

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

J. Cordell Maddox, Jr., Circuit Court Judge

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S.C. Supreme Court

MICHAEL ADAM BAILEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000651

SUPPLEMENTAL APPENDIX

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6 MICHAEL ADAM BAILEY) August 16, 2007
7 MIKE A. CARR) Conway, S. C.
8)

8 B E F O R E :

9 HONORABLE JAMES E. LOCKEMY, JUDGE.

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

11 BERT Von HERRMANN, ESQ.
12 ASSISTANT SOLICITOR FOR HORRY COUNTY
13 ATTORNEY FOR STATE

14 WILLIAM ISAAC DIGGS, ESQ.
15 ATTORNEY FOR DEFENDANT, BAILEY

16 JAMES GALMORE, ESQ.
17 ASSISTANT PUBLIC DEFENDER FOR HORRY COUNTY
18 ATTORNEY FOR DEFENDANT, CARR

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DIXIE COX EUBANK
CIRCUIT COURT REPORTER
FIFTEENTH JUDICIAL CIRCUIT

1 (THE FOLLOWING TAKES PLACE ON AUGUST 16, 2007.)

2 THE COURT: This is the State versus Michael Adam
3 Bailey in the State versus Michael Carr. These matters were
4 tried last week, and a verdict was reached on July 26, 2007,
5 finding both Defendants guilty of the crime of murder.

6 The Defendants requested time to prepare any motions
7 they had. I granted that time. Both have sent in Briefs to
8 me, which I have reviewed, and I am ready to hear any motions
9 the defense has on this matter.

10 So, Mr. Galmore and Mr. Diggs, have y'all decided who
11 would go first regarding the motions, or ---

12 MR. DIGGS: Your Honor, Mr. Galmore can go first.

13 THE COURT: Okay. All right. Mr. Galmore.

14 MR. GALMORE: May it please the Court, Your Honor. We
15 did submit a written Motion, or Memorandum in support of our
16 motion.

17 THE COURT: Yes sir. I've got it before me.

18 MR. GALMORE: Basically our arguments are the same,
19 that the Court should have granted the directed verdict
20 motion, and the motion for a new trial. Those are based on
21 the ---

22 THE COURT: The main thing the issue is on is the issue
23 of severance.

24 MR. GALMORE: Yes sir. We also -- we also addressed
25 that issue. The severance issue was very concerning to us. I

1 think the Court saw that there were antagonistic defenses. I
2 know that's not the only basis for a motion of severance.
3 That, in and of itself, is not sufficient, but that, coupled
4 with the differences in the indictments placed these two
5 Defendants in different situations. They were not similarly
6 situated. One indictment read, basically, that Mr. Carr is
7 alleged to have been the shooter, while the other indictment
8 read that Mr. Bailey was present, participating in a robbery
9 and/or burglary at the time that Mr. Patterson was shot.
10 Because of these differences in the indictments we feel that
11 the cases should have been severed, and because they were not
12 severed, that Mr. Carr was prejudiced as a result of that. I
13 think that ---

14 THE COURT: Well, Mr. Galmore, let me ask -- I've been
15 thinking about that ---

16 MR. GALMORE: Yes sir.

17 THE COURT: ---And from the very beginning of the case
18 the State says their theory, Mr. Carr did the shooting, and
19 that Mr. Bailey was there to participate in the crime of
20 robbery. I mean, whether it was in writing, or whether they
21 say it, and whether it would have been two similar indictments
22 as it appeared to be the way the thing came -- began, since
23 that's what the State said to the jury, and proceeded with
24 that theory, how is that any different about the indictments,
25 as far as whether the indictments are worded differently or

1 not?

2 **MR. GALMORE:** Well, before any testimony is ever taken,
3 once a jury looks at two separate indictments they are going
4 to think of these people differently.

5 **THE COURT:** Remember now, they didn't look at two
6 separate indictments. They heard, but -- they heard the same
7 from the State when they gave the opening statement before any
8 witness came.

9 **MR. GALMORE:** Right, but these clients are not
10 similarly situated. From the outset they are thinking that my
11 client is guilty of a charge that this person may or may not
12 be guilty of. They are not the same, because the indictments
13 are not the same. If you give them to twelve citizens on the
14 street and ask them to read these two documents they are going
15 to come to the conclusion that Mike Carr is the person guilty
16 of murder, and that Mr. Bailey may or may not be guilty of
17 robbery, murder, felony murder, or whatever his -- his actual
18 charge was.

19 **THE COURT:** Well, in fact the jury determined that both
20 of them were guilty of murder.

21 **MR. GALMORE:** Yes sir. I know they made that
22 determination, but I think that, had this case been severed
23 from the outset, that Mr. Carr would have had a fair
24 opportunity to argue to the jury that he was not the person
25 responsible for the murder. I mean, he made that argument,

1 but, you know, when the indictment says that he is, you know,
2 I don't know if a jury is going to -- you know, which way a
3 jury is going to go with that. Obviously the jury didn't buy
4 what Mr. Carr was selling.

5 THE COURT: All right. And you mentioned an arrest of
6 judgment.

7 MR. GALMORE: Yes sir. That is the motion that
8 challenges the sufficiency of the indictment. Also, the other
9 problem that we had with the indictments, the matter of the
10 two indictments that Mr. Bailey had, I just wanted to
11 reiterate that part of this motion, because the Court read to
12 the jury one indictment regarding Mr. Bailey and Mr. Carr, and
13 then read a second indictment regarding Mr. Bailey, that
14 further exacerbated the difference between these two. That
15 further highlighted the fact that these two people were not
16 similarly situated, even though they went through a trial as
17 though they were similarly situated. For a jury to hear that
18 Mr. Bailey, you know, was being charged with murder, and then
19 an hour later to hear that he's being charged with being
20 present while Mr. Carr was doing the murder, again, they are
21 ready to jump to the conclusion that Mr. Carr is guilty of
22 murder.

23 THE COURT: They didn't hear that, Mr. -- they didn't
24 hear mere presence.

25 MR. GALMORE: Right. Not mere presence.

1 **THE COURT:** As the charge stated -- in fact it stated
2 for them to find Mr. Bailey guilty they had to find that, in
3 fact, a robbery was occurring, or a burglary ---

4 **MR. GALMORE:** Yes sir.

5 **THE COURT:** ---That he was participating in when the
6 murder occurred -- and when a murder occurred. I mean, it
7 put, really, I guess, additional elements regarding Mr. -- Mr.
8 Bailey.

9 **MR. GALMORE:** Well, I look at it as though it lowed the
10 standard with regard to Mr. Bailey, as opposed to having
11 additional elements. He's charged with murder, and then he's
12 charged with being present during a robbery when a murder was
13 committed, and in both of those different indictments ---

14 **THE COURT:** Not being present, participating.

15 **MR. GALMORE:** Or participating in a robbery while a
16 murder was being committed. Both of those indictments were
17 read to the jury, and I believe the jury, after hearing one,
18 and then hearing the other, could come to the conclusion that,
19 well, definitely Mr. Carr is guilty of the murder, and Mr.
20 Bailey's guilt was an issue for them to determine.

21 **THE COURT:** Okay. All right. Anything else, Mr.
22 Galmore? I'm going to probably see if Mr. Von Herrmann wants
23 to respond now, or whether he would rather wait for Mr. Diggs.

24 **MR. GALMORE:** Yes sir. Nothing further, Your Honor.

25 **THE COURT:** All right.

1 Mr. Von Herrmann, would you rather respond now, or wait
2 for Mr. Diggs?

3 **MR. VON HERRMANN:** Your Honor, I would prefer to
4 address both at the same time, if that's okay with the Court.

5 **THE COURT:** All right. Mr. Diggs.

6 **MR. DIGGS:** Your Honor, with all due respect, I would
7 submit that it's just not a fair process. I was looking --
8 you know, Your Honor had asked us what was the penalty for
9 murder, you know, at this point, because we had some
10 discussion about what the leeway was, was it a minimum of
11 thirty years or life, or thirty years up the life.

12 **THE COURT:** Right. The only reason I asked that was --
13 I knew it was thirty years, but at one time the statute read
14 that it was thirty years or life, and there was some thought
15 about five or six years ago about whether or not you could
16 sentence people in between thirty and life, and in fact I told
17 you that in a couple of cases I had done it, because I felt
18 like there couldn't be thirty or life, it had to be logically
19 some thing in between, and I think the statute is clear now
20 that it can be anything from thirty to life, and that's -- I
21 was just -- just mentioning that that, in fact, at one time it
22 was different, although I felt that it wasn't, but that you
23 could read it different.

24 **MR. DIGGS:** Your Honor, things evolve and they change.
25 I point that out for the point that the Court's discretion in

1 this case with respect to sentencing is severely limited, and
2 based on the facts of the case, regardless of how the Court
3 sees them, the culpability of Adam Bailey may not justify
4 thirty years -- at least thirty years in prison. I mean, the
5 Court just has no discretion to go any lower than that, and my
6 point is, it's a serious -- you talked about confining Mr.
7 Bailey for thirty years, at least thirty years, and possibly
8 for life. We owe it to ourselves, and to the system, to make
9 sure that we've got a process that's just, not minimally fair,
10 but something that is as reliable as we can make it. To this
11 young man it's tantamount to saying we are going to go ahead
12 and kill him. I mean, it's a severe blow to someone as young
13 as Mr. Bailey, who is old enough proba -- well, young enough
14 to serve every one of those years, take -- to put him in a
15 situation -- impose that kind of penalty on him. We owe, as a
16 society, to make sure that we've got a fair process.

17 And I would submit to you, absent a severance in this
18 case for Mr. Carr, Mr. Bailey is just not going to get a fair
19 procedure. Mr. Von Herrmann -- and I'm not being critical,
20 but he was able to make use of the fact that he didn't know
21 who the shooter was. He felt comfortable -- you know, when
22 that indictment was read by the Court, the incorrect one,
23 about Mr. Bailey, the Solicitor's Office was very happy with
24 that, because it broadened, you know, the target that they
25 were trying to hit. I gave them multiple theories upon which

1 they could convict this young man, not based on what the facts
2 were, but based on what the law permitted, given the breadth,
3 you know, between the theories encompassed in those two
4 different indictments.

