

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

J. Cordell Maddox, Jr., Circuit Court Judge

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JAN 28 2015

S.C. Supreme Court

MICHAEL ADAM BAILEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000651

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1 how old were you at that time?

2 A Twenty-one years old.

3 Q Twenty-one?

4 A Yes, sir.

5 Q And had you lived here in Horry County all your life?

6 A No, sir.

7 Q Where -- where did you live before that?

8 A Oh, Rock Hill, South Carolina.

9 Q All right. Now, when did you move here?

10 A I think I was 12 or 13 years old.

11 Q All right. And your family is here, were seated
12 behind us at counsel table?

13 A Yes, sir.

14 Q Did you go to school here?

15 A Yes, sir.

16 Q Did you -- how far did you go in school?

17 A I -- I finished the ninth grade.

18 Q All right. And did you plan to do any additional
19 school?

20 A Oh, yes, sir. I was wanting to go and get my GED.

21 Q All right. And have you done that or --

22 A No, sir.

23 Q -- do you have plans to do it?

24 A I have plans to do it, but I kind of got off-track
25 with the case and everything and...

1 Q All right. So now when you -- you were arrested
2 pretty soon after Mr. Patterson was killed --

3 A Yes, sir.

4 Q -- death; were you not?

5 A Yes, sir.

6 Q And you were placed -- you were admitted to bail and
7 allowed to be placed on bond; is that true?

8 A Yes, sir.

9 Q What were the conditions, if any, of your bond--

10 MR. VON HERRMANN: Your Honor, I'm going to have
11 to object. Relevance. The condition of bond?

12 MR. DIGGS: Well, let me put it this way.

13 BY MR. DIGGS:

14 Q Were you -- had you been on house detention?

15 A Yes, sir.

16 MR. VON HERRMANN: Again, I object, Your Honor.
17 What is the relevance of that?

18 THE COURT: Is that your only question there?

19 MR. DIGGS: Oh, all right.

20 THE COURT: All right. Go forward.

21 BY MR. DIGGS:

22 Q All right. And you got that for the last three
23 years?

24 A Yes, sir.

25 Q Okay. Let's go ahead and go to the day of September

1 the 27th.

2 A Yes, sir.

3 Q 2004.

4 A Yes, sir.

5 Q Okay. Do you remember that day?

6 A Yes, sir.

7 Q Tell us how you started the day, if you remember.

8 A Well, Kareem Harry called me and told me that a girl
9 that--

10 Q You don't need to tell me what Kareem said.

11 A Okay.

12 Q Just tell me what -- what you did.

13 A I got dropped off to Kareem Harry's apartment that he
14 was -- well, it wasn't his apartment, it was a girl's
15 apartment who had left it to him.

16 Q All right. And is that the apartment that we heard
17 testimony about during the course of this case?

18 A Yes, sir.

19 Q What time did you go over there?

20 A I would say probably about three or four in the
21 afternoon.

22 Q And when you got there, do you recall -- first of
23 all, who was there?

24 A When I got there it was just Kareem and -- and me
25 once I arrived.

1 Q So you're -- you made a decision about what you were
2 going to do? Did you decide to stay there, did you go --
3 did you leave? What happened?

4 A No, I stayed. I stayed there.

5 Q Okay. What did you do at that point?

6 A We was just hanging out, watching TV and listening to
7 music and just hanging out like ordinary day.

8 Q Then tell us what happened then. You and Kareem were
9 there by your -- the two of you?

10 A Yes, we was there by ourselves.

11 Q Tell us about when other people came what they did.

12 A I think next Mike Carr came and I think he came maybe
13 three hours or so after I arrived.

14 Q So that would have put him there seven or 8:00?

15 A Seven, eight, nine, I'm not approximately sure about
16 the time.

17 Q Now Adam, go ahead and tell us who came next as far
18 as you can remember.

19 A Nikki, Nikki Phillips or Ashley Phillips, Durriel
20 Simmons and Antonio Davis.

21 Q Did they come together or did they come at different
22 times?

23 A No, sir, all three of them arrived at the same time.

24 Q They were traveling as a group?

25 A Yes, sir.

1 Q At least by appearance?

2 A Yes, sir.

3 Q Now, what time would you estimate it to be when all
4 of you were there at the apartment?

5 A Maybe 10:30.

6 Q Okay. So--

7 A Eleven.

8 Q So for the first time on the 27th (sic) at
9 10:30 p.m.?

10 A Yes, sir.

11 Q Everyone whose names we have heard during the course
12 of the trial were at Kareem's apartment?

13 MR. VON HERRMANN: Your Honor?

14 BY MR. DIGGS:

15 Q The apartment of his--

16 A Yes, sir.

17 MR. VON HERRMANN: I'm going to object to
18 leading.

19 THE COURT: On you now, Mr. Diggs. No leading,
20 sir.

21 MR. DIGGS: I was just summarizing.

22 THE COURT: Let him summarize, sir. Let's
23 proceed.

24 BY MR. DIGGS:

25 Q Now, at that point at about 10:30, if you would,

1 Adam, tell us what you were doing and what others were
2 doing.

3 A We was just--

4 Q The parts you could see.

5 A When -- whenever everybody arrived, we was all just
6 hanging out like, everybody knew that Kareem had the
7 apartment and the girl was gone, so we was just hanging
8 out.

9 We was all just watching TV, some people watching TV,
10 some people listening to music. I mean, we was having a
11 few drinks, you know D and J (sic) I believe it was.

12 Q And then continue on. What...

13 A We sit around for a little while longer and this -- I
14 believe it was Durriel had brought up the fact that they
15 was looking for some weed.

16 Q All right. Let me -- let me ask you about that. Had
17 anyone there been smoking marijuana that evening?

18 A No, sir.

19 Q And did you have any marijuana at that time on you?

20 A No, sir.

21 Q Had you?

22 A No, sir.

23 Q So go ahead and tell us about that, about what time
24 it was and tell us the conversation that you recall about
25 that.

- 1 A It's maybe 11:30, 12:00.
- 2 Q Okay.
- 3 A Somewhere.
- 4 Q What was done as a result of Duriel's comment?
- 5 A Everybody said that they would pitch in and buy an
- 6 ounce of weed from the guy that Mike and Duriel knew.
- 7 Q Now, did you agree to make a contribution towards the
- 8 purchase for your own benefit?
- 9 A Yes, sir.
- 10 Q For use?
- 11 A Yes, sir.
- 12 Q And how much did you contribute?
- 13 A \$20.
- 14 Q \$20. Who did you give that \$20 to?
- 15 A I gave it to Mike Carr.
- 16 Q Now, go ahead and tell us if you can what other
- 17 conversations took place regarding the purchase of the
- 18 marijuana.
- 19 A Nothing, everybody just said that they would chip in
- 20 and Duriel said that JoJo had ounces of weed going for a
- 21 hundred dollars.
- 22 Q Did you see anyone else give Mike Carr or any other
- 23 person money?
- 24 A Yes, sir.
- 25 Q What did you see? Tell us.

1 A Duriel and Rock gave him money toward the purchase.
2 I told him I had \$20 to pitch in, and they -- they all
3 gave Mike what they had. I'm not sure who gave Mike what,
4 but everybody gave Mike money to purchase the weed because
5 they said that Duriel said that Mike had been with him
6 before to purchase the marijuana from Joseph Patterson and
7 Duriel said that he didn't want to go to the door because
8 he said his mom or his grandmom lived--

9 MR. VON HERRMANN: Your Honor, objection to
10 hearsay.

11 MR. DIGGS: Your Honor, Duriel has been in
12 court. He's testified. He's available to be
13 recalled. Plus he's a co-defendant.

14 THE COURT: To this point I'm going to allow it,
15 Mr. Von Herrmann. First cross-examine you and fine
16 you -- and then can call Mr. Duriel if we need to.
17 Continue on about this event.

18 MR. DIGGS: Yes, sir.

19 THE COURT: To this event.

20 MR. DIGGS: Yes, sir.

21 BY MR. DIGGS:

22 Q Go ahead.

23 A Duriel said that his mom or his grandmom--

24 Q All right. Before we get to that, when -- when did
25 that conversation take place? Was that after you left the

1 apartment or before you left the apartment or--

2 A It was as we was leaving.

3 Q All right. Let's go back and I want to -- I want to
4 address all the conversation, Adam, that you remember
5 concerning the purchase of the marijuana before you left
6 the apartment.

7 A It really wasn't too much of a conversation. Duriel
8 said he knew where we could get the weed and we all
9 gave -- we all had the money.

10 Q So Duriel suggested Mr. Patterson?

11 A Yes, sir.

12 Q Who collected the money?

13 A Mike Carr.

14 Q And then what happened?

15 A But see that didn't happen until we was leaving when
16 Mike--

17 Q All right. How long did it take -- how much time are
18 we talking about between the time that you gave him the
19 money and the four of you left?

20 A No time at all other than the money was being handed
21 out as we was leaving the apartment.

22 Q Now, when the four of you left, picked up the defense
23 there -- tell us what happened.

24 A We left, we left from Island Greens at Kareem's
25 apartment and me, Duriel Simmons, Antonio Davis and Mike

1 Carr, we left -- we left Island Green.

2 Q Okay.

3 A And Nikki told -- Ashley Phillips told Duriel she was
4 going to walk back to her apartment and--

5 Q All right. We don't -- she said that before you
6 left, though?

7 A Yeah.

8 Q Okay. The four of you left the apartment?

9 A Yes, sir.

10 Q Whose car did you take?

11 A Ashley Phillips'.

12 Q Now, did you hear any discussion between Ashley and
13 Duriel about Duriel's use of the car?

14 A Yes, sir.

15 Q Tell us about what you remember.

16 A Duriel asked her could he use -- could he use her car
17 to go to Forestbrook Road to buy the weed.

18 Q Now, did Ashley agree -- that she wanted to
19 contribute money for the marijuana or do you remember?

20 A I'm not sure. I know she was ready to get it because
21 she smoked, too, and she wanted to smoke, too. I'm not
22 sure if she put money towards it. I don't think she did.

23 Q All right. But she knew that the four of you were
24 going to go and purchase marijuana?

25 A Yes, sir.

1 Q And she was willing to allow her car to be used for
2 that purpose?

3 A Yes, sir.

4 Q All right. After you got in the car and you drove --
5 did you go directly to the complex where Mr. Patterson
6 lived?

7 A Yes, sir.

8 Q Were there any conversations in there in route that
9 you recall?

10 A Not really because the way Duriel -- they had like
11 a -- the radio on, they had the music up loud and we was
12 basically just listening to music.

13 Q Okay. How long of a drive is it? How much time does
14 it take you to get from one -- from where you were to Mr.
15 Patterson's complex?

16 A I'm not sure. It's just 35 minutes maybe, 30
17 minutes, somewhere along those lines.

18 Q And where were -- where were you in -- when you were
19 at Kareem's apartment?

20 A Yes, sir.

21 Q Where is that apartment located?

22 A It's in Island Greens.

23 Q Where is that located in Horry County?

24 A Freewoods Road in the Burgess section of Myrtle
25 Beach.

1 Q Okay. So you left from there and you went to Turtle
2 Cay, Turtle Cay?

3 A Yes, sir.

4 Q All right. And how far is that in distance?

5 A Maybe four or 5 miles.

6 Q Okay. Again, how long did it take you to get there,
7 do you recall?

8 A Maybe 30, 35 minutes.

9 Q All right. After you got there, tell us what you
10 remember.

11 A We pulled in to the apartment complex which I now
12 know as Turtle Cay.

13 Q All right. Have you ever been there before?

14 A No, sir.

15 Q And have you ever been there -- well, let's just
16 leave it there. Have you -- at that time had you ever
17 been to the Turtle Cay apartments?

18 A Yes, sir. I mean no, sir.

19 Q All right.

20 A That was the first time.

21 Q And could -- were you aware of the name of the
22 individual you were going to purchase the marijuana from?

23 A All I know is that Duriel referred to him as JoJo.

24 Q All right. When you got to the Turtle Cay
25 Apartments, tell us what happened at that point.

1 A We pulled into the apartment complex and when we
2 first pulled in Duriel seen somebody he knows and I later
3 found out it was Jason Robinson, but I didn't know at the
4 time.

5 Q All right. At that time was anyone there with Mr.
6 Robinson or did you just see him?

7 A I seen it was -- they were parked and I think there
8 was another guy standing outside of that truck, but I
9 don't...

10 Q And at that time did you know where Mr. Patterson's
11 apartment was?

12 A No, sir, not at that point.

13 Q But did you know that was where he lived?

14 A I knew he must live in Turtle Cay Apartment complex
15 because that's where Duriel had driven.

16 Q Okay. Tell us what happened then.

17 A He spoke to Jason Robinson and then we pulled up and
18 we parked.

19 Q Do you remember if you parked immediately or if you
20 drove around in the lot and...

21 A Well, it's been three years ago, so I mean, I'm
22 pretty sure that we parked, we pulled in and parked.

23 Q Okay. Can you tell us where you parked in relation
24 to Mr. Patterson's apartment?

25 A It was in front of the building, but it was on down

1 because all of the parking spots in front of Mr.
2 Patterson's complex or his actual building was full up.

3 Q All right. Let me show you what's been marked as
4 State's Exhibit 14.

5 A Yes, sir. Okay. That is -- that's Mr. Patterson's
6 apartment?

7 Q I don't know. Can you -- do you recognize it?

8 A If -- I recognize it as a building in the Turtle Cay
9 but I'm not sure if it's --

10 Q Okay.

11 A -- the actual apartment.

12 Q Let me ask you this. Assume that you're standing
13 there, okay, in front of this building looking at it.
14 Where did you park in relation to this building? Did you
15 park on the left side or the right side?

16 A If that's Mr. Patterson's apartment...

17 Q Yes. Let's assume that it is.

18 A Then we went down on the like -- from the right from
19 the picture from the right and we pulled in on the same
20 side of the street that the building is.

21 Q All right. Can you give -- are you good at judging
22 distances? Can you judge a distance for us?

23 A I wouldn't say I'm good at judging distances, but I
24 mean, I'm saying maybe a hundred feet, 50 feet.

25 Q Okay. Can you give us an idea of how many spaces

1 would have been between where you were parked and where
2 you would have entered into Mr. Patterson's apartment
3 building?

4 A Maybe... I have no idea.

5 Q All right. Let me move on then. After you parked,
6 tell us what happened.

7 A Mike got out of the car and he asked me to come with
8 him to buy the weed and I really -- I didn't want to go
9 because I didn't know Mr. Patterson. I didn't really want
10 to go up there, but he kind of insisted that I come with
11 him. So I--

12 Q All right. What time of the day was this?

13 A It was -- it was late.

14 Q Okay. Go ahead.

15 A And we got out of the car and we walked towards Mr.
16 Patterson's apartment, but I was following Mike.

17 Q Okay. Did you go in the front or the back?

18 A We went in the front.

19 Q All right. And again, if we look at State's Exhibit
20 14, assume that is Mr. Patterson's apartment building --

21 A Yes, sir.

22 Q -- is that the entrance that you entered into that
23 evening?

24 A Yes, sir.

25 Q Okay.

1 A If that's Mr. Patterson's apartment.

2 Q All right. Go ahead and tell us then what happened
3 at that point. And what -- before you do that, though,
4 Adam, I want to repeat -- your purpose was to do what?

5 A Purchase marijuana.

6 Q Okay. And Mike asked you to go with him to do what?

7 A To buy the weed.

8 Q All right. And to your knowledge who had the money?

9 A Mike.

10 Q And did he have the \$20 you had given?

11 A Yes, sir.

12 Q And to your knowledge did he have the money that the
13 others had given him?

14 A Yes, sir.

15 Q All right. Go ahead and tell us what happened at
16 that point.

17 A We went to the top of the stairs and Mike knocked on
18 the -- on the door and nobody came. And then--

19 Q Can you duplicate that knock?

20 A (complied.) and then right directly after that, he --
21 Mike kind of went to the balcony and he was kind of
22 looking like over the balcony to try to see if he could
23 see.

24 Q All right. Can we see that in this photo?

25 A Yes, sir. He was looking over this part right here

1 trying to see if he could see in there.

2 Q Okay. He was looking around trying to look into the
3 balcony area? Is that your testimony?

4 A Yes, sir.

5 Q Okay. Go ahead and tell us again, duplicate that
6 knock for me.

7 A (complied.)

8 Q And then what happened?

9 A While he was looking over the balcony, I knocked
10 (knocked) and nobody came to the door. And then Mike come
11 back over and he was standing there for -- we stood there
12 for a while.

13 Q How long did you stand there?

14 A Not long, maybe -- it was a little while, like 15, 20
15 seconds maybe.

16 Q All right. Long enough -- was it -- did you feel
17 like it had been enough time for someone to respond to the
18 knocks?

19 A Yes, sir. And I told -- want me to continue?

20 Q Yes, sir.

21 A I told Mike, I said nobody's home, I said let's go
22 back to the car, there's nobody here. And at that point
23 that's when I seen that Mike was armed and had a gun.

24 Q All right. Is that the first time that evening you
25 had seen a gun?

1 A That evening, yes, sir.

2 Q That -- on that day?

3 A Yes, sir.

4 Q So prior to that point you did not realize he was
5 armed?

6 A No, sir.

7 Q Okay. Go ahead and tell us what happened.

8 A He -- he pulled out the weapon and he said, he said
9 let's get him, let's get him, and I was like, what do you
10 mean, what do you mean let's get who? And he said
11 let's -- let's rob the house.

12 Duriel said it's weed in there, let's rob the house.
13 And I was like, man, no, you're crazy, I don't want
14 nothing to do with this because actually I was scared once
15 I seen the weapon. I was afraid.

16 Q Okay.

17 A And--

18 Q What happened then?

19 A I was like, I don't want nothing to do with this, I
20 don't want nothing to do with it.

21 Q Did he say anything back to you in response?

22 A Yes, sir.

23 Q Did he use vulgar language or--

24 A Yes, sir.

25 MR. DIGGS: Your Honor, with your permission can

1 we repeat it?

2 *THE COURT:* This is the witness.

3 BY MR. DIGGS:

4 Q Okay. Tell us what Mike responded after you told him
5 that.

6 A He told me -- he told me to quit acting like a little
7 bitch.

8 Q Okay. Go ahead.

9 A And I was like man, call me what you want to, I'm
10 leaving, and I started back toward the car and he was
11 like, well, all right then pussy, don't ask me for shit
12 when I get back to the car. Excuse my language.

13 Q All right. So what did you do?

14 A I went back to the car. I started back towards the
15 car and I would say maybe, it wasn't long after, maybe 10,
16 15, maybe not even that long, I'm not sure how long it
17 was, I heard like a big boom, like boom, and I didn't -- I
18 didn't know what was...

19 Q All right. I want to -- I want you to think about
20 this, Adam. How far away were you from the Patterson
21 door, Mr. Patterson's door--

22 A At the time I heard the bang?

23 Q That you heard that noise?

24 A I wasn't far at all. I had just started down the
25 steps.

1 Q All right. Would you -- how many steps had you gone
2 down?

3 A Maybe three, four.

4 Q All right. So would you -- I don't want to put words
5 in your mouth. Were you half-way down, a quarter of the
6 way down, two-thirds of the way down?

7 A Maybe one third of the way down, maybe about
8 half-way.

9 Q Now, did you look to see what had caused that sound?

10 A Yes, sir.

11 Q What -- tell us what you did.

12 A I turned back around and looked up from the stairs
13 and I seen Mike going like he was going into the victim's
14 apartment and then at that point I turned back around and
15 took off running and that's when I heard three loud bangs.

16 Q All right. How much time expired between the time
17 you saw Mike going in the apartment and you heard the
18 shots?

19 A No time at all. I mean, it was like directly after,
20 like as soon as I turned back around I heard boom, boom,
21 boom.

22 Q Now, when you heard those shots did you know what was
23 happening?

24 A No, sir. I mean, it was just so much -- it was like
25 such a daze I didn't -- I just took off running. I knew

1 that it sounded like gunshots and I knew that Mike had
2 been armed, but I wasn't sure who was shooting, I didn't
3 know.

4 Q So at that time you didn't know who had been shot, if
5 anyone. Is that fair to say?

6 A Yes, sir.

7 Q So tell us what you did then.

8 A I just run.

9 Q Where did you run to?

10 A I run straight down the stairs and there's a
11 little -- there an opening on both sides, and I run.

12 Q Okay. In State's Exhibit 14 you talk about the
13 opening in the front. There's also an opening in the
14 rear. Is that your testimony?

15 A Yes, sir.

16 Q I believe the State had introduced in that -- a
17 photograph of that. I'm not going to waste the time right
18 now looking for it. But tell us what -- what you did.
19 You were running away. Tell us what direction you ran --

20 A I ran.

21 Q -- to and where you were going.

22 A Directly down the stairs, and the stairs went like
23 this, and I ran out the back entranceway, and then I
24 circled back around the building this way and ran back,
25 but it wasn't maybe right as I got around the corner I

1 heard footsteps behind me like running behind me and then
2 I heard Mike saying, don't tell nobody, don't tell nobody,
3 better not tell nobody. And then I just kept running and
4 got in the car.

5 Q What were you thinking while you were running?

6 A I was thinking that I was scared to death. I mean, I
7 was terrified.

8 Q Why were you terrified?

9 A Because I had just heard gunshots and I knew that
10 Mike Carr had a weapon.

11 Q Okay. So tell us what Mike said.

12 A He said he was running behind and he said you better
13 not tell nobody, you better not tell nobody, and then we
14 got in the car and--

15 Q Who got in the car first?

16 A I did.

17 Q All right. So if we could bring witnesses in here
18 who saw you running, you -- you're admitting you were
19 there running?

20 A Yes, sir.

21 Q How far back from you was Mike Carr? I mean, if you
22 know?

23 A I can't be certain because, I mean, I was running
24 this way, but know he was close enough to where I could
25 hear his footsteps and I could hear him talking,

1 screaming, you better not tell nobody, you better not tell
2 nobody.

3 Q Did he sound excited?

4 A He sounded --

5 Q Scared?

6 A -- he sounded just like -- like he had adrenaline
7 pumping like real, you better not tell nobody, you better
8 not tell nobody.

9 Q Now, when you got to the car did you get back into
10 the same seat that you were in when you drove over or rode
11 over?

12 A I got in from -- it was the car was parked like this.
13 And I got in on this side. And I slid over. When -- I
14 got in right here and then Mike came up behind me and I
15 slid over to the other side.

16 Q Okay. So you slid -- did you get in on the driver's
17 side or the passenger's side?

18 A I got in on the driver's side.

19 Q And then you slid over to the passengers?

20 A Yes, sir, the -- in the back seat, though.

21 Q Right.

22 A Yes, sir.

23 Q What were Duriel and Rock doing?

24 A They was just sitting there. And then when we got in
25 the car Mike jumped in, I got in the car first and they

1 was like, what are you doing, what are you doing? And I
2 was like man, we got to go, we got to go, and then Mike
3 jumped in right behind me.

4 And Mike got in the car and he was telling everybody
5 that he had shot the dude, he had shot the dude.

6 Q Okay. What happened at that point?

7 A That's when everybody was just looking at him like
8 why did you shoot the dude? And I think -- I think it was
9 Antonio Davis who was like, why did you shoot him? And I
10 believe at some point pretty much we all asked him why did
11 you shoot him, and he just kept saying he didn't want to
12 talk about it, don't say nothing else about it, don't say
13 nothing else about it.

14 Q Where did you go? Where did you go then?

15 A We left out of Turtle Cay Apartments and we went down
16 and made the Forestbrook Road, I think turned back onto
17 Forestbrook Road, we go all the way down to the end of
18 Forestbrook Road and we made a right right by the gas
19 station and we went right and we went down and then we
20 made that left back down there and went down to the
21 Enterprise Road back to the top towards Island Green.

22 Q Toward Island Green?

23 A Yeah, because you could take the -- the road. It's
24 like a dirt road and it goes around and then you can come
25 back up and you can turn into the -- onto Freewoods.

1 Q Okay. Now, when you got back to the Island Green,
2 what did you do?

3 A We went -- we went back to Duriel and Nikki's
4 apartment.

5 Q All four of you?

6 A Me, Mike -- me, Mike Carr, Antonio Davis and Duriel
7 Simmons.

8 Q Now you say you went to Duriel and Nikki's?

9 A Yes, sir.

10 Q You didn't go back to Kareem's?

11 A No, sir.

12 Q All right. When you got to Duriel and Nikki's
13 apartment, tell us what happened at that point.

14 A We went inside the apartment and Nikki Phillips, she
15 was there now because she had walked from Kareem's because
16 they had said she was going to walk and she asked if we
17 had got the weed, if we had got the weed, and I believe
18 somebody said that Mike had messed up, Mike had did
19 something stupid, and then I believe that's when she was
20 told, I believe Duriel told her.

21 Q What was her reaction?

22 A She--

23 Q First of all, do you know specifically what was said
24 to her, her presence and in your presence?

25 A In -- talking about Nikki?

1 Q Yeah, about Mike messing up. What specifically --

2 A I believe.

3 Q -- was Nikki told?

4 A I believe that Duriel pretty much told her what
5 happened, told her that we had went up there to get the
6 weed and that Mike had shot the man.

7 Q What was Ashley's reaction?

8 A She just seemed like she didn't believe it, kind of
9 like it wasn't -- it didn't -- wasn't true. But I believe
10 by the -- through the night she started to realize it was
11 because she seen Mike wrapping the gun in a white T-shirt
12 and she seen all that, so I believe she started to
13 understand that it was true.

14 Q All right. Let's go back in the car on the way back
15 to Island Green.

16 A Yes, sir.

17 Q Mike you said got in the automobile with you.

18 A Yes, sir.

19 Q Did you see him with the weapon at that time?

20 A Yes, sir.

21 Q What was he doing with it?

22 A Talking about when he got back in after he had--

23 Q Yes, after the shooting.

24 A After the shooting. He got back in and he -- he had
25 the gun and he had it on his lap and he took them out and

1 then when he told us that he had shot the dude, that
2 everybody was like, why, why, he was like, I don't want to
3 talk about it, I don't want to talk about it.

4 And then after we was riding back, I believe it was
5 Antonio, I believe it was Antonio Davis who said that,
6 asked them did you think you killed him? Do you think you
7 killed him?

8 And Mike was like, I don't know because I shot three
9 times. Then he opened the gun, I'm not sure how he done
10 it, but it was -- and dumped the things in his hand.

11 Q Okay.

12 A The bullet shells or what, the cartridges, however
13 you refer to them.

14 Q And he did this in the car?

15 A Yes, sir.

16 Q All right. Then you -- pick it up -- pick up your
17 testimony now, arrive back at Durriel and Nikki's. Through
18 the evening you believe that she stated she started to
19 believe --

20 A Yes, sir.

21 Q -- this had happened?

22 A Yes, sir.

23 Q Tell us what happened at that point. Continue on.

24 A I know Mike had wrapped the gun in a T-shirt, in a
25 white T-shirt, and he was like, he was trying to wipe it

1 like he was wiping the fingerprints off or something. And
2 he wrapped it up and then he took it to the back because
3 he was standing at the bar when he done it and he took it
4 towards the back of the -- the back of the apartment.

5 Q Okay. And this was Duriel's apartment and Nikki's
6 apartment?

7 A Yes, sir.

8 Q All right. Go ahead and tell us -- continue on.
9 What did you do and what--

10 A We stayed in Nikki and Duriel's house that night, all
11 of us. I mean, really I wanted to leave, I wanted to go
12 home and leave, but I didn't -- I was afraid that if I
13 left that Mike was going to say, well, you're going to
14 tell on me, you're going to tell on me, and he had just
15 told me he had shot somebody, so I was afraid of him. I
16 was scared.

17 Q Did you ever go to sleep that night?

18 A No, sir, not at all.

19 Q Who was the first to leave among the group?

20 A The next morning?

21 Q Yes, this -- this would be the morning of the 28th.

22 A I think Antonio Davis left first.

23 Q Okay. Do you remember if Nikki went to work or would
24 you know?

25 A I think she -- she did go to work, yes, sir.

1 Q Now--

2 A She -- she left first. Nikki left first.

3 Q What did you do?

4 A When?

5 Q That day.

6 A That day? We just -- we hung around the apartment.
7 I believe everybody was kind of scared to do anything out
8 of the ordinary because we were scared of Mike. I mean,
9 he told us that he had just shot somebody.

10 Q Okay. Did you -- was there time that you left that
11 day?

12 A Yes, sir.

13 Q What time was that?

14 A Well, Antonio left before me and I'm not sure what
15 time it was. I don't know.

16 Q Now, do you remember what time you left?

17 A Yes, sir, I left not long after Antonio left because
18 I seen that Antonio had left and Mike didn't say anything
19 about him leaving and wasn't upset with the fact that he
20 left, so then I realized, well, maybe if I leave, he's not
21 going to say anything to me, so then I left.

22 Q And where did you go?

23 A I called Otis Davis -- I mean, Antonio's brother and
24 he gave me a ride out to his house.

25 Q All right.

1 A And I went to his house.

2 Q Did you have anybody go home before that?

3 A Before that?

4 Q Yes.

5 A No, sir.

6 Q All right. You -- you went directly from Island
7 Green to Mel Davis'.

8 A Yes, sir.

9 Q And I'm sorry, I don't recall if you could tell us
10 what time that was.

11 A I -- honestly I don't know. It was morning. Maybe
12 10:30, 11:00.

13 Q All right. And then what did you do thereafter?

14 A I stayed at -- I stayed at Mel's house just kind of
15 hanging out, just laying around that day, and then I had
16 Mel Davis bring me home.

17 Q What time did he take you home?

18 A It wasn't -- it wasn't too much longer after I got
19 there. I would say maybe an hour after I arrived at his
20 house that he took me home.

21 Q Okay. Now, at any point in time after Mike Carr took
22 the gun, took the gun back into the back of the
23 apartment --

24 A Yes, sir.

25 Q -- at any point in time did you see a weapon after

1 that?

2 A No, sir.

3 Q Okay. Can you describe for us what that weapon
4 looked like?

5 A The weapon that Mike Carr had?

6 Q Yes.

7 A It was a black gun with a white handle.

8 Q All right. Does this look like the gun that he had?
9 I'm referring to State's Exhibit number one.

10 A No, sir.

11 Q All right. That's -- that's definitely not?

12 A No, sir.

13 Q All right. I'm not asking you if you have ever seen
14 this gun or not. I'm asking you to focus on that day on
15 the 28th. Did you see a gun that looked like this one at
16 any time that day?

17 A That, the day of the 28th?

18 Q Yes.

19 A No, sir.

20 Q Now, did you take any weapon out to the end of
21 Freewoods Road and dispose of it?

22 A No, sir, not at all.

23 Q Have you ever -- could you describe for us what it
24 looks like down there on the end of Freewoods Road?

25 A At what part of Freewoods Road?

1 Q At the end.

2 A I have never been to the very end of Freewoods Road.

3 Q You have never been there?

4 A No, sir.

5 Q Did you go with anyone to any road at the -- as a
6 dead end -- and get out and dispose of a weapon --

7 A No, sir.

8 Q -- while Durriel and Nikki waited for you to return?

9 A No, sir.

10 Q Now, when did -- when did you learn for the first
11 time that indeed Mr. Patterson had been shot and that he
12 had died as a result?

13 A Nikki Phillips had called to Mel's phone and told me
14 that he had.

15 Q Now, that Mel is Rock's --

16 A Brother.

17 Q -- brother?

18 A Yes, sir.

19 Q Okay. And you were there with Mel at that time?

20 A Yes, sir.

21 Q Is Mel in the courtroom?

22 A Yes, sir.

23 Q Okay.

24 THE COURT: Speak a little louder. Couldn't
25 hear you.

1 BY MR. DIGGS:

2 Q The gentleman back here who raised his hand, you were
3 at his home?

4 A Yes, sir.

5 Q All right. And the telephone came, the call came
6 from Nikki. And what did you learn, if anything, as a
7 result of that call?

8 A She said that Duriel's brother I think it was had
9 called Duriel and told him that Joseph Patterson had
10 passed away.

11 Q And what did you do as a result of that?

12 A I told Mel to take me home.

13 Q And did you go home?

14 A Yes, sir.

15 Q And pretty much did you stay home there thereafter?

16 A No, sir. I -- I was home for like maybe two, two and
17 a half, maybe three hours. And the reason I had went home
18 is because I wanted to tell my mom what had happened and
19 get her -- her advice on what I needed to do.

20 Q All right. Don't -- that was on the 28th?

21 A That was -- yes.

22 Q Okay. And so -- and again, I'm asking you to repeat
23 this because I -- I forgot myself or I wasn't paying
24 attention. What time did you go to Mel's?

25 A I wasn't sure. I'm not sure of the exact time, but

1 I -- I would say maybe 10:30, 11:00.

2 Q All right. And you were at Mel's when you learned
3 that Mr. Patterson had died?

4 A Yes, sir.

5 Q And thereafter you decided to do what?

6 A Go home.

7 Q And did you go home?

8 A Yes, sir.

9 Q All right. Now, at that point, Adam, did you ever
10 see Nikki or Duriel or Rock again before you interviewed
11 with the police?

12 A No, sir.

13 Q All right. Now, as we sit here today is there any
14 doubt in your mind that this is the day that -- that you
15 are recalling this from the events that occurred that day
16 on the 28th of September of 2004?

17 A I'm pretty sure, yes, sir.

18 Q All right. And that's -- that's the way things
19 happened as you best remember it?

20 A Yes, sir.

21 Q All right. Adam, I want you to answer any questions
22 that the Solicitor may have.

23 CROSS-EXAMINATION

24 BY MR. GALMORE:

25 Q Mr. Bailey, you're telling this jury that you had

1 never met Joseph Patterson before; is that correct?

2 A Yes, sir, I had never met him before.

3 Q Why then would you ride in the car and go over to the
4 house?

5 A Because we was going to get the marijuana. I mean, I
6 didn't -- when I left to go, I had no intentions of ever
7 getting out of the car.

8 Q Why did you get in the car?

9 A To go get the weed.

10 Q Well, several people who were going to participate or
11 partake in the weed did not go; is that correct?

12 A Just Nikki.

13 Q Kareem?

14 A Well, Kareem didn't have anything to do with the
15 deal.

16 Q Nikki stayed at home and Kareem stayed at home,
17 right?

18 A Nikki went to her apartment. Kareem stay at the one
19 he had.

20 Q And you had been with Kareem for three hours before
21 anybody showed up?

22 A Yes, sir. But I had told Kareem that I was going to
23 leave and go hang out with them over at Nikki and Durriel
24 when we got back.

25 Q Okay. This is the person that you never met that you

1 were going to go over to their house?

2 A I wasn't -- I had no intentions of going to his
3 house. I was going to stay in the car.

4 Q Okay. Then you're being -- you rode over there?

5 A Yes, sir.

6 Q Then you went upstairs to the house?

7 A Yes, sir.

8 Q To the apartment?

9 A Yes, sir.

10 Q And that's because Mike Carr forced you to do that?

11 A He didn't actually force me to go up the stairs. He
12 kind of asked, and I mean, I kind of just -- I didn't want
13 to, but I -- I did it any way. I can't really explain why
14 I did it, but I did it.

15 Q Well, are you older than Mr. Carr?

16 A Yes, sir.

17 Q How much older are you than Mr. Carr?

18 A Maybe a year or two. I'm not sure.

19 Q So you deny that you went up to that house with the
20 intention of stealing from Mr. Patterson?

21 A Yes, sir, I had no intentions of robbing anybody.

22 Q So why did you go upstairs to the apartment?

23 A To purchase marijuana.

24 Q But I thought Mr. Carr was purchasing the marijuana?

25 A He is, but he -- he was, but he asked me to go up

1 there with him.

2 Q To do what? What's your role in going upstairs?

3 A He just asked me to come with him.

4 Q You're just being a friend?

5 A Yes, sir.

6 Q Okay. You sat here and you listened to everybody's
7 testimony today and yesterday; right?

8 A Yes, sir.

9 Q And you testified that Mr. Carr said, don't say
10 nothing, don't say nothing?

11 A Yes, sir.

12 Q Did anybody else corroborate that statement, sir?

13 A No, sir because we weren't in the car yet. Nobody
14 else heard it. Nobody else heard him say don't say
15 nothing, don't say nothing.

16 Q You said that they were saying in the car that Mike
17 had messed up, right?

18 A No. No, sir. They said -- they had -- when Mike got
19 in the car he was saying, he told everybody that he had
20 shot the dude. He said, I shot the dude, I shot the dude.
21 Nobody in the car ever said that Mike had messed up.

22 Q Why didn't you go straight home after all this
23 happened?

24 A Because Duriel was my ride. I mean, what was I
25 supposed to do, walk? I didn't have no way home.

1 Q You testified you were scared?

2 A Yes, sir, I was scared.

3 Q But also you didn't have a way to get home?

4 A Well, I -- I thought you was referring to right after
5 it happened, after I got back in the car why didn't I go
6 home. I -- we went back to Island Greens, and after that,
7 once we got into the apartment -- I mean, I couldn't
8 leave.

9 I had just seen this man shoot somebody and he knows
10 that I knew that he had just killed somebody.

11 Q You don't want to go to jail today; do you?

12 A No, sir.

13 Q You'd say anything to make sure you don't go to jail?

14 A No, sir, I wouldn't say anything to make sure I
15 wouldn't go to jail. This here--

16 Q But you denied being on Freewoods Road; right?

17 A I denied being on Freewoods Road. Island Green was
18 on Freewoods Road.

19 Q You denied burying that gun at the end of Freewoods
20 Road?

21 A Yes, sir.

22 Q You say this is not the gun that Mr. Green had -- I
23 mean, excuse me, Mr. Carr had?

24 A No, sir.

25 Q Okay. You didn't have a gun.

1 A No, sir.

2 Q Where does this gun come from, sir?

3 A I don't know. I know that I have seen that gun
4 before. That -- that gun right there belongs to Antonio
5 Davis.

6 Q And after everything happened you went to Antonio
7 Davis' brother's house?

8 A Yes, sir.

9 Q Again, instead of going home to --

10 A I had no --

11 Q -- to consult your mother.

12 A -- I had no way -- I had no way to get home at that
13 time. I had called Otis Davis to come pick me up and he
14 took me to his house because he said he wanted to go home
15 because he had just gotten out of work and he wanted to go
16 home and take a shower and everything before he took me
17 home.

18 Q Do you deny threatening Duriel and Nikki?

19 A I never threatened anyone.

20 Q You deny saying that anybody spoke would be a dead
21 man walking?

22 A I never said that.

23 Q And you deny burying a gun at the end of Freewoods
24 Road?

25 A I never buried a gun.

1 Q When you claim that you saw Mr. Carr armed --

2 A Yes, sir.

3 Q -- you didn't attempt to dissuade him from trying to
4 rob Mr. Patterson?

5 A I just told him it was crazy.

6 Q You didn't ask him to let's just go? You didn't ask
7 him to just leave?

8 A No, sir, I didn't -- it wasn't on my mind.

9 MR. GALMORE: No further questions, Your Honor.

10 THE COURT: Anything? Mr. Von Herrmann?

11 MR. VON HERRMANN: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. VON HERRMANN:

14 Q How long did Kareem had his apartment available, the
15 one that he had got from the girl?

16 A As -- best of my knowledge that was the first day
17 that he had it.

18 Q And do you know how long he had it? He had it that
19 night, right?

20 A Yes, sir.

21 Q And how many bedrooms was in that apartment?

22 A I'm not sure. I think it was two -- no, one bedroom
23 apartment.

24 Q One bedroom apartment?

25 A Yes, sir.

1 Q And how about the apartment that Nikki lived in? How
2 many bedrooms was that?

3 A Think it was two bedroom.

4 Q Two bedroom? Now, Kareem had that --- Kareem had
5 that apartment complex or that room for quite a while;
6 didn't he?

7 A He had it for that day.

8 Q So he was there that night?

9 A Yes, sir.

10 Q And--

11 COURT REPORTER: Sorry, I didn't hear that.

12 THE COURT: Make sure you speak into that mike.
13 Want to bring it down a little bit further?

14 THE WITNESS: Yes, sir.

15 THE COURT: Bring the microphone down a little
16 bit further. Speak into it.

17 THE WITNESS: Yes, sir.

18 BY MR. VON HERRMANN:

19 Q And Kareem smokes pot, too; right?

20 A Yes, sir.

21 Q And Nikki and Kareem were together when y'all left?

22 A Yes, but she had said she was going to walk home.

23 Q Okay. So your testimony is that five of y'all stayed
24 in Nissi's (sic) apartment that night. Where did y'all
25 sleep?

1 A Huh? No one slept. I mean, Nikki and Duriel went to
2 their bedroom and me and Antonio Davis and Mike Carr, we
3 stayed out in the living room area.

4 Q Where they had couches and --

5 A Yes, sir.

6 Q -- fell asleep?

7 A Nobody fell asleep. To my knowledge everybody was
8 up.

9 Q Where were you working at that time?

10 A Where was I working at that time? I had -- I worked
11 for my father, but it was a -- the job I had it was kind
12 of go when you want to go type of thing.

13 Q When was the last time you worked?

14 A Probably, I can't say for certain, but I'm sure it
15 wasn't long because I usually worked a couple--

16 Q Well, this is an important time in your life; isn't
17 it?

18 A Yes, sir.

19 Q Okay. So we got an available apartment with one
20 person asleep in it, we got three people crowded into a
21 one bedroom apartment?

22 A Yes, sir.

23 Q When you pulled up at the parking place, when you --
24 as you're going into Turtle Cay and Joe Patterson's
25 apartment is on the left, or I -- yeah. When you say you

1 parked in a parking place a hundred, 150 yards, is it on
2 the same side as Joe's?

3 A I said 50.

4 Q Fifty. Is it on the same side as Joe's --

5 A Building.

6 Q -- building?

7 A Like you come into Turtle Cay and on the left is
8 Joseph Patterson's apartment building.

9 Q Okay.

10 A And then you go on down maybe -- I say maybe 50 feet
11 to a hundred feet, and then if you show me the picture, I
12 can show you where I sat if you show me the picture you
13 were showing.

14 Q Was it in front of another apartment complex?

15 A I'm not sure. It was dark. I haven't been out
16 there. I mean, that was the first time I was ever there.

17 Q Well, let me ask you this. When you ran down the
18 stairs you indicated you went out the back and to run to
19 the car. Did you turn left or right?

