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Supreme Court of Texas.  
Trammell Crow Central Texas, LTD, Petitioner,  
v.  
Maria Gutierrez, Individually and as Representative of the Estate of  
Luis  
Gutierrez; and Karol Ferman as Natural Parent and as Next Friend of  
Luis Angel  
Gutierrez, Respondents.  
No. 07-0091.

January 17, 2008

Appearances:

W. WENDELL HALL, Fulbright & Jaworski, LLP, San Antonio, Texas,  
for Trammell Crow Central Texas, LTD., for Petitioner.

Joe B. Stephens, The Stephens Law Firm, Houston, Texas, for  
Respondent.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Harriet  
O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W.  
Green, Phil Johnson, and Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: Be seated please. The court is ready to  
hear argument in 07-0091 *Trammell Crow v. Gutierrez*.

SPEAKER: May it please the Court. This argument, the petitioner,  
the petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF W. WENDELL HALL ON BEHALF OF THE PETITIONER

MR. HALL: May it please the court. Wendell Hall and Rosemarie  
Kanusky for Trammell Crow Texas Central Limited.

This case involves a question of liability of Trammel Crow as the  
property manager for the Quarry Market in San Antonio for the criminal  
conduct of a third party on its premises. The 43 majority in the court  
below before the Court of Appeals rejects the analytical frameworks set  
out in *Timberwalk* as well as this Court's decision in the City of  
Keller and imposes a rule of strict liability for premises owners.

There are two central issues in this case. First, whether the  
murder of Luis Gutierrez was similar to the other 10 crimes of issue as  
defined by this Court's decision in *Timberwalk*. And second, under the

applicable standard overview articulated by the City of Keller and the previous cases regarding the equal inference rule, whether the circumstances are equally consistent with either of two facts, that is, a robbery or a targeted hit on Luis Gutierrez. Because the circumstantial evidence of a vital fact is meager in this case, that is the evidence of a robbery. The reviewing court must consider not just favorable evidence but all the circumstantial evidence and competing inferences, not in isolation, but in light of all the non-circumstances.

The competing inference to the crime of robbery, again, is a retaliatory hit on Luis Gutierrez because he had become a police informant for the San Antonio Police Department. There is no doubt that the circumstances and inferences will support either the conclusion of a robbery or a reprisal hit, although as the majority of the dissenting opinion authored by Justices Duncan, Angelini and Stadelon said, the evidence of robbery is at best stand. Because neither fact can be inferred in this case, the jurors are required to guess as to what happened and what the vital facts are. And the jurors are not entitled to guess. Consequently, there's no evidence of a robbery without legally sufficient evidence of a robbery, the crime cannot be considered similar as required by *Timberwalk*.

JUSTICE NEILL: Was it disputed that Mr. Gutierrez's wallet was taken?

MR. HALL: Your Honor, the only evidence about Mr. Gutierrez's wallet was confirmed and testified that she thought he had taken his wallet to the movie theater. When they left the Regal Cinemas at the Quarry Market, they walked out into the parking lot. They heard a shot and they turned around, Mr. Gutierrez had been shot once already. When he turned around, he was shot three more times, twice in the shoulder, once in the back, and once in the back of the head. He fell to the ground and died. No one ever saw any one bend over Mr. Gutierrez and take any property from him. No one saw anyone come near Mr. Gutierrez at the parking lot in front of the Regal Cinemas --

JUSTICE O'NEILL: Are you saying there was not even a fact issue that there was a robbery?

MR. HALL: Your Honor, I don't believe there is because I think the evidence is too meager. I think you have to guess that there might have been a robbery.

JUSTICE BRISTER: But whether it was a robbery or a targeted murder. The plaintiff's theory of the case was that it could have more visible security. I assume even people doing targeted murders don't want to get caught. Would you assume that?

MR. HALL: Yes.

JUSTICE BRISTER: These guys apparently didn't, because they took off and never came back. And so if you could have more visible security, what difference does it make whether it was a targeted murder or robbery?

MR. HALL: Well, first of all, the evidence I supposed must be conflicted about that because the evidence that I recall is that, that at 12:20 in the morning at the time of this murder, the parking lot at the Quarry was almost like daylight because it was so bright. As a matter of fact, the policeman who was an off-duty San Antonio Police Department officer, who passed by an unmarked car in front of the Quarry, saw the assailant who was dressed either in a black ski hood or in a black ski mask and we got about 100 to 200 feet past the theater that is when the assailant attacked Mr. Gutierrez.

JUSTICE BRISTER: Was he -- was -- let me ask you about the

security guard. Was he an independent contract or I assume --

MR. HALL: Yes.