5 It also allowed the Solicitor to get -- to ask for and
6 receive multiple charges on accomplice liability. You know,
7 you -- when a jury hears that there are multiple ways here
8 where we can convict this young man here; we've got a dead
9 victim, you know, that's serious -- a serious situation in any
10 society, but especially in our society, one that values life.
11 I would submit that the process needs to be more honed in,
12 where we know what the facts are, with pretty good confidence,
13 and beyond a reasonable doubt; we know what Mr. Bailey's
14 participation was, or was not, what he did do, and that's just
15 as important as what he did not do. And the Solicitor's
16 theory, by having a joint trial here -- it didn't really
17 matter what Mr. Bailey did. They wanted -- the prosecution
18 wanted to create a cloud of dust here, and convict everybody
19 inside of that cloud, regardless of what was going on, and
20 what actually happened. And I would submit to the Court that
21 the severance was essential in this case, given the difference
22 between what was alleged by Mr. Carr, and then what was
23 alleged to have happened, or been completed -- been done by
24 Mr. Bailey, different things.

25 We cited the case law in our Memorandum, the factors

1 that the Court would probably take into account in granting or
2 denying the severance motion, and as Mr. Galmore pointed out,
3 one of those requirements is that the charges been
4 substantially the same, proved by the same evidence, same
5 general nature, and single chain of circumstances. The same
6 evidence clearly does not apply in this case, because if you
7 look at the definition of murder by itself, it's the unlawful
8 killing of another human being with malice aforethought.
9 That's what murder is, and this whole thing about accomplice
10 liability, or felony murder, or whatever you want to call it,
11 and there are two -- those concepts are clearly distinct,
12 different concepts, and as I said during the course of the
13 trial, we don't have felony murder in this State. We
14 recognize accomplice liability, and I think that's what the
15 Court was trying -- and did get to under the instruction that
16 was given, that was requested by the State. But that's not
17 felony murder, and so you've got certain requirements. The
18 evidence has got to show it here for Mr. Carr, and a
19 completely different set of facts that are required to convict
20 Mr. Bailey, different evidence, and it's not ---

21 **THE COURT:** Well, an additional requirement.

22 **MR. DIGGS:** They are addit -- they are different. They
23 are different elements.

24 Now, if -- as I said, during the course of the trial,
25 Your Honor, this felony murder, or accomplice liability, those

1 two concepts represent theories upon which you arrive at the
2 murder. Murder is defined as murder. It is what it is, the
3 definition that it should be. We didn't have that in our
4 indictment, and I couldn't find -- the cases all say, well,
5 you can convict on accomplice liability under an indictment
6 for murder, but I couldn't find any -- and I'm not going to
7 tell the Court there aren't any, but I've looked, and I didn't
8 find any that said the reverse, that it's proper to go ahead
9 and prosecute someone for murder based on an indictment that
10 alleges the accomplice, because if you look it just goes
11 back ---

12 **THE COURT:** Well, the indictment doesn't allege only
13 the accomplice. I says that -- that, in the execution of a
14 criminal act -- and a criminal act alleged being burglary
15 and/or robbery -- that in the execution of that criminal act,
16 and as a natural and probable consequence of that criminal
17 act, Joseph Patterson -- then they said murdered by putting
18 the elements of murder. So, they say that in the execution of
19 that criminal act, and as a natural and probable consequence
20 of it, Mr. Patterson was murdered. It doesn't say that Mr.
21 Bailey was the one who murdered him.

22 **MR. DIGGS:** It's -- at the minimum it's confusing to
23 me, and I would submit that it's confusing to any reasonable
24 person who reads that indictment, and is trying to figure out
25 what it was that Mr. Bailey did, exactly, you know, what

1 phrase in there, what part of that language is superfluous and
2 what part is necessary, and I would submit that reasonable
3 minds ---

4 **THE COURT:** Let me ask you this, Mr. Diggs -- and this
5 is the point that I have really been thinking about the last
6 couple of week. Is it your position that, in the State of
7 South Carolina, if you are participating in a robbery, and if
8 your intent is to participate only in a robbery, and during
9 the course of that robbery one of the participants who was
10 with you committing that robbery shoots and kills someone,
11 that you are not guilty of the crime of murder?

12 **MR. DIGGS:** Under -- that's my position under the -- I
13 think what Your Honor has stated is the felony murder
14 doctrine, as is generally taught in law school, as is
15 generally -- it came in to -- part of the law and the
16 jurisprudence in the United States from the Common Law. South
17 Carolina doesn't have that, although ---

18 **THE COURT:** So when you say accomplice liability you
19 are saying that, if you are with someone who you know is
20 probably going to commit murder, and they commit murder and
21 you don't do the shooting ---

22 **MR. DIGGS:** Right.

23 **THE COURT:** ---You are still libel under accomplice
24 liability.

25 **MR. DIGGS:** Right. And that's ---

1 **THE COURT:** But you are saying the only accomplice
2 liability that Mr. Bailey could be under, under the theory of
3 the State, is the liability for murd -- for robbery.

4 **MR. DIGGS:** Right. Unless he knew that a life was
5 going to be put at risk, as a natural and probable consequence
6 of what he had agreed to do.

7 **THE COURT:** Well, that's what the State alleged, that
8 committing a robbery and burglary put someone as -- as a
9 natural consequence it's foreseeable someone else's life would
10 be at risk.

11 **MR. DIGGS:** They -- they allege that as accomplice
12 liability, but I -- what I'm saying is, I'm not -- what I'm
13 arguing is, that's not the appropriate way to indict somebody,
14 and I -- I would argue again to the Court, they should have
15 indicted him for murder, as that crime is defined by statute,
16 and then let the jury decide whether there was an appropriate
17 theory, such as accomplice liability, that allowed the -- one
18 to arrive at the conclusion that he is -- Mr. Bailey is guilty
19 of murder, as that crime is defined by statute.

20 By indicting him under the theory -- the language on the
21 theory it falls short, okay, it keeps them -- it's just
22 confusing, Your Honor, and it could -- it could reasonably
23 create a situation where the jury says yeah, I think he's --
24 he -- he did those things, and that's all they've got the
25 find; they don't have to take that extra step to say, he had

1 malice aforethought; all he did was participate in some
2 nebulously defined criminal behavior. And it does allow the
3 State to get a conviction in this case without reaching that
4 final hurdle of finding an unlawful killing of another human
5 being with malice aforethought. That's clear. That's the way
6 murder is defined. What they did was indict on a theory as
7 how to get the murder, and it's hidden in there, Your Honor,
8 and it's confusing.

9 Now, the severance -- they were able to benefit -- the
10 prosecution was able to benefit by trying these two Defendants
11 together, because either way they get to convict Mr. Bailey,
12 whether he was the shooter or not, they get to convict him,
13 and I would submit that it's just -- it taints the proceeding.

14 And Your Honor has got to have, I would submit, some
15 concern, a reasonable concern about the fairness of this
16 particular proceeding, and you know, it's underscored by the
17 fact that we had an indictment that was certified to be true
18 and correct. It wasn't. I mean, it just wasn't. And
19 that's -- I would submit that could only happen when the State
20 is, itself, confused, to some extent, and if that's the case
21 then the jury had to be. I mean, it's just unreasonable to
22 say the jury wasn't somewhat confused by, you know, who is
23 indicted for what, and you know, these two Defendants get
24 tried -- they are thrown in together. Even today it's going
25 to be difficult for Your Honor, and it takes -- it takes the

1 Judge, a sophisticated legal mind, to be able to sit in a
2 proceeding like this and make a, you know, a legal ruling in
3 the two types of cases that Your Honor has to do today in a
4 single case, puts a tremendous amount of pressure, I would
5 submit, on being able to put -- for the Court to analyze each
6 case independently and make a decision about it. And I'm
7 certainly not saying that Your Honor can't do that, but it's
8 difficult to do. It's got to be difficult. I know it's got
9 to be difficult.

10 But before we put this young man in prison for at least
11 thirty years, and maybe for life, and we get -- we'll cross
12 that bridge when we come to it, the State of South Carolina
13 can do better than what was done in this case, I would submit.
14 We can be more fair, and we can be more sure, you know, in the
15 legal process and the reliability of the verdict, than we are
16 as we sit here this afternoon on this case, because these two
17 were tried together, and because of the difference in the
18 facts of the case, and how we get to the crime of murder as --
19 you know, based on what we knew.

20 Your Honor, there is no way for those three witnesses,
21 Ms. Phillips and Mr. Simmons and Mr. Davis, there's no way for
22 those people to know what happened up there at that door.
23 There is no way that anyone knows what was communicated
24 between Mr. Bailey and Mr. Carr at that door, whether Mr.
25 Bailey turned and walked away. Who knows how many jurors

1 would have believed Mr. Bailey's testimony on that point if --
2 if we didn't have a joint trial here with these two
3 Defendants.

4 I would submit that justice would be better served with
5 a separate trial, and I would submit that Mr. Bailey is
6 entitled to have that motion granted on the ---

7 **THE COURT:** Mr. Diggs, in the trial Mr. Carr testified
8 that Mr. Bailey did the shooting. In the trial Mr. Bailey
9 testified, to his shock, Mr. Carr did the shooting.

10 **MR. DIGGS:** Right.

11 **THE COURT:** If they had separate trial, in essence, the
12 jury could have come back with a decision of, well, maybe the
13 other guy did it, in each one of the -- in each one of the
14 trials. It would be sort of an interesting situation when --
15 I'm kind of anticipating what Mr. Von Herrmann is going to
16 say.

17 **MR. DIGGS:** Your Honor, that would be -- it would be a
18 tragic thing. The tragedy has already occurred. No one has
19 ever suggested that Mr. Patterson deserved to die, and heaven
20 knows, we are all in agreement on that. He was a young man
21 himself. But as tragic as that is, I would submit a bigger
22 tragedy of the -- among the options that we have remaining
23 would be to imprison an innocent young man for a crime he
24 didn't commit. I would prefer -- and it's been said by wiser,
25 more intelligent people than myself, that it's better to set a

1 hundred guilty men free than to imprison, you know, one
2 innocent man.

3 I would submit to you that the State has got enough
4 evidence -- Mr. Patterson was killed. There is no doubt about
5 that. There were people who heard Mr. Carr confess to doing
6 that. There is no doubt -- reasonable doubt, I would submit,
7 that Mr. Carr would be convicted.

