloan] Not exactly, but I'm sure I did.

Q. Okay. Do you recall testifying in the second trial that prior to your picking him out in the courtroom, that you had seen him in the courtroom?

A. Yes, I do.

Q. And that someone asked you if anyone looked familiar?

A. In the courtroom?

Q. Yes.

A. Yes, when I was testifying.

Q. Before you testified, did anyone ask you if he looked familiar to you?

A. Well, that morning, I had been introduced to, I suppose, Mr. Guartos when I got introduced to the Judge and all these people to make sure nobody was recognized or knew each other, I suppose, and then when I was on, after I left there, they wanted to know if I recognized him before, then I went back in to testify.

Q. And who asked you if you recognized anyone?

A. I don't recall. I think it was either Mr. Gunn or the victim's advocate lady - - I'm not sure what her title is, but she had kind of shown us where to go that day and told us what to do and all that stuff.

Q. So it was somebody from either the Police Department or the District Attorney's office?

A. Yes, yes.

Q. And when you were asked either by Mr. Gunn or the lady from the DA's office if anyone looked familiar, what did you say?

A. Yes.

Q. Okay, and what did you tell them?

A. That, yes, that was the man at the Green Hills Mall that day.

(Vol. XI, pp. 765-766)

Based on all these factors, Mr. Guartos was clearly denied Due Process by the in-court identification consisting of the contaminating affects of the district attorney's statements to her as well as having Mr. Guartos pointed out to her before she identified Mr. Guartos at trial.

Mr. Colavecchio, the trial lawyer, testified at the hearing on the motion for new trial that he was of the view that there was no one who could positively identify Mr. Guartos as being at the scene. (Vol. XI, p. 851). Mr. Colavecchio was not aware that Ms. Sloan had been asked prior to Mr. Guartos' trial if anyone looked familiar to her. Mr. Colavecchio was not aware of the situation that happened in the courtroom. (Vol. XI, p. 852). The district attorney testified that he did not disclose to the defense attorney that an inquiry had been made to Ms. Sloan concerning Mr. Guartos' in-court identity. (Vol. XII, pp. 933-934).

In reviewing this issue, this Court should review the inconsistencies and contradictions in Ms. Sloan's statements which can be observed in detail in the analysis of her testimony in both trials as it appears at page 212 which is appended to the motion for new trial. This is simply a review of all of the testimony of both trials along with her statements showing the

gross inconsistency in her testimony. Clearly these inconsistencies establish the fact that the in-court identification was suggestive and was illegal.

It is true that a defendant had no right to an in-court lineup. *United States ex rel. Clark v. Fike*, 538 F.2d 750 (1976); *People v. Clark*, 52 Ill.2d 374, 288 N.E.2d 363 (1972). However, identification testimony that amounts to a "show up" is not per se inadmissible, but rather is dependent upon the "totality of the circumstances." *United States v. Kaylor*, 491 F.2d 1127 (2nd Cir.1973), citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 374, 34 L.Ed.2d 401 (1972). Normally, the appropriate procedure for the defendant to take is to request a traditional pretrial lineup procedure to assure that the identification witness would first view the suspect with others of similar description rather than in the courtroom sitting alone at the counsel table. Cf. *United States v. Archibald*, 734 F.2d 938 (1984). If the police officials had refused to arrange such lineup, then counsel could have resorted to the trial court for assistance. In *State v. Killebrew*, 760 S.W.2d 228, 234 (Tenn.Crim.App. Jul 21, 1988) the Court held there was no absolute right to an in-court lineup.

Mr. Colavecchio testified that he did not request a lineup because he was of the view that there would be no in-court identification. Mr. Colavecchio testified at the hearing on the motion for new trial that he would not ask for any physical lineups in this case because of time constraints. As noted earlier, Mr. Colavecchio was not aware that Ms. Sloan had been asked prior to trial if anyone looked familiar to her and was not aware of the situation that happened in the courtroom. (Vol. XI, pp. 852-853).

Tennessee law has clearly recognized that any identification procedure initiated or designed by police which is inherently suggestive violates the accused's due process rights. E.g. *State v. Thomas*, 780 S.W.2d 379 (Tenn.Crim.App.1989); *State v. Beal*, 614 S.W.2d 77 (Tenn.Crim.App.1981); *Sloan v. State,* 584 S.W.2d 461 (Tenn.Crim.App.1978). It is also well settled, however, that an observation of a defendant by a victim cannot be characterized as a show-up unless it is arranged by the police. *State v. Dixon*, 656 S.W.2d 49, 51 (Tenn.Crim.App.1983). Clearly the in-court identification was arranged by the government in Mr. Guartos' case.

It is obvious that the pretrial identification of Mr. Guartos was flawed. It is also obvious that Mr. Guartos was the victim of State sanctioned, one-on-one identification procedures right in the courtroom when his lawyer was not aware that Ms. Sloan would make an identification of Mr. Guartos.

This case is not unlike *State v. Philpott*, 882 S.W.2nd 394 (Tenn. Crim. App. 1984) where the victim's identification of the defendant was unreliable since he had no real opportunity to see the assailant but was confronted with the defendant at the preliminary hearing. There was no doubt in that case that after the preliminary hearing the victim would retain the image of the defendant as the perpetrator at the crime.

Remember, once again, that Ms. Sloan first said that the robbers were black men. (Vol. VII, p. 201). Yet, at the trial she identified Mr. Guartos as the man she saw in the parking lot. (Vol. VII, p. 200).

Mr. Guartos was clearly denied Due Process by the impermissible identification procedures in this case. He obviously had short hair at the time of the alleged offense as addressed in the issues concerning the recently discovered mug shot taken in March of 1999. If there were any question about this, one could refer to the photograph in the possession of the Metropolitan Davidson County Police Department acquired on May 26, 1999, which was sent to the Davidson County Police by the Miami, Florida authorities. This document appears as Exhibit 8A in the hearing on the motion for new trial. Detective Tarkington testified at the hearing on the motion for new trial that the photographs were sent to him from Miami on May 26, 1999. (Vol. XI, p. 822).

This Court should also refer to the police report which appears at page 269 as part of the amended motion for new trial. Here, the witness testified that the photograph of herself, Maria Charry, was taken in "March of 1999." [6] This photograph clearly shows Mr. Guartos with short hair and is consistent with the mug shot photograph taken of him in March of 1999. A copy of this photograph appears earlier in this brief.

As noted throughout this Brief it is clear that the person identified as Mr. Guartos throughout the trial is an individual having much longer hair which of course could not be Mr. Guartos. As also noted earlier, witnesses that all testified that the robber had long hair on top and average on the sides. This, of course, is a physical impossibility since the Court can see for itself the short length of Mr. Guartos' hair in March of 1999, the month of the robbery.

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[6] Although Detective Tarkington "assumed" that the woman in the photograph was Maria Charry, Maria Charry is actually the Defendant's mother. (See Vol. X, pp. 729-731).

Mr. Guartos' hair did not magically grow in two weeks! For all these reasons, this Court should find that Mr. Guartos' Due Process rights were violated in the unconstitutional and illegal identification procedures occurring out-of-court and in-court regarding Ms. Sloan.

VIII. THE DEFENDANT WAS DENIED DUE PROCESS BY THE IN-COURT IDENTIFICATION OF MS. SLOAN AND THE OUT-OF-COURT IDENTIFICATION OF MS. SLOAN IN VIOLATION OF DUE PROCESS PROVISIONS OF THE TENNESSEE AND UNITED STATES CONSTITUTIONS.

The testimony heard at the trial of the co-defendants is Exhibit 1 to the Motion for New Trial. During that trial Ms. Sloan testified that Mr. Guartos was not wearing a hood and that none of the men had their hoods up. Yet, Mr. Nagele and Mr. Rogers said that the man had a hood on. (Vol. VII, p. 169 (Mr. Nagele) and Vol. VII, p. 230 (testimony of officer, quoting victim Mr. Rogers)).

This gross inconsistency in the evidence is much more clear when one examines Ms. Sloan's testimony at the Gomez trial. At the Gomez trial Ms. Sloan admits that she was allowed to see Mr. Guartos prior to her in-court identification of Mr. Guartos. (See Gomez Trial Transcript p. 147).

This prior in-court identification of Mr. Guartos was not disclosed to the defense attorney in Mr. Guartos' case. Also, Ms. Sloan said when viewing the photo lineups of Mr. Guartos that he "looked familiar." Yet, at Mr. Guartos' trial Ms. Sloan said she was "certain" that Mr. Guartos was the person that was "picking up the gun." She said that none of the other men had guns. Thus, this had to be the same person that Mr. Nagele and Mr. Rogers saw, but they said they saw a man with a hood. Thus, Ms. Sloan could not have reliably

identified Mr. Guartos, excluding for the moment her tinted windows and that she was crouched down to hide herself and her children from the robbers. Thus, her identification was contaminated by the fact that she saw Mr. Guartos in the courtroom prior to his identification by her in court.

At the hearing on the Motion for New Trial, Ms. Sloan testified. She said that on the day of the trial she had an opportunity to see Mr. Guartos when he was sitting in court when Mr. Guartos was brought in and all the potential witnesses were introduced to the jury. (Vol. XI, p. 803). Ms. Sloan testified that the robbers were all wearing jackets with hoods but she does not recall if the hoods were on or not. She does not recall now if the person she identified and believed to be Mr. Guartos had on a hood or not. (Vol. XI, p. 805).

It is apparent that the issues regarding the in-court and out-of-court identification of Ms. Sloan are sufficiently clear so that this Court can rule once and for all that Ms. Sloan had no real opportunity to identify Mr. Guartos and that her identification was severely compromised by being shown inaccurate and older mug shots. The law regarding identification procedures has been discussed extensively in the above issues. Counsel readopts those legal doctrines and asks this Court to reverse this conviction because of the substantial chance of misidentification.

