

1 A. Then we asked Mr. Lowery again, again it was a pause.  
2 Asked him then what did you do. Mr. Lowery stated that  
3 he then jumped up, threw the knife down inside the resi-  
4 dence and then left the residence.

5 Q. Did he proceed to tell you more about what happened or  
6 does that sum it up?

7 A. That basically sums it up. I can't recall right offhand  
8 what else he had said.

9 Q. What happened after he told you?

10 A. I'm sorry.

11 Q. What happened after he related this information to you?

12 A. Took quite a while to get the information due to the fact  
13 that every time he'd say something we'd have to ask him,  
14 then what did you do. It wasn't just throw out. Every  
15 time he'd make a comment he would stop and we would ask him,  
16 then what did you do. Mr. Lowery then stated he would  
17 like to take a break which we said fine, 10, 15, 20  
18 minutes so he thought about 15 minutes. I then went and  
19 got Mr. Lowery a cup of coffee. He set in a room by him-  
20 self and there was myself or Investigator Johnson was not  
21 with him and about 15 minutes later we came back to Mr.  
22 Lowery and again Investigator Johnson read the Miranda  
23 warning to Mr. Lowery and asked Mr. Lowery if he would put  
24 in writing form what he had told us, if he would make a  
25 written statement to us. Mr. Lowery then stated that he

1 did not wish to talk to us anymore, that he did wish an  
2 attorney at that time.

3 Q. Did you continue to talk with him after that?

4 A. No, sir.

5 Q. Up until that point had he ever been placed under arrest  
6 by you?

7 A. No, sir. He had not been placed under arrest. As a matter  
8 of fact, each time he was advised of his rights he was told  
9 that he was not under arrest, that he did not have to  
10 talk to us.

11 Q. During the course of the questioning, did you, at any  
12 time, suggest to him what the proper answer would be?  
13 In other words, did you ever say to him, "Did you rape  
14 the lady?"

15 MR. VOGEL: Object as this being leading.

16 THE COURT: It is leading. Sustained.

17 Q. (By Mr. Caffey) At any time did you ever suggest to him  
18 what the proper answer should be?

19 A. No, sir, I did not. The only time that a possible sug-  
20 gestion is when I thought that the screen was cut and  
21 not torn. I did ask him if he did not cut the screen.  
22 That was the only time. Every other time he'd answer a  
23 question or make a statement and then we'd ask him, then  
24 what did you do. At no time did anybody ask him a specific  
25 question. We just asked him, then what did you do.

1 Q. Did anybody make any threats or promises to him to induce  
2 his giving a statement?

3 A. No, sir, they did not. No promises at all. As a matter  
4 of fact, before the afternoon interview started I asked  
5 Mr. Lowery if he would like to get something to eat or a  
6 cup of coffee or something and he stated that -- to me  
7 that he would like to get it over with. He did not wish  
8 to get anything to eat at that time.

9 Q. At any time during the time that he was being questioned  
10 was he ever placed in handcuffs or anything like that,  
11 any kind of restraints?

12 A. I don't recall Mr. Lowery ever having handcuffs on him.  
13 When he was placed under arrest he was in the interview  
14 room and we walked directly to the jail and he did not  
15 have handcuffs on him at all.

16 Q. Before he gave the statement to you, at any time, did he  
17 have handcuffs on?

18 A. No, sir, not at any time.

19 MR. CAFFEY: I have no other questions at this time.

20 CROSS EXAMINATION

21 BY MR. VOGEL:

22 Q. Officer Malugani, my name is Lawrence Vogel and I'm the  
23 attorney for the defendant, Eddie Lowery and I'd like to  
24 ask you a few questions if I could. What was the reason  
25 that you or Officer Johnson called Eddie's house on July

1       27th? You stated that there was a call made to his home  
2       at sometime that day, I believe.

3       A. We did not call his home. We went to his residence.

4       Q. And who was present when you went to the residence?

5       A. Myself and Investigator Johnson.

6       Q. Who was present at Eddie Lowery's residence when you  
7       went there?

8       A. There was Eddie. Eddie was there and there was one other  
9       gentleman. I can't recall his name right offhand at the  
10      initial contact.

11      Q. Did -- then at that time you're saying that you picked  
12      Eddie up right then when you went to find him?

13      A. Yes, I asked Mr. Lowery if he would come into the police  
14      department to talk to me which he agreed to.

15      Q. That would have been on July 27th, is that right?

16      A. Yes, sir.

17      Q. About what time do you remember that being?

18      A. That would had to have been around -- I read him his rights.  
19      I believe it was 4:30 in the afternoon so we had to pick  
20      him up 4:25 or so in the afternoon, enough time to drive  
21      over to the police department from Ogden.

22      Q. You picked him up in Ogden, is that right?

23      A. Yes, sir.

24      Q. When you first picked Eddie up at his home, did you  
25      indicate to him the reason why you wanted to talk with

1 him?

2 A. Yes, sir, I did. I advised him that I'd like to talk to  
3 him regarding an accident that he was involved in and I  
4 did not tell him the specific incident. I did tell him  
5 there was an earlier incident just prior to the accident  
6 that I'd like to discuss also. I did not say what this  
7 other incident was.

8 Q. Let's not talk then about what you -- the reason you  
9 stated to him that you wanted to talk to him, but, what  
10 was, in fact, the reason that you wanted to talk to him?

11 A. I wanted to talk to him to see what his activities were  
12 just prior to the accident due to the accident occurred  
13 just a few minutes after the rape was reported to us.

14 Q. How do you know that?

15 A. With our complaint sheets and the accident reports and  
16 the time that the officers were notified of the accident  
17 and arrived -- I mean, the accident and the rape.

18 Q. So then, at the time you picked up Eddie on July 27th  
19 then, at that point anyway, you really didn't have probable  
20 cause to arrest him, is that right?

21 A. That is correct, sir. He was not arrested.

22 Q. Did you advise him that he was not arrested?

23 A. Yes, sir, we did advise him. In fact, he asked us if  
24 he was under arrest and we told him that he was not under  
25 arrest and when we was finished with the interview we would

1 take him home which we did.

2 Q. Did he ever request that he wanted to go home before you  
3 took him home?

4 A. No, sir, he did not.

5 Q. We're talking, still talking about July 27.

6 A. July 27th, yes.

7 Q. So then, other than the fact or what you're stating that  
8 Eddie allegedly was involved in an accident shortly after  
9 this alleged rape occurred, that was the primary reason,  
10 at that point, anyway, that you wanted to talk to the  
11 defendant?

12 A. That is correct, yes, sir.

13 Q. I believe you stated on direct testimony that after you  
14 and Investigator Johnson picked up Eddie Lowery that day,  
15 July 27th, and you transported him back over to the Riley  
16 County Police Department?

17 A. That is correct, yes, sir.

18 Q. And you stated then that he signed a waiver of rights  
19 form?

20 A. This is correct, yes.

21 Q. Which the prosecutor -- plaintiff's exhibit #1?

22 A. Yes, sir.

23 Q. And what time is that? Does it indicate on there on  
24 time?

25 A. I believe it was 4:30 in the afternoon, on 7-27-81. Yes,

1 it was 4:30 in the afternoon he was read his rights and  
2 at 4:32 he signed it.

3 Q. Who was present then after the waiver of rights was signed  
4 by the defendant in reference to any questioning that you  
5 indicated you did?

6 A. During the interview?

7 Q. Yes.

8 A. Myself and Investigator Johnson and Mr. Lowery.

9 Q. And where did that take place?

10 A. At the interview room, administration side of the Riley  
11 County Police Department.

12 Q. How long did that questioning take place?

13 A. Questioned Mr. Lowery approximately hour and 40 minutes  
14 and then we went back to Ogden and conducted search.

15 Q. Still back in that hour and 40 minutes that you questioned  
16 him, did you do most of the questioning or did Officer  
17 Johnson?

18 A. I don't believe either one of us did most of them.

19 Q. You both questioned him?

20 A. We both asked Mr. Lowery some questions.

21 Q. During this questioning -- now we're still talking about  
22 July 27th, during that questioning after he signed the  
23 Miranda warning, did he ever request an attorney?

24 A. No, sir, he did not.

25 Q. How would you describe your questioning to him as far as

1 reflection in your voice or your demeanor towards asking  
2 him these questions?

3 A. I would say it was calm, about the way it is now. We had  
4 no point to be any other reason at that time.

5 Q. You didn't indicate to asking questions that night, we  
6 know you did it, admit doing it?

7 A. No, sir. That evening we did not know he did it.

8 Q. You never indicated to him that night then?

9 A. We told him that there was an incident occurred when he  
10 was talking to us about the accident he advised us that it  
11 occurred shortly after 12:00 o'clock and that he left his  
12 trailer and went and got -- hit a parked car and we told  
13 him that we knew that cannot be so because the accident  
14 occurred after 3:30 in the morning and then we told him  
15 that we believed that he could be responsible for the  
16 rape and burglary upon Elm Street.

17 Q. You didn't make any statements that you've got 10 years  
18 on the force and you're going to prove he raped that  
19 woman if it takes 10 years to prove it?

20 A. I'm sorry, I didn't understand the question.

21 Q. Did you make any sort of statement such as, I have 10 years  
22 on the force and if it takes all of my 10 years I'm going  
23 to prove that you raped that ol' lady, anything like that?

24 A. I did not.

25 Q. We're talking about the first night.



1 A. I'm talking about the first night.

2 Q. You stated that when, sometime prior to him -- prior to  
3 your questioning him you indicated to him that he was  
4 not under arrest?

5 A. This is correct.

6 Q. Okay. Did you indicate that once during this time period?

7 A. I told him when we started talking to him. I read him his  
8 rights. He then asked me if he was under arrest and I  
9 said, "No, you are not under arrest."

10 Q. Who was present when he asked you that?

11 A. Investigator Johnson and then again after the interview  
12 was concluded and we started to go to Ogden he again  
13 asked if he was under arrest and I again told him no,  
14 that he was not under arrest and all we was going to do  
15 at this time. He had signed a voluntary waiver of search  
16 warranting search of his vehicle and his residence.

17 Q. And did he cooperate with you as far as the search warrant  
18 is concerned?

19 A. Yes, sir, he read it and consented to it and signed it.

20 Q. All right. Now, let's switch over to the next day, July  
21 the 28th. That would have been on a Tuesday?

22 A. Yes.

23 Q. I believe you stated on direct examination that he called  
24 the Riley County Police Department, I don't know, 8:30  
25 or so that morning?

1 A. Around 8:30, 8:35. I'm not sure of the exact time.

2 Q. And indicated he didn't have transportation to get over  
3 to the police department?

4 A. That's correct.

5 Q. So then it's my understanding then you and Investigator  
6 Johnson - -

7 A. No, sir.

8 Q. Excuse me.

9 A. I went over to Ogden to pick him up. Investigator Johnson  
10 did not go with me.

11 Q. Okay.

12 A. Before I did I told Mr. Lowery if you want me to I can  
13 come over and pick you up and he asked me if I would and  
14 I told him I'd be over as soon as I could to drive from  
15 Manhattan. Drove over to Ogden, picked him up and directly  
16 back to the police department.

17 Q. When you picked up Eddie Lowery, did you advise him at  
18 that time when he was under arrest?

19 A. No, sir, did not tell him he was under arrest at all.

20 Q. You didn't tell him he was or wasn't, you just picked  
21 him up?

22 A. I don't believe I told him one way or the other at that  
23 time, no.

24 Q. After you picked him up in Ogden at his home, then you  
25 took him back to the police station, is that right?

1 A. This is correct, yes.

2 Q. Then what happened?

3 A. After we got to the police department I again read Mr.  
4 Lowery the Miranda and he stated that he does desire to  
5 talk to us again and again I had him read, initial and sign  
6 the Miranda rights and also the waiver of rights form.

7 Q. And when was that signed?

8 A. At 8:51 in the morning on 7-28 of '81.

9 Q. Then did you and Investigator Johnson question him then  
10 after he signed the Miranda?

11 A. At that time, no, sir, advised Sergeant Raynor he was  
12 primarily there and he agreed to come in for the polygraph  
13 that evening before. This is why he was coming over to  
14 Manhattan on the 28th.

15 Q. You didn't interview him at all prior to - -

16 A. That morning - -

17 Q. Let me finish the question first, I'm sorry. You didn't  
18 question him at all in one of the interview rooms prior  
19 to him talking with Officer Raynor?

20 A. I did not. I don't recall Investigator Johnson talking  
21 to him. I did not. I -- all I did that morning was read  
22 him the Miranda rights.

23 Q. Do you know if Eddie ate breakfast that morning at all?

24 A. I have no idea, sir.

25 Q. You didn't make any inquiry about that?

1 A. No, sir, I did not.

2 Q. Do you recall if there were any new leads or anything in  
3 this alleged rape case between the 27th of July when you  
4 questioned him that afternoon and early evening and then  
5 the next morning when you picked him up? Are there any  
6 more leads that might have made you feel that possibly  
7 Eddie Lowery was the individual that committed those  
8 crimes?

9 A. Not any new leads from the night that we dropped him off  
10 in Ogden and the next morning when we picked him up.

11 Q. That's all I need to know for now. So, you merely wanted  
12 to question him some more and have a polygraph administered?

13 A. This is correct, yes.

14 Q. And again, what is your recollection of the time period  
15 then after he signed the Miranda warning on the 28th of  
16 July, the time period that lapsed when Officer Raynor  
17 talked with him from when to when?

18 A. I believe Sergeant Raynor started the polygraph around  
19 9:35, 9:40 in the morning, somewhere around that time  
20 zone.

21 Q. And it lasted until approximately when?

22 A. I believe around 12:30, 12:40.

23 Q. After the polygraph was completed, what happened?

24 A. After the polygraph was completed, again Sergeant Raynor  
25 advised that he felt there was deception in Mr. Lowery's

26 Q. Did you have a conversation with Mr. Lowery for 15, 18 minutes  
27 and Mr. Lowery said he and Investigator Johnson again

1        answers. Talked to Sergeant Raynor for 10, 15 minutes  
2        maybe and then myself and Investigator Johnson again  
3        interviewed Mr. Lowery.