8 **THE COURT:** The testimony of the other three -- I don't
9 know if we want to call them co-defendants or whatever, but
10 the other three individuals, their testimony, really, as I
11 recall, supported that there was going to be a robbery going
12 on there, and that Mr. Bailey was aware of a robbery, and the
13 robbery was about to be done with a weapon.

14 **MR. DIGGS:** They said that, Your Honor, but I would ---

15 **THE COURT:** And when you say an innocent person -- I'm
16 not the finder of fact, but the jury had a lot of information
17 that a weapon was going to be used to rob Mr. Patterson, and
18 that your client was very much involved in that.

19 **MR. DIGGS:** But you know, Your Honor, every bit of that
20 testimony was purchased by the State. I'm not saying that we
21 know it was false, but we know it was purchased with
22 concessions to all three of those Defendants in the form of at
23 least not being charged with murder, so I wouldn't -- to me it
24 would be irrelevant, pretty much, how much time they get. The
25 fact that they may do some prison time, or do a lot of prison

1 time, but the fact also remains, they are not going to do time
2 for murder.

3 Your Honor, I would also like to renew the objections
4 that we made. I know the objections that I made at the trial,
5 there was an objection to reply testimony. I would submit to
6 you that wasn't really appropriate. They should have included
7 that witness in the case-in-chief, the witness ---

8 **THE COURT:** Refresh me on the reply testimony.

9 **MR. DIGGS:** That was, I think, Mr. Spencer that came up
10 and testified ---

11 **THE COURT:** Oh yes. The gentleman next-door, or
12 driving by.

13 **MR. DIGGS:** He was down in the parking lot.

14 **THE COURT:** Yes. Down in the parking lot. He had
15 driven by.

16 **MR. DIGGS:** Right.

17 **THE COURT:** In fact he was even -- they even stopped
18 and talked with him and wouldn't let him go for a while.

19 **MR. DIGGS:** And I would submit to Your Honor, it's a
20 pretext. Mr. Bailey had given a statement to the police early
21 on. They knew what he was going to say, and it was a pretext
22 and inappropriate use of a reply testimony procedure, and I
23 would submit to you that that -- especially given the charges,
24 the exaggeration, not -- or the enhancement of Mr. Spencer's
25 in-court testimony over what his actual statement was to the

1 police officers that evening. He never put those people
2 inside the building, inside the apartment, as he did at the
3 trial of the case. That's why it caught me by surprise, but I
4 would submit that's inappropriate, improper, prejudicial reply
5 testimony. All of these things considered ---

6 **THE COURT:** Well, I'm not sure that prejudicial was the
7 standard there for reply testimony. I mean, obviously that
8 was the purpose of it, to be not favorable to the defense.

9 **MR. DIGGS:** It the human nature of sand-bagging. I
10 would submit that Mr. Spencer was probably included in the --
11 should have been included in the case-in-chief witnesses, and
12 it was just a way to pressure -- to try to get the last word
13 in, in a way that the rules of procedure don't really allow
14 for.

15 Your Honor, one last thing. I'm afraid it's gone out of
16 my -- if it comes back to me, Your Honor, I -- if it's still
17 within the time frame maybe I could bring it up, but I just
18 lost my train of thought there ---

19 **THE COURT:** Let me see if I can go through ---

20 **MR. DIGGS:** ---Just to prove ---

21 **THE COURT:** ---Your ---

22 **MR. DIGGS:** okay.

23 **THE COURT:** ---Argument to -- in this matter, is
24 severance should have been granted, felony murder is not a
25 crime in this State, and although this is a crime it's

1 accomplice liability, and this was not the situation here; the
2 jury could have found that Mr. Bailey was participating in a
3 robbery, and just on that alone they could have convicted him;
4 you feel that's improper, and the reply testimony, had three
5 areas of your argument.

6 One thing I do want to ask you is, on the -- in your
7 Brief you mentioned that -- that I gave an instruction on
8 accomplice liability.

9 MR. DIGGS: Right.

10 THE COURT: I was curious, since I have not seen a
11 transcript, did you get that out of the transcript of the
12 trial, or was that on the written requests to charge that the
13 State gave me?

14 MR. DIGGS: No sir. It was Mr. Von Herrmann's written
15 request, and ---

16 THE COURT: So you assume I read that word for word.

17 MR. DIGGS: I think you did, Your Honor.

18 THE COURT: I may have, but I was just curious about
19 it.

20 MR. DIGGS: Yes sir. What I did was read that when
21 Your Honor reached that point in the charge, and I'm pretty
22 sure, I'm pretty confident to say to the Court at this point,
23 that the Court read that instruction verbatim.

24 And that was the additional point I wanted to make.

25 THE COURT: Well, I thought I would bring you up --

1 that for you.

2 MR. DIGGS: And I appreciate that. In the **Crow** case
3 they were -- they never intended for that language to be used
4 verbatim as an instruction on accomplice liability. What they
5 were doing in that case was commenting on the facts of that
6 case in an Appellate Opinion. And what Mr. -- what the
7 Solicitor's Office did was to lift out the general discussion
8 from that case and put it in as a jury instruction, and that
9 raises that possibility of the Peterson error. What Mr.
10 Bailey might have agreed upon was strong-arm robbery, and
11 that's a different thing from an armed robbery, and a natural
12 probable consequence of the strong-arm robbery, un -- unarmed,
13 might be different from an armed robbery, and that's why there
14 is such a disparity in the sentences that are imposed for
15 those two separate offenses.

16 And the **Peterson** case, steps in **Peterson**, points out
17 that there can be a problem when you've got a criminal act
18 that differs from another criminal act and only one of the
19 conspirators, if you will, actually agreed or understood they
20 were going to participate in it, and so with that out there
21 we've got a situation where the robbery could have been --
22 maybe Mr. Bailey could have understood there was going to be a
23 strong-arm robbery, but he testified he didn't know there were
24 guns involved; he didn't see a weapon until Mr. Carr pulled it
25 out, right before he opened ---

1 **THE COURT:** In charging the jury though, didn't I
2 charge the crime of armed robbery as an element?

3 **MR. DIGGS:** I think you did.

4 **THE COURT:** And I told the jury that was the elements
5 they had to find.

6 **MR. DIGGS:** With -- it may be, Your Honor, I don't have
7 a copy of the transcript, but I would submit that there is a
8 **Peterson** error in there, and I would submit that that charge
9 would -- should not have been given. It's an inaccurate --
10 it's an inaccurate, incomplete statement of the law, as was
11 put to the Court by the Solicitor's Office, and it's important
12 to this case. It's material.

13 **THE COURT:** You say by reading it as I did it was a
14 comment on the facts.

15 **MR. DIGGS:** Yes sir. Exactly.

16 **THE COURT:** So severance, the felony murder accomplice
17 situation, the reply testimony, and the comment on the facts.

18 **MR. DIGGS:** Yes sir.

19 **THE COURT:** All right. Mr. Von Herrmann.

20 **MR. VON HERRMANN:** Thank you, Your Honor. I will just
21 address briefly some of the arguments.

22 Your Honor, first of all the indictment. The indictment
23 against Mr. Carr and Mr. Bailey alleged murder. We -- with
24 regards to Mr. Bailey we certainly -- you know, to be honest
25 with you, we put a bigger burden on ourselves than we had to.

1 Quite frankly, we could have eliminated the superfluous
2 language about robbery and all of that, and just gone with the
3 straight murder, and we wouldn't even be talking about this.
4 But what we did do is, we ended up putting that language in
5 there; the Court correctly made us prove those elements of the
6 indictment; we did, to the satisfaction of the jury. Quite
7 frankly, both Defendants took the stand, and quite frankly,
8 the jury just didn't believe them.

9 We added an additional step on ourselves, which tells me
10 that, quite frankly, the jury had an absolute grasp on the
11 facts, and had an absolute grasp on the issues that were to be
12 raised by each Defendant, and found them guilty, even in light
13 of the fact that we had put on ourselves a higher burden, or
14 an extra element that we had to prove.

15 **THE COURT:** Since the beginning of the trial, Mr. Von
16 Herrmann, have you determined how I was handed up an improper
17 copy?

18 **MR. VON HERRMANN:** No, Your Honor, I have not. There
19 is -- and it is clearly -- I mean, the mistake that you had a
20 incorrect copy clearly falls on my shoulders. There is nobody
21 that I can blame. There is nobody I can look for to do
22 anything about that, and clearly I accept the responsibility.
23 I'm the one that handed it to the Court, and I don't ---

24 **THE COURT:** As you know, I felt that it's my duty to
25 report to the Chief Administrative Judge about how that's

1 done, and there has been some instructions on hoping that
2 something of that nature doesn't happen again.

3 MR. VON HERRMANN: Yes sir, Your Honor, I'm aware of
4 that, and I have talked to the Clerk of Court myself. Again,
5 there is no one that's more -- that is responsible but myself.
6 There is absolutely -- you know, I can't offer the Court any
7 explanation for how it occurred. The thing that I can tell
8 the Court is, it certainly didn't prejudice these Defendants
9 in any way. It is a snafu. It is a paperwork snafu. The
10 Court correctly -- and as in every trial that I've done in the
11 last ten years, told the jury, these indictments are not
12 evidence, right before they did anything about it, and then
13 you, correctly -- again, been done a hundred times, gave the
14 indictments to the jury when they went back for their verdict,
15 and explained it to them, and they had them back there to
16 read, the correct indictments.

17 As to whether or not the incorrect indictment -- quite
18 frankly, they weren't very dissimilar; they were certainly --
19 the correct indictment added an additional element that I had
20 to prove, so I mean, certainly the indictment that went back,
21 you know, did put an additional burden on me, but -- and, you
22 know, I have apologized to the Clerk of Court because, quite
23 frankly, I'm not sure how it happened. I apologized to the
24 Court. I don't think these Defendants were prejudiced in any
25 way by that. I believe that any prejudice that might have

1 even remotely occurred was cured by Your Honor's instructions
2 to the jury, the fact that you read the correct indictments to
3 the jury, and the fact that you sent the indictments back
4 there for them to write on the back of them, and the fact the
5 Court had told them that it was not evidence.