20 A I turned right.

21 Q Turned right. And your testimony is that by that
22 time you heard Mike Carr?

23 A I had heard him before -- before I turned right.

24 Q So he was able to catch up to you and then--

25 A No, you mean I heard his voice or I heard the shots?

1 Q You heard his voice.

2 A Oh, his voice. It was -- I had turned the corner and
3 I had made it maybe half-way back to the car and that's
4 when he -- I assume he rounded the corner and that's when
5 he started yelling at me.

6 Q Did you ever get any of the pot?

7 A No, sir.

8 Q And you'd agree with me that y'all were all together
9 at Turtle Cay -- I mean excuse me, yeah, Turtle Cay
10 apartment prior to the robbery?

11 A Yes, sir.

12 Q In a one bedroom apartment and there is six of you.
13 Is that correct?

14 A I'm confused on what you're asking.

15 Q You're at Turtle Cay Apartments, the one Kareem
16 Harry's got?

17 A No, sir, that was in Island Green.

18 Q Island Green, excuse me.

19 A Yes, sir.

20 Q All right. Island Green in a one bedroom apartment.
21 There's six of you?

22 A Yes, sir.

23 Q And you're all in this one bedroom apartment?

24 A Yes, sir.

25 Q And you say some were watching TV, some were

1 listening to music and everybody is talking?

2 A I didn't say everybody was talking. Everyone was
3 just off doing their own thing. That was the point I was
4 trying to make, like everybody was off just kind of --
5 some -- I think some people was watching TV, couple people
6 was listening to music.

7 Q And did you ever get your -- anything, \$20 -- your
8 marijuana or anything?

9 A Did I ever -- I got my \$20 back.

10 Q So the guy that you were scared of gave you your
11 money back for the pot?

12 A Yes, sir.

13 Q You indicated that you all left together and got in
14 Nikki's car?

15 A Yes, sir.

16 Q And you knew that you didn't know Joseph Patterson?

17 A I did not know Joseph Patterson, no, sir.

18 Q And you didn't know what apartment he lived into?

19 A No, sir.

20 Q But yet you continued to go.

21 A Yes, sir.

22 Q When you get there, what color was the gun that you
23 saw in Mike Carr's hand?

24 A The gun that Mike Carr had was a black gun with a
25 white handle.

- 1 Q So you agree that -- that that's true?
- 2 A Yes, sir.
- 3 Q You don't -- when you get to the door, you knock on
- 4 the door, is it that -- was it light outside? I mean,
- 5 were there lights on?
- 6 A It was dark.
- 7 Q Was the apartment dark?
- 8 A The inside of the apartment from what I could tell it
- 9 was, yes, sir.
- 10 Q And you knocked on the door?
- 11 A Yes, sir.
- 12 Q And you wait for a second?
- 13 A Yes, sir.
- 14 Q And knocked on the door again?
- 15 A I didn't knock twice.
- 16 Q Well, he knocked once and then you knocked?
- 17 A Yes, sir.
- 18 Q Okay. And then so you believed nobody was there?
- 19 A Yes, sir.
- 20 Q And he believed nobody was there?
- 21 A Yes, sir. I can't say what he believed. I can't --
- 22 Q Well, y'all talked about it. You said nobody home?
- 23 A I said nobody's home.
- 24 Q And what did he say, you're right?
- 25 A He didn't really say much. That's when he showed me

1 the weapon and said he was going to go in -- he said,
2 let's get them, let's get them.

3 Q Well, if nobody come, why is he pulling out a weapon,
4 there's nobody there to hurt?

5 A I don't know that he didn't know nobody was home. I
6 don't know what he was--

7 Q You just said that -- you said nobody was home?

8 A I said nobody was home.

9 Q The lights are dark, nobody's come to the door and
10 you waited for somebody and knocked twice?

11 A Yes, sir.

12 Q And then he pulls out a gun for somebody that's
13 nobody getting in the apartment. Doesn't make any sense;
14 does it? Doesn't make any sense; does it?

15 A I don't know what makes sense to him.

16 Q No, I'm talking about you. That doesn't make any--

17 A No, that doesn't make any sense to me.

18 Q Okay. You would agree with me had you not gone over
19 there to buy pot, that Mr. Patterson would still be alive?

20 A Yes, sir.

21 Q And you bear responsibility for that; don't you?

22 A I don't bear responsibility for him being killed, no,
23 sir.

24 Q You certainly bear responsibility for him being
25 robbed. Isn't that true?

- 1 A Him being robbed?
- 2 Q Yeah.
- 3 A I ain't had nothing to do with the robbery.
- 4 Q For the robbery you had some involvement in that
- 5 robbery; didn't you?
- 6 A I had no part of no robbery.
- 7 Q When you ran out the back of the apartment complex --
- 8 A Yeah.
- 9 Q -- as you say with the defendant Mike Carr, you could
- 10 have gone straight and there's another apartment complex
- 11 and there's a busy road right there; isn't it?
- 12 A I'm not sure.
- 13 Q You know where Forestbrook Road is?
- 14 A I know where Forestbrook Road is.
- 15 Q Isn't that a busy road?
- 16 A Yes, sir.
- 17 Q Had you run straight, would you have run into
- 18 Forestbrook Road?
- 19 A I -- I guess so.
- 20 Q Is Abaco Apartments right in front of you?
- 21 A I don't know the area that well, but I assume it is.
- 22 It--
- 23 Q When you run down the stairs you're looking at an
- 24 apartment complex. You didn't see that?
- 25 A When I run down the stairs there was an apartment

1 complex behind me.

2 Q Right there?

3 A Yes, sir.

4 Q Okay. And your testimony is that you went to buy
5 marijuana, buy marijuana at 1:00 in the morning. What
6 time did y'all start drinking that afternoon?

7 A It was probably 5:00.

8 Q So you had been drinking from 5:00 to 12:30.

9 A I hadn't been drink steady like that, no, sir.

10 Q Well, you said you started drinking at five. So when
11 did you quit, 12:30?

12 A I just -- it was -- it was more like just taking a
13 few shots of rum. It wasn't--

14 Q So you were doing shots?

15 A Yes, sir.

16 Q Were you drinking beer, too?

17 A No, sir.

18 Q You just taking shots of liquor every now and then?

19 A Yes.

20 Q All right. And yet you're going to go buy pot at
21 1:00 in the morning?

22 A Yes, sir.

23 Q Okay. In reality you're saying that you were scared
24 but you ran to the same place that Mike Carr was going to
25 go. You knew Mike Carr didn't have a way out; didn't you?

1 A Yes, sir.

2 Q And there's no doubt in your mind that Mike Carr is
3 the shooter. No -- no question?

4 A No question at all.

5 Q No question you had time on it -- according to your
6 testimony -- when you ran down the steps?

7 A Excuse me?

8 Q When you get to the bottom of the stairs, you got
9 lead time on him. He isn't there, according to your
10 testimony.

11 A Yes, sir.

12 Q You got lead time. You can go wherever you want to.

13 A Well, yeah. Yes, sir.

14 Q But you choose to go right back to the same place you
15 know Mike Carr is going to go.

16 A Yes, sir.

17 Q And you still know that Mike Carr's got that gun?

18 A Yes, sir.

19 MR. VON HERRMANN: No further questions, Your
20 Honor.

21 THE COURT: Anything else, Mr. Diggs?

22 REDIRECT EXAMINATION

23 BY MR. DIGGS:

24 Q Adam, behind Mr. Patterson's apartment, want you to
25 tell us what you can, if anything, what -- what do you

1 know about the area between Turtle Cay and Abaco Bay
2 Apartments? Do you know anything about it?

3 A I don't -- I don't know anything about it. I don't
4 know that area at all.

5 Q All right. If there were a fence there, would you be
6 aware of that or do you know?

7 A I don't know.

8 Q Okay. That's all I have. Thank you.

9 THE COURT: Mr. Galmore, anything else from you?

10 MR. GALMORE: Yes, sir. Very briefly.

11 RECROSS-EXAMINATION

12 BY MR. GALMORE:

13 Q When you pulled into the apartment complex, did you
14 see these two gentlemen that were talking to Duriel?

15 A I seen the guy come to the car window, the driver's
16 window. He walked around to the driver's window and then
17 there was another guy standing off by a white truck.

18 Q This is in front of Joseph's apartment?

19 A Yes, sir.

20 Q And you saw two people standing right there in front
21 of Joseph's apartment?

22 A Yes, sir.

23 Q Would Mike have been in the car at the same time?

24 A In the same time that I was there?

25 Q Yes, sir.

1 A Yes.

2 Q Mike would have been in a position to see two people
3 standing right outside of JoJo's apartment?

4 A From inside of Duriel and Nikki's car?

5 Q Yes.

6 A Yes, sir.

7 Q Because you saw two people standing outside the
8 apartment?

9 A Yes, sir.

10 Q Okay. No further questions.

11 THE COURT: Anything else?

12 MR. VON HERRMANN: Nothing from the State, Your
13 Honor.

14 THE COURT: Mr. Diggs?

15 MR. DIGGS: Nothing.

16 THE COURT: You may step down.

17 (Witness left the stand.)

18 THE COURT: Other witnesses, Mr. Diggs?

19 MR. DIGGS: Your Honor, that's all the testimony
20 that we will present.

21 THE COURT: All right. So the defense Mr.
22 Bailey rests.

23 MR. DIGGS: Yes, sir.

24 THE COURT: Okay. I'll let the State preserve
25 the rebuttal if you have any because we have the

1 other...

2 MR. VON HERRMANN: Thank you, Your Honor.

3 THE COURT: All right. Mr. Galmore, witnesses,
4 sir? Does anybody on the jury need a break right
5 now? Everybody is fine? Okay. Good. Next witness.

6 MR. GALMORE: Your Honor, we would call Mike
7 Carr to the stand.

8 MIKE CARR, after being duly
9 sworn, testified as follows:

10 THE COURT: Please make sure you speak loudly
11 and in the microphone. Okay. Mr. Carr?

12 THE WITNESS: Yes, sir.

13 THE COURT: All right. Your witness.

14 DIRECT EXAMINATION

15 BY MR. GALMORE:

16 Q Mr. Carr, how old are you?

17 A I'm 21 now.

18 Q Okay. How old were you at the time of this incident?

19 A I just turned 18.

20 Q Just turned 18. Married, single?

21 A Girlfriend.

22 Q Kids?

23 A No, sir.

24 Q Okay. You go to school?

25 A Yes, sir.

1 Q Okay.

2 A Well, I wouldn't say we was in school. I would say
3 home school. I was in home school since I was in tenth
4 grade. From there on I was in home school till then.

5 Q Graduate from high school?

6 A No, sir, because of my arrest.

7 Q Because of your arrest on this charge?

8 A Yes, sir.

9 Q Have you ever been arrested before?

10 A No, sir. As a juvenile 13, 14 years old, that was my
11 last time.

12 Q Let me take you back to September 28th of 2004. Can
13 you tell this jury -- just begin with the details of the
14 day, what you all were doing earlier in that day.

15 A That day I was at Island Green with Kareem Harry and
16 defendant Adam Bailey, Michael Bailey, Durriel Simmons,
17 Antonio Davis and myself and Nikki Phillips.

18 Q How did you come to be over there in Island Green?

19 A Kareem called me earlier that day from a female that
20 we have met a couple weeks before that she was going out
21 of town and she left the apartment to him, so he told me I
22 would come over then and stay with him, so I agreed. I
23 mean, I ain't had no problem with it.

24 Q Did you get a ride over there?

25 A Yes, sir, my -- Kareem brother Kayson, his twin

1 brother took me over there.

2 Q What did y'all do when you got there?

3 A When I first got there I didn't -- when I first
4 pulled to the apartment -- the apartment complex I didn't
5 actually go straight in there. I went next door where I
6 acknowledge I seen him, Mr. Bailey and Mr. Davis over
7 there and then I went next door to Kareem's apartment
8 which who was in there, Duriel, Nikki and him, then I came
9 and then that's when --

10 Q They --

11 A -- they came.

12 Q -- they were your neighbors, friends of yours?

13 A Right. Or next door.

14 Q Okay.

15 A Before I got--

16 Q I mean, when you pulled up you saw them next door?

17 A Uh-huh.

18 Q And went to speak to them first?

19 A Yes. You could say.

20 Q Nikki went on into the apartment?

21 A Yes, sir.

22 Q What did y'all do in the apartment?

23 A We played music, we smoked weed, drink, basically the
24 whole night, all of us in there. None -- everybody
25 participated in smoking weed, everybody participated in

1 drinking.

2 Q Okay. Did there come a time when you ran out of
3 marijuana?

4 A Yes, there was.

5 Q I'm sorry?

6 A Yes, there was.

7 Q Tell me what happened at that -- at that...

8 A When we ran out of marijuana, nobody else had no weed
9 to smoke. I mean, everybody pitched in to smoke all the
10 marijuana up with everybody, so we were at the point where
11 we had been going through the ash trays and getting the
12 roaches.

13 A roach is where the end of the blunt. And that, you
14 break it down, take the weed out and roll that up. We got
15 to that point. So then everybody thought of somewhere we
16 can go find some more weed which came -- I had somebody to
17 go to. But the person I called said they didn't have any
18 more.

19 And I also had weed to that person -- then that
20 earlier that day where Mr. Davis and Mr. Bailey had
21 purchased from me and I had no more. So that's when
22 Durriel Simmons came up with the idea that we should go see
23 JoJo.

24 I decided against it for the simple fact I had dealt
25 with JoJo before with someone else and myself -- by myself

1 before and he shortened my bag, so I decided against it.

2 Q So you know Joe -- knew JoJo Patterson?

3 A Yes, sir, say I know him.

4 Q How well would you say you knew him?

5 A Not too well, but I -- I know him. I have been to
6 Duriel Simmons' mother house which lives right across the
7 street from JoJo and well I been over there before and he
8 took me over there, purchase some weed. That's the person
9 I spoke of when I -- when I did said I been over there
10 with somebody else before, that's the person I was talking
11 about, Duriel Simmons.

12 Q Now, if you went up to JoJo's door, would he
13 recognize you?

14 A Yes, sir.

15 Q Mr. Simmons suggested that y'all go see JoJo for some
16 weed?

17 A Yes, sir.

18 Q What happened as a result of that?

19 A After he suggested that we go to there, everybody
20 pitched in. Well, really not I -- not everybody, four of
21 us pitched in, which was me, Duriel, him and Mr. Davis.
22 Everybody put in \$20.

23 Q And then what did you do?

24 A We counted the money up and came up to \$80 which
25 is -- you know, we wanted to get an ounce. When you buy

1 regular weed that's how much an ounce costs, \$80. So
2 that -- that's when Duriel went to Nikki Phillips, which
3 is his girlfriend, was his girlfriend then, and asked her
4 can he get the car to go there, and she was like, she
5 don't mind.

6 Q Now, when you're sitting around Mr. -- this house,
7 was there any discussion of a robbery?

8 A No, sir.

9 Q No discussion to rob Mr. Patterson?

10 A No, sir.

11 Q Any passing out guns over there?

12 A No, sir.

13 Q So Duriel, was he able to get the car?

14 A Yes, sir. I mean, he gets anything, that's -- that's
15 his girlfriend. She going to tell him yeah.

16 Q Then what did y'all do?

17 A Well, we sat around for a little bit more just doing
18 nothing, planning on what time we'll go and all of that,
19 then I say about 30 minutes later everybody got their
20 stuff together and we went.

21 Q Let me back up. You saying that you had called
22 somebody first, right?

23 A Yes, sir, I did.

24 Q And what was the problem with that?

25 A When I called the person, I called his name is Dee --

1 I rather not...

2 Q Just tell us what happened.

3 A Okay. Well, he told me he didn't have any weed but
4 said he -- he -- he got some high drug, which is -- it's
5 expensive weed, and that I told him I didn't have the
6 money to -- to get that expensive weed because it was a
7 lot of us, you know what I mean, and everybody wouldn't
8 want to put that much money up, so I told him whenever you
9 get some regular weed, call me. He said, it might be late
10 tonight, but if not, it will be tomorrow morning.

11 Q Okay. So you called and you weren't able to get your
12 connection?

13 A Yes, sir.

14 Q Did Mr. Simmons try to call --

15 A No, sir.

16 Q -- Mr. Patterson?

17 A No, sir, he didn't.

18 Q Okay. He just got the keys and y'all decided to go?

19 A Yes, sir.

20 Q All right. Tell me what happened.

21 A On the day going there we stopped by my uncle house
22 which is on 707. I went to see my uncle have something to
23 give me. He said he didn't have anything. We all was in
24 the car. Duriel Simmons, Adam Bailey.

25 Q Had some what?

1 A Marijuana.

2 Q Okay.

3 A Duriel Simmons, Adam Bailey, me, myself, and Antonio
4 Davis was all in the car. We got back from -- I mean,
5 left from my uncle house which is my grandmother house and
6 went straight to Turtle -- Turtle Cay.

7 Q What did you do when you got to Turtle Cay?

8 A When we first entered Turtle Cay, Duriel -- we turned
9 in, Duriel seen a white truck with two black men standing
10 outside of that -- his mother apartment. So he rode by
11 them, he never said nothing to them. They didn't wave the
12 car down or anything.

13 He drove by them. He went all the way down to the
14 end. He made a U-turn. When he came back that's when he
15 stopped the car.

16 Q How long was he out there talking to them?

17 A I give it three minutes, four minutes.

18 Q And all of y'all were in the car at the time?

19 A Yes, sir.

20 Q Okay. What happened after that?

21 A Right after that we -- we drove out, we went to the
22 next apartment over which is Abaco Bay if I'm not mistaken
23 and we stopped right there beside the dumpsters. Well,
24 yeah, he was set beside the dumpsters because he -- from
25 what he told us that he didn't want his mother to see his

1 girlfriend car and she was suspect him as buying something
2 from JoJo because he was going over there.

3 But when we got there to Abaco Bay he said he's not
4 going up there because his -- his sister fiancée was out
5 there and she might happen to come out there and speak to
6 him.

7 Q That was one of the two men in the pick-up truck?

8 A Yes, sir. I don't know any name -- any of their
9 names.

10 Q Okay. But Duriel decided that he didn't want to go
11 up to JoJo's apartment?

12 A Yes, sir.

13 Q Is that how you came to go to JoJo?

14 A Yes, sir.

15 Q Because you had met him before?

16 A Yes, sir.

17 Q Tell me what happened when -- when you got upstairs.

18 A When we got out the car, that's--

19 Q Wait. Let me back up. Were these two guys still
20 there when you went upstairs?

21 A Yes, sir. That -- to my knowledge, yes, they were.

22 Q Okay.

23 A Excuse me. When we got out the car -- well, let me
24 say when I got out the car. When I got out of the car I
25 shut my door, that's when I heard another car door opening

1 which came to be Adam Bailey and I asked him what was he
2 doing. He said he come with me because he don't want to
3 get short of his duty.

4 I told him I don't blame him. I mean, if you want to
5 come, you can come on. He chose for himself to come. So
6 on the way going though we had to go through this little
7 path which that leads to Joseph house -- I mean apartment
8 should I say.

9 So we go upstairs, we knock on the door (indicating).
10 Nobody answers so we just sitting around waiting for
11 somebody to come to the door. Then we knock again
12 (indicating). Somebody answers this time. He asked who
13 it was. I told him black Mike.

14 Black Mike is the name that I prefer people call me
15 on the streets instead of calling me by my mother give me
16 name (sic).

17 Q So what you're saying is that Mr. Patterson answered
18 the door?

19 A Yes, sir.

20 Q All right.

21 A So when he -- I guess I'm -- I'm thinking he looked
22 through the peep hole and recognized who it was, so when
23 he opened the door I was like, what's up? He's like, man,
24 I haven't seen you in a minute. A minute means a while.
25 Then I told him, what's up?

1 He asked me who he was. I told him he cool, he with
2 me, because I guess I would hate to say towards them,
3 y'all, I apologize for the death, but he was a drug
4 dealer, but when a drug dealer see somebody with somebody
5 they don't know, they get cautious, think he's a police or
6 undercover, anything like that, so I told him he was
7 straight, he with me. So he let us in.

8 Q Okay. Now, we have had some testimony that the door
9 was kicked open.

10 A Not to my concern. I had heard plenty of time that
11 his door has been kicked in from Duriel Simmons, but I
12 haven't seen it for myself. That door wasn't kicked in
13 that night.

14 Q You're telling this jury you didn't kick that door
15 open that night?

16 A Did not kick their door that night, his or anybody
17 else's door.

18 Q Well, what happened when you went in?

19 A When I went in he direct -- he directed us to the
20 seats, his couch. I sat down on the couch. Mr. Bailey
21 was still standing up. When we sat down, got comfortable,
22 he asked me, what's up, what we doing, for -- what we do,
23 we do last night.

24 I explained to him that we did a little nothing, hang
25 around, same we do every day which is smoke weed and

1 drink. And then he asked me what's good. I told him I
2 wanted to purchase some weed. Well, my -- my words were,
3 I want to buy some weed.

4 He's like how much? I told him, I want an ounce. He
5 told me, hold on. He never said that he was going to go
6 get the weed. He just said, hold on. He went to a back
7 room.

8 Q Okay. So he left you and Mr. Carr -- Mr. Bailey
9 alone in the living room?

10 A Yes, sir.

11 Q All right. Then what happened?

12 A And then when he was in the back that's when I
13 noticed Adam plunder, I don't -- not saying that he been
14 trying to steal from him or anything in that -- in that
15 concern but I didn't know he was just looking around
16 like -- like looking around like he was amazed to see what
17 he was looking at.

18 So I didn't say anything to him. I just laid back on
19 the couch; picked up a magazine, looked at it, flipped
20 through it until Mr. Joseph Patterson came back which then
21 he did. He came back half-way in the hallway.

22 And when he stopped, that's when Mr. Bailey asked him
23 can he use the restroom. I didn't say anything. He just
24 like, dude, can I use your restroom? And Joseph Patterson
25 told him, yes, you can. He said it's in my room, go

1 straight ahead. Then went in there.

2 Then while that was going on Mr. Joseph Patterson had
3 come talk to me asking me how do I want my weed bagged up.
4 In my mind I'm thinking since it's the four of us and
5 everybody want their -- they separate bags I told him out
6 of an ounce is 28 grams. So I told him give me 7 grams in
7 four bags. He was like, all right.

8 He like, hold on. He went in the kitchen first, he
9 grabbed the scale. I seen him put it back, the scale,
10 went in his room. On his way going in the room Mr. Bailey
11 was coming out of the bathroom. At that time he walked by
12 him and brushed him like -- like the hallway was too
13 little.

14 Q Right.

15 A So they brushed past each other. So Mr. Bailey kept
16 coming. I noticed him walking kind of fast, but I said
17 no -- no attention to it, you know what I mean. So that's
18 when Joseph Patterson came back out of his room and
19 asked -- asked him, yo, yo, what the fuck you doing? What
20 you got inside your pocket? Excuse my language. Because
21 he had something bulging out in his side which I noticed
22 then but I never knew what it was.

23 At that time I didn't know what it was. And he did
24 not turn around yet. And then to say nothing to him. And
25 that's when he -- that's when he told him, what the fuck

1 you talking about, I don't have nothing?

2 Then that's when Joseph Patterson said, well let me
3 see what the fuck you got in your back, and he pulled out
4 and he pulled out his gun which would be the gun that's in
5 that picture right there.

6 So at that point in time I seen Mr. Bailey stand back
7 and had the gun like that. When I looked at Joseph
8 Patterson, I notice he had something in his hand which
9 I -- I still to this day don't know what it was.

10 Q Okay. Where were you when all this was--

11 A Still by the couch -- I stood up by now, but I'm --
12 I'm at the couch still. I'm standing right in front of
13 the couch.

14 Q Okay.

15 A So when I seen Joseph with the thing in his hand,
16 right then and there I knew something was going to go down
17 because he got a gun pointed at the man, anybody know that
18 you pull a gun you're going to use it. Well I mean,
19 anybody that -- that uses guns, that's -- when they pull
20 it, they use it.

21 So right then and there Joseph about to say something
22 and he -- by the time he went like that, that's when I saw
23 the two shots go off. I froze up. I mean, I never seen
24 anybody get shot face to face like that. So after I froze
25 up and the shots was already over I seen Joseph laying

1 face down.

2 And then that's when I'm looking at him like, you
3 know what I mean, like what you doing. I didn't ask him
4 that but that's my thinking. He just pulled me and ran
5 and told me to come on, come on. So we left out the
6 house.

7 Q And what did you do after you left out of the house?

8 A We ran downstairs first. On the way going to the
9 car -- back to the car where we came from, that's when he
10 stopped me and told me, don't tell nobody nothing, you
11 know what I mean. If anybody asks you, just say we shot
12 him.

13 I mean, I don't know him, my adrenelines are pumping.
14 So I just said, all right, all right. I had no choice but
15 to say all right for what -- I probably would have got
16 killed. You never know.

17 Q Was the pick-up truck and the two guys out there when
18 you came back down the steps?

19 A I -- I didn't even look back to see if they was
20 there. All--

21 Q You didn't pay attention?

22 A That wasn't even in my mind.

23 Q How long were you in the house?

24 A About a good 10 minutes, probably eight. Excuse me,
25 eight.

1 Q So now you come downstairs and what happens from
2 there?

3 A Like I said, we was in the pair -- and he told me if
4 anybody say something, anybody asked what happened just
5 tell them that we shot the man. So when we got back to
6 the car, like he said earlier, he got in first and I came
7 in behind him.

8 We sitting there, Rock turned around and asked me
9 where the weed at. I looked up and said the man got shot.
10 I never stated, as the testimony from Antonio Davis that I
11 shot the man. I never stated that. I said the man got
12 shot. I said it twice.

13 Q You deny making the statement, I shot the dude?

14 A I deny that --

15 Q Okay.

16 A -- to the fullest. I didn't never say I shot anybody
17 and from that point Duriel -- I mean, Rock was like, which
18 is Antonio Davis, he was like, yeah right, yeah right,
19 man, he like, man, fuck it, come on man, go, go, go, but
20 Duriel put the pedal to them and drove off.

21 On the way going back to Island Green that's where we
22 were headed to, it started to rain real, real hard. I
23 mean, we really couldn't see the highway. So you know
24 what I mean, we slowed down to driving. On the way back
25 going we see police was coming.

1 That's when Antonio turned around and like, y'all
2 really did shoot the man. I didn't say anything. He
3 didn't say anything. He like, you think you did? Nobody
4 still said nothing. So we still headed back to the
5 apartments to Island Green.

6 We get to Island Green, we did not go to Nikki house,
7 we went back to Kareem house where we came from. Nikki
8 was still in there on -- no, I'm skipping. When we pulled
9 up there, when we parked the car, so it was still raining
10 so we were just sitting in there waiting for it to stop
11 raining.

12 So at that time when we was about to get out I -- I
13 stood there getting out the car first. That's when he
14 looked at me and tell me don't tell nobody or he going to
15 kill me. From that statement I believed him for the
16 simple fact we had altercations months prior to, to this
17 incident, him and my mother, him and me, his best--

18 Q Mr. Bailey?

19 A Yes, Mr. Bailey. No disrespect to his family, but
20 Mr. Davis and him are best friends. They are known for
21 jumping people, they are known for robbing people.

22 MR. DIGGS: Your Honor, I -- I object to that
23 and move that it's stricken. It's not responsive to
24 the question.

25 THE WITNESS: I apologize.

1 BY MR. GALMORE:

2 Q What did you do when you got back to Island Green?

3 A When we got back to Island Green we went in the
4 house, all four of us. Nikki asked where the weed was.
5 Nobody said nothing. She asked again. Duriel told her,
6 don't worry about it, just let's go home.

7 So Rock took the rest of the liquor that was up there
8 and Nikki and Duriel they all -- all three of them went
9 back to their apartment which was probably like a minute
10 or two away from where we was at around the corner. Me
11 and him stayed in the house together with Kareem.

12 While we in there, Kareem said he was going to sleep
13 because it was -- it was kind of late that night. So
14 Kareem went to the back room and went to sleep. During
15 that time he was wiping off the gun, wiping off the same
16 gun that's on that picture with a shirt, taken out the
17 bullets, wiping them off, then he placed them in a plastic
18 bag.

19 Q At what point or -- now, what point did you leave the
20 apartment in Island Green?

21 A That next day.

22 Q You stayed the night?

23 A Yes, sir.

24 Q Why did you stay the night?

25 A Because that -- I told Kareem I was staying. Well,

1 he advised me that I could stay with him, so I stayed with
2 him.

3 Q Even after what went down?

4 A Yeah, but I thought he was going to leave to be
5 truthful. I thought he was going to go because he usually
6 stays, be with Rock 24-seven, so I figured that's where he
7 was going to go. So I went in the living room and laid
8 down and tried to get some sleep.

9 I opened my eyes back up, he laying next to me, not
10 on the chair, couch next to me, said well, we got some
11 space between us. He lay next to me. So nothing been
12 said between the both of us.

13 And I doze off to sleep and that's when I feel a
14 tapping on my shoulder. He wakes me up to tell me we need
15 to go kill Duriel. For what reason I have no idea. But I
16 told him, Nah, we did enough, let's just go to sleep and
17 get the thing over with.

18 Q And the next day you left and where did you go?

19 A To my grandmother house.

20 Q Did you dispose of any weapons?

21 A No, sir.

22 Q How did you come to be arrested?

23 A I was at my grandma house for basically the whole
24 day. I got a call from Nikki Phillips. She stated that
25 Duriel had got arrested for some murder that happened in

1 Turtle Cay. I hung up with her. I'm still at my
2 grandmother house, Kayson calls me. By then the days gone
3 by.

4 It probably like seven something in the afternoon
5 now. Kayson tell me, let's go to Island Green and chill,
6 he got some girls I -- he want me to meet, so I agree. At
7 first I didn't want to go back there because I figured
8 that the same people would be there, so I really didn't
9 want to go, but Kayson is my best friend. That's Kareem
10 Harry brother.

11 So I told him, all right, I'll go. When he came to
12 my grandmother house, I was in the front yard waiting on
13 him. He had this white girl with him, so I got in the car
14 and we went to Island -- back to Island Green.

15 But we didn't go straight to Kareem's apartment. We
16 went to this so-called friend of his and went to their
17 house where I see them two at when I arrived Island Green
18 the day before.

19 Q When you what?

20 A Arrived at Island Green the day before.

21 Q Oh, okay. Okay. So you went to the house next door?

22 A Yes, sir.

23 Q And then what happened?

24 A I spoke to a female on the phone for a while, decided
25 against it, but I had to hang up the phone. I went

1 outside. And when I went outside, I had a black and mild
2 in my hand. I was wiping it up. At that time I noticed
3 the officer that step up here today, Jack, I don't even
4 know his last name. I noticed him sitting in his car.

5 I paid him no mind. I just lit my black and mild up
6 and I was walking next door to Kareem house. When I was
7 going to stairs, I knocked on the door, Kareem answered
8 the door, he like, what's up? Giving me -- Kayson was in
9 there and a white boy was in there named Jamie.

10 So I went in there and closed the door. I say about
11 three minutes later a knock was on the door and it was
12 Horry County Police. Kareem asked who it was. He was
13 like, Horry County Police. He didn't say no name. So
14 Kareem just opened the door. He came in, he pull a gun
15 out and told me to get on the ground.

16 I was like, for what, for what, what happened? But
17 I'm getting on the ground in the process. He tell me I'm
18 going in for questioning for a murder that happened in
19 Turtle Cay.

20 Q Now, Mr. Bailey wasn't over there that next day
21 coming back, was he?

22 A No, sir, I haven't seen him since that night.

23 Q And when Officer Johnson, Jack came over and took you
24 into custody, you knew what murder he was talking about?

25 A Yes, sir.

1 Q Did you plan with anybody to rob Mr. Patterson?

2 A No, sir.

3 Q What was your intention when you went to Mr.
4 Patterson's house?

5 A Go purchase some marijuana so we all could smoke it.

6 Q Did you plan with anybody to shoot Mr. Patterson?

7 A No, sir.

8 Q Did you shoot Joseph Patterson?

9 A No, sir.

10 Q I think you said that you saw this weapon, State's
11 Exhibit number one?

12 A Yes, sir.

13 Q And where did you see this weapon?

14 A His hands.

15 Q In his hand?

16 A Adam Bailey.

17 Q Do you know anything about any other weapons?

18 A No, sir.

19 Q Were you on Freewoods Road with Mr. Bailey and
20 Mr. Simmons and -- and Miss Phillips?

21 A No, sir.

22 Q Do you know anything about that part of their
23 testimony?

24 A Well, when I got arrested that same night that the
25 officer picked me up, I came to J Ruben Long which I was

1 in the front and that's when I seen Durriel Simmons. I
2 spoke to him for like a couple of seconds.

3 I asked him what happened. He told me he didn't
4 know. And they put me in a cell right next to him, and I
5 was like, what's up? He's like, Adam hid the gun.

6 At that time I mean I'm not knowing when they went.
7 I didn't know where they went. Later -- till a couple
8 days later I went -- I got to the pod and they was next
9 door to the pod where I was at, they went and put me
10 around everybody because they had two co-defendants can't
11 be in the same pod.

12 So we talking through the door, me and him, sometimes
13 me and Rock, Antonio Davis. I'm asking Antonio Davis
14 what's up. He's telling me he think they found the gun.
15 I'm like, what gun? He said the gun Adam had.

16 He said, but I don't see how they can find it when
17 Adam hid it in Fair -- not Fairwoods Lake, Freewoods Road
18 at the end of the road. But I still don't know where that
19 was. I been down there before but not all the way to the
20 end. So I -- I didn't know where or, you know what I
21 mean, when did he go do that.

22 Q Now, this gun wasn't found on Freewoods Road; was it?

23 A To my knowledge, no.

24 Q Okay. Where -- well, you didn't see or did you see
25 any other weapons other than this gun on September 28th?

1 A No, sir.

2 Q All right. Thank you. That's all the questions I
3 have.

4 THE COURT: Mr. Diggs, you want to
5 cross-examine?

6 MR. DIGGS: Just a couple.

7 CROSS-EXAMINATION

8 BY MR. DIGGS:

9 Q Mr. Carr, were you there when Mr. Patterson dialed
10 the 911 operator?

11 A No, sir.

12 Q Did you -- were you aware -- did you ever see Mr.
13 Patterson using a telephone?

14 A No, sir.

15 Q Okay. After Mr. Bailey shot Mr. Patterson, tell us
16 again what you did.

17 A As I said before, I was standing there when he shot
18 the man, I was standing in front of the couch. When I
19 seen him shoot him, I froze up like -- like that and he
20 pulled my arm and told me to come on.

21 Q And what happened, what did Mr. Patterson do?

22 A He fell to the floor.

23 Q Did he -- did he pass out, was he rolling in?

24 A We didn't stay long enough to realize whether he
25 passed out or...

1 Q Okay. How many shots, do you know, did he shoot?

2 A Two.

3 Q Bear with me.

4 MR. DIGGS: Beg the Court's indulgence one
5 moment.

6 (Whereupon there was a pause.)

7 MR. DIGGS: Your Honor, that's all we have.

8 THE COURT: Okay. Cross-examination?

9 MR. VON HERRMANN: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. VON HERRMANN:

12 Q Mr. Carr, you started off by telling us that you
13 hadn't graduated high school at 19 years of age because
14 you were arrested?

15 A I was 18, sir.

16 Q You said 19. If you--

17 A I was 18, sir.

18 Q But you said that you didn't graduate because of this
19 arrest?

20 A Yes, sir.

21 Q And you said that you were in an apartment next door.
22 Is that correct? That's where you started off? Then --
23 how well did you know JoJo?

24 A Like I said before, not too well. Met him twice. I
25 mean, we never chilled and hanged out or anything like

1 that, we just came, get some weed and left.

2 Q No doubt in your mind that you all parked in the rear
3 of the apartment building?

4 A Excuse me?

5 Q No doubt that you parked in the rear at Abaco
6 apartments when you got there?

7 A We were parked in Abaco.

8 Q Backed in?

9 A Yes, sir.

10 Q And you went to the apartment?

11 A We went to the apartment. Thank you.

12 Q But you went with somebody that didn't know JoJo;
13 right? And you indicated to me that drug dealers are real
14 suspect dealing with people they don't know real well.
15 And how was your relationship with--

16 THE COURT: Let him answer. She's got to know
17 the answer.

18 MR. VON HERRMANN: I'm sorry. Was the answer
19 yes?

20 THE WITNESS: To what?

21 BY MR. VON HERRMANN:

22 Q That drug dealers are not typically very receptive
23 to--

24 A Kind of cautious with people they don't know.

25 Q And you didn't -- what was your relationship with

1 Antonio Davis?

2 A Good but not too good because we had a lot of
3 altercations.

4 Q Okay. And you -- how about with Adam Bailey?

5 A Same.

6 Q And how about Duriel Simmons?

7 A Me and him been best friends since 11 or 12 years
8 old.

9 Q And you're a drug dealer. You admitted that?

10 A I admit to that.

11 Q No doubt the two of you went to the apartment
12 building. No doubt that the lights were off in the
13 apartment building when you got there?

14 A The lights were on.

15 Q The lights were on? Okay. All right. No doubt that
16 had y'all not gone to the apartment complex, JoJo
17 Patterson would be alive today?

18 A If we didn't go there, yes, we would.

19 Q I'm sorry?

20 A If we didn't go there he would be alive right now.

21 Q He would be alive, right? Okay. Do you know where
22 the end of Freewoods Road is; don't you?

23 A Yes, sir.

24 Q You're familiar with it? You indicated that
25 everybody slept. Everybody that night slept?

1 A Uh-huh.

2 Q Adam Bailey, yourself, everybody. You heard the two
3 shots went off; is that correct?

4 A Uh-huh.

5 Q Did you see any those shots hit Joseph?

6 A When he shot, I mean, I freaked out, so when you
7 at -- don't expect something that you never seen before, I
8 didn't know he shot the man. When I -- that's when that
9 shot him him right there, that's when I'm like -- I'm
10 looking at him now.

11 Q What did Adam steal from him?

12 A To this day I still don't know.

13 Q Well--

14 A I'm guessing -- I'm guessing it wasn't nothing. I
15 guess it was just was the gun that he seen bulging out of
16 the back pocket -- not the back pocket, off his hip.

17 Q It's your testimony Adam shot him for no reason at
18 all?

19 A Over the argument, he seen the hammer.

20 Q Thought you said on direct examination you saw
21 something in his hand but you didn't know what it was?

22 A Later on we found out that it was a hammer.

23 Q Later on you found out that it was a hammer or that a
24 hammer was located somewhere in the crime scene? And so
25 that changed your story?

1 A In the living room beside the body.

2 Q And that fits your story. The hammer was actually
3 nowhere near the body. Isn't that true?

4 A From what I heard, the hammer was in the living room.

5 Q Well, you have been provided everything I have got;
6 haven't you?

7 A Probably no. You had shown more than I ever knew
8 about my own case.

9 Q And you indicated that he's a -- drug dealers don't
10 typically trust people they don't know?

11 A Somewhat.

12 Q And that Adam Bailey told you don't tell nobody
13 nothing. But that's not what you did; did you?

14 A I didn't tell anybody anything.

15 Q You didn't tell anybody anything. So I'm -- on -- in
16 October or September when you were interviewed with the
17 police, isn't it true that you told them that there was a
18 plan to rob JoJo Patterson and that -- and that your job
19 was that of a lookout? Didn't you tell the police that?

20 A I told the detective --

21 Q You--

22 A -- I'm stating -- you asking me, I'm telling you--

23 THE COURT: One second. One at a time. Ladies
24 and gentlemen, I know it's a little bit late, but I'm
25 trying to get all the testimony in today, but I need

1 you all if you would please just step to the jury
2 room just for a couple of minutes.

3 Won't be long, just enough time to refresh
4 yourself and we'll bring you back out.

5 (Jury left the courtroom at 6:00 p.m.)

6 *THE COURT:* All right. Mr. Von Herrmann, as I
7 mentioned earlier at the bench, I asked you to let me
8 know before you were going to go into any statements
9 made by any one of the defendants. I know you have a
10 right if something is -- something to impeach
11 someone.

12 However, I've still got to make sure that what
13 was said was freely and voluntarily said which I have
14 not made a determination yet. Even forgetting
15 Miranda rights for a minute, we still got the free
16 and voluntary situation to be determined in that
17 regard.

18 *MR. VON HERRMANN:* Your Honor, I would apologize
19 to the Court. That was exactly your instruction. I
20 just got ahead of myself in my cross-examination. I
21 apologize.

22 *THE COURT:* All right. Now tell me about this
23 statement. When was it made and under what
24 condition, providing the testimony --

25 *MR. VON HERRMANN:* This statement, Your Honor,

1 was made on October 12, 2004, 2:30 by Detective
2 Lewis. It was videotaped. I have got a copy of the
3 videotape in which this defendant gives a
4 statement -- he initially denies that there was any
5 involvement about him at the -- or any information
6 about that.

7 Later on in the statement he admits that -- he
8 confesses that he was there with Duriel Simmons and
9 Michael Bailey, that he was hide as a lookout while
10 they robbed the victim of drugs.

11 He also indicated at that point that Simmons and
12 Bailey went to the door and Simmons forced the door
13 open and shot the victim after all the -- after all
14 that they fled.

15 MR. GALMORE: Your Honor?

16 THE COURT: All right. So that's the tape that
17 you have?

18 MR. VON HERRMANN: Yes, sir.

19 THE COURT: Now, was the defendant under arrest
20 at the time?

21 MR. VON HERRMANN: Yes, sir, he was.

22 THE COURT: Was he hearing his Miranda rights?

23 MR. VON HERRMANN: Yes, sir, he was.

24 THE COURT: All that on this tape?

25 MR. VON HERRMANN: Yes, sir.

1 THE COURT: Was it any way get -- well, take --
2 might can look at -- Mr. Galmore, you admit those are
3 the same as such he's given the Miranda rights?

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

5 THE COURT: I think however before I do
6 anything, if you would sir, step down if you would
7 sir, back up here. Please don't discuss your
8 testimony. All right. How about your witness, Mr.
9 Von Herrmann. Be prepared to take his testimony of
10 this statement.

11 MR. VON HERRMANN: Detective Lewis be called to
12 the stand, Your Honor.

13 JOHN LEWIS, after being duly
14 sworn, testified as follows:

15 THE COURT: All right, sir.

16 DIRECT EXAMINATION

17 BY MR. VON HERRMANN:

18 Q Detective Lewis --

19 THE COURT: I want to know the conditions of the
20 statement and that type of thing.

21 MR. VON HERRMANN: Thank you, Your Honor.

22 BY MR. VON HERRMANN:

23 Q Detective Lewis, on October 12th, 2004, around
24 2:30 did you have an opportunity to interview Michael Carr
25 concerning the case that we're here on today?

1 A I did.

2 Q And did you properly mirandize him?

3 A I did.

4 Q And was that prior to any questions that you asked?

5 A It was.

6 Q And did you do that consistent with your departmental
7 policy?

8 A Yes.

9 Q Did he indicate to you that he understood his rights?

10 A He did.

11 Q Did he indicate to you that he wished to make a
12 voluntary statement?

13 A He did.

14 Q At what -- at -- that point did you have -- were you
15 ensuring that the videotape -- or was that videotaped,
16 this particular interview?

17 A The interview was recorded, audio and video.

18 Q Did you have another detective in there present with
19 you?

20 A In the beginning I believe I started on my own and
21 then in the middle of the interview one of my other
22 partners came in and assisted in the interview.

23 Q During the course of this interview did you deprive
24 this defendant of any rights he had such as the ability to
25 use the restroom, food, water, anything like that?

1 A No, sir.

2 Q Did you promise him anything for the statement?

3 A No, sir.

4 Q Threaten?

5 A No, sir.

6 Q Coerce him?

7 A No, sir.

8 Q Did he indicate to you at any time during this
9 statement that he didn't wish to continue on?

10 A No, sir.

11 Q Were you doing this and did you explain to him it was
12 during the -- the conduction of an investigation into a
13 murder?

14 A I don't know if I ever told him that it was involving
15 a murder, but it would have been involving a criminal
16 investigation.

17 Q Did he indicate -- understand that he was under
18 arrest at that point?

19 A Yes, sir.

20 Q Did he indicate to you--

21 THE COURT: What was he under arrest for? He
22 was under arrest, he had to be arrested for
23 something. What was it?

24 THE WITNESS: Well, it would have been for
25 this -- for this case, but I didn't specifically tell

1 him what I was questioning him about.

2 *THE COURT:* He was under arrest for murder?

3 *THE WITNESS:* Yes, sir.

4 BY MR. VON HERRMANN:

5 Q And in this particular case -- so obviously you heard
6 some of the statements he made. Did he make the statement
7 to you -- did he agree to make a statement to you at that
8 time?

9 A Yes, sir.

10 Q And in the beginning did he indicate to you -- or
11 tell the Court what he indicated to you.

12 A Can I have my notes?

13 Q Sure.

14 *THE COURT:* Mr. Von Herrmann, you don't
15 necessarily need to have to admit it, now. I just
16 want to make sure that question this witness for
17 impeachment purposes that the question of the witness
18 is a free and voluntary statement made and
19 inconsistent with what he said today.

20 MR. VON HERRMANN: Okay. Perhaps -- perhaps I
21 can get through it a little quicker this way.

22 BY MR. VON HERRMANN:

23 Q Did he initially indicate to him, indicate to you
24 that he was not involved in this, had no information with
25 regards to the case?

1 A That is correct.

2 Q And then did he later change that story to say that
3 he knew there was a robbery planned and that his job then
4 was as a lookout and that other individuals had gone to
5 the crime scene and shot the victim Joe Patterson?

6 A That is correct.

7 Q And that would be in -- inconsistent with what he
8 testified earlier?

9 A Yes, sir.

10 MR. VON HERRMANN: Your Honor, I believe that's
11 all.

12 THE COURT: Do you have a card on you that
13 indicates what you read him as the Miranda rights?

14 THE WITNESS: I have the original copy of the
15 Miranda form.

16 THE COURT: All right. If you would give it to
17 the Court and let's -- if he identifies it, let's
18 mark it as a Court Exhibit with right to copy and
19 then give the original back.

20 MR. VON HERRMANN: Your Honor, I'd like to have
21 at time -- do I have the original? I do, Your Honor.

22 THE COURT: Show that to Mr. Galmore and see if
23 he agrees that's an accurate, true copy of the
24 original.

25 MR. VON HERRMANN: He does, Your Honor.

1 THE COURT: Do you?

2 MR. GALMORE: Yes, sir.

3 THE COURT: All right. That's a Court
4 Exhibit 1.

5 (Whereupon, Court's Exhibit No. 1 was marked for
6 identification only.)

7 THE COURT: Mr. Galmore, do you have any
8 questions of this witness?

9 MR. GALMORE: No, sir, Your Honor.

10 THE COURT: All right. For purposes of this
11 hearing you say you have a copy of the statement? Or
12 was it on--

13 THE WITNESS: Video.

14 MR. VON HERRMANN: Videotape, Your Honor.

15 THE COURT: What if you put it in as a Court
16 Exhibit at this time?

17 MR. VON HERRMANN: Yes, sir.

18 THE COURT: It's necessary at some point as an
19 exhibit, you may do so. Is that -- is that--

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

21 THE WITNESS: That's the video recording.

22 THE COURT: Any objection, Mr. Galmore, as a
23 Court Exhibit?

24 MR. GALMORE: No, sir, Your Honor.

25 THE COURT: All right.

1 (Whereupon, Court's Exhibit No. 2 was marked for
2 identification only.)

3 *THE COURT:* All right. You may step down, sir.
4 (Witness left the stand.)

5 *THE COURT:* Mr. Diggs, I really didn't see any
6 questions, you would have any standing.

7 *MR. DIGGS:* Your Honor, I don't have.

8 *THE COURT:* All right. Then therefore I now --
9 I find that the statement given -- any other
10 questions of you, Mr. Galmore?

11 *MR. GALMORE:* No, sir.

12 *THE COURT:* I find the statements given to this
13 officer was freely and voluntarily given and was
14 given also after the Miranda rights were rendered to
15 the defendant and he understood the Miranda rights
16 and gave the statement freely and voluntarily after
17 being informed of his rights.

18 Now, didn't take long, did it? Fine. All
19 right. Now, if you would, sir, you want to step back
20 up here. Sir, Court Reporter tells me she needs to
21 go make a phonecall, so you stay there for a second.
22 Just don't discuss your testimony.

23 All right. We will take about five minutes.
24 Time for you to get refreshed and go. We will take a
25 break. Take about five minutes, no more than that.

1 (Whereupon a recess was had.)

2 THE COURT: Come on up, if you would please, Mr.
3 Carr.

4 (Witness Carr resumed the stand.)

5 THE COURT: Okay. Bring the jury in.

6 (Jury entered the courtroom.)

7 THE COURT: You can proceed. You may proceed.

8 MR. VON HERRMANN: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. VON HERRMANN:

11 Q Mr. Carr, back on October 12th, 2004, you were
12 interviewed by Detective Lewis; weren't you?

13 THE COURT: Got to answer.

14 THE WITNESS: Yes, sir.

15 BY MR. VON HERRMANN:

16 Q And during that interview you told Detective Carr
17 or -- excuse me -- Detective Cox and Detective Lewis, you
18 indicated to them that you were hired to look out while
19 others went and robbed them of drugs; weren't you -- did
20 you?

21 A I wasn't hired.

22 Q No, sir. Just please answer the question yes or no.

23 A No.

24 Q You did not tell them that?

25 A I wasn't hired.

1 Q No, sir. The question is, did you tell them that you
2 were hired to be a lookout while they robbed the victim?

3 A If you use the word hired as in -- in another way, I
4 will answer the question. I'm not going to answer the
5 question. I wasn't hired.

6 THE COURT: Mr. Carr, you can answer his
7 question and then if you wish to explain what you
8 meant by it, you can do that, sir.

9 THE WITNESS: Yes.

10 BY MR. VON HERRMANN:

11 Q Go ahead and explain it.

12 A I was not hired. I was asked to be asked to be -- be
13 in--

14 Q So there was a plan to rob him?

15 A It was a lot I told him.

16 Q You lied to the police about you being involved in a
17 plan to rob?

18 A Because he told me if I don't tell him anything, I'm
19 going to get 30 years in prison for something I didn't do.

20 Q You indicated to him at that time that Simmons forced
21 the door open, the front door, kicked the door in; didn't
22 he?

23 A Yes, I did tell him that.

24 Q And you indicated that Simmons was the one that shot
25 the victim?

- 1 A Yes, I did tell him that.
- 2 Q And that y'all all fled the scene?
- 3 A Yes, I did.
- 4 Q And you indicated to him that I know there was a
- 5 shooting.
- 6 A Yes, I did tell him.
- 7 Q And I know the door was kicked in?
- 8 A Yes, I did tell him that.
- 9 Q And I heard shots?
- 10 A Yes, I did.
- 11 Q And I jumped down the stairs, went through the
- 12 apartments in the back?
- 13 A Yes, I did.
- 14 Q And they paid me to watch out?
- 15 A Yes, I did.
- 16 Q And he was going to rob the guy for a pound?
- 17 A Yes, I did.
- 18 Q And he'd pay us afterwards?
- 19 A Yes, I did.
- 20 Q That I hadn't been smoking or doing drugs?
- 21 A Yes, I did.
- 22 Q And that I did not know the victim?
- 23 A Yes, I did.
- 24 Q Those are all things that you told back in October --
- 25 A No.

1 Q -- of 2007. In September?

2 A Two things one time. September.

3 Q But they're all things you said back--

4 A Yes.

5 MR. VON HERRMANN: No further questions, Your
6 Honor. Thank you.

7 THE COURT: Redirect, counsel?

8 REDIRECT EXAMINATION

9 BY MR. GALMORE:

10 Q Mr. Carr, why did you make those statements to
11 Detective Lewis?

12 A Because Mr. Lewis told me if I don't give him
13 something on this case, which he told me already that he
14 been had it out for me and also had pictures of me that I
15 would do 30 years in jail for murder. So I told him
16 something thinking that I -- after I told him that, I was
17 going to go back to where they pick me up from.

18 Q But they--

19 A Didn't turn out to be that.

20 Q Said what you told Detective Lewis in September was
21 not true?

22 A No, sir, it wasn't.

23 Q Thank you.

24 THE COURT: Mr. Diggs, sorry, but did you want
25 to ask him anything?

1 MR. DIGGS: I don't have anything further.

2 THE COURT: Okay. Anything further?

3 MR. VON HERRMANN: No, sir, Your Honor.

4 THE COURT: Okay. You may step down, sir.

5 THE WITNESS: Thank you.

6 (Witness left the stand.)

7 THE COURT: Mr. Galmore, any other witnesses?

8 MR. GALMORE: No, sir.

9 THE COURT: All right. Defense rests. Any
10 rebuttal or reply witnesses from the State?

11 MR. VON HERRMANN: Your Honor, can we approach?

12 THE COURT: Yes, sir.

13 (Whereupon a bench conference was held.)

14 THE COURT: Ladies and gentlemen of the jury,
15 I'm going to let you go home. Tomorrow, is 9:00 okay
16 for y'all? I know we don't start at nine, but really
17 we have other things to get going and no sense in
18 bringing you in. Also you can enjoy whatever goodies
19 the Clerk has.

20 But is 9:00 okay with everybody? What we plan
21 to do with everybody is that maybe one short witness
22 up and after that we're going to give you the case by
23 having the attorneys give their closing arguments and
24 my charge on the law.

25 I'm anticipating sometime around 11:00 or a

1 little bit after, 11:30 the case will probably be in
2 your hands about that time. So if everyone is
3 prepared for nine, we will just start at nine
4 tomorrow.

5 Please do not discuss this case at all. I have
6 not noticed anyone in the press here, but just be
7 safe at this point in time, we're almost to the end
8 of the case, don't look at any local papers tomorrow.
9 Let's just don't take a chance of that.

10 So come on in tomorrow morning and the case will
11 be in your hands sometime just before lunch or after
12 lunch at that time. Okay? See you tomorrow morning.
13 Have a good evening.

14 (Jury left the courtroom at 6:25 p.m.)

15 THE COURT: Okay. I will take up motions
16 tomorrow, but since we're almost at the conclusion of
17 the case regarding charges, obviously I have my
18 standard charge regarding the jury itself, reasonable
19 doubt and those type of things.

20 You all are welcome to view it and my Clerk has
21 as far as the term reasonable doubt and define it --
22 the Victor v Nebraska and State v Manning, both of
23 those together.

24 Obviously circumstantial evidence, State v
25 Grippon, I think wouldn't be appropriate in this

1 case.

2 The defendants are charged with murder. I don't
3 see here where any fact scenario, and if so, please
4 correct me, could end up with a finding of any lesser
5 charge of voluntary or involuntary, there is no --
6 there is no evidence that I gleam, the juror -- in
7 that regard.

8 Mr. Von Herrmann, Mr. Diggs, Mr. Galmore, in
9 that -- on that issue only, do y'all see anything...

10 MR. VON HERRMANN: No, Your Honor.

11 MR. DIGGS: I don't know. I was trying to
12 torture the testimony with twist -- maybe construe
13 would be a better word, the testimony of Mr--

14 THE COURT: Fully examine.

15 MR. DIGGS: Yes, sir, the extent to how the
16 shooting occurred, see if -- manslaughter situation
17 out of that. Not sure that I can do that. Unless
18 the Court can think of--

19 THE COURT: I don't let any -- other evidence I
20 will charge them, just trying to think -- seem like
21 each case the other says that the other one, you
22 know, intentional killing without -- no provocation
23 or anger or any type of emotion going on. Each of
24 them says the other did it. Mr. Galmore?

25 MR. GALMORE: I would say out of an abundance of

1 caution perhaps we should look--

2 *THE COURT:* Then you tell me under what fact
3 scenario they can come up with that.

4 *MR. GALMORE:* I can't say that. No, out of a
5 factual...

6 *THE COURT:* All right. Then whatever charges
7 that the State requests other than what I
8 mentioned -- and I need the indictment, guilty or not
9 guilty, murder, the Grippon as far as circumstantial
10 and standard charge, expert witnesses. I mean,
11 it's -- testified.

12 Also I could go ahead and do the -- I guess I
13 would have to do voluntariness of the statements
14 since you did use that for impeachment purposes
15 regarding Mr. Carr. Anything else from the State?

16 *MR. VON HERRMANN:* Felony murder, Your Honor,
17 and the hand of one.

18 *THE COURT:* That's what we're going to get
19 into -- hand of one, hand of all. Charge that. You
20 want to take that book and see what you want to come
21 up with as far as what you think is the appropriate
22 charge?

23 *MR. VON HERRMANN:* For felony murder?

24 *THE COURT:* Yes.

25 *MR. VON HERRMANN:* Your Honor, the standard.

1 THE COURT: I mean, hasn't --

2 MR. VON HERRMANN: I was going to say the felony
3 murder charge that I know the Court used in its
4 standard charge book is fine with me.

5 THE COURT: Have you seen whether the standard
6 charge--

7 MR. GALMORE: Probable and natural consequence
8 of the time.

9 THE COURT: Have you seen murder, the standard
10 judicial charge book?

11 MR. VON HERRMANN: I have, but I'm not sure it's
12 the one you have.

13 THE COURT: I was wondering if you have if I
14 could look through it, might -- Mr. Diggs, whatever
15 requests do you have?

16 MR. DIGGS: I would like to comment in the
17 morning on this felony murder issue. I still think
18 take the position we don't have felony murder here
19 and that felony simply doesn't supplant the requisite
20 malice, malicious intent.

21 It is merely evidence to give rise to the
22 inference should the jury choose to do that. So
23 that's how I would approach that. Of course, we
24 would ask for a charge on mere presence, not guilty
25 for being present -- also ask for a charge under--

1 THE COURT: Of what?

2 MR. DIGGS: Broad.

3 THE COURT: Charge on the broad--

4 MR. DIGGS: Even if he had combined--

5 THE COURT: Is there a legal case on that issue?

6 MR. DIGGS: I can get you one.

7 THE COURT: I don't think you could. You--

8 MR. VON HERRMANN: Your Honor, I think he was
9 talking about being drawn from a conspiracy and you
10 actively put -- there is no conspiracy here. I mean,
11 I had no problem with mere presence.

12 MR. DIGGS: Says he was involved, he denied --

13 THE COURT: Well, any way, you see what you got.
14 I'm not sure -- I thought you were charge the broad
15 house or something, but anyhow, mere presence I think
16 both you're entitled to obviously.

17 MR. DIGGS: And if he went over there and robbed
18 and then he abandoned that scheme with the -- clearly
19 the new case out should Mr. Carr prior to actions
20 that set the criminal -- in motion, we would be
21 entitled to -- wouldn't have, you know, as a result
22 of that, hand of one is the hand of all would no
23 longer be applicable. Felony murder wouldn't be
24 applicable under any -- and malice wouldn't be.

25 THE COURT: You find something that you wish

1 to --

2 MR. DIGGS: Okay.

3 THE COURT: -- you want me to charge in that
4 regard. Mr. Galmore?

5 MR. GALMORE: Your Honor, I think you covered
6 all the charges I was going to ask.

7 THE COURT: I assume you want mere presence
8 also? All right. All right. Standard charge,
9 expert, mere presence, murder, felony murder,
10 standard, hand of one hands of all -- hand of all.

11 MR. VON HERRMANN: Your Honor, my understanding
12 of the law as well that under felony murder rule we
13 have to define the underlying felony four especially.

14 THE COURT: Well, you're right.

15 MR. VON HERRMANN: Would have to--

16 THE COURT: Robbery or burglary.

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

18 THE COURT: So we going to discuss that more
19 tomorrow I would think. All right. Anything else
20 from anyone tonight? Mr. Diggs, at this time, sir,
21 the State's case has put up and I deny your motion
22 for directed verdict because of that.

23 That means at this stage I feel this is an issue
24 for the jury to decide and it has reached the point
25 where I feel I need to revoke your client's bond and

1 until this case is disposed of tomorrow. I told him
2 that -- told him that any way when the case began.

3 So Mr. Bailey will be in custody here until this
4 case is resolved which I assume will be sometime
5 tomorrow. I'd like to hand to the Clerk, though,
6 these two indictments. Also hand...

7 (Judge conferring with Clerk.)

8 THE COURT: All right. Anything else from
9 anyone?

10 MR. VON HERRMANN: No.

11 MR. DIGGS: No.

12 MR. GALMORE: No.

13 THE COURT: See y'all tomorrow at 9:00.
14 Everyone have a good night.

15 (Court in recess for the evening.)

16 ***** July 26th, 2007 *****

17 THE COURT: Ready for your case in rebuttal?

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

19 THE COURT: Did you give a copy to Mr. Diggs and
20 to Mr. Galmore of your request to charge on felony
21 murder?

22 MR. VON HERRMANN: Yes I did, Your Honor.

23 THE COURT: Okay. Right now -- my assistant
24 look those cases up. Mr. Diggs and Mr. Galmore, do
25 y'all have something y'all wanted to hand me on those

1 other charges?

2 MR. DIGGS: No, we have got case off -- had it
3 on the computer but computer station I have access to
4 doesn't have a printer on it. It's State v Dane,
5 2003 Court of Appeals, South Carolina that explains
6 and gives that drawn instruction that I spoke about
7 yesterday afternoon.

8 THE COURT: Okay.

9 MR. DIGGS: With respect to his requests to
10 charge I have several objections.

11 THE COURT: Well, we can address it later. I
12 just wanted to let y'all have a copy of it.

13 THE COURT: Everyone is here then, the name of
14 your witness?

15 MR. VON HERRMANN: Steven Spencer, your honor.

16 THE COURT: And his position -- what -- does he
17 work for the county or...

18 MR. VON HERRMANN: No, sir. He was one of the
19 individuals that were in front of Mr. Patterson's
20 home the night of the shooting and he witnessed the
21 car ride down the area, turn around and come back.

22 He talked to Jason Robinson, and then a few
23 minutes later he heard the shooting and saw the two
24 individuals running from the apartment.

25 THE COURT: This is where he rebut...

1 MR. VON HERRMANN: To rebut the defendant
2 Bailey's accusation that they pulled and parked in
3 front of Joe Patterson's house in the lane there and
4 ran away from that area. And also that when they
5 left he was half-way down the stairs by the time Mr.
6 Carr caught up to him.

7 THE COURT: Okay. Mr. Diggs?

8 MR. DIGGS: Your Honor, I respectfully suggest
9 it's pretext. This witness was a fact witness that
10 should have been called in the State's case in Chief.
11 There's no material facts that would be rebutted by
12 the reply witness, proposed witness, so we would
13 object.

14 THE COURT: All right.. Assuming he testifies to
15 this, would be a little different than what Mr.
16 Bailey said in his testimony.

17 MR. DIGGS: But you know what, not really. It's
18 not going--

19 THE COURT: Tell me why it isn't.

20 MR. DIGGS: He's already given a statement to
21 Detective Cox back on the 28th. He indicated at that
22 time he saw -- saw two people running from the scene.
23 He didn't see them emerge out front, so he assumed
24 that they went into the back.

25 That's what he said on the 28th of September,

1 years ago. Now what he's going to say, I don't know,
2 but I would suggest that -- wants to use his
3 testimony.

4 *THE COURT:* You have the statement ready just in
5 case he does say something?

6 *MR. DIGGS:* Your Honor, I have the notes that
7 the detective made and put into the Court. That's
8 where I got the information as to what was said.

9 *THE COURT:* Well, it's like 613 you ask him did
10 he say such and such and I assume he had detective
11 where he could come by -- want to give some
12 assistance there?

13 *MR. DIGGS:* Yes, sir, I do.

14 *THE COURT:* What is the name of the detective?

15 *MR. DIGGS:* Detective Cox.

16 *THE COURT:* Is he available, Mr. Von Herrmann?

17 *MR. VON HERRMANN:* Best of my knowledge I can
18 have one of my officers or somebody in my office
19 call.

20 *THE COURT:* Well, have somebody call and make
21 sure he's on the way here any way just in case. Mr.
22 Galmore, any comments you have?

23 *MR. GALMORE:* No, sir, we don't have -- take a
24 position on this.

25 *THE COURT:* All right. Bring the jury out,

1 please.

2 (Jury entered the courtroom at 9:42 am.)

3 THE COURT: All right, ladies and gentlemen.
4 We're ready to proceed at this time. The State has
5 one witness in rebuttal and that would conclude the
6 evidence in this case I think. If not, we'll
7 continue on to that degree. All right. Mr. Von
8 Herrmann, your witness, sir.

9 MR. VON HERRMANN: Thanks, Your Honor. The
10 State calls Steven Spencer to the stand.

11 THE COURT: All right. Come around.

12 STEVEN SPENCER, after being duly
13 sworn, testified as follows:

14 THE COURT: Your witness.

15 MR. VON HERRMANN: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. VON HERRMANN:

18 Q Mr. Spencer, on September 28th of 2004 in the early
19 morning hours late or late night, did you tell me if you
20 were at Turtle Cay Apartments?

21 A Yes, sir, I was.

22 Q And what were you doing at Turtle Cay Apartments?

23 A I was out there with a friend of mine, Jason
24 Robinson. We went out there to try to get his wife to
25 come back to the hotel with him.

1 Q And who was she staying with?

2 A She supposed to been at her -- her grandmother's and
3 her mom's, but she was at her -- another friend's house
4 which is a few doors down.

5 Q And did she live directly across from Joe Patterson?

6 A Yes.

7 Q Did you observe a car -- were you outside or inside?

8 A I was outside sitting in my truck.

9 Q And did you observe her car drive, a Honda car drive
10 down past you?

11 A Yeah, a car drove by, went on down, turned and came
12 back.

13 MR. DIGGS: Your Honor, we would object at this
14 point and approach.

15 THE COURT: Yes.

16 (Whereupon a bench conference was held.)

17 THE COURT: Please proceed.

18 BY MR. VON HERRMANN:

19 Q Now, please tell the jury again how -- what you saw
20 the car do.

21 A It went down towards end of the parking lot, turned
22 around and came back down.

23 Q And when it came back, what happened?

24 A They stopped, the car stopped behind us and Jason got
25 out and went and talked to 'em, to the guy who was

1 driving, which was apparently his brother-in-law.

2 Q That Duriel Simmons?

3 A Duriel, yes.

4 Q Did you ever get out of the car and go talk to them?

5 A No, sir.

6 Q After that conversation -- how long did that
7 conversation last?

8 A Probably a few minutes.

9 Q What did Jason do when the conversation quit?

10 A He came back to the truck and--

11 Q What happened to the car? Where did the car go?

12 A The car took off and went out the parking lot.

13 Q Did the car ever park in the Turtle Cay Apartment
14 parking lot?

15 A No, not that I saw, no.

16 Q A few minutes later did you hear something?

17 A All I heard was a bang, bang, then about a second or
18 two later another bang.

19 Q And did you look up at Joe Patterson's apartment at
20 that time?

21 MR. DIGGS: Would object to the leading.

22 THE COURT: I mean, that was a leading question,
23 Mr. Von Herrmann. Just asked him what he can testify
24 to.

25 BY MR. VON HERRMANN:

1 Q What did you do?

2 A Well, first thing I done, I was -- I ducked because
3 the first two bangs scared the crap out of me, and -- but
4 when I raised up, I -- I seen a couple guys running out of
5 the apartment after -- after the third bang. One of them
6 was probably a few seconds ahead.

7 Q How many steps would you say ahead of the other?

8 A Probably three or four, not much more or less.

9 Q And was that what you know Joe Patterson's apartment
10 or do you know it to be involved in that, is that the
11 apartment you saw them running out of?

12 A Yes, sir.

13 Q And which way did they run?

14 A They ran down the steps and towards the back of the
15 apartment complex.

16 Q Did you ever see those individuals again?

17 A No, sir.

18 MR. VON HERRMANN: No further questions, Your
19 Honor.

20 THE COURT: Mr. Diggs?

21 MR. DIGGS: May it please the Court.

22 CROSS-EXAMINATION

23 BY MR. DIGGS:

24 Q Mr. Spencer, how are you this morning?

25 A All right.

1 Q Now, you were interviewed on the 28th of September of
2 2004 right after this event; correct?

3 A Yes, sir.

4 Q You were interviewed by Detective Scott Bogart and
5 Detective Cox?

6 A I don't remember their name.

7 Q But a couple of detectives?

8 A Yeah.

9 Q And you gave them basically the same story or
10 recounting as you have given today, correct?

11 A Yes, sir.

12 Q Basically the same thing?

13 A Yes, sir.

14 Q And you told them when they asked you which way did
15 they run, would it be accurate to say that you said, well,
16 I didn't see them again so I assumed they went into the
17 back?

18 A You can pretty much say that because, I mean, the
19 stairways went down towards the back.

20 Q Right.

21 A Towards the back end of the parking lot--

22 Q So after they got out of your field of view, you
23 didn't see where they went?

24 A No, I didn't see where they went.

25 Q Okay. Now, you say that Jason Robinson was with you,

1 Jason Robinson?

2 A Yes, sir.

3 Q And he is the brother-in-law of the fellow he was
4 talking to in the car?

5 A Yes, sir.

6 Q And what was Mr. Robinson doing there?

7 A He was out there to try to get his wife --

8 Q Okay.

9 A -- to come back to the hotel.

10 Q Where was -- where was his wife at that time?

11 A She was at another friend's house, a guy named Willy.
12 I can't think of his last name, sir.

13 Q Okay. Does her mother live there if you know?

14 A Her mother and grandmother live in the apartment
15 where I was parked in front of.

16 Q All right. In fact, it's just a few feet from where
17 Mr. Patterson lives; isn't that true?

18 A That's -- well, the -- Mr. Patterson lives across
19 the --

20 Q Street?

21 A -- parking lot, yes.

22 Q Okay.

23 A And kind of back behind and up.

24 Q Okay. His building is here let's say up where you
25 are and then there's the parking area then here's the

1 building where his mother-in-law resides; correct?

2 A Yeah.

3 Q All right. So when -- you can throw a rock from one
4 balcony to the other?

5 A If you got a good arm, yeah.

6 Q Okay. Now, let me ask you about the two individuals
7 you saw running away. When you heard the sounds, are you
8 testifying that they were shots?

9 A That's what it sound like to me.

10 Q Okay. You feel like you're -- you're safe in telling
11 us under oath that it sounded like shots to you?

12 A Well, it seem like firecrackers, but I mean, a loud
13 firecrackers.

14 Q All right.

15 A That's what I told the detectives.

16 Q And when you heard that sound, could you tell from
17 the direction that it came from?

18 A It came from behind us, sir.

19 Q And what did you do?

20 A Like I said, I ducked at first, then there was a
21 third bang used and second or two later and that's when I
22 kind of raised up and turned back, looked in my back
23 window, sir.

24 Q All right. And how long did you immediately see the
25 two individuals?

1 A The one that just stepping right out the door and
2 started down.

3 Q All right. Let me hold you right there. You saw one
4 person stepping out of the door.

5 A Right then.

6 Q Okay. And then what did you see?

7 A About a second or two later the second person comes
8 running out of the door.

9 Q So your testimony is you saw two people running out
10 the door.

11 A Basically, yes, sir.

12 Q Are you sure about that?

13 A Is that the first one facing right there at the door,
14 coming down.

15 Q All right. And I don't want you to assume. I want
16 you to tell us what you're sure of that you saw and that
17 you remember, okay, because you didn't make that statement
18 on the 28th of September; did you?

19 A Yes, sir.

20 Q Are you sure?

21 A I think so, sir, yes.

22 Q You said you saw two people running away, running
23 down the stairs. I want you to be clear about this. Been
24 three years ago, and I understand that. But I want you to
25 be clear. I want you to be able to tell us you're telling

1 the facts as you remember them as they occurred.

2 A That's basically pretty much what happened.

3 Q All right. Could it have been when you looked up
4 one -- you saw one person running down the stairs and
5 another person coming out of the apartment? Could that
6 have been the scenario?

7 A I don't think so, sir. I mean, they -- they both run
8 full blast coming out the--

9 Q I understand that. But I want you to tell us as best
10 you can where that lead person was when you looked up and
11 saw him for the first time.

12 A Right at the door.

13 Q Right at the door.

14 A Yes. Right there in the doorway I saw--

15 Q You saw him in the doorway? Up on the foyer? Let's
16 look at the apartment housing structure. Okay. Is there
17 Mr. Patterson's apartment or his building?

18 A Not sure. I can't really--

19 Q Does it look like it?

20 A Yeah, I mean all the doubles look the same to me.

21 Q Okay. With respect in -- and we're looking at
22 State's Exhibit 14. Where would you have been with regard
23 to the other items depicted in this photo?

24 A I would have been probably up this way.

25 Q Uh-huh.

1 A And over on this side of the parking lot.

2 Q All right. Now, I want you to tell us this as best
3 you can. And if you can't remember, that's fine. When
4 you first looked up and you saw a person running, is that
5 what your testimony is?

6 A Yeah.

7 Q Can you remember exactly where they were when you
8 first saw them?

9 A It been about right over here, in the doorway there.

10 Q Okay. Point for me again. Come down and show me the
11 jury where--

12 THE COURT: Mr. Spencer, when you step down,
13 there's one area of the box where we can hear you,
14 but other than that if you walk off I can't hear you
15 and this lady right here has got to hear you, so make
16 sure when you speak you're speaking to her basically.
17 Okay, sir?

18 THE WITNESS: Yes, sir.

19 THE COURT: Got to take down what you say.
20 Speaking to her.

21 THE WITNESS: Okay.

22 BY MR. DIGGS:

23 Q All right. When you turned around to look at the
24 sounds that you had heard, show the jury the best you can
25 at this point where you believe the man was first time you

1 saw him. Come around, sir, so everybody can see.

2 THE COURT: I can't hear you, sir.

3 THE WITNESS: The person would be about right
4 here, sir. Right there near the doorway.

5 BY MR. DIGGS:

6 Q Okay.

7 A The side --

8 Q The driveway of...

9 A -- this apartment right here.

10 Q So standing up here on the foyer?

11 A It's like right here in the foreway (sic).

12 Q All right. Okay. And you didn't tell either of the
13 detectives that on the night that you were interviewed;
14 isn't that true?

15 A I'm not sure, sir.

16 Q All right. All right. Well, I'm going -- I'm going
17 to call the detectives, okay, and have them repeat for us
18 what you told them that night. And let me ask you this.
19 Is your memory better now than it was on the 28th of
20 September of '04?

21 A No.

22 Q More?

23 A No, sir.

24 Q All right. Your -- your perception of the events
25 would have been better preserved in your memory at that

1 time than they are today three years later. Would you
2 agree with that?

3 A Pretty much, sir.

4 Q All right. And do you believe that you would defer
5 to what your statement was on the 28th of September of
6 2004 as opposed to now?

7 A They're both probably pretty much the same.

8 Q Okay. But -- but with respect to details like that?

9 A I'm--

10 THE COURT: Remember now, he is still asking.

11 THE WITNESS: I'm not sure. I mean, sometimes
12 you remember things later on that you don't try to
13 remember then.

14 BY MR. DIGGS:

15 Q All right. And so on the 28th of September of 2004
16 you weren't trying to remember when you first saw them?

17 A I was scared, sir. I just -- I just wanted to get on
18 out of there and get home.

19 Q All right. I understand that, Mr. Spencer, but you
20 were trying to be as truthful with the police as you could
21 be; were you not?

22 A Yes, sir.

23 Q And you did be as truthful as you could be; did you
24 not? You told them the truth?

25 A Yes. Yes, sir.

1 Q All right. And you told them everything that you
2 could think of?

3 A Yes, sir.

4 Q All right. That's the only point I think... that's
5 all -- that's all I have at this time.

6 THE COURT: Mr. Galmore?

7 CROSS-EXAMINATION

8 BY MR. GALMORE:

9 Q Good morning, Mr. Spencer. How are you?

10 A I'm doing all right.

11 Q You said you got a telephone call, is that correct,
12 to go pick up Mr. Robinson?

13 A Yes, he had called my house.

14 Q About what time was that?

15 A I'm not sure. I know probably after midnight. I
16 don't know.

17 Q Was that unusual for you to go pick somebody up at
18 midnight?

19 A Well, I always try to help my friends out as much as
20 I can.

21 Q Did you--

22 A It don't matter.

23 Q Did you have to work the next day or anything?

24 A I -- I can't remember what day it's actually on. I
25 mean, if it's during a weekday or weekend, so I don't...

1 Q But you went and picked him up?

2 A I went and picked him up, yes.

3 Q Okay. And I think you testified once you got there
4 Mr. Robinson spoke to people in the car; is that...

5 A I know he spoke to his brother-in-law because I asked
6 him who it was, yes.

7 Q Nothing unusual about that?

8 A No.

9 Q Then the next thing you know you heard the bang,
10 bang, bang?

11 A Yes, sir.

12 Q Okay. Now after that, you were interviewed by the
13 police; is that correct?

14 A Yes, sir, about 11 and a half hours probably.

15 Q You said 11 and a half hours?

16 A Yes, sir.

17 Q You were with them for 11 and a half hours?

18 A Yes, sir.

19 Q Okay. But the interview wasn't 11 and a half?

20 A No, not the interview.

21 Q Okay. What else did you do with them while you were
22 there for 11 and a half hours?

23 A They did a ballistics test on my hands and
24 fingerprinted me. Basically everything they needed me to
25 do.

1 Q So they swabbed your hands?

2 A Yeah.

3 Q And did the test on your hands?

4 A Took my clothes and everything, everything I was
5 wearing.

6 Q They took your clothes into custody also?

7 A Yeah.

8 Q Isn't it true they took your truck also?

9 A Truck and rifle I had.

10 Q And they took your gun as well, your rifle?

11 A Yeah, which hadn't been touched in probably over a
12 year.

13 Q They collected a lot of evidence from you?

14 A Yes, sir.

15 Q You got any of that stuff back?

16 A I got the truck back, but that is the only thing I
17 ever got back.

18 Q Okay. Thank you, Mr. Spencer. No further questions.

19 THE COURT: Redirect?

20 MR. VON HERRMANN: No further questions.

21 THE COURT: Y'all would, please approach while
22 they step down. All right. Mr. Diggs, do you have
23 other questions?

24 MR. DIGGS: Just briefly.

25 RECROSS-EXAMINATION

1 BY MR. DIGGS:

2 Q Mr. Spencer, you can -- going back to your September
3 the 28th statement, did you -- did you give a statement to
4 detective Bogart and Cox?

5 A Yes, sir.

6 Q To the best of your recollection?

7 A Yes.

8 Q At that time did you tell them you saw two people
9 coming out of the apartment?

10 A Yes, sir.

11 Q You say you did?

12 A I'm pretty sure I did, sir, yeah.

13 Q Well, going to have to call them to show--

14 THE COURT: Why don't you just ask him, sir, the
15 question.

16 BY MR. DIGGS:

17 Q What did you tell him?

18 A I told him I'd seen two people running from the --
19 the apartment.

20 Q Okay. All right. That's -- that's what you told
21 them?

22 A I think so, pretty much, sir, yes.

23 Q All right. Good.

24 MR. DIGGS: That's all I have, Your Honor.

25 THE COURT: Come on up here.

1 (Whereupon a bench conference was held.)

2 THE COURT: Any other questions?

3 MR. VON HERRMANN: None from the State, Your
4 Honor.

5 THE COURT: All right. You may step down, sir.

6 (Witness left the stand.)

7 THE COURT: Any other rebuttal witnesses?

8 MR. VON HERRMANN: No more, Your Honor.

9 THE COURT: Anything anyone else has, anything
10 else to bring up now after the testimony of this
11 witness and the redirect and the re-cross?

12 MR. GALMORE: We have got some motions, Your
13 Honor.

14 THE COURT: I'm talking about witnesses.

15 MR. GALMORE: Oh, no, sir.

16 MR. DIGGS: I'm sorry.

17 THE COURT: You have any other witnesses you
18 want to call after the re-cross and redirect of this
19 witness? Anybody have any other witnesses?

20 MR. DIGGS: No, Your Honor.

21 THE COURT: Okay. All right. Ladies and
22 gentlemen of the jury, that will conclude the
23 testimony in the case. Let me now go over some legal
24 matters with them and we'll bring you back out to
25 have the closing arguments and my charge on the case.

1 If you would, if you want to step outside, you
2 may do so. It's going to be at least 20 minutes or
3 so before we're ready. But please do not discuss the
4 case, though. It's not your case yet to decide.
5 Please step to the jury room.

6 (Jury left the courtroom at 10:04 am.)

7 *THE COURT:* When I called everyone to the bench
8 I asked Mr. Diggs if he wanted to ask this witness
9 something, see if he refuted or changed from some
10 prior testimony.

11 And then Mr. Diggs asked other questions and
12 then -- and they came back had that second bench
13 conference this morning, Mr. Diggs said now he did
14 not wish to call the other officer, Officer Cox, so
15 we're ready to proceed. I just wanted to make sure
16 everybody understands. So motions at this time. I'm
17 sorry.

18 *MR. DIGGS:* Well, Your Honor, we still -- we
19 renew, I would ask that the Court to strike all the
20 testimony because I would submit it's not proper
21 reply.

22 *THE COURT:* I'm sorry. Also the first bench
23 conference Mr. Diggs mentioned he felt this witness
24 was cumulative to other witnesses and would not be in
25 rebuttal.

1 Mr. -- Mr. Von Herrmann said the difference with
2 this witness does not have a conviction or a deal or
3 anything of that nature with the State and his
4 rebuttal testimony that the defense gave and for that
5 reason I permitted him to testify.

6 I did note the objection, Mr. Diggs, of the
7 testimony of Mr. Spencer. Now, motions by the State.

8 MR. VON HERRMANN: No motions, Your Honor.

9 THE COURT: Okay. Motions by the defendant Mr.
10 Bailey?

11 MR. DIGGS: Your Honor, we renew the motion for
12 directed verdict now that all the evidence has been
13 submitted. No rational trier of fact could conclude
14 guilt on behalf of Mr. Bailey beyond a reasonable
15 doubt.

16 The same reasons that were stated at that time
17 very eloquently by Mr. Galmore, Judge, we ask you to
18 reconsider that motion and grant it to dismiss the
19 murder charge with respect to Adam Bailey.

20 THE COURT: Okay. I feel the evidence is
21 sufficient as was the end of the State's case for the
22 jury to then make its own decision, so I deny your
23 motion. Mr. Galmore, motions?

24 MR. GALMORE: Yes, sir. I would make a motion
25 for directed verdict also. The basis is the same as

1 remained during our prior motion for directed
2 verdict.

3 At the conclusion of all the evidence at this
4 point there's still no direct evidence at this point
5 pointing to my client and would ask the Court to take
6 that into consideration and grant our motion at this
7 time.

8 *THE COURT:* All right. I feel that the evidence
9 is sufficient for a jury to make the decision one way
10 or the other, but it's sufficient to go to the jury
11 for their decision. And I would respectfully deny
12 your motion, Mr. Galmore.

13 *MR. GALMORE:* Yes, sir. Thank you.

14 *THE COURT:* Now, we need to discuss charges.
15 Would you ask my law clerk to come in and bring the
16 legal material with him that I left with him? Did
17 you get your charge on the--

18 *MR. DIGGS:* Your Honor, I have the case here.

19 *THE COURT:* Do you want to look it over first or
20 do you have--

21 *MR. DIGGS:* I looked at it last night. I would
22 submit that it's applicable here.

23 *THE COURT:* You have a copy for Mr. Galmore, Mr.
24 Von Herrmann?

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

1 MR. DIGGS: On the copy that I have given him,
2 Your Honor, is basically on page seven...

3 THE COURT: Page seven of what you gave me?

4 MR. DIGGS: Yes, sir.

5 THE COURT: The last page?

6 MR. DIGGS: No, sir, page four. I'm sorry.

7 THE COURT: In the middle of the page or...

8 MR. DIGGS: Yes, sir, the person completely
9 withdraws from the common design and plan in the case
10 broad and associates under these circumstances that
11 permit the associates to withdraw then a person
12 escapes criminal responsibility for the actions of
13 the associates.

14 I would submit that's applicable here. There
15 are two of them at that point according to
16 Mr. Bailey's testimony, explains to Mr. Carr that
17 it's not going to be a part of, doesn't want anything
18 to do with that and he intends to leave.

19 THE COURT: Are you saying by the fact that the
20 testimony of your client that once they knocked on
21 the door and got no answer, he said let's go?

22 MR. DIGGS: Correct.

23 THE COURT: And I think he testified he started
24 walking down the steps?

25 MR. DIGGS: And that Mr. Carr actually pulled

1 the gun out, he -- he said, what are you going to do,
2 and there were some words exchanged, Mr. Carr called
3 him a couple of names, said in fact you're not
4 getting any of the stuff and Mr. Bailey testified
5 proceeded on down the stairs, that's when he heard
6 the door kicked in.

7 So it clearly was -- was communicated to Mr.
8 Carr under circumstances it was before the events had
9 been committed and it's in time for Mr. Carr to
10 withdraw as well, so we would submit we're entitled
11 to that.

12 *THE COURT:* Mr. Von Herrmann?

13 *MR. VON HERRMANN:* Your Honor, the only
14 difference between this particular case is the
15 testimony of the defendant says that there was no
16 plan. There was no plan to commit robbery, so if
17 he -- he -- either he didn't participate in the
18 robbery or he didn't withdraw.

19 *THE COURT:* But remember the jury can read part
20 of someone's testimony and part of another person's
21 testimony. A jury can believe that -- what if the
22 jury believe they were there to commit the robbery,
23 at least the testimony of the witnesses here have,
24 and then gleamed his part that he decided after no
25 one answered the door he would leave? And Mr. Carr--

1 MR. VON HERRMANN: Your Honor, I believe at that
2 point he passed the point where he would withdraw.
3 He was actually behind the scene they were about to
4 do it, I mean, I think it be kind of--

5 THE COURT: He walked up to the man at the front
6 door and knocked and then left -- if the jury
7 believes what he said.

8 That's not -- if the jury believes that going
9 there to do a robbery, believes the testimony of the
10 witnesses there but believes that once no one
11 answered the door he decided he was not going to be
12 involved in the robbery and he was going to leave and
13 told that to Mr. Carr, and if they believe what Mr.
14 Bailey says Mr. Carr said and Mr. Bailey was leaving
15 when Mr. Carr did what Mr. Bailey says he did, if the
16 jury believes all that, why would they not say that
17 Mr. Bailey was -- was through with the parts --
18 participated in the -- never went inside the
19 building, if they believe him, he was on the steps of
20 the entity.

21 MR. VON HERRMANN: Would be the State's
22 position, Your Honor, that he had begun the
23 participation in the plan, he had done -- they
24 acquired the gun, they had gone to the apartment,
25 they had knocked on the apartment door, they had

1 begun the activity and set the plan in motion.

2 And therefore to withdraw, once you're already
3 in the plan, is not sufficient. Once you have --
4 have begun fulfilling the duties you don't have to
5 actually get to the point of, you know, kicking in
6 the door.

7 *THE COURT:* What were the fact situations in
8 State v Dane?

9 *MR. DIGGS:* Your Honor, my exact portion would
10 be permanent--

11 *MR. GALMORE:* This was an armed robbery with
12 several co-defendants. At some point Dane told one
13 of the co-defendants to go into the store and get the
14 person who was supposed to shoot the store owner.

15 Dane also went into the store itself and was
16 talking with another co-defendant when the shooter
17 came up from behind the store owner and shot him.

18 So Dane's argument is that he withdrew when he
19 was going to get the other guys to leave the store
20 when the shooter came behind the store owner and shot
21 the store owner.

22 *THE COURT:* While the robbery was already --

23 *MR. GALMORE:* Looks like Dane was -- could
24 have--

25 *THE COURT:* This is a Horry County case?

1 MR. GALMORE: No, this is a case from Aiken.
2 See, the store owner ends up going over to talk to
3 Dane and some co-defendants and that's when the
4 shooter comes behind the store owner and shoots him
5 at that point. Dane's argument is that he went into
6 the store to tell the guys, let's go, let's leave.

7 MR. DIGGS: Yeah. So if I'm not mistaken, the
8 situation here wasn't -- had fully withdrawn. The
9 Court does here as indicated -- that withdrawal needs
10 to be communicated, needs to be communicated before
11 the act is committed.

12 Now, with all due respect, the robbery and
13 burglary that is alleged in the indictment hadn't
14 been committed and it hadn't -- for example, standing
15 up there on the door stoop is not a robbery or
16 burglary.

17 That's the point Mr. Bailey be entitled to
18 withdraw from a portion of the testimony, so he did
19 withdraw. Of course, we did maintain he was never
20 involved.

21 But as Your Honor said, some or all of the
22 testimony could be believed with respect to each of
23 the individual witnesses.

24 So if there were a plan to rob and or
25 burglarize, neither of those had occurred at the time

1 of the withdrawal. So clearly be entitled to
2 instruction.

3 MR. VON HERRMANN: But Your Honor, evidence is
4 not that he withdraw from a plan. He said that he
5 was never in the plan. And they can certainly
6 believe part of what a witness says or, you know, all
7 or none of it or other witnesses.

8 THE COURT: Well, they can believe that he was
9 in the plan because other witnesses says he was, so
10 they could disregard any portion that says he wasn't
11 in the plan, they could believe he was in the plan to
12 do the robbery.

13 MR. VON HERRMANN: Correct. But if he was in
14 the plan to do the robbery and they believed that,
15 then he had already -- he was already in the plan, he
16 had begun the operation of the plan.

17 THE COURT: Right. And withdrawal is
18 withdrawing from something he had done. I mean, if
19 he never call withdrawal if he -- if he -- if he
20 hadn't begun the plan, he hadn't begun any activities
21 of withdrawal -- withdraw from.

22 MR. VON HERRMANN: Right. But he had done more
23 than preliminarily riding around. He had formulated
24 the plan, acquired the guns, he approaches the door,
25 they -- one knocks on the door. I tell you what,

1 Your Honor, I will withdraw my objection.

2 *THE COURT:* I tell you. Let's do this, Mr. Von
3 Herrmann. Wait a minute. The -- looking at that
4 case, they were looking at the charge the Judge did,
5 they commented on State v Woods that the -- that
6 the -- that which states that one who has entered a
7 common design to commit a crime escapes
8 responsibility for acts of his associates if before
9 the crime is committed he withdraws entirely from the
10 undertaking and the fact the withdrawal is
11 communicated to his associates under such
12 circumstances as would permit them to take the same
13 action.

14 Instead of a long charge that the Judge -- the
15 trial Judge gave in the case, it seemed to me that
16 the Court basically said that was the charge, but
17 we'll okay this one because of the fact that that
18 case -- you really requesting I charge something from
19 State v Woods I assume, Mr. Diggs?

20 *MR. DIGGS:* Yes, sir. It's not a new -- full
21 extent part of a common law in South Carolina for a
22 long, long time.

23 *MR. GALMORE:* Your Honor, I submit that they are
24 not entitled to a withdrawal charge at all. You go
25 earlier down that page it says a person continues in

1 the common design to not claim withdrawal.

2 I -- I -- and there was testimony that Mr.
3 Bailey left in the car with everybody else, went back
4 to Kareem's house and then the next day hid a gun.

5 I would submit that that is all continuing in
6 the common design, therefore he cannot request the
7 withdrawal charge. If Your Honor sees fit to give
8 him a withdrawal charge, I would ask you to charge
9 that language as well.

10 *THE COURT:* I think you're right, Mr. Galmore.

11 *MR. DIGGS:* Well Your Honor, I would -- to
12 that -- the common design was to rob. That's what
13 all the statements--

14 *MR. GALMORE:* Hiding the gun is furtherance of
15 that -- of that claim.

16 *MR. DIGGS:* It's not -- that's not part of the
17 plan. The part of the plan was to rob.

18 *THE COURT:* Wait. Mr. Galmore -- excuse me,
19 sir.

20 *MR. GALMORE:* Yes, sir.

21 *THE COURT:* Mr. Diggs, the jury could very well
22 believe once again, this is -- and I just -- that you
23 have -- the jury could believe very well, sir, that
24 he fought to stop with the robbery and then decided
25 no, it's done, I'm going to help hide the gun and

1 all.

2 I mean, the jury could believe common actions of
3 everybody's testimony and I think that's
4 appropriate -- appropriate charge.

5 MR. DIGGS: Your Honor.

6 THE COURT: So I'm going to charge it.

7 MR. DIGGS: Please note our objection.

8 THE COURT: Okay.

9 MR. VON HERRMANN: Your Honor, are you going to
10 read the entire--

11 THE COURT: Well, I'm trying to decide right
12 now, Mr. Galmore is kind of -- what I want to read
13 just the -- State v Woods, what the charge that the
14 trial Judge read in that case--

15 MR. VON HERRMANN: Your Honor, the State would
16 request withdraw its objection. I think it would be
17 sufficient -- I believe to read the statement
18 withdrawal charge that was given in Dane.

19 THE COURT: By the -- that seems to be a little
20 more complete.

21 MR. VON HERRMANN: Yes, sir. And I withdraw my
22 objection to that.

23 THE COURT: All right.

24 MR. DIGGS: Your Honor, when do you want to
25 discuss the State's proposed--

1 *THE COURT:* Do it right now. Give me one
2 second.

3 (Whereupon there was a pause.)

4 *THE COURT:* The discussion is the defense -- the
5 State's requests to charge regarding Mr. Bailey's
6 participation in the indictment against Mr. Bailey.
7 Mr. Galmore, I'm not sure I see -- although it may be
8 also I guess in yours, too -- your -- your client's
9 interest also in regards to requests to charge.

10 I have seen the three cases State v Crow, State
11 v Cannon, State v Long -- I had some research done
12 this morning while we had testimony of the last
13 witness. So that's the State's requests to charge?

14 *MR. VON HERRMANN:* Yes, sir, Your Honor.

15 *THE COURT:* And Mr. Diggs?

16 *MR. DIGGS:* Your Honor, we submit none of it
17 should be charged except the following language, that
18 the killing had no connection--

19 *THE COURT:* Where are you reading from?

20 *MR. DIGGS:* The last line of the middle
21 paragraph.

22 *THE COURT:* Okay.

23 *MR. DIGGS:* The killing had no connection with
24 the common purpose and did not ensue as a proper
25 result of attempt to execute it, then the slayer

1 alone is responsible for the killing. I have no
2 objection to that language.

3 The rest of the language merely is inadequate
4 because it says the people combine to commit an
5 unlawful act. That clearly is a inaccurate -- got to
6 be a felony -- even under the State's theory it's got
7 to be a felony -- felony, says such is robbery.

8 That's a comment on the facts in this case, and
9 that the action is a probable consequence that burden
10 of proof -- tantamount saying probably guilty. So
11 for all those reasons we would object to the charge.

12 *THE COURT:* Mr. Galmore?

13 *MR. GALMORE:* Your Honor, we don't take a
14 position on this request to charge.

15 *THE COURT:* I think I have researched the cases,
16 believe it or not, State v Cannon is still good law,
17 including their last sentence that you read. 1897
18 case, it's still good law.

19 State v Crow and -- 35 years old and longer
20 and -- 14 years old, but they seem to be -- the only
21 thing I want to make sure, Mr. Von Herrmann
22 understands, though, is that Mr. Von Herrmann in the
23 indictment against Mr. Bailey charged that Mr. Bailey
24 is engaged in a robbery or burglary and as to Mr.
25 Diggs' comment regarding withdrawal from that, charge

1 as it is there.

2 However, I am still going to charge the jury on
3 robbery and burglary and the State alleges that Mr.
4 Bailey was involved in a robbery and burglary and
5 they have got to prove he was involved in a robbery
6 and burglary for this to go forward.

7 That's mere basis. Of course, the robbery or
8 burglary and or burglary that this murder took place,
9 he's responsible for the murder, and then this law
10 that you cited, Mr. Von Herrmann, falls right -- if
11 they believe those as well.

12 MR. VON HERRMANN: But we still are -- you still
13 are charging hand of one hand of all; correct?

14 THE COURT: Yes, sir.

15 MR. VON HERRMANN: Okay. I have no--

16 MR. DIGGS: Your Honor, the charge, multiple
17 charges that are basically the same principle I would
18 suggest that's prejudicial--

19 THE COURT: I find the three paragraphs here,
20 sir, in this request to charge all having different
21 elements. Almost like it's a -- each one of them is
22 not repeating the other.

23 MR. DIGGS: Well, I know. What we are talking
24 about now is the hand of one is the hand of all. I
25 mean, how many times are we going to say the same

1 principle.

2 THE COURT: But Mr. Diggs, that's why it's also
3 Mr. Galmore's claim of which I'm not going to charge
4 robbery or burglary -- Mr. Galmore's client said he
5 was there to buy some drugs and this thing happened
6 and that I had no control over it and I wasn't
7 involved with it and--

8 MR. DIGGS: Then I would ask that you limit it
9 to him.

10 THE COURT: Well, if they find -- I'm going to
11 say -- I'm going to charge hand of one hand of all.
12 I'm going to charge that. I'll note your exception.

13 MR. DIGGS: Thank you.

14 THE COURT: Okay. I'm going to charge robbery,
15 burglary, hand of one, hand of all, this request to
16 charge, of course murder, circumstantial evidence,
17 witness testifying had a prior conviction, expert
18 witness. Anything else? Anything from anyone else?

19 MR. VON HERRMANN: Mere presence.

20 THE COURT: Mere presence and withdrawal.

21 MR. GALMORE: Credibility, Your Honor?

22 THE COURT: I said about a witness testifying
23 that has a prior conviction. That charge standard --

24 MR. GALMORE: Yes, sir.

25 THE COURT: -- then determining credibility.

1 MR. GALMORE: Yes, sir.

2 THE COURT: All right. How long do you need
3 before -- which of the two of you are going first?

4 MR. DIGGS: You pick.

5 THE COURT: I'm not going to choose unless I
6 have to. If we do, we'd go through the natural
7 consequence of -- in the opening statements Mr. Von
8 Herrmann went, then you went, then Mr. Galmore went.
9 So when -- constant of that, you go first Mr. Diggs,
10 Mr. Galmore you go, then Mr. Von Herrmann.

11 MR. DIGGS: I will leave it to James.

12 MR. GALMORE: That would be fine, Your Honor.

13 THE COURT: All right. So Mr. Diggs, you go,
14 then Mr. Galmore goes, then Mr. Von Herrmann goes.

15 MR. VON HERRMANN: And Your Honor, the State has
16 waived opening on the law. Your--

17 THE COURT: All right. Give me about three or
18 more minutes and I think I'm ready to proceed. And
19 we all agree on these charges. As I said yesterday I
20 can see no possible result other than one of two, not
21 guilty or guilty, guilty or not guilty?

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

23 THE COURT: Mr. Diggs and Mr. Galmore, before we
24 proceed to this final stage, let's make sure that no
25 one knows what results will be, that the innocent

1 both individuals, could be guilty of both
2 individuals.

3 Mr. Diggs and Mr. Galmore, I did want to make
4 sure the record reflects what negotiations were there
5 before we proceeded into this point.

6 As I understand, Mr. Von Herrmann, at some point
7 in time you offered a plea to Mr. Bailey of what at
8 some point in the time?

9 MR. VON HERRMANN: Mr. Bailey I believe was
10 offered voluntary manslaughter at 20.

11 THE COURT: All right. And you communicated
12 that to Mr. Bailey?

13 MR. DIGGS: Yes, sir.

14 THE COURT: And Mr. Bailey decided he refused
15 that and--

16 MR. DIGGS: Well, you know, it was on the table.
17 It was taken off the table before we had, you know,
18 made an -- decision to accept it I'd say. We had not
19 really communicated a final answer on that offer at
20 the time that it was taken off.

21 THE COURT: Let me ask you this, Mr. Diggs. Did
22 you communicate that offer to Mr. Bailey?

23 MR. DIGGS: Yes, sir.

24 THE COURT: Did Mr. Bailey ask you to
25 communicate -- did Mr. Bailey tell you he'd accept

1 that offer?

2 MR. DIGGS: No, sir.

3 THE COURT: That is -- so no acceptance was made
4 before the State decided to take the offer away.

5 MR. DIGGS: No.

6 THE COURT: Mr. Bailey? Stand up for me, sir.
7 Is what Mr. Diggs told me correct, sir?

8 DEFENDANT BAILEY: Yes, sir.

9 THE COURT: And you were aware when you were
10 considering the offer the State made that if you are
11 convicted of murder the minimum sentence is 30 years
12 up to life --

13 DEFENDANT BAILEY: Yes, sir.

14 THE COURT: -- do you understand?

15 DEFENDANT BAILEY: Yes, sir.

16 THE COURT: And you decided, sir, to not accept
17 the offer before the State withdrawing the offer; is
18 that right, sir?

19 DEFENDANT BAILEY: Yes, sir.

20 THE COURT: That was your choice?

21 DEFENDANT BAILEY: Yes, sir.

22 THE COURT: All right. You may be seated, sir.
23 Any other negotiations other than that?

24 MR. VON HERRMANN: Your Honor, subsequent to
25 that we did offer him a plea to murder and 30 years,

1 but that was rejected as well.

2 THE COURT: Mr. Galmore, any -- you and Mr.
3 Carr -- Mr. Von Herrmann, any negotiations with Mr.
4 Galmore and Mr. Carr?

5 MR. VON HERRMANN: Yes, sir, it was not me that
6 did it, Your Honor, but I am aware of the negotiation
7 that Mrs. Tolder the original assigned this case did
8 make an offer to Mr. Galmore, Mr. Carr plead guilty
9 to voluntary manslaughter and the State -- 25 years.

10 THE COURT: Okay. Mr. Galmore, was that offer
11 submitted to you, sir?

12 MR. GALMORE: Yes, sir.

13 THE COURT: Did you discuss that with Mr. Carr?

14 MR. GALMORE: Yes, sir.

15 THE COURT: Was that offer refused by your
16 client or--

17 MR. GALMORE: Yes, it was.

18 THE COURT: All right. Mr. Carr, do you -- do
19 you recall Mr. Galmore telling you the State offer in
20 letting you plead to voluntary manslaughter with a
21 sentence of 25 years?

22 DEFENDANT CARR: Yes, sir.

23 THE COURT: And did you refuse that offer?

24 DEFENDANT CARR: Yes, sir.

25 THE COURT: Were you aware that if you were

1 convicted of murder the minimum sentence is 30 years
2 up to life?

3 *DEFENDANT CARR:* Yes, sir.

4 *THE COURT:* And you decided to refuse the offer;
5 right, sir?

6 *DEFENDANT CARR:* Yes, sir.

7 *THE COURT:* All right. Thank y'all very much.
8 Mr. Diggs, how long do you think you will be, 30
9 minutes, 35, 40?

10 *MR. DIGGS:* Forty-five.

11 *THE COURT:* Forty-five minutes? Mr. Galmore?
12 Forty-five, 35...

13 *MR. GALMORE:* Thirty minutes, Your Honor.

14 *THE COURT:* All right, sir. If both of you go
15 over an hour, then I will take a short break before
16 Mr. Von Herrmann speaks. Mr. Von Herrmann, if you
17 speak -- if you speak 45 or less I'll go right into
18 my charge. If you go over 45, probably going to --
19 before I give my charge. My charge is about 15 or
20 20.

21 *MR. VON HERRMANN:* I will not speak 20 minutes.

22 *THE COURT:* Just letting y'all know. All right.
23 Mr. Diggs, be ready to start your first comment at 20
24 minutes to...

25 (Whereupon there was a pause.)

1 THE COURT: Now, as Mr. -- during the closing
2 arguments that I don't have people coming in and out,
3 so Mr. Diggs, Mr. Galmore, if y'all want to approach
4 here y'all have everybody in y'all want in the room
5 here?

6 MR. DIGGS: Yes, sir.

7 MR. GALMORE: Yes, sir.

8 THE COURT: Okay. Then Mr. Lyles, make sure,
9 sir, that during closing arguments that -- I rather
10 we not even have court personnel coming in. So
11 somebody out there needs to come in, come on in now.
12 I'm sure you can arrange for him to come in quietly.
13 Other than that, I...

14 (Conferring with bailiffs.)

15 THE COURT: Okay. State ready?

16 MR. VON HERRMANN: State's ready.

17 THE COURT: Defense Mr. Bailey ready?

18 MR. DIGGS: Yes, sir.

19 THE COURT: Defense Mr. Carr ready?

20 MR. GALMORE: Yes, sir.

21 THE COURT: Okay. Bring the jury in, please.

22 (Jury entered the courtroom.)

23 THE COURT: Okay, ladies and gentlemen of the
24 jury, we're now ready to proceed to the final stages
25 of the trial. The final stages of the trial are the

1 closing arguments of the parties through their
2 attorney and then after that my charge on the law.
3 So you will know basically where we are.

4 The State charges Mr. Carr with murder, and I
5 will be explaining the elements of that and other
6 matters to you shortly.

7 They charge Mr. Bailey with the crime of murder
8 while participating in a robbery or burglary. I will
9 explain that to you also in a short while.

10 The attorneys will have an opportunity to give
11 their closing arguments to you. The procedure is
12 going to be as follows. Mr. Diggs for Mr. Bailey
13 will give the closing argument first. Mr. Galmore
14 for Mr. Carr will then give his closing argument,
15 then Mr. Von Herrmann for the State will close.

16 These are very serious charges as you can
17 discern already. So I'm not putting a time limit on
18 them as far as their closing argument. I anticipate
19 that each closing argument will be somewhere between
20 30 minutes and an hour. But if it goes further, it
21 goes further.

22 After you -- after you have listened for say an
23 hour and 10 minutes, 15 minutes, if someone concludes
24 after that period of time, I'm going to give you a
25 break.

1 I'm not going to require someone to come and
2 give you a closing argument after you have already
3 listened for an hour. But when say something is over
4 in 45 minutes or so, I will let the other person go
5 and then we'll take a break after that.

6 But I will try my best to do things such that
7 you get breaks not necessarily because you may be
8 thinking you need a break but actually you do as far
9 as the opportunity to relax, focus, stand up and
10 stretch, whatever else, as humans we do. And so it
11 could be -- could be a few hour process. We'll have
12 to wait and see. Okay.

13 Now ladies and gentlemen, you have paid
14 attention, close attention, during the course of this
15 trial. Please continue to do so. The attorneys will
16 give you what they feel the case has shown or has not
17 shown. I will charge you on the law.

18 By the way, what the attorneys say is not
19 evidence. They're permitted to discuss with you what
20 they feel the evidence has shown or has not shown.

21 So if they say something about evidence
22 presented, you remember the evidence being presented
23 differently, take your memory of the evidence.

24 Also, I am the instructor of the law, so the
25 attorneys say something about the law, I say

1 something different about the law, accept what I say
2 about the law because I am the instructor of the law.
3 With that in mind we shall proceed now. Mr. Diggs
4 for Defendant Bailey.

5 CLOSING STATEMENT

6 MR. DIGGS: Ladies and gentlemen, I want to
7 thank you for your attention this week. I don't like
8 having to get up here first because when you're doing
9 this kind of proceeding, you always want to have an
10 opportunity to argue last because that's what -- at
11 least we attorneys think that's what juries take away
12 with them most freshly in their minds.

13 I'm going to ask you not to do that. Don't give
14 Mr. Von Herrmann the benefit of the procedure to try.
15 Try to remember with equal importance and weight the
16 arguments that I make even though I'm having to go
17 first because this is the only time that Mr. Bailey
18 is going to have a chance to make our final
19 statements to you.

20 Mr. Galmore will come up, bring his argument
21 after me, and then Mr. Von Herrmann will do so on
22 behalf of the State. So I'm going to ask you to do
23 this, that give us that and take what we say back
24 with you as well as the other attorneys.

25 I want to first address Mr. Spencer's testimony

1 today. I don't think anybody really expected him to
2 remember the events that night the way he stated them
3 today.

4 With all due respect to Mr. Spencer I know he's
5 probably trying to tell us the truth as he remembers
6 it because remember, that night he was certainly
7 under the spotlight, he was a murder suspect himself.

8 He went down and took gunshot residue tests on
9 his hands just to make sure he was not involved in
10 this case. He did his best to explain to the
11 policeman why he wasn't involved.

12 He told them about these other people who were
13 up there at the apartment running away, so he would
14 have done everything he could have done within his
15 power to tell the police that night all he knew about
16 this case.

17 However, again with all due respect, I don't
18 accuse the man of lying, I accuse him of being a
19 human being and having a memory like all the rest of
20 us.

21 We -- with time blur a little bit specific
22 details of what we saw and when we saw it. But we
23 have a piece of evidence in our case today that prove
24 to you that it's not quite like Mr. Spencer
25 remembers.

1 Just go back to the 911 tape of Mr. Patterson
2 himself made. I put this drawing up here for you,
3 State's Exhibit number 26, and you will remember this
4 is a diagram of the apartment where Mr. Patterson
5 lived, and he was laying right here on the -- on the
6 rug, front door right here.

7 And this telephone was right over here beside
8 him. And there was testimony, remember in trial,
9 telephone laying there on the floor.

10 What does he say on the tape? I did not see it,
11 who it was, I do not know how many people there were.
12 Had these two defendants been inside that apartment,
13 he would have seen them. He would have known.

14 So I would submit to you it is unreasonable,
15 there is no question, there's no reasonable question
16 that Mr. Spencer is slightly off in terms of where
17 these people were at the first moment he saw them.
18 Okay. We know he was not in the apartment.

19 While we're talking about the apartment, I think
20 we can put this to rest as well. Mr. Carr's version
21 of events is incorrect. No defendants were in the --
22 no people were in that apartment. They were not
23 discussing anything.

24 Mr. Bailey did not take out a gun and just shoot
25 Mr. Patterson as has been testified to by Mr. Carr,

1 and again the 911 tape defeats that unless you want
2 to take Mr. Carr's version of events and reject the
3 911 call from Mr. Patterson, but I would submit to
4 you that's not reasonable. Reasonable people are not
5 going to do that.

6 So by -- we can discount or -- both the
7 testimony of both Mr. Carr and Mr. Spencer because
8 we're in the case now where we have got to pay
9 attention to the details, specific, minute details,
10 because the defense in this case requires you to
11 consider that. It requires an analysis of minute
12 details, a matter of a few feet.

13 Remember Mr. Bailey's testimony, I had just
14 begun to walk away, I was only about three, maybe
15 three steps down and then I heard the shots and --
16 and I began to run, and then he noticed that Mike --
17 Mike Carr was behind him.

18 Let me go through the testimony as I see it and
19 explain to you why I have -- why Mr. Bailey's
20 testimony makes the most sense given all of the
21 circumstances we know. It's just common sense.

22 What I'm going to ask you to do is listen and
23 reconsider the testimony of the State's witnesses,
24 especially the three, Nikki Phillips, Duriel Simmons
25 and rob -- Antonio Davis, Antonio Davis.

1 And I want you to think about that. Ask
2 yourselves if people really act like this in the real
3 world. You know, is this the way we as human beings
4 conduct ourselves. We live in this.

5 And we're all -- we all have personal
6 relationships and social relationships and deal with
7 people. Adam's testimony fit basically the most
8 sense under the circumstances of this case.

9 And there really is -- you discount the three
10 people who got deals and who were paid by the
11 State -- and I say paid, not monetarily but by
12 concessions. Okay, we won't charge you,
13 Miss Phillips, with this murder.

14 Think about that for a minute. You loan your
15 car to somebody to use in a robbery and the State
16 says, that's fine, we're not -- you're off the hook,
17 just come in here and tell us what we want to hear.
18 She fully expects to be completely set free.

19 She says, I expect them to drop the charges. So
20 I was going to review the testimony and see if it
21 makes sense, if -- if people really do conduct
22 themselves the way they want you to think they
23 conducted themselves that evening.

24 Consider the overall scheme, and I know this is
25 something that jumps out from the very beginning.

1 There sits Adam Bailey over there, and you saw him in
2 the trial. You know, I wish I could have put him on
3 the stand for two days because I -- I would submit to
4 you that he's a credible witness.

5 And I -- pull this out without his testimony,
6 he's the only witness in this case who didn't get
7 impeached with a prior inconsistent statement, the
8 only one. He's the only one.

9 Everybody else has lied to the police. And then
10 they have told a different story according to their
11 testimony. It was different from what they asserted
12 was the truth before.

13 Even Nikki Phillips, when she did it she knew
14 she was trouble. She was trying to -- doing
15 everything she could to get the spotlight off of her.
16 And so she takes the deal but not until on September
17 the 28th when she gives all of her statements, two
18 written statements and a video, the video is the one
19 we watched, she's tried to get the spotlight off of
20 her, tried to implicate Adam Bailey and yet doesn't
21 mention anything about a planned robbery.

22 Now it makes sense that if she's in that
23 situation -- and you saw her on the video -- it makes
24 sense that she was -- she would have said everything
25 at that point she knew about this case and implicated

1 Adam, but she didn't.

2 It was only on the 14th of October, two weeks
3 later, when she comes up with the details -- okay,
4 here we have the mask and they had the guns and they
5 planned the robbery and she gets a deal.

6 And I want you to look at her plea agreement.
7 It's -- it promises her in exchange for that
8 statement she is not going to be charged with murder.
9 And you heard her on the stand in this trial. She
10 expects to be set free.

11 Why didn't -- on the 28th of September, why
12 didn't she say anything about the planned robbery if
13 she's going ahead and implicating herself and
14 disposing of the weapon and the bullets, why didn't
15 she say -- why didn't she remember or think to tell
16 them about the robbery plans?

17 Initially on the stand she said, well, I did
18 tell them. And she didn't and that's why we had to
19 play the videotape because she said, yeah, I did, I
20 told them. No, she couldn't remember what she had
21 said that day.

22 And I would submit to you that's evidence --
23 beyond a reasonable doubt in the minds of a rational
24 trier of fact to convict this boy of murder based on
25 her testimony?

1 And why didn't the State polygraph her? Said,
2 okay, we're going to give you a polygraph and if we
3 ask you to, you're going to have to take it. She
4 said okay. What did she have to lose?

5 But they gave polygraph because they knew -- let
6 me ask you something. You think she would pass a
7 polygraph? I mean, it is almost comical, but they
8 want you to use that testimony to convict that young
9 boy, young man of murder, a most serious crime in our
10 society.

11 They pay her and then they don't polygraph her,
12 they choose to be ignorant about her truthfulness.
13 Adam Bailey knew as a juror, as a juror in our
14 criminal justice system deserve better than that.

15 You deserve to have evidence that the State can
16 reasonably stand behind and check and double-check
17 and do everything they can to make sure they have got
18 the right person and the right charge. That wasn't
19 done in this case again and again and again because
20 after three years Duriel Simmons gets a deal.

21 He's going to -- he's been locked up for three
22 years. Heck, he's almost -- doesn't -- he's going to
23 be given credit for time served and he's looking at a
24 pretty -- a parole eligibility date not far in the
25 future.

1 So do they take Duriel down and polygraph him?
2 I mean, heck, he's in jail. You think Duriel Simmons
3 is going to pass a polygraph? The State doesn't do
4 that. You got to put Adam Bailey in prison for
5 murder on -- you think you got evidence beyond a
6 reasonable doubt? That is a reason to hesitate to
7 act right there.

8 And when you get your jury instructions from his
9 honor, the Judge in this case, he's going to explain
10 to you what a reasonable doubt is and it is a reason
11 that causes you to hesitate, a doubt that causes you
12 to hesitate to act, and that's what we have here. We
13 have got being paid, Nikki being paid by dropping the
14 charge.

15 She get -- listen to the Solicitor yesterday was
16 up in Adam's face, said, well, if you hadn't gone
17 there, Mr. Patterson would be alive today. Heavens,
18 if Nikki hadn't provided her car, he would be alive,
19 so what's the difference in terms of culpability?

20 Who is more culpable, Nikki or Adam? Adam was
21 just go ing along even under the State's theory.

22 Duriel, he -- they were sitting around talking
23 about robbing somebody. Who can we rob? Is it
24 common sense first of all for Nikki to say, okay,
25 take my car, use it in the robbery, I'm going to go

1 take a nap. Does that make sense? That's -- that's
2 comical almost. No woman is going to make that
3 decision, engage in that conduct.

4 But even -- it gets even worse and she's not
5 polygraphed again, but it gets even worse. Duriel
6 says, yeah, we're sitting around talking about a
7 robbery, who can we rob, and he says, wait a minute,
8 I know Joe, I have known him all my life, let's go
9 rob him.

10 I'm not going to have anything to do with it,
11 but you guys go rob Joe. Does that make sense? Are
12 people going to do that? That's laughable.

13 With all due respect to the Patterson family,
14 they deserve better than this. You think Duriel
15 offered up his own friend? Not even that, his
16 grandmother lives 25 feet away. He's going to send
17 his friends over there to commit an armed robbery,
18 possibly involving death, with respect to his best --
19 one of -- a long time friend right across the parking
20 lot from his grandmother and his sister's baby?
21 That's absurd.

22 At least I would suggest it would be reasonable
23 to take Duriel down and polygraph him. But you know
24 what? He wouldn't pass and they know he's not going
25 to pass and that's a reason for you to hesitate to

1 convict him.

2 Adam deserves better proof, he deserves better
3 justice, a better approach to justice. You deserve
4 as a jury, the Patterson family and our community
5 deserves it.

6 And it gets worse. Adam -- excuse me -- Antonio
7 Davis comes on the stand. He gets a deal. He -- he
8 thinks he's going to be out in two years. He's
9 already done one -- three years, both Duriel --
10 Duriel is sitting for three years, he doesn't -- he
11 doesn't tell the truth.

12 No, he's -- he maintains the truth until they
13 finally buy him and pay him to flip. He'll say
14 anything to get out of prison. Three years.

15 Then Antonio Davis comes up here, he gets even
16 less. By the way, you heard they're pleading to
17 accessory after the fact. That's something -- hey,
18 excuse me, it's not like murder. You do accessory
19 after the fact, I would submit that's not hard time
20 like murder.

21 But look, rock says treat is truth (sic) and you
22 know that's true. That's about the only true thing
23 he said. At least let's take Rock down and polygraph
24 him. But do they do that? No.

25 Not a single one. Out of three witnesses or --

1 you know, I'll just leave it at that. I was going to
2 say probably other people they could have
3 polygraphed, but those three we know. If they want
4 to know the truth in this case, why didn't they do
5 anything other than take Ashley Phillips' statement
6 at first value?

7 They had Ashley here. And remember back in the
8 27th -- excuse me -- the 28th of September they had
9 Ashley's statement, they had access to Adam, okay, so
10 who do you choose?

11 They made a choice at that time. Are we going
12 to go with Ashley, you know, the young lady you saw
13 on the video. A little more prim and proper when she
14 was in here and she didn't use that kind of language
15 in here that she used on the tape, but that's who
16 they decided to go with and that's who they stuck
17 with and that's their story because they bought two
18 more witnesses with sweetheart baby-ruth-deal.

19 People that if you buy their theory are just as
20 guilty as Adam Bailey is not norm. People who played
21 an active role, they gave them their car to be used
22 in the robbery, offering up their friend as a victim
23 in the robbery, offering the guns.

24 Where did the guns come from? Antonio Davis.
25 What did Adam do? He walked up to the door. That's

1 the only thing he did. Carr, without question,
2 killed Mr. Patterson. Without question.

3 Who among the group is less culpable, less
4 guilty than Adam Bailey? Is Nikki less guilty when
5 she provided her car? Is Duriel Simmons less guilty
6 because he only offered up his best friend? Is Rock
7 Davis less guilty because all he did was supply the
8 murder weapon?

9 What is it about Adam? Why are they so intent
10 on getting him? I would submit to you kind of are
11 blinded to the realities and the equities of justice
12 in this case. They have to convince you of his guilt
13 beyond a reasonable doubt. And Mr. Galtore gave you
14 an -- showed you an example of what that means.

15 On the evidence that you have, is it the truth
16 in this case to set Nikki Phillips free, convict him
17 of murder? Is that what should be done in this case
18 based on the evidence? You have no reasonable doubt.
19 That's what we need to do.

20 We need to let Duriel Simmons go and we need to
21 convict him of murder. There's no doubt, there's no
22 reasonable doubt about that. That's the thing we
23 need to do.

24 We need to let Antonio Davis go. Convict Adam
25 Bailey of murder? There's no doubt that's -- no

1 reasonable doubt that's what we need to do. I'm not
2 going to hesitate to act. That's the way to resolve
3 this case.

4 Convict that boy of murder and let all the rest
5 of them go with a slap on the wrist and get on down
6 the road to the next case and the next situation and
7 the next deal.

8 I would submit to you that's not what the
9 justice system is about. We require this system
10 reasonable doubt, proof -- proof beyond a reasonable
11 doubt.

12 You got three witnesses they even -- they won't
13 polygraph them. They don't want to know they're
14 lying. They'd rather stick their head in the sand
15 and let you guys worry with them.

16 Because his responsibility, highly impersonally,
17 that -- the Solicitor's office, the State's
18 responsibility is to put this evidence together, to
19 get to the bottom of it and find out what happened.

20 They didn't do that in this case. I would
21 submit to you early on that they knew Michael Carr
22 was the shooter, they should have acted on that and
23 they could have resolved this case a long time ago.

24 I ask -- I yelled a lot a little bit yesterday,
25 Antonio Davis. Tried to press him for some of the

1 details. A robbery was planned, because Nikki -- no,
2 she said a lot of details that she could give us like
3 had the guns there, brandishing them out, they were
4 boasting, building up his self-esteem, putting on
5 masks. Remember that? Nobody else saw that.

6 The jurors were -- excuse me -- the witnesses
7 were sequestered from you during the trial of the
8 case so they couldn't hear eachother's testimony and
9 then just get up there and say the same thing.

10 You know, that -- that conversation, those
11 events never took place. Rock -- Antonio Davis
12 didn't remember it. Duriel didn't remember it. You
13 know, that never took place. Nikki was the only one.

14 You know what? There weren't any details. Adam
15 got up there, you know, and I was trying to get Adam
16 to say, give us, you know, tell us more about what
17 was going on.

18 And the bottom line was couldn't really tell us
19 anything because nothing was going on. They just
20 decided, let's go get some marijuana. And so they
21 did.

22 That's the only thing that makes sense. Not a
23 robbery across the street from Duriel's grandmother
24 and his -- to rob his best friend. They went over
25 there to buy marijuana. That is the only thing that

1 makes sense.

2 Duriel wanted to stay down in the car when they
3 got over there because he didn't want his grandmother
4 to see him. Now, there's a couple of different
5 versions about where they parked. I would submit to
6 you it's pretty immaterial.

7 I mean, the Solicitor gets up here, he's
8 probably going to try to make a big deal out of the
9 fact that, well, everybody says they parked behind in
10 Abaco Bay. If you're familiar with that area,
11 it's -- it's pretty much like any other area.

12 I don't -- when you get these pictures back
13 there, there's going to be one you remember where
14 they put a marker on here and says here's where we
15 parked. Take it back there.

16 It's basically the same place that Adam says
17 they parked, but it's one row of apartment buildings
18 over. Okay. And you got to remember this is like
19 1:30 in the morning. It's dark. Adam has never been
20 there before.

21 He says they parked back down the street over
22 here to -- to the right side of the front of the
23 apartment and that's where everybody else says they
24 parked except they put it one block over, and it's
25 just -- it's just -- it's very close. You can look

1 at the photos.

2 I would submit to you if you do decide that they
3 parked over there in Abaco Bay, you know, that's
4 forgivable error because again boy hadn't been there
5 ever in his whole life, it was dark and it was, you
6 know, he wasn't familiar with it. He wasn't familiar
7 with it.

8 What happened on the 28th with respect to the
9 gun that was disposed of down at Freewoods Road? Why
10 is it unbelievable for Adam today, I have never been
11 there?

12 You know, that makes sense because you know
13 people don't go riding down a dead-end road. Okay.
14 Adam's testimony is he's never been there. Nikki and
15 Duriel say he was there. Yeah, he went with us. He
16 disposed of the gun, Duriel disposed -- disposed of
17 the bullets.

18 But you know what? There are no -- there's no
19 physical evidence that corroborates that at all.
20 Rock didn't remember. When he discussed that event
21 with Nikki and Duriel, they neglected to tell Rock
22 that Adam was with them. You think about that.
23 Okay.

24 Because we had Rock till Antonio's testimony
25 yesterday, they didn't tell him nothing. The

1 police -- but I would suggest to you -- and you know
2 one thing, those officers that came in were
3 impressive. I would submit to you they're
4 professionals and they're good at their job.

5 And they had three years to find the weapon and
6 have them supposedly disposed of to find them and
7 they have never found them. Is that just
8 coincidental or did Adam never -- did that event
9 never happen?

10 They went down there. Duriel had the bullets.
11 Duriel disposed of the bullets. They found the
12 bullets. Adam goes down there, Adam disposes of the
13 gun. They don't find the gun. Is that part of the
14 deal?.

15 It's on -- it's on display in this case. It's
16 an effort to give something to the prosecution, to
17 the police, they can shield themselves, deflect the
18 spotlight away.

19 Now, Nikki gave that statement initially on the
20 28th of September. She said, yes, Adam went and
21 disposed of the gun. She did say that on the 28th of
22 September. Immediately. Immediately the police went
23 and searched for the weapon and did not find one.

24 But again, she did not in her plan, her
25 concocting this plan, she did not mention the

1 robbery, the planning of the robbery, the masks, all
2 of those things. Remember that never surfaced until
3 14th of October. Oh, yeah, give the statement.
4 Okay.

5 We didn't put the whole letter into evidence
6 because we didn't -- no one really felt it was
7 necessary. It was a letter from Nikki to Duriel.
8 This portion of the letter is in evidence. I need
9 help, I feel like I am two or three personalities.
10 That's what she's saying.

11 The testimony was in January, the following
12 January after October 14th statement she gave she
13 says where they planned the robbery.

14 Is that -- does that add anything to the scales
15 of justice here so that the State's case against Adam
16 as the weights go down and down and down, evidence
17 mounts up, you know, it calls into question that
18 evidence even more -- even given the fact that it
19 doesn't make sense, she would loan her car, the fact
20 she hadn't been polygraphed, all these other things,
21 she even admits, you know, I feel like I got two or
22 three personalities.

23 But this young girl's story, these other two
24 young men bought on, too. Okay. They bought on to
25 that after three years to save their backsides. They

1 bought on to that young girl's story who says, who
2 out of her own mouth says, I feel like I have got two
3 or three personalities.

4 Are we going to use that evidence in this system
5 to convict Adam Bailey of murder beyond a reasonable
6 doubt? No, I would submit to you that that's a
7 reason to hesitate to act in this case. That's a
8 reason.

9 What other evidence do they have? Ashley
10 started the ball rolling implicating Adam. These two
11 caught on. You know, they grabbed on to the story
12 last week. Last -- imagine that.

13 And I would say, no, we're not going to use that
14 evidence to convict this young man of murder.
15 Murder. All you're going to -- our system and I
16 would submit in any system in this country is going
17 to require more evidence than that.

18 Put her on the polygraph. If you don't want to
19 know that, so we'd rather put the burden on you to
20 make you have to decide. I would submit that's not
21 fair.

22 And let me get to Rock for just a minute. Let's
23 tell -- let's say there was going to be a robbery.
24 The door is kicked in violently at 1:30 in the
25 morning with one, two, three, four, five, six, seven

1 neighbors right there.

2 I mean, this goes -- look how many people lived
3 around there. Okay, that's from up in the air, but
4 you have seen the picture I held up about where Mr.
5 Patterson lived. Here.

6 Look at all the neighbors he had in this
7 building alone. You're going to go there in the
8 middle of the night and kick in a door? You're going
9 to plan to do that? Does that make any sense?

10 You know you're going to wake up every -- all of
11 the little children and all the people living --
12 dogs. What kind of commotion is that going to use?
13 The very commotion that it caused. Going to plan
14 that in advance? I would submit, no. That's not
15 reasonable.

16 Carr, Mr. Carr testified yesterday. We saw he's
17 a loose cannon. He is impulsive and he is subject to
18 outrageous conduct. You saw that yesterday and that
19 story, that outrageous story that he gave you about
20 going in there and sitting down with Mr. Patterson.
21 It completely ignores the facts regarding the 911
22 tape.

23 I would suggest to you they went up there to
24 make a purchase of marijuana. When no one came to
25 the door, Adam decided to leave. Did it strike you

1 as a scheming, caniving kind of guy? I mean, look at
2 him. He's just a plain, ordinary young man.

3 Not exceptionally devious, deceptive, caniving,
4 scheming. Wanted to have some marijuana, that was
5 his -- the fault, but that's not murder.

6 When he started to walk away, Mike Carr, who was
7 18 years old at the time, committed a -- an
8 unpredictable come -- impulsive act. Nah, I'm going
9 to go in.

10 That was an 18 year old impulse -- you know,
11 something that he did on the spur of the moment. Not
12 thought through, not thought out, not planned, but
13 something he did independently on his own.

14 That's the only thing that makes sense.
15 Remember, not only did Duriel's mother live --
16 grandmother live across the street, he just saw a
17 friend of his down in the parking lot.

18 He had -- you're going to go -- I submit it
19 would have been reasonable for that to raise a red
20 flag. If you're planning a robbery and just before
21 you go in and bump somebody off, with all due
22 respect, oh, yeah, you run into a friend, you have a
23 two to five minute conversation with them and then
24 you go ahead and continue on with the robbery?
25 That's absurd.

1 No. He planned no such thing. He planned to
2 purchase marijuana quickly, quietly, secretly in the
3 dark, leave, go about his business.

4 But Carr, impulse, impulse, 18 year old kid at
5 the time, Nah, I'm going to go in, kicks the door
6 open, goes in, confronted by Mr. Patterson, his
7 reaction to kill him instantly, Mr. Patterson, so
8 quickly that Mr. Patterson didn't even recognize him.

9 And we know there weren't two people in that
10 room because Mr. Patterson didn't see them. He never
11 saw anybody.

12 And he at the beginning of that tape when his
13 voice was still strong and he was still coherent, he
14 had his senses and his wits about him, he didn't see
15 anyone, he couldn't tell if there were one shooter or
16 two or more.

17 Okay. And that's -- that's what happened. It
18 was a hammer laying by him. He was probably going to
19 use that for protection. But he didn't get a chance
20 to because he was killed immediately.

21 But let's say it was a plan to rob. Why didn't
22 they go on in and take his stuff? You know.
23 Wouldn't have taken 20 seconds, you can put the stuff
24 laying on the kitchen counter or something.

25 I mean, there was no plan to rob. There was no

1 plan to kill. There was a plan to purchase and
2 that's it.

3 You know, how do you conduct -- you go up --
4 think about that. You do a robbery and, well, you
5 might have to shoot the guy. Well heck, we're going
6 to go there and rob him. If you're going to shoot
7 him, go ahead and take the stuff and just -- that
8 doesn't make any sense. They didn't accept that.

9 It is consistent with what Adam has said and it
10 was completely inconsistent with now what is being
11 said by the State's case.

12 Adam stated he didn't know that Mike Carr was
13 armed. And that when the door, no one responded to
14 the door, he decided he was going to leave. Let's
15 go. Mike Carr said, no, I'm going in. Pulls the gun
16 out, I'm going in.

17 Adam says, wait a minute, I don't want to have
18 anything to do with this. Carr calls him a name.
19 Adam says, come on, let's go, I'm leaving. He turns
20 around. Carr says, well, don't expect me to give you
21 any of the stuff then.

22 Kicks the door open and immediately fires the
23 shots because Mr. Patterson is standing right there
24 and that's where he falls. That's where he dies.
25 Somewhere -- that's what he used to call 911.

1 Even if -- you had a chance to see Adam on the
2 stand, judge his credibility. Even if there was a
3 plan to rob, and I submit to you there wasn't, but
4 even if there was, he at that point said I'm out of
5 here, I'm not doing this.

6 I say that because there's going to be a jury
7 instruction for you on withdrawing from a criminal
8 activity. I wish that I could stand up here and take
9 all day.

10 I wish I could, to tell you -- to tell you, tell
11 you and tell you what makes sense in this case in my
12 opinion and what doesn't, and who is credible in this
13 case and why and who is not and why.

14 But I am limited to a reasonable amount of time
15 here and I have basically said what I want to say.
16 But I would suggest to you after three years with the
17 professionalism in our law enforcement that you have
18 seen here and in our community and SLED, in the State
19 of South Carolina, some -- some evidence could be
20 produced that would prove or tend to indicate this
21 young man's guilty other than Nikki Phillips, Duriel
22 Simmons and Antonio Davis simply saying so.

23 I would submit to you they're not the key --
24 keystone cops. They are professionals. They could
25 have found that weapon if it had been there as they

1 said. And I would submit to you they didn't find it
2 because it wasn't there.

3 Beyond a reasonable doubt is the heaviest burden
4 of proof in our system. I would submit you wouldn't
5 believe the State's witnesses in this case in a car
6 wreck much less criminal trial for murder.

7 I'm asking you to go back there, consider the
8 evidence and return a verdict that is consistent with
9 the evidence in this case, the standard of proof that
10 has to be met and find Adam Bailey not guilty because
11 that is the only verdict that is justified as being
12 the true verdict in this case by the evidence that's
13 been presented.

14 Thank you very much for listening to me. You
15 have been very kind to me and to Adam and we
16 appreciate it and so thank you very much.

17 *THE COURT:* Mr. Galmore, do y'all need this
18 chart here?

19 *MR. GALMORE:* No, sir.

20 *THE COURT:* While he's doing that, ladies and
21 gentlemen of the jury, stand up please for me. Let's
22 just stand up. All right now. If everyone is okay
23 we are going to continue on.

24 Does anyone need to go to the restroom or
25 anything else? Okay. If not, then -- then let's

1 just when you're ready, sit down when you're ready
2 and we will get started.

3 THE COURT: Mr. Galmore, you ready, sir?

4 MR. GALMORE: Yes, sir.

5 THE COURT: All right. Proceed with their
6 argument, Mr. Carr -- Mr. Galmore.

7 CLOSING STATEMENT

8 MR. GALMORE: Madam forelady, ladies and
9 gentlemen of the jury, I want to take a brief second
10 to tell you how cases work. They fall into three
11 categories, and it's real simple. It didn't happen,
12 it wasn't me, and let me explain.

13 Number one, it didn't happen. Say you're a
14 cashier at the Scotchman and you call the police and
15 say, my God, I was just robbed at gun-point. After
16 some investigation it turns out you robbed the
17 Scotchman, took the money, stuck it in your purse,
18 call the police and said somebody came in and did it.

19 That crime didn't happen. It happened but it
20 wasn't me. That's what we have here. Somebody else
21 did it. Mr. Patterson is dead. Mr. Patterson was
22 shot and killed. Somebody killed him. But it wasn't
23 me.

24 And the other one. It happened, it was me, let
25 me explain. It's like driving under suspension.

1 They caught me driving down the road but without my
2 license, my license was suspended, but officer, I was
3 taking my wife to the hospital, I had a reason for
4 doing it, I had an excuse.

5 That's not the case here. This case is number
6 two. It happened but it wasn't me.

7 I bring that out because you are going to have
8 to decide who it was that shot Mr. Patterson. We
9 submit to you that it was Adam Bailey. The State
10 feels that it was Mike Carr. And that means the
11 State has to prove it.

12 Your Honor told you about they have the burden
13 of proof. Now think about that phrase for a minute.
14 Burden of proof. Burden is just that, it's not
15 something that you do all willingly or -- it is a
16 responsibility. It is a load. It is a heavy load.

17 They have to carry that load. Do you think they
18 did that these last three days? I don't think so.

19 Burden of proof. That means they have to prove
20 it. They have to show you with evidence who killed
21 Joseph Patterson. We have got evidence. Doesn't
22 show you who did it.

23 And this is their responsibility. You see, Mr.
24 Carr is presumed innocent in the eyes of the law.
25 You all heard that phrase before, presumed innocent.

1 That's what he is. Sitting there right now he is
2 wrapped in a cloak of innocence unless and until the
3 State can pull it off.

4 What does that have to do with beyond a
5 reasonable doubt? This is how it all comes together.
6 They have to prove his guilt beyond a reasonable
7 doubt. He doesn't have to prove that he didn't do
8 it.

9 You all might be sitting there like, nah, I
10 think he did this. I may be wrong, might be, could
11 be. That's not what the law says.

12 The law doesn't say if he might be guilty then
13 you find him guilty, if he could be or if I think he
14 did it, then you can find him guilty. Doesn't say
15 that. It says you have to be convinced beyond a
16 reasonable doubt that he is guilty.

17 And I showed you what beyond a reasonable doubt
18 meant when I did that football. The Judge is going
19 to tell you beyond a reasonable doubt means you must
20 be firmly convinced of his guilt.

21 Now, you have seen this evidence for the last
22 three days. This evidence does not leave me firmly
23 convinced as to who shot Joseph Patterson. In fact,
24 it raises more questions than answers.

25 I'm going to give you -- I'm going to give you a

1 piece of advice. Y'all people come from 12 different
2 walks of life. Twelve different jobs, professionals,
3 12 home lives, 12 different personalities. But you
4 all share one thing in common. All have common
5 sense.

6 You don't leave your common sense out in the
7 parking lot. Bring it with you. And when you're in
8 your jury room use that common sense. And when
9 you're listening to this testimony and when you look
10 at this evidence, use your common sense to try to
11 figure out what happened. Excuse me.

12 You don't have to figure out what happened.
13 They have to figure out what happened and they have
14 to tell you. So let's see what they told us.

15 They brought us a 911 tape. Now, there's been a
16 lot of talk about the tape, what he says, what he
17 doesn't say. He's on the phone 10 minutes, can't
18 give a description of anybody, can't say who did it.

19 I wish he said it was a black man and white guy
20 was standing there. Can you say Mike Carr is guilty?
21 Well, if he said there were two guys up there and the
22 white guy shot me, you say I bet he's guilty, but it
23 doesn't.

24 And I don't fault the man for that. He's trying
25 to get some medical attention. I don't know, just

1 send the ambulance. That's basically what he's
2 saying. He's not concerned about solving a crime.
3 He is concerned about 911 sending help.

4 The tape tells us that he needed help. He
5 doesn't tell us who shot Joseph Patterson. That is
6 the question. That is the challenge that the State
7 has to meet. That's the burden they have to carry.

8 They bought us Nikki, they brought us Duriel,
9 they bought us Rock. All of them have something to
10 gain. Everybody has a motive to tell a lie. In
11 fact, if you listen to Nikki, she wasn't even out
12 there and she's telling us who did it. She didn't
13 even go.

14 At least Rock and Duriel drove out there. Nikki
15 is not even there. And she is capable some kind of
16 way of telling us Mike Carr did it. I don't think
17 so. Let's set that aside. Fine. They testified,
18 fine, they got on the Bible and said they would tell
19 the truth. Fine.

20 Can we corroborate that story? Is there
21 anything that does that? Let's talk about
22 Mr. Spencer. He says he's out there, he talks to
23 these people or Mr. Robinson talks to all, sitting
24 out there and just kind of sitting in the parking lot
25 where he can -- I mean, he hears bang, bang, bang.

1 Mr. Spencer is the only person who doesn't have
2 something to gain by telling a lie. Doesn't have a
3 incentive, doesn't have an arrest. He's the only
4 outside independent witness. Notice what he says.
5 Notice what he didn't say.

6 He did not say, I heard that door get kicked in.
7 He's out in the parking lot at 1:30 in the morning
8 right out there. I think if that door was kicked in,
9 he would have heard it.

10 If you ever lived in an apartment complex
11 before -- I'm sure one or two of you have lived in an
12 apartment complex -- think about your apartment
13 complex. Somebody kicks in your door, your neighbor
14 is going to hear that. The man outside in the
15 parking lot is going to hear that. Nobody, not one
16 witness heard it.

17 That's because it didn't happen. They put
18 Mr. Spencer up there. He could have got up there and
19 said, yeah, I heard the door get kicked in, then I
20 heard bang, bang, bang, but he didn't say it because
21 he didn't hear it.

22 What does that tell us? That they were in there
23 with the permission of Mr. Patterson just like Mike
24 Carr said.

25 Think about the door -- I think there was --

1 well, there was testimony that he had been broken
2 into previously, but think about this door.

3 If your door gets kicked in, probably going to
4 be wood chips or splint, splinters or something
5 hanging down, right? If your door got kicked in a
6 week ago and you opened and closed and locked and
7 unlocked your door since then several times, it's not
8 going to look like it was just kicked in five minutes
9 ago. It's going to look like it was kicked in a week
10 ago.

11 Those little splints that are sticking in, some
12 of them are going to fall off. The little stuff
13 that's laying there -- if your door gets kicked in,
14 it's going to be pieces of wood right there on the
15 ground.

16 Do we have pictures of that? No. What does
17 that tell you? That this door was not kicked in.
18 That Mike Carr's telling y'all the truth.

19 Let's talk about the gun. I don't know what to
20 make of it to be totally honest with you. We've had
21 testimony that there were two guns.

22 And if you take the State's version of this
23 case, Adam has this gun, Mike has this invisible,
24 never to be found black gun with a white pearl
25 handle, and the black gun with the white pearl handle

1 is the murder weapon. That's the State's theory,
2 okay? Fair enough?

3 Well, Mike said don't have that up here. This
4 gun was found, according to testimony, 150 yards from
5 Mike. And if you believe the State, Adam is out
6 there burying a gun and it wasn't this one, so it's
7 probably the other one, burying a gun at the end of
8 Freewoods Road.

9 Let's say Mike did shoot him with this white
10 pearl handle gun. Why on Earth would he then take
11 that gun, give it to Adam to go bury the murder
12 weapon for him? Does that make any sense? No.

13 What it suggests to me, Mike had this thing and
14 threw it in the bushes 150 feet from his house, Adam
15 has the other one. Is this the murder weapon? No.

16 What Mr -- or Agent Defreese from SLED said,
17 said this gun is a 38, the man was shot with a 38
18 bullets, this is one of 12 different types of guns
19 that could have been the murder weapon in this case.

20 I can't tell you that these bullets came from
21 that gun. Didn't even try to say, well it might have
22 did but I just can't -- huh-uh. In the immortal
23 words of that chinese guy in the OJ Simpson case, no
24 match.

25 This is just a gun. I don't even know if this

1 gun was involved in this case at all. It's just a
2 gun. No fingerprints. We don't know if it was in
3 Mike's hand or if it was in Adam's hand or if it was
4 in anyone's hand. Just a rusty gun.

5 What I'm doing is going through the physical
6 evidence because what I want to illustrate is that
7 we've got two types of evidence in this case. We got
8 testimonial evidence and we have got physical
9 evidence.

10 You all heard everybody testify, fine. That's
11 testimony and evidence. Do with it what you will. I
12 think you all come to the conclusion that it wasn't
13 that great.

14 What I challenge the State to do is to
15 corroborate that evidence with the physical evidence.
16 Now mind you, they know how to do it. They got
17 Mr. Spencer, they took his rifle, they took his car,
18 they took the clothes off his back and they tested
19 his hands. That's a case. That's what you're
20 supposed to do. You're supposed to corroborate.

21 But in this case this evidence doesn't
22 corroborate anything. These bullets, all we know is
23 Durriel threw them out. Doesn't say that my guy got a
24 print the first on -- nobody everybody testified that
25 my guy even had these bullets.

1 All we know is that they threw them out. We
2 don't even know these bullets go in that gun. We
3 don't know if these bullets are the same as these
4 bullets. Agent Defreese didn't say that. I don't
5 know if these bullets came out of that box.

6 And these bullets take us nowhere. You think
7 about that football field I'm going to give you 50 --
8 as a matter of fact, I'm going to give you 80-yards
9 just on the testimony alone. You only got 20 to go.
10 I'm going to give you 80-yards. Does this get us
11 anywhere toward who did it? No.

12 Do these? They just tell us that he was shot.
13 This advances the ball? I don't think so. Do these
14 advance the ball? Do these tell us who did it? No.

15 This is the 911 tape. Doesn't tell us who did
16 it. What this sketch does tell us, what crime scene
17 Specialist Cestare said is that he was shot inside
18 his residence. That is consistent with what Michael
19 Carr told you.

20 Least it helps a little bit. At least it tells
21 us that he was shot inside the house. This -- is
22 right here inside the house they said that he had
23 been shot from inside.

24 Now, let's talk about this footprint on the
25 door. You remember when Cestare testified and Mr.

1 Diggs got up and they started talking about this Mike
2 Carr's footprint, it's Mike Carr's footprint, then
3 y'all took a break and the Solicitor got back up and
4 says, let me hand you this report from SLED.

5 He had to do my job for me -- because this
6 report from SLED saying it was the footprint? Does
7 it say it was Mike Carr's print? No match.
8 Footprint out on Freewoods Road.

9 They didn't even say that Mike Carr was out
10 there, even -- even Nikki and all those folks, Nikki
11 who wasn't there but knows everything, all these
12 people, they didn't say Mike Carr ever went to
13 Freewoods Road.

14 But if you believe Mr. Diggs' version, Mike
15 Carr's footprint is out there. We had to go back to
16 SLED. These are the people that know. You watch
17 CSI? SLED is the laboratory.

18 The cops, the crime scene investigators, they
19 collect the stuff and they send it to SLED to be
20 tested. SLED comes back and says, that's not Mike
21 Carr's footprint out there because they got his
22 boots.

23 They got his boots. They got the cast. They
24 got the picture on the door and they can match them
25 up. No match.

1 I mean, even the State's people aren't even
2 saying that he was out there. But that's what --
3 that's what almost happened yesterday. We don't have
4 any gunshot residue. You heard enough, they test
5 your hands, they swab your hands. They send that to
6 SLED, too.

7 They put it in a little tube and send this tube
8 to SLED and SLED can chemically analyze it to see if
9 you have gunpowder, gun residue on your hands. They
10 did it for Mr. Spencer, and of course he didn't have
11 any because he wasn't involved.

12 They didn't do it on Mr. Carr. We got plenty of
13 reasons why it's past six hours, but we can do it
14 under certain circumstances. What about a dead body?
15 Is that a good enough circumstance to say, okay, it
16 might be eight hours but I'm going to test the man
17 any way?

18 Had a dead body. Test his hands. Collect his
19 clothes. They did it with Spencer or what we can't
20 really see gunpowder on -- well, what did you take
21 Spencer's clothes for?

22 All you have to do is send them to SLED, they'll
23 check and see if there's any gunpowder on the
24 clothes, then we'd know who did it. Then we'd know
25 who fired a gun. We don't have that.

1 What we have in this case is a lack of evidence.
2 And what that leads us to is one conclusion. That
3 conclusion is that the State hasn't carried its
4 burden. For you the question is not did Adam Bailey
5 do it or did Mike Carr do it or -- or is this person
6 guilty or that person guilty.

7 The question for you, did the State prove it.
8 That's your challenge. You're not supposed to solve
9 this crime for them. You're not supposed to go back
10 there and say, well, let me see, let me tell you what
11 I think happened.

12 No, they're supposed to tell you what they think
13 happened and then they're supposed to prove it. And
14 they haven't. They haven't shown anything.

15 They have given us a lot of stories. That's all
16 they have given you. Now, you're about to get this
17 case very soon. And it's going to be up to each and
18 every one of you to make up your own mind.

19 Like I said, 12 hearts, 12 minds, 12 walks of
20 life, 12 professions, 12 personalities, 12 decisions.
21 When you get back there, take your position, whatever
22 it is, and hold on to it.

23 There's going to be a lot of talk. There's
24 going to be a lot of discussion, a lot of swaying of
25 opinions, a lot of interpretation of evidence.

1 Each one of you makes your own interpretation.
2 And each one of you reaches your own decision. It is
3 not they all think he's guilty, some go along with
4 it. Doesn't work like that. You have to come up
5 with your own mind with your own decision.

6 Now I'm going to ask you to avoid one thing
7 while you're back there. You know how you see on TV
8 they all sit around the table and they say, well,
9 let's take a vote. Guilty, next person says guilty,
10 next person says guilty.

11 I'm going to ask you to not do a voice vote.
12 And here's the reason why. It's group dynamics is
13 what it is. If you get the first two people that say
14 think he's guilty, the rest of the group tends to
15 fall in line.

16 When you're doing your deliberations, I'm going
17 to ask you take a written vote. Just write it down
18 and pass out papers in. That way when you get to
19 person number seven at the end of the line and all
20 these people saying guilty, that person doesn't feel,
21 well I must say guilty just because they said it.

22 I don't want you to be swayed for the wrong
23 reason. I want you to use your individual minds and
24 come up with your individual decisions.

25 I thank you for listening. Thank you for paying

1 attention and I thank you for coming to jury duty.
2 This is important. This is a murder trial. People's
3 lives are on the line.

4 And I ask you to do your job. Don't do their
5 job. The police job is to figure this case out. I
6 submit to you that they have not. The Solicitor's
7 job is to prove this case to you and I submit to you
8 that they have not.

9 Your job is simply to say by virtue of your
10 verdict that y'all proved it beyond a reasonable
11 doubt or y'all didn't prove it beyond a reasonable
12 doubt. And I'm going to ask you to return a verdict
13 of not guilty.

14 Take Mr. Carr's testimony. It is consistent.
15 No door was kicked in. It is consistent he was shot
16 in the house, that whatever footprint they have is
17 not his footprint. Whatever gun they have is not his
18 gun. That is the only story that fits.

19 I thank you for your attention. I ask you to
20 return a verdict of not guilty and leave it to the
21 Judge.

22 THE COURT: Thank you very much. Okay. At this
23 time I'm going to have y'all step back for about 10
24 minutes. Just step back, refresh yourselves, come
25 back in, we'll get started with the closing argument

1 of the State and my charge on the law. If you will
2 please step back. Do not discuss the case. Not
3 yours yet.

4 (Jury left the courtroom at 12:07 p.m.)

5 THE COURT: Okay. Mr. Von Herrmann, be prepared
6 to say your first words at 12:15.

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

8 THE COURT: Okay. We'll take a break.

9 (Whereupon a recess was taken.)

10 THE COURT: State ready?

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

12 THE COURT: Defense ready?

13 MR. DIGGS: The defense is ready.

14 THE COURT: Everybody in the courtroom who wants
15 to be in the courtroom, right? All right. Bring the
16 jury in, please.

17 (Jury entered the courtroom at 12:26 p.m.)

18 THE COURT: Okay. Ladies and gentlemen, we're
19 now ready to proceed with the closing argument of the
20 State. You may proceed, Mr. Von Herrmann.

21 MR. VON HERRMANN: Thank you, Your Honor. May
22 it please the Court.

23 THE COURT: Yes, sir.

24 CLOSING STATEMENT

25 MR. VON HERRMANN: Ladies and gentlemen, there's

1 been an adage that's been around the law since
2 probably the first lawyer ever had the honor of
3 standing before a jury and what that adage is is if
4 the facts are on your side, argue the facts. If the
5 law is on your side, argue the law. If neither is on
6 your side, just argue and argue a lot.

7 And I submit that we have listened to an hour
8 and a half of arguing a lot because the facts aren't
9 on either one of their sides and the law is not on
10 either one of their sides.

11 So let's start off talking about the law and
12 then we'll start talking about the real facts. Now
13 I'm going to tell you -- just allay your fears, I'm
14 not going 45 minutes.

15 I'm not going to -- I am going to trust your
16 memory and what you heard, but I do feel obligated to
17 correct some of the misstatements that were made by
18 defense counsel and the misleading facts that they
19 did.

20 So let's first talk about the law. If you
21 listen to them or according to them the only one
22 that's going to be guilty is the shooter. It's not
23 true.

24 The definition of murder is intentional killing
25 of one by another for unlawful means. Okay. That's

1 all it is. Killing of one by another -- we know we
2 have that. We have got Joseph Patterson dead. We
3 know it's at the hands of plan to rob. Okay.

4 Then there what's you call the felony murder
5 rule. And you have to -- I should say it's the
6 intentional killing with malice aforethought.

7 Then you have the felony murder rule. And what
8 that essentially says that if you are with somebody
9 else and you are committing a -- a felony and as a
10 proximate cause or a reason that felony, a dangerous
11 felony, that you can be held liable for or be found
12 guilty as if you were the person that pulled the
13 trigger.

14 There is also a concept called hand of one, hand
15 of all. And essentially what that means is, is if me
16 and somebody else go to do something and we have a
17 common plan and as a result of that common plan
18 somebody gets killed at the hand of my defendant --
19 co-defendant, I am held liable just as if he was.

20 So please do not confuse the fact that the only
21 person here is the shooter that he's guilty. If
22 there -- if you find -- and we're going to get into
23 it -- the shooter is definitely guilty of murder
24 under that theory.

25 Under the felony murder rule if we prove that

1 there's a burglary or a -- or a robbery that took
2 place and as a proximate result of that dangerous
3 felony somebody died, you are required by law to
4 treat that person the same way and find him guilty as
5 if they had pulled the trigger. Okay.

6 So understand, those are concepts that I need
7 you to understand going in to talking about this
8 because the truth is when -- we have one shooter and
9 it's Mike Carr.

10 And the truth is what we have is we have -- have
11 an agreement between at least four people to commit
12 an armed robbery, which is dangerous, they took guns,
13 they had guns, they knew that they were going to pull
14 the guns and they knew that they were going to rob
15 them.

16 Now I wanted to spend some of the -- just to
17 kind of -- just background stuff. Breaking and
18 entering into a building in the nighttime with intent
19 to commit a crime is burglary. Okay. That's what we
20 proved to you that they committed.

21 I just want to quickly go through this because I
22 don't want to belabor the point. The evidence is
23 what you folks think it is. But I want you to
24 understand that we have a picture of the door frame
25 for you where it had been kicked in.

1 You heard from Peter Cestare the door was ajar
2 and locked when he got there to process the crime
3 scene.

4 It's been kicked in, it's got a footprint on it
5 for goodness sakes. You know, to argue that there is
6 no breaking in and entering in that place is
7 ludicrous. It clearly was broken into.

8 Now, even if you were to -- well, if you were to
9 even go one step further and start thinking, well,
10 maybe Mike Carr was telling the truth, they were
11 sitting and they were eating -- then look at this
12 picture and look at the magazines.

13 I doubt anybody went back and stacked the
14 magazines nicely and put a candle and the remote
15 control on top of the magazine before they decided to
16 run out when the shooting started. It's ludicrous.

17 There is absolutely no way anything other than a
18 robbery and a burglary occurred in this case, so
19 let's just -- we ought to get through that.

20 Now, the question is as far as the shooter, all
21 the evidence is Mike Carr is the shooter. You heard
22 from all the co-defendants. Now, they beat up on the
23 co-defendants about polygraphs and all of that and
24 how bad I should be.

25 We got three witnesses who all give relatively

1 the same stories. There are some chain -- you know,
2 little minor details like there is going to be. Why?
3 Because of the three -- they all testified they never
4 talked to each other.

5 You got one sitting in jail who hasn't talked to
6 anybody. You got two other people that don't even
7 associate with each any more and they all come
8 forward and give essentially the same factual details
9 with regard to the plan of the robbery, where they
10 were, who was present, who was going to go and do it
11 and how it was going to be accomplished.

12 Now, I have got to tell you. I can't get two
13 kids to agree to the same thing that happened when
14 I'm not in the room, so I don't know how I could get
15 three people, unless they were there to do it, unless
16 they were participants, to agree on that without them
17 talking.

18 And they haven't talked. They testified to
19 that. And there's no information you have that says
20 they ever talked.

21 What else about the burglary that we know? We
22 know from that 911 tape that Joseph Patterson, some
23 of his dying words were, they came in on me, they
24 broke in my house.

25 So dispense with the fact that there's not a

1 breaking and entering. That's ludicrous. He doesn't
2 say, folks, on the 911 tape, I don't get to see the
3 people that did it.

4 What he says is, I don't know who they were
5 because Mike Carr had never met him. Everybody
6 testified the only person in the group in the
7 conspiracy that knew the Joe Patterson was Duriel
8 Simmons. And that's the reason Duriel Simmons didn't
9 go rob him because then he would know who robbed him.
10 It only makes sense.

11 It's not an -- I told you in the beginning this
12 case is not that difficult. It is presented in a
13 difficult fashion. It is presented in a difficult
14 fashion because you have witnesses that do have
15 deals, because that's the way life is. That's the
16 way our system is.

17 The people that are least culpable, whether it
18 be in your eyes or not, and in my eyes, that's my
19 decision, that's my job. And I'm not saying that you
20 necessarily agree with the fact that I thought that
21 one person deserved X years and another person
22 deserved this year.

23 And this whole thing about Nikki not getting or
24 just walking free, it does not say that anywhere in
25 her proffer agreement. She is still under the

1 charges of accessory after the fact of murder. And
2 every one of you has a deal is pleading to accessory
3 after the fact of murder.

4 Now, whether or not you disagree that eight
5 years or 15 years or whatever it is is irrelevant.
6 That is not a reason to find them not guilty. That
7 has nothing to do with that.

8 Essentially what they have all done is they have
9 all come up here and told you we participated and
10 were accessories to what their actions were. The
11 penalty is not up to you.

12 The penalty in this case is not up to you if you
13 are find -- to find guilty. That's what the Judge
14 does. Okay?

15 So the whole theory behind you shouldn't punish
16 my guy because they didn't get punished real bad,
17 that's not for you to decide. I don't know parole
18 eligibility. I don't know when they're going to be
19 eligible for parole.

20 I mean, the fact that the man's been in jail for
21 three years pending trial, I mean, what does the
22 defense think, he shouldn't get credit for that time,
23 he should just start a sentence from right now? I
24 don't know what they think.

25 It's just ludicrous and it doesn't affect

1 whether or not these two individuals are guilty of
2 murder and felony murder and under the theory of the
3 hand of one the hand of all that they committed a
4 dangerous felony and in the commission of that
5 dangerous felony somebody was killed. And that's
6 really the heart and the crux of this case.

7 Now, you folks sat here and listened to the
8 three witnesses that were co-defendants. They were
9 consistent about where they parked. They were
10 consistent about who had -- where they sat in the
11 car.

12 They were consistent about who went to the door
13 and they admit going to the door. They were
14 consistent about who went and hid the gun.

15 Antonio Davis even admitted going and getting
16 the gun for the robbery. He admitted hiding the gun
17 after it was over, after Adam Bailey gave him the gun
18 back.

19 All of that, folks, is what we call
20 corroboration in spite of the fact that they're going
21 to stomp around and going, you know, 80-yard line.
22 This isn't about football, folks, this is about life.
23 And this isn't about stepping over the goal line.

24 This is about you folks being firmly convinced
25 of the guilt of these two individuals. That's what

1 this is about.

2 And to minimize the process by talking about
3 football and whatever other cracks is not fair to
4 y'all because it is your responsibility to make sure
5 that each and every one of you are firmly convinced.
6 And I'm telling -- the evidence is there and I ask
7 that you look at it.

8 I'm not going to go through each and every
9 individual piece, but I can tell you, this is the 911
10 tape. Please listen and look at the photographs.
11 Listen and remember what the witnesses said and why
12 they have a reason to lie.

13 You know, they talked about, well, these --
14 these witnesses are the State, they sure have the --
15 they have the reason to lie, they got a deal. They
16 got a deal.

17 Well, what about the other two that took the
18 stand? They got kind of a reason to lie, too, don't
19 they? Because they're going to jail if y'all
20 don't -- if y'all are firmly convinced of their
21 guilt. And they can make it about a whole clock.

22 Now, Mr. Diggs said I was going to make a big
23 deal out of the fact that his guys claimed he parked
24 on the same street as Mr. Patterson. Well, I'm not
25 going to make a big deal out of it. Y'all know what

1 that means. It isn't he made a mistake by -- and he
2 backed in.

3 You know, if I'm buying pot, I'm going to get
4 up -- why didn't he just get out when he pulled up --
5 when they pulled up and they talking to Steven
6 Spencer? Why didn't he get out then and go, be right
7 back, y'all talk here, I'm going up here and take
8 care of some business.

9 Why park at all? Not going to take that long if
10 that's what you're going to do. But you're not going
11 to park and stand there and wait while you go up and
12 rob somebody.

13 You're going to go somewhere elsewhere the car
14 is not, you're going to back in and the lookouts are
15 going to sit there and wait until you rob the place
16 and come back.

17 Now, the truth of the matter is I don't even
18 know how loud the bang was when the door opened.
19 They said, oh, everybody would have heard it,
20 everybody would have heard it.

21 Well, I don't know if that's true or not. I
22 know this. Everybody heard those gunshots. We know
23 that. And we know there were three and we know they
24 came from inside of the house.

25 And if you listen to the 911 tape we know it

1 came from a pistol because she said he saw a pistol.
2 Sir, were you shot with a pistol? Yes, I was. And I
3 agree, he wasn't sitting there trying to give us
4 evidence of a criminal crime, but what he did give us
5 was a lot of evidence.

6 He didn't know the people. He was shot with a
7 pistol. How would he have not know or not have seen
8 the people that shot him if he didn't -- but know if
9 they had a pistol. Makes no sense.

10 Those are the facts that y'all need to look at.
11 And I agree, you need to look at the details.
12 There's no question about that. I know. But you
13 need to understand that they are both criminally
14 responsible if it is a natural and probable
15 consequence of the commission of that robbery.

16 And I submit to you that the fact that you rob
17 somebody at 1:30 in the morning with a gun in your
18 hand, a natural and probable consequence is somebody
19 is going to get killed.

20 And if you find that and you're firmly convinced
21 of that, folks, you have a duty to find those two
22 defendants guilty of murder. Now, here's the way
23 that this system works and it's spoken about and
24 wisely and it should be.

25 But the truth is is the only people that know

1 and can render a verdict and give the truth and the
2 truth comes from the latin word veredicto which means
3 the speak to truth -- is you folks. Y'all are the
4 only ones that can give us a verdict and answer the
5 question of guilt or not guilty.

6 I submit to you, and I believe that when you go
7 through the evidence, you have all of it back there
8 with you, and you review the testimony and you talk
9 about -- and I'm not going to tell you how to
10 deliberate. I don't care honestly if you take a
11 vote, straw -- it doesn't matter to me. That's up to
12 y'all.

13 I have no preference and however y'all are
14 comfortable voting him guilty is fine by me.

15 But I think when you review all the evidence,
16 you talk about it, you talk about the testimony, you
17 realize that life is just part -- life has just got
18 deals that have to be made.

19 And everybody was consistent and hadn't talked.
20 And the fact that even Ashley talked back in 19 or
21 2004, I mean, it's kind of funny that they are
22 always -- oh, well, they did start mentioning story
23 up in the last 10 days. No, that's not true. They
24 told it back in 2004. She told it back in 2004 after
25 she got her lawyer.

1 Lying to the police. There is a shock. I tell
2 you what. I had two beers and I didn't know how fast
3 I was driving. They going to lie to the police.

4 Then they get with their lawyers and lawyers
5 say, no, what you better do is come clean. But let's
6 go ahead and figure out what's going to happen first.
7 That's why they lie. We expect it.

8 You think any detective that interviews these
9 people thinks that everything that the defendant
10 tells them is true? No. It's ridiculous.

11 I mean, we know that Matt Carr (sic) lied. He
12 either lied on the stand or he lied to the police
13 because you sat here and heard me ask him, didn't you
14 tell the police that there was a plan to rob? Yes, I
15 did. Didn't you plan on robbing them of pounds of
16 marijuana? Yes, I did.

17 Didn't you tell them -- all -- all those things
18 that he -- so we know he lied but yet they're going
19 to make a big deal because our people way back in
20 2004 lied to the police. It's ridiculous. And it
21 doesn't give you reasonable doubt.

22 Everything here points to these gentlemen along
23 with two co-defendants who are going to be
24 punished -- actually three co-defendants that are
25 going to be punished -- making a plan to rob, to rob

1 Mr. Patterson.

2 And when they robbed Mr. Patterson of --
3 whatever reason, Mike Carr shot him. That, folks, is
4 what the evidence has shown. And I'm asking you to
5 go back there and find them both guilty of murder.

6 THE COURT: Thank you, Mr. Von Herrmann.

7 MR. VON HERRMANN: Thank you, Your Honor.

8 JURY CHARGE

9 THE COURT: Ladies and gentlemen of the jury, it
10 now becomes my duty to charge you on the law. Now
11 ladies and gentlemen, as you have listened to their
12 closing arguments, please listen to the law as I give
13 it to you because you must accept the law as I
14 instruct you.

15 Now, I'm going to do my best to speak to you
16 straight forward, me to you, looking at you, as best
17 I can. However, there are going to be several things
18 I'm going to have to look down and read.

19 Once again, when I do that I'll try to do that
20 as clearly as possible. If you do not remember
21 something I said, you want me to repeat something I
22 said, when you go back in the jury room, just sign a
23 question. I will be glad to review it or repeat it
24 to you again.

25 Now ladies and gentlemen, the State of South

1 Carolina charges the defendants, Michael Carr and
2 Michael Bailey, with crimes, criminal offenses.

3 Mike Carr is charged with the crime of murder.
4 Michael Bailey is charged with murder during the
5 commission of a robbery or burglary and or -- you
6 should understand that to these indictments, to these
7 charges the defendants plead not guilty and in doing
8 so that places the burden upon the State for the
9 State to prove guilt beyond a reasonable doubt.

10 Now, ladies and gentlemen, a person is presumed
11 innocent of charges and that presumption of innocence
12 remains with the person from the minute they're
13 charged all the way through any proceedings and is
14 never removed until you the jury, if you're convinced
15 of guilt beyond a reasonable doubt.

16 It's a vital, important rule of law that people
17 charged with crimes should be presumed innocent no
18 matter what the nature, no matter what the nature of
19 the charge.

20 And the burden is upon the State to prove guilt
21 beyond a reasonable doubt.

22 Now ladies and gentlemen, some of you at some
23 point in time in your lives may have been involved in
24 a civil case where people had disputes about
25 accidents, contracts, land disputes or whatever and

1 you may have been a witness or party or observed the
2 trial in that regard. A civil case.

3 If so, you would have heard a jury told by the
4 Judge that the person bringing the lawsuit has a
5 burden of showing that their position, that their
6 claim is more likely true than not. That's a burden
7 in a civil case. It's sometimes called the greater
8 weight of the evidence.

9 But in a criminal case the burden is much
10 heavier than that. In a criminal case the entity
11 bringing the allegations, the State, must prove guilt
12 beyond a reasonable doubt.

13 Proof beyond a reasonable doubt, ladies and
14 gentlemen, is proof that leaves you firmly convinced
15 of a defendant's guilt. Our courts have decided that
16 a reasonable doubt is a doubt that would cause a
17 reasonable person to hesitate to act.

18 Having said that, now let me also say this,
19 ladies and gentlemen. There are few things in this
20 world that we know with absolute certainty. And in
21 criminal cases the law does not require proof that
22 overcomes every possible doubt. The law requires
23 proof beyond a reasonable doubt.

24 Reasonable doubt may arise from the lack or
25 absence of evidence in this case or from the evidence

1 in the case. You the jury, you decide whether or not
2 there is reasonable doubt as to the guilt of either
3 of these defendants.

4 If after considering the evidence you have a
5 reasonable doubt as to the guilt of a defendant, you
6 should find that defendant not guilty. If on the
7 other hand you do not have a reasonable doubt of the
8 guilt of that defendant, you should find the
9 defendant guilty.

10 Now, madam forelady and members of the jury,
11 under the constitution of this state you are the
12 finders of fact, not I. I cannot get involved in the
13 decisions of the facts. We have people disagreeing
14 in testimony as to what they heard, only you can
15 decide what you believe, what you accept.

16 If for some reason during the course of the
17 trial because of some ruling I may have made or
18 anything else I may have done here from the bench you
19 have a thought or feeling that I have an opinion
20 about the facts, you're wrong, I do not have. That's
21 you -- that's you make those decisions.

22 In deciding the facts, ladies and gentlemen, the
23 law does not require nor does it desire that you
24 leave your common sense at home. The law wants the
25 benefit of your individual and your collective common

1 sense as you approach the issues in this case.

2 So in the jury room please use your common sense
3 as you decide these issues.

4 Further, ladies and gentlemen, in deciding the
5 facts of a case you must necessarily pass upon, rule
6 upon, decide upon the believability, the credibility
7 of the evidence placed before you.

8 And in doing so you can consider certain things
9 as the demeanor of the witness, whether the witness
10 was forthright or hesitant, whether a witness had a
11 reason to be biased or prejudiced in regard to the
12 testimony that he or she gave, whether a witness's
13 testimony was contradicted on the one hand or
14 corroborated, made stronger on the other.

15 Was the testimony of a witness consistent? What
16 was the opportunity of -- for that witness for
17 observation or knowledge of facts about which he
18 perceived to testify in.

19 You certainly, ladies and gentlemen, do not
20 determine this matter of credibility by counting the
21 number of witnesses either side. That makes no
22 difference.

23 You may believe a small portion of a witness's
24 testimony and disregard the larger or vice versa.
25 You may believe one witness against many or many

1 against one.

2 Look at all the testimony and decide what you
3 accept, what you don't accept. That's totally up to
4 you, ladies and gentlemen, looking at all the
5 testimony, all the evidence in the case. You have
6 one single goal and that's to reach the truth
7 regardless of where, where the evidence comes that
8 helps you get to that point.

9 Now ladies and gentlemen, just as you are
10 presiders of fact, I am the instructor of law. And
11 as the instructor of the law you must accept the law
12 as I give it to you.

13 Do not be concerned with the law that you may
14 have thought applied before you came in here and do
15 not be concerned with the law that, as you think it
16 should be. You must accept the law as I give it to
17 you under your oath and apply it to this case.

18 First of all, expert witnesses. I have already
19 told you a little bit about that. The rules of
20 evidence ordinarily do not permit a person to come
21 into court and give his or her opinion.

22 The law says a witness must come and testify as
23 to what they perceive by their senses, what they saw,
24 what they heard, what they smelled, things of that
25 nature, tasted.

1 However, if a person because of education,
2 experience in some art, science, profession or
3 calling has qualified themselves to give an opinion
4 about that because it's beyond the understanding of
5 most laypersons, the Court can qualify that
6 individual to give an opinion.

7 You should consider that opinion as evidence in
8 the case just like all the other evidence in the case
9 and give it the weight you think it should have or
10 deserves.

11 If you decide that the opinion of an expert
12 witness is not based on sufficient education or
13 experience or if you conclude that the reasons given
14 in support of the opinion are not sound or that the
15 opinion is outweighed by other evidence, you can
16 disregard the opinion entirely or you may accept the
17 opinion entirely or you may reject part of it and
18 accept part of it.

19 An expert witness's opinion is to be given no
20 greater weight than any other testimony or evidence
21 in the case. You treat it just like other evidence.

22 In all cases, ladies and gentlemen, almost,
23 there's two types of evidence come into play. One is
24 direct evidence, evidence where someone does testify
25 what they saw, heard or smelled or tasted.

1 Also there is circumstantial evidence that comes
2 into a case. Circumstantial evidence is proof of a
3 chain of facts and circumstances indicating the
4 existence of a fact. It is evidence which
5 immediately establishes collateral facts from which
6 the main fact may be inferred.

7 Circumstantial evidence is based on inference,
8 not on personal knowledge or observation. The law
9 makes absolutely no distinction between the weight or
10 value to be given to direct evidence and
11 circumstantial evidence.

12 They both are evidence and neither one should
13 give greater weight than the other. There's no
14 greater degree of certainty required of
15 circumstantial evidence than of direct evidence.

16 You weigh all the evidence in the case. And
17 when all the evidence in the case you are convinced
18 of a defendant's guilt beyond a reasonable doubt, you
19 can find him guilty. If you're not beyond a
20 reasonable doubt, you should find him not guilty.

21 Witnesses testified in this trial, ladies and
22 gentlemen, you heard mentioned the fact that a
23 witness had a prior conviction.

24 A person who has a past criminal record is
25 competent to testify during a trial. A past record

1 does not affect the ability of that witness to
2 testify. The past record may be considered by you if
3 at all, in determining the witness's believability.

4 Remember, you are the sole judges of the facts
5 in the case and of the believability of any and all
6 witnesses.

7 There has been evidence presented that witnesses
8 and people testifying may have made prior statements
9 which are not consistent with the witness's present
10 testimony. You may use this evidence to decide
11 whether or not you believe a witness.

12 You may also use the evidence of the earlier
13 contradictory statements to determine the truth of
14 those statements. It is up to you to decide whether
15 to believe earlier statements or the testimony given
16 at trial.

17 If a witness is shown to have knowingly
18 testified untruthfully concerning any material
19 matter, you may consider this in determining whether
20 you trust that witness's testimony as to other
21 matters.

22 You may reject all testimony of that witness or
23 give all or part of the testimony the weight you
24 think it deserves.

25 There was also testimony, ladies and gentlemen,

1 that the defendant, Mr. Carr, had made statement to
2 law enforcement. That statement alleged to have been
3 made by the defendant Mr. Carr and substances or
4 questions about that statement was admitted into
5 evidence of this case.

6 Prior to that I had to determine if the
7 statement was admissible. I instruct you that you
8 make the ultimate decision of whether or not the
9 defendant made the statement.

10 If the defendant did make a statement, you must
11 determine whether the statement was made by the
12 defendant voluntarily and of his own free will.

13 That means that the statement was not caused by
14 any pressure, force, fear, threats, coercion or
15 intimidation or by any hope or a promise of leniency
16 or reward of any kind.

17 In determining whether the statement was
18 voluntary you should consider both the
19 characteristics of the defendant and the details of
20 the question.

21 Some of the things you can consider like the age
22 of the defendant, the defendant's education or lack
23 thereof, IQ, mental ability, place and length of
24 detention, nature of the question, the advice or lack
25 thereof to the defendant of his constitutional rights

1 called the Miranda rights about remaining silent, any
2 statement can be used against you in a court of law,
3 right to have a lawyer present, if you could not
4 afford one, right to have one appointed without any
5 cost, you can stop making the statement at any time.

6 The State has the burden of proving, ladies and
7 gentlemen, beyond a reasonable doubt that the alleged
8 statement was voluntarily, that it was made. And if
9 you determine it was, you may give that statement any
10 further consideration that you deem proper.

11 You must decide what weight, if any, should be
12 given to the alleged statement. If you determine
13 that the alleged statement was not made or that it
14 was not free and voluntarily made, then you should
15 not consider the statement at all.

16 In our law, ladies and gentlemen, there's a
17 principle. That principle is called the hand of one
18 is the hand of all. And what that means is if a
19 crime is committed by two or more people who are
20 acting together in committing a crime, the act of one
21 is the act of all.

22 A person who joins with another to commit an
23 unlawful act is criminally responsible for everything
24 done by the other person which happens as a probable
25 or natural consequence of the acts done in carrying

1 out the common plan and purpose.

2 If two or more people are acting together,
3 assisting each other in committing an offense, the
4 act of one is the act of all. Whereas sometimes it's
5 said the hand of one is the hand of all.

6 Prior knowledge that a crime is going to be
7 committed without more is not sufficient to make a
8 person guilty of that crime.

9 Mere knowledge of another person is going to
10 commit a crime, even if the defendant is present when
11 the crime is committed, is not sufficient to convict
12 the defendant as a principle.

13 Guilt as a principle is shown by actual or
14 constructive presence at the scene as a result of a
15 prior arrangement. Therefore a finding of a prior
16 arranged plan or common scheme is necessary for a
17 finding of guilt as a principle.

18 The State must prove beyond a reasonable doubt
19 by competent evidence the theory of the hand of one
20 is the hand of all. A principle in a crime is one
21 who either actually commits the crime or who is
22 present aiding, abetting or assisting in committing
23 the crime.

24 When a person does an act in the presence of and
25 with the assistance of another, the act is done by

1 both. Where two or more acting with a common plan or
2 scheme are present in the commission of a crime, does
3 not matter who actually commits the crime, all are
4 guilty. The hand of one is the hand of all.

5 Present at the commission of a crime means to be
6 sufficiently near to aid and abet and assist in the
7 commission of the crime. However, mere presence at
8 the scene of a crime is not sufficient to convict one
9 as a principle. Only the theory -- on the theory of
10 aiding and abetting.

11 Intent is also a necessary element that must
12 have been a common design or intent to commit the
13 crime, the crime must have been committed pursuant
14 thereto with the person aiding and abetting by some
15 overt act.

16 Intent means intending the result which actually
17 occurs, not accidentally or involuntarily. Intent
18 may be shown by acts and conduct of the defendant and
19 other circumstances from which you may naturally and
20 reasonably infer intent.

21 The State must prove these elements beyond a
22 reasonable doubt.

23 Both defendants are charged with the crime of
24 murder. To prove someone guilty of murder the State
25 must prove beyond a reasonable doubt that the

1 defendant killed another person with malice
2 aforethought.

3 Malice is hatred, ill will or hostility towards
4 another person. It is an intentional doing of a
5 wrongful act without just cause or excuse and with an
6 intent to inflict an injury or under circumstances
7 that the law will infer an evil intent.

8 Malice aforethought does not require that malice
9 exist for any particular time before the act is
10 committed, but malice must exist in the mind of a
11 defendant just before and at the time the act is
12 committed.

13 Therefore there must be a combination of
14 previous evil intent and the act.

15 Now malice aforethought can be either expressed
16 or it can be inferred. These do not mean different
17 kinds of malice but merely the manner in which malice
18 may be shown to exist. That is either by direct
19 evidence or by inference from facts and circumstances
20 which are proven.

21 Expressed malice is shown when a person speaks
22 words which express hatred or ill will for another or
23 when the person prepared beforehand to do the act
24 which was later accomplished.

25 For example, laying in wait for a person or any

1 other act of preparation going to show that the deed
2 was within the defendant's mind would be expressed
3 malice. Also may be inferred from the conduct
4 showing a total disregard for human life.

5 Inferred malice may also rise when the deed is
6 done with a deadly weapon.

7 Deadly weapon is any article, instrument or
8 substance which is likely to cause death or great
9 bodily harm.

10 Following are examples of deadly weapons. A
11 pistol, a shotgun, rifle, dagger, knife, slingshot.
12 That is the elements of the crime -- that -- those
13 are the elements of the crime of murder.

14 Also in regard to that, mere presence at the
15 scene is not sufficient to prove someone guilty of a
16 crime. A defendant's presence where a crime is being
17 committed or mere association with a person who
18 commits a crime does not make a defendant an
19 accomplice or an aider and abettor of the person who
20 committed the crime.

21 The burden is on the State to prove every
22 element of the crime charged. If you find after
23 reviewing all the evidence that the State has proved
24 that the defendant was only present at the scene of
25 the crime and that they have not proven beyond a

1 reasonable doubt any other participation in the
2 crime, then you must find the defendant not guilty.

3 The law is that proof of at the scene of the
4 crime only is not sufficient to find someone guilty.

5 Now, the law charges in regard to Mr. Bailey
6 that he was participating in a robbery and or a
7 burglary when the murder took place and that he was
8 guilty of burglary because of that. So let me tell
9 you what the crime of burglary is and the crime of
10 robbery is.

11 Burglary. State must prove that a burglary
12 beyond a reasonable doubt that a defendant entered a
13 building in the nighttime without consent. A
14 building is any structure, vehicle, watercraft, air
15 cab, aircraft where someone lodges or lives, where --
16 or with people assemble for the purpose of business,
17 government or other type of purposes.

18 In order to prove the defendant entered the
19 building, the State doesn't have to show -- does not
20 have to show that the defendant's entire body entered
21 the building. The smallest entry is sufficient.

22 It may be any part of the body such as a hand or
23 a foot or even an instrument. In addition, the State
24 doesn't have to prove that force was used. Does not
25 have to prove that force was used to gain entry.

1 If a person enters a building by using
2 deception, trick, disrepresentation (sic) to get
3 consent to enter, then this is an entry without
4 consent.

5 State must prove also next beyond a reasonable
6 doubt that the defendant intended to commit a crime
7 therein, either a felony or a misdemeanor at the time
8 of the entry to be guilty of a burglary.

9 The mere entry into a building without consent
10 is not burglary if the intent to commit a crime is
11 formed after the entry it is not burglary. On the
12 other hand, if the defendant intended to commit a
13 crime at the time of entry, it is burglary even if
14 the intent was abandoned after the entry.

15 It does not matter that the intended crime was
16 not completed. The intent may be shown by acts and
17 conduct of the defendant and other circumstances from
18 which you may have -- may naturally and reasonably
19 infer intent.

20 What is robbery? In order to prove robbery the
21 State must prove beyond a reasonable doubt that the
22 defendant took the personal property from the person
23 or presence of another person without that person's
24 consent and carried it away.

25 Property is in the presence of a person if it is

1 within the person's reach, inspection, observation or
2 control so that the person could, if not overcome
3 with violence or prevented by fear, retain possession
4 of the property.

5 The State must prove that the defendant carried
6 property away with the intent to permanently deprive
7 the owner or than in regard to the robbery that he
8 intended to be -- the defendant intended to carry
9 property away and to convert the property to the
10 defendant's own use.

11 The slightest removal of the property, the
12 complete possession of the property, even for an
13 instant by the defendant is sufficient to show the
14 taking and carrying away of the property.

15 The taking and carrying away of the property
16 must have been done with violence or by putting the
17 owner of the property in fear or of violence.

18 Now ladies and gentlemen, if a person completely
19 withdraws from the common design or plan and
20 communicates his withdrawal of the design -- start
21 again.

22 If a person completely withdraws from the common
23 design or plan of the crime, and communicates his
24 withdrawal to his associate or associates under
25 circumstances that permit the associate to withdraw,

1 then the person escapes criminal responsibility for
2 the act of the associate.

3 However, if the withdrawal was not communicated
4 to a particular associate or if that associate did
5 not have an opportunity to withdraw after the
6 communication, then the person remains responsible
7 for the actions of that associate that were the
8 natural and proximate -- and probable consequences of
9 the common design.

10 Now, the law requires that a person involved in
11 a common design or crime must withdraw entirely and
12 completely from it and must communicate that
13 withdrawal to his associate.

14 A person who continuess in the common design
15 cannot claim withdrawal. It's the burden of the
16 State to prove that the defendant had not withdrawn
17 from an unlawful common design or plan at the
18 relevant time.

19 It is a further well-settled principle of law
20 that if two or more combine together to commit
21 unlawful act such as robbery or some other crime and
22 in the execution of that criminal act a homicide is
23 committed by one of the actors as a probable or
24 natural consequence of the acts done in pursuance of
25 the common design, all present participating in the

1 unlawful undertaking are as guilty as the one who
2 committed the fatal act.

3 The common purpose may not have been to kill and
4 murder, but if the intended act was unlawful and in
5 the execution of the common purpose a homicide was
6 committed by one as a probable or natural consequence
7 of the act done and the results of a common design,
8 then all present participating in the unlawful common
9 design are as guilty as the slayer.

10 But the killing had no connection with the
11 common purpose and did not ensue as a probable result
12 of an intent to execute common purpose, then the
13 slayer alone is responsible for guilt.

14 It is immaterial whether the defendant charged
15 with the accomplice liability knew in advance that
16 his co-defendant would choose the victim. The
17 gravamen of the offense is that the murder was a
18 natural and probable consequence of the other crime
19 in which the defendant had voluntarily chosen to
20 participate.

21 Now ladies and gentlemen, you have heard all the
22 evidence in the case. You must decide the issues of
23 fact from the evidence you heard in the case or lack
24 of evidence in the case.

25 There's no more evidence to present to you. I'd

1 instruct you on the law. A few minutes you're going
2 to go back to the jury room and begin your
3 deliberations. Please understand my charge on the
4 law is not trying to emphasize one thing more than
5 the other.

6 I -- in doing a charge with so many things to
7 tell you about, many times I repeat things. There is
8 no effort to repeat things to in any way try and
9 make -- focus on one above the other. Just trying to
10 make sure I gave you all the law involved in this
11 particular case.

12 Once you get back to the jury room you
13 deliberate among yourselves. All we ask. As you
14 deliberate and as you make your decision, that you
15 reach a decision that you feel speaks the truth.

16 As I said, the defendants are charged with
17 murder. The State has the burden of proving that
18 Mike Carr did with malice aforethought knowing and
19 willfully and feloniously by means of shooting the
20 victim with malice aforethought either express or
21 implied that he did shoot Joseph Patterson and that
22 the victim died as a result thereof.

23 You find the State has proven that Mr. Carr
24 committed murder, then feel the State's proven that
25 beyond a reasonable doubt, you should find him

1 guilty.

2 If you feel the State has not proven that beyond
3 a reasonable doubt, you should find him not guilty.

4 As to Mr. Michael Bailey, the State charges that
5 he did, as Mr. Carr, in Horry County, on or about the
6 28th of September of '04 that he did combine with two
7 or more people to commit an unlawful act, that
8 unlawful act was robbery and or burglary, and that in
9 the execution of that criminal act and as a natural
10 and probable consequence of that criminal act the
11 victim Joseph Patterson was willfully, feloniously
12 and intentionally killed with malice aforethought
13 either express or implied by means of shooting the
14 victim and the victim did die as a result thereof.

15 Those are the State's charging in Mr. Bailey
16 that he's participating in a robbery and burglary
17 when the murder occurred and was a natural and
18 probable consequence of those criminal acts that the
19 murder occurred and that he is therefore guilty of
20 murder. Those are the allegations of the State.
21 They have the burden of proving guilt beyond a
22 reasonable doubt.

23 Now your verdict, ladies and gentlemen, must be
24 unanimous. All 12 of you must agree on your verdict.
25 Although the foreperson signs the verdict form, all

1 of you must agree on the verdict.

2 I have in my hand those two pieces of paper that
3 I told you was not evidence. On the back of these
4 pieces of paper, madam forelady, you will see the
5 word verdict on each one.

6 Now one of two possible choices each one of the
7 charges. Guilty or not guilty. Not guilty and
8 guilty. No preface in listing the words. So on each
9 one of these indictments you would write one of those
10 two phrases, guilty or not guilty. Not guilty or
11 guilty.

12 Your verdict will still be the same on both
13 indictments. Your verdict could be different on the
14 indictments. Totally up to you in looking at the
15 matters.

16 If you are in the course of your deliberations
17 you have any questions, write it down and I will see
18 if I can respond to it. If there's some evidence you
19 want to see, we can find and play back for you or
20 read back for you, we'll do so.

21 There is no more evidence in the case, but
22 something that's already been presented, I will see
23 if we can do it.

24 If you need me to re-read something on the law,
25 I'll be glad to do that for you. If not, then once

1 you have decided on the verdict, of course, knock on
2 the door and we'll receive your verdict at that time.

3 Now ladies and gentlemen, I know this case has
4 been now -- started on Monday, early, and you were
5 selected and began the case, you listened and paid
6 attention and observed. And I have seen that.

7 Your duty now is to do what Americans have done
8 over 200 something years in our jury system, is go
9 back there, deliberate and reach your decision, the
10 truth in this case. If you would when you go back
11 there, don't begin your deliberations until I send
12 the exhibits back there. Then you may do so.

13 But until I send them back, just wait. Lunch --
14 is here. Madam forelady, y'all may have lunch and
15 discuss the case while you're eating lunch or you may
16 wish to take a break, eat lunch and discuss that,
17 totally up to you.

18 The only rule is that all of you need to be
19 doing the same thing. So all of you should be eating
20 lunch and discussing it or all of you should be
21 taking a break, not some doing one and some doing the
22 other. You have the benefit of everybody's
23 involvement.

24 Once I do say -- if I have forgotten something,
25 I will bring you back out before I send the exhibits

1 to tell you. If I haven't, we will sent those
2 exhibits back and you may begin your deliberations.

3 My two alternates, if you would step back with
4 them right now. I'll probably bring you back out
5 shortly. But since we're not deliberating yet I'm
6 going to let you go back in just -- so if you would,
7 ladies and gentlemen, please step to the jury room.
8 Don't begin deliberating until I send back the
9 exhibits.

10 (Jury left the courtroom at 1:11 p.m.)

11 (The Court was conferring with the bailiff.)

12 *THE COURT:* Exceptions by the State?

13 *MR. VON HERRMANN:* None from the State, Your
14 Honor.

15 *THE COURT:* Exceptions by the defendant Mr.
16 Bailey?

17 *MR. DIGGS:* Your Honor, we would renew the
18 objection to the State's request to charge on malice
19 that we stated on the record earlier, on the facts,
20 unlawful acts, is the first half of that again is
21 that reference to argue -- I would say that's
22 inadequate and lowers the standard of proof, burden
23 of proof of the case.

24 Having that to say, it's probably this -- this
25 happens probably guilty -- we would submit and

1 that -- that charge is simply a misstatement of law,
2 was the standard of guilt.

3 And also, Your Honor, at the time at this point
4 when I objected to that charge I would suggest I
5 think the only remedy that I can get would be to ask
6 for a mistrial, because I think it would be
7 inadequate -- inadequately bring back out, say
8 disregard the portion of the -- that would be the
9 substance of this.

10 Your Honor also, I don't know if it was
11 stated -- maybe I missed it if it was -- that they
12 could find either or of them guilty in this case.

13 *THE COURT:* I said the verdicts could be
14 different on each one.

15 *MR. DIGGS:* That would be our -- that's all.
16 Thank you.

17 *THE COURT:* All right. I note your objection or
18 exception and I respectfully decide not to grant a
19 mistrial or re-charge.

20 *MR. DIGGS:* Thank you.

21 *THE COURT:* Mr. Galmore?

22 *MR. GALMORE:* No exceptions, Your Honor.

23 *THE COURT:* Okay. If y'all would let's come and
24 make sure we have got all of the exhibits. Regarding
25 the tape, do they have something to play it or -- may

1 want to listen to it because I'm not sure what else
2 is on that tape.

3 MR. VON HERRMANN: It's just a--

4 THE COURT: Are there any other matters on the
5 tape?

6 MR. VON HERRMANN: Not that I know of, sir.

7 MR. DIGGS: There are two tapes, Your Honor,
8 also is that video that's still...

9 THE COURT: Okay. The TV can go in. I would --
10 is there anything else on that VHS tape other than
11 that... nobody's walked in...

12 (Alternates excused.)

13 (Jury began deliberations at 1:17 p.m.)

14 (Whereupon this case was in recess awaiting word
15 from the jury.)

16 THE COURT: All right. Where are our
17 defendants? Now, three questions. One is, they want
18 to hear the testimony of Mike Carr stating -- want
19 his first statement to the police was, then the
20 testimony of Adam.

21 Then says, if possible, can we get the yellow
22 piece of paper Herrmann read from about Mike's first
23 statement to the police.

24 The last question I will answer to them that
25 that is not part of the evidence and therefore they

1 must make their decision based on the evidence
2 submitted. The State and the defense agree to that?

3 MR. DIGGS: Yes, sir.

4 MR. GALMORE: Yes, sir.

5 THE COURT: The next one I understand that the
6 testimony of Mr. Carr was done towards the end of
7 the -- end of his testimony. I don't know whether or
8 not -- I know Mr. Von Herrmann went through it. I
9 don't know whether Mr. Diggs and Mr. Galmore went
10 into anything about that, whether we can isolate that
11 or not.

12 MR. DIGGS: I didn't ask for anything back.

13 MR. GALMORE: I believe what you did near the
14 end of his cross-examination--

15 THE COURT: You did redirect on that issue?

16 MR. GALMORE: I did ask him -- yes, I did. I
17 asked him--

18 THE COURT: Therefore we will find it -- if we
19 can find it we'll find it near the end of the
20 cross-examination and during the course of redirect.

21 MR. GALMORE: Yes, sir.

22 MR. DIGGS: It's after the Jackson v Deno
23 hearing.

24 THE COURT: I know that. And then maybe we
25 could just play all of his testimony after the jury

1 came back in from Jackson v Deno.

2 And testimony of Adam, I would like to just ask
3 the jury do you wish to hear the entire testimony of
4 this witness just to make sure they're talking about
5 that, they can say -- get that response, it's yes --
6 bring them on out while the Court reporter is trying
7 to find the testimony on her tape. All right?

8 MR. GALMORE: Yes, sir.

9 THE COURT: So I'm going to send that question
10 in and then respond to their question once I get that
11 back. Y'all come look and see what I have wrote
12 down, if y'all agree with that on that -- saw that,
13 bailiff take that back in while she looks for this
14 stuff.

15 Take that in. You would tell them we're trying
16 to find the testimony -- if they want the entire
17 testimony of Mr. Bailey or just a portion, then bring
18 them back out. Tell them you're waiting on that,
19 then bring them back on out.

20 BAILIFF: All right, sir.

21 THE COURT: See if you can find that testimony.

22 COURT REPORTER: Okay.

23 (Whereupon the jury entered the courtroom at
24 2:50 pm and listened to requested portions of
25 record.)

1 (Whereupon, Court's Exhibits Nos. 3 AND 4 were
2 marked for identification only.)

3 (Whereupon the jury left the courtroom at 3:13
4 pm.)

5 *THE COURT:* Okay. Does anyone have any
6 objection to the testimony being played for the jury?

7 *MR. VON HERRMANN:* Nothing from the State.

8 *MR. DIGGS:* No, sir.

9 *MR. GALMORE:* No, sir.

10 *THE COURT:* Or to the answer I gave in regarding
11 the last question, that piece of paper?

12 *MR. VON HERRMANN:* Nothing from the State.

13 *MR. DIGGS:* Nothing from Mr. Bailey.

14 *MR. GALMORE:* No, sir.

15 *THE COURT:* All right. We'll wait for their
16 verdict. Thank y'all very much.

17 *MR. DIGGS:* Are we at ease?

18 *THE COURT:* We are at ease.

19 (Court in recess.)

20 *THE COURT:* I understand we have a verdict.
21 Couple of things. Officers, I don't know what the
22 verdict is, but whatever it is, I want all my
23 officers to be standing up and to be vigilant. I
24 don't want any outbursts no matter what, no matter
25 what the verdict is.

1 Obviously we let this matter be handled by the
2 jury and they have made their decision and so that's
3 the system we have in the United States of America.
4 Whatever their decision is, it is that decision.

5 So officers, no matter who it is, if somebody
6 starts sitting out -- outbursts, need to be taken
7 into custody, get out of the courtroom. Out of the
8 courtroom.

9 Now, other than that, Mr. Diggs, Mr. Galmore,
10 when the Clerk reads the verdict, I would request
11 that you and your client stand if you would please.
12 All right. Bring the jury in.

13 (Jury entered the courtroom at 3:45 p.m.)

14 || VERDICT

15 THE COURT: All right. Ladies and gentlemen, I
16 understand that you have reached a verdict. Have you
17 reached a verdict, madam forelady?

18 FORELADY: Yes, sir.

19 THE COURT: If you would please hand it to the
20 Clerk. She'll send it over to me.

21 (Whereupon the Clerk approached the forelady
22 then approached the Court.)

23 THE COURT: If you would, the defendants and the
24 attorneys please rise.

25 THE CLERK: This is indictment number

1 2005-GS-26-2560, the State versus Michael Bailey,
2 indicted for murder. The verdict is guilty.

3 This is indictment number 2005-GS-26-2558, State
4 versus Michael Carr. The verdict is guilty. Deana
5 Wilson, foreperson, dated July 26th, 2007.

6 Madam forelady, ladies and gentlemen of the
7 jury, if this is your verdict, so signify by raising
8 your right hand. Thank you.

9 *THE COURT:* If you would please be seated. Mr.
10 Diggs or Mr. Galmore, do you want any -- request
11 polling of the jury?

12 *MR. DIGGS:* Your Honor, I would request that the
13 jury be polled.

14 *THE COURT:* All right. Then therefore we'll
15 poll them now. Mr. Galmore, I will be glad to poll
16 on your client also at the same time.

17 *MR. GALMORE:* Yes, sir, Your Honor.

18 *THE COURT:* All right. Ladies and gentlemen,
19 what I'm going to have the Clerk do is she's going to
20 call your name out.

21 When she calls your name out, I want you to
22 stand individually. Then, Madam Clerk, what I want
23 you to do is first say in regard to -- let's go with
24 State v Bailey first.

25 In regard to State v Bailey she'll then say, is

1 this your verdict, is it still your verdict. Then
2 she'll say, in regard to State v Carr, is this your
3 verdict, is it still your verdict. Two questions.

4 So please answer them individually. Is this
5 your verdict, answer yes or no. Is it still your
6 verdict, answer yes or no. All right.

7 So in essence you will answer four questions
8 when you stand up. One regard State v Bailey, one
9 regard to State v Carr. Is that clear with everyone?
10 Madam Clerk, is it clear with you, too?

11 THE CLERK: Yes, sir.

12 THE COURT: All right. Call your first name.

13 THE CLERK: Diana Wilson.

14 THE COURT: Please stand up.

15 THE CLERK: As to Michael Bailey, is this your
16 verdict?

17 JUROR: Yes.

18 THE CLERK: Is it still your verdict?

19 JUROR: Yes.

20 THE CLERK: As to Mike Carr, is this your
21 verdict?

22 JUROR: Yes.

23 THE CLERK: Is it still your verdict?

24 JUROR: Yes.

25 THE CLERK: Thank you. Frances Richmond, as to

1 Michael Bailey, is this your verdict?

2 JUROR: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR: Yes.

5 THE CLERK: As to Mike Carr, is this your
6 verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Thank you.

11 THE COURT: I'm sorry. The last answer as to
12 Michael Carr, is it still your verdict?

13 JUROR: Yes.

14 THE COURT: Okay. Thank you.

15 THE CLERK: William Leonard. As to Michael
16 Bailey, is this your verdict?

17 JUROR: Yes.

18 THE CLERK: Is it still your verdict?

19 JUROR: Yes.

20 THE CLERK: As to Mike Carr, is this your
21 verdict?

22 JUROR: Yes.

23 THE CLERK: Is it still your verdict?

24 JUROR: Yes.

25 THE CLERK: Thank you. Henry Eddy, as to

1 Michael Bailey, is this your verdict?

2 JUROR: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR: Yes.

5 THE CLERK: As to Mike Carr, is this your
6 verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Thank you. Darlene Lore, as to
11 Michael Bailey, is this your verdict?

12 JUROR: Yes.

13 THE CLERK: Is it still your verdict?

14 JUROR: Yes.

15 THE CLERK: As to Mike Carr, is this your
16 verdict?

17 JUROR: Yes.

18 THE CLERK: Is it still your verdict?

19 JUROR: Yes.

20 THE CLERK: Thank you. Kristi Falk, as to
21 Michael Bailey, is this your verdict?

22 JUROR: Yes.

23 THE CLERK: Is it still your verdict?

24 JUROR: Yes.

25 THE CLERK: Thank you. As to Mike Carr, is this

1 your verdict?

2 JUROR: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR: Yes.

5 THE CLERK: Thank you. Tammy Turbeville, as to
6 Michael Bailey, is this your verdict?

7 JUROR: Yes, ma'am.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes, ma'am.

10 THE CLERK: As to Mike Carr, is this your
11 verdict?

12 JUROR: Yes.

13 THE CLERK: Is it still your verdict?

14 JUROR: Yes.

15 THE CLERK: Thank you. Gayla Mccracken, as to
16 Michael Bailey, is this your verdict?

17 JUROR: Yes.

18 THE CLERK: Is it still your verdict?

19 JUROR: Yes.

20 THE CLERK: As to Mike Carr, is this your
21 verdict?

22 JUROR: Yes.

23 THE CLERK: Is it still your verdict?

24 JUROR: Yes.

25 THE CLERK: Thank you. William Barnhill, as to

1 Michael Bailey, is this your verdict?

2 JUROR: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR: Yes.

5 THE CLERK: As to Mike Carr, is this your
6 verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: Thank you. Alan Campbell, as to
11 Michael Bailey, is this your verdict?

12 JUROR: Yes.

13 THE CLERK: Is it still your verdict?.

14 JUROR: Yes.

15 THE CLERK: As to Mike Carr, is this your
16 verdict?

17 JUROR: Yes.

18 THE CLERK: Is it still your verdict?

19 JUROR: Yes.

20 THE CLERK: Thank you. Miguel Kurth, as to
21 Michael Bailey, is this your verdict?

22 JUROR: Yes.

23 THE CLERK: Is it still your verdict?

24 JUROR: Yes.

25 THE CLERK: As to Mike Carr, is this your

1 verdict?

2 JUROR: Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR: Yes.

5 THE CLERK: Thank you. Tonia Clemmons, as to
6 Michael Bailey, is this your verdict?

7 JUROR: Yes.

8 THE CLERK: Is it still your verdict?

9 JUROR: Yes.

10 THE CLERK: As to Mike Carr, is this your
11 verdict?

12 JUROR: Yes.

13 THE CLERK: Is it still your verdict?

14 THE COURT: What was your last response?

15 JUROR: Yes.

16 THE CLERK: Okay. Did I miss anyone?

17 THE COURT: Okay. If you were polled, please
18 raise your right hand. Okay. You may put it down.
19 All right.

20 Ladies and gentlemen of the jury, I want to
21 thank you for your service. At this time though I
22 want you to step back to the jury room and I will be
23 with you in a minute.

24 Bring you back out in a few minutes. Please do
25 not discuss this case any further. We'll bring you

1 back out in a few minutes. Step back to the jury
2 room.

3 (Jury left the at 3:51 p.m.)

4 THE COURT: At this time any motions from the
5 State?

6 MR. VON HERRMANN: No motions from the State,
7 Your Honor.

8 THE COURT: Any motions from the defendant
9 Bailey?

10 MR. DIGGS: Your Honor, we'd move for a new
11 trial based on all the grounds for the -- all of the
12 objections that we have made through the course of
13 the trial.

14 And Your Honor, perhaps maybe it would be better
15 served to Mr. Bailey if I would request maybe 10 days
16 to submit that motion in writing.

17 THE COURT: Okay. You wish to do so, sir, you
18 may do so.

19 MR. DIGGS: Your Honor, what I would do in that
20 is to outline the particular catching (sic) of the
21 things, certain rulings of Your Honor and just to
22 kind of renew those.

23 THE COURT: Okay. I'm trying to determine as to
24 the opportunity by -- I will be back here in three
25 weeks, so it may take that long, but it may not --

1 MR. DIGGS: Yes, sir.

2 THE COURT: -- to be responsive. But I do want
3 your written motions within 10 days.

4 MR. DIGGS: Yes, sir.

5 THE COURT: In fact, it won't be three --
6 August 12th. I guess that's one, two, the third
7 week, so I would expect everything to me then from
8 you by -- today is the, what, the 26th of July? So
9 Monday a week I would expect to have everything ready
10 by then.

11 MR. DIGGS: Yes, sir.

12 THE COURT: All right. Mr. Galmore?

13 MR. GALMORE: Yes, sir. I would also make a
14 motion for a new trial and a motion for an order and
15 arrest of judgment. Like Mr. Diggs, I would also
16 request the opportunity to submit that motion in
17 writing so we could continue.

18 THE COURT: All right. You may do so. One
19 second. If you have...

20 (Conferring with law Clerk.)

21 THE COURT: Okay. I will respond to your
22 motions and probably by the end of the week after
23 next respond to everything. And if I grant your
24 motions, then of course they would be grant -- if I
25 don't grant your motions, then plan for sentencing

1 probably 15th or 16th of August.

2 Okay. 15th or 16th of August. We'll have
3 sentencing around about that time. So we're going to
4 have that then.

5 MR. DIGGS: Thank you, Your Honor.

6 THE COURT: All right. Very good. If y'all
7 would stay in place. Bring the jury back in, please..
8 August 16th at 2:00.

9 (Jury entered the courtroom at 3:55 p.m.)

10 (Whereupon jury was dismissed.)

11 THE COURT: Okay. At this time then I will wait
12 and reconvene on these matters during the week of the
13 13th of August. I would probably let y'all know my
14 decisions on the motions or whether I need to hear
15 any oral arguments on the motions very shortly after
16 I receive them.

17 If I decide to grant the motions that are --
18 arguments, I will let you -- say I need them, we will
19 do them that week. So Mr. Galmore, I don't -- during
20 General Sessions that week I assume you will be
21 available that week?

22 MR. GALMORE: Yes, sir.

23 THE COURT: And Mr. Diggs, please be available
24 then, too.

25 MR. DIGGS: Yes, sir.

1 THE COURT: Now, whether we got oral arguments
2 or not, if I end up denying the motions, be prepared
3 for sentencing at 2:00 on the 16th of August. The
4 sixth at 2:00, 16th of August.

5 If I grant the motions, of course, that will be
6 moot. If I don't, then that's when I'm going to do
7 sentencing. Any questions from anyone?

8 MR. GALMORE: No, sir.

9 THE COURT: All right. If you would, officers,
10 everyone is in custody until then. Thank y'all very
11 much and see y'all later. Court is adjourned.

12 (End of requested transcript of record.)
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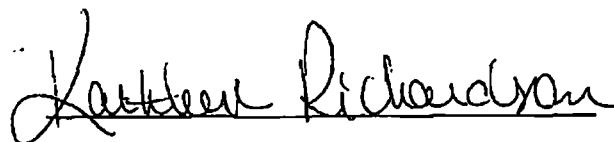
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

I, KATHLEEN RICHARDSON, RPR, CRR, Official Court Reporter for the fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina, on the twenty-sixth day of July, 2007.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 20, 2008



KATHLEEN RICHARDSON, RPR, CRR

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

James E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL BAILEY,

APPELLANT

FINAL BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error by allowing the State's three key witnesses to testify that they had agreed to have their testimony verified by polygraph at the State's discretion, as this evidence violated *State v. Johnson*, 376 S.C. 8, 654 S.E.2d 835 (2007).

STATEMENT OF FACTS

On July 23 through 26, 2007, Michael Adam Bailey and Michael Carr stood trial in Horry County, before Judge James E. Lockemy and a jury, for the murder of a drug dealer, Joseph Patterson, Jr. The State alleged that Carr shot Patterson during an attempted robbery and that Bailey, who was also armed, was his accomplice. Bailey testified that he had accompanied Carr to Patterson's house to purchase marijuana, but was unarmed immediately left when he saw that Carr was armed and intended to rob Patterson. ROA p. 515, line 5 – p. 522, line 16. Carr testified that Bailey had been the shooter and that he was an innocent bystander. ROA p. 561, line 17 – p. 567, line 16. (Even the State did not believe Carr's preposterous testimony. The Assistant Solicitor told the jury in closing argument, "[W]e have one shooter and it's Mike Carr." ROA p. 691, lines 6-9.) The jury found both men guilty and, on August 16, 2007, the judge sentenced them each to imprisonment for thirty years.

ARGUMENT

The trial judge committed reversible error by allowing the State's three key witnesses to testify that they had agreed to have their testimony verified by polygraph at the State's discretion, as this evidence violated *State v. Johnson*, 376 S.C. 8, 654 S.E.2d 835 (2007).

The three key State's witnesses each testified that Bailey was armed and had agreed to help Carr rob Patterson. These witnesses also testified that they had an agreement with the State to take a polygraph in connection with their testimony at the State's discretion, but had not been polygraphed yet. ROA p. 174, line 4 – p. 175, line 20; ROA p. 284, line 24 – p. 285, line 4; ROA p. 355, lines 1-6. In his closing argument to the jury, the Assistant Solicitor explained that polygraphs were not necessary because “[w]e got three witnesses who all give relatively the same stories.” ROA p. 692, line 22 – p. 693, line 1.

Defense counsel did not object to this line of direct examination. In fact, he cross-examined the first of the three witnesses about the State's failure to give her a polygraph [ROA p. 198, lines 5-24] and argued this omission in his closing argument. ROA p. 654, line 1 – p. 655, line 7; ROA p. 656, line 1 – p. 657, line 1; ROA p. 657, line 23 – p. 658, line 6.

Evidence of a witness' willingness to submit to a polygraph test is inadmissible. See, for example, *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999).

The safer course would normally be to avoid any mention of a polygraph examination. If such is brought out in the testimony, the trial judge should be meticulous to see that no improper inference is created.

State v. McGuire, 272 S.C. 547, 253 S.E.2d 103, 105 (1979). The Fourth Circuit Court of Appeals has set forth two factors to consider in reviewing whether a curative instruction or a mistrial is an appropriate response to a reference to a polygraph:

- (1) [W]hether an inference about the result of the test may be critical in assessing the witness' credibility and
- (2) whether the witness' credibility is vital to the case.

United States v. Brevard, 739 F.2d 180, 182 (4th Cir. 1984).

Testimony that each of the three key witnesses had agreed to take a polygraph in connection with their testimony that bolstered the credibility of these witnesses by implying that the State believed their testimony to be true. See, for example, *State v. Johnson*, 376 S.C. 8, 654 S.E.2d 35 (2007). The credibility of these three witnesses was crucial to the verdict. The error could not have been harmless. *Id.*

Since defense counsel did not object to the testimony or the Assistant Solicitor's closing argument, this Court may require Bailey to raise the issue on post-conviction relief. See, for example, *Ellenburg v. State*, 367 S.C. 66, 625 S.E.2d 224 (2006). If not, the Court should reverse Michael Adam Bailey's conviction for murder and remand for a new trial.

Respectfully submitted,


 Joseph L. Savitz, III
 Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of June, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 4, 2009



Joseph L. Savitz, III
Chief Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry CountyJames E. Lockemy, Circuit Court Judge

THE STATE,

RESPONDENT,

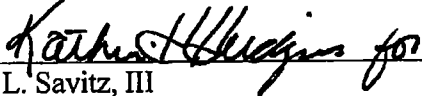
V.

MICHAEL BAILEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Anthony J. Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of June, 2009.



Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of June, 2009.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: March 19, 2017.



SCCID

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June 4, 2009

Anthony J. Mabry, Esquire
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

Re: The State v. Michael Adam Bailey

Dear Anthony:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

A handwritten signature in cursive script, reading "Joseph L. Savitz, III".

Joseph L. Savitz, III
Chief Appellate Defender

JLS,III/kde

Enclosure

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Michael Adam Bailey,

Appellant.

Appeal From Horry County
James E. Lockemy, Circuit Court Judge

Unpublished Opinion No. 2010-UP-306
Submitted June 1, 2010 - Filed June 10, 2010

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, and Assistant Attorney General J. Anthony

Mabry, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

PER CURIAM: Michael Adam Bailey was convicted of murder and sentenced to thirty years' imprisonment. He appeals, arguing the trial court erred in allowing three key witnesses to testify they agreed to take polygraph examinations. We affirm¹ pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."); Id. ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

AFFIRMED.

HUFF, SHORT, and WILLIAMS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of Harry)

Michael Adam Bailey 323554)
 Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broadriver Correctional Institution
Columbia, South Carolina
2. Name and location of Court which imposed sentence _____
Harry County courthouse, Conway SC
3. Name(s) of co-defendant(s) (if any) Mike Carr, Antonio Davis,
Daniel Simmons, Ashley Phillips, Kareem Harry,
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) 2005-GS-26-2560

FILED
 HARRY COUNTY
 CLERK OF COURT
 JUNE 11 10 PM 12:45
 CLERK HUGGINS-WADSWORTH

- (b) _____
(c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
(a) August 16, 2007
(b) 30 years
(c) _____
6. Check whether a finding of guilty was made:
(a) after a plea of guilty _____
(b) after a plea of not guilty At trial
(c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered Ayes@ to (7), list:
(a) the name of each Court to which you appealed:
i. S. C. court of appeals
ii. _____
iii. _____
(b) the result in each such Court to which you appealed:
i. dismissed
ii. _____
iii. _____
(c) the date of each such result:
i. June 10, 2010
ii. _____
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. _____
ii. _____
iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
(a) _____

- (b) _____
 (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Prosecutor misconduct - presented faulty indictment
 (b) ineffective assistance of counsel
 (c) ineffective assistance by appellate defense attorney

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Presented faulty indictment
 (b) Failure to investigate
 (c) Raised only one issue that had no merit -

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? direct appeal
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
 (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. _____
 iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) NO

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. TRIAL - Attorney Bill Diggs
Oak St. Myrtle Beach SC.

ii. Sentencing - Attorney Bill Diggs
Oak St. Myrtle Beach SC.

iii. Appellate defense - Attorney Joe Sawitz
Appellate defense office - Columbia, SC.

(b) the proceedings at which each such attorney represented you:

i. _____

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

I am in prison on a faulty indictment -

Mr. Diggs advised me not to accept a 20 year plea, he said

I was indicted as shooting and killing the victim, and there is no

20. Are you now under sentence from any other court that you have not challenged?

felony
murder
in SC.

NO

Revised 3/2003

20 11 CP26 4890

STATE OF SOUTH CAROLINA)

VERIFICATION

County of _____)

I, MICHAEL A. BAILEY, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Mich Bailey

SWORN to and subscribed before me this 8th day of June 2011.

Susan H. Frye (L.S.)
Notary Public

My Commission Expires
March 5, 2018

My Commission Expires: _____

ED
COUNTY
2011 JUN 10 PM 12:44
KELANIE HUGGINS-WARD
CLERK OF COURT

2011 CP26 4890

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Michael A. Bailey, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Michael Bailey
Applicant

SWORN or affirmed to and subscribed before me this

8th day of June, 2011.
Susan D. Drye
Notary Public

My Commission Expires: My Commission Expires
March 3, 2018

ED
COUNTY
2011 JUN 10 PM 12:44
MELANIE HUGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF WILLIAM ISAAC DIGGS
 COUNTY OF HORRY)

COMES NOW THE UNDERSIGNED, who upon duly sworn, deposes and says
 as follows:

1. My name is William Isaac Diggs. I am a licensed attorney in South Carolina having been so licensed since 1980. I am in the private practice of law and my office is located at 1700 Oak Street, Suite D, Myrtle Beach, South Carolina, 29577. My telephone number is 843-626-4243.

2. I was retained to represent Michael Adam Bailey in case 2005-GS-26-2560, wherein a murder was alleged. A co-defendant, Michael Carr was also indicted for the offense of murder in case number 2005-GS-26-2558. The victim in both cases was one, Joseph Patterson, Jr.

3. At the trial of the case, the Honorable James E. Lockemy, Judge, read the indictments in the following way:

These indictments charge that Michael Bailey and Michael Carr or Mike Carr did in Horry County on or about the 18th of September, 2004, willfully, feloniously and intentionally kill one Joseph Patterson, junior with malice aforethought either express or implied by means of shooting the victim and the victim did die as a proximate result thereof on or about September the 28th, 2004 in Horry County, South Carolina.

Tr. 7 line 21 – Tr. 8, line 5.

4. Several minutes later Judge Lockemy again read Michael Adam Bailey's indictment to the jury. It read as follows:

Michael Bailey did in Horry County on or about September 28, 2004 willfully, feloniously intentionally kill the victim, Joseph Patterson, junior, with malice aforethought either express or implied by means of shooting him.

Tr. 60, lines 18 – 22.

5. After another purported indictment was retrieved from the file of the Clerk of Court, the Court read a second indictment relating to Michael Adam Bailey. The Court read the following language:

... he had combined with two or more people to commit an unlawful act IE robbery and or burglary and in execution of the criminal act and as a natural, probable consequence of the criminal act the victim Joseph Patterson was willfully, feloniously, intentionally killed with malice aforethought either express or implied by means of shooting the victim and the victim did die as a proximate result thereof on or about September 28, 2005.

Tr. 64, line 23 – Tr. 65, line 8.

6. As counsel for Defendant Michael Adam Bailey, at that time I assumed that two separate indictments had been returned against defendant, Bailey. Thereafter, it continued to appear to me that two separate indictments were returned against Michael Adam Bailey. The following colloquy occurred between the Court and the Clerk of Court and the Solicitor.

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

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

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

...

THE COURT: Madam Clerk, you have everyone indicted on this – because this thing here, this says certified copy and it's different than what you brought me. Look at that. Doesn't that say the indictment is a certified copy of the indictment? And it's different than the one you brought me. Well, that's different than the one you brought me.

Tr. 68, lines 5 – 21.

7. Upon information and belief, at trial the Court had two indictments relating to Michael Adam Bailey: one which alleged common law murder as read by Judge Lockerny at Tr. 60, lines 18 – 22; and a second indictment which was clocked and stamped, “certified true copy” on July 19, 2007, which alleged a form of felony murder as read by Judge Lockerny at Tr. 64, line 23 – Tr. 65, line 8.

8. I have since learned that the Clerk of Court has indicated that Michael Adam Bailey was only indicted on one occasion, not two. See **Exhibit A**.

9. In hind sight, and in support of this belief, at trial the Clerk of Court stated to Judge Lockerny, “Anybody could have gone in and copied it [the indictment] who has his file. I don’t know who clocked it.” Tr. 70, lines 4 – 6.

11. Thereafter, during a discussion regarding a motion to sever the trials of the co-defendants Carr and Bailey, the Court stated to Mr. Carr’s trial counsel, “... I’m just trying to understand why you feel *reading it [the indictment] differently or reading it as it really is original [sic] although the Clerk said the other one is original, how it really is original, how is that different?*” Tr. 80, lines 12 – 16. Emphasis added.

12. Prior to the actual presentation of evidence to the jury at the trial of this matter, the Solicitor was required by the Court to select which indictment allegations it would proceed on at trial. See Tr. 99, line 16 – Tr. 100, line 9. At that time, the Solicitor elected to proceed on the allegations contained in the “felony murder indictment.” Id., Tr. 100, lines 6-7, not the common law indictment.

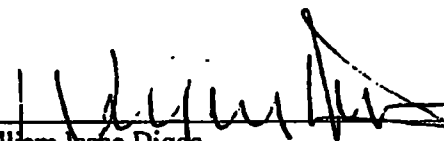
13. Upon information and belief, Michael Adam Bailey was not tried on an indictment which had actually been presented to the Grand Jury.

14. I have since check the criminal file in the office of the clerk of court and

there is no common law indictment therein as read by Judge Lockemy at Tr. 21; and Tr.

60.

FURTHER I SAITH NOT!



William Isaac Diggs

Sworn to before me this 23rd day
Of September, 2008



NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires
April 7, 2015

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Michael Adam Bailey, # 323554,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-4890

RETURN
(Attorney Appointment Requested)

Respondent, making its Return to the Application for post-conviction relief filed June 10, 2011, by Michael Adam Bailey, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in July 2005 for the murder of Joseph Patterson, Jr. (2005-GS-26-2560). William I. Diggs, Esquire, represented the Applicant. On July 23-26, 2007, the Applicant was tried and convicted pursuant to a jury trial before the Honorable James E. Lockemy.¹ On August 16, 2007, Judge Lockemy sentenced the Applicant to thirty (30) years. A notice of appeal was timely filed, and Joseph L. Savitz, III, represented the Applicant on appeal. The South Carolina Court of Appeals affirmed the conviction on June 10, 2010 (2010-UP-306). The case was remitted to the circuit court on June 28, 2010.

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the conviction, the Applicant's records from the Department of Corrections, the trial transcript, and the direct appeal records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

¹ The Applicant was tried with a co-defendant, Mike Carr, who was also convicted of murder and sentenced to 30 years.

II. – Allegations and Relief Sought

In his Application, Mr. Bailey alleges that his custody is unlawful for the following reason(s):

- (1) Prosecutor misconduct: presented faulty indictment;
- (2) Ineffective assistance of counsel: failure to investigate; and
- (3) Ineffective assistance by appellate defense attorney: raised only one issue that had no merit.

The Applicant states he is seeking the following relief: “I am in prison on a faulty indictment – Mr. Diggs advised me not to accept a 20-year plea, he said I was indicted as shooting and killing the victim and there is no felony murder in SC.”

III. – Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Stalk v. State, 375 S.C. 289, 297, 652 S.E.2d 402, 405 (Ct. App. 2007) (citations omitted); Rule 71.1(e), SCRPC. “Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that ‘counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.’” Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007) (citing Strickland v. Washington, 466 U.S. 668, 669 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985)). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007). “In order to prove that counsel was ineffective, a PCR applicant must show that: (1) counsel’s performance was deficient; and (2) there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007) (citations omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Id. (citations omitted). “Furthermore, when a defendant’s conviction is challenged, ‘the question is whether there is a

reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id. (citations omitted). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Id. (citations omitted). The applicant must overcome this strong presumption in order to obtain relief. Stalk, supra (citation omitted).

IV. – Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

V.

Respondent submits that the Applicant's claim regarding the prosecutor presenting a "faulty indictment" is not an appropriate PCR claim. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) (when asserting the erroneous admission of evidence, a violation of a constitutional

right, or other errors in a proceeding, the applicant generally must frame the issue as one of ineffective assistance of counsel). Further, Respondent submits that the Applicant will not be able to meet his burden of proof as to his claims of ineffective assistance of trial and appellate counsel. However, because the allegations may raise questions of fact that the record does not conclusively refute, Respondent requests an evidentiary hearing to fully resolve the issues. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is DENIED.

VII.

WHEREFORE, having made its Return, the Respondent requests that counsel be appointed and an evidentiary hearing held.

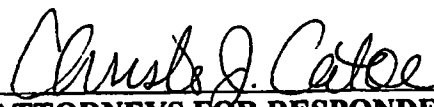
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

July 21, 2011

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Michael Adam Bailey, # 323554,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

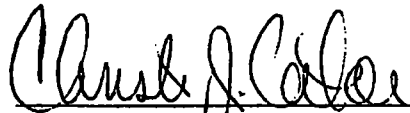
2011-CP-26-4890

CERTIFICATE OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the State's **RETURN** in the above-captioned matter on the following person(s) by depositing in the United States mail, postage prepaid:

**Michael Adam Bailey, # 323554
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210**

DATED this 21st day of July, 2011.



Christina J. Catoe
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

COURT OF COMMON PLEAS

MICHAEL A. BAILEY)
323554)
PETITIONER,)

v.)

TRANSCRIPT OF RECORD
11-CP-26-4890

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

August 26, 2013
Conway, South Carolina

BEFORE :

THE HONORABLE CORDELL MADDOX, JR., JUDGE

APPEARANCES:

J. MARSHALL BIDDLE, ESQ.
Attorney for the Petitioner

SUZANNE WHITE, ESQ.
Attorney for Respondent

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter

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(There were no exhibits submitted.)

1 MS. WHITE: May it please the Court, Your
2 Honor, Susan Lyle on behalf of the State. This is
3 the case of Michael Adam Bailey, case number
4 2011-CP-26-1470. Mr. Bailey today is represented by
5 Mr. J. Marshal Biddle. He was represented at trial
6 by William Diggs. Mr. Bailey was indicted July 2005
7 on a charge of murder, proceeded to trial at which
8 he was convicted before Judge Lockemy, July 26th,
9 2007, subsequently sentenced to 30 years August 16th
10 of that year. There was an appeal and the
11 conviction and sentences were affirmed. This
12 application was filed June 10th, 2011, and he's
13 alleged ineffective assistance of counsel in that
14 counsel failed to investigate. Counsel also advised
15 him not to take a 20 year plea deal and told him
16 that there was no felony murder in South Carolina
17 incorrectly. He's also alleged there was a faulty
18 indictment and ineffective assistance of appellate
19 counsel in that appellate counsel only raised one
20 issue that lacked merit. And at this time I can
21 turn it over to Mr. Biddle.

22 THE COURT: Yes, sir.

23 MR. BIDDLE: Your Honor, the only
24 clarification, I believe she read out Mr. Mincey's
25 case number. This is actually 2011-CP-26-4890 so

PW - M. BAILEY - DIRECT

1 just — I know she didn't do that on purpose; but
2 just to make sure we have the right record, Your
3 Honor. And we're ready to go forward.

4 THE COURT: All right, you may call your
5 first witness.

6 MS. WHITE: Thank you. May it please the
7 Court, I call Michael Adam Bailey to the stand.

8 THE CLERK OF COURT: Please raise your
9 right hand, place your left hand on the Bible.
10 WHEREUPON,

11 **MICHAEL BAILEY,**
12 having been duly sworn by the Clerk of Court,
13 testified as follows:

14 THE CLERK OF COURT: Please be seated and
15 state your name for the record and spell your last.

16 THE WITNESS: All right. Michael Bailey,
17 B-A-I-L-E-Y.

18 MR. BIDDLE: Thank you, Your Honor, may it
19 please the Court.

20 THE COURT: Yes, sir.

21 **DIRECT EXAMINATION**

22 BY MR. BIDDLE:

23 Q Mr. Bailey, we're here today under your PCR
24 application; is that correct?

25 A Yes, sir.

PW - M. BAILEY - DIRECT

1 Q Okay. And you and I have had some time to talk
2 as well as you have lived through this so you're
3 familiar with the facts and circumstances; is that
4 correct?

5 A Yes, sir.

6 Q Let's talk about your PCR application, if you
7 would. As you heard the Attorney General's Office
8 discussed ineffective assistance of counsel
9 referring to Mr. Diggs who is at the back of the
10 courtroom there — he's hiding from me — as well as
11 the ineffective assistance of Appellate Defense
12 counsel as well as a faulty indictment. Are those
13 the grounds for your PCR?

14 A Yes, sir.

15 Q Okay. Let's talk about those things, I guess, in
16 order. Ineffective assistance of counsel Mr. Diggs,
17 when this case came up and you were charged, how
18 much time did you spend with Mr. Diggs discussing
19 this case?

20 A I'd seen him on numerous occasions. I can't say
21 how many times I talked to him, but I talked to him
22 a good bit of times.

23 Q Okay. And were you aware what you had been
24 charged with?

25 A No, sir. I didn't know a felony murder. I

PW - M. BAILEY - DIRECT

1 didn't know about it.

2 Q So, but your discussion of felony murder, when
3 did you find out that it was felony murder?

4 A The day of my trial.

5 Q Okay. So the day of your trial you realized it
6 was a felony murder?

7 A Yes, sir.

8 Q But prior to that what did you believe that your
9 sentence was or your —

10 A I thought my charge was a straight murder that I
11 would have to be found as the trigger man that was
12 —

13 Q As the actual shooter; is that correct?

14 A Yes, sir.

15 Q And you discussed that with Mr. Diggs?

16 A Yes, sir.

17 Q A lot?

18 A Yes, sir.

19 Q Was there ever any discussion about felony murder
20 or anything like that with him?

21 A No, sir.

22 Q Okay. So that wasn't an option as far as you
23 were concerned; is that —

24 A I knew nothing about it.

25 Q Okay. And you spent — Mr. Diggs was not, he was

PW - M. BAILEY - DIRECT

1 not a court appointed attorney, he was actually
2 retained; is that correct?

3 A Yes, sir.

4 Q So, and you spent a considerable — let's say,
5 did you meet with him — how long from the time you
6 were arrested until you were tried?

7 A About three years.

8 Q Okay. So during that three year period you guys
9 were working on your case discussing facts,
10 defenses, and those kind of things; is that correct?

11 A Yes, sir.

12 Q And during that process there never was a
13 discussion of this felony murder?

14 A No, sir.

15 Q Okay. Did he discuss it with you?

16 A No, sir.

17 Q Did he bring it up to you?

18 A No, sir.

19 Q Okay. And so at the time of your trial you guys
20 discussed the facts of what your testimony was gonna
21 be?

22 A Yes, sir.

23 Q And, you know, what did he tell you that — in
24 terms of I understand there was a plea offer, what
25 was that plea offer?

PW - M. BAILEY - DIRECT

1 A The plea was for 20 years.

2 Q Okay. And what was his advice to you under that?

3 A Well, my understanding was that, not that he —
4 advised me not to take the plea because they
5 couldn't convict me of killing a man because I
6 didn't pull the trigger, I didn't kill him.

7 Q Okay.

8 A That's the way I understood it.

9 Q And y'all discussed the facts —

10 A Yes, sir.

11 Q —of what happened that night or that day?

12 A Yes, sir.

13 Q And based on that as well as his additional
14 information I'm assuming that y'all discussed
15 witnesses?

16 A Yes, sir.

17 Q Do you know if he did any interviews or
18 investigations or anything like that?

19 A I'm not sure.

20 Q Okay. But you felt like he had a clear
21 understanding of what —

22 A Yes, sir, I was — I felt good about what he was
23 doing.

24 Q Okay. When you showed up to trial and it became
25 a felony murder what was your reaction?

PW - M. BAILEY - DIRECT

1 A I didn't understand what was going on because I
2 didn't know of the felony murder; and then he told
3 me in the court that day, he told me there was no
4 such thing as felony murder in the State of South
5 Carolina.

6 Q Okay. But yet, they were making arguments to the
7 judge, he and the prosecutor, for felony murder; is
8 that correct?

9 A Yes, sir.

10 Q When — that was the first date that you had
11 heard anything about you were being charged with
12 felony murder?

13 A Yes, sir.

14 Q Okay. So your understanding was that they had to
15 prove if you were going on straight murder that the
16 jury was gonna have to find you guilty of actually
17 physically pointing and pulling the trigger and —

18 A Yes, sir.

19 Q —shooting the man?

20 A Yes, sir.

21 THE COURT: Hold on just a second.

22 Yes, ma'am.

23 MS. WHITE: Your Honor, I just want to
24 object. He's getting into a lot of leading
25 questions. I know there's got to be a little leeway

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1 with PCR, but I would object to the leading nature
2 and testimonial nature of the question.

3 THE COURT: Yeah, if -- you're protected
4 for the record.

5 I'll allow you to lead a little bit but
6 don't go too far.

7 MR. BIDDLE: Thank you, Your Honor.

8 BY MR. BIDDLE:

9 Q Did you see the indictment on the day that, I
10 guess, when you were arraigned or sentenced?

11 A I never seen the indictment.

12 Q Not sentenced, but arraigned before -- you've
13 never seen the indictment. Had your lawyer seen the
14 indictment?

15 A I don't think so, no.

16 Q Okay. Would you anticipate that he would have
17 seen it?

18 A I would hope he had seen it. I would hope he had
19 went and got it and read it.

20 Q Okay. Do you know -- was the judge provided with
21 more than one indictment?

22 A Yes, sir.

23 Q And you were there that day, did you see both of
24 them?

25 A I seen them both handed to the Court, yes, sir.

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1 Q And tell me about the discussions that were going
2 on regarding that in the courtroom.

3 A They was discussing which one was the original
4 indictment because the first indictment that was
5 read to the jury was a standard murder indictment,
6 the straight murder. And then somewhere along the
7 trial another indictment was presented which was the
8 felony murder indictment, and that's when they
9 started discussing which one was actually the
10 original. But during the trial, when they read off
11 the docket number both indictments had the same
12 docket number but they was two separate indictments
13 that read different. The bodies of the indictments
14 were different.

15 Q Okay, so let me just make sure I understand that.
16 There were two indictments that had two separate
17 languages but they had exactly the same case number
18 on it?

19 A Yes, sir.

20 Q Okay. And what did Mr. Diggs say about that?

21 A Mr. Diggs, he — him and the judge had a
22 discussion about which indictment was the original
23 one, and he was saying that he was confused about
24 which one the original and he wanted the case to be
25 stopped and reindicted because they didn't know

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1 which was the original indictment.

2 Q Okay. And again, with respect to that, I mean,
3 obviously the judge didn't stop the trial?

4 A Because Mr. Diggs had no — and Mr. Diggs also
5 had said he had never seen the felony murder
6 indictment, and he said that he had never seen the
7 straight murder indictment.

8 Q Okay. So he never saw either one of the
9 indictments?

10 A He said that he never looked in the file prior
11 to. Those were his exact words. He said he never
12 looked in the file.

13 Q Okay. I mean, obviously if you would have been
14 provided with a felony murder indictment and you
15 were looking at 30 years, would you have probably
16 pled to the 20 years?

17 A Yes, sir, probably so, if I would have understood
18 at the time what the felony murder consisted of.

19 Q Okay. Tell me about your appellate, I mean,
20 obviously you filed an appeal?

21 A Yes, sir.

22 Q Did you meet and discuss with your appellate
23 defense attorney anything?

24 A No, sir, I never met him.

25 Q So somebody else did that?

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1 A Yes, sir.

2 Q Do you know what the issues that were raised
3 under the appeal?

4 A The only issue I believe that was raised was the
5 lie detector and that was it. He didn't raise any
6 of the other issues.

7 Q Okay, and so — but there were other issues to be
8 raised; were there not?

9 A Yes, sir.

10 Q Do you know why he didn't raise those issues?

11 A No, sir.

12 Q Do you know who was communicating with your
13 appellate defense attorney?

14 A I really don't. I don't know.

15 Q Okay. Do you know if Mr. Diggs knows?

16 A I mean, I would hope so. I would hope he knew.
17 I think he had, I think he had a hand in it, but I'm
18 not, I can't say for sure.

19 Q Okay. Well, Mr. Diggs will talk to us about
20 that. But your understanding was, it was just the
21 issues associated with the lie detector but there
22 were multiple other issues like we've discussed; is
23 that correct?

24 A Yes, sir.

25 Q Okay. You said you never met your appellate

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1 defense. Do you know your appellate defense
2 attorney's name?

3 A I think it was Mr. Savitz if I'm not mistaken.

4 Q Joseph Savitz; is that right?

5 A Jo Savitz, yes, sir.

6 Q And if -- again, today we're asking for the Court
7 to grant you PCR and you're asking for a new trial?

8 A Yes, sir.

9 Q And that's based on the fact that the indictments
10 were faulty; is that correct?

11 A Yes, sir.

12 Q Okay. And the issue of that is that the same
13 indictment, two separate indictments with one case
14 number?

15 A Yes, sir.

16 Q Okay. And that you weren't aware of that until
17 the day of trial?

18 A Yes, sir.

19 Q And the fact that Mr. Diggs advised you not to
20 plead to the 20 years?

21 A Yes, sir.

22 Q And that's based on the fact that he was saying
23 there was no felony murder in South Carolina?

24 A Yes, sir.

25 Q Okay. And then with respect to the Appellate

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1 Defense, the issues that weren't raised by
2 Mr. Savitz, being the faulty indictment, the motions
3 to sever, the other ---

4 A Yes, sir.

5 Q ---issues that were raised at the trial of this
6 matter?

7 A Yes, sir.

8 Q Okay. Anything else you want to talk to the
9 Court or mention to the Court regarding Mr. Diggs
10 and/or Mr. Savitz?

11 A No, sir.

12 Q Okay. Answer any questions that the Attorney
13 General may have.

14 A All right.

15 MS. WHITE: Thank you.

16 **CROSS-EXAMINATION**

17 BY MS. WHITE:

18 Q Mr. Bailey, you said you met with Mr. Diggs
19 numerous times over the pattern, over the time of
20 three years; is that right?

21 A Yes, ma'am.

22 Q And you said at the time you were pleased with
23 how the progress was going and what you were
24 discussing?

25 A Yes, ma'am.

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1 Q And was the defense essentially that you were
2 there, you thought you were going to purchase
3 marijuana, the other co-defendant was the one that
4 pulled out a gun and shot the victim?

5 A Yes, ma'am.

6 Q So the whole time you allege that you did not
7 pull the trigger?

8 A No, ma'am.

9 Q You were arrested for murder; is that right?
10 That's what your arrest warrant was for?

11 A Yes, ma'am.

12 Q Did you talk to Mr. Diggs about the murder
13 charge?

14 A Yeah.

15 Q You said you didn't talk about felony murder?

16 A Yes, ma'am. Yes, ma'am.

17 Q You said you would you have taken the 20 year
18 plea if you knew you were facing 30 years, but did
19 you not discuss with him that murder carries 30
20 years to life?

21 A I would have, I would have took the plea if he
22 would have explained to me that I could go to prison
23 for 30 years or the rest of my life and I didn't
24 pull the trigger. I didn't understand that. If he
25 would have let me know that, even though I'm not

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1 guilty whatsoever, but I might would have considered
2 a 20 year plea because of the severity of what I was
3 facing. But see, I didn't understand that just
4 being there could make me guilty of murder. I
5 didn't understand.

6 Q So your testimony is that Mr. Diggs never
7 explained to you that you being there and being
8 involved, the State could potentially prove that you
9 had something to do with it and you could also be
10 found guilty of murder?

11 A No, I didn't know that.

12 Q But you knew you were going to trial on the
13 charge of murder, right?

14 A Yes, ma'am.

15 Q And did you ever discuss with Mr. Diggs the
16 concept of hand of one hand of all?

17 A No, not to any — nothing that amounted that I
18 didn't — I never was explained what it meant. I
19 never knew anything about it because my whole, the
20 whole time while I was out on bond waiting for trial
21 I was being told that I was going to trial as the
22 trigger man; and if I could prove that I did not
23 commit the murder that I could be — I would be
24 found not guilty.

25 Q So you never talked with your attorney about the

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1 theory of accomplice liability, that the two of you
2 worked together?

3 A I never heard none of those words that you
4 mentioned until the day of my trial.

5 Q Okay. And your attorney made numerous
6 objections, and in fact, made a motion to dismiss
7 the indictment?

8 A Yes, ma'am.

9 Q Is that right?

10 A Yes, ma'am.

11 Q And he argued pretty extensively about that.
12 Also made a motion to sever the trial based on the
13 two different indictments?

14 A Yes, ma'am.

15 Q And the judge overruled that, right?

16 A Yes, ma'am.

17 Q And ultimately the State ended up having to prove
18 more. They had to prove that you were aware that
19 there was a robbery or burglary that was gonna occur
20 and that you knew someone could die as a result.

21 A I mean, I guess, yeah.

22 Q Okay. And you said you never spoke with your
23 appellate attorney. Did you ever receive any
24 communication with him?

25 A You talking about —

PW - M. BAILEY - REDIRECT

1 Q From him?

2 A —Mr. Savitz?

3 Q Yes.

4 A He wrote me and told me he would be doing my —
5 he would be doing my direct appeal. And then I
6 never heard nothing else from him until I got the
7 letter saying direct appeal was denied.

8 Q Okay.

9 MS. WHITE: Your Honor, I think that's all
10 I have at this time for this witness.

11 THE COURT: All right. Anything on
12 redirect?

13 MR. BIDDLE: Just briefly, Your Honor.

14 **REDIRECT EXAMINATION**

15 BY MR. BIDDLE:

16 Q I just want to make sure, Mr. Bailey, just to be
17 clear. Your understanding and your communication
18 from Mr. Diggs was that they had to prove that you
19 actually committed the murder, that's what's your
20 understanding —

21 A Yes.

22 Q —of the — for them to find you guilty of
23 murder, that's what your understanding was?

24 A Yes, sir.

25 Q And that was — and that understanding came from

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1 meeting with Mr. Diggs and discussing the facts and
2 the circumstances for the trial; is that correct?

3 A Yes, sir.

4 Q Okay. And none of the other discussions were
5 made again, between the hand of one hand of all,
6 that was not discussed?

7 A No, sir.

8 Q Okay. And felony murder was not discussed, I
9 believe your testimony is, other than the fact he
10 said it didn't exist in the State; is that correct?

11 A Yes, sir.

12 Q Okay.

13 MR. BIDDLE: Those are the only questions
14 I have, Your Honor.

15 THE COURT: Okay. Thank you, sir. You
16 can step down.

17 MR. BIDDLE: Thank you, Your Honor.

18 Applicant calls Bill Diggs to the stand.

19 THE CLERK OF COURT: Please raise your
20 right hand, place your left hand on the Bible.

21 WHEREUPON,

22 **WILLIAM I. DIGGS,**
23 having been duly sworn by the Clerk of Court,
24 testified as follows:

25 THE CLERK OF COURT: Please be seated.

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1 State your name for the record, spell your last.

2 THE WITNESS: Hi, my name is William Isaac
3 Diggs, D-I-G-G-S.

4 MR. BIDDLE: May it please the Court.

5 **DIRECT EXAMINATION**

6 BY MR. BIDDLE:

7 Q Mr. Diggs, you were Mr. Bailey's trial counsel;
8 is that correct?

9 A Yes.

10 Q And you spent a tremendous amount of time
11 preparing his case; is that correct?

12 A I think we -- I think we spent a lot of time, you
13 know, amount of time that would be considering the
14 nature of the case and the charges sufficient to try
15 to prepare and defend him.

16 Q Okay. When did he hire you? Did he hire you
17 immediately after arrest, before the arraignment, or
18 do you recall?

19 A I don't recall. I don't know that we were doing
20 arraignments per se at that time, I mean, without
21 looking in some documents somewhere.

22 Q Okay.

23 A I couldn't really tell you when it was in the
24 process.

25 Q But when you were hired your understanding of

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1 what he had been charged with, what was your
2 understanding of what he had been charged with?

3 A Well, he'd been charged with murder and my
4 understanding was he was there participating in a
5 crime with this Mr. Carr who unbeknownst to Adam had
6 a gun and pulled it out and shot and killed a fellow
7 in the case. And that Adam was being charged
8 because he was there participating in that,
9 whatever, I guess robbery is what they had assumed.

10 Q Was it actually a robbery or was that what your
11 understanding was it was robbery?

12 A Yeah, it was gonna be — are you asking me from
13 my perspective —

14 Q Yes.

15 A —as a defense attorney or what the State's
16 theory was?

17 Q I guess what the State's theory was and —

18 A Well, the State's theory was that the two fellas
19 were gonna go there to steal marijuana from the
20 fella who had it in his possession.

21 Q Okay. Marijuana and cash if he had that?

22 A Yeah, whatever, but I think specifically it was
23 pounds, ebb the phrase pounds of marijuana he
24 supposedly had the premises.

25 Q Did you have any discussions with Adam regarding,

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1 you know, the alleged robbery or what the intent was
2 or —

3 A Yeah, we had a lot of discussions about — and we
4 took, made every effort to try to corroborate what
5 Adam was telling us. And I'd always believed Adam
6 was telling me the truth that he went there to make
7 a purchase with the other fella and had no idea what
8 happened was going to happen. And so Adam's
9 understanding and my understanding was that he went
10 there to make this purchase fairly, I think, he in
11 the range of a 20 dollar purchase and fella ended up
12 getting shot by David Carr. I think his name was
13 David —

14 Q Right.

15 A —or Michael, I'm not sure.

16 Q And he was the trigger man I believe it was
17 Michael Carr.

18 A Yeah, there's no doubt about it.

19 Q And he actually was the co-defendant that was
20 being tried at the same time; is that correct?

21 A Right, right.

22 Q And was there ever any discussion about felony
23 murder?

24 A I don't think there was any discussion about it.
25 Throughout my career I've always, and for — I don't

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1 know, I'm not aware of any changes in the law. And
2 Justice Ness used to say there's no felony murder in
3 South Carolina, you know, in terms of the technical
4 sense of the meaning of that phrase. South
5 Carolina's malice murder it's unlawful killing of
6 another human being with malice afterthought. And
7 certainly, you can have the hand of one is the hand
8 of all. You can have two or three or four, however
9 many people committing, you know, participating in
10 that killing encouraging it and planning it and
11 carrying it out, and so forth. But in terms of the
12 strict, strict term felony murder, we don't have
13 that. I don't know, I'm not aware of any statute t
14 hat's adopted that as the rule in South Carolina.

15 Now we certainly would have talked — you
16 know, Adam always took the position with me that he
17 didn't know about this. He wasn't aware this was
18 gonna happen; that it's something that happened,
19 completely caught him by surprise, in fact, caught
20 him by surprise. In fact, he had turned away and
21 was leaving when Carr, I think, kicked open the door
22 and to his surprise the young fella was standing
23 there and Carr shot him. Adam did not know that was
24 gonna happen and mere presence does not make you
25 guilty, okay. So he wasn't, under that theory of

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1 the case he wasn't guilty of murder.

2 Q And y'all —

3 A And shouldn't have been convicted of that.

4 Q And y'all had discussed that at length I believe?

5 A Many times.

6 Q So, you know, you show up the day of trial and
7 all of a sudden you got this indictment and there's
8 — that's different — you're handed something
9 different than the judge reads.

10 A Oh, yeah, absolutely. That was a major surprise.
11 I had received -- I think I got a copy of the
12 indictment in the discovery materials. I'm not
13 sure. I'd have to go back and refresh my memory
14 about it. I was trying to look at that a minute ago
15 to see when I first got hold of that indictment. I
16 typically don't go over and look. In the criminal
17 file here there's not a lot of things, you know,
18 that are there that were not already provided with
19 in the discovery process. I got a copy of the
20 indictment. I don't know how exactly how I came
21 into possession of the indictment, but I had a copy
22 of the indictment and I was looking at it as the
23 judge was reading it to the jury, you know, after
24 the jury had been seated. And I realized that's not
25 the indictment that I had, you know, so clearly

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1 there were two indictments and there was only one, I
2 mean, should have been only one.

3 Q And there was extensive pages and pages and pages
4 of discussion with you and with co-counsel's or
5 co-defendant's counsel I believe Mr. Gallimore; —

6 A Right.

7 Q —is that correct?

8 A Yeah.

9 Q Regarding the indictment issue and the prejudice
10 and those kind of things?

11 A Well, I felt that clearly Mr. Carr was gonna take
12 the stand and commit perjury, okay. That's what I
13 thought. And I thought that would be apparent to
14 everybody because it was a certain procedure that
15 had to be followed in that event counsel couldn't
16 participate and help encourage that, and I think for
17 us to have to be sitting there with that
18 co-defendant under those circumstances was extremely
19 prejudicial. Why it wasn't pursued at the appellate
20 level I have no idea.

21 Q Let's talk about the appellate level. Did you
22 communicate with Mr. Savitz?

23 A Yeah, I asked him specifically if he would
24 personally take the case. I knew it was going to go
25 to Appellate Defense.

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1 Q Okay. And did y'all discuss the myriad of issues
2 that obviously are in ---

3 A No, not really, maybe in a general broad sense;
4 but I said, you know, I just said this is, you know,
5 a case where I feel like we've got wrongful
6 conviction here and I would appropriate it if you
7 would look at it and do the appeal which I
8 thought --- I had hired Joe so I felt like he was the
9 best one they had on staff at the time.

10 Q Okay. And there were a number of issues is your
11 understanding?

12 A Yeah, right.

13 Q Did you see the appeal when it was filed and any
14 of those items?

15 A No, I don't think I --- the first thing I heard
16 about it, I think, was when Adam's mother told me
17 about it. I might be wrong there but...

18 Q Was that before or after it was affirmed?

19 A It was after, certainly after the appeal had been
20 submitted.

21 Q Okay. Did you review it after the fact or did
22 you see the order?

23 A Yeah, I saw it. I saw the brief after the fact.

24 Q Okay. And did you feel like it met the level of
25 what you really thought were the issues?

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1 A No, no, no.

2 Q Okay. And so you had obviously advised your
3 client of that?

4 A I don't know if I ever talked to Adam about it.
5 I know I talked to his mom.

6 Q Okay. So ---

7 A She would come by and she was very disappointed
8 in what Joe did and, you know, he's a good friend of
9 mine and I'm not talking about him.

10 Q The lawyers typically have relationships with
11 each other and those kind of things. But I believe
12 your testimony is that, you know, there were lots of
13 issues and he didn't address any of them?

14 A Right.

15 Q Other than that one?

16 A Right. And you know, I introduced the polygraph
17 evidence. Why would you argue that on appeal that
18 the State had made an error or the Court had made an
19 error.

20 Q Did you -- do you feel like that was ineffective
21 assistance of appellate counsel?

22 MS. WHITE: Your Honor, I would object. I
23 think there's case law on point that says counsel
24 attorneys cannot testify as experts as to whether or
25 not somebody else is ineffective.

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1 THE COURT: Yeah, sustained on that one.

2 MR. BIDDLE: I'm not asking him as an
3 expert, Your Honor, just simply in his opinion.
4 Well, I'll rephrase. Thank you.

5 THE COURT: Yeah, rephrase it.

6 BY MR. BIDDLE:

7 Q If you would have filed the appeal would — what
8 were the issues that you would have filed?

9 A Certainly the severance is one I would have
10 pursued and I would have done something. I would
11 have asked for remand or something on the indictment
12 question.

13 Q Let's talk about that indictment question. That
14 seems to have been a major issue.

15 A Yeah.

16 Q What is your understanding, and I mean, was there
17 ever any conclusion as to what really happened?

18 A Not that I'm aware of.

19 Q Okay. As a result of that case and that
20 indictment, was there a new policy with the county
21 clerk's office?

22 A I know that —

23 MS. WHITE: Your Honor, I would just
24 object to his knowledge of this. I think that, you
25 know, as an attorney he can — needs someone to

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1 testify to the clerk's office policy he will need to
2 call somebody from the clerk's office.

3 THE COURT: You can ask him if he had
4 knowledge of it, personal knowledge. If he does he
5 can respond; if not, we'll get somebody from the
6 clerk's office. It's got to be of his own personal
7 knowledge.

8 MR. BIDDLE: Yeah, I'm asking him of his
9 own personal knowledge because Mr. Diggs has done
10 several criminal matters over the years, probably
11 hundreds if not thousands, and I'm just asking him
12 if things changed with his dealings with respect to
13 indictments after —

14 THE WITNESS: Yeah, they changed. You
15 know, it wasn't like a, said look, we're gonna
16 change this and you know, we're not gonna be able to
17 do this or that anymore. It was like it was more
18 subtle than that. I just noticed that there were a
19 lot more hands-on in terms of we had access to the
20 criminal files.

21 Q Okay. And do you think that was a result of this
22 matter?

23 A I think so.

24 Q Okay. Do you believe that your advice to Adam by
25 not recommending that he take the 20 year plea based

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1 on the felony murder — I mean, had you known felony
2 murder would you have advised him not to take that
3 plea?

4 A Well, we don't have felony murder. You know, if
5 Adam had come to me and said, look, I was in there
6 with him, we went up there, we were gonna rob him,
7 you know, that was our real purpose for going there,
8 I would have explained, well, then in that situation
9 it makes you liable for what happens, you know, and
10 you can be convicted of murder even if you're not
11 the one who actually pulled the trigger. You know,
12 it's kind of a technical concept and I'm not
13 surprised that Adam doesn't have it exactly right
14 the way I recall it, slightly different but very
15 similar. I did tell him we don't have felony murder
16 but I don't think he understood you go a little bit
17 further than that in the analysis and you can
18 participate with someone in the killing of another
19 person even though there's only one actual person
20 who is pulling the trigger.

21 Q Okay. And again, do you think that he understood
22 that, I mean, again?

23 A I think so because Adam never indicated to me in
24 any of our conversations that he was guilty of
25 anything that would have exposed him to criminal

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1 responsibility for murder, you know.

2 Q Or even for — even if it was in the act of
3 felony to commit the murder you got that issue but
4 buying marijuana and/or?

5 A Right.

6 Q You know —

7 A He went there to — he had contributed a
8 20-dollars I think to make a purchase of marijuana
9 and that was the extent of his involvement is the
10 way he explained it to me.

11 Q It's your understanding the indictment issue was
12 not addressed on appeal; is that correct?

13 A Yeah, it wasn't.

14 Q Has it ever been addressed by anybody other than
15 Judge Lockemy?

16 A No, and I — yeah, I would think it needs to be
17 addressed, but I'm not aware of anyone. Even Judge
18 Lockemy I'm not sure addressed it.

19 Q Well, I mean, based on my reading of the
20 transcript — and again, you're testifying, he
21 didn't, did he?

22 A No, I don't think so.

23 MS. WHITE: Your Honor, I would just
24 object to counsel testifying during his questions.

25 MR. BIDDLE: Thank you, Your Honor. I'm

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1 not testifying.

2 THE COURT: Yeah.

3 BY MR. BIDDLE:

4 Q So what was the result of that? I mean,
5 obviously well, just tell me what's your
6 understanding of what did happen? What did Judge
7 Lockemy do?

8 A I recall the Solicitor standing up and saying,
9 well, I take responsibility for that, I'm sorry,
10 Your Honor, on what happened. It wasn't clear to me
11 what he was taking responsibility for; but I felt I
12 was disappointed that, you know, we didn't get more
13 clarification about what it was that was — he was
14 apologizing for what had happened here. You know,
15 had — as it was my understanding incorrect that the
16 grand jury had returned multiple indictments in the
17 case or had returned only one and another one had
18 just appeared; I don't know.

19 Q And the judge never addressed that?

20 A I don't think so.

21 Q I mean, obviously Mr. Von Hermann apologized for
22 something?

23 A Right.

24 Q But the judge didn't — were there any
25 ramifications for any of that?

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1 A Not that I'm aware of.

2 Q I mean, so you had two indictments. I mean, what
3 was the result of that?

4 A Well —

5 Q During the trial, if you will?

6 A We had made our objection it. We, I think,
7 preserved the record with respect to the effect of
8 the indictment, certainly questionable status or
9 state of the indictment. The State, as the Attorney
10 General alluded, had a number of witnesses involved
11 supposedly in terms of what the plan was and indeed
12 it would have been a little more difficult to prove,
13 you know, but...

14 Q Was there any question that there were two
15 indictments?

16 A No, no, no, no, everybody understood that.

17 Q And the judge knew that?

18 A If you see that right from the record. I'm
19 holding my indictment and the judge is holding his
20 indictment and not the same.

21 Q Right. And but yet, somehow one mysteriously
22 just goes away? Is that what happened?

23 A Or just mysteriously appeared.

24 Q Okay.

25 A I think the one that I had was the original one

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1 that had been returned by the grand jury and the
2 other one that the judge had was not. I mean,
3 that's my opinion.

4 Q Sure.

5 A Or belief.

6 Q And obviously that prejudiced Mr. Bailey?

7 A That — when was Gentry decided? I'm not sure

8 —

9 MS. WHITE: Gentry, March 7th, 2005.

10 THE WITNESS: Let me say this. And our
11 trial was —

12 MS. WHITE: Your trial was 2007 so.

13 THE WITNESS: Okay. It used to be much of
14 my career the indictment was critical in terms of
15 establishing jurisdiction of the court. No longer
16 is. It's more of a noticed thing so I don't know if
17 what we have here is a jurisdictional defect or not.
18 You know, I'm not really prepared to give an opinion
19 about that or make a statement about it. And so I
20 don't know if he was prejudiced. I'm not really,
21 you know, in a position right now to analyze what
22 the prejudice is.

23 BY MR. BIDDLE:

24 Q If you would have had that indictment from the
25 beginning you think your advice would have been

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1 different to him under the plea offer?

2 A I think that the indictment was tailored to fit
3 the evidence that we knew existed at the time of the
4 trial because that evidence kind of evolved and as
5 stories changed and people came around to accept
6 deals. Every witness to my recollection was given a
7 break, all of whom had more culpable roles than Adam
8 did, you know, in this whole process; and but yet,
9 he's the one that gets unsaddled with the murder
10 along with the actual shooter but.

11 Q And were all of these witnesses testifying
12 against him?

13 A I think —

14 Q Against Adam?

15 A Yeah. Yeah, but I think — I don't know. I
16 can't speak right now to how much it might have
17 affected the way we prepared the case if the
18 indictment were different, if I had known it was
19 gonna be different. I mean, you know, it's just
20 because I look at murder as being murder and they're
21 gonna have to prove those elements; and it really
22 doesn't matter how you get there, you know, with
23 either this or that or something else, if those
24 elements of murder are met by way of evidence so you
25 can have a conviction. And so I don't know, I just

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1 look at it the way the statute defines murder and
2 look at how the evidence might be plugged in to fit
3 those elements.

4 MR. BIDDLE: Bear with me, Your Honor, for
5 a moment.

6 BY MR. BIDDLE:

7 Q Do you have an opinion as to where you think —
8 again, this is personal knowledge only, if you have
9 it. Do you suppose where that indictment came from?

10 MS. WHITE: Your Honor, I think that calls
11 for speculation.

12 THE WITNESS: It is speculative.

13 THE COURT: Yeah, I sustain.

14 MR. BIDDLE: Thank you, Your Honor.

15 THE COURT: If he knows an answer.

16 THE WITNESS: I don't know.

17 BY MR. BIDDLE:

18 Q So no knowledge. Answer any questions the AG may
19 have. Thank you, Mr. Diggs.

20 **CROSS-EXAMINATION**

21 BY MS. WHITE:

22 Q Mr. Diggs, I want to start off with just a couple
23 of background questions. Mr. Bell made reference to
24 your years of criminal practice. Can you tell me
25 how long you've practiced here in South Carolina or

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1 in general?

2 A Since 1980.

3 Q And has the majority of that practice been in
4 criminal law or?

5 A Yeah.

6 Q What level of cases or what variety of cases have
7 you represented clients on?

8 A Well, at what level? You're talking about, are
9 you talking about trial level?

10 Q Well, magistrate, general sessions. Have you
11 been involved in any other murder cases, death
12 penalty?

13 A I used to be the chief attorney at the Office of
14 Appellate Defense and I represented about 24 death
15 penalty clients. In terms of trials I think I've
16 done maybe eight death penalty trials. We had a not
17 guilty verdict in Georgetown.

18 Q So you have spent your time researching,
19 preparing, and practicing in the criminal law area?

20 A Yeah. Yes.

21 Q When you received this case I guess at what point
22 you were retained you were aware that he was charged
23 with murder?

24 A Yeah.

25 Q Is that correct?

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1 A Right.

2 Q And you were aware that and the co-defendant Carr
3 were the ones accused of being —

4 A Yes.

5 Q —up at the apartment?

6 A Yes.

7 Q Now at the trial multiple co-defendants testified
8 against Mr. Bailey and Mr. Carr; is that right?

9 A Right.

10 Q And everyone pointed to Carr as the trigger man?

11 A As I recall, yeah.

12 Q Okay.

13 A If I recall correctly.

14 Q And so that's really never, that was never a
15 question?

16 A Right.

17 Q The question was whether or not Mr. Bailey and
18 Mr. Carr went to solely purchase marijuana —

19 A Right.

20 Q —or to rob?

21 A Right.

22 Q So in realm of the indictment the felony murder
23 that we keep referencing the indictment says murder
24 but it says that he was involved with the commission
25 of a robbery or burglary at which point he should

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1 have known essentially consequences could be the
2 death of someone. Now did that actually make it
3 harder for the State to prove because they had to
4 prove that your client actually knew he was going
5 there for robbery?

6 A Yeah, yes.

7 Q And some of the evidence, each of the
8 co-defendants actually testified that he had a gun
9 with him when he went; is that right?

10 A I believe so, yeah.

11 Q And in fact, several of them testified that he
12 went maybe the day after to dispose of that gun—

13 A Yes.

14 Q —with a couple of them?

15 A I think so.

16 Q So there was some evidence that proved or tended
17 to prove that he might have been aware of it being a
18 robbery, but his defense entirely was absolutely
19 not, only —

20 A Right.

21 Q —went to purchase marijuana?

22 A Right.

23 Q Okay. In the theory of that there were several
24 motions made because of inconsistent statements;
25 weren't there?

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1 A Yeah.

2 Q And you attempted to address to the jury the fact
3 that some of these codefendants had changed their
4 statement multiple times?

5 A Right, correct.

6 Q And in fact, some recently had changed their
7 statements?

8 A Yes.

9 Q You made a motion at the beginning to dismiss the
10 indictment?

11 A Right.

12 Q Because of the risk of prejudice because of the
13 two separate —

14 A Yeah, because it was obviously something wrong,
15 you know. I mean, I didn't feel like we should go
16 forward on a charge as serious as murder. We don't
17 even know what the legitimate, correct indictment
18 is.

19 Q And in fact, you also made a motion to sever at
20 the time —

21 A Yeah.

22 Q —because of that same risk?

23 A Yes.

24 Q Those were all denied as we've said earlier?

25 A Right.

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1 Q But throughout the trial you made, I think you
2 made, a motion to continue the case based on that
3 same issue?

4 A Right, correct.

5 Q We raised — you raised several issues having to
6 do with, you know, some of the testimony. When it
7 comes to getting your client to testify as well, was
8 that something you are always aware would be
9 necessary in this case or —

10 A I felt like it would be. I think — I can't
11 really recall specific conversations that we had
12 about it, but I felt like Adam — I think our
13 approach to the case always was that he was gonna
14 have to testify because, you know, it looked bad,
15 just the facts of the case and he needed to explain.
16 We needed to have somebody to explain how he was
17 there at the time somebody was killed and murdered.

18 Q Now the applicant testified that he would have
19 absolutely accepted a 20 year plea deal if he knew
20 he was facing 30 years to life. Did you review with
21 him the potential sentence for murder if he had gone
22 to trial?

23 A Yeah, I'm sure we talked about all of that.

24 Q So —

25 A We talked about the 20 years we felt was too

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1 severe for him being present at the time someone was
2 killed that he had no foreknowledge of.

3 Q And so his awareness of it being 30 to life did
4 not, to your understanding, occur just on the day of
5 trial?

6 A No. We always knew what the life sentence, I
7 mean what the murder sentence potentially was. And
8 you know, it was a situation where Adam never
9 confessed to anything to me, you know, about being
10 culpable in the case.

11 Q In regards to —

12 A To me, I don't know if I've ever had a client in
13 30 years that agreed to take a severe, that severe
14 of a sentence when they were, you know, just
15 completely innocent of the offense.

16 Q In regards to other discussions you had did you
17 discuss with him anything about potential issues of
18 accomplice liability or hand of one hand of all
19 prior to trial?

20 A Yeah, we discussed that.

21 Q And in your discussions with him did you feel
22 that he understood the concept that even though —

23 A I think he did; but you know, it was never a
24 situation where we were discussing his participation
25 in this effort to commit crimes against the

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1 individual who lived in the apartment.

2 Q But you were aware and you did discuss with him
3 that that was what the State was gonna try to show?

4 A Yes.

5 Q Okay. And you mentioned something earlier about
6 the fact that he was the least culpable and that
7 each of them got a break. We had — somebody drove
8 the car there?

9 A Right.

10 Q Somebody knew the victim?

11 A Yeah, I think I'm making those statements in
12 closing argument maybe.

13 Q Somebody provided the car so —

14 A Somebody — each of the witnesses had done
15 something.

16 Q Okay.

17 A Okay. To my knowledge though there was nothing
18 that Adam had done other than gone up the stairs to
19 make the purchase.

20 Q Okay. But when it comes to the trial was it
21 essentially a credibility match?

22 A Yeah, it was.

23 Q And so the testimony presented and the evidence
24 presented by the State tended to indicate he had
25 more culpability?

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1 A Right.

2 Q Okay.

3 MS. WHITE: Beg the Court's indulgence for
4 a moment.

5 THE COURT: Okay.

6 BY MS. WHITE:

7 Q Just a quick question. About you indicated that
8 you obviously were chief appellate defender for a
9 while.

10 A Yes, ma'am.

11 Q In your practice as appellate defender can you
12 raise every issue that's brought up at trial, or
13 would you normally raise every potential preserved
14 issue at trial?

15 A No. You would, you wouldn't do an Anders brief
16 though if there were meritorious issues. I don't
17 understand who reviewed that at the court and signed
18 off on that Anders process but —

19 Q Now—

20 A —they did.

21 Q Okay. And I might be incorrect, I was under the
22 impression it was not an Anders brief.

23 A Okay, maybe I'm wrong.

24 Q Yeah, there was a full briefing filed.

25 A Okay, yeah, you're right, but I think I did see

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1 a respondent's brief.

2 Q Okay. So, but in your general practice you're
3 not able to raise every potential preserved
4 appellate issue for appellate review?

5 A Typically you don't do that because, you know,
6 you water down the good issues in the case. And I
7 think the prevailing view is you take the strongest
8 issues and you go with them and you don't argue
9 everything.

10 Q And that is probably an issue of credibility as
11 well for appellate defenders; is that correct?

12 A Right, yeah.

13 Q Okay.

14 MS. WHITE: Your Honor, I think that's all
15 I have at this time for this witness.

16 THE COURT: All right, anything else?

17 MS. WHITE: Just a little followup.

18 **REDIRECT EXAMINATION**

19 BY MR. BIDDLE:

20 Q Along those same lines, Mr. Diggs, did you
21 provide any affidavits or information to the
22 Appellate Defense when they were working on this as
23 to what your thoughts were with respect to the
24 trial?

25 A Yeah, I wrote an affidavit. I think — I don't

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1 remember specifically what it said. I did see — I
2 was reminded of that a little while ago before the
3 hearing started; but I can't remember, you know,
4 exactly what I said in the affidavit.

5 Q And was that kind of laying out what you thought
6 were the major issues, if you would?

7 A Yeah, I guess.

8 Q As opposed to every issue?

9 A Right. I needed — I probably should look at
10 that affidavit if you want me to comment on it but
11 —

12 MS. WHITE: May I approach, Your Honor.

13 THE WITNESS: I can't remember exactly
14 what the purpose of it was.

15 BY MR. BIDDLE:

16 Q If you would.

17 A Okay.

18 MS. WHITE: If that's going to go into
19 evidence I need to see a copy of that as well.

20 THE COURT: Have you got an extra copy?

21 MR. BIDDLE: Be glad to let her.

22 THE COURT: He says she's got one. Y'all
23 work that out.

24 (Document tendered to the Respondent.)

25 (Pause.)

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1 THE WITNESS: Okay. What was your
2 question?

3 BY MR. BIDDLE:

4 Q I guess the question is, you know, were those the
5 what you perceived as the meritorious issues and —

6 A You know, there were other meritorious issues. I
7 thought the severance was justified because of the
8 nature of the defense that Mr. Carr was gonna
9 present.

10 Q Okay. And was there any — did you have any
11 understanding or belief as to the indictment issue
12 based on that affidavit?

13 A Yeah, I felt like there had been some
14 inappropriate, improper conduct with respect to the
15 presentation of that indictment. I don't think the
16 grand jury returned that indictment.

17 Q Okay. And so that seemed to be your major issue
18 with —

19 A Yeah.

20 Q —the indictment concern —

21 A Right, exactly.

22 Q —was that. And I believe it was, it was just
23 never true billed?

24 A Well, that indictment wasn't.

25 Q To your information and to —

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1 A Right.

2 Q —your knowledge. Did they ask you to waive any
3 true billing or submission to the —

4 A No.

5 Q Okay. Or presentment or, you know, service of
6 anything like that, did they ever at the trial, do
7 you recall?

8 A No, I don't. We weren't asked to waive anything
9 with respect to the indictment.

10 Q Okay.

11 MS. WHITE: If I can just get some
12 clarification. When he's talking about the
13 indictment, the indictment I have copy of was true
14 billed so I'm not sure if he's representing one that
15 they did not proceed on.

16 THE COURT: And I don't know; you'll have
17 to clear that up.

18 MS. WHITE: Can I get some clarification.

19 BY MR. BIDDLE:

20 Q The clarification is, is that the actual
21 indictment that he was tried for and that was
22 referenced was the alleged felony murder. Your
23 testimony is you do not believe that was true billed
24 by the grand jury?

25 A Right, I don't think it was.

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1 Q Okay.

2 MS. WHITE: Okay, 'cause it does have a
3 stamp.

4 THE WITNESS: Right.

5 BY MR. BIDDLE:

6 Q That's the — I believe his testimony was that he
7 believes there was some inappropriateness that
8 occurred on somebody's behalf. We don't necessarily
9 know who.

10 A I think the indictment got something in the text
11 of the indictment got changed?

12 Q Okay.

13 A That's just my opinion because the judge was not
14 reading the indictment that I had.

15 Q Okay. And you obviously preserved that was one
16 of the major issues?

17 A Yeah. And I'm not, there may be some people who
18 know about this, but that other — it may be that
19 that other indictment disappeared, I'm not sure.

20 Q Okay.

21 A Okay.

22 Q No further questions.

23 A All right.

24 THE COURT: Anything else? I mean, I'll
25 give y'all because this is a little confusing but

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1 I'll be happy to.

2 MS. WHITE: Nothing further for this
3 witness, Your Honor.

4 THE COURT: All right. Yes, sir, you can
5 step down.

6 THE WITNESS: Thank you.

7 MR. BIDDLE: Your Honor, briefly I will
8 call Ms. Rose Bailey to the stand.

9 THE COURT: All right.

10 THE CLERK OF COURT: Please raise your
11 right hand, place your left hand on the Bible.
12 WHEREUPON,

13 **ROSE BAILEY,**
14 having been duly sworn by the Clerk of Court,
15 testified as follows:

16 THE CLERK OF COURT: Please be seated and
17 state your name for the record, spell your last.

18 THE WITNESS: My name is Rose Bailey,
19 B-A-I-L-E-Y.

20 **DIRECT EXAMINATION**

21 BY MR. BIDDLE:

22 Q Ms. Bailey, what is your relation to Adam?

23 A He's my son.

24 Q Okay. And you were present during the trial of
25 this matter; is that correct?

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1 A I was.

2 Q Okay. And you were also witness to the
3 discussion regarding the indictments and those kind
4 of things?

5 A Yes, sir.

6 Q Do you have any knowledge, of your own personal,
7 regarding the two indictments what happened to the
8 second indictment, if you will?

9 A Yeah, the trial started with the straight murder
10 indictment which we don't have anymore because Burt
11 Von Hermann got that back from Judge Lockemy, and he
12 destroyed that indictment.

13 MS. WHITE: Your Honor, I would object to
14 that.

15 THE WITNESS: I have all of the —

16 THE COURT: Ma'am. Ma'am.

17 THE WITNESS: I'm sorry.

18 THE COURT: Ma'am, everybody.

19 THE WITNESS: I'm sorry.

20 THE COURT: Yeah. You answer the question
21 that he asked and that's all you answer.

22 THE WITNESS: Okay.

23 THE COURT: What is your objection?

24 MS. WHITE: My objection would be if he's
25 asking for personal knowledge I think there needs to

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1 be some kind of foundation set as to what personal
2 knowledge she might have —

3 THE COURT: If you could.

4 MS. WHITE: —other than speculation.

5 THE COURT: If you could, set some.

6 BY MR. BIDDLE:

7 Q You were present at the trial?

8 A Yes.

9 Q You were in the courtroom?

10 A Yes.

11 Q And you watched the whole time?

12 A Yes.

13 Q You were standing there watching them discuss
14 this stuff with the judge?

15 A Yes.

16 Q Did you see the two indictments?

17 A Yes.

18 Q Did you see them hand them to the judge?

19 A Yes.

20 Q Did you see anybody get them back from the judge?

21 A Yes.

22 Q Who got the indictment back from the judge?

23 A Burt Von Hermann, the Solicitor for the State.

24 Q And you know that to be him because?

25 A Because I sat in the trial for five days and knew

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1 who he was.

2 Q And he introduced himself to the jury, you were
3 present for that?

4 A Yes.

5 Q And you saw the two documents?

6 A Yes.

7 Q And you, and you saw him as you testified that he
8 destroyed one?

9 A I believe he destroyed one.

10 Q Okay.

11 MS. WHITE: Your Honor, I would object.
12 That's her speculation. She has no —

13 THE COURT: Yeah, I mean, her response was
14 I believe he destroyed it. If she doesn't have any
15 further information.

16 UNIDENTIFIED PERSON: Not only that —

17 THE COURT: Hey, wait a minute. Hold on,
18 let me just stop everybody. You'll leave now if you
19 say another word.

20 You answer the question. I'm trying to
21 get to the facts. I'm trying — y'all don't know me
22 here. I will do my best to stay calm, but if you
23 burst, have anymore outbursts, you're leaving for
24 the day. All right.

25 MS. WHITE: And Your Honor, I would ask

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1 that be stricken from the record.

2 THE COURT: Yeah, it's stricken. I mean,
3 she can't say that basically it disappeared and I
4 think someone else did it unless she knows.

5 MR. BIDDLE: And that's my question, Your
6 Honor, and my understanding is she does know so.

7 BY MR. BIDDLE:

8 Q Did you witness Mr. Von Hermann ball up and throw
9 away the indictment?

10 A I saw him place it in his folder. He was the
11 last one to have possession of that. It never
12 surfaced again. It wasn't — the Clerk of Court's
13 Office has the felony murder indictment in the file.
14 It does not have straight murder indictment in the
15 file. Solicitor's Office does not have the straight
16 murder indictment in their file. The only one that
17 we have now is the one that surfaced after the trial
18 began. The trial began with the straight murder
19 indictment. The jury was going to decide which
20 individual shot and killed the victim. Did Michael
21 Bailey shoot the victim or did Mike Carr shoot the
22 victim. Both indictments started with this trial
23 the very same way, but Mr. Von Hermann gives a
24 second indictment to Mr. Diggs which was felony
25 murder. And this was arguing through the transcript

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1 of the trial for like, I mean, this went on for like
2 an hour, and it was like 67 pages in the transcript
3 of Judge Lockemy trying to figure out which is the
4 original indictment. Nobody knew that indictment
5 that we have here, the felony murder, yes, it was
6 true billed according to the stamp on the back.

7 Q Right.

8 A But in my opinion, and I have researched this for
9 five years —

10 Q I got to stop you. You can't give — I want to
11 ask you a question.

12 A Okay.

13 Q I want to ask you a question.

14 A Okay.

15 Q The last person you saw with that indictment was
16 Mr. Von Hermann; is that correct?

17 A Solicitor Von Hermann, yes.

18 Q And I believe your testimony was you visited the
19 Solicitor's Office?

20 A I did not but Paul Archer did. He was appointed
21 the case.

22 Q You can't testify to that. You visited the
23 clerk's office?

24 A Yes, I did.

25 Q And it's not in the clerk's file?

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1 A It's not in the clerk's file.

2 Q And you made that understanding your own self; is
3 that correct? You looked at the file along with —

4 A I looked at the file along with Melanie Huggins
5 who is Clerk of Court here in Horry County.

6 Q And it was not there?

7 A It was not there.

8 Q Okay. And your testimony is the last person that
9 had that second indictment was Mr. Von Hermann?

10 A It was the first indictment presented to the
11 judge and Mr. Von Hermann had that.

12 Q That's the non-felony, the straight murder?

13 A That was the straight murder. That's how the
14 trial began.

15 Q Okay. Did you have discussions with Mr. Savitz,
16 not what those discussions were regarding the
17 appeal?

18 A Yes, I did.

19 Q Okay. So because obviously Adam was in jail; is
20 that correct?

21 A Right.

22 Q Did y'all discuss lots of issues?

23 A We did. The main issue that we discussed was the
24 fact that there were two indictments, and Mr. Diggs
25 had mailed this affidavit that we have to Judge

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1 Savitz to use for the direct appeal to talk about
2 the indictment to raise that issue. But Joe Savitz
3 mailed this back to me and said he didn't want to
4 raise the issue of the indictments.

5 MS. WHITE: Hearsay, Your Honor.

6 MR. BIDDLE: You can't testify as to what
7 he said.

8 THE COURT: Sustained.

9 MR. BIDDLE: Thank you, Your Honor.

10 BY MR. BIDDLE:

11 Q But you had discussed multiple issues with
12 Mr. Savitz?

13 A Yes.

14 Q And he did not file the appeal based on those; is
15 that correct?

16 A He did not.

17 Q He only did the one for the lie detector?

18 A Correct.

19 MR. BIDDLE: No further questions, Your
20 Honor.

21 THE COURT: Yes, ma'am.

22 **CROSS-EXAMINATION**

23 BY MS. WHITE:

24 Q Just for clarification, you've testified that you
25 saw the solicitor put the indictments in his file.

1 A Yes.

2 Q You have no knowledge of where they went, who
3 touched them, what happened to them after the end of
4 the trial? Personal knowledge of visual seeing
5 anything with those indictments? Yes or no is all I
6 need.

7 A I saw Solicitor Von Hermann put it in his file if
8 that's what you're asking me.

9 Q And after that point you have no knowledge?

10 A I never saw it again.

11 Q Thank you.

12 MS. WHITE: Your Honor, that's all I have.

13 THE COURT: Anything other than —

14 MR. BIDDLE: No, sir.

15 THE COURT: All right, ma'am, you may step
16 down.

17 MR. BIDDLE: Your Honor, that's the
18 Applicant's showing.

19 THE COURT: All right.

20 Yes, ma'am, anything?

21 MS. WHITE: Your Honor, the State has
22 nothing in reply.

23 THE COURT: Okay. Well, I've got
24 something to read tonight. I want to read this
25 transcript, which is fairly voluminous although I

1 did look and there is a very long discussion about
2 these two indictments. Does anybody — and I open
3 this to the attorneys in the courtroom — have any
4 idea how you ended up with two indictments in this
5 case that seem to be somewhat that had the same
6 numbers but separate set of facts. Now I have held
7 court in a county that will remain unnamed, but
8 their computer refuses to print out what they put in
9 so if you put a burglary first it will print
10 something that's not fact related and it also fails
11 to put the dates in. This is a coastal community
12 far south of us. And so the dates are all 00000000.
13 And the last time I went down there for a criminal
14 court week I dismissed all the indictments because
15 they, you know, what happened here, do you know? If
16 somebody's got — and I'll take speculation from the
17 lawyers at this point if you can, if you can explain
18 it.

19 MR. BIDDLE: The pure speculation, Your
20 Honor, is that the indictment was created by the
21 solicitor that tried the case because he knew that
22 he was not gonna be able to get him convicted.

23 THE COURT: As the shooter?

24 MR. BIDDLE: As the shooter. And it was
25 created for that purpose. That's truly what we

1 believe happened.

2 THE COURT: All right, that's your
3 position.

4 MR. BIDDLE: Yes, sir.

5 THE COURT: And just for the record,
6 that's your position. Do you have any, and again,
7 this is just position and I'm not going to hold you
8 to it or hold you in contempt for perjury. I just
9 need to know what's going on.

10 MS. WHITE: Your Honor, I have no personal
11 knowledge of it. I know that the indictment that we
12 have that he was tried on has got a stamp and a
13 signature of the foreman of the grand jury, a date
14 that which it was true billed. You know, there is a
15 presumption of regularity with that. I don't know
16 if an indictment was —

17 THE COURT: There was another one true
18 billed too, right?

19 MS. WHITE: I don't — from the
20 conversation to be honest, from the record, I can't
21 really determine if it was actually true billed
22 signature and, you know, I have read through it
23 several times.

24 THE COURT: It would shock me if they were
25 both true billed. I mean, I'm not sure how that

1 would physically happen but I'll look.

2 MS. WHITE: And I don't know if there was
3 an amended indictment. I don't know what happened.
4 Essentially though our position, obviously, is that
5 a murder indictment is a murder and alleges
6 essentially the same elements in regards to murder;
7 and in fact, this was almost tougher for the State
8 in this case because they actually had to prove that
9 Mr. Bailey was aware that he was gonna be there for
10 an actual robbery or burglary.

11 THE COURT: All right. Now let me ask you
12 this, what difference would it make?

13 MR. BIDDLE: Your Honor, the language ---

14 THE COURT: Let me, my understanding is
15 they --- let's assume all the facts are as you say.
16 They go rob somebody of marijuana or money, who
17 knows, and they're in a group and based upon what
18 I've heard, the best case scenario for him is that
19 as he's walking out somebody pulls a gun and shoots
20 somebody, right?

21 MR. BIDDLE: Yes, sir.

22 THE COURT: Worse case scenario is that a
23 jury believe that they went there, he knew there was
24 a gun, and he said we're gonna rob somebody and
25 shoot somebody. He was looking at what, 25?

1 MR. BIDDLE: Yes, sir, I believe so. You
2 know, it looks like the issue, Your Honor, is that
3 there were, there were elements that were added to
4 the indictment to kind of a lesser included, you
5 know, based on what it was to, you know, the felony
6 murder, if you will.

7 THE COURT: Have any of you talked to the
8 Solicitor's Office to find out what they think? I
9 mean, I'm just kind of I'm curious.

10 MR. BIDDLE: I haven't, Your Honor.

11 MS. WHITE: Your Honor, the State's
12 position is it's always applicant's burden of proof
13 in this situation so, you know, to demonstrate
14 prejudice. They did get a mere presence jury
15 charge. They did get a hand of one hand of all jury
16 charge. I think Mr. Diggs has testified he did
17 review all that with him. Gentry established that
18 the indictments are notice document just to give you
19 sufficient notice. He was charged with murder. He
20 had hand of one hand of all. They addressed the
21 mere presence and the lack or inclusion of intent
22 and also withdrawal. They also were able to get a
23 jury charge on the fact that he alleges he turned
24 around and left before.

25 THE COURT: Oh, that's in here.

1 MS. WHITE: Yes, Your Honor.

2 THE COURT: So the jury had in front of
3 them facts and a charge that he may have opened the
4 door as he said and left and heard the shot?

5 MS. WHITE: Yes, Your Honor.

6 THE COURT: Okay. Do me a favor, I just
7 would be curious. I'm gonna, it will take me a
8 couple of days to look at this because I want to
9 read the whole thing. But if you can talk to the
10 Solicitor's Office and find out this one question
11 for me. Were there two indictments that were
12 presented and signed by the foreman of the grand
13 jury? What I suspect is that there was one that was
14 true billed and another that was floating around and
15 I've had that happen before, but it wasn't true
16 billed. If you can find that out it will sure help
17 me to know what's going on. I'm not sure it's going
18 to make a difference in what I do. It just that
19 this is — there's a little something off here.

20 MR. BIDDLE: Yes, sir.

21 THE DEFENDANT: Your Honor, can I say
22 something? Can I say something now?

23 THE COURT: Talk to your lawyer first.

24 (Attorney confers with petitioner.)

25 MR. BIDDLE: His position is, you know,

1 the judge said they both appear to be true billed.

2 The judge said that in the transcript.

3 THE COURT: Outline —

4 MR. BIDDLE: Says it does appear that way;

5 but again, there's arguments on both sides but I

6 will certainly communicate with Mr. Richardson.

7 Thank you.

8 THE COURT: All right. I'll take it under

9 advisement. If you would communicate, let me know

10 tomorrow sometime. I'm here through Wednesday; is

11 that right? And then I go to Georgetown Thursday.

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14 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

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C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, FRANCES BAKIS-RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Twelfth Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 26th day of August, 2014.

Frances B. Ray

FRANCES BAKIS-RAY, RPR

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Michael Adam Bailey, #323554,)

Case No. 2011-CP-26-4890

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

HORRY COUNTY
14 FEB -3 PM 1:51
JELANE HIGGINS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed June 10, 2011. Respondent made its Return on or about July 21, 2011. The Court convened an evidentiary hearing into the matter on August 26, 2013, at the Horry County Courthouse. Applicant was present at the hearing and represented by J. Marshall Biddle, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Also testifying were Applicant's trial counsel, William I. Diggs, Esquire, and Applicant's mother. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the return, and the appellate records. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. In July 2005, the Horry County Grand Jury indicted Applicant for murder (2005-GS-26-2560). William I. Diggs, Esquire ("trial counsel"),

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SC Court of Appeals

represented Applicant. On July 23-26, 2007, Applicant proceeded to trial before the Honorable James E. Lockemy and a jury.¹ The jury found Applicant guilty as indicted. On August 16, 2007, Judge Lockemy sentenced Applicant to thirty (30) years incarceration.

A notice of appeal was timely filed, and Joseph L. Savitz, III, ("appellate counsel") perfected Applicant's appeal. The South Carolina Court of Appeals affirmed the conviction on June 10, 2010. State v. Bailey, Op. No. 2010-UP-306 (S.C. Ct App. filed June 10, 2010). The case was remitted to the circuit court on June 28, 2010.

II. ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

- (1) Prosecutor misconduct: presented faulty indictment;
- (2) Ineffective assistance of counsel: failure to investigate; and
- (3) Ineffective assistance by appellate defense attorney: raised only one issue that had no merit.

At the PCR hearing, Applicant proceeded on all the grounds included in his application.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

¹ The Applicant was tried with a co-defendant, Mike Carr, who was also convicted of murder and sentenced to 30 years.

A. Summary of Testimony

Applicant testified he met with trial counsel numerous times over three (3) years but was not informed he was charged with felony murder. Applicant testified he was under the impression he could not be convicted of murder unless he was the actual shooter. Applicant recalled receiving a twenty (20) year plea offer, but Applicant rejected the plea upon advice of trial counsel because the State could not prove Applicant was the shooter. He further testified he probably would have accepted the offer if he understood he could be convicted under a felony murder theory.

Applicant recalled two indictments being presented to the trial judge. He testified he never actually saw the indictments. However, he recalled the bodies of the indictments were different. He also remembered trial counsel asking for a continuance to clarify the indictments. Applicant also testified appellate counsel did not raise an indictment issue on direct appeal.

On cross-examination, Applicant testified his defense was that he thought he was merely going to buy marijuana from the victim, not rob him. He testified he never discussed the "hand of one" theory with trial counsel. He also claimed he never heard of accomplice liability until the day of trial. He did recall trial counsel making a motion to quash the indictments. Applicant maintained he was always under the impression he must be the shooter to be convicted.

Trial counsel testified he has been a practicing attorney since 1980 and has extensive criminal law experience. He believed he spent a sufficient amount of time on Applicant's case considering the serious nature of the charges. Trial counsel testified Applicant always understood the State's theory was that Applicant and the co-defendants were participating in a crime by intending to rob the victim. However, trial counsel believed Applicant's claims he did

not know the co-defendant intended to rob the victim. He also recalled there was no doubt the State knew the co-defendant actually shot the victim. Trial counsel testified several co-defendants gave conflicting stories that changed over time. He also testified he moved for a severance because he feared the codefendant would take the stand and implicate Applicant. Trial counsel testified Applicant needed to testify to explain why he was at the victim's home that night.

Trial counsel admitted he was under the impression there was no felony murder rule in South Carolina, so Applicant may not have understood there were circumstances where he could be convicted of murder despite not having pulled the trigger. However, on cross-examination, trial counsel admitted he discussed the "hand of one" and accomplice liability theory with Applicant and he thinks Applicant understood those concepts. He further testified he explained to Applicant the State would have to prove he went to the victim's home with the intent to rob the victim.

Trial counsel testified he was surprised when two (2) indictments appeared at trial. He believed the copy of the indictment he received in discovery was not the same as the copy currently in the clerk's file. He testified moved to dismiss the indictment because there were more than one. However, Judge Lockemy required the State to elect which indictment they would proceed under. Trial counsel recalled the State apologizing for any confusion in the indictments. Trial counsel also testified the second indictment was tailored to fit the evidence the State would present at trial. However, he admitted the State would have been required to prove the same elements no matter what indictment they proceeded under. He also admitted he is not sure his advice to Applicant would have changed if he had the other indictment.

Trial counsel also testified he discussed Applicant's appeal with appellate counsel. He testified he mailed an affidavit to appellate counsel regarding the indictment issue. Trial counsel stated he would have raised the indictment issue along with a challenge to Judge Lockemy's ruling on a motion to sever.

Applicant's mother testified she was in the courtroom when Judge Lockemy read the two indictments. She testified she saw Judge Lockemy give one indictment back to the solicitor, who put the indictment in his file. However, she has not seen the indictment since that time.

B. Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to appellate counsel, the applicant must prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted).

1. Trial Counsel

The Court finds Applicant failed to meet his burden of proving trial counsel was ineffective for failing to investigate. Regarding this allegation, the Court finds Applicant's testimony to be not credible, and trial counsel's to be credible. Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Here, Applicant presented no testimony of how trial counsel's investigation was deficient. In contrast, trial counsel demonstrated a thorough knowledge of Applicant's case. The record reflects trial counsel competently and thoroughly cross-examined the State's witnesses and presented Applicant's defense. The Court finds trial counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. Thus, Applicant has not shown any deficiency in

trial counsel's performance. Furthermore, the Court finds Applicant cannot show prejudice because there is overwhelming evidence of his guilt in the form of witness testimony about the plan to rob the victim. Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (citations omitted) (overwhelming evidence of guilt negates any claim of deficient performance).

2. Appellate Counsel

The Court also finds Applicant failed to meet his burden with respect to appellate counsel. Though Applicant argued appellate counsel should have briefed additional issues, he failed to present any testimony from appellate counsel on that issue. As such, the Court cannot speculate as to why certain issues were not briefed. Cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, without a witness's testimony, "any finding of prejudice is merely speculative"). Furthermore, appellate counsel was clearly aware of these other potential issues from trial counsel's affidavit. Therefore, the Court must presume appellate counsel made a reasonable professional judgment to not brief them. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690).

Regardless, the Court finds Applicant failed to demonstrate appellate counsel did not exercise sound judgment in choosing which issues to present on appeal. See Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983) (holding appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on appeal). He also failed to demonstrate he would have been successful on appeal had his preferred issues been raised. Anderson, 354 S.C. at 434, 581 S.E.2d at 835. The indictment is a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). As will be discussed below, the allegations in the either indictment were sufficient to put Applicant on notice of the

charges he was required to defend at trial. Id. Furthermore, Judge Lockemy did not abuse his discretion in ruling on the severance motion. See State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999) ("The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." (citing State v. Leonard, 287 S.C. 462, 339 S.E.2d 159 (Ct. App. 1986))). Because none of Applicant's suggested appellate issues are viable, he was not prejudiced by appellate counsel's decision to not brief them. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (no ineffective assistance of appellate counsel where applicant's alleged issues are not meritorious).

C. Prosecutorial Misconduct

The Court further finds Applicant failed to prove prosecutorial misconduct. Generally, an allegation of prosecutorial misconduct involves a solicitor's "improper efforts to collect evidence or unfair trial tactics." State v. Needs, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998). Neither form of misconduct is implicated here. Rather, Applicant's allegation is essentially one of a fraudulent indictment. At trial, the State initially presented Judge Lockemy an indictment alleging Applicant

"did in Horry County on or about September 28th, 2004 willfully, feloniously intentionally kill the victim, Joseph Patterson, junior, with malice aforethought either express or implied by means of shooting him"

(Trial Tr. 59:18-22). However, trial counsel and the clerk of court provided Judge Lockemy with an indictment (the "indictment of record") which alleges Applicant did

"combine with two or more people to commit an unlawful act, i.e. robbery and/or burglary and, in the execution of the criminal act and as a natural and probable consequence of the criminal act the victim, JOSEPH PATTERSON, JR, was

willfully, feloniously and intentionally killed with malice aforethought either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof on or about SEPTEMBER 28, 2004."

(Trial Tr. 64:23-65:8). The State elected to proceed under the indictment of record. Applicant does not argue the indictment of record is insufficient on its face, but rather that the State procured two different indictments relating to the same crime. He alleges the indictment of record was fraudulently created because it more closely recites the facts presented at trial.

The Court finds there is no evidence in the record or before this Court indicating the indictment of record was obtained by fraud. A presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) (citing State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947); State v. Waring, 109 S.C. 52, 95 S.E. 143 (1918)). Absent evidence to the contrary, the Court must presume that a properly returned indictment is valid. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991)). Here, there is no evidence the indictment of record is irregular in any manner whatsoever. Likewise, there is no evidence it was fraudulently created and presented to the grand jury. The indictment of record is valid on its face because it states all the necessary elements murder, the date of the offense, and the name of the accused. Id. at 75, 472 S.E.2d at 40. Likewise, the indictment of record is stamped "True Billed" and signed by the foreman. Pringle, 287 S.C. at 410, 339 S.E.2d at 128. There is no evidence, aside from Applicant and his mother's self-serving testimony, to indicate the indictment was procured by fraud or deceit. Thus, Applicant has not proven any prosecutorial misconduct in the procurement of the indictment of record.

Regardless, Applicant has not shown how he was prejudiced by the being tried under the indictment of record. See State v. Robinson, 305 S.C. 469, 476, 409 S.E.2d 404, 409 (1991) (finding no prejudice from alleged prosecutorial misconduct). Initially, the Court notes trial counsel conceded during arguments on the motion to quash that he was provided with the indictment of record prior to trial. (Trial Tr. 60:9-12). Furthermore, trial counsel testified he discussed theories of accomplice liability with Applicant. Thus, Applicant cannot now argue the indictment did not give him notice of the charges against him or what the State would attempt to prove. Gentry, 363 S.C. at 102, 610 S.E.2d at 500 (2005) ("The indictment is a notice document.").

Even if trial counsel had been provided a copy of the other alleged indictment, it would have likewise been sufficient to put him on notice of the charges against him.² The language of the other indictment was sufficient to charge Applicant with murder as an accomplice regardless of whether he was the shooter. See State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) ("It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." (citing State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987); State v. Cox, 258 S.C. 114, 187 S.E.2d 525 (1972); State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971); State v. Hunter, 79 S.C. 73, 60 S.E. 240 (1908))). Applicant contended at trial the two indictments alleged different crimes. However, South Carolina "makes no distinction between murder and felony murder." State v. Yates, 280 S.C. 29, 34, 310 S.E.2d 805, 808 (1982) overruled on other grounds by State v.

² Trial counsel conceded his advice regarding the charges would likely not have been affected by the language of the indictment.

Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The record indicates the State proceeded under the theory the co-defendant was the shooter, and Applicant was merely an accomplice. (Trial Tr. 67:25-68:4; 691:6-15). Therefore, the State had to prove Applicant and co-defendant went to the victim's home with the intent of committing a robbery. This theory is consistent with South Carolina jurisprudence on accomplice liability to murder. See State v. Crowe, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972) ("It is further well settled that, if two or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a probable or natural consequence of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act."). Furthermore, Judge Lockemy's charge instructed the jury they must find Applicant committed a burglary or robbery (Trial Tr. 717:5-10). This charge effectively increased the State's burden because they had to prove each element of a second crime to support the murder conviction. Ultimately, Applicant is not prejudiced because either indictment, and certainly the indictment of record, supported the State's theory and the jury's verdict.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30 day of January, 2014.


THE HONORABLE J. CORDELL MADDOX, JR.
Presiding Judge

Anderson, South Carolina

WITNESSES

LEWIS/HCPD

ARREST WARRANT NO. 1267865 *OB*

CDR: 0116 16-03-0010,0020

DOA: 09-30-04

ACTION OF GRAND JURY

R. Warner JUL 28 2005
Foreman of Grand Jury

VERDICT

Guilty
D. W. 7/26/07
Foreman of Petit Jury Date:

C DOCKET NO. 2005-GS-26- 2560

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

HST 75167-3

COURT OF GENERAL SESSIONS

JULY TERM 2005

THE STATE

VS.

MICHAEL BAILEY W/M

SOCASSEE, SC 29577

SSN DOB

BILL DIGGS
Attorney

INDICTMENT FOR:
MURDER

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

Trial
Judge James Hickey
CR Elizabeth Harris

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT FOR
MURDER

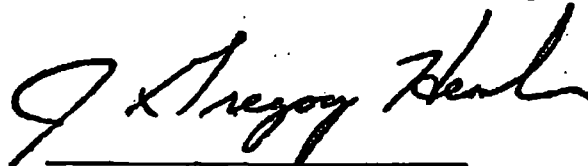
At a Court of General Sessions, convened on JULY 28, 2005, the Grand Jurors of Horry County present upon their oath:

MURDER

(CDR: 0116 16-03-0010,0020)

That MICHAEL BAILEY did in Horry County on or about SEPTEMBER 28, 2004, combine with two or more people to commit an unlawful act, i.e. robbery and/or burglary and, in the execution of the criminal act and as a natural and probable consequence of the criminal act the victim, JOSEPH PATTERSON, JR, was willfully, feloniously and intentionally killed with malice aforethought either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof on or about SEPTEMBER 28, 2004 in Horry County, in violation of Section 16-3-10, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT GENERAL SESSIONS

853

COUNTY OF
STATE

VS.

INDICTMENT/CASE#:

AKA:

Race:

Sex:

Age: 24

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

AW#:

Date of Offense:

S.C. Code §:

CDR Code #:

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: MURDERIn violation of § 16-3-601.5 of the S.C. Code of Laws bearing CDR Code # 0-1-1-1-1-6☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury (Defendant Initial)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$ provided that upon the service of days/months/years and/or payment of \$ plus costs
and assessment(s) as applicable, the balance is suspended with probation for months/years and subject to South Carolina
Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections. 1052 Days☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal \$ plus 20% fee \$

Payment Terms:

☒ ESE by SCPPPS

Recipient:

Fine	\$	
§16-1-206 (Assessments-107.5%)	\$	
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$ <u> </u>
§56-5-2995 (DUI Assessment)	\$12	\$ <u> </u>
§35-13 (Public Def/Prob)	\$500	\$ <u> </u>
§73-3-1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§33-7-1B TP (Drug Court Surcharge)	\$100	\$ <u> </u>
§50-21-114 (BUI Breath Test Fee)	\$50	\$ <u> </u>
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ <u> </u>
3% to County (if paid in installments)	\$	\$ <u>3.75</u>
TOTAL	\$	\$ <u>128.75</u>

PTUP

 days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmis. of \$ beginning\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, §35-13 TP

Requires \$500 be paid to Clerk during probation.

Court Reporter:

PRESIDING JUDGE

Judge Code:

Sentence Date: