

VOLUME ONE OF TWO

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Horry County

J. Cordell Maddox, Jr., Circuit Court Judge

RECEIVED

JAN 28 2015

S.C. Supreme Court

MICHAEL ADAM BAILEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000651

APPENDIX

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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) COURT OF GENERAL SESSIONS

State of SC,)
PLAINTIFF)
vs.) TRANSCRIPT OF RECORD
Michael Adam Bailey and)
Michael Carr,)
DEFENDANTS)

July 23-26, 2007
Conway, South Carolina

B E F O R E:

THE HONORABLE JAMES E LOCKEMY, JUDGE; and a
jury.

A P P E A R A N C E S:

BERT VON HERRMANN, ASSISTANT SOLICITOR
Attorney for the Plaintiff

WILLIAM DIGGS, ESQUIRE
JAMES GALMORE, PUBLIC DEFENDER
Attorneys for the defendants

reported by Elizabeth Harris, CVR
transcribed by Kathleen Richardson, RPR, CRR
Official Court Reporters

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1 THE COURT: Okay. Mr. Solicitor Von Herrmann,
2 if you would please call your case, sir.

3 MR. VON HERRMANN: Thank you, Your Honor. May
4 it please the Court. Your Honor, indictment 2005-GS-
5 26-2558, State versus Mike Core -- Michael Carr
6 indicted for murder.

7 Your Honor, also we are here on 2005-GS-26-2560,
8 State of South Carolina versus Michael Bailey
9 indicted for murder. Your Honor, both of these
10 indictments have been true billed by the Horry County
11 Grand Jury.

12 THE COURT: All right. If you would bring up
13 copies -- get copies of the indictments? Is that the
14 original? All right. Representing Mr. Michael
15 Bailey is...

16 MR. DIGGS: Your Honor, I'm Bill Diggs from
17 Myrtle Beach. I'm here this morning on behalf of
18 actually called Michael Adam Bailey who will be
19 referred to as Adam during the course of this trial.

20 THE COURT: All right.

21 MR. DIGGS: And seated behind him is Johana
22 Beaufort, Your Honor. She is a Law Clerk in my
23 office. She actually is from Albania. She practices
24 law in Albania. She's here as a US citizen.

25 She is a law Clerk, a paralegal in my office.

1 That's who we have at defense counsel table.

2 THE COURT: All right. Mr. Diggs, I will permit
3 you to introduce more for me later. And representing
4 then Mr. Michael Carr is Mr. Galmore?

5 MR. GALMORE: My name is James Galmore. I'm
6 from the Horry County Public Defender's office. And
7 it's my -- my client, Michael Carr.

8 THE COURT: All right. Now ladies and
9 gentlemen, I have in my hand two pieces of paper
10 called indictments.

11 Now, the fact that someone is indicted for
12 crimes, meaning charged with crimes, brought before a
13 Court for a jury to decide the issue, the fact that
14 it occurred is not evidence these two individuals
15 have committed any crimes whatsoever.

16 What it means is that this matter will be
17 brought before a jury for a jury to determine whether
18 guilt is proven beyond a reasonable doubt. A person
19 is presumed innocent unless their guilt has been
20 proven beyond a reasonable doubt.

21 These indictments charge that Michael Bailey and
22 Michael Carr or Mike Carr did in Horry County on or
23 about the 28th of September, 2004, willfully,
24 feloniously and intentionally kill one Joseph
25 Patterson, junior with malice aforethought either

1 express or implied by means of shooting the victim
2 and the victim did die as a proximate result thereof
3 on or about September the 28th, 2004 in Horry County,
4 South Carolina. As it -- these two defendants are
5 charged with the crime of murder.

6 Does anyone on the jury panel know anything
7 about this particular case? You know anything about
8 this particular case, please stand up. All right.

9 Potential witnesses that may testify in the
10 case -- and the fact that people may be on the Horry
11 County Police Department or some other law
12 enforcement group, the fact you know they're a
13 policeman is no problem. I want to know if you know
14 them more than the fact that you know that you see
15 them as a policeman.

16 Officer Scott Bogart, officer David Caraker,
17 officer Peter Cestare, officer Andy Cooper, officer
18 Todd Cox, officer Jeff Gause, G-a-u-s-e, officer Rod
19 Green. Let me stop there.

20 Anybody on the jury panel related by blood or
21 marriage to these individuals, have any business,
22 personal, social relationship with these individuals
23 whatsoever; if so, please stand up. All right.

24 Also officer Jack Johnson, officer Neal
25 Livingston, officer John Lewis, officer Laurie Rabon

1 of the Horry County Police Department. Anybody on
2 the jury panel related by blood or marriage to these
3 individuals, have any business, personal or social
4 relationship with them; if so, please stand up.

5 Also other witnesses that may be involved and
6 testifying in the case include Antonio Davis, Allison
7 Jackson, Harry Kareem, Ashley Nikki Phillips.
8 Anybody related by blood or marriage to those
9 individuals, have any business, personal or social
10 relationship with them; if so, please stand up.

11 Also with the State law enforcement division,
12 Agent Dan Defreese, D-e-f-r-e-e-s-e. Anybody related
13 by blood or marriage to agent Dan Defreese or have
14 any relationship with him at all; if so, please stand
15 up.

16 With the 911 system, Renea Hardwick. Anybody
17 related by blood or marriage to Renea Hardwick or
18 have any business, personal or social relationship
19 with her; if so, please stand up.

20 Jason Robinson, Duriel Simmons, it's spelled
21 D-u-r-e-i-l, Duriel, Duriel Simmons, Steven Spencer,
22 Antonio Rutledge. Anybody related by blood or
23 marriage to these individuals or have any business,
24 personal or social relations with them; if so, please
25 stand up.

1 Another agent from the South Carolina Law
2 Enforcement Division, Illa, I-l-l-a Simmons,
3 S-i-m-m-o-n-s. Anybody have any relationship with
4 Illa Simmons at all?

5 There is a list here that says Dr. Proctor is a
6 doctor, a -- a pathologist Mr. Von Herrmann?

7 MR. VON HERRMANN: Yes, sir, Your Honor.

8 THE COURT: Is she or her not here? Do you know
9 their first name?

10 MR. VON HERRMANN: It's Dr. Lee Proctor, Your
11 Honor.

12 THE COURT: Lee. Out of what county?

13 MR. VON HERRMANN: He works for Grand Strand
14 Regional Memorial Hospital.

15 THE COURT: All right. Dr. Lee Proctor works at
16 Grand Strand Memorial Hospital. Anybody have any
17 relationship with Dr. Lee Proctor in any form or
18 fashion; if so, please stand up. Okay. Your name
19 again, ma'am?

20 JUROR: Laura Stewart.

21 THE COURT: How do you know Dr. Lee Proctor?

22 JUROR: He is my neighbor and friend.

23 THE COURT: All right. Have you ever discussed
24 anything at all about this case with him or know
25 anything about it?

1 JUROR: No, sir.

2 THE COURT: If he were to testify -- well, I
3 tell you what, Mrs. Simmons -- is it Simmons?

4 JUROR: Stewart.

5 THE COURT: Stewart. Have a seat, Mrs. Stewart,
6 for right now. Anyone else? Okay. If you have
7 someone related to you who is involved in law
8 enforcement, whether it be here in Horry County or in
9 some other county or state, please stand up. If you
10 would, if you have someone related to you who is
11 involved in law enforcement...

12 Now what I'm going to do is I'm going to ask you
13 to give us your name and then tell us who it is, your
14 cousin, nephew or whatever. If it's a local person,
15 for example who works in Horry County, tell us that
16 person's name and what relation they have to you and
17 what their duty is, okay? That's all we need.

18 Now, you need to do it a little slowly because
19 the attorneys are going to be making notes. So
20 don't -- speed is not required here, okay?

21 So I need your name and you know your juror
22 number. If you don't, look at your card. Your name
23 and juror number and then the person who is related
24 to you and what their duty is, okay? In the front.
25 Ma'am, your name.

1 *JUROR:* Number 16, Tammy Belanger.

2 *THE COURT:* Tammy Belanger, juror number 16.

3 Yes, ma'am.

4 *JUROR:* My brother -- my brother is a police
5 officer in Charleston.

6 *THE COURT:* Thank you, Mrs. Belanger. Yes,
7 ma'am. Out of the front row again. Your name.

8 *JUROR:* Nancy Proctor.

9 *THE COURT:* Nancy Proctor.

10 *JUROR:* 217. My husband is employed Proctor --
11 self-employed.

12 *THE COURT:* You're in Horry County?

13 *JUROR:* Yes.

14 *THE COURT:* Thank you, ma'am. And your name in
15 the white sweater?

16 *JUROR:* My name is Teresa Benton. I'm number
17 20. By marriage I'm related to -- in Horry County.

18 *THE COURT:* All right. Thank you, ma'am. Your
19 name, ma'am?

20 *JUROR:* Naqua Edgerton.

21 *THE COURT:* Your first name is.

22 *JUROR:* Naqua.

23 *THE COURT:* Naqua. Eighty-two.

24 *JUROR:* Yes. My father, grandfather is a
25 probation officer, and my aunt and uncle both work at

1 general -- officer in probation.

2 *THE COURT:* Thank you, ma'am. Lady in black.
3 What is your name, ma'am?

4 *JUROR:* My name is Carrie Hughes, number 133,
5 and Jerome Randall is a detective.

6 *THE COURT:* In the Horry County Police
7 Department?

8 *JUROR:* He's my nephew.

9 *THE COURT:* Nephew. Thank you, ma'am. Yes,
10 ma'am, your name.

11 *JUROR:* Diana Wilson, juror 291, and my father
12 he is a ex-officer.

13 *THE COURT:* Thank you, ma'am. Yes, sir, your
14 name.

15 *JUROR:* My name is Joseph Tutka.

16 *THE COURT:* Do you know your number?

17 *JUROR:* 274.

18 *THE COURT:* 274.

19 *JUROR:* My son is a police officer in Horry
20 County, name is Timothy Tutka, currently serves in--

21 *THE COURT:* Thank you, sir. Yes, Mrs. Stewart.

22 *JUROR:* My son, Jack Stewart, is a -- an active
23 officer with Horry County.

24 *THE COURT:* What is your number, Mrs. Stewart?

25 *JUROR:* 260.

1 THE COURT: Thank you, Mrs. Stewart. Yes, ma'am
2 here with the white coat.

3 JUROR: My nephew is a police officer in New
4 Jersey.

5 THE COURT: 229. What is your name again?

6 JUROR: Beatrice Rodenbaug.

7 THE COURT: Rodenbaug, thank you.

8 JUROR: With the county, my sister works at a
9 law office, that--

10 THE COURT: Yes, ma'am. That counts. Tell us
11 who that is.

12 JUROR: My sister works in law office in--

13 THE COURT: All right. Thank you.

14 MR. DIGGS: Could we get her to tell us her
15 number again, Your Honor?

16 THE COURT: What's your number again, ma'am?

17 JUROR: 229.

18 THE COURT: 229. Thank you. Yes, sir. Your
19 name again, please sir.

20 JUROR: William Blackburn, number 26.

21 THE COURT: Twenty-six.

22 JUROR: My son is a police officer in Baltimore,
23 Maryland.

24 THE COURT: Baltimore. Right on the seashore.
25 Yes, ma'am, your name.

1 *JUROR:* Amanda Thompson, 261.

2 *THE COURT:* Mrs. Thompson, number 261.

3 *JUROR:* And my dad is with Aynor police. Aynor
4 police.

5 *THE COURT:* Aynor? All right. Thank you,
6 ma'am. And your name back there?

7 *JUROR:* Debra Praete, number 215, and I have a
8 cousin Joe Benson that works with Horry County Police
9 Department.

10 *THE COURT:* Jeff Bent. Thank you, ma'am. In
11 the back, ma'am, your name?

12 *JUROR:* 278, Starla Venters. My daughter's
13 fiancée, Conway Police, Michael Todd.

14 *THE COURT:* All right. Thank you, ma'am. Yes,
15 ma'am.

16 *JUROR:* My name is Diane Hardwick, 115. My
17 sister Mary Alice works for Ruth Wiley (sic).

18 *THE COURT:* With the Solicitor's office?

19 *JUROR:* Yes, sir.

20 *THE COURT:* In this county? All right. In this
21 county then?

22 *JUROR:* Yes, sir.

23 *THE COURT:* Okay. Thank you, ma'am. And your
24 name in the purple -- well, both of you purple. This
25 one on the end here.

1 *JUROR:* David Janson, 142. My brother's a US
2 customs agent.

3 *THE COURT:* He's busy, I'm sure. You're name,
4 sir?

5 *JUROR:* Randy Woodson. My brother and
6 sister-in-law are police officers in Ohio.

7 *THE COURT:* All right. Thank you, sir. Yes,
8 ma'am. In the green, you stood up. Yes, ma'am in
9 the green.

10 *JUROR:* Julie Lee, juror number 158. My sister.

11 *THE COURT:* Juror number 158. All right. Yes,
12 ma'am.

13 *JUROR:* My sister and brother-in-law, one, she's
14 a deputy sheriff in Charleston county, he's a highway
15 patrol, retired.

16 *THE COURT:* All right. You were going to stand
17 back up again, ma'am?

18 *JUROR:* I just wanted -- Cooper, his wife works
19 at undercover person in something.

20 *THE COURT:* Where?

21 *JUROR:* In New Jersey.

22 *THE COURT:* In New Jersey. Okay. Now ladies
23 and gentlemen, is anyone a member of organizations
24 that have an emphasis on the study or watch areas
25 over certain crimes and all, groups like Madd, Sadd,

1 citizens against violent crime, other type of
2 organizations that have a focus on observing or
3 studying issues of crime?

4 If you're a member of those organizations, just
5 for information, please stand up. All right. Your
6 name, sir, and number?

7 JUROR: Earl Jones, 145. I'm -- Madd.

8 THE COURT: All right. Thank you, sir.

9 JUROR: Sylvia Kinney, 115. Madd, Sadd and
10 Cadre.

11 THE COURT: All right. Thank you, ma'am.
12 Anyone else? All right. Now ladies and gentlemen, I
13 read to you the allegations here that or the
14 allegations that someone was wrongfully unlawfully
15 killed.

16 Does anyone on the jury panel -- well, let me
17 ask it this way. If you had a situation within your
18 family that something of this nature has occurred
19 whether someone in your family was charged in
20 something of this nature or someone in your family
21 was victim of allegations or something of this
22 nature, if you would please come up here to the front
23 and just tell me a little about it.

24 Now, the charge is murder, but if someone was
25 assaulted severely such that it was a very serious

1 matter or whatever, or someone was charged in your
2 family with something of a serious matter of
3 assaulting seriously, if you would please step up
4 front and tell me about it, please.

5 *BAILIFF:* 179.

6 *THE COURT:* Okay. 179. Your name again is...
7 anthony Mccracken.

8 *THE COURT:* Okay. Mr. Mccracken.

9 *JUROR:* My brother, this is early 80's, was a
10 victim of involuntary manslaughter and he sent to
11 state...

12 *THE COURT:* Okay. Involuntary manslaughter,
13 reckless regard for the safety of others, I mean,
14 I -- would that affect your ability to be fair and
15 impartial, sir?

16 *JUROR:* Honestly, Your Honor, think that I would
17 be materialistic enough to not let that effect me.

18 *THE COURT:* Would you be able to make your
19 decision based on the evidence in this case and the
20 law as I instruct it to you and in making your
21 decision disregard the matters about your brother?
22 Focus on the facts in this case and the law as I
23 instruct it to you?

24 *JUROR:* I think I can do that. Yes, sir.

25 *THE COURT:* All right. Have a seat, sir. If

1 y'all would please, we need a little quiet, please.

2 What happens is when you mumble and all of that,
3 it gets picked up on this recorder up here so when
4 the Court Reporter is trying to transcribe, she's got
5 all this mumbling in the background and everything,
6 so please try to keep quiet if you would, please sir.

7 *BAILIFF:* Yes, sir.

8 *JUROR:* (conferring with judge out of hearing)
9 of Ohio.

10 *THE COURT:* She was charged with a crime?

11 *JUROR:* Well, I didn't--

12 *THE COURT:* And was convicted.

13 *JUROR:* Very well, but it was...

14 *THE COURT:* All right. Now, this case as a
15 juror you would be asked to make a decision based on
16 the facts and evidence of this case and the law as I
17 instruct it to you.

18 *JUROR:* Uh-huh.

19 *THE COURT:* Do you feel you could make your
20 decision in this case based on evidence in this case
21 and the law as I instruct it to you?

22 *JUROR:* I believe so.

23 *THE COURT:* Would the fact of what happened to
24 your relative, would that in any way offend (sic)
25 into your decision making in this case?

1 JUROR: No.

2 THE COURT: Okay. You could basically make your
3 decision based on the evidence in this case?

4 JUROR: Okay.

5 THE COURT: Give me your name again, please
6 ma'am.

7 JUROR: Carol Torbic.

8 THE COURT: And number?

9 JUROR: 267.

10 THE COURT: 267. Why did you point to her?

11 JUROR: I didn't.

12 THE COURT: Where are your...

13 JUROR: It's on my purse.

14 THE COURT: Okay. Thank you. Have a seat.

15 Next person, please.

16 BAILIFF: 271.

17 THE COURT: Okay. Your name, ma'am?

18 JUROR: Watson.

19 THE COURT: Mrs. Watson, 271. Yes, Mrs. Watson.

20 JUROR: My niece's seven year old son was
21 killed.

22 THE COURT: Okay. And was someone arrested and
23 convicted of it?

24 JUROR: Yes.

25 THE COURT: Was that in this county or somewhere

1 else?

2 JUROR: No, it was in Fayetteville, North
3 Carolina.

4 THE COURT: I used to live there when I was in
5 the army. Now, in this case the jury will be asked
6 to make the decision based on the evidence in this
7 case and the law as I instruct it to you. Would you
8 be able to do that, ma'am?

9 And would what happened in your family
10 situation, would that in any way affect your ability
11 to make a decision based on the evidence in this case
12 and the law as I charge it?

13 JUROR: No, sir.

14 THE COURT: Okay. Thank you, ma'am.

15 JUROR: Okay.

16 BAILIFF: Ninety-four.

17 THE COURT: Okay. 94. Your name again, ma'am?

18 JUROR: Toni Gambuzza.

19 THE COURT: Toni Gambuzza.

20 JUROR: Uh-huh.

21 THE COURT: Okay. Mrs. Gambuzza. Yes, ma'am.

22 JUROR: Many many years ago, about 25 years ago
23 my husband was charged with assault, found not guilty
24 and, you know, nothing ever came of it.

25 THE COURT: Would that affect your ability to be

1 fair and impartial in this case?

2 JUROR: Not at all.

3 THE COURT: You'd make your decision in this
4 case based on the law and evidence in this case?

5 JUROR: Yes.

6 THE COURT: All right. Thank you, ma'am.

7 JUROR: Thank you.

8 THE COURT: Next person.

9 BAILIFF: Sixty-six.

10 THE COURT: All right. Mr. James Davis, come on
11 closer please. Yes, sir, Mr. Davis.

12 JUROR: My ex-wife's brother was murdered about
13 20 years ago.

14 THE COURT: Where, what state?

15 JUROR: Huntsville, Alabama.

16 THE COURT: Okay. Would the fact that it -- was
17 someone charged convicted or charged?

18 JUROR: Not certain. It went unsolved for
19 years. I'm not certain what the status is.

20 THE COURT: All right. A juror in this case
21 would be asked to make the decision based on the
22 evidence in this case and the law as I instruct it to
23 you. Do you feel you could do that, sir?

24 JUROR: Yes.

25 THE COURT: Would what happened to your wife's

1 brother you say?

2 JUROR: Yes, sir.

3 THE COURT: Would that any way come into your
4 decision making process at all?

5 JUROR: No.

6 THE COURT: All right. Thank you, sir. Have a
7 seat.

8 JUROR: Thank you.

9 BAILIFF: . 163.

10 THE COURT: What is your name, 163?

11 JUROR: Pauline Lewis.

12 THE COURT: Pauline Lewis.

13 JUROR: Uh-huh.

14 THE COURT: Okay. Mrs. Lewis. Yes, ma'am.

15 JUROR: I have a sister that shot and killed her
16 husband.

17 THE COURT: Okay. Was she charged with a crime?

18 JUROR: Uh-huh.

19 THE COURT: And what was she convicted of, if
20 any?

21 JUROR: She had got 15 years.

22 THE COURT: Okay. Where was that?

23 JUROR: It's in Horry County here.

24 THE COURT: How long ago was that?

25 JUROR: I believe 25, 30 years ago.

1 THE COURT: Okay. Now, would the fact that the
2 sister was charged and convicted of killing her
3 husband, would that in any way affect your ability to
4 be fair and impartial in this case?

5 JUROR: No, sir.

6 THE COURT: Could you make your decision in this
7 case based on the evidence in this case and the law
8 as I instruct it to you?

9 JUROR: Yes, sir.

10 THE COURT: Would what happened with your sister
11 and her husband have anything to do with your
12 decision in this case?

13 JUROR: No, sir.

14 THE COURT: Thank you, ma'am. Have a seat.

15 BAILIFF: 282.

16 THE COURT: 282. Come around, 282. What is
17 your name, ma'am?

18 JUROR: Danielle Ward.

19 THE COURT: Danielle Ward. Yes, Mrs. Ward.

20 JUROR: It's not a person I was related to.
21 It's a friend and co-worker. She was murdered two
22 years ago and I don't know--

23 THE COURT: Where did that occur?

24 JUROR: Here in Horry County.

25 THE COURT: Has anyone been charged with a

1 crime?

2 JUROR: Yes.

3 THE COURT: Has anything happened to the charges
4 that you know of?

5 JUROR: Not that I know of.

6 THE COURT: Okay. Are you involved at all other
7 than the fact you were a friend of hers?

8 JUROR: No.

9 THE COURT: You're not a witness or anything of
10 that nature?

11 JUROR: No.

12 THE COURT: All right. Would the fact that
13 occurred to your friend and someone has been charged
14 with it you think -- do you know the name of the
15 person?

16 JUROR: Yes, Stephen Stanko.

17 THE COURT: That was already tried.

18 JUROR: Oh, yes.

19 THE COURT: Okay. I thought it was Horry
20 County -- I mean Georgetown.

21 JUROR: It was Georgetown and Horry.

22 THE COURT: All right. Now, the fact that it
23 happened to a friend, would that in any way affect
24 your ability to be fair and impartial in this case?

25 JUROR: No.

1 THE COURT: Would you make your decision in this
2 case based on the law and the evidence in this case
3 and the law as I instruct it to you?

4 JUROR: No.

5 THE COURT: You would or would not?

6 JUROR: No, I would not. Would not.

7 THE COURT: Okay. Let me ask the question
8 again, maybe you didn't hear. In this case would you
9 make your decision based on the law and the evidence
10 in this case and the law as I instruct it to you?

11 JUROR: Yes. Yes.

12 THE COURT: Would what happened to your friend
13 have anything, would that be involved in any way in
14 your decision in this case?

15 JUROR: No.

16 THE COURT: Okay. Your name again is...

17 JUROR: Danielle Ward.

18 THE COURT: Mrs. Ward. Hold on. If you would
19 have a seat in the jury box for me.

20 (conferring with Mr. Diggs.)

21 THE COURT: All right. 247. What's your name,
22 sir?

23 JUROR: Riley Snapp.

24 THE COURT: Riley Snapp? Like snap peas?

25 JUROR: Like Snap, Crackle, Pop Pop.

1 THE COURT: S-n-a-p-p? Mr. Snapp, yes, sir.

2 JUROR: My wife's dad was murdered about 1970's.

3 THE COURT: Okay. Was that in this county or--

4 JUROR: No, that was in Virginia.

5 THE COURT: Okay. Would the fact that occurred
6 with your wife's father, would that in any way affect
7 your ability to be fair and impartial in this case?

8 JUROR: No.

9 THE COURT: Could you make your decision in this
10 case based on the law and evidence in this case and
11 would the fact of what happened to him have anything
12 to do with your decision in this case?

13 JUROR: No.

14 THE COURT: Tell me a little bit how that
15 happened that you -- that you know of any way.

16 JUROR: Well, they're up for parole. He was 61
17 years old and was sitting on a couch and boy was
18 about 22 years old kicked him up the chin.

19 THE COURT: They were arguing?

20 JUROR: Yeah.

21 THE COURT: Okay. All right. But you would
22 make your decision based on the evidence in this case
23 and the law as I instructed to you?

24 JUROR: Yes.

25 THE COURT: Thank you, Mr. Snapp. Yes, ma'am.

1 BAILIFF: 291.

2 THE COURT: 291. What is your name again, 291?

3 JUROR: Deana Wilson.

4 THE COURT: Deana Wilson. All right.

5 Mrs. Wilson.

6 JUROR: I have an aunt that was murdered by her
7 husband in Atlanta.

8 THE COURT: All right. In Atlanta. And about
9 how long ago was that?

10 JUROR: Seven years ago.

11 THE COURT: Okay. Would the fact that occurred,
12 would that affect your ability to be fair and
13 impartial in this case?

14 JUROR: No, it wouldn't.

15 THE COURT: Could you make your decision in this
16 case based on the law and evidence of this case?

17 JUROR: Yes.

18 THE COURT: Would what happened to her have
19 anything to do with your decision in this case?

20 JUROR: No.

21 THE COURT: Thank you. Have a seat. Yes,
22 ma'am.

23 BAILIFF: 269.

24 THE COURT: 269. What your name, 269?

25 JUROR: Lee Tucker.

1 THE COURT: Tucker? T-u-c-k-e-r. Okay.

2 Mrs. Tucker. What happened in your situation?

3 JUROR: I had a cousin who was also my god child
4 who was murdered at Jamestown Laundry. His name is
5 Teddy Myers.

6 THE COURT: Is that here in this county?

7 JUROR: Yes.

8 THE COURT: Okay. How long ago was that, ma'am?

9 JUROR: 2000.

10 THE COURT: Was someone charged with the crime?

11 JUROR: They never did find out who did it.

12 THE COURT: Okay. Well, in this case the jurors
13 will be asked to make a decision based on the
14 evidence and law in this case and the law that I
15 would instruct you. Could you make your decision in
16 this case based on the evidence in this case?

17 JUROR: Yes.

18 THE COURT: Would what happened -- you say your
19 cousin?

20 JUROR: Yes.

21 THE COURT: Your god child.

22 JUROR: Yes.

23 THE COURT: Would that in any way affect your
24 ability to be fair and impartial?

25 JUROR: No.

1 THE COURT: You can make your decision without
2 regard to what happened to him?

3 JUROR: Yes.

4 THE COURT: That wouldn't come into play at all?

5 JUROR: No.

6 THE COURT: Okay. Thank you, ma'am.

7 BAILIFF: 213.

8 THE COURT: Mr. Poole, I guess.

9 JUROR: Yes.

10 THE COURT: Mr. Poole, yes, sir.

11 JUROR: Ninety-three. I'm a victim of a
12 assault.

13 THE COURT: Where at, sir?

14 JUROR: In Manhattan.

15 THE COURT: In Manhattan. You and many other
16 people.

17 JUROR: Oh...

18 THE COURT: Manhattan.

19 JUROR: I had a severe operation to my face and
20 stuff like that.

21 THE COURT: Did they catch the person who did
22 it?

23 JUROR: He gets out this year.

24 THE COURT: So he was put in prison.

25 JUROR: Yes, for assault, I know I'm a victim,

1 so...

2 THE COURT: Okay. Where were you, you were
3 there in New York when it happened?

4 JUROR: Yeah.

5 THE COURT: Were you in a building or...

6 JUROR: No, I was recovery--

7 THE COURT: Okay. you were working with him?

8 JUROR: Yeah, yeah. I was there when it
9 happened though.

10 THE COURT: Okay. Thank you, sir. Now, would
11 that in any way affect your ability to be fair and
12 impartial in this case?

13 JUROR: No.

14 THE COURT: You could make your decision in this
15 case based on the evidence in the case and the law as
16 I instruct it to you?

17 JUROR: Yes.

18 THE COURT: All right. Thank you, Mr. Poole.

19 BAILIFF: 268.

20 THE COURT: 268 . What is your name?

21 JUROR: Debra Truluck.

22 THE COURT: Debra Truluck? T-r-u-l-u-c-k.

23 JUROR: Yes.

24 THE COURT: Okay. Mrs. Truluck?

25 JUROR: I just thought I needed to tell you I

1 have known Adam's family for years.

2 THE COURT: I'm going to read that out in a
3 minute.

4 JUROR: I know.

5 THE COURT: Is that the one with the -- okay.

6 JUROR: His mother and father taught my son
7 little league baseball.

8 THE COURT: Okay.

9 JUROR: And I saw her out front in the hall. I
10 didn't talk to her, though. I wondered if that
11 would -- I didn't know.

12 THE COURT: Did you know he was charged with a
13 crime?

14 JUROR: No.

15 THE COURT: Okay.

16 JUROR: I just know him.

17 THE COURT: Adam who, Adam...

18 JUROR: Bailey.

19 THE COURT: Bailey. Okay. So now would the
20 fact that he's charged -- you say you're friends with
21 his father?

22 JUROR: Well, I have known -- but they -- sit at
23 ballgames for years together.

24 THE COURT: Okay.

25 JUROR: And I -- I just see him now like run

1 into the -- because their child.

2 *THE COURT:* Turn this way if you can. She's
3 trying to hear you.

4 *JUROR:* Sorry. I didn't want to sit there and
5 not say anything.

6 *THE COURT:* Okay. Well, tell me this. Would
7 the fact that -- would that make you feel
8 uncomfortable on the jury?

9 *JUROR:* Well, it -- yeah.

10 *THE COURT:* Could it affect your ability to make
11 a decision fair and impartially?

12 *JUROR:* It would be hard. It's somebody I know.

13 *THE COURT:* Well, no one is blaming you, ma'am.
14 Don't worry about that. Just be honest. Nobody can
15 blame you for that.

16 *JUROR:* I -- they -- I would feel bad for his
17 mother.

18 *THE COURT:* All right. So you think that would
19 come into play in your decision?

20 *JUROR:* I would try not to.

21 *THE COURT:* But you couldn't assured me it
22 wouldn't.

23 *JUROR:* I guess I could assure you I will not...

24 *THE COURT:* I'm not sure what you're saying.

25 *JUROR:* I just -- I don't know. I hate to say

1 no, and I--

2 *THE COURT:* No, no, no. See, there is no right
3 or wrong answer. All you need to do is just say.

4 *JUROR:* It would be hard for me to convict
5 somebody's child that I had known for years.

6 *THE COURT:* All right. Just have a seat over in
7 the jury box for a minute. Ma'am, don't worry about
8 a thing. I thought about this, I thought --
9 discharge those two. Do y'all have any objections?
10 All right.

11 Now, the Clerk's Office have this computer thing
12 and what the computer thing does, it cannot give us
13 one name at a time.

14 We can get a group and then it will just get
15 them groups and I can do one of two things. We can
16 just say give us a group of 50 or I can say give us
17 everybody you have out there.

18 What we will do is give her a sheet and it will
19 have one person, first, second, that's how she will
20 call them. Of course, y'all won't know so and so, so
21 y'all want to do the whole group or do y'all want to
22 do like 50, 35 or 40 since you got 10 strikes -- wait
23 two defendants, 20 strikes, about just do everybody.

24 Yeah, because we're going to have about 70
25 something jurors left. I think... I know. But after

1 I drew the jury, if I grant your motion, let the rest
2 of the jurors stays -- stay here. Maybe I should
3 hear that motion before we do it. You got your law?
4 You told me you were going to get your stuff.

5 (Whereupon a bench conference was held.)

6 *THE COURT:* See, if I grant this motion, might
7 have to do the whole thing again. All right.
8 Let's -- I'm going to pick the jury. I'm going to
9 pick the jury then I will do those motions. Okay.

10 What matters do y'all have other than the
11 defendants, introduce the lawyers, anything else?
12 I'm going next the family of the victims. Okay?
13 Okay? Anything else? Okay.

14 (Court resumed the bench.)

15 *THE COURT:* Ladies and gentlemen of the jury,
16 the defendants are charged with murder of Joseph
17 Patterson, junior. Does anyone on the jury panel
18 know Mr. Patterson or know anyone in his family; if
19 so, please stand up. Okay. If you would Mr. Diggs,
20 Mr. Galmore, introduce your clients to the jury.

21 *MR. DIGGS:* Your Honor, as I stated earlier my
22 client is Adam Bailey. Adam, would you stand up. He
23 lives here in Horry County and we're representing
24 him.

25 *THE COURT:* All right. Anybody on the jury

1 panel related by blood or marriage to Mr -- is it
2 Adam Michael or Michael Adam?

3 MR. DIGGS: Michael Adam Bailey.

4 THE COURT: Michael Adam Bailey. Anybody on the
5 jury panel related by blood or marriage to Mr. Bailey
6 or have any relationship to him or any members of his
7 family; if so, please stand up. Okay. You may be
8 seated. Mr. Galmore, introduce your client, please
9 sir.

10 MR. GALMORE: My name is James Galmore. This is
11 my client Michael Carr.

12 THE COURT: Anybody on the jury panel related by
13 blood or marriage to Mr. Michael Carr or anybody in
14 his family; if so, please stand up. Okay. If you
15 would, Mr. Von Herrmann, introduce yourself to the
16 jury, sir.

17 MR. VON HERRMANN: I'm Bert Von Herrmann. I'm
18 one of the Assistant Solicitors here in Horry County.

19 THE COURT: Anybody on the jury panel related by
20 blood or marriage to Mr. Von Herrmann or have any
21 business, personal or social relation with him or any
22 members of the Solicitor's Office for the 15th
23 Judicial Circuit; if so, please stand up.

24 Isn't there one person that said they worked for
25 the Solicitor's Office? Yes, ma'am.

1 JUROR: My sister does.

2 THE COURT: Your sister does. And what's your
3 name again, ma'am?

4 JUROR: Diane Hardwick.

5 THE COURT: Diane...

6 JUROR: Hardwick.

7 THE COURT: Hardwick. Okay. Thank you,
8 Mrs. Hardwick. Okay. Mr. Diggs, if you would, sir,
9 Mr. Diggs, if you want to stand up and anything else?
10 I'm ready to introduce you to the jury.

11 I think you have introduced yourself already.
12 Anyone have any relationship to Mr. Diggs or -- Mr.
13 Diggs the name of your law firm is...

14 MR. DIGGS: It's the Law Office of William Isaac
15 Diggs, Myrtle Beach.

16 THE COURT: Anybody related by blood or marriage
17 to Mr. Diggs, have any business, personal or social
18 relations with him or any members of his law firm; if
19 so, please stand up. Okay. Thank you, Mr. Diggs.
20 All right. Mr. Galmore, introduce yourself to the
21 jury, sir.

22 MR. GALMORE: My name is James Galmore. I'm an
23 Assistant Public Defender with Horry County Public
24 Defender's office.

25 THE COURT: Any members of the jury panel

1 related by blood or marriage to Mr. Galmore or have
2 any business, personal or social relation with him;
3 if so, please stand up. All right. Any other voir
4 dire requests from the State?

5 MR. VON HERRMANN: None from the State, Your
6 Honor.

7 THE COURT: Any other voir dire requests from
8 the defense? Mr. Diggs, Mr. Galmore?

9 MR. DIGGS: Nothing, Your Honor.

10 MR. GALMORE: No, sir.

11 THE COURT: All right. I informed y'all the
12 method of jury selection by the Clerk here in Horry
13 County. Also informed y'all that we had -- I had
14 also transferred a Mrs. Barbara Mangini due to health
15 reasons.

16 Y'all have any objection to the transfer of
17 Mrs. Mangini as well as any other jurors I
18 transferred or excused in this trial or as general
19 jurors or any objections to the selection process by
20 the Clerk, without a blind person or child as I --
21 that name and capsules will be in computer selection
22 by the State. Any objections?

23 MR. VON HERRMANN: None from the State, Your
24 Honor.

25 THE COURT: Mr. Diggs?

1 MR. DIGGS: No, Your Honor.

2 THE COURT: Mr. Galmore?

3 MR. GALMORE: No, Your Honor.

4 THE COURT: All right. Now y'all two jurors, if
5 you would please, if y'all would, I'm excusing y'all
6 on this trial only, this trial only, but if you would
7 go back on that side of the room in the back and have
8 a seat back there for me, please.

9 Madam Clerk, you have the two names of the
10 jurors? Got both names? All right.

11 Ladies and gentlemen, the Clerk has your names
12 in a computer. It will -- and make a list. I'm
13 sorry, I -- you don't know how to repeat -- it will
14 jumble the names up and then come out with a list.

15 So she will then call your names out. She will
16 call you one by one until we get the number of jurors
17 we wish. In this case the State has 10 strikes, each
18 one of the defendants have 10 strikes. Everyone
19 agree that is the law, Mr. Von Herrmann, Mr. Diggs,
20 Mr. Galmore?

21 MR. VON HERRMANN: Yes, Your Honor.

22 MR. DIGGS: Yes, Your Honor.

23 MR. GALMORE: Yes, Your Honor.

24 THE COURT: All right. So what I do is when you
25 stand up where you are, I will ask Mr. Von Herrmann

1 position -- or the Clerk will ask Mr. Von Herrmann
2 the position of the State, then she will ask Mr.
3 Diggs then she will ask Mr. Galmore.

4 So then if you are selected, we'll have you come
5 have a seat in the jury box. If you're excused
6 anywhere along the process, then of course you can
7 have a seat where you are. So just stand in place
8 wherever you are and wait until the Clerk asks you to
9 be seated or to come up to the jury box, one or the
10 other.

11 Okay. I need just one minute to get a list
12 myself ready to go here. Madam Clerk, you got yours?
13 Let her now push the appropriate buttons here.

14 (Whereupon there was a pause.)

15 THE COURT: Mr. Diggs, Mr. Galmore, y'all have
16 any objection since he's there and then you,
17 Mr. Galmore?

18 MR. GALMORE: No, sir.

19 MR. DIGGS: No, Your Honor.

20 THE COURT: Okay. If your name is called,
21 please stand up in place where you are until the
22 Clerk tells you to be seated or have a seat in the
23 jury box, one or the other. Madam Clerk?

24 THE CLERK: Number 47,...

25 THE COURT: Y'all have the wrong list?

1 (Whereupon there was a pause.)

2 THE COURT: Mr. Galmore, I assume y'all agreed
3 to the situation of each one of you all individually
4 or y'all want to do it together and just have one
5 announcement? Either way y'all want to do it.

6 MR. DIGGS: Your Honor, what we -- I think flow
7 better if we just do -- if we announced our decision
8 as to the juror then pass him on to Mr. Galmore.

9 THE COURT: Okay. Do it that way, of course,
10 one of you could be expired selection before the
11 other, then what would happen? I just want everybody
12 to be involved on the defense because the law says
13 20.

14 And it doesn't say 10 and 10. It says 20 as I
15 recall the law. So I want to make sure all of y'all
16 are involved.

17 MR. DIGGS: All right. We'll do it as one.

18 MR. GALMORE: Okay. That will be good.

19 THE COURT: Y'all want to do it as one then,
20 y'all just collaborate together in that regard?

21 MR. GALMORE: Yes, we will do it that way then.

22 THE COURT: All right. Who is going to be
23 announcing it then? Or y'all then want to take turns
24 and announce it 10 and 10? Y'all let me know,
25 whichever one stands up.

1 Jurors in this state and all over the nation
2 have been customarily having your names put in a
3 cylinder or a box and then pull the names out one at
4 a time.

5 In the last two years and even longer than that
6 in Columbia, but in the last two years many counties
7 have gone to putting names in the computer and having
8 the computer jumble the names up and print them out
9 as a group with a list, then you just go to the first
10 name that's on that list and have the selection made
11 that way instead of pulling it out of the box because
12 that would take a longer time.

13 Therefore we are doing it this way to give
14 you -- if you were in Dillon County your names would
15 all be in a Tampa Nugget box, so... in Marlboro
16 County it's a Swisher Sweet box.

17 What I do also is the law provided that jurors
18 be drawn by a blind person or a child up until just
19 recently.

20 And what I have done in some counties is I have
21 gone and talked to some of the elementary schools and
22 said during school would you like for us to bring a
23 couple of kids up to the courthouse and learn the
24 experience drawing the jury.

25 It's really interesting, you know, a policeman

1 go pick them up out of the school and they get to
2 ride in a police car and go to courthouse and go
3 back. And -- but you better make sure the parents
4 know what happened.

5 Usually give them notice beforehand and let the
6 school give me a list of kids who would like to come
7 up and do it. It's real exciting for them. All
8 right.

9 There's a problem with her computer, so what we
10 are going to have to do, ladies and gentlemen, is
11 this, and this is very important. Please, it is
12 doubly important that -- I'm not going to make you
13 sit in a room while she tries to fix this glitch.

14 There's a matter I need to handle any way
15 outside of your presence, so I'm going to go ahead
16 and see if I can handle this matter I need to handle
17 outside of your presence. I want no one except
18 jurors -- everyone else to remain in this courtroom
19 except jurors.

20 If you are a juror, just go ahead for about 15
21 minutes and step outside. I'm going to have somebody
22 at the door. They'll let you know when you can come
23 back in, but just go ahead and step out for at least
24 15 minutes.

25 Jurors only. No one else. No one else. Mr.

1 Von Herrmann, you may go get your information. I was
2 going to do that now.

3 (Jurors left the courtroom.)

4 THE COURT: Yes, sir. All right. While we have
5 the jurors out of the room, Mr. Diggs, you had
6 mentioned that you had a motion you wanted to make,
7 sir, and I will be glad to hear the motions you have
8 made, sir, at this time.

9 MR. DIGGS: Thank you, Your Honor. We --
10 initially I would ask the Court to sever these
11 trials, and the reason--

12 THE COURT: One second before we do that.
13 Mr. Cooper? Did I not read your name on this list?
14 Sir? Is that you that's on this list?

15 MAN: Yes.

16 THE COURT: How about if you would, if you would
17 stay away from jurors.

18 MAN: That's why I stepped out here. They were
19 out there so I stepped in here.

20 THE COURT: I know, but do we have anyone to
21 relieve him during the course of this trial? I'd
22 rather he not even be involved in the courtroom or
23 anything else. Okay?

24 So if you would find somebody to relieve him if
25 you would there, I'd appreciate it. All right. Yes,

1 sir, Mr. Diggs.

2 MR. DIGGS: Your Honor, this case is going to
3 present facts that are somewhat unique, at least to
4 me, and all the time that I have practiced criminal
5 law I don't recall a situation quite like this one.
6 You have got two co-defendants charged with murder of
7 a single individual.

8 And it's my understanding that the co-defendant
9 in the case that I don't represent is going to
10 exercise his right to testify and is going to testify
11 in a manner that is inconsistent with the evidence in
12 the State's case in Chief and the co-defendant, my
13 client's testimony, to the point that Mr. Galmore has
14 acknowledged that there is a procedure that attorneys
15 required to follow in that situation.

16 And Your Honor, I -- I'd state to you off the
17 record -- I don't want to say this right directly in
18 front of Mr. Carr at this point.

19 There is a procedure and what I'm alluding to is
20 the defendant in that circumstance merely tells his
21 side of the story, what happened, without really
22 involvement by the defense counsel in terms of
23 eliciting testimony that will be otherwise not true.

24 The problem that it puts in this particular
25 situation, Mr. -- from the very beginning Mr. Bailey

1 has taken the position in this case that he did not
2 have any knowledge of a prior robbery on this
3 occasion, that he did not have any intent to
4 burglarize anyone's home, that he did go to this
5 residence of Mr. Patterson with the sole intent of
6 making a small purchase of marijuana for his own
7 personal use.

8 From the very beginning his testimony has
9 indicated -- has been that he contributed on the
10 night of the shooting an amount of \$20, constituted
11 his portion of the purchase price of the marijuana.

12 And I would point out that at least one of the
13 co-defendants who just recently changed his story as
14 recently as 48 hours ago --

15 THE COURT: One Don--

16 MR. DIGGS: -- right -- indicated that same
17 thing. Your Honor, it puts us in a very--

18 THE COURT: Assuming he's going to corroborate
19 your client or not going to corroborate your client?

20 MR. DIGGS: Well, up until 72 hours ago for the
21 past three years he did corroborate my client.

22 THE COURT: He did.

23 MR. DIGGS: Did.

24 THE COURT: Now he's not.

25 MR. DIGGS: Now he's not. But the problem that

1 I have is explaining to the jury why they should
2 discount the testimony of one man in a -- in an
3 unusual procedure that's invoked to prevent counsel
4 from eliciting known -- known perjured testimony and
5 asking the jury to consider on the merits the defense
6 of the lack of knowledge as to what happened and what
7 was going to happen in that particular -- on that
8 occasion.

9 So I would -- I would submit, Your Honor,
10 that -- and I understand, I was in the Appellate
11 Defense for almost 10 years, I know what the case law
12 has been on severances and that kind of thing, that's
13 why we have not really made a motion on the severance
14 because I didn't really think we'd have a realistic
15 chance of having that granted until this morning when
16 I was able to speak with Mr. Galmore who confirmed
17 for me what procedure was going to be in this case.

18 And Your Honor, this is -- you know, it's not a
19 death penalty case but it is a murder prosecution.
20 It's the most important, most serious allegation that
21 can be made against an individual.

22 And I would submit that it's just a situation
23 that would prejudice Mr. Bailey's right to have his
24 defense fully heard and weighed and considered, and
25 he deserves a right to have a decision made on his

1 involvement in this case that's not the result of any
2 kind of compromised verdict and tainted by procedure
3 that -- that is not as -- is not as fair as it could
4 be, Your Honor, under our system to what our system
5 was designed to do. That would be the first motion
6 that I have. Your Honor, should--

7 *THE COURT:* And the basis of your motion is the
8 fact that -- that Mr. Galmore's client is going to
9 testify contrary to the interest of your client or
10 you feel he is.

11 *MR. DIGGS:* Your Honor, may we approach?

12 *THE COURT:* Yes, sir.

13 (Whereupon a bench conference was held.)

14 *THE COURT:* Any of that -- as I asked, Mr.
15 Diggs, you feel the matter should be severed because
16 Mr. Carr is going to say things adverse to what your
17 client said regarding what occurred, that -- on that
18 date.

19 *MR. DIGGS:* Your Honor, when I started making
20 this motion, it was my understanding that Mr. Carr
21 was going to offer a narrative as to what his side of
22 the story was and that was the extent of his defense.

23 Counsel now tells me that's not the case, he's
24 going to testify and he's going to be examined by his
25 own attorney, and so it appears that that portion of

1 the motion would be -- would be moot. He's not going
2 to offer a narrative.

3 However, Your Honor, with all due respect to the
4 Court, we have got a black defendant and we have got
5 a white defendant, and the bulk of the testimony if
6 not all of the testimony is going to be as presented
7 by the State that the -- that Mr. Carr was the
8 shooter in this case.

9 That's what all of the information indicated
10 that was given to us through his office in our
11 discovery responses that we received.

12 Your Honor, I want to out of an abundance of
13 caution prevent a situation where the jury's got to
14 possibly interpose or come in with a compromised
15 verdict. I just don't want the issue in this case to
16 ever be that if they convict Mr. Carr, they're also
17 going to have to convict Mr. Bailey because of his --
18 the fact that he's white.

19 And I would ask for a severance in this case on
20 that basis.

21 *THE COURT:* All right.

22 *MR. DIGGS:* And to avoid having race in any way
23 come into play in the jury deliberation.

24 *THE COURT:* Okay. Mr. Galmore, do you want to
25 make any comments or -- regarding anything that's--

1 MR. GALMORE: Yes, sir, I would. I join in the
2 motion for severance there -- I anticipate that there
3 will be inconsistent things that -- pretty much
4 they're going to be pointing the finger at each
5 other, and out of an abundance of caution I would ask
6 the Court to sever the case because of the fact, you
7 know, jurors tend to say--

8 THE COURT: Either one of y'all have any case
9 law supporting you? My understanding is an old case
10 eight years old, State v Davis, 1999, says that the
11 general rule allowing going to trial applied in equal
12 force when the severance motion based on mutually
13 antagonistic defenses regarding what y'all have here.

14 MR. DIGGS: The problem with this case is Mr.
15 Carr gave a statement after his arrest indicating
16 that he thought Durriel Simmons was the shooter in the
17 case.

18 Now at the time of trial when he understands
19 that we are going to maintain the same position in
20 this case that we always have, that Mr. Carr was the
21 shooter, we witnessed that act, my client witnessed
22 that act, that simply for that reason now he's
23 changed his testimony and he's going to say that my
24 client was the shooter.

25 He's not said that before, Your Honor. He's on

1 record three years ago saying that it wasn't my
2 client, it's Mr. Simmons. And Your Honor, it would
3 be blatantly unfair and prejudicial at this point at
4 this -- three years into the -- into the matter to
5 allow him to come in and take a crap shoot with the
6 jury as a handsome, nice looking young man, they may
7 just believe him. And you know, Your Honor, that--

8 *THE COURT:* You're referring to Mr.

9 *MR. DIGGS:* Mr. Carr. Mr. Carr. They may
10 believe him. And the State in all candidness then --
11 I submit the State knows that Mr. Bailey was not the
12 shooter in this case and would -- and I would ask
13 them to make a statement on the record if that -- if
14 they know he was not the shooter and also to the
15 point that if a -- the State allows that, if the
16 State condones a joint trial in this case and allows
17 Mr. Carr to get on the stand and point the finger at
18 Mr. Bailey, they would be supporting perjury in that
19 situation because they know, the State knows that is
20 not the case. The facts--

21 *THE COURT:* Mr. Galmore, what is your basis for
22 severance other than what you already mentioned?

23 *MR. GALMORE:* That is it, that there will be
24 antagonistic defenses.

25 *THE COURT:* All right. Now, just so the Court

1 will know, Mr. Diggs mentioned that you were planning
2 on having your client do a narrative. I don't need
3 to know it, don't have to know it, not required to
4 know. But you want to tell me one way or the other?

5 MR. GALMORE: It is not intention for my client
6 to testify as it--

7 THE COURT: Plan to have your client -- if your
8 client testifies, you plan to be a question and
9 answer type thing?

10 MR. GALMORE: Yes, sir.

11 THE COURT: All right. And Mr. Diggs, if your
12 client testifies, you plan yours to be a question and
13 answer kind of situation?

14 MR. DIGGS: Absolutely, Your Honor, and it will
15 be basically the same testimony that he gave on the
16 28th or 29th of September of 2004 or I guess now,
17 three years ago he gave to the investigators in my
18 office the afternoon was questioned...

19 THE COURT: Mr. Von Herrmann, for the State,
20 wish to make any responses?

21 MR. VON HERRMANN: Your Honor has correctly
22 cited the case with regard to the antagonistic
23 defense, I ask the Court held the same thing in
24 antagonistic defenses in and of themselves without
25 more.

1 THE COURT: Has that been -- anything since
2 State v Davis?

3 MR. VON HERRMANN: No, sir, Your Honor, not that
4 I'm aware of. Your Honor, we would respectfully
5 request that the motion be denied. We have all the
6 same witnesses for both the individuals at trial. We
7 would have to present the same evidence.

8 It would just be a matter of putting it off
9 longer and doing it two times instead of one. It's
10 a -- judicial economy certainly require that we go
11 forward with it.

12 There's no case law to support the position with
13 regard to any race base or any issues out there.
14 They have certainly not been able to present anything
15 where race has come into play with this at all.

16 I can tell the Court that white people and black
17 people are going to be testify -- both against both
18 co-defendants.

19 The State -- you know, Mr. Diggs keeps saying
20 the State knows this, the State knows that. I don't
21 know what happened out there. The only thing is that
22 I have got nothing -- overwhelming evidence of these
23 two individuals approached a door and ended up
24 shooting -- one of these two individuals shot
25 Mr. Patterson.

1 Is there better evidence or more evidence to
2 support the fact that Mike Carr killed Mr. Patterson
3 while they were both engaged in a robbery? That is
4 true. There is also some evidence, Your Honor, that
5 there's a possibility of more than one gun was fired.

6 MR. DIGGS: Your Honor, I would dispute that and
7 I would ask the Solicitor to point to any evidence in
8 the record to suggest that my client was the shooter
9 in this case. I would suggest he can't do it.

10 THE COURT: He just said that he -- he said
11 there is some evidence might suggest it was more than
12 one weapon involved.

13 MR. DIGGS: There is no evidence to suggest
14 that.

15 THE COURT: Once again, I don't know. I have
16 not been involved in the case.

17 MR. VON HERRMANN: I mean, certainly we'll see
18 at trial where that.

19 MR. DIGGS: Your Honor, the three--

20 MR. VON HERRMANN: Interrupted me.

21 MR. DIGGS: All right.

22 MR. VON HERRMANN: I mean, there certainly is no
23 reason to sever these based on the reasons they have
24 given. Antagonistic defenses have been held not to
25 be a reason to sever the trial.

1 There is absolutely no information -- in fact,
2 they handled that in voir dire if they asked the
3 Court to do it, and I'm not opposed if they want to
4 ask you -- have you ask the voir dire of these jurors
5 before we -- before we draw the jury with regards to
6 any race or bias or, you know, feelings about having
7 prosecuted one white or one black or one black or one
8 white, however they want to do it, want to handle it
9 in voir dire.

10 There's no information we have at all that
11 they're more or less likely to convict one or the
12 other or both based on race. There is no information
13 about that. And it's simply not a reason to sever
14 these cases.

15 MR. DIGGS: Your Honor, judicial economy is
16 always important, but it's not -- it's not a
17 justification. In this situation where this
18 defendant who otherwise if he got a fair trial, would
19 be found not guilty, that to know the minimum
20 sentence that he faces is 30 years in prison, Your
21 Honor, that's -- that is a -- that's a huge severe
22 sentence.

23 Judicial economy, as I stated -- I don't want to
24 understate the importance of it because it is
25 important, but Your Honor, justice in this case would

1 only be served by having a separate trial under the
2 facts of this case of these two defendants.

3 Let them -- let them have their day in court and
4 have an independent decision made on what they're
5 individual guilt is.

6 Your Honor, under the circumstances of this case
7 suggests too great -- the temptation is going to be
8 too great to be able to reach an independent decision
9 on the facts of the case with respect to each
10 individual defendant. And we're not going to get
11 that if we get -- we have two defendants in this
12 case.

13 Your Honor, we need two separate cases and I
14 would ask you to sever them, Your Honor. I have one
15 more motion after this one.

16 THE COURT: All right.

17 MR. VON HERRMANN: Your Honor, I would point out
18 to the Court real briefly, State versus Dennis (sic)
19 is almost identical to this particular case. There
20 were co-defendants--

21 THE COURT: Dennis, not Davis?

22 MR. VON HERRMANN: Dennis.

23 THE COURT: Dennis I read with the research I
24 had had Davis, but Dennis is 337 South Carolina 275,
25 1999.

1 MR. VON HERRMANN: Yes, sir, Your Honor. And
2 it's an identical situation where you have two
3 co-defendants pointing at each other, antagonistic
4 defenses and, you know, one saying one did it, the
5 other one saying the other one did it.

6 Exactly the same situation. And our Supreme
7 Court held that that is not a reason to sever under
8 those circumstances.

9 MR. DIGGS: Your Honor, it's always within the
10 Court's discretion to sever. That -- that case
11 doesn't state--

12 THE COURT: Well, that case does say that it's
13 addressed to the sound discretion of the trial Judge.

14 MR. DIGGS: I would ask Your Honor to sever
15 these cases.

16 THE COURT: Looking at this, thinking about it
17 and knowing the fact situation that you all have told
18 me that would be potential selection of the jury one
19 way or the other seems to me that I have faith in the
20 system of a jury to make a decision.

21 I don't feel their decision is based on race. I
22 don't think it will be based on some sort of picking
23 one over the other or picking both or whatever. I
24 think it's going to be based on the evidence in the
25 case and the law. I just have faith that that's what

1 they would do.

2 If there is any evidence otherwise, of course, I
3 would grant a motion for a mistrial. But in
4 selecting the jury and in qualifying this jury it's
5 my observation of them in response to the questions,
6 and they're paying attention so intently that even
7 the jury qualifications that they're -- whatever is
8 selected, whomever is selected will be on a jury
9 that's going to make a decision based on the evidence
10 and law and not based on race and not based on
11 just -- over the other, just to do it without proper
12 evidence.

13 Mr. Diggs and Mr. Galtmore, I will be glad if you
14 wish me to, I will be glad to give some sort of
15 cautionary instruction to the jury when they're
16 selected, I will be glad to make a comment to the
17 jury to see if race has anything to do with anybody's
18 decision before the jury is selected or I can
19 instruct the jury once they are selected while they
20 are trying the case, either way.

21 I just think that the constitutional rights of
22 both of these defendants will be protected by this
23 court and would be protected with a joint trial. But
24 I will be glad to consider appropriate cautionary
25 instructions if either one of you wish me to do so.

1 I don't feel any prejudice has really been shown
2 here to necessary state a separate trial. So your
3 motion would -- effectively denied with the note, too
4 that I will be glad to do an instruction before the
5 jury is selected or one after the jury is selected or
6 both.

7 MR. DIGGS: Thank you, Your Honor.

8 MR. GALMORE: Respectfully, Your Honor, I don't
9 know if they need to have a cautionary instruction.

10 THE COURT: No one has requested one yet, Mr.
11 Galmore.

12 MR. GALMORE: Okay.

13 THE COURT: Why don't you wait and hold that and
14 see if someone requests it?

15 MR. GALMORE: Yes, sir.

16 THE COURT: All right. Mr. Diggs?

17 MR. DIGGS: Your Honor, we'd move to strike this
18 indictment because it's defective. It doesn't really
19 allege murder. What it alleges--

20 THE COURT: I'm still waiting on the original
21 documents.

22 MR. DIGGS: The indictment that I was given this
23 morning was filed July 19th.

24 THE COURT: All right. I have got certified...

25 MR. DIGGS: Really alleges felony murder. It

1 doesn't allege murder in South Carolina and it's
2 prejudicial because it alleges that my client
3 committed a robbery and or a burglary, they don't
4 even know which one. And I would ask -- you know,
5 these are serious.

6 *THE COURT:* All right. Now I am looking at what
7 I read as the indictment. I don't see the word
8 robbery in there at all.

9 *MR. DIGGS:* Okay. My indictment says that Mike
10 Bailey did on or about September 28th, 2004, combine
11 with two or more people to commit an unlawful act IE
12 robbery and slash--

13 *THE COURT:* That is not on the indictment I have
14 just handed to me.

15 *MR. VON HERRMANN:* Your Honor, he has a
16 certified copy of the indictment. I assume you have
17 the original.

18 *THE COURT:* I have says that Michael Bailey did
19 in Horry County on or about September 28th, 2004
20 willfully, feloniously intentionally kill the victim,
21 Joseph Patterson, junior, with malice aforethought
22 either express or implied by means of shooting him.
23 Is this a certified copy of the original, then I
24 need --

25 (Conferring with Clerk.)

1 MR. DIGGS: Your Honor, we're asking the
2 severance based on that and ask that the case be
3 re-indicted so that we know what the charges are
4 specifically as relates to Mr. Bailey.

5 MR. VON HERRMANN: Well, Your Honor, both of
6 those -- I mean, let's find out what the original
7 indictment is, but both of them sufficiently puts
8 them on notice of the charges.

9 Obviously murder, either one or both of the
10 factual scenario alleged, figure out which one the
11 original is which will have to be on file in the
12 Clerk's office. We'll know what it is. And either
13 one sufficiently puts him on notice.

14 THE COURT: Well, something tells me the one Mr.
15 Diggs has is on the original because this is the one
16 that's signed by the foreman of the Grand Jury.

17 MR. VON HERRMANN: Your Honor, I do have -- my
18 secretary went and got a certified copy from the
19 Clerk's Office, so I would imagine that's what I gave
20 to Mr. Diggs. I would imagine he does have a copy of
21 the original. I really don't--

22 THE COURT: The one what -- it says on Mr. Carr.
23 Why it says something different on Mr. Carr than it
24 does on Mr. Bailey...

25 MR. VON HERRMANN: Your Honor, I believe that --

1 well, like I said, I'd like -- if we can wait a few
2 minutes to see which one the original -- what it
3 says. But we -- obviously, Your Honor, it's the
4 State's intention throughout this to proceed under
5 its own murder.

6 MR. DIGGS: But we don't have felony murder per
7 say. I would submit -- it's got to allege the crime
8 correctly.

9 THE COURT: Well, we have the hand of one hand
10 of all.

11 MR. DIGGS: Right.

12 MR. VON HERRMANN: We were talking early --

13 MR. DIGGS: We don't have any--

14 MR. VON HERRMANN: -- in South Carolina law,
15 absolutely.

16 MR. DIGGS: When did that become the law?
17 Enough of the cases that say we don't have felony
18 murder.

19 THE COURT: Let me ask y'all. I mean, obviously
20 felony murder, the common description of that and
21 definition of that is that you were involved in
22 committing a felony and someone was killed either by
23 someone else who was involved when you were
24 committing the felony because even if it was your
25 co-defendant, that you were then guilty of murder

1 because you're involved in the doing a felony when a
2 murder occurs.

3 In fact, we have seen some cases in other states
4 and over history where you had a bank robbery and one
5 of the bank robbers was killed and the surviving bank
6 robber is charged with felony murder of the bank
7 robber that was with him because somebody was killed.

8 That's my understanding of felony murder. Hand
9 of one hand of all seem to me the only difference
10 in -- correct me if I'm wrong -- the hand of one hand
11 of all is basically that if you are with someone and
12 doing a joint crime and that -- and you're
13 responsible for what actions that person does in the
14 commission of that crime, whether you actually go in
15 the house, actually pull the trigger, not pull the
16 trigger.

17 When you get involved with someone who is
18 committing a robbery and someone is killed, then you
19 can be guilty of the murder also. Hand of one is the
20 hand of all. But... but any way, you say there is a
21 felony murder rule in South Carolina that's codified
22 or -- and Mr. Diggs says there is not.

23 MR. VON HERRMANN: Well yes, sir. I mean, it
24 wouldn't -- I mean, Your Honor has the jury
25 instructions. They are specific jury instruction on

1 felony murder.

2 *THE COURT:* Comes from where?

3 *MR. VON HERRMANN:* That, Your Honor, I'd have to
4 look up. But I do know they exist because I have
5 done it.

6 *THE COURT:* Well, let's wait and see what this
7 indictment -- anyone able to get a hold of the
8 indictment?

9 *THE COURT:* All right. Here they come.

10 *MR. VON HERRMANN:* Your Honor, it was felony
11 murder, accomplice liability, determined State v
12 Avery 509 -- 76 -- combines together to commit a
13 felony during which a homicide is committed, the
14 natural and probable consequence, all those present
15 and participated are guilty of murder as the one who
16 committed the homicide.

17 *THE COURT:* What year was that?

18 *MR. VON HERRMANN:* 1998, Your Honor.

19 *THE COURT:* All right. Now I have the original
20 indictment. The indictment on Mr. Bailey is
21 different than indictments on Mr. Carr, on the
22 indictment of Mr. Carr.

23 Mr. Bailey is charged with he had combined with
24 two or more people to commit an unlawful act IE
25 robbery and or burglary and in execution of the

1 criminal act and as a natural, probable consequence
2 of the criminal act the victim Joseph Patterson was
3 willfully, feloniously, intentionally killed with
4 malice aforethought either express or implied by
5 means of shooting the victim and the victim did die
6 as a proximate result thereof on or about
7 September 28th, 2004. Then Mr. Carr was just charged
8 with -- is charged with killing Mr. Patterson.

9 MR. VON HERRMANN: That's correct, Your Honor.
10 But Your Honor, the most recent case on indictment
11 say that merely charging document by which we have to
12 give notice. New law that arises or any charges that
13 are related to that are to be handled by the Court,
14 not by the indictment.

15 The indictment is merely the method by which we
16 tell them what they are charged with and tell them
17 what we intend on proving.

18 MR. DIGGS: Your Honor, the Solicitor is not
19 being consistent here. Just a minute ago he with a
20 straight face stood up and said there was evidence
21 that indicated Mr. Bailey was the shooter.

22 THE COURT: No, he has--

23 MR. DIGGS: He hasn't alleged -- he hasn't even
24 alleged that Mr. Bailey was the shooter.

25 MR. VON HERRMANN: Your Honor, that's not what--

1 MR. DIGGS: I would submit that--

2 THE COURT: I heard what Mr. Von Herrmann said.
3 He said he had some evidence that there was more than
4 one weapon used or more than one shot fired.

5 MR. DIGGS: There were three shots fired, Your
6 Honor, but he--

7 THE COURT: Well, he -- I thought he was
8 indicating to me that he thought he had -- some
9 evidence that shots were coming, could possibly have
10 come from more than one weapon.

11 MR. VON HERRMANN: Your Honor, I--

12 MR. DIGGS: He didn't make that.

13 THE COURT: One second. Let me hear from Mr.
14 Galmore. Everyone else be quiet. Yes, Mr. Galmore.

15 MR. GALMORE: I would ask at this time to renew
16 the motion to sever because now we have two different
17 indictments and the indictment against Mr. Bailey
18 suggests that my client was the shooter.

19 THE COURT: Mr. Galmore, that's why I was
20 reading that -- Mr. Von Herrmann, it does seem to me
21 that by Mr. Bailey's indictment there is a strong
22 implication here that you feel your case against Mr.
23 Carr as being the shooter is a lot stronger since you
24 charged Mr. Bailey differently with -- and the jury
25 being faced with that, seems to me it's almost giving

1 them a thought of what the State feels.

2 MR. VON HERRMANN: Well Your Honor, I can tell
3 the Court while they are his evidence--

4 THE COURT: Let me just show you all that and --
5 and tell you what let's do. Let me let y'all look at
6 that and let me go look at some things on that.
7 That's a little different than what we had.

8 But we do have him charged with murder but you
9 use a basis of Mr. Bailey did it to start with that
10 makes a difference. It may not. I don't know, but I
11 have got to look at it differently since the
12 indictments themselves now I -- don't say the same--

13 MR. VON HERRMANN: Your Honor, if I may just
14 point out to you. The first you told the jury when
15 you read the indictment is that the indictments are
16 not evidence. I would not object to the indictments
17 not going back to be -- intend to use the jury
18 verdict form. These are merely charging papers to
19 which we--

20 THE COURT: I know, but what I read to the jury
21 is not what Mr. Bailey is indicted for. I read -- I
22 read here on the indictments you handed me what they
23 said. That's not what this indictment says.

24 MR. VON HERRMANN: Yes, sir. I mean,
25 substantively they are. I can tell you from the

1 State's perspective the way we intend on prosecuting
2 this case is as if Mike Carr was the shooter and as
3 if Adam Bailey was a participant in a robbery and
4 therefore has violated the law of--

5 THE COURT: One thing I'm curious about, Mr. Von
6 Herrmann, was Mr. Bailey re-indicted?

7 MR. VON HERRMANN: Your Honor, I just -- I
8 simply don't have that information.

9 THE COURT: I mean, it says Clerk's -- says
10 filed with the Clerk, certified copy. That is a
11 different type of document. That doesn't have all
12 the information on it.

13 MR. VON HERRMANN: The only thing--

14 THE COURT: Madam Clerk, you have everyone
15 indicted on this -- because this thing here, this
16 says certified copy and it's different than what you
17 brought me. Look at that.

18 Doesn't that say the indictment is a certified
19 copy of the indictment? And it's different than the
20 one you brought me. Well, that's different than the
21 one you brought me.

22 THE CLERK: All we have is what's in the--

23 THE COURT: Well, how would she have access to a
24 certified copy?

25 THE CLERK: I can't--

1 MR. VON HERRMANN: Your Honor, those are the
2 copies that I had in my file.

3 THE CLERK: That's the only copy that I had in
4 the file that they had -- first of all or--

5 THE COURT: Well then, what have we got? I
6 don't know. With that said by the Clerk of Court,
7 this is a certified copy, says right here by the
8 Clerk of Court, filed in Horry County, 19 July '07,
9 Melanie Hudgins, Clerk of Court, certified copy.
10 Doesn't that mean this is a copy of something in the
11 Clerk's office?

12 THE CLERK: I would think so. We would pull
13 those and copy those and then copy the--

14 THE COURT: I mean, why would they have her name
15 on it if she's not saying it's a copy of what she's
16 got?

17 THE CLERK: But these up here on the front it's
18 got copy indictment.

19 THE COURT: I know that. But I'm looking right
20 here with the seal from the Clerk. Is this a copy of
21 what she has in her office or not?

22 THE CLERK: No. It says right there, right here
23 it's got the Solicitor's Office does their copies
24 right here.

25 THE COURT: I know. But this says copy, too.

1 This is a -- this is the Clerk's file. But here I
2 have from the Clerk saying this is a certified copy.
3 Why would she stamp it if it isn't?

4 *THE CLERK:* I don't know, sir. Anybody could
5 have gone in and copied it who has his file. I don't
6 know who clocked it.

7 *THE COURT:* But only the Clerk has this stamp
8 saying certified copy.

9 *THE CLERK:* We had to clock it, though.

10 *THE COURT:* Nobody can -- I can walk in and do
11 it? Okay. But I'm sure that someone on the street
12 could walk in and do it--

13 *THE CLERK:* No, no. I would know he did that.
14 I know...

15 *THE COURT:* Well, is there a chance you all got
16 an indictment on this gentleman? You sure? You are
17 sure or you're not sure?

18 *THE CLERK:* I am sure. ((check elizabeth's tape
19 for this conversation.)) All -- got is what's in the
20 file.

21 *THE COURT:* Well, all I can do with the jury,
22 I'm not going to let them wait long. I'm going to
23 let them go to lunch. This is interesting and I need
24 to know whether it's any significance or not. I
25 assume those jurors out there -- everybody have a

1 seat. Let me get those jurors.

2 (jury panel entered the courtroom.)

3 THE COURT: Mind looking around seeing a friend
4 they don't see or something? Look for a friend?
5 Ladies and gentlemen of the jury, as you probably can
6 understand, this is a very serious matter, but again
7 there are a couple of issues that have come up that I
8 have got to look into maybe for a longer period of
9 time than I want you to hang out in the hallway, and
10 so I don't want to just keep y'all hanging around in
11 that regard.

12 I might as well let you all go to a late lunch
13 and let me just handle this matter here so you would
14 be confined to one area. So what I'm going to do
15 though is give you an hour and a half.

16 So you need to go do some errands, you can do
17 that, too, but we won't be through selecting the jury
18 in this matter until 3:00, so -- but please, please
19 keep in mind my comments regarding not discussing
20 this matter with anyone at all.

21 Don't talk to anyone other than your fellow
22 jurors. Don't even share any information about your
23 thoughts or maybe other about various charge in this
24 nature because it's very important your decision in
25 this case be made based on the evidence presented in

1 the courtroom and the law as I instruct it to you,
2 okay?

3 This is very important you not even talk about
4 the case. All right. If you would at this time just
5 be back in your seats at 3 p.m. You can go at this
6 time. Thank you very much. Jurors only.

7 (Jury panel left the courtroom.)

8 THE COURT: I have in front of me -- give me
9 your name, please ma'am.

10 JUROR: Danielle Ward.

11 THE COURT: Mrs. Ward.

12 JUROR: Debra Truluck.

13 THE COURT: Mrs. Truluck. Mrs. Ward, what is
14 your number?

15 JUROR: 282.

16 JUROR: 268.

17 THE COURT: 268. Now, both of y'all were
18 excused on this particular trial because of various
19 reasons and involved. Mrs. Truluck, you said you
20 were aware of the family of Mr. Bailey, and Mrs. Ward
21 what was your reason? I forgot.

22 JUROR: I have a friend who was murdered.

23 THE COURT: Okay. Exactly and I felt like both
24 of those situations were such that they would effect
25 your ability to be fair and impartial whether you

1 wanted to or not.

2 I know both of you want to be that way, but it
3 could very well, whether you wanted to or not, affect
4 your ability and without objection to either side.

5 But what I need to make sure though is that you
6 don't let people ask you questions about why were you
7 excused, don't discuss with them why you were excused
8 or anything else. Very, very important. Okay?

9 JUROR: Yes, sir.

10 THE COURT: So, but I need you back at three
11 because once we do select the jury, I need basically
12 let you know when you need to come back, you need to
13 call and stuff like that. I don't know that yet.
14 All that depends on what we do at three.

15 So please, best thing is try to stay away from
16 the other jurors, but don't discuss anything with
17 them. If someone persists on the jury in asking you
18 or whatever then please let me know who that juror
19 was, okay? Okay. So y'all can do that?

20 JUROR: Yes, sir.

21 THE COURT: All right, good. We will see you
22 this afternoon then at 2:00.

23 (Jurors left the courtroom.)

24 THE COURT: Okay. Why don't everyone else just
25 sort of step back for a minute, have a sandwich and

1 then in about 2:30 I'm going to go ahead and if the
2 Court reporter doesn't mind see if we can -- when she
3 gets back set up in the other courtroom and let's
4 just do the motions over there, that way the jurors
5 can come on back in here and we can go from there
6 with it, okay?

7 So y'all get a sandwich or so and I will just
8 hear from y'all -- instead of us going around at
9 1:30 going on and on and on, I will see y'all at
10 2:30 in courtroom A. Courtroom A at 2:30.

11 Everyone, if you're in the courtroom stay away
12 from jurors, do not talk to jurors. Only ones that
13 discuss the case, business to discuss this case. No
14 one else is going to discuss the case.

15 By the way, stand up for me if you would there,
16 Mr. Bailey. Mr. Bailey and you also Mr. Carr. This
17 trial has been called. So please understand that the
18 time the case could very well continue whether you're
19 here or not, Mr. Bailey.

20 I haven't made a decision about whether you
21 should not be on bond or whatever else, but please
22 understand whether you're here or not this case will
23 continue all the way up to the verdict as well as if
24 you're found guilty by sentencing, so you need to be
25 present, sir.

1 *DEFENDANT BAILEY:* Yes, sir.

2 *THE COURT:* All right. Thank you. Mr. Galmore,
3 if you need to talk to Mr. Carr, I'm sure they will
4 be liberal in letting you talk to him.

5 (Court in recess for lunch.)

6 *THE COURT:* Okay. Before me is a motion by Mr.
7 Diggs and Mr. Galmore to continue the case. Now,
8 does anybody -- Mr. Diggs, Mr. Galmore wish to put
9 anything else -- wait. I'm sorry.

10 Now Mr. Galmore, Mr. Diggs, the motion is your
11 motion, both your motions to sever the trials. We
12 have learned that -- Madam Clerk, on the original
13 indictment on Mr. Carr, do you have that or is that
14 in the other courtroom? Mr. Carr?

15 *THE CLERK:* They were both in.

16 *THE COURT:* How about if y'all would, go with --
17 make sure you can find what's on the bench in the
18 other courtroom on Mr. Carr. I know, but I want to
19 make sure we don't mess up with the original. I have
20 learned today that what is said to be in the Clerk's
21 Office now be in the Clerk's office.

22 *MR. DIGGS:* Your Honor, did you find the
23 original on Mr. Bailey?

24 *THE COURT:* Yes. Yes, I've got the original on
25 Mr. Bailey.

1 MR. DIGGS: Is that the one I gave you or was
2 it--

3 THE COURT: No, no, it's the original file in
4 the Clerk's Office. I guess--

5 MR. DIGGS: Well, I handed you my copy.

6 THE COURT: Is this a copy or is that the
7 original?

8 MR. DIGGS: Well, I think it's the one -- that's
9 the one I gave you.

10 THE COURT: Is that a copy or is that an
11 original?

12 MR. DIGGS: Looks like... copy to me.

13 THE COURT: Well, I checked and the original is
14 that.

15 MR. DIGGS: Okay. This is a copy.

16 THE COURT: Okay. but it is a copy of the
17 original. Any way, Mr. Diggs and Mr. Galmore, do
18 y'all wish to make any other comments that you
19 haven't made already regarding severance, in Mr.
20 Diggs?

21 MR. DIGGS: Not any additional comments, Your
22 Honor.

23 THE COURT: Mr. Galmore?

24 MR. GALMORE: Your Honor, I would just say that
25 I believe as far as these defendants to be tried

1 jointly would prejudice my client.

2 THE COURT: Why is that?

3 MR. GALMORE: Because -- because of the nature
4 of the two different indictments at this point, I
5 think the jury was given two different theories, I
6 think it would suggest to the jury--

7 THE COURT: I have both the originals in my
8 hand.

9 MR. GALMORE: I think it would suggest to the
10 jury what their verdict ought to be.

11 THE COURT: What would the suggestion of verdict
12 ought to be in regard to say Mr. Bailey?

13 MR. GALMORE: Well, I think if -- if one says
14 that one indictment says that Mr. Bailey conspired
15 and the other one says that Mr. Carr didn't.

16 THE COURT: No, no, no. They charged Mr. Bailey
17 with murder.

18 MR. GALMORE: I understand that. But the body
19 of the indictment does not say that he killed anyone.
20 It says that he conspired with others.

21 THE COURT: No it doesn't. Never mention the
22 word conspire. Said that he combined with two or
23 more people to commit an unlawful act IE robbery and
24 or burglary, in the execution of that criminal act
25 and a natural probable -- as a consequence of the act

1 Mr. Patterson was killed.

2 So it says he was committing a crime, not
3 conspiring but he was committing a crime and that
4 crime was burglary and while he was or robbery and
5 while he was committing the crime of robbery or
6 burglary Mr. Patterson was killed and he's
7 responsible for the murder because he was involved in
8 the robbery and murder -- or burglary.

9 So it shows to me that the State's going to have
10 to prove that Mr. Bailey was involved in the crime of
11 robbery or burglary and that in the course of that
12 crime of robbery or burglary Mr. Patterson was
13 killed.

14 MR. GALMORE: But you have already read to the
15 jury something different. At this point to go back
16 and read that indictment would unfairly prejudice my
17 client.

18 THE COURT: How would it prejudice any more than
19 I read it first that way?

20 MR. GALMORE: Well, had you read it the correct
21 way at first, I would still have made a motion to
22 sever because under that -- under that theory we have
23 got two different--

24 THE COURT: So therefore the fact that it's been
25 read makes no difference now, you'd still be making

1 the same motion.

2 MR. GALMORE: Well, I guess.

3 THE COURT: We haven't selected a jury.

4 MR. GALMORE: I understand. But the second
5 argument is to go back and attempt to correct it.

6 MR. VON HERRMANN: Correct it?

7 MR. GALMORE: Yes because you have read one
8 indictment to -- and Mr. Bailey is going to trial on
9 a different indictment, the body of the indictment is
10 different. For you to go back and give them that
11 second body of the indictment would prejudice my
12 client.

13 THE COURT: How would it prejudice any more than
14 if I read it that way the first time?

15 MR. GALMORE: Well, had you read it that way the
16 first time, I would still be making a motion to
17 sever.

18 THE COURT: Right. So I'm asking you how would
19 it be any more?

20 MR. GALMORE: Because now on top of that motion
21 now you have to go back and correct it.

22 THE COURT: All right. And that's prejudicing
23 more how?

24 MR. GALMORE: You just read them something
25 different.

1 THE COURT: Right. I know. What I'm asking is
2 how does now reading it the way the Clerk Office --
3 Clerk's Office said it was the original, but now I
4 know the Clerk's Office was incorrect, it's not
5 original, how would that make any more of a
6 difference than -- than reading it that way the first
7 time?

8 I know it's different, but how would it make any
9 difference as far as prejudice? I know what your
10 argument is, Mr. Galmore, about the prejudice. I
11 understand that. We can discuss that.

12 I'm just trying to understand why you feel
13 reading it differently or reading it as it really is
14 original although the Clerk said the other one is
15 original, how it really is original, how is that
16 different?

17 MR. GALMORE: Well, I'm thinking if I were on
18 the jury and the Judge just told me that these two
19 guys killed somebody and then the Judge turns around
20 and says, no, he conspired and I--

21 THE COURT: I never -- we -- no one has ever
22 used the word conspire.

23 MR. GALMORE: I understand that, sir.

24 THE COURT: What I'm saying is the Judge is not
25 going to tell them at any time there was a

1 conspiracy. If the Judge would say that Mr. Bailey
2 committed the murder by Mr. Patterson being killed
3 whether Mr. Bailey was involved in a robbery or
4 burglary...

5 MR. GALMORE: Yes, but because you haven't told
6 them that, if you go back and tell them that, that
7 would prejudice my client because then it looks like
8 my client was the shooter and our defense is that he
9 was not.

10 THE COURT: Well, nowhere it says in here that
11 Mr. Bailey wasn't the shooter. Says a probable
12 consequence of the criminal act, the victim was
13 killed, malice aforethought expressly implied by
14 means of shooting the victim, the victim died as a
15 result there. Okay. I understand your position.

16 But I was -- really wanted to listen to the
17 substance of your concern about the actual weight of
18 the document read and whether -- whether the weight
19 of the indictment is put forward whether it was done
20 originally that way or not.

21 So your concern is the indictment as it is
22 doesn't what? How does it prejudice your client?
23 Forget about how it was read the first time. How it
24 does as a matter of fact--

25 MR. GALMORE: What it does is suggest to the

1 jury that my client was the person who did the
2 shooting and that Mr. Bailey is the person that did
3 the robbery. And--

4 THE COURT: Mr. Bailey is giving murder because
5 he was there committing a robbery or burglary.

6 MR. GALMORE: But my defense is that my client
7 was not the shooter. But to give them two different
8 indictments suggests to the jury that he was the
9 shooter.

10 THE COURT: All right. Okay. That it? Now
11 Mr. Von Herrmann, you want to reply to all of that?

12 MR. VON HERRMANN: Your Honor, the indictment --
13 the first thing the Court told them is that it's not
14 evidence. You did not read in fact that -- they keep
15 talking about how you will read something else. You
16 didn't read each indictment to the jury verbatim.

17 THE COURT: I read one indictment is that they
18 are both charged with and I read the indictment.

19 MR. VON HERRMANN: Right, and extensively--

20 THE COURT: And by the way, this indictment here
21 though is indictment the Grand Jury was indicted Mr.
22 Bailey on and nothing would prevent any party to say
23 in questioning or arguing to the jury that, that the
24 State indicted Mr. Bailey alleging that he did this.

25 MR. VON HERRMANN: Absolutely.

1 THE COURT: So when you say it's not evidence,
2 it is -- it is permissible for comment.

3 MR. VON HERRMANN: Certainly permissible to
4 comment on, but it's not evidence as per say to what
5 the Court is. It's certainly -- under the
6 circumstances we have today, if the evidence comes
7 out that says that Mr. Carr was not the shooter and
8 he was just participating in a robbery and just for
9 the sake of argument that another--

10 THE COURT: Well, that's what you allege. You
11 allege that he was committing a robbery or burglary
12 and that's when Mr. Patterson was killed.

13 MR. VON HERRMANN: I understand, Judge, but what
14 I'm saying is either way we would get -- if evidence
15 arose during the course of the trial that one was the
16 shooter and the other one was the shooter, we would
17 still get the felony murder charge.

18 I mean, it's clear that -- that the murder is a
19 murder. There is no distinction between felony
20 murder and murder. The only thing that that
21 indictment is supposed to do is put them on notice as
22 to the murder.

23 THE COURT: Right. But you are alleging that
24 Mr. Bailey did a felony murder.

25 MR. VON HERRMANN: Absolutely.

1 THE COURT: That's your allegation.

2 MR. VON HERRMANN: Absolutely.

3 THE COURT: So you're alleging Mr. Carr did the
4 shooting.

5 MR. VON HERRMANN: I'm alleging Mr. Carr did the
6 shooting but with regard to the jury instructions at
7 the end the case is -- recent case on indictments is
8 very clear and it says if evidence is presented at
9 trial it needs to be conformed if the jury
10 instructions are not bound by the allegations of the
11 indictment. That's the most recent comment on
12 indictments.

13 And so what I'm saying if by some chance even
14 though they can't argue that that's not what I tried
15 or charged Mr. Carr for, they can certainly have the
16 felony murder charge as well on each defendant.

17 I mean, if they don't -- they don't get --
18 alleviate that burden or don't have an extra burden
19 of proof to prove murder. All I have to do is prove
20 that there was a crime committed, it was a felony,
21 and by virtue of the fact that that type of felony,
22 it is likely that someone could be hurt or injured.

23 THE COURT: What if the jury doesn't believe
24 that a felony was being committed?

25 MR. VON HERRMANN: Then they're going to end up

1 convicting whoever they think the shooter is.

2 THE COURT: All right. But in your indictment
3 against Mr. Bailey you allege that Mr. Patterson was
4 killed as a result of a felony being committed.

5 MR. VON HERRMANN: Correct.

6 THE COURT: So what if they feel it was just
7 a -- a drug buy and all of a sudden somebody just
8 pulled out a weapon and shot Mr. Patterson for no
9 reason at all during a marijuana purchase?

10 MR. VON HERRMANN: I think the jury would find
11 him not guilty.

12 THE COURT: So if they found Mr. Bailey pulled
13 out a weapon and shot Mr. Patterson during the
14 commission of a drug buy, marijuana buy for no reason
15 whatsoever just shot him, they'd find him not guilty?

16 MR. VON HERRMANN: No, sir. No, sir. No, sir.
17 I'm saying they would find the co-defendant -- if for
18 instance the jury believes, and what the defense is
19 apparently going to be, that these two individuals
20 went to the door to purchase marijuana, while they
21 were at that door without unbenounced or without any
22 plan whatsoever Mr. Carr pulls out a gun and sticks
23 in the door and shoots him without any knowledge of
24 Mr. Bailey which appears to be the defense.

25 If the jury were to believe those facts and

1 circumstances, they would convict Mr. Carr and they
2 would turn the other one loose and find him not
3 guilty.

4 However, if the jury was to go up there,
5 determine that they went up there with the sole
6 intent to rob them, there was a burglary committed,
7 it really does not matter who pulled the trigger
8 because under the theory of hand of one hand of all--

9 *THE COURT:* Mr. Von Herrmann, you're not hearing
10 me. You charged Mr. Bailey, Mr. Bailey did on
11 September 28th, '04 combine with two or more people
12 to commit an unlawful act IE robbery and or burglary.
13 So you have to prove that?

14 *MR. VON HERRMANN:* I have to prove that there
15 was -- yes, sir.

16 *THE COURT:* All right. So that he was going to
17 either do a robbery or burglary.

18 *MR. VON HERRMANN:* Yes, sir.

19 *THE COURT:* All right. And then you have to
20 prove that in the execution of that robbery or
21 burglary, that's what your indictment said, and as a
22 natural and probable consequence of that robbery or
23 burglary Joseph Patterson, junior was willfully,
24 feloniously, intentionally killed with malice
25 aforethought.

1 MR. VON HERRMANN: Yes, sir.

2 THE COURT: So if you don't prove he was killed
3 as a result of a robbery or burglary, how would you
4 then convict Mr. Bailey? You wouldn't have proved
5 your evidence --

6 MR. VON HERRMANN: Well--

7 THE COURT: -- if Mr. Bailey were the shooter.
8 If they were to believe Mr. Carr.

9 MR. VON HERRMANN: Yes, sir. No, sir. I think
10 here's the problem now. I think this is where we're
11 struggling. Felony murder is no different from
12 murder. If you write a murder indictment, it is a
13 murder indictment.

14 If the evidence shows the felony part of it,
15 then that's fine. I mean, that's -- that's -- you
16 get that charge. But if you have that and they find
17 that he is the shooter, he should be guilty of
18 murder.

19 THE COURT: There was no felony going on.

20 MR. VON HERRMANN: Absolutely.

21 THE COURT: Where in the indictment would
22 they -- so they would not have to find any of the
23 elements of the indictment?

24 MR. VON HERRMANN: No, sir. They have to find
25 the elements of the crime of murder.

1 THE COURT: Okay. But it says he was killed as
2 a result of that felony.

3 MR. VON HERRMANN: I understand that. But what
4 I'm saying is is they do not have to find -- they
5 have to find the elements of murder. That is merely
6 a document for which these individuals are put on
7 notice as to the crime.

8 The -- when you -- when you charge the jury,
9 you're going to read, I feel comfortable, you're
10 going to try -- you will do the murder charge, the
11 standard murder charge and then you're going to give
12 the felony.

13 THE COURT: I tell the jury in your view that
14 even if you find a felony was not committed, a felony
15 was not being committed, you can still find the
16 defendants guilty?

17 MR. VON HERRMANN: No, sir. That's not what the
18 felony murder indictment -- I mean the felony murder
19 charge says.

20 THE COURT: I would say you got to find a felony
21 was being committed?

22 MR. VON HERRMANN: Yes, sir, or that he was
23 directly involved in the death of Mr. Robinson -- I
24 mean, excuse me--

25 THE COURT: Mr. Patterson.

1 MR. VON HERRMANN: I mean, either way we get
2 there it's not -- it's not just because I have
3 indicted it using the felony murder language, it's --
4 it's certainly an element. It's certainly a part of
5 proving murder.

6 THE COURT: It's your whole indictment. It's
7 all you say in your indictment.

8 MR. VON HERRMANN: Correct. But -- but the
9 overall thing says murder. So I mean it's got to be
10 a murder. What I can tell you--

11 THE COURT: But it says, though, he was murdered
12 as a result of the felony being committed.

13 MR. VON HERRMANN: Maybe this would help the
14 Court. All of the evidence that I have that I'm
15 going to present to this jury is going to indicate
16 that Mr. Carr is the shooter, that it was a planned
17 robbery between the four individuals and that that's
18 how it was committed, they were in the middle of a --
19 a felony -- committing a violent felony, if that
20 helps the Court at all.

21 I mean, I kind of -- I mean, it seems like we
22 are getting off on these things that -- I mean, I'll
23 agree with you if they find that he was -- I guess if
24 they find he was the shooter or they find that he was
25 the shooter and I don't prove a violent felony which

1 I don't know how shooting can't be, then I guess they
2 can cut him loose, Your Honor.

3 But that to me just makes absolutely no legal
4 sense whatsoever. And it seems like we're--

5 *THE COURT:* Well, I don't know if Mr. Carr is
6 going to testify to -- none of us do. But what if
7 Mr. Carr testifies that I walked up there with Mr.
8 Bailey and Mr. Bailey pulls out a weapon with no --
9 no thought we were going to buy marijuana and shoots
10 him. What if the jury somehow believes that?

11 *MR. VON HERRMANN:* I mean, I think if they
12 believe that then they're going to find him not
13 guilty.

14 *THE COURT:* Then the question is whether then
15 you could re-indict Mr. Bailey on a regular murder
16 charge or whether that's jeopardy has attached. I
17 guess that can be addressed later.

18 *MR. VON HERRMANN:* No, sir. I believe jeopardy
19 has attached. I mean, we charged him with murder.
20 It's going to be -- it's up or down on this -- on
21 this trial.

22 *THE COURT:* All right. Well then, therefore you
23 want to proceed, too?

24 *MR. VON HERRMANN:* Yes, sir.

25 *THE COURT:* You sure?

1 MR. VON HERRMANN: Yes, sir.

2 THE COURT: And if I get a request to charge,
3 ladies and gentlemen of the jury, if you believe that
4 the sole shooter was Mr. Bailey, then you must find
5 both of them not guilty?

6 MR. VON HERRMANN: No, sir, that's even making a
7 comment on the facts. Of course--

8 THE COURT: The law.

9 MR. VON HERRMANN: No, sir, that would not be
10 the law. That would be--

11 THE COURT: So then what would be their choice
12 if they found that Mr. Bailey was the sole shooter
13 and a felony was not being committed?

14 MR. VON HERRMANN: How could there be -- they
15 could find a shooting and a felony not being
16 committed? The shooting is the felony.

17 THE COURT: No, no, that the shooting occurred
18 during the commission of a felony, not just a
19 shooting but a felony was being committed like a
20 robbery or burglary when the shooting happened.

21 MR. VON HERRMANN: Well, there are -- I mean --
22 certainly in the indictment it says robbery, but it
23 can be any felony. So if they find that -- if they
24 find that it was another felony that tended to -- and
25 our Courts have held that drug dealing is innately

1 involved in handguns and weapons. If they find
2 drugs--

3 THE COURT: I'm curious is that -- that's a good
4 point. Is purchasing marijuana a felony? I don't
5 even know. Is that a misdemeanor?

6 MR. VON HERRMANN: Depends how much.

7 MR. GALMORE: Simple possession of marijuana
8 would be a misdemeanor.

9 MR. VON HERRMANN: Purchase.

10 MR. GALMORE: Purchase something he would be in
11 possession once the purchase is made. Purchasing
12 itself is not a crime.

13 THE COURT: So to attempt to purchase or
14 purchasing marijuana is not a felony?

15 MR. GALMORE: No, sir.

16 MR. VON HERRMANN: The conspiracy part if two or
17 more people combine certainly would be a felony, even
18 though we haven't alleged that indictment, we don't
19 have to allege, it can be an unindicted
20 co-conspirator. I can tell you that I think there
21 were 10-pounds of marijuana found in that particular
22 area -- particular house.

23 So I mean, to conspire to buy purchase 10-pounds
24 of marijuana, yes, it is a -- and we are not alleging
25 that. I mean, that's not -- I mean, just kind of

1 academic at this point. Really what we're alleging--

2 THE COURT: What you are alleging in your
3 indictment against Mr. Bailey is you are alleging
4 that he combined with two people to commit an
5 unlawful act, robbery and burglary, and you're
6 alleging in the execution of one of those criminal
7 acts that he was combining to do that, a natural and
8 probable consequence of that criminal act in other
9 words one should be aware that when you're doing
10 something like this, someone could be shot and killed
11 as a consequence naturally and probably of that
12 criminal act, burglary, robbery or whatever, it --
13 really felony, that Mr. Patterson was killed, was
14 murdered.

15 MR. VON HERRMANN: Yes, sir.

16 THE COURT: And he was murdered as a consequence
17 of the criminal act, not the murder, not the shooting
18 but there was a criminal act going on that was a
19 felony and as a natural and probable result of that
20 felony he was murdered, shot. That's what you're
21 saying on Mr. Bailey you are going to try to prove.

22 MR. VON HERRMANN: That's certainly what we are
23 trying to prove, but he still is charged with a
24 substantive offense of murder. So if even under that
25 theory -- I mean, I'll give you an example. I

1 couldn't indict him with both languages.

2 I couldn't say he was -- like if I was to say
3 they were both the shooter in the indictment and they
4 prove -- the evidence came forth that one of them
5 wasn't the shooter, I would still be entitled to the
6 felony murder doctrine. By the same token you're
7 charged with murder.

8 *THE COURT:* Which one wonders why you're getting
9 this charge, what the indictment read that you gave
10 me initially.

11 *MR. VON HERRMANN:* Well, I didn't mean...

12 *THE COURT:* I mean, that would have been seem to
13 me a lot simpler.

14 *MR. VON HERRMANN:* I do not disagree with that.

15 *THE COURT:* Why it was done like this, I don't
16 know.

17 *MR. DIGGS:* Well Your Honor, we would renew --
18 remember we had the motion on the table to strike
19 that indictment because of the -- either or language
20 in there. It's like what the Solicitor's argued this
21 afternoon is like multiplying fractions.

22 He's lowering -- every time he throws in a
23 different theory, he's lowering his burden of proof
24 here and making it more likely that these -- that
25 these -- that my client is going to be convicted.

1 It's just not either.

2 *THE COURT:* I don't think Mr. Galmore would
3 agree.

4 *MR. DIGGS:* Well, just saying we don't know
5 exactly how it happened. This morning you said there
6 was evidence that two guns was used. He represented
7 to the Court that my man -- my man was going to be --
8 was going to be evidence that he was the shooter.

9 *MR. VON HERRMANN:* No, I object. I simply have
10 not told this Court there's evidence that he was the
11 shooter. Not one time have I said that.

12 *MR. DIGGS:* Maybe I misunderstood.

13 *THE COURT:* He said -- he misunderstood. He's
14 now saying as a matter of record he does not have
15 evidence in that regard.

16 *MR. VON HERRMANN:* Your Honor, if I can do it,
17 that way so everybody will know exactly what I'm
18 saying. There is going to be evidence presented in
19 this courtroom that it may or may not have been more
20 than one gun fired.

21 That is all the evidence that I have got with
22 regard to that. It's that simple. And the gun that
23 we found that we put in Mr. Bailey's hand is the one
24 that they say is consistent.

25 *THE COURT:* With Mr. Bailey's hand?

1 MR. VON HERRMANN: I'm sorry.

2 THE COURT: The gun you put in Mr. Bailey's
3 hand?

4 MR. VON HERRMANN: Adam Bailey, yes, sir. We
5 never -- we only have located one firearm in this
6 case and it is -- we believe it not to be the murder
7 weapon.

8 THE COURT: Okay. So y'all telling me -- okay.
9 So therefore the weapon you found with Mr. Bailey was
10 not the murder weapon.

11 MR. VON HERRMANN: Correct. Well, it's
12 consistent with, but we just don't know. It's
13 inconclusive. The ballistics came back on it
14 inconclusive. It could have been one of that gun or
15 10 or 11 other guns and two manufacturers are the
16 same in that particular area.

17 We have witnesses that have seen that gun, that
18 saw Mr. Bailey with that gun at the crime scene and
19 has indicated that same witnesses that Mr. Carr was
20 the one that shot him. So it's my belief--

21 THE COURT: With that gun or some other gun?

22 MR. VON HERRMANN: That's with another gun, a
23 second gun. And we found where they disposed of the
24 gun but were unable to locate it where they hid it.

25 MR. GALMORE: How can that be consistent and

1 it's in Mr. Bailey's hands? But Mr. Carr's the
2 person you allege did the shooting?

3 MR. VON HERRMANN: Because the projectiles were
4 so fragmented they were unable to identify them with
5 a specific gun.

6 THE COURT: We don't need to get too much into
7 the evidence situation here. He tells you now why
8 he's trying to -- trying to prove.

9 MR. DIGGS: Your Honor, we move to strike the
10 indictment and for severance. Short of that--

11 THE COURT: I wasn't going to strike the
12 indictment.

13 MR. DIGGS: Because it doesn't state murder.
14 It's convoluted, tries to allege -- it's in a
15 convoluted fashion. Some kind of tangential guilt by
16 Mr. Bailey because Mr. Patterson was murdered.

17 They don't know if it's a robbery, they don't
18 know if it's a burglary. And I would submit that's
19 prejudicial language. It doesn't adequately or
20 appropriately or properly charge murder, killing of
21 another human being with malice aforethought.

22 THE COURT: Well it does, it just doesn't use
23 the word murder. It does say that.

24 MR. DIGGS: Well, I would submit that it's
25 inadequate, inaccurate and should be stricken.

1 Process go back --

2 *THE COURT:* So in other words, this had and--

3 *MR. DIGGS:* -- on the indictment.

4 *THE COURT:* The word murder is not in there,
5 that's why -- although it's on the top of the
6 indictment. You say in fact the word murder is not
7 in the body of the indictment although it says all
8 the elements of murder, that didn't give you notice
9 that charged him with murder?

10 *MR. DIGGS:* I'm saying that it doesn't include
11 the elements of murder.

12 *THE COURT:* Okay. Where is it -- what did it
13 leave out? Want yours back?

14 *MR. DIGGS:* Says killing of a human being with
15 malice aforethought.

16 *THE COURT:* Okay. Well, let me look again, sir.
17 You can have that, your...

18 *MR. DIGGS:* Well, Your Honor, I don't -- I don't
19 read it that way. It's a convoluted statement and I
20 would submit to you it's really hard to tell what's
21 being alleged here. Although we do know that he
22 wasn't missing -- he might -- he--

23 *MR. DIGGS:* That's what we do know.

24 *THE COURT:* Right. What does it leave out about
25 the elements of murder in the body of that

1 indictment? What elements does it leave out?

2 MR. DIGGS: That he intentionally killed another
3 human being with malice aforethought, malice
4 aforethought.

5 THE COURT: So you don't see willfully,
6 feloniously, intentionally kill with malice
7 aforethought.

8 MR. DIGGS: No, I see that as in some way
9 connected with this robbery and or slash murder,
10 burglary, but I don't see a malice aforethought with
11 respect to the killing.

12 THE COURT: Okay. Well, on that motion I would
13 respectfully deny your motion there.

14 MR. DIGGS: I would also ask for that severance.
15 (Whereupon there was a pause).

16 THE COURT: Y'all stay put right for a minute.
17 I need one second. I'm going to let the State know
18 that -- I haven't heard the evidence yet. And of
19 course, after hearing the entire case it may change
20 my mind.

21 But with the indictment as now read, I would
22 plan unless I'm really changed a lot by the evidence,
23 I would read to the jury that if they find the man
24 guilty, I would read the indictment that the State
25 charges. And that those are the elements the State

1 must prove.

2 And I just want the State to know that's
3 probably what I'm planning on doing. The State
4 wishes to continue, we haven't selected the jury
5 yet...

6 MR. VON HERRMANN: We wish to continue, Your
7 Honor.

8 THE COURT: All right. Okay. In that regard
9 then I would respectfully deny the motions. I am
10 going to, Mr. Galmore, let the jury know that in --
11 in reading the indictment I read only one indictment
12 and that did not read both indictments, and see if
13 that makes a difference about their qualifications or
14 they know -- got out the case wouldn't affect them as
15 fair jurors because I did just read one indictment.

16 But I will not let them know the fact is the
17 Clerk had marked those two indictments as actually
18 ones filed in their office and they weren't filed in
19 their office.

20 So I will leave that -- am going to talk with
21 the Clerk of Court. It is amazing that the Clerk's
22 staff could be on something as it is filed in their
23 office when it's not filed in their office. That is
24 an amazing thing to me. Yes, Mr. Galmore.

25 MR. GALMORE: Your Honor, in that case I would

1 respectfully request that the jury be had -- start
2 the opening and the testimony in the morning. This
3 indictment or his indictment is new to me. And I
4 would like an opportunity to--

5 THE COURT: You didn't have a copy of his
6 indictment?

7 MR. GALMORE: No, sir. This is the first time
8 that I have heard that he was charged under a felony
9 murder case.

10 THE COURT: Well, you had that indictment
11 though, Mr.--

12 MR. DIGGS: I was just given it this morning.

13 THE COURT: No, sir. That's the one you handed
14 to me. What were you handed before? What have you
15 had that in the course or -- or haven't been -- in
16 preparation for the trial--

17 MR. GALMORE: I haven't had one.

18 THE COURT: Have you asked for one under rule
19 five?

20 MR. GALMORE: No.

21 THE COURT: Okay. But they were filed in the
22 Clerk's office. And so all this was filed in the
23 Clerk's office.

24 MR. DIGGS: We waived the -- could I ask when it
25 was filed?

1 THE COURT: I have here on the original
2 indictments -- I don't have any stamps on them, so I
3 don't know. All I have got down is where he was
4 indicted July 28th, '05. But the originals y'all
5 must not stamp them down at all?

6 THE CLERK: No, sir.

7 THE COURT: They were just in the file.

8 MR. DIGGS: No, I haven't seen it before.

9 THE COURT: Well, you handed them to me so you
10 didn't ask for them -- they were filed in the Clerk's
11 office, I assume they would have been filed in the
12 Clerk's office about two years.

13 MR. DIGGS: Well, there's no stamp on it?

14 THE COURT: Y'all don't stamp indictments,
15 Donna, at all?

16 THE CLERK: No, sir, we don't. We give them to
17 the Solicitor's Office. All we do is number them and
18 keep them.

19 THE COURT: They number them and keep them.

20 MR. DIGGS: I didn't look in the file.

21 THE COURT: Okay. Okay. We will look for that,
22 Mr. Galmore.

23 MR. GALMORE: Thank you, Your Honor.

24 THE COURT: Let's go back over -- I will give
25 you all a few minutes, we'll get back over to the

1 room and we'll select the jury. The jury is already
2 having jumbled through the system and has been --
3 she's now ready to call their names out, so we'll do
4 that over there. All right?

5 So give y'all about 10 minutes or so to get back
6 over there. Well, whatever time it takes the Court
7 Reporter to get set up. She's the important one
8 we're asking to move around back and forth.

9 (Back in courtroom.)

10 THE COURT: Good afternoon. It's 3:00. Be
11 seated, please. Forgot to tell you I was working on
12 central standard time. All right.

13 Ladies and gentlemen, we have now used another
14 courtroom so y'all would not have to be out in the
15 hallway or anything else. I wanted to be able to let
16 y'all come in and be here instead of having to wait.

17 We have now have got everything ready. We're
18 ready now to commence with the trial. Let you know
19 before we begin the trial, I do note that you know
20 when I read the indictments, I only read one and let
21 me just read both indictments to you.

22 That Mike Carr did in Horry County on or about
23 September the 28th, 2004 willfully, feloniously and
24 intentionally kill the victim, Joseph Patterson,
25 junior, with malice aforethought either express or

1 implied by means of shooting the victim and the
2 victim did die as a proximate result thereof on or
3 about September the 28th, 2004 in Horry County in
4 violation of the law of this state. That's as to
5 defendant Mr. Michael Carr.

6 The State also charges as to defendant Michael
7 Bailey the crime of murder by saying that Michael
8 Bailey did in Horry County on or about September the
9 28th, 2004 combine with two or more people to commit
10 an unlawful act, IE robbery and or burglary, and in
11 the execution of the criminal act and as a natural
12 and probable consequence of the criminal act the
13 victim, Joseph Patterson, junior, was willfully,
14 feloniously and intentionally killed with malice
15 aforethought either express or implied by means of
16 shooting the victim and the victim did die as a
17 proximate result thereof on or about September the
18 28th, 2004, in Horry County in violation of the law.

19 Now, did anyone -- does anyone other than you
20 have already referred to me, talked with me, after
21 hearing me read both indictments, does anyone know
22 anything at all about this case? Anything at all
23 about this case, elements of it, whatever, before you
24 came into court today; if so, please stand up. Okay.

25 Ladies and gentlemen of the jury, what occurs in

1 a jury trial is you as a jury, you will decide the
2 facts. And in almost all cases witnesses have
3 different thoughts and comments regarding the facts.

4 You decide what the facts are and remembering
5 the burden is upon the State to prove the facts or
6 the elements of the crime, the evidence, the guilt of
7 a defendant beyond a reasonable doubt.

8 But you would decide that. I would explain the
9 law to you and instruct you on the law. I cannot get
10 involved with your decision on the facts.

11 You must accept the law as I give it to you.
12 You must apply the law as I instruct you. Those are
13 our rules. The jury determines the facts. I
14 instruct the law. The jury puts those two together
15 and reaches its decision.

16 Does anyone feel they could not follow that rule
17 of courtroom procedure; if so, please let me know
18 now. Okay. State ready to draw a jury?

19 MR. VON HERRMANN: State's ready, Your Honor.

20 THE COURT: Defense ready? Mr. Galmore?

21 MR. DIGGS: Yes, sir.

22 MR. GALMORE: Yes, sir.

23 THE COURT: Ladies and gentlemen, as I mentioned
24 to you before, the Clerk has now had -- has your
25 names now and she will call out your names as they

1 were randomly drawn.

2 When your name is called, please stand, she will
3 then address the State first, they'll get a choice of
4 presenting the juror or excuse the juror and then
5 she'll go to the defense and they'll get a choice of
6 swear the juror or excuse the juror.

7 Please remain standing until the Clerk gives you
8 the instruction. Her instruction will be you may be
9 seated or you -- her instructions will be come on up
10 to the jury box, something of that effect. So that's
11 the procedure as we'll do it.

12 Now Mr. Diggs, Mr. Galmore, would -- y'all
13 discussed at one time having one of y'all read out
14 swearing or excuse or do y'all want to do it
15 separately? How will you do it?

16 MR. DIGGS: Your Honor, I think we're going to
17 do it -- we're going to work together and have one of
18 us announce.

19 THE COURT: All right. Is that right, Mr.
20 Galmore?

21 MR. GALMORE: Yes, sir, Your Honor.

22 THE COURT: All right. And Mr. Diggs, you going
23 to announce initially?

24 MR. DIGGS: I will be happy to start.

25 THE COURT: All right. If y'all want to change

1 it, just let me know, no problem, just one of you.
2 All right. Then we'll now proceed 10 and 20 are the
3 strikes. Madam Clerk, you may proceed.

4 THE CLERK: 225, Frances Richmond (white
5 female). What says the State?

6 MR. VON HERRMANN: Please present the juror.

7 THE CLERK: Defense?

8 MR. DIGGS: Swear the juror.

9 THE CLERK: Have a seat in the jury box, please.
10 278, Starla Venters (white female). What say the
11 State?

12 MR. VON HERRMANN: Please present the juror.

13 THE CLERK: Defense?

14 MR. DIGGS: We'll excuse the juror from the
15 trial of this case.

16 THE CLERK: You're excused in this particular
17 case. 261, Amanda Thompson (white female). What say
18 the State?

19 MR. VON HERRMANN: Please present the juror.

20 THE CLERK: Defense?

21 MR. DIGGS: We would excuse the juror from the
22 trial of this case.

23 THE CLERK: You're excused in this particular
24 case. 161, William Leonard (white male). What say
25 the State?

1 MR. VON HERRMANN: Please present the juror.

2 THE CLERK: Defense?

3 MR. DIGGS: Swear the juror.

4 THE CLERK: Have a seat in the jury box, please.

5 237, Linda Saylor (white female). What say the
6 State?

7 MR. VON HERRMANN: Please present the juror.

8 THE CLERK: Defense?

9 MR. GALMORE: Please excuse the juror in the
10 trial of this case.

11 THE CLERK: You're excused in this particular
12 case. Number 80, Henry Eddy (white male). What say
13 the State?

14 MR. VON HERRMANN: Please present the juror.

15 THE CLERK: Defense?

16 MR. GALMORE: Please seat the juror.

17 THE CLERK: Have a seat in the jury box, please.
18 Number one, Gini Abee (white female). What say the
19 State?

20 MR. VON HERRMANN: Please present the juror.

21 THE CLERK: Defense?

22 MR. DIGGS: We would excuse the juror for the
23 trial of this case.

24 THE CLERK: You're excused in this particular
25 case. 291, Diana Wilson (black male.) What say the

1 State?

2 MR. VON HERRMANN: Please present the juror.

3 THE CLERK: Defense?

4 MR. DIGGS: Swear the juror.

5 THE CLERK: Have a seat in the jury box, please.

6 142, David Janson (white male). What say the State?

7 MR. VON HERRMANN: Please present the juror.

8 THE CLERK: Defense?

9 MR. GALMORE: Please excuse the juror in the
10 trial of this case.

11 THE CLERK: You're excused in this particular
12 case. 271, Iris Watson (white female). What say the
13 State?

14 MR. VON HERRMANN: Please excuse the juror in
15 the trial.

16 THE CLERK: You're excused from this particular
17 case. 269, Lee Tucker (black female). What say the
18 State?

19 MR. VON HERRMANN: Please present the juror.

20 THE CLERK: Defense?

21 MR. GALMORE: Please excuse the juror in the
22 trial of this case.

23 THE CLERK: You're excused in this particular
24 case. 133, Carrie Hughes (black female). What say
25 the State?

1 MR. VON HERRMANN: Please excuse the juror in
2 the trial of this case.

3 THE CLERK: You're excused from this particular
4 case. 166, Darlene Lore (white male). What say the
5 State?

6 MR. VON HERRMANN: Please present the juror.

7 THE CLERK: Defense?

8 MR. DIGGS: Swear the juror.

9 THE CLERK: Have a seat in the jury box, please.
10 141, Kristi Falk (white female). What say the State?

11 MR. VON HERRMANN: 141, Madam Clerk?

12 THE CLERK: Uh-huh. Karah Kristi Falk.

13 MR. VON HERRMANN: Your Honor, can we inquire
14 her as to her employment? For some reason I didn't
15 catch it.

16 THE COURT: Mrs. Falk, where have you worked?

17 JUROR: Sir?

18 THE COURT: Where do you work now?

19 JUROR: I'm at...

20 THE COURT: You do the...

21 JUROR: The wellness counseling.

22 THE COURT: The wellness counseling? Are you
23 married, Mrs. Falk?

24 JUROR: Sir?

25 THE COURT: Are you -- does your husband, is he

1 employed? Where is he employed?

2 JUROR: He owns Falk Manufacturing...

3 THE COURT: Thank you, ma'am.

4 MR. VON HERRMANN: Please present the juror.

5 THE CLERK: Defense?

6 MR. DIGGS: Swear the juror.

7 THE CLERK: Have a seat in the jury box, please.

8 Thirty-three, Davis Boykin (white male). What say
9 the State?

10 MR. VON HERRMANN: Please present the juror.

11 THE CLERK: Defense?

12 MR. DIGGS: Excuse the juror in the trial of
13 this case.

14 THE CLERK: You're excused in this particular
15 case. Eighteen, Edna Bellamy (black female). What
16 say the State?

17 MR. VON HERRMANN: Please present the juror.

18 THE CLERK: Defense?

19 MR. DIGGS: Excuse the juror from the trial of
20 this case.

21 THE CLERK: You're excused in this particular
22 case. 272, Tammy Turbeville (white female). What
23 say the State?

24 MR. VON HERRMANN: Please present the juror.

25 THE CLERK: Defense?

1 THE COURT: Did you say swear the juror?

2 MR. DIGGS: Yes, sir, Your Honor.

3 THE COURT: Please know the Court Reporter has
4 got to hear you. I'm sorry. I asked y'all to be on
5 facing that way, but wasn't fair -- when you're
6 making your selection, let the Court Reporter know.

7 MR. DIGGS: Thank you.

8 THE CLERK: 213, James Poole (white male). What
9 say the State?

10 MR. VON HERRMANN: Please excuse the juror from
11 the trial of this case.

12 THE CLERK: You're excused from this particular
13 case. Sixty-three, Elsie Daub (white female). What
14 say the State?

15 MR. VON HERRMANN: Please present the juror.

16 THE CLERK: Defense?

17 MR. GALMORE: Please excuse the juror in the
18 trial of this case.

19 THE CLERK: You're excused in this particular
20 case. 178, Gayla McCracken (white female). What say
21 the State?

22 MR. VON HERRMANN: Please present the juror.

23 THE CLERK: Defense?

24 MR. DIGGS: Swear the juror for the trial of
25 this case.

1 THE CLERK: Have a seat in the jury box, please.
2 229, Beatrice Rodenbaugh (white female). What says
3 the State?

4 MR. VON HERRMANN: Please present the juror.

5 THE CLERK: Defense?

6 MR. GALMORE: Please excuse the juror in the
7 trial of this case.

8 THE CLERK: You're excused in this particular
9 case. 163, Pauline Lewis (white female). What say
10 the State?

11 MR. VON HERRMANN: Please excuse the juror in
12 the trial of this case.

13 THE CLERK: You're excused from this particular
14 case. Number 12, William Barnhill (white male).
15 What say the State?

16 MR. VON HERRMANN: Please present the juror.

17 THE CLERK: Defense?

18 MR. DIGGS: Swear the juror.

19 THE CLERK: Have a seat in the jury box.

20 THE COURT: Before she calls the next one, I'll
21 just do a recount. Got four and 10 of the strikes.
22 And any matters on jury selection from either side at
23 this point from the State? Is that your count?

24 MR. VON HERRMANN: Yes, sir, Your Honor.

25 THE COURT: Your count, defense? Four and 10?

1 MR. DIGGS: Yes, sir, Your Honor.

2 THE COURT: No matters about jury selection from
3 anyone, we shall continue then. Okay.

4 THE CLERK: 267, Carol Torbic (white female).
5 What says the State?

6 MR. VON HERRMANN: Please present the juror.

7 THE CLERK: Defense?

8 MR. DIGGS: We'll excuse the juror for the trial
9 of this case.

10 THE CLERK: You're excused in this particular
11 case. Forty-five, Alan Campbell (white male). What
12 say the State?

13 MR. VON HERRMANN: Please present the juror.

14 THE CLERK: Defense?

15 MR. DIGGS: Swear the juror.

16 THE CLERK: Have a seat in the jury box, please.
17 153, Miguel Kurth (white male). What says the State?

18 MR. VON HERRMANN: Please present the juror.

19 THE CLERK: Defense?

20 MR. DIGGS: Swear in the juror.

21 THE CLERK: Have a seat in the jury box, please.
22 125, Terry Heyne (white male). What says the State?

23 MR. VON HERRMANN: Please present the juror.

24 THE CLERK: Defense?

25 MR. DIGGS: Excuse the juror.

1 THE CLERK: You're excused in this particular
2 case. Twenty-one, Shawn Bergeron (white male). What
3 say the State?

4 MR. VON HERRMANN: Please present the juror.

5 THE CLERK: Defense?

6 MR. DIGGS: Your Honor, we'll excuse the juror
7 from the trial of this case.

8 THE CLERK: Excused in this particular case.
9 258, Leslie Taflan (white female). What says the
10 State?

11 MR. VON HERRMANN: Madam Clerk, it's 258?

12 THE CLERK: 258, I'm sorry.

13 MR. VON HERRMANN: Please present the juror.

14 THE CLERK: Defense?

15 MR. DIGGS: We'll excuse the juror from the
16 trial of this particular case.

17 THE CLERK: You're excused in this particular
18 case. 265, Donnie Todd (white male). What say the
19 State?

20 MR. VON HERRMANN: Please present the juror.

21 THE CLERK: Defense?

22 MR. DIGGS: Excuse the juror for the trial in
23 this case.

24 THE CLERK: You're excused in this particular
25 case. 293, Ronald Wing (white male). What say the

1 State?

2 MR. VON HERRMANN: Please present the juror.

3 THE CLERK: Defense?

4 MR. DIGGS: We'll excuse the juror from the
5 trial of this case.

6 THE CLERK: You're excused in this particular
7 case. Fifty-five, Tonia Clemmons (white female).
8 What say the State?

9 MR. VON HERRMANN: Please present the juror.

10 THE CLERK: Defense?

11 MR. DIGGS: Swear the juror.

12 THE CLERK: Have a seat in the jury box, please.

13 THE COURT: Okay. Counsel, before we do
14 alternates, y'all approach one second if you would,
15 please.

16 (Whereupon a bench conference was held.)

17 THE COURT: Okay. We'll do alternates. First
18 alternate one strike for the State, two for the
19 defense.

20 THE CLERK: 151, Michael King (white male).

21 What say the State?

22 MR. VON HERRMANN: Please present the juror.

23 THE CLERK: Defense?

24 MR. GALMORE: Swear the juror.

25 THE CLERK: Have a seat in the jury box, please.

1 THE COURT: All right. Let's do another
2 alternate, please. Two strikes for the State, one
3 for the defense.

4 THE CLERK: Thirty-six, Bryan Broskie (white
5 male). What says the State?

6 MR. VON HERRMANN: Please present the juror.

7 THE CLERK: Defense?

8 MR. GALMORE: Swear the juror.

9 THE CLERK: Have a seat in the jury box, please.

10 THE COURT: Okay. Ladies and gentlemen, at this
11 time I'm going to ask you to step to the jury room.
12 They'll direct you there. But before I do, please
13 ladies and gentlemen do not discuss this case at all.
14 Don't discuss anything about it. Just get to know
15 each other.

16 I'll bring you back out in a few minutes. It's
17 unlikely we're going to start the case today,
18 probably tomorrow morning. But let me first get a
19 few things done before we bring you back out.

20 So don't discuss this case at all. We'll see
21 you in a few minutes. Bailiffs, if you will escort
22 the jury.

23 (Jury left the courtroom at 4:31 p.m.)

24 THE COURT: Any motions by the State regarding
25 jury selection?

1 MR. VON HERRMANN: Nothing from the State, Your
2 Honor.

3 THE COURT: Any motions by either defendant
4 regarding jury selection?

5 MR. DIGGS: No, Your Honor.

6 MR. GALMORE: No, sir, Your Honor.

7 THE COURT: All right. Madam -- administrative
8 purposes, Mr. Von Herrmann, just for the rest of the
9 jury, not on this particular case.

10 (Whereupon a bench conference was held.)

11 (Remaining panel released.)

12 THE COURT: Anyone else with a juror who is
13 here? Anyone else with a juror? Okay. I will turn
14 around the other way. All right. Now Mr. Galmore
15 requested that because of various motions to have the
16 case start tomorrow.

17 I told him and told Mr. Von Herrmann Mr. Diggs
18 had no problem with that so we'll start the case
19 tomorrow morning.

20 Also, Mr. Von Herrmann is going to look at the
21 matters before swear the jury to determine whether he
22 does or does not wish to agree with any of the
23 motions of either one of the defendants regarding
24 severing, he'll let me know that tomorrow morning.

25 And we will proceed -- before we bring the jury

1 back in let me put on -- anything from you, Mr. Von
2 Herrmann?

3 MR. VON HERRMANN: No, sir, Your Honor.

4 THE COURT: Mr. Diggs?

5 MR. DIGGS: Not at this time, Your Honor.

6 THE COURT: Okay. Mr. Galmore?

7 MR. GALMORE: No, sir, Your Honor.

8 THE COURT: All right. I'm going to bring the
9 jurors back in and let them go home and report back
10 at 9:30 tomorrow morning. Fine with everyone?

11 MR. GALMORE: Yes.

12 THE COURT: Bring them on back.

13 (Jury entered the courtroom at 4:43 p.m.)

14 THE COURT: As I mentioned to you, ladies and
15 gentlemen, we're not going to start the trial today.
16 I'm going to let you go and we'll begin the trial
17 tomorrow.

18 Ladies and gentlemen, during the course of the
19 evening as I've asked you already do not discuss this
20 case. Do not in any way discuss this case with your
21 family, your friends or anyone else.

22 The best thing is to come back in tomorrow and
23 as I stated to you, your decision should be made
24 based on the evidence in the case presented in the
25 case and the law as I instruct it to you, not on

1 anything else.

2 So ladies and gentlemen, the best way to make
3 sure you make the decision regarding it is not
4 discuss it with anyone. If anyone mentions anything
5 to you about it, please let me know tomorrow.

6 Ask yourself, sorry I cannot even discuss the
7 nature of the case, the charges, the people involved
8 or anything.

9 Folks, it's human nature when you mention
10 something like that, it's human nature for someone to
11 tell you something or their view, this or that. That
12 wouldn't be appropriate. So please don't discuss it
13 with anyone at all.

14 Return tomorrow at 9:30 into that jury room that
15 you were in today. The Clerk, the bailiff will show
16 you how to get back into the jury room. Also, when
17 you get in there tomorrow everyone except Mr. King
18 and Mr. Broskie, that's you two there on the end,
19 right? The rest of you from among the 12 of you
20 select who you wish to be your foreperson.

21 The foreperson is someone who has really no more
22 authority than anyone else. It's -- other than to be
23 an administrative spokesperson for the jury and one
24 who would begin deliberations when the jury is ready
25 to begin deliberating and who will sign -- the person

1 who actually signs the verdict form when you're
2 presented with the case to make a decision.

3 So choose among your 12 who you would like to be
4 your foreperson. Whoever you choose to be the
5 foreperson, have him or her sit in the seat right --
6 you're Mrs. -- what's your name again?

7 *JUROR:* William Barnhill.

8 *THE COURT:* Mr. Barnhill. Have him sit right
9 where Mr. Barnhill is sitting. Whoever is selected
10 to be your foreperson, have him sit where
11 Mr. Barnhill is sitting.

12 The rest of you sit anywhere you wish. No
13 reserved seatings. My two alternates, y'all can sit
14 either that -- either one of those two chairs there.

15 Y'all don't have to sit necessarily the way you
16 were selected because if we do need an alternate in
17 the case, it's not necessarily the one who was chosen
18 first that would be the one on the jury -- both of
19 your names and basically in a hat dig out one of the
20 names, so either one of the two of you could end up
21 being on the jury if we lose a juror.

22 So we will see you all then, ladies and
23 gentlemen of the jury, we will see you then tomorrow
24 at 9:30 hours. Bailiffs, y'all would please take
25 them with them and return to the jury room tomorrow,

1 not to the courtroom.

2 And by the way, let you know please, no shorts,
3 no shorts, no dress like -- rather you have your
4 shirt tails in, gentlemen, if you would. See y'all
5 tomorrow.

6 (Jury left the courtroom at 4:46 p.m.)

7 *THE COURT:* When -- we thought about this
8 before, y'all wanted to be able to spread out. I see
9 everyone sitting on one side. This is courtroom A.

10 Court reporter says she hears better in
11 courtroom A, but y'all wanted something spread people
12 out. Of course got all the jurors here so I guess
13 maybe y'all will spread it out later.

14 Y'all have a change of heart let me know
15 tomorrow morning. Anything else before we need to
16 break for the day? State?

17 *MR. VON HERRMANN:* Nothing from the State, Your
18 Honor.

19 *THE COURT:* Defense?

20 *MR. DIGGS:* Your Honor, since we have begun this
21 trial I'm going to ask the Court, Mr. Bailey remain
22 on his bond.

23 *THE COURT:* Well, under the law, of course, when
24 the case is called his bond is up. You have a
25 bondsman here in case the State doesn't oppose it?

1 MR. DIGGS: We don't have a bondsman here, but
2 he is on house detention. Bondsman is not here but
3 he's been on home detention.

4 THE COURT: Is that through the terms of the
5 bondsman or through the terms of the bond itself?

6 MR. DIGGS: The Court determined terms of his
7 bond.

8 THE COURT: Was it a monetary bond in addition?

9 MR. DIGGS: Yes, sir.

10 THE COURT: Position of the State?

11 MR. VON HERRMANN: Yes, sir, we would take the
12 position, Your Honor, Your Honor the case has been
13 called. It's our policy to request that Court be put
14 in -- pending the outcome of this trial.

15 We have actually had bad experiences on several
16 occasions where we have had jurors and things like
17 that and we had things -- it is a concern of our
18 office.

19 THE COURT: Okay. Mr. Diggs, what I will do is
20 I will, if the bondsman will come in and re-sign the
21 bond, I will permit him to stay out until the case of
22 the State is completed, but it's proper when the case
23 of the State is completed I will require him to stay
24 in custody until the jury has reached a decision.

25 So if y'all want to contact the bondsman on the

1 same terms, same conditions he has now, he's in
2 custody till a bondsman will go and sign saying the
3 bondsman is still on the bond.

4 The State indicates, though, that they will
5 probably have their case up I would think tomorrow
6 probably, and if the State does have its case up
7 tomorrow, then if I permit the case to continue, but
8 of course I would -- the bond to remain in custody
9 until the case is concluded.

10 So just as a matter of economic interest of
11 whether your man wants to pay someone if they charge
12 or anything just for a day. It's up to them. But
13 he's in custody unless a bondsman signs to let him
14 remain until tomorrow.

15 Stand up, Mr. Bailey. Mr. Bailey, I want to
16 make sure you understand, sir, though that this case
17 has been called for trial.

18 *DEFENDANT BAILEY:* Yes, sir.

19 *THE COURT:* If for some reason you didn't appear
20 tomorrow, the bondsman did come and sign, get you
21 out, and you didn't appear tomorrow, this trial will
22 go forth even without you present.

23 They would continue on. In addition, sir, it
24 would continue all the way up to a verdict. If the
25 jury found you guilty I would sentence you in your

1 absence, sir.

2 DEFENDANT BAILEY: Yes, sir.

3 THE COURT: So your not being here would not
4 stop anything whatsoever, sir. Do you understand?

5 DEFENDANT BAILEY: Yes, sir.

6 THE COURT: Okay, sir. With that in mind if a
7 bondsman comes down and signs the matter on the same
8 terms that on the bond now, same bondsman come in and
9 sign, then you can release him.

10 If the bondsman comes and says he will stay on
11 the bond -- it's got to be the same bondsman and
12 signed with the same conditions that were there and
13 state -- likely the State's case is completed, I will
14 keep him in custody until the case is through. Do
15 you understand that?

16 DEFENDANT BAILEY: Yes, sir.

17 THE COURT: All right. We'll adjourn this
18 matter until tomorrow. Hand these indictments over
19 to the Clerk.

20 (Whereupon there was a pause.)

21 THE COURT: Mr. Galmore, please make sure your
22 people know my concerns here about tomorrow.

23 MR. GALMORE: Yes.

24 THE COURT: Okay.

25 (Court in recess for the evening.)

1 ***** Tuesday, July 24th, 2007 *****.

2 MR. VON HERRMANN: Judge, in reviewing this
3 indictment, I think that's probably one of the things
4 that I was operating on, the wrong indictment, I
5 hadn't had an opportunity to review this indictment.

6 They are correct, felony murder has been I
7 believe associated with State v Avery and a few other
8 cases, but -- and there's not a substantive offense,
9 but this indictment is not a felony murder.

10 This indictment is for murder, it has the proper
11 code section for murder, it has all the elements of a
12 murder. The only thing that this indictment has done
13 in addition to is we have given the theory of how we
14 intend to prove malice in the first and opening part
15 of it that is something that they're not entitled to.

16 That is something that is quite frankly giving
17 up some more of the State's case on how we intend to
18 prove the malice portion of the indictment. But if
19 you read the indictment, it has all of the elements
20 of murder.

21 It says was willfully, feloniously,
22 intentionally killed with malice aforethought either
23 expressed or implied by means of shooting the victim
24 and the victim did die as a proximate result thereof.

25 THE COURT: And he died during the course of the

1 criminal act, burglary or robbery. So remember now,
2 you -- you do state in there that in the course of
3 that criminal act.

4 MR. VON HERRMANN: Absolutely, yes, sir. So
5 what I would tell the Court is this is a murder
6 indictment. We have agreed or by our presentation to
7 the Grand Jury, we have told the Grand Jury, we have
8 told this jury how we intend on proving express or
9 implied malice, but it's a murder indictment.

10 It's not a felony murder indictment. I
11 apologize to the Court and quite frankly I think I
12 spent a lot of time yesterday arguing the wrong
13 issue. This is an indictment for murder.

14 Now, if the evidence becomes apparent that there
15 was a felony committed and it was a burglary or a
16 robbery, then the State would be entitled to a jury
17 charge of felony murder.

18 THE COURT: All right. Now once again, Mr. Von
19 Herrmann, your indictment says, and I don't have it
20 in front of me, but let me just go by memory and see
21 how accurate I am. That -- that Mr. Bailey -- Mr.
22 Diggs' client here, that he was in the process of
23 committing a crime, that crime being burglary and or
24 robbery, I think you have robbery and or burglary.

25 And that in the course of committing that

1 criminal act that Mr. -- that the victim was shot
2 with malice aforethought either express or implied
3 feloniously, willfully, intentionally.

4 So it says that in the course of that criminal
5 act. So, it seems to me that you are going to have
6 to prove the elements of your indictment.

7 MR. VON HERRMANN: I have to certainly prove the
8 elements of murder, and I believe because I have
9 specified that it was during the operation of the
10 robbery or a burglary that in his particular case I
11 need to prove it.

12 THE COURT: As long as we got that
13 understanding, I'm--

14 MR. VON HERRMANN: But I just want the Court to
15 understand this is not -- you know, we proceeding and
16 talked about as if this is a felony murder
17 indictment. This is an indictment for murder.

18 Nowhere in here does it even specify felony
19 murder. And the Court is correct, there is no
20 statutory felony murder and the indictment, CDR codes
21 and everything.

22 THE COURT: And well, the references to felony
23 murder is the fact of where showing malice--

24 MR. VON HERRMANN: Yes, sir, I agree.

25 MR. DIGGS: Your Honor, can I respond to that?

1 THE COURT: Yes, sir.

2 MR. DIGGS: While -- what we have got is an
3 indictment that charges a theory of murder, but
4 there's no way even with a jury verdict on this
5 particular indictment that you're going to have a
6 bar, subsequent prosecution for murder.

7 That is because this doesn't allege the elements
8 of murder. Regardless of what just say theory --
9 regardless of what the jury verdict is in this case
10 on this indictment, guilty or not guilty, there is
11 not going to be a bar to retrying Adam Bailey on the
12 subsequent indictment that alleges simply a murder.

13 And for that reason I would -- I would renew our
14 motion to strike this indictment, to quash it, at --
15 require the Solicitor to go back, seek the proper
16 indictment for murder, so that we know and we know
17 what the charge is.

18 Regardless of what the theory is -- and we can
19 use that indictment as a bar to any further
20 prosecution as to that particular -- as to Mr.
21 Patterson's death by virtue of a jury verdict on
22 proper indictment.

23 THE COURT: I am reviewing this indictment. I
24 think it -- it -- it alleges certain acts and I'm
25 going to require the State to prove those acts as

1 elements of the crime that it alleges.

2 And if they don't, if the jury determines they
3 do not prove those elements then the jury would
4 acquit him as far as where jeopardy attaches and that
5 would be a question for someone in the future.

6 Any way, I have already denied your motion for
7 severance. Mr. Galmore, I thought this morning to
8 myself have I addressed your motion for severance and
9 I heard your arguments and I just want to make sure
10 the record is clear that, you know, your arguments
11 are well taken, but I think looking at as it is, I
12 have deny -- I'm going to deny your motion for
13 severance also.

14 I feel that the -- neither one of your clients
15 are going to be overly prejudiced by the fact of this
16 matter being tried together.

17 And so I will deny your motion also Mr. Galmore
18 and we will proceed with this case with both of them
19 being tried together. Okay?

20 MR. GALMORE: Yes, sir. Just for the record I
21 wanted to say that I was about to renew my motion
22 for -- to protect the record.

23 THE COURT: All right, sir. There was one other
24 thing y'all had mentioned about a 403 review?

25 MR. DIGGS: Your Honor, I was just going to go

1 into that. The Solicitor informed me that the first
2 witness is going to be the 911 operator and I object
3 to the introduction of the 911 tape itself for a
4 number of reasons.

5 Number one, there is no dispute in this case
6 about Mr. Patterson being shot. There is no dispute
7 in this case about him dying as a result of being
8 shot on that occasion.

9 There's no dispute that he called 911, reported
10 the fact that he had been shot and reported the fact
11 that he thought he had mortally wounded.

12 All of those facts are not in dispute. The only
13 thing that is going to result from the introduction
14 of the actual 911 tape is that the jury will hear a
15 dying man pleading for help.

16 And I would submit that it's just too
17 prejudicial, too -- it -- it cannot hear that tape
18 and not have sympathy and prejudice on the -- with
19 respect to that individual, that dying man, and the
20 people or the person who caused his injury and death.

21 And so under 403 it certainly, the prejudice of
22 this tape far outweighs its probative value simply
23 because all of the other probative facts can be --
24 are going to be in evidence without objection.

25 And so we would ask the Court not to let the 911

1 tape itself but other -- just allow maybe a
2 recantation by the operator as to what she's going
3 to...

4 THE COURT: Okay. Mr. Von Herrmann?

5 MR. VON HERRMANN: Your Honor, the operator --
6 he's saying operator. We're actually calling the
7 custodian of the records, putting it in. The
8 operator himself passed away.

9 He's unavailable and the State's -- how we do it
10 we bring Renea Hardwick in the end on the 911. She
11 testifies they put it in evidence.

12 But probably the most important thing in what
13 I'd like to point out to the Court is as you just
14 indicated to me, I'm going to have to prove a
15 burglary or a robbery that was ongoing.

16 In the tape he indicates somebody broke into his
17 home. And so that probably, I mean, any prejudicial
18 effect far outweighed by the fact that I had to prove
19 through information and relevant evidence that he was
20 broken into.

21 The best witness we have as to whether or not
22 there was a break-in outside of the footprint on the
23 door, the broken door jam and everything else, is a
24 firsthand account or firsthand witness of the
25 individual that died who says they just broke into my

1 house.

2 So Your Honor, that would go directly to an
3 element which I'm required to prove, and that we
4 agree that we're required to prove and that is very
5 clear on the tape, Your Honor.

6 And not to mention, I really do not think the --
7 the balance of it is -- is prejudicial. One of the
8 things he indicates is in his final on tape is that
9 he did not know that the -- the defendant.

10 That is important because our -- that would
11 corroborate our testimony that the two individuals
12 that went to rob him had never met him before, that
13 there was only one person out of the entire group
14 that knew who he was and that they had told him and
15 laid out -- the layout of the apartment and therefore
16 the fact that he didn't know who the intruder was
17 corroborates other testimony that we would have down
18 the road and other witnesses.

19 And we'll certainly play the tape for the Court
20 if you wanted to hear it.

21 THE COURT: Okay. Mr. Galmore, you hadn't
22 mentioned anything on this yet.

23 MR. GALMORE: Yes, sir, I would just -- I join
24 in Mr. Diggs' motion. I think that everything that
25 is on the 911 tape is cumulative and can be proven by

1 other evidence.

2 With that said, its probative value is -- it is
3 only being introduced to inflame -- isn't the right
4 word -- but arise the passions of the jury, that
5 therefore I think it's more prejudicial than
6 probative.

7 MR. DIGGS: Your Honor, I need to put on the
8 record also the response to Mr. Von Herrmann's
9 argument if that's the position the State takes,
10 clearly the tape is testimony, Davis versus
11 Washington, most recent US Supreme Court case,
12 non-testimonial or testimonial matter on one call
13 can't come into evidence because we don't have access
14 to this proper clarity.

15 We don't have an opportunity to cross-examine
16 him. So we would also submit the under suspension
17 constitution violation, a violation of the
18 confrontation clause--

19 MR. VON HERRMANN: Your Honor, first of all 911
20 tapes are admissible. It's not a -- it's not a
21 violation, non-testimonial -- testimonial by nature
22 has been recorded for future use in court. This man
23 was trying to get help. That's all he was doing.

24 Second of all, even under a hearsay there'd be
25 the exception of the excited utterance. He makes

1 this 911 tape just soon as he gets broken into and in
2 fact on the tape said I was just shot twice. So it
3 is not testimonial.

4 There is no way that they can argue by testimony
5 of the Supreme Court clearly defined it as one that's
6 recorded for use in -- in future court proceedings.
7 And in this stage this is not reported for that.

8 It's the standard I think in -- to record the
9 tape. All he was trying to do was get help and
10 that's all there was to that. That's not
11 testimonial. Certainly in the excited utterance --
12 overcome any hearsay exception.

13 THE COURT: What about the comments of the 911
14 operator?

15 MR. VON HERRMANN: What about them, Your Honor?
16 It's non-testimonial in nature. He's unavailable any
17 way, so they have to stand for what they are.

18 THE COURT: The 911 operator is...

19 MR. VON HERRMANN: Passed away.

20 THE COURT: Oh.

21 MR. VON HERRMANN: We have -- we put these in a
22 hundred times.

23 THE COURT: I don't need to know a hundred
24 times. I'm just talking about this case here, all
25 right? Mr. Diggs?

1 MR. DIGGS: Your Honor, the Solicitor again and
2 with all due respect has been inconsistent with some
3 of these -- a moment ago he tells you he's got all
4 this detailed evidence from Mr. Patterson that's come
5 into evidence to prove his case and then now he's
6 saying oh no, we're just asking for help.

7 It's clearly testimonial. And I would ask the
8 Court -- first of all I object to the admissibility.
9 But if the Court allows the tape, I will ask for a
10 curative instruction.

11 The jury can't consider any of the details that
12 the declarant makes in considering whether or not he
13 would -- whether or not Mr. Bailey's guilty or
14 innocent. The details--

15 THE COURT: Now, my understanding of the tape is
16 he doesn't mention either one of the defendants or
17 gives any description of the defendants.

18 MR. DIGGS: He said he never saw any -- didn't
19 see the person who shot him. So where Mr. Von
20 Herrmann gets the inference that they entered the
21 apartment or anyone entered the apartment, you know,
22 I would certainly disagree with that, the inference
23 is not there.

24 But I would ask -- I would object to the tape
25 and ask for jury instruction saying you can't --

1 ladies and gentlemen, you can't consider any factual
2 details contained in this.

3 THE COURT: What is your position on the fact
4 that 803 excited utterance? Obviously someone has
5 just been shot and they are calling on the phone
6 right away, they are in an excited state, do you not
7 think, sir?

8 MR. DIGGS: I do not think.

9 THE COURT: Why would that not be an exception?

10 MR. DIGGS: I would submit to you, Your Honor,
11 that it still doesn't outweigh 403. 403 prejudice is
12 still there. Should be -- or even if there is
13 hearsay exception.

14 THE COURT: Well, in my--

15 MR. DIGGS: Probably was. I'm not conceding
16 that.

17 THE COURT: Well, my rulings have been not based
18 on hundreds of other ones but on my own rulings and
19 the decision on whether this has been -- when you
20 have something with excited utterances 803 comes into
21 play and that 911 tapes and my rulings of the law has
22 been based on that if they were excited utterances.

23 And here if in fact someone's just been shot,
24 obviously their utterances are doing and still
25 experiencing the heightened motion of what's going

1 on.

2 So I would permit the 911 tape to come in even
3 after considering the 403 analysis. I do believe its
4 probative value substantially outweighs any prejudice
5 or--

6 MR. DIGGS: Just one more point. The operator,
7 if I'm not mistaken, is the individual that
8 interjects the concept of they into the conversation.
9 And of course that would not be part of the excited
10 utterance, so... maybe get a jury instruction on
11 that. I may be wrong.

12 THE COURT: You want to prepare one about him
13 interjecting himself, the term they, would anything
14 from the -- from the victim, Mr. Patterson, I will be
15 glad to consider that.

16 Speaking of that, Mr. Diggs, Mr. Galmore, do
17 y'all want any instruction to the jury regarding the
18 trials being together here of the jurors not in any
19 way making any decision based on the fact we're
20 trying these cases together?

21 MR. DIGGS: I would ask -- we would like to
22 ask--

23 THE COURT: Would you like me to do it at the
24 end of the case or the beginning of the case? At the
25 beginning of the case I need to have you something --

1 you're suggesting ones now, I give you a couple
2 minutes or we'll wait and do it at the end of the
3 case.

4 *MR. DIGGS:* Your Honor, I would ask that you
5 give an opening instruction that we got two
6 defendants but they're being tried separately.
7 They're entitled to separate deliberations. And each
8 individual verdict with respect to guilt or
9 innocence.

10 *THE COURT:* I'll be glad to do that. Do you
11 have any concerns with my opening comments please I
12 will give you a chance to come and approach the bench
13 at that point in time, and you want to make any
14 requests or corrections I will be glad to hear those
15 before we proceed on with the evidence.

16 Okay. Now, the juror I just got notice is
17 finally here. Is that right?

18 *BAILIFF:* Yes, sir.

19 *THE COURT:* How about if you would remind them I
20 told them to select the foreperson. Have they done
21 that already?

22 (Bailiff conferring with Judge.)

23 *MR. GALMORE:* Your Honor, have they selected a
24 foreperson with the 12th juror or did they do that
25 after?

1 THE COURT: You want me to ask him?

2 MR. GALMORE: It just occurred to me that maybe
3 we should.

4 THE COURT: Well, that's fine. I got a feeling
5 the one who was -- you afraid they selected the
6 absent juror as the foreperson? No.

7 MR. GALMORE: No, I--

8 THE COURT: If you would tell him don't worry
9 about the badge, he'll have a chance to get it at
10 home tonight. But make sure that they made their
11 selection with all 12 jurors taking part. Then when
12 they're finished with that bring them on out if you
13 would, please.

14 BAILIFF: Yes, sir.

15 THE COURT: Check with me first before you bring
16 them out. Y'all step around here right one second.

17 (Whereupon there was a pause.)

18 MR. VON HERRMANN: Your Honor, the defendants
19 have entered into an agreement to go ahead and mark
20 and enter all exhibits with the exception of number
21 28 which is the 911 tape into evidence, so for
22 whatever purpose the defendant or myself need to be--

23 THE COURT: Do you have the numbers, Madam Court
24 Reporter?

25 COURT REPORTER: Yes, sir, I do. One through 27

1 and 29 through 31.

2 THE COURT: One through 27 and 29 through 31 for
3 the State. Okay. Have you -- Mr. Diggs, Mr.
4 Galmore, y'all have agreed to have those introduced
5 without objection?

6 MR. GALMORE: Yes, sir, Judge.

7 MR. DIGGS: Yes, sir. And I don't know what the
8 911 tape's number is.

9 THE COURT: It was not in the one she read.

10 MR. DIGGS: Okay. We don't have any objection
11 to the other exhibits.

12 THE COURT: Okay. All right.

13 (WHEREUPON, state's Exhibits 1-27, 29-31 were
14 admitted into evidence.)

15 (WHEREUPON, State's Exhibit No. 28 was marked
16 for identification only.)

17 MR. VON HERRMANN: There will be a few more that
18 I'll introduce, some -- things like that, Your Honor.

19 THE COURT: All right, sir. One through 27 and
20 29 through 31 are in evidence.

21 MR. VON HERRMANN: Thank you, Your Honor.

22 THE COURT: If you would, do you have that note
23 again? I forgot the name of the person. Now if you
24 would, Mr. Bailiff, back up for me, please sir.
25 Mr. Bailiff, raise your right hand. You swear the

1 testimony you give the Court will be the whole truth
2 and nothing but the truth so help you God?

3 BAILIFF: Yes, sir.

4 THE COURT: I sent you back in to see if they
5 had selected this person before the late juror got
6 there and you determined you told me that they had
7 selected before he got there, right?

8 BAILIFF: Yes, sir.

9 THE COURT: So they re voted with him there,
10 right?

11 BAILIFF: Yes, sir.

12 THE COURT: And they selected her again.

13 BAILIFF: Yes, sir.

14 THE COURT: So she's been elected twice. All
15 right. Okay. Very good. Thank you, sir. Diana
16 Wilson is our -- is our foreperson.

17 MR. GALMORE: Your Honor, we would just ask that
18 the witnesses be sequestered and that we get NCIC's
19 on all of the non-law enforcement.

20 THE COURT: Mr. Von Herrmann, I thought that had
21 been agreed to before we started.

22 MR. VON HERRMANN: It has been agreed to. I
23 don't think we have any witness -- we have the 911
24 operator who is the first witness, Your Honor, if
25 you'd like her to leave.

1 THE COURT: I see no need for that. All right.
2 Everyone else sequestered.

3 MR. VON HERRMANN: The other thing, Your Honor,
4 I do have John Lewis here. I don't expect to call in
5 the case, but he is my chief case agent.

6 THE COURT: He has a right to be here.

7 MR. VON HERRMANN: Thank you, Your Honor.

8 THE COURT: And also they have a right at some
9 point in time when you finish with the witnesses to
10 know if they have any prior background for
11 impeachment purposes. Do you have those available as
12 you call your witnesses?

13 MR. VON HERRMANN: Yes, sir, I do.

14 THE COURT: All right. Okay. Bring the jury
15 in, please. Mr. Galmore, I don't think what we did
16 was necessary, but for you I did it any way.

17 MR. GALMORE: Thank you, sir.

18 THE COURT: I'm not sure of any rule that says
19 that all to be...

20 MR. GALMORE: It just occurred to me that--

21 THE COURT: It's interesting. Interesting. I
22 could have said I'll hear about taking away their
23 right to elect to appoint. I'm going to appoint...

24 (Jury entered the courtroom at 10:51 am.)

25 THE COURT: Good morning, ladies and gentlemen,

1 ready to proceed and I trust we will be starting on a
2 more regular time basis in the future. But we had to
3 handle some matters any way, so it didn't delay
4 things too much. Mrs. Wilson, I understand you have
5 been selected as foreperson. Is that correct, ma'am?

6 *JUROR:* Yes, sir.

7 *THE COURT:* As your first duty as foreperson you
8 want to order us to cut the air conditioner up to
9 make it warmer in here? Is that... see your coat
10 like that. We're now ready to proceed with this
11 trial.

12 Before we do so I'm going to put you under oath
13 again as a jury and then I'm going to do a bit of
14 instructions to you as we get started. So if you
15 would, Madam Clerk, can you put the jury under oath,
16 please?

17 (Whereupon jury was sworn.)

18 *THE COURT:* All right. Ladies and gentlemen, I
19 told you yesterday that both Mr. Bailey and Mr. Carr
20 are charged with the crimes of murder, and I read out
21 you the charges.

22 Ladies and gentlemen of the jury, the fact that
23 they are charged with these crimes is not evidence
24 they have committed the crime at all. The burden is
25 upon the State to prove guilt beyond a reasonable

1 doubt.

2 A person is presumed innocent and that
3 presumption of innocence remains with a person unless
4 the State proves guilt beyond a reasonable doubt.

5 Also, ladies and gentlemen, the fact that
6 they're being tried at the same time should not in
7 any way, in any way lessen the rights of either of
8 the individuals.

9 They are both entitled for you to look at the
10 matters and require the State to prove guilt beyond a
11 reasonable doubt if it can do so individually,
12 looking at them individually. Your verdict could
13 very well be different in this case or it could be
14 the same.

15 So please do not in any way, the fact that they
16 are being tried together in any way cause that to
17 prejudice either one or both of -- the State has the
18 burden of proving guilt beyond a reasonable doubt of
19 each individual.

20 Ladies and gentlemen, the procedure in this case
21 is as follows. We'll begin with an opening statement
22 by each side. We'll also then -- I mean, after that
23 we'll then have the presentation of evidence and then
24 we'll have the closing statement by each side, where
25 each side will be able to come to you and summarize

1 or discuss with you what they feel their case has
2 shown or has not shown.

3 After that is completed I will then give you my
4 instructions on the law. You do not need to be
5 concerned that much with the law at this time because
6 I will tell you the law later on at the end of the
7 case.

8 Your focus at this time, ladies and gentlemen,
9 should be to listen, to observe, to pay attention.
10 When I said we would have the presentation of
11 evidence, what that means is that someone will come
12 up to this witness stand, take an oath, sit down,
13 respond to questions to the attorneys -- from the
14 attorneys.

15 That becomes evidence for you to consider in
16 this matter. In addition, there could be items,
17 objects, documents, photographs introduced. They
18 become evidence for you to consider.

19 At this time without objection exhibits one
20 through 27 and 29 through 31 by the State have been
21 introduced in evidence without objection of the
22 defense. Those items will be evidence for you to
23 consider.

24 Exhibits themselves will go back in the jury
25 room with you when you're deliberating after the case

1 is presented to you. So if you happen to be shown an
2 exhibit, do not look at it like you are never going
3 to see it again because you will have it in the jury
4 room with you at the end of the trial.

5 However, testimony of witnesses will be such
6 that you will have to remember, so please don't let
7 some exhibit take your focus off of your
8 observations, your listening and paying attention to
9 the testimony of a witness.

10 Now ladies and gentlemen, reason I say that is I
11 rather you not take any notes because the case will
12 not last that long and I want to make sure you keep
13 observing and paying attention and I don't want some
14 people to take notes and some not.

15 So the best thing is no one just to take notes,
16 just listen and pay attention. I think this case
17 will be in your hands sometime tomorrow. So it won't
18 be a long period of time of you having to sit there
19 and listen.

20 Now ladies and gentlemen, you are key in this
21 matter in the sense that you will be the ones
22 rendering the verdict. So it's very important that
23 you listen and pay attention throughout the course of
24 the entire trial.

25 My two alternates I told you yesterday you all

1 should still listen and pay attention because you
2 could very well be on this trial. Who knows what may
3 happen like almost happened today, so you could very
4 well be on this trial. So listen and pay attention
5 just as if you're on the trial.

6 If we don't need you, then at the end of the
7 case just before the jury begins its deliberations I
8 will remove you at that time. But until then act as
9 if you're regular parts of the jury.

10 If exhibits are passed around for you to look
11 at, make sure you as alternates you look at them
12 also. We're now I think ready to proceed. Any
13 objections or comments that the State wishes to make
14 to the bench before we start?

15 MR. VON HERRMANN: No, Your Honor.

16 THE COURT: From you Mr. Diggs for Mr. Bailey?

17 MR. DIGGS: No, Your Honor.

18 THE COURT: From you Mr. Galmore for Mr. Carr?

19 MR. GALMORE: No, sir.

20 THE COURT: All right. And so I think that
21 we'll begin -- if you want to begin when we do the
22 defense side, you want to go State, then Galmore
23 since y'all are sitting, is that fine with y'all?

24 That has no implications of anything, it just
25 looks natural to do it like that.

1 MR. GALMORE: That would be fine.

2 MR. DIGGS: That's okay with us.

3 THE COURT: All right. We will begin with the
4 opening statement of the State and then with each of
5 the attorneys for the defendants. Mr. Von Herrmann,
6 you may proceed.

7 MR. VON HERRMANN: Thank you, Your Honor. May
8 it please the Court.

9 THE COURT: Yes, sir.

10 OPENING STATEMENT

11 MR. VON HERRMANN: Folks, I wish we were here to
12 celebrate the life of Joe Patterson. I wish we were
13 here to talk about what a great guy he was and how
14 much he had going on in his life. Even though he did
15 some bad things. But we -- his family and his
16 friends have already done that.

17 What we're here today is to talk about why he
18 died so early and why he was murdered cold and
19 brutally murder on September 28th, 2004 and why these
20 two defendants are the ones that murdered him and why
21 they should be held accountable. That's really what
22 this is.

23 It seems like a -- it seems like somewhat of a
24 waiting decision you have to make. By the end of
25 this trial I will have presented all the evidence

1 that we have that will leave you firmly convinced
2 that these individuals decided that what they would
3 do on September 28th, late at night, early morning
4 hours is they would go along with two other
5 co-defendants to Joseph Patterson's home in Turtle
6 Cay all -- right off of Treemont road or Forestbrook
7 Road -- excuse me -- that they went up there two --
8 two individuals stayed in the car.

9 They all had -- they all -- the robbery, two
10 individuals whose job was look out and drive. Duriel
11 Simmons and Antonio Davis stayed in the car.

12 These two defendants went up from Abaco (sic)
13 Chase apartment complex went up the back way, went up
14 the stairs, knocked on the door to see if they could
15 get Mr. Robinson (sic) to come to the door. When he
16 didn't, they kicked the door in and confronted Mr.
17 Robinson and shot and killed him.

18 Now, the evidence is going to be pretty
19 overwhelming for breaking and entering and a robbery.
20 And this is probably -- and I cannot apologize for
21 that. It is going to be a difficult situation. It's
22 going to be difficult evidence for you to hear.

23 But it's the most compelling evidence that I
24 believe that I can provide to you, and that is the
25 voice of Mr. Robinson as he laying in his house,

1 dying, and he's saying they shot me, they shot--

2 MR. GALMORE: It's Patterson, Your Honor. The
3 victim's name is Patterson. You said Robinson.

4 MR. VON HERRMANN: Oh. Sorry. As he lays in
5 the floor on his cellphone talking to 911 and he's
6 begging them to help. He talks about people breaking
7 into his house.

8 We're going to note the trajectory of the
9 bullet, that he was shot while somebody was in his
10 house. And you go why, that just seems awful random.
11 He was a drug dealer. He dealt pot.

12 And one of the witnesses that were driving the
13 car that's going to testify, come in here and tell
14 you what happened, knew him, and he had bought
15 marijuana in the past and they decided instead of
16 buying marijuana on this day that they were going to
17 go rob.

18 You're going to hear from Antonio Davis who was
19 also in the car. He's going to tell you that there
20 was a plan to go up there and rob him, there was a
21 plan to make sure that they got the drugs and the
22 money or whatever was available.

23 Why they panicked and shot, we don't know. But
24 it doesn't matter. The fact that they engaged in
25 that activity and they shot and killed that man and

1 shot him, left him to die, then they left the scene.

2 Who else are you going to hear from in response?

3 You're going to hear from one of the other
4 co-defendants, Nikki Phillips. Nikki Phillips was
5 actually there when they formed the plan of the
6 robbery and what was going to happen.

7 She's going to tell you all about what happened
8 and how they disposed of the murder weapon,
9 cartridges, spent cartridges, all the evidence and
10 what their story was going to be when the police came
11 and asked.

12 So you're going to have three co-defendants
13 testifying against these two. That's important.
14 That 911 tape is important. Listen to what the man
15 said. I know it's going to be hard to get over the
16 emotion of listening to a dying man. I understand
17 that.

18 But understand that that is important for you to
19 listen to his word, listen to what he said, listen to
20 his -- if you will notice on the 911 tape he will
21 tell you, I don't know who did this, I don't know who
22 did this.

23 And the reason he didn't know is he, Durriel
24 Simmons, knew this and Durriel Simmons planned this
25 along with the other co-defendants. They get the

1 guns and they committed the robbery, then they
2 dispose of all the evidence after the shooting.

3 Listen to all the fact -- there's only going to
4 be 10 or 11 witnesses. The Judge said you'll
5 probably get this for your deliberations tomorrow.

6 At the end of the day I believe you will be
7 firmly convinced that these two individuals went to
8 this victim's house, broke down the door and shot and
9 killed him and left him laying there to die.

10 *THE COURT:* All right. Mr. Diggs?

11 *MR. DIGGS:* May it please the Court.

12 *THE COURT:* Yes, sir.

13 **OPENING STATEMENT**

14 *MR. DIGGS:* Good morning, ladies and gentlemen.
15 My name is Bill Diggs, as I stated to you yesterday,
16 and I represent Adam Bailey. Adam, I want you to
17 stand up for a second and come over here and let's
18 let them look at you.

19 During the course of this trial you're going to
20 have an opportunity to meet him more thorough, get to
21 know him better. I want you to look at him. You're
22 going to be able to judge after you hear all of the
23 evidence in this case whether or not the Solicitor's
24 version of the facts really occurred or did something
25 else occur.

1 That's -- that's why we have the jury here.
2 What we anticipate and what we know -- see, Mr. Von
3 Herrmann wasn't at the shooting incident at that
4 location. He wasn't there. He doesn't know what
5 happened.

6 He was there. He knows what happened. Very
7 first day following Mr. Patterson's death he came to
8 me, we contacted the police and we explained to them
9 what happened. That was all he could do at this
10 moment.

11 And what you're going to hear is that every
12 witness that he just identified gave the same factual
13 account that Adam did, every one. And only -- in
14 fact, Mr. Davis, Rock, is going to come in and
15 testify, gave the exact same account until Friday of
16 last week.

17 This murder was three years ago. The evidence
18 is going to show you he did that because they bought
19 his testimony. We'll show you that. That is why
20 it's important that you wait.

21 We're asking you to wait because there are going
22 to be times during this trial you're going to think
23 Adam Bailey must be guilty. But remember, a trial
24 has to unfold in a certain way. Somebody's got to go
25 first and someone has to go second and third in this

1 case.

2 So you're going to hear all of the State's
3 evidence, their best effort and you're going to
4 think, he might be guilty. But I'm asking you at
5 that point to think about what I'm saying now.

6 Wait until you have had an opportunity to hear
7 all of the evidence and that includes Adam before you
8 begin to make up your mind because at that time
9 you're going to have a serious doubt about what
10 happened here and you're going to have a serious
11 doubt about the Solicitor's allegations about Adam
12 Bailey's guilt.

13 Now, we're being tried with another defendant.
14 Believe me, we don't want to be. We'd rather be here
15 by ourselves. But we have two defendants.

16 The indictments in this case tell us or allege
17 that Mike Carr was the shooter. The State alleges
18 that. They know that. They allege it in their
19 indictments. Mike Carr did shoot Mr. Patterson.
20 That's not going to be in dispute.

21 Other than Mr. Carr's testimony, he's probably
22 going to deny it. But the Solicitor's correct in
23 this regard that evidence will be overwhelming when
24 you hear all of the case, that Mr. Carr was the
25 shooter.

1 On Adam's indictment -- haven't produced these
2 actually, the Judge will give them to you -- but or
3 read them to you, the State alleges with respect to
4 Adam Bailey that he went there to commit a robbery
5 and or a burglary.

6 They don't even know. But because someone was
7 killed in the process, because Mike Carr killed a
8 man, they are alleging Adam Bailey is guilty of
9 murder.

10 Every witness will -- you watch for this -- that
11 he puts up is going to say, yes, I entered into a
12 plea agreement and I am testifying pursuant to that
13 plea agreement.

14 So I would ask you to wait until the evidence
15 has all been presented and we all had a chance to
16 discuss it with you before you begin to make up your
17 mind.

18 Now, Adam's going to testify, I will tell you
19 that right now, he's going to testify. He's going to
20 tell you the same thing that Mr. Davis said up until
21 last Friday.

22 And that is that they went to make a purchase,
23 they were sitting around talking about wanting to get
24 some marijuana to smoke and so they decided they
25 would go over -- Duriel Simmons knows a -- a source

1 where they could get some marijuana.

2 And so they all kick in their contributions, 10
3 and \$20 a piece for the purchase of the marijuana.
4 Adam is there. He gives them \$20 to Mike Carr.

5 And they drive over to Mr. Patterson's house,
6 the four of them in the car, Duriel Simmons who is
7 taking the deal, Antonio Davis is taking the deal,
8 Mike Carr and Adam Bailey. They drove over to
9 Patterson apartment complex and the decision is made
10 for those two to go up and make the purchase.

11 Now when you look at this apartment complex, I
12 mean, it is -- you're going to see very close
13 quarters. I mean, there are people that live all
14 around it. Okay.

15 You can look out, people are going to be able to
16 look out their door -- their door -- the peep hole in
17 the door and see who is at Mr. Patterson's apartment.

18 But any way, they go over there, cars parked out
19 in the parking lot. These two go up to make the
20 purchase. And they knock on the door. Adam is still
21 say -- this is what he said since September the 29th,
22 2004. He knocked on the door, no one came to the
23 door.

24 Knocked on the door again and no one came to the
25 door. So Adam says, they're not home, let's go. And

1 so he turns to walk away, go back down the stairs,
2 this apartment is up on the second floor.

3 And as he's doing this, he realizes at that time
4 for the first time that Mike Carr's armed. Carr
5 pulls out a gun and says, I'm going to go in and
6 steal his drugs.

7 Adam says, you're crazy. You're crazy. I'm
8 leaving. Begins to walk away and bam, he hears the
9 door kicked in and everybody else in the complex
10 scares them, too, and the witnesses are going to tell
11 you they hear the bam, door opens, and bam, bam, bam,
12 three shots immediately.

13 What happened was, I would suggest, you're going
14 to conclude that Mr. Carr is surprised that somebody
15 is at home and he instantly kills him and they run.

16 Adam did not know the evidence is going to show
17 you -- he did not know Carr was robbed -- armed, he
18 did not know that a burglary or a robbery was
19 planned.

20 All of the witnesses gave -- watch this -- the
21 same statement until weeks later or years later deals
22 started to be made by the prosecution. We're going
23 to -- as the Judge said, this is not going to be a
24 long trial, but it's an important trial so we're
25 going to make sure that we take our time to present

1 to you everything that you need to make a decision in
2 this case.

3 We appreciate you being here because I know
4 there are other places you would prefer to be. But
5 we won't waste your time. I thank you for listening
6 to me this morning.

7 *THE COURT:* Thank you, Mr. Diggs. Mr. Galmore
8 for Defendant Carr.

9 *MR. GALMORE:* May it please the Court.

10 OPENING STATEMENT

11 *MR. GALMORE:* Good morning, ladies and
12 gentlemen. Once again let me introduce myself. My
13 name is James Galmore. I work in the Public
14 Defender's office and I have the privilege of
15 representing Michael Carr seated at the table next to
16 me.

17 I'm not going to try to draw any of your
18 sympathies with the 911 tape. I'm not going to try
19 to draw on your sympathies by bringing my client up
20 here and introducing him in front of you.

21 What I'd like to talk to you today about is
22 roles and responsibility because everybody in this
23 courtroom has a responsibility. My responsibility is
24 to represent my client, to zealously advocate for my
25 client.

1 Everyone in here including yourselves has a
2 responsibility in this. Your Honor, his
3 responsibility is to resolve our legal disputes just
4 like yesterday when you sat back there for an extra
5 hour, we were out here arguing with the Judge.

6 Well, not arguing at the Judge, a different
7 point. The Judge referees these things. That's why
8 when someone gets up and says, objection, the Judge
9 has a legal decision.

10 Madam Court Reporter, Mrs. Harris, she's taking
11 down a record of everything that's being said.
12 Yesterday during jury qualification when you all come
13 up one at a time and stand over here and talk, she's
14 taking a record of that.

15 When you all were in the back and we were out
16 here arguing, she's taking a record of that. When
17 you took your oath just now, it's right there on that
18 computer.

19 The Clerk has a responsibility. Her job is to
20 keep the indictments. Her job is to keep the
21 indictments, to keep all of the legal record of this
22 case.

23 I'd like to talk to you about their
24 responsibility. You have got Horry County Police
25 Department and the Horry County Solicitor's Office,

1 almost a hundred cops, 20 attorneys, and their job is
2 to prove this case.

3 Your Honor told you at the beginning, the burden
4 of proof is on the State. That means Mr. Carr
5 doesn't have to prove himself innocent. Mr. Carr
6 doesn't have to say a thing.

7 Mr. Carr, you might -- you might feel like he's
8 guilty, but the State has to prove it to you beyond a
9 reasonable doubt. Those are the words that came out
10 of Judge Lockemy's mouth, beyond a reasonable doubt.

11 When you look at this case at the conclusion of
12 this case, I think that you will agree with me that
13 the State hasn't proven to you anything. Let's talk
14 about what they did. Let's talk about what they are
15 going to present to you.

16 Have this shooting and the police start to
17 investigate. And I just ask -- they start knocking
18 on doors talking to people in the immediate area to
19 try to get an idea of what happened. Talking to
20 people on the... well, eventually the street started
21 talking back.

22 The street lied to them. Gave various stories.
23 The street dug a hole for itself, got himself in a
24 lot of trouble and got himself arrested.

25 So then the street, word out they had to get out

1 of the whole -- so they told new stories. Different
2 stories. Trying to making up a story we planned the
3 robbery, everybody agreed this is what we were going
4 to do and went up there and did the robbery and mike
5 car shot in the process. That's not the first story
6 that they told.

7 Now, once the police and once the Solicitor
8 heard something that they liked and heard Mr. Diggs
9 saying all these people are getting cut deals --
10 deals with the devil. Once they heard something they
11 liked, they brought this case.

12 And they're going to put these same people on
13 the stand. These same people are going to tell you
14 the same story even though they told different
15 stories to different people.

16 What I'm asking you to do -- well, what we're
17 asking them to do is to take that story, whichever
18 story you want to believe, take that story and prove
19 it.

20 I could give you a story all day. But when it
21 comes down to the evidence, this stuff here, the box
22 of bullets, when it comes down to the evidence, more
23 of the evidence suggests to me that I believe will
24 suggest to you that Michael Bailey was the shooter.

25 We ask you to listen and pay attention. I ask

1 you to keep an open mind. One thing Mr. Diggs said
2 was correct. Somebody has to go first and somebody
3 has to go second and somebody has to go third.

4 Please don't make any decisions in this case
5 until you have listened to all of the evidence, until
6 you have taken everything into account. And I ask
7 you to do your job. Your job is to challenge these
8 people, make them prove their case.

9 They talked to the boys and that's it. Your job
10 is to say if you didn't do your job, I'm not going to
11 find someone guilty. That is your responsibility.
12 Your responsibility is to hold them to that burden of
13 proof that the Judge told you.

14 Now let me tell you what we mean when we say
15 beyond a reasonable doubt. It doesn't mean beyond
16 every doubt 100 percent because nobody can be
17 100 percent about anything.

18 Varying doubt, very -- that might -- I would
19 submit would a stupid man to predict that. But we're
20 not going to that extreme. I will explain it in
21 terms of a football field, so maybe you'll
22 understand.

23 A football field runs a hundred yards from end
24 to end. Now, in civil cases, auto accident or a
25 breach of contract or something like that, you only

1 have to prove to right here. We call that the
2 greater weight or preponderance of the evidence. If
3 right to the 50-yard line, put one toe over. If you
4 can do that, you win your lawsuit.

5 Or administrative cases we have what's called
6 clear and convincing evidence. That's somewhere
7 right about here. You work it down the field, but
8 we're not there yet.

9 For a criminal case where the punishment is jail
10 time, you have to be here. Like I said, can't be
11 about -- but you have to be convinced, we're talking
12 about football -- you have to be convinced that the
13 very next question is going to score some points.

14 You got to take it all the way down to that goal
15 line. You don't have to cross the goal but that
16 would be 100 percent. But you got to take it down to
17 that goal line at least and you have to be firmly
18 convinced of Mr. Carr's guilt.

19 He is going to testify. He is going to tell you
20 what happened. He will tell you that he was at that
21 house. He will tell you that there was no robbery
22 or -- he will tell you that this was a drug deal, a
23 drug purchase, and he will tell you Michael Bailey is
24 the person that pulled the gun and shot Mr.
25 Patterson.

1 I thank you for your cooperation. Thank you for
2 your attention. I just ask that you keep an open
3 mind, let all of the testimony, let all of the
4 evidence come out before you make your decision.
5 Thank you.

6 THE COURT: Thank you, Mr. Galmore. First
7 witness for the State, Mr. Von Herrmann?

8 MR. VON HERRMANN: Yes, Your Honor. The State
9 calls Renea Hardwick to the stand.

10 THE COURT: Come around, ma'am.

11 RENEA HARDWICK, after being duly
12 sworn, testified as follows:

13 THE COURT: All right. Mrs. Hardwick, make sure
14 you speak loud. Get under that microphone.

15 THE WITNESS: Yes, sir.

16 THE COURT: All right. Your witness.

17 MR. VON HERRMANN: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. VON HERRMANN:

20 Q Mrs. Hardwick, can you please tell the jury where
21 you're employed?

22 A I'm employed with Horry County 911. I'm the Deputy
23 Director, oversee day to day operations.

24 Q Can you tell us basically what the 911 facility
25 operates and how it operates and what goes on there?

1 A Our responsibility is to answer all emergency calls,
2 non-emergency calls from public safety field personnel and
3 to handle the radio communications for them and to keep
4 the records. We're required by law to record the 911
5 calls and radio traffic and things of that nature.

6 Q And in the particular case, have I requested that you
7 give a copy or provide a copy of a 911 tape for that day?

8 A Yes, sir.

9 Q And that call was made from Mr. Patterson?

10 A Yes, sir.

11 Q Have you had an opportunity to listen to that tape?

12 A Yes, sir.

13 Q Let me show you State's Exhibit number 28 marked for
14 identification. State's Exhibit number 28 marked for
15 identification, are you familiar with that?

16 A Yes, sir.

17 Q Can you please tell the jury what that is.

18 A It's is a copy of the -- it's actually two calls.
19 It's the initial call from Mr. Patterson and then they
20 were disconnected and they called him back, so it's two
21 phonecalls.

22 Q And does this fairly and accurately represent the
23 conversation that was held that night?

24 A Yes, sir.

25 Q And was it held by 911 or your department in the

1 course of the business records, things of that nature?

2 A Yes, sir.

3 MR. VON HERRMANN: Your Honor, at this time we
4 move State's Exhibit number 28 into evidence.

5 THE COURT: Any objection, Mr. Diggs?

6 MR. DIGGS: Your Honor, I just renew the
7 position that we stated earlier.

8 THE COURT: All right. Any objection, Mr.
9 Galmore?

10 MR. GALMORE: No, sir, Your Honor.

11 THE COURT: All right. The matter will be
12 introduced in evidence, State's Exhibit 28 is it?

13 (WHEREUPON, State's Exhibit 28 was admitted into
14 evidence.)

15 MR. VON HERRMANN: Yes, sir, Your Honor.

16 THE COURT: Twenty-eight in evidence.

17 MR. VON HERRMANN: Your Honor, we'd like to
18 publish this to the jury at this time if it's all
19 right.

20 THE COURT: How -- you had them --

21 MR. VON HERRMANN: Yes, sir, Your Honor.

22 THE COURT: That's the speaker to it there?

23 MR. VON HERRMANN: Yes, sir. It's wired into
24 the speaker.

25 THE COURT: All right.

1 (State's Exhibit Number 28 played for the jury.)

2 MR. VON HERRMANN: Your Honor, at this point
3 talking to the medical providers.

4 THE COURT: Okay.

5 MR. VON HERRMANN: Your Honor, I have no further
6 questions.

7 THE COURT: All right. Mr. Diggs?

8 CROSS-EXAMINATION

9 BY MR. DIGGS:

10 Q Mrs. Hardwick, for the record, who was the 911
11 operator for that evening?

12 A On the first call it was Crystal Burke who no longer
13 works with our department.

14 Q Okay.

15 A The second call was the supervisor on duty, Randy
16 Lilly.

17 Q All right. And are both of those individuals
18 available to testify?

19 A No, sir.

20 Q Why is that?

21 A Crystal Burke no longer works for us and Randy Lilly
22 passed away --

23 Q Okay.

24 A -- in July of '05.

25 Q Okay. Sorry to hear that. That's all I have.

1 THE COURT: Mr. Galmore?

2 CROSS-EXAMINATION

3 BY MR. GALMORE:

4 Q Mrs. Hardwick, just to be clear, Mr. Patterson
5 doesn't say on that tape that Michael Carr shot--

6 MR. VON HERRMANN: Objection, Your Honor. The
7 tape stands for itself.

8 THE COURT: Overruled. Cross-examination.

9 BY MR. GALMORE:

10 Q Did he?

11 A I -- I could testify the authenticity of the tape.

12 Q Did Mr. Patterson say on the tape that Michael Carr
13 shot him?

14 A I didn't hear him --

15 Q Thank you.

16 A -- say that.

17 Q Did Mr. Patterson say on the tape whether there were
18 two people at his house?

19 A I didn't hear him say that.

20 Q Okay. Did Mr. Patterson say he saw who shot him?

21 A He said someone broke his door in and shot him is
22 what he said on the tape.

23 Q All right. Did Mr. Patterson give any details at all
24 about the suspect who shot him?

25 A No, sir.

1 Q Thank you, Mrs. Hardwick.

2 THE COURT: Redirect?

3 MR. VON HERRMANN: No further questions, Your
4 Honor. I would request that she be released from her
5 subpoena and returned to the 911 center.

6 THE COURT: Any objection? Hearing none, you
7 may return. Thank you very much.

8 THE WITNESS: Thank you.

9 (Witness left the stand.)

10 THE COURT: Excused from further service in this
11 trial. Your next witness, please.

12 MR. VON HERRMANN: Your Honor, the State would
13 call Danny Phillips (sic.)

14 THE COURT: Come up this way, ma'am, if you
15 would, all the way up to the front.

16 ASHLEY NIKKI PHILIPS, after being
17 duly sworn, testified as follows:

18 THE COURT: All right, Miss Phillips. Have a
19 seat there if you would. See the microphone there in
20 front of you? Try to speak into the microphone.
21 Give us your name again, ma'am, so I can make sure I
22 can hear you.

23 THE WITNESS: Ashley Phillips.

24 THE COURT: Just one second. Say it again
25 please ma'am.

1 THE WITNESS: Ashley Phillips.

2 THE COURT: All right. Please attain your level
3 of speaking. Your witness, please.

4 MR. VON HERRMANN: Thank you.

5 DIRECT EXAMINATION

6 BY MR. VON HERRMANN:

7 Q Mrs. Phillips, could you please tell the jury where
8 you live currently?

9 A In Myrtle Beach.

10 THE COURT: Ma'am, have to speak louder.

11 THE WITNESS: In Myrtle Beach.

12 BY MR. VON HERRMANN:

13 Q And how old are you?

14 A Twenty-one.

15 Q And you know what we're here talking about today;
16 correct?

17 A Yes, sir.

18 Q And do you have any current pending charges with
19 regard to the incident, the murder of Mr. Patterson?

20 A Yes, sir.

21 Q And can you tell the jury what those charges are?

22 A Accessory after the fact of murder.

23 Q And did you have an opportunity back in October of
24 2004 to meet with your attorney, Billy Monckton here of
25 the Horry County bar?

1 A Yes, sir.

2 Q And at that meeting did you--

3 MR. DIGGS: Your Honor, I object to the leading.

4 THE COURT: At this stage I would overrule it.

5 However, I would be concerned, Mr. Von Herrmann, that
6 you may be getting into matters which would not be
7 appropriate.

8 MR. VON HERRMANN: Yes, sir. I'm just trying to
9 get this cleared up.

10 THE COURT: Well, I know that. I'm going to
11 have to listen to each question. What's your next
12 question?

13 BY MR. VON HERRMANN:

14 Q What -- who met with you on October 4th -- 14th of
15 2004?

16 A My lawyer, Billy Monckton, Detective Lewis, and other
17 gentleman from the Solicitor's Office.

18 Q Let me show you a -- mark this.

19 (WHEREUPON, State's Exhibit No. 32 was marked
20 for identification only.)

21 BY MR. VON HERRMANN:

22 Q Let me show you State's Exhibit number 32 marked for
23 identification. Will that help you remember with who you
24 met with in our office?

25 A Yes, sir.

1 Q And can you please tell the jury who it was?

2 A Fran Humphreys.

3 Q And can you tell what position he holds within our
4 office?

5 A He's a Deputy Solicitor.

6 Q So he's number two guy in the office?

7 A Yes.

8 Q Did you at that point enter into an agreement with
9 regards to testifying, giving statements on this -- this
10 case?

11 A An agree--

12 Q Did you make an agreement?

13 A Yes, sir.

14 Q And could you tell the jury what that -- let me ask
15 you this. Show you State's Exhibit number 32. Is that
16 the agreement that you entered into?

17 A Yes, sir.

18 Q Take a look at all the pages. Let's make sure.

19 A (complied.) Yes, sir.

20 MR. VON HERRMANN: We'd move State's Exhibit
21 number 32 marked for identification into evidence.

22 MR. DIGGS: No objection.

23 MR. GALMORE: Without objection.

24 THE COURT: All right. In evidence, 32.

25

1 (WHEREUPON, State's Exhibit 32 was admitted into
2 evidence.)

3 BY MR. VON HERRMANN:

4 Q Before we get too far into all of this I want to talk
5 about what your agreement is. Can you tell me what your
6 understanding of the agreement between our office and you
7 with regards to any statements and testimony and all that,
8 tell us what you have to do.

9 A Tell the truth.

10 THE COURT: Into the mike.

11 WITNESS: To tell the truth.

12 BY MR. VON HERRMANN:

13 Q All right. Let's just go back through this item by
14 item. On the first one just take a quick glance at that.
15 Read it and tell the jury what that basically says.

16 A That I will be completely truthful and completely --
17 be completely truthful and -- about my involvement and the
18 other individuals in this matter.

19 Q Okay. Let's go to the second paragraph. Tell us
20 about what the second paragraph says.

21 A That I will agree to a polly gram (sic) examination
22 without any questions that anyone has.

23 Q All right. What about paragraph three?

24 A I shall not be charged with other violations of law
25 about which I give information involving myself and the

1 defendants in the case.

2 Q What about the next paragraph?

3 A That I would be a witness in the trial of all the
4 individuals in this matter and I will be completely
5 truthful and consistent with all of my prior statements
6 made to the State. Failure to testify in the matter of
7 the above will render the terms of this proffered
8 agreement --

9 Q And what about the fifth?

10 A -- the State had -- no action Nicole Phillips if this
11 case goes to court, she advise the Court of Ashley
12 Phillips' extent and degree of cooperation in connection
13 with this matter.

14 Q What are your instructions from Fran Humphreys as
15 well as myself with regard to your testimony in this
16 courtroom and all testimony you give in any future or
17 prior cases?

18 A To tell nothing but the truth.

19 Q Have you had a polygraph?

20 A No, sir.

21 Q This statement -- well, I believe you said was
22 October 14th, 2004?

23 A Yes, sir.

24 Q That was how many days after the incident?

25 A I think it was going on two weeks maybe.

1 Q Have you given a prior statement to law enforcement?

2 A Yes, sir.

3 Q Had you told law enforcement the truth?

4 A No, sir.

5 Q Why didn't you tell them the truth?

6 A Because I was scared and at the beginning we were all
7 talk -- we were all going to say the same thing.

8 Q Had you been threatened in any way?

9 A Not in -- not -- well, there were statements said,
10 yes, sir.

11 Q What type of statements were said that would be
12 threatening towards you?

13 A That like if anyone told that they would be a dead
14 man walking.

15 Q And who said that?

16 A Adam.

17 Q Adam Bailey?

18 A Yes, sir.

19 Q Let's talk about September 28th. Tell me about what
20 happened in the evening hours of September 28th.

21 A We were all in the house in--

22 Q You're going to have to raise your head up and talk
23 into the microphone.

24 A Okay. We were all in our own apartment at Fairwood
25 Lakes and the Burgess community and we were all over there

1 planning to go to a house in the Forestbrook area to go
2 and rob someone and to get drugs and money.

3 Q Tell me who was present.

4 A Myself, Mike Carr, Adam Bailey, Antonio Davis and
5 Duriel Simmons and Kareen Harry.

6 Q All right. Who was making the plan to rob?

7 A Everyone.

8 Q Who knew Mr. Patterson?

9 A Duriel Simmons.

10 Q Did any of the other individuals know Duriel, I mean
11 know Mr. Patterson?

12 A No, sir.

13 Q Did you know how this -- how Duriel Simmons knew Mr.
14 Patterson?

15 A They lived across the street -- well, Duriel's mother
16 lived across the street from him.

17 Q What did Kareem Harry, did he ever leave the
18 apartment that night?

19 A No, sir.

20 Q Did you ever leave the apartment that night?

21 A No, sir.

22 Q Who left the apartment?

23 A Mike Carr, Adam Bailey, Antonio Davis and Duriel
24 Simmons.

25 Q Let me show you a couple of exhibits we have marked.

1 Show you State's exhibit number -- State's exhibit number
2 two. Do you recognize this?

3 A Yes, sir.

4 Q Can you take this where it says Ashley Phillips'
5 apartment, can you place the arrow to your apartment?

6 A Yes.

7 Q And what is that apartment complex named?

8 A What is it?

9 Q What is the name of it?

10 A Fairwood Lakes.

11 Q Do you know or did you know Mr. Patterson?

12 A I knew of him.

13 Q And how was that?

14 A From him living across the street from Duriel.

15 Q What is Duriel -- your relationship to Duriel?

16 A At the time he was my boyfriend.

17 Q How long have y'all been broken up?

18 A Since he went to jail.

19 Q How long ago was that?

20 A Going on three years.

21 Q Okay. Tell me what the plan was. I mean -- well,
22 first of all did -- how did they know the layout of the
23 apartment?

24 A From Duriel.

25 Q Tell us what the general plan was for the robbery.

1 A Well, Duriel was going to drive the car and Adam and
2 Michael were going to go upstairs and go into the house
3 and get the stuff and Duriel and Rock were going to stay
4 in the car.

5 Q Let me show you -- whose car did they drive?

6 A My car.

7 Q Let me show you State's Exhibit number five. It's in
8 evidence. Do you know what that -- whose car that is?

9 A That's my car.

10 Q Okay. So tell me what happens when they leave --
11 what time did they leave the apartment?

12 A It was around 12:00, maybe 12 -- between 12 and
13 12:30.

14 Q All right. Tell me exactly who left the apartment.

15 A Mike Carr, Adam Bailey, Duriel Simmons and Antonio
16 Davis.

17 Q At any point during the planning of the robbery did
18 you see any guns?

19 A Yes, sir.

20 Q Tell me about how many guns and who had them.

21 A Two guns and Adam and Mike had them.

22 Q What were their comments about going to rob Mr.
23 Patterson?

24 MR. DIGGS: Your Honor, I object to the leading.

25 THE COURT: Well, haven't been the previous

1 question I would agree, but she's already mentioned
2 that, so that wouldn't be -- would have been -- the
3 first question. Any way, I overrule your objection.

4 MR. DIGGS: Thank you.

5 BY MR. VON HERRMANN:

6 Q Please tell us what comments were made about Adam
7 Bailey and Mike Carr about the robbery along with Antonio
8 and Duriel.

9 A I got -- Adam was just like he's going to go and do
10 it and Mike didn't say much. Like he didn't even say
11 anything. And Antonio just said there's nothing to worry
12 about, there's nothing to be scared of.

13 Q So they tell -- they leave your house or your
14 apartment.

15 A Yes, it was not my apartment.

16 Q I'm sorry, the apartment y'all were at. What did you
17 do then?

18 A I sit down and they left me and Kareem Harry stay at
19 the house and they left.

20 Q Now, whose apartment were y'all in then?

21 A Apartment that Kareem was staying in, the girl let
22 him stay in while she went out of town.

23 Q So they leave. How long before they come back?

24 A About an hour or so. I don't know exactly the time.

25 Q Had you had any phonecalls or any conversations with

1 anybody -- what had you been doing?

2 A I fell asleep.

3 Q Tell me what happened when they came home. Who was
4 there.

5 A Adam, Antonio and Duriel.

6 Q Where was Mike Carr, do you know?

7 A He -- he did not come back with them.

8 Q Did they have a gun at that point?

9 A I -- I don't know.

10 Q What was said when they came home?

11 A Mike shot the dude.

12 Q Did they have any conversation about what to do about
13 it or what to say about it? What did you do then?

14 MR. DIGGS: Your Honor, I didn't hear the
15 answer.

16 THE COURT: What was your answer?

17 THE WITNESS: I don't know.

18 BY MR. VON HERRMANN:

19 Q You don't know if they had any conversation or they
20 didn't have any conversation?

21 A They just said that, that he shot the guy.

22 Q So what did you do then?

23 A Then me and Duriel and Antonio went back to my
24 apartment.

25 Q Now, when you say back to your apartment, how far

1 away from your apartment was the apartment you were
2 staying in?

3 A The same neighborhood.

4 Q Said the same neighborhood like how far in distance?
5 Same apartment complex?

6 A No, it was a couple complexes away from each other.

7 Q So what time -- how long do you think it took to get
8 back to your apartment?

9 A Not even a minute.

10 Q What time did they get back, do you recall?

11 A No, sir, I don't know.

12 Q What did you do when you got back to your apartment
13 complex?

14 A I went to sleep.

15 Q Did y'all have any conversation, discussion about
16 what went on other than --

17 A He -- then he said he killed him.

18 Q -- did they indicate at that point that they had
19 broken in to it?

20 A Yes, sir, they -- at the -- it must have been at the
21 house that he -- that they said that he went up to the
22 door and he -- that they kicked in the door and that when
23 they kicked in the door that the guy was standing there
24 and Mike shot him.

25 Q The next day tell us what happened. What time did

1 you get up?

2 A I got up the next day I went to work until about
3 1:00.

4 Q When you got back at 1:00 to do -- or did you go to
5 your apartment?

6 A Yes, and Duriel was at my house and he said that --
7 that his mother had called and said that the guy died and
8 that they need to go and get rid of the gun.

9 Q Okay. How many guns were in total when they left?

10 A Two.

11 Q Tell me what happened and what did you do with Duriel
12 Simmons?

13 A Me and Duriel went down the road and got Adam Bailey
14 and we -- they told me to drive to the end of Freewoods
15 Road, to go and get rid of the gun.

16 Q Describe the end of Freewoods Road to the jury.

17 A It's a -- it's a long road and you go down into the
18 road and it's a wooded area and it has a gate like you
19 can -- it's a little drive and it has a gate and then a
20 whole bunch of woods.

21 Q So tell the jury again who was present in the car
22 when you went to dispose of the weapon.

23 A Me, Duriel Simmons and Adam Bailey.

24 Q Let me show you Exhibit -- State's Exhibit number
25 three and four marked for identification. Are you

1 familiar with that location?

2 A Yes, sir.

3 Q And can you tell the jury what this location is?

4 A That's the end of Freewoods Road.

5 Q Let me show you State's Exhibit number seven in
6 evidence. Are you familiar with that?

7 A Yes, sir.

8 Q And can you tell the jury what this is and what
9 happened to it?

10 A Those are bullets that Duriel Simmons threw out of
11 the car when we went to get rid of the gun.

12 Q Who got rid of the -- or what did Mr. Bailey do
13 during that time?

14 A Adam, he got out of the car, back the car in and went
15 and jump the fence and went and got rid of the gun.

16 Q And those exhibits that I showed you, do they depict
17 the fence that he jumped and went behind?

18 A Yes, sir.

19 MR. VON HERRMANN: Your Honor, I'd like to
20 publish these to the jury if you wouldn't mind.

21 THE COURT: You may show what to the jury to
22 publish it?

23 MR. VON HERRMANN: State's Exhibit three and
24 four.

25 THE COURT: May go forward... pass them...

1 BY MR. VON HERRMANN:

2 Q Miss Phillips, what comments were made after Mr.
3 Bailey disposed of the weapon?

4 A He was just saying that now all the evidence is gone
5 and nothing that -- nothing should -- that no one should
6 get in trouble and that if anyone does then they're a dead
7 man walking.

8 Q When he came back from over the fence, did he have a
9 gun with him?

10 A No, sir.

11 Q Did you at some point find out from the co-defendants
12 that a gun was put over -- another gun was hidden?

13 A Yes, sir.

14 Q And who hid that gun?

15 A I don't know who hid that gun.

16 Q Do you know where it was hid?

17 A The -- people were -- had said that the gun was hid
18 in the woods.

19 MR. DIGGS: Your Honor, I would object. Object
20 to the hearsay.

21 THE COURT: I sustain.

22 BY MR. VON HERRMANN:

23 Q Was it one of your co-defendants that told you?

24 MR. DIGGS: I object to the leading.

25 MR. VON HERRMANN: It doesn't suggest the

1 answer.

2 *THE COURT:* It does. I sustain the objection.

3 BY MR. VON HERRMANN:

4 Q Would anybody else in the world other than the people
5 you were with know where the gun was hidden?

6 A No, sir. No, sir.

7 Q So who -- was it one of them that told you?

8 A Yeah, it was -- I don't know exactly who did that,
9 but I know that it had to be one of them because all those
10 were the only people who had the gun.

11 Q Tell me about when you -- did you ever see Adam
12 Bailey throw any empty shells out of the car?

13 A No, sir.

14 Q Do you know what happened to the empty shells?

15 A No, I have no idea.

16 Q How about with -- are you familiar with anybody
17 throwing any empty shells?

18 A Those were the only things that I saw.

19 Q So you were there when they disposed of those two?

20 A Yes.

21 MR. VON HERRMANN: No further questions, Your
22 Honor.

23 *THE COURT:* Mr. Diggs?

24 MR. DIGGS: Your Honor, before I get into the
25 cross-examination I'm going to need a television.

1 I'm going to ask that we take just a morning break
2 while we set that up.

3 THE COURT: Well, we can do that. We can take
4 15 minutes. Ladies and gentlemen, please do not
5 discuss the case. Please step back in the jury room,
6 please.

7 (Jury left the courtroom at 11:51 am.)

8 THE COURT: Mr. Diggs, hang on just a second.
9 Ask your assistant -- where are we now that we need
10 to discuss is -- obviously it's an open courtroom and
11 it's fine come in in an open courtroom, but I think
12 overall you three attorneys to make sure, Mr. Von
13 Herrmann --

14 MR. VON HERRMANN: Yes, sir.

15 THE COURT: -- to make sure when you get people
16 in when the case begins, people walking in, walking
17 in, has to be a little distracting to the jury. I
18 could very well just go and tell the officer other
19 than court personnel don't let anyone else in once we
20 get started.

21 I don't want in any way to prejudice anybody out
22 there who wants to be here because of their concern
23 of a family member or whatever else, but we had two
24 groups came in after the trials started and during
25 the course of opening statements and testimony.

1 And so I before I step off the bench I'm going
2 to let y'all know about the time we're going to come
3 back on and advise them, make sure anyone you have in
4 the courtroom interested in being here is in the
5 courtroom about that time. Because once we get the
6 jury in, I just don't want groups of people walking
7 in.

8 Now, what is this about a television?

9 MR. DIGGS: Your Honor, what we are going to do
10 is use prior statement of Miss Phillips.

11 THE COURT: Want a projector or something, see
12 something on the screen?

13 MR. DIGGS: It's a video.

14 THE COURT: Oh, it's a video of her?

15 MR. DIGGS: It's a video of her statement.

16 THE COURT: All right. Is that in evidence?

17 MR. DIGGS: Not yet.

18 THE COURT: You plan to introduce it into
19 evidence?

20 MR. DIGGS: I plan to introduce it.

21 THE COURT: Okay.

22 MR. VON HERRMANN: Your Honor, we are are going
23 to make a motion to exclude that. Obviously rule --
24 of the rules of evidence he has to present her,
25 chance to either accept or deny whether she made that

1 statement. If she accepts that statement, no outside
2 evidence is admissible. I can provide the Court--

3 *THE COURT:* Now, I'm -- you feel that she's
4 making something inconsistent with what she said
5 before you can ask her about it. If she admits she
6 made an inconsistent statement, that she did say what
7 you allege she said, then that -- then I know
8 extrinsic evidence is permitted.

9 *MR. DIGGS:* The statement itself is not
10 extrinsic.

11 *THE COURT:* She's on the stand if you can ask
12 her if she -- if she said something. If she has, she
13 has, but what's the purpose of introduction it --
14 then if she admits it?

15 *MR. DIGGS:* I can -- the statement itself is not
16 extrinsic evidence. It's evidence that's in
17 before -- part of the record. She's admitted making
18 the statement.

19 What the rule and Mr. Von Herrmann cite applies
20 to -- is me bringing in third parties to impeach her
21 say yes she did make the statement. The statement
22 itself, Your Honor, has always been admissible. It's
23 even substantive evidence under State v--

24 *THE COURT:* I know what is it you want the jury
25 to discern from -- from this video of the statement?

1 MR. DIGGS: Because in her statement they can
2 see her demeanor. She is clearly trying to implicate
3 Adam Bailey, okay, because she tells the story about
4 going down to the end of the road, climbing over the
5 fence and throwing the gun away, but she doesn't
6 mention anything about planning a burglary or seeing
7 any guns or Adam Bailey having any knowledge of
8 anything that was going to occur.

9 The only thing in this statement that she can
10 use to implicate Adam with was the fact that he
11 disposed of the weapon, and that's it. And of course
12 by that time Mr. Bailey knew that the weapon had been
13 used in a murder. He was there when it was used.

14 So I want to use the television to show the jury
15 what her state of mind was and the -- show them
16 exactly what she said on September -- I believe it's
17 September the 29th if not the 28th on the day that
18 she was taken into custody in Horry County.

19 And again, Your Honor, the statement itself
20 would be substantive evidence under State v Copeland.

21 MR. VON HERRMANN: Your Honor, it's clearly a
22 prior inconsistent statement. It's not admissible.

23 THE COURT: How you show her demeanor without
24 showing the video?

25 MR. VON HERRMANN: He can ask her her demeanor.

1 He's certainly open to discussion, you know, were you
2 scared, were you threatened, anything like that. I
3 mean, there -- that's -- I mean rule 613 is just...

4 MR. DIGGS: Your Honor.

5 MR. VON HERRMANN: I mean, it's clearly
6 extrinsic evidence and 613 clearly on four corners
7 addresses the issues this -- if she denies or makes
8 any--

9 THE COURT: I'm aware of the basic rules, sir,
10 that you ask her, she has a chance to deny it. If
11 she admits she made that then it precludes extrinsic
12 evidence.

13 But his position of her demeanor, whether she
14 was in the state of excitement or whatever else that
15 may have caused her to say something one time and
16 something now, whether she was calm, those types of
17 things, so I do not -- able to view her demeanor.

18 MR. VON HERRMANN: I don't disagree, but I think
19 the way to get that information to the jury is to ask
20 her about it. It's not to circumvent 64 -- 613 by
21 claiming that you're showing her demeanor.

22 If it's her demeanor we want to cut the
23 statement off and they can watch her and see if she
24 acts nervous or has any outward demeanor, I'm okay
25 with that.

1 THE COURT: Well, I'm inclined to admit it, rule
2 again before we go further. How long is this video?

3 MR. DIGGS: About 20 minutes.

4 THE COURT: All right.

5 MR. DIGGS: Your Honor, also if you look at that
6 rule, I would cite 613B where it says, quote, this
7 provision does not apply to admissions of a party
8 opponent as defined in rule 801D2. 801D2 says a
9 statement by a co-conspirator or other party during
10 the course -- further excited...

11 THE COURT: Mr. Galmore, do you have any concern
12 one way or the other?

13 MR. GALMORE: No, sir.

14 THE COURT: Okay. Now we're going to step off
15 the bench for a minute. When I do that you're not
16 permitted to discuss your testimony with anyone. Do
17 not ask, should I say something else, how should I
18 address this or that.

19 Do not discuss your testimony with anyone,
20 ma'am. When we get back in here you'll be back on
21 the stand and either side is going to ask you have
22 you talked with anyone about your testimony. And if
23 you have, then you are violating the instructions of
24 this Court. Do you understand?

25 THE WITNESS: Yes, sir.

1 THE COURT: So you can step off and all that but
2 do not talk to anyone about your testimony. If --
3 anyone is around you is subject to be called and
4 asked, too, all right? Let's just take a few minutes
5 here. It's right now 10 minutes -- nine minutes till
6 by that clock up there.

7 I will be back here at eight minutes after.
8 So -- no, I will give you 10 minutes after. You want
9 to be in this courtroom, be seated in the courtroom
10 at 10 minutes after 12.

11 MR. VON HERRMANN: Thank you.

12 THE COURT: Mr. Von Herrmann?

13 MR. VON HERRMANN: Yes, sir.

14 THE COURT: I might keep your book for a minute.

15 (Whereupon a recess was had.)

16 THE COURT: Now I'm going to try to see if we
17 can stop for lunch around 1:00. This is going to be
18 20 minutes, I'm not sure if it's going to let you
19 complete your cross, but we'll see. And Mr.
20 Galtmore's cross, too. The State still objects to
21 having the matter come in?

22 MR. VON HERRMANN: Yes, sir. And Your Honor, I
23 do have one more additional objection or reason for
24 objection and I'm really not positive on how the
25 defense intends on counting all of that, this

1 statement A has not been authenticated by this
2 witness. She hasn't seen --

3 THE COURT: That's exactly.

4 MR. VON HERRMANN: -- and the second thing, Your
5 Honor, is it's loaded with hearsay because she's
6 being interviewed by two deputies or two police
7 officers, so everything they say is hearsay, and I
8 think that's exactly the reason 613--

9 THE COURT: Well, you got a good point there.
10 You didn't tell me that. I thought this was her
11 making the statement. So we got deputies in there,
12 too?

13 MR. VON HERRMANN: Yes, sir. She being
14 interviewed by police officers.

15 THE COURT: All right. I might need to review
16 the statement then before I let it come in. I didn't
17 know that. I'm going to ask -- let the jury know --
18 you have any questions, Mr. Diggs, you have -- I wish
19 y'all would have brought this up to me before trial.
20 I asked y'all about motions and matters. I could
21 have done this yesterday. Mr. Diggs?

22 MR. VON HERRMANN: I had no idea.

23 MR. DIGGS: Well, the entire defense is of
24 course the--

25 THE COURT: But you knew they were going to

1 object to this.

2 MR. DIGGS: I mean, I had no idea he was going
3 to object, you know.

4 THE COURT: Well now, I haven't heard what these
5 officers are saying. They could be saying things
6 that are totally hearsay on hearsay on hearsay.

7 MR. DIGGS: Well, what they're doing, I --
8 Judge, we have looked at the tape and it was apparent
9 to me that's going to be admissible as a prior
10 inconsistent statement, and you know, it never
11 occurred to me that that the State would object to it
12 on the grounds that one it was extrinsic or two that
13 it was hearsay.

14 THE COURT: Well, I have ruled on those. But my
15 concern is what they may say on there. Of course
16 there's a lot of hearsay said here today that no one
17 objected to, but about officer, I just don't know
18 what they said. I think I need to -- is there a
19 transcript of this statement anywhere?

20 MR. DIGGS: Here -- Your Honor, last time I made
21 a transcript.

22 THE COURT: Listen. Please. I am so concerned
23 with people saying that, you know, some other trial,
24 so and so.

25 MR. DIGGS: Yes, sir.

1 THE COURT: This is this trial. I just want to
2 know so then I could see what the officer said. Do
3 y'all recall what they say? Is there anything
4 significant they say in there?

5 MR. VON HERRMANN: Your Honor, it's a lot of --
6 I quite frankly didn't think the tape was admissible
7 and anything and I watched it sometime back and clear
8 it was inconsistent statement.

9 She has watched the tape is all -- she's
10 admitted to me that she made inconsistent statements.
11 I went strictly by 613 interpretation and, you know,
12 the cases that are supported, so no, sir, I never --
13 in all honesty never thought this would become an
14 issue myself because I didn't think it was
15 admissible, and I didn't...

16 THE COURT: All right.

17 MR. DIGGS: Your Honor, this is--

18 THE COURT: I will review the statement. Do you
19 have any question -- if we can do anything, address
20 anything until the jury--

21 MR. DIGGS: I can go ahead and cross-examine
22 her, Your Honor, and leave the tape till last.

23 THE COURT: Let's do that. Let's move the TV
24 then.

25 MR. DIGGS: But Your Honor, that taped statement

1 is the one that was given to us by the Solicitor with
2 respect to calling the case and I'm -- that's a spur
3 of the--

4 MR. VON HERRMANN: I just took it straight out
5 of the evidence and handed it to him. I haven't even
6 seen this particular one, Your Honor, so I can't
7 authenticate it.

8 THE COURT: The Court make rules to admit has
9 the means to do that one way or the other. They are
10 not... get the officers who were involved or her or
11 anybody else to identify her on the tape and other.
12 We can do that outside the presence of the jury.

13 MR. DIGGS: Your Honor, we can probably do it...

14 THE COURT: All right. I'm going to let the
15 jury come, his questions to her, and if you do finish
16 and Mr. Galmore asks questions, I will let --
17 preserve the right to keep her on the stand for
18 purposes of the video if I permit it to come back in.
19 All right. Bring the jury in, please.

20 (Jury entered the courtroom at 12:30 p.m.)

21 THE COURT: When the first question is asked no
22 one leaves, no one comes in, okay? Okay. We'll now
23 proceed with cross-examination. Mr. Diggs.

24 MR. DIGGS: Thank you, Your Honor. May it
25 please the Court.

CROSS-EXAMINATION

1
2 BY MR. DIGGS:

3 Q Miss Phillips, how are you this afternoon?

4 A I'm good.

5 Q Okay. Let me start with your plea agreement. It's
6 been introduced into evidence. And the precise number
7 escapes me, but it's in -- into evidence is the agreement
8 that you identified in your direct examination.

9 Do you have -- did you ever have any discussions with
10 the prosecution about polygraph?

11 A Have I taken one? No, sir. Oh, he said -- he asked
12 if I would be willing to take one and I said yes.

13 Q Okay.

14 A But doing one, no one ever did it.

15 Q And did they ever ask you to take a polygraph?

16 A He asked if I would be willing to take one.

17 Q Did he ask you to take one?

18 A No.

19 Q All right. No one ever asked you to take a
20 polygraph?

21 A No, sir.

22 Q They just took you at face value; is that your
23 testimony?

24 A Yes, sir.

25 Q Took your testimony at face value. Now, what did

1 they promise you on the day that you gave that statement?

2 A I don't know.

3 Q Had they promised you you wouldn't be charged with
4 murder; didn't they?

5 A I--

6 Q You want to see the statement?

7 A I was never charged with murder.

8 Q All right. And they also promised you you wouldn't
9 be; didn't they? You can tell us.

10 A I don't -- I don't.

11 Q You don't remember. Would it help you if you saw
12 your statement?

13 MR. VON HERRMANN: Your Honor, I'm going to have
14 to object. He can ask the question and let her
15 answer then he can ask the follow-up question. I
16 don't think that was her answer. He interrupted.

17 THE COURT: Do you remember, ma'am?

18 THE WITNESS: I don't understand he -- I was
19 never charged with murder so I don't know what he's
20 asking me. Is he saying that I will be -- that
21 nothing would happen to me? No, they didn't ever
22 promise me that.

23 BY MR. DIGGS:

24 Q All right. Your testimony is they never promised you
25 you would not be charged with murder. That is your

1 testimony?

2 A Yes.

3 Q Okay. And it would be on the videotape of your
4 statement, that would be news to you; is that right?

5 A Yes.

6 Q Now. Okay. So no promises were made to you, just
7 made this statement because you wanted to.

8 A Yes.

9 Q All right. Now, when was the first time you came up
10 with this story about your car? You just gave them the
11 keys and said, go ahead and use my car. When was the
12 first time you told that story? Was at this time, wasn't
13 it, on the 14th of October?

14 A No, sir.

15 Q Oh, um, refresh my memory then. When was it?

16 A When I was taken to the Horry County Police
17 Department.

18 Q All right. You said at that time, and you're
19 correct, I will agree with you, you told them right then
20 you volunteered for your car to go; correct? You told
21 them that?

22 A At the Police Department, yes.

23 Q Yes. But you didn't tell them anything about a
24 robbery; did you?

25 A Yes.

1 Q Oh, okay. Your testimony is that the Horry County
2 Police Department -- what was this, the 28th of September?
3 Was it the same day Mr. Patterson was shot or the next
4 day? Was the 28th; wasn't it?

5 A No, sir, I did a written -- a written statement and
6 then I did a video.

7 Q All right.

8 A So in the written statement, no, sir, I did not tell
9 them that.

10 Q You told them in your written statement that you
11 loaned Duriel your car; did you not?

12 A No, sir, not in the first written statement.

13 Q Well then you tell us again, maybe I misunderstood.
14 When was the first time you told them about you giving
15 Duriel permission to use your car? When was the first
16 time?

17 A At the Police Department.

18 Q All right. Which day? How many times were you at
19 the Police Department?

20 A Two times -- twice.

21 Q All right. Let's focus in. Let me help you, Miss
22 Phillips. On the 28th of September, 2004 you went to the
23 police station; correct?

24 A Yes.

25 Q Horry County.

- 1 A Yes.
- 2 Q And you gave a statement; correct?
- 3 A Yes.
- 4 Q And you told them that you permitted Durriel to use
5 your car; correct?
- 6 A Yes.
- 7 Q But you failed to tell them about any robbery; didn't
8 you?
- 9 A No, sir.
- 10 Q Okay. Do you want to read your statement? I have it
11 right here.
- 12 A Okay.
- 13 Q If you can authenticate it.
- 14 A Okay.
- 15 Q Okay. First of all, look through this and see if you
16 can identify it for me.
- 17 A (complied.) Yes, sir.
- 18 Q Okay. What is that?
- 19 A This is a statement that I wrote at my house.
- 20 Q Okay. And why did you write that statement?
- 21 A Because the detective asked me to write the statement
22 outside my house.
- 23 Q All right. And in that statement what do you say?
- 24 A I--
- 25 Q In fact, I would ask you to read that.

1 MR. DIGGS: Your Honor, I have admitted into
2 evidence at this point and ask that she read it.

3 THE WITNESS: Me, Duriel--

4 THE COURT: One second, ma'am. He's made a
5 motion.

6 THE WITNESS: Oh.

7 MR. VON HERRMANN: To have the entire statement
8 put in evidence? Correct.

9 MR. DIGGS: Yes.

10 MR. VON HERRMANN: All three pages?

11 MR. DIGGS: Yes.

12 MR. VON HERRMANN: No objection.

13 THE COURT: Mr. Galmore?

14 MR. GALMORE: No objection, Your Honor.

15 THE COURT: All right. Let's go ahead and hand
16 it back to the Court Reporter to be marked.

17 (WHEREUPON, Defense Bailey Exhibit 1 was
18 admitted into evidence.)

19 THE COURT: Defense Bailey one in evidence.
20 Okay.

21 BY MR. DIGGS:

22 Q All right. Miss Phillips, let me get you to read
23 that for us.

24 A Me, Duriel and Rock went to the studio in Myrtle
25 Beach.

1 THE COURT: Ma'am, she's repeating what you're
2 saying. Don't read too fast.

3 THE WITNESS: Oh. Me, Duriel and Rock went to
4 the studio in Myrtle Beach at 11, 12:30. We then
5 went to Kareem's house for a--

6 THE COURT: Slow down, ma'am. Go ahead.

7 THE WITNESS: For a bit. Then I gave Duriel my
8 keys, he left. I then left walking to my house. I
9 went to sleep. Duriel and Rock came in around 3:00.
10 Didn't wake me up. Not too much -- his mother called
11 and said there was a shooting in Turtle Cay.

12 He asked Duriel if he did -- did it or was
13 there. He said no. Hung up the phone and we went to
14 sleep. That was at 6:30 for work, Duriel was asleep.
15 I came home from work at 11 -- at one or 2:00.

16 I went to the store. Duriel's mother called
17 back and said someone was dead. Duriel and me then
18 left the house to go to a friend's house. We saw
19 Adam. Duriel told him that someone died. Adam asked
20 us to take him somewhere.

21 He got in and told us to drive to the end of the
22 Freewoods Road. He didn't say anything to us the
23 whole ride. He told me to back into the road. I
24 did.

25 He jumped out. He came running back and told us

1 he buried it with his hands. We -- talking about the
2 gun -- we dropped him off by the big P and came home
3 and we went -- that is when the detective was there.

4 BY MR. DIGGS:

5 Q All right. Now, I don't remember you reading
6 anything in that about planning a robbery. Did I -- am I
7 correct?

8 A Correct.

9 Q You didn't say anything about it; did you?

10 A No, sir.

11 Q And you were trying to implicate Adam the best you
12 could; didn't you? Weren't you? Were you not?

13 A I don't...

14 Q You put him going down to the end of Freewoods Road,
15 disposing of the gun. You're trying to get that boy in
16 trouble; are you not?

17 A No, I'm telling the truth. I have no reason to get
18 him in trouble.

19 Q All right. It slipped your mind that they planned
20 the robbery and talked about it and all of that before you
21 gave them the car keys?

22 A Yes.

23 Q That slipped your mind.

24 A No, I just didn't tell them, say that.

25 Q All right. You didn't tell them. But isn't it true

1 the only time you did tell them was after Mr. Humphreys
2 promised you you wouldn't be prosecuted for the murder;
3 isn't that true?

4 A No, sir.

5 Q Oh, what's false about it?

6 MR. VON HERRMANN: Your Honor, I'm sorry.

7 That's argumentative.

8 BY MR. DIGGS:

9 Q How is that incorrect?

10 MR. VON HERRMANN: It's not even a question
11 whether she said no or he said what's false about it.

12 THE COURT: What is your question again? Let's
13 hear it one more time.

14 MR. DIGGS: She denied--

15 THE COURT: Ask her.

16 MR. DIGGS: All right.

17 BY MR. DIGGS:

18 Q Isn't it true the first time you did remember to tell
19 them about planning of the robbery was in exchange for
20 Mr. Humphrey's promise to you that you would not be
21 charged with murder; isn't that true?

22 A I -- I don't remember the first time that I said
23 that. I think that there was a time in between that
24 that -- that I said -- that I spoke to the detective after
25 this statement.

1 Q All right.

2 A So I'm not sure if that was the first time. I don't
3 think so.

4 Q All right.

5 A I'm not completely sure.

6 Q Okay. Could you tell us maybe when that was?

7 A This was at my house. There was another time that I
8 was at the Police Department and we spoke to the
9 detectives.

10 Q All right. And that was on video; wasn't it?

11 A Yes, sir.

12 Q Okay. Would it help you refresh your memory if you
13 could watch the video?

14 A I don't know.

15 Q And are you telling us that on that video you tell
16 about the robbery that was planned? Is that your
17 testimony?

18 A I don't remember if that was when it was.

19 Q You don't remember.

20 MR. DIGGS: Your Honor, that's not a denial.

21 THE COURT: Sir, you don't need to explain
22 things to me. You ask the questions.

23 MR. DIGGS: Yes, sir.

24 BY MR. DIGGS:

25 Q Miss Phillips, why is it that you permitted your

1 key -- your car to be used in an armed robbery with no
2 more concern that -- I think your testimony was you gave
3 them the car keys, they--

4 MR. VON HERRMANN: Your Honor, if he'd just ask
5 her a question, allow her to answer it, then a
6 follow-up question. It's--

7 THE COURT: Let him finish first. What's your
8 question?

9 BY MR. DIGGS:

10 Q Your testimony on direct, Miss Phillips, was that
11 they discussed the robbery, these two, they had the guns,
12 they were going to go commit a robbery and for no reason
13 you just let them use your car to do it.

14 A Yes, sir.

15 Q And then with no more interest than to just be able
16 to go in, lie down and go to sleep.

17 A Yes, sir.

18 Q All right. You had no curiosity at all at that time
19 about whether they were going to commit the robbery?

20 A No, sir.

21 Q You weren't curious about that?

22 A No, sir.

23 Q You weren't curious about the possibility of somebody
24 getting hurt or killed?

25 A No, sir.

1 Q All right. And do you agree with me that if you
2 hadn't given them your car, Mr. Patterson probably
3 wouldn't have been shot?

4 A Yes.

5 Q Don't you agree with that?

6 MR. VON HERRMANN: Your Honor, I'm going to have
7 to object to speculation. How does she know
8 whether--

9 THE COURT: Let her answer let him...

10 THE WITNESS: Yes, sir.

11 BY MR. DIGGS:

12 Q You agree with it? All right. And you agree that if
13 that's true, you could have been prosecuted for murder.
14 Don't you agree with that?

15 THE COURT: I sustain that objection. That's a
16 legal question, sir.

17 BY MR. DIGGS:

18 Q Now, you and Duriel, this next day on the 28th, you
19 and Duriel meet -- where do y'all meet?

20 A He lives with me.

21 Q All right. Y'all were living together. He's a
22 co-defendant; right?

23 A Yes.

24 Q They were his bullets; right?

25 A No.

1 Q Well, he's the one who got -- who threw them away,
2 right? Isn't that what you testified to?

3 A Yes.

4 Q All right. Why did Adam -- Adam didn't have the
5 bullets?

6 A No.

7 Q Duriel had the bullets?

8 A Yes.

9 Q And low and behold the police find the bullets?

10 A Yes.

11 Q But Adam had the gun and the police didn't find the
12 gun?

13 A Yes, sir.

14 Q Oh, they did?

15 A No, sir, they did not.

16 Q All right. No, they didn't. So all we have is your
17 story about Adam going down to the end of Freewoods Road
18 and disposing of the gun and Duriel disposing of the
19 bullets but nothing else can corroborate it; correct?

20 A Correct.

21 Q All right. And the police find Duriel's bullets,
22 correct?

23 A Yes, sir.

24 Q So no doubt according to you that's corroborative
25 evidence Duriel was there --

1 A Yes, sir.

2 Q -- disposing of stuff perhaps connected to this
3 crime; correct?

4 A Yes, sir.

5 Q But the stuff that Adam supposedly disposed of nobody
6 could find that; right?

7 A As far as I know, no, sir.

8 Q Despite their best efforts.

9 A Yes, sir.

10 Q Horry County Police never found that weapon; did
11 they?

12 A No, sir.

13 Q To this day, three years later it has never been
14 found; correct?

15 A No, sir.

16 Q All right. So Adam did -- had him a job; didn't he?

17 A Yes.

18 Q Disposing of that weapon. How long did it take him
19 to get rid of that weapon so thoroughly?

20 A What from the time we went back there and he jumped
21 the fence and came back within five minutes.

22 Q Okay. Within five minutes he got rid of the gun
23 according to your testimony that nobody could find that
24 they knew was there?

25 A Yes, sir.

1 Q Okay. By the way, on your direct examination you and
2 Duriel left your apartment and you ran into Adam; right?

3 A Yes.

4 Q And then y'all went, Adam got rid of the gun; right?

5 A No, we went back to -- we -- Adam was walking down
6 the road, we picked Adam up, we went back to the apartment
7 where they were at where we had been at the night before
8 and Adam went up the stairs and Duriel and Adam -- Adam
9 got the gun and Duriel got the bullets. They came back
10 down the stairs and we went to Freewoods Road.

11 Q Okay. Did you remember to tell us that in your
12 direct testimony was ongoing?

13 A What?

14 Q Isn't that the first time today that you have told us
15 you went back to the apartment where the gun was?

16 A Adam came down the road, we went over there to go
17 pick him up.

18 Q Yes, ma'am. Now, my question is, in your direct
19 testimony didn't you say you went from there and hid the
20 gun?

21 A I went -- I went from where?

22 Q From your home with Duriel where you lived with
23 Duriel and went -- your testimony on direct, we can have
24 it played back --

25 MR. VON HERRMANN: Your Honor, I'd appreciate it

1 if we would play it back because I understand--

2 *THE COURT:* It hasn't been asked.

3 *THE WITNESS:* I didn't -- he didn't -- nobody.
4 asked me that. I don't understand.

5 BY MR. DIGGS:

6 Q I'm asking you now how did Adam get the gun?

7 A From the house where they -- where they had been the
8 night before.

9 Q All right. And my question to you is, why didn't you
10 tell us that until I got up to ask you about it?

11 A I don't know.

12 Q All right. Is it because it didn't happen?

13 A No, sir.

14 Q Now, tell us, Miss Phillips, you got up and went to
15 work on the 28th, correct?

16 A Correct.

17 Q You got home about 1:00, 1:30?

18 A That's correct.

19 Q And then you and Duriel go off and run into Adam?

20 A Correct.

21 Q And what time did the police come over to your house
22 that day?

23 A As soon as we got back from dropping him off, so it
24 must have been around 3:00, maybe not even that late.

25 Q Okay. So--

- 1 A I'm not sure.
- 2 Q So 1:00 to 3:00 you can account for your time that
3 day, correct, because you were at work or you were either
4 at work or with the Horry County Police?
- 5 A That's correct.
- 6 Q Low and behold in that two hour window that's when
7 you run into Adam and dispose -- and he disposes of the
8 gun?
- 9 A Correct.
- 10 Q And he disposes of the gun and he makes threats about
11 dead man walking and stuff like that?
- 12 A That's correct.
- 13 Q And now we've gotten rid of all the evidence so we
14 don't have to worry, said all of that?
- 15 A That's correct.
- 16 Q All right. Just threw it out of the window just by
17 chance? All of this came down just by chance?
- 18 A Just... I don't -- just by chance? No, he -- we took
19 him to go get the gun -- get rid of the gun.
- 20 Q Okay. So your testimony is you were at work, you go
21 home, gratuitously you run into Adam and he hides the gun
22 and then the police come to your house?
- 23 A I don't know in between the time that I had been to
24 work Duriel had spoke with Adam. I don't know that. I
25 was not there.

1 Q All right. Well, do you want to--

2 A They could have spoke in between the time and set it
3 up to go. I don't know.

4 Q Okay. So they set it up so you -- for you to
5 gratuitously run into Adam so he could dispose of the gun?

6 A I'm saying I do not know.

7 Q All right. You were there when Adam was told that
8 the man had died; weren't you?

9 A Yes.

10 Q All right. And what was his reaction according to
11 you?

12 A Let's go, let's get rid of the gun.

13 Q All right. Now, is that consistent with them
14 discussing it earlier?

15 A Consistent with them discussing -- I don't know if
16 they spoke earlier. That's what I'm saying. I don't know
17 for a fact that they spoke earlier.

18 Q Well, they didn't seem to indicate it. Didn't Duriel
19 know he was there also?

20 A Yes.

21 Q All right. So according to your testimony, Adam
22 found out that the man was dead, then he decided we got to
23 go hide the gun; correct?

24 A Correct.

25 Q But also he could have planned with Duriel earlier to

- 1 go and hide the gun after you got off work?
- 2 A I don't know.
- 3 Q Okay. You just don't know; correct?
- 4 A Not what you're trying to say there, no.
- 5 Q All right. You love Duriel?
- 6 A No, I don't.
- 7 Q You loved -- l-o-v-e-d?
- 8 A Yes.
- 9 Q And when he was in jail you wrote him a lot of
- 10 letters?
- 11 A Yes.
- 12 Q And they were pretty just direct; right?
- 13 A I don't know.
- 14 Q You told him you missed him.
- 15 A Yes.
- 16 Q And sometimes you talked about what you would do with
- 17 him if he were out intimately?
- 18 A All right.
- 19 Q You told him you wanted to have his child; didn't
- 20 you?
- 21 A I don't remember that, no, sir.
- 22 Q All right. You told him that you were under a lot of
- 23 pressure; didn't you?
- 24 A I don't know.
- 25 Q You told him you felt like you had multiple or split

1 personalities? Didn't you say that?

2 A I don't know. No, I don't remember saying that.

3 Q Show you this document. See if it refreshes your
4 memory.

5 MR. VON HERRMANN: Your Honor, I'd like to have
6 a chance to review it. I haven't seen this document
7 either.

8 THE COURT: I know, let her look at it first
9 then I'll let you look at it before it's--

10 BY MR. DIGGS:

11 Q Can you identify that? And let me just draw your
12 attention to this sentence right here. Don't read it out
13 loud. Just look at it and see if you can identify it.

14 A Yes.

15 Q All right. Did you write that?

16 A Yes.

17 Q All right.

18 MR. DIGGS: Your Honor, we'll offer it in
19 evidence.

20 THE COURT: Let Mr. Von Herrmann -- evidence...

21 THE WITNESS: Oh, my God. Was written...

22 MR. VON HERRMANN: Your Honor, I'll be happy to
23 look at this, but it's at least seven pages that I
24 have never seen before. And clearly it -- you
25 know... I just don't want to read what Mr. Diggs

1 wants me to read and go on about it.

2 *THE COURT:* Well, all of this Mr. Diggs is
3 asking is to publish when she identified, I have not
4 ruled and don't plan to rule on admitting all of the
5 document into evidence. Mr. Diggs, you want to show
6 him where you want her to read or what?

7 *MR. VON HERRMANN:* No, I'm saying, Your Honor,
8 my objection wasn't just to -- to that small portion
9 and none of the document in completion. I just don't
10 know without reading the whole thing.

11 *MR. DIGGS:* At this point, Your Honor, I just
12 offer that one line.

13 *MR. VON HERRMANN:* I understand, sir, but I
14 might object to putting only a portion in without
15 reading it.

16 *THE COURT:* Well, if so, sir, I will let you
17 later on put more parts of it in if you wish. Move
18 on. Ma'am, can you identify this as something you
19 wrote?

20 *THE WITNESS:* Yes, sir.

21 *MR. VON HERRMANN:* Yes, sir, I'd object and ask
22 he put the entire document in. It's not in context.

23 *MR. DIGGS:* I will put the whole document in.

24 *MR. VON HERRMANN:* But Your Honor, there's no
25 way that I can--

1 THE COURT: Let Mr. Galmore see it.

2 MR. VON HERRMANN: He put one paragraph out of
3 five pages -- I mean one sentence--

4 THE COURT: Mr. Von Herrmann, Mr. Diggs'
5 question to her was did this refresh her memory. And
6 if she says yes it refreshes her memory, then she can
7 testify from memory what she wrote to Mr. Simmons.
8 That was what the question was.

9 MR. VON HERRMANN: I -- no, sir. The question
10 is the admissibility of the document. I -- she--

11 THE COURT: Okay. Right now, Mr. Diggs, do you
12 want her now to testify as to whether she wrote a
13 certain thing to this gentleman? Tha'ts what you
14 asked and she didn't remember?

15 MR. DIGGS: Correct.

16 THE COURT: So I'm going to permit that. Not
17 publishing the document, but whatever--

18 MR. VON HERRMANN: I have no objection to--

19 THE COURT: Proceed on when Mr. Galmore has
20 completed.

21 MR. DIGGS: And Your Honor, what we're doing is
22 also in that one line to be published into evidence.

23 THE COURT: No, sir. I'll let you do her memory
24 and then after lunch y'all discuss the thing of
25 publishing part of it and they will have a chance

1 to -- her memory -- you can ask her did you write
2 such and such or remember writing these things, I'll
3 let you...

4 (Whereupon there was a paus.)

5 THE COURT: Mr. Galmore, I'm going to permit you
6 during lunch in order to review the whole thing if
7 you wish, sir.

8 MR. GALMORE: Yes, sir.

9 THE COURT: Just look at it quickly right now.

10 MR. GALMORE: I have no objection to it.

11 THE COURT: All right. Thank you, sir.

12 BY MR. DIGGS:

13 Q Did you ever write a statement to Durriel telling him
14 you felt like you had multiple personalities or two
15 personalities?

16 A That's my handwriting, yes, sir.

17 Q All right. And when did you do that?

18 A I have no idea when that letter was wrote.

19 Q What if--

20 A While he'd been in jail.

21 Q Pardon?

22 A While he'd been in jail.

23 Q All right. Would it help you to look at the letter
24 again to see if you can determine when it was written?

25 A Yeah (complied.) It was over two years ago.

1 Q Can you give us the date?

2 A January 21st, 2005.

3 Q And that was after your plea agreement with the
4 Solicitor?

5 A Yes.

6 Q Okay. And you were stating you felt like you had
7 multiple personalities?

8 A Yes.

9 Q All right. Now, when you went back to the apartment
10 according to your testimony on cross-examination and got
11 the gun, did you go up in the apartment or did you stay in
12 the car?

13 A No, we all went upstairs.

14 Q You all three went upstairs?

15 A Uh-huh.

16 Q Why was that?

17 A I don't know -- no.

18 Q You just did?

19 A Yeah.

20 Q Okay. And you went up there and got the weapon.
21 What weapon was that by the way?

22 A The one that had the white bottom on it.

23 Q Okay. Was that -- do you know if that was the
24 alleged murder weapon?

25 A I have no idea.

1 Q All right. But any way, that's the one -- where was
2 the other gun by the way?

3 A I don't know.

4 Q All right. But that gun you don't know, could have
5 been, may not have been the murder weapon, y'all decided
6 to go and Adam took the lead; is that your testimony?

7 A Correct.

8 Q He took the lead, he was the leader of the gang and
9 he goes and hides the weapon?

10 A Correct.

11 Q Okay. And he climbs the fence at the end of
12 Freewoods road and runs off into the woods and hides the
13 weapon?

14 A Correct.

15 Q How high is that fence, do you recall?

16 A It's -- they have a picture of the fence. I don't
17 know the...

18 Q It's pretty tall, would you agree with me? It's
19 about 6 feet?

20 A Yeah.

21 Q Would you agree with that? And he climbed over. And
22 what time of day was it?

23 A Daylight.

24 Q Was it dusk or what?

25 A It was that afternoon around mid-day.

1 Q Oh, in the afternoon -- okay. Before the police came
2 to your house?

3 A Correct.

4 Q Okay. And so it's the middle of the day and it
5 wasn't in the afternoon; right?

6 A I do not know the time sequence. I do not know.

7 Q Okay. But common sense tells us if the police
8 were -- you were in the presence of the police from 3:00
9 on, right?

10 A From the time that I got back from Freewoods Road the
11 detectives were at my house. I do not know what time that
12 was.

13 Q All right. So your testimony earlier then it was
14 about three was wrong that time; is that correct?

15 A I don't know exact times, sir.

16 Q Okay. The police didn't go with you to bury the
17 weapon, though; right?

18 A No.

19 Q All right. So you came home and as soon as you came
20 home --

21 A The detectives were there.

22 Q -- the detectives were there? All right. So Adam --
23 let's focus here. How long did it take you to dispose of
24 the weapon, the three of you?

25 A To drive from the house to there and back, I don't --

1 I don't know the time.

2 Q Now, you back in Freewoods Road?

3 A Correct.

4 Q How far did you back in?

5 A Not all the way to the fence.

6 Q Okay. Where did you turn your car around and begin
7 your drive backwards?

8 A I do not know.

9 Q Okay. And why did you do that?

10 A Because that's what they told me to do.

11 Q Now who told you to do that, was it Adam or Duriel?

12 A I don't know.

13 Q Okay. Earlier you -- you made statements saying that
14 Adam told you to do that; isn't that true?

15 A That Adam told me to back the car in?

16 Q Yeah. Yeah.

17 A I don't know.

18 Q Okay. So you get out -- have you ever made the
19 statement that y'all did this, it was dark or late in the
20 day?

21 A No.

22 Q All right. Now, Adam gets out and he's got this gun,
23 right --

24 A Correct.

25 Q -- which may or may not have been the murder weapon?

1 A Correct.

2 Q And he climbs over this 6-foot high fence; correct?

3 A The fence is very easy to climb over. There's enough
4 space in between to get your foot on it and climb over the
5 fence, yes, he climbed over the fence.

6 Q Let's look at that fence. Have you looked at that
7 picture yet, Miss Phillips? I don't know if...

8 A Yes, you showed it to me.

9 Q Okay. Okay. These are State's Exhibits three and
10 four. Number three is showing a fence. Is that the one
11 y'all drove down to and Adam climbed over -- climbed over?

12 A Yes, sir.

13 Q And you backed up into there; is that correct?

14 A Yes, sir.

15 Q And here is a close-up --

16 A Uh-huh.

17 Q -- of the fence. Isn't it true that that is a gate,
18 Miss Phillips? It's not a fence.

19 A I don't know what it was. I did not get out of the
20 car and go over there and tell.

21 Q Isn't it true there's no -- there's no fence at all
22 around there, that you can just walk around it?

23 A Make -- maybe it's a gate. It's a fence or a gate.
24 It looks like a fence, but it--

25 Q Okay. Isn't it true that you could just as easily

1 walk around--

2 THE COURT: Mr. Diggs? Mr. Diggs? The Court
3 Reporter is looking at me. She cannot take things
4 down that you're asking while she's answering. Let
5 her complete the answer before you ask the next
6 question. Madam Court Reporter, you got everything
7 down?

8 COURT REPORTER: I couldn't get her last phrase.

9 THE COURT: Please try to make sure she
10 completes it before you ask another question.
11 Continue on.

12 BY MR. DIGGS:

13 Q Isn't it true that he could have just as easily
14 walked around the gate, stepped around it and climbed over
15 a 6-foot gate?

16 A I don't know. I don't know how long that thing is.
17 I can't...

18 Q Okay.

19 A No, he climbed the gate.

20 Q You don't know if there's a fence there or not?

21 A No, I do not.

22 Q Okay. Now, we have talked about the first statement
23 you gave to police on September the 28th at 5:43. Do you
24 remember that statement?

25 A I don't know. I -- I don't know. If you show it to

1 me, I mean, I don't know the sequences of the statements
2 that I gave.

3 Q All right. In that statement -- get you to identify
4 this. This is -- want you to tell me what that is.

5 A It's another statement.

6 Q Okay. Whose statement is it?

7 A My statement.

8 Q All right. And in that statement do you tell the
9 police that--

10 MR. VON HERRMANN: Mr. Diggs, can you give me
11 the date and time of that, please?

12 MR. DIGGS: 5:43 on September 28th.

13 BY MR. DIGGS:

14 Q Okay. You gave -- you gave a statement to the police
15 at that time and you put it to writing; did you not?

16 A Correct, I--

17 Q And this is it; correct?

18 A Yeah.

19 Q And in this statement you lied saying you didn't know
20 anything about anything; correct?

21 A That was the first statement right there.

22 Q Then you gave a second written statement that day;
23 did you not?

24 A Yes.

25 Q At the Horry County Police or at the--

1 A Yes.

2 Q Where was it?

3 A I think -- I wasn't positive that one right there was
4 the first one. The second one was that -- was the one
5 that you just showed earlier was the second one that I
6 gave. That was the first one that I gave.

7 Q Okay. And you made a second statement 8:17 p.m. on
8 that same day?

9 A That -- yes, sir. That was the first one you showed.

10 Q And in that statement you again -- did I leave it up
11 there with you?

12 A Yes.

13 Q That's what I was looking for. Thanks. In this
14 statement you tell the police about Adam disposing of the
15 gun but you don't tell them anything about the planning of
16 the robbery; correct?

17 A Correct.

18 Q All right. So that's -- that statement no doubt in
19 this statement you're implicating Adam, you're trying to
20 get him in trouble. He's disposing of the murder weapon;
21 correct?

22 A Yes, he is.

23 Q But you don't tell him anything about Adam planning a
24 robbery; do you?

25 A No.

1 Q Okay. And do you agree with me that on the video,
2 that after you did this you gave a third statement, did
3 you not, on video?

4 A Correct.

5 Q And do you agree with me on this that while you told
6 him about Adam hiding the gun, you never mentioned about
7 him planning a robbery. Do you agree with that?

8 A On the video?

9 Q Yes.

10 A I -- on the video I think I -- I told about the --
11 the robbery.

12 Q Well, if you think you did, you meant to, right? You
13 meant to tell them everything you could about Adam to get
14 him in trouble; didn't you?

15 A That was my purpose for telling them things?

16 Q Yes.

17 A No, that was not the purpose for telling them things.

18 Q What was your purpose?

19 A To tell the truth.

20 Q Okay. But you admit you didn't tell them about the
21 robbery, the planning of the robbery?

22 A No.

23 Q All right. You did not.

24 A No.

25 Q Why didn't you?

1 A I don't know. The gun -- we -- on the thing it said
2 that I didn't say anything about that, it just said that
3 they took my car and then when they came back we got rid
4 of the guns, so...

5 Q On the -- on the video?

6 A On those right there it says it, too.

7 Q Right. Okay. You didn't tell them anything about
8 the planning of the robbery on any of those statements,
9 the written statements?

10 A No.

11 Q And in the video that was done that night again you
12 didn't tell them anything about the robbery; correct?

13 A No.

14 Q Is that... do you agree with me you did not tell
15 them?

16 A I don't remember.

17 Q All right. You don't remember.

18 MR. DIGGS: Your Honor, we'd offer her prior
19 statement on tape simply because she says--

20 THE COURT: This is a good time for a break.
21 Ladies and gentlemen, I'm going to let you go to
22 lunch at this time. If you would please return at
23 2:30. We'll see you then. You may go to lunch.
24 Everyone else remain seated. Only the jurors...

25 (Jury left the courtroom at 1:07 p.m.)

1 THE COURT: Y'all can set that up in my chambers
2 then so I can look at it.

3 MR. DIGGS: Yes, sir.

4 THE COURT: All right. I'll look at it during
5 lunch. Just so I'll know the witness here gave three
6 statements, two written statements and a video?

7 MR. DIGGS: She gave four indictments, Your
8 Honor. One was--

9 THE COURT: 5:43 on September 28th.

10 MR. DIGGS: Right.

11 THE COURT: One about 8:17 on September 28th...

12 MR. DIGGS: Then she gave a video statement
13 which was on that same day.

14 THE COURT: Later that night.

15 MR. DIGGS: Later that night.

16 THE COURT: All right.

17 MR. DIGGS: Then she gave a fourth statement on
18 October the 14th.

19 THE COURT: And only one on video.

20 MR. DIGGS: The only -- that's correct.

21 THE COURT: Now, is it your contention the one
22 she made on video was a true statement?

23 MR. DIGGS: No. What our contention is that she
24 made that statement at a time when she was trying to
25 implicate Adam Bailey, but she did not talk about the

1 planned robbery at that point.

2 *THE COURT:* But she already had two other
3 statements she didn't do it, so how would the video
4 help in any way?

5 *MR. DIGGS:* Because it -- it is at a time when
6 she's trying to come clean and implicate the
7 defendant in the case but neglects to tell about the
8 robbery, the plan which she does not mention until
9 October the 14th, two weeks later.

10 *THE COURT:* Okay. But what I'm saying is how is
11 the video, essence of the video, how is it different
12 from the 8:17 statement, the one earlier that night,
13 the second one?

14 *MR. DIGGS:* It is -- it's consistent with that
15 statement, Your Honor, but she's stated she doesn't
16 remember, she mentioned it -- or not. So it's a
17 inconsistent statement.

18 *THE COURT:* Well, but my thoughts earlier from
19 you before I took the break and you were going to set
20 it up is that the video that you feel that she was
21 telling the truth on the video, you want the jury to
22 observe her demeanor when you think she's telling the
23 truth, or you feel that on the statement she's
24 telling the truth or you convinced she wasn't telling
25 the truth?

1 MR. DIGGS: I contend that she was lying, trying
2 to implicate Adam Bailey and -- and if her statement
3 today is true, there was plenty of incriminating
4 evidence that she was aware of, she just neglected to
5 tell them during the video.

6 THE COURT: But she had already admitted that.

7 MR. DIGGS: She said she didn't remember that.

8 THE COURT: No, she's admitted -- I mean
9 regarding the other statement that she didn't say
10 anything about the robbery.

11 MR. DIGGS: Right. But this is the third
12 statement where she just said she didn't remember if
13 she said that or not.

14 THE COURT: Well then, it's a -- but let me --
15 y'all set it up in my chambers. I will try to look
16 at it before we get started back. All right.
17 Anything else before we break for lunch?

18 MR. VON HERRMANN: Nothing from the State, Your
19 Honor.

20 THE COURT: See y'all -- bring them in about
21 2:15. Ma'am, please understand the same thing. Do
22 not discuss your testimony with anyone. Ma'am, one
23 other thing. Please, you're under subpoena so you
24 need to be back here no later than 2:15.

25 THE WITNESS: Yes, sir.

1 THE COURT: All right? For purposes of Mr.
2 Bailey, at this time Mr. Bailey, I haven't signed
3 anything putting him in your custody, but I have
4 something signed by the bondsman -- be quiet a
5 second -- so Mr. Bailey until I say otherwise is
6 released on bond. Mr. Bailey, remember, the trial
7 will continue with or without you.

8 MR. DIGGS: Your Honor?

9 THE COURT: If y'all can find them, bring them
10 in my chambers.

11 MR. DIGGS: We'll do that. We prepared that
12 after lunch.

13 THE COURT: I will rule again after the -- just
14 for lunch now.

15 (Court in recess for lunch.)

16 THE COURT: Okay. Mr. Galmore, is your client
17 here yet?

18 MR. GALMORE: On the way.

19 THE COURT: Okay. I was about to view the video
20 about 25 minutes ago and then Mr. Galmore and Mr. Von
21 Herrmann came in and said Mr. Von Herrmann did not at
22 this time object to the video coming in. So
23 therefore we -- no longer objects to it; is that
24 right, Mr. Von Herrmann?

25 MR. VON HERRMANN: Yes, sir.

1 THE COURT: Mr. Galmore, you don't object to it?

2 MR. GALMORE: No, sir, I don't object.

3 THE COURT: You still want to put it in?

4 MR. DIGGS: Yes, sir.

5 THE COURT: Well, the only thing I was concerned
6 about, asked Mr. Von Herrmann and Mr. Galmore, and I
7 ask you now, Mr. Diggs, is there anything on this
8 video that would lead to a mistrial regarding
9 anything at all that you know of?

10 MR. DIGGS: Not that I'm aware of, Your Honor.
11 I watched it a few times.

12 THE COURT: Mr. Von Herrmann mentioned there's
13 some bad language, but other than that...

14 MR. DIGGS: There's nothing that I'm aware of on
15 this particular item. And so that's why I'm offering
16 it.

17 THE COURT: And you reviewed it and there's
18 nothing that you feel highly prejudicial to your
19 client?

20 MR. DIGGS: Your Honor, there's not anything on
21 there that I believe is prejudicial, you know, as
22 we're approaching this case to Mr. Bailey.

23 THE COURT: And Mr. Galmore, you feel the same?

24 MR. GALMORE: Yes, sir, Your Honor.

25 THE COURT: All right. Therefore mark it as an

1 exhibit if you would, probably do at this time,
2 Defendant Bailey two.

3 (WHEREUPON, Defendant Bailey Exhibit 2 was
4 admitted into evidence.)

5 THE COURT: Probably just mark the box it's in.
6 I'd rather mark the video itself if you got it.

7 COURT REPORTER: I did. I always mark the...

8 THE COURT: I'm sorry. Greater Judge than me
9 said she's got to have the video itself. She said
10 unless I want to keep all the exhibits with me... is
11 the only courtroom that plays video...

12 MR. DIGGS: We don't play video -- in mine.

13 THE COURT: I was just wondering as the VCR
14 machines break down whether you get the other
15 department or buy others. Is the jury ready? Is the
16 State ready?

17 MR. VON HERRMANN: State's ready, Your Honor.

18 THE COURT: Defense ready to go, counsel?

19 MR. DIGGS: Yes, sir.

20 MR. GALMORE: Yes, sir.

21 THE COURT: Now ma'am, did you discuss your
22 testimony with anybody during lunch?

23 THE WITNESS: No, sir.

24 THE COURT: Ma'am?

25 THE WITNESS: No, sir.

1 THE COURT: All right. Don't have any questions
2 of her, bring the jury in, please. Mr. Von
3 Herrmann (Off-the-record discussion was had concerning
4 another case with other attorneys and scheduling
5 hearings.)

6 (Jury entered the courtroom at 2:51 p.m.)

7 THE COURT: Okay, ladies and gentlemen. We're
8 now ready to proceed with the continuation of the
9 cross-examination. As you recall, the defense, Mr.
10 Diggs, was cross-examining this witness and he now
11 may be permitted to do so.

12 MR. DIGGS: Thank you, Your Honor.

13 BY MR. DIGGS:

14 Q Let me back up just a moment, Miss Phillips, and ask
15 you with respect to your statement of September the 28th
16 at Horry County that evening that was videotaped, do you
17 recall whether or not you indicated at that time or told
18 the police at that time that you were aware that a robbery
19 had been planned with respect to Mr. Patterson?

20 A I said I do not remember it.

21 Q Your testimony is now you don't know if you told them
22 or not?

23 A In this video.

24 MR. DIGGS: Your Honor, we'd like to play the
25 video for the jury.

1 THE COURT: It's my understanding there's no
2 objection by the State or by Mr. Galmore?

3 MR. VON HERRMANN: No objection, Your Honor.

4 THE COURT: All right. Mr. Galmore, no
5 objection?

6 MR. GALMORE: No, sir, no objection.

7 THE COURT: All right. You may play the video.
8 Now everyone see -- if you can't see, move around or
9 whatever, but feel free to move around if you need
10 to.

11 (Whereupon the video was played, Defendant
12 Bailey's Exhibit two.)

13 THE COURT: Now Mr. Galmore, Mr. Von Herrmann,
14 y'all want to leave it there, y'all want to play it,
15 what...

16 MR. VON HERRMANN: Your Honor, I'm not going to
17 play anything.

18 MR. GALMORE: I'm not going to play anything.

19 THE COURT: All right. Move the TV out of the
20 way. All right. Continue on, please.

21 BY MR. DIGGS:

22 Q No question, Miss Phillips that on the 28th at Horry
23 County Police Department you didn't disclose any
24 information about the robbery; correct?

25 A Correct.

1 Q Agree with that now?

2 A Yes.

3 Q Now, the only time that you ever disclosed knowledge
4 about a robbery was two weeks later when you entered into
5 your agreement with the prosecution; is that correct?

6 A Correct.

7 Q Correct?

8 A Correct.

9 Q And in that agreement the prosecution promised you
10 they would not seek murder charges against you; correct?

11 A No, that's not my understanding of it. They never
12 dismissed me of anything, told me that I would be
13 dismissed of anything.

14 Q They never told you that you would not be charged
15 with murder if you gave a statement that was consistent
16 with your prior statements?

17 A They never told me that I would be dismissed of the
18 charges. The charges are still pending.

19 Q All right. Let's look at your plea agreement in
20 writing. All right. Let me ask you to read paragraph
21 three of your agreement.

22 A Ashley Phillips shall not be charged with other
23 violations of law about which she -- she give information
24 involving herself and named defendants in the Joseph
25 Patterson murder.

1 Q Now, do you perceive that to be a promise by the
2 State that you won't be prosecuted for murder?

3 A That's not my understanding.

4 Q All right. But nevertheless, that statement is in
5 your plea agreement; is it not?

6 A Correct.

7 Q And also Mr. Humphreys told you orally your statement
8 was recorded on October 14th; correct?

9 A Correct.

10 Q And at the beginning of that statement he again
11 informed you orally that you would not be prosecuted for
12 murder; isn't that true? You don't recall that?

13 A No, that's not my impression of the agreement --

14 Q All right.

15 A -- that I have with them.

16 Q All right. We can call him and ask him.

17 A That's -- okay. I don't -- that's not my
18 understanding of the --

19 Q Or we can play your tape.

20 A Okay.

21 Q All right. So as of September the 28th you'd given
22 two written statements?

23 A Correct.

24 Q An oral statement to the detective and a video on the
25 evening of the 28th.

1 A Correct.

2 Q So you had given four statements. And in that
3 statement that we just played you indicated there, did you
4 not, that you wanted to tell the truth and tell them what
5 you knew?

6 A Correct.

7 Q And is it your testimony now that you were lying at
8 that point?

9 A Correct.

10 Q You purposely concealed the fact that a robbery had
11 been planned. Is that your testimony?

12 A Correct.

13 Q All right. In that tape you also say you got home
14 from work at 1:30 to two?

15 A Correct.

16 Q In your testimony here today you said you got home at
17 one. Now, could you tell us which one it was? 1:00 or
18 2:00?

19 A I do not know the correct time. It was three years
20 ago.

21 Q Okay. But if it was at 2:00, do you agree with me
22 you would have had even less time to take Adam to dispose
23 of the gun than before when you testified you got home at
24 one, correct?

25 A No.

1 Q In other words, your testimony, your statement on
2 that tape closes that window even further; does it not?

3 A From the time that -- I said I do not know the time
4 the detectives got to the house, so yeah, if -- if that,
5 yes, it does.

6 Q All right. And it cuts a whole hour, cuts it in
7 half; doesn't it?

8 A Correct.

9 Q So now you've got approximately 60 minutes wherein
10 you just again gratuitously run into Adam Bailey and he
11 says I want to get rid of the gun?

12 A Correct.

13 Q All right. Now, do you remember on that tape saying
14 anything about going back to the apartment for Adam to get
15 the gun?

16 A No, sir.

17 Q Didn't say anything; did you?

18 A No, sir.

19 Q Okay. That was consistent with what you said earlier
20 in this testimony, in your direct testimony; is it not?

21 A Correct.

22 Q All right. Do you remember what happened, Miss
23 Phillips?

24 A When? Do I remember what happened when?

25 Q On September the 28th? Can you -- can you sit there

1 and tell us what happened?

2 A Yes.

3 Q Can you remember what you said and when you said it?

4 A No, sir, not when I said it. Yes, what I said.

5 Q Now, you can't even remember when you lied and when
6 you didn't lie; is that true?

7 A Correct.

8 Q All right. But we know now because of your testimony
9 in this case --

10 A Uh-huh.

11 Q -- you were not going to be prosecuted for murder
12 even though it was your car, go ahead and take my car,
13 that was used for them to go to the Patterson dwelling,
14 apartment; correct?

15 A No.

16 Q You're not going to be charged with murder?

17 A I -- I have not been told of anything that's going to
18 happen to me for testifying.

19 Q Well, we just read your plea agreement; didn't we?

20 A Yes, but they did not tell me that I'm going to
21 not -- to be charged.

22 Q They told you in there, in that plea agreement you're
23 not going to be charged with anything you tell them in
24 that interview; correct? I mean, it says so.

25 A I'm telling you no, that nobody has promised me that

1 I'm going to be released of any charges.

2 MR. VON HERRMANN: Asked and answered a hundred
3 times.

4 THE WITNESS: God.

5 THE COURT: Mr. Diggs, the jury heard you read.
6 She's answered it, so let's proceed on. The document
7 is in evidence.

8 BY MR. DIGGS:

9 Q What are you charged with right now, Miss Phillips?

10 A Accessory after the fact of murder.

11 Q And what are you expect to get in terms of a sentence
12 for that charge?

13 A No one has told me anything.

14 Q What do you expect? You have an -- expectations?

15 A I have no idea.

16 Q Do you have an expectation?

17 A No.

18 Q You have no expectations?

19 A No, I don't know what they're going to do.

20 Q How much time can you get for accessory after the
21 fact?

22 A Fifteen years.

23 Q All right. And you're telling us under oath right
24 now that you might get 15 years for your involvement in
25 this case?

1 A That's correct. They never gave me an agreement.

2 Q All right. And you believe you might get 15 years?

3 A I would hope not.

4 Q You hope not?

5 A Yeah, I hope not.

6 Q All right. And what do you have to do in order to
7 make sure you don't get 15 years?

8 A Put it in the faith of God and the people who are
9 going to give me the sentence.

10 Q All right. This...

11 MR. DIGGS: Your Honor, earlier we had put a
12 sentence out of this particular letter Miss Phillips
13 said she wrote to Duriel, and at this time I'm going
14 to introduce the entire letter.

15 THE COURT: Well, Mr. Diggs, you haven't shown
16 me how the letter is -- other than what you have
17 asked her about -- that relevant. I mean, do you
18 wish to have an en camera hearing?

19 MR. DIGGS: No, I don't. I simply do it because
20 the Solicitor raises issue of the complete text of
21 the letter. And I mean, I don't need to have it in.

22 THE COURT: Well then I will let the Solicitor
23 maybe if he wants to try to get on it, I will rule on
24 it on his motion.

25 MR. DIGGS: All right.

1 BY MR. DIGGS:

2 Q Let me ask you about this again, Miss Phillips. You
3 state here quote I feel like I have two or three
4 personalities, closed quote. Why did you say that? Tell
5 us what you meant by that.

6 A Well, I was face -- I'm facing trials for I mean
7 charges for murder. Someone was killed. And so anyone
8 who has to deal with that will probably feel like they're
9 going crazy.

10 Q All right. And you knew -- your testimony is now is
11 you knew that was a possibility when you loaned that --
12 loaned the car to your boyfriend to go over there and rob
13 the victim; didn't you?

14 A Correct.

15 Q You knew that?

16 A Yes.

17 Q And you willingly gave him the keys, let him go use
18 your car, trotted off to bed and went to sleep.

19 A Correct.

20 Q But now that same scenario causes you to feel like
21 you have multiple personalities?

22 A Yes.

23 Q Okay.

24 A Someone was killed.

25 Q That's all I have. Thank you very much.

1 A Uh-huh.

2 CROSS-EXAMINATION

3 BY MR. GALMORE:

4 Q Miss Phillips, you -- what are you charged with now
5 in connection with this case?

6 A Accessory after the fact of murder.

7 Q And you said that carries up to 15 years; right?

8 A I'm assuming.

9 Q Do you have an attorney for that charge?

10 A Yes.

11 Q Okay. And your attorney is in court with you today;
12 is that correct?

13 A Yes, sir.

14 Q And your attorney has told you that you can get up to
15 15 years for that charge; is that--

16 THE COURT: Now Mr. Galmore, we don't need to
17 discuss whether your client had an attorney.

18 MR. GALMORE: All right. That's fine, Your
19 Honor.

20 BY MR. GALMORE:

21 Q Miss Phillips, you indicated that according to you
22 they discussed this robbery prior to the robbery taking
23 place; is that correct?

24 A That's correct.

25 Q And you indicated that your contribution to this

1 robbery was your automobile; is that correct?

2 A Correct.

3 Q So under oath today you're saying that you gave your
4 car to be used in this robbery?

5 A That's correct.

6 Q Has the State charged you with accessory before the
7 fact to a murder?

8 A No.

9 Q You were charged with accessory after the fact;
10 correct?

11 A Correct.

12 Q Even though your participation was before and after?

13 A That's -- that's correct. I did not pick my charges.
14 That's what the State gave me, yes, sir.

15 Q Do you know the penalty for accessory before the fact
16 to murder?

17 A No, I do not.

18 (WHEREUPON, Defense Carr's Exhibit No. 3 was
19 marked for identification only.)

20 BY MR. GALMORE:

21 Q Are you familiar with your proffered agreement,
22 ma'am?

23 A Yes.

24 Q Because you signed it; correct?

25 A Correct.

1 Q And I think Mr. Diggs asked you to read one of the
2 paragraphs about you not being charged with any additional
3 charges in connection with this case; is that correct?

4 A Any addition -- yes, sir.

5 Q Okay. But by your testimony today you have pretty
6 much admitted to being accessory before the fact to this
7 charge?

8 A Yes.

9 Q And because of your proffered agreement you're not
10 going to be charged with that charge?

11 A They have not told me that I'm not going to be
12 charged. It is still pending, accessory after the fact is
13 still pending today.

14 Q You did read the statement where it said Ashley Nikki
15 Phillips shall not be charged with any other violations of
16 law about which she gives information involving herself
17 and the named defendants in Joseph Patterson's murder;
18 correct?

19 A Any other violations, that's correct.

20 Q Okay.

21 A Yes.

22 Q But what I'm saying today is that you have admitted
23 to another crime involving this case?

24 A Correct.

25 Q Let me hand you what's been marked for identification

1 purposes as Defense Carr three and ask you if you
2 recognize this document.

3 A Yes, sir.

4 Q Okay. Is that your signature on the bottom of this
5 document?

6 A That's correct.

7 Q Does it appear to be altered in any way from when you
8 signed it initially?

9 A No.

10 Q What is this document, ma'am?

11 A It's the same document he just pulled up, the first
12 statement that I wrote.

13 Q This is the first statement that you wrote?

14 A Correct.

15 MR. GALMORE: Your Honor, I would move to have
16 Defense Exhibit 3 entered into evidence at this time.

17 MR. VON HERRMANN: No objection from the State,
18 Your Honor.

19 MR. DIGGS: No objection.

20 THE COURT: All right. Now, have you got it
21 defense...

22 MR. GALMORE: It's Defense Carr, yes, sir.

23 THE COURT: Number three in evidence.

24 (WHEREUPON, Defense Carr Exhibit 3 was admitted
25 into evidence.)

1 BY MR. GALMORE:

2 Q Let me hand you Defense Carr Exhibit 3 and ask you to
3 read the bottom portion of that statement, please.

4 A I have read each page of the statement consisting of
5 one pages, each of which bears my signature. That's
6 blocked out correction and it bear my initials, and I
7 certify that the facts obtained here is correct and is
8 true and correct.

9 Q So when you signed this, you told them that you were
10 being truthful and correct; is that correct?

11 A Yes, sir.

12 MR. GALMORE: May I publish this, Your Honor?

13 THE COURT: I thought it already has been.

14 MR. GALMORE: No, that's a different one.

15 THE COURT: Go ahead.

16 BY MR. GALMORE:

17 Q But in fact you were not being truthful and correct?

18 A Correct.

19 Q So when you sit here today, you're telling this jury
20 that you have already lied in this case?

21 A Correct, in the -- yes, I did.

22 Q What did you tell the police in that statement?

23 A That I didn't have anything to do with anything.

24 Q In fact, you said that you and your boyfriend were in
25 a recording studio; is that right?

- 1 A Correct.
- 2 Q And that was a lie?
- 3 A No, it was not a lie. We were there that same day.
- 4 Q Okay. Now, let me hand you what's been marked
- 5 already as Defense Exhibit 1 Bailey and ask you if you
- 6 recognize that.
- 7 A Yes.
- 8 Q And what is that document?
- 9 A It's another statement that I wrote.
- 10 Q Okay. What is the date that you wrote that
- 11 statement?
- 12 A September 28th, 2004.
- 13 Q What is the date you wrote that statement?
- 14 A The same day; isn't it.
- 15 Q Okay.
- 16 A The 28th, yes.
- 17 Q So you wrote two statements in one day?
- 18 A That's as soon as they picked me up, and I guess this
- 19 was later on in the day when -- sometime in the day, yes.
- 20 Q Did they ask you to be truthful and correct in this
- 21 statement?
- 22 A Yes.
- 23 Q Were you truthful and correct in this statement?
- 24 A Partially.
- 25 Q So that means you were partially lying; is that

1 right?

2 A Correct. Yes, sir.

3 Q So you gave two statements and neither one of which
4 was truthful, then you gave the videotape that we just
5 saw; is that correct?

6 A Correct.

7 Q In that videotape you didn't say, well, sat around
8 planning a robbery; did you?

9 A No, I did not.

10 Q So that would be an omission; is that correct?

11 A Define that. I don't know what that means.

12 Q That means that you left out something.

13 A Correct.

14 Q So now that's three statements none of which
15 according to you is truthful and complete?

16 A Is complete.

17 Q You left out the robbery. Are you still saying that
18 it was a complete statement although you left out--

19 A I said it was not complete. It was the truth but it
20 was not complete.

21 Q It was omitted, it was left out?

22 A Correct.

23 Q Okay. So you have two lies and an omission; is that
24 correct? Would that be correct, your three statements,
25 two lies and an omission?

1 A Yeah, the first one was a lie. The rest had
2 omissions.

3 Q The first one was a lie, the second one I think we
4 said was --

5 A Was partially--

6 Q -- partial truth and partial lies?

7 A Correct.

8 Q And the third one was an omission?

9 A Correct.

10 Q Then you got with your attorney; is that correct?

11 A That's correct.

12 Q And that's when you signed the proffer agreement and
13 gave a fourth statement?

14 A That's correct, because none of those times, sir, I
15 had met with my attorney yet, so I had no idea of what to
16 do or anything, I just spoke, so after I spoke with my
17 attorney and was advised of what I should do is when I
18 came out with them and told everything that I knew.

19 Q Okay. Tell me about the details of this planning.

20 A The details of it?

21 Q Yes, ma'am.

22 A That we were all in the house, there were guns,
23 Durriel set up where to go to, what the house looked like,
24 Adam and Mike had the guns and they left.

25 Q How long did this discussion take?

1 A I don't know the approximate time. We had been there
2 for a little bit. I don't know.

3 Q Was this like a 30 second meeting?

4 A No, I think we had been at the house for a little
5 bit. I don't think it was 30 seconds. I'm not sure how
6 long it took. How long.

7 Q Those are all the details you could remember from
8 this whole discussion?

9 A What would you like for -- I mean, we were all in the
10 house, there were guns in the house, there were plot --
11 planning on to go there. I gave them my keys. They left.
12 I don't know what you want me to say. I mean, what are
13 you asking? That's it. They were planning to rob
14 somebody that -- and there were guns there.

15 Q Do you recognize State's Exhibit one?

16 A I do not remember -- I don't know.

17 Q Was this one of the guns that was in the house?

18 A I do not remember that gun.

19 Q You were at the meeting; is that correct?

20 A Yes, it was three years ago again. I remember a
21 white one. I know there were two guns, but only one I
22 remember is a white gun.

23 Q Do you remember whether Michael Bailey had this gun
24 in his possession?

25 A I do not know who had which one.

1 Q You took them out to go bury the gun, right?

2 A He had the white one that next day. The night that
3 they left I did not see who had who -- what gun, no.

4 Q According to you Mr. Bailey had the white gun?

5 A The following day.

6 Q Did they discuss hiding their identities during this
7 robbery?

8 A They were putting little mask over their face like a
9 T-shirt or something over their face. But when they left
10 the house no one had that one over their face, but in the
11 house they were doing that.

12 Q Why would you not put details like three questions
13 ago you didn't say that?

14 A I don't know.

15 Q Did they have gloves, too, as long as they had masks?

16 A No, they did not.

17 Q Okay. Did they discuss what was in the house to be
18 taken?

19 A Yes.

20 Q And what was that, since you were there?

21 A When we were at the house discussing what they were
22 going to get, they want -- they said that there would be
23 drugs and money in the house.

24 Q Tell you how much drugs and how much money?

25 A No, they did not know.

1 Q What was your share of this supposed to be?

2 A We didn't have shares. Nobody discussed that.

3 Q So you didn't go but they felt free enough to discuss
4 the whole thing in front of you?

5 A Yes.

6 Q And I think you testified that when they left, you
7 went to sleep; is that right?

8 A Uh-huh.

9 Q Did you go to sleep right there at that house?

10 A Yes.

11 Q You didn't walk home to your house and go to sleep?

12 A No, I did not. No, I did not. I stayed at the house
13 until they came back.

14 Q So your boyfriend at the time was off on a robbery?

15 A And I was in the house with someone else.

16 Q And you took a nap?

17 A Yeah. Yeah.

18 Q Okay.

19 A It was like 1:00 at night. It was late.

20 Q Let's just be clear. You did not go to the
21 apartment?

22 A I did not go to the apartment, no.

23 Q You didn't ride in the car?

24 A No.

25 Q And you didn't see who shot who?

1 A No.

2 Q Okay. And your testimony has been on what you heard
3 them say?

4 A Correct.

5 Q And the next day Duriel's mother called and asked if
6 he did it?

7 A They asked -- yeah, he -- she said, were you guys
8 over there, did you guys do that? Yes, she did.

9 Q And as a result of that telephone call, y'all went to
10 go find Adam?

11 A Uh-huh.

12 Q And Adam hid a gun?

13 A Correct.

14 Q And you participated in driving --

15 A Correct.

16 Q -- to the location?

17 A Yes.

18 Q Where was this gun hidden in relationship to where
19 Duriel lived, around the corner?

20 A No, Duriel lived--

21 Q Around the street, next door?

22 A At the time Duriel lived in my house.

23 Q Well, how far was this gun from your house?

24 A Five minutes from my house, 10 minutes, I'm not sure.
25 It's not right around the corner, no, I mean...

1 Q And after you took Adam to hide this gun, he
2 threatened you and said anybody that talk would be a dead
3 man walking?

4 A Correct.

5 MR. GALMORE: Court's indulgence, Your Honor.

6 (Whereupon there was a pause.)

7 BY MR. GALMORE:

8 Q Now, after this shooting you didn't see Michael Carr
9 again; did you?

10 A That's correct.

11 Q He didn't threaten you and say you would be a dead
12 man walking; did he?

13 A No, he did not.

14 MR. GALMORE: Thank you, Your Honor. No further
15 questions.

16 THE COURT: Okay. Redirect?

17 MR. VON HERRMANN: Yes, sir, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. VON HERRMANN:

20 Q What time did you have to get up that next morning?

21 A Had to work at nine -- around -- I had to get up
22 early because I had to be at work by -- think I worked
23 either eight or -- eight to one to 12 and something --
24 between eight and 9:00.

25 Q And who is 12 -- what's his name?

- 1 A Adam Bailey.
- 2 Q This gentleman over here?
- 3 A Correct.
- 4 Q Okay. The gun that was hid in the back of Freewoods
- 5 Road, do you know where he hid it?
- 6 A No, on the other side of the fence.
- 7 Q Okay. And they indicated to you that you didn't
- 8 disclose in your recent -- on your most recent statement,
- 9 September 28th statement, they indicated that you didn't
- 10 mention anything about a robbery.
- 11 A Right.
- 12 Q But you did mention something about breaking into
- 13 Patterson's home, correct, in that statement that we just
- 14 listened to?
- 15 A That someone had been into the house?
- 16 Q That had broken into the house.
- 17 A Yes.
- 18 Q And who did you indicate had broken into that house?
- 19 A In -- then we were just talking or in the video?
- 20 Q In the video, who did you indicate?
- 21 A Those two.
- 22 Q And who broke into the house?
- 23 A Those two.
- 24 Q And who shot Joseph Patterson?
- 25 A Mike Carr.

1 Q They keep referring and talking about the form. Do
2 you have the proffered agreement up there?

3 A No.

4 THE COURT: No, that's just the statement. Mr.
5 Galmore, you had -- no, that's just the statement.

6 MR. GALMORE: I have a copy.

7 THE COURT: Here it is right here. We found it.

8 MR. VON HERRMANN: I appreciate it. Thank you.

9 BY MR. VON HERRMANN:

10 Q Now, this has been referred to you as what? What
11 type of an agreement is that?

12 A A proffered agreement.

13 Q Do you have any plea agreement with the State at this
14 point?

15 A No, I do not.

16 Q Do you have any idea -- have you and I ever discussed
17 what would happen to -- to these charges?

18 A No.

19 Q What is the only instruction that Mr. Humphreys, your
20 attorney, me or anybody else for the State of South
21 Carolina that represents them or represents you has told
22 this jury you need to do?

23 A Tell the truth.

24 Q And are you doing that now?

25 A Yes, sir.

1 Q Let's talk about that for a second. We talked about
2 all the statements since September 28th. Were you
3 represented by an attorney at that point?

4 A No.

5 Q At what point did you become represented by an
6 attorney?

7 A After I got released from jail.

8 Q Okay. Now, is that prior to any -- well, obviously
9 prior to entering into the proffer agreement; correct?

10 A Yes.

11 Q Did you have a chance to fully discuss with
12 Mr. Monckton all the -- everything that you knew about the
13 case?

14 A Yes.

15 Q At that point--

16 MR. DIGGS: Your Honor, we object because we
17 weren't permitted to go into her conversations with
18 Mr. Monckton.

19 THE COURT: I'm not going to admit any -- I
20 guess in a general sense he said that she discussed
21 everything, that's part of what you--

22 MR. VON HERRMANN: Absolutely, sir. My point
23 and what I'm getting to is...

24 BY MR. VON HERRMANN:

25 Q You had an opportunity to disclose to him whatever

1 you wanted to about the case. And then after consultation
2 y'all approached the Solicitor?

3 THE COURT: Let her answer.

4 THE WITNESS: Oh, yes.

5 MR. VON HERRMANN: I apologize, Your Honor. You
6 have to answer yes or no, the nodding is not...

7 THE WITNESS: Okay.

8 BY MR. VON HERRMANN:

9 Q After you had an opportunity to fully disclose and
10 talk to your attorney about everything, they decided that
11 they would approach Mr. Humphreys with an option of having
12 you cooperate; is that correct?

13 MR. DIGGS: Your Honor, I object.

14 THE COURT: I sustain.

15 BY MR. VON HERRMANN:

16 Q At some point did y'all approach the Solicitor's
17 Office and want to cooperate?

18 A Yes.

19 Q And as part of that did you enter into that proffer
20 agreement?

21 A Yes, sir.

22 Q As part of that proffer agreement did you give a
23 statement?

24 A Yes.

25 Q Is that statement consistent with what you testified

1 here today?

2 A Yes, sir.

3 Q When was that statement entered into? When did you
4 give it?

5 A In October. The -- October, 2004.

6 Q So three years ago?

7 A Yes.

8 Q After you got an attorney?

9 A Yes.

10 Q Did you indicate in that particular statement whether
11 a armed robbery was planned?

12 A Yes.

13 Q Did you indicate in there that a burglary had been
14 planned?

15 A Yes.

16 Q Did you indicate that these two individuals were the
17 ones that did the robbery?

18 A Yes.

19 Q And they burglarized the home?

20 A Yes.

21 Q And that ultimately killed Joseph Patterson?

22 A Correct.

23 Q And you gave--

24 MR. DIGGS: Your honor, I object.

25 THE COURT: Yes. Continue on. Your lawyer went

1 through that material, Mr. Von Herrmann, as they had
2 to.

3 MR. VON HERRMANN: I'm sorry, Your Honor.

4 THE COURT: You are -- I mean, you have gone
5 through the material already as far as what the State
6 has said, you had her -- I think you read her
7 statement.

8 MR. VON HERRMANN: No, sir. This is an entirely
9 different statement the defense hasn't even talked
10 about.

11 THE COURT: I know, but she's on the stand --
12 you asked what she says on the stand. Now, does
13 somebody challenge that she said something
14 inconsistent with that statement?

15 MR. VON HERRMANN: Oh, absolutely. Yes, sir.
16 Under 80--

17 THE COURT: Y'all approach if you would, please.
18 I thought -- I thought there was something...

19 (Whereupon a bench conference was held.)

20 THE COURT: Please proceed.

21 MR. VON HERRMANN: Thank you, Your Honor.

22 BY MR. VON HERRMANN:

23 Q On October 14th, 2004, when you entered into the
24 proffered agreement, have you told the truth to the
25 investigators that day?

1 A Yes, sir.

2 Q Have you told the truth here today?

3 A Yes, sir.

4 Q You have any hope of reward or promise of reward with
5 regard to testifying today?

6 A No, I have nothing.

7 Q You could face 15 years for your--

8 A Correct.

9 Q I have no further questions.

10 A Thank you.

11 THE COURT: Anything else, Mr. Diggs?

12 MR. DIGGS: Your Honor, there is a tape of the
13 October 14th statement and it's a very long
14 statement. I don't want to put the whole thing into
15 evidence, but there is a statement on that tape by
16 Mr. Humphreys and by Miss Phillips where they're
17 discussing--

18 MR. VON HERRMANN: Objection, Your Honor. We're
19 not going to let him sit here and make a--

20 THE COURT: No. No. Mr. Diggs -- you need to
21 ask the question, sir. You want to discuss things
22 with me, you need to do it outside of the presence of
23 the jury.

24 MR. DIGGS: All right.

25 THE COURT: Now, if you have a question, you ask

1 questions.

2 MR. DIGGS: Well, what I wanted to do is put it
3 in.

4 THE COURT: Well, ask questions or either come
5 up here and talk to me.

6 MR. DIGGS: I don't have any further questions.

7 THE COURT: All right. Mr. Galmore?

8 MR. GALMORE: Very briefly.

9 RE CROSS-EXAMINATION

10 BY MR. GALMORE:

11 Q Miss Phillips, you did sign a proffer agreement; is
12 that correct?

13 A Yes, I did.

14 Q And would it be fair to say that you would desire to
15 not go to jail for 15 years?

16 A Yes.

17 Q Would it be fair to say that you would desire perhaps
18 to get probation out of this case?

19 A No, I would want nothing.

20 Q Okay. So you would -- you want -- it is your desire
21 to have the charges against you dropped, is that--

22 A My desire, yes, it is.

23 Q Okay. I understand that since this case occurred,
24 you have had a baby; is that correct?

25 A I have had two.

1 Q You have had two. Okay. I don't have any further
2 questions.

3 A Thank you.

4 THE COURT: Anything else from anyone else?

5 MR. VON HERRMANN: Not from the State, Your
6 Honor.

7 THE COURT: You may step down, ma'am. Ladies
8 and gentlemen of the jury, if you would please step
9 back to the jury room a minute, let me discuss some
10 things here.

11 Before you step back, though, ladies and
12 gentlemen, as I told you when this case began, it's
13 very important since you'll be the ones deciding this
14 case that you pay close attention.

15 If there's something that you have personally or
16 some other reason why you have an inability to pay
17 close attention to all testimony and to all evidence
18 introduced, you need to let me know, ladies and
19 gentlemen.

20 I expect you all to pay attention, to observing
21 and listening. If there's something you need to talk
22 to me about please feel free to do so. If not I'm
23 going to continue to observe. I want you all to be
24 paying attention and listening. If you would please
25 step to the jury room.

1 (Jury left the courtroom at 3:52 p.m.)

2 THE COURT: Just to let you all know why I said
3 that. The juror here on the back end here with white
4 hair I just noticed during the video was basically.

5 I'm not sure, it seemed like to me he was paying
6 as close attention as other jurors, so just wanted to
7 make sure that he may have been listening and paying
8 attention in his own way, but I really can't tell how
9 they are.

10 But I just wanted to make sure -- then I noticed
11 that he was on the front row in the course of the
12 opening statements and he was down like this with his
13 head down and his hand -- hand under his head holding
14 his head up. I'm not sure whether that's the way he
15 listens or not. Could very well be.

16 So I just wanted to just make sure that they
17 know I'm watching. That's the only juror I have
18 noticed that -- that had me real concerned.

19 But once again, it may be his fashion. Didn't
20 appear to be sleeping or anything, so I was making
21 his fashion.

22 Now, Mr. Diggs, I did not know what you were
23 talking about. You mentioned when we came up here on
24 the -- the discussion at the bench, Mr. Von Herrmann
25 said he has case law and he wanted an 801D1 but --

1 excuse me -- 801D2 to put her October 14th statement
2 in.

3 He then handed me state versus Sharon Gaskey
4 Jerrell (phonetic) which I haven't read -- handed to
5 me. But and 801D2 and I was ready to listen to your
6 arguments, but then he said he just had one or two
7 more questions and he probably wouldn't attempt to do
8 it then because you opposed him doing it and I
9 understood Mr. Galmore did, too.

10 Then all of a sudden he sits down and the first
11 thing you do is bring up something in the statement
12 that I thought you opposed being introduced. So I
13 was rather confusing. But however you are to ask
14 questions if you wish to explain something to me --

15 MR. DIGGS: Okay.

16 THE COURT: -- for example when you made known
17 earlier during the testimony of the lady on the stand
18 that Your Honor that was a discrepancy or Your Honor
19 that was a -- something that was inconsistent, I -- I
20 mean, you don't need to tell me those things.

21 I recognized those things, at least make my own
22 determination what they are and can assess them
23 later. I am paying attention and listening.

24 So I was curious why you wanted to bring in this
25 statement when you seemed to object to it. What were

1 you going to do?

2 MR. DIGGS: Your Honor, I don't want to bring up
3 the statement, but there was a conversation between
4 Fran Humphreys, Mr. Humphreys and Miss Phillips.
5 before the statement was actually given wherein
6 Mr. Humphreys tells her that she cannot be prosecuted
7 and will not be prosecuted for murder as a result of
8 her interview, information given in that interview,
9 and that is the only portion of that tape that I
10 wanted to introduce into evidence because Miss
11 Phillips denied that conversation took place on
12 October the 14th.

13 THE COURT: Well, Miss Phillips, you read the
14 statement that -- and the proffer, and she just says
15 she --

16 MR. DIGGS: Right, but--

17 THE COURT: -- the jury can know what it means
18 or doesn't mean by just basically what it says.

19 MR. DIGGS: But there was another oral statement
20 made by Mr. Humphreys again telling her she could not
21 be prosecuted for murder as a result of what she said
22 in that interview.

23 And that's the statement I wanted to introduce
24 into evidence. The statement I wanted to introduce
25 into evidence--

1 THE COURT: Well, is the State willing to
2 concede or is the stipulation that Miss Phillips as
3 part of her agreement that she testifies truthfully
4 will not be prosecuted for murder?

5 MR. VON HERRMANN: I am willing to stipulate
6 that if she comes forward and provides all truthful
7 testimony that she will not be prosecuted for murder.

8 THE COURT: And the State has basically assured
9 her of that?

10 MR. VON HERRMANN: That she had that assurance
11 from the State, yes, sir.

12 THE COURT: Well, if they stipulate to that, why
13 do you need it?

14 MR. DIGGS: Well, could we tell the jury that?

15 THE COURT: Well, that's what a stipulation
16 means.

17 MR. DIGGS: Thank you, Your Honor.

18 THE COURT: All right. Mr. Galmore?

19 MR. GALMORE: I was just going to say, are you
20 going to tell the jury.

21 THE COURT: What would be the purpose of it if
22 it doesn't go to the jury to stipulate to it letting
23 it in?

24 MR. VON HERRMANN: Well, Your Honor, the only
25 thing I would want in the stipulation is that she

1 might misunderstand that. I mean, I don't want
2 her -- I don't want to put a stipulation in the
3 record that--

4 *THE COURT:* Well, we can say that regardless of
5 what Miss Phillips understands, the State stipulates
6 that in their proffer they intended to assure her
7 that if she gave truthful testimony she would not be
8 prosecuted for murder.

9 *MR. VON HERRMANN:* The State has no objection to
10 that, Your Honor.

11 *THE COURT:* Okay. All right. Now, where are we
12 at 10 minutes to four with this first two quick
13 witnesses here?

14 *MR. VON HERRMANN:* I think, Your Honor, we are
15 into -- the third is probably going to be equally as
16 long. He'd be the co-defendant, Duriel Simmons.

17 *THE COURT:* Well, I know, but I want to get that
18 witness in today and question -- get the witness in
19 today. You need your -- I'm accumulating a bunch of
20 your material up here.

21 *MR. VON HERRMANN:* Your Honor, I trust I have
22 got--

23 *THE COURT:* You want this to read or something?

24 *MR. VON HERRMANN:* It's pretty boring, Judge.

25 *THE COURT:* John Hayes, a man I respect a great

1 deal from York County. By the way, was he affirmed
2 or reversed in that case?

3 MR. VON HERRMANN: He was affirmed, Your Honor.

4 THE COURT: Affirmed. Another one.

5 MR. VON HERRMANN: Didn't reverse it, I promise
6 you.

7 THE COURT: Let's go ahead then since the jury
8 is out, take a minute or so then we'll come back.
9 We're going to stay until we get at least the direct
10 or maybe some of the cross-examination of that
11 witness.

12 Don't be -- Mr. Diggs, Mr. Galmore, any
13 anticipated objections to what Mr. Von Herrmann is
14 going to try to do with Mr. Simmons and Mr. Some --
15 there going to be any anticipated objections to Mr.
16 Diggs or Mr. Galmore's? Is there a recorded
17 statement here of this?

18 MR. DIGGS: Your Honor, there is a video
19 statement by Mr. Simmons just as with Miss Phillips
20 wherein he says they went over there to purchase
21 marijuana.

22 I anticipate that it's -- his in-court testimony
23 is going to be contrary to that and he's going to say
24 I went over there to commit a robbery. So we may be
25 in a position where we'd want to -- are going to need

1 to play his video as well or probably impeach him.

2 MR. VON HERRMANN: Yes, Your Honor, there would
3 be an objection at that time as to that.

4 THE COURT: Why are you going to object to that,
5 didn't object to the one of Miss--

6 MR. VON HERRMANN: That would help me. The next
7 one may or may not help me, Your Honor. I mean, I
8 would have--

9 THE COURT: I have no idea what it is, but
10 here's my thoughts. My thoughts is you want that
11 video in of Mr. Simmons because you want the jury to
12 believe what he told the police officers initially
13 was the truth or not?

14 MR. DIGGS: With respect to Mr. Simmons,
15 basically yes, and I would offer it as substantive
16 evidence.

17 THE COURT: What I'm asking is, are you
18 contending that what he told on the video is the
19 truth?

20 MR. DIGGS: As far as we know the truth, yes,
21 sir.

22 THE COURT: So you're trying to persuade them
23 what he told them then that -- on the video is the
24 truth?

25 MR. DIGGS: Yes, sir. He stated on the tape

1 that the drug -- actually started at Turtle Cay
2 apartments to buy marijuana. Said they parked, and
3 they were in the apartments and that the -- Mr. Carr
4 and Mr. Bailey had gone up to make the purchase and
5 they had come back and it was on there.

6 So what we would offer is impeachment evidence
7 with prior inconsistent statement.

8 *THE COURT:* Well now, if he admits he made it,
9 you lose your argument about impeachment. Do you
10 not, sir?

11 *MR. DIGGS:* Well, he's impeached himself. Yes,
12 sir.

13 *THE COURT:* But remember the rule says that
14 point blank, I mean, there is no -- 613 there is no
15 if, and, or butts regarding using for impeachment,
16 that it says that if a witness does not admit that he
17 has made a prior inconsistent statement, extrinsic
18 (sic) evidence of the State is admissible.

19 However, if the witness admits making the prior
20 statement, extrinsic (sic) evidence of a prior
21 statement is made is inadmissible the--

22 *MR. DIGGS:* Your Honor, my position is that the
23 statement itself is not extrinsic evidence. That
24 rule does not apply to the actual statement.

25 That rule applies -- that's because the

1 statement is in the record. That rule applies
2 bringing it out -- accord -- witnesses together on
3 the stand to testify about what was said and what
4 wasn't said. That's extrinsic evidence outside of
5 the record outside of the Court evidence.

6 But with that statement is already in the
7 record, the record -- is already in the record that
8 is not extrinsic and that rule is not designed to
9 apply to that situation, to keep out prior
10 inconsistent statements.

11 *THE COURT:* Well, I'm not sure I'm with you on
12 that, but I was with you on the idea that you're
13 trying to say that the jury should believe what he
14 said in his statement, they have right to look at his
15 demeanor, look at the way he's giving the statement.

16 *MR. DIGGS:* Right.

17 *THE COURT:* So they can make the decision
18 whether they believe him or not. And if that's the
19 purpose you're putting it in, it's because you
20 believe what he said is the truth on whatever date
21 that was -- that the video was done, then Mr. Von
22 Herrmann seems to me that Mr. Diggs is trying to say
23 that -- that what Mr. Simmons said was the truth,
24 they have -- just like you would a video deposition
25 of someone -- to see them make the statement, see if

1 they can judge the demeanor of when they were --
2 truth is --

3 MR. VON HERRMANN: Well, I mean, Your Honor, we
4 had the same hearsay problem we had in the first
5 video statement. We still got police officers
6 interrogating and quite frankly--

7 THE COURT: That's my concern with that. I
8 don't know anything about what's said, but I guess
9 I'm probably going to have to look at it after we
10 leave tonight, but I don't know what's in there of
11 the police officer. Because remember what the police
12 officers say would be hearsay and that would be a
13 problem.

14 MR. DIGGS: Your Honor, I believe it's going to
15 be very similar to what we had with Miss Phillips
16 that there were questions put to Mr. Simmons and
17 that's basically it.

18 But I will tell you what I'll try to do. I'll
19 try to get -- I'll try to get what I want from
20 Mr. Simmons out during my direct examination so we
21 don't have to waste evidence -- waste that time. But
22 at the same time I want Mr. Bailey to be -- to have a
23 chance to be fully--

24 THE COURT: I will consider it at the time.
25 I -- I believe the jury has a right to view the

1 demeanor of someone that you're saying is telling the
2 truth then and not now, but I also would have a
3 strong concern, though, about hearsay coming in in
4 front of this jury that who knows where the officers
5 are or what they were saying or if they were
6 repeating what someone else may have said, could be a
7 403 type hearsay.

8 Could be a 403 analysis, but -- and or just do a
9 review of it, but I am concerned about that. So if
10 it comes in, it might be subject to -- might have to
11 redact some of the comments from the officers.

12 MR. DIGGS: Suggest maybe I can do that tonight?

13 THE COURT: Maybe you can, maybe you can't. I
14 don't know. We'll see.

15 MR. DIGGS: I could do it.

16 THE COURT: All right. Anything else that you
17 anticipate you're going to object to, Mr. Von
18 Herrmann?

19 MR. VON HERRMANN: No, sir, Your Honor.

20 THE COURT: Okay. We will then proceed. Now
21 everyone, I will be back here ready to go let's say
22 at about 10 after or a little before so make sure
23 you're in your seat by then. Officer, please let's
24 not let the people go in and out.

25 MR. VON HERRMANN: Your Honor, can we approach

1 for scheduling purposes?

2 THE COURT: Make it 12 after four now, they're
3 approaching.

4 MR. VON HERRMANN: It won't take long.

5 (Whereupon a bench conference was held.)

6 (Whereupon a recess was had.)

7 THE COURT: Ready?

8 MR. VON HERRMANN: State's ready.

9 THE COURT: Bring the jury in, please.

10 (Jury entered the courtroom at 4:34 p.m.)

11 THE COURT: All right. Ladies and gentlemen,
12 we're ready for the next witness. Next witness for
13 the State, please.

14 MR. VON HERRMANN: Thank you, Your Honor. The
15 State calls Duriel Simmons to the stand.

16 THE COURT: Come around, Mr. Simmons.

17 DURIEL SIMMONS, after being duly
18 sworn, testified as follows:

19 THE COURT: All right. Your witness.

20 MR. VON HERRMANN: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MR. VON HERRMANN:

23 Q Mr. Simmons, were you involved in the armed robbery
24 on September 28th, 2004, of Joe Patterson?

25 A Yes.

1 MR. DIGGS: Your Honor, object to the form of
2 the question. And it's leading.

3 MR. VON HERRMANN: How does that suggest the
4 answer?

5 THE COURT: Well, I will overrule the objection.
6 Overrule the objection.

7 MR. VON HERRMANN: Thank you.

8 THE COURT: I will let you cross-examine on that
9 issue.

10 MR. DIGGS: Thank you, Your Honor.

11 BY MR. VON HERRMANN:

12 Q Were you involved in that?

13 A Yes.

14 Q And tell me who participated in that armed robbery
15 and ultimately murder with you.

16 MR. DIGGS: Your Honor, it would be a continuing.
17 objection.

18 THE COURT: I will let it continue, but I will
19 let you do -- you know, when he asks questions, that
20 gives you a lot of leeway on cross-examination.

21 BY MR. VON HERRMANN:

22 Q Mr. Simmons, please sit up so you can talk in the
23 microphone. Tell me all the co-defendants who
24 participated in the armed robbery and murder of Joe
25 Patterson.

1 A Mike Carr, Adam Bailey, Antonio Davis.

2 Q Were there other co-defendants in this particular
3 case that helped plan or were present during the planning?

4 A Kareem Harry.

5 Q Who else?

6 A Ashley Phillips.

7 Q What relationship do you have to Ashley Phillips at
8 the time?

9 A She was my girlfriend.

10 Q How long had y'all been dating?

11 A About two and a half years.

12 THE COURT: Let me at this time, Mr. Von
13 Herrmann, ladies and gentlemen of the jury, in my
14 rulings please understand you're the ones who decide
15 whether a robbery has taken place, murder has taken
16 place. They're ultimately your decision.

17 I can permit questions in that regard, but those
18 decisions and conclusions are yours to make. Proceed
19 on, Mr. Von Herrmann.

20 MR. VON HERRMANN: Thank you, Your Honor.

21 BY MR. VON HERRMANN:

22 Q Have you had an opportunity to discuss your testimony
23 today with either -- any of your co-defendants?

24 A No, sir.

25 Q How long has it been since you have spoke with Ashley

1 Phillips?

2 A Been about six -- six and a half months ago.

3 Q How about with Michael Carr?

4 A Talk to him.

5 Q Adam Bailey?

6 A Don't talk to him.

7 Q Antonio Davis?

8 A Don't talk to him.

9 Q As part of your agreement to come here and testify
10 today, did you enter in a proffer agreement with -- with
11 your attorney with me?

12 A Yes.

13 MR. VON HERRMANN: And let me have this marked
14 if I could please, Madam Court Reporter.

15 (WHEREUPON, State's Exhibit No. 33 was marked
16 for identification only.)

17 BY MR. VON HERRMANN:

18 Q Let me show you State's Exhibit number 33 marked for
19 identification. Are you familiar with that document?

20 A Yes, I am.

21 Q Whose signatures are on the bottom of that page?

22 A My name and my lawyer's name.

23 Q And who is that right there?

24 A This right here?

25 Q Uh-huh.

1 A That's your name.

2 MR. VON HERRMANN: Your Honor, we'd move State's
3 Exhibit number 33 into evidence.

4 MR. DIGGS: Your Honor, we don't have any
5 objection.

6 MR. GALMORE: No objection, Your Honor.

7 THE COURT: All right. State's 23 in evidence.
8 But I have already admitted one through 27 and all
9 that haven't I? Twenty-three?

10 MR. VON HERRMANN: Thirty-three.

11 THE COURT: I'm sorry.

12 MR. DIGGS: Your Honor, I'm sorry, what number?

13 THE COURT: Thirty-three.

14 (WHEREUPON, State's Exhibit 33 was admitted into
15 evidence.)

16 BY MR. VON HERRMANN:

17 Q Mr. Simmons, can you please tell the jury the
18 substance of our agreement on what you are supposed to do
19 today and what you plan or you hope to or will receive if
20 you testify truthfully and all the attendant...

21 A If I testify truthfully I will get 15 years non--

22 Q And what were you charged with?

23 A Accessory after the fact.

24 Q And part of that have you agreed or elected to at any
25 point receive or have we asked you to take a polygraph and

1 you agreed to do that?

2 A Yes.

3 Q Have you agreed -- have you done that?

4 A No.

5 Q Have you agreed to give all law enforcement all your
6 information, everything you know whether we asked you
7 about it or not?

8 A Yes.

9 Q Have you done so?

10 A Yes.

11 Q Have you done so truthfully?

12 A Yes.

13 Q Have you in the past given statements to law
14 enforcement with regard to this case where you were not
15 truthful and forthcoming?

16 A Yes.

17 Q Was that prior to entering into -- in the proffer
18 agreement?

19 A No.

20 Q Was that prior to representation by counsel? In
21 other words, did you have a lawyer at the time you were
22 lying to the police?

23 A No.

24 Q Let me get in and ask you, in 2002 were you convicted
25 of malicious injury to personal property?

- 1 A Yes, sir.
- 2 Q That's the only charge?
- 3 A Yes, sir.
- 4 Q Let's talk about this situation you find yourself in
- 5 today. Tell me about the night of September 28th, 2004.
- 6 Where were you?
- 7 A I was out with Kareem.
- 8 Q What, whose apartment?
- 9 A I didn't know the chick, but I was -- I went to a
- 10 spot where Kareem was staying.
- 11 Q Okay. And who else was there?
- 12 A Tonio, Mike and Adam.
- 13 Q So Adam Bailey, this defendant?
- 14 A Yes.
- 15 Q Michael Carr?
- 16 A Yes.
- 17 Q This defendant, yourself, Antonio Davis, who else?
- 18 A And Ashley.
- 19 Q And Kareem, right?
- 20 A Yes, sir.
- 21 Q At some point did a discussion come up about
- 22 purchasing or buying or getting marijuana?
- 23 A Yes, sir.
- 24 Q Tell us about how that conversation...
- 25 A Well, I came through to buy some, some marijuana from

1 Kareem, but then I started -- I stayed over there for a
2 minute, then the conversation started coming up about
3 going to rob somebody.

4 Q Did you know somebody that sold marijuana and had
5 money on them?

6 A Yes, sir.

7 Q And who would that have been?

8 A Joe Patterson.

9 Q Did anybody else in that room at that time know Joe
10 Patterson?

11 A No, sir.

12 Q How do you know Joe Patterson?

13 A I know him since I was a kid.

14 Q Does he live close to you?

15 A Right across the street from my grandmother.

16 Q At some point tell us about how did -- the plan was
17 developed to go and rob.

18 A I mean, it really -- really wasn't a plan other than
19 just conversation, then one thing led to another.

20 Q Tell me about that one thing led to another. You
21 told -- did you tell them what the layout of the apartment
22 was?

23 A Yes, sir.

24 Q And what did you indicate?

25 MR. DIGGS: Your Honor, we object to the

1 leading.

2 *THE COURT:* Your question is about to be
3 leading. I sustain.

4 BY MR. VON HERRMANN:

5 Q Tell us what the plan entailed, who was going to do
6 what.

7 A Well, about us -- the whole conversation we were
8 talking, and -- well, I told them straight up I wasn't
9 going to the house. Carr and Adam, they said that they'll
10 go to the house.

11 Q Say that Carr -- these two individuals said they
12 would go up?

13 A Yes, sir.

14 Q Okay. Tell me how many guns were there.

15 A Two.

16 Q How did the guns get--

17 *MR. DIGGS:* Your Honor, we object to the
18 leading. The witness.

19 BY MR. VON HERRMANN:

20 Q How many guns?

21 *THE COURT:* I overrule that one, Mr. Diggs.
22 Some of those you were right -- overrule that one.
23 Please continue.

24 BY MR. VON HERRMANN:

25 Q How did you go about getting the guns or how were the

1 guns got?

2 A They were Antonio's guns.

3 Q And tell us about the guns. What were they like?

4 A One was a white handled Smith and Wesson. The other
5 one was a brown handle.

6 Q Okay. Let me show you State's Exhibit number one
7 marked for identification -- or excuse me -- in evidence.
8 Can you identify this particular handgun?

9 A Yes, I can.

10 Q Okay. And where -- where was the -- where did you
11 last see that gun?

12 A Last time I saw that pistol was the last time I saw
13 Antonio.

14 Q That -- tell me when you -- when they -- when y'all
15 left Island Green apartments, who had the guns?

16 A Time? Which time, when we left?

17 Q When you went to rob Joe Patterson.

18 A Adam and Mike.

19 Q Who had that particular gun?

20 A Adam had that gun.

21 Q And who had the -- the white handled gun?

22 A Carr.

23 Q And tell us what the plan was that was going to occur
24 when you got to Turtle Cay apartments.

25 A To rob Joseph Pratt (sic).

1 Q Tell us how you were going to plan about that.

2 A I mean, the only -- the only thing that I had to do
3 with it was drive the car. I didn't have no plans of
4 going to the house.

5 Q And what was Adam or Antonio's job?

6 A Nothing but supply the pistol.

7 Q Let me show you State's Exhibit number 21. Can you
8 identify that particular photograph?

9 A Yes, I can.

10 Q Tell the jury what that is.

11 A Joseph apartment.

12 Q All right. How about this thing says victim's
13 apartment. How about put it on there and point it toward
14 the victim's apartment.

15 A (complied.)

16 Q Show you State's Exhibit number 14 in evidence.
17 Which apartment is his? Put that on there, too.

18 A (complied.)

19 MR. VON HERRMANN: Your Honor, at this point
20 we'd like to publish these two particular photographs
21 to the jury.

22 THE COURT: What numbers?

23 MR. VON HERRMANN: That would be 14 and 21.

24 THE COURT: They are in evidence already. You
25 may do so.

1 BY MR. VON HERRMANN:

2 Q Let me show you State's Exhibit number 18 marked for
3 identification. It's not quite clear, but are you
4 familiar with where the victim's apartment is in this
5 particular case?

6 A Between the trees right there.

7 Q Take that and put it on there.

8 A (complied.)

9 Q When you approached -- I will tell you what.

10 MR. VON HERRMANN: Your Honor, if I could have
11 him step down, I would appreciate it.

12 THE COURT: Well, I think the acoustics are over
13 there. I think there's a mike over there, too, but
14 please speak loud over there. You're going to have
15 to stand here.

16 MR. VON HERRMANN: I'm just going to have him
17 draw where they drove that particular night.

18 THE COURT: Okay. Says anything, he'll have to
19 speak loud, please. Step down, please.

20 BY MR. VON HERRMANN:

21 Q Mr. Simmons, if you will step right over here.

22 A (complied).

23 Q Just to make it easy we'll publish it to the jury,
24 but tell us where the main entrance to the victim's
25 apartment is.

1 A Right here.

2 Q Okay. Tell us when you came in exactly -- draw a
3 line, an arrow, how you drove.

4 A Come...

5 THE COURT: Sir, I can't hear you. You're going
6 to have to--

7 THE WITNESS: Came from the entrance of hellyaw
8 (sic) way. Came in, I drove from the front of Turtle
9 Cay entrance and went around to where the trash can
10 is, the trash can right between these trees right
11 here.

12 Came back and drove around and then went in
13 Abaco Bay. Drove in Abaco Bay and I parked right
14 here by the -- by the mailbox in the last apartment
15 to your left.

16 BY MR. VON HERRMANN:

17 Q All right. We're going to get to that. Draw me a
18 line all the way around there and back that way.

19 A (complied.)

20 Q All right. Use this where says defendants parked.
21 Point out where you parked in the parking lot.

22 A (complied.)

23 Q Go ahead and have a seat.

24 MR. VON HERRMANN: Your Honor, we'd like to
25 publish defendant's 18 (sic) to the jury.

1 THE COURT: All right. You may do so.

2 BY MR. VON HERRMANN:

3 Q Did you park in Turtle Cay Apartment parking lot?

4 A Did I?

5 Q Yes, sir.

6 A Yeah, for a second to talk to my brother-in-law.

7 Q Okay. Tell us how that happened.

8 A When I pulled in, I saw him sitting in the parking

9 lot. When I went in, he turned around by the dumpster. I

10 came back and I stopped and I talked to him.

11 Q Did you notice anything about the victim's apartment

12 when you turned around?

13 A All the lights were off.

14 Q Was his car there?

15 A Yup.

16 Q Then what did you -- where did you proceed to?

17 A I went to Abaco Bay like I showed you on the picture,

18 I parked by the mailbox in the last apartment and we left.

19 Q Tell me about how you parked. Was it the front in or

20 the back in?

21 A Backed in.

22 Q What happened at that point? Where -- who got out of

23 the car?

24 A Adam and Mike.

25 Q And where did they go, do you know?

1 A They proceeded to the apartment.

2 Q Whose apartment?

3 A Joe's.

4 Q That's Joe Patterson. Tell me what happened.

5 A Well, I don't know. I wasn't there.

6 Q But you were sitting there. What happened, what was

7 the next time you saw them?

8 A Came back walking.

9 Q Did they have guns with them when they left?

10 A Yup.

11 Q When they came back, did they get in the car?

12 A Yeah, they got in the car.

13 Q What if anything did they say?

14 A Wasn't too much said.

15 Q All right. What was said?

16 A Mike said that he think he killed the dude --

17 Q What did you say?

18 A -- he shot him.

19 Q What did you do?

20 A I kept driving.

21 Q At some point did they indicate to you that they had

22 entered his apartment?

23 A No, I didn't find -- I didn't really find that out

24 till the next day.

25 Q Okay. The next day when you found out, how did you

1 remember seeing or how did you find out?

2 A From Adam.

3 Q And what did he say?

4 A He said he was standing right beside Mike when he
5 kicked the door in.

6 Q And was there any indication of what they were trying
7 to do?

8 A Rob him for the property.

9 Q And what specifically is this property that they were
10 trying to rob when they broke in his house?

11 A Drugs.

12 Q Did both of them know that was going to occur?

13 A What, the drugs?

14 MR. DIGGS: Your Honor, I object. Calls for
15 speculation.

16 THE COURT: What was your question? I didn't
17 hear you.

18 MR. VON HERRMANN: I just wanted to know if they
19 both had the understanding that they were -- go there
20 to rob for drugs and money, both of them.

21 THE COURT: He cannot testify what the other
22 people had an understanding to do. He can testify
23 what he understood.

24 BY MR. VON HERRMANN:

25 Q What did -- did y'all have an agreement that was what

1 was going to happen?

2 A Yeah, we had an agreement.

3 Q Okay. Tell me what happened. Where did you go after
4 you left Turtle Cay apartments?

5 A Went back to Island Green.

6 Q Where did you -- what did you do when you got to
7 Island Green?

8 A I dropped those two off at the same spot I picked
9 them up from.

10 Q Which is where?

11 A Where the spot where Kareem was staying at.

12 Q And where did you go?

13 A I went home.

14 Q And who went with you home?

15 A Ashley and Antonio.

16 Q Did you go in the apartment where Kareem was?

17 A What, that night? No.

18 Q How did Ashley get -- come down to you?

19 A She came downstairs and got in the car and we went
20 back to the apartment.

21 Q Was there any conversation y'all had after he said, I
22 think I killed him, I shot him?

23 A Nah.

24 Q When was the next time that -- let me ask you this.

25 I apologize. Strike that. Where did you and Ashley and

1 Antonio go?

2 A Back to her apartment.

3 Q And what happened when you got there?

4 A Nothing, went to sleep.

5 Q When was the next time you saw -- any of the three
6 co-defendants?

7 A The next day.

8 Q Tell us -- tell me what happened then.

9 A Well, like I told you before, I spoke with Adam. At
10 first I had went to -- back to the apartment and we had
11 conversations at the apartment about what happened and
12 then we had a conversations about how -- getting rid of
13 the guns and stuff.

14 Q Tell me about the conversation about what happened.

15 A Well, we went back to the apartment, it was me,
16 Antonio, Ashley and Adam. And Adam was telling us what
17 happened.

18 Q Tell us what happened.

19 A Said like I told you before, he said Mike kicked the
20 door in and he said Mike shot the dude and he turned
21 around and ran.

22 Q Did he indicate to you that he helped kick the door
23 in?

24 A No.

25 Q He indicate to you that he was participating in that

1 robbery?

2 A Yes.

3 Q What did Adam tell you about it?

4 A Tell me about...

5 Q I'm sorry. What did Mike tell you about it?

6 A Never talked to him.

7 Q When was the next time you saw Adam?

8 A Next day.

9 Q Okay. Tell me about when you saw him.

10 A When I saw him, like I told you, he told -- told me
11 everything that happened, so I told him, well look, you
12 need to go ahead and get rid of that gun then, so I took
13 the gun end of Freewoods Road.

14 Q Who was driving to the end of Freewoods Road?

15 A Ashley.

16 Q And who was in the car with you?

17 A Me and Harry.

18 Q When you got to the end of Freewoods Road tell me
19 what happened.

20 A Adam went in the woods and I threw the bullets in the
21 ditch.

22 Q Show you State's Exhibit number 27. Are these the
23 bullets that you threw in the water?

24 A Yes.

25 Q You familiar with those?

1 A Yes.

2 Q Did y'all discuss or you and Ashley discuss at some
3 point what your story would be if the police came?

4 A No.

5 Q Did you discuss with any of the co-defendants what
6 would happen if the police came what your story would be?

7 A I told them I wasn't going down for something I
8 didn't do.

9 Q You indicated that on Freewoods Road that Adam jumped
10 over the fence?

11 MR. DIGGS: Your Honor, I'd object.

12 THE COURT: That is a leading question. I will
13 sustain that objection. Ask the question and let him
14 answer.

15 BY MR. VON HERRMANN:

16 Q When you went to the end of Freewoods Road, what did
17 Adam do?

18 A Jump over the fence.

19 Q And did he have the gun with him or not?

20 A Yes.

21 Q What did he indicate to you he did with it while he
22 was back there?

23 A Didn't say.

24 Q Did he come back and have the gun?

25 A No, I didn't see no gun.

1 Q Did he indicate to you that he buried the gun or
2 disposed of it?

3 A No.

4 MR. DIGGS: Your Honor, object to the leading.

5 THE COURT: I sustain it but he said no he
6 didn't, so... Mr. Von Herrmann, please don't ask
7 leading questions, sir.

8 MR. VON HERRMANN: Yes, sir.

9 BY MR. VON HERRMANN:

10 Q You indicated you gave law enforcement a statement?

11 A Right.

12 Q Why did you lie to them?

13 MR. DIGGS: Your Honor, I object. He hasn't
14 characterized the statement as being a lie.

15 THE COURT: I thought he said earlier he did
16 lie.

17 MR. VON HERRMANN: He absolutely did.

18 MR. DIGGS: I stand corrected.

19 THE COURT: Okay.

20 BY MR. VON HERRMANN:

21 Q You lied to the police during the course of your
22 investigation; didn't you?

23 A Right.

24 Q Tell us why you lied.

25 A I don't know, I just didn't tell them the truth.

1 Q Well I understand that, but why?

2 A Because felt like if I told them the truth I was
3 going to get locked up regardless even if I didn't--

4 Q Any doubt in your mind that there was an agreement
5 between the four of y'all to go rob Joe Patterson?

6 A Yeah, it was an agreement.

7 THE COURT: The Court Reporter can't hear you,
8 sir.

9 THE WITNESS: Yes, it was an agreement.

10 BY MR. VON HERRMANN:

11 Q Any doubt in your mind that that was accomplished?

12 A Was accomplished?

13 Q That his house was broken into and he was killed?

14 A Say that again.

15 Q Is there any doubt in your mind that his apartment
16 was broken into and he was killed?

17 A No because I never heard no gunshots.

18 Q But there's no doubt he's dead; right?

19 A I mean, I know now.

20 Q How did you find out he was dead?

21 A I didn't find out he was dead until the next day.

22 Q How did you find out?

23 A My mother and my brother-in-law.

24 Q And what -- who did you call when you found that out?

25 A They called me.

1 Q Okay. And then did you call somebody or did you just
2 keep that information?

3 A No, I just kept that.

4 Q And then at what point did you have a discussion with
5 Adam and Mike about him being dead?

6 A I talked to Adam and Antonio. I never talked to
7 Mike.

8 Q Have you talked to Mike since the day that happened?

9 A No.

10 Q And what was Adam's response to him being dead?

11 A He ain't did nothing, that he didn't do nothing.

12 Q He didn't do anything. He didn't kill him or he
13 didn't do anything?

14 A He didn't do anything.

15 Q So y'all never had a discussion where he indicated
16 that he--

17 MR. DIGGS: Objection.

18 THE COURT: No, Mr. Von Herrmann.

19 MR. VON HERRMANN: Your Honor, I--

20 THE COURT: This is your witness.

21 MR. VON HERRMANN: Yes, sir, Your Honor and I
22 believe at this point I would declare him a hostile
23 witness to go to impeachment evidence under the
24 rules.

25 THE COURT: All right. Approach, let me see

1 what you have got.

2 (Whereupon a bench conference was held.)

3 THE COURT: All right. You may proceed on.

4 MR. VON HERRMANN: Thank you, Your Honor.

5 BY MR. VON HERRMANN:

6 Q Isn't it true when you were involve -- interviewed
7 initially on this you said that Adam Bailey had
8 participated in the burglary or the robbery of Joe
9 Patterson and was familiar with the victim?

10 A Yes.

11 Q And that's true; isn't it?

12 A Yes.

13 MR. VON HERRMANN: No further questions, Your
14 Honor.

15 THE COURT: All right. Mr. Diggs?

16 MR. DIGGS: Your Honor, may it please the Court.

17 CROSS-EXAMINATION

18 BY MR. DIGGS:

19 Q All right. Now this statement that you made wherein
20 my client, Adam Bailey, was in on the robbery, you made
21 that statement when?

22 A When I first got locked -- when I was approached when
23 I got locked up and was interviewed by the police.

24 Q Did you first say it last week or did you say it
25 three years ago?

1 A I said that three years ago, too.

2 Q Oh, okay. Then that would be in the detective's
3 reports of what you said at that time?

4 A Supposed to be.

5 Q Should be there? Do you remember -- by the way, when
6 were you locked up?

7 A If I'm not mistaken I got locked up I think the 29th
8 or 30th -- 29th?

9 Q Okay. Of -- of September of 2004, correct?

10 A Yes, sir.

11 Q And did you interview with police detectives at that
12 time?

13 A Yes.

14 Q Yeah, you did. And you told them you went there to
15 buy marijuana. Isn't that what you told them?

16 A Yes, sir.

17 Q Okay. When did your story change that you went there
18 to rob Mr. Patterson who you say now is your friend?

19 A A week ago.

20 Q All right. Okay. That's my point. Last week,
21 nearly three years. And where have you been the last
22 three years by the way?

23 A In jail on--

24 Q In jail. You have been in jail, correct? You
25 couldn't make the bond?

1 A No.

2 Q Okay. so after -- in September of 2004 you're -- you
3 told the police, I went there to get marijuana?

4 A Right.

5 Q But last week when you signed your plea agreement you
6 said, oh yeah, I did go there to rob him; correct?

7 A Right.

8 Q Now, it took you three years to change that --
9 your -- your story?

10 A I could have told the truth then.

11 Q Yeah. All right. Now, what's the result of you
12 changing your story now and coming up here to testify?
13 What benefit are you going to get?

14 A What benefits are you talking about?

15 Q Yeah. What kind of -- you are going to be charged
16 with murder?

17 A No.

18 Q No. You're not going to be charged with murder
19 although you -- you now say you knew you were going over
20 there to rob your buddy; right?

21 A Right.

22 Q You had known Joseph Patterson all your life?

23 A Right.

24 Q He lived in front of your grandmother about how many
25 feet away?

1 A Twenty-five.

2 Q Yeah. You could throw a rock through your
3 grandmother's window from Joe Patterson's porch; couldn't
4 you?

5 A Right.

6 Q Yeah. But you planned to go over there at midnight
7 and rob him at gunpoint; correct? That's what you're
8 expecting us to believe now; correct?

9 A Right.

10 Q Okay. But that's not true; is it?

11 A What?

12 Q What you're saying now.

13 A It is true what I'm saying?

14 Q You went over there to buy marijuana plain and
15 simple; correct?

16 A No.

17 Q All right. What you told the police three years ago
18 on September the 28th, 2004, was the truth; wasn't it?

19 A No.

20 Q And they did a videotape of you, didn't they, Duriel?

21 A Yes, they did.

22 Q And we got that. You deny that you made the
23 statement at that time that you went over to make a
24 purchase of marijuana?

25 A I said that.

1 Q Okay. And why did you say that?

2 A Because I didn't want to get locked up.

3 Q All right. But you have been locked up now for three
4 years; haven't you?

5 A Exactly.

6 Q Now what's going to happen as a result of your
7 changing your story?

8 A I don't know.

9 Q All right. Now, you have been locked up three years.
10 You going to get credit for that time served?

11 A Hope.

12 MR. VON HERRMANN: Objection, Your Honor.

13 BY MR. DIGGS:

14 Q Do you expect -- sorry?

15 THE COURT: May ask if he expects.

16 BY MR. DIGGS:

17 Q Do you expect to get credit for that time, sir?

18 A I hope so.

19 Q All right. So you're going to be home scott free
20 pretty soon according to your calculations; isn't that
21 true?

22 A I hope.

23 Q Yeah. All you have got to do is come in here and
24 talk about a robbery; correct? Correct?

25 A Right.

1 Q All right. And in your plea agreement it says just
2 like Miss Phillips, you will not be prosecuted for murder
3 based on anything you say in regard to this case; correct?

4 MR. VON HERRMANN: Your Honor, if he could read
5 that statement, I don't believe that's what that says
6 in that proffer agreement.

7 BY MR. DIGGS:

8 Q All right. Let me -- let me draw your attention to
9 paragraph six.

10 THE COURT: Ask him does he understand it
11 means...

12 BY MR. DIGGS:

13 Q Do you understand it means that?

14 A I didn't. Let me see it. Which one -- which one are
15 you talking about?

16 Q All right. This is your plea agreement that was --

17 A Right.

18 Q -- just introduced into evidence. Let me get you to
19 read the sentence that's written in at the bottom of
20 paragraph six. Can you read that, Mr. Simmons?

21 A Duriel Simmons shall fail to comply with the terms of
22 this proffer the statement revoke any sentence
23 negotiations, offers of leniency or reduction in sentences
24 charged and the presiding Judge may sentence in his
25 discretion to the maximum amount allowed by law.

1 Q All right. Is that paragraph six?

2 A Yes, sir.

3 THE COURT: No, it's not.

4 THE WITNESS: It's paragraph seven. Excuse me.

5 BY MR. DIGGS:

6 Q Yeah. Let me go back -- what I want to draw your
7 attention to --

8 A Right here.

9 Q -- is paragraph six and the handwritten...

10 A This is only to resolve murder charge. All other
11 pending charges will be dealt with later.

12 Q Okay. So under the terms of that agreement you were
13 promised by the State that they would not pursue murder
14 charges against you for the death of Joe Patterson;
15 correct?

16 A That was spoken.

17 Q Pardon?

18 A That was something totally different.

19 Q All right. But it has to do with Duriel Simmons and
20 the charge of murder, correct? Let me show you this
21 again. Show you a copy of your plea agreement. What does
22 that say right there? In re, do you know what that means?

23 A What that means?

24 Q Have you ever--

25 MR. DIGGS: Your Honor, with your permission --

1 it means in the matter of concerning.

2 *THE WITNESS:* Okay.

3 *THE COURT:* Latin term. What is the, re?

4 *MR. DIGGS:* Re, RE colon.

5 BY MR. DIGGS:

6 Q And what does it say there? What's it in respect to?
7 What is it dealing with?

8 A Murder.

9 Q All right. Murder as opposed to who?

10 A Duriel Simmons.

11 Q Duriel Simmons. Okay. And it's talking about murder
12 of Mr. Patterson, Joe Patterson; correct?

13 A Right.

14 Q Okay. So this plea agreement promises you -- it's
15 dated June the seventh, 2007. Did you actually sign it
16 then?

17 A I can't recall.

18 Q Okay. But it was this summer?

19 A Yeah.

20 Q This summer. And as a result of that plea agreement
21 you met with some investigators last week?

22 A Yes.

23 Q Okay. And at that time you said, oh yes, we planned
24 the robbery; correct?

25 A Yes.

1 Q Okay. And contrast to that with your interview with
2 Detective Scott Bogart -- do you remember him?

3 A Yes, sir, I do.

4 Q You interviewed with him on September the 28th of
5 2004, and at that time you were videotaped; correct?

6 A Right.

7 Q And at that time you said that the four of you went
8 over to Mr. Joe Patterson's house to purchase marijuana;
9 correct?

10 A Yes, sir.

11 Q All right. And that was your story for nearly three
12 years until last week?

13 A Yes, sir.

14 Q All right. Did you ever make the statement that I'll
15 say anything to get out of jail?

16 A No, sir.

17 Q Okay. Now, tell us about how it was that you got up
18 with Adam and he went -- how -- how was it that Adam ended
19 up being the one to throw the gun away?

20 A I don't know, just that day I just asked him and he
21 said he'll throw -- he's going to be the one to get rid of
22 the gun.

23 Q Okay. How did you -- when did he make that statement
24 and how did you come into contact with Adam?

25 A Like I said earlier, we was -- came to my house.

- 1 Q Okay. Adam came to your house?
- 2 A Yes, sir.
- 3 Q Okay. Tell us about that conversation.
- 4 A The conversation we had that ain't nobody going down
- 5 for what that individual had did.
- 6 Q All right. And did he give you the gun or what?
- 7 What happened?
- 8 A No, sir. I didn't touch that gun never a time.
- 9 Q Okay. Well, what -- what happened at that point?
- 10 Pick up -- pick up the narrative, if you would. He came
- 11 to your house?
- 12 A Came to my house, we had conversations of the
- 13 situation and what happened.
- 14 Q All right. Mr. Simmons, about what time of the day
- 15 was this?
- 16 A I can't recall. I just know it was in the afternoon.
- 17 Q Okay. Tell us what you did after he had that
- 18 conversation with you.
- 19 A We went and got rid of the gun.
- 20 Q How did you do that?
- 21 A We left in Nikki's car and went to the end of
- 22 Freewoods road and he jumped over the fence.
- 23 Q Okay. Who selected Freewoods Road as the
- 24 destination?
- 25 A I can't recall.

1 Q And who -- who was driving?

2 A Ashley was.

3 Q Now, your testimony is that Adam came over to your
4 house and y'all left in Nikki's car, the three of y'all?

5 A We all went to the house together.

6 Q All right. And these are the bullets that you threw
7 away?

8 A Yes, sir.

9 Q And where were the bullets, what are -- whose bullets
10 are these? Tell us about these bullets.

11 A I don't know.

12 Q How did you get them in your possession?

13 A They were at the house Kareem was staying at.

14 Q They were at Kareem's house? And how come you
15 decided to go ahead and take the bullets with you?

16 A I don't know. I just grabbed them.

17 Q Okay. And you went down with Nikki and threw them
18 out at the end of Freewoods Road; right?

19 A Adam also.

20 Q And Adam. All right. Did you think it was smart to
21 throw the bullets out at the same place that the gun was
22 being?

23 A Wasn't thinking. I just threw them.

24 Q Now, how long did it take Adam to dispose of the gun?

25 A Not long.

1 Q Not long? Kind of do your best to give us an
2 estimate.

3 A Say a good two minutes, three tops.

4 Q Two what?

5 A Two, three minutes tops.

6 Q Okay. And when he went to dispose of the gun, you
7 saw him climb over the fence?

8 A Yes, sir.

9 Q Is that a fence or is it a gate?

10 A It's like a gate.

11 Q Okay. Actually there's no fence there; is there,
12 Mr. Simmons?

13 A No.

14 Q Okay. He could have just as easily walked around the
15 gate; couldn't he?

16 A Can't walk around that gate. Can either go under or
17 climb over.

18 Q You can't walk around it?

19 A Nah.

20 Q Had you ever been out there other than the time you
21 threw the bullets out?

22 A Nah, that was the first time I ever been over there.

23 Q Well--

24 A I been in that area before but not in that -- in that
25 spot.

1 Q All right. So you don't know if you can walk around
2 the gate or not; do you?

3 A I was there.

4 Q Your testimony is that you cannot walk around the
5 gate?

6 A You cannot walk around the gate. You can either go
7 over that gate or under that gate. That gate is locked.
8 I saw a lock on the gate.

9 Q But there's no fence on either side?

10 A Lot of grass and vines that's blocking that whole
11 area.

12 Q Let's see if we got a picture. Is this basically
13 what it looks like?

14 A Yes.

15 Q Okay.

16 MR. DIGGS: Let's have those marked for
17 identification -- marked into evidence, Your Honor.

18 THE COURT: Okay. Any objection?

19 MR. VON HERRMANN: One second, Your Honor.

20 THE COURT: Mr. Galmore, do you have any
21 objection to this?

22 MR. GALMORE: No, sir, no objection.

23 MR. VON HERRMANN: No objection, Your Honor.

24 THE COURT: All right. Have them marked as
25 defense be...

1 COURT REPORTER: Four and five.

2 THE COURT: Four and five.

3 (WHEREUPON, Defense Bailey Exhibits 4 and 5 were
4 admitted into evidence.)

5 BY MR. DIGGS:

6 Q Mr. Simmons, if you could, I want you to look at
7 those photos, at least the gate that's depicted in those
8 photographs, would it be possible just to walk around the
9 gate on either side; wouldn't it?

10 A I see that now.

11 Q Okay.

12 A Like I told you before, I wasn't familiar with the
13 place.

14 Q Okay. That's -- I understand. I believe in your
15 direct testimony you testified that you actually didn't
16 plan on robbing anybody; is that correct?

17 A Yes, sir.

18 Q But you knew these other -- these other people were
19 going to do the robbery; correct?

20 A Right.

21 Q Is what you're saying now. Did you have any concerns
22 about going over to rob someone you had known all of your
23 life?

24 A Yes, I did.

25 Q And why did you do it?

1 A Money.

2 Q Money? Well, were you going to get any of the money?

3 A Some of it got--

4 Q All right. Let me ask you this. How is this robbery

5 supposed to take place?

6 A I don't know. I didn't plan anything.

7 Q In other words, they didn't rob him. Might have

8 killed him -- right, or somebody did?

9 A Right.

10 Q But he didn't get robbed; did he?

11 A No, sir.

12 Q So let's talk about the details of the robbery. What

13 was going to happen? How was that going to come down?

14 A I don't know.

15 Q He had money in his apartment. You think?

16 A Right.

17 Q Isn't that what you said? You think he had marijuana

18 in his apartment.

19 A Right.

20 Q You don't get either one of them. You see what I'm

21 getting at? Mr. Patterson just gets shot dead for no

22 reason. Was that part of the plan that y'all discussed

23 that to any extent?

24 A Discussed what? Just shoot a man just to shoot a

25 man?

- 1 Q Yes, sir, how you were going to rob him.
- 2 A Nah, man.
- 3 Q Exactly how were you going to conduct this robbery?
- 4 A I don't know. I didn't -- like I told you, I did not
- 5 plan this robbery.
- 6 Q Okay. So did you hear any planning being discussed?
- 7 A Like I said earlier, we had conversations of robbing
- 8 a individual. I didn't do the dude that was robbed.
- 9 Q And how was the robbery going to take place?
- 10 A Whoever went to the door was going to kick the door.
- 11 Q We have a picture -- let me ask you. The -- this is
- 12 an apartment complex, right, Mr. Simmons?
- 13 A Yes, sir.
- 14 Q And -- the photographs are right over there. Okay.
- 15 Let me ask you to look at what's been marked as State's
- 16 Exhibit -- I think that's... 14. Okay. We can see in
- 17 that photograph, is that Mr. Patterson's building?
- 18 A Yes, sir.
- 19 Q All right. So he had a lot of neighbors in close
- 20 proximity; didn't he?
- 21 A Yes, sir.
- 22 Q And if anybody kicked the door in or knocked the door
- 23 in, that was going to make a lot of noise; wasn't it?
- 24 A Right.
- 25 Q And any one of those neighbors would have heard that

1 for sure; don't you think?

2 A Right.

3 Q So that wasn't a very smart plan. Do you agree with
4 me?

5 A No.

6 Q What were -- what were they going to do after they
7 kicked the door in?

8 A I don't know.

9 Q Did they discuss that in your presence?

10 A Like I told you, they did not discuss that in my
11 presence.

12 Q Okay. They must have discussed that somewhere else;
13 correct?

14 A What you mean by that? Like I said--

15 Q What the plan was going to be.

16 A Like I told you and like I told that man right there,
17 we talked about it, right, it wasn't really a plan. You
18 see what I'm saying? It was just go to get him for his
19 product. You see what I'm saying? Now what went on
20 before that I don't have nothing to do with and I don't
21 know nothing about.

22 Q Do you recall ever hearing anyone talking about
23 purchasing marijuana --

24 A No, sir.

25 Q -- from Mr. Patterson?

- 1 A No, sir.
- 2 Q Well, Mr. Patterson did sell marijuana; did he not?
- 3 A Yes, sir.
- 4 Q And sometimes people will go there to his apartment
5 and purchase marijuana; would they not?
- 6 A I went a couple time.
- 7 Q You did?
- 8 A I can't vouch for everybody else.
- 9 Q All right. You went there a couple of times?
- 10 A Yes, sir.
- 11 Q Did you ever see -- well, let me back up. On that
12 night of the 27th, early morning hours of the 28th, did
13 you and Mr. Bailey or any other persons discuss going to
14 purchase marijuana --
- 15 A No, sir.
- 16 Q -- on that occasion?
- 17 A No, sir.
- 18 Q Never? Is that your testimony?
- 19 A We never went and -- we never discussed to go over
20 there and buy marijuana.
- 21 Q Okay. How did you come into possession of Ashley's
22 car that evening?
- 23 A I told her to let me use it.
- 24 Q Okay. Did -- what did -- what did you want to use it
25 for?

1 A To go to Joe's.

2 Q Okay. And what did she tell you she was going to do
3 while you were gone?

4 A Nothing.

5 Q Now after you left the apartment, Mr. Patterson's
6 apartment, what did you do?

7 A Went back to Island Green.

8 Q And why did you go to Island Green? Who lived there
9 or where were you going?

10 A I was staying in Island Green with Ashley.

11 Q All right. You went back to Ashley's apartment?

12 A I went to Kareem's first and dropped them off.

13 Q All right. Does he live in the same apartment
14 complex as you at that time?

15 A He stayed -- like when you come in, he stayed on
16 right side, I stayed in the back.

17 Q Okay. But it's the same apartment complex?

18 A Yeah. Yeah.

19 Q So you just walk pretty much from one apartment to
20 the other?

21 A Yes, sir.

22 Q Mr. Simmons, thank you very much. That's all I have
23 at this point.

24 MR. DIGGS: Your Honor, I have that other matter
25 concerning the tape.

1 THE COURT: All right. Mr. Galmore -- I'll let
2 you preserve that. You want to ask any questions,
3 Mr. Galmore?

4 MR. GALMORE: Yes, sir. Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. GALMORE:

7 Q Mr. Simmons, when you were first approached by the
8 police, isn't it true that you told them that you were at
9 a recording studio?

10 A Yeah, I went there after I went home.

11 Q And Ashley told you the same thing; is that--

12 A Right.

13 Q But those statements you're telling us today that
14 those statements--

15 A That was true. That was true just I didn't have
16 nobody to vouch for me where I was at at the time.

17 Q Did you tell the police that you had alibis, other
18 people that were at the studio?

19 A Yeah, but nobody came forward.

20 Q And you told the police that you were -- you could
21 even give the names of the people that were at the studio?

22 A I didn't say that. I said that me, Ashley and
23 Antonio were at the studio after I went home because I
24 told them, I also said that I got a phonecalls while I was
25 at the studio.

1 Q Okay. But you didn't tell the police that you could
2 give the names of the other people that were at the studio
3 with you?

4 A I couldn't give no names.

5 Q All right. But you did tell them that you were at a
6 studio?

7 A I don't think I did.

8 Q But you definitely told them at some point that y'all
9 were going over to JoJo's house to buy drugs; is that
10 right?

11 A Yeah, I told them that.

12 Q Okay. And that's the tape recorded statement --

13 A Yeah.

14 Q -- that you gave?

15 A Yes.

16 Q Now you're telling us now today that that statement
17 wasn't true either?

18 A Right.

19 Q So you're telling us that the first two things that
20 you said to them were both lies?

21 A What two things?

22 Q That you were in a recording studio?

23 A I did go to the recording studio.

24 Q Okay.

25 A I just said that I went to go buy drugs.

- 1 Q Okay. So you're telling us that you at least gave
2 them up with false statement?
- 3 A Yes, sir.
- 4 Q Now how -- how long had you known JoJo?
- 5 A All my life.
- 6 Q And JoJo is Joseph Patterson; right?
- 7 A Yes, sir.
- 8 Q How long have you known Mike?
- 9 A All my life.
- 10 Q Y'all went to school together, you --
- 11 A Yes, sir.
- 12 Q -- and Mike. Did you go to school with JoJo, too?
- 13 A No, sir.
- 14 Q Okay.
- 15 A But brothers knew him, he know my family.
- 16 Q Okay. But you have known him since childhood?
- 17 A Yes, sir.
- 18 Q And would you consider Mr. Patterson to have been a
19 friend of yours?
- 20 A You can say that.
- 21 Q You definitely say that you bought marijuana from him
22 in the past; right?
- 23 A I have.
- 24 Q Large quantities of marijuana or dime bags?
- 25 A I bought a large -- a large quantity before.

1 Q How long we talking about?

2 A Pound or better.

3 Q A pound or better?

4 A Yup.

5 Q So JoJo had that much marijuana?

6 A I don't know. I ain't...

7 Q Okay. Now, when the plan came around to robbing
8 somebody, you suggested Joseph Patterson?

9 A Yes, sir.

10 Q So as far as the target of this robbery, that was
11 your idea?

12 A Yes, sir.

13 Q And this is a person that you would consider a
14 friend?

15 A Yes, sir.

16 Q Would you consider Mike Carr a friend?

17 A Not now.

18 Q Back then?

19 A Yeah.

20 Q Guess you can't consider Joseph a friend any more
21 either; can you?

22 A Nah.

23 Q Had you not suggested Mr. Patterson's name, do you
24 think that he would have been robbed that night?

25 A No, sir.

1 Q Why did you suggest Mr. Patterson's name?

2 A I don't know, the name just came to my head.

3 Q Do you know whether he had been robbed before?

4 A I heard about it. I was accused of that one.

5 Q What happened on that occasion, the door was kicked
6 in?

7 A I don't know. I don't have nothing to do with that.

8 Q You said you had been offered 15 years; right?

9 A Yes, sir.

10 Q That sound like a long time; don't it?

11 A It do.

12 Q Isn't it true that you'd be eligible for parole?

13 MR. VON HERRMANN: I'd object.

14 THE COURT: Objection sustained.

15 MR. GALMORE: Your Honor, he's getting the
16 benefit from the testimony. I think the jury is
17 allowed to know it.

18 THE COURT: Yes, sir. But are you asking him
19 does he know without -- does he have an
20 understanding? If he has an understanding, fine.
21 You got an understanding of when you'll be eligible
22 for parole?

23 THE WITNESS: No, sir, I don't.

24 THE COURT: He doesn't have an understanding.

25 BY MR. GALMORE:

1 Q Your attorney did not discuss parole eligibility?

2 THE COURT: Well, once again I'm not going to
3 permit you to discuss what the attorney told him.

4 MR. GALMORE: Yes, sir.

5 MR. DIGGS: Your Honor, I'll note -- state on
6 the record that I want to ask the same question.

7 THE COURT: Okay. You stated it.

8 MR. DIGGS: Thank you.

9 THE COURT: The only reason he gets to ask is
10 one was a attorney made.

11 BY MR. GALMORE:

12 Q Would it surprise you to know--

13 THE COURT: No, sir, don't testify, sir.

14 BY MR. GALMORE:

15 Q Where did those bullets come from?

16 A I don't know where they came from. I just know they
17 came from an individual's house. I don't know whose
18 bullets they are.

19 Q You didn't purchase them?

20 A Nah.

21 Q Okay.

22 A I don't even own a gun.

23 Q Think your testimony is that the gun came from
24 Antonio Davis; is that correct?

25 A Yes, sir.

1 Q Now, when you went with Adam -- you did go with Adam
2 to hide the gun; is that correct?

3 A Yes, sir.

4 Q Which gun did you hide?

5 A The white handled one. The white handled Smith and
6 Wesson.

7 Q The gun that we don't have today. Did Adam make any
8 threats towards you when you were taking him down to the
9 back of Freemont Road or Freewoods Road?

10 A No, sir.

11 Q He didn't make a comment about anybody talking was
12 being a dead man walking?

13 A He said that when we all was in the house.

14 Q Okay. So he did make that comment?

15 A Yes, sir.

16 Q Would you take that comment to be a threat?

17 A Nah.

18 Q You?

19 A I didn't.

20 Q You didn't?

21 A No.

22 Q But he did make that comment?

23 A Yes, sir.

24 Q How is it that you learned that JoJo had been killed?

25 A Say what? Say that again.

1 Q How is it that you came to find out that JoJo had
2 been killed?

3 A What like the night when I was at the studio, I got a
4 phonecall. My mother told me that he had been shot. I
5 got a phonecall from my brother-in-law telling me the same
6 thing. I left the recording studio, went back to Island
7 Green.

8 Q Did your mother ask you if you did it?

9 A She asked me if I was out there.

10 Q She didn't ask if you did it?

11 A No.

12 Q As far as going over to the -- to the apartment, you
13 did not go up to JoJo's door; did you?

14 A No, sir.

15 Q You didn't see if the door was kicked in; did you?

16 A No, sir.

17 Q You didn't hear the door being kicked in; did you?

18 A No, sir.

19 Q Do you know if the door was in fact kicked in?

20 A No, sir. Didn't hear gunshots either.

21 Q You didn't see who shot Joseph Patterson; did you?

22 A No, sir.

23 Q Thank you.

24 THE COURT: Mr. Von Herrmann, any other
25 questions?

1 MR. VON HERRMANN: Yes, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. VON HERRMANN:

4 Q You were told who shot JoJo; weren't you? You were
5 told?

6 A Yes, sir.

7 Q And you were told that they kicked the door in?

8 A Yes, sir.

9 Q There's a lot made of when you first came forward
10 with your statement to tell the truth, the fact that you
11 lied to law enforcement. When was the first time you and
12 I ever met, do you remember?

13 A I can't remember the date.

14 Q Was in June?

15 A Yes.

16 Q Does that help you? At that point who -- who met
17 with you?

18 A Who met with me that day? You and a female right
19 behind you.

20 Q An investigator with the Solicitor's Office?

21 A Yes, sir.

22 Q Had you met with your attorney prior to that?

23 A Before that?

24 Q Right.

25 A Yes, sir.

1 Q And had you discussed the proffer agreement?

2 A Yes, sir.

3 Q How many times prior to that had you met -- had you
4 met with your attorney?

5 A Well, before that met with him that one time he told
6 me that I was going to get a--

7 THE COURT: No, sir, let's don't talk about what
8 your attorney talked about.

9 BY MR. VON HERRMANN:

10 Q Yeah, just how many times had you met with him?

11 A Since I been locked up? Over 50 times.

12 Q And when you entered the proffer agreement, how many
13 times did you talk to me?

14 A Twice.

15 Q And what has my sole instruction to you been
16 throughout this entire process about what you have to do
17 to get that 15 --

18 A Tell the truth.

19 Q Is that what you have done today?

20 A Yes, sir.

21 MR. VON HERRMANN: No further questions, Your
22 Honor.

23 THE COURT: Anything else, Mr. Diggs?

24 MR. DIGGS: Not at this time, Your Honor.

25 THE COURT: Mr. Galmore?

1 MR. GALMORE: No, sir, Your Honor.

2 THE COURT: Okay. You can step down, sir. If
3 you would just have a seat right there, please.

4 (Witness left the stand.)

5 THE COURT: Could I see counsel at the bench,
6 please?

7 (Whereupon a bench conference was held.)

8 THE COURT: Ladies and gentlemen of the jury,
9 one thing that the parties have stipulated to -- and
10 what a stipulation is is something you may accept as
11 fact. You may accept as true without controversy.

12 Regarding Miss Phillips, the lady who testified,
13 both parties agree that regardless of what her
14 understanding may be, that the State with its
15 proffering her, that the State has agreed not to
16 charge her with the crime of murder as long as she
17 gives truthful testimony in a court of law.

18 So regardless of what her understanding may be,
19 the State has agreed that if she gives truthful
20 testimony, they will not prosecute her for murder.
21 Is that the degree of stipulation, Mr. Von Herrmann?

22 MR. VON HERRMANN: It is for the State, Your
23 Honor.

24 THE COURT: Mr. Diggs?

25 MR. DIGGS: Yes, sir.

1 THE COURT: Mr. Galmore?

2 MR. GALMORE: Yes, sir.

3 THE COURT: All right. Want to make sure the
4 stipulation is something you can accept is fine. All
5 right, ladies and gentlemen, at this time going to
6 end for the day because other witnesses will be
7 longer and longer and I know that -- that sometimes
8 have a tendency to say let's keep going, let's keep
9 going, you know, and get the thing over with or
10 whatever else.

11 But please understand this is serious to the
12 State and to the defense, and so I want to make sure
13 everybody is fresh and available to hear and listen
14 and pay attention, alert.

15 So it's 5:30 now, so we're going to quit for the
16 day. But I tell you what we'll do. We'll start back
17 at nine am tomorrow morning as opposed to 9:30. I
18 know Horry County is a big ever-loving county.
19 Anybody have any trouble getting here at 9:00? No
20 trouble at all.

21 All right. Madam Court Reporter, she'll be
22 here. So any way, we'll see you all then tomorrow
23 morning at nine am. Do not discuss this case at all
24 tonight. How is your forelady? She doing well?
25 Been a good leader?

1 All right. See y'all tomorrow morning at nine
2 am. If you need a phone number to call in case you
3 have trouble getting here, get the phone before you
4 leave. The bailiff is about to give you the phone
5 number.

6 (Jury left the courtroom at 5:32 p.m.)

7 *THE COURT:* Let me also make the statement that
8 I notice that when the jury enters and leaves, Mr.
9 Diggs and Mr. Bailey, they stand up. I want to make
10 sure that that is fine if they wish to stand up.

11 If the State wishes to stand up, if Mr. Galmore
12 and Mr. Carr, if y'all wish to stand up, you can.
13 But that's totally your -- your option. Either one
14 of your options. All right.

15 Now let's discuss briefly this matter of the
16 tape. Mr. Diggs, I don't recall hearing much in
17 there where he disagreed with anything you were
18 saying about what was on the tape.

19 *MR. DIGGS:* Well Your Honor, we still have the
20 same issue about introducing it. And what I would
21 propose to do is let me take it home tonight and
22 redact it if it needs to be, report back to you if we
23 find out exactly how long it is and make a motion at
24 that time as to whether or not I want to make that
25 part of the record and introduce it into evidence.

1 THE COURT: All right. Well, let me just make
2 sure you understand the parameters that -- if I
3 permit it in. The only way I permit it in if you're
4 telling me you wish to -- for the jury to believe
5 what he says in this statement is true and therefore
6 you want them to observe his demeanor as he's giving
7 whatever statement he gave.

8 However, if you have got so much hearsay on
9 there from other people as well as a situation where
10 you have no Judge there to determine his own
11 testimony may be something that's objectionable to,
12 that either Mr. Galmore's client or to the State,
13 then I will make another ruling and so you can look
14 at it tonight, come back.

15 You may want to talk to Mr. Galmore and Mr. Von
16 Herrmann, see if y'all may be able to agree to a part
17 of it, you want a part of it.

18 If not, surely I can look at it and make sure
19 that not so much there to be objectionable otherwise,
20 but the basic principle you have the right to look at
21 the demeanor on the basis of the statement, then I
22 agree you should be able to permit -- put it in if
23 you wish to. All right. Anything else?

24 MR. GALMORE: No, sir.

25 MR. VON HERRMANN: No, sir.

1 THE COURT: All right. Good. We will see you
2 in the morning at 0900. I just want to make sure
3 that that young man knows where to call if he has a
4 problem tomorrow.

5 BAILIFF: Your Honor--

6 THE COURT: I want to make sure I know where his
7 home is because if he's not here, we're going to go
8 pick him up. Everybody stay away from jurors,
9 please.

10 (Court in recess for the evening.)

11 ***** July 25th, 2007 *****.

12 THE COURT: As we begin, most of you know by my
13 procedures around the state I had this direct
14 situation as far as at least appropriate dress, I
15 don't require people to dress up when they come in
16 the courtroom. In addition, because we are in a
17 serious environment, we're in a court environment,
18 nothing can be more serious, more congruent than this
19 trial here.

20 But also decore within the courtroom as far as
21 making sure people are positioned appropriately. I
22 don't permit people to be laying in the seats and
23 laying on the front row with the head -- or asleep.

24 So officers, if y'all would make sure y'all
25 watch that because to me especially if you're on one

1 side or the other in here and apparently way y'all
2 divide it is -- who, I don't know. But your actions
3 may -- could very well effect interest that you have.

4 And officers, make sure y'all watch that for me.
5 In addition, when I let the jury go, when I let the
6 jury go back to the -- to their chambers on a break
7 or whatever, the Court is not at recess until I say
8 it's a recess.

9 We could very well be going to have a motion or
10 might be want to put something on the record. It's
11 very difficult for the Court reporter if while -- as
12 soon as that jury gets out that door if the noise
13 starting in the audience as well as me trying to say
14 something or the attorneys trying to say something.

15 So until I say court is recessed, it is not
16 recessed and everyone stay in place just as the trial
17 is going on.

18 The other issue is coming in and out. I have
19 tried my best to be fair to everyone and I will
20 continue to do so, but I do not want groups of people
21 coming in and out of the courtroom while the trial is
22 going on.

23 It's unfair to the whichever attorney is up
24 asking questions or making motions to distract them
25 in that regard.

1 There's no way we can stop the court officials
2 because court officials have a duty to do it, people
3 come in and come out for different reasons, so that
4 is not covered by my decision.

5 But if you're going to be in here, I give
6 everybody pretty much time to let you know when we're
7 going to start and I always start after that so
8 everybody has a chance to be in here and be seated.
9 So please try and do that.

10 Mr. Diggs, Mr. Galmore, Mr. Von Herrmann, is
11 there anyone outside now that y'all -- do you all
12 think will be coming in, will have an interest in
13 your particular side of this case?

14 MR. VON HERRMANN: Not from the State, Your
15 Honor.

16 MR. DIGGS: No, sir.

17 MR. GALMORE: Your Honor, I -- Mr. Carr's family
18 is due to come in today, but if they do come we'll
19 just have them wait until the appropriate time.

20 THE COURT: Please if you would. Also officers,
21 if you would make sure that once that jury is seated,
22 once they're seated and the first witness is asked a
23 question, from then on only court officials,
24 officers, people working in the court system can come
25 in, okay? Okay. Mr. Von Herrmann, are you ready to

1 proceed, sir?

2 MR. VON HERRMANN: Yes, sir, Your Honor. There
3 is the issue of the matter of the videotape.

4 THE COURT: Yes, sir.

5 MR. VON HERRMANN: Mr. Diggs wanted to address.

6 MR. DIGGS: Your Honor, we're -- had an
7 opportunity the taped statements of Mr. Simmons at
8 this time -- decided not to.

9 THE COURT: All right. So then therefore you
10 don't need that -- is he here by the way, available?

11 MR. VON HERRMANN: I'm not sure if he was
12 transported this morning or not.

13 THE COURT: Oh, I'm sorry. I don't think the
14 jury could still -- could be called back, but he --
15 he's available?

16 MR. VON HERRMANN: Yes, sir, he's available.

17 THE COURT: So do you need to call him back at
18 all?

19 MR. DIGGS: I don't think so.

20 THE COURT: Mr. Galmore, you didn't get any call
21 about that?

22 MR. GALMORE: No, sir.

23 THE COURT: So you're ready to go to your next
24 witness?

25 MR. VON HERRMANN: Yes, sir, Your Honor.

1 THE COURT: All right. If you would then let's
2 go ahead and get me my -- might want to get the
3 witness. Bring the jury in, please.

4 Hey, young fellow. How are you doing out there?
5 You learning something about the Court system a
6 little bit? Want to come up here? One day you may.

7 (Jury entered the courtroom at 9:35 am.)

8 THE COURT: Good morning, ladies and gentlemen.
9 If you do like I do and watch some of the Braves
10 game, see what Bonds was going to do last night. If
11 you did, you stayed up too late. If you didn't, hit
12 two homers.

13 All right. We're ready to proceed, ladies and
14 gentlemen, today. You heard testimony yesterday and
15 the State will continue to offer evidence today.

16 Before we get started, has anyone discussed this
17 case, anyone hear about it from anyone; if so, let me
18 know now. All right. Hearing no polling requests,
19 Mr. Von Herrmann, your next witness.

20 MR. VON HERRMANN: Thank you, Your Honor. The
21 State would call Antonio Davis to the stand.

22 ANTONIO DAVIS, after being duly
23 sworn, testified as follows:

24 THE COURT: D-a-v-i-s; right?

25 THE WITNESS: Yes, sir.

1 THE COURT: All right. Your witness, Mr. Von
2 Herrmann.

3 MR. VON HERRMANN: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MR. VON HERRMANN:

6 Q Mr. Davis, could you please tell the Court or the
7 jury, are you familiar with what you're here testifying
8 about today?

9 A Yes, sir.

10 Q And that would be the occurrences on September 28th?

11 A Yes, sir.

12 Q Can you please tell the jury where you were on the
13 evening or the early morning hours or late -- excuse me --
14 late at night on the 28th --

15 A The 28th.

16 Q -- of September, what you're here to testify?

17 A All right. The night when I was in Island Green at a
18 apartment that my friend Kareem Harry had.

19 Q And who was in that apartment with you?

20 A Me, myself, Durriel Simmons, Michael Carr, Adam
21 Bailey, and Kareem Harry.

22 Q Was there any females present?

23 A Nikki Phillips.

24 Q And so Mike Carr and Adam Bailey were the two
25 individuals that were sitting over here, defendants?

1 A Yes, sir.

2 Q Tell me what if any discussions with regarding to an
3 armed robbery took place during that time.

4 A Well, around that time Duriel Simmons had a plan to
5 rob the guy standing on Forestbrook which would be
6 Mr. Joseph Patterson.

7 Q Now, did you know Mr. Patterson?

8 A No, sir.

9 Q Who all was involved in the discussion of robbing?

10 A Myself, Duriel, Mike Carr, Kareem Harry, Nikki
11 Phillips and Adam Bailey.

12 Q Everybody knew there was going to be a robbery that
13 night?

14 A Yes, sir.

15 Q Tell me what specifically the plan was to rob Joe
16 Patterson.

17 A Well, the plan was for Mike Carr and Adam to go rob.

18 Q And what were you going to do?

19 A I -- I was going to ride with them.

20 Q What was your job in the robbery?

21 A Well, me and Duriel Simmons had to get the guns, so
22 we went to go get the guns.

23 Q And how many guns did you get?

24 A Two.

25 Q Describe the guns to the jury.

1 A It was one gun that was black with a white handle and
2 another gun that was black with a wooden handle.

3 Q Let me show you State's Exhibit number one that's in
4 evidence. Do you recognize that?

5 A Yes, sir.

6 Q And can you tell the jury what that gun is, how do
7 you recognize the gun?

8 A I recognize it because it was mine.

9 Q Was that one used in the robbery?

10 A One of them.

11 Q Who had the black handled gun?

12 A The--

13 Q The gun I just showed you the picture of?

14 A Adam Bailey.

15 Q Okay. And who had the white handled gun?

16 A Mike Carr.

17 Q At some point did y'all leave the apartment complex?

18 A Yes, sir.

19 Q And who left the apartment complex?

20 A Myself, Duriel, Mike Carr, Adam.

21 Q And what was your intentions of -- what were you
22 going to do when you left the apartment?

23 A Go rob Joseph.

24 Q And do you know what time that was?

25 A Yes, sir, I would say about 12:00 maybe.

- 1 Q That's at night?
- 2 A Yeah.
- 3 Q Okay. Tell me how y'all were seated in the vehicle.
- 4 A Duriel Simmons was driving, I was in the passenger's
- 5 side front seat, and Adam Bailey was behind me and Mike
- 6 Carr was behind Duriel Simmons.
- 7 Q And who had the guns at that point?
- 8 A At that point Mike Carr had the gun with the white
- 9 handle and Adam Bailey had the gun with the brown handle.
- 10 Q Tell me -- you indicated to me that you had gone and
- 11 gotten the gun. How did that occur?
- 12 A Before it all happened me and Duriel went down to
- 13 Buddy Lane (sic) down a guy named Corel -- Corel's house,
- 14 and he wasn't home, so we rode in Laurel Woods which is
- 15 next door and Corel was walking down the street and had
- 16 the guns on him and we got the guns from him.
- 17 Q When you left to go to rob Joe Patterson, tell me
- 18 what your job in the car was.
- 19 A Just to sit there and look, to watch.
- 20 Q And whose car were you in?
- 21 A Nikki Phillips'
- 22 Q Now, tell me the route you take from the apartment
- 23 complex to Turtle Cay Apartments where Joe Patterson
- 24 lived.
- 25 A We came out of Island Green, turned at the BP

1 station, Burgess, went down 707 and went across the Turner
2 Bridge.

3 Q Okay. And then --

4 A Toward--

5 Q -- yeah. Take me all the way to--

6 A Then we went down Forestbrook, went all the way down
7 to Abaco Bay, then made that left. Then we made another
8 left then we rode to the back of Abaco Bay and we rode out
9 to the front.

10 Q Did you notice anything about Joe Pat -- first of
11 all, did you know Joe Patterson?

12 A No, sir.

13 Q Who was the only person that knew Joe Patterson?

14 A Duriel Simmons.

15 Q Do you know if any of the defendants knew Joe
16 Patterson?

17 A I don't think they knew Joe.

18 Q Did you notice anything or did they point out where
19 Joe Patterson's apartment was?

20 A Yes, sir, Duriel Simmons pointed it out.

21 Q And tell me if you noticed anything about that.

22 A Well, the lights were off and it seemed empty.

23 Q Well, how about the lighting on the area by the door?

24 A I believe it was off, too.

25 Q What did -- was there anything said about a car being

1 present or anything like that?

2 A Um...

3 Q About Joe Patterson's car being there?

4 MR. DIGGS: Your Honor, object to the leading.

5 THE COURT: I sustain it. Ask your question
6 again and rephrase.

7 BY MR. VON HERRMANN:

8 Q Was there any comment made about a specific car being
9 there?

10 A A specific car? No. All he did was really point at
11 the house, say that's the house.

12 Q Okay. I'm going to ask you to step down for me, if
13 you would. I'm going to show you State's Exhibit number
14 18. You're going to have to come over here and you're
15 going to have to be loud, okay, as you point out to the
16 jury. Do you recognize this photograph?

17 A Yes, sir.

18 Q Okay. And what is that?

19 A It's Abaco Bay.

20 THE COURT: You're not loud enough. We cannot
21 hear you, say -- got to make sure I can hear you.

22 THE WITNESS: Abaco Bay Apartments.

23 BY MR. VON HERRMANN:

24 Q And what is this over here?

25 A That's where we parked at back.

1 Q Okay. What apartment is this, this is Turtle Cay?

2 A That's--

3 MR. DIGGS: Your Honor, we object to the
4 leading.

5 THE COURT: Is this -- that I will not -- I
6 overrule on that one.

7 BY MR. VON HERRMANN:

8 Q Is that Turtle Cay apartments?

9 A Yes, that's how the -- apartments at that -- that's
10 it.

11 Q Okay. And tell me how you drove coming in from the
12 Forestbrook, where did you go?

13 A We came in from Forestbrook and went all the way in,
14 then we went all the way to the back. Then we turned
15 around from the back, we came back out and stopped right
16 here.

17 Q And what happened when you stopped right there?

18 A Duriel talked to two dudes standing on the side.
19 That's when he pointed up to the house, rode back out,
20 parked -- rode to the back and parked right there.

21 Q Okay. When you parked back here, how were you
22 parked, facing in or facing out?

23 A Facing out, sort of back in, backed in to...

24 Q You can have a seat.

25 A (complied.)

- 1 Q Mr. Davis, tell me what happened when you parked back
2 here.
- 3 A When we parked, Michael Carr got out the car, said
4 come on, Adam, so then they left.
- 5 Q Who left?
- 6 A Adam Bailey and Mike Carr.
- 7 Q Did they have the guns with them when they left?
- 8 A Yes, sir.
- 9 Q How long you took -- where did they go?
- 10 A They went around to Joseph Patterson's apartment.
- 11 Q Did you hear or see anything?
- 12 A No, sir.
- 13 Q I have -- did you ultimately see them again?
- 14 A Yes, sir.
- 15 Q How did they approach the car?
- 16 A Adam Bailey got in on my side then Mike Carr got in
17 on the other side.
- 18 Q How far apart were they?
- 19 A Couple seconds.
- 20 Q Okay. Were they running towards the car or were they
21 walking or tell us how, what manner they--
- 22 A I really couldn't tell if they were running or
23 walking.
- 24 Q What was said when they got in the car, anything?
- 25 A Not right off the bat like when we turned out of the

1 apartment -- out of the apartment complex and hit
2 Forestbrook Road that's when Mike said he shot the dude.
3 Said he shot him and he think he killed him.

4 Q Did he indicate at any time to you how many times he
5 shot?

6 A No, he said he shot bang, bang.

7 Q What gun would he have used had he shot?

8 A Right hand.

9 MR. GALMORE: Objection, Your Honor. This man
10 has no way of answering that question. That's
11 speculation.

12 THE COURT: Well, the way he asked the question,
13 he wasn't there other than what you asked him what he
14 told him.

15 MR. VON HERRMANN: Let me --

16 BY MR. VON HERRMANN:

17 Q Did he -- did he indicate to you what gun he used to
18 shoot Joe Patterson?

19 A He didn't indicate what gun he used. I gave him the
20 guns.

21 Q Okay. What gun did you give Mike Carr?

22 A The gun with the white handle.

23 Q Did you see him after he got in the car with that
24 white handled gun?

25 A Did I see him?

1 Q Mike Carr.

2 A Yes, I seen him.

3 Q And did he do anything with that gun while y'all were
4 riding?

5 A Took the spent casings out.

6 Q What did he do with the spent casings?

7 A We rode down -- first we was riding down Forestbrook
8 Road, we made a right at that Texaco because it started
9 raining real hard that night. And then we went over the
10 big bridge and then we went down Enterprise Road.

11 And at the end of Enterprise Road there's a boat
12 landing and they got a rock road that goes down all the
13 way towards Myrtle Beach golfing aisle, and that's where
14 he throw them out the door at.

15 Q What did he do with the gun at that point?

16 A Kept it.

17 Q Did he make any comments about that gun?

18 A He said he wasn't giving it up, he was going to hold
19 it.

20 Q What -- where did y'all go from there?

21 A Back to Island Green Apartments.

22 Q At what point did Mike Carr tell you what occurred?

23 A Soon as we got the car.

24 Q What did he tell you about kicking in the door and
25 all of that?

1 MR. DIGGS: Your Honor, I -- I don't -- I would
2 object to that as leading.

3 THE COURT: Yeah, I overrule that. He's already
4 commented. May answer the question.

5 BY MR. VON HERRMANN:

6 Q What did Mike Carr tell you about kicking the door in
7 and robbing and what went on in that respect?

8 A He said we kicked the door and I shot him.

9 Q Adam Bailey said he shot him or Mike Carr said?

10 A Mike Carr said he shot him.

11 Q Okay. What did Adam Bailey say about what occurred
12 kicking in the door and the shooting?

13 A He said they kicked the door and Mike shot.

14 Q Did you ever come into possession of the -- of the
15 handgun that Adam Bailey had?

16 A Yes, sir.

17 Q How did you do that?

18 A Well, after we found out that the guy was actually
19 shot, he didn't want the gun and I didn't want the gun so
20 he gave it to me and I put it next to the dumpster in
21 Island Green.

22 Q And have -- and when you say Island Green, is that
23 where y'all were staying?

24 A Yes, sir.

25 Q Did you ever be able to find out what happened or

1 what occurred to the white handled gun? Did any of your
2 co-defendants tell you what happened to the white handled
3 gun?

4 A Next morning after I woke up from Nikki's house, she
5 took me to my house and later on that day she picked me
6 back up, her and Duriel, and they said that they got rid
7 of the gun.

8 Q Do you have a -- you have been convicted of a crime;
9 is that correct?

10 A Yes, sir.

11 Q And it was in 2002 strong armed robbery; is that
12 correct?

13 A Yes, sir.

14 Q Let me have this marked and show you...

15 (Whereupon, State's Exhibit No. 34 was marked
16 for identification only.)

17 BY MR. VON HERRMANN:

18 Q Let me show you State's Exhibit number 34 marked for
19 identification only. Are you familiar with that document?

20 A Yes, sir.

21 Q And can you just identify what it is?

22 A Yes, sir.

23 Q Please tell the jury.

24 A It's a -- it's my eight years.

25 Q And you -- can you just not think of what we call it?

1 A I don't...

2 Q Proffer agreement?

3 A A proffer agreement.

4 Q Okay. Let me show Mr. Diggs...

5 MR. DIGGS: Your Honor, this case I don't have
6 any objection.

7 MR. VON HERRMANN: We'd move it in evidence.

8 THE COURT: Is it 34? Thirty-four in evidence.

9 (Whereupon, State's Exhibit 34 was admitted into
10 evidence.)

11 BY MR. VON HERRMANN:

12 Q Mr. Davis, under the terms of this agreement, please
13 tell the jury what you have to do.

14 A Admit to my part in the crime.

15 Q What is my sole instruction especially today when you
16 testify what you're to do?

17 A Tell the truth and the whole truth.

18 Q Have you done that?

19 A Yes, sir.

20 Q What happens if you don't tell the truth?

21 A The deal is gone.

22 Q What is your deal?

23 A To tell the truth.

24 Q Right. But what -- what did -- if you tell the truth
25 in here and if you want you can just read paragraph number

1 six. You can read it out loud to the jury.

2 A It's just saying that I will receive eight years if I
3 tell the truth. .

4 Q On the charge of...

5 A On the charge of murder.

6 Q No. I tell you what. Just read -- I understand.
7 Don't try to paraphrase.

8 THE COURT: I tell you what, Mr. Von Herrmann.
9 You read it there what it says.

10 MR. VON HERRMANN: Okay. Well, put it in the
11 form of a question for you.

12 BY MR. VON HERRMANN:

13 Q Does paragraph six say, the defendant agrees to enter
14 a plea of guilty to the charge of accessory after the fact
15 of murder and receive a negotiated sentence of eight
16 years?

17 A Yes, sir.

18 Q Okay. And what do you have to do to get that eight
19 year sentence?

20 A Tell what I did in the crime.

21 Q Do you have to agree to testify against any
22 co-defendant?

23 A Yes, sir.

24 Q Not just these two?

25 A Yes, sir.

- 1 Q And you have to subject yourself to polygraph?
- 2 A Yes, sir.
- 3 Q Have I asked you to take a polygraph?
- 4 A Not yet.
- 5 Q But you understand you're subject to?
- 6 A Yes, sir.
- 7 Q When did we enter into this proffer agreement?
- 8 A Early last week.
- 9 Q When was the first time that you ever met and talked
10 to me?
- 11 A Early last week.
- 12 Q Did you know how long I had been assigned to
13 prosecute you?
- 14 A No, sir.
- 15 Q Okay. But you hadn't talked to me ever before?
- 16 A No, sir.
- 17 Q And did you enter into that proffer agreement that
18 day?
- 19 A Yes, sir.
- 20 Q And did you give me details of what you told the
21 Court today?
- 22 A Yes, sir.
- 23 Q And were you truthful then?
- 24 A Yes, sir.
- 25 Q And are you being truthful now?

1 A Yes, sir.

2 MR. VON HERRMANN: No further questions, Your
3 Honor.

4 THE COURT: All right. Mr. Diggs?

5 MR. DIGGS: May it please the Court.

6 CROSS-EXAMINATION

7 BY MR. DIGGS:

8 Q Good morning, Mr. Davis. How are you?

9 A How are you? Fine.

10 Q Good. Okay. Summarize your statement, your
11 testimony today, Nikki gave the car?

12 A Yes, sir.

13 Q Duriel supplied the victim?

14 A Yes, sir.

15 Q You supplied the guns?

16 A Yes, sir.

17 Q For Adam to go and commit a robbery; correct?

18 A For us to commit a robbery.

19 Q All of y'all to commit a -- what did Adam contribute?

20 A Excuse me?

21 Q What did Adam contribute?

22 A How do you mean by that?

23 Q Well, Nikki contributed the car, Duriel the victim,
24 you the guns, what was he, the passee, you were just going
25 to send up there to do the dirty work?

1 A All us do the same...

2 Q Who decided Adam was going to go?

3 A He's his own man.

4 Q Did he decide that night to go and rob Mr. Patterson?

5 A That was his own choice.

6 Q Okay. You're not saying if he made that choice or
7 not; are you?

8 A I didn't -- I can't make a choice for another man.

9 Q All right. All right. Now, without question in the
10 last three years you have maintained that you gave money
11 to Mike Carr for him to go and make the purchase of
12 marijuana from Mr. Patterson?

13 A Yes.

14 Q Isn't that true?

15 A Yes, sir.

16 Q You -- you gave that story, that scenario on
17 September the 28th, 2004, and you maintained it every day,
18 reasserted it every day, promised it was truthful every
19 day up until last week.

20 A Yes, sir.

21 Q Now, what's changed recently to make you want to
22 change your story? Has anything significant occurred, for
23 example, that would make you see the light and come
24 forward with the truth finally now?

25 A Well, in the beginning I was scared. When you're

1 scared, 70 percent of all people lie.

2 Q All right. And after three years you calmed down a
3 little bit and decided to go ahead and tell the truth?

4 A Excuse me?

5 Q So after you had a little bit of time, let's say
6 three years, you decided to calm down, you weren't scared
7 any more, thought you'd go ahead and tell us the truth.
8 Is that your testimony?

9 A The truth is the truth.

10 Q All right. Isn't it also the truth a couple of weeks
11 ago you had a new baby?

12 A Yes.

13 Q Have you ever made the statement you didn't want to
14 go to prison not -- and miss your child growing up? Did
15 you ever make that statement?

16 A Did I ever make that statement?

17 Q Yes, sir.

18 A How you mean?

19 Q Did you ever make a statement to the effect that you
20 didn't want to go to prison and not see your child grow
21 up? Did you ever make that statement?

22 A Who are you pointing it as to?

23 Q Anybody, anyone.

24 A May have.

25 Q Okay. You may have. And any way, even if you didn't

1 make that statement, it's what you thought; isn't it?

2 A No, it's only natural.

3 Q Okay. Only natural?

4 A You know what I mean.

5 Q Only natural. And your only alternative to coming in
6 here and testifying as you did today was sitting over
7 there with Adam and risking going to prison for the rest
8 of your life, right, for murder?

9 A But I'm testifying on what I did.

10 Q Well, you planned the robbery; didn't you?

11 A I didn't plan anything.

12 Q You gave them the guns; didn't you?

13 A I gave them the guns.

14 Q You're just as guilty as anybody short of the man who
15 pulled the trigger. Isn't that true?

16 A You could say that.

17 Q All right. And yet you get eight years. And by the
18 way, have you already done any time?

19 A Excuse me?

20 Q Have you already been in jail following your arrest
21 in this case?

22 A Yes, I was in jail for a year without a bond.

23 Q Okay. With a year and you're going to get credit for
24 that or do you expect to get credit for that?

25 A I'm not sure. I expect to do every day of the eight

1 years.

2 Q Right. You expect to do how much?

3 A Eight years.

4 Q You expect to be eligible for parole at any time?

5 A I'm not sure when that's going to happen.

6 Q I know you're not sure, but do you expect it?

7 A I don't expect anything. I--

8 Q Is it a possibility?

9 MR. VON HERRMANN: Your Honor, if he could just
10 let him answer the question, please.

11 THE COURT: Only because it's hard for the Court
12 Reporter, Mr. Diggs, really. Let him answer before
13 you interrupt him.

14 BY MR. DIGGS:

15 Q According to your understanding is parole a
16 possibility?

17 A It may be.

18 Q May be. In fact, it is; isn't it? Come on,
19 Mr. Davis. You promised to tell us the truth. Is it or
20 not?

21 A The truth is the truth. Eight years.

22 Q Well, what is the truth?

23 A Of course you will get out one day.

24 Q And you are expecting to get out way before eight
25 years.

1 A Hopefully.

2 Q Yeah. And hopefully within about a year?

3 MR. VON HERRMANN: Objection, Your Honor.

4 THE COURT: I sustain that.

5 BY MR. DIGGS:

6 Q Do you expect it to be within a year?

7 MR. DIGGS: Objection, Your Honor.

8 THE COURT: Sustained. Mr. Diggs, I sustain.

9 Let's go on to some issue. You examined this point
10 far enough.

11 BY MR. DIGGS:

12 Q Now, you start out in your testimony, Mr. Davis,
13 saying that Duriel had the plan.

14 A Yes.

15 Q Correct?

16 A Correct.

17 Q When did he share this plan with Adam?

18 A He shared the plan with all of us.

19 Q Okay. And Adam, too. I'm asking you about Adam
20 because all of you aren't on trial. Adam is. When did
21 Duriel to your knowledge share the plan with Adam?

22 A That night.

23 Q And I want you to tell us exactly what the details of
24 that plan were.

25 A That night the details of the plan was to go and rob

1 Joseph, Joseph Patterson.

2 Q And that was the extent of the detail?

3 A I mean, robbery is robbery. You don't get into too
4 much detail about a robbery.

5 Q All right. But was there ever any discussion about
6 it being in a populated, highly populated, densely
7 populated apartment complex?

8 A Say again?

9 Q This is where Mr. Patterson lived; right?

10 A Yes, sir.

11 Q Okay. Was there ever any discussion about the
12 possibility of being seen?

13 A No.

14 Q No. Nobody raised that? No one raised that
15 prospector (sic) of the possibility of being seen or
16 caught --

17 A No--

18 Q -- while you were planning this robbery?

19 A Nobody was thinking about being seen or caught.

20 Q All right. The last time you committed robbery,
21 how--

22 MR. VON HERRMANN: Objection, Your Honor.

23 THE COURT: Better come talk to me about that
24 before you get involved in that, Mr. Diggs.

25 (Whereupon a bench conference was held.)

1 THE COURT: Proceed.

2 BY MR. DIGGS:

3 Q Let me approach it this way. When you were planning
4 this robbery with Adam, there was no discussion of any
5 detail whatsoever about how it was going to be carried
6 out?

7 A Not exactly. We were going to go up there and rob
8 him.

9 Q Okay. Now, you said a minute ago that while you were
10 driving through the neighborhood, Duriel stopped and
11 talked to a couple of people in a truck. Didn't you say
12 something about that?

13 A I never said in a truck.

14 Q Who did he stop and talk to?

15 A Two dudes standing outside.

16 Q Two dudes standing outside. And they seem to know
17 who he was; right?

18 A Right.

19 Q In fact, they were standing outside of Duriel's
20 grandmother's apartment; weren't they?

21 A Right.

22 Q Right. Okay. The very -- 25 feet or more or less
23 from the place y'all were going to go and rob within a
24 couple of minutes, right?

25 A Well, I didn't know till after that was his mother's

1 house --

2 Q Okay.

3 A -- across the street.

4 Q Well, Durriel knew it; didn't he?

5 A I can't think for him.

6 Q But he knew it. He knows where his grandmother
7 lives; doesn't he?

8 A I'm pretty sure he does.

9 Q Okay. But that didn't raise a red flag in anybody's
10 mind to your knowledge that maybe it's not a good time to
11 carry out a robbery, now that we have been seen at the
12 location? Didn't raise a question in your mind?

13 A Not for somebody set up the robbery which was Durriel.

14 Q All right. But you were sitting there in the car
15 while he was setting up the robbery and plan, you were in
16 the car well aware of it. That's what you're telling us;
17 isn't it?

18 A Well, what I knew, rob the guy?

19 Q Yeah.

20 A I was aware of that before I left.

21 Q Yeah. You didn't -- it didn't occur to you that
22 maybe you want to pull back on this plan and wait till
23 some other time?

24 A Yeah, maybe, but that wasn't the case.

25 Q All right. Now, tell us what you said to the police

1 the first time that you were interviewed.

2 MR. VON HERRMANN: Objection, Your Honor. I
3 mean, it's clearly an inadmissible -- he can ask him,
4 did you say this, and if he denies it or accepts it.

5 THE COURT: Are you asking the question -- he
6 has a right to ask him if a know question -- if it's
7 something he says is in -- he feels in contradiction.

8 MR. VON HERRMANN: Well, I completely agree,
9 Your Honor. I don't have any problem with the
10 statement if he denies it, it doesn't matter. But he
11 hasn't asked him. He said what did you tell him,
12 then he said--

13 THE COURT: Just ask him --

14 MR. DIGGS: I will ask him this way.

15 BY MR. DIGGS:

16 Q On the 28th we all agreed you told the police you
17 gave \$10 to Mike Carr for him to go make a purchase, small
18 amount of marijuana for your personal use. Isn't that
19 what you told the police?

20 A Yes, sir.

21 Q Okay. And did you give Mike Carr \$10?

22 A No, sir.

23 Q You said it; didn't you?

24 A Yes, sir.

25 Q And you said it every day for the last three years;

1 didn't you?

2 A Yes, sir.

3 Q Until you signed your plea agreement and got your
4 eight year promise?

5 A It's a promise?

6 Q Until you signed your plea deal that was your story
7 and you stood by that unwaivering. Didn't you do that,
8 Mr. Davis?

9 A I told the story before I signed the plea.

10 Q All right. All right. Now there's no doubt in your
11 mind about who pulled the trigger?

12 A No doubt in my mind?

13 Q Mike Carr confessed to doing that in your presence;
14 correct?

15 A Correct.

16 Q When was it that you initially supplied the weapons
17 to the group?

18 A Well, me and Duriel went to go get the guns before it
19 happened.

20 Q And when did you go get the guns?

21 A We left Island Green, went to go get the guns, came
22 back to Island Green.

23 Q What time did you leave Island Green to go get the
24 guns?

25 A I would say it must have been about 11:00.

- 1 Q Okay. Was this before the discussion of the robbery
2 or after the discussion?
- 3 A After.
- 4 Q Okay. Adam just wait in there for you to go get the
5 guns?
- 6 A Everybody was there.
- 7 Q You and Duriel left and went to get the guns and then
8 came back and picked up Adam and Mike?
- 9 A Yes, sir.
- 10 Q How long did it take you to go get the guns?
- 11 A Approximately about 10 minutes.
- 12 Q And then what happened when you got back?
- 13 A I got back, we went back up to the apartment and gave
14 them the guns.
- 15 Q And then what happened at that point?
- 16 A Then we left.
- 17 Q Okay. When did the -- when did the planning take
18 place then, before you went and got the gun?
- 19 A Yes.
- 20 Q No additional planning after you got back?
- 21 A No.
- 22 Q Okay. And tell us everything you remember about the
23 planning.
- 24 A Just told you.
- 25 Q That was everything you remember?

1 A I told you everything --

2 Q All right.

3 A -- about the planning.

4 Q All right. Thank you very much, Mr. Davis. That's
5 all I have at this point.

6 A Thank you.

7 THE COURT: All right. Mr. Galmore?

8 MR. GALMORE: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. GALMORE:

11 Q Hello, Mr. Davis.

12 A How you doing.

13 Q All right. You remember me?

14 A Yes, sir.

15 Q Tell this jury how you remember me.

16 A I remember you because you told me to sign the plea
17 for something somebody else did. That's how I remember
18 you.

19 Q You sure you remember me then?

20 A Positive.

21 Q What plea was that?

22 A That five year probation.

23 MR. VON HERRMANN: Objection, Your Honor. Can
24 we approach?

25 THE COURT: Yes.

1 MR. VON HERRMANN: Thank you.

2 (Whereupon a bench conference was held.)

3 THE COURT: Ladies and gentlemen of the jury, if
4 y'all would please step out to the jury room. Let me
5 cover this so y'all don't have to sit there and
6 listen.

7 (Jury left the courtroom at 10:10 am.)

8 THE COURT: What are you getting into, Mr.
9 Galmore? Make sure that it's something that you know
10 what you're getting into and also that it's something
11 that is appropriate.

12 MR. GALMORE: Your Honor, I believe Mr. Davis
13 has a prior conviction for strong armed robbery.
14 His -- the statement he says I told him sign the
15 agreement, I represented a co-defendant that went to
16 trial and he testified against that co-defendant and
17 he received a probationary sentence for strong armed
18 robbery.

19 THE COURT: So you were not his lawyer?

20 MR. GALMORE: No, sir, I wasn't.

21 THE COURT: All right. So your -- the purpose
22 of your question is the fact that he was a witness in
23 another case?

24 MR. GALMORE: Yes, sir, and to elicit the
25 conviction.

1 THE COURT: Well, we have already done the
2 conviction.

3 MR. GALMORE: I want to do it again.

4 THE COURT: Well, I don't want to permit you to
5 do it over and over and over, Mr. Galmore.

6 MR. GALMORE: No, sir.

7 THE COURT: He's already admitted he's been
8 convicted. You made a comment on it yourself. But
9 any way, Mr. Von Herrmann, Mr. Galmore's purposes --
10 by the way, let's clear this up. Sir, do you
11 remember Mr. Galmore as your lawyer as a lawyer for
12 someone else?

13 THE WITNESS: As my lawyer. I went to -- my mom
14 brought me to the Public Defender's office, refer him
15 to be my lawyer. I mean, I know who was my lawyer
16 and I know who talked to me. It was him.

17 BY MR. GALMORE:

18 Q When was that?

19 A Even my probation officer, Brian, will tell you that
20 you were my lawyer.

21 Q Well, I need to go check the file because--

22 A I think that's what you need to do.

23 Q You didn't testimony -- you testified in Yoko's
24 (phonetic) case; right?

25 A No.

1 Q In 2002, that strong armed robbery.

2 A No.

3 MR. GALMORE: Can I have a minute to go check in
4 my office?

5 THE COURT: This is interesting. Sure. I'm
6 glad we didn't get into all the confusion in front of
7 the jury.

8 MR. GALMORE: Yes, sir.

9 THE COURT: Where is the probation officer --
10 when y'all say Brian, what is Brian's last name?

11 THE WITNESS: Brian...

12 THE COURT: Any way, Mr. Galmore, you have
13 hundreds and hundreds and hundreds of clients.

14 THE WITNESS: Yeah, but his name is Brian.

15 THE COURT: So what.

16 THE WITNESS: He works at Probation and Parole.

17 THE COURT: Go ahead. You want to check
18 something, you can. If he says you were his lawyer,
19 Mr. Galmore--

20 THE WITNESS: I'm positive.

21 MR. GALMORE: Well, what do we do in that case?

22 THE COURT: What case?

23 MR. GALMORE: If I was the lawyer?

24 THE COURT: Well then that -- we need to -- were
25 you his lawyer?

1 MR. GALMORE: I don't know. Let me -- let me go
2 and check my file.

3 THE COURT: Go check your file.

4 MR. GALMORE: Let's do that. I'm going to need
5 like 15 minutes.

6 THE COURT: No, sir. No, sir.

7 MR. GALMORE: The office is a block away, sir.

8 THE COURT: Well, you probably need to call.
9 Call, now. This is something you opened the door on.
10 I'm going to wait right here. I'm going to give the
11 probation -- see if there's a probation officer named
12 Brian.

13 PROBATION AGENT: Brian?

14 THE COURT: Yeah, come into -- Brian something.
15 What was the name of the person -- did you have a
16 co-defendant, sir, in that case?

17 THE WITNESS: Yes, sir.

18 THE COURT: Who was your co-defendant?

19 THE WITNESS: Jason Bennett and Shaun Drake
20 Myers (phonetic).

21 THE COURT: And who were their lawyers, do you
22 know?

23 THE WITNESS: I'm not sure. I know they were
24 out of the Public Defender's Office.

25 THE COURT: Do you know who the prosecutor was?

1 THE WITNESS: I'm not sure of that neither. All
2 I'm sure of is he was my lawyer.

3 THE COURT: Mr. Von Herrmann, can't you find
4 out -- Mr. Von Herrmann?

5 MR. VON HERRMANN: I'm sorry, Your Honor.

6 THE COURT: Can you look in your file in your
7 office somewhere and find out who his lawyer was?
8 Was it here in this county?

9 THE WITNESS: Yes, sir.

10 MR. VON HERRMANN: May I use the telephone?

11 THE COURT: Sure.

12 (Whereupon there was a pause.)

13 THE COURT: I'm going to step off for a second.
14 When Mr. Galmore returns, y'all just come on back.
15 I'm sure he is going to have a concern that he wants
16 to express to me. Mr. Davis, you're not in custody
17 in any way, in any way then; are you, sir?

18 THE WITNESS: No, sir.

19 THE COURT: You are under subpoena, though, so
20 please understand you must stick around this
21 courtroom. Do not talk with anyone about your
22 testimony. Do you understand that?

23 THE WITNESS: Yes, sir.

24 THE COURT: No one about your testimony. All
25 right. Did you want to put that matter on the

1 record, Mr. Diggs, regarding the tape?

2 MR. DIGGS: Yes, sir. Your Honor, we have the
3 audiotape of the State made by Mr. Davis back on
4 about September 28th, 2004. In that statement he
5 provides a scenario that's quite substantially
6 different from the testimony that he's given today.

7 What we would propose to do is introduce that
8 tape into evidence and play it for the jury.

9 THE COURT: Has he denied making the statements
10 on that tape?

11 MR. DIGGS: No, sir. He admitted in his
12 testimony that he had made those statements.

13 THE COURT: So everything he says on those
14 statements he admits he's made.

15 MR. DIGGS: Correct.

16 THE COURT: And why is -- what is the purpose
17 you have for -- this is a video or a--

18 MR. DIGGS: It's an audiotape.

19 THE COURT: Audiotape. Not a video.

20 MR. DIGGS: No video. Just audio.

21 Instructing -- when I was listening to the State,
22 Mr. Davis sounded very credible when he was making
23 this statement, voice inflexions and that kind of
24 thing come across that go into weighing credibility.

25 Now with respect to the video, of course, we

1 have a lot of people who sit on juries who always
2 have to make decisions based on the only audio that
3 they hear, not necessarily visual input, but we would
4 offer that tape as substantive evidence in this case
5 both to impeach Mr. Davis and to -- to show evidence
6 that it was a planned purchase of marijuana only and
7 not a robbery.

8 THE COURT: And my concern is the tapes
9 themselves are, so I guess have background here and
10 there and I have never really -- a cassette tape is
11 it?

12 MR. DIGGS: Yes, sir.

13 THE COURT: Never had a cassette tape -- to me I
14 don't see how it adds anything at all. It would not
15 get the jury an opportunity to look at the demeanor,
16 could be either way as far as -- far as his voice one
17 way or the other on this thing, on the cassette tape.
18 Could make him sound one way or the other.

19 And the only purpose in letting in matters of
20 that nature is to show he said something here that he
21 said he didn't say. He does say he admits it --
22 what's the State's position on this?

23 MR. VON HERRMANN: State's position, Your Honor,
24 is it's inadmissible as there are law enforcement
25 talking, Your Honor, which would be hearsay, 613

1 precludes the evidence as extrinsic evidence as a
2 statement which is already admitted making. And Your
3 Honor, that is our argument.

4 THE COURT: All right. I will respectfully deny
5 the admission of the tape unless it contains
6 something he hasn't admitted to here.

7 MR. DIGGS: Your Honor, could I make -- have the
8 tape marked for identification?

9 THE COURT: Yes.

10 MR. DIGGS: On the record?

11 (Whereupon, Defense Bailey's Exhibit No. 6 was
12 marked for identification only.)

13 MR. DIGGS: Thank you, Your Honor.

14 THE COURT: Yes, sir. All right. Now Mr.
15 Galmore, are you ready to proceed with your
16 questions?

17 MR. GALMORE: Yes, sir, Your Honor.

18 THE COURT: Now one thing you -- did you want to
19 ask him anything else regarding the matter that you
20 sort of opened there?

21 MR. GALMORE: Well, I did want to ask him what
22 the original charge was, but I understand the Court's
23 ruling on that.

24 THE COURT: Right. He -- according to what
25 y'all told me he was originally charged with armed

1 robbery, he pled to strong armed robbery, that would
2 be the only thing admissible, what he was convicted
3 of. And what else were you going to say?

4 Just say you were convicted of strong armed
5 robbery? And if he asks you that, sir -- if he asks
6 you that, sir, just confirm or deny it. If you were
7 convicted, say yes. Let's go on from there.

8 We don't need to go further in the information
9 you and Mr. Galmore discussed earlier. And let the
10 record reflect that Mr. Galmore was a lawyer -- turns
11 out Mr. Galmore was a lawyer for this defendant and
12 that Mr. Galmore confused this case with some other
13 case I assume.

14 MR. GALMORE: Yes, sir.

15 THE COURT: And so you now wish to go other than
16 that area?

17 MR. GALMORE: Yes, sir, that's correct.

18 THE COURT: All right. Bring the jury in,
19 please.

20 (Jury entered the courtroom at 10:40 am.).

21 THE COURT: Ladies and gentlemen, we're ready to
22 proceed now. The -- just -- we'll go to other
23 matters, but in regards to Mr. Galmore at one time
24 years ago did represent Mr. Davis. We'll proceed on.
25 Mr. Galmore, if you will proceed, sir.

1 BY MR. GALMORE:

2 Q Isn't it true--

3 THE COURT: Beyond on that the charge he's
4 talking --

5 BY MR. GALMORE:

6 Q -- that in 2002 you pled guilty to strong armed
7 robbery?

8 A That's true.

9 Q And isn't it true that you received--

10 MR. VON HERRMANN: Objection, Your Honor.

11 THE COURT: Mr. Galmore, you know the rules.
12 Only say conviction.

13 MR. GALMORE: Well--

14 THE COURT: Well, then again that would be right
15 normally, but then we -- no, we have got this concern
16 not that -- so only the conviction. Only the
17 conviction, that's that.

18 MR. GALMORE: May we approach, Your Honor?

19 THE COURT: Yes, sir.

20 (Whereupon a bench conference was held.)

21 THE COURT: Proceed.

22 BY MR. GALMORE:

23 Q On September 29th, 2004 you had an attorney for this
24 case; is that correct?

25 A Correct.

1 Q That would be the day after this robbery and
2 shooting?

3 A Correct.

4 Q Shortly after hiring your attorney you gave a
5 statement to the police; is that correct?

6 A Correct.

7 Q And in that statement at that time you told them that
8 you gave \$10 to buy some marijuana; is that correct?

9 A Correct.

10 Q And the police officer asked you to be truthful?

11 A Correct. But like I said before, 70 percent of all
12 people lie when they're scared.

13 Q Did the police officers ask you to be completely
14 honest with the details?

15 A It doesn't matter what they asked me.

16 Q But you did have an attorney with you when you gave
17 that statement?

18 A Correct.

19 Q And it's your testimony today that statement was a
20 lie?

21 A Correct.

22 Q Didn't you say at that time that Mike Carr was
23 outside smoking a cigarette?

24 A No, I said Adam Bailey was outside smoking a
25 cigarette.

1 Q You said Adam Bailey was outside smoking a cigarette.

2 A Correct.

3 Q Didn't you also say that you didn't hear any noises?

4 A Correct.

5 Q But now you're saying almost three days -- three
6 years later that this was a planned robbery from the
7 beginning?

8 A Correct.

9 Q You indicated that when you got to the parking lot
10 Durriel spoke with two people in the parking lot; is that
11 right?

12 A Correct.

13 Q In spite of that fact they still went ahead with the
14 robbery, sir?

15 A Correct.

16 Q You also indicated that y'all drove to a boat landing
17 to dispose of some evidence?

18 A I never said boat landing. I said Enterprise loading
19 dock was there.

20 Q Enterprise loading dock?

21 A Enterprise dock. I never said nothing about the boat
22 or--

23 Q I'm sorry, okay. So there was no boat landing?

24 A We passed one. Enterprise Road boat landing, we
25 passed it, yes.

1 Q And that was actually disposed of in that location
2 according --

3 A Correct.

4 Q -- and you also testified that they got rid of the
5 gun the next day?

6 A Correct.

7 Q Who did that, sir?

8 A Anthony and Duriel.

9 Q Anybody else?

10 A I can't say anybody else because I wasn't there.

11 Q You know which gun they got rid of?

12 A Yes.

13 Q Which one was that?

14 A The gun with the white handle.

15 Q The gun with the white handle?

16 A Correct.

17 Q What happened to the gun with the brown handle?

18 A I put it next to the dumpster.

19 Q So you had the gun, you got back the gun with the
20 brown handle.

21 A Correct.

22 Q You didn't go upstairs to the apartment that night;
23 did you?

24 A No.

25 Q You didn't see who shot Mr. Patterson; did you?

- 1 A No.
- 2 Q But you learned that he was shot and killed?
- 3 A Yes, sir.
- 4 Q If you knew that Mr. Patterson was shot and killed,
5 why wouldn't you -- excuse me -- and you knew that you
6 didn't do it, why wouldn't you tell the police that with
7 your attorney the day after it happened?
- 8 A Because.
- 9 Q Is that your answer?
- 10 A I said because.
- 11 Q That's your whole answer?
- 12 A No. I was waiting on you to say something.
- 13 Q Oh, no. You go right ahead.
- 14 A Because I was scared.
- 15 Q Let me hand you State's Exhibit 34 and ask you if you
16 recognize that document.
- 17 A Yes, sir.
- 18 Q And what is this?
- 19 A Forget what you call it.
- 20 Q Just call it whatever... whatever you think.
- 21 A An agreement.
- 22 Q This your agreement. When did you sign that
23 agreement?
- 24 A On the 20th.
- 25 Q The 20th of when?

1 A The 20th of this month, July.

2 Q When did your attorney sign this agreement?

3 A On the 25th.

4 Q Is that today, sir, the 25th?

5 A Yeah.

6 Q So from September of 2004 until five days ago you had
7 a different story; is that right?

8 A You say that like I said the story numerous of times
9 in three years. I only said it one time.

10 Q You spoke to the police the day after it happened.

11 A One time.

12 Q From then three years ago --

13 A Three.

14 Q -- to -- to five days ago your story had not changed?

15 A No.

16 Q Had your story changed on the 20th of this month?

17 A Yes, sir.

18 Q No further questions?

19 THE COURT: Okay. Redirect?

20 REDIRECT EXAMINATION

21 BY MR. VON HERRMANN:

22 Q Mr. Davis, you told that story to the -- anybody
23 since September of 2004 until you met with me?

24 A No.

25 Q So you didn't keep repeating the same story?

1 A No.

2 Q Have you had a chance, an opportunity to discuss your
3 testimony with Duriel Simmons?

4 A No, sir.

5 Q Have you talked to him and told him you were
6 testifying today?

7 A No, sir.

8 Q What about Nikki Phillips, have you had a chance to
9 talk to her about it?

10 A No, sir.

11 Q Tell me about the relationship between the
12 co-defendant. Who was your best friend in 2004?

13 A Adam Bailey.

14 MR. DIGGS: Your Honor, I'd object. I don't
15 think it's proper direct -- redirect and I would
16 object to it.

17 THE COURT: I will let you cross-examine on
18 that, sir.

19 BY MR. VON HERRMANN:

20 Q I don't know if the jury got it when he interrupted.
21 Could you tell me who your best friend was in that
22 particular time?

23 A Adam Bailey.

24 Q Did you want to protect your friend?

25 A Yes, sir.

1 MR. VON HERRMANN: No further questions, Your
2 Honor.

3 THE COURT: All right. Mr. Diggs?

4 RECROSS-EXAMINATION

5 BY MR. DIGGS:

6 Q Mr. Davis, you had the same attorney today that you
7 had three years ago; isn't that true?

8 A Correct.

9 Q How many times did you discuss this case with him? I
10 don't want -- I don't want to know what you discussed, but
11 how many times did you discuss it with him?

12 A Well, that would be irrelevant because that's why
13 they call him my attorney.

14 Q Humor me. How many times did you meet with him?

15 A A few times.

16 Q All right. And when we got notice -- let me ask you
17 this. When did you get notice that you were going to go
18 to trial this week?

19 A When I spoke to my lawyer.

20 Q When was that, do you recall?

21 A About two weeks ago.

22 Q Now, two weeks ago is it not true that you maintained
23 the same factual scenario that -- that you gave the police
24 three years ago in September of '04?

25 MR. VON HERRMANN: Objection, Your Honor. I

1 mean, maintain the story to who?

2 THE COURT: Not talking about his attorney.

3 MR. DIGGS: No, we are talking about any
4 friends, family, even the defendant Adam Bailey.

5 THE COURT: All right.

6 BY MR. DIGGS:

7 Q Isn't that true?

8 A Yes.

9 Q All right. So the fact of the matter is you didn't
10 change your testimony slowly over time, you did it
11 immediately, abruptly within the last two weeks; isn't
12 that true?

13 A Repeat that again.

14 Q You changed your story abruptly within the last two
15 weeks when you decided to sign that plea agreement; isn't
16 that true?

17 A What do you mean by abruptly?

18 Q Just like that.

19 A Not just like that.

20 Q Pretty quickly.

21 A If you say.

22 Q I'm sorry, I didn't understand you.

23 A I said if you were to say.

24 Q I would say? I want to hear what you would say.

25 A I changed it.

1 Q All right. And prior to that time you had not
2 changed it; isn't that true?

3 A Correct.

4 Q All right. Now, you -- you stated in your testimony
5 that the white handled gun was disposed of?

6 A Correct.

7 Q By Durriel?

8 A Correct.

9 Q And how do you know that?

10 A When Durriel and Nikki picked me up that next morning
11 they told me that they got rid of the gun.

12 Q Okay. And do you remember the full extent of that
13 conversation?

14 A They didn't go into full extent, they just said they
15 got rid of the gun.

16 Q Okay. Thank you. That's all I have.

17 THE COURT: Anything else, Mr. Galmore?

18 MR. GALMORE: No, sir, Your Honor.

19 THE COURT: All right. You may step down, sir.

20 (Witness left the stand.)

21 THE COURT: Next witness, please.

22 MR. VON HERRMANN: Thank you, Your Honor. The
23 State would call Peter Cestare.

24 MR. DIGGS: Your Honor, we don't have any
25 objection at this point to cease with that -- I think

1 the critical witness is the fact witness.

2 THE COURT: All right. We will handle that at
3 the appropriate time. Want to send for this other
4 witness.

5 MR. DIGGS: Thank you.

6 PETER CESTARE, after being duly
7 sworn, testified as follows:

8 THE COURT: All right. Your witness.

9 MR. VON HERRMANN: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. VON HERRMANN:

12 Q Investigator Cestare, would you please tell the jury
13 where you're employed.

14 A Yes, sir. I'm -- my title is Specialist. I'm
15 employed with the Horry County Police Department and I'm
16 in charge of the crime scene investigations unit.

17 Q And how long have you been employed there?

18 A I have been with the Horry County Police Department a
19 little over four years. I have got 26 years of law
20 enforcement experience.

21 Q Where was your other 22 (sic) years of law
22 enforcement experience?

23 A New York City Police Department. I retired from
24 there. I was the head of the Manhattan Bronx Homicide
25 Division.

1 Q Let me draw your attention specifically to this case.
2 Had you had an opportunity to review your notes and
3 photographs and things of that nature?

4 A Yes, sir, I have.

5 Q Let me draw your attention to specifically the
6 location of the -- of Joe Patterson's death. Could you
7 please tell me what time the report was that this crime
8 was committed?

9 A It occurred approximately 1:18 in the morning I
10 believe is when the first 911 call came in. And that was
11 September 28th, 2004.

12 Q And did you respond to that scene?

13 A Yes, sir, I did. About 1:45 that morning I was
14 notified and I arrived there about 2:20 in the morning.

15 Q And is that here in Horry County?

16 A Yes, sir, it is.

17 Q Please tell the jury when you're processing a crime
18 scene and when you approach, in particular this crime
19 scene, kind of walk us through and tell us what you do
20 first and kind of the process that you go through and then
21 we'll get into the specifics of what you collected.

22 A Sure. I'd like to -- to kind of preface that a
23 little bit with unlike what most people watch on TV, the
24 show CSI and so forth, they portray things quite
25 differently on a show like that.

1 A lot of what they do is in fact true and a lot of it
2 is made for TV fiction. In reality in processing a crime
3 scene everything comes into play from the moment you're
4 notified to respond, you're thinking about weather
5 conditions, time of day, lighting conditions, kind of
6 sizing up the situation as your -- as you're approaching
7 it.

8 Once you get on scene you take a careful close and
9 very methodical look around the entire location before you
10 even enter it. Photographs are taken before -- again
11 before you ever even enter the scene area to kind of
12 reflect how things were at that particular time.

13 Then you make a slow and careful approach to the
14 scene itself. Again, noting anything -- anything that
15 could be potentially evidence or of evidentiary value.
16 Continuing on we photographing and so forth, you do an
17 initial walk-through of the scene to kind of locate
18 evidence.

19 You do a careful path in and out doing the same
20 footsteps or re-tracing your same steps so that you don't
21 potentially contaminate the crime scene. We take
22 different levels of protection.

23 Anything from covering our -- our shoes with
24 protective coverings and certainly our hands with
25 protective coverings so that we don't in any way

1 contaminate or potentially cross-contaminate any evidence
2 that may be there.

3 In doing that methodical approach to a crime scene
4 you're looking for anything from the obvious evidence to
5 things that are not so obvious, things that can't be seen
6 by the normal eye.

7 And we utilize a lot of chemicals sometimes,
8 alternate light sources, magnification and things of that
9 nature to try and determine any potential evidence that
10 could be anything from a physical object to any degree of
11 trace evidence, any type of body fluids, hairs, fibers and
12 so forth.

13 Once you've conducted that initial walk-through, you
14 then begin to number and or as we refer to it tag evidence
15 so that you know what you're going to collect, what seems
16 to be out of place, what may be potentially useful in that
17 case.

18 Often times you collect more things than you need to
19 collect simply because you're not too sure, you know, what
20 exactly occurred so we have got to be very careful because
21 we only get one chance at processing a scene and it has to
22 be done correctly the first time.

23 Everything is then photographed in place with an
24 evidence marker. Different items may be processed on
25 scene with fingerprint powders or chemicals to try and

1 develop latent prints or to try and discover any other
2 type of evidence that's not visible by the eye.

3 Other items are brought back to the Police Department
4 land where they may be worked on there and certainly a lot
5 of evidence is sent off to the State Law Enforcement
6 Division up in Columbia for processing, DNA evidence and
7 things of that nature, and firearms and so forth are
8 generally sent to them for processing.

9 And then again before we leave a scene we do a
10 careful methodical walk-through of that scene with the
11 case agent or the lead detective who is handling that case
12 to ensure that both they and the crime scene investigator
13 are comfortable with what was done and to make sure that
14 we've basically achieved the goal of coming there and
15 collecting everything, successfully prosecute that case.

16 Q And in this particular case did you process this
17 crime scene with the type direction that you indicated
18 here along with your training and experience, did you
19 process this crime scene that way?

20 A Yes, sir, I did.

21 Q Let me just direct you just so the jury know we will
22 be talking about several different things. Are there
23 actually three different areas of crime scene, be where
24 obviously where body or where the murder occurred, the
25 autopsy that you were take -- and then there would be a

1 place where collected evidence on three would be --

2 A Yes, sir.

3 Q -- is that correct?

4 A Yes. Often times -- and I neglected to mention
5 earlier, when you -- when you're processing crime scenes
6 you also have to think of alternate locations. Certainly
7 where someone is found is a crime scene, but there may be
8 related scenes to that initial one.

9 So yes, that -- there are -- there are a lot of
10 things that come into account and in this case there were
11 several locations that were come upon following that one.

12 Q All right. First one I want to talk about is Turtle
13 Cay Apartments crime scene.

14 A Yes, sir.

15 Q Let's start off. Was Mr. Patterson's body there when
16 you arrived?

17 A No, sir. He had been removed by Horry County Fire
18 EMS to Conway Hospital.

19 Q We talked about photographs first. Let me show you
20 some photographs. I'm going to ask you to step down and
21 explain to the jury what some of these photographs are.

22 A (complied.)

23 Q Actually let me stop one second. Mr -- or officer
24 Cestare, did you do a diagram of this scene?

25 A Yes, sir, I did.

1 Q Could you step down and let's just talk about a few
2 things?

3 A Sure.

4 Q On State's Exhibit number 26 and just kind of explain
5 your diagram to the jury so they'll understand kind of
6 what we're looking at as we go through the photographs.

7 A Sure. This is an enlargement of a sketch that I drew
8 following this incident. Customarily we draw a sketch of
9 what the scene looks like for recollection purposes later
10 on in court like this.

11 This is a not-to-scale drawing but a fairly accurate
12 rendition of what this particular apartment looked like
13 that day.

14 Q Now, can you tell the jury the significance of for
15 instance number four?

16 A Yes, sir. Just an overall looking at this, the
17 doorway into the apartment is here. This area of the
18 apartment faces the parking area that I approached from.
19 This is a second floor apartment.

20 Each of the numbers represents an area of evidence
21 that I tagged and collected for future processing or for
22 the purposes of having in relation to this investigation.

23 Q Let me hold this for a second and let's go through
24 some photographs if we could. Let me start off by showing
25 you State's Exhibit no. 10 marked for -- or in evidence.

1 Could you tell the jury what that particular photograph
2 is?

3 A Yes. State's Exhibit 10 is a view of the living room
4 of that apartment looking from the doorway. This would
5 have been looking from the entranceway of the doorway, my
6 first view of the interior of that apartment.

7 Q And then let me show you State's Exhibit number
8 seven, marked -- in evidence. Please tell the jury what
9 that is.

10 A Yeah. State's Exhibit seven is inside the apartment
11 standing at the back corner of the living room area here
12 looking back towards the entrance door. This is the
13 entrance door of the apartment and couch area.

14 Again, this wall of the apartment is the front wall
15 or facing the parking lot in which I approached from.

16 Q And State's Exhibit number six kind of -- does that
17 show a little bit more of the wall?

18 A Yes, sir. State's Exhibit six is just from a little
19 bit of a different angle standing in that living room
20 slash dining room area of that apartment looking again
21 back at the entrance door to the apartment.

22 Q And what significance is there located right there,
23 is there anything of evidentiary value?

24 A There are a couple of items of significance in this
25 photo. On the lower side here, lower left corner you'll

1 see an open cellphone lying on the floor. That cellphone
2 was found just as you see it. It was powered on.

3 Also on the floor here is a T-shirt that has some DNA
4 evidence on it, some blood. You'll notice on the door as
5 well there's a couple of markings or indications on the
6 door that something may have struck the door.

7 Q Let me show you State's Exhibit number 12. Can you
8 show this -- that for me.

9 A Yes, sir. That's the cellphone little bit closer
10 view than what you just saw on the rug. Generally when we
11 photograph things we photograph them from a distance and
12 work our way into it so the initial photos show the room
13 as I saw it. This is coming up closer on particular items
14 of evidence that I felt may be important in the case.

15 Q Let me ask you, Officer Cestare, did you photograph
16 the outside of the building as well?

17 A Yes, sir, I did.

18 Q And we have been using a lot of photographs that you
19 took with other witnesses so I'm not going to get you to
20 do that or to go through that, but these are the type
21 photographs that you have taken, correct?

22 A Yes, sir, that's correct.

23 Q And this particular photograph nobody has had a
24 chance to identify before, State's Exhibit number 13.
25 Could you identify that for the jury?

1 A Yeah. State's Exhibit 13 is looking from the side of
2 the building along the back of the building. This is the
3 building where Mr. Patterson's apartment is. And you will
4 notice there's a small fence area and the building
5 directly behind that one.

6 Q And what -- let me get you to put this sticker that
7 says back of victim's apartment on there. And can you
8 tell the jury the significance of the back of the victim's
9 apartment in this particular case?

10 A Yes, sir. We -- I was informed that day that people
11 were heard running down the staircase and out through the
12 back area of that building following what sounded like
13 gunshots.

14 MR. DIGGS: Your Honor, I object to the hearsay.

15 THE COURT: Well, you're correct unless there
16 was some -- he was using it as a basis of his
17 decision here which isn't going to be offered for the
18 truth of the matter asserted but that's how he used
19 to make some determination.

20 Which is it, Mr. Von Herrmann, is it just
21 hearsay or should I sustain the objection?

22 MR. VON HERRMANN: No, sir, Your Honor. I
23 believe it was the basis of his opinion. I believe.

24 THE COURT: Did you using that, sir, in any way
25 to reach a conclusion on your own, sir?

1 THE WITNESS: No, sir.

2 THE COURT: Well then therefore I sustain the
3 objection. Please disregard it. Proceed on.

4 BY MR. VON HERRMANN:

5 Q Let me ask you if this is the front of the victim's
6 apartment. It's already been identified. The suspects
7 are believed to have run which way?

8 A Out through the back and--

9 MR. DIGGS: Your honor, I object to the question
10 and the answer. If I'm not mistaken, he asked him
11 which way did the suspects run?

12 MR. VON HERRMANN: No. I said which way is it
13 believed that the suspects ran.

14 THE COURT: By whom?

15 MR. VON HERRMANN: By the course of the
16 investigation.

17 THE COURT: By him?

18 MR. VON HERRMANN: Well, I mean, I think he's
19 party--

20 THE COURT: Your question to him that in his
21 investigation did you determine which way he thought
22 the suspect--

23 MR. VON HERRMANN: Yes, sir.

24 THE COURT: That's the question. I overrule if
25 that's the question.

1 THE WITNESS: I was told that--

2 THE COURT: No, sir. Don't tell us what anybody
3 told you, sir.

4 THE WITNESS: In the course of my investigation
5 we found that the suspects ran out the back entrance
6 of the building.

7 THE COURT: Okay. Speak a little bit louder if
8 you could, sir. She's got to get it down.

9 THE WITNESS: Yes, sir.

10 BY MR. VON HERRMANN:

11 Q Would -- were you able to or was there any
12 significant recovery of any evidentiary value of
13 ballistics located within the apartment?

14 A Yes, sir, there was.

15 Q And let me show you State's Exhibit number nine and
16 11. Can you please identify first what 11 depicts?

17 A Yes. Eleven shows a hallway leading back to a single
18 bedroom in that apartment. This hallway in the earlier
19 photo that I showed you is -- the living room, this
20 hallway comes off of the living room, goes back to the
21 bedroom and on the lower corner of the hallway here there
22 is a vented metal grid mounted to the wall and in that
23 grid appeared to be what looked like a buff mark or a
24 strike from a bullet.

25 In the molding to the doorway of the bedroom was a

1 hole that would be consistent with a projectile hole or a
2 bullet hole.

3 Q Let me show you State's Exhibit number nine. Does
4 that better depict?

5 A Yes. State's Exhibit nine again is a close-up of
6 those two areas. This is the metal grate that's mounted
7 to the wall. This is the molding to the right side of the
8 bedroom door coming to the bedroom. This is on the
9 hallway side.

10 Something had struck the grid and had gone through
11 molding. I did remove both the grid and the molding and
12 recovered a projectile in the wall behind the molding.

13 Q Let me show you State's Exhibit number four. Would
14 that be the projectile that you recovered?

15 A Yes, sir, it is.

16 Q And is it in that box?

17 A Yes, sir, it is.

18 Q Let me show you -- refer back to State's Exhibit
19 number 26.

20 A The area we were just discussing is here for --
21 represents where that projectile was recovered from. The
22 grid would be mounted on this wall here, the molding is at
23 the right edge of the door frame here and the projectile
24 was recovered behind the molding just inside the door jam.

25 Q Were you able to determine in looking at that whether

1 a person could have been on the outside and fired in or
2 whether they had to enter the apartment?

3 A Looking at the -- at the angle of that.

4 MR. DIGGS: I would object. I don't -- I object
5 on the basis of it requires an opinion. I don't
6 think he's been qualified as an expert to give an
7 opinion.

8 THE COURT: What was your question again, Mr.
9 Von Herrmann?

10 MR. VON HERRMANN: Essentially, Your Honor.

11 THE COURT: What's your question?

12 MR. VON HERRMANN: The question is is can he
13 determine whether or not this bullet was fired from
14 outside or inside the apartment.

15 THE COURT: All right. What qualifications does
16 he have in determining that? You have to ask him
17 that first.

18 MR. VON HERRMANN: Well Your Honor, there's a
19 wall between the wall and the door.

20 THE COURT: Okay.

21 MR. VON HERRMANN: So I mean, it's -- it's just
22 common observation, it's not opinion. It's a -- it--

23 THE COURT: How did you make that decision, sir,
24 about what you think one way or the other?

25 THE WITNESS: Using trajectory rods.

1 THE COURT: All right. Does that mean you have
2 done this before, sir?

3 THE WITNESS: Yes, sir, I have.

4 THE COURT: Ask him what his experience in doing
5 this before is, Mr. Von Herrmann.

6 BY MR. VON HERRMANN:

7 Q Have you had an opportunity to use or determine
8 trajectory of bullets from angles fired?

9 A Yes, sir. I have been viewed as an expert in -- in
10 this county and New York in crime scene reconstruction,
11 crime scene processing, blood spatter analysis.

12 Q Let's just stick to this. Were you able to use the
13 trajectory rods and to figure out whether or not that
14 bullet could be fired from the outside or it had to be
15 fired from the inside?

16 MR. DIGGS: We'd object, Your Honor. He hadn't
17 been declared an expert and we'd object.

18 THE COURT: Do you have--

19 MR. DIGGS: Offer him as an expert and I
20 wouldn't have any objection.

21 THE COURT: Well, how many years have you done
22 this, sir?

23 THE WITNESS: I--

24 THE COURT: New York and here.

25 THE WITNESS: I have got 26 years of law

1 enforcement experience, probably 20 years as an
2 investigator.

3 THE COURT: I will let him answer the question.
4 My -- whatever, I will let him give his opinion
5 testimony in that regard if you want him to do so,
6 Mr. Von Herrmann.

7 MR. VON HERRMANN: Yes, sir, Your Honor.

8 THE COURT: All right. Now ladies and gentlemen
9 of the jury, what that means is -- and there may be
10 other questions in this regard is that normally a
11 person is not permitted to come into court and give
12 an opinion what a person can do is give what they
13 perceive by their senses, what they saw, smelled,
14 tasted, heard, stuff like that.

15 But of course, as experience certain areas, the
16 Court can give person the authority to give opinion
17 testimony. That does not mean you must accept the
18 opinion.

19 What it means it becomes evidence for you to
20 consider in all the other evidence in making your own
21 decision. You can accept it or reject it. Accept it
22 in part, reject it in part.

23 I'm going to let him give opinion testimony
24 regard to his opinion about where the bullet may have
25 come, outside or inside, and trajectory of the

1 various bullets. You may proceed.

2 MR. VON HERRMANN: Thank you.

3 BY MR. VON HERRMANN:

4 Q Can you please tell them what your opinion is
5 regarding whether the bullet was fired from inside or
6 outside and what you base your opinion on?

7 A The bullet that I recovered from behind the door jam
8 molding, it's my opinion that that bullet was fired from
9 within the apartment. Reason being is that standing at
10 the doorway of the apartment there is not a clear line of
11 sight or line of fire to where that piece of molding was
12 struck.

13 Someone would have to have been in the apartment when
14 that shot was fired.

15 Q Thank you. Let's talk about the front door. You
16 indicated that you had taken photographs of that so you
17 could have some evidentiary -- had any evidentiary value.

18 Let me show you State's Exhibit number six. Can you
19 tell us if you're able to observe anything on that
20 particular door that became apparent to you is evidence?

21 A Yes. State's Exhibit six again is a photo of the
22 open side of the front door to that apartment viewing it
23 from in the living room. On that door looking with just
24 the normal eye was apparent that there were several
25 markings, one that -- one that looked like a footwear

1 impression.

2 A closer look at the door with the flashlight I
3 believe that that point that there was a footwear
4 impression on the door. I believe that there may have
5 also been some type of fingerprints or -- or latent detail
6 on that door.

7 Q Can you tell the jury did you dust that door for
8 fingerprints?

9 A Yes, I processed that door using basic black
10 fingerprint powder which if there is any type of
11 fingerprint definition or anything on that door, you hope
12 to try and develop it, it will also bring up any other
13 markings that are on the door. For instance, a footwear
14 marking or something of that nature.

15 Q And were you able to withdraw or lift any
16 fingerprints?

17 A Yes, sir. I lifted several fingerprints off of that
18 door. I also attempted to lift a footwear impression off
19 that door.

20 Q You -- how many fingerprint impressions did you lift?

21 A I would have to refer back to my notes.

22 Q Okay. If you need to do that, that's fine.

23 A (complied.) I took four -- four sets of latent lifts
24 off of that door.

25 Q Can you just number where you took those latent

1 prints understanding that it's going to be rough, but just
2 approximately on that door where you...

3 A I don't have the exact location, but it looks like a
4 footprint was lifted--

5 THE COURT: Loud, sir.

6 THE WITNESS: From the peep hole of the door,
7 another print was lifted.

8 BY MR. VON HERRMANN:

9 Q Would this help?

10 A Yes. One print was lifted here by the peep hole of
11 the door. One--

12 MR. DIGGS: Your Honor, I'm sorry. I object to
13 this -- the Solicitor just handed something to this
14 and I wasn't -- just wanted to know what it was.

15 MR. VON HERRMANN: Oh, that's fine. I asked him
16 if it would refresh his recollection.

17 MR. DIGGS: Okay.

18 MR. VON HERRMANN: The diagram that he and I
19 actually helped me -- he drew.

20 THE COURT: Continue on.

21 THE WITNESS: I took four latent lifts, one with
22 just with me -- the peep hole of the door, one
23 slightly lower, and two at the opening edge of the
24 door, one above the door handle and one below the
25 handle. I also took a latent footwear lift off the

1 door, mark that one next.

2 BY MR. VON HERRMANN:

3 Q Did you have an opportunity to observe the door jam,
4 the foot rest--

5 A Yes, sir.

6 Q Can you please tell me State's Exhibit eight.

7 A Yes, sir. State's Exhibit number eight is a
8 photograph standing on the outside of the apartment
9 viewing the locking side of that door jam. You'll notice
10 here is the strike plate that the doorknob lock would pull
11 against.

12 And some type of a hole where a bolt lock would --
13 where you turn to throw it into the doorway. You will
14 notice that the door frame itself is -- the door jam is
15 cracked and pushed inward into the apartment.

16 MR. VON HERRMANN: Your Honor, if we could, if
17 we could take just a few minutes to allow the jury to
18 look at the photographs that we have been talking
19 about.

20 THE COURT: You moved them in. You may do so.

21 MR. VON HERRMANN: Okay, sir.

22 THE COURT: They are in evidence at this time.

23 MR. VON HERRMANN: If you just want to have a
24 seat, we'll just give them a few minutes to look at
25 them.

1 THE COURT: I'm not sure about a few minutes,
2 but just pass them around. Remember they will be in
3 the jury room with you, so don't look at them as if
4 you won't see them again.

5 (WHEREUPON, State's Exhibit No. 35 was marked
6 for identification only.)

7 BY MR. VON HERRMANN:

8 Q While they're doing that, let me also ask you,
9 Officer Cestare, let me show you State's Exhibit number 35
10 marked for identification. Can you identify that for the
11 jury as well?

12 A Yes, sir. State's Exhibit 35 is a photograph of the
13 outside of the apartment door showing the portion of the
14 door, the knob lock and bolt lock.

15 MR. VON HERRMANN: Your Honor, we'd move State's
16 Exhibit number 35 into evidence.

17 THE COURT: Any objection?

18 MR. DIGGS: Note--

19 MR. GALMORE: No, sir.

20 MR. VON HERRMANN: Sure.

21 THE COURT: In evidence.

22 (WHEREUPON, State's Exhibit 35 was admitted into
23 evidence.)

24 BY MR. VON HERRMANN:

25 Q Officer Cestare, were you able to determine how many

1 times that door had been kicked?

2 A No, sir. I -- as I indicated, I was able to develop
3 one in -- footwear impression on the door.

4 Q What was the condition of the door in general?

5 A The door had several bumps and markings on it.

6 Q Did you later have the fingerprints that were
7 familiar to the door run through the AFIS system?

8 A Yes, sir, I did. The fingerprints that were lifted
9 from the door were sent to the State Law Enforcement
10 Division's lab up in Columbia to their latent print
11 experts and asked to be run through a system we call AFIS,
12 Automated Fingerprint Identification System.

13 It is a nationwide system. It connects all of the
14 agencies within South Carolina and also connects through
15 the FBI's database. Those latent prints were run through
16 the AFIS database.

17 Q And in running through the AFIS -- in running through
18 the AFIS computer system, were they able to identify any
19 of those prints?

20 A Yes, sir, they did. One of the prints labeled print
21 B I believe taken just below the peep hole of the door --
22 if you have that photograph what I marked the locations --
23 the print here just below the peep hole of the door was
24 positively identified as that belonging to Michael Carr.

25 Q If you can just circle that one for me please so we

1 know where it is.

2 A (complied.)

3 Q Now, were they able to determine through biography
4 checks and things of that nature that this is Mike Carr?

5 A Yes, sir. It is.

6 Q That's okay. So This is Mike Carr?

7 A Yes, sir.

8 Q Did you find anything else of any other evidentiary
9 value that had been -- had come forward to be used in this
10 term -- at that particular scene?

11 A Some other items were taken from the location, but
12 none that I could see that were relative to the -- to the
13 incident.

14 Q So nothing helped you resolve who defendant were --

15 A No, sir.

16 Q -- in -- were you at some point dispatched to
17 Freewoods road?

18 A Yes, sir, I was.

19 Q And can you tell this jury what your -- what you were
20 doing in Freewoods Road, the end of Freewoods Road?

21 A Yes.

22 Q Excuse me one second, Officer Cestare. Could you
23 please tell the jury what the weather was like on
24 September 28th?

25 A Sure. Bear with me one moment. Okay. Obviously by

1 the time of day it was dark outside. This was the early
2 morning hours. Temperature was approximately 75-degrees
3 Fahrenheit. It was slightly windy and with a slight rain
4 falling.

5 Q So it was wet outside?

6 A Yes, sir.

7 Q Tell me what you were dispatched to end of Freewoods
8 road to do.

9 A On that same date, September 28th, 2004, at
10 approximately 7:30 in the evening I was dispatched and
11 arrived at Freewoods Road which is in the Socastee area to
12 assist in locating evidence relative to this -- for this
13 incident.

14 Q Let me show you State's Exhibit number three
15 marked -- or it's in evidence. Can you tell the jury what
16 that is?

17 A Yes, sir. State's Exhibit number three is a
18 photograph of a fenced area at the end of Freewoods Road
19 where it kind of comes to an end. You'll notice there is
20 a gate here and there is just off the photo of this is
21 a -- a water drainage ditch that kind of runs through that
22 area.

23 Q And let me show you State's Exhibit number four
24 marked for identification. Can you tell the jury what
25 that is a picture of and what significance that was to

1 you?

2 A Yes, sir. State's Exhibit four is a photo looking
3 inside that gated area that you just saw at the end of
4 Freewoods Road. You'll notice a silver box in the center
5 with a green, greenish colored substance in it.

6 We -- I had found some footwear impressions in the
7 ground inside that fenced-in area and from those footwear
8 impressions I framed them with a metal frame and poured a
9 casting solution in it in an attempt to retrieve a casting
10 impression of that footwear.

11 Also on the fence area there were several areas in
12 a -- in mud that would indicate some type of a footwear
13 pattern where someone had climbed that fence.

14 Q Were you able to match up or was anybody ever able to
15 match up the footwear impressions that you collected to
16 anybody?

17 A I don't -- I don't understand.

18 Q You collected footwear impressions and then there
19 were some known samples taken from different people. Were
20 you able to ever match them up, was anybody able to ever
21 match them up?

22 A No, sir, not to my -- not to my recollection.

23 Q All right. What else were you able to collect at the
24 Freewoods Road area?

25 A In the drainage ditch to the side of that fence that

1 I showed you, to the right side looking at the fence from
2 the Freewoods Road side of it there is a small drainage
3 ditch there that had some water in it.

4 In that ditch I observed a plastic carrier for
5 bullets similar to a type that you would get when you
6 purchase a box of bullets. I observed that under water
7 with a number of bullets in that carrier.

8 Q Let me show you State's Exhibit number 17 in
9 evidence. Can you please tell the jury what that's a
10 picture of?

11 A Yeah, State's Exhibit 17 again I'm standing on the
12 outside of that fence that -- the Freewoods Road side of
13 that fence and that's looking to the right of the fence is
14 that water drainage ditch that I just spoke of.

15 Q And let me show you State's Exhibit number 16.

16 A Yes, sir. We're getting closer to the water again.
17 We work from distance moving in closer. That's a photo of
18 what I observed under the water. You'll notice here
19 there -- there is some type of a plastic holder and
20 protruding from the top of the plastic holder are a number
21 of live bullets.

22 Q And again, just a little closer show -- explain
23 State's Exhibit number 15.

24 A Yes, sir. State's Exhibit number 15 is a picture of
25 that plastic holder that was under water after I removed

1 it from the water and you'll notice in it are 31 live
2 cartridges.

3 Q Show you State's Exhibit number seven. Recognize
4 that?

5 A Yes, sir. State's Exhibit seven is the cartridges
6 and holder that I recovered from that drainage ditch.

7 Q Thank you. Let me jump back real quick to the crime
8 scene photo. I forgot one particular thing. Let me show
9 you State's Exhibit number 22 in evidence. Can you please
10 tell that -- tell the jury where that table is?

11 A Yes, sir. State's Exhibit 22 is kind of a living
12 room dining room combination, it's all one common room.
13 And that dining room table is back here to the right of
14 the doorway and almost directly in front of the kitchen
15 area.

16 Q Thank you. Were you able to locate anything else on
17 Freewoods Road of any significance other than the bullets?

18 A Give me one second. Let me just refer back to my
19 notes here. The only two things that -- that I recovered
20 from the Freewoods Road section was in the bullets holder
21 and the footwear, the cast footwear impressions that I
22 collected.

23 Q Did you participate in looking for a white handled
24 pistol out there?

25 A Yes, sir, I did. We conducted an intensive search

1 with initially visually looking for a weapon. We then
2 utilized metal detectors, searched a pretty wide area in a
3 grid type of pattern.

4 We also had the assistance of the Myrtle Beach Police
5 Department with a gun sniffing dog, a dog, a canine dog
6 trained in sniffing for firearms, but we did not retrieve
7 one.

8 Q Did you attend the autopsy of Joseph Patterson?

9 A Yes, sir, I did.

10 Q And did Dr. Proctor perform that autopsy?

11 A Yes, sir, he did.

12 Q Let me show you -- did he hand you or give you any
13 projectiles from the body of Joseph Patterson?

14 A Yes, sir, he did.

15 Q Let me show you State's Exhibit number 29 and 30 in
16 evidence. Can you identify those for me?

17 A Yes, sir. State's Exhibit 29 and 30 are the two
18 projectiles that were recovered inside the body of the
19 Joseph Patterson, given to me by Dr. Proctor during the
20 autopsy.

21 Q Let me ask you to step down here and I'm going to
22 show you State's Exhibit number 25. I believe you might
23 be familiar with.

24 A (complied).

25 Q And what I'd like for you to do is -- and if it takes

1 you a second, that's fine. I'd like for you to first of
2 all get -- identify where Freewoods Road is. Sure.

3 A All right. This is an areal photograph encompassing
4 quite a large section of Horry County. Freewoods Road is
5 here. This red dot would indicate the area of Freewoods
6 Road where that gate was that I just spoke of and where
7 the bullets were recovered from the water, also where cast
8 impressions were taken.

9 Q I'm going to put -- Freewoods Road?

10 A Yes, sir.

11 Q Okay. Second of all can you look and tell me where
12 Turtle Cay apartments, the crime scene is present?

13 A Yes, sir. Turtle Cay apartments is back... here and
14 here.

15 Q Okay.

16 COURT REPORTER: I'm sorry, I can't hear.

17 THE COURT: Remember whatever you say she's got
18 to take down.

19 THE WITNESS: Yes, sir.

20 THE COURT: Real loud. The jury's got to hear
21 you, too.

22 THE WITNESS: Turtle Cay apartments are
23 indicated back here where this red dot is at the top
24 right area of it - of this areal photograph.

25 BY MR. VON HERRMANN:

1 Q And finally if you can tell me where Island Green
2 Apartments is.

3 A Yes, sir. Island Green Apartments is closer to the
4 Freewoods Road area and it's indicated right down here
5 with this red dot.

6 MR. VON HERRMANN: I have no further questions.
7 Please answer any questions Mr. Diggs--

8 THE COURT: Mr. Diggs?

9 MR. DIGGS: Thank you, Your Honor. May it
10 please the Court.

11 CROSS-EXAMINATION

12 BY MR. DIGGS:

13 Q Investigator Cestare, did you bring the shoe casts
14 with you? Do you happen to have that here with you in
15 court?

16 A Yes, sir, I believe they are here.

17 Q Could you show it to us? Okay. Without going into
18 any detail at this point, could you open one of those
19 boxes and show us what a cast looks like and kind of...
20 tell us what it is we're looking at in a general sense.

21 A This is a cast impression made with a material called
22 dental stone similar to like a -- like a plaster of paris
23 impression of something. Dental stone is a much harder
24 substance and doesn't break down as easily and it's poured
25 into a footwear impression or a tire wear impression in a

1 hope to be able to obtain that same impression in a
2 permanent bonded cast as you see here.

3 Q Thank you, sir. You can return to your seat.

4 A (Complied).

5 Q Now, is this something that you do in the normal
6 course of your job?

7 A Yes, sir, it is.

8 Q How long have you been doing this?

9 A Approximately -- probably 10 years.

10 MR. DIGGS: Your Honor, I'd move to have him
11 declared an expert in this area as well as he...

12 THE COURT: Any objection to giving opinion
13 testimony? What area in particular, crime
14 investigation?

15 MR. DIGGS: Investigation, yes, sir.

16 THE COURT: Crime scene investigation?

17 MR. DIGGS: Yes, sir.

18 THE COURT: Any objection?

19 MR. VON HERRMANN: Absolutely no objection.

20 THE COURT: Any objection?

21 MR. GALMORE: No, sir.

22 THE COURT: All right, sir. Ladies and
23 gentlemen of the jury, give his opinion in that
24 regard. Once again mean that you must -- you don't
25 have to accept it. You may accept it, may not. It's

1 just evidence along with other evidence. You may
2 proceed.

3 BY MR. DIGGS:

4 Q Now, Specialist Cestare, did you have an opinion
5 during the course of your investigation here, did you have
6 about what was revealed by this casts and the footwear
7 that you investigated?

8 A If you give me just a moment --

9 Q Yes, sir.

10 A -- to refer back to my notes. May I look at the
11 cast?

12 Q Yes, sir. In fact, can I ask you to look at this and
13 see if you can identify it for me also? I know I'm asking
14 you to multitask here, but...

15 A Yes, sir. That's a copy of an investigative report
16 that were prepared.

17 Q All right. And did you do that report?

18 A Yes, sir, I did.

19 Q Let me -- go ahead and have a seat there for a -- for
20 a second and let me show you a comment that was made in
21 the report. Just read this paragraph right...

22 THE COURT: That's his comment?

23 MR. DIGGS: That's his comment.

24 THE COURT: Read it.

25 BY MR. DIGGS:

1 Q Just refresh your memory.

2 THE COURT: Read it to yourself, sir.

3 BY MR. DIGGS:

4 Q Do you understand where I'm going here with this line
5 of questioning?

6 A Yes, sir.

7 Q All right. Now, can you tell us after looking at
8 this at this point did you have an opinion at that point
9 in time as to who made those impressions that you happened
10 to have made a cast of?

11 A At the time the cast was --

12 Q Yes, sir.

13 A -- made. No, sir, I did not have any idea at that
14 point.

15 Q All right. At any point subsequent thereto did
16 you -- did you form an opinion as to who it appeared to be
17 in your mind?

18 A Yes, sir, I did.

19 Q Who was that?

20 A It was my opinion that the footwear was similar in
21 nature to footwear that was collected on Michael Carr.

22 Q Okay. Now you collected footwear off of Michael
23 Bailey, too; didn't you?

24 A I did not --

25 Q You took the shoe--

1 A -- no, sir.

2 Q All right. Okay. And is the -- are those casts made
3 of the foot press that you spoke of that were depicted in
4 the photograph a few minutes ago?

5 A This photograph at the end of Freewoods Road.

6 Q Yes, sir.

7 A Behind that fence, yes, sir, they were.

8 Q Okay. So those photographs, the footprints in front
9 of the gate were used to make that cast and then compared
10 that as against Michael Carr's footwear?

11 A Yes, sir, that would be accurate such as--

12 Q Were you able to determine if there were any
13 fingerprints on the gate?

14 A No, sir. I did attempt to develop fingerprints on
15 the gate, but I was not able to develop anything of -- of
16 definition quality.

17 Q Okay. Now, with all due respect, has anyone talked
18 to you about your opinion with regard to climbing over the
19 gate? Because I noticed in your direct testimony, for
20 example, you made the statement that it appears that these
21 footprints were in a place, a location as if someone had
22 climbed over the gate.

23 A Yes, sir, that's what I said.

24 Q Okay. Now, you did not make that conclusion in your
25 report.

1 A No, sir, I did not.

2 Q When did you realize that that was also part of your
3 opinion, that someone could have climbed over the gate,
4 made those prints or impressions?

5 A That was just an observation and I had looking at the
6 gate, but there was nothing distinguishable of any
7 definition on the gate to --

8 Q Right --

9 A -- to conclude--

10 Q -- the Solicitor for example asked you to
11 specifically address that point today?

12 A No, sir.

13 Q Okay. That's all I have. Thank you very much.

14 THE COURT: Mr. Galmore?

15 CROSS-EXAMINATION

16 BY MR. GALMORE:

17 Q Investigator Cestare, let's go back to the apartment
18 first. You had an opportunity to go through and pick --
19 walk through and process the apartment; is that correct?

20 A Yes, sir, I did.

21 Q Okay. Did you find any drugs in any apartments?

22 A Yes, sir, I did.

23 Q Tell the jury specifically what you found in the
24 apartment.

25 A Sure. Might be able to refer back to my notes, if

1 you will.

2 Q Yes, sir.

3 A May I step down and reference on the diagram?

4 Q Yes, sir. Yes, sir.

5 THE COURT: When you do so, please don't forget
6 to be loud, sir.

7 THE WITNESS: Yes, sir.

8 BY MR. GALMORE:

9 Q Please stand here in front of this microphone.

10 A Five, here in a closet I recovered a plastic shopping
11 back containing 2-gallon size zip-lock bags with a green
12 leafy substance in it. Area six is a countertop. I
13 recovered a small plastic bag containing a green leafy
14 substance on the counter.

15 Area seven back here by a water heater I recovered
16 two plastic gallon zip-lock size bags containing a green
17 leafy substance.

18 Area nine also in that closet in an attatache (sic) I
19 recovered a black plastic bag containing a white rock like
20 substance. That's it.

21 Q Okay. With regard to area five, approximately how
22 much -- oh, you can take your seat. Yes, sir.

23 A (complied.)

24 Q Approximately how much -- when you say green leafy
25 substance, do you believe that to be marijuana, sir?

1 A It had the appearance of it, yes.

2 Q Okay. And approximately how much marijuana did you
3 recover at that location?

4 A Item five on a rough weight was 2-pounds, two --
5 2.07-pounds.

6 Q These are like the large zip-lock bags?

7 A Yes, sir.

8 Q And there were two of them. Is that correct?

9 A Yes, sir, there was a -- a plastic shopping bag
10 containing 2-gallon size zip-lock bags.

11 Q Area six that you identified from the kitchen
12 counter, approximately how much marijuana was recovered in
13 that location?

14 A .02 was a small similar to a sandwich baggie.

15 Q And sandwich baggies' worth?

16 A Yes.

17 Q Oh, all right. And then area seven, when you said
18 you recovered some -- some drugs from there, too, is that
19 marijuana also?

20 A Yes, sir. Appeared to be, had the appearance of
21 marijuana and that was on near the water heater area, and
22 that was of an approximate weight of .8-pounds.

23 Q Okay. Regarding area nine on this diagram, what did
24 you recover from that location?

25 A That was a small black plastic bag containing a white

1 rock type of substance and the weight on that will be
2 approximate weight on that was .24-pounds.

3 Q And believed that substance to be crack cocaine?

4 A It had the appearance of it.

5 Q All right. Did you also recover a digital scale from
6 inside the house?

7 A Yes, sir, I did. Item number 10 is depicted on that
8 sketch is a black in color digital scale which was
9 recovered in a drawer in the kitchen.

10 Q Is a digital scale typically used in weighing out
11 drugs?

12 A Yes, sir, it can be.

13 Q Okay. Did you also recover a quantity of cash in the
14 house?

15 A Yes, sir. Item number eight depicted on the sketch
16 was a black wallet for Joseph Patterson and it had the sum
17 of \$500 in cash in it.

18 Q All right. And you -- did you happen to recover a
19 hammer also?

20 A I'm sorry, sir?

21 Q Did you happen to recover or process a hammer in the
22 residence?

23 A Yes, sir, I did. Item number 12 is indicated on that
24 sketch was a wooden handled hammer, standard type of
25 hammer like a claw back hammer. That was lying on the

1 floor.

2 Q How far was this hammer from Mr. Patterson's body?

3 Well I know his body wasn't there, but from where you
4 believe his body to have been?

5 A Let's see if I have a measurement on it.

6 Q Well, you can give us an approximation, sir.

7 A It was a couple of feet away.

8 Q Indicated that you recovered a single fingerprint on
9 the front door belonging to Mr. Carr; is that correct?

10 A I recovered a number of fingerprints, one was
11 identified to Michael Carr, yes, sir.

12 Q And the other prints were not identified with any
13 person?

14 A No, sir, were not.

15 Q Now, this footprint that you identified on the door,
16 you were not able to connect that with Mr. Carr; were you?

17 A I don't know if I understand -- understand you. I'm
18 not...

19 Q You were not able to take the footprint that you
20 found on the door, you're not able to sit here and tell
21 this jury today that that was Mr. Carr's footprint; are
22 you?

23 A Not conclusively, no, sir.

24 Q Did you conduct any gunshot residue tests on any
25 persons involved in this case?

1 A No, sir, I personally did not.

2 Q Did you know if any other Horry County police
3 officers conducted a gunshot residue test on the
4 impressions in this case?

5 A No, sir, I don't know that for a fact, no.

6 Q What is a gunshot residue test designed to elicit?

7 A Gunshot residue test is a test performed on a
8 subject's hands to tell if they had recently fired a
9 weapon. Gunshot residue tests incorporates two theories
10 of collection.

11 One is a SEM caplet that is dabbed on the hand
12 initially to try and pick up any trace evidence of
13 gunpowder, gunshot residue.

14 The second portion of that test is a swab test where
15 control swabs are coated with a nitrate solution and
16 swabbed on that person's hand, the entire back of the
17 hand, the left areas of the finger, the entire palm of the
18 hand down to the wrist area in an attempt to gain any type
19 of trace evidence relative to a firearm being discharged.

20 Q Would it have been useful to this jury to have
21 conducted gunshot residue tests on both of these young
22 men?

23 A That's a difficult question to answer, sir. A
24 gunshot residue test by the State's policy can only be
25 conducted on a living subject within six hours. On a

1 deceased subject there is no time length.

2 So if a -- if a gunshot residue test is to be
3 conducted, it would have -- it would have to be done
4 within a six hour timeframe unless there was some type of
5 unusual circumstance that would have to be explained in --
6 more than likely the State would not test it.

7 Q Test could be conducted after six hours; is that
8 correct?

9 A Yes, sir, but it would be considered inconclusive.

10 Q But no test was done in this case?

11 A I can't.

12 Q That you are aware?

13 A That I'm aware of, no, sir.

14 Q Do you know if any clothing was collected for
15 analysis?

16 A Clothing collected from whom?

17 Q From either of these young men.

18 A Yes, sir, I know that some clothing was collected,
19 for instance footwear and things. I personally collected
20 clothing from Mr. Patterson. Outside of that I can't
21 attest to what else was collected.

22 Q Regarding Mr. Carr, did you collect a shirt or a pair
23 of pants?

24 A No, sir, I don't believe I collected anything from
25 him.

1 Q Had those items been collected, could tests have been
2 performed to determine whether gunpowder was on them?

3 A I don't know that for a fact, no, sir.

4 Q Is it possible to test clothing for gunpowder?

5 A Yes, sir, it is.

6 Q Regarding this door jam, there any indication in your
7 photographs in your processing as to when the door jam was
8 broken?

9 A No, sir. The -- the door was found ajar with a lock
10 in the locked possession, but the door was open when I
11 arrived there.

12 Q You can't tell us if it was broke in minutes before
13 or hours or weeks before; can you?

14 A No, sir. I cannot.

15 Q Okay. You found and processed this ammunition,
16 State's Exhibit 27?

17 A Yes, sir, that's correct.

18 Q And you also collected from Dr. Proctor the bullets
19 that were recovered from the body and from the wall?
20 Well, you got the bullets from the body from Dr. Proctor;
21 is that correct?

22 A Yes, sir.

23 Q Were you able to make a determination or an
24 opinion -- do you have an opinion as to whether these are
25 consistent with one another?

1 A No, sir, they were all sent to SLED for evaluation.

2 Q Didn't you indicate in your notes that the bullets or
3 projectiles recovered from Mr. Patterson's body were
4 consistent with those that you found on Freemont Road
5 (sic)?

6 A Yes, sir, meaning in color and somewhat in shape.
7 Outside of that I'm not qualified to compare them to say
8 that they are in fact the same or similar.

9 Q But you said they are consistent?

10 A In color-wise, yes, sir.

11 Q Okay. Did you have an opportunity to attempt to lift
12 fingerprints off any of those bullets?

13 A Off of any...

14 Q Any of these bullets, item 27?

15 A I don't recall specifically if I did or not. I'm
16 sorry.

17 Q What about the plastic case, did you have an
18 opportunity to attempt to lift bullets or lift
19 fingerprints from this plastic case?

20 A Bear with me one second. I just need to see.

21 Q Yes, sir.

22 A Sorry, I can't recall. I know that prints were
23 attempted to get -- to be obtained off of it. I don't
24 recall if I did it or if SLED did it.

25 Q All right. Did that explain the black substance that

1 is in that bag?

2 A Yes, sir. What you're seeing in the bag is a black
3 basic black fingerprint powder --

4 Q Okay. So someone--

5 A -- to indicate that, yes, that carrier was in fact
6 printed.

7 Q All right. Someone attempted to get fingerprints off
8 it.

9 A Yes, sir.

10 Q Do you have any notes as to whether any fingerprints
11 were lifted or were in fact lifted off the bag?

12 A Not to my knowledge, no, sir.

13 Q And is it your opinion that the shots were fired from
14 inside the residence; is that correct?

15 A At least one of them was, yes, sir.

16 Q Now you indicated that the footwear impressions that
17 you had before you matched Mike Carr's shoes. Is it
18 possible that that was a typo, sir?

19 A No, sir, I don't -- I'm not qualified to say they
20 matched. All I can say is that they are similar in
21 design.

22 Q Okay. But you're sure about that being Mr. Carr's
23 shoes?

24 A Take a look at them? Okay. There are distinctly two
25 different types of footwear patterns on these casts here.

1 MR. GALMORE: No further questions, Your Honor.

2 THE COURT: Redirect?

3 MR. VON HERRMANN: Could we take a brief recess
4 before redirect, Your Honor? I need to look at some
5 matters.

6 THE COURT: All right. Ladies and gentlemen of
7 the jury, if you would, it is -- if you need to go
8 out and -- I understand some of y'all have taken a
9 thing, so if y'all need to step outside and do that,
10 then feel free to do it. We'll take about 15
11 minutes. We'll see you in a few minutes. Everyone
12 else stay put.

13 (Jury left the courtroom at 12:01 p.m.)

14 THE COURT: All right. Well aware of -- Mr. Von
15 Herrmann?

16 MR. VON HERRMANN: I just need to look at some
17 evidence, Your Honor.

18 THE COURT: All right. All right. If you
19 would, sir, you can step down and you're going --
20 now, has anything up here in front of him been
21 introduced?

22 MR. VON HERRMANN: No, sir.

23 MR. DIGGS: Your Honor, I think I'm going to
24 move that be introduced when the jury comes back.

25 THE COURT: All right. Therefore what I'm

1 saying is, if I'm -- reason for that is that that's
2 still in your custody. The Court Reporter doesn't
3 have it, so it...

4 MR. GALMORE: Moved in his cross-examination...

5 MR. DIGGS: I have some re-cross to do after--

6 THE COURT: If no one has any questions of him,
7 he's through.

8 MR. DIGGS: I need to ask him a question.

9 THE COURT: Okay. We'll see. Let's just wait
10 and take a break here but you need to take those
11 things in with you.

12 THE WITNESS: Yes, sir, I will.

13 THE COURT: Back to him or whatever, but the
14 Court Reporter has no duty over them yet. While
15 you're down do not discuss your testimony with
16 anyone.

17 THE WITNESS: Yes, sir. Thank you.

18 THE COURT: Do not -- do not call anyone on law
19 and order of New York. You're down here.

20 THE WITNESS: Yes, sir.

21 THE COURT: All right. We'll take a break.
22 Everybody, I will be back in my seat at a quarter
23 after 12. Everybody be in here a quarter after 12.

24 (Whereupon a recess was had.)

25 (The Court had an off-the-record discussion

1 about a spectator's clothing, and demeanor in the
2 courtroom during the recess.)

3 *THE COURT:* Now, there was a discussion about a
4 SLED report. Mr. Von Herrmann?

5 *MR. VON HERRMANN:* Yes, sir.

6 *THE COURT:* Ready?

7 *MR. VON HERRMANN:* Yes, sir, Your Honor. The
8 defense has agreed -- Mr. Diggs I understand has
9 agreed to allow the SLED report in regards to the or
10 actually just the first page with regards to the
11 subject boot stain on left toe, suspect being Michael
12 Carr.

13 The item two impression is not identified as
14 item one shoe. What we would do is -- propose to do
15 is ask a few questions of Officer Cestare, enter this
16 as -- enter this one particular page and simply have
17 those items read to the jury and with the
18 understanding that the suspect is Michael Carr.

19 *THE COURT:* Okay. Now that document, Mr. Diggs,
20 you have no objection to it being introduced?
21 Because they could get -- so extents of that?

22 *MR. DIGGS:* With the understanding that the
23 document is going to speak for itself. Not going to
24 have anybody explaining it, it's whoever write that
25 document did and said -- used certain language. For

1 example, on the document it says not identified.

2 And what I have agreed to is letting that go
3 before the jury, but I object to anybody getting up
4 and explaining what was wrong with the document.
5 Not--

6 THE COURT: Unless the alternate document is
7 here, I don't know anything about that unless you
8 got -- unless it's boilerplate document that SLED
9 uses, has somebody from SLED to discuss it and say --
10 well, Mr. Galmore, you have no objection to its
11 introduction?

12 MR. GALMORE: I don't have an objection to its
13 introduction, but I think we should be allowed to
14 question Mr. Cestare about what--

15 THE COURT: Well, see, I have on the record
16 y'all have not mentioned to me how Mr. Cestare has
17 any association with that document.

18 MR. VON HERRMANN: Your Honor, the way the
19 process works is Detective Lewis collected the
20 evidence, submits it to crime scene and either Peter
21 Cestare or one of those folks will take it to SLED
22 and receive the report back and forward it back to
23 him.

24 Mr. Cestare and I have had conversations about
25 the fact that this footwear has not been identified

1 with any of the suspects. So he would -- he would
2 have that information. The only way he would know.

3 THE COURT: Well, why didn't he answer Mr.
4 Diggs' question?

5 MR. VON HERRMANN: Because again, Your Honor?

6 THE COURT: Well, I tell you what. You should
7 always have the opportunity if you wish to to ask
8 Mr. Cestare what is meant by his comment to Mr.
9 Diggs.

10 MR. VON HERRMANN: Yes, sir.

11 THE COURT: Can ask that. But as far as this
12 document coming in, that's not one that Mr. Cestare
13 produced or generated, so he can't say what the
14 person meant by writing, what they meant, what his
15 opinion is of his investigation.

16 MR. VON HERRMANN: I understand, Your Honor, but
17 he would be -- as an expert he would be entitled to
18 change his opinion based on other tests that.

19 THE COURT: I'm not concerned about his opinion.
20 What I'm concerned about him saying on -- Mr. Diggs
21 mentioned what that document means. To me he had
22 nothing to do with that document as far as he had --
23 said what someone may have meant by it.

24 By his own opinion, he can always give his own
25 opinion. He can explain what he meant or what he

1 said to Mr. Diggs and whether he still has that
2 opinion or not.

3 MR. GALMORE: Your Honor, as an expert he should
4 be able to interpret what another expert wrote. I
5 mean, one doctor can read what another doctor's
6 medical records were and give an opinion based on
7 that.

8 THE COURT: What is this on the document that
9 there's concern about -- what's the document say?

10 MR. VON HERRMANN: Here's the -- here's the
11 whole issue. Agent Cestare when he initially
12 collected the evidence wrote his report on
13 October 1st of 2004.

14 In his report he indicates that the footwear is
15 similar to that of the suspects but then he takes
16 that, properly so, and forwards it to SLED to be
17 compared.

18 He goes to SLED, it is compared, it is
19 determined to be not identified with that particular
20 shoe.

21 THE COURT: Well, let me ask you this. When
22 this document says, subject boots, who is the
23 subject? It doesn't say up here.

24 MR. GALMORE: That's Mr. Carr.

25 MR. DIGGS: Mr. Carr.

1 THE COURT: It doesn't say on the indictment who
2 the subject is.

3 MR. VON HERRMANN: It was submitted as Mr.
4 Carr's. That's his boots were submitted. And Your
5 Honor, if I can just add--

6 THE COURT: So he's saying based on this
7 document it says, speaks for itself, that the
8 footwear casts of Mr. Carr's foot does -- is not
9 identified with the boots that -- that subject's
10 boots.

11 MR. VON HERRMANN: Correct, Your Honor.

12 THE COURT: Well, subject -- and he -- word
13 subject means Michael Carr?

14 MR. VON HERRMANN: The suspect in this
15 particular case was --

16 THE COURT: Subject.

17 MR. VON HERRMANN: -- subject, yes, sir. If
18 that--

19 THE COURT: So I could read it by saying Michael
20 Carr's boots with stain on left toe is item one.

21 MR. VON HERRMANN: Yes, sir.

22 THE COURT: Footwear casts of Michael Carr's
23 foot, the results. Item two, which is Michael Carr's
24 foot, is not identified with Michael Carr's shoe.

25 MR. VON HERRMANN: Correct, Your Honor.

1 THE COURT: So Michael Carr had shoes that don't
2 identify with his foot?

3 THE WITNESS: No.

4 THE COURT: Now I'm reading it, item one, item
5 two.

6 MR. VON HERRMANN: No, sir. The -- the boots
7 that Michael Carr -- that were taken from Michael
8 Carr are in -- are not identified with the castings
9 that were taken at the Freemont -- Freewoods section
10 nor was it identified with the door where it was
11 kicked in. It was -- it's not, you know, excluded.
12 It's just not identified. They weren't able to
13 determine.

14 THE COURT: Well, that's his determination,
15 that's fine. But did he use this document in
16 making --

17 MR. VON HERRMANN: No, sir.

18 THE COURT: -- completing his investigations?

19 MR. VON HERRMANN: No, sir, because that was --
20 that was -- what he did was he made a preliminary
21 finding that it was similar. If -- since it is
22 similar I need to submit this to an expert and foot
23 -- and shoe identification.

24 When he gets his report back, then he knows that
25 it's similar, it's still similar, but it's not

1 identified which are two different--

2 THE COURT: But in his investigation he
3 determined that it wasn't the foot or wasn't the
4 cast.

5 MR. VON HERRMANN: That's exactly what that--

6 THE COURT: Did he determine that in his
7 investigation by using all means of his investigation
8 including having SLED look at certain things and his
9 own looking at things and measuring and all of this,
10 then that's fine if that's his -- his interpretation.

11 MR. VON HERRMANN: Absolutely, Your Honor. And
12 that's what I was trying to impress of the Court,
13 that's how I would propose to--

14 THE COURT: Have no problem with that at all.

15 MR. DIGGS: I don't know where we are, but
16 Mr. Cestare, Investigator Cestare has already stated
17 he could not conclusively conclude that that was
18 Michael Carr impression. We understand that.

19 Could I ask the witness at this point, you know,
20 does he feel like his testimony still stands?

21 MR. VON HERRMANN: Your Honor, that's...

22 MR. DIGGS: Even knowing he has -- the SLED
23 report. Does he still--

24 THE COURT: You're asking questions.

25 BY MR. DIGGS:

1 Q Investigator, do you have -- or Specialist, do you
2 still have the same opinion that you wrote in your report
3 in 2004 with respect to the casts of the footprints taken
4 at the end of Freewoods Road, Michael Carr, do you still
5 have that opinion that they were subject -- appeared to be
6 similar?

7 A Yes, sir, I do.

8 Q All right. Is there anything in the SLED report that
9 makes you have an opinion otherwise?

10 A No, sir.

11 Q Okay.

12 MR. VON HERRMANN: Your Honor, can I follow-up
13 with one question?

14 THE COURT: Well, no. I'm going to let you
15 question on him when the jury gets here. You may
16 question on his reviewing the SLED report and his
17 investigation and his opinion.

18 MR. VON HERRMANN: That's fair, Your Honor.

19 THE COURT: All right. Bring the jury in.

20 (Jury entered the courtroom at 12:45 p.m.)

21 THE COURT: Okay. We'll continue now with the
22 redirect of this witness. Mr. Von Herrmann, you may
23 continue.

24 MR. VON HERRMANN: Thank you, Your Honor.

25 REDIRECT EXAMINATION

1 BY MR. VON HERRMANN:

2 Q Specialist Cestare, let me ask you about the gunshot
3 residue test on clothing. If it had been 24, 48 hours or
4 more, you don't have the exact clothing that they wore
5 when they shot the gun, would it do any good to test the
6 clothing that you found?

7 A No, sir, it wouldn't.

8 Q How about what affects the ability to use a gunshot
9 residue test and it -- not showing up on your hands, how
10 is it done? Or had we had the suspects right there, you
11 know, an hour after we were able to test them?

12 A Several -- several factors could alter how the test
13 comes out. A person's reactions, your humidity, outside
14 temperature could affect it, your reactions if you're
15 nervous, someone who washes their hands in a certain
16 manner thoroughly, something else coming into contact with
17 them, them coming into contact with -- with another item
18 could transfer that gunshot residue to something else. So
19 there is quite a number of things that could alter how
20 that test responds.

21 Q How about the weather like rain?

22 A Yes, sir.

23 Q So gunshot residue test is just a guide; is that
24 correct?

25 A That's correct, yes, sir.

1 Q Let me ask you about the fingerprints on the bullets,
2 Mr. Galtore went on. Where were those bullets found?

3 A Underwater.

4 Q And how did that affect your ability to get
5 fingerprints off of a slick object or an object like a
6 bullet or casing?

7 A Certainly anything from a science standpoint objects
8 in motion -- are in motion, anything that comes into
9 contact with those, whether it be an abrasive substance
10 like touching it with your hand, rubbing it against
11 clothing, walling (sic) through water could -- could
12 definitely alter your ability to obtain a fingerprint, and
13 they're just -- body conditions and climate conditions
14 that can also affect how your body leaves the salts and
15 acids that cause a fingerprint to be left on something.

16 So if it -- there again, there are a number of things
17 that could alter how -- how a fingerprint is left to begin
18 with no less how it could be partially removed or
19 completely removed.

20 Q As a crime scene investigator, does it surprise you
21 that you weren't able to get fingerprints off something
22 submerged in water?

23 A No, sir, not at all.

24 Q But they tried to do it, right?

25 A Yes, sir.

1 Q Tried to make sure they did everything?

2 A Only get one shot, we try to do the best we can.

3 Q Let's talk about the shoe impressions that they
4 mentioned. Do you know when those shoe impressions or is
5 there any way to tell how long those shoe impressions had
6 been at that particular -- at Freewood (sic) Road?

7 A No, sir. There's no way to tell how long an
8 impression has been there.

9 Q Do you know, when you take that evidence, you
10 indicate you only have one shot at it. Do you know
11 whether or not that's related to this case or not?

12 A No, sir. In fact, in casting an impression in it --
13 in and of itself can to some degree destroy your potential
14 for obtaining exactly what you see by eye which is why
15 generally what's done first is before a cast is made,
16 footwear impression or tire wear impressions are
17 photographed two ways, photographed initially the way we
18 see it, and photographed with a scale meaning a ruler of
19 some sort, to be able to put aside reference or relativity
20 in size to something in the event that the cast does
21 not -- does not come out as well as what you hoped it
22 would.

23 Q You indicated and testified on cross-examination
24 that -- that the footwear obtained from Michael Carr was
25 similar to the footwear that you found on the -- at the

1 end of Freewoods Road.

2 A Yes, sir.

3 Q Can you tell this jury what in -- what you were doing
4 and what in similar you mean by that?

5 A The footwear that I observed in Freewoods Road are
6 two different patterns of footwear. In addition the
7 footwear pattern that I observed on the door of Mr.
8 Patterson's apartment after applying basic black
9 fingerprint powder appeared to me to have the same style
10 or pattern of footwear.

11 So my indication in the report saying -- and let me
12 read exactly what my report says... footwear obtained from
13 the suspect Michael Carr turned in by Detective John Lewis
14 on 9-24-04 appears to match footwear casts obtained on
15 Freewoods Road from the impression on the victim Mr.
16 Patterson's residence door at the time of the incident.

17 What -- what -- what I'm saying in that sentence
18 essentially is that what the pattern I saw on the door
19 after applying black, basic black fingerprint powder and
20 the pattern that I observed in the soil, sand at the end
21 of Freewoods Road appeared to look similar when Detective
22 Lewis turned -- Lewis sent to me from Mr. Carr, the bottom
23 tread or pattern of the boot appeared to look like one of
24 the cast impressions from Freewoods Road and the
25 impression of what transfer I observed on the door of Mr.

1 Patterson's apartment.

2 Q And so at that time -- at that particular point you
3 felt that they were similar?

4 A Yes, sir.

5 Q And what did you do with that to further change -- to
6 determine whether or not it was in your opinion?

7 A I took the footwear from Mr. Carr along with the cast
8 impression that I took from Freewoods Road along with a
9 gel lift, a lift or an attempt of a lift of an impression
10 off of Mr. Patterson's door along with the door itself and
11 sent those items to SLED to be examined by a latent
12 examiner both for the fingerprints on the door and by a
13 footwear expert whether -- a comparison of footwear versus
14 the Freewoods Road impression, the door impression, the
15 actual footwear itself.

16 Q Okay. And you indicated on direct that the
17 fingerprint came back off the AFIS machine resulting in
18 Michael Carr; correct?

19 A Yes, sir.

20 Q Okay. Did you receive a report back from the South
21 Carolina Law Enforcement Division with regards to the
22 footwear identification?

23 A A report was received back. I don't know if it was
24 addressed to me or not, I guess, what was sent back.

25 Q Have you seen it?

1 A Yes, I have.

2 Q And as a result of -- well, first of all let me ask
3 you this. Are you an expert in comparing shoe -- shoe
4 impressions?

5 MR. DIGGS: Your honor, I object. He's already
6 been declared an expert.

7 MR. VON HERRMANN: He has not been declared a
8 special--

9 MR. DIGGS: Asked him that opinion.

10 MR. VON HERRMANN: No, sir. He is not a
11 special--

12 THE COURT: No, no. I know, now. Whether he
13 has or not, he wishes to say the same or ask the same
14 way, whatever.

15 BY MR. VON HERRMANN:

16 Q Are you an expert in shoeprint comparisons?

17 A No, sir, not in comparison, no.

18 Q In your opinion does shoeprint comparisons -- when
19 you said they were similar, did you look at any
20 microscopic or did any other impressions or anything?

21 A No, sir. I said we looked at a particular tread
22 design and they looked similar to me and that was what
23 caused me to send that off to -- to an expert to be
24 reviewed.

25 Q And having received a report from an expert today and

1 at -- subsequent to writing this report, had you changed
2 your opinion as to whether or not they are identified as
3 Michael Carr's footprints both at Freewoods Road and at
4 the crime scene?

5 A I don't know if I understand you. I'm going to say,
6 no, I have not changed my opinion, the pattern still looks
7 similar.

8 Q All right.

9 A But--

10 Q I'm talking about have you changed your opinion or do
11 you have an opinion now as to whether they are identified
12 with Michael Carr's boots and shoes?

13 A Reading the report submitted from SLED they were not
14 identified but they were not ruled out either.

15 Q Correct. So it -- it's your opinion that they were
16 similar but they are also not identified?

17 A That's correct, yes.

18 MR. VON HERRMANN: No further questions.

19 THE COURT: All right. Mr. Diggs?

20 MR. DIGGS: Brief follow-up?

21 RE CROSS-EXAMINATION

22 BY MR. DIGGS:

23 Q That -- and I understood you to say that was with
24 respect to the prints found at the end of Freewoods Road
25 and the print on the door of the apartment occupied by Mr.

1 Patterson?

2 A Yes, sir, one of the casts from the end of Freewoods
3 Road, yes.

4 Q That's all I have.

5 THE COURT: Okay. Mr. Galmore?

6 RE CROSS-EXAMINATION

7 BY MR. GALMORE:

8 Q Very briefly, sir. You said that you reviewed the
9 report from SLED, South Carolina Law Enforcement Division.

10 A Yes, sir, I did.

11 Q And you sent that cast wear impression along with Mr.
12 Carr's shoes along with a gel lift from the door to SLED
13 to an expert to be compared; is that correct?

14 A Yes, sir.

15 Q And as a result of that comparison, I think you
16 testified that they said it did not -- it was not
17 identified as Mr. Carr's shoe; is that correct?

18 A No, I think -- I think how the report reads is that
19 it was not, it was--

20 MR. VON HERRMANN: Your Honor--

21 THE WITNESS: May I see the report?

22 THE COURT: Any objection, Mr. Galmore?

23 MR. GALMORE: No, sir.

24 THE COURT: Mr. Diggs, any objection?

25 MR. DIGGS: Not to the witness looking at the

1 report.

2 THE WITNESS: Thank you.

3 BY MR. GALMORE:

4 Q Does that report help to refresh your memory, sir?

5 A Yes. The cast was not identified with Mr. Carr's
6 shoe.

7 Q Okay, sir.

8 A And the gel lift, no conclusion was rendered --

9 Q Yes, sir.

10 A -- based on the quality of the lift.

11 Q Yes, sir. Thank you, sir. No further questions.

12 THE COURT: Anything else?

13 MR. VON HERRMANN: No, sir, no further
14 questions.

15 THE COURT: You may step down, sir.

16 (Whereupon the witness left the stand.)

17 MR. VON HERRMANN: Your Honor, we would request
18 that he be excused from his subpoena and return to
19 his normal duties.

20 THE COURT: If y'all want to approach.

21 (Whereupon a bench conference was held.)

22 THE COURT: How long will your next witness be?
23 How many more witnesses do you have?

24 MR. VON HERRMANN: Your Honor, I have three
25 witnesses. Two will be here at 2:00 and I have

1 one -- should be a short witness, Your Honor, but I
2 will do whatever the Court prefers.

3 THE COURT: Let's -- we will start him any way.
4 Bring him on around. Let's start him, sir.

5 MR. VON HERRMANN: State calls officer Jack
6 Johnson.

7 THE COURT: And both defense attorneys say that
8 they're requesting sequestration is over, so if you
9 want to bring -- in that event -- all of your
10 witnesses in, you can bring them in.

11 MR. VON HERRMANN: Okay, Your Honor. Thank you.

12 THE COURT: Is that right, Mr. Diggs, Mr.
13 Galmore?

14 MR. DIGGS: Yes, sir.

15 MR. GALMORE: Yes, sir.

16 MR. VON HERRMANN: Your Honor, we would
17 respectfully request that they--

18 THE COURT: Oh, I understand. I understand.

19 JACK JOHNSON, after being duly
20 sworn, testified as follows:

21 THE COURT: All right. Your witness.

22 MR. VON HERRMANN: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY MR. VON HERRMANN:

25 Q Officer Johnson, can you please tell the jury where

1 you're employed?

2 A Horry County Police Department.

3 Q And tell them your job duties and responsibilities
4 for the Horry County Police Department.

5 A I'm a -- I'm a uniform patrol officer. I patrol the
6 the area of sector 15 which is the Burgess community.

7 Q Is that around the Sea Island Greens community?

8 A Yes, sir.

9 Q Can you tell me, are you familiar with the defendants
10 in this particular case?

11 A Yes, sir.

12 Q Let me ask you, were you dispatched to Sea Island
13 Green area on February 1st, 2005?

14 A Yes, sir.

15 Q And can you please tell this jury what you were
16 dispatched there for.

17 A A young teen-aged girl had found a revolver outside
18 of her residence and wanted to turn it into the police.

19 Q And did you go to that area?

20 A Yes, sir.

21 Q Please tell the jury, describe to this jury what you
22 found when you got there.

23 A When I got there the -- they were in like combo units
24 and were on the second floor. They had a plastic zip-lock
25 bag with a revolver, 38 pistol in it with a little bit of

1 rust on it.

2 Q Will you -- I'm sorry. Were you able to determine
3 where that pistol was found?

4 A Yes, sir. I asked the little girl where she found
5 it, she -- she took me back down and we -- when you come
6 off of Sunny Hanna Drive (phonetic), the last road on the
7 right, I can't remember the name of it, I think it's
8 Fairway Village or something like that, you make a right
9 and the road breaks off to the left right before the
10 dumpster and there's a group of bushes there and she
11 showed me where she found it under a bush in the dirt
12 under the pinestraw she saw the plastic bag sticking out.

13 Q Show you State's Exhibit number one marked -- or it's
14 in evidence. You recognize that?

15 A Yes, sir.

16 Q And tell the jury what that is.

17 A That's the gun that I -- that the little girl turned
18 over to me.

19 Q Let me get you to step down, if you would. When you
20 said that -- and you testify down here, officer, you're
21 going to need to be kind of loud, okay?

22 A (complied.)

23 Q Show you State's Exhibit number two in evidence. Can
24 you please tell me where that gun was located in this
25 area?

1 A It's located right in this area right here, this side
2 of the road.

3 Q Please step back up there.

4 A (complied.)

5 Q During the course of the investigation as the
6 suspects had been identified, did you have an occasion to
7 assist or help in the arrest of Michael Carr?

8 A Yes, sir.

9 Q And can you tell me what apartment that was that you
10 arrested Mr. Carr?

11 A 10J.

12 Q And instead of coming down and doing all of that, I'm
13 going to -- I got a Michael Carr arrested is all it says.
14 And I'm going to get you just to put it on here at the
15 particular location.

16 A Is there an arrow? Yeah, there's an arrow. In that
17 building right there.

18 Q What's that number?

19 THE COURT: Got to make sure we can hear you.

20 THE WITNESS: I'm sorry, sir. I was talking to
21 myself. The -- placed the decal with the arrow
22 pointing and the arrow means on the -- they'll know
23 was arrested in.

24 THE COURT: Okay.

25 BY MR. VON HERRMANN:

1 Q I have no further questions. Please answer any
2 questions they have.

3 THE COURT: Mr. Diggs?

4 COURT REPORTER: I'm sorry. Somebody knocked my
5 microphone off. I don't see it. I see it. It's...

6 THE COURT: It's right there.

7 COURT REPORTER: It was hidden behind the Bible.
8 Sorry.

9 CROSS-EXAMINATION

10 BY MR. DIGGS:

11 Q Officer Johnson, how are you doing this afternoon?

12 A All right, sir.

13 Q Now, with respect to the area you have identified for
14 us, the area on State's Exhibit number two where the gun
15 was found that you just identified as being depicted in
16 State's Exhibit number one. Okay.

17 A Yes, sir.

18 Q Can you tell us approximately the distance between
19 where this gun was found and are you -- let me ask you
20 this. Let me back up. Are you familiar with the
21 Freewoods Road?

22 A Yes, sir.

23 Q Okay. And can you tell us, are you sufficiently
24 familiar with that area so that you can give us an
25 estimation of the distance between the end of Freewoods

1 Road and the apartment where you found this particular
2 weapon?

3 A Freewoods -- Freewoods Road from that apartment back
4 from the road is approximately maybe 3/4 of a mile to a
5 mile.

6 Q Okay. It's a good -- a good distance, would you
7 agree with me?

8 A It -- it -- I guess so. It -- it taken -- if you're
9 walking on foot it would take you between five and 12
10 minutes probably to walk that -- that distance.

11 Q Okay. And so in terms of round trip, it would take
12 better part of a half an hour; wouldn't it?

13 A Probably so or some -- yeah.

14 Q All right. Let me ask you, if someone were to
15 deposit a gun at the end of Freewoods Road and then to get
16 out at the end of Freewoods Road and then walk over or run
17 over to this location, put that gun there and then run
18 back to the end of Freewoods Road, can you give me an idea
19 of how long it would take him to make that journey round
20 trip?

21 A I'm not really sure. It -- it depends on the shape
22 of the person and everything else, you know.

23 Q But no doubt it'd take a lot longer than two to five
24 minutes, correct?

25 A It would probably take a few more. If I was in shape

1 I could probably do it in under 10 minutes.

2 Q A round trip?

3 A Back in the day when I was running a lot, probably
4 so.

5 Q Okay. Were -- let me -- I'm just going to drop it at
6 that point. That's all I have. Thank you very much.

7 A Okay, sir.

8 THE COURT: Mr. Galmore, any questions?

9 MR. GALMORE: Yes, sir.

10 CROSS-EXAMINATION

11 BY MR. GALMORE:

12 Q Very briefly, Officer Johnson. You said that you
13 arrested Mr. Carr; is that correct?

14 A I detained him for question for the -- for the
15 detectives, yes, sir.

16 Q Yes, sir. Did he attempt to flee from you when you
17 detained him?

18 A No, sir.

19 Q Okay. Now, how far is it from where you arrested Mr.
20 Carr to where this gun was recovered, sir, approximately?

21 A I would say it's approximately 150 yards.

22 Q Okay. So Mr. Carr was arrested 150 yards from where
23 the gun was found?

24 A Approximately, yes, sir.

25 Q Okay. Thank you. No further questions.

1 A Thank you, sir.

2 THE COURT: Anything else?

3 MR. VON HERRMANN: Nothing from the State, Your
4 Honor.

5 THE COURT: Worked out fine. Thank you, sir.
6 You may step down.

7 THE WITNESS: Thank you, sir.

8 (Witness left the stand.)

9 MR. VON HERRMANN: Your Honor, we would ask that
10 he be released from his subpoena so he can return to
11 his duties as well.

12 THE COURT: Okay. Hearing no objection, you may
13 return there, Officer Johnson. Don't need to run.
14 All right.

15 Ladies and gentlemen, I'm going to let y'all go
16 to lunch now. If you would, you all don't have to be
17 back until 2:30. We'll try to get back about
18 2:15 and see if we need to do anything extra. So
19 we'll see y'all at 2:30. See you then. Have a good
20 lunch.

21 (Jury left the courtroom for lunch at 1:07 p.m.)

22 THE COURT: All right. Now, Mr. Von Herrmann,
23 are you looking at finishing within about an hour and
24 a half? You got a long witness or what?

25 MR. VON HERRMANN: No, sir, both witnesses are

1 very short. I would be surprised if they crossed
2 anything on one and they might have a little bit of
3 cross on the other one. It's a firearms expert and
4 the pathologist, Your Honor.

5 THE COURT: Okay. At this stage, Mr. Diggs and
6 Mr. Galmore, assuming the State finishes around
7 3:30 or four, do y'all plan to have witnesses that's
8 going to take us into tomorrow?

9 Anticipate charging the jury not this afternoon,
10 tomorrow morning, any way.

11 MR. GALMORE: Your Honor, I -- I do anticipate
12 calling Mr. Carr as a witness. I think Mr. Diggs
13 might do the same thing. We can argue and charge in
14 the morning.

15 THE COURT: So y'all feel we could get all the
16 evidence in today?

17 MR. DIGGS: Your Honor.

18 THE COURT: Between 5:30 and six?

19 MR. DIGGS: We could probably get a couple --
20 don't hold me to this.

21 THE COURT: I shall... no.

22 MR. DIGGS: We could probably get ours done
23 in... probably that time.

24 THE COURT: All right. Good. We will try to do
25 that. All right. Everyone have a good lunch, but I

1 will be back in chambers around 2:15, 2:20 or so if
2 y'all need to see me. If not, we'll start at 2:30.

3 (Whereupon court was in recess for lunch.)

4 THE COURT: State ready?

5 MR. VON HERRMANN: State's ready, Your Honor.

6 THE COURT: Defense ready?

7 MR. DIGGS: Yes, sir.

8 MR. GALMORE: Yes, sir.

9 THE COURT: All right. Bring the jury in,
10 please.

11 (Jury entered the courtroom at 2:58 p.m.)

12 THE COURT: Seeing everybody is here, say the
13 jury ate \$50 worth of biscuits and \$16 worth of
14 donuts. That's... all right.

15 Ladies and gentlemen, we're ready to get
16 started. Hope you had a pleasant lunch and we'll
17 proceed with further testimony in the case. Mr. Von
18 Herrmann, you may proceed.

19 MR. VON HERRMANN: Thank you, Your Honor. The
20 State calls Dr. Lee Proctor to the stand.

21 THE COURT: Come around, please sir.

22 DR. LEE PROCTOR, after being duly
23 sworn, testified as follows:

24 THE COURT: Okay. your witness.

25 DIRECT EXAMINATION

1 BY MR. VON HERRMANN:

2 Q Dr. Proctor, could you tell me if you have ever been
3 qualified as an expert in forensic pathology?

4 A Yes, sir, I have.

5 Q Can you tell the Court about how many times?

6 A Probably 75 to a hundred times.

7 MR. DIGGS: Your Honor, we would stipulate to
8 the witness's qualification.

9 THE COURT: All right.

10 MR. GALMORE: I would as well.

11 THE COURT: All right. You have a right to
12 introduce him to the jury if you wish to do that.
13 They stipulate that he can give opinion testimony in
14 the area of pathology, medical science of pathology.
15 But if you want to introduce him, you can.

16 MR. VON HERRMANN: Thank you.

17 BY MR. VON HERRMANN:

18 Q Dr. Proctor, can you tell the jury what forensic
19 pathology is and what you do as a forensic pathologist?

20 A Yes, sir. I am a medical doctor engaged in the
21 practice of pathology and forensic pathology. My general
22 pathology practice is we do biopsies, see the biopsies,
23 give diagnosis on what's brought to us in the lab. We
24 also run the lab blood bank, microbiology, chemistry and
25 those things.

1 As a forensic pathologist I am qualified to
2 participate in the medical, legal investigation of a
3 death. I am contacted in this county and in this state by
4 the local coroner and consulted to do a case in which I
5 perform a post-mortem examination to include an external
6 exam, dissection and analysis of body fluids and tissue to
7 come up with what I feel is a cause of death and along
8 with the information from investigative authorities a
9 manner of death.

10 Q Specifically in this case, Dr. Proctor, did you have
11 an opportunity to review a report or do you remember doing
12 an autopsy on this particular case?

13 A Yes, sir, I have a copy of my autopsy report.

14 Q Dr. Proctor, could you please tell the jury just the
15 basic way an autopsy is conducted, what you're looking
16 for?

17 A Yes, sir. In a forensic case we are looking for the
18 specific cause of death and then a means of determining
19 the manner of death. As part of forensic pathology, we
20 get some histories from the Coroner at the time of the
21 case as well as some history from law enforcement if
22 they're available. The histories may not be complete at
23 this time because we have just what's available.

24 We do a complete external examination, then we do a
25 dissection of the body. We retain tissues and body fluids

1 as necessary, we remove any foreign projectile, examine
2 all wounds, then we do a microscopic examination of
3 certain tissues as necessary, do toxicology evaluation and
4 then we take all of these parameters that we have
5 examined, put it together with a cause and manner of
6 death.

7 Q In this particular case did you do an internal
8 examination?

9 A Yes, sir, I did.

10 Q And in the course of that internal examination were
11 you able to remove two projectiles from the body?

12 A Yes, sir.

13 Q And did you transfer those to law enforcement?

14 A I did.

15 Q Did you change them in any form or fashion?

16 A No, sir, I did not.

17 Q I'm going to show you State's Exhibit number 29 and
18 30. It's in evidence. And are those particular
19 projectiles that you removed from the body?

20 A Okay. This is item number 29 and item number 30,
21 yes, sir.

22 Q And who did you transfer those to, do you recall?

23 A I transferred these to a representative of the Horry
24 County Police Department.

25 Q During the course of your autopsy were you able to

1 determine how Mr. Patterson or where Mr. Patterson was
2 shot?

3 A Yes, sir. Mr. Patterson was shot twice, once in the
4 left anterior shoulder area and once in the left posterior
5 shoulder area.

6 Q Can you describe to us what's the difference of an
7 anterior and a posterior?

8 A Okay. Basically this gentleman -- one was anterior
9 to the shoulder this way and one was slightly posterior to
10 the midline of the shoulder this way.

11 Q Okay. And did -- what path did that take throughout
12 the body?

13 A Okay. The first projectile, the one penetrating the
14 body anteriorally passed left to right and inferiorally
15 and it penetrated the lungs and was removed I think from
16 the -- yes, removed from the fourth rib space on the right
17 side, so it traversed the body left to right and slightly
18 inferior penetrating both the left and right lungs.

19 Q And what about the second one?

20 A The second entered the left posterior shoulder, it
21 traveled superior to inferior, actually hit the sixth rib
22 so it was sort of posterior shoulder by the shoulder
23 blade, entered the left chest cavity and lodged against
24 the thoracic vertebral column at about the ninth rib
25 level.

1 Q And through your autopsy were you able to determine a
2 cause and manner of death?

3 A Yes, sir, I was.

4 Q And could you please tell the jury what the cause and
5 manner of death -- the death was?

6 A Mr. Patterson died as a result of the injuries to
7 both his right and left lungs with associated hemorrhage.
8 So the cause of death was a gunshot wound with massive
9 hemorrhage.

10 The manner of death which was determined based on my
11 evaluation and information I had available at the time of
12 this autopsy was homicide.

13 Q Thank you. I have no further questions, Dr. Proctor.

14 THE COURT: All right. By the way, ladies and
15 gentlemen, by -- there is stipulation, and I gave him
16 authorization also to give opinion testimony. You
17 know I gave instructions about it earlier. You may
18 proceed.

19 CROSS-EXAMINATION

20 BY MR. DIGGS:

21 Q Dr. Proctor, you did a full examination of the body
22 of Mr. Patterson?

23 A Yes, sir.

24 Q And did you look to see if there were any other type
25 of wounds on his body or bruises, that kind of thing?

1 A I examined Mr. Patterson and looked for wounds,
2 injuries and whatnot, and did not -- let's see. I found
3 some tattooes but I found no evidence of any other injury.

4 Q All right. Certainly no evidence that Mr. Patterson
5 was involved in a fight or a struggle as far as you could
6 tell?

7 A As far as I could tell, no, sir.

8 Q Seemed to be just a plain straight-away shooting, two
9 shots interiorally as you described?

10 A Left shoulder area.

11 Q Left shoulder?

12 A Yes, sir.

13 Q And would it be fair to say that the angle of those
14 bullets would be maybe consistent with him trying to duck
15 or maybe get out of the way of being shot?

16 A The angle of those bullets was certainly from the
17 victim's left. It's certainly possible he could be
18 turning or -- or, you know, the shooter boom, boom, you
19 know, hands moving. I can say it's possible.

20 Q Okay. And it would be a reasonable inference, would
21 it not, if you were to stand -- all of a sudden be
22 confronted with a weapon and -- and be afraid you were
23 about to be shot that you would turn away in order to try
24 to shield yourself in some manner?

25 A It -- yes, sir, certainly reasonable.

1 Q Dr. Proctor, thank you very much. That's all I have
2 at this time.

3 A Yes, sir.

4 THE COURT: Mr. Galmore?

5 CROSS-EXAMINATION

6 BY MR. GALMORE:

7 Q Afternoon, Dr. Proctor.

8 A Hey.

9 Q Could you tell the jury what a folly catheter is?

10 A A folly catheter is a catheter in a male or female is
11 placed in the urethra to the bladder and it actually
12 drains urine out of the bladder.

13 Q Is that something that you would insert or is that
14 something that's inserted perhaps in a hospital?

15 A I would not insert a folly, no, sir. Folly was
16 inserted probably by either -- I would think folly be
17 inserted by emergency medical personnel, physician.

18 Q And it would be a sign to you of attempts at
19 resuscitation?

20 A That's correct.

21 Q Okay. And that would be the same for an intravenous
22 IV line?

23 A Intravenous would be to provide fluids, yes, sir.

24 Q Okay. And Mr. Patterson had both of those at the
25 time of the autopsy?

1 A That's -- the records show intravenous lines. There
2 was one within the right wrist and right -- I mean, the
3 right wrist and let's see -- and there was a folly
4 catheter present, yes, sir.

5 Q So with the presence of the catheter and the IV line,
6 would that suggest to you that he was alive for some
7 period of time and there were resuscitation efforts?

8 A That would suggest to me that emergency medical
9 personnel, whether on scene, in the ambulance or medical
10 personnel at the emergency department where he was
11 transported would have instituted resuscitative attempts.

12 Q Okay. I think you indicated that you did not find
13 any residue or stippling on the body?

14 A That's correct.

15 Q What does that indicate?

16 A Residue and stippling usually occurs from a wound
17 that is administered as a loose contact or very close
18 wound. In the case of handguns usually within 12 to
19 18 inches, certainly not much more than that, and residue
20 is actually the powder, the smokey carbon stuff that comes
21 out of the gun.

22 Stippling is actually caused by the hot powder coming
23 out of the gun. The stippling actually burns the skin.

24 Q You did not see stippling or residue in this case?

25 A I did not.

1 Q What does that suggest to you?

2 A That suggests to me that the gun that fired the shots
3 that hit Mr. Patterson were fired from a distance greater
4 than 12 to 18 inches.

5 Q And you can't say who fired those shots?

6 A Absolutely not.

7 Q All right. Now, I understand that you recovered two
8 projectiles during the course of the autopsy; is that
9 correct?

10 A Yes, sir.

11 Q Did -- were there any fragments remaining in the
12 body?

13 A I -- I recovered two intact projectiles that are in
14 those containers there. Many times as a projectile
15 traverses the body small little pieces may be deflected
16 off of a -- particularly if it hits bone, and those pieces
17 are virtually impossible to recover.

18 Q All right. Could you comment on the general
19 condition of these projectiles?

20 A Yes, sir. All right. I have been handed exhibit
21 number 30 which is a projectile. This is an intact
22 projectile slightly flattened along one edge, but it shows
23 very nice pattern of lands and grooves which is the actual
24 pattern put on this projectile by the gun barrel through
25 which it traverses. They are very easily identifiable.

1 Q Yes, sir. And what about this one, item 43?

2 A Item 43 again there is a little distortion along one
3 edge of this projectile, but again, it is fairly pristine,
4 well-formed, and shows very nice groove -- you know,
5 grooving pattern on this projectile also.

6 Q And these two are the two projectiles that you
7 recovered from Mr. Patterson's body?

8 A Yes, sir. Yes, sir.

9 Q And turned those over to the Horry County Police
10 Department?

11 A That's correct.

12 Q Just one last question. Did you do a toxicological
13 examination on Mr. Patterson?

14 A Okay. As -- as a part of every forensic case that we
15 do, we draw blood and that blood is sent to National
16 Medical Services Laboratory in Pennsylvania for
17 toxicological evaluation.

18 Q What were the results of the examination in this
19 case?

20 A Okay. In this case a blood ethanol was performed and
21 that was negative. And a blood drug screen was positive
22 for THC which is marijuana and THC by-product which is
23 marijuana degradation product.

24 Q And what does that -- marijuana degradation--

25 A That means -- that means the presence of THC or the

1 active component of marijuana, means that marijuana had
2 been smoked very close to the time of death, within an
3 hour or so of that.

4 Marijuana degradation product is as the marijuana
5 metabolite breaks down into the degradation product, that
6 can hang around for two to three weeks so you can detect
7 that for a couple of weeks.

8 Q So Mr. Patterson was negative for alcohol but
9 positive for marijuana?

10 A That's correct.

11 Q All right. Thank you, Dr. Proctor.

12 THE COURT: Anything else?

13 MR. VON HERRMANN: No further questions.

14 THE COURT: Anything else?

15 MR. DIGGS: No, Your Honor.

16 THE COURT: You can step down, sir. Thank you
17 very much.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: Any objection to him being released
20 from further services in the trial?

21 MR. GALMORE: No, sir.

22 MR. DIGGS: No, sir.

23 THE COURT: Thank you, doctor. You may return
24 to your duties.

25 (Witness left the stand.)

1 MR. VON HERRMANN: Your Honor, can we approach?

2 THE COURT: Yes.

3 (Whereupon a bench conference was held.)

4 THE COURT: Okay. Next witness, sir.

5 MR. VON HERRMANN: Thank you, Your Honor. The
6 State would call Special Agent Dan Defreese.

7 DAN DEFREESE, after being duly
8 sworn, testified as follows:

9 THE COURT: Your witness.

10 MR. VON HERRMANN: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. VON HERRMANN:

13 Q Agent Defreese, could you please tell the jury where
14 you're employed.

15 A I work with the South Carolina Law Enforcement
16 Division in the forensic services laboratory in Columbia.

17 Q And can you tell what you do as a forensic laboratory
18 in Columbia?

19 A I'm assigned to the unit within the laboratory of
20 where we do the analysis of firearm and toolmark evidence.

21 Q And how long have you done that?

22 A Forty years.

23 Q And how many times have you been qualified in court,
24 can you tell the jury?

25 A I don't know how many times I have been qualified. I

1 estimated it's something in excess of 600 times.

2 Q And are you a member of any --

3 MR. DIGGS: Your Honor, we'd stipulate to his--

4 MR. VON HERRMANN: Yes, sir.

5 THE COURT: At the appropriate time tell him the
6 area in which him -- to give opinion testimony.

7 MR. VON HERRMANN: Your Honor, I think the fact
8 that he's 600 times and they were so quick to
9 stipulate, Your Honor, we would ask that he be
10 qualified as an expert in firearm identification and
11 toolmark identification.

12 THE COURT: All right. Ladies and gentlemen,
13 that means he can give opinion testimony in that area
14 just as I've mentioned earlier about how you handle
15 opinion testimony. You may proceed.

16 MR. VON HERRMANN: Thank you, Your Honor.

17 BY MR. VON HERRMANN:

18 Q Agent Defreese, I'm going to give you a couple of
19 exhibits. Just set it up here so I don't have to keep
20 walking back and forth and bothering you.

21 Agent Defreese, were you asked by Horry County Police
22 Department to conduct certain tests or toolmark
23 identification with regard to ammunition and some
24 projectiles and a gun?

25 A Yes, sir.

1 Q Can you please -- let's start off by explaining to
2 the jury -- some of them may or may not be familiar
3 with -- first of all let's start off with a semiautomatic
4 or it should be a revolver and how that operates and what
5 is left after shooting that.

6 A A revolver is generally a kind of handgun that has as
7 its center member a cylinder into which there are a number
8 of chambers that you can place cartridges and usually
9 anywhere from five to about nine cartridges depending upon
10 the caliber.

11 A revolver is a manually operated firearm that uses
12 none of the energy of the firing of the cartridge to
13 operate. It's operated entirely by the energy supplied by
14 the shooter.

15 Some revolvers are what are known as double action
16 revolvers for a long pull of the trigger cocks the hammer
17 and then at some point the hammer will drop and cause the
18 cartridge to fire.

19 While this is happening the cylinder is being rotated
20 to a position where it lines up with the barrel so that
21 soon as the firing pin strikes the primer on the
22 cartridge, the powder burns, the pressure builds within
23 the cartridge and the bullet starts to move out of the
24 cylinder down the barrel and on toward its target.

25 And in a revolver there is no extraction and ejection

1 of a fired cartridge case with every shot as there is with
2 semiautomatic firearms. The fired cartridge cases remain
3 in the cylinder until they are manually removed.

4 The -- as the bullet passes through the bore or
5 through the bore is the interior surface of the barrel --
6 it is gripped by a series of grooves because sizing of the
7 bullet and the sizing of the barrel is such that the
8 bullet is in very, very tight contact with the interior
9 surface of the barrel.

10 These grooves spiral either to the left or to the
11 right to impart the spin on the bullet as the bullet is
12 being propelled down the bore and out of the gun.

13 The spin is put on the bullet for the same reason a
14 quarterback puts a spin on a football as he releases it
15 where it won't tumble end over end.

16 But we found by looking at bullets microscopically
17 that when they're recovered in sufficiently good
18 condition, we can identify a particular bullet back to the
19 gun barrel in which it was fired based on the individual
20 unique markings that are present inside the barrel that
21 are imparted on the bullets that are fired in that barrel.

22 Q And you indicated that you had to manually remove --
23 how is it typically done in a revolver?

24 A In the case of revolvers would sling out cylinders
25 which many of the double action revolvers have swing out

1 cylinders. The shooter would press a latch that releases
2 the cylinder from its locked position.

3 The cylinder is on a crane assembly so that it
4 swivels slightly to one direction or another, usually to
5 the left, and then a single press on the ejection rod
6 would cause all five or six or however many cartridges are
7 in the cylinder to be eject, extracted and ejected from
8 the cylinder all at one time.

9 Of course, in western style revolvers we sell it --
10 frank revolvers there's an ejection mechanism and a lot of
11 times they are extracted one at a time through a loaded
12 gate.

13 Q In this particular case the revolver that we asked
14 you to take a look at, could you tell the jury how that...

15 A The revolver submitted in this case was a double
16 action revolver with a swing out cylinder. It would be of
17 the type that the shooter could view the rear of the
18 cylinder and could view all the chambers at one time and
19 could place -- in this case, as many as six cartridges in
20 it which could be loaded at once and extracted at once.

21 Q The exhibit you have before you, is that a picture of
22 the firearm that you were asked to examine?

23 A Yes. State's Exhibit one is a picture of -- a
24 picture of the firearm that I examined in this case.

25 Q Okay. Can you explain to the jury how a -- what a

1 bullet is comprised -- or excuse me -- the entire shell
2 unfired?

3 A A complete cartridge consists of a cartridge case
4 into which all the other components are loaded. At the
5 rear of the cartridge are what we actually call a
6 cartridge casing. In a center fired cartridge there's a
7 primer.

8 The primer contains a percussion sensitive chemical,
9 that is when it's struck smartly it explodes and the
10 primer is what you use to initiate the burning of the
11 powder.

12 The powder goes into the cartridge case and the last
13 thing that caps off the top of the -- of the powder is
14 the -- the bullet itself. So the cartridge is -- rather
15 like a cartridge casing is rather like a cup and then
16 the -- the bullet closes off the end of that.

17 Q And in this particular case did we submit a number of
18 cartridges for you to look at?

19 A You did.

20 Q And is that sitting in front of you? If you can just
21 say the exhibit number, I would appreciate it -- in
22 evidence.

23 A Yes, this is State's Exhibit seven which are a number
24 of 38 special caliber cartridges which are loaded with
25 plain lead bullets.

1 Q And submitted also was two cartridges that were
2 discovered in Joe Patterson's body.

3 A There were two bullets.

4 Q Two bullets, I'm sorry.

5 A The cartridge is the whole round. The bullet is just
6 the projectile portion.

7 Q I apologize. I misspoke. How many total projectiles
8 or bullets did -- were you asked to examine in this
9 particular case?

10 A Three.

11 Q And were you able to examine and compare as to the
12 firearm, the other cartridges and all the bullets
13 together?

14 A I was.

15 Q Can you please tell the jury anything that you were
16 able to clear by looking at all of that evidence?

17 A I compared the three bullet specimens that are
18 contained in State's Exhibits 29, 30 and 31 with each
19 other. All of these bullets are damaged to some extent.
20 I was able to observe the same class characteristics on
21 all three bullets, that is that all three are the same
22 caliber, all three of them have the same number of lands
23 and grooves.

24 So as the -- they could have been fired by the same
25 gun, but the individual markings, the very small

1 microscopic markings that need to be present in order to
2 identify bullets to a particular gun barrel were too badly
3 damaged for me to conclude that all three of these bullets
4 were fired by one and the same gun.

5 They could have been fired by one gun. If they were
6 fired by more than one gun they were fired by guns that
7 had the same rifling specifications.

8 Q And what caliber gun would that be?

9 A The bullets are consistent with .38 caliber, 38
10 special caliber bullets. Thirty-eight special caliber
11 cartridges can be fired and 38 special caliber firearms
12 and 357 magnum caliber firearms.

13 Q And were you able to compare those or compare the
14 bullets with any particular thing and come to any
15 conclusion?

16 A I compared the bullets in State's Exhibits 29, 30 and
17 31 with test bullets which I fired from the firearm that
18 appears in State's Exhibit one. I found the same class
19 characteristics, that is the revolver depicted in State's
20 Exhibit one had the same number of lands and grooves, it
21 had approximately the same width, the same direction or
22 twist, but due to the damaged condition of the three
23 bullets, I couldn't tell whether they were fired by that
24 gun or by another gun that had the same kind of rifling
25 specifications.

1 Q With regards to the cartridges that were sent up
2 there, would they fit in that particular handgun?

3 A Yes, they would.

4 Q And would -- had -- would they -- were you able to
5 generate or determine a possible number of manufacturers
6 that the bullets could have come from?

7 A Yes. Based on the specifications that I found on the
8 bullets, I suggested in my report a number of brands of
9 firearms that could have fired the bullets in State's
10 Exhibits 29, 30 and 31.

11 One of those brands being the brand of which the
12 pistol depicted in State's Exhibit one, and the others are
13 other 38 special caliber and 357 magnum caliber firearms
14 which had five lands and grooves and right hand twist of
15 approximately the same dimensions.

16 Q Let me just make sure that your testimony -- that I
17 understand your testimony. You're indicating that another
18 38 special revolver could have fired these bullets?

19 A Could have. And I'm not saying that that gun didn't.
20 But it could have been that gun, could have been another
21 gun. But whatever kind of gun it was, it was a 38 or a
22 357 magnum that had five lands and grooves and right hand
23 twists.

24 Q No further questions. Please answer any questions
25 the defense may have.

1 THE COURT: All right. Mr. Diggs?

2 MR. DIGGS: Thank you. Your Honor, we have no
3 questions of this witness.

4 THE COURT: Okay. Mr. Galmore?

5 CROSS-EXAMINATION

6 BY MR. GALMORE:

7 Q Agent Defreese, I noticed on my report that you had a
8 serial number for this 38 special for that Sports Sounders
9 (phonetic) you got... is that correct?

10 A Yes, that's correct.

11 Q Is it possible to take that serial number and trace
12 ownership of that weapon?

13 A It is certainly possible to take that serial number
14 and trace it to the first retail purchaser of the firearm.

15 Q Was that done in this case?

16 A No, I -- I have no -- I didn't do it and I don't know
17 whether it was done.

18 Q All right. Now, as part of your examination of that
19 revolver, you testified -- was in working condition; is
20 that right?

21 A Yes, sir.

22 Q How -- explain to the jury how you did that.

23 A I loaded the revolver with ammunition that contained
24 bullets similar to the bullets used in State's Exhibits
25 29, 30 and 31, and I test fired it into a vertical water

1 recovery tank. It's like a rather large piece of pipe,
2 but it has about 12 feet of water in it.

3 In the bottom of a pipe there's a funnel shaped
4 region that goes to a small collection cup so that after I
5 test fired it, I can retrieve bullets. And it's really --
6 it's about a comparison of bullets to bullets that we're
7 able to identify bullets being fired by a particular
8 firearm. It's not a direct comparison of a firearm.

9 Q You also physically inspected the revolver; is that
10 right?

11 A I did.

12 Q And you found it to be in working order?

13 A It -- it had a couple of mechanical defects but it
14 was in work -- it was in good working order. I think the
15 rear sight was broken and it had a little rust on it, but
16 there was nothing that prevented the -- the revolver from
17 firing.

18 Q What is the IBIS system?

19 A The IBIS is an acronym for the Integrated Ballistics
20 Identification System.

21 Q And--

22 A It's a computer based system for and in which we can
23 put selected bullet and cartridge case specimens and
24 sometimes the -- the computer will suggest a relationship
25 between for instance a bullet we might submit in a case

1 and then test bullets from a gun we would recover so that
2 the computer would suggest that we compare a bullet from a
3 given gun with a bullet in a given case or a cartridge
4 case.

5 Q So you can take that test fired bullet, enter it into
6 the system and see if this gun has been fired in other
7 cases?

8 A That's the idea.

9 Q Was that done in this case?

10 A Yes.

11 Q Did it turn out that that gun had been used in any
12 other crime?

13 A If -- there's been no correlation found thus far.

14 Q Now, as far as State's Exhibits 29, 30 and 31, you're
15 not able to tell this jury that State's Exhibit one fired
16 those projectiles; are you?

17 A No.

18 Q You can't tell this jury if 29, 30 and 31 even came
19 from one gun or more than one gun; can you?

20 A Not for certain, no.

21 Q In fact, those three bullets could have been fired
22 from 12 different types of guns?

23 A My list may include as many as 12 different brands
24 that have the same specifications as I count on the three
25 bullets, but the three bullets could have been fired by

1 one gun, two guns, or three guns.

2 Q Yes, sir. And there are 12 different brands of guns
3 that would fire those -- that potentially could have fired
4 those three bullets?

5 A Right, there are 12 that we know of.

6 Q Thank you, sir. No further questions.

7 THE COURT: Any redirect?

8 MR. VON HERRMANN: No redirect, Your Honor. We
9 would request that he be released from his subpoena.

10 THE COURT: Mr. Diggs, Mr. Galmore?

11 MR. DIGGS: No objection.

12 THE COURT: You may step down. You may be
13 released from further service in this trial. Thank
14 you, sir.

15 THE WITNESS: Thank you, sir.

16 (Witness left the stand.)

17 THE COURT: Any further witnesses for the State?

18 MR. VON HERRMANN: Your Honor, at this time the
19 State rests.

20 THE COURT: All right. Ladies and gentlemen of
21 the jury, there are a couple of matters I need to
22 handle now, so if you would please step back to the
23 jury room, and could be 15 minutes or so, so if you
24 need to step outside, you can do so. Step back to
25 the jury room.

1 (Jury left the courtroom at 3:32 p.m.)

2 THE COURT: All right. Any motions from the
3 State? Hearing none, motions by the defense?

4 MR. DIGGS: Your Honor, I'd move for a directed
5 verdict because there's not sufficient evidence for a
6 reasonable juror to conclude beyond a reasonable
7 doubt that Mr. Bailey committed the conduct or
8 engaged in conduct alleged in this indictment.

9 Now, it's been a while, I don't know that I ever
10 argued this type of motion in Your Honor's court
11 before, but I would assert that's the appropriate
12 stage of review that the Judge, Court has to engage
13 in at this point and that is whether there was
14 reasonable doubt, whether a rational trier of fact
15 could conclude guilt beyond a reasonable doubt.

16 And I would submit that that standard has not
17 been met in this case. For that reason we'd ask for
18 a directed verdict.

19 THE COURT: Response by the State?

20 MR. VON HERRMANN: Your Honor, I would be glad
21 to address any detail. The State would stand on the
22 record. We believe there is sufficient evidence to
23 take both of them to trial, but I will certainly be
24 happy if the Court has any questions with regard to
25 any element, I will be glad to address, but I just

1 don't want to waste the Court's time seeing we're
2 going to try to finish up the evidence today.

3 *THE COURT:* From the testimony particularly the
4 three individuals, Davis, Miss Phillips, and what was
5 the other gentleman's name? Simmons? Based on that
6 testimony, Mr. Diggs, I feel there's enough evidence
7 for the jury to make a decision regarding the charges
8 against your client, so I would respectfully deny
9 your motion.

10 *MR. DIGGS:* Thank you.

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

12 *MR. GALMORE:* Yes, sir, Your Honor. I would
13 also make a motion for a directed verdict. There is
14 no direct evidence that Mr. Carr was involved in this
15 case at all. Actually the only direct evidence is
16 evidence to proceed to -- essentially nobody says I
17 saw Mike Carr shoot and kill Mr. Patterson.

18 Your Honor, there is some -- some circumstantial
19 evidence, but I think the case law requires that it
20 be substantial circumstantial evidence. The case law
21 also requires that where that circumstantial evidence
22 only raises a mere suspicion of guilt, then the Court
23 must grant the directed verdict motion.

24 The Court did indicate that there were
25 statements by co-defendants that seem to implicate

1 Mr. Carr. However, at the same time there is no
2 physical evidence that corroborates those statements
3 and each of those co-defendants has a motive or
4 reason to lie.

5 All of them have entered into proffered
6 agreements and received deals. We got one that's
7 wanting a dismissal and we got one that's -- that's
8 got 15 years and three years under his belt which is
9 probably going to be one more year before he's
10 released, we got one that's been given an eight year
11 sentence who -- sitting out here in this audience who
12 haven't pled guilty either.

13 I would submit that the circumstantial evidence
14 is not substantial and that merely raises a suspicion
15 of guilt and therefore we'd ask the Court to grant
16 our motion for a directed verdict.

17 *THE COURT:* All right. Once again based on the
18 testimony I have heard, I think it will be a question
19 for the jury. Of course, start -- points both of
20 you. All right. Deny your motion, too.

21 *MR. DIGGS:* Your Honor, could we ask that the
22 record reflect I incorporated all of the arguments
23 that Mr. Galmore made?

24 *THE COURT:* If he does, fine.

25 *MR. DIGGS:* He did make some good points and I'd

1 incorporate those and ask the Court to consider.

2 THE COURT: All right. I will consider those in
3 regard to Mr. Bailey also and would still deny the
4 motions. Any other motions?

5 MR. GALMORE: No, sir. I would ask to inquire,
6 though.

7 THE COURT: I'm going to talk to your client and
8 Mr. Bailey.

9 MR. GALMORE: Yes, sir.

10 THE COURT: All right. Mr. Bailey, Mr. Carr, if
11 y'all would please stand. Now, each of you have the
12 right, has the right, to testify or not testify. No
13 one can force you to testify.

14 If you choose not to testify, you want me to,
15 you request me to, I would instruct that jury that
16 they're not to hold that against you whatsoever. I'd
17 remind the jury the burden is upon the State to prove
18 your guilt, not upon you to prove yourself innocent.

19 And I'd remind the jury they can't discuss in
20 the jury room the fact that you didn't testify, that
21 you're presumed innocent and the invocation of your
22 rights not to testify should not be held adversely
23 whatsoever.

24 You also have the right to testify. If you do
25 testify, though, you'll be under oath and be required

1 to answer all questions that are relevant to this
2 case. Moreover and you'll be cross-examined
3 obviously and questioned by not only your attorney
4 but the attorney for the other defendant as well as
5 the State's attorney, the Solicitor.

6 Also if there are any prior convictions that you
7 have that fall within our rules, specifically rule
8 609, then that conviction may be seen in the trial --
9 could be introduced, not as evidence you committed
10 this crime, but only as a reflection upon the
11 credibility and would not be able to go into the
12 details unless you somehow open the door to that.

13 Mr. Von Herrmann, if either one of the
14 defendants testify, you have convictions you would
15 attempt to introduce on either one of them?

16 MR. VON HERRMANN: No, sir, Your Honor.

17 THE COURT: Well then, therefore that would not
18 come into play. The decision to testify is yours and
19 yours alone. Mr. Bailey, it's not your lawyer's,
20 it's not your family's, it's yours.

21 Mr. Carr, it's not your lawyer's, it's not your
22 family's, it's yours. You should consider yourself
23 individually and of course talk with your attorney,
24 talk with your family, but the decision should be
25 yours.

1 In fact, I have to make a finding that you made
2 a free and voluntary and knowing decision to testify
3 or not testify.

4 So I want you both to think about it. Mr.
5 Bailey, do you have any questions about your rights
6 to testify or not testify?

7 DEFENDANT BAILEY: No, sir.

8 THE COURT: What about you, Mr. Carr?

9 DEFENDANT CARR: No, sir.

10 THE COURT: I assume, Mr. Diggs, or Mr. Galmore,
11 y'all both discussed this with them?

12 MR. DIGGS: Yes, sir.

13 MR. GALMORE: Yes, sir.

14 THE COURT: All right. We're going to take a
15 break now. When we come back I will assume I will
16 hear your decision. If you need more time, you can
17 let me know.

18 If not, I assume I will hear your decision once
19 we get back after the break. Y'all may be seated.
20 Any other matters before we take a recess?

21 MR. GALMORE: No, sir.

22 THE COURT: All right.

23 MR. DIGGS: No, sir.

24 THE COURT: All right. I'll give them then
25 about 10 minutes or so and -- and we'll be getting

1 back -- back in session. If you need more time, let
2 me know. We're in recess. Be back on the bench here
3 between a quarter till or 10 till.

4 (Whereupon a recess was taken.)

5 THE COURT: Okay. Mr. Diggs and Mr. Bailey and
6 Mr. Galmore and Mr. Carr, y'all stand up. All right.
7 Mr. Bailey, have you made your decision yet regarding
8 testifying or not testifying?

9 DEFENDANT BAILEY: Yes, sir.

10 THE COURT: And what's that decision?

11 DEFENDANT BAILEY: Will testify.

12 THE COURT: That's your choice, sir?

13 DEFENDANT BAILEY: Yes, sir.

14 THE COURT: Not your lawyer's, not your
15 family's, but yours?

16 DEFENDANT BAILEY: Yes, sir.

17 THE COURT: And have you talked with your lawyer
18 about it, right, sir?

19 DEFENDANT BAILEY: Yes, sir.

20 THE COURT: Mr. Diggs, you have consulted with
21 him, sir?

22 MR. DIGGS: Yes, sir.

23 THE COURT: All right. And Mr. Bailey, you
24 understand fully your rights to testify and not
25 testify?

1 DEFENDANT BAILEY: Yes, sir.

2 THE COURT: All right. Find you made a
3 knowingly, freely decision not to testify -- excuse
4 me -- to testify.

5 DEFENDANT BAILEY: Yes, sir.

6 THE COURT: Freely, voluntarily and knowingly to
7 testify. All right. Mr. Carr, have you made a
8 decision, sir?

9 DEFENDANT CARR: Yes, sir.

10 THE COURT: What's your decision?

11 DEFENDANT CARR: I'll testify.

12 THE COURT: Sir?

13 DEFENDANT CARR: Going to testify.

14 THE COURT: You will testify?

15 DEFENDANT CARR: Yes, sir.

16 THE COURT: That's your choice?

17 DEFENDANT CARR: Yes, sir.

18 THE COURT: Not your lawyer's but yours?

19 DEFENDANT CARR: Yes, sir.

20 THE COURT: You have talked with your lawyer
21 about it; haven't you, sir?

22 DEFENDANT CARR: I have.

23 THE COURT: And Mr. Galmore, you have talked
24 with him about, discussed it with him, sir?

25 MR. GALMORE: Yes, sir.

1 *THE COURT:* All right. And Mr. Carr, you say
2 this is your decision to do so?

3 *DEFENDANT CARR:* Yes, sir, it is.

4 *THE COURT:* I find you made a knowing, freely
5 and voluntarily decision to testify. Okay. Y'all
6 may be seated. For planning purposes do y'all plan
7 to call many more witnesses? All right.

8 *MR. GALMORE:* Just my client.

9 *THE COURT:* All right. We have been going in
10 the order of Mr. Diggs, Mr. Galmore. Y'all have any
11 problem with continuing that way?

12 *MR. GALMORE:* No, sir.

13 *THE COURT:* Okay. And Mr. Von Herrmann, of
14 course, when one testifies, we'll conclude I think
15 probably then take a break at that time and hear
16 motions I would think, reconvene and hear motions
17 again or should we hear motions at the end of both of
18 them testifying?

19 *MR. VON HERRMANN:* I think doing motions at the
20 end of both, that's fine.

21 *THE COURT:* That preserve your rights, Mr.
22 Diggs?

23 *MR. DIGGS:* I think making the motion at the end
24 of all of the evidence would be...

25 *THE COURT:* All right. Okay.

1 MR. DIGGS: If we could do it that way, we agree
2 that's the way the Court wants to proceed.

3 THE COURT: Okay.

4 MR. DIGGS: Not aware of...

5 THE COURT: We'll rule that way.

6 MR. DIGGS: It's going to be -- it's applicable
7 to this particular --

8 THE COURT: All right. Bring --

9 MR. VON HERRMANN: Your Honor, I have one motion
10 in limine prior to the jury coming in if you will
11 entertain it. Your Honor, it is my concern that the
12 defendants each have made statements or statements to
13 law enforcement in October of 2004 -- excuse me --
14 September of 2004.

15 Clearly those are intended to be consistent
16 statements in accordance with their testimony here
17 today I'm supposing without deciding, but any way,
18 what I want to do is make sure that neither defendant
19 mentions the fact that he did anything more than talk
20 with law enforcement then, the substance of the
21 statement or anything that comes out is inadmissible,
22 it is obviously self-serving hearsay -- or excuse
23 me -- self-serving, it has been addressed in State
24 versus Fulton -- and I apologize to the Court that
25 there is a death penalty case out there as well, I

1 just cannot recall the facts of the case.

2 But in essence what had occurred in that was the
3 defendant had given a statement that was
4 self-serving, the State initially did a Jackson v
5 Deno hearing, the Court declared that admissible and
6 then turned around, the State didn't put it in and
7 the defense attempted to and that was not allowed and
8 upheld by the Supreme Court.

9 MR. DIGGS: Your Honor, I don't--

10 MR. VON HERRMANN: Can I please finish, Mr.
11 Diggs?

12 MR. DIGGS: I think certainly not to cut you
13 off, but we don't have any intention of doing that.
14 I mean, I don't understand where you're going. It
15 seems to be just a waste of time from my perspective.

16 MR. VON HERRMANN: Well, here is what my concern
17 is and I just want to be very specific. In his
18 opening statement he indicated to the jury that he
19 was going to show them that he or tell them that his
20 statement here today is the same as it was in 2004.

21 If they're not going to mention or talk about
22 any statement in 2004, I have no motion as long as
23 we're clear on that issue. That is my concern is
24 that in opening statements he indicated to the jury
25 that's what he was going to show in his story was

1 consistent from 2004 until today.

2 The only thing that's relevant and admissible is
3 his story today. As long as he agrees to do that, I
4 have no problem.

5 MR. DIGGS: Your Honor, I disagree with that.
6 And certainly if the story has changed, Solicitor
7 can -- can go into that. That -- my -- my client
8 went on the record and made a statement in this case
9 on either the 28th or the 29th, I don't remember
10 which day it was, and he gave a statement that's
11 basically same that he's going to give in court
12 today.

13 And I don't understand -- it seems to me that
14 the Solicitor is trying to box him in and say in some
15 fashion he's just recently come up with this
16 particular statement which is not the case. Unlike
17 the State's witnesses, Mr. Bailey has been
18 consistent.

19 MR. VON HERRMANN: Your Honor, if I was to do
20 that, if I was to say this is the first time you have
21 ever said that on direct, on cross-examination, you
22 know, came up with this story, then he would
23 certainly be allowed to admit the statement saying
24 no, I didn't.

25 But if I'm going to ask him about that

1 statement, then there's no reason for it to come in.
2 My concern is since Mr. Diggs' has represented to the
3 jury that he is going to show them that he was
4 consistent throughout, that he brings it up in his
5 direct examination which will be totally
6 inappropriate and not admissible under the law.

7 THE COURT: Mr. Diggs and I guess Mr. Galmore,
8 too, when your client testifies he's going to state
9 anything about it, what he said to the police before?

10 MR. DIGGS: I hadn't planned to even go in that
11 direction. What I planned to do is put him on the
12 stand and ask him to tell us about what happened on
13 that day, the 28th, the 29th, and let it go with
14 that.

15 MR. VON HERRMANN: I have no problem with that
16 as long as we don't talk the prior statements, Your
17 Honor.

18 THE COURT: Where Mr. Von Herrmann is going is
19 that he feels it's inappropriate for either Mr. Carr
20 or Mr. Bailey to say this is exactly what I told the
21 police because then his interview would be
22 self-serving and it is hearsay since that -- you
23 won't have that here -- if you're saying the same
24 thing now.

25 Now, if he challenges it and says didn't you say

1 something differently, first of all before he
2 challenges him we need to have a conference before me
3 because I need to have a Jackson v Deno maybe because
4 it may or may not be impeachable what he's saying.

5 But before he did it, or either have it -- if I
6 permit him to ask the questions about that, then --
7 then you can bring up those things.

8 But until those things come -- are made an
9 issue, then if you could just grim -- say this is
10 what I said on that date, what I'm saying now.

11 MR. DIGGS: Your Honor, what case is it that
12 says -- that prohibits that? Do you have a case?

13 THE COURT: No, it's just a self-serving
14 statement. I mean...

15 MR. DIGGS: Other than self-serving?

16 THE COURT: Are you saying you didn't want to do
17 that?

18 MR. DIGGS: I don't plan on doing it, but
19 it's -- just curious.

20 MR. VON HERRMANN: It's State versus Bullet --
21 prior inconsistent statement made by the defendant
22 after arrest is inadmissible because the obvious
23 motive -- claim of innocence.

24 MR. DIGGS: But isn't that--

25 MR. VON HERRMANN: Your Honor, talk -- go ahead.

1 MR. DIGGS: Well--

2 THE COURT: Give me a copy of the case.

3 MR. VON HERRMANN: I don't have a copy of the
4 case, Your Honor. I have the prosecutor's notes
5 which you have, but it also says under rule 801 there
6 would be no reason to -- 801DD there would be no
7 reason to allow a consistent statement unless it is
8 challenged by me as being made up or--

9 THE COURT: Which is the standard.

10 MR. DIGGS: I had not intended to put the
11 statement into evidence or refer to--

12 MR. VON HERRMANN: Let's be clear. Not just put
13 it in. I don't want it mentioned about it.

14 MR. DIGGS: Well, I will do whatever the Judge
15 rules, tells me what -- what I can't do.

16 THE COURT: Mr. Von Herrmann, what I'll not
17 permit him to do is violate rule 801.

18 MR. DIGGS: Thank you.

19 THE COURT: Mr. Galmore, what is your intention,
20 sir?

21 MR. GALMORE: I don't have any intention of
22 mentioning my client's...

23 THE COURT: All right. All right. Let's
24 proceed. Is...

25 (Whereupon there was a pause.)

1 THE COURT: Okay. If everybody is ready, bring
2 the jury in, please.

3 (Jury entered the courtroom at 4:30 p.m.)

4 THE COURT: Okay, ladies and gentlemen. We are
5 ready to proceed with testimony from the defense.
6 Mr. Diggs, your first witness, sir.

7 MR. DIGGS: Thank you, Your Honor. We're going
8 to call at this time Mr. Adam Bailey.

9 THE COURT: Come around, Mr. Bailey.

10 MICHAEL ADAM BAILEY, after being
11 duly sworn, testified as follows:

12 THE COURT: Your witness.

13 DIRECT EXAMINATION

14 BY MR. DIGGS:

15 Q Okay. Adam, you go by Adam; is that correct?

16 A Yes, sir.

17 Q All right. Now, are you scared this afternoon?

18 A Yes, sir.

19 Q All right. Did you feel like testifying?

20 A Yes, sir.

21 Q Let's start out -- let me ask you a little bit about
22 your personal history. Tell us how old you are at this
23 time.

24 A I'm 24 years old.

25 Q 24. And three years ago when Mr. Patterson was shot,