6 I think this jury, in this particular case, spent a lot
7 of time deliberating, a lot of time considering the evidence,
8 a lot of time thinking about their burden, and what they are
9 suppose to be finding as a matter of, you know, determining
10 the facts in the case, and I believe they rendered a true and
11 fair verdict. It has been the State's position the entire
12 time; it is today, and I think the evidence revealed itself,
13 that Mike Carr shot and killed Joe Patterson while in the
14 commission of an armed robbery that was conducted at the same
15 time with Michael Bailey. That is consistent with every piece
16 of information, other than the co-defendants' testimony. The
17 only difference in all of that is, who is the shooter. And in
18 this particular case, Your Honor, it really doesn't matter who
19 the shooter was. They are both just as guilty, and just as
20 responsible as before.

21 **THE COURT:** Well, let's discuss first the issue that
22 Mr. Galmore and Mr. Diggs brought up, the issue of severance.

23 **MR. VON HERRMANN:** Yes sir, Your Honor.

24 **THE COURT:** Discuss with me why you feel it's proper to
25 try those two Defendants together.

1 **MR. VON HERRMANN:** Clearly the Courts have held, on
2 numerous occasions, but at least one specific case where they
3 said antagonistic defenses is not a reason to sever the case.
4 They have offered absolutely no reason that we should sever --
5 or this Court should sever the case, other than they have
6 antagonistic defenses. That is the only thing they have
7 offered. They talk about the indictments. They talk about
8 everything under the sun, but they don't -- and they have
9 never pointed out to one thing that prejudiced their clients,
10 other than the fact that they can't throw up the defense,
11 because their defense is, the other guy did it. I was proved
12 with the same evidence; it was proved by the same witnesses;
13 it was proved by the same time table, same exhibits, same
14 everything had we tried them separately. Quite frankly,
15 judicial economy, the res gestae, the putting it in
16 perspective for the jury, the jury got to see all the
17 participants of the crime; every co-defendant but one
18 testified, or was a Defendant, and that is all the evidence
19 that we would have presented had we tried them separately.
20 There was no prejudice to either one of these Defendants to be
21 tried separately, other than the antagonistic defenses and the
22 -- you know, Mr. Carr could have pointed to Mr. Bailey and
23 said Mr. Bailey didn't do it if he wasn't sitting there, and
24 vice-versa, but that's not a reason to sever the trial. I
25 mean, this Court correctly held that antagonistic defenses

1 does not rise to the level of severance, and there is no
2 reason in the world that this case should have been severed.
3 There is none. And they can't point to any prejudice either.
4 I mean, I'm sure if they had some they would be just, you
5 know, more than happy to give it to the Court, but there is no
6 prejudice, other than their guys got found guilty.

7 **THE COURT:** Well, they both indicate they feel the
8 prejudice was being associated with each other. Mr. Galmore
9 says being associated with Mr. Bailey, and Mr. Bailey says
10 being associated with Mr. Galmore (s.i.c.).

11 **MR. VON HERRMANN:** That would have occurred even if
12 they had separate trials. I mean, certainly would, and we
13 would have had the opportunity to put in that evidence, and we
14 would have had -- we would have put in any statements and
15 evidence of furtherance of the conspiracy. They would have
16 been associated together anyway. I mean, just because they
17 are sitting at a table together, I don't see that being
18 prejudicial.

19 **THE COURT:** Mr. Galmore also brings up -- he didn't
20 present a lot of oral discussion of it -- but about the fact
21 that there was no direct evidence at all of the murder, and
22 any evidence that was there was all circumstantial, and it
23 wasn't substantial circumstantial evidence, and it wasn't
24 sufficient for finding them guilty.

25 What is your response to that?

1 **MR. VON HERRMANN:** I absolutely disagree with Mr.
2 Galmore. We had eyewitnesses that were there in the planning
3 of an armed robbery. We had witnesses that drove them from
4 the armed robbery. We had witnesses that hid, you know, or at
5 least witness hiding of particular things that were used in
6 the armed robbery, and even if you take all that away and
7 substantial evidence, they both testified that one or the
8 other one did it. One says I -- he did it, and one said the
9 other one did it. That's not substantial evidence. I don't
10 know how we ever get substantial evidence. We've got
11 eyewitness testimony. And maybe they don't agree about who
12 the shooter was, but we know from the 911 tape he was shot,
13 and we know he was killed; there's no question about that, and
14 we know that everybody was there. Those two -- nobody, no
15 witness has ever said anything different than these two
16 Defendants were at that door when that man was shot. Now the
17 question might be who the shooter was, who the shooter wasn't.
18 In my mind there is no question, but I'm talking about
19 theoretically. To me there can be no more substantial
20 circumstantial evidence, other than the fact that we've got a
21 situation where we know a guy was killed; we know there were
22 two guns; we know who the two people were at the door; we know
23 they had to be inside of the apartment, based on trajectory of
24 the bullet; we know that they both fled; we know they hid --
25 somebody hid, you know, out of that group -- they -- you know,

1 the witnesses say they were the ones that hid firearms that
2 were involved in it, and it's undisputed that there was two
3 guns. They have not disputed, sufficiently, any of the
4 evidence that there were two guns. In fact, if you will
5 recall, Your Honor, Mr. Bailey testified and said that the gun
6 that I presented evidence of was not the weapon that shot and
7 killed Joe Patterson, which would lead you to believe that
8 there's two guns. So they haven't disputed that either. So
9 we know we've got two people at the door, when he's killed,
10 and they've both guns. I mean, I'm not really sure, Your
11 Honor, how they could want any more substantial circumstantial
12 evidence.

13 **THE COURT:** So what is your position on whether or not,
14 in this State, there is felony murder?

15 **MR. VON HERRMANN:** My position is, Your Honor, that we
16 have charged both these Defendants with murder. The fact that
17 there are -- felony murder does, in fact, exist in South
18 Carolina; it is recognized as a criminal offense; it is held
19 as accomplice liability just under the theory of hand of one
20 the hand of all, but in reality the felony murder, when we
21 prove to a jury that someone was participating in is a natural
22 and probable consequence of their actions, or their
23 participation in a violent offense or a violent crime, that a
24 death occurs, that everybody is held accountable for it.
25 There is, in fact, accomplice liability, and there is, in

1 fact, felony murder in South Carolina.

2 I cannot tell Your Honor that that was the most artfully
3 drafted indictment I've ever done. I mean, quite frankly, it
4 doesn't matter -- but I didn't draft the indictment -- but it
5 is not the way that I would like the language to be, but I
6 will say -- the Supreme Court most recent case says that all
7 the indictment is is a notice to the Defendant, and quite
8 frankly, Mr. Diggs is being insincere when he says to this
9 Court that he didn't know what his guy was charged with,
10 because the last sentence in that case, or in that indictment,
11 sets forth every element of murder, and that's all we have
12 charged them with is murder. I mean, quite frankly, let the -
13 - up front with the Court. When we first started talking
14 about this back when we tried the case, I actually got a
15 little bit confused myself with regard to that, but the truth
16 is, the indictment specifies every element of murder, and it
17 is a murder indictment. It is not a felony murder indictment.
18 It is not -- we certainly took on more of a burden than we had
19 to, and we accepted that responsibility. To me, quite
20 frankly, if the jury did not believe a burglary or robbery was
21 occurring anyway, they were going to turn Mr. Bailey loose no
22 matter what; they were going to find him not guilty because we
23 -- all the evidence we have says that Mr. Carr was the
24 shooter. And so I didn't -- it doesn't bother me that I took
25 on the additional responsibility of having to prove that a

1 robbery or a burglary was occurring at the time of his death;
2 it doesn't bother me at all, and I think we did that. I think
3 there is overwhelming evidence that there was a burglary or a
4 robbery occurring.

5 **THE COURT:** Well, the jury could have thought, from Mr.
6 Carr's testimony -- I mean, they could have determined that
7 Mr. Bailey did the shooting, and Mr. Carr, on accomplice
8 liability, was responsible for the murder, theoretically.

9 **MR. VON HERRMANN:** Yes sir.

10 **THE COURT:** Let me ask you this. Mr. Diggs' position
11 though is that, if you are participating in an armed robbery,
12 you agreed to participate in an armed robbery, and that
13 accomplice liability means that, if you are there, and not
14 holding a weapon on anyone, and you don't shoot anyone, but
15 you are there, and then during the course of the robbery one
16 of the other robbers kills someone, that the most you can be
17 guilty of is armed robbery, unless you were involved with the
18 planning of a killing.

19 **MR. VON HERRMANN:** That would be an incorrect statement
20 of the law, Your Honor. I think the jury -- that is an issue
21 for the jury. The jury has to find that the action of the
22 underlying offense, that the death -- and as the Court
23 properly instructed them, resulted in the natural and probable
24 consequence of the actions of the crime, and this Court
25 certainly charged the jury that, and the jury certainly found

1 that, or they could not have come back with a guilty verdict.

2 THE COURT: Have you found any case where this has been
3 commented on by the Appellate Courts at all?

4 MR. VON HERRMANN: Are you talking about the felony
5 murder rule, Your Honor, or ---

6 THE COURT: Either the felony murder rule, or the
7 extent of accomplice liability, as far as natural and
8 consequence of the act.

9 MR. VON HERRMANN: The ones, Your Honor -- Your Honor,
10 the only ones that I have found I have passed up to the Court
11 in the form of jury instructions, in State v. Crow, and there
12 is, I think, a couple more, and as far as accomplice
13 liability, I mean, Your Honor, the hand of one, hand of all
14 and accomplice liability has been around for two hundred
15 years, and it's ---

16 THE COURT: Well, remember, the hand of one, the hand
17 of all is usually used to find the person guilty of the crime
18 for which they planned to do, for example, a look-out at a
19 burglary. You then can be guilty of the burglary. A look-out
20 at an armed robbery and guilty of the armed robbery. Mr.
21 Diggs' argument is that you can be guilty of the crime which
22 they were going there to do, but the added step of the --
23 added crime of murder that, unless you were involved and
24 planning that, and wanted to do that with them you are only
25 guilty of the armed robbery.