IX. MR. GUARTOS SHOULD BE GRANTED A NEW TRIAL BECAUSE THE WITNESS, KIMBERLY ALLISON, WAS TELLING DEBORAH SLOAN WHO MR. GUARTOS WAS DURING THE TRIAL.

As has been noted, Deborah Sloan was a material witness for the State in this case. Kimberly Allison was also a witness. (Vol. VII, p. 141).

At the hearing on the motion for new trial the defense called Kimberly Allison to testify. She said that she first met Ms. Sloan after the robbery when they started getting ready for court. (Vol. X, p. 722). She says she does not "recall" pointing out Mr. Guartos to Ms. Sloan through the courtroom window. (Vol. X, p. 723). Ms. Allison was in the courtroom when the jury was selected but was excluded from the courtroom and had to sit outside until she testified. However, she knew that Mr. Guartos was the person being tried because he was sitting with the lawyers and was being "charged." (Vol. X, pp. 724-725). She denied telling Ms. Sloan that Mr. Guartos was being charged.

Ms. Allison testified that when she was outside the courtroom waiting to testify she looked through the window and saw Mr. Guartos. She does not recall if Ms. Sloan looked through the window but believes that they were all peeking through the window. Ms. Allison testified that she was peeking through the window of the courtroom because it was uncomfortable and they wanted to get the trial over with. (Vol. X, p. 726).

At the hearing on the motion for new trial Maria Charry, who is actually Mr. Guartos' mother, testified that she observed both Ms. Allison and Ms. Sloan in the hearing for the motion for new trial and had seen them at the trial itself. (Vol. X, pp. 730-731).

Ms. Charry said there was a lady who she believed to be Ms. Allison looking through the window of the door inside the courtroom and that she was pointing into the courtroom with her finger with another lady standing by her. Ms. Charry identified Ms. Allison and Ms. Sloan as the two people who were talking to each other and pointing through the window. (Vol. X, p. 732). Ms. Charry knew that they were witnesses because she heard them testify during the trial.

Ms. Sloan testified at the hearing on the motion for new trial that she did not look through the courtroom window. (Vol. XI, pp. 764-765).

The defense vigorously asserts here on appeal that while the witnesses were pointing Mr. Guartos out to each other this clearly constituted "State action" because the trial court obviously did not enforce the rule of keeping witnesses away from the courtroom when identification was such a crucial issue. The defense adopts here the legal analysis previously addressed regarding suggestive identification procedures. Clearly this also constituted an unlawful identification procedure which contaminated Ms. Sloan even further. Accordingly, this Court should grant Mr. Guartos a new trial.

X. MR. GUARTOS WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WAS DENIED THE RIGHTS TO DISCOVERY UNDER RULE 26.2 OF THE TENNESSEE RULES OF CRIMINAL PROCEDURE BY THE FAILURE OF THE GOVERNMENT TO PROVIDE ALL OF THE STATEMENTS OF MR. NAGELE A CRUCIAL WITNESS FOR THE GOVERNMENT.

Mr. Nagele was one of the two security guards who were robbed at the mall. He testified extensively as to the facts surrounding the robbery and the shooting of his partner,

Mr. Rogers. (Vol. VII, pp. 159-172). While he could not identify Mr. Guartos, his testimony was critical as to the placement of the various witnesses and the physical distances and facts surrounding the shooting itself.

Following the trial the undersigned counsel located additional tape recordings of statements which Mr. Nagele had given to the authorities. These had not been disclosed to the defense prior to the trial itself.

The missing documents appear as Exhibits O and P to the Affidavit of David L. Raybin at pages 86 through 89 of the Affidavit itself. These exhibits consist of a transcript of an interview of Mr. Nagele by Officer Finchum on the day of the shooting. Mr. Nagele describes the assailant as having a hood pulled up over his head. There is an additional transcript of an interview on March 17, by Detective Tarkington and Mr. Nagele. This is a much lengthier statement. Exhibit 24 to the Motion for New Trial consists of the actual videotape of the interview. A transcript of this lengthy interview appears at page 89 to Exhibit P in Mr. Raybin's Affidavit which is Exhibit 2 to the Motion for New Trial.

During the hearing on the Motion for New Trial the district attorney agreed that he had not turned over the tapes of the interviews with Mr. Nagele. (Vol. XII, p. 923). It is obvious, then, that the missing tapes were not utilized for cross-examination as it relates to the other discovery provided by the defense.

Under *Brady v. Maryland*, the prosecution must furnish the accused with any material exculpatory evidence that pertains to the guilt or innocence of the accused, or the punishment which may be imposed upon conviction. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Exculpatory evidence includes evidence which the accused may use to impeach. *Giglio v.*

United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). "[A] violation of the requirements found in *Brady* ... is a due process violation." *State v. Davis*, 823 S.W.2d 217 (Tenn.Crim.App.1991).

Several federal circuit courts of appeal have, and have concluded that "the prosecution's *Brady* obligations include not only a duty to disclose exculpatory information, but also a duty to search possible sources for such information." *U.S. v. Brooks*, 966 F.2d 1500, 1502 (D.C.Cir.1992). See also, *U.S. v. Perdomo*, 929 F.2d 967 (3rd Cir.1991); *Carey v. Duckworth*, 738 F.2d 875 (7th Cir.1984); and *U.S. v. Auten*, 632 F.2d 478 (5th Cir.1980).

The statements were favorable to the defense such that the State's attorney would be required as a constitutional matter to disclose their existence with or without a request from the defendant. See *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 (1995) ("*Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ') (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985)).

Rule 26.2(a) provides that "[a]fter a witness other than the defendant has testified on direct examination, the trial court, on motion of a party who did not call the witness, shall order the attorney [for the side sponsoring the witness] to produce ... any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified." Tenn. R.Crim. P. 26.2(a) (emphasis added).Clearly the statements at issue here fell within this rule.

Obviously, the State violated Due Process and the disclosure requirements. The issue now becomes whether Mr. Guartos was prejudiced by the failure of the State to disclose these materials. He clearly was. Obviously, Mr. Nagele was a crucial witness for the State. Mr. Nagele was asked about how far away he was from Mr. Rogers. On page 8 of his transcribed statement to Detective Tarkington, he says that he was five to seven meters away. However, on a supplemental report, Mr. Nagele reports to having been ten feet or so away. (Motion for New Trial, p. 202). A supplemental report filed by Detective Tarkington indicates that Mr. Nagele had reported to authorities he was five yards behind Mr. Rogers. (Motion for New Trial, pp. 200-201).

At trial, Mr. Nagele testified he was about twenty feet away from Mr. Rogers when he regained consciousness. (Vol. VII, pp. 166-167). Mr. Nagele makes another statement about his distance behind Mr. Rogers, at which time he says he was twenty to twenty-five feet behind him. At trial, Mr. Nagele he had been knocked unconscious and was not even close to the roof. On page 9 of the transcribed statement, the detective asked Mr. Nagele where he was when he was knocked out, in which case Nagele responded that he was on the ramp.

In this case, Mr. Guartos was denied a fair trial when the prosecution knew the testimony offered by Mr. Nagele was inconsistent and inaccurate with his prior statements, some of which were not disclosed. The various statements and contradictions of Mr. Nagele as it relates to his various statements appear in the summary contained in Collective Exhibit GG to Motion for New Trial (p. 167). Exhibit PP contains the drawing of the crime scene as introduced at trial (Motion for New Trial, p. 288) (See also Trial Exhibit 1). It can be seen that Mr. Nagele puts himself at letter "A" near Ms. Sloan's vehicle. This is also noted in Trial

Court Exhibit 2-A, also contained in Collective Exhibit PP (Motion for New Trial, p. 292). However, in Court Exhibit 2-B, also contained in Collective Exhibit PP, Mr. Nagele puts himself much closer to Mr. Rogers, who is listed on Court Exhibit 2-B with the letters "A" and "B" (p. 290). Mr. Rogers is obviously near his own utility belt, which was taken off of him after he was shot. Mr. Nagele was either in one place or the other, but not both. Ms. Sloan's vehicle can be seen in Trial Court Exhibit 31-C (Motion for New Trial, p. 293). Her proximity to the shooting is highly questionable given that she testified that she turned around only after she heard a shot. Where that shot was fired, of course, is highly dependent on Mr. Nagele's testimony as to where he was when the shot was fired. This is why his prior "undisclosed statement" statement becomes critical.

If Mr. Nagele was back near Ms. Sloan, which he claims in part of his testimony, then the shooter would have to be an extraordinary marksman to fire a pistol that distance and <u>through</u> the intervening truck to strike Mr. Rogers, who was up on the ramp of the parking garage. If, on the other hand, the shooter was very close to Mr. Rogers as could be inferred by Court Exhibit 2-B, then the shooter would have been distant from Ms. Sloan, whose ability to identify anyone would have been even more doubtful. The position of Mr. Nagele thus becomes critical as it relates to where the shooter was, since that impacts both the credibility of Mr. Nagele and the ability of Ms. Sloan to identify the alleged shooter.

The Court should examine the crime scene diagram, Exhibit 1, which is part of the record in this case, as it relates to the several photographs, which are also exhibits in this case, to determine the impossible inconsistency between Mr. Nagele's testimony and that of Ms. Sloan, as it relates to the identity of the alleged shooter (Motion for New Trial, pp. 288-294

containing trial exhibits). It is apparent that when one examines all of the various discrepancies in Mr. Nagele's testimony as revealed in the missing tapes and transcripts it is obvious that these could have been used to great advantage to impeach both Mr. Nagele and Ms. Sloan. Both could not possibly be telling the same story about the shooting. By depriving Mr. Guartos of the valuable witness statements the State denied Mr. Guartos Due Process of law in violation of the Fourteenth Amendment to the United States Constitution. This Court should reverse this case and remand for a new trial.