JUSTICE BRISTER: -- he's a police officer?

MR. HALL: Yes.

JUSTICE BRISTER: Why was he in an unmarked vehicle? Was that because Quarry Market said so or was that his own decision?

MR. HALL: That was the decision of San Antonio Police Department Officers who were serving as off-duty security for Trammell Crow. That was their decision and that was the evidence on the record. The Trammell Crow provided for the security officers whatever they wanted. The security officers felt like inconspicuous security was much more effective than conspicuous security.

JUSTICE BRISTER: But that was the security officer's decision, not Quarry Market's?

MR. HALL: That was the security officer's decision. Yes, your Honor.

The majority and of the senate focused on the ten crimes that occurred in the previous 22 months in this case. Even if you assumed that this was in fact a robbery and the dissenting opinion assumes that and we argue that as well in our brief below and before this Court. Even if you assume that this was in fact a robbery, it is so dissimilar in its character and in the way it took place. That there is no way that a reasonable juror could conclude that this was a robbery similar to the other 10 events that occurred at the Quarry. There have never been a shot fired at the Quarry. No one had ever been seriously injured at the Quarry. And certainly, no one had ever been shot four times from the back at the Quarry which I think most reasonable people would conclude is probably not the best method or the most likely scenario for a robbery.

JUSTICE MEDINA: And sometimes things go wrong during a robbery. I mean if the robbery in itself is a violating crime whether someone has a paper bag and says he has a gun and said give me your money, then you will give him your money whether she took all the violence. It is all wrong.

MR. HALL: I agree, your Honor. And I think if there was any --

JUSTICE MEDINA: But my --

MR. HALL: Excuse me --

JUSTICE MEDINA: I understand *Timberwalk* on why they settle these things which is not exactly the same, therefore didn't apply. If there is evidence in this case, and perhaps, the wallet was stolen maybe some jewelry was broken, maybe there is a hit. I don't know what it was but there is some evidence. Isn't that enough for the jury to consider?

MR. HALL: No, your Honor because it has been more than just meager circumstantial evidence. There is no direct evidence that a wallet was stolen. There is just speculation that a wallet was stolen. Karol Ferman testified she thought he had his wallet. There is also a testimony that Mr. Gutierrez had several dollars in his front pocket. So it is just as equally likely that Mr. Gutierrez carried his money and his personal belongings in his front pocket and then he carried a wallet that evening.

CHIEF JUSTICE JEFFERSON: Where there others in the vicinity, other patrons in the parking lot?

MR. HALL: Yes, your Honor, there were.

CHIEF JUSTICE JEFFERSON: It seems like the more audacious a crime like this with other people around but less likely security would have made a difference anyway.

MR. HALL: Your Honor, that is exactly right and that is our

argument and I think part of the flaw in the plaintiff's expert's testimony.

First of all, he testifies that this was in fact a robbery. I don't think an expert can testify that this was a robbery. That is simply a fact question for the jury to determine. He might testify as to proximate cause whether some sort of level of security or another would have prevented this crime, but I certainly don't think he was capable of testifying about whether this was a robbery or a targeted hit, but yet, he nevertheless, didn't testify to that.

And I think that is the Hobson's choice for the security guards at Trammel Crow were faced with. I can assure you, if they had been in a car with a police department sticker on the side and a flashing yellow light on the roof of the car, it would have given the assailant in this case, just as much warning that the police had passed by the front of the theater. Actually, we have given a better warning and more warning that the police were out of the way and he could commit his crime. But as the police officer testified, in this case, his arm was hanging outside the window, he was in his San Antonio Police Department Uniform and his security patch was showing. And he said he made eye contact with these assailants.

So, whether the officer of the San Antonio Police Department had requested conspicuous security and the guard in this -- excuse me -- the plaintiff's expert in this case suggests that a golf cart with a flashing light, whether that was the scenario or whether there was an inconspicuous car with no markings on it, I don't think it would have made any difference. And in either circumstance, the assailant certainly could have carried out the crime and then in either scenario, Trammel Crow would have been sued for not providing inconspicuous security if they in fact that had a flashing light. I can certainly see the plaintiffs making the argument that well, if you would not have that flashing light on top of the car and you have been inconspicuous, perhaps the assailants wouldn't have seen you and then you could have caught the criminals.

This crime was well set up. The assailants were standing outside the theater waiting for the theater to leave. As soon as they left -- as soon as the Gutierrez and Karol Ferman left, and he was shot and murdered, he ran down a breeze way next to the movie theater into a back parking lot where a waiting car was to pick him up and they fled the Quarry Shopping Center. As they fled the Quarry Shopping Center, another security guard made chase after them but several people in the car started shooting back at them so they stopped their chase and the car got away and these assailants were never caught, unfortunately. But it was certainly, there is no *indicia* in this case that this was a planned robbery. And Justice Medina, as you pointed out earlier, sometimes things do go wrong with robbery. Sometimes, someone will come up with a gun in a paper bag or a plastic sack and hold it to you and there might be a struggle and the gun will go off. Well, that would certainly to me indicate a robbery on an assault of some sort but when someone is shot from quite a distance away, four times in the back, that is not a robbery going wrong. I don't know what it was and I can't --

JUSTICE O'NEILL: You have to find that this was a hit job as a matter of law?

MR. HALL: No, your Honor. No your Honor, I don't think you have to. I think with the equal inference rule, if you cannot conclude, if there are equal inferences that this was a robbery or a retaliatory hit, then there is no evidence that it was a robbery because there is

simply no evidence to support a robbery. If there is no evidence to support a robbery, then there is certainly no similarity. And if there is no similarity, then there is no foreseeability and judgment must be reversed for Trammel Crow.

So, I have some sort of similarity of this crime to the other 10 crimes that occurred at the Quarry, there is no way to impose liability on Trammel Crow without simply imposing strict liability on all the premises owners. And again, I think this Court made clear in *Timberwalk* what the general rule in the state should be and is. And that is, that premises owners are generally not liable for the criminal conduct of third parties and that makes good sense. It makes perfect sense because there is absolutely no way to prevent against all criminal conduct. And until you're on notice of a particular type of crime occurring on your property with some sort of regularity, I don't think you can be held to a standard that you should foresee that particular crime on your premises.

JUSTICE HECHT: I saw the evidence that the autopsy revealed that the victim was not shot at close range but I don't know what that means.

MR. HALL: That is correct, your Honor. It is not clear exactly how far he was. He was certainly close enough to get in for good shots.

JUSTICE HECHT: But how close is close with the autopsy report? Might be a few inches or feet or --

MR. HALL: No, your Honor. I believe it was in excess of 20 feet. It was not close. He was not close to the victim.

CHIEF JUSTICE JEFFERSON: Let's assume there is proof that it was an assassination or some kind of a hit job. What does a premise owner do in the future to guard against that?

MR. HALL: Your Honor, I'm not sure what the premises owner can do. At some point, you simply can't make all premises owners or anyone strictly liable for all crimes that can occur on premises. If this was a targeted hit and that was in fact the law in the scare, if that was a legal conclusion in this case, then I don't think you can ever hold any premises unreliable for targeted hits. Unless, you could somehow show that targeted hits occurred on this premises with frequency. But one or two targeted hits on any property could happen in any city, in any locality.

So I don't think that would advance the ball for the plaintiff either. I think what the court may wish to do in that and it is difficult to do because I think every single case, every *Timberwalk* case is going to be very case, in fact specific, that I think the language on similarity probably require some clarification. Obviously, the crimes don't have to be identical but there are certainly and as *Timberwalk* says, they do have to be similar. But what the majority opinion this case did was jump and hang its head on the language in *Timberwalk* and that first sentence that reads string of assaults and robberies in the department complex make the risk of other violent crimes like murder and right foreseeable. Well, that may or may not be true but as Justice Hecht wrote in *Mellon Mortgage*, when the woman was abducted from another location by a police officer and take him to *Mellon Mortgages'* parking garage, where a rape could be foreseeable in the parking garage, the court held that this particular rape was not foreseeable because of the circumstances surrounding the abduction and rape of this woman at the *Mellon Mortgage* parking garage. Are they similarly in this case, even if the court wanted to conclude that this was some sort of robbery gone bad, is so dissimilar that it cannot be held -- that cannot be considered similar for purposes of *Timberwalk*.

JUSTICE WAINWRIGHT: Counsel, assuming it's a robbery, what type of evidence do you think at that location might rise -- may raise the probability that the property owner knew or should have known that has answered the foreseeability question and raise of duty.

MR. HALL: Raise the duty in this particular case your Honor?

JUSTICE WAINWRIGHT: No. Assuming this was a robbery, what prior events you think would have raised a duty?

MR. HALL: Additional robberies.

JUSTICE MEDINA: How many, if there exists?

MR. HALL: your Honor --

JUSTICE MEDINA: The problem here is, while this robbery was different, this one was different. This lady was hit on the head which he wouldn't rape. This lady was strangled. And I mean, where would you know about the distinction --

MR. HALL: No lady was strangled. There were four --

JUSTICE MEDINA: I'm just giving a hypothetical --

MR. HALL: Exactly.

JUSTICE MEDINA: -- where would you got the distinction, because under your scenario, the premises' probability and we will never be responsible.

MR. HALL: No I don't think that's true. I think if there was another robbery, for instance, if someone walked up to a person sitting in a car with a gun, knocked on the window and said, "get out of your car or I'm gonna kill you" and this person was then shot because the person wouldn't get out of the car, I think we have a very different fact pattern and Trammell Crow might have a different situation on its hands because there was a similar incident like that on the premises of Trammell Crow.

JUSTICE WAINWRIGHT: One similar or several similar incidents?

MR. HALL: I think there has to be more than, and in this case, there were 10 in 22 months. It is certainly up to this Court to determine. But I think there have been more than just two or three incidents before you can put a premises owner on notice that from that point forward into the future, they've got to be -- they have to foresee all that type of crime.

JUSTICE O'NEILL: If it were undisputed that this was a robbery, you withdraw your similarity argument, right?

MR. HALL: No I wouldn't, your Honor because I think it is so different. And again, in its character and that's what the dissenting opinion argued and are not argued but pointed out below, was that this wasn't a robbery like any other robbery that occurred at the Quarry Market. Being shot four times from the back and even if a wallet was stolen, I don't think you can conclude that that was similar enough to the other 10 incidences to put Trammell Crow unnoticed of this sort of crime.

CHIEF JUSTICE JEFFERSON: Thank you Mr. Hall. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Stephens to represent arguments for the respondent.

ORAL ARGUMENT OF JOE B. STEPHENS ON BEHALF OF THE RESPONDENT

MR. STEPHENS: Good morning, your Honor. At the outset, let me say that if somebody were to roll up a set of facts that would meet the

*Timberwalk* requirements isn't going to be the case. The Quarry Market Mall was a very very dangerous place on February 18, 2002. They had 227 crimes. They had ten robberies out of which eight were first-degree felonies. There were eight people that would have been sentenced to life in the penitentiary for the crimes that they committed. There were a total of 24 personal crimes that had occurred. There was a major crime as the FBI would classify these 227 crimes, all major crimes every three days, most of the crimes occurring at night, 75 percent of the crimes occurring out in the parking lot.

JUSTICE BRISTER: But the difference is, the question in most of the earlier cases was, there is no security, evidence of danger risks and the argument was, they should have security. These folks did have security.

MR. STEPHENS: I disagree with --

JUSTICE BRISTER: In the whole point of *Timberwalk* that if foreseeable, that crimes are going to occur, you need to something about it, and so they did some about hiring security guards. They weren't negative at hiring security guards.

MR. STEPHENS: I partially disagree with you Judge Brister and that's the very point. During this two-year period that they had the 227 crimes, they did in fact have security. They have the same type of security. And what is so ironic about this particular case is that Nancy Alarcon who was assaulted in April of 2000 was represented by my law firm. And we sent a detective over two weeks for this murder to ask, where was the visible security when Nancy Alarcon was assaulted coming out of the Bed, Bath & Beyond and there is all of these crimes? And we get into an argument with the security guard out there, and he says we don't need visible security out here and he goes back and there is some discussion with management. And lo and behold, Luis Gutierrez is murdered and robbed two weeks later.

JUSTICE BRISTER: But I mean that this -- did Quarry Market tell according to the opposing counsel -- Quarry Market never told the off-duty police officer, they could or couldn't use unmarked cars. That was the security guard's choice, right?

MR. STEPHENS: Your Honors, my memory of the record is that there was a discussion between the security guard and Shirley Sheer who was the manager in charge at that time. And I believe that there is an inference in the record that there was a discussion about money about whether we are going to pay for the security and they chose to put bicycles out there because they felt bicycles was visible enough. And it would also ironically --

JUSTICE BRISTER: I mean that's all interesting but we are not talking about bicycles. Question, in fifth club, we said, the police officer, off-duty police officer independent contract does something that is wrong that causes a death or a serious injury. The question is, did the landowner control that choice? Did they have actual or contractual right to control, so did they or was it Quarry Market that said use unmarked police cars or was this something that the police officers decide?

MR. STEPHENS: It is our position, your Honor that the Quarry Market undisputedly said in this record that they had the right to control security that they were responsible for security that that is undisputed in this record. That's what the evidence is.

JUSTICE BRISTER: Now that's a great answer. Now my question is the unmarked vehicles. Yes, they could have fired them all. So in that sense, they have the right to control. But who had the right to choose contractual, that means you got some contract evidence that says were

going to say what you ought to round in or actual which is that the -- some discussion or some direction by the landowner that told them use unmarked cars, which in this case wasn't regarding unmarked cars. Was it contractual or actual control?

MR. STEPHENS: Your Honor, again, I know the point that you are driving at and certainly very bright head, would like to -- some input there. Certainly, he did. He was the guy that was the off-duty police officer that was basically in charge of the security.

JUSTICE BRISTER: He was an independent contractor?

MR. STEPHENS: And he was an independent contractor in that sense but still your Honor, when it comes to the right to control, it is our position that management knew and did have the right to control the choices that were made by their independent contractors.

JUSTICE BRISTER: But you don't have. I wondered, you won't tell me whether that was contractual or actual control?

MR. STEPHENS: Again, your Honor, I think that the record would probably support both. I believe that there is a contract in evidence in this case. It gives Trammell Crow the right to control the security, I don't know as I said here, what it says about the details, but I believe that also in actual practice that I believe that there is some evidence in the record to support that Quarry Market had the right to control the detail.

JUSTICE GREEN: Let me ask you, we know what happened out there but we don't really know why, we are not sure. Would you agree though that if this man was assassinated, that you lose? Just prove it.

MR. STEPHENS: I would agree that on the issue of duty that if they conclusively prove, and that's the key -- conclusively prove it. They don't owe a duty.

JUSTICE GREEN: We know that he was assassinated. Then you would lose this case if that would be the case. You will win if there is a robbery, some other reason other than assassination. Correct?

MR. STEPHENS: Yes, your Honor, it may.

JUSTICE GREEN: And so we know that when talked about the wallet is there, not there, whatever. And the existence are not existence of the wallet is, would you think, a speculation?

MR. STEPHENS: No sir, I disagree.

JUSTICE 3: Did anybody actually see the wallet?

MR. STEPHENS: Yes, your Honor and just to clarify the record in that respect, there wasn't a belief or a thought by Karol Ferman. It was the testimony. It is on page 43 of her deposition of her trial transcript. I'm sorry. Question: You did not see a wallet on Luis that night? I did. Question: And you stated that today earlier, you believed that Luis pulled out a wallet and pay for the ticket. "No he had the wallet." So there is no question on this record, the jury had facts which they could infer in our favor. He had the wallet.

JUSTICE GREEN: Okay so there is testimony that he had a wallet before the shooting and afterwards there wasn't a wallet on his body?

MR. STEPHENS: Yes, your --

JUSTICE GREEN: Is there any other evidence of robbery in this particular case?

MR. STEPHENS: Yes there is, your Honor. Not only is the wallet missing, the chain of custody has never been broken and we looked at the record that the wallet had his driver's license in it. It had his ID cards in it.

JUSTICE GREEN: No, that's not my question. What is the -- other than the wallet, what is the evidence of robbery?

MR. STEPHENS: Well, the bracelet that he had on his right hand was

broken and found and recovered at the scene. It was not missing at the scene. As said in their transcript, it was actually recovered at the scene and checked in to the police property room suggesting a struggle. There was -- instead of the shots all fired in the back. There is one shot that is actually fired into the shoulder laterally instead of in the back. There is --

JUSTICE GREEN: And that -- and that demonstrates robbery?

MR. STEPHENS: Yeah. It is consistent with the inference. We can't look at one fact alone. But if we look at the totality of those facts: Missing wallet, struggle at the scene, the shots are not close range, there is no indication, he is actually execution style as they suggest, that's not what's in there if you look at all of that. That's very consistent. In fact, it's a mirror image that U.S. marine that was attacked walking out of the movie theater not too long before --

JUSTICE GREEN: Well we're getting astray from my question. Anything other than that support robbery?

MR. STEPHENS: There is a testimony of a criminologist who spent 40 years, that says yes. As a matter of fact, it is a robbery, because the wallet is missing.

JUSTICE GREEN: Okay. As -- you told me on the basis of the absence of the wallet. But the other thing I am wondering about is, as raised earlier by the chief justice, what does the property owner do to protect itself from the assassination scenario like this and the liability that might accrue. Would the land, would a property owner be required in a situation like this to actually catch the culprit and bring him in and make them testify and say, yes, I was committing an assassination and won the robbery, is that what they have to do?

MR. STEPHENS: No sir, your Honor. We do not have to indicate strict liability in Texas for property owners for assassins, not in the slightest. But again, that is the beauty of our Texas jury, since they are uniquely qualified to listen to all of these issues that we are talking about today.

CHIEF JUSTICE JEFFERSON: But we have in Texas, you know when this occurred, the concealed weapons log past, isn't that right? So and there other people into the vicinity in the parking lot, correct? So why would they assume that they could get away with this in a crowd anymore, you know, with or without visible security there. I mean, it seems to me like this is such an audacious criminal act that, I mean, I just don't see. And maybe there is a fact issue here, but I don't see how, you know, flashing light or golf cart would have deterred this activity. Whether it was a robbery or it was an assassination.

MR. STEPHENS: At the point we have taken your Honor, and the facts are, this was a 12 o'clock movie that they have come out of -- there wasn't a huge crowd. There were not all that many people around. And it is again similar to the U.S. marine attack that they came out without any reason. They come out and start beating on this guy and that's the very problem with -- that's a reason we say liabilities here. We know that when you had such a large number of property criminals, it is not just the number of the criminals. What happens there is that people as they start turning wicked, we know that instead of just property, these same people become hardened criminals and there are attracting dangerous criminals out here to this scene. And so we know that criminals that are dangerous people are going to commit these types of acts.

JUSTICE MEDINA: How will you say -- how are they attracting people to the scene? By the lack of security or --

MR. STEPHENS: That's a great point, your Honor. The Quarry Market

Mall, I am sure, we all know, is one of the best malls there in San Antonio, and it's -- at least on the outside and it has got lots of money going in. Its got Bed, Bath & Beyond. Its got P.F. Chang's, it has got a theater. And if you are a criminal and you are thinking like a criminal and you are going to make a hit or make a robbery, that's the place to go.

JUSTICE MEDINA. Does it matter that only a wallet was stolen? You have to have a robbery steal a wallet in a car, to make it a real robbery or just a wallet, it doesn't matter?

MR. STEPHENS: It doesn't matter, your Honor. And I think that every opinion that has been written by this Court recognizes that it is the violence that people are concerned about. The law is that it only has to be the general danger that the property owner has to foresee. It just so happens here that the ten crimes that we are citing as similar happened to be robberies. We can look at Justice Hecht's opinion like in the *Mellon* case in that garage, I don't think there had been any personal in the garage at all. This Court has never required what they are now advocating, if you listen really to the argument, then you are entitled to the one-free murder rule as a property owner. That is not the degree of similarity that this Court or any court has required in the entire United States. That's a ridiculous requirement. Respectively, to impose upon a victim to meet before they had a right to justice.

JUSTICE WAINWRIGHT: Well Counsel, that is the question. What's the right thing to do here? That these cases under the *Timberwalk* raised difficult issues of the states' obligations to police properties versus the private owner's liability to persons who may be injured on that property in where you draw the line. In this communal area of the law, the policy issues that we have to take a look at and decide if there's a duty here. That's what we're talking about. When we are talking about the jury being uniquely qualified but the jury didn't make the determination of duty. That's a separate issue. That's a legal issue here. And you think these ten prior robberies were sufficiently similar to get to satisfy the foreseeability requirement in *Timberwalk*. None of them, as I understand, involves shootings.

MR. STEPHENS: Yes, your Honor, that's very fair concern and my answer to that is this case meets the classic *Timberwalk* factors and that is an outstanding opinion. And this case meets those requirements. We have got the similarity. We got more similarity in this case than in any case in the history of Texas jurisprudence. We've got more crime zone property than any case in the history of Texas jurisprudence.

JUSTICE WAINWRIGHT: Okay. I heard you when you say that when you started. What are the similar crimes here?

MR. STEPHENS: The other --

JUSTICE WAINWRIGHT: The ten robberies?

MR. STEPHENS: The ten robberies are similar and it's my belief that if we look at the other cases decided by this Court, the other 14 personal crimes on top of the robberies are similar enough for this property owner with the remaining factors of *Timberwalk* has within there to have the duty. Out there are 14 more personal crimes on property. And so, we got that and then considering the similarity of the really identical sufficiently identical robberies, all of those occurring in the parking lot, occurring at night, occurring unprovoked attacks, occurring with deadly weapons, we are talking UZIs --

JUSTICE BRISTER: Back to my control questions, the reason you hire an independent contractor is because they know more about security than you do, if that is the presumption in the law. And so no question if

you can negligently hire an independent contractor if you hire somebody that you know is not going to do a good job and people are going to get hurt. So you hired an independent contractor and make people start getting robbed and you call them in and you say, you know, we're concerned, people getting robbed. And they say, but no, this is the way we need to do it, or you negligently if you don't rely. We could continue to rely. How many robberies have to happen? Surely not one or two. Surely, you are entitled to rely on somebody's expertise after you hire them as well as before as to whether you need to change. Your position is after ten though they should have fired them because they worked.

MR. STEPHENS: Yes, sir your Honor and we also need to look at the degree of expertise to this property owner. I mean we are talking about Trammell Crow. We are not talking about Joe's Bar down the street. And Trammell Crow had a --

JUSTICE BRISTER: That independent contractor law though plus the [inaudible] next door as well as Trammell Crow. And the question is whether they were negligent. I wouldn't hear any prudent personal standard, or an ordinarily prudent landowner standard. And so, would you think they were negligent for not -- problem was fire -- I mean, everybody uses off-duty police officers for security. For good reasons, cause they can pack, eat and all kinds of things, training. And if we fire them who are you going to hire?

MR. STEPHENS: And I hear your point Judge Brister but in connection with this case, I don't think it would take anybody but a reasonable person to realize once you got this level of crime. There is a number of similar crimes. These kinds of dangerous crimes. If you've got a contractor that is not clean enough to situation, we got a danger situation. You ought to realize as a reasonable property owner, they're not doing the job right.

JUSTICE GREEN: Those San Antonio police officers aren't good enough. You gotta bring in back runner to protect Quarry Market under these conditions?

MR. STEPHENS: The police officers had to do a good job but they don't have to be perfect if they have to do reasonable jobs in connection with the work that they are hired to do. And if you got this level of crime --

JUSTICE GREEN: You -- you argued that perhaps they did it the wrong way and not being identifiable, unmarked cars and so forth. And Mr. Hall suggested that if they had been in the market vehicle with orange flashing lights and so forth driving around, then if the same thing had occurred, the assailants in this particular case waited till the officers run around the corner and then committed this robbery or whatever kind of assault it was. Aren't you be in here arguing that they did it in the wrong way. It should've been unmarked vehicles so that they couldn't be seen to stop this flow of activity. How do you respond to that?

MR. STEPHENS: Yes, I would respond by saying that their expert Marvin Moore that this Court has heard Marvin Moore has made more than mine. It made it on the witness stand that if they had visible security there at the movie theater that night, the only place open at the mall, this could not have occurred even with a reprisal type killing. And that is their expert paid 40 or \$50,000 in this case.

JUSTICE MEDINA: What are we going to do with him when in the next case, all the security provided? You have got someone in the Wal-Mart, a little golf cart running around in this blue light. You got an unmarked car. You've got a guy on horseback and as much as we try, as

much as the premises on earth try, we still can't protect as a general citizen from this bloodsucking vermin that are going to commit crime no matter what happens. Where does the standard shift then? They have done everything, and yet a heinous crime is still committed. Is there going to be more security required?

MR. STEPHENS: We are not advocating strict liability. We are asking for reasonable efforts and if in that scenario, if they had the flashing lights and they had taken reasonable measures, that's all they need to do. But here, they had taken none. They were under the radar. And they could not be seen out there. And we take issue with his accusation that the assailant saw this particular officer that was hotly disputed, nobody knows where that assailant came from.

JUSTICE WAINWRIGHT: It sounds like you had been conceded that if there was visible security on the premises and the unfortunate murder still occurred, then there would be no duty?

MR. STEPHENS: That's correct.

JUSTICE 3: There's no liability --

MR. STEPHENS: No liability, your Honor. If it was readily visible, we are not talking some bicycle you can barely see but as Mr. George Darcum said, they stick out, like a sore thumb, like we see at the Wal-Mart and so forth, that would be sufficient to the property owner, sure.

JUSTICE WILLETT: Going back to your exchange with Justice Green earlier, I am not trying to get you concede anything at all, but they seem to ask you that if you agreed, this was an assassination and not a robbery gone bad that you would lose. You seem to agree with that. See if we can clarify that or expand on that but only when if it is a robbery?

MR. STEPHENS: Yes, and thank you your Honor as you guys wrote in *Stefan* case, there was an issue in the courts of intermediate appeals, whether or not who had the burden on superseding collars and Justice O'Neill clarify that and said, if they have the burden to conclusively prove as a matter of law, it was a superseding cause if you are a target hit. And Mr. Hall to his credit, he readily admits we do not have a case where we can show it was a targeted as a matter of law. And he also, to his credit, admits that we got a jury question on robberies, I thought I heard him say it's a fact question. And that's what the conflicting inference rule says is that, like in *Lozano*. If you got a question of motive, like in *Lozano* who tore down the posters. We knew he tore down the posters, but why did they tear him down? They tear him down because they were embarrassed or because they had a reason to hide the children. The court said that is for the jury to decide on the motive. And we clearly have, in this case [inaudible].

CHIEF JUSTICE JEFFERSON: Any further questions. Thank you.

MR. STEPHEN: Thank you.

JUSTICE JOHNSON: Mr. Hall, he says that you are an expert and admitted if you had been informed at the site that this would not have happened. What is your position on that?

REBUTTAL ARGUMENT OF W. WENDELL HALL ON BEHALF OF THE PETITIONER

MR. HALL: Your Honor, Shirley Sheer testified who worked for Trammel Crow that she asked this after the officers what do they want and we provided them whatever they wanted to use to protect Trammell

Crow's friend here to protect the Quarry Market. The police officer said they wanted bicycles and be on foot primarily in the daytime because the traffic at the Quarry is so heavy that if you are in a car, and you see some crime occur, you can't get to it because you're literally locked in by all the cars. And then, at night time, they wanted to be in cars, because there was much less traffic and they can move around freely. So the --

JUSTICE JOHNSON: Well, if I was going to insist --

MR. HALL: I'm sorry.

JUSTICE JOHNSON: Because even if you have police officers out there, there is going to, for strange reasons that there is going to be some crime.

MR. HALL: Absolutely.

JUSTICE JOHNSON: My question is this, as I understand, holding back your position, your expert testified that cause in fact in this case, cause in fact, your expert testified, even if it could have a man there in uniform in place, this would not have occurred. Do you agree with that?

MR. HALL: No, they did not testify to that. There was a security officer employed by the theater who was there. I think he was inside the theater at the time, separately employed by the Regal Cinemas.

JUSTICE JOHNSON: And how do we know then if they have uniform security officers out there as this would not have happened anyway. I mean, it seems to me like that's causation question, has it been all the time, all the time.

MR. HALL: Absolutely your Honor, it is a causation question and fortunately I don't think this Court has to reach causation because I think this case falls on foreseeability. Unfortunately, there is a lot of crime nowadays. When you call about your car being broken in, you can barely get the police to come and take a report because the amount of crime in every city, in every part of this country is just skyrocketing. At the Quarry, he described it as an extremely dangerous place. The statistics at trial were that the likelihood of the crime at the Quarry were 1.7 million to one, whereas in the city of San Antonio, it is 50,000 to one. So the likelihood of being a victim of crime at the Quarry, I'd much rather be at the Quarry than in the city of San Antonio.

JUSTICE MEDINA: You've got to break the statistics down to the area you are talking about. You are talking about the general area of San Antonio as opposed to a little isolated area. What about the 227 cases involving eight felonies and 24 personal crimes?

MR. HALL: Your Honor, first of all, those are exaggerated by my pausing counsel. There were 227 crimes. Things like cars were broken into when no one was present, as occurs that every single shopping mall in this country, whether it is a Lock and Terry Barten Great Mall or any other highland park mall or whatever, that occurs at shopping centers routinely.

JUSTICE O'NEILL: One thing that I'm confused about is this case about duty or is it about breach?

MR. HALL: I believe it's about duty, your Honor. I don't think breach --

JUSTICE O'NEILL: But this follows up on Judge Brister's question. It seems that if you got a high number of crimes, I mean, you wouldn't contest that Trammell Crow had a duty to provide security at the mall?

MR. HALL: Correct.

JUSTICE O'NEILL: So there is a duty there to provide security. It seems to me then the question goes to, "Was the duty to provide

reasonable security breach?

MR. HALL: No, I think the duty issue your Honor is, was this crime foreseeable? That's the first duty issue is to put Trammell Crow foresee this particular crime. If we could not foresee this particular crime under the *Timberwalk* analysis then there is no foresee ability and there is no duty.

Additional comments that I want to address was that the ten crimes were similar to the crime in this case. In fact, these crimes were not similar at all. As we discussed at [inaudible] this morning, no one else was ever shot, no one was ever seriously injured and certainly no one else was shot four times from the back. So even if we give them the fact, which I don't think you can do under the equal inference rule that this was a robbery, it was so different in nature and character that it was not similar under *Timberwalk* therefore it was not foreseeable and therefore Trammell Crow had no duty in this particular case.

JUSTICE WILLETT: And you admit Mr. Hall that it was a jury question, whether or not this was a robbery or something else but there have been evidence just to make to erase the fact that she want that.

MR. HALL: That's correct, your Honor and no jury question was submitted to the jury asking whether this was a robbery. It was a broad negligence question. There is no specific robbery.

CHIEF JUSTICE JEFFERSON: Any further questions?

MR. HALL: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. This case is submitted and that includes the argument for this morning the marshal will adjourn the Court.

SPEAKER: Rise. Oyez, oyez, oyez. The Honorable Supreme Court of Texas now stands adjourned.

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