4        Q. At the point that you state that Officer Raynor was through  
5        with his questioning, right?

6        A. Yes.

7        Q. Up to that point had he been arrested as yet?

8        A. No, sir, he had not been arrested.

9        Q. And why is that?

10       A. We did not have probable cause to arrest him at that time.

11       Q. During this entire questioning not only on the 27th of  
12       July but also during the entire period on the 28th of  
13       July, was Eddie Lowery ever left alone where he wasn't  
14       locked in?

15       A. Yes, sir, he was. He was left alone from the time -- from  
16       the time that I interviewed him or, excuse me, read him  
17       his rights.

18       Q. We're talking about the 28th now.

19       A. On the 28th at 8:51 in the morning to the time Sergeant  
20       Raynor started the polygraph test. He was left alone.  
21       He was not locked in or anything else.

22       Q. Where is that?

23       A. This is in the interview room on the administration side  
24       of the police department. He was again left alone in the  
25       interview room on the administration side the time Sergeant

1 Raynor concluded his polygraph test till myself and In-  
2 vestigator Johnson started interviewing him again which  
3 was approximately 15 minutes after the polygraph test  
4 was over.

5 Q. Either just prior or just after the polygraph test was  
6 given by Officer Raynor, did Eddie ask for a lawyer?

7 A. No, sir, he did not.

8 Q. If he had, what would you have done?

9 A. If he had asked for an attorney we would have had to  
10 conclude the interview and contacted an attorney. Could  
11 not have talked to him any further.

12 Q. I believe on direct examination you stated that on July  
13 the 28th then after the polygraph was taken then you and  
14 Officer Johnson started questioning him again, is that  
15 correct?

16 A. And then after a certain period of time then he made  
17 certain admissions?

18 A. This is correct, yes.

19 Q. Is that right?

20 A. Yes.

21 Q. And you also stated that the way those admissions were  
22 given that you would simply ask, then what happened,  
23 then what happened, then what happened?

24 A. This is correct, yes.

25 Q. You're stating then that you never would say, didn't you

1 do such and such and he would merely reply a yes or no?

2 A. No, sir. We did not ever at any time ask him if he did  
3 any specific thing except that one time I did ask him if  
4 he did not cut the screen which he replied that he ripped  
5 it. He did not cut it.

6 Q. And after the polygraph was given and you and Officer  
7 Johnson began questioning the defendant again, at any  
8 time during that questioning prior to the defendant making  
9 certain admissions, did he ever ask for an attorney?

10 A. No, sir, he did not.

11 Q. Would you describe your demeanor or Mr. Johnson's during  
12 the interview that took place after Officer Raynor com-  
13 pleted the polygraph and through the time period that the  
14 defendant made admissions?

15 A. Again, like I said earlier, we were calm. I can't see  
16 any difference in then and right now to be quite honest  
17 with you.

18 Q. You didn't shout or - -

19 A. No, sir, there was no shouting then.

20 Q. No threats?

21 A. No threats whatsoever. When Mr. Lowery started to tell  
22 us about driving around, I don't recall either one of  
23 us ever raising our voice. We would ask him, then what  
24 did you do.

25 Q. Did you ever ask the defendant, we know you did it, why

1 don't you admit it, and if so, when would you have said  
2 something like that?

3 A. Never. I never asked him that. I don't recall Investi-  
4 gator Johnson telling him that. I don't know if he did or  
5 not. I don't recall.

6 Q. Why was it necessary to keep Eddie at the police station  
7 approximately from the way the Miranda warning was signed  
8 on the 27th until the search warrant was signed, we have a  
9 time frame there which computes, I believe, about two and-  
10 a-half, three hours that first day and then the second day  
11 we're talking about picking Eddie up about 8:30 and I  
12 believe he was arrested sometime around 4:00 or 4:30 that  
13 afternoon finally. Why, what was the reason why he was  
14 kept there this long before he was finally arrested?

15 A. On the 28th?

16 Q. Yes.

17 A. The polygraph took most of the morning. Sergeant Raynor  
18 would have to tell you about polygraphs, I can't. The  
19 polygraph took until approximately 12:30, 12:40 in the  
20 afternoon.

21 Q. Right.

22 A. And then what took the rest of the time is like I stated  
23 before, is Mr. Lowery did not just verbatim tell us what  
24 happened. He would make a comment and then stop.

25 Q. But we're talking about from roughly 12:40, 12:45 when  
officer Raynor completed his examination



1       Officer Raynor completed his examination until 4:30 in  
2       the afternoon when he was finally arrested. We're talking  
3       about over four hours after the polygraph was completed  
4       that he was still being questioned.

5       A. He was questioned approximately three, three and-a-half  
6       hours of that time. We would stop and get him some coffee  
7       throughout the interview.

8       Q. Did you ever offer to feed him?

9       A. I offered, I asked Mr. Lowery personally if he wanted  
10       something to eat or some coffee at that time and he stated  
11       no, that he wanted to get this over with, let's just  
12       continue on.

13       Q. If he stated he wanted to get it over with, why did it  
14       take three or four hours to get the testimony out of him  
15       that you wanted?

16       A. I don't know why, sir. I can't answer why he would not  
17       tell us.

18       Q. I mean if he's saying to you, no, I don't want to eat.  
19       Let's get this thing over with, it wouldn't -- it would  
20       have only taken a few minutes then if he really wanted to  
21       get it over with.

22               MR. CAFFEY: Objection. This is being argumentative.

23               THE COURT: I believe you're bordering on being  
24       argumentative. He may state what occurred, what happened.

25       Q. (By Mr. Vogel) What time then, did you actually arrest

1 him in the sequence of events that occurred on July 28?

2 A. He was arrested, I believe around 4:20, 4:30 in the  
3 afternoon on 7-28 of '81.

4 Q. And was that before or after he made certain admissions  
5 to you?

6 A. This was after he had made the admissions to us.

7 Q. Did you feel that you had probable cause to have arrested  
8 him before he had made those admissions?

9 A. Before he had made the admissions I'd say we did not have  
10 probable cause to make the arrest.

11 Q. Then he made these or al admissions. Then I believe you  
12 testified he took a 10 or 15 minute break, is that right?

13 A. That's correct.

14 Q. And then after that break was over, I believe you testified  
15 that you asked if he would write a statement down.

16 A. After the 15 minute break I believe it was Investigator  
17 Johnson and I went back in the room. Investigator  
18 Johnson again read Mr. Lowery the Miranda rights and he  
19 at that time stated that he did not wish to talk to us  
20 any more or write anything out, that he did wish an  
21 attorney and so we concluded that interview.

22 Q. And your testimony is that that was the first time during  
23 the entire questioning either on the 27th or the 28th  
24 that Eddie Lowery requested an attorney?

25 A. As far as I know it is, yes.

1 Q. Could you tell us what, either what your practice is or  
2 the recommended practice here at Riley County Police  
3 Department in reference to these waiver of rights? Let  
4 me explain a little further. A couple of times here you  
5 stated that he actually signed waiver of rights and we  
6 have those and they are in evidence today, is that correct?

7 A. That is correct, yes, sir.

8 Q. You've also stated that on certain occasions either on  
9 the 27th or 28th of July that either you or Officer Johnson  
10 verbally went through these rights, is that right?

11 A. That's correct, yes.

12 Q. Is that normal practice or is it normal practice to have  
13 them sign each time you go through rights, Miranda warning?

14 A. There is no set policy on having them sign it. I believe,  
15 and I do not know why Investigator Johnson did not do it,  
16 I believe that whenever you read somebody the Miranda right,  
17 they should also read, initial and sign the Miranda rights  
18 and waiver if they desire to talk to us. I cannot answer  
19 to you why Investigator Johnson did not have him read and  
20 sign the Miranda rights when he did that.

21 Q. Is there any certain procedure you're instructed on as  
22 an investigator on the Miranda rights, whether they be  
23 signed or not? Did you have any training?

24 A. No, sir, there is no set policy on the Miranda rights and  
25 waiver.

1 Q. It can either be read orally or you can ask if they're  
2 willing to sign a waiver?

3 A. Normally, yes. I'm sorry, you can either read them or  
4 have them read and sign the waiver. Normally, as I stated,  
5 you do have them read and sign the Miranda waiver. If they  
6 desire to talk to you.

7 Q. When you're talking to someone for an extended period of  
8 time through interviews and polygraph tests and that sort  
9 of thing -- I'm talking about you specifically -- would it  
10 be your normal practice to go ahead and have another Miranda  
11 warning waiver signed or not?

12 MR. CAFFEY: Your Honor, I'm going to have to object  
13 about what the normal practice is or what the practice of the  
14 police department is. I don't think that's what's relevant  
15 here. It's what actually happened and whether or not that  
16 fits within the law is what is really relevant.

17 THE COURT: Yes. I'm inclined to agree with that.  
18 What occurred in this instance, I think within reasonable  
19 limitations it would be appropriate to allow inquiry about  
20 normal procedures to see if they were substantially deviated  
21 from and for what reason but I believe that it's pretty well  
22 been covered here.

23 MR. VOGEL: Okay. I have no other questions, Your  
24 Honor.

25 THE COURT: Thank you. Do you have any re-direct?

1 MR. CAFFEY: I don't believe so, Your Honor

2 THE COURT: Thank you, Officer, you may step down.  
3 Call your next witness.

4 (State's Exhibit #3 was marked for  
5 identification.)

6 ALLEN RAYNOR,

7 called as a witness in behalf of the State, being of  
8 legal age and having been first duly sworn, testified  
9 as follows:

10 DIRECT EXAMINATION

11 BY MR. CAFFEY:

12 Q. Would you state your name for the Court, please?

13 A. Allen Raynor.

14 Q. By whom are you employed?

15 A. Riley County Police Department.

16 Q. What is your position at the Riley County Police Depart-  
17 ment?

18 A. I'm Sergeant supervisor records communication slash poly-  
19 graph examiner.

20 Q. You have more than one job?

21 A. I wear many hats.

22 Q. Do you know the defendant in this case, Eddie James  
23 Lowery?

24 A. Yes, I do.

25 Q. Is he present in the courtroom?

- 1 A. Yes, he is.
- 2 Q. Would you identify him, please?
- 3 A. The man in the blue shirt at defendant table.
- 4 Q. Did you have occasion to meet with Mr. Lowery on July
- 5 28th of this year.
- 6 A. Yes, I did.
- 7 Q. What was the purpose?
- 8 A. To administer a polygraph examination.
- 9 Q. And where was that polygraph examination to be administered?
- 10 A. At the Riley County Police Department.
- 11 Q. Where was Mr. Lowery when you first saw him?
- 12 A. In the business office in the police department.
- 13 Q. And what did he do when you saw him there?
- 14 A. I was introduced by one of the investigators and then I
- 15 escorted him over to the examination room.
- 16 Q. Okay and is that in a different building?
- 17 A. It's in the adjoining -- the examination took place at the
- 18 basement of the jail.
- 19 Q. Is that in a confinement portion of the jail?
- 20 A. No, it's -- actually it's the juvenile detention facility
- 21 recreation room.
- 22 Q. And before you conducted this examination did you speak
- 23 with Mr. Lowery about his rights to take the examination
- 24 or to refuse to take it?
- 25 A. Yes, I did. I had him read, initial and sign a waiver

1 not holding the police department or myself responsible  
2 and in fact the statement saying that he was taking it  
3 freely and willfully without coercion or threat or promise  
4 or anything of that nature. It's a prepared form which  
5 also has a waiver of Miranda rights attached.

6 Q. I'll show you what's been marked as State's Exhibit  
7 number 3, can you identify that document?

8 A. Yes, I can.

9 Q. What is it?

10 A. That is the original data analysis sheet which has the  
11 waiver and the right waiver that I just spoke of.

12 Q. And it appears to have the signature here of Eddie J.  
13 Lowery, is that correct?

14 A. That's correct.

15 Q. And who signed that?

16 A. Eddie J. Lowery.

17 Q. And it also has the initials E.J.L. Do you know the side  
18 by those numbers, who put those initials there?

19 A. Eddie Lowery did.

20 Q. And it also appears to have the signature of Allen Raynor,  
21 who put that there?

22 A. I did.

23 Q. There are other blocks on the side and on the bottom, who  
24 filled out those?

25 A. I filled those out upon questioning Mr. Lowery. It's in-

1 formation pertinent to the examinee.

2 MR. VOGEL: Your Honor, on that it does mention  
3 polygraph in here. I don't have any objection for this  
4 hearing as far as him performing the polygraph and all but  
5 as far as the time of trial I would probably object to it  
6 because polygraph is mentioned.

7 THE COURT: Why don't we talk about it now that  
8 we're in this Jackson v. Denno hearing and certainly we're  
9 going to have to wait till the results of this hearing are  
10 disposed of concerning this suppression. In the event that  
11 the admissions are suppressed then there would be no need for  
12 reference anyway to this. In the event that the motion to  
13 suppress was overruled and the admissions were allowed then  
14 it likewise strikes the Court that there would be no need for  
15 any reference whatsoever to the polygraph. Now, the cases  
16 are fairly clear and I think it's important not to interject  
17 that because it would definitely be argued to be prejudicial.  
18 That is to say, if there was a polygraph given even though the  
19 ultimate results were not exposed. I think we're treading  
20 on very, very thin ice there in regard to inferences of ad-  
21 missions or inferences that he did not in fact successfully  
22 complete the polygraph test so I would just say at this point  
23 in time and the jury is not here, that either way, I think  
24 there should be no reference whatsoever to the polygraph. In  
25 fact, I can put my hand on a case or two where in fact a



1 reference was made and I believe the Court held that was  
2 error so indeed there would be strong prejudicial inferences  
3 in regard to that so just to cover that point I would give  
4 counsel an opportunity to respond to this point at this time.

5 MR. CAFFEY: Your Honor, the only problem that I  
6 have with it is that we're going to have a gap here that's  
7 going to be unexplained and the problem that also comes about  
8 there is that lingering questions that a jury might have,  
9 what happened during that time and so forth and I suppose it  
10 might be possible that that could be filled in by the state-  
11 ment that Allen Raynor spoke with the defendant but not the  
12 content of the conversation.

13 THE COURT: I think it should be handled -- again,  
14 either way, I believe it's very, very precarious. Again it  
15 becomes a question, is it so prejudicial to the State that  
16 if you left a gap there and the jury was wondering why did  
17 you hold this man and so on, would that be prejudicial to the  
18 State or the defendant that it would far outweigh that not  
19 to be mentioned and so I feel that there is an appropriate  
20 way to get around this in regard to that he was there and there  
21 was further discussions and let it go at this. Mr. Vogel.

22 MR. VOGEL: Yes, Your Honor, I would agree. I  
23 have no objections. I would hope also he wouldn't say he was  
24 a polygraph examiner at the trial if he testifies but in  
25 addition, Your Honor, I would have no objection if he testi-

1 files and questions merely be asked, did you question the  
2 defendant and not go into any detail or the fact that it was  
3 a polygraph but in fact that Officer Raynor did question  
4 him for approximately three hours. I would have no objection  
5 to that, of course.

6 MR. CAFFEY: It would be very difficult, I think,  
7 for us to use this form since it uses polygraph unless we  
8 were to mask that.

9 THE COURT: I think that aspect of it really isn't  
10 in contention. The bottom line is these contentions and we  
11 know the polygraph isn't admissible so that really isn't  
12 relevant anyway. I do think that we have a problem here that  
13 needs to be ironed out in order to be fair to the State and  
14 the defendant in regard to the time this polygraph was given  
15 and it just seems to me possibly the parties could agree upon  
16 the fact that something that would be acceptable to both  
17 sides in regard to explaining that time period and not giving  
18 undue weight to that to the jury one way or the other. It's  
19 an area that you need to think about and hopefully that could  
20 be discussed prior to trial and some explanation could be  
21 made to the jury or at least by the testimony that there was  
22 some time there that he was there and without a whole lot of  
23 further comment. Now obviously you say he was interrogated  
24 by him for three hours then the jury might say, well, that  
25 sounds unreasonable to me. I wonder why he was interrogating

1 him. However, the bottom line is the admissibility of that  
2 and that's going to be determined here today so I really don't  
3 think that that aspect of it would be prejudicial for the  
4 State. Thank you.

5 MR. CAFFEY: Your Honor, we offer State's Exhibit  
6 3.

7 THE COURT: Well, for purposes of this hearing do  
8 you have any objection to that for purposes of this hearing.

9 MR. VOGEL: Not for this hearing, Your Honor. For  
10 the trial I would.

11 THE COURT: These particular exhibits will be gone  
12 through again and proffered again anyway at the time of  
13 trial. It's just a question of the suppression should and  
14 properly must be disposed of now. For purposes of this  
15 hearing only State's #3 will be admitted.

16 Q. (By Mr. Caffey) Do you recall what time it was that you  
17 took the defendant down to this room and started talking  
18 with him?

19 A. Approximately 9:45.

20 Q. And how long did it take you to conduct the polygraph  
21 examination itself?

22 A. Until shortly after 11:30.

23 Q. And why did it take that long, why does this process take  
24 that long?

25 A. There are three phases to a polygraph. There's a pre-test

1 phase and an in-test phase and a post-test and the pre-  
2 test, of course, you have the filling out of the waiver  
3 and the gathering of the information, you know, itself.  
4 It's just height, weight, physical condition and it's  
5 a form and then I have a discussion with the examinee  
6 to determine his mental and physical fitness to take a  
7 polygraph examination of which a large number of people  
8 do not qualify.

9 THE COURT: Excuse me. I just want to try to move  
10 this along. Let's just zoom past the polygraph and get into  
11 what's appropriate here.

12 Q. (By Mr. Caffey) Okay. At any rate it took you until about  
13 11:30 or so to complete the polygraph?

14 A. That's correct.

15 Q. After the polygraph was completed, what did you do?

16 A. I informed Mr. Lowery of the results and I asked him to  
17 explain it and then went into an interrogation and attempted  
18 to get him to tell me what I believed to be the truth.

19 Q. And did he make any kind of admissions to you at that time?

20 A. No, he did not.

21 Q. And then what happened? First of all, how long did this  
22 take?

23 A. About another hour.

24 Q. So, it was about 12:30 or so?

25 A. Shortly after 12:30.

1 Q. Then what happened?

2 A. I then took him back over to Investigator Johnson and  
3 Malugani and informed them of my opinion of the results  
4 and that was the last I saw of him.

5 Q. At any time during the conversation with you and the  
6 taking of this test did Mr. Lowery ever indicate that he  
7 did not want to continue or that he wanted to have an  
8 attorney present?

9 A. No, he didn't.

10 Q. Did you do anything to force him to take this test -- to  
11 coerce him to take the test?

12 A. No, I did not. As a matter of fact you cannot force  
13 anyone to take a polygraph examination. It requires  
14 cooperation on the part of the examinee.

15 MR. CAFFEY: I have no further questions.

16 CROSS EXAMINATION

17 BY MR. VOGEL:

18 Q. Just a couple of questions. I believe you stated, did  
19 you not, on direct examination that the defendant did  
20 not ask for an attorney either before the test or after  
21 the test was given while he was in your presence?

22 A. That's correct.

23 Q. How would you describe the defendant's composure so to  
24 speak just before or during and after the test while he was  
25 with you?

- 1 A. Well, I'm sure you're aware it's a little difficult to  
2 ~~tell not say~~ tell not having known him prior to the examination nor  
3 having much dealing with him since then but I found him  
4 a little apprehensive, perhaps scared and probably even  
5 a little slightly confused. I mean just kind of awed  
6 at the whole thing -- unsure of what was happening which  
7 is typical of anyone taking a polygraph examination but  
8 nothing more than that. You know, he was at the police  
9 department and I'm sure he was just unsure of what was  
10 going to happen next.
- 11 Q. Did you, Officer Raynor, I believe you stated that you  
12 did after the test was completed, you questioned him for  
13 approximately another hour, is that right?
- 14 A. That's correct.
- 15 Q. Did you ask any questions indicating that you might as  
16 well admit it or anything like that?
- 17 A. Yes, I did.
- 18 Q. And what would he respond to that?
- 19 A. His responses were in agreement with me that the instru-  
20 ment my charts indicated - -
- 21 Q. I'm not asking about the charts, I'm just simply asking  
22 you, you might as well admit it, would he then admit it  
23 or not?
- 24 A. He never did admit it.
- 25 Q. And then after you interviewed him for approximately an

Douglas Johnson - Direct

1 hour then Officer Malugani and Officer Johnson then took  
2 him and questioned him as far as you know?

3 A. Yes, as far as I know.

4 MR. VOGEL: No other questions, Your Honor.

5 THE COURT: Thank you, Officer. You may step down.  
6 Let's take a little break here.

7 (Thereupon a recess was taken, after which  
8 the following proceedings were had:)

9 MR. CAFFEY: Call Doug Johnson.  
10 MR. CAFFEY: Call Doug Johnson.

11 DOUGLAS JOHNSON,

12 called as a witness in behalf of the State, being of  
13 legal age and having been first duly sworn, testified  
14 as follows:

15 DIRECT EXAMINATION

16 BY MR. CAFFEY:

17 Q. State your name for the Court, please.

18 A. Douglas Johnson.

19 Q. Mr. Johnson, by whom are you employed?

20 A. The Riley County Police Department.

21 Q. Were you so employed on the 27th day of July of this  
22 year?

23 A. Yes, sir, I was.

24 Q. Call your attention to that day. Did you have occasion  
25 to meet with the defendant, Eddie J. Lowery?

A. Yes, I did.

1 Q. What brought about this meeting with Mr. Lowery?

2 A. Myself and Investigator Malugani were investigating the  
3 reported aggravated burglary and rape incident that oc-  
4 curred in Ogden. We had discovered that Mr. Lowery had  
5 been involved in a traffic accident in the early morning  
6 hours Sunday morning and we contacted him in Ogden and  
7 requested that he come to the police department to have a  
8 chat with us.

9 Q. And what happened when you got to Ogden to talk with him  
10 about this?

11 A. When we got to Ogden?

12 Q. Yes.

13 A. We found him at his trailer and transported him back to  
14 the Riley County Police Department in Manhattan.

15 Q. Was there a conversation with him prior to his being trans-  
16 ported back?

17 A. We had informed him that we were aware of the traffic  
18 accident and there was another incident that occurred that  
19 evening and we wanted to talk to him about and he agreed  
20 to come with us.

21 Q. At that time was he placed under arrest?

22 A. No, sir, he was not.

23 Q. When he was transported was he in any kind of restraints?

24 A. No, he was not.

25 Q. And where was he placed when he was taken back to the



1 Riley County Police Department?

2 A. Where in the building?

3 Q. Yes.

4 A. In the interview room in the administration building at  
5 the police department, 600 Colorado.

6 Q. Who else was there with him?

7 A. Just myself and Investigator Malugani and Mr. Lowery.

8 Q. I'll show you what's been marked as State's exhibit #1.

9 Do you recognize what that is?

10 A. Yes, sir, I do.

11 Q. What is that?

12 A. That's the Miranda rights form that Mr. Lowery signed on  
13 the 27th day of July.

14 Q. And that's signed as witnessed by Investigator Malugani,  
15 you didn't sign it?

16 A. No, sir, I didn't.

17 Q. Were you present when it was signed?

18 A. Yes, sir, I was.

19 Q. At that time did Mr. Lowery indicate whether or not he  
20 understood what his rights were?

21 A. Yes, sir.

22 Q. And what was that occasion?

23 A. He indicated that he understood his rights and agreed to  
24 talk with us.

25 Q. At that time was he under arrest?

1 A. No, sir, he was not.

2 Q. Was there any discussion with him about whether he was  
3 under arrest?

4 A. No, we never told him he was under arrest or mentioned  
5 arrest to him.

6 Q. Did a conversation then ensue?

7 A. Yes, sir.

8 Q. And without going into specifics of the conversation, what  
9 was the general nature of the conversation with him?

10 A. We asked about his activities on that Saturday night and  
11 Sunday morning, where he had been, what he'd done leading  
12 up to the time of the accident. We mentioned the other --  
13 the case that we were investigating, asked him if he had  
14 any knowledge of that. He indicated that he had no knowledge.

15 Q. You specifically mentioned though this aggravated burglary  
16 and rape incident?

17 A. Yes, we did.

18 Q. And approximately how long did this interview with him  
19 last?

20 A. About two hours, I believe, till about 4:30 or so. We  
21 took Mr. Lowery back home and executed a waiver of search  
22 for his car and his trailer.

23 MR. VOGEL: Your Honor, this really isn't responsive  
24 to the question.

25 THE COURT: He responded to part of it, I guess.

1 MR. VOGEL: Yes.

2 Q. (By Mr. Caffey) The time frame that you gave, are you  
3 trying to explain what took place?

4 A. I'm trying to explain how I arrived at the two hours.

5 Q. How did you arrive at the two hours then?

6 A. Well, around 8:30 we executed the rights waiver and the  
7 original rights were signed at around 1630, travel time  
8 between Ogden and back and preparation to go. We couldn't  
9 have been any longer than two hours in the interview.

10 Q. So it was two hours or less?

11 A. I would say two hours.

12 Q. And then you transported him back to Ogden?

13 A. Yes, sir.

14 Q. Was he under arrest during that time?

15 A. No, he was not.

16 Q. And then did you, in fact, conduct a search?

17 A. Investigator Malugani and myself searched Mr. Lowery's  
18 vehicle and his trailer.

19 Q. Was there any discussion about Mr. Lowery returning to the  
20 police department at some other time?

21 A. Yes, we asked Mr. Lowery to come back the next morning for  
22 the purpose of polygraph examination.

23 Q. And at that time was he told that he had to come or was  
24 this a voluntary thing?

25 A. It was strictly voluntary.

1 Q. And what was his indication?

2 A. He indicated that he would be glad to come back and take  
3 the polygraph.

4 Q. And what happened then after he indicated that?

5 A. We left him at his trailer on that evening at about 7:00  
6 and returned to the police department.

7 Q. Now, did he come in the next morning?

8 A. The next morning he called sometime after 8:00 o'clock,  
9 I believe about 8:15, 8:20 and told Investigator Malugani  
10 that he didn't have any transportation back over to the  
11 police department and so Investigator Malugani went to  
12 Ogden and picked Mr. Lowery up.

13 Q. And were you at the police department when Mr. Malugani  
14 and Mr. Lowery arrived then at the police department?

15 A. Yes, sir, I was.

16 Q. And where did Mr. Lowery go after you brought him to the  
17 police department at that time?

18 A. Again he was placed in the administration room at the  
19 police department.

20 Q. And this is on the 28th?

21 A. Yes, sir.

22 Q. What happened after he was placed in this interview room?

23 A. At some time around 9:00 o'clock, just shortly before  
24 9:00 o'clock Investigator Malugani again advised Mr.  
25 Lowery of his rights under the Miranda warning and he

1 completed another rights waiver, our form and signed it.

2 Q. I show you what's been marked as State's exhibit #2. Will  
3 you look at that and identify it?

4 A. Yes, sir.

5 Q. What is that?

6 A. That's a copy of the rights waiver that Mr. Lowery signed  
7 on the 28th of July.

8 Q. Does that indicate the time?

9 A. 0851 hours.

10 Q. So it would have been shortly before 9:00 o'clock?

11 A. Just shortly prior to it.

12 Q. Were you present when his rights were read to him that time?

13 A. Yes, sir, I was.

14 Q. At that time did Mr. Lowery give any indication that he  
15 did not understand the rights?

16 A. No, sir, he indicated that he understood the rights.

17 Q. Did he give any indication of a desire to speak with an  
18 attorney at that time?

19 A. No, sir.

20 Q. Did he give any indication of desire to terminate the  
21 interview at that time?

22 A. No, sir.

23 Q. Was he under any kind of physical restraints such as  
24 handcuffs or anything like that?

25 A. No, sir.

Q. This is

1 Q. This was conducted in the interview room at the police  
2 department?

3 A. Yes, sir.

4 Q. And not in the jail?

5 A. No, sir.

6 Q. What happened after he filled out this form?

7 A. Investigator Malugani and myself again requested Mr.  
8 Lowery to take the polygraph examination or asked him  
9 if he was still willing to do so and he indicated that  
10 he was still willing and that essentially terminated my  
11 conversation with him until after the polygraph examination.

12 Q. And where was the polygraph examination conducted?

13 A. At the jail building, at the Riley County Police Department.

14 Q. And after it was conducted what happened to the defendant?

15 A. Upon receiving the results of the examination from Sergeant  
16 Raynor, myself and Investigator Malugani began to question  
17 Mr. Lowery in the interview room at the police department  
18 in the administration building again.

19 Q. And at that time was he under arrest?

20 A. No, sir, he was not.

21 Q. If he had said, I want to go, I want to terminate this  
22 interview, what would have happened?

23 A. He would have been able to leave the police department.  
24 The interview would have stopped.

25 Q. Do you make any effort whatsoever to detain him there or

1       restrain him in any way?

2       A. No, sir, I did not.

3       Q. Was he locked up?

4       A. No, sir, he was not.

5       Q. So, there is no lock on the door of the interview room?

6       A. There is a lock there. There is no key for the lock, it's  
7       never been locked as far as I know.

8       Q. So, it wasn't locked on that day?

9       A. Certainly not.

10      Q. What happened during the course of this interview with the  
11      defendant?

12      A. During the interview we advised Mr. Lowery again of what  
13      we'd learned from polygraph examiner and continued to  
14      question him about his activities that evening and where  
15      he had been. He eventually gave us a verbal confession  
16      to the fact that he was the one that committed the burglary  
17      and the rape.

18      Q. During the course of that interview, did you at any time  
19      make any threats or promises to him?

20      A. No, sir, I did not.

21      Q. Did you at any time tell him what to say?

22      A. No, I did not.

23      Q. What happened after he gave you the verbal confession?

24      A. Mr. Lowery then asked to take a break to which we agreed  
25      after he confessed. I asked him to give me a written

1 statement to that effect. Prior, well, I asked him to  
2 give me the written statement, we took a 15 minute break  
3 and got him a cup of coffee. I came back in and then  
4 again advised Mr. Lowery of his rights under the Miranda  
5 warning. He, at that point, for the purpose of the  
6 statement is why I read him his rights. At that point he  
7 indicated that he wanted to speak with an attorney.

8 Q. Did you question him any more after he said he wanted to  
9 speak with an attorney?

10 A. No, sir, I cannot. He was placed under arrest at that  
11 time.

12 Q. And that was after he had already made a verbal confession  
13 to you?

14 A. After the verbal confession.

15 Q. Was he at any time placed under arrest prior to the time  
16 that he made the verbal confession to you?

17 A. No, sir.

18 MR. CAFFEY: I have no other questions.

19 CROSS EXAMINATION

20 BY MR. VOGEL:

21 Q. Officer Johnson, about what time do you recall you picked  
22 up -- you and Officer Malugani picked up Eddie on the 27th  
23 of July, would you estimate?

24 A. I'd say sometime around 4:00 o'clock the 27th.

25 Q. And at that time when you picked Eddie up, did either



1 you or Officer Malugani, again I'm asking a couple questions  
2 that are a little bit repetitious. Did you or Officer  
3 Malugani ask or mention to the defendant that he was under  
4 arrest at all?

5 A. No, sir, we did not.

6 Q. And there was no warrant for his arrest at that time?

7 A. No, sir.

8 Q. And again, what was the reason why you picked him up and  
9 wanted to question him?

10 A. We were investigating an aggravated burglary - rape  
11 incident. We had observed through an accident report  
12 filed by one of our patrol officers that Mr. Lowery had  
13 been involved in an accident during the early morning  
14 hours of Sunday and would have been out and about at that  
15 time and that's what lead us to Mr. Lowery.

16 Q. And that was the only thing at least at that time that  
17 lead you to want to question Eddie Lowery?

18 A. Yes, sir.

19 Q. And I believe you have State's exhibit #1 up there some-  
20 where. That's the waiver of rights and that was signed  
21 by Eddie at the police department at what time?

22 A. At about 1630 hours.

23 Q. 4:30 in the afternoon?

24 A. Yes, sir.

25 Q. How long again was Eddie questioned? Again, we're talking

1           about July 27th, 1981 when you arrived back at the police  
2           station and signed the waiver.

3       A.   In the area of two hours.

4       Q.   Who did most of the questioning or did both you and Officer  
5           Malugani do the questioning?

6       A.   We both talked with Mr. Lowery.

7       Q.   Is it correct then both of you were present during that  
8           entire period?

9       A.   I believe so. I don't recall anybody leaving.

10      Q.   During that time period of two hours, did Eddie Lowery  
11          ever request to see an attorney?

12      A.   No, sir, he did not.

13      Q.   During any of the time that Eddie was in your custody  
14          with physical presence with you and Officer Malugani on  
15          the 27th, did either you or Officer Malugani ever advise  
16          him that he was not under arrest?

17      A.   You're talking about any time in the two-day period?

18      Q.   Right now we're talking about the first day.

19      A.   First day?

20      Q.   Yes, the 27th.

21      A.   I never told him that and I don't recall Investigator  
22          Malugani ever telling him he was not under arrest.

23      Q.   Could you describe to the Court how the questioning was  
24          done on the 27th as far as how either you or Officer  
25          Malugani -- the demeanor, the conduct, how you acted towards

1 him when you asked the questions?

2 A. On the 27th was merely a conversation with Mr. Lowery  
3 about where he had been on that evening in question, who  
4 he'd seen, who he'd talked to, who he was with that night,  
5 who was around him that night that could verify his presence.  
6 It was a normal conversation.

7 Q. Do you recall if either you or Malugani's voice raised  
8 like a shouting or anything like that? We're still back  
9 on the 27th now.

10 A. No, sir, I don't recall that.

11 Q. Could you describe how Eddie Lowery's demeanor was during  
12 that questioning on the 27th?

13 A. He was very much in control, very straight forward, answered  
14 the questions.

15 Q. Do you recall if you or Officer Malugani actually specifically  
16 asked Eddie on the 27th during that two hour period if he  
17 had, in fact, committed these alleged crimes of rape,  
18 burglary, and assault?

19 A. I know that those items were discussed and he was asked  
20 if he had any knowledge of those. Now, whether we set  
21 down and said you know, did you, I don't -- I can't recall  
22 anybody specifically saying did you but, do you have any  
23 knowledge, do you know who, were you in the area, you  
24 know, were the kind of questions that were asked on the 27th.

25 Q. And you don't specifically remember whether or not you might,

1           you or Officer Malugani might have asked him personally  
2           if he had committed those crimes?

3       A.   On the 27th we were merely trying to find out where he  
4           had been and where he was and who he had talked to.  
5           There was an hour and-a-half in his story that he couldn't  
6           account for and we asked him if he had any knowledge of  
7           those crimes and he indicated he did not.

8       Q.   And do you recall then about what time that interview  
9           ceased on the 27th?

10      A.   Around 6:30.

11      Q.   And it's my understanding then that you and Officer Malugani  
12           took Eddie back to his mobile home in Ogden and I believe  
13           you testified also that it was agreed that Eddie would come  
14           back in the morning and talk.

15      A.   Yes.

16      Q.   Did Eddie call you in the morning at the police station?

17      A.   He called Investigator Malugani.

18      Q.   And do you recall -- on State's exhibit #2 I believe there  
19           was a time it was stated that Eddie came back to the  
20           police station and signed the second waiver, is that right?

21      A.   Yes, sir.

22      Q.   What time was that signed, 0851 hours? Were you present  
23           when that was signed?

24      A.   Yes, sir, I was.

25      Q.   What happened right after it was signed?

1 A. Right after it was signed?

2 Q. What occurred?

3 A. Due to the inconsistency of Mr. Lowery's story of the  
4 night before we explained to him we wanted him to take  
5 the polygraph. He agreed. We advised him of his rights  
6 and insured that he still was willing to take the poly-  
7 graph. He said he was. At that point we informed Sergeant  
8 Raynor that Mr. Lowery would take the polygraph and he  
9 was set in the room until Sergeant Raynor was ready for  
10 him with no questioning.

11 Q. So you're saying then that the morning of the 28th, prior  
12 to the defendant talking with Officer Raynor, that you or  
13 Officer Malugani did not interview or question him at all?

14 A. No, sir.

15 Q. Prior to the polygraph being taken on the 28th, do you  
16 know if Eddie ever requested an attorney?

17 A. When I was present he never asked to see an attorney.

18 Q. While you were present from the time that he was brought  
19 to the Riley County Police Department on July 28th and  
20 up until the time of the test being administered, was he  
21 ever advised by the police, either you or Officer Malugani,  
22 or anybody else, that he was not under arrest?

23 A. That morning at the time this rights waiver was signed  
24 Investigator Malugani advised him that he was not under  
25 arrest at that time. Those were his rights and he wanted

1 him to be aware of them before he took the polygraph.

2 Q. Do you recall if it was explained to him at that time then  
3 that if he wanted to leave he could?

4 A. Those were, that I can recall, you can leave, I don't  
5 recall those ever being spoken. The fact that he was not  
6 under arrest -- he was advised of his Miranda warning and  
7 advised that he could stop making any statements at any  
8 time is where it was left.

9 Q. After Officer, well, first of all, do you recall about  
10 what time Officer Raynor started questioning him?

11 A. Still between 9:30 and a quarter till 10:00 in the morning.

12 Q. And do you recall about what time Officer Raynor was finished  
13 questioning him?

14 A. Still around 12:30, quarter till 1:00.

15 Q. After Officer Raynor was completed, was through talking  
16 with the defendant, what happened?

17 A. Mr. Lowery was brought back over to the administration  
18 building and placed in the administration room.

19 Q. At that time when he was brought back over to the admini-  
20 stration building and placed in an interview room was he  
21 at that time -- excuse me. Did he at that time ask if he  
22 could see an attorney?

23 A. No, sir, he did not.

24 Q. Was he advised at that time about the Miranda warnings?

25 A. No, he was not advised at that time.

1 Q. Then what happened then?

2 A. After obtaining the results of the polygraph from Sergeant  
3 Raynor myself and Investigator Malugani began to question  
4 Mr. Lowery in more detail.

5 Q. At that time during that segment of the questioning and  
6 after the test was administered, were voices raised by  
7 either you or Officer Malugani?

8 A. No more than what is raised in the normal course of  
9 conversation.

10 Q. Now, do you recall what you stated at the preliminary  
11 hearing, you said that voices were raised, I believe.

12 A. No more than what you would normally raise your voice. I  
13 mean you talk at different levels.

14 Q. So you're saying it wasn't a regular conversation voice  
15 like I'm doing right now but that voices were raised?

16 A. Voices were raised.

17 Q. Whose voices?

18 A. I would say mine and Investigator Malugani's.

19 Q. Was this just raising or was it a shouting type of incident?

20 A. I would say it was raised voices, not shouting.

21 Q. At that time were there any questions asked that you  
22 might as well admit it, we know you did it or anything like  
23 that asked?

24 A. Not in those terms.

25 Q. Well, what terms? Explain to me what terms then.

1 A. There were questions asked along the lines, we have, here  
2 is what the polygraph shows, how did -- can you explain  
3 that to us, you know.

4 Q. Okay. How would you explain or describe the defendant's  
5 conduct or demeanor at that time when this questioning  
6 was going on?

7 A. He was setting with his head lowered through most, through  
8 part of the interview. He was acting very ashamed at  
9 himself and I would guess ashamed would be the proper.

10 Q. Was he crying?

11 A. I remember him crying once only for a very short time just  
12 prior to giving the confession.

13 Q. Do you recall if the defendant ate anything while he was  
14 at the police station on the 28th up from the time he was  
15 taken to the police station until he was finally arrested  
16 that afternoon?

17 A. No, he didn't eat anything. He was offered several cups  
18 of coffee.

19 Q. Do you know why he didn't eat anything?

20 A. At one point he indicated he didn't want anything to eat.  
21 Investigator Malugani asked him at one time if he wanted  
22 to get something to eat and he indicated he'd just soon  
23 get it over with.

24 Q. The questioning by Officer Raynor was completed, I think you  
25 said around 12:30, 12:45, something like that on the 28th



1 of July?

2 A. Yes, sir.

3 Q. Then you and Officer Malugani then questioned the defendant  
4 for how long?

5 A. From about 1:00 o'clock until about 3:00 or 3:30.

6 Q. Would you describe how the defendant actually made certain  
7 admissions, what transpired just briefly? Did he volunteer?  
8 What I'm asking is, did he voluntarily make the statement  
9 himself or were questions specifically asked of him and then  
10 he would respond to those?

11 A. Mr. Lowery was responding very slowly and in a short  
12 sentences only. He would be asked a question as to, tell  
13 us what happened. He would say, "Well, I parked by the  
14 side of the house." We would have to ask him, what happened  
15 next. Then he would give us another short sentence and  
16 then we'd have to ask him, then what happened or what did  
17 you do then or how did this happen and he would respond  
18 to those questions.

19 Q. Are you stating then at no time did either you or Officer  
20 Malugani ever specifically ask questions and say, then  
21 what did you do, pick up a knife or what did you do, grab  
22 a vase?

23 A. We didn't lead him if that's what you're getting at.

24 Q. You just simply asked him, what happened and he provided  
25 all of the information without any knowledge of what might

1 be the correct answer from either you or Officer Malugani?

2 A. He provided the answers to us that no one else could have  
3 known.

4 Q. And you had not provided those answers to him prior to  
5 him making those admissions?

6 A. No, sir, I did not.

7 Q. Did he -- anytime during -- just prior, during or after  
8 these admissions were being given request to stop and have  
9 an attorney?

10 A. He requested after the confession. I asked him to give  
11 me a written statement. He said, "Okay, I will but I'd  
12 like to take a break first." At that point we took a  
13 15 minute break. I gave him his -- got him a cup of  
14 coffee. At the end of the 15 minute break I re-entered  
15 the interview room and again advised him of his Miranda  
16 rights and then he asked to see an attorney. That is  
17 the only time.

18 Q. That is the only time when he was in your presence on  
19 either the 27th or 28th that he requested an attorney?

20 A. Yes, sir.

21 Q. And do you recall while Eddie Lowery was in your presence  
22 again on the 27th or 28th, any time specifically that  
23 either you or Officer Malugani said something to the  
24 effect that, you are not under arrest. Was that ever  
25 mentioned? I think you said one time. Any other times

1           that you recall?

2       A.   The only other time was the time I mentioned on the  
3           morning of the 28th.

4       Q.   Morning of the 28th was the only time that you recall  
5           while you were present with Eddie Lowery that that con-  
6           versation transpired that you are not actually under arrest?

7       A.   Yes, sir.

8       Q.   Do you recall about what time he finally was placed under  
9           arrest?

10      A.   Around 3:30 in the afternoon I believe is the time that  
11           he was placed under arrest.

12      Q.   Without spending any more time, if I were to say that the  
13           arrest warrant would indicate 4:20 in the afternoon, would  
14           that still sound reasonable to you?

15      A.   Reasonable fact that that was the time that the report was  
16           filled out. When I said the words, "You are under arrest"  
17           it would have been around 3:30. By the time the report  
18           would have been filled out he would have been taken next  
19           door and booked it could have possibly been 4:20 before  
20           that was written down.

21      Q.   And you verbally told, you or Officer Malugani told him  
22           he was under arrest?

23      A.   I believe I informed him he was under arrest.

24      Q.   And that was right after he made those admissions you  
25           advised him of that?

1 A. No.

2 Q. When did you advise him he was under arrest?

3 A. After the break, after the 15 minute break when I came  
4 back in to get the written statement. After I advised him  
5 of his Miranda again he then asked to see an attorney and  
6 he was then placed under arrest.

7 Q. Prior to the oral admission being given by my client, did  
8 you feel that there was probable cause to arrest him for  
9 these, this alleged rape, burglary and assault?

10 A. Prior to his confession?

11 Q. Prior to his oral confessions, yes?

12 A. No, sir, I didn't have probable cause to arrest him.

13 MR. VOGEL: No other questions, Your Honor.

14 RE-DIRECT EXAMINATION

15 BY MR. CAFFEY:

16 Q. At any time on the 28th when you were with the defendant  
17 prior to the time he confessed, did he ask for food?

18 A. No, sir.

19 Q. Did you at any time prior to the time he confessed hear  
20 him ask to talk to an attorney?

21 A. No, sir.

22 Q. Did you hear him at any time ask to be taken home or to  
23 be released or to let out so he could go home?

24 A. No, sir.

25 Q. Now this interview was conducted in this same interview

1 room that you spoke of about, that he was in on the 27th,  
2 is that right? The same interview room?

3 A. They're one of the two that are located next door to one  
4 another in the administration building.

5 Q. And at the time that this interview was conducted on the  
6 28th in the afternoon was that interview room locked?

7 A. No, it was not.

8 Q. Was the building locked in any way?

9 A. No, it was not.

10 Q. Did the defendant at any time request to terminate this  
11 interview prior to the time he made his admissions to you?

12 A. No, sir.

13 Q. If he had prior to the time he made the admissions to you --  
14 what if he had requested to terminate the interview? What  
15 would you have done?

16 A. Taken him home.

17 MR. CAFFEY: No other questions.

18 MR. VOGEL: No questions.

19 THE COURT: Very well. Step down.

20 MR. CAFFEY: I have no other questions, Your Honor.

21 THE COURT: Very well. Are you ready to proceed,  
22 Mr. Vogel?

23 EDDIE LOWERY,

24 called as a witness in behalf of himself, being of legal  
25 age and having been first duly sworn, testified as

1 follows:

2 DIRECT EXAMINATION

3 BY MR. VOGEL:

4 Q. Would you state your name please?

5 A. Eddie James Lowery.

6 Q. And your occupation?

7 A. I work at Fort Riley in the U. S. Army.

8 Q. What is your rank out there?

9 A. E4.

10 Q. How old are you?

11 A. 22.

12 Q. And your education?

13 A. High school graduate.

14 Q. Do you recall what, if anything, happened on May the --  
15 excuse me, Monday, July 27th, 1981?

16 A. Yes, I had gone to work Monday morning and when I came  
17 home that afternoon Shelly Payne (sp) was there and she  
18 told me to call Investigator Malugani.

19 Q. Who is Shelly Payne?

20 A. She was a girl that was at my trailer at the time.

21 Q. And did you then, in fact, call Officer Malugani?

22 A. Yes, she give me the message and I called him and they  
23 came down and picked me up.

24 Q. Do you recall about what time -- they meaning who now?

25 A. Well, it was Investigator Malugani and Johnson.

1 Q. Do you recall about what time they came down on the 27th  
2 of July and picked you up?

3 A. About 4:00 o'clock.

4 Q. Do you recall when they picked you up if they indicated  
5 the reason why they wanted to talk with you?

6 A. I got the understanding it was because of the accident  
7 that I was involved the previous night.

8 Q. Were you arrested at that time?

9 A. No, they asked me to come down to the police station with  
10 them and talk to them and the whole time I thought it was  
11 because of the accident I was in the previous night.

12 Q. Do you recall about what time then that you arrived at the  
13 police station?

14 A. Must have been around, I guess 4:30.

15 Q. What happened after you arrived at the police station?

16 A. I was placed into an interview room and Investigator Malugani  
17 and Johnson came to the room and started asking me questions.

18 Q. Now previously there was testimony that prior to those  
19 questions being asked that afternoon that you signed a  
20 waiver of rights. Do you recall that?

21 A. Yes, I signed a waiver Miranda warning.

22 Q. I hand you what's been marked State's exhibit #1, do you  
23 recognize that?

24 A. Yes.

25 Q. And is that your signature on there?

1 A. Yes.

2 Q. And what time does it indicate in date that that was signed?

3 A. 07, July 27th, '81 at 1630 hours.

4 Q. And do you recall, in fact, signing that?

5 A. Yes.

6 Q. After you signed the waiver of rights what occurred?

7 A. Well, Detective Malugani started asking me questions  
8 about these crimes that were committed and I asked him  
9 about, I go, "Well, I thought you guys brought me down  
10 here for the automobile accident that I was in" and he  
11 goes, "No, that ain't our jurisdiction, we're here for - -

12 Q. You're talking too fast and it's hard to understand, Eddie,  
13 and I need to kind of specifically ask you questions as  
14 we go along.

15 A. Okay.

16 Q. So, you're stating then that Officer Malugani started  
17 asking you questions about some crimes that were committed?

18 A. Right.

19 Q. Okay, what type of questions did he ask you?

20 A. He asked me if I knew anything about a crime that was  
21 committed in the early hours of Sunday and he had told me  
22 that somebody had been raped and their house had been  
23 burglarized.

24 Q. And how did you respond to that?

25 A. I told him that I didn't know nothing about that.



1 Q. How long were you questioned that day, do you remember  
2 about how long it was?

3 A. I think it was about 45 minutes to an hour.

4 Q. And who was present during that questioning?

5 A. Investigator Malugani and Johnson.

6 Q. Can you explain or describe their conduct or the way they  
7 asked you the questions?

8 A. Well, Investigator Johnson, he really didn't say too  
9 much. Investigator Malugani, he was the one kind of  
10 getting rough with me in a way. He had been telling me,  
11 you know, that, "Lowery," he goes, "we think you're the  
12 one that did this" and then I kept on telling him that I  
13 didn't do that and at one point he had told me he had 10  
14 more years left on the force and if it took him the 10  
15 years he was going to prove that I caused these crimes.

16 Q. And that was the first day that that sort of conversation  
17 transpired.

18 A. Yes, sir.

19 Q. What was his tone of voice when he was saying that?

20 A. Well, at first when he talked to me it was kind of  
21 normal and he started raising it. He didn't really  
22 shout but he got kind of loud with me, you know.

23 Q. So you're stating that at the first interview Malugani was  
24 indicating that he felt that you committed those crimes?

25 A. Right, yes, sir.

1 Q. And you denied those?

2 A. Yes, sir.

3 Q. Any time during the interview that occurred on July 27th,  
4 did you ever request an attorney?

5 A. No, sir, I don't think I did.

6 Q. Do you recall if any of the police officers indicated that  
7 you were not under arrest? This is, again, we're just  
8 talking about July the 27th?

9 A. The only time he said anything about arrest was when he  
10 read off the Miranda warning when they put me in the  
11 interview room.

12 Q. And what did they say then?

13 A. They just read off the Miranda warning. They didn't tell  
14 me if I could leave or they were putting me under arrest  
15 or anything.

16 Q. During the questioning on the 27th, what was your feeling  
17 whether you could leave or not?

18 A. If I got up and left they would probable put me in jail or  
19 something.

20 Q. Why did you feel that way?

21 A. I really didn't -- I didn't know. I thought they were  
22 actually accusing me of the crime right then and I felt  
23 that I couldn't leave then. I didn't know I could get  
24 up and leave and walk out at any time.

25 Q. Did you ever ask to leave on the 27th?

1 A. I don't know. I didn't know if I could or not.

2 Q. Do you recall about what time the questioning ended on  
3 the 27th of July?

4 A. I don't really recall that but I guess somewhere around  
5 5:30 or so.

6 Q. After the questioning was over what happened?

7 A. After they questioned me they asked me if I would sign a  
8 search warrant to search my car and my trailer and I told  
9 them I would.

10 Q. Why did you volunteer to do that?

11 A. Because I had nothing to hide.

12 Q. After you signed that search warrant what happened?

13 A. After I signed the search warrant they took me out and  
14 put me in a car and took me back to my trailer.

15 Q. And what happened when you arrived back at the trailer?

16 A. They searched my car and my trailer.

17 Q. Okay, after they were through searching what happened?

18 A. Well, they were inside my trailer and everything and they  
19 had me go through Shelly Payne's purse for some reason  
20 and they asked me whose purse it was and I told them it  
21 was Shelly Payne's and I told them it was not my property  
22 and I didn't want to go through it.

23 Q. After that though, what happened?

24 A. They asked me if I could come back the next day.

25 Q. Did you agree to it?

1 A. I said yes I would.

2 Q. Why did you agree to it?

3 A. I didn't have nothing to hide from them.

4 Q. What was the arrangement that was made about you talking  
5 to the police the next day as far as getting to the police  
6 station?

7 A. They told me, I told them, they asked me to come in at  
8 8:00 o'clock. I told them I could and the next morning  
9 I couldn't find a car so I called up Investigator Malugani  
10 and he came and picked me up.

11 Q. Do you recall about what time Officer Malugani picked you  
12 up that morning, July 28th?

13 A. It was 8:30.

14 Q. At the time he picked you up were you ever advised you  
15 were under arrest?

16 A. No.

17 Q. What conversation, if any, took place between you and  
18 Officer Malugani on the trip from Ogden back to the police  
19 department?

20 A. Well, he asked me if I had a good night's sleep and I  
21 told him I didn't sleep too much and then he asked me,  
22 let me see, I think that was about all that went on, you  
23 know. We didn't really talk about the crime at any time.

24 Q. Do you recall if you had anything to eat that morning before  
25 Officer Malugani picked you up?

1 A. No, I didn't eat at all.

2 Q. What happened then after you were transported back to the  
3 Riley County Police Department?

4 A. I was put inside the interview room again and that's when  
5 they -- I signed the Miranda warning.

6 Q. And did you sign one?

7 A. Yes, sir.

8 Q. I hand you what's been marked State's exhibit #2. Is  
9 this an accurate copy of the one that you signed?

10 A. Yes.

11 Q. And that's your signature on that?

12 A. Yes, sir.

13 Q. What's the date and time on there that you signed that?

14 A. July 28th, 1981 and 0851 hours.

15 Q. 0851?

16 A. Yes.

17 Q. After you signed that waiver of rights form, what happened?

18 A. Malugani came in the -- well, Malugani asked me if I was  
19 going to still take the lie detector test and I told  
20 him that I didn't think it would work and that I really didn't  
21 want to take it now and finally he said that, he goes,  
22 "Well, it's going to prove if you're innocent or guilty  
23 or not" and then they started telling me that they would  
24 explain how it worked to me.

25 Q. Without getting into details of the polygraph, what other

1 conversation took place between you, Officer Malugani,  
2 and Officer Johnson at that time, if any?

3 A. Investigator Malugani, he asked me a few more questions  
4 about the crime when I was sitting in there before the  
5 polygraph test.

6 Q. Like what, can you remember any of them?

7 A. He asked me if I remembered anything more about the crime  
8 that was committed and if I -- and he goes, "Are you the  
9 one that knows anything about this crime that was committed?"  
10 And I kept on telling him that I didn't know anything about  
11 it the whole time.

12 Q. Do you recall during that time frame there if you ever  
13 requested to see an attorney?

14 A. Malugani was inside there with me and after he got done  
15 asking me a few questions I asked him if I could get a  
16 lawyer and Malugani goes, he goes, "I don't think there's,  
17 you need one right now because all we want to do is find  
18 out some information from you." And I go, "Okay."

19 Q. But you did?

20 A. I did ask Malugani if I could see a lawyer and he told me  
21 that there's no probable cause for one right now because  
22 I wasn't under arrest or anything.

23 Q. After, did any questioning then continue after Officer  
24 Malugani stated that there was no reason to have a lawyer?

25 A. He just started going into the polygraph test. He finally

1       talked me into taking it because I told him I didn't want  
2       to take it.

3       Q. Was there any, can you explain the demeanor or conduct  
4       of Officer Malugani or Johnson during this time frame  
5       we're talking about now as far as how they acted when they  
6       asked you questions?

7       A. That morning?

8       Q. Yes. If there's anything distinguishable. If not, fine.

9       A. I don't think so.

10      Q. Then after, what happened after Officer Malugani talked  
11      with you?

12      A. They had left me in the room by myself for about an hour  
13      or so.

14      Q. Then what happened?

15      A. And then they came back in and they got me and took me  
16      over to see the one who was working the lie detector test.

17      Q. Officer Raynor?

18      A. Yeah, Officer Raynor and took me over to him.

19      Q. And how long were you with Officer Raynor?

20      A. About three hours.

21      Q. After you were through talking with Officer Raynor, what  
22      happened?

23      A. Investigator Malugani and Johnson came back down and got  
24      me and took me back over to the interview room.

25      Q. Now from the time you were originally picked up that

1 morning and brought to the police station up to the time  
2 that Officer Raynor was through talking with you had you  
3 eaten anything?

4 A. No.

5 Q. Why not?

6 A. I didn't know if I could eat there or what so I didn't  
7 even ask or anything.

8 Q. Did they offer to feed you?

9 A. Not to my recollection they didn't offer me anything.  
10 They offered me coffee. That was about it.

11 Q. How about food?

12 A. They didn't offer me any food that I can remember.

13 Q. So then after the questioning by Officer Raynor then your  
14 testimony is you were taken back over to the main building  
15 and to one of the interview rooms over there again?

16 A. Yes, sir.

17 Q. Do you recall after talking with Officer Raynor if you  
18 ever requested an attorney?

19 A. After talking to him?

20 Q. Yes, after or during, whatever you can remember.

21 A. Well, I guess it was after his statement that I made.

22 Q. What now? Oh, after the admissions, you mean?

23 A. Right.

24 Q. So you're saying you don't recall then any -- well, you  
25 tell me what you're saying.



1 A. Okay. I'm saying that after I made the oral confession  
2 and everything, that's when I made the request for an  
3 attorney.

4 Q. Who was present in the interview room besides yourself  
5 after Officer Raynor was through questioning you next door?

6 A. Malugani and Johnson.

7 Q. Can you describe a little bit about how that questioning  
8 went?

9 A. Well, I sit in the interviewing room and Malugani kept  
10 on, you know, telling me, kind of telling me to admit to  
11 this crime that they'd get me help if I needed to and I  
12 kept on telling them that I didn't do this and I told  
13 them that I shouldn't have took the polygraph test any-  
14 way because I was a very nervous person and Malugani kept  
15 on saying, "Lowery, if you'll admit this we'll get you the  
16 proper help that you need." I kept telling him I didn't  
17 need no help that I didn't do this crime.

18 Q. Can you describe his demeanor or tone of voice at that  
19 time?

20 A. Detective Johnson didn't really raise his voice much but  
21 Malugani raised his voice at me a lot telling me to admit  
22 this crime and if I admitted he would get me help.

23 Q. And how were you, how were you doing at that time?

24 A. I was really confused. Really emotionally upset about  
25 all this. I really didn't know how to take it and every-

1           thing.

2       Q.   Anything else that Officer Malugani brought up during  
3           that questioning that you remember?

4       A.   They brung up my past history about my brother that was  
5           killed and they brung up my sister that was raped.

6       Q.   Anything else that you remember? Well, after that questionin  
7           or that conversation took place what happened?

8       A.   After he brung up my past history?

9       Q.   Yes.

10      A.   Oh, I was sitting there and they talked about me having  
11           my head hung down low. Well, that's natural for me  
12           because I always do that. I always have my head hanged  
13           down low when I'm talking to somebody but, okay, after  
14           that they asked me to admit to this crime. They asked me  
15           how I did it and everything and I just kept on telling them  
16           that I didn't do this crime.

17      Q.   Okay. Well, how did you finally explain to them how you  
18           did it?

19      A.   Well, at that point I was really upset and everything and  
20           I was crying at the time and everything and really emotionally  
21           upset and Malugani -- okay, I told him that I parked the  
22           car out in the front yard.

23      Q.   Why did you say that?

24      A.   He was on my back a lot and everything. I just wanted to  
25           get the whole thing over with. I was all confused about

1 everything. I didn't know what to do and I just wanted  
2 to get away from it all.

3 Q. What else then happened?

4 A. Malugani asked me what I did after I parked the car. I  
5 told him that I went up to the door and he goes, "Well,"  
6 he goes, "how did you get in?" And I didn't say anything.  
7 I paused for a while. He goes, "Did you cut the screen  
8 door down or did you bust it open?"

9 Q. He asked you that way?

10 A. He asked me if I sliced the screen door or pulled it and  
11 I just told him that I busted it open with my hand.

12 Q. And why did you say that?

13 A. I don't know. It just sounded like the natural thing to  
14 say at the time because he told me at the time that he  
15 didn't think I busted it down with my hand. He said I  
16 used a knife to do it with.

17 Q. Are you saying that he was the first one to suggest about  
18 a screen being busted down?

19 A. Yes.

20 Q. You didn't bring that up first?

21 A. No, I just said I went up to the door and he goes, "How  
22 did you get in?" I didn't say anything and then he said,  
23 he goes, "Did you cut the screen door down or open -- or  
24 did you bust it open with your hand?" I said I busted it  
25 open with my hand.

1 Q. Then what happened?

2 A. I busted it open the door with my hand and busted open the  
3 door and they asked me if I was in the front or back and I  
4 said I was in the front, you know.

5 Q. Do you know, do you have any knowledge at this time whether  
6 there was a front door or back door entered into?

7 A. No, I don't even know what the place looks like.

8 Q. Go ahead.

9 A. I told him that I was inside the house, that I was running  
10 around inside the living room and kitchen and everything and  
11 then I told him and Malugani goes, he goes, "What caught  
12 your attention to the -- down the hall?"

13 Q. What caught your attention down the hall?

14 A. He asked me what caught my attention and I told him I  
15 heard somebody down the hall inside the room and he goes,  
16 "Did you go down there?"

17 Q. Who mentioned the hall first?

18 A. Malugani, he was doing most of the questioning to me.

19 Q. What happened?

20 A. He asked me if I went down the hall and I said yes and  
21 he said, "Did you go into a room?" I said I went into a  
22 bedroom and he said, "What did you do then?" I didn't  
23 say anything because I didn't know what to say and he goes,  
24 "c'mon, Lowery, tell me what you said, you're almost there.  
25 Just tell us what you did and it will be over with for you."

1 I kept on crying and everything and I was holding my head  
2 down, you know, and I finally said, he goes, "Did you  
3 have a knife in your hand?" I go, "Yeah." And he goes,  
4 I go - -

5 Q. Excuse me for interrupting. He asked you, did you have a  
6 knife in your hand?

7 A. Yes.

8 Q. Had the word knife been brought up in any other of the  
9 other interrogations before that?

10 A. He said that the screen door was cut down with a knife.

11 Q. All right.

12 A. And I told him I was in the room and everything. He  
13 goes, "What did you do?" I said I jumped on her, jumped  
14 on the bed. He goes, "Did you hit her or anything?" I  
15 go, "No, I didn't hit her." He goes, "C'mon, Lowery,  
16 tell us the whole truth. Did you hit her with a vase or  
17 with a knife -- butt of the knife?"

18 Q. He asked those specific questions?

19 A. He asked me if I hit her with a vase or the butt of the  
20 knife.

21 Q. Then what was asked?

22 A. And then he asked me, he goes, "Well, what was she wearing"  
23 and everything and he said, I said a nightgown, I guess,  
24 you know. I just told him a nightgown.

25 Q. Then what happened?

1 A. And then after that I was pausing for a while and every-  
2 thing just really upset, you know. I didn't know what  
3 to do at the time.

4 Q. Was there anything else happen, any other admissions  
5 during that time, any other questions he asked that you  
6 remember?

7 A. I recall him asking me about what she was wearing. He  
8 asked me if she was wearing pajamas or a gown, a night-  
9 gown and I just told him a nightgown and he asked me if  
10 she was wearing underwear or not and I told him yes, she  
11 was wearing underwear.

12 Q. Now, you heard Officer Malugani and Officer Johnson  
13 testify earlier that the way those questions were asked  
14 to you is that they would say what happened, now what  
15 happened, what did you do next, that sort of questioning.  
16 Are you saying that this, in fact, is not the way it oc-  
17 curred?

18 A. I'm saying that isn't how it occurred. They were really  
19 pressuring me a lot at the time. From the starting of  
20 all this I had nothing to do with this and I was cooperating  
21 with them and everything.

22 Q. You were what? Cooperating?

23 A. Yes and I kept on telling them I didn't have nothing to  
24 do with this and they were jumping all over me telling  
25 me to admit this and they would seek proper help for me.

1 Q. Do you recall at all during the day, the 28th of July, if  
2 you ever requested an attorney?

3 A. Yes.

4 Q. Which times do you remember if any?

5 A. The most distinct time I remember was before the polygraph  
6 test and that's when Malugani told me that, he goes,  
7 "There's no need for one right now" you know, "all we  
8 want to do is find out a few answers from you." I said,  
9 "Okay."

10 Q. After you made these admissions what happened?

11 A. I asked for a break and they gave me a break.

12 Q. Who was with you during your break?

13 A. Nobody, just me.

14 Q. In that interview room?

15 A. Right.

16 Q. After the break was over what happened?

17 A. They came back in and I think they had me sign another  
18 Miranda warning, I'm not sure or they read my rights off  
19 to me and told me I was under arrest for rape and burglary  
20 and assault.

21 Q. Had you ever, before that time, been advised that you were  
22 under arrest?

23 A. No.

24 Q. Do you recall any time on the 27th of July or 28th of  
25 July if you were specifically advised that you were not

1 under arrest?

2 A. The only time that I remember them telling me that I was  
3 not under arrest was on the 27th.

4 Q. But you don't recall them mentioning that at all on the  
5 28th?

6 A. No, they didn't tell me if I was under arrest or if I  
7 was being arrested or if I could leave or anything.

8 Q. Can you explain to the Court your interpretation or your  
9 feeling of whether you were under arrest or not on the  
10 28th of July?

11 A. I felt that I was under arrest and that I couldn't leave.  
12 If I left they'd just throw me in jail right there.

13 Q. Why did you feel that?

14 A. Because of the way they were asking me questions and getting  
15 on me. The way that they were talking to me like Malugani  
16 he told me to admit to these crimes and stuff and I figured  
17 they were going to arrest me no matter what I did.

18 Q. Do you recall then about what time you finally were arrested?

19 A. Must have been around 4:30 or so.

20 Q. On July 28th?

21 A. Right.

22 Q. And your testimony is that that was after you made those  
23 oral admissions that that was when you finally -- you  
24 were finally advised you were under arrest?

25 A. Right.



1 MR. VOGEL: No other questions, Your Honor.

2 CROSS EXAMINATION

3 BY MR. CAFFEY:

4 Q. Mr. Lowery, how long have you been in the Army?

5 A. I was in the Army since April 16th, 1979.

6 Q. And you were what, an E4, did you say?

7 A. I'm presently an E4.

8 Q. To reach the -- Sp.-4?

9 A. Sp.-4, yes.

10 Q. To reach the rank of Sp.-4 I assume that it would be  
11 difficult for someone who was not reasonably intelligent  
12 to reach the rank of Sp.-4, would it not?

13 A. What do you mean?

14 Q. It would be difficult if someone were of subnormal in-  
15 telligence to reach the rank of Sp.-4, would it not?

16 A. If he knew his job and did his job he made his rank.

17 Q. Do you consider yourself reasonably, of normal intelligence?

18 A. I'm a normal person, yes.

19 Q. And when you were read the Miranda rights you understood  
20 those, did you not?

21 A. Yes.

22 Q. You didn't have any questions about it?

23 A. No, not at that time I didn't.

24 Q. You were read those rights several times, weren't you?

25 A. Three times, three Miranda warnings that I signed.

1 Q. Well, you signed three but you said you had an additional  
2 time at least one other time that you were informed of the  
3 rights verbally, is that correct?

4 A. Malugani said that to me.

5 Q. So that would be four times that you were informed of your  
6 rights?

7 A. Malugani told me the first day verbally and then he had me  
8 sign the Miranda warning.

9 Q. And then the second day you were also informed verbally?

10 A. No, the second day he told me that this is the same thing  
11 I had received Monday, it was a Miranda warning and he  
12 had me read -- he had me read the Miranda warning and  
13 sign my initials on it.

14 Q. And when you talked with Sergeant Raynor didn't he read  
15 it to you and you sign that also?

16 A. I might have, I don't know. I don't remember if he had  
17 one or not because he had quite a few pieces of paper.

18 Q. I believe just a few minutes ago you testified that you  
19 think there was another time that they read you your  
20 rights but you didn't sign anything.

21 A. That was the first day.

22 Q. Well, after you made your statement and before you were  
23 arrested, didn't they again inform you of your rights?

24 A. Before I was arrested?

25 Q. Before you were arrested, didn't you say that they

1 informed you of your rights once more?

2 A. Malugani said it verbally to me one time that I can re-  
3 member. That was on Monday.

4 Q. Well, in any case, while you were there you knew what your  
5 rights were, didn't you?

6 A. Yes.

7 Q. Okay. And you said when you were there on the 27th that  
8 you felt that you couldn't leave. You felt that you were  
9 under arrest?

10 A. I felt that they were, you know, arresting me that day  
11 and everything for all of this.

12 Q. And you felt the same thing on the 28th?

13 A. Yes. I was surprised when they took me home.

14 Q. They took you home on the 27th?

15 A. 27th I asked them if I was going to be arrested and they  
16 said no and that's when I stopped worrying about it, that  
17 day.

18 Q. And you called the police department for them to come in  
19 and pick you up, right?

20 A. 28th.

21 Q. You actually called them the 27th too, you said, right?

22 A. Yeah, because they left a message.

23 Q. And they came out and picked you up on the 28th?

24 A. Right.

25 Q. And you still think you were under arrest on the 28th?

1 A. No, the 27th I asked them if I was under arrest after they  
2 started questioning me and everything, what all this was  
3 about and they said no, they just wanted to ask me some  
4 questions so the 27th they asked me questions and every-  
5 thing and after they asked me questions they asked me if  
6 I would sign a search warrant.

7 Q. Consent to search?

8 A. Yeah, whatever it is. And at my trailer, see, they searched  
9 my trailer and my car and asked me if I could come back  
10 Tuesday and I said yes.

11 Q. But you knew by that time that you weren't under arrest?

12 A. Yes.

13 Q. You probably figured that out because they took you home  
14 and left you there?

15 A. They told me I wasn't under arrest Monday.

16 Q. And yet you thought when you called them and asked them  
17 to come and pick you up from the police department to your  
18 home and take you to the police department, you thought  
19 that meant that they were arresting you?

20 A. Well, not right then I didn't but after I got down there  
21 and they started asking me questions and everything.

22 Q. And did the police department at any time on the morning  
23 of the 28th prevent you from eating breakfast?

24 A. Prevent me from eating?

25 Q. Yes.

1 A. No.

2 Q. You were home, weren't you?

3 A. Yes.

4 Q. You could have eaten breakfast if you wanted it?

5 A. I could have.

6 Q. Did they tell you no, we won't feed you lunch?

7 A. No, as far as I know there was no mention of food at all.

8 Q. You didn't ever ask them?

9 A. No.

10 Q. So you weren't complaining, saying I'm hungry, you're  
11 starving me to death or anything like that?

12 A. No, I wasn't thinking about it at the time.

13 Q. Now, didn't you say that the reason that you went back down  
14 there was you said you had nothing to hide from them?

15 A. Right.

16 Q. And not because they forced you to come down to the police  
17 department?

18 A. They asked me to cooperate with them and everything would  
19 go a lot easier and I said okay.

20 Q. Okay. Now, you said that during the interview at some  
21 point in that sometime they mentioned something about a  
22 brother who was killed and a sister who was raped?

23 A. They brung it up, yeah, they went back through my past  
24 history.

25 Q. But that's something you told them, I take it?

1 A. Right.

2 Q. Then you admitted that you told them that you drove this  
3 car, your car to the victim's house and parked it near her  
4 house, you admitted that you told them that?

5 A. Right.

6 Q. And you admit that you told them you went up to the door  
7 and you told them that as you put it, I believe, busted  
8 the screen door with your hands?

9 A. Yeah, I told them that.

10 Q. You told them that?

11 A. Right.

12 Q. And you busted open the door?

13 A. Right, I told them I busted open the door.

14 Q. You told them you went inside the house?

15 A. Right.

16 Q. You told them you heard someone inside a room or -- and  
17 that you went into this bedroom?

18 A. Right.

19 MR. VOGEL: Again, Your Honor, I might interject  
20 one thing. He's stating that he might not have actually  
21 verbalized those but he's answering yes.

22 THE COURT: If he didn't tell them that he can so  
23 indicate that.

24 MR. VOGEL: Well, on direct examination he didn't  
25 say that.

1 THE COURT: I understand that. I understand what  
2 the officers say as well. If he wants to clarify his answers  
3 he can do so without counsel's help.

4 Q. (By Mr. Caffey) Now, you also admitted that you had a  
5 knife or that you picked up a knife?

6 A. I told them that I picked up a knife in the kitchen.

7 Q. And then you also told them that you hit this lady in the  
8 head with a butt of the knife, is that correct?

9 A. Malugani asked me if I hit her in the head with a vase or  
10 with the butt of a knife.

11 Q. Weren't you free to say no, I didn't hit her in the head  
12 with anything?

13 A. At the time I was really emotionally upset and I didn't  
14 know what to do at all. I had never been accused of any-  
15 thing like this.

16 Q. They asked what she was wearing and you said a nightgown?

17 A. They asked me if she was wearing pajamas or a nightgown  
18 and I just told them nightgown.

19 Q. Again, you would have been free to say no, I don't know what  
20 she was wearing because I wasn't there. You could have  
21 said that, right?

22 A. I could have said that, yeah, but the way they talked --  
23 they talked like they were standing right there when all  
24 this went on.

25 Q. At the time you consented to take this polygraph test,

1 did you think you were under arrest?

2 A. I figured that they were going to arrest me.

3 Q. Well, seems to me that in your earlier -- in your questioning  
4 you said that you had asked to have a lawyer just before  
5 this polygraph test was given?

6 A. I asked Malugani that.

7 Q. And Investigator Malugani said there was no reason for  
8 one because you were not under arrest?

9 A. Right.

10 Q. And yet you thought you were under arrest?

11 A. Yeah. I didn't know how they worked. I didn't know what  
12 they were doing.

13 Q. Do you suppose that maybe you might have confused -- might  
14 be confused about that conversation?

15 A. No.

16 Q. You don't think you're confused at all?

17 A. Not that I can remember.

18 Q. At any rate, in the afternoon when you were being questioned  
19 there you didn't ask to terminate the questioning at any  
20 time, did you?

21 A. No, I didn't know if I could or not. I didn't know I  
22 could get up and just walk out or anything.

23 Q. Can you look at State's exhibit #2 and can you read me the  
24 paragraph right there that I'm pointing to?

25 A. "If you decide to answer a question now without a lawyer



1 present you will still have the right to stop answering  
2 at any time. You also have the right to stop answering  
3 at any time until you talk to a lawyer."

4 Q. You said that was read to you and you understood it?

5 A. I read it.

6 Q. I take it from what you testified to here today that you  
7 are now saying that what you told the police officers  
8 about where you parked the car and how you got into the  
9 house and all this is not true?

10 A. Right.

11 Q. So you're admitting that you lied to the police officers  
12 at that time, is that correct?

13 A. I told them that I tried to tell them that I didn't do  
14 this whole crime but they insinuated that I did do this  
15 and they were going to make me admit. He kept on saying,  
16 I know you did this, just admit that you did this and every-  
17 thing will be all right.

18 Q. You admit that you told them an untruth at that time? You  
19 told them something that was not true?

20 A. Right.

21 MR. CAFFEY: No other questions.

22 MR. VOGEL: No questions, Your Honor.

23 THE COURT: Thank you, you may step down. Do you  
24 have anything else?

25 MR. VOGEL: No, Your Honor.

1 THE COURT: Summation, please.

2 MR. CAFFEY: Your Honor, it seems to me that this  
3 motion by the defendant is perhaps two-fold. One dealing  
4 with the Fourth Amendment -- one portion dealing with the  
5 Fourth Amendment and the other dealing with the Fifth  
6 Amendment and I think I'll deal with the Fifth Amendment  
7 first because that's something that I guess we deal with more  
8 often than we do with the Fourth Amendment. The Fifth  
9 Amendment question is whether or not the defendant gave a  
10 voluntary statement based on having been informed of his rights  
11 under the Miranda case and understanding those rights and I  
12 think it is clear from the testimony that he was -- that the  
13 Miranda rights were read to him on a number of occasions. He  
14 admitted that he understood those rights and that he went  
15 ahead and made those statements. Now, I think there is a knowing  
16 and voluntary waiver of his Miranda rights. It seems very  
17 little question about that because the defendant admitted that  
18 he knew what his rights were and admitted that he then made  
19 statements. He now is repudiating the statements themselves  
20 but he certainly did understand his rights at any rate. The  
21 other question is the Fourth Amendment question, I suppose,  
22 whether or not there was an illegal arrest that lead to his  
23 conversation. I think the testimony has been clear from the  
24 beginning, from the defendant, from the police officers in-  
25 volved that there was no arrest. Nobody ever said the words,

1 you are under arrest. Also, I think it's clear that there  
2 was no de facto arrest I suppose you could say by virtue of  
3 the factual situation. Defendant was requested to go to the  
4 police department with the officers and he went. Certainly  
5 if there was any doubt about whether or not his initial  
6 agreement to go down there was based on the fear that he was  
7 under arrest that was dispelled when he then was told by the  
8 police officers that he was not under arrest, was transported  
9 back home, they let him stay at home, they didn't lock him  
10 up in the jail. He then called the next morning and said  
11 can you come and get me and take me in for this interview and  
12 how then he can say that he thought he was under arrest seems  
13 beyond me. He was then brought back to the police department,  
14 wasn't in handcuffs, wasn't restrained in any way, the door  
15 in the interview room was unlocked, the door to the police  
16 department building itself was unlocked, he could have left  
17 at any time. He was in no way restrained at the time he was  
18 questioned by officers Malugani and Johnson. He consented to  
19 the lie detector test. He then had his rights read to him again  
20 at the time of the lie detector test by Sergeant Raynor and  
21 then once more after that was done he was again interviewed.  
22 He, at that time was free to go. Again, the interview room  
23 was unlocked. He was not in any kind of restrains. The  
24 officers testified that if he had requested to terminate the  
25 interview and to go home they would have taken him home. He

1 did not request to terminate the interview and I think we've  
2 got a clear situation where he voluntarily gave the statements  
3 to them and I recognize that maybe it's hard for a person to  
4 say how can somebody voluntarily admit guilt of a crime but  
5 we see it every day here. We see many cases where there are  
6 confessions given that are voluntary and unless one were to  
7 assume that only an idiot would give a confession, a volun-  
8 tary confession then I think that's the only thing -- the  
9 only argument he has here and I don't think that's -- there's  
10 been anything that indicates that is present here.

11 MR. VOGEL: Your Honor, as was indicated when we  
12 first started the testimony on this motion that the burden  
13 of proof is on the prosecution. To carry the burden to prove  
14 that this confession was in fact, or should be admissible and  
15 we're contending and we still are contending that it should  
16 not be and the reasons are, first of all, we're stating that  
17 we do not believe that the confession made by the defendant  
18 was made voluntarily and I would refer you to the Kansas  
19 Criminal Law Handbook by Judge Michael Barbara, Section 9,  
20 Point 9 which sets out the factors of voluntariness and just  
21 briefly on those, Your Honor, the first one is duration and  
22 manner of interrogation and -- or, excuse me, duration and  
23 manner of interrogation. Well, I believe the testimony shows  
24 that on July 27th he was either in custody or being questioned  
25 for roughly two and-a-half hours. On the 28th of July he was

1 either in the custody of the Riley County Police Department  
2 or being questioned for approximately eight hours. Secondly,  
3 second factor is the age and intelligence. My client indi-  
4 cated he's 22 years old and he had a high school education.  
5 Thirdly, the factor is the ability of the defendant to request  
6 communication with counsel or family. The defendant stated in  
7 his testimony that prior to the polygraph test being admini-  
8 stered by Officer Raynor that he specifically asked for an  
9 attorney and that Officer Malugani indicated something to the  
10 effect that he didn't need one and the questioning then con-  
11 tinued and the polygraph, the testimony there was the polygraph  
12 test I believe began around 9:30, 9:45 and my client is stating  
13 that before that polygraph was administered he requested an  
14 attorney and it was denied and he was still at the Riley  
15 County Police Department all the rest of that day and was  
16 finally arrested at 4:20 in the afternoon on July the 28th.  
17 Another factor of voluntariness is the fairness of the officer  
18 conducting the interrogation. Again, there's controversy on  
19 the testimony but my client testified that he does not recall  
20 the police ever offering to feed him at all and he was at the  
21 Riley County Police Department roughly from 8:30 - 9:00 o'clock  
22 on the 28th of July until 4:20 when he was finally arrested  
23 and then I assume after that sometime he ate. I don't know,  
24 but during that time period my client was not fed and he made  
25 the statement that he does not recall ever being offered any

1 food. The next factor would be extent of advising him of  
2 his rights. There is some conflict, I believe, on the number  
3 of times that the rights were read to him or that he signed  
4 them. However, he indicated that even though he signed those  
5 he felt that he was under arrest and granted, he stated that  
6 he never asked to leave but he stated he assumed he couldn't and  
7 he was at the police station. This questioning didn't take  
8 place at his mobile home under his sort of environment. It  
9 occurred -- all of this interrogation occurred right there in  
10 the interview interrogation room of the Riley County Police  
11 Department and both police officers testified that they did  
12 not feel they had probable cause to arrest the defendant un-  
13 til after he made the oral confession which was two and-a-half  
14 to three hours they talked to him or he was in the custody  
15 of the police department on July 27th and approximately eight  
16 hours on the 28th of July until he finally was arrested.  
17 And the last factors would be any coercion or duress. Again,  
18 I'm merely referring to the length of the time the interview  
19 lasted, the testimony from my client that he was not offered  
20 food as far as he recalls, the fact that he was denied an  
21 attorney even though he states he requested one prior to the  
22 polygraph being given. Secondly, Your Honor, in reference to  
23 item 5 on my amended motion where it states custodial  
24 questioning on less than probable cause for arrest is in  
25 violation of the Fourth Amendment. I cited the case of

1 Dunaway v. New York and in that the decision was custodial  
2 questioning on less than probable cause for arrest was held  
3 violative of the Fourth Amendment; link between improper  
4 police conduct and evidence obtained as result, held in-  
5 sufficiently attenuated to permit use of evidence. In that  
6 case Judge Brennan states that it was held that the police  
7 violated the Fourth and Fourteenth Amendments to the Federal  
8 Constitution when, without probable cause to arrest, they took  
9 the individual into custody, transported him to the police  
10 station, and detained him there for interrogation, the  
11 detention for custodial interrogation intruding so severely  
12 on the interest protected by the Fourth Amendment as to trigger  
13 the traditional safeguards against illegal arrests, and two,  
14 the incriminating evidence given to the police during the  
15 illegal detention was not admissible at the individual's  
16 criminal trial since under appropriate Fourth Amendment analysis,  
17 which takes into account as factors the temporal proximity  
18 of an illegal arrest and confession, the presence of intervening  
19 circumstances, and the purpose and flagrancy of the official  
20 misconduct, no intervening event broke the connection between  
21 the individual's illegal detention and the incriminating  
22 statements, the giving of Miranda warnings not rendering such  
23 connection sufficiently attenuated to permit use of the in-  
24 criminating evidence at trial. Justice White concurs and  
25 makes one sentence and states that the police conduct in question

1 was similar enough to an arrest that the normal level of  
2 probable cause was necessary before the interests of privacy  
3 and personal security had to give way. Just briefly, Your  
4 Honor, one short paragraph on the fact that occurred in the  
5 Dunaway case was basically back on March 26th, 1981, the owner  
6 of a pizza parlor in Rochester, New York was killed during  
7 an attempted robbery. A police officer told Detective  
8 Fantigrossi that an informant had some information on the  
9 case. Fantigrossi spoke to the informant who was in jail  
10 and he got the name of Irving Dunaway from him. He received  
11 no further information to enable him to get a warrant. He  
12 had Dunaway picked up and brought in for questioning. The  
13 police knocked on his door and asked him to come to the  
14 police station for questioning. The defendant consented and  
15 went to the station. He was not placed under arrest but when  
16 he arrived at the station house he was interrogated. Once  
17 the interrogation started he was not free to leave although  
18 he was still not under arrest. After receiving his Miranda  
19 warnings he waived counsel and made statements implicating  
20 himself in the crime. Your Honor, we contend that that  
21 essentially is what happened in this case that we are here  
22 today on a motion to suppress the admissions and confessions.  
23 Further, I might also mention, Your Honor, that this particular  
24 case of Dunaway v. New York has been cited in the case of  
25 United States of America v. Charles N. Matthews, U.S. Court



1 of Appeals, Tenth Circuit, 615 F. 2d 1279, a 1980 case. We  
2 contend, Your Honor, that the police at no time prior to that  
3 oral confession had probable cause to arrest the defendant,  
4 that even though his Miranda warnings were given as indicated  
5 in State's Exhibit #1 and #2 and signed and there is some  
6 testimony that at least one other time, possibly two, it was  
7 also orally given to the defendant, the defendant still  
8 testified that he did not feel that he could voluntarily have  
9 left. He felt that he was under arrest. Therefore, Your  
10 Honor, I would merely submit that the defendant made that  
11 confession merely to satisfy the police officers, to hopefully  
12 terminate the questioning which had gone on for -- either  
13 custody or interrogation had gone on for a period of eight  
14 hours that day and that the only reason that they were questioning  
15 him there was they had no probable cause other than hopefully  
16 getting his confession that he, in fact, might have been the  
17 individual that committed those crimes. Thank you, Your Honor.

18 MR. CAFFEY: I'll try to speed this up, Your Honor.  
19 Your Honor, I think first of all as to the duration and manner  
20 of interrogation, defense counsel has been characterizing  
21 this as being an eight-hour long interrogation and that's  
22 certainly not the case. The Court heard the testimony, there  
23 was a break and the defendant was taken down and given a lie  
24 detector test, brought back, asked if he wanted something to  
25 eat, he said no. Both officers who were present said they

1 asked the defendant if he wanted something to eat and he said  
2 no, let's go and get this over with. I don't think there's  
3 anything to indicate that the officers intentionally deprived  
4 him of food or water or any of the normal comforts and there  
5 was no indication of any coercion or force or anything of  
6 that nature and I remind you that both officers testified  
7 that he did not ask to see an attorney, did not ask to have  
8 an attorney present. With regard to the case of Dunaway v.  
9 New York, we can certainly distinguish this case without  
10 question. In Dunaway the police officers said the defendant  
11 was not free to leave. In this case the police officers have  
12 testified from the beginning that the defendant was free to  
13 leave. In fact, they took him home during the process. They  
14 took him home and let him spend the night at home and he came  
15 back voluntarily the next day. He testified that the reason  
16 he came back is that he said he didn't think he had anything  
17 to hide. It wasn't because the police officers forced him to  
18 come back. The distinction between this case and Dunaway v.  
19 New York is in this case this was no illegal detention and  
20 in Dunaway there was illegal detention and in this case there  
21 was none so we think that it's clear in this case that that  
22 confession was voluntarily given after the defendant was in-  
23 formed of his rights and he waived those rights knowingly and  
24 voluntarily.

25 THE COURT: Thank you. Well, gentlemen, I have

1 carefully listened to the evidence that has been presented  
2 in this case and I want to state that I appreciate doing that  
3 today. Now, it seems clear to me, it's been about three hours  
4 and fifteen minutes. There's no way that this could have been  
5 done Monday so I'll ask for your assistance in the future. I  
6 had a contested matter in the middle of the afternoon and it  
7 would have been impossible for us to have done that so I  
8 appreciate your cooperation. Help us with that. Tell us  
9 how long this will take but I am glad that you were willing  
10 to make arrangements to do it today and I appreciate that  
11 very much. These matters do have a tendency to take longer  
12 than they might seem at first but you do have substantial  
13 testimony of the defendant plus the officers and the estimate  
14 of a couple of hours was totally unrealistic and I would ask  
15 for your help with us in setting these in the future. I'd  
16 like to just take these up in reverse order. I'm looking at  
17 the defendant's amended motion to suppress confession, number  
18 5, I'll take that up first because I think that's the one  
19 that has been discussed last here. Number 5 of the defendant's  
20 amended motion to suppress states that custodial questioning  
21 on less than probable cause for arrest is in violation of  
22 the Fourth Amendment and cites the Dunaway v. New York case.  
23 I have had the opportunity to look at this case and I have it  
24 before me now and that is the authority that has been cited  
25 here. After carefully listening to the defendant and after

1 being fully advised in the premises -- I might just say in  
2 regard to the Dunaway case, I think that's clearly distinguishabl  
3 from the facts and circumstances in this particular matter.  
4 The crux of the Dunaway case is and as counsel was reading  
5 there time after time they refer to an illegal detention. I  
6 think the facts and circumstances in this case are contra-  
7 indicative of an illegal detention. In many instances, the  
8 officer -- of course, there is some conflict of testimony  
9 but, I believe in the course of human events that a reasonable  
10 mind under the facts and circumstances in this case, would  
11 not deem themselves to be detained against their will. The  
12 first day the defendant admits that pretty much. The second  
13 day the defendant agreed to go back, as a matter of fact,  
14 called and asked them to take him on in because he didn't  
15 have a way to get there. He said he had nothing to hide and  
16 it seems quite clear to me that this was not to be classified  
17 as an illegal detention. That's clearly rebutted so at the  
18 outset, I think it's distinguishable on those and also again,  
19 I'll read on page 824 of the U.S. Supreme Court 60 Lawyers  
20 Edition at page 824 the summary states, although not possessing  
21 sufficient information to obtain a warrant, police took an  
22 individual into custody in connection with an attempted  
23 robbery and homicide, and brought him to police headquarters  
24 where he was questioned after being given Miranda warnings.  
25 The individual was not told when taken into custody that he

1 was under arrest, but would have been physically restrained  
2 if he had attempted to leave. Under the facts and circumstances  
3 in this case certainly the officers indicated that on at  
4 least two occasions he was told that he was not in fact under  
5 arrest and the defendant admits that that's true on the first  
6 day. The defendant quarrels with that on the second day. It  
7 seems clear that the fact and inferences as this case has  
8 evolved would indicate to any reasonable mind that they were  
9 not under arrest and they did not have to cooperate if they  
10 chose not to do so. As a matter of fact, when the defendant  
11 himself called and asked for transportation, that was a vol-  
12 untary act. I don't think comes up in any way to a degree  
13 that could be called an illegal detention which would be the  
14 bottom line that would be necessary to apply Dunaway. Also,  
15 based upon the facts and circumstances in this case and after  
16 weighing all of the testimony and the credibility of the wit-  
17 nesses and being fully advised in the premises, it seems quite  
18 clear to this Court and this Court would hold that under the  
19 facts and circumstances in this case that one, that the  
20 individual would have been in fact released if he'd so asked  
21 and I think that reasonable persons under these facts and cir-  
22 cumstances in this case could come to but no other conclusion  
23 if they wanted to terminate they could. That's substantiated  
24 by the very warnings themselves that indicate they could  
25 cease to discuss it and so on at any time. They're advised

1 that specifically and in the course of human events and on  
2 the facts of this case, I think that would be clear. I  
3 think Dunaway is clearly distinguishable from this case and  
4 I feel that the argument concerning this matter is without  
5 merit on the part of the defendant. This really didn't come  
6 up to the threshold of an illegal detention and I believe  
7 there's been no improprieties in regard to the reasonable  
8 handling of things in regard to the defendant's motion to  
9 suppress. Going quickly then to the defendant's position  
10 number 4 and that states there was a period of unnecessary  
11 delay between interrogation, arrest and arraignment as pro-  
12 vided in and they cite McNabb v. United States as their lead  
13 case and then also cite Mallory. Now, in regard to McNabb,  
14 I think that's totally distinguishable from the fact in this  
15 case. In McNabb which has been cited and I have that in  
16 front of me, I'll give you just a couple of examples. In  
17 McNabb case, immediately upon arrest Freeman and Raymond and  
18 Emuill were taken to the Federal Building at Chattanooga.  
19 They were not brought before a U.S. Commissioner or judge.  
20 Instead, they were placed in a detention room where there was  
21 nothing they could sit or lie down on and kept there from  
22 3:00 o'clock Thursday morning until 5:00 o'clock that after-  
23 noon. They were given some sandwiches and they were not  
24 permitted to see relatives and friends who attempted to  
25 visit them. They had no lawyer and there is no evidence that

1 they requested the assistance of counsel or that they were  
2 told that they were entitled to such assistance. In this  
3 case obviously this gentleman in this case was advised that he  
4 could terminate at any time and so on plus that was a fourteen-  
5 hour stretch. Also, in this particular matter, throughout  
6 the questioning, most of which was done by an Officer Taylor,  
7 at least six officers were present. At no time was a lawyer  
8 or any relative of the defendant present and so on. I think  
9 under the circumstances we've had this broken up quite nicely.  
10 We start off with the first day. There's nothing really to  
11 indicate that there was any coercion in this court's feeling  
12 and the defendant admits that. The second day he came in  
13 voluntarily. It was clear he did not need to do so, the  
14 warnings were given the second day and there was a total three  
15 or four times that this defendant was advised of his rights,  
16 give or take one or two but I would say there was at least three  
17 and probable four times that he was advised of his rights.  
18 Notwithstanding he had agreed to come back the next day. Under  
19 the facts and circumstances, there was no unnecessary delay  
20 between the interrogation and arrest and arraignment in this  
21 particular matter and I feel that McNabb is not in point and  
22 is distinguishable. In regard to point 3, the defendant  
23 states as certain alleged statements and questions made by  
24 him, the defendant, were made at the time the defendant was  
25 under custodial interrogation and therefore proper warning

1 should have been given to the defendant at that time. Indeed,  
2 I'm not convinced that it was custodial interrogation. It  
3 was interrogation, however, custodial has inference of improper  
4 holding against one's will and I think that the facts in this  
5 case rebut that throughout that he was there against his will.  
6 He had the right to leave at any time and I believe under these  
7 facts and circumstances, most reasonable individuals would  
8 understand that to be the case and would so interpret that  
9 to be the case and as a matter of fact were so specifically  
10 told on at least two occasions, by the officers and the  
11 defendant admits at least one occasion he was told that he was  
12 not under arrest. The warnings as I've stated were given  
13 repeatedly and I feel that point 3 is without merit in re-  
14 gard to the defendant in this particular matter. Point 2,  
15 and that would just be the general allegation that the de-  
16 fendant challenges the admissibility of the evidence con-  
17 cerning statements or confessions the defendant willingly  
18 made to police officers prior to the appointment of an  
19 attorney and that it failed to afford defendant due process of  
20 law guaranteed in the Fourteenth and Fifth Amendments. I  
21 believe that in fact the officers were very carefully reason-  
22 ably approached their duties, conscientiously gave their  
23 warnings and I see no error or impropriety and this court  
24 would so hold there was no violation of due process of law  
25 concerning the Fourteenth or the Fifth Amendment. Finally,



1 the bottom line, of course, is in regard to all of this  
2 notwithstanding the fact that that Miranda warning was given,  
3 is the confession voluntary? I'm convinced, based upon the  
4 evidence in this case in this matter that the interrogation  
5 was not unconscionably long. The Court would find that  
6 reasonable accommodations and comforts were afforded this  
7 defendant. He was not coerced into staying under the cir-  
8 cumstances and looking at the totality of the case and all  
9 of the facts and circumstances this Court would find that  
10 the admissions given by this defendant were voluntarily  
11 made and were not a result of coercion, duress or unfairness  
12 on the part of the officers conducting the interrogation.  
13 So, in regard to these matters to summarize then, it would  
14 be the finding of the Court that the admissions that have  
15 been obtained in this particular matter have not violated  
16 the constitution of the United States or the State of Kansas,  
17 that the admissions were obtained reasonably and fairly and  
18 were not obtained under any illegal detention under these  
19 unique facts and circumstances and therefore, it would be  
20 the order of the Court that the amended motion to suppress  
21 the confession should be and is hereby overruled. Any  
22 clarifications or questions on the part of the State or de-  
23 fense in regard to this matter?

24 MR. CAFFEY: None, Your Honor.

25 MR. VOGEL: No, Your Honor.