XI. THE DEFENDANT WAS DENIED DUE PROCESS BY THE FAILURE OF THE STATE TO PRODUCE THE ENTIRE 911 CONVERSATION OF DEBORAH SLOAN, A KEY STATE WITNESS.

Exhibit M which is the Affidavit of David L. Raybin consists of a transcript of the 911 call which Deborah Sloan made to the police shortly after she observed the robbery. Exhibit 6 to the Motion for New Trial is the tape itself. In this tape, the tape cuts off as Deborah Sloan was talking to the emergency people. Given the gravity of her call, it is fair to assume that the 911 dispatcher/operator either called her back or there is more to the tape. Since there is a tape recording of the State's witness making a critical 911 call the defense must be provided with the entire tape concerning any and all statements by Deborah Sloan.

The tape recording is a "statement" within the meaning of the discovery rule and the State was under an obligation to produce this witness' statement when the witness testified. See Tenn. R.Crim. P. 26.2(a). Tenn. R.Crim. P. 16(a)(2). Thus, the failure of the State to make

the tape available to the defense prior to trial was a violation of Tennessee Rule of Criminal Procedure 16.

Case law from other jurisdictions supports the conclusion that tape recordings of 911 calls should be treated as witness statements producible after the witness testifies. See e.g., *Slye v. United States*, 602 A.2d 135, 138 App.1992); *State v. Cain*, 596 A.2d 449, 454 *State v. Dedrick*, 589 A.2d 1241 (Conn.App.1988); *Bartley v. United States,* 530 A.2d 692, 697 n. 10 (D.C.App.1987). As minium the tapes are certainly "tangible objects" discoverable pre-trial pursuant to Tennessee Rule of Criminal Procedure 16(a)(1)(C), if they are "material to the preparation of the defendant's defense." Clearly, the 911 tape was material.

At the hearing on the Motion for New Trial Ms. Sloan actually listened to the 911 tape. Ms. Sloan testified that apparently there was more to the tape because police wanted to know the location of where she was so they could send the ambulance to a more specific spot and she tried to describe the route. (Vol. XI, p. 786). Thus, the defense established, to the extent it was able, that there was more to this 911 tape. (Vol. XI, p. 786). The district attorney testified at the hearing on the Motion for New Trial that he did not have any more of the 911 tape except that which was disclosed. (Vol. XII, p. 919). Yet, Ms. Sloan clearly indicated that there was more to the tape. Given this state of the record, it is obvious that Mr. Guartos was denied Due Process by the failure of the State to preserve all of the conversation which obviously contained more reports of the crime itself. Thus, this Court should grant a new trial.

XII. THE DEFENDANT WAS DENIED DUE PROCESS AND THE STATE ENGAGED IN A *BRADY* VIOLATION BY FAILING TO TURN OVER THE TAPE RECORDINGS OF CHRISTINA HUDSON AND STATEMENTS OF BARBARA FRANKLIN.

Exhibit N to the Affidavit of David L. Raybin, at page 78, contains the transcript of an interview with Barbara Franklin a witness in the case. At page 115 of the Affidavit of David L. Raybin the Court can find the interview with Christina Hudson, another witness in the case.

The Court can observe that Ms. Hudson talks about the fact that the robbers are wearing hats. This is completely inconsistent with other testimony and with her testimony at Mr. Gomez' trial and at Mr. Guartos' trial. (See Trial Transcript Vol. VII, p. 211 (Guartos Trial) and pages 183 - 192 of the Gomez Trial). Barbara Franklin was working at the jewelry store the day before the shooting and saw several Hispanic men in the store that day. Her testimony at trial was inconsistent with her statements not provided to the defense.

Mr. Guartos testified at the hearing on the Motion for New Trial that he did not hear and was not aware of tapes of Ms. Hudson or Ms. Franklin until Mr. Raybin acquired them and provided them to Mr. Guartos. (Vol. XI, p. 884).

Mr. Colavecchio testified at the hearing on the Motion for New Trial that although he had a tape recording of Ms. Franklin and Ms. Hudson's interviews he never played these tapes for Mr. Guartos. This was due to his own personal time constraints. Mr. Colavecchio was conducting a trial in another county and it took about two or three days and he had only a few days to get ready for Mr. Guartos' case so he was kind of "stuck in the middle" doing some work on the other trial and trying to get ready for Mr. Guartos' trial. (Vol. XI, pp. 850-851).

Mr. Guartos was severely prejudiced by the failure of the State to disclose the interviews so that he could hear them. The interview with Barbara Franklin is particularly important. This was conducted the day of the shooting. The transcript relates that the person whom she subsequently identified as being in her store the day before the robbery was Mr. Guartos and that he had long hair because it was "pulled back." Her exact statement was: "It was pulled back so I don't, I can't remember if it was long in the back but it was short around his face because it was pulled back." (Transcript, page 2 of Interview, Exhibit N to Affidavit of David L. Raybin). This statement is important because Ms. Franklin testified in Mr. Guartos' trial that Mr. Guartos was a shorter man and that his hair was "pulled back like that." (Vol. VII, pp. 422-423). This should be compared to the photograph of Mr. Guartos showing extremely short hair taken approximately two weeks prior to the robbery.

Previous issues addressed in this Brief have cited the law regarding exculpatory information and discovery violations. Clearly these failures of disclosure constituted material violations and severely prejudiced Mr. Guartos' rights to a fair trial. This Court should reverse these convictions.

XIII. MR. GUARTOS WAS DENIED DUE PROCESS BY THE IN-COURT IDENTIFICATION OF BARBARA FRANKLIN.

On March 17, 1999, while investigating the offense, Detective Whitehurst conducted an on-scene interview with Barbara Franklin. This was tape recorded and the transcript of this tape appears as Exhibit MM to the Amended Motion for New Trial. As noted in the previous

issue Mr. Guartos was never provided copies of this tape recorded interview until after the trial.

If the transcript would have been made available to him prior to the trial it would have established that Ms. Franklin had described someone other than Mr. Guartos. The transcript states that Ms. Franklin told the authorities this smaller man's hair was long and pulled back. (Vol. VIII, p. 422-423).

Given the fact that on March 16, 1999, Mr. Guartos actually wore his hair very short all around his head (as reflected in the March 1, 1999, mug shot), it becomes perfectly clear that Ms. Franklin was not describing Mr. Guartos as the person who was at the store at the mall the day before the robbery. Clearly she was describing someone else.

At the trial, Ms. Franklin told the jury that Mr. Guartos was the man she had seen on March 16, 1999, and that his hair was pulled back indicating that his hair was longer than it actually was. According to Ms. Franklin she was never at any time prior to the trial given the opportunity to participate in a photographic lineup or any lineup of Mr. Guartos or any other person connected with this case. (Vol. VIII, p. 424). However, it appears that she was invited to participate in one. (See Exhibit MM to the Amended Motion for New Trial, p. 265).

Mr. Guartos asserts here that he was denied Due Process because of this misidentification and that, in fact, he could not have been the person who committed the robbery or been at the mall the day before. Mr. Guartos had very short hair and thus the robber was a different person.

The law regarding in-court identifications has been addressed earlier in this Brief. Clearly, what happened here, was that the State simply paraded in a bunch of witnesses into

the courtroom and they identified whoever was sitting at the defense table. Mr. Colavecchio testified that he did not ask for any physical lineups in this case because of his own personal time constraints. (Vol. VI, pp. 852-853). The lawyer's problems notwithstanding, the point is that the State presented contaminated and unlawful eyewitness testimony against Mr. Guartos based only on in-court identification when Mr. Guartos was the only person at the defense table. As noted, this issue has been addressed earlier here with respect to Ms. Sloan but it is renewed once again for purposes of Ms. Franklin.

XIV. MR. GUARTOS WAS DENIED DUE PROCESS BY THE ALLEGED IN-COURT IDENTIFICATION OF STACEY BUTTS.

Stacey Butts testified at the trial that she worked at the jewelry store. She testified that the day before the shooting she had contact with some Hispanic men at the store in the early evening. (Vol. VIII, pp. 425-426). Ms. Butts identified one of the men she saw in the store as Mr. Guartos. (Vol. VIII, pp. 426-427).

On March 17, 1999, an interview was conducted with Stacey Butts. (See the report attached to the Motion for New Trial as Exhibit LL, p. 253). In this report she described the smaller man as possibly 5 foot, 8 inches tall. At trial when Ms. Butts was asked to describe the two men she claimed to have observed she said that "one was fairly tall, the other was a little bit shorter. One was very large in size. One was very small." (Vol. VIII, pp. 426-427). It is clear that these descriptions and identifications do not match those of Barbara Franklin, who was standing right next to her in the store. Thus, the in-court identification of Ms. Butts must be considered inconsistent and unreliable for use at trial. Ms. Butts was never asked to

participate in any photo lineup of the Defendant or anyone else. She simply came into the courtroom and identified Mr. Guartos with no procedural protections whatsoever.

The law regarding in-court identifications has been addressed earlier in this Brief. The Defendant adopts that legal analysis here and asks this Court to find that the in-court identification of Ms. Butts was unlawful, highly suggestive and taken in violation of Mr. Guartos' rights of Due Process under the Fourteenth Amendment to the United States Constitution and the Sixth Amendment to the United States Constitution.

XV. MR. GUARTOS WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE FAILURE OF THE STATE'S COURT REPORTER TO TRANSCRIBE THE CLOSING ARGUMENT OF THE DISTRICT ATTORNEY.

When this Court examines Volume IX, page 572, the Court will find that the closing argument of the district attorney was not transcribed and does not appear in the record. Mr. Guartos raised this issue at the Motion for New Trial and it turns out that the court reporter never recorded the proceedings so it is lost forever.

At the hearing on the Motion for New Trial the defense called the court reporter and she testified that the closing argument of the district attorney took twelve minutes and she was "fooling" with the tape and did not tell anyone that the closing argument was not being transcribed. (Vol. X, p. 750). The court reporter testified that there was no way to recreate the closing argument. She had no independent recollection what the district attorney may have said and she has no notes of anything he said. (Vol. XI, p. 751). The district attorney

testified at the hearing on the Motion for New Trial and he does not remember what he said. (Vol. XI, pp. 759-760).

The law here is abundantly clear that the absence of a significant portion of the trial transcript dictates that a new trial be granted. Normally, it is the responsibility of Appellant to prepare a transcript that will enable this Court to review the issues raised.

Where the record is inadequate, the trial court's rulings are presumed correct. However, this case does not involve the usual situation where Appellant has failed to designate the required portions of the record or has neglected to supplement the record when missing portions were discovered. In this instance, Mr. Guartos noted the missing portion of the transcript and attempted, unsuccessfully, to rectify the error. Through no fault of Appellant, this Court is unable to rule on Appellant's issues because the record on appeal is inadequate.

In *Griffin v. Illinois*, 351 U.S. 12, 18-21 (1956), the United States Supreme Court held that destitute defendants must be afforded as adequate an appellate review as defendants who have money to pay for the transcripts. An indigent defendant is effectively denied adequate appellate review of an issue when the record is transmitted to this Court without a transcript of the relevant proceedings in the court below. *State v. Draper*, 800 S.W.2d 489, 493 (Tenn.Crim.App.1990). The rule is no different where the defendant is a person of means but state action has caused the loss of the transcript.

In Tennessee, the obligation to see that an indigent's appeal is properly perfected and the transcript timely filed belongs not only to appellant but is "the duty of all the State officials involved, "official reporter, trial judge, district attorney general, and court-appointed counsel for the accused." *Nelms v. State*, 413 S.W.2d 378, 381 (Tenn.1967). The state must

provide an indigent defendant who appeals as of right to this Court "with a 'record of sufficient completeness' to permit proper consideration of the issues the defendant will present for review." *Draper*, 800 S.W.2d at 493. Where it appears that an indigent defendant has been deprived of appellate review on the merits of the case due to the action or non-action of a state agency, the case must be remanded to the trial court so that a proper record may be made. *Elliott v. State*, 435 S.W.2d 812, 817 (Tenn.1968). Mr. Guartos is not indigent but the same law applies here.

When an appellant is unable to prepare or have prepared a transcript of the evidence and proceedings, the burden is on the appellant to show ... [his or her] inability to prepare a transcript, the reasons for the inability, and that the inability was brought about by matters outside ... [his or her] control...." *State v. Rhoden*, 739 S.W.2d 6, 14 (Tenn.Crim.App.1987). When an accused seeks appellate review of an issue in this Court, it is the duty of the accused to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issue. Tenn.R.App.P. 24(b); *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn.1983); *State v. Bennett*, 798 S.W.2d 783, 789 (Tenn.Crim.App.1990). When, as here, the record is incomplete, and does not contain a transcript of the proceedings relevant to the issue, or portions of the record upon which the accused relies, this Court is precluded from considering the issue. *State v. Groseclose*, 615 S.W.2d 142, 147 (Tenn.1981); *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn.Crim.App.1988). Instead, this Court must conclusively presume that the ruling of the trial court on the issue was correct. *State v. Draper*, 800 S.W.2d 489, 493 (Tenn.Crim.App.1990).

Allegations contained in pleadings are not evidence. *Hillhaven Corp. v. State ex rel. Manor Care, Inc*., 565 S.W.2d 210, 212 (Tenn.1978). Also, the arguments of counsel and the recitation of facts contained in a brief, or a similar pleading, are not evidence. *Price v. Mercury Supply Co., Inc*., 682 S.W.2d 924, 929 n. 5 (Tenn.App.1984). The same is true of statements made by counsel during the course of a hearing, trial or argument in this Court. *Davis v. State*, 673 S.W.2d 171, 173 (Tenn.Crim.App.1984); *Trotter v. State*, 508 S.W.2d 808, 809 (Tenn.Crim.App.1974). Thus, such matters cannot be considered in lieu of a verbatim transcript or a statement of the evidence. *State v. Draper*, 800 S.W.2d at 493.

In this case counsel filed a designation containing the portions of the proceedings that the Mr. Guartos wanted transcribed. Tenn.R.App.P. 24(b); *State v. Matthews*, 805 S.W.2d 776, 784 (Tenn.Crim.App.1990); *State v. Rhoden*, 739 S.W.2d 6, 14 (Tenn.Crim.App.1987). However, the court reporter could not transcribe the portion of the record. Normally, when counsel discovers the deficiency in the transcript, he or she should take steps to have the proceedings transcribed; and, subsequently, supplemented the record with the additional transcription. *State v. Matthews*, 805 S.W.2d at 784.

It is not possible to supplement the record in this case because the trial transcript never existed and the court reporter never transcribed same. Even in civil proceedings a new trial is required. See *Warren v. Warren*, 731 S.W.2d 908 (Tenn. 1985): "Since we have no way of knowing what is lacking in the record because of the absence of a court reporter during part of the proceedings, you are compelled to reverse the judgment of the court and remand this case for new trial." This Court should do exactly the same thing here because, through no fault

of Mr. Guartos, this Court cannot fully review all of the issues because of the absent of the transcript thus this Court should grant a new trial.

XVI. THE ALLEGED STATEMENT TAKEN BY THE NASHVILLE POLICE IN MIAMI, FLORIDA WAS UNLAWFUL, BEING GIVEN IN VIOLATION OF MR. GUARTOS' FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE MR. GUARTOS REPEATEDLY REQUESTED TO SEE HIS ATTORNEY.

During the trial testimony Detective Tarkington testified that he traveled to Miami, Florida. Mr. Guartos was interviewed and "admitted" that he was in Nashville at the time of the robbery. Mr. Guartos said that he was about a block-and-a-half from the scene and that after the robbery and shooting they went back to Miami with the watches which were sold. (Vol. IX, pp. 474-475). A full copy of the alleged statement appears as Exhibit CC to the Motion for New Trial at page 132.

Mr. Guartos has, unfortunately, been arrested several times in Miami. However, he has been represented by the same attorney for years. Exhibit 3 to the Motion for New Trial is the affidavit from the attorney in Florida who has represented Mr. Guartos for many years. In fact, when Mr. Guartos was interviewed by the Nashville police when he was in Florida he was at that time being represented by his regular attorney, Kenneth Wiseman who had entered an appearance for him on March 2, 2000, on an unrelated matter. This is <u>why</u> Mr. Guartos was in custody when interviewed by the police. (See Exhibit J to the Affidavit of David L. Raybin at page 24).

At the hearing on the Motion for New Trial Mr. Guartos testified that when the Nashville police came to interview him, he was in jail in Miami under the name of Hector

Deleon. His attorney was Kenneth Wiseman. (Vol. XI, p. 871). Mr. Guartos testified that Kenneth Wiseman had been his lawyer since 1994 and that Mr. Wiseman had represented Mr. Guartos on three different cases. (Vol. XI, p. 874).

Mr. Guartos testified that when he was in jail in Florida, Detectives Tarkington, Haney, Capote and Mensker came to interview him. He thought he was being taken to see his lawyer because he had met with Mr. Wiseman in jail before. Once confronted with the Nashville police, Mr. Guartos requested his attorney as soon as the officers identified themselves. They had not given Mr. Guartos his *Miranda* rights.

According to the "jail movement sheets" which were introduced as Exhibit 9 at the hearing on the Motion for New Trial, Mr. Guartos believed that he was in the interrogation room for about two hours and ten minutes. (Vol. VI, p. 876). Mr. Guartos testified but he did not make any incriminating statements to Detective Tarkington but that he wanted to see his attorney.

It is absurd to suggest that Mr. Guartos would just go on and confess to a murder without requesting his regular attorney. Thus, the "confession" was unlawful because it was taken in violation of his Fifth and Sixth Amendment right to counsel given the fact that Mr. Guartos repeatedly requested that his attorney be present.

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The corresponding provision of the Tennessee Constitution states "[t]hat in all criminal prosecutions, the accused shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. Our Supreme Court has previously held that "[t]he significant difference between these two

provisions is that the test of voluntariness for confessions under Article 1, Section 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." *State v. Crump*, 834 S.W.2d 265 (Tenn.1992).

To admit a defendant's statement into evidence, the statement must have been given voluntarily by a defendant knowledgeable of his constitutional rights and accompanied by a valid and knowing waiver of those rights. See *State v. Middlebrooks*, 840 S.W.2d 317, 326 (Tenn.1992). The prosecution may not use statements, whether inculpatory or exculpatory, that stem from custodial interrogation unless it demonstrates the use of procedural safeguards that effectively secure the privilege against self-incrimination. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966); Crump, 834 S.W.2d at 268.

A confession must be free and voluntary, and it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence or other evidence of police overreaching. *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). The issue of voluntariness requires the trial judge to focus on whether the behavior of the state's agents was such as "to overbear" the accused's will to resist and thus bring about a confession that was not freely given. *State v. Kelly*, 603 S.W.2d 726, 728 (Tenn.1980).

The Fifth Amendment right to counsel is triggered whenever a suspect requests that counsel be present during custodial interrogation. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).When a defendant clearly requests an attorney during custodial interrogation, all questioning must cease until an attorney is present, unless the defendant subsequently initiates further conversation with the authorities. *Edwards v. Arizona*,

451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This same test is utilized under both the Fifth and Sixth Amendment right to counsel. *Michigan v. Jackson,* 475 U.S. 625 at 636, 106 S.Ct. 1404 (1986).

Mr. Guartos clearly requested an attorney and his statement was take in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The United States Supreme Court held in *Miranda* that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444, 86 S.Ct. at 1612. Among those safeguards is the right to the presence of an attorney, either retained or appointed. Furthermore, if the accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Id. at 445, 86 S.Ct. at 1612. See *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994) (stating that the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney").

This Court should recall that Mr. Guartos' statements were not tape recorded in any way. It is also clear that Mr. Guartos did not sign any waivers and absolutely nothing was recorded with respect to his "statement" and, as will be noted later, the notes taken by the investigators of this "five or six hour interview" were destroyed by the officers themselves.

The most detailed analysis of Mr. Guartos' statement was taken up at the trial of the co-defendant. (See Gomez Trial Transcript, pp. 77-91). During this hearing, Detective

Tarkington advised the Court that he gave Mr. Guartos his *Miranda* rights. (See Gomez Trial Transcript, p. 79). After Detective Tarkington was examined by the prosecutor and both defense attorneys, the trial judge started asking questions as to the fact that "do you understand that he was putting himself up in the middle of a murder charge?" (See Gomez Trial Transcript, p. 90).

When taken in conjunction with the total circumstances that Mr. Guartos had great familiarity with the criminal justice system, that he was in jail at the time with a retained attorney, and was being questioned about a murder charge, it is crystal clear that Mr. Guartos' statements were taken without the benefit of his attorney, which he repeatedly requested throughout the "four to five hours" of interrogation. Thus, his statements were taken in violation of the Fifth Amendment to the United States Constitution. The statements were inadmissible and this Court should find that the statements were unlawfully admitted in the trial and that a new trial should be granted.

XVII. THE DEFENSE IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE CONSISTING OF REPORTS OF THE DATE COUNTY POLICE DEPARTMENT SHOWING THE TIME OF CONFINEMENT OF MR. GUARTOS DURING HIS "INTERROGATION."

Exhibit 9 consists of the inmate movement log from Dade County which was introduced at the Motion for New Trial. Exhibits H and I to the Affidavit of David L. Raybin, pages 18 and 21, also show these movement sheets and checkout sheets. These documents establish that on March 15, 2000, when interviewed by the Nashville police, Mr. Guartos was checked out of confinement at 18:25 hours and was checked back into confinement at 20:45

hours, a total of two hours and twenty minutes. Mr. Guartos could not have been interviewed for much more than two hours given the fact that he was pulled from the cell and put back in his cell in about that time. This information was highly pertinent to the length of time of his interrogation by the Nashville authorities, because during the trial Detective Tarkington testified that the interview with Mr. Guartos lasted "four, maybe five hours." (Vol. IX, p. 477). When confronted with the jail movement sheets during the hearing on this new trial motion, Detective Tarkington agreed that the interview could have lasted for only two hours "at most." (Vol. X, pp. 827-828).

The law regarding newly discovered evidence has been discussed in great detail previously in this Brief. This evidence was clearly material because the newly discovered evidence would have established that the interview was of much shorter duration than the police officers testified to at the trial. This would have called into question the truthfulness of these officers as it relates to the fact that Mr. Guartos allegedly made a confession where there was no recording, no notes and no waiver.

At the hearing on the Motion for New Trial, Mr. Colavecchio, the trial lawyer, testified that he did not have the movement sheets showing Mr. Guartos was in the Miami jail and moved around for something less than two hours. In reviewing the discovery that he did get from the court file and from talking with Mr. Guartos, the issue of the amount of time did not seem to occur to Mr. Colavecchio so he did not look into that issue. This was primarily the case since the detective did not testify as to the length of time until the trial itself. (Vol. XI, p. 847-848). Mr. Colavecchio testified that he was under severe time constraints to obtain discovery and information and investigate this case. He did not file any motions to continue

the case because the judge told him verbally that this case was going to be tried on the day it was set so he felt he did not have an option and had to get ready for trial. (Vol. XI, p. 848-849).

The truth of the matter is that the jail movement sheets, while they might seem trivial, are vitally important in contradicting the officer in the amount of time that he was in the company of Mr. Guartos. This contradiction was important given the dispute as to what was said during the "unrecorded" interview. This more than meets the test for material evidence and thus this Court should grant a new trial.

XVIII. THE STATE VIOLATED RULES 16 AND 26.2, TENNESSEE RULES OF CRIMINAL PROCEDURE AND VIOLATED THE DUE PROCESS RIGHTS OF MR. GUARTOS BECAUSE ALL OF THE NOTES OF THE POLICE OFFICERS OF THEIR INTERVIEW WITH MR. GUARTOS ON MARCH 15, 2000, HAD BEEN DESTROYED.

XIX. MR. GUARTOS IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE CONCERNING THE FACT THAT IT WAS ONLY LEARNED AFTER THE TRIAL THAT THE OFFICERS HAD DESTROYED THEIR NOTES OF THE INTERVIEW OF MR. GUARTOS.

These two issues will be considered together. Following the trial the undersigned counsel interviewed Detective Tarkington and learned that he had destroyed his original notes of his interview with Mr. Guartos at the Miami jail. Undersigned counsel also learned that Detective Haney had destroyed her notes as well. (See Affidavit of David L. Raybin, pp. 2-3).

At the hearing on the Motion for New Trial, Mr. Colavecchio testified that he was not aware that during the trial that the police officers had destroyed their notes. He testified that had he known this fact he would have asked the officers to provide or recreate their notes or this would have formed the basis of motions and further cross-examination. (Vol. XI, pp. 864-865).

The district attorney testified during the hearing on the Motion for New Trial that he did not know that the detectives had destroyed their notes. (Vol. XII, p. 920).

Detective Haney testified at the Motion for New Trial that he destroyed his personal notes. (Vol. VII, p. 904). He agreed that during the trial he did say he was looking at his notes while he was testifying, (see Vol. VIII, p. 443), however it is recollection that he did not take his notes up on the witness stand. He does not recall telling the district attorney at any time that he destroyed his notes. (Vol. XII, p. 907). The Detective admitted that if there were some dispute later and his notes were gone that there would be no way to compare the typed report. (Vol. XII, p. 906). It is apparent, then, that the officers destroyed their notes of this "four or five hour" interview with Mr. Guartos.

In *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993), the Supreme Court held that the government was prohibited from using witnesses whose initial interviews were taped and were destroyed by state investigators. The notes of the detectives in the instant case certainly constituted statements of the detectives themselves pursuant to Rule 26.2,Tenn. R.Crim. P. The government may not avoid the requirements of Rule 26.2 by adopting a policy of destroying notes made during an investigation.

The notes clearly would constitute statements of the Defendant made pursuant to Rule 16, Tenn. R. Crim. P. The defense is entitled to all notes and reports concerning any oral statement that the Defendant may have given to the authorities. A combination of Rule 16 and 26.2 dictate that statements of the Defendant are to be disclosed to his attorney and not destroyed. There is simply no excuse for this.

Unfortunately, the original trial lawyer was not aware that these notes had been destroyed. Clearly they would have been usable to impeach the police officers and to cast discredit on their testimony. This more than meets the test of material evidence and thus this Court should grant a new trial so that these officers can explain to another jury why they destroyed their notes.

XX. MR. GUARTOS WAS DENIED DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY THE FAILURE OF THE GOVERNMENT TO COMPLY WITH RULE 16, TENNESSEE RULES OF CRIMINAL PROCEDURE REQUIRING THE DISCLOSURE OF ALL STATEMENTS MADE BY THE DEFENDANT.

XXI. THE DISCLOSURE OF THE DEFENDANT'S POST-ARREST STATEMENT TO THE POLICE CONSTITUTES NEWLY DISCOVERED EVIDENCE.

These two issues will be considered together. As noted in the Affidavit of David L. Raybin, Mr. Raybin spoke with Detective Tarkington on March 29, 2002, and learned that there was an additional statement that Mr. Guartos had given to the authorities after he had been brought back to Nashville. (See Collective Exhibit 2, Motion for New Trial, Affidavit

of David L. Raybin, p.2). The prosecutor was not told about the statement and thus it was not disclosed to the defense attorney prior to trial.

Mr. Guartos' undisclosed post-arrest statement which Detective Tarkington gave to Mr. Raybin appears in Mr. Raybin's Affidavit as Exhibit G, page 16, to said Affidavit. The police report states as follows:

> On 06/22/2000, Det. Robert Jinette of the fugitive section and myself [Det. Tarkington] were in Miami, Florida to pickup and extradite the defendant identified as Bryant Guartos back to Nashville for the robbery and homicide of the victim known as Roy Benton Rogers. Guartos was brought back to the Justice Center in Nashville without incident.
>
> On 06/26/2001, I checked Guartos out of jail and he was brought to the CID/Robbery Unit. Once we reached the office Guartos began by asking what he had told Det. Dean Haney and myself when we visited him in the Miami jail several months ago. At the time he stated no one could know he had confessed to being involved in the robbery/homicide for fear of his life but more importantly fear his family would be killed. He stated he hoped we had taped him then because he had nothing else to say. Threats had been made to him because someone in Miami had informed old friends he had snitched on the others about the robbery and homicide that occurred in Nashville. He stated he was afraid for his family and had nothing else to say. He did not ask for an attorney and was told if he wanted to talk at a later date he could call me and I would come to the jail and check him out. He was returned to the jail.

This statement is important because it is consistent with Mr. Guartos' position that he did not make any confession to the authorities in Miami, for the simple reason that, if he had, the police would have had no reason to talk to him once again when he returned to Nashville.

Under Tennessee Rules of Criminal Procedure 16, the State has an obligation to disclose any written or recorded statements made by the defendant and prepared by law enforcement officers. *State v. Moore*, 703 S.W.2d 183, 185 (Tenn.Crim.App.1985); see *State v. Brown*, 552 S.W.2d 383, 386 (Tenn.1977). The State may withhold disclosure of a

statement it does not intend to offer in evidence only if that statement is oral. *State v. Hicks*, 618 S.W.2d 510, 513 (Tenn.Crim.App.1981). Otherwise, the defendant has what has been described as "virtually an absolute right" to disclosure. Id. at 513-14. Rule 16 covers "not only written, recorded and transcribed verbatim statements by a criminal defendant, but also written 'interpretation(s) or summar[ies]' of statements made by the accused, or a memorandum of an interview 'even though not verbatim and not signed' by the defendant." Id. at 514 (citation omitted). In *State v. Delk*, 692 S.W.2d 431, 436-37 (Tenn.Crim.App.1985), the Court held that a law enforcement agent's notes of an interview with the defendant constituted an "interpretation or summary" of the defendant's statement, and, under *Hicks*, were subject to full discovery by the defendant upon request. *Delk*, 692 S.W.2d at 436-37. "The prosecutor's duty to disclose extends not only to material in his or her immediate custody, but also to statements in the possession of the police which are normally obtainable by 'exercise of due diligence,' that is, a request to all officers participating in the investigation or preparation of the case." *State v. Hicks*, 618 S.W.2d 510, 514 (Tenn.Crim.App.1981).

At the hearing on the Motion for New Trial the district attorney said that he was not aware of the subsequent statement that Mr. Guartos had given to the detective. The district attorney's "explanation" for not knowing about the statement was that the detective had not given it to him. (Vol. XII, pp. 921-922). The detective testified at the hearing on the Motion for New Trial and agreed that the subsequent statement links back to the earlier conversation that he had with Mr. Guartos in the jail in Miami. (Vol. XI, pp. 838-839).

It is obvious that the State failed to provide the Defendant's statement to the attorney prior to trial in violation of Rule 16, Tenn. R. Crim. P. Even though the statement is exculpatory on its face, why would the police need to question Mr. Guartos further if he had already made a confession in Miami? This subsequent conversation is extremely important to the case and the failure to disclose this statement constitutes reversible error. The error is not harmless. Here the statement is exculpatory and, given that the State introduced part of Mr. Guartos' statement, all of the balance of his statements would have been admissible by the defense. This could have changed the entire complexion of the defense strategy in the case. Mr. Guartos testified at the trial but he might not have had to testify had this exculpatory statement been made available to his attorneys for use at trial. Certainly this would have been fruitful for cross-examination of the police. Under such circumstances the failure to disclose this important statement constitutes reversible error. See *State v. Carter*, Tenn. Crim. App. at Jackson, filed February 20, 2003 (unpublished) (copy attached hereto). Accordingly this Court should reverse this conviction.

XXII. MR. GUARTOS WAS DENIED EXCULPATORY INFORMATION IN VIOLATION OF *BRADY* BY THE FAILURE OF THE STATE TO DISCLOSE TO HIS ATTORNEY THE CONTENTS OF AN INTERVIEW WITH AN INDIVIDUAL WHO WAS INTERVIEWED JUST PRIOR TO MR. GUARTOS IN MARCH, 2000, IN MIAMI, FLORIDA.

As noted in earlier issues, *Brady v. Maryland*, *supra*, compels the government to disclose exculpatory information which is helpful to the defense. Exhibit 12 to the Motion

for New Trial is a report from Detective Tarkington, filed under seal. The undersigned counsel has respected the Order of Sealing and has not opened this information to see what is contained therein. From investigation of the case, however, the undersigned counsel was of the view that someone had been interviewed just prior to the interview of Mr. Guartos. The undersigned counsel was of the view that this other individual had given information implicating Mr. Guartos which is why the detectives went to talk to Mr. Guartos in the first place. Since they were aware of Mr. Guartos' possible complicity in this homicide from talking with this other person, the officers should have armed themselves with tape recorders or some other type of recording device to record statements made by Mr. Guartos. However, the officers did not tape record anything in their "four or five hour" interview with Mr. Guartos and, as previously noted, they even destroyed their notes of this interview with Mr. Guartos in Miami.

At the trial, Detective Tarkington testified that he went to Miami to speak with someone else initially. (Vol. IX, p. 477). He testified that he did not tape record Mr. Guartos' statement or get a signed statement from Mr. Guartos. He said that questioning Mr. Guartos was a "very last minute decision." (Vol. IX, p. 477).

At the hearing on the Motion for New Trial Detective Tarkington testified about taking the statement from Mr. Guartos and then he was asked during the hearing on the Motion for New Trial about interviewing the mystery person prior to talking to Mr. Guartos. (Vol. XI, p. 832). At this point the district attorney objected and the defense advised the Court that the relevancy of this information about the interview with the individual prior to Mr. Guartos

concerned the question of the officer's knowledge and would go to show that they had enough information to justify arming themselves with tape recorders prior to interviewing Mr. Guartos:

> What I [David Raybin] wanted to be able to show is that had the government disclosed this to Mr. Colavecchio, this is a discovery violation, Mr. Colavecchio would have then realized that they did have a person. This is not just some accidental thing that just falls on Mr. Guartos and that they knew that he was the shooter, that he was the culprit, and that would have caused any reasonable police officer to walk in there with a tape recorder.
> (Vol. XI, pp. 833-834).

At this point the judge refused to require the report to be disclosed and it was to be filed under seal. (Vol. XI, pp. 835-836). The report appears in the record here as Exhibit 12 to the Motion for New Trial. As noted, undersigned counsel has not reviewed this report but would argue that should the report contain sufficient information linking Mr. Guartos to the alleged crime then it clearly would be exculpatory for the reasons noted above. Accordingly, this Court should grant a new trial so that experienced defense counsel can utilize this evidence to further impeach these police officers as to why they did not record Mr. Guartos in this crucial interview which Mr. Guartos flatly denied occurred in the manor which the officers testified. Given that the "confession" was the only evidence linking Mr. Guartos to this crime, the error becomes far more profound and the importance of the "missing report" takes on added significance.

XXIII. MR. GUARTOS WAS DENIED DUE PROCESS BY THE FAILURE OF THE STATE TO DISCLOSE A POLICE REPORT OF DETECTIVE HANEY WHICH STATEMENTS SHOULD HAVE ALSO BEEN DISCLOSED TO THE DEFENSE UNDER RULE 26.2, TENNESSEE RULES OF CRIMINAL PROCEDURE.

Exhibit BB which appears at page 131 of the Amended Motion for New Trial is a police report which shows that a telephone call was made to an answering service used for an escort service. This is also Exhibit 13 to Motion for New Trial. The proof at trial was that Mr. Guartos' fingerprint was found on a Yellow Pages telephone book in a hotel room in Nashville. The fact remains that the telephone book was used by Mr. Guartos to look up the number of the escort service. This would have explained his presence in the room at the motel. The failure to disclose that a call was made to an escort service denied the Defendant a fair trial as well as the right to Due Process under the Fourteenth Amendment to the United States Constitution. In addition, the report was prepared by Detective Haney and should have been disclosed under Rule 26.2, Tenn. R. Crim. P. as a prior statement of the witness.

More particularly, the document shows that on March 23, 1999, Detective Haney prepared the report which indicated that it was learned that Mr. Guartos had rented two rooms at the Howard Johnson located on Charlotte Pike in Nashville. According to this report the investigation revealed certain phone numbers obtained from the records at the motel. According to Detective Haney, he called an answering service which led to a number and an address for a local escort service. The report further indicates that he personally spoke with "Brandi" of the escort service and drove to her location. Detective Haney reports that she advised that no girls had been sent to the Charlotte Pike area.

At the trial, Mr. Guartos testified as to why he rented two rooms and as to the circumstances which occurred. He explained to the jury that while in room number 204 he had searched through the Yellow Pages for a strip club or escort service in the area to help the people in the room.

Q. Now after you all, you rented the rooms with them or for them, what did you all do after that?

A. I went and got me some beer with the girl I was with, and I just decided like to go and knock on them, and I went and knocked on the door and they opened the door and, hey, what's up? Oh, you know, and see if we could go to a strip club or something around there. I told them I check the Yellow Pages. I went and grabbed the Yellow Pages and told them here is escort service, you know. That is what, I mean, when I go traveling sometimes, I just go to a Yellow Pages escort service.

Q. So what was the purpose of you having the phone book again?

A. To look for a escort service in there.

(Vol. IX, p. 484)

The importance of the telephone book, of course, is that it contained a fingerprint of Mr. Guartos. This linked Mr. Guartos to the room where some of the other Hispanics were staying which the State contended was the staging area for the robbery.

Had the State disclosed Detective Haney's report to the defense then of course this would have supported Mr. Guartos' testimony that he had been in the room to call an escort service. The fact that the State had this information was clearly exculpatory since it was obviously consistent with Mr. Guartos' testimony at trial.

It is true that the State did disclose all telephone records but they were huge and voluminous and, although the number to the escort service was provided, it was contained

within hundreds of pages. What was not disclosed of course was the report of Detective Haney that the telephone number at issue was in fact to an escort service.

District Attorney Gunn testified that he did not disclose this report to the defense. (Vol. XII, p. 926). The district attorney also testified at the hearing on the Motion for New Trial that he believed Mr. Guartos was not telling the truth about calling the escort service and he did not see how that really mattered in any event. (Vol. XII, p. 927). This is astounding! Mr. Guartos' truthfulness was for the jury and not the district attorney.

The defense attorney, Mr. Colavecchio, was called at the hearing on the Motion for New Trial. Mr. Colavecchio recalled that when Mr. Guartos was testifying about making phone calls that he was trying to call escort services. Mr. Colavecchio confirmed that the missing report substantiates that fact. Mr. Colavecchio testified that had he had the report at trial he could have cross-examined the detective about this fact. (Vol. XI, pp. 855-856).

Detective Haney testified at the hearing on the Motion for New Trial that his investigation established that the phone number for the escort service came from one of the two rooms and he agreed that escort services advertised in phone books. (Vol. XII, p. 913).

The issue here of course is not whether a number, among the thousands and thousands of numbers provided to the defense was disclosed in discovery. The issue is whether or not the State should have disclosed the report of Detective Haney which showed that one of these numbers was linked to an escort service. This information was totally consistent with Mr. Guartos' testimony and was obviously exculpatory information which should have been disclosed, if not prior to trial, then certainly during the trial. In any event, the report of Detective Haney constituted a statement pursuant to Rule 26.2 since it was a report prepared

by Detective Haney himself. Detective Haney testified at the trial all about his investigation of the Howard Johnson motel on Charlotte which is where the subjects were staying prior to the robbery, according to him. (Vol. VIII, pp. 433-434).

Clearly this escort service report should have been disclosed prior to or during trial and thus the defense was denied Due Process because this report obviously constituted *Brady* information. It certainly tended to corroborate Mr. Guartos and explained the presence of the fingerprint. Mr. Guartos' credibility was for the jury and not for the district attorney. This Court should reverse this case and remand for new trial.

XXIV. THE DEFENDANT WAS DENIED DUE PROCESS BY THE MISLEADING CHARACTERIZATION OF TELEPHONE RECORDS AS HAVING OCCURRED ON MARCH 17, 1999, WHEN IN FACT THEY WERE GENERATED ON MARCH 16, 1999.

During the trial the prosecution presented evidence in the form of a "Bell South subscriber information" document which alleged that Mr. Guartos placed various calls from the Green Hills Mall to different locations. This was Exhibit 39 at the trial and a copy also appears in the Amended Motion for New Trial as Exhibit HH at page 206.

As the Court can see the subscriber information notation of March 17 is totally false since the discovery shows that the call was actually made on March 16 the day before the robbery. (See Amended Motion for New Trial, page 208).

[FOR THE CONVENIENCE OF THE COURT A COPY OF PAGES 206-208 FROM THE AMENDED MOTION FOR NEW TRIAL APPEAR ON THE FOLLOWING PAGES]

This misleading document is clearly prosecutorial misconduct when the State was in possession of the same phone records as the defense which clearly showed that the call was placed on March 16, thus implying that the Defendant was making calls from the mall at the time of the robbery! The impropriety of the prosecutor's actions are evident and are supported by the record in that the trial court later went so far as to question the district attorney about the date when the call was made in which case the district attorney responded "24 hours before" which would have been on March 16, 1999, which is contrary to the false evidence put before the jury. See Vol. X, p. 685, where the judge is asking the district attorney about the correct date that the calls were made since the exhibit lists March 17, 1999.

The district attorney finally told the judge (during the sentencing hearing) that the incorrect date just meant that is who the phone was listed to on the date of the robbery: "It does not mean the call was made on that date." If the judge was confused, imagine how the jury must have felt trying to sort out the voluminous telephone calls which had an incorrect date on an exhibit displayed for the jury.

In *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763 (1972), the United States Supreme Court held that the knowing presentment of false evidence is incompatible with the demands of justice. It is true that the defense lawyer sat on his hands while this was occurring but this constitutes such a fundamental flaw in the trial that this Court should correct the error. Even where the defense counsel is aware of the false evidence, there may be a deprivation of Due Process if the prosecutor reinforces the deception by capitalizing on it in closing argument. *Mills v. Scully*, 826 F.2d 1192 (2nd Cir. 1987). See also *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000) ("The government's duty to correct perjury by its witnesses

is not discharged merely because defense counsel knows and the jury may figure out, that the testimony is false.") This Court should reverse this conviction and insist that the prosecutor accurately label his exhibits.

XXV. THE TRIAL COURT ERRONEOUSLY PERMITTED HEARSAY EVIDENCE IN THE FORM OF POLICE REPORTS AS TO THE ADDRESS AND PHONE NUMBERS OF THE DEFENDANT.

At the trial, Officer Steve Kaufman testified that he was with the police department in Miami, Florida, and that on March 1, 1999, he came into contact with Mr. Bryant Guartos at his residence at a particular location. The officer also testified as to the telephone number of Mr. Guartos and his girlfriend at that location. (Vol. VIII, p. 407). The officer obtained the above information as part of his "official duty" as a police officer and took this information as part of a "official report" on March 1, 1999. This was entered as Exhibit 36. (Vol. VIII, p. 410). [7]

When the officer testified at trial about the information concerning the telephone number the defense attorney objected saying it would be hearsay. (Vol. VIII, p. 409). The judge overruled the objection and allowed the report to come into evidence.

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[7] The relevancy of this information is that it tied into some of the phone calls made from Nashville back down to Florida allegedly showing a connection with Mr. Guartos. It should be noted, of course, that on that same March 1, 1999, Mr. Guartos was arrested at his girlfriend's house for alleged domestic violence and his mug shot was taken on that date. (Vol. XI, p. 870). It is astounding that the Nashville prosecutors bring an officer up from Florida to testify about an arrest and a telephone number when that same officer arrests Mr. Guartos and his mug shot is obviously taken that moment. This is only two weeks prior to the robbery in Nashville. The undersigned counsel will leave it to others to inquire as to why neither the prosecutor nor defense lawyer at the time simply asked about a mug shot taken at the time of that arrest which, as noted, was only two weeks before the robbery here in Nashville. Certainly that would be the subject of inquiry at the next trial.

Obviously, the officer obtained his information from the girlfriend and thus it clearly constitutes hearsay. This testimony met all of the requirements for hearsay in that it depended on the out-of-court assertion of the girlfriend and that it was introduced to prove the truth of the matter asserted that her telephone number was a certain number. (See Rule 801, Tennessee Rules of Evidence). Apparently, the judge let this in under some exception of a public record because there was some duty to report the facts. However, there is an exception to the exception. Rule 803(8) clearly excludes "matters observed by police officers and other law enforcement personnel." The committee comments say that "Police reports are expressly excluded." See also *State v. Allen*, 692 S.W.2d 651, 653 (Tenn. Crim. App. 1985).

The introduction of the hearsay testimony is clearly not harmless because the telephone records were only linked to the Defendant Guartos by the fact that he allegedly lived with his girlfriend which is where the telephone calls were directed. The defense would like to also establish that the prosecutor capitalized on this at closing arguments but of course the closing argument is not present because the court reporter neglected to transcribe the testimony at the time it was being given, as noted in the previous issue. See the closing argument of the defense attorney at Vol. IX, p. 566:

> Now I am sure that the State is going to say in rebuttal to that, well they called his house. They called his girlfriend's work but that is just the point. They, who is they? Mr. Guartos admitted he knew these people at some point in time. Who is to say they were not calling his family? Who is to say who is calling who for that matter? We don't know. (Vol. IX, p. 566).

This Court should reverse this conviction and remand for new trial.

XXVI. THE COURT ERRONEOUSLY IMPOSED THE MAXIMUM SENTENCES WHICH ARE IN VIOLATION OF *BLAKELY v. WASHINGTON*.

XXVII. THE CONSECUTIVE SENTENCES WERE IMPROPERLY IMPOSED AND, IN ANY EVENT, CONSECUTIVE SENTENCING HERE VIOLATED *BLAKELY v. WASHINGTON*.

With respect to the conviction for conspiracy to commit aggravated robbery, the Court imposed a sentence of 10 years. With respect to the conviction for especially aggravated robbery the Court imposed a sentence of 25 years. With respect to the aggravated robbery conviction the Court imposed a sentence of 12 years. The conviction for murder in the first degree carried a life sentence. The Court ran all of the sentences consecutively for an effective sentence of life plus 47 years. (Vol. III, pp. 449-452). The Court found that all counts were Range I except for Count 1 which was a Range II sentence. The Court stated that Mr. Guartos had a previous history of criminal convictions or criminal behavior. The Court did not specify which of the two the Court were relying on. (Vol. X, p. 695).

The Court also found that Mr. Guartos was also the leader in the commission of the offense. (Vol. X, p. 696). The Court also found that the personal injuries inflicted and the amount of property taken was particularly great. The Court also applied the factor that Mr. Guartos had a previous history of unwillingness to comply with the conditions of his sentence. (Vol. X, pp. 696-698). The Court said that it was weighing very heavily factors 1, 2, and 8. (Vol. X, p. 699).

As to the consecutive sentence determination, the Court ran the sentences consecutively because the Court found that Mr. Guartos was a "dangerous offender whose

behavior indicates little or no regard for human life." (Vol. X, p. 700). The judge said that Mr. Rogers was "meant to be killed." Thus, as noted, the judge ran the sentences consecutively.

In *State v. Gomez*, 163 S.W.3d 632 (Tenn., 2005), this Court addressed both the Sixth Amendment *Blakely* issue and also a state procedural waiver issue. With respect to the waiver problem, this Court found that under Tennessee procedure the sentencing issue could only be reviewed for plain error in this Court because the "defendants did not raise this constitutional challenge at their April 4, 2002, sentencing hearing or in their motions for new trial, nor did they raise it in the Court of Criminal Appeals." Clearly, then, had the Sixth Amendment question been raised at any one of these three points the issue would have been preserved and the merits of the Sixth Amendment controversy would have been ripe for review.

As this Court is aware, Mr. Guartos was a co-defendant in the *Gomez* matter. Mr. Guartos was tried first and then Gomez and Londono were later tried, convicted and sentenced. However, because of a significant problem with the trial transcript, Mr. Guartos' appeal was delayed and the motion for new trial was denied on November 24, 2003. *Blakely* was decided on June 24, 2004. Thus, the Sixth Amendment issue was not raised in the trial court at the sentencing hearing or in the motion for new trial.

In his brief on the merits in the Court of Criminal Appeals, Mr. Guartos has preserved his Sixth Amendment sentencing claims precisely this Court in *Gomez* noted would be the probable point of final preservation as a matter of state law. Presumably, then, after the case leaves the Court of Criminal Appeals then a Sixth Amendment sentencing issue could only be addressed by plain error in this Court as this Court itself just held in *Gomez*.

A brief review of Tennessee law establishes that neither the Court of Criminal Appeals nor this Court have imposed waiver barriers to sentencing issues litigated in the Court of Criminal Appeals. In other words, there have never been requirements of contemporaneous objections as it relates to sentencing questions later litigated in the Court of Criminal Appeals.

Record preservation is to be distinguished from certain kinds of trial objections. For example, it is elementary that to have full review in the Court of Criminal Appeals the trial attorney must prepare a transcript of the sentencing hearing. See e.g. *State v. Meeks*, 779 S.W.2d 394 (Tenn. Crim. App. 1988).

A trial objection is necessary for routine evidentiary propositions such as hearsay. For example, in *State v. Pugh*, 713 S.W.2d 682 (Tenn. Crim. App. 1986), the trial judge was entitled to consider evidence which was included in the presentence report where the presentence report was introduced without objection.

The Sixth Amendment questions here did not depend upon the introduction of testimony or the objection to a specific piece of evidence at trial or at the sentencing hearing. Rather, the Sixth Amendment question deals only with whether certain enhancement factors could or could not be utilized against the defendant. Tennessee has never imposed a waiver rule on the litigation of enhancement factors in the Court of Criminal Appeals. In other words, this Court has never denied appellate review of enhancement factors because of some failure to "object" at the trial level.

Distinguishable are cases which involve sentencing questions where some event must have occurred prior to the jury trial. For example, in *State v. Stephenson*, 752 S.W.2d 80 (Tenn, 1988), this Court was concerned about pretrial notice of prior convictions used to

enhance the sentence into a higher range. This Court held that if the defendant does not seek a continuance by delayed notice "any objection to the delayed notice . . . ordinarily should be deemed to have been waived." However, in *State v. Debro*, 787 S.W.2d 932 (Tenn. Crim. App. 1989), the Court of Criminal Appeals did not apply the waiver doctrine to cases involving defects in the content of the notice rather than in the delay of filing of the notice. Accordingly, the inquiry in those types of cases is one of prejudice rather than waiver.

Unlike the mandatory pretrial notice of prior convictions used to enhance a sentence into a higher range there is no requirement of notice of enhancement factors used to enhance a sentence within the range. Compare Tenn. Code Ann. § 40-35-202(a) with subsection (b) noting that enhancement factor notice is only required where the judge orders notice. Given that notice of enhancement factors is not mandatory there is no waiver imposed for failing to object to the utilization of enhancement factors. Indeed, this Court has said that enhancement factors which were not relied upon by the trial court might be considered by an appellate court in conducting *de novo* review. See *State v. Pearson*, 858 S.W.2d 879 (Tenn., 1993) which held that an appellate court is authorized to consider <u>any</u> enhancement factors supported by the record. See also, *State v. Adams*, 864 S.W.2d 31 (Tenn., 1993).

Given that, under Tennessee law, <u>all</u> of the enhancement factors are still "in play" at any time on direct appeal leads to the inescapable conclusion that a party can object to the utilization of enhancement factors at any time on direct appeal. This Court can certainly consider enhancement factors not considered by the trial court or the Court of Criminal Appeals in adjudicating an appropriate sentence. This is so because "<u>we</u> must review the length, range or manner of service of a sentence *de novo* with a presumption that the

determinations made by the trial court were correct." *State v. Imfield*, 70 S.W.3d 698 (Tenn., 2002). As noted, even the Supreme Court is authorized to consider any enhancement as part of *de novo* review. *State v. Pearson, supra*.

At bottom, the Sixth Amendment issue as it relates to "waiver" depends on whether a trial court may constitutionally utilize enhancement factors to increase the length of a defendant's sentence. This is no different than whether an enhancement factor is properly supported by the record, is already utilized as an element of the crime or where there is some other statutory defect in the enhancement factor in that particular case. As noted, enhancement factors may be contested at any time on direct appeal and, indeed, may be advanced by the state for the first on appeal or even by the appellate court itself. How then can one legitimately argue that there is some "waiver" by the failure of a defendant to contest the utilization of an enhancement factor at some level either at trial or on direct appeal in the Court of Criminal Appeals or in the Supreme Court? How can an enhancement factor be "raised" for the first time on appeal by an appellate court but be immune to the defendant's complaint that the enhancement factor violates the constitution?

Gomez imposed a state procedural waiver barrier to the merits of the Sixth Amendment claim as it relates to the utilization of the enhancement factors. However, as noted, these enhancement factors may be contested at any time on direct appeal on any ground.

There is no state procedural waiver as a matter of state law as it relates to the ability of a defendant to contest the enhancement factors on direct appeal on any statutory or constitutional ground. For this reason it is also not necessary to determine if *Blakely* is a new rule or not. It is certainly the law today as this Court reviews the enhancement factors. Thus,

Mr. Guartos has clearly perfected his Sixth Amendment claims since he is still on direct appeal.

As to the merits of the Sixth Amendment issue, Mr. Guartos respectfully asserts that the majority decision in *Gomez* was wrongly decided. The majority in *Gomez* repeatedly emphasized that our sentencing statutes do "not mandate an increased sentence upon a judge's finding of an enhancement factor," to support the finding that *Blakely* is inapplicable to Tennessee's sentencing scheme. However, an increased sentence was not mandated by the Washington guidelines at issue in *Blakely* or in the New Jersey statute at issue in *Apprendi*. Indeed, the constitutional relevance of merely exposing a defendant to a greater punishment based on a judicial fact-finding, but still leaving it to the judge's discretion whether to impose the heightened punishment was extensively discussed in *Blakely* itself. Footnote 8 of the majority opinion in *Blakely* says quite clearly that it is immaterial for Sixth Amendment purposes "whether the judicially determined facts require a sentence enhancement or merely allow it."

As to the length of the sentences, it is clear that all of the enhancement factors, except for the prior criminal record, can no longer be used to enhance beyond the statutory minimum or presumptive sentence. *Blakely v. Washington*, 124 S.Ct. 2531 (2004). It is clear, of course, that *Blakely* does not eliminate the use of prior convictions for enhancement purposes within the Range. However, this Court should not parse out all of these enhancement factors and leave only the prior criminal record and get to the exact same sentence that the judge imposed here. This is so because the judge gave great weight to all of the enhancement factors.

Moreover, the prior convictions in Mr. Guartos' case were property offenses and not crimes of violence.

The convictions from Florida appear in the record as Collective Exhibit 2 to the sentencing hearing. They show a conviction for burglary and grand theft in 1995 and burglary of an unoccupied conveyance and grand theft in 1997. These are hardly the types of convictions for the Court to impose maximum sentences. The 1997 case involved a theft of over $300 and less than $5,000.

Clearly, then, the enhancement factor of the prior conviction does not justify the excessive sentences imposed here. Consequently, this Court should reduce the sentences to the statutory presumptive sentence in all counts.

As to the judge's "reason" for running the sentences consecutively, the judge said that Mr. Rogers was "meant to be killed." This is not supported by the facts. Mr. Rogers obviously heard Mr. Nagele being attacked, Rogers turned, he went for his gun, and the robbers then shot him. If the robbers were meant to kill the guards then they would have killed Mr. Nagele as well! They did not. There is simply no legal justification for the consecutive sentencing here. This is not the sort of case like *State v. Turner*, 41 S.W.3d 663 (Tenn. Crim. App. 2000), where during the robbery the defendant there pointed a gun at police officers who were approaching and fired at them at close range.

Lastly, the defense would argue that under the Tennessee scheme for imposing consecutive sentences that the consecutive sentences violated *Blakely v. Washington*, *supra*. Tennessee law provides for presumption of concurrent sentences. Thus, factors which justify

consecutive sentences must be found by a jury. Since Tennessee law does not permit a jury for this fact-finding-determination, the consecutive sentences violated *Blakely v. Washington*.

The trial judge's sentence here was almost identical to that in *State v. Lee*, Tenn. Crim. App. at Knoxville, filed December 23, 2002, where the order of consecutive sentences was reversed. There, the trial judge said, "If they were there just to rob him, there was no need for them to execute him, so he did indicate little or no regard for human life, so I will make that a consecutive 20-year sentence to the life sentence that the jury imposed for the first degree murder." The robbery may have been planned in our case here. The shooting clearly was not.

For all the reasons stated herein this Court should impose the statutory minimum or presumptive sentence for each offense and run the sentences concurrently and not consecutively.

CONCLUSION

The identification of Mr. Guartos was clearly flawed. He was misidentified. This Court is also faced with convictions where the State repeatedly failed to disclose material evidence to the defense. Traditional tools utilized for testing the truth of the accusation were not available to the defense lawyer or were only discovered after the trial by undersigned counsel. The errors both individually and collectively conspired to deprive Mr. Guartos of a fair trial. This Court should grant review, reverse, and remand this matter.

Respectfully submitted this _____ day of May, 2006.

HOLLINS, WAGSTER, YARBROUGH,
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_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief has been furnished via *U.S. Mail* to Assistant Attorney General Mark Fulks, Attorney General's Office, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202, on this the _____ day of May, 2006.

_____
David L. Raybin

APPENDIX