1 **MR. VON HERRMANN:** I believe the **Peterson** and the
2 **Stubbs** case, Your Honor, is what he's addressing in that
3 particular case, and in those particular cases they weren't
4 involved in particularly dangerous -- I believe one of them
5 was stealing a car, where an individual died. They were not
6 dealing in a ---

7 **THE COURT:** I know, and I thought the **Peterson** case
8 almost said though that you could be guilty of something
9 that's a natural and probable consequence of the crime you are
10 involved in, like the crime of robbery, which ---

11 **MR. VON HERRMANN:** Absolutely, Your Honor, but the
12 **Stubbs** and **Peterson** case differentiate the crimes for which
13 it's not a natural and probable consequence of -- to occur,
14 and that's what we are dealing with here. I submit to the
15 Court that a natural and probable consequence of an armed
16 robbery, where two people had loaded weapons and go to rob a
17 drug dealer, the death -- and I believe the jury found the
18 death is a natural and probable consequence of armed robbery.
19 I mean, it's realistic, it's natural to believe that, if two
20 people approach an individual and attempt to rob him with a
21 gun, that there is likely, and it's probably going to happen,
22 that somebody is going to die if there's any resistance at
23 all, or at least shot. And I think the **Peterson** and **Stubbs**
24 case essentially says -- at least -- and I'm not -- actually I
25 think it's the **Peterson** case, essentially in the possession of

1 the stealing of a vehicle, I believe it was, is -- the Court
2 determined that that was not ---

3 THE COURT: Could not be a natural consequence ---

4 MR. VON HERRMANN: Absolutely.

5 THE COURT: ---Because of murder.

6 MR. VON HERRMANN: And in this case, Your Honor, that
7 is a fact for the jury. I was presented to the jury. The
8 evidence was presented to the jury, and in fact the jury found
9 that, as a natural and probable consequence of an armed
10 robbery or burglary, Mr. Patterson was killed, by these
11 Defendants.

12 MR. DIGGS: Your Honor, could I be heard on that?

13 THE COURT: About one issue alone, the felony murder,
14 accomplice liability?

15 MR. DIGGS: Yes sir.

16 THE COURT: Yes sir.

17 MR. DIGGS: The -- that's why the Court's mentioning of
18 the armed robbery in the charge was an especially prejudicial
19 comment on the facts in the case, because in the **Stubbs** and
20 **Peterson** case you remember, they were going to go up and steal
21 a car off of a used car lot, and Craig Stubbs was in agreement
22 with that. He was going to go and help steal the car, but
23 Peterson decides, at least under one theory of the evidence,
24 to go in and commit an armed robbery of the attendant, and to
25 kill him in the process, and they escape in the car. And the

1 Supreme Court reversed -- he was sentenced to death, and the
2 State Supreme Court reversed that saying, look, this charge
3 was confusing because it didn't differentiate between what was
4 something that would likely reasonably lead to the killing, or
5 the taking of a life, and a crime that didn't, and that's why
6 the charge was deficient, and incorrect.

7 What we have here are three possible crimes that could
8 have been agreed to by Mr. Bailey. One was the purchase of
9 marijuana. Now -- and the Court said unlawful act in
10 purchasing marijuana and possessing marijuana is unlawful. It
11 could have been also that Mr. Bailey agreed to a robbery, but
12 didn't know that they were -- that anybody was armed, and
13 therefore didn't anticipate somebody was going to be shot in
14 the process.

15 Actually there is a fourth one, that being a burglary.
16 The indictment says burglary -- there was absolutely no
17 evidence that anybody had planned a burglary in this case.

18 **THE COURT:** But there was evidence that someone had
19 knocked the door down and went in with the intent to commit a
20 crime therein.

21 **MR. DIGGS:** Right. But that would have happened after
22 the firsthand knowledge of the eyewitnesses, and that -- as I
23 said a minute ago, they didn't know -- they had no way of
24 knowing what actually went on when the two Defendants were up
25 there at the top of the stairs.

1 The fourth one would be where -- the fourth scenario
2 would be where Mr. Bailey agreed to participate in an armed
3 robbery, and so I would submit to the Court the jury
4 reasonably could have found that three of those scenarios
5 wouldn't have endangered the taking of a life, and the fourth
6 one did.

7 **THE COURT:** But I charged the jury that they had to
8 find, beyond a reasonable doubt, that Mr. Bailey was involved
9 in an armed robbery, or a burglary.

10 **MR. DIGGS:** Or an unlawful act.

11 **THE COURT:** No. I said they had charged burglary and
12 robbery, and/or robbery, so they had to find one or the other.

13 **MR. DIGGS:** Your Honor, I believe -- and I might -- I
14 stand to be corrected -- that in that particular charge it was
15 two or more combined together to commit an unlawful act, such
16 as robbery, and in the execution of the criminal act a
17 homicide was committed. So it says such as, but it didn't
18 limit it to that. So it was a confusing ---

19 **THE COURT:** Mr. Diggs, I'll be glad to -- and I'm sure
20 the effort will be made, at some point in time, to get a copy
21 of this transcript ---

22 **MR. DIGGS:** Right.

23 **THE COURT:** ---But I'll be glad to -- my thoughts are -
24 - Mr. Von Herrmann, do you recall, did I not charge the jury,
25 on Mr. Bailey, they had to find him guilty of burglary first

1 degree, and/or armed robbery.

2 MR. VON HERRMANN: Yes sir, Your Honor. You did -- you
3 actually specifically said that, but when you read the
4 accomplice liability statute, the accomplice liability in
5 State v. Crow does say, an unlawful act such as robbery.

6 THE COURT: Such as robbery. I know that.

7 MR. VON HERRMANN: But you specifically said, you have
8 to, with regards to Mr. Bailey, find that he was present and
9 participating in an armed robbery, or a burglary, and here is
10 the definition, and the ---

11 THE COURT: And I thought that I told you that, if you
12 are going forth with that indictment I was going to hold you
13 to that standard, that they had to find him guilty of
14 participating in one of these two crimes, or both of them, for
15 them to get to the next step of finding him guilty of murder.

16 MR. VON HERRMANN: Yes sir, you did. You indicated
17 that to me, Your Honor, and you charged the with that.

18 MR. DIGGS: But all the more reason that charge
19 shouldn't have been given, because it's still in there, and it
20 still allow the jury -- you've got a conflicting instruction
21 there, because it still allows the jury to find him guilty,
22 find Mr. Bailey guilty of agreeing to commit an unlawful act.
23 I mean, that's just there in the language.

24 THE COURT: But that unlawful act must have been
25 burglary or robbery, armed robbery.

1 **MR. DIGGS:** Well, that particular charge doesn't say
2 that.

3 **THE COURT:** The charge I gave them does. I mean, if
4 they look at the totality of the charge.

5 **MR. DIGGS:** They do. But you are having to stretch
6 that, Your Honor, and hope that they ---

7 **THE COURT:** I wasn't stretching that, Mr. Diggs. I was
8 telling them that. I mean, I told the jury that, for them to
9 find Mr. Bailey guilty they must find that, while he was
10 participating in an armed robbery or -- and/or a burglary in
11 the first degree, that while participating in those crimes,
12 that a murder occurred, that was a probable and natural
13 consequence of his participation in those two crimes.

14 **MR. DIGGS:** And that's true, Your Honor. I agree with
15 that, but there's also this incorrect charge that's in the
16 record, and so we still have that there, even though it might
17 have been cured by the language that Your Honor just quoted,
18 but that language, such as, was in the Requests to Charge that
19 the State handed up to the Court, and to which we objected.
20 And I would submit the only way Your Honor can cure that is to
21 grant a new trial at this stage.

22 **THE COURT:** You might as well, Mr. Von Herrmann, also,
23 on the comment on the facts -- you haven't really addressed
24 that, about me saying, in reading accomplice liability, that I
25 read the term, such as robbery. Mr. Diggs feels that's an

1 improper comment on the facts.

2 MR. VON HERRMANN: Your Honor, that's not a comment on
3 the facts. This Court went out of it's way to make sure there
4 was no comment on the facts, and in fact, even expressed an
5 opinion to the jury, or expressed a direction to the jury that
6 you have no opinion as to the facts of the case, and it's in
7 the sole discretion of the jury to find the facts, and that
8 you are the finder of the law and the instructor of the law,
9 and that they are to find the facts, as they see them, and
10 mesh them with the law as you give it to them. You, as most
11 Courts do, you were very clear and concise about your role in
12 this case, and about the jury's role in this case. I cannot
13 recall one time where this Court, in this case or any other
14 case for that matter, has ever commented on the facts
15 sufficient to -- other than to provide some instruction and
16 some direction for this jury, and I don't believe in this case
17 such unlawful acts, or things like that are a comment on the
18 facts. You were very specific as to what this jury needed to
19 find with regard to the facts, and the fact that this Court
20 didn't have an opinion as to one way or the other whether
21 those facts were there or sufficient to -- for them to find
22 the Defendants guilty.

23 THE COURT: What about Mr. Diggs' comments, which I
24 find rather interesting, that your reply testimony was sort of
25 laying in wait, that you could have called him in your case-

1 in-chief, but you decided that you knew pretty much what you
2 thought the defense was going to put up, and you decided that
3 you wanted to get the last word, and this is the way to get
4 the last word as far as in the testimony, as well as in the
5 closing argument.

6 MR. VON HERRMANN: Absolutely incorrect, Your Honor.
7 Mr. Spencer absolutely rebutted the Defendant Bailey's
8 testimony that he, in fact, had parked on the same side of the
9 apartment, that they had run at that direction, and there was
10 a lot of testimony that Mr. Bailey ---

11 THE COURT: Well, why didn't you use that in your
12 direct though?

13 MR. VON HERRMANN: I wouldn't have -- there would be no
14 reason to. I, quite frankly, was surprised by the fact that
15 Mr. Bailey would testify that they parked in front of that
16 apartment complex, because nobody else, out of all the
17 witnesses I have interviewed, ever said that that's where they
18 parked, and that's how they left the apartment complex after
19 the murder. There would be no reason to.

20 THE COURT: So you saying that you had not intended to
21 call this reply witness? I forgot -- what was his name again,
22 Mr. ---

23 MR. VON HERRMANN: Mr. Spencer.

24 THE COURT: Mr. Spencer.

25 MR. VON HERRMANN: Had I -- I mean, I want to make sure

1 I answer the Court's -- had I never intended on calling him?
2 No. At one point I absolutely had given consideration to
3 calling Mr. Spencer to the stand in my case-in-chief. I felt
4 like it wouldn't add anything. Quite frankly, with all
5 deference to Mr. Spencer, Mr. Spencer is a not well-educated
6 individual. He is not well-spoken. He -- I felt that there
7 was opportunities for which they could successfully cross-
8 examine him, under certain circumstances, and it concerned me
9 in the case-in-chief, so while I was going through my case-in-
10 chief it appeared that he could not add any more than the
11 other witnesses had already given me, and so I wasn't going to
12 call him in that thing. I did have him under subpoena, and at
13 one point I had intended on calling him for trial. It became
14 apparent that he wasn't going to need to testify in my case-
15 in-chief, and quite frankly, we excused him from his Subpoena.
16 If you will recall, it was late in the evening. I sent my
17 Investigator, Carmen Burke, to pick him up, to bring him back,
18 to make sure that he was available to testify before the
19 Court, because of Mr. Bailey's testimony, and it was in direct
20 rebuttal of his testimony.

21 It was not -- and let me say this. As a trial lawyer, a
22 technique of lying -- or laying in wait and then seeing what
23 the defense is going to do to put your evidence in is, quite
24 frankly, from a prosecutor's standpoint, stupid, because you
25 never know whether you are going to get that chance to put him

1 up there, because had this Court ruled it wasn't rebuttal
2 evidence, I wouldn't have got any of that evidence in, and
3 this Court properly ruled and found the reason that I was
4 doing it was to rebut Michael Bailey's testimony. It was
5 not -- I was not laying in wait. I'm not that foolish.

6 **THE COURT:** Mr. Galmore, I haven't given you an
7 opportunity, sir, to make any response. Would you like to
8 make a reply?

9 **MR. GALMORE:** Yes sir, just briefly regarding the
10 circumstantial evidence and direct evidence. I think the Court
11 recognizes that there wasn't any direct evidence in this case,
12 and this case was purely a circumstantial case. There was not
13 any substantial circumstantial evidence, given that the
14 circumstantial evidence came in the form of testimony from the
15 three co-defendants and from Mr. Bailey, and that each one of
16 these co-defendants had a motive or reason to lie. I would
17 submit that, therefore, the evidence was not substantial, and
18 that is the same as our written argument. I would just ask
19 the Court to consider our written argument, as well as our
20 oral argument on that issue.

21 The Court did say one interesting thing regarding Mr.
22 Bailey's indictment. In talking with Mr. Diggs you said words
23 to the effect that, Mr. Bailey's indictment doesn't say that
24 Mr. Bailey is the person who killed Mr. Patterson, and that is
25 correct, however, when put next to Mr. Carr's indictment, it

1 certainly gives the impression that Mr. Carr was the person
2 that killed Mr. Patterson, and therefore ---

3 **THE COURT:** Well, and also the State said that to the
4 jury too. They orally said that, and they are the ones that
5 do the indictment. I mean, they are the ones who presented
6 the indictment to the grand jury.

7 **MR. GALMORE:** Well, I understand the State -- what's
8 the State's argument is, but when you put two people on trial,
9 and they are going after two different theories, they are
10 not -- and they are not similarly situated, then my client
11 ended up prejudiced as a result of that. I think it was a
12 foregone conclusion that Mr. Bailey -- that Mr. Carr was going
13 to be found guilty. The only question in the whole trial was
14 whether Mr. Bailey was going to be found guilty.

15 But just taking the two indictments, and lining them up
16 next to each other, to me it was a foregone conclusion that
17 Mr. Carr was going to be found guilty of the underlying
18 offense.

19 Your Honor, we would just ask you to accept the written
20 statement, written arguments in addition to our oral
21 arguments.

22 **THE COURT:** Mr. Diggs, I'm giving you the last word,
23 sir.

24 **MR. DIGGS:** Thank you, Your Honor. I have found the
25 State's Requests to Charge here, and again, this is the way I

1 remember the Court reading it to jury. It says, it is further
2 well-settled that, if two or more together -- combine together
3 to commit an unlawful act, such as robbery, and in the
4 execution of that criminal act a homicide is committed ... --
5 so Your Honor didn't say armed robbery, you said robbery, and
6 that was at the request of the prosecution, and I would
7 submit, that's not an accurate statement of the law, because
8 the statement ---

9 **THE COURT:** The only definition I gave of robbery was
10 armed robbery.

11 **MR. DIGGS:** Right. But it is a comment on the facts.
12 It is a comment on the facts, and it's telling -- it's telling
13 the jury -- it's really taking an issue, a factual issue from
14 the jury, as to whether or not that was -- the homicide was a
15 natural and probable consequence of Mr. Bailey's intended act,
16 even if he's only intended to commit a strong-arm robbery and
17 not while armed with a weapon.

18 And Your Honor, on the circumstantial argument again,
19 Mr. Galmore -- he's very good. I want to incorporate his
20 argument on -- the one he just made on circumstantial
21 evidence, because it's even more strong when applied to Mr.
22 Bailey, because we know that there were some confessions by
23 Mr. Carr to at least a couple of the witnesses that testified
24 for the State, and so we have strong evidence that Mr. Carr
25 was the shooter, and so we have -- we are left with even more

1 weak circumstantial evidence with respect to Mr. Bailey's
2 guilt of the homicide case, and so I wanted to make sure that
3 was ---

4 **THE COURT:** All right. I will incorporate that.

5 I want to say that I have, over the last several days,
6 once I got the comments of the Briefs from both Mr. Diggs and
7 Mr. Galmore, thought about this matter, and thought over the
8 trial situation. I have not reviewed the transcript,
9 obviously, because there is no transcript available yet. I
10 guess I could have ordered that the Court Reporter go ahead
11 and type it all up now, and it would be ready to go, but I
12 didn't, because I thought I remembered, since it was only a
13 short while ago, most everything that was done and said, and
14 as this jury did, and the jury did pay close attention, I paid
15 close attention and listened to the testimony that was given,
16 and we went through a long period of time of the arguments
17 before the trial began regarding severance, and also regarding
18 felony murder and accomplice liability. Those matters were
19 gone into very thoroughly. I made my decisions then. I don't
20 see anything regarding the trial that would change my
21 determination that severance was -- was not required, and that
22 the charging of Mr. Bailey, as the indictment charges him,
23 other than I held the State to an obligation that, if they
24 were going to go forth, that I was going to require that they
25 prove that Mr. Bailey, beyond a reasonable doubt, was doing a

1 robbery, and I was going to require armed robbery, and of
2 burglary.

3 As to the charge for the comment on facts, I am not
4 positive whether I said, such as, but just assume for a second
5 I did say such as, to me, even though doing that, when I add
6 to the jury's requirement that they find that he was doing
7 that, and each and every element of that, and I define that to
8 be arm-robbery, I don't see that as being a comment on the
9 facts, other than a comment on what the charges are, and I
10 think -- I'm trying to remember if there was ever any
11 testimony from Mr. Bailey or Mr. Carr they saw the other do
12 the shooting. I thought there may have been pretty close
13 evidence that that was there, but even if we don't have that,
14 I don't know of any stronger case I've tried before that,
15 circumstantially you didn't have evidence that there was a
16 murder here, and evidence that these two individuals were
17 involved in that murder. I think the evidence was enough for
18 that jury to make that decision.

19 I agree, Mr. Diggs, the jury could have decided, with
20 the testimony and the evidence there, that Mr. Bailey was only
21 there to participate in the purchase of marijuana, and that
22 Mr. Carr, without his knowledge, without his -- any way of
23 knowing it, and to his shock, pulled out a weapon and shot Mr.
24 Patterson. The jury could have believed that, because that
25 was -- enough evidence there for them to decide that, however,

1 they decided, beyond a reasonable doubt, that the evidence
2 convinced them of the guilt firmly of Mr. Bailey that he was
3 there, involved in an arm-robbery, and/or a burglary, and that
4 he was there, and that the murder was committed, with him
5 participating.

6 As to the reply testimony, I -- that's a matter, really,
7 the discretion of the Court in doing reply testimony. I don't
8 feel I abused my discretion. I think the testimony of Mr.
9 Spencer was geared toward a reply -- a rebuttal rather,
10 rebuttal testimony -- I guess we would use that word in
11 criminal court -- that that was in rebuttal to the statements
12 of Mr. Bailey, and -- in fact, also, I thought that there were
13 certain points the defense made by Mr. Spencer's testimony,
14 when he admitted to the jury that he apparently was a suspect,
15 initially, because as I recall, wasn't he there all night or
16 something, for hours and hours?

17 **MR. VON HERRMANN:** He was there for a while, Your
18 Honor.

19 **THE COURT:** And questioning him, and then wondering
20 what he was doing in the area, and that -- that -- I thought
21 that was making points for you all, that maybe he was looked
22 at in that regard.

23 So I don't feel the rebuttal testimony was
24 inappropriate, or that it was an abuse of discretion to permit
25 it.

1 After having considered -- and I have considered all the
2 elements brought up in the Briefs, as well as the arguments
3 here today, after considering all those arguments and motions,
4 I would respectfully deny those motions, for Mr. Carr and Mr.
5 Bailey.

6 Now, Mr. Diggs, I'm about to proceed -- and Mr.
7 Galmore -- to the sentencing issues, but please understand
8 this, that means that the case, in essence, is ending today,
9 so that means that y'all have the time, Mr. Diggs, and Mr.
10 Galmore, as far as Appellate time and reconsideration time,
11 and any things of that nature from today, so don't be
12 misunderstanding and thinking it was July 26. It is today, so
13 if you find something in the transcript or something, Mr.
14 Diggs, that you feel that I may have misinterpreted from my
15 arguments today, please let me know, and you too, Mr. Galmore,
16 and also, for purposes of any Appellate rights and all that, I
17 want to be sure the record is clear that the time begins to
18 run from after today.

19 All right. At this time, Mr. Von Herrmann, do you have
20 any matters you wish to present to me about ---

21 All the motions, directed verdict motions, the motions
22 regarding new trial, the motion in arrest of judgment, and all
23 the issues brought up are respectfully denied.

24 Do y'all file your motions with the Clerk of Court, your
25 Briefs?

1 MR. GALMORE: Yes sir.

2 THE COURT: Okay. I just want to make sure there's a
3 record of what y'all filed. There is then?

4 MR. GALMORE: Yes sir.

5 THE COURT: Okay. Then I don't need to hand it to the
6 Court Reporter.

7 Mr. Von Herrmann, at this time I'll be glad to hear from
8 anyone from the State regarding ---

9 MR. GALMORE: Hold on -- just a second, Your Honor.
10 Just to clarify the record, my motion has a stamp date of
11 August 2nd, 2007. The Clerk informed me that there stamp
12 clock was not accurate, and this motion was actually filed on
13 August 6th, but -- I know. I know. Just thought I would let
14 you know.

15 THE COURT: Madame Clerk, how could there be something
16 stamped on August ---

17 MR. GALMORE: Oh, it wasn't -- it wasn't Donna.

18 THE COURT: No, I know, but maybe she might know. How
19 can something be stamped August 2nd that actually was filed
20 August 6th?

21 DEPUTY CLERK OF COURT, DONNA WILLIAMS: I have no idea.

22 THE COURT: Who told you that? I mean, it doesn't make
23 any difference here because ---

24 MR. GALMORE: The one that used to work in Aynor.

25 She said that the clock had the wrong date on it,

1 because -- you know, I didn't stamp it, of course, after the
2 last situation, but ---

3 **THE COURT:** So I mean, I -- you sent it to me, so
4 obviously I'm considering the motion as you sent to me:
5 Whether it was August 6th or August 2nd, it doesn't matter to
6 me in that regard at all.

7 I'm not sure what -- was there a purpose in -- other
8 than to show the Clerk made an error, any purpose other than
9 that?

10 **MR. GALMORE:** Just wanted to make sure the record was
11 clear on it.

12 **THE COURT:** I mean, you want me -- I will be glad to
13 look further into that, but that wouldn't -- makes no
14 difference in this issue.

15 **MR. GALMORE:** No sir. No sir.

16 **THE COURT:** All right. All right. Well, that's noted,
17 but I just wanted to make sure though that, for the purpose of
18 review of what's all in the record, and what I considered in
19 the motions here today, that I considered the Briefs that you
20 filed, that I have a clock date on of August 2nd, and I have a
21 clock date of August 3rd on what Mr. Diggs filed.

22 I did get Mr. Diggs' -- I got his before I got yours ---

23 **MR. GALMORE:** Yes sir.

24 **THE COURT:** ---And he mailed it to me on August 4th,
25 and I got your's faxed to me, and your fax came in on August

1 6th.

2 MR. GALMORE: Yes sir.

3 THE COURT: As a matter of curiosity, did you fax it to
4 me the same day you filed it?

5 MR. GALMORE: Yes, I did.

6 THE COURT: That's very interesting.

7 Well, Mr. Diggs -- they had -- August 3rd they had the
8 right date on it, because he mailed the letter August 4th, so
9 I'm assuming his was right. Somebody was in there trying to
10 turn back the clock or something, I guess maybe.

11 All right. Anything else in that regard?

12 MR. GALMORE: No sir.

13 MR. DIGGS: We e-mailed our's and mailed it through
14 regular mail, Your Honor.

15 THE COURT: I know, but I got the regular mail August
16 4th.

17 All right. Mr. Von Herrmann, anyone you need for me to
18 hear from, sir, in regard to sentencing?

19 MR. VON HERRMANN: Your Honor, I would like to point
20 out to the Court that the lead investigator, John Lewis, who
21 worked really hard on this case, is present in the courtroom,
22 along with the victim's family, father in particular, and
23 other relatives. It's my understanding that they don't wish
24 to address the Court, that they are concerned about the
25 emotional aspect of it, and that they are not sure that they

1 can properly address the Court in a non-emotional fashion, and
2 they just want to make sure justice is served here today. But
3 they are present, and they are sitting here in the front
4 right-of-way.

5 **THE COURT:** Okay. Well, I know that y'all were here
6 also -- many of you were here during the trial, but obviously
7 under our Constitution you all are permitted to address the
8 Court, and if you don't wish to, of course, that will not, in
9 any way, make me feel that you have a lesser feel about the
10 severity of what the jury determined occurred, but I did want
11 to make sure you had an opportunity.

12 And your lead investigator also does not wish to say
13 anything either?

14 **MR. VON HERRMANN:** That's correct, Your Honor.

15 **THE COURT:** All right. Thank you, Mr. Von Herrmann.

16 All right. Mr. Galmore and Mr. Diggs, why don't y'all
17 come around here with your clients, and who else you wish to
18 address.

19 Mr. Galmore, if you want to, sir, if you are going
20 first, if you -- why don't you just hold that mike yourself,
21 then you can let your client hold it too, if you wish to, sir.

22 **MR. GALMORE:** Yes sir.

23 **THE COURT:** Yes sir.

24 **MR. GALMORE:** Yes sir, Your Honor. We are going to ask
25 you to consider sentencing Mr. Carr to a thirty year sentence.

1 He is twenty-one years old. We would ask you to take into
2 consideration when he was arrested for this charge he was
3 eighteen years old at the time. He was in ---

4 **THE COURT:** And by the way, for a matter of the record,
5 as I recall I went through this when I determined their
6 decisions of testifying or not testifying, to my knowledge,
7 neither one of them have a prior General Sessions record at
8 all; is that correct?

9 **MR. GALMORE:** That's correct.

10 **THE COURT:** I know that Mr. Carr indicated some things
11 in his testimony about school, but of course that wouldn't
12 have any affect on me here, but that is clear -- that's
13 correct, isn't it, Mr. Von Herrmann?

14 **MR. VON HERRMANN:** Yes sir, Your Honor.

15 **THE COURT:** All right. Proceed on.

16 **MR. GALMORE:** Yes sir, Your Honor. He was eighteen
17 years old at the time this offense occurred. He is twenty-one
18 years old now. He has spent the last, almost three years, at
19 the detention center, since September 28th of this year.
20 That's a total of one thousand fifty-two days at the detention
21 center.

22 He was in school at the time. He was being home-
23 schooled in the twelfth grade when this offense occurred, and
24 since this time he has not -- he has not had an opportunity to
25 finish out his education.

1 Your Honor, he has worked several jobs in the past, most
2 recently working as a cook and dishwasher at Miyabi's
3 Restaurant. He worked there for almost six months prior to
4 his incarceration. Before that he worked at Bob Evans, also
5 working as a cook, and he also worked at the local Food Lion.

6 Like the Court said, he did not -- he does not have a
7 prior record.

8 We are asking you to consider this thirty year sentence
9 because he is a young man, and he is a person with a
10 redeemable spirit. He did not have a prior record, and this
11 tragic accident is something that he can put behind him, and
12 that he can fulfill his debt to society. He can put this
13 sentence behind him and he can have a productive life once
14 this sentence is served.

15 We would ask you to take into consideration that no
16 matter what the prior plan was, whether it was a planned
17 robbery or a planned burglary, or whatever it was, there's no
18 indication, no testimony that there was a planned killing.
19 Everything -- all of the evidence looks to me like the
20 shooting was an accident, not a legally sufficient accident,
21 but that these young men, at no time, sat down and decided to
22 shoot Mr. Patterson, but that this shooting happened as an
23 accident.

24 It looks to me like Mr. Patterson was asleep in the
25 house, he was startled and jumped up as a result of the door

1 coming open, and -- and not instinctively, but almost as a
2 reaction, Mr. Patterson was shot and killed. The point is,
3 they did not sit around and plan on killing anyone. At worse,
4 they sat around and planned on stealing some drugs from Mr.
5 Patterson.

6 Your Honor, I guess there is no other way to say it
7 except that Mr. Patterson did not come to this incident with
8 clean hands, and I'm not trying to disparage anyone, but the
9 Court has to keep in mind that, but for his own culpability in
10 this, but for the fact that -- that he was leading this type
11 of life style, he would not have been a person that was
12 targeted for a robbery, and subsequently killed as a result of
13 it.

14 Your Honor, Mr. Carr is from the Burgess Community.
15 That's a small community down on 707, down by Socastee. I was
16 surprised to find out that he went to school with Ashley
17 Phillips. That was the young lady that testified. I had an
18 opportunity to talk to her father after this case was over.
19 He said that they all grew up together; he and Ashley and
20 Durell all went to school together, and he would pick them up
21 and take them on field trips and take them to McDonald's
22 afterwards and buy everybody a happy meal. I say that to say
23 that that is part of his extended family.

24 Mr. Carr does have family in the courtroom today. His
25 father is seated in the back of the courtroom along with his

1 stepmother, and he also has his uncle and some other relatives
2 here in court. But he does have an extended family that cares
3 for him. They are here to support him. They don't condone
4 what happened, but they are here to support him during this
5 time.

6 We just ask the Court to consider a thirty year sentence
7 because this is a young man with no prior run-ins with the
8 law. I think that, under those circumstances he can be
9 redeemed, he can fulfill his debt to society, and he can learn
10 from this opportunity.

11 He would like to address the Court as well.

12 **THE COURT:** All right. Mr. Carr.

13 **MR. CARR:** I would like to apologize to the family for
14 what occurred. I didn't know ---

15 **THE COURT:** Mr. Carr, I rather you would look at me.
16 You can apologize to them, but just look this way, sir.

17 **MR. CARR:** I would like to apologize to the family for
18 what occurred. I mean it wasn't really -- like he said, it
19 wasn't planned for him to be killed, and I knew one of -- one
20 of the relatives in his family, and I know he knows better
21 than me doing anything like that.

22 I have learned from this situation that happened. I've
23 been in here three years. I have learned my lessons, and I
24 mean -- and I apologize to the Court for everything that's
25 happened.

1 That's all I have to say. Thank you.

2 **THE COURT:** Thank you, Mr. Carr.

3 Anybody else, Mr. Galmore?

4 **MR. GALMORE:** No sir.

5 **THE COURT:** All right. Mr. Diggs.

6 **MR. DIGGS:** Your Honor, we have, of course, with Mr.
7 Bailey, his family, his parents, Mr. and Mrs. Bailey,
8 siblings, brother and sister, a sister-in-law, and Your Honor,
9 we have Reverend Davis from the church where the Baileys
10 attend, and I'm going to ask him to make a very brief comment
11 on the case, but also, Mr. Bailey, Your Honor, is a young man.
12 At the time of this incident he was twenty-one years old. He
13 has lived here pretty much all of his life.

14 Your Honor, I would argue, and submit that the evidence
15 is pretty strong that Mr. Bailey did not intend for Mr.
16 Patterson to be killed. He indicated to me before we came in
17 here today that he wanted me to speak for him; he didn't want
18 to -- to personally address the Court, but he wanted me to
19 tell the Court that he is very -- regrets very much Mr.
20 Patterson's death, and that he -- he just carries a great
21 deal of sorrow inside him because of Mr. Patterson's death.

22 Your Honor, I would ask you to have mercy in this case,
23 and give this young man the statutory minimum sentence.
24 Thirty years is a long time.

25 Also, Mr. Bailey has been on home detention since his

1 arrest, which was roughly the day after the shooting, and I
2 would ask Your Honor to consider giving Mr. Bailey credit for
3 that, for the time that he has been under house arrest, home
4 detention.

5 We have a letter I'm going to put into the record, Your
6 Honor, from the Sheriff's Department that confirms when he's
7 been -- the fact that he was on home detention, house arrest,
8 and that he has been continuously monitored for three years,
9 approximately three years, since the day after the shooting.
10 Of course he was in J. Reuben Long for a number of weeks, and
11 then was admitted to bail, and was placed on house arrest.

12 **THE COURT:** Mr. Von Herrmann, I had an occasion last
13 week in Spartanburg County to actually have a trial where
14 someone was spotted away from their house arrest that they
15 were on pending, believe it or not, a trial for murder, and
16 they were seen at some other location, and the police, not
17 knowing that they were on house arrest, had stopped the
18 vehicle. There was another person driving, but anyway, the
19 Defendant ran, and they ran after him, and he then ran into
20 someone's home. When they tried to keep him out of the home
21 he still ran into the home, and he was eventually caught
22 though, but the charges the jury were asked to decide were
23 escape, as well as burglary. The jury found him guilty of
24 escape, so Mr. Diggs seems to have a reasonable argument that
25 house arrest, you are in custody, and do you have any

1 objection to his consideration in that regard?

2 **MR. VON HERRMANN:** Your Honor, I will certainly -- you
3 know, whatever the Court feels is necessary. It is my
4 position that a condition of bond does not necessarily avail
5 you to the -- while it can, in fact, make you eligible to have
6 your bond revoked it can certainly, you know, trigger other
7 offenses. It's certainly not incarceration. It is not jail
8 time. It is a mere condition of your bond. You have to do
9 this to be out on bond. I mean, I would object, but if this
10 Court -- not going to invade your province whatsoever.

11 **THE COURT:** Well, it was interesting that another area
12 of your profession though, I guess, as a Solicitor, is part of
13 the Attorney General's Office, in a way, and so therefore with
14 Spartanburg arguing escape means you are in custody, I'm going
15 to hold you to that standard.

16 **MR. VON HERRMANN:** Your Honor, it's my understanding,
17 quite frankly, that that is a reasonable -- I mean, we do it.
18 We have charged that, in fact, so I'm not going to take
19 exception with that at all.

20 **THE COURT:** Reverend, give me your name, if you would,
21 sir.

22 **REVEREND DAVIS:** Pastor Stacy Davis from Christian Life
23 Center of Myrtle Beach.

24 **THE COURT:** All right. Is Christian Life Center any
25 particular denomination?

1 REVEREND DAVIS: Non-denominational.

2 THE COURT: Non-denominational. All right. Pastor
3 Davis, do you know Mr. Bailey?

4 REVEREND DAVIS: I do know Mr. Bailey.

5 THE COURT: All right. What would you like to tell me,
6 sir?

7 REVEREND DAVIS: I would like to say that I know this is
8 a difficult situation for everybody here today. What I have
9 heard so far from everyone is, if we could recall time we
10 would go back and make some changes. It's too late for that
11 now.

12 THE COURT: And if you would, for the purpose of the
13 Court Reporter, a little bit louder if you would.

14 REVEREND DAVIS: Okay.

15 So, what I would like to present to you, this Court, is
16 that I have known Adam Bailey for approximately six years,
17 along with his family, and I believe that -- what I have known
18 -- in pastoring you see all types of people come and go. You
19 meet all types of personalities, all types of people with
20 their -- you get to know people. You know how people respond,
21 how they act, what kind of person they are after you are
22 around them for a short enough time, and I see a lot of
23 violent people that come and go from our church, that would
24 visit, but I have seen from Allen -- from Adam, I have never
25 seen any type of violence in him. My wife and I -- of course

1 my wife is here, and all the opportunities and times that we
2 have had to work with him, talk with him, he has never
3 displayed any type of attitude in that nature, and he has
4 always been very kind, very cordial, and I'm just simply
5 speaking on fact. I'm speaking on what my strong opinion is.
6 I feel like he was at the wrong place at the wrong time by how
7 much I know him. Of course that's not fact; that's my strong
8 personal opinion.

9 I know everybody is here doing their job today.
10 Sometimes this is jobs that none of us really like to do,
11 because somebody lost their life, and that's a devastating
12 situation, but we are all here doing our jobs. You are doing
13 your job. The prosecutor is doing his job. Appreciate all of
14 you that are doing your job. We need that. But I'm doing my
15 job now, and I would like to just -- the Court to consider
16 mercy as much as possible when it comes to sentencing of Adam
17 Bailey.

18 Thank you.

19 **THE COURT:** Pastor, thank you very much.

20 Mr. Diggs, it would probably be better now if we just go
21 ahead and put that back on the stand. If anyone else wishes
22 to speak, let them just come there to the stand. If you can
23 move that stand back toward you a little bit. So if anyone
24 else wishes to speak, let them just come to the stand there.

25 Do you have anyone else, Mr. Diggs, who would like to

1 say something.

2 MS. BAILEY: I would like to say thank you.

3 THE COURT: All right. Okay, Ma'am.

4 MS. BAILEY: I would just like to thank you for allowing
5 Adam to come home during the trial, and I'm just grateful that
6 you let him spend another night with us, because I know that
7 you could have revoked his bond, you know, and had him during
8 the trial to stay, you know, incarcerated, but I just thank
9 you for letting him come home and be with us during the trial.

10 THE COURT: Okay. And Ma'am, for the record, give us
11 your name too, please Ma'am.

12 MS. BAILEY: Rose Bailey.

13 THE COURT: Ms. Bailey, thank you.

14 Anyone else?

15 Okay. Mr. Diggs.

16 MR. DIGGS: Your Honor, that would -- that would be all
17 that we would have at this time.

18 THE COURT: Does Mr. Bailey wish to say anything at
19 all?

20 MR. DIGGS: Your Honor, he doesn't. As you know, he
21 testified at trial. He -- he has a heavy heart. He asked me
22 to communicate that to the Court, Your Honor, and speak for
23 him, because he just didn't feel like he wanted to make any
24 statements to -- beyond that. He's just very -- he's very
25 sorry to the Patterson family.

1 **THE COURT:** Well, as the Pastor said, I mean, it's sad
2 that someone lost their life. It's also -- and it's never a
3 good thing for this Court to have two young people in my
4 courtroom who had no prior convictions in this Court, which is
5 really where you go for serious crimes, and to have the first
6 one, and hopefully the only one, that they end up being
7 convicted of is the most serious we have in American
8 Jurisprudence, so that is not a good thing either.

9 Mr. Carr, what is your date of birth?

10 **MR. CARR:** May 24th, '86.

11 **THE COURT:** So May 24th, '86. So, then how old are you
12 at this state -- now?

13 **MR. CARR:** Twenty-one.

14 **THE COURT:** Twenty-one. Okay.

15 When the incident occurred, September the 28th, '04, you
16 would have been ---

17 **MR. CARR:** I was just eighteen.

18 **THE COURT:** Yes. Okay. That's right.

19 Well, I do feel for the Patterson family too.

20 Obviously, whether he was or was not involved in the drug
21 situation has nothing to do with the right to live, and the
22 right to continue on in their lives.

23 The playing of the tape that was played in the courtroom
24 shows that this man ended up being shot, not knowing why he
25 was shot, not knowing who shot him, and the agony I'm sure he

1 went through as his life drained from him, and the efforts of
2 the E.M.S. to get there to try and save his life are things
3 that cannot help but cause us all to have some emotion in
4 regard to that, and to know that really nothing of benefit
5 came to anyone from this. Mr. Patterson is dead. Mr. Carr is
6 about to be sentence to a substantial period of his life, as
7 is Mr. Bailey. The violence that occurs in these regard, the
8 Court just cannot but help to be continually amazed of how
9 life is taken, so often for so, so little of a reason.
10 Amazing.

11 Mr. Carr and Mr. Bailey both testified differently as to
12 who actually did the shooting. The State's theory is Mr.
13 Bailey did. Mr. Diggs' theory is Mr. Bailey was there to buy
14 drugs only; was not there to do a robbery, and Mr. Patterson
15 was killed. Mr. Carr's theory is that he was there, not to do
16 a killing, and that Mr. Bailey did the killing.

17 The jury made the decision that, in essence, under the
18 law, you both did this killing, and you both did this murder.
19 So it is -- I guess it could be that the Court could look at
20 this and say, well, the State's theory was, Mr. Carr did it,
21 and Mr. Bailey was guilty because of being there and
22 participating in the robbery, and the Court could then make
23 some differences, or try and say the jury decided this or
24 that, but all I know is, the jury decided they both were
25 guilty of murder; they both have similar occurrences here in

1 this courtroom, meaning none, so I cannot, in any way, see how
2 I can treat them differently in regard to this.

3 So the sentence, on each one of the indictments, is
4 thirty years. Credit for a thousand fifty-two days served in
5 each case.

6 Thank y'all very much.

7 **MR. GALMORE:** Thank you, Your Honor.

8 **MR. DIGGS:** Thank you.

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

10 **THE COURT:** Pastor, thank you for being here today. It
11 always adds to the Court to know that a pastor cares enough by
12 the congregation to come and assist whenever he can ---

13 **REVEREND DAVIS:** Thank you, Your Honor.

14 **THE COURT:** ---Not out -- not just in the church, but
15 outside also, and that's important.

16 Mr. Patterson, hopefully this will help, in some way,
17 end the grieving a little bit, so we all can continue on in
18 that regard, so thank everyone for coming.

19 Everyone knows that because the day the trial ended I'll
20 be glad to hear anything that I need to before then.

21 This matter is now in adjournment.

22 Thank you.

23 -----END OF REQUEST OF TRANSCRIPT OF RECORD-----

24

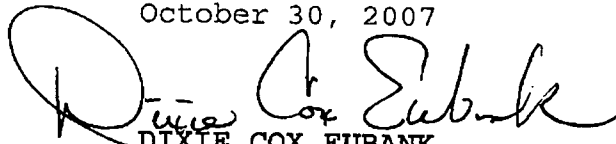
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C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, 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 all the proceedings had and evidence introduced in the **SENTENCING** of the captioned case, relative to appeal, in the **COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA**, on the 16th day of August, 2007.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

October 30, 2007


DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT