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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2011-GS-10-05232
Case No.: 2011-GS-19-04844

The State of South Carolina.....Respondent,

v.

Robert Harvey Payne ..... Appellant.

RECORD ON APPEAL

VOLUME 2

GINGER D. GOFORTH
Lazenby Law Firm, LLC
PO Box 6099
Spartanburg,, SC29304
(864) 804-5050

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR APPELLANT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

T. PARKIN C. HUNTER
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, Suite 400
Charleston, SC 29401

ATTORNEYS FOR RESPONDENT

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juror would know what that instrument means, that indictment means, much less know how to pick given the evidence that we have, and so those are the two bases for my motion at this time on the directed verdict.

THE COURT: Let's go ahead and hear from the State on this one.

MS. CARDILLO: Mr. Pennington is right, as far as the facts are questionable, but it is a question, we believe, that should be submitted to the jury.

The perception of each victim as it was happening, there has been a lot of testimony that the defendant was intoxicated, that he was stumbling. I think at the distance from where he was when he fired, it could be easily perceived from both victims that he was firing at them. I mean, it could -- and I put all three victims in the same indictment because it's not to mess up the jury and make them not be able to decide, but because it is a case of perception and of whether each one felt threatened through the assault.

As each testified, they each perceived that the defendant was pointing at them. There are many different ways that you could angle a gun or swing it over or if it fired and went in one direction, I can't explain that, but what I think is the victim's testimony is plausible and reasonable, given the situation and the

evidence that came in.

As far as the present ability to do so under the statute, the evidence shows that the defendant had a loaded shotgun. He pulled the trigger at the victims, and there is evidence that the ammunition could have reached the victims.

There was testimony from Mark Kelly that he said that it would max 1,300 feet, I believe, instead of 1,300 yards, well within the range of firing.

Now, whether the jury could find serious bodily injury, I think that's a question of fact for them to determine. It could easily have poked out any one of the victim's eyes. That would be a serious injury, I believe, under the statute of the definition, but I think also in the present ability is when the defendant fired, the victims thought he had the actual present ability to harm them.

They ducked. They grabbed their child. They called 911 again. They took cover, and also the fact that the defendant was still approaching them after he had fired his firearm goes more towards their reasonable assumption that they were being assaulted at that time.

I think that there is case law that I won't get into unless it's necessary but also deals with the fact that the victim's perceptions and a reasonable

apprehension of fear should take into account whether they believed they were assaulted by the defendant, and obviously we can't get into the defendant's head, but through his actions in the evidence that has been put forth, we believe that we have shown that he has committed assault first and it should be submitted to the injury for their determination.

I believe it's the position of the defense at this point that they want you to find as a matter of law that if you are far enough from someone when you fire a shotgun, then that's not an assault, and that's a tricky situation to be in. I think that as a matter of law we would ask the Court to deny their motion for directed verdict and submit all the evidence to the jury.

MR. PENNINGTON: In reply, Your Honor let me address present ability and then go back to this issue that I think the State is raising, the common law definition of assault and why I don't think it would apply in this situation.

As far as the present ability, I believe the best testimony, strongest testimony, is that it could hurt but that it was left in a very ambiguous -- I think I'm being charitable in appraising that this eye issue could probably be the only claimed manner of injury that could even approximate the level of damage that we're

talking about.

I'm going to move off of that. I'm going to move to this question of the -- I don't want the Court to be adopting the old common law standard that we look through the victim's eyes and we decide that an assault occurred when the victim feels threatened. The reason I say that is there is a thread of our case law that goes back to the Sutton decision involving -- it's a 19th century South Carolina decision that talks about a horse rider that was swinging a stick at someone and the Court found that was sufficient because the person perceived that they were under assault.

The issue I have with that is that in 2010, June 2, 2010, that law was abolished in our state pursuant to section 16-3-610, where under the omnibus sentencing reform act that they passed, the legislature gave its clear intent to abolish ABWIK, assault with intent to kill, ABHAN, simple assault, and assault and battery. Those are actually clearly enumerated and named as being ended in our state and substituted instead is the statute that we have that requires a far more rigorous standard of proof to reach this threshold of assault and battery first, where there has to be the ability to find the present ability to inflict the kind of harm, the substantial risk of death causing serious

permanent disfigurement or the loss of function or impairment of function of a badly member or organ.

There are other, lesser included -- the statute does provide, and I should say in the abundance of fairness, that the Court is going to have to deal with the question of does it have to charge assault and battery second and assault and battery third, which are the scaled down forms of injury. The statutes do provide that those are by statute lesser included.

In my view, the real narrow question for this Court is can the State -- I don't think the Court can say I can dismiss the A and B first and we are going to redraft the indictment for A and B second. I don't think we can do that at this stage under a directed verdict.

I think it's a yes, no, up, or down ruling by the Court as to whether or not the State has presented sufficient evidence that a reasonable juror could find the disputed elements. We contend that they have not crossed the threshold.

MS. CARDILLO: Your Honor, if I may respond --

THE COURT: Go ahead.

MS. CARDILLO: Your Honor, South Carolina has recognized definition of the criminal assault that did not require the present ability at the time, but under

the new law, it does specifically mention present ability.

However, under the new degrees of assault, there has been no direct case law on point that discusses whether a victim's mental state should be considered. The only line of cases that we have support the idea that an intentional act created in the victim apprehension of great bodily injury coupled with the actual ability to injury is sufficient for the charge of common law of assault and battery.

I have specific case law that I can hand up and will provide to defense. That case law under state versus Sims, way back in 1848, that is also similar to where the person rode a horse and was holding up a stick and was about to thrash but didn't hit it says if his action and conduct was such to create a belief in the mind of the prosecutor at the time, that is the victim, that he intended to ride upon or strike him, he would be guilty of an assault.

In addition -- I will have to gather those, but I can hand those to you.

In addition, under State v. Izzard, which is also 1876, again, the intent is of the essence of an assault as of other crimes, but where the act is such as to excite in the mind of person assailed a just

application of a battery is intended.

In addition we have another case from 1983, but it's in the matter of McGee. It also indicates the crime of assault has long been defined as an unlawful attempt or offer to commit a violent injury upon the person coupled with a present ability to complete the attempt or offer by a battery.

Again, I know there is no direct case law on point dealing with the new statute, so this is definitely a new area for the Courts to go into, but I believe, going through the case law prior to the change of the law, does give the Court some direction, even though it is dicta, and I can hand up those cases if you like, Your Honor.

THE COURT: Thank you.

Well, it's always a little dicey trying to figure out what the legislature meant. I have a couple of different ways of looking at that. One is we view it from the perspective of the aggressor, from the perspective of the victim, or from the -- I don't think either of you really touched on, and that is, what does the act of aiming a shotgun at somebody, and a loaded shotgun at somebody, and firing it mean of within the parlance of the statute?

The defendant's charged with 16-3-610, and

the subsection is section C, and the applicable part would read, a person commits the offense of assault and battery in the first degree if the person unlawfully, and I'll drop down to 1(b), attempts to injure another person with the present ability to do so and the act is accomplished by a means likely to produce death or great bodily injury.

That could certainly be satisfied by pointing a loaded shotgun at somebody without resorting to measuring what the effect of the injury is for distance purposes. That is a way of reading it. I don't know if it's the correct way of reading it, but it is a way of reading it because, frankly, if you stop and ask yourself at what point would I be comfortable having somebody aim a loaded shotgun at me and firing?

I don't know what my comfort zone would be, not having any interest or knowledge in guns any ballistics. The expert from the ATF testified, and I wrote this down, I think it was brought out on cross-examination, that a distance of 500 feet still has the potential to break skin.

I know this argument is, well, even if one would be -- even if you say, well, it was fired, I guess, at a distance that it could shoot either of the two, it wouldn't have caused great bodily injury to either of

them, either at a distance of, what, 525 feet, or the other one was -- I guess one was -- 537 feet was the measurements we heard this morning, 812 feet to where Mr. Anderson was.

When you look at great bodily injury as defined under the statute as meaning bodily injury, which causes a substantial risk of death, or which causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ, I don't think that -- well, it says, bodily member or organ, so member could be finger, hand, anything other than an organ as well, and it could cause -- it says either permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

So I don't know that there is a requirement that it be a -- the way Mr. Pennington is reading this is that, at least as I understand your argument, it wasn't -- if he hit somebody from that distance in something other than his eye, it wouldn't have caused a protracted loss or a permanent disfigurement to the function of a bodily member.

But the statute reads in terms of permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ, and I don't know that shooting from that far away couldn't have caused

impairment of the function of a bodily member to get shot from that distance. That, I think, is within the purview of the jury to decide whether or not that could have happened.

So for that reason, I will deny the motion, as to the indictment for assault and battery.

MR. PENNINGTON: Your Honor, I believe I understand your ruling, and --

THE COURT: That's usually helpful.

MR. PENNINGTON: Pardon me?

THE COURT: That's helpful.

MR. PENNINGTON: I do want to ask a question that relates to how we'll argue this to the jury, because it's something the Court at least wants to think about, if it's not going to rule on now, is that I am deeply troubled by altering the statute, and I don't know if this is what the Court is saying, that victim point of view can substitute for what is described as having the present ability to do so and the act is accomplished by a means likely to produce the outcome.

To me, that is a very clear direction of legislature to focus on the threat, not the perceived threat, and since the section that I cited abolishes the common law, I would contend that it would be improper for the State now to create in their closing argument or for

to Court to instruct that the victim's point of view opens the door to supplying these elements.

I don't think that comes close, and I would ask the Court to consider at the appropriate time ruling on that question. I would rather not have that be argued or presented if it's not appropriate. I do also, just as a helpful aid to the Court, would pass up, with the Court's permission, it's hard to read those statutes, and this is a breakdown that attempts to dissect, and that may be of help.

THE COURT: I've received yours. Well, again, I think your reading is from the aggressors's standpoint, and I'm not sure that that is the only way that this statute says that you have to look at it.

For instance, you have a compendium of distance versus the caliber of the gun, and at some point in there, you have, well, the jury is going to put that together, and they can figure out some sort of formula in which they can decide, well, this caliber of gun and this distance could have caused a great bodily injury from either -- from any perspective, from a neutral perspective or from a victim's perspective or if we only took the aggressor's, well, the victim is over there and they're like, well, I didn't know it was only a BB gun and it was ten yards away.

The victim -- maybe it was a blank, for that matter, in the gun. You get to shoot a blank rifle, you know, a shotgun loaded with a blank from ten yards away at somebody? I don't know that the legislature intended that outcome to be a not guilty verdict under this statute, but I think that instead of it being an aggressor perspective or a victim perspective that probably gets you some sort of reasonable standard perspective, and it's up to the jury to decide how to take the caliber of the weapon, the caliber of the bullet, and the distance and figure out whether or not it's going to be a great bodily injury or no injury was possible, and I'm -- I'm not ruling at this point you get an A, B, 1, 2, and 3 charge, but you may very well based on what I heard, so I will allow you to argue that.

I don't have a charge on perspective on that, but I would imagine, you know, taking a tort law concept of reasonable person and bringing that over into this area and saying, look, you don't have to look at this from the victim's standpoint. You don't have to look at it from the aggressor but what a reasonable person in this statute in this instance believe, taking what we know is the weapon, what type of shell, and how far away, you, the jury, get to decide whether or not that that meets the statute. That's really about the best I could

do.

MR. PENNINGTON: I'm more comfortable with that latter definition. Here's the rub for me: I really hope the State is not going to get up and say it doesn't matter if it's a blank or not because I think it matters if it is a blank or pointing an unloaded weapon. The case law that the submit, the dicta is they've got a situation where that truly is saying that the practical realities of the threat of harm are not important.

If they can contend to this jury now, under this statute, that, you know what? Even if this thing could have only gone 350 feet, the fact that the victim perceived it is enough. That would be -- I'm pointing the unloaded weapon. I would contend that that's why the State has indicted for the five-year offense of pointing and presenting a firearm. I also contend there are lesser forms of assault, and I haven't researched whether there are other potential attempts, attempted murder kind of scenarios that could have potentially played out in this, not that I want to give them any ideas if we had to retry this case, but my point is that we've got to deal with what we got.

THE COURT: And I have been trying to -- you know, again, the re-indictment on the date of trial, I was wondering why did we do this, and then looking at the

statute a little bit -- and, again, I didn't know anything factually about the case and its specifics until it's played out and I go, Well, I guess I could see why instead of charging three separate indictments they charged one with all alternatives, because with the testimony having played out as only one shot was heard in which it was perceived that it was aimed at somebody is a problem from the State's perspective, but it wasn't until we really went out and looked at that time that you could see how with both victims in the sort of general direction, there being some distance from their houses, but with the person standing out there on the island, I could see where both people would think that gun was being aimed in their direction, and, clearly, it could have been aimed at either of them or neither of them.

But I can see that, and it's impossible for them -- you have both victims clearly of the belief that the gun was aimed in their direction, but you only got one shot having been fired. That's the problem, and there is no way to reconcile that and a good defense if there were three different indictments --

MR. PENNINGTON: You have to pick one, or two and then one.

THE COURT: So I can see why that's done. And I don't think that arguing that if a gun was loaded

with blanks would be the best argument that they would make. It's a red herring.

I'm just thinking out loud at this point, and I'm just trying to reconcile what this statute actually says, the fact that it's not what the old law used to be, and what does it mean to say a person with the present ability to do so, does it mean from the aggressor standpoint, the victims's standpoint, or, perhaps, a reasonable person's standpoint?

And I'm inclined to say it's a reasonable person's objective, neutral standpoint, and under those facts, based on what I've heard, I think you could support that either of these two people believed the gun was being shot in their direction with a gun being able to go -- with a projectile able to go 1,300 feet, we're 500 and 800 feet out, whether or not it would have hurt somebody, you know, a serious permanent disfigurement, I don't know about that, but having a protracted loss or an impairment of a bodily member or an organ is something that I think is within the purview of the jury, based on the evidence that I heard.

So that's where I'm coming from.

MR. PENNINGTON: And has Your Honor already ruled on the question that I raised about the fact that there seemed to be the jury is going to have to decide a

victim, I suppose?

THE COURT: I don't know that they have to. They don't have to return a verdict on the indictment, and the indictment says it was upon the victim, Graham Stone and/or Scott Anderson and/or Noah Anderson.

I don't think they have to pick a victim and argue, well, it was Stone and not the Andersons, or vice versa.

MR. PENNINGTON: Very good. I understand the Court's ruling.

THE COURT: All right.

MR. PENNINGTON: Let's move on then, if you're ready, to hear me speak about the First Amendment. Given the Court's ruling on what you've said, let me address pointing and presenting very quickly.

Our contention is that no reasonable juror under these facts could find evidence of pointing and presenting in that the presentment was at least 179 to 180 yards away. That's my argument.

THE COURT: What's this got to do with First Amendment?

MR. PENNINGTON: I'm sorry. I back tracked because I thought it would be easier to deal with the gun issues before we get into the weeds of the First Amendment.

THE COURT: So you're on pointing and presenting?

MR. PENNINGTON: Yes, sir. It says it's unlawful to present or, alternatively, present or point at another person a loaded or unloaded firearm.

THE COURT: Okay. What is the --

MR. PENNINGTON: And the argument is this is too far away to be either a pointing and presenting because the testimony taken at its strongest is 175 to 180 yards.

THE COURT: If that's the best you got, I don't really think I need to hear from the State before I deny that one.

MR. PENNINGTON: Very good. Then, Your Honor, on this question of the indecent exposure, the elements of indecent exposure require indecency. I believe I gave you the statute. I hope I did.

THE COURT: You did.

MR. PENNINGTON: It is unlawful for a person to willfully, maliciously, and indecently exposed his person in a public place or on public property of others or to the view of any person on a street or private area.

We've done a lot of research on this question, and inevitably what reaches the appellate level is that people that are trying to titillate one another

in the context of strip clubs and those kinds of activities or flashers who have some sort of sexual gratification for themselves or their intended victim.

What we have in this case, though, clearly does not fit that. We are dealing with what would be is a statement of disdain and disrespect that was clearly intended as expressive speech which was narrowly committed. We don't have any other complainants that observed the offensive behavior.

I asked Mr. Anderson today, did he see the behavior. He did not. So the testimony was, very clear and very explicit, Mr. Stone said that Mr. Payne got right up, looking directly at him, and with his shooting the bird, with the finger, with both hands, thrusted his pelvis in a direction saying, in effect, I don't appreciate how I'm being treated by you in this matter.

Article one, section two of the South Carolina constitution says that no statute can impinge on the freedom of expression or speech in our state. Of course the First Amendment says that that shall -- the States cannot abridge free speech, and our contention is that this was clearly not intended to arouse sexual gratification of either party and was a clear message of disdain that was understood, and if you look at the case law, they will look precisely at the scope and

circumstances of the totality of circumstances test, but what cuts in Mr. Payne's favor is that statutes that are going to suppress expression are viewed with strict scrutiny, and what we have is a very unique and very specific set of facts where this is clearly expressive speech.

It was not intended as appealing to the prurient interests of the parties under the Miller versus California analysis of what is obscene.

THE COURT: There are definitions of indecent that have nothing to do with sexual gratification.

MR. PENNINGTON: I guess that is the question.

THE COURT: So how are you going to argue this without your client's testifying as to what his purpose was in doing this?

MR. PENNINGTON: My contention at this stage of the case is that his intention is transparent from the way in which Mr. Stone testified about the history of trespass notices that had been building throughout the week before, and then finally on this particular day, they described with great pains the fact that he was continuing to flip them off every ten or fifteen minutes, according to the testimony, and finally culminating in this act, which I think can only be understood as a

statement of disdain.

If we are --

THE COURT: Prompted by what?

MR. PENNINGTON: By the circumstances of the fact that he had been forced to relocate his boat. In other words, two things, actually. Forced to relocate his boat, but more to the point --

THE COURT: You cannot argue facts in evidence.

MR. PENNINGTON: You're right. I believe that Mr. Stone testified that he was aware that there had been an understanding reached between the city of Mount Pleasant that my client had to -- the opportunity to float this boat out until February the 4th -- I mean, June 4th of 2011, and in spite of that, there was this obvious continual ill feeling.

My question, or my objection, on his behalf, is that I can't think of -- if we're going to use the definition of indecency as not seen as parading through scope, I would call that, under a moral definition, indecent, but we know that absolutely without question that that is protected speech. The F the draft decisions, bad taste, indecent by my mother's standards, clearly protected speech.

Recent decisions by the Supreme Court that

relate to the fact that police officers have a difficult job and that they cannot find probable cause for arrest certainly because of insulting comments by people to them about the nature of their work --

THE COURT: Let me stop you, because you may be able to make and argue that to the jury, but right now, based on what I've heard, which is a very thin argument on your part, factually, for you to say this was my client's intent, to show his disdain for these folks or whoever authority, whatever authorities are making him move his boat and this is his way of expressing his disdain for that as opposed to general improper behavior I think is going to take testimony from your client, or some other evidence, as to what his intent was, because right now I just have speculation by you, and that's not enough to get you past the directed verdict.

MR. PENNINGTON: Okay.

THE COURT: Okay?

MR. PENNINGTON: I would ask -- or clarify and ask a question on this one narrow thing. Is the Court implying that it's going to instruct the jury as to the First Amendment and give them the option of finding that it's protected speech or is that something where the Court will step in and say I would renew my motion at the end of the case and argue that to protect a person under

the First Amendment that it's a judicial call?

THE COURT: I will not tip my hand --

MR. PENNINGTON: Okay. Fair enough.

THE COURT: All right. Anything else?

MR. PENNINGTON: No, Your Honor.

THE COURT: All right. What is your thoughts about the afternoon? It's 4:00. You've got, you said, a couple of short witnesses?

MR. PENNINGTON: I do.

THE COURT: Okay.

MR. PENNINGTON: Your Honor, we will supply the Court with a decision -- I don't know if the Court is familiar with the trial level ruling in Portland, Oregon last summer where an individual named Mr. Brennan, John Brennan, was being prosecuted by city of Portland. He was going through the airport and he objected to the body scan that presented an image of his person, and he is a -- flies all the time, so when the TSA agents rubbed his hands or did something on his garments, they detected chemicals that are the trigger for a body scan. He said -- he refused and at that point summarily took off all of his clothes and this was in the airport.

He then was arrested and charged with -- what was he charged with? I think he -- with indecent exposure, if I'm not mistaken. I'll have to verify the

statute, and the Court ruled as a matter of law that this was protected speech under the First Amendment as a protest to his being required to do the body scan.

Now --

THE COURT: Well, I'll not familiar with the facts of that case. I'm sure he must have said something to express that, but my ruling today is there is not a record that indicates -- there is no evidence in the record to indicate this was political speech on your client's behalf.

MR. PENNINGTON: Understood.

THE COURT: Okay.

MR. PENNINGTON: Thank you, Your Honor. You were asking about who we were going to call?

THE COURT: Yes, sir.

MR. PENNINGTON: I would like to have a quick chance to run to the men's room, but I'm prepared to call, I believe, three short witnesses that we could do before 5:00.

THE COURT: That work. All right. Let's take five.

(Recess taken.)

(In open court, jury present.)

THE COURT: Okay. Thank you for your patience, folks. The State has presented all of their

evidence, and they rested. Normally we would have them -- we bring you in, I ask them for their next witness, they say we rest and I would send you out and then we would argue these motions.

We just spent the last 45, 50 minutes doing so. For the purposes of just kind of moving things along, they've rested. I told you that. We argued the motions that would be legally what we do already, so we're now going to move on to the defense's presentation of their case, and Mr. Pennington has a few short witnesses that we'll get in today, and then we will resume tomorrow morning.

So, Mr. Pennington, if you're ready?

MR. PENNINGTON: Yes, sir, thank you, Your Honor. Mr. Payne and I call former chief of Mount Pleasant police Harry Sewell.

HARRY SEWELL,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PENNINGTON:

Q. Have you worked in law enforcement?

A. Yes, I have.

Q. Tell us about that.

A. I just retired as chief of police of Mount

Pleasant police department. I retired January 1st. I had a 22 and a half year career there, and then I was with the Ports Authority several years before that.

Q. Were you the chief of police on what would be May 29, 2011?

A. Yes, sir.

Q. Do you know a man named Robert Payne?

A. I do.

Q. How do you know Robert Payne?

A. Interestingly enough, they lived several doors down when I was growing up, and over the years we kept in contact.

Q. Chief, did you come to be involved in a situation where Mr. Payne moved his boat around the 18th of May 2011 and it moved from Jerry Moore's property out into the marsh?

A. I did, sir.

Q. Okay. Did you have conversations with Mr. Payne around Thursday, May 26th that involved working out an understanding with Mr. Payne about what was going to happen next?

A. Yes, sir.

Q. Tell the jury about that, please.

A. Okay. His boat -- is it located? Can I say where it was located?

Q. Absolutely. In fact, would it help you to make reference to State's Exhibit 2?

A. Okay.

Q. You want to come down and point?

A. No. That would be okay, sir. I just want to make sure I'm answering your question.

The neighborhood was up in arms, and letters were coming into the mayor's office, phone calls were coming into the mayor's office, and this houseboat had been moved by Robert Payne, and there was issues prior to that, but it had moved into the Bailey property, which now the town of Mount Pleasant owned.

So I attempted to make visits down there, but on May 26 Major Frank Riccio and I made contact with Robert, and I had a conversation with him to find out what we needed to do to get rid of -- to get this vessel off the town, get it away from [redacted], and then we had that discussion. And we were there for a long time, and you'll have I'll have to read my notes here --

Q. Did you reach an agreement?

A. To reach an agreement. We had some legal processes going on in the process too, but I was trying to be a neighborhood solver on both sides of the house.

Robert was agreeing to fix his boat and he felt comfortable that between the 1st and 4th the tides would

go high enough up that he would be able to get it out.

Q. The 1st and 4th of when?

A. The 1st and 4th of -- let's see here. I'm assuming it would have been June, because this is May 26 when I was talking.

Q. So he was comfortable with the idea that he thought he could make the necessary repairs so he could float the boat out of there by the high tides that were due in early June?

A. That's correct.

Q. And so did you work out a letter on Friday, May 27th, two days before this incident, that you posted on the boat?

A. Yes, sir, I did.

Q. I'm going to show you what's been marked as Defense Exhibit 1., and without telling us what this is, I'll ask you to look at Defense Exhibit 1 and tell us what that depicts. Do you recognize what that is? It's simply a yes or no.

A. Yes, sir.

Q. Well, tell us -- well, first of all, at this point, Your Honor -- tell us what it is.

A. It's basically -- and I can read the letter.

Q. Before you publish it, just tell us in summary what it is.

A. It's a letter that my legal department advised me to post to get in contact with Robert Payne.

Q. Is this a fair and accurate representation of this document?

A. As far as I recall, yes, sir. I have a file at the Mount Pleasant police department, but yeah, this looks similar.

MR. PENNINGTON: Your Honor, at this time I would move in State's 1 {sic}.

MR. VOIGT: Without objection.

THE COURT: Admitted.

MR. PENNINGTON: Thank you.

(Defense Exhibit No. 1 marked for identification and admitted into evidence.)

BY MR. PENNINGTON:

Q. Now, this is a letter to Robert Payne from you as chief of police?

A. Yes, sir.

Q. And, in effect, what it is, is saying that you had a meeting on Friday, May 27th?

A. Yes, sir.

Q. And that there had been an agreement reached where you said, It is my understanding you represented to me you will voluntary remove your boat property from the Shem Creek property on or about June 4, 2011.

A. Yes, sir, June 1st through June 4th, yes, sir.
Q. And that was to take advantage of the high tides that are scheduled to occur during that period of the 1st through the 4th of June.
A. That's right.
Q. All right. And so you arranged to have this posted on his boat on that Friday?
A. That's correct.
MR. PENNINGTON: If I may have the Court's indulgence.
BY MR. PENNINGTON:
Q. Chief Sewell, are you aware there was a trespass notice that had been issued by Officer Decker on May 19th that then was withdrawn upon advice of counsel of the city of Mount Pleasant?
A. Yes, sir, I do recall that.
Q. So it's fair to say sort of in summary that there were some legal questions --
MR. VOIGT: Objection to the form of the question. It's a leading question.
THE COURT: All right. Rephrase, please. Your witness.
MR. PENNINGTON: Yes, sir.
BY MR. PENNINGTON:
Q. Chief, you were aware that the town of Mount

Pleasant, in order to create a park, purchased a parcel of marsh; is that correct?

A. Well, they purchased a parcel of land, which included marsh, and also included an island that is here that the docks came over, and that was the old OK Tire, what we called the Bailey property.

Q. And so that would have been about 49 acres of marsh?

A. You know, I don't know the number, I just know that that plat was looked at, you know, and the boat that landed was within that.

Q. On the other hand, were you aware that Mr. Payne was contending that even though the city of Mount Pleasant had a property interest in that that it's not exclusive and that the public still has a right of access to waters below the mean high water mark?

A. I can't answer that. I knew the [redacted] had it, that they had some sort of a -- I forget what they call that, that you could walk out on, but yeah, I don't know how to answer your question.

Q. All right. You were aware that part of the earlier dispute had been involved the use of easement property and the dispute is about use of that easement property that is owned by [redacted]?

A. Yes, but that's two different issues of what we

were dealing with. That's why I said the whole neighborhood was up in arms. We're talking two separate things. That was a piece of property that aligned out. This houseboat landed on town of Mount Pleasant property, and the neighborhood was sick of the actions that were going on.

Q. Okay. But it's fair to say that it appeared that he had floated the boat out in an effort to repair it so he could get it out of the town of Mount Pleasant's hair?

A. I don't know that. All I know is it floated out because my understanding is the property that he was on, the property he was on, it was there. He got it out of there because they no longer wanted the boat there, so at really high tide he floated out and happened to land on town of Mount Pleasant property. I don't know what his intentions were at that point.

Q. And if you had a distressed boater in the harbor and in order to avoid capsizing they marooned themselves on town of Mount Pleasant property, that's something that is not a crime for the town of Mount Pleasant?

MR. VOIGT: Objection. Calls for speculation.

MR. PENNINGTON: He's the chief of police, Your Honor.

THE COURT: Overruled. Go ahead.

THE WITNESS: I think under normal circumstances, yes, sir, but I think it would be a reasonable amount of time for that to occur.

BY MR. PENNINGTON:

Q. Is that why you worked out the agreement that he could have until the high tide came in early June?

A. Yes, sir. I was in, you know, in law enforcement. Of course my role as the chief of police is to keep the peace, and that was my whole role at that point, let's get the boat out of there, and it was on both sides of us so I cared for the community and I thought that agreement was taking place so that's why all that happened.

MR. PENNINGTON: Okay, sir. I have no further questions.

THE WITNESS: Thank you.

THE COURT: Please answer any questions the State may have.

MR. VOIGT: Thank you.

CROSS-EXAMINATION

BY MR. VOIGT:

Q. I just have a couple questions. When you were talking to Robert Payne, you were talking as a representative of the town of Mount Pleasant --

A. Yes, sir.

Q. -- in May of 2011? And those conversations, you

find them fruitful, and, I mean, he listened to what the town of Mount Pleasant's position was and you listened to his position and you came to an agreement based on that conversation?

A. Yes, sir.

Q. And at any time -- about how long did you spend with him on that day when you went out and talked to him?

A. None of our conversations were very lengthy. I mean, ten minutes, I'm guessing here, ten minutes, maybe.

Q. And this was about the placement of his boat. It had come to rest on property owned by the town of Mount Pleasant, so you were there not representing [redacted] or any specific citizens on [redacted], but for the entire town of Mount Pleasant because that's where his boat was?

A. That's right. Yes, sir.

Q. And at any time when you were in his presence, did Mr. Payne protest the actions of the town of Mount Pleasant in your asking him to move his boat?

A. No. He was very cooperative in our discussions.

Q. And was he respectful to you in his manner and appearance?

A. Yes, sir.

Q. And do you recall how he was dressed when you talked to him?

A. I don't recall. There was certainly when I was -- he looked disheveled. He was living off a boat.

Q. But there was nothing unusual about his garb? He was wearing appropriate clothing for the weather?

A. At the time I saw him, yes, sir.

MR. VOIGT: Thank you. I have nothing further.

THE COURT: Redirect?

MR. PENNINGTON: No, sir.

THE COURT: You may step down. Thank you.

MR. PENNINGTON: Thank you for coming. May the chief be excused?

THE COURT: Certainly. Next witness?

MR. PENNINGTON: Yes, sir. At this time the defense would call Mount Pleasant Officer Basile.

ROBERT BASILE,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PENNINGTON:

Q. Officer Basile, you work for the town of Mount Pleasant in the Mount Pleasant police department?

A. I do.

Q. Tell us about your education, please.

A. Graduate of a four-year college with a major in

justice studies, minor in psychology.

Q. What college?

A. Montclair State University in New Jersey.

Q. And have you had law enforcement or academy training?

A. Yes.

Q. Tell us about that.

A. Six months in New Jersey and an additional six weeks in South Carolina.

Q. All right. Did you work as a law enforcement officer in to New Jersey?

A. I did.

Q. For how long?

A. Four years.

Q. Where at?

A. Montclair State. It's in the state of New Jersey.

Q. Then you relocated, I take it?

A. I did.

Q. Tell us about that.

A. New Jersey, from 2003 to 2007. Then I got hired in Mount Pleasant August 2007 to current.

Q. What is your responsibilities and assignments right now in Mount Pleasant?

A. I work in the traffic safety unit.

Q. I'm going to ask you, as part of your training,

were you ever trained officially as to how to interview witnesses as part of an investigation?

A. Other than basic academy instruction and certain hours of classes here, that's about it.

Q. Classes in South Carolina?

A. No, up north.

Q. Okay. Is that something that is expected as part of your responsibilities?

A. It is.

Q. Do you have experience in taking statements from witnesses?

A. Some.

Q. And what is the purpose of taking a statement?

A. Just to get an exact -- just to get exactly what happened from their perspective and get it on paper. It's kind of like doing a report. For instance, such as this, if something comes up a year or two years later it's something to recall and refer back to.

Q. In your training, how important is it to be accurate about the kind of statement that you're talking?

A. It's pretty important.

Q. Is that something that you strive to do as an officer?

A. I do.

Q. All right. Is the purpose of the statement to put

your spin or your interpretation on the document or is it to reflect what the witness says?

A. It's to totally reflect what the witness says.

Q. Do you find yourself disputing with the witness or do you just write down what they tell you?

A. Never dispute, just write down what they tell me.

Q. All right. You were employed and, I believe, working on May 29, 2011 for the city of Mount Pleasant?

A. Yes, sir.

Q. And were you called out to deal with Mr. Graham Stone?

A. I went, yes.

Q. Okay. What were you asked to do, or assigned to do?

A. To speak to one of the victims.

Q. Okay. Where did you do that, if you recall?

A. At his residence.

Q. Okay. And did you interview him verbally?

A. Yes.

Q. And then what did you do next?

A. I explained to him whatever he spoke I would hand write on the statement for him.

Q. Okay. Is this a form that's generated by Mount Pleasant?

A. Yes.

Q. Does it call for the witness to actually read the statement themselves before signing?

A. And get a copy, yes.

Q. Okay. Did that happen in this case?

A. It did.

Q. All right. Does it provide a portion where the witness is invited to acknowledge that they've either read or had read to them the statement which has been freely and voluntarily made and is true and correct to the best of their knowledge?

A. It does.

Q. When you interviewed Mr. Stone, did you go through this protocol with him?

A. I don't know if I read it to him or he read it to himself, to be honest.

Q. Did you skip that or would you have gone through one of those?

A. Either or.

Q. And you know that because you actually witnessed the statement as a witness?

A. Right.

Q. There is a date and time, May 29, 8:25 p.m. What does that time refer to, on the front page?

A. Of the statement?

Q. Of the statement, on the bottom right-hand corner.

A. That's -- I'm sorry. That's the time that he dated and signed and got a copy of it.

Q. Okay. So this means that the statement was obtained on May 29th and that you finished it up at about 8:25 that evening.

A. Yes.

Q. Did you use the format first of getting a narrative from the witness and then later go through a question and answer process?

A. Originally spoke to him briefly, Hey, what happened? What did you see type thing, and then when I realized that he did see a lot and he was a victim in this case, I took a formal statement.

Q. The format that you adopted was to let him tell the story and then ask questions?

A. Yes.

Q. Okay. During the interview, when it came to the salient portions of this shooting incident, did Mr. Stone say to you that he saw Mr. Payne stagger back to the golf cart, still giving him the finger?

A. He did.

Q. And it said he picked up a gun, or he picked up again, I thought it to be a stick, sat in the golf cart again, got out, grabbed the stick, and then I realized it was a gun; is that correct?

A. Yes.

Q. And then at the next statement was, He pointed at or above my house and fired it.

Is that what he said?

A. Yes.

Q. Is that an accurate rendition of what he told you?

A. Yes.

Q. And then he said at that point he called police?

A. Yes.

Q. Was the fact that this was an assault charge, did the fact that you were focussed on this question of where the gun was pointed, was that an important fact in this investigation?

A. I thought it was.

Q. So did you follow up in the first question that was asked where you asked the question did the suspect point the gun in your direction, is that the question you asked?

A. Yes.

Q. And what response did you get from Mr. Stone?

A. It appeared to me it was at the house or above it.

Q. Were those your words?

A. No.

Q. Those words are actually in quotation words. Is that because those were Mr. Stone's words?

A. Yes.

Q. Any question in your mind about that?

A. No.

Q. Was Mr. Stone in a condition of where it appeared to you that despite the excitement and fear, trauma, of going through this event that he was physically able to have this interview and give you this information?

A. Yes.

MR. PENNINGTON: Court's indulgence. Thank you, Officer Basile. Please answer any questions the solicitor may have.

CROSS-EXAMINATION

BY MS. CARDILLO:

Q. Did the victim, Mr. Stone, indicate where he was standing when the defendant fired at him?

A. Without looking at what he said, his back porch area, outside.

Q. And from -- do you recall going into the house?

A. Yes.

Q. And the back porch area that he was referring to, is that an elevated part of the house?

A. It is.

Q. So it's in the house itself?

A. Yes.

Q. Could you -- was the victim pretty upset when he

was talking to you?

A. I guess initially, but as it went on -- I mean, he was excited but not to the point of not being able to take a statement.

Q. Did he seem like when you first talked to him still under the excitement of the event, of what happened to him?

A. I don't think so.

Q. That's fair. Thank you very much.

A. Okay.

MR. PENNINGTON: No further questions.

THE COURT: You may step down. Thank you.

MR. PENNINGTON: At this time, the defense would call Jerry Moore, Mr. Jerry Moore.

GERALD E. MOORE, JR.,

having been first duly sworn,

was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PENNINGTON:

Q. Good afternoon, Mr. Moore.

A. How are you?

Q. Very fine, thank you. Mr. Moore, how old are you, sir?

A. Seventy-four.

Q. And where do you live?

A. [redacted], Mount Pleasant.

Q. That's in [redacted]?

A. Correct.

Q. Do you know a man by the name of Robert Payne?

A. I do.

Q. Did Robert Payne come to reside near your property?

A. Yes.

Q. Tell us about that.

A. Robert had a houseboat that was leaking, and I offered to let him temporarily tie up in front of my house, run an extension cord out until he could stop the leak.

Q. Okay. I kind of skipped over your background. Maybe I should touch on it. Tell us what you do for a living.

A. Im a public insurance adjustor.

Q. In the past, what have you done for a living?

A. My first job after I got married, I worked for Sears in the carpet department. I left Sears and went to work for my father-in-law as a food broker. I sold my food brokerage company and very, very briefly was in a boat rental business. After that I went into commercial real estate.

Q. How long were you in that?

A. Twenty years.
Q. All right.
A. And then I hired a company, a public adjusting company, to help me with my home and then my business loss after Hugo, and after that went to work with that company and have been that company ever since.
Q. And that's why you're now an insurance adjustor?
A. Yes, public insurance adjustor. I work for the owner, you might say, as an advocate, against the insurance company.
Q. In case they were go to -- estimated too low, the loss?
A. Yes, yes.
Q. Are you single or married?
A. Married.
Q. Children?
A. Yes.
Q. How many?
A. Three.
Q. Are they grown?
A. Yes.
Q. How long have you lived at that address on [redacted]?
A. I think about 40 years.
Q. Okay. You mentioned that -- did Mr. Payne have a

key to your house?

A. At one time he did. I'm not sure whether he did or not, actually. We changed the keys one time.

Q. All right. Was he able to when he wanted to come in and out of your house?

A. Yes.

Q. How could he get into the house?

A. We had a door that, really, anybody could have gotten in. It was -- I had a little stick. It was a sliding door, and I had a little stick bracing it. You could shake the door and the stick would drop, in you come.

Q. And that -- so that's one way that Robert could get into your house.

A. Yes.

Q. Do you own firearms?

A. Yes.

Q. Tell us about those. And I don't mean all of them, but let me be more specific, because it's getting late. I'm maybe not the only one that's tired. Tell us, do you have --

A. That's my passion.

Q. Let me stop there. Before we get into that, do you have rifles?

A. Yes.

Q. Do you have rifles that shoot 223 ammunition?
A. Yes.
Q. What is 223 ammunition?
A. It's the caliber that was mostly used in Vietnam.
Q. All right. Describe -- do you have something called an AR-15?
A. Yes, I do.
Q. What is that?
A. It's a -- it's the civilian non-automatic version of the weapon that was used primarily in Vietnam and Afghanistan.
Q. Some might consider it an M-16, like an M-16?
A. Like, but not automatic.
Q. Not automatic, meaning that each time you fire you have to pull the trigger?
A. That is correct.
Q. It couldn't keep firing like a machine gun?
A. That's correct.
Q. And 223 was developed, or is -- what's the purpose of that kind of ammunition?
A. Well, it's a military cartridge.
Q. So it's designed to kill people?
A. Absolutely. Short range.
Q. Does the -- does this rifle, is it a popular rifle?

A. Very popular.
Q. Did your particular rifle have a -- any kind of aid for the shooter?
A. Telescopic sight? Yes.
Q. Where is that gun kept?
A. At my home.
Q. Whereabouts?
A. I move them around.
Q. Okay.
A. Maybe in my bedroom.
Q. Okay. Robert familiar with that weapon?
A. Yes.
Q. Do you have other, similar weapons in the house?
A. Well, I have a 30/30. That's probably one of the early all-time favorites for deer hunting. It's got a scope, and I've got a 30 ought six with a scope. That's a little more recent caliber.
Q. All right. And do you have another Ruger?
A. I have a Ruger 22 pistol.
Q. I'm talking rifles.
A. Yes, yes, I do. I have what they call a mini 14.
Q. All right. Does that also have a -- something that aids the --
A. Yes.
Q. And that's what?

A. It's a red dot scope.

Q. A scope. Again, are these the type of weapons that you're using to shoot long distance with some accuracy?

A. What would you define long distance?

Q. Well, you define for me. Tell me in terms of target shooting, what would be the range that you would acquire this weapon for?

A. Well, it just so happens I was the best shot in my Air Force reserve unit, but I would think that a 223 maximum range for me would be 200 yards.

Q. Okay.

A. And the 30 ought six would be 400 yards.

Q. Okay. Do you own these guns as part of a hobby?

A. Yes.

Q. Do they have value as well?

A. Yes.

Q. Okay. Did you also own a pistol grip 20 gauge shotgun?

A. Yes.

Q. Where did you keep that?

A. I kept it in a case, hanging behind the seat of my little pickup.

Q. Where?

A. My pickup truck.

Q. In your pickup truck. On May the 29th, 2011, were you in town or out of town?

A. Out of town.

Q. Was your pickup truck with you or was it at the house?

A. At the house.

Q. Where was the shotgun the last time you saw it?

A. In the pickup truck.

Q. Did Robert ever have occasion to use that pickup truck?

A. Often.

Q. Did you, in the days that followed Robert's arrest, make a police report about what appeared to be a break-in at your house?

A. I did, I did.

Q. Tell us about that.

A. Well, my wife has a little cottage at Murrell's Inlet and almost every weekend we're either up there enjoying it or piddling around or, more recently, remodelling it. So we came in late Sunday night, and I guess probably Monday I noticed that somebody had pulled the screen so hard that the latch had been pulled out, and it was, you know, on the floor, on the porch outside.

Q. Do you know who did that?

A. I beg your pardon?

Q. Do you know who did that?
A. Oh, no.
Q. Did you report that Robert Payne did it?
A. No.
Q. Did you talk to Officer Wiedmann and suggest it could have been Robert Payne that could have broken the screen?
A. I may have.
Q. Now, you had a golf cart also.
A. Yes.
Q. Where did you keep your golf cart?
A. Parked in the back yard.
Q. Okay.
A. I beg your pardon, I think I probably left it parked underneath the carport.
Q. All right. You're familiar that Mr. Payne relocated his boat from your property out into the marsh?
A. Yes.
Q. All right. There were repairs that were needed?
A. Well, he had -- he had -- it was floating. In other words, he hadn't fished the repairs, not completely finished them, but it was floating and my wife had been after me and him for a long time to get it out of the back yard, so he had gotten it out of the back yard.
Q. Did he use, when he floated it out, bilge pumps to

get water out faster than it came in, in order to get it to that other position?

A. Yes. He had a bilge pump. Now, how well it worked, I'm not sure, but --

Q. Okay. Was Mr. Payne permitted to have access to your home for the purpose of things such as bathroom or laundry?

A. Yes.

Q. Showers?

A. Yes.

Q. Is there anything that would have stopped Mr. Payne if he wanted to grab one of those rifles that we talked about on this Sunday?

A. No.

Q. Did have you live ammunition for each of those weapons in your home?

A. Yes.

MR. PENNINGTON: Court's indulgence. Please answer any questions that the solicitor may have.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. VOIGT:

Q. Thank you, Mr. Moore. Welcome. Thank you for coming down.

So the reason why -- if I understand your

testimony, the reason why Mr. Payne was moving that boat was because your wife was getting on you and him to get that move boat moved?

A. That wasn't the only reason. I think he was wanting to get it out where he could anchor it permanently out in the anchorage.

Q. And I'm going to show you what has been marked as State's 15. Have you ever seen this weapon before?

A. I've seen one like it. Let me have it and I'll tell you if it's mine.

MR. VOIGT: May I approach the witness, Your Honor?

THE COURT: You may.

MR. VOIGT: Thank you.

THE WITNESS: It looks like mine. It's been a long time since I've seen it.

BY MR. VOIGT:

Q. Do you know one way or another if this weapon is yours?

A. Not positive, no.

Q. Okay.

A. No.

Q. Okay. You have some familiarity with weapons just like this one, though?

A. Certainly.

Q. Correct. Yeah. And you fired weapons just like this one before?

A. Yes.

Q. And what's the -- how close would -- or, rather, how far would you be -- strike that.

Is this weapon what's been marked as State's 15 a safe -- it safe to discharge near people?

A. Certainly.

Q. Is it safe to discharge near people when you've got -- when you have the barrel aimed in their direction?

A. How far away?

Q. Well, you tell me. When does this become safe to aim at somebody?

A. I'm going to tell you. I'm going to tell you.

Q. Okay.

A. The last time I went bird hunting, I couldn't understand why I was missing so much, so I aimed the shotgun at a tree, to see if I could make the leaves rattle. And 200 feet away, I didn't hit the tree at all, so I would say that that range on that gun, to injury anybody, would be, at the most, 300 feet.

Q. Now, you've never actually done any experiments trying to injury anybody, not with this gun, that gun, or anybody else's gun, right?

A. I might have foolishly done something in high

school, but that was another friend involved and we were just experimenting. He was behind a tree.

Q. Got you. In your experience with all the firearms that Mr. Pennington had you go through, it's best for safety purposes to keep the barrel of the gun away from people?

A. Absolutely.

Q. And that's to reduce the risk of injury or harm to them in case the weapon were to go off?

A. Absolutely.

Q. And that's at any distance, right?

A. Right.

Q. All right. I have no further questions.

THE COURT: Redirect?

MR. PENNINGTON: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. PENNINGTON:

Q. Mr. Moore, when you went back to look in your truck, was your shotgun still there after May 29th, 2011?

A. What was May 29th? Is that the --

Q. This is the big date, May 29th, Robert's arrest. Was your gun -- was your shotgun in the truck after that date?

A. No.

Q. It had gone missing after that date?

A. Yes, sir.

MR. PENNINGTON: Thank you. That's all I have.

THE COURT: Recross?

MR. VOIGT: No, thank you, Judge.

THE COURT: You may step down.

Do you have any other witnesses you want to call today?

MR. PENNINGTON: No -- well, may we approach?

THE COURT: Sure.

MR. PENNINGTON: Is it all right to release Mr. Moore from his subpoena?

THE COURT: It's all right by me. Have a nice day.

All right, folks. We are then going to break for today and resume tomorrow morning at 9:30. Again, let me stress not to talk to anybody about the case including other members of the jury panel, any third person, and if anyone approaches you about the case, please report that immediately to the Court.

Also, I haven't head anything in the newspaper about this case. I don't know if anybody was covering it today, but if you do read the paper tomorrow and there is an article about the case, please disregard it and not read it. All right?

See you tomorrow morning at 9:30. Thank you for your patience today.

(Jury recessed.)

THE COURT: Okay. We will break till 9:30 tomorrow morning. Mr. Payne, you, it sounds like, don't have any other witnesses and you need to discuss tonight with your lawyers if you want to testify tomorrow. But tomorrow morning when we resume, it will be time for you to give me your decision on that. Okay? See y'all tomorrow.

MR. PENNINGTON: I will report that we have made special arrangements with the jail so we can have video conferencing from 7:00 to 8:00. We'll be in a pretty good posture to start at 9:30.

(February 7, 2013.)

THE COURT: Okay. Yes, sir? All right. Mr. Pennington, what's the plan for this morning?

MR. PENNINGTON: We're ready to proceed. I do intend to call my client, Mr. Payne.

THE COURT: Okay. Mr. Payne, I told you yesterday -- you can set down. It's easier to read.

I told you yesterday that you have a decision that you needed to make by this morning as to whether or not you want to testify. You have the right to testify,

tell the jury your side of the story. You have the right to not testify, and if you decide you do not want to testify, I will instruct the jury they're not to hold that against you in any way while they're deliberating.

I also told you that you have until this morning to make your decision, because as I understand it, your lawyer has called all the other witnesses you intend to call as witnesses. So he just informed me that you intend to testify this morning; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And this is your decision, your decision alone?

THE DEFENDANT: Absolutely. I've been trying to testify for two years.

THE COURT: Okay. Now, you're going to have the ability to have the court reporter set over next to you so that -- all right. You'll have the court reporter sitting over next to you with the ability to transcribe for you. As I understand it, she is only going to transcribe the questions that are being asked of you and not your answers because, presumably, you will know your answers and you don't need to have your answers transcribed.

Do you understand that?

THE DEFENDANT: Yes, sir, but if it's no

problem, I would just rather have her go ahead and enter that too.

THE COURT: What is your preference on that? I'm saying I deal -- I have realtime in a lot of trials. I have it going on right now. It can be -- unless you have a lot of experience with it, it can be a little disconcerting to read your words on the screen simultaneously as you speak them.

So you may find it more confusing to do your answers, is my point, and it's not like you can't hear your own answers. They're coming from your mouth, so I'm just -- it was explained to me that she was only going to do it that way. I suppose if you want her to do your answers as well and it doesn't confuse you, then we'll have her do your answers as well.

THE DEFENDANT: That will be fine, Your Honor.

THE COURT: What will be fine?

THE DEFENDANT: What you suggested.

THE COURT: To only do your questions and not the answers?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Are all the jurors here yet? Okay. Well, why don't we take a break, you guys get -- you get set up over here, and you will be the

first person called when we come back. All right? Let's take a five-minute break.

(Recess taken.)

MR. PENNINGTON: We appear to be ready, Your Honor.

THE COURT: Okay. Bring the jury in.

(In open court, jury present.)

THE COURT: All right, folks. We're now going to have the defense call their next witness, which will be Mr. Payne, and, again, Mr. Payne has hearing difficulties and has had the realtime court reporter assisting him, so she is going to be setting over there next to him, and the way this works, it's kind of like closed captioning on TV screens. So when the questions are spoken to him, he'll be able to view them on the screen before he answers.

All right. Mr. Pennington?

MR. PENNINGTON: If it please the Court, Your Honor, I call my client, Robert Payne.

ROBERT PAYNE,

having been first duly sworn,

was examined and testified as follows:

THE DEFENDANT: I'm not going to swear on the Bible.

THE COURT: Do you affirm that you will tell

the truth?

THE DEFENDANT: I promise to state the facts under penalty of perjury.

THE COURT: Say that again?

THE DEFENDANT: I promise to state the true facts under the penalty of perjury.

THE COURT: That's fine.

THE DEFENDANT: Thank you.

MR. VOIGT: Your Honor, at this time I would object to Mr. Payne bringing materials to the witness stand with him.

THE COURT: What materials do you have?

THE DEFENDANT: I have a picture of my church and a copy of a rule to show cause.

THE COURT: Let's do this: Let's give those to Mr. Pennington, and if those are needed for evidentiary purposes or to refresh your memory, then he will know how to go about entering those into evidence properly.

MR. VOIGT: I have the same objection as to the legal pad, Your Honor. We don't allow people to bring notes.

THE COURT: Do you have some need to have the legal pad with you while you're testifying?

THE DEFENDANT: Yes, sir, I do.

THE COURT: What is that?

THE DEFENDANT: To make notes.

THE COURT: Well, you don't get to make notes during testimony, so --

MR. PENNINGTON: May we proceed, Your Honor?

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. PENNINGTON:

Q. Mr. Payne, on Sunday, May the 29th, 2011, did you have a shotgun?

A. Yes.

Q. Tell us why.

A. For two years I've been harassed by Mr. Stone. I was leaving the subdivision, and I thought it would be a good idea to send him an audible message, and the shotgun, I happened to find in Gerald, Mr. Moore's truck --

Q. Keep your voice up, please.

A. It sounded like a good idea at the time, and it was the safest -- I wanted to make a lot of noise. It was the safest gun in his collection that would do that, limited range, wouldn't hurt anybody.

Q. Well, before we get into all that, where did you get the gun?

A. Mr. Moore's pickup truck.

Q. And so how did you get the gun out to the boat?
A. I loaded tools and work materials on to the boat --
Q. Speak up, now.
A. The golf cart -- is that a mike?
Q. It is a mike. Why don't you slide up here if you can, and you can keep your voice up. You can look at the jury, but --
A. Testing, testing, testing.
Q. I'm sorry to cut you off.
A. I loaded everything up into the golf cart, spent all day long working on it, and then about 7:00 at night I drove the golf cart out to the marsh. It was low tide.
Q. Okay.
A. And I drove it out there and unloaded tools and materials and put it on the boat.
Q. All right. What were you going to do with those tools and materials?
A. I had agreed to move the boat, just to please Harry Sewell and to get the town off his back.
Q. What were you going to do with the tools?
A. The boat had a hole in it. It was sinking. I had two bilge pumps running just to keep ahead of the leaks. I went as far as I could intending to take Mr. Moore from the subdivision.

Q. Who is Mr. Moore?

A. Mr. Moore is a longtime friend, and I had -- he allowed me to keep the boat at his house, right up to his property for the past two years, but for two years I've been there with no problems. Nobody could see it unless they got out of their own home and came down to Mr. Moore's house.

Q. An exception to that would be Mr. Anderson who lived next door, isn't that correct?

A. Yes, but the brush was so thick he couldn't see the boat when I moved it the last time.

Q. Where was the brush between the houses, between Mr. Moore and Mr. Anderson's home?

A. At the southeast corner of Anderson's lot, southwest corner of Moore's lot.

Q. So that would be sort of in the area where the boat was yesterday?

A. Yes, yes, I think. Where we stood on the corner lot, yes.

Q. On the corner of the lot?

A. Yes, the southwest corner of Moore's lot, the southeast corner of Anderson's lot.

Q. When you went out there yesterday, had some of that brush been cut back?

A. Yes, drastically, if you look at the pictures that

were taken before it was cut. That's why I put it there, so nobody else could see it.

Q. Looking at State's 14, can you see that?

A. Yes, sir.

Q. I would like you to examine that photograph and see if you can see if you could identify by looking at that where Jerry Moore's property is. If you can't tell, just stop me and we'll look at the photograph. Is that where you put a red dot?

A. I'm pretty sure that's it.

Q. All right. Would it help you to look at the picture itself?

A. Yes, yeah, yeah, yeah.

Q. And I'm going to refer you to State's 20, and, again, comparing these, can you spot Jerry Moore's house?

A. Yes, absolutely. It's right there.

Q. And can you spot the brush that you're referring to on the corner of Mr. Anderson's property?

A. Right here.

Q. All right. I'm going to put these back up so you can put your little mark so the jury can see it.

A. How do you make these go away?

Q. I think our clerk can help us -- all right. Once again, Mr. Moore's property and the brush, okay, and looking at State's Exhibit 20, that's the brush?

A. Yes.
Q. Thank you. You testified you rode out there with Mr. Moore's golf cart and his shotgun, correct?
A. Yes, in a protective case.
Q. What did you do when you got out there?
A. Unloaded the golf cart.
Q. And did what?
A. Took the tools and the materials from the golf cart to the boat and the shotgun.
Q. Where did you park the golf cart?
A. At the -- as far as I could in the high ground at the island.
Q. Why?
A. So it wouldn't be flooded when the tide came in.
Q. All right. So where did you go once you got on the boat? What did you do?
A. Well, it was about 7:00 at night when I first went out there, and --
Q. Well, let's back up. What did you do all afternoon, Robert?
A. Thank you. I work in Mr. Moore's back yard, back and forth from where my church was to the storage tent.
Q. What were you doing all afternoon in his back yard?
A. Working on my dinghy. I was fixing to put my

houseboat back in the creek. I needed a dinghy to get back and forth.

Q. So you had a dinghy in the back of Jerry Moore's property?

A. No. Actually, it was on the civic club's property I was working on, right next to the church.

Q. And you need that to then be able to go back out on to living on the water?

A. Yes, got to have access to shore.

Q. Before that, what had you been doing Sunday morning?

A. I woke up about 9:00 or 10:00, over in a condominium complex off Ben Sawyer, and then about noon, when the restaurants opened on Shem Creek, I met a friend for lunch there.

Q. How did you get there?

A. I used my bicycle.

Q. And then what happened?

A. Flat tire.

Q. And so then what happened?

A. We ate lunch.

Q. Where?

A. At Red's. It didn't open until 12:00.

Q. Red's is a restaurant on Shem Creek?

A. Yes, sir.

Q. What did you drink?
A. Probably a Bloody Mary.
Q. What else?
A. Water. A couple Bloody Marys.
Q. What time did you get over to the Moore property to work on the dinghy?
A. About 1:00.
Q. Okay.
A. She helped me take the bicycle so I fixed it over there.
Q. On the Moore property?
A. Well, on the civic club's property.
Q. Okay.
A. And Moore's property. It's combined.
Q. So you went out on to the boat, you had the shotgun. Was it loaded?
A. I thought it was. I didn't load it myself.
Q. All right. And so tell us, first of all, were you having anything to drink out there?
A. I didn't take any beer out there with me, but there must have been some on the boat, and Mr. Stone said he saw me drinking, and he doesn't lie, so I must have been drinking on the boat too.
Q. Okay. Do you remember clearly one way or the other?

A. No.
Q. Did there come a time when you needed to use the rest room?
A. Yes, frequently. I've got prostate cancer.
Q. All right. By the way, does this houseboat have a bathroom?
A. Yes.
Q. But is it in repair, on May 29th, 2011?
A. No. It was a Coast Guard approved toilet, porta potty with a holding tank. I had removed that to make repairs, had a bucket and one gallon jugs.
Q. You would use those when you would go to the bathroom?
A. Most of the time I like to recycle and be ecologically friendly and not put it back in the drinking water as possible.
Q. Sometimes you put it in the compost?
A. Yes, that's the goal. I try to get it there, yeah, in the garden.
Q. Are there some times when you violated that rule?
A. Yes.
Q. Tell us about that.
A. I was on a water fast, and I was -- had to go to the bathroom, so I did.
Q. I thought you just told us you had lunch.

A. Lunch was a Bloody Mary and a salad.
Q. Okay. So has there been times when you've urinated off the side of your boat?
A. I tried not to because --
Q. Just answer my question. Are there times that you've urinated off the side of the boat?
A. Occasionally.
Q. How about that day?
A. I remember peeing off the side of the boat. It's a boat thing. It's on the water.
Q. Tell us about what you did and how did you it that day.
A. Well, on the roof of the boat, I pulled my shorts down far enough to manage the process, and then I was facing Mr. Stone's -- one of two houses that I thought was his, and I gave him the bird, in that general direction.
Q. Demonstrate for us. Stand and demonstrate what you did.
A. This is the -- and I did this. (Indicating.)
Q. All right. Why did you make that gesture?
A. Diogenes taught it to me. He was a Greek political cynic. It's a simple of contempt and frustration.
Q. Does it have another word, giving the finger?

A. Yes.
Q. The bird?
A. Yeah.
Q. That's the common layman's term today?
A. Yes.
Q. And had you done that in the direction of those homes in the past?
A. Yes.
Q. How often?
A. I was only there ten days and probably only half that time I was on the boat, so -- I don't know. If I walked down to the boat, I would give the bird in the general direction and closing of the hand.
Q. Why?
A. For two years I've been living there, working on the bow, off and on, couldn't get any work done because of all the harassing and stalking and the cops coming down. Spent more time dealing with that than I could working on the boat.
Q. Did that annoy you?
A. Yeah, yeah, and pestered me. I couldn't get any work done.
Q. Did you tie all that to Mr. Stone?
A. Absolutely. He was the ringleader. I never saw him unless he came to Moore's property, to the civic club

property. If he would have stayed home, I never would have met the man.

Q. All right. So you were making Diogenes signal in his direction to let him know how frustrated you were; is that correct?

A. Yes. I thought I was sending a clear message, but I didn't know which house he lived in, and after they tore my church down, I had to quit treatment. I had problems with long division. With the growth turned up -- I didn't know which house his house was until I got in jail and got the paperwork.

Q. Okay.

A. The only way I knew he ever saw me was one time I was walking down the road, and they drove by, and he gave me the bird, and I busted out laughing because that told me that he had received my signal. Until that time, I didn't -- until he gave me the bird, I didn't know he had even seen me.

Q. So back to that day. We're going back to the boat. May 29th, you're on the boat, you urinated, you shot the bird. What else did you do?

A. Took the shotgun off the boat, went into the golf cart -- oh, before that. I wanted to make sure nobody saw me shoot the gun because I knew was probably -- the city might have had an ordinance against shooting a

firearm in the city limits, although I can remember my daddy shooting squirrels out the back door of his porch. But anyway, they shoot shotguns at the city limits at the turkey shoot on the causeway.

Q. So what did you do?

A. I wanted to make sure nobody saw me do it. I didn't think it was that illegal, so I have a roof scull.

Q. A what?

A. A hole in the roof, with a covering over it, a hatch over it, a hatch built, and I pointed the gun up through that, straight up in the air, and fired it.

Q. What happened?

A. Nothing.

Q. How much time went by before you left the boat?

A. About 20 or 30 minutes.

Q. What were you doing on the boat while you were sitting there?

A. Working, listening to music.

Q. So then what did you do?

A. Well, I went back to the golf cart and went to the island, walked to the center of the island. There is heavy brush back there, made sure nobody could see me shoot it, and I again stuck it straight up in the air and shot the gun.

Q. Why?

A. To irritate Mr. Stone. I was being forced out of a subdivision. I hadn't violated any laws. Cops hadn't given me any tickets on the boat. I was just moving.

Q. You didn't even know he was home, though, right?

A. No, I never -- I never saw Stone.

Q. How can you be there trying to irritate a man that you don't know is there?

A. Potluck.

Q. You're just doing it to do it in case he's home.

A. Yes.

Q. Okay. So you fire the shot in the middle of the island?

A. That's correct.

Q. Tell us what you did next.

A. I had to move the golf cart because of the tide. I didn't want it going in the water, so I headed back to Mr. Moore's house, and I couldn't leave the gun there, because I can't leave a gun out in the open. Somebody would lock the boat up, so I took it with me.

Q. Did you do anything on the way to the golf cart or after you got to the golf cart?

A. I should have put it back in the case, but I couldn't find the case. I walked straight from the island, straight up the causeway, didn't go to the left, right. You can go straight there. That's the only

reason I was going there.

Q. Did you ever eject the spent shell casing?

A. Oh, yes. As I was coming out of the woods, I ejected it.

Q. Okay. How long after you fired on the island did you eject the shell casing?

A. As I was walking off the island.

Q. How much time went, estimate for us?

A. Fifteen, twenty seconds from -- it's only about 30 feet from the center of the island from the golf cart the amount of time it took me to walk there.

Q. All right. Where do you think the first spent shell casing is?

A. Oh, it's in the bilge of the boat. If you get the pictures, I will show it to you.

Q. Is that why the police didn't find a second shell casing?

A. I don't know why they couldn't find it.

Q. Okay. So you fire in the air and then you walk back toward Jerry Moore's house; is that correct?

A. That's correct.

Q. What was your intent -- what were you going to do next?

A. Get a winch. I thought the golf cart was stuck on a stump, a winch or a jack to get it off and get it back

to the house.

Q. So you were having trouble moving the golf cart?

A. Yeah, yeah. It was stuck.

Q. What happened as you walked back?

A. The cops arrested me.

Q. All right.

A. I asked them what for. They wouldn't say.

Q. All right.

A. I asked them to put the handcuffs in front and they refused to do it. I was beaten up by the cops when I was in jail.

Q. We're not going there. Mr. Payne, where were you born?

A. Florence, South Carolina.

Q. Where were you raised, in Florence?

A. God no. I was raised in Darlington, and the family tradition is the boys go off to military school. I finished military school in Atlanta, Georgia.

Q. Where at?

A. Georgia Military Academy, Woodward Academy now.

Q. Did you have further education?

A. I started at Clemson in '63, Clemson University.

Q. Did you go straight through all four years, or what happened?

A. No, I had -- enlisted in the Naval Reserve. I

felt the draft, and the Naval Reserve at that time had a two-year active duty program so I went on active duty for two years.

Q. Active duty in what?

A. The United States Navy. Served on the USS Charleston. I was a diver, and Charleston hated it. They wanted to destroy it.

Q. You're talking about Charleston hated the ship. We're not talking about that. Let's talk about what kind of ship was this?

A. I screwed up.

Q. What was the type of ship?

A. It was a cargo ship, but it was outdated the day it was launched.

Q. Okay. Did you have a role besides being a diver?

A. Clerk.

Q. Okay.

A. And I operated an anti-aircraft gun mount.

Q. Was there ever an accident in that gun mount?

A. Yeah. It takes four guys to load whatever it was. The shells are like this, and it's automatic loader, but you got to feed it the magazines, and somehow one of the shells wasn't loaded properly and it burst open. Powder was everywhere.

I didn't realize the danger of it until it was all

over. One of the guys, I never seen anybody turn so white in my life. He pulled his helmet off and ran.

Q. When you exited the Navy, what kind of discharge did you have?

A. Honorable. The best thing I ever did was going in the Navy.

Q. What year, roughly, did you leave the Navy?

A. I got out three months early to go back to college, so it would have been '69, probably early '69.

Q. Where did you go back to college?

A. January '70.

Q. Where?

A. Oh, Clemson.

Q. And did you finish at Clemson?

A. August the 7th of '71. Had a BS in mechanical engineering.

Q. All right. Were you ever married?

A. Once.

Q. For how long?

A. Twenty years.

Q. Have children?

A. Two, so far.

Q. Are they boys or girls?

A. One of each.

Q. Are they grown now?

A. Yes.

Q. Where did you work once you graduated from Clemson University?

A. I came to Charleston because Johnny Dodds was my uncle, and I always liked Charleston when we visited him. So I started off at the Charleston Navy shipyard in the nuclear engineering program, nuclear submarine program.

Q. What was your job there?

A. I was a nuclear engineer, but my degree was in mechanical, but my job was nuclear engineering.

Q. So what does that mean? I mean, I'm not a nuclear engineer. So what were you responsible for doing?

A. We overhauled and refuelled nuclear submarines, and the department I was in provided temporary heating and air conditioning, water power for the year that it took to do the refuelling.

Q. How long did you work there?

A. Too long. I got -- I spent a lot of time in radiation --

Q. Just answer my question. How long?

A. About 15 years.

Q. Then where did you go?

A. The Army Corps of Engineers.

Q. What did you do there?

A. Mechanical engineer and cost estimator.

Q. Where did you go after that?
A. I went to the hospital, the VA Medical Center and went to work in their engineering department.
Q. In what kind of capacity? What was your job?
A. It required a professional engineering license, and I had mine. I got out of the Corps as a professional engineer.
Q. That is a license that requires a test?
A. Yeah.
Q. Couple days?
A. Well, no. It's five years' work experience and two days exam and after five years one day exam at the beginning of the five years, while you're in college.
Q. So how long were you at the VA Medical Center as a mechanical engineer?
A. About three or four years.
Q. Where did you go next?
A. The Citadel.
Q. What did you do there?
A. Project engineering, construction projects.
Q. What was your role and responsibilities in those jobs?
A. Make contractors do what they're supposed to do, write the contract, pay the contractors, monitor progress.

Q. So you're kind of a detail guy?
A. Yeah.
Q. That was your job? That was your responsibility?
A. Yeah.
Q. Okay. At some point did it come time for you to retire?
A. Yes. I had health issues, so I needed to concentrate on that.
Q. All right. Did you continue to work after you retired?
A. Part-time. I became a real estate agent, sold several million dollars' worth of property. It was a lot of fun. I worked -- finally went to work for Gerald Moore, also part-time, as an insurance adjustor, and because of my cancer became very interested in health, became a health minister.
Q. Meaning that you were treating your prostate cancer somehow?
A. Oh, yeah. I did a lot of research and found out that conventional treatment is fraud. It doesn't work, and I got a second opinion from a doctor, and Socrates that said let food be your medicine and medicine be your food, and I started treating my prostate cancer. As long as I took fruit and veggies I was fine. I found out I didn't need glasses.

Q. Let's talk about your eyesight. I see you're wearing reading glasses; is that correct?

A. It is, but I have trouble with distances and also passing my driver's license exam. I have to take it three or four times before I finally passed and finally had to go to a doctor to get him to pass it so I could get a permit to drive without glasses.

I tried to treat it with carrot juice and it worked, and once I got off the carrot juice, I had to have glasses.

Q. In terms of your distance vision, how far out do things begin to get fuzzy?

A. I can't tell if your mouth is moving when you talk.

Q. All right. So if you're looking at 170 yards, are you able to discern at that distance, for example, people?

A. No.

Q. All right. You started living on this boat. Why were you living on this boat?

A. I had to live somewhere, and it's ecologically friendly, and I've lived on houseboats before and I enjoy living on the water. Who wouldn't?

Q. Had you been reading -- in terms of this dispute about where you could anchor, had you been doing any

reading or research at that time where you could legally anchor?

A. About 20 years ago, 25 years ago, the Beach Company was putting in a mooring field, or wanted to, at the Ashley River. We fought that because -- then we lost, but in doing that we did a lot of research.

MR. VOIGT: Objection as to the relevance of this, Your Honor.

THE COURT: What is the relevance?

MR. PENNINGTON: I don't think there is any, Your Honor.

THE COURT: Then let's move on.

BY MR. PENNINGTON:

Q. Mr. Payne, let's go back to what you were reading in May of 2011, about anchorage.

A. Well, the city had passed an ordinance on abandoned boats. Mine didn't violate that.

Q. Had you read a book about the right to anchor?

A. Right to anchor, yes. The jail has got it. They won't give it to me.

Q. All right.

A. Your right to anchor. It's a national issue, old issue. I never got a ticket for having a boat there.

Q. So let's go back to the shots. The first shot, what were you shooting at?

A. Straight up in the air. Nothing in particular.
Q. Why did you shoot?
A. To make noise.
Q. To do what?
A. To annoy Stone.
Q. Anybody else?
A. Nobody else had bothered me.
Q. Second shot, what were you shooting at?
A. Straight up in the air.
Q. Why?
A. To annoy Stone. He had been on my case for two years. I hadn't done anything.
Q. You testified to that. You were annoyed with the fact that you were being asked to leave. That's clear, right?
A. He never asked me to leave. They never sent a letter saying leave. It wasn't my property. All he did was send the cops down. I agreed and I was talking to the chief, to move the boat. I was moving it anyway.
Q. Putting aside your point of view, while you've been awaiting this trial, have you thought about the impact of what you did on Mr. Stone?
A. Yeah, yes.
Q. How do you feel about what you did?
A. It was probably the biggest mistake of my life.

Q. Why?
A. All the trouble I've caused.
Q. Did you think that you could have frightened Mr. Stone?
A. Yeah, yeah, yeah. Some people frighten more than others. I know what it's like to have a shotgun pointed at you.
Q. It would be frightening?
A. Almost wet my pants.
Q. Did you point a shotgun at Mr. Stone?
A. Never saw him -- no. I never saw Mr. Stone.
Q. When you fired the shotgun, where was the gun fired?
A. Once was on the boat right up in the air. The other was in the middle of the island, straight up in the air.
Q. Do you know Mr. Anderson at all?
A. Never met him. I had seen him. I didn't know his name until I got in jail.
Q. Had you ever had any conflict with Mr. Anderson whatsoever?
A. The closest we came was his dog was trying to attack me to call his dog off. That was the closest we ever came.
Q. Were you shooting at Mr. Anderson?

A. Never saw Mr. Anderson. On that -- on the 29th, even though I was in the back yard all day long, I didn't see him then.

MR. PENNINGTON: Court's indulgence, Your Honor.

BY MR. PENNINGTON:

Q. Oh, Mr. Stone -- I mean, Mr. Payne. Forgive me. You have been convicted in 2003 of a charge of the conviction of petty larceny; is that correct?

A. Yes.

MR. PENNINGTON: Court's indulgence. Please answer any questions the solicitor may have.

THE COURT: Cross.

MR. VOIGT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. VOIGT:

Q. Good morning, Mr. Payne.

A. Good morning.

Q. Now, let's talk a little bit about your boat. I'm going to put -- can we get -- that's your boat.

A. Yes, that's my boat.

Q. And that's the last place your boat was resting, right, a few miles off the island of Shem Creek?

A. Probably about 200 yards from Shem Creek and about 100 yards off the island.

Q. And how did the boat get to rest exactly there? Tell me how you got it out there.

A. God must have wanted it there because the pump proceeded to leak.

Q. Does that boat have an engine?

A. Not since I've had it.

Q. How long have you had that boat?

A. Six, seven years now.

Q. Have you lived on that boat the entire time that you had it?

A. No, off and on. That was my doghouse. I would go back there when I had to. Nobody lives on a boat if they have a place on the shore.

Q. So during the entire six or seven years that you've owned the boat, it's never had an operable engine?

A. No.

Q. How long had it been since that boat had an operable Coast Guard approved bathroom?

A. About two or three months before I moved the boat here.

Q. Okay. So the entire time that the boat was either adjacent to the Moore property or further out toward Shem Creek, at no time did your boat have an operable engine or a functioning bathroom?

A. No, that's not true. Partially true, partially

incorrect. It never had an engine on it. I never had no need for an engine. Functioning bathroom, yes. I had a porta potty with a source container built in, and that was connected to a waste holding tank.

Now, it was there until the accident. I had a water line pop in the boat, and it flooded the boat and broke the hull. In order to get access to the break in the hull, I had to remove the holding tank and the toilet.

Q. So you had a water line break that actually broke your hull. And where was that water coming from, the water line?

A. Mr. Moore's well.

Q. So you had your boat hooked up to Mr. Moore's well, and that ultimately broke both the bathroom and the hull of your boat. Am I understanding you correctly?

A. It was copper water lines on the boat. One winter it froze and broke. When the line thawed out, tide went out, the boat filled up with water and broke, at low tide. It broke the field.

Q. In May of 2011, were you living on this boat?

A. Not really. I would go out and visit and work on it. If I was working late at night I would sleep on it.

Q. Okay.

A. It was only there in this position, ten, eleven

days.

Q. During any of those days, the ten or eleven days it was in that position, did you spend the night on that boat?

A. Sure.

Q. And when the boat was in that position, did it have electricity?

A. Yes.

Q. And how did it have electricity?

A. I had two large storage batteries and an LED light.

Q. So you had an LED light and two large batteries and that provided the power. What sort of things could it power on that boat?

A. Bilge pumps.

Q. And the purpose of bilge pump was taking the water that was leaking into the hull of your boat and take it out of your boat to maintain its buoyancy?

A. No. The purpose of the bilge pumps is to pump the water out of the boat.

Q. I think that's what I said.

A. Oh, leaking -- yes. It's a bilge pump.

Q. Okay. Did you pull by a series of ropes -- manually pull that boat to that location during a high tide?

A. Sure, yes. That's how I moved it.
Q. Because that boat had no way of going anywhere under its own power; is that correct?
A. No.
Q. Does that boat have a name?
A. Mañana, yes, mañana. I think it means maybe tomorrow.
Q. And where is that boat registered?
A. In South Carolina.
Q. Okay. Did you spend the night on the boat on May 29, 2011?
A. Absolutely not. I slept over off Coleman Boulevard, off Ben Sawyer Boulevard.
Q. And you stated you stayed in a condo there?
A. Yes, over in Bay club.
Q. And that's not your condo, though, right? That's the condo of a friend?
A. I had sold it -- no. It's not my condo. I sold it to a client. I was doing property management on it, and I had permission to be there. We were in between tenants.
Q. When you left the condo, how were you dressed?
A. Got on my bicycle.
Q. When you left the condo, how were you dressed?
A. Shorts, T-shirt, and tennis shoes.

Q. Okay. And approximately what time did you leave the condo to go to Red's?

A. 11:00. I went swimming that morning in the pool.

Q. Did you have anything to eat before you went to Red's?

A. No. The fridge was empty.

Q. So the first thing you had on that morning of May 29, 2011 was a Bloody Mary?

A. Yes, probably.

Q. The first thing on your stomach, May 29th, 2011, was a Bloody Mary and then you had another Bloody Mary?

A. I don't remember that. It's possible.

Q. And then you went to Mr. Moore's property --

A. No. I was taken there.

Q. You were taken there because your bike didn't work.

A. Yeah. Mr. Moore's son's ex-girlfriend gave me a ride -- she wanted to talk. She still wanted to get back with him, and she wanted to talk about it.

Q. Let's talk about this boat for a minute. One of the things you could power on that boat was music, and I think you testified you were listening to music that day.

A. Yes. I have a small radio.

Q. I'm guessing you had to have that radio pretty loud for you to hear anything, right, Mr. Payne?

A. Yes.

Q. Now, you testified that you spent the day, prior to going out to the island, in Mr. Moore's property and in the civic club property right there next to it; is that correct?

A. Yes. That's correct.

Q. Were you drinking during that time, if you recall?

A. It was close to the first of the month. I get a VA pension after the first of the month. I ran out of beer money.

Q. But you still had beer on the boat.

A. Must have.

Q. And you were drinking the beer once you got out to the boat?

A. I don't remember it. I must have.

Q. And how long did you spend after leaving the Moore property on the island and on the boat?

A. Less than 30 minutes.

Q. Okay.

A. 40 minutes, I was in cuffs. From the time I arrived to the time I was in cuffs.

Q. What I'm talking about, though, is you left Mr. Moore's property, and I'm presuming you took this golf cart out there. Right? You went out to the island, and then -- how long were you on your boat?

A. Before what?

Q. Well, just how long were you out there on the boat that afternoon?

A. My tools and material on the boat, it was about ten minutes, and I found an opening in the boat and discharged the firearm and -- about ten minutes.

Q. So the entire time after -- you worked all day in the yard, in Mr. Moore's yard, and about the only time you spent on the boat and out there on the island is about ten minutes. Is that what you're telling us?

A. Must have been about 20 minutes, because when I got -- I went to the island after that and fired a gun there, so about 30 minutes altogether from the time I arrived to the time of the second shot.

Q. Okay. So when were you taking -- when were you urinating off the side? When did you do that?

A. Must have been before I fired the shot. I don't remember for sure.

Q. Now, when you were working in Mr. Moore's yard, did you come into contact with anybody from [redacted] at all, any neighbors, Mr. Moore, anybody?

A. I noticed the neighbors on the other side and Mr. Bass was there, and he had company.

Q. Did you speak to --

A. I don't remember seeing Mr. Anderson.

Q. Okay. And you definitely didn't see the Stones?
A. I can't see the Stones. It's 150 yards away.
Q. So during the entire time you were out there, after you came over from Red's, you didn't know if the Stones were there or not?
A. No.
Q. And you do know Mr. Stone lives in his house with his wife; isn't that right?
A. I had knowledge. I had been introduced to him and his wife about a year or two before that. They lived somewhere. Which house he lived in, I had no knowledge.
Q. But you could make the assumption, could you not, that he lived in his house, wherever that might have been, with his wife, who you have met?
A. Right, yes, yes.
Q. Okay. So approximately what time do you start to take these materials to the boat?
A. 7:00. It's getting dark, so I want to get out of there before dark, and I worked as long as I could on the dinghy, was running out of daylight. I had to get stuff out of there before it got dark.
Q. What kind of materials were you taking out to the boat?
A. Well, fiberglass resin.
Q. Okay. And you had to walk that from the island

out to that boat through the marsh?

A. It's all sand. Everything came from Mr. Moore's yard 100 years ago. It's not pluff mud, it's sand.

Q. And that is marsh, though, where your boat is located. That's marsh. It's not firm land, is it?

A. Well, if you're familiar with marsh back there, that's firm land. It's sand. 150 years ago they took the sand out of Mr. Moore's back yard and dumped it out, made the trail, made the island, got wooden planks and barrels and made a foot bridge across Shem Creek.

That's how the island got there, from Mr. Moore's back yard. Over time, high tides, hurricanes, winds, storms, it washed the sand off the roadway into the marsh. It's mostly firm sand out there. You've been out there. It's sand.

Q. This question began when I asked you if you walked out there. Did you walk out there?

A. Yeah.

Q. Okay. How high was the water when you walked out there?

A. It was coming in. It eventually run right up to my calves.

Q. Was your intention when you went out there to spend the night on the boat?

A. Yes, yes, because I -- yes.

Q. When you went out there, how were you attired? How were you dressed?

A. Same way I was when I left the condo at 11:00 that day.

Q. So you had a T-shirt on?

A. Yes. No, no, no. I had taken my T-shirt off by that point. It was hot.

Q. So in Mr. Moore's back yard, it was hot and you took your T-shirt off.

A. I took it off early in the day.

Q. So when you went out to the island, were you attired in tennis shoes and shorts?

A. Swimming shorts and tennis shoes.

Q. And about how long were you on the boat before you felt the need to urinate?

A. I don't remember.

Q. Okay.

A. We're talking less than 30 minutes in the process.

Q. Okay. Let me see if I remember a little bit about Diogenes. He was a man who was looking for one honest man, right?

A. Yeah, yeah.

Q. He never found one, did he?

A. I don't know. He found three dog night.

Q. Diogenes has nothing to do with your physical need

to urinate, does he?

A. No, but he allowed me to express myself while I did it. I had gotten arrested for giving the bird one time. A little kid on the school bus gave the bird to a cop when it was stopped. I got arrested one time for giving the bird to the cops in Mount Pleasant. The case went all the way to the U.S. Supreme Court, and the Court ruled it wasn't illegal.

Q. And you're not here today because you gave the bird to anybody, are you?

A. Yeah, that's one of the reasons. It's not violating the law. Shooting the gun is a minor part of it.

Q. You think so?

A. I know so. This is about the fifth highest court I know. People either love them or they hate them. I had another boat downtown that I lost when I was in jail, at Lockwood and Broad, in the creek. They cut it up and put it in the Dumpster. The Beach Company guy told me, he said, you don't know how many calls I've gotten about your boat. The people ride by, they see your boat, and they hate it.

Q. Mr. Payne, I haven't asked you a question.

A. No, I'm not in jail for giving the bird.

Q. Mr. Payne, you testified that you got on top of

your boat to urinate. Is that normally how you urinated when you felt the need, the urge to relieve yourself, is to get on the top of your boat?

A. No, it's not. Normally I peed in a one-gallon water jug, but the view is better from the top, and I was leaving.

Q. The view it better for whom, Mr. Payne?

A. For me. Can you see --

Q. This is really about you, isn't it, Mr. Payne?

A. So. It's about me expressing myself to Mr. Stone.

Q. Okay. And from the top of your boat, you could have been seen from all around Shem Creek, from restaurants, from fishing piers, from parks? Robert Payne standing on top of that boat could be seen from anywhere on Shem Creek, couldn't he? Is the answer yes or is the answer no, Mr. Payne?

A. I'm several hundred yards away from all that.

Q. So Robert Payne, in all of his glory, though, could be seen, even from hundreds of yards away, from anybody on Shem Creek; isn't that right, Mr. Payne?

A. If I could see far enough, I could see Mr. and Mrs. Stone naked in their house since they have no drapes on their windows.

Q. Mr. Payne, you can't see far enough to see anything, can you?

A. I know that. I can see some things.

Q. And, Mr. Payne, you didn't care who saw you standing on top of your boat urinating into Shem Creek, did you?

A. Sure I did.

Q. And how did you show your modesty, your care, your concern for the public in general when you stood on top of your boat?

A. How close I am to other people.

Q. Are you telling this jury, Mr. Payne, that when you stood on top of your boat and urinated into Shem Creek that the only person within eyesight to which you were directing that gesture was Mr. Stone, a person that you didn't know was home and you didn't know where he lived?

A. Would you rephrase the question?

Q. When you stood on the top of your boat and peed and gestured, you didn't know that Mr. Stone was home; is that correct?

A. I did not know Mr. Stone was home. Never saw the man, and I didn't know which home his home was.

Q. That's what I'm getting to. And if he had been home, you wouldn't have known which home that was, right?

A. Well, they were next door to each other.

Q. And you wouldn't have known where to direct your

gesture, would you?

A. From 200 yards, it didn't matter.

Q. That is really not the answer to my question, is it, Mr. Payne? You didn't know in which direction to express yourself, did you?

A. Yes, one of the two houses.

Q. Did you know Mr. Stone lived?

A. At the time, absolutely not. Listen, Mr. Stone and Mr. Anderson lived 160 yards apart.

Q. I haven't asked you a thing about Mr. Anderson.

MR. PENNINGTON: I think he can answer his question, Your Honor.

THE WITNESS: No.

THE COURT: Well, he hasn't answered his question. He's just kind of free talking right now, but --

BY MR. VOIGT:

Q. Mr. Payne, have I asked you a single question about Mr. Anderson?

A. Not yet, no.

Q. Now, when you're making your gesture on top of your boat, you wished that to be seen as a sign of contempt; is that true?

A. Yeah, political contempt.

Q. Political contempt. And to what part of the state

of South Carolina, or its subdivisions, does Mr. Stone or Mrs. Stone belong?

A. [redacted] and Mount Pleasant.

Q. Does Mr. Stone work for the state of South Carolina or the town of Mount Pleasant?

A. No. [redacted] is incorporated and the town is incorporated. They're both residents, and members.

Q. And, in fact, the person that came out to talk to you about removing the boat was someone with whom you were very familiar, Chief Harry Sewell, who works for the town of Mount Pleasant; is that correct?

A. He was one of the people, yes.

Q. And at no time did Mr. or Mrs. Stone talk to you about removing your boat?

A. No.

Q. Okay. And when the town of Mount Pleasant came out and talked to you about removing your boat in the person of chief Harry Sewell, what form of political protest did you lodge at that time?

A. He asked me to help him stop his phone from ringing.

Q. So when the town of Mount Pleasant came out to talk to you, you kept your pants on?

A. Yes. There is a law against urinating in public. I haven't been charged with violating that.

Q. As a matter of fact, the impetus, the reason you went on top of your boat was not, in fact, to make some sort of grand political process, but was, in fact, to fulfill a bodily function?

A. Both, bodily function and as an act of protest. I'm displeased with the way I've been treated. If you would left me alone, none of this would have happened.

Q. And you're talking to a person, you're making this gesture towards a person, and you don't know if he's there, where he is, and it's also someone with whom you have not spoken. Correct?

A. Wait a minute. I'm not sure I understand the question, but I think the answer is yes.

Q. This seemed like a good time, didn't it, to take this weapon and fire it? Those were your words, right?

A. Yep.

Q. And this expression, by firing this gun, this was part of some political expression of ideas --

A. Yeah. You see it in the Mideast on TV all the time.

Q. So by firing this gun, this was a political protest against what, all the terrible things that Mr. Stone had done to you?

A. Yes.

Q. And let's list all the terrible things he had done

to you. He had not actually talked to you, had he?

A. Yes.

Q. He hadn't talked to you.

A. We talked to each other.

Q. But not about removing your boat.

A. He claims we did, about a year before all this happened. I don't remember it because it has nothing to do with the subdivision. Wasn't on their property. Wasn't harming a flea. It was just there.

Q. You don't remember talking to Mr. Stone about your boat at all, do you?

A. I've been in jail for two years now, so that was four years ago. I think it was the afternoon he came down and produced his wife and was standing there talking. He may have said something about my boat, and I said I'll move it as soon as I can, but they never -- I was never requested, officially, to move the boat.

Q. So what other forms of oppression did Mr. Stone rain on to you?

A. That's a good question. I can't think in the four years it's been happening, since I arrived on the scene, a single government agency he hasn't called to whine and complain to, from the Army Corps of Engineers, the OCR, to DNA, to DNR, to the Charleston County, to the town of Mount Pleasant, to code enforcement officer -- he even

complained about Gerald Moore putting bar chips in his yard, three of us were in court together, bar chips, and the judge -- the prosecutor refused to prosecute, only for nuisance.

And the judge asked him, he said, Well, there was probable cause, and the judge -- solicitor said, We ain't going to talk about that.

Q. I'm going to talk about the ways -- my question is directed to the ways in which Mr. Stone has oppressed you personally, not about what other people may have said about other things and other people, all right?

A. He --

Q. You have not --

A. He complained to every government agency that I knew of, found all of this out later.

Q. So every government --

A. On and on and on.

Q. -- agency that you can think of has been after you?

A. No. They tried to. DNR came out there one day. No violations. DHEC had no -- they asked me to move the boat and I agreed to move it.

Q. They asked you to move the boat, a government agency asked you to move the boat? Yes?

A. Harry Sewell did.

Q. Oh, Harry Sewell did. You didn't fire this gun in protesting anything Harry Sewell may have said to you, did you?

A. No, it didn't happen.

Q. Firing this gun seemed like a good idea at the time, right?

A. It doesn't now. It did then. I certainly wouldn't do it again.

Q. When you took that gun from Mr. Moore, it was already loaded?

A. I'm not sure that I checked to see if it was loaded or not.

Q. It's not going to make a lot of noise if it's not loaded, is it?

A. You're right.

Q. And it made a lot of noise, right?

A. Yes.

Q. And the purpose, as you told Mr. Pennington, was you really wanted to annoy Mr. Stone?

A. Payback, yes.

Q. Payback, revenge.

A. I don't know about revenge, but --

Q. Well, revenge and payback, they're synonymous, aren't they?

A. He caused me a lot of discomfort. I was just

trying to cause him a lot of discomfort.

Q. And let's see how he caused you discomfort. Did he take away the engine from your boat?

A. No.

Q. No?

A. It's ridiculous. It never had one.

Q. Did he cause a hole in the hull of your boat?

A. No.

Q. Did he cause you to sleep nights on the boat or nights in condos that people let you sleep in?

A. No, he didn't.

Q. He didn't cause any disruption in your ability to repair to your dinghy on the Moores' property that day, did he?

A. I don't know. I never saw him.

Q. And that's pretty much true of the entire time you were out in [redacted]. You never saw him, did you?

A. Unless he left his house, walks 150 yards down the street, and came in my back yard, I never seen the man. People left me alone. I never would have known he existed.

Q. And where would your back yard be?

A. Mr. Moore's back yard and the civic club's property.

Q. And you don't own any property in [redacted]

right?

A. No.

Q. So when you're talking about your back yard, you're really talking about Gerald Moore's back yard?

A. And the civic club. I was a resident there. I was entitled to use it. I was a member of the civic club.

Q. You wrote them a check.

A. I did.

Q. And you never owned any property in [redacted].

A. No.

Q. Were you blocked in a houseboat right off shore, right?

A. Blocked in the house -- blocked? I don't understand the word.

THE COURT: I think you need to repeat the question. I think it's not showing up correctly on his monitor.

BY MR. VOIGT:

Q. So the closest you ever came to being a resident of [redacted] was occasionally spending the night on the houseboat without its own source of power or water or movement that was tethered to the back yard of Gerald Moore?

A. No, that's not true.

Q. And in what sense was it not true?

A. Well, the impression of the home, some lady claimed I was living in a tent in the back. That was in the paper. It was a bald-faced lie. I stored material there. I didn't live in a tent.

Q. I haven't accused you or questioned you about living in a tent, have I? So that has nothing to do with any question I've asked you, does it?

A. No.

Q. Okay.

A. You asked me -- you asked me -- here is your question: Excuse me. The closest thing you ever came to being a resident of [redacted] was living on a boat.

That's not true. I lived in Mr. Moore's house. He rented me space in his house. He's got an apartment there.

Q. So Mr. Moore allowed you to stay in his house?

A. Yes.

Q. And you were not staying in his house on May 29th, 2011.

A. Never went in the house, on that particular day. I was house sitting. Never went into the house. Mr. Moore was out of town. I was taking care of his property.

Q. Did you ever reload this weapon?

A. No.
Q. Did you know where ammunition to that weapon was stored?
A. I fired it twice. It only held two rounds. Did I reload the magazine? No. Did I reload the chamber? Yes.
Q. So this weapon holds three rounds, and you fired two of the three and there was one remaining.
A. I believe that to be true.
Q. Okay. To the best of your recollection --
A. It's not recollection, it's knowledge. I don't know how many rounds that gun holds. I believe it to be three.
Q. When you fired the gun from inside your houseboat, you knew when you fired the gun that your actions were illegal; isn't that true?
A. Absolutely not.
Q. You thought it was a good idea to fire the gun in your own houseboat?
A. Yes.
Q. Okay.
A. I don't anymore.
Q. All right. Now, I think you told Mr. Pennington that you believed there was some sort of ordinance about discharging firearms within town limits. Did I remember

that correctly?

A. I got a ticket for it, after the fact.

Q. So before the fact, you didn't think that there was anything wrong with firing this gun --

A. No. People shoot shotguns all the time, in the city limits. Every November they have a turkey shoot. At the Citadel where I worked they had a skeet range. That's in the city limit.

They also have an indoor rifle range, and every kid there has an assault weapon. There are thousands of assault weapons there.

Q. In the time, the nearly two years or so that you had your houseboat on the Moore property and further out in the marsh, did you ever hear anybody firing shotguns on Shem Creek?

A. No. I wasn't there a third of the time.

Q. So during the third of the time that you spent there on Shem Creek during this time period, you never heard anybody firing shotguns in Shem Creek?

A. No, not from there.

Q. Okay.

A. Maybe some people shooting out on crab bank.

Q. You probably wouldn't have heard that anyway, would you?

A. I don't know. We can test it.

Q. Can you stand up in front -- just where you are right now and demonstrate how you discharged the weapon, where your hands may have been, in what position. I'm not going to give you the gun to demonstrate.

A. (Indicating.)

Q. Stand up. Let me see. Show us again. Both times.

A. What?

Q. Both times? Was it the same motion both times?

A. Yes. It's impossible to fire that gun and aim it at the same time.

Q. It's impossible to fire that gun and aim it at the same time?

A. Would you like for me to show you?

Q. No, really, I don't. So you're saying that Mossberg has manufactured a gun that is impossible to fire and aim at the same time? That's what your testimony is.

A. They made a defensive weapon designed to be used at close range with a pistol grip. A weapon like that with such a violent recoil, you've got to hang onto it with two hands. If you hang onto it with two hands, there is no shoulder stock. There is no sight on the barrel.

Q. It's a defensive weapon?

A. Yes.
Q. And who were you defending yourself from?
A. No one at the time.
Q. When you stood on the top of your boat and made the gestures that you made and dropped your pants, you didn't care who saw you, did you?
A. Well, there was nobody else around. I didn't see anybody.
Q. You couldn't have seen anybody with your sight problems, right?
A. That's right.
Q. So in that very small, hazy world in which you live, you didn't care who saw you at the top of that boat?
A. Yes, I care, and the bow was up to shore. I was very careful about where I went to the bathroom, but I was irritated.
Q. So when you're out in the middle of the creek where more people can see you, though, you don't care who can see you when you stand at the top of your boat and gesture and urinate?
A. Some distance, 200 yards, 300 yards, 400 yards, you can't see.
Q. Let's see if you can answer this question. Did you care who you saw --

A. Yes, I cared.

Q. And how did you demonstrate that care and concern?

A. By facing the general direction of Mr. Stone's, what I thought was one of two houses that he lived in. No, I'm not even sure if I did that. The bird took care of that.

Q. When you fired your shotgun, once from your boat, once from an island in the middle of Shem Creek, you didn't care who saw or heard you, did you?

A. That's absolutely a lie. I definitely cared who saw me, and that's why I went there. I wanted no one to see me.

Q. So now you cared who saw you, and you hid.

A. Yes. I didn't want anybody falsely accusing me of pointing a shotgun at them, like they did. I wanted to be real careful that didn't happen.

Q. So you're saying people have falsely accused you.

A. Yes. They never saw me shoot -- from the interior of the island, you can't see the shore. There is no way they could see back at me, much less through the brush to get to their house. It's impossible.

MR. VOIGT: Please answer any questions Mr. Pennington may have.

THE COURT: Redirect.

MR. PENNINGTON: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. PENNINGTON:

Q. Mr. Payne, the solicitor asked you about times in the past where various state agencies had come in response to your presence in [redacted], right?

A. Yes.

Q. Name those agencies that came out and spoke to you.

A. DNR, the tall white shirt from DNR on James Island came over. The first houseboat I had in the creek up in Hobcaw he came over, ten years ago.

Q. We're not talking about that now. Let's talk about this particular time frame. Who called DNR?

A. I have no idea. I assume Mr. Stone did because he came down there at the same time the DNR came down there.

Q. Have you heard testimony from Mr. Stone about who called DNR?

A. No. Not that I can remember. But he arrived at the same time they did, lo and coincidental.

Q. All right. What other agencies came out there asking about your position next to Mr. Moore's property?

A. Mount Pleasant city cops. He said --

Q. OCRM?

A. Yeah, OCR and DHEC. He claimed they were there and they weren't.

Q. Let's talk about two weeks before May 29th, which would be Sunday, May 15th. Did the police come looking for you that day?

A. Yes, yes.

Q. Who called the police on you that day about being on the under construction dock?

A. Which particular incident? I recognize the 15th, but I'm not sure what happened on the 15th. Can you tell me what that event was?

Q. The report that there were two people out on the dock. We don't need the details, Robert, just answer the question. Were you advised who called the police?

MR. VOIGT: Objection. Beyond the scope of cross.

THE WITNESS: Yes, yes.

THE COURT: Was this brought up on cross?

MR. PENNINGTON: Yes. He went through in detail about when did Mr. Stone call the law on you or bring down the law on you.

THE COURT: All right. Go ahead.

BY MR. PENNINGTON:

Q. We're talking about the day of the call, of the Mount Pleasant police to investigate two people on the dock. Without giving any of the details, who did you understand called the police that day on you?

A. Stone.

Q. All right. Moving to May the 19th, the day after your boat got out there in the middle of the marsh, who called the Mount Pleasant police to get a trespass notice issued against you?

A. I assume it was Mr. Stone.

Q. You recall testimony to that effect in this case?

A. I can't recall it. I have CRS.

Q. And that trespass notice was withdrawn the same day?

MR. VOIGT: Objection.

THE WITNESS: Oh, yes, yeah.

THE COURT: Stop.

MR. PENNINGTON: Hang on. Whoa, whoa.

THE COURT: What is your objection?

MR. VOIGT: My objection is that he just testified he doesn't know facts about it, and now he's continuing to go into the facts, and there had been -- from this witness there has been no foundation laid that he knows the answer. He just testified he didn't.

MR. PENNINGTON: He just showed his sign of recognition, recollection. I could rephrase the question.

THE COURT: All right. Just go and let's move on. Overruled.

BY MR. PENNINGTON:

Q. Mr. Payne, do you recall the trespass notice that was recalled and Mr. Stone being involved?

A. Absolutely.

Q. That was on Thursday the 19th of May, ten days before this incident?

A. Yes, yes, yes. And he put on no trespass notice for the HOA property, and I called him after that happened and I said, It's crazy. I said to the prosecutor from the town, rescind this thing. I'm a resident here, and the next day, or that day or the next day, he did.

Q. All right. So -- and on the Tuesday before the Sunday incident, did the town of Mount Pleasant respond to a call from Mr. Stone about flashlights?

A. Yeah.

Q. Tell us what happened there.

A. I was on my boat, minding my own business --

MR. VOIGT: Objection to the form of the question.

THE COURT: Overruled. Go ahead.

THE WITNESS: I was on my boat, trying to go to sleep, reading, and the whole inside of the boat lit up like a flare was set off inside, and the lights were coming from shore from Mr. Stone's house, so I called 911

to make a complaint.
BY MR. PENNINGTON:
Q. And you found out what?
A. That it was the cops shining the lights in my house.
Q. From where?
A. Well, it turned out it was from Mr. Stone's house. So I called to complain about the harassment.
Q. But the next day you worked out the agreement with Mr. Sewell, Chief Sewell, to move to your boat?
A. I don't know that it was the next day, but yeah. Harry and I get along. If I can help him out, I'm happy to do it.
Q. So you agreed to move, but you were still irritated with Mr. Stone?
A. Yeah, yeah.
Q. Court's indulgence.
Did you try to kill Mr. Stone?
A. No.
Q. Where did you shoot that shotgun?
A. Straight up in the air.
Q. Why?
A. To Venus. That's the second best place to shoot it if you don't want to hurt anybody.
Q. You say it's impossible to fire and sight the

shotgun at the same time; is that correct?

A. Yes.

Q. But if you go like this (indicating), you can sight the weapon, correct?

A. Might do it one time.

Q. Why is this a problem?

A. Because the recoil is going to knock your face off.

Q. So you probably want to be more braced?

A. More like this (indicating).

MR. PENNINGTON: That's all the questions I have.

THE COURT: Redirect?

MR. VOIGT: No redirect, Your Honor.

THE COURT: You may step down. I'll tell you what, let's go ahead and just take a break right now. And -- let's see. Let's take about 10, 15, minutes, and we will resume in a few minutes. Don't begin deliberations or discussions about the case, and we'll see you in about ten, fifteen minutes.

(In open court, jury not present.)

MR. PENNINGTON: May he come down, Your Honor?

THE COURT: Yes.

(Recess taken.)

THE COURT: All right. Are you going to call any other witnesses, Mr. Pennington?

MR. PENNINGTON: No, sir.

THE COURT: All right. The State rests or the defense rests. Is the State going to have any rebuttal?

MS. CARDILLO: No, Your Honor.

THE COURT: All right. So we'll then go with directed verdict motions and a charge conference.

What I propose is bring the jury in, let them go to lunch, and that we hear the DV motions then. I'll give you my proposed jury charges, which she's putting on some final touches to so that you can study them at little bit at lunch, and we'll come back and have our charge conference, and then we'll charge and argue.

So I'm thinking that I'll tell them to come back at 2:00. That way we've got time to argue, get a bite to eat, and then have a charge conference. 2:00 seems reasonable.

MR. PENNINGTON: Do I understand your practice is to charge and argue?

THE COURT: I'll happy to do that. Ed Cottingham used to do that. I used to think it made a lot of sense.

MR. PENNINGTON: Then we don't have to guess

what the charge is. I think it's great.

THE COURT: Does that work for you, for me to charge first and then you argue?

MS. CARDILLO: That's fine, Your Honor.

THE COURT: It's one of those things, we live in South Carolina, and the lawyers go, Wait a minute. We've never done it that way, so if you don't agree, I won't do it.

Bring them in.

(In open court, jury present.)

MS. CARDILLO: If it matters, the State is waiving opening on the law.

THE COURT: All right.

Folks, we've reached a point in the trial where the defense has now rested and is not going to call any more witnesses, in other words. The defense -- or the State is not going to offer any reply, or rebuttal, so you've heard all the evidence that is going to be presented in this trial. So what is left then is to have the charge on the law and the closing arguments by the lawyers.

Procedurally, we have to do a little bit of work outside of your presence. We have some legal matters we have to take up. We have to have a charge conference, and then we got to get a little bite to eat.

So we're going to break now, or we'll break in a few minutes. We got to, like I say, do a little bit of work, but I want to break for lunch, give you an extended lunch hour, and you come back to the jury room at 2:00, and we'll be ready to resume by then.

Now, you've heard all the evidence, but it's still improper for you to begin your deliberations or discuss the case in any way with anybody, including other jury members. Primary reason: I haven't told you what the law is, so you don't know what the law is so you couldn't possibly begin to deliberate.

So you'll be able to deliberate it this afternoon, but don't do it while we're at lunch today. If you want to go to lunch with somebody else on the jury panel, that is fine, but please, again, resist the temptation to discuss the case or any witness demeanor or anything at all to do with this case whatsoever.

So we'll see you back at 2:00. Please report to the jury room just a few minutes before.

(Jury recess.)

THE COURT: So, Mr. Pennington, I'm sure you have some motions you would like to make.

MR. PENNINGTON: I would renew the motions I have made and attempt to incorporate the argument I made before with regard to the -- let's go count by count.

There is a charge of assault and battery first degree. Given the new testimony that you've heard, our position remains that no rational juror could find that under the totality of the circumstances that there's evidence that the defendant was assaulting with the present ability to do so and that the act is accomplished by means likely to produce death or great bodily injury, which incorporates a substantial risk of death or serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

Our argument, we don't neat to repeat as distance or other circumstances, and I'll stop there on that count.

THE COURT: Would the State like to respond?

MS. CARDILLO: The State relies on the brief arguments made. I think even though also in -- during the defendant's testimony he showed how he held it and it wasn't quite straight up in the air like he said, it was more leaning this way, which is more consistent with what the victims viewed.

I think, just given the fact that he, again, as the Court noted during the prior arguments, that just him firing a loaded shotgun at people is in and of itself an assault. I think under the -- he had the present ability to do so. Again, the distance it would have made

it that far, from evidence I think under the great bodily injury argument, the impairment of bodily function or organ is entirely possible and perceived by the victims that it did indicate a threat and could have possibly killed -- produced great bodily injury, in one form or another.

THE COURT: Well, there is conflicting evidence, obviously, as to whether or not the gun was shot straight up in the air or whether or not it was aimed at the victims. Mr. Payne says he held it, shot up, straight. In fact, if I understand his testimony correctly, he was shooting through the hole of the roof, which means he was inside the place and they couldn't have seen him at all, arguably, but he says he shot the gun straight up in the air; however, you have testimony of two victims who say not only did they have a clear view of him, but it was their impression that the gun was aimed at them, and so that's a conflict in the evidence, which can be only resolved by the jury.

As to this present ability to inflict great bodily harm, as you will see, drafting a reasonable person standard on that in which basically it says whether present ability to do so means whether or not a reasonable person in light of all of the evidence that's heard, a reasonable person would conclude that great

bodily injury could have been inflicted had the act been completed.

So then we get to -- well, what about the possibility that great bodily harm could have been inflicted? And I think we have to go back to the definitions of what great bodily injury, moderate bodily injury are. Great bodily injury under the statute is defined as bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of a bodily organ or member.

And I know yesterday in discussing that, I talked about, well, what about the impairment of a function of the bodily member, and I think both sides talked about the eyes as being the possibility that a pellet could have landed and hit them, so that's a possibility; plus, you know, I also got to thinking about it later.

Permanent disfigurement, if a pellet would have broke the skin of somebody, obviously, that left the possibility for permanent disfigurement as far as scarring goes. Whether or not the jury wants to believe that is a realistic possibility, I think that is going to fall within their purview, but for the purposes of a directed verdict, I think there is sufficient evidence in

the record that a reasonable juror could conclude that there is a possibility of great bodily injury as defined by the statute.

So that motion is denied.

MR. PENNINGTON: Is the Court finding that the testimony of the ATF agent, Mark Kelly, where he describes that at less than 400 feet per second it would not break skin and given the distances are a minimum of 175 yards, that would be below the 400 feet per second threshold, I think the only evidence that we have proffered to this jury is that it could not have broken the skin, or at least that's the rule of thumb in this.

THE COURT: I wrote down that on cross-examination the agent said at 500 feet, he has -- it has the potential to break skin. So I wrote that down. Circled potential, so, obviously, he must have said that, or something very, very close to that, for me to write it down and circle it.

MR. PENNINGTON: Was this during the phase after he described the rule of thumb and he said, well, there are possibilities? Is that what the Court's perhaps referring to?

THE COURT: It don't recall the exact context. I think it was on cross-examination. But, in any event, I think that it's enough that if it could have

broke skin, that leaves the potential for it either supposedly hitting an eye or if it hit the skin, breaking the skin, or hitting the skin hard enough, for that matter, that it would leave some sort of permanent marking on there, and permanent marking, permanent disfigurement is in the eyes of the beholder.

I understand we're talking about a potential injury here, and I might have a higher threshold as an almost 53-year-old man if a pellet hit me in the head and I have to walk around with a red mark on my head, versus Mr. Anderson's 18-month-old child who was there, and if he was hit with a pellet and left with a red mark on his face to live with for the rest of his life, we all would have a different view, probably, of whether or not that would be a permanent disfigurement and the degree of seriousness of it and what somebody could expect to tolerate.

But bottom line is, is that's something. There is evidence in the record that I believe you could conclude there is a possibility that the injury could have resulted in great bodily injury, as defined by statute.

MR. PENNINGTON: I understand the Court's ruling. Thank you.

With regard to the count of pointing and

presenting a firearm we would move for a directed verdict of not guilty based on the argument that given its distance and incorporate the argument that we had yesterday. I really don't have any new facts.

The Courts heard today's testimony, but it doesn't change much the argument I made yesterday that given this distance that this is not constituting either pointing or presenting a firearm at another person, given what we contend to be excessive distance.

THE COURT: Well, again, the argument that you make, I believe a juror, a reasonable juror, could conclude, based on the evidence, that two victims stating that they were definitely of the impression that the gun was aimed at them would get this to the jury. So that would also be denied.

MR. PENNINGTON: Yes, sir.

With regard to the charge of indecent exposure, you've now heard the defendant's testimony in that regard. Our contention is that in looking up indecency, we've had a chance to look at the obscene billboard statute which describes a billboard as indecent when taken as a whole. It describes a patently offensive way as determined by contemporary community standards, sexual acts, excretory functions, or parts of the human body, and, taken as a whole, it lacks serious literary,

artistic, political, or scientific value.

I believe that this goes exactly to the question at hand, which is that the notion that when someone decides to present his genitals in the manner and intent that has been described and testified to that this begins to create a ground, not -- I assume you want me to argue this now, the First Amendment claim, which is that this is expressive speech, symbolic speech, which is intended to convey a particularized message and where there is a distinct likelihood that the message would be understood by those who viewed it.

We're relying on Spitz versus Washington, which is a U.S. Supreme Court case from 1974.

The statutes that are used to inhibit direct expression are considered to require strict scrutiny, and our contention is that we have lots of what would be offensive behaviors. Many people felt flag burning, of course, is very offensive behavior, which are protected as speech.

I mentioned yesterday the city of Portland case and the trouble is that it is reported as -- it's a news report of the trial proceedings, but I've copied that and also a decision from the Court of Appeals in Oregon, which is City of Portland versus Gatewood where the Oregon constitution has a provision that says, No law

should be passed refraining from free expression of opinion or restricting the right to speak, write, or print freely on any subject whatsoever.

I have recited the facts to the Court yesterday of an individual in the airport who was not in favor of the motion of having a full body scan and image of a full body scan and as a protest he disrobed, and there is actually a photograph of that, kind of blurred out, on the third to the last page, of him standing in the airport next to the TSA guys before his arrest.

The question, I suppose, becomes one of whether or not that the behavior was -- if the Court believes that this was a statement of expression, then it seems to me that this would require some strict scrutiny, and Mr. Payne has testified today that he needed to urinate, sure enough, but he was also expressing his disdain for what had been going back and forth, police calls that he enumerated, et cetera.

So it's our belief that this is exceptional in this regard. We're not contending that Mr. Payne from henceforth whenever he feels that he is unhappy with someone while he's checking out in his shopping lane of a supermarket could do this behavior. He apparently selected a setting where he felt that he was within a reasonably -- he and the victim.

We realize that this is an open public park, but I also note that Mr. Anderson testified that he did not see the conduct, nor were there any other reports of anybody else who saw the conduct, and it does fit the other test about being directly toward an individual that would understand the content and meaning of the content if you have direct testimony of his intent.

It would be a fairly narrow ruling under these very specific facts, but I think that is what is called for under the analysis, and I think the presumption is actually in favor of the defendant.

Once you're in a position where you accept the fact that this was a deliberate attempt to express disdain, rather than something that would be more in line with the offensive characteristics of genitalia being displayed that usually has a sexual connotation, I don't think there is any testimony or suggestion that this was intended to arouse anyone, which is what the cases typically talk about, where it doesn't meet the muster under the constitution.

This was, as I cited in my little motion, akin to the Scotsman out on the field letting the English army know what he thought of them prior to that Battle of Sterling. It may not be something we want to teach our children, but we have a First Amendment that even

protects Nazis that want to protest, so I would ask the Court to rule, as a matter of law.

In my view, the jury is not in a position where they know the background of the law, First Amendment, and are capable of rendering that kind of analysis that's required to apply the test of whether this is protected speech. I think that must come from this Court, and rule as a matter of law rather than as a matter of fact, that under the facts as they're undisputed that this was a -- was not a sexual contact in a sense of -- and I think the State has always conceded that if this case is a conviction that we're not dealing with a request by the State to seek registry because there is a fork in the road here on that, under our state law.

So I'll stop right there on this.

THE COURT: Let me ask you about a totality of the circumstances argument, and I know you want to isolate that charge because it occurred not simultaneously with the shooting of the gun, but it wasn't a long period of time before the shooting of the gun, so don't we have to consider the totality of the circumstances there and so the indecent exposure is not -- or not limited to the sexual gratification part, but whether or not it was indecent, also meaning

offensive, immodest, grossly vulgar, obscene, unseemly, becoming unfit to be seen or heard? While there must be an exposure of the private parts, it doesn't necessarily require that a conviction be done -- a conviction could only be secured in the instance in which the exposure was done for sexual gratification.

In other words, if he was doing this out of just pure meanness, I think you could support a conviction for indecent exposure. So we have to look at the totality of the circumstances. He was clearly flashing himself, and I don't think there is any question that he was not doing it for the purposes of either gratifying himself or trying to titillate Mr. Stone, or arouse Mr. Stone, but you could argue he was doing this not solely for the purpose of expressing a constitutionally protected symbolic speech, but just out of meanness, if you buy the argument that he's firing off the shotgun at the same time as part of expressed speech, or protected speech.

Is it your argument that shooting off the gun is protected speech as well?

MR. PENNINGTON: No. I think that crosses the public safety threshold and clearly goes beyond where -- it's like yelling fire in a crowded movie theater, thank you. That would be absolutely

unacceptable.

THE COURT: But here is the point, I guess, and that is don't we also, when we're saying, Let's view this in its totality, I think we can all agree, it wasn't done for sexual gratification purposes, but he was also shooting off a gun at the same time. Shouldn't that be considered in the totality of the circumstances?

MR. PENNINGTON: I suppose what I say in response is I do think it's all part of one -- I incorporate that in my analysis because it's clear that he is annoyed, deeply annoyed, by what's going on and is trying to register that in a way, in multiple ways.

I'm not contending firing a gun is protected, but I do think as a precursor -- I would imagine that we would call the Nazis plain mean or that the folks that are saying to a police officer just doing his job, F you, or F the draft, although provocative things, I don't think the level of hostility of the speaker removes the right to make the speech.

In other words, I don't think we have to examine or second guess the degree of irritation as an undercutting of the content of the message, which lacks serious -- what I'm arguing is sort of serious political content to this extent.

He felt he was being manhandled and

manipulated by the homeowners of [redacted] were using their relationship with law enforcement to constantly harass him and to force him to move, even though he preferred to stay in that neighborhood and was being pushed out because he was a little guy and because he felt that they were abusing their authority.

THE COURT: I get that argument. Here is what I'm trying to address, though, is your argument that I as a matter of law should dismiss the charge because there is no evidence in the record other than the purity of his symbolic political speech.

There is evidence in this record, based on what I've heard, he didn't even know where Mr. Stone lived. There is contradictory testimony out of his own mouth as to whether or not he knew where he lived and whether he was home at the time, so you've got conflicts as to his motive and the purity of his motive. The State still has the burden of proving that he was acting solely with maliciousness.

I'm willing -- I think the charge, even if I don't buy your argument, I think you could still argue to the jury, Folks, this was protected political speech, if you want to still make that argument to the jury, but the State still has the burden of proving that it was not protected political speech, it was done solely for

maliciousness; in other words, he was just a cranky old drunk that day.

He had been drinking. He's cranky. He doesn't like those people, and he's firing off a shotgun and thrusting his, you know, private parts out. I think an argument could be made that based on the contradiction in testimony that he was not making a symbolic speech that day, he was just acting maliciously and meanly because he didn't know those people were home. He was just acting out some rage that he had, and that is not political speech.

MR. PENNINGTON: I believe his testimony focussed on the notion that he treated them as whether they were there or not, he was registering kind of on a constant basis, he was flipping them the bird, constantly, as he came on and off, and so in case they were home, he was making his protest, not unlike the people that go to the White House and they sit outside the White House and they have no idea if the president is on the grounds or somewhere else or would be inclined to look out the window, but for them, they are registering their protest to the world.

THE COURT: Maybe this argument -- and I'm not leaving anything for Mr. Voigt who is obviously standing there wanting to argue, but there is also

testimony in the record that he was relieving himself, a bodily function, which is not protected free speech and would be a violation of the statute.

MR. PENNINGTON: Right. I think Mr. Voigt asked him that question, and he said this was an opportunity to do two things at once, and so -- and to me, again, purely voiding one's self is clearly not protected, but if you decide to void yourself in a context like this, if I'm at the White House and in the midst of my process I void on the White House cornerstone, somebody is going to make an argument that that is protected free speech.

I wouldn't really have to defend that case. I realize that that maybe would take it up one more step because there is a question of dirtiness and cleanliness and civil order when it comes to crossing that line here.

We're not in that setting, but I guess my point is, I don't know that the urination -- again, the trouble is, is that I think it does come down to a question of persuasion. If the Court is not persuaded by the preponderance of the evidence that he really had the kind of political speech intent -- and if that's the case, then I suppose the motion fails, although I think this requires -- it's hard to understand why continuing to stand out on a boat and waving your fingers in the air

at a house doesn't -- isn't intended to convey a message.

THE COURT: He's not charged with flipping the bird. That's not the indecent act that they're complaining of. It's the exposing his genitalia, and if it was solely -- if he could say, well, I suppose if he hadn't urinated, then you would have a stronger argument, but he urinated, and that didn't seem to be -- and he's like, yeah, incidentally, I had to urinate, so I did it while I was up there.

That's not protected. You got to go in and cover yourself, or at least do it where people can't see you.

Mr. Voigt, do you have anything to add on to this?

MR. VOIGT: Do you need me to add anything to this, really?

A couple then. One: This is actually an attack on the statute for being facially overbroad, and even though it's in the context of a motion for directed verdict, it's a overbreadth argument, because the defense says that this statute is so broad that it impinges on free speech.

Boilerplate law for that is the statute is going to presumed to be constitutional and the presumption must be overcome by the defense. It's one of

the few there where there is still a burden on them, and I don't believe that has been met at all.

I actually have a case, it's kind of fun. It's an old district court -- District of Columbia Court of Appeals case that I can pass up and give a copy to Mr. --

THE COURT: Just cite it, if you want, for the record, because I'm --

MR. VOIGT: I will cite it. That's 515 Atlantic 2d 724 from 1986, and in that case a woman stripped down naked and put a cut-out over her head so that the only part of her naked body in this protest was her buttocks and the rest of her body was covered up, and the DC Court of Appeals said that is not indecent exposure and they actually go through the common law of indecent exposure which is very similar to South Carolina's.

Maryland's, because the District of Columbia uses Maryland's common law, and Maryland's common law of indecent exposure is exactly the same as South Carolina's, and it's very specific. It is showing the male genitalia. It is not showing the buttocks, so it's not mooning. Indecent exposure is not mooning under the common law.

So it's not like that. It just isn't, and it

isn't under the common law and it shouldn't be true to that.

I was very specific in my questions to Mr. Payne. He wanted this whole thing to be political speech. Firing a gun? Well, that's political speech. Doing everything he had done is political speech. Of course it isn't. It isn't for the other statutes that were charged and it isn't for this either.

What he did was clearly a mean-spirited, malicious, vulgar act, and that's how it comes across in the testimony. That's how it comes across from the testimony of the victims and the testimony of Mr. Payne, and that's not constitutionally protected speech. It's just not constitutionally protected speech, and I'll just note in passing, Goddard's law, and Goddard's law, as least as it relates to the Internet, is the first person that mentions Nazis loses the argument, and there is nothing about this that has anything to do with Nazis.

THE COURT: All right.

I'm going to deny the motion, I think for the reasons that I said here in my questioning and fleshed it out a little bit, but it was -- I think there's factual evidence in the record that a reasonable juror could conclude that this was not solely protected political speech, and therefore I'll deny that motion.

THE COURT: Anything further from the State?

MS. CARDILLO: No, Your Honor.

THE COURT: How about the defense?

MR. PENNINGTON: No, Your Honor. I appreciate the Court's hard work, and I have no exceptions to make, so I thank the Court. Also, I reviewed the verdict form. It appears to me to be in order as well.

THE COURT: Okay. All right. Go ahead. Actually, is there any objection to me giving a copy of the charges to the jury to take back with them?

MS. CARDILLO: No, Your Honor.

THE COURT: Okay. We'll just do one copy to take back to them. Make the typographical changes, make sure that you have the -- you don't need to put the warrant numbers on there, but as long as we're making corrections, change that to 2011 as well.

All right. I'm sorry, Mr. Pennington. I interrupted you.

MR. PENNINGTON: Thank you, Your Honor.

I don't like to object during argument, and given the charge as written, I know that there was a discussion yesterday about that the way to determine what could have happened is through the victims' eyes, and I want to state that I would object if the State is going

to argue that spin on this statute for this reason: It seems to me that under the statute section that I quoted yesterday, the State legislature was extremely clear about the notion of abolishing common law and going with what I think is the plain language of the statute as it would ordinarily and commonly be understood, and so if -- and I don't know how Ms. Cardillo is going to argue, so maybe this is just me talking and I should shut up, but I would rather not interrupt her, and if the Court is going to agree with me that she can redact that now.

My contention is that the common law is not a reliable foundation upon which to now argue with this particularly unique --

THE COURT: My charge says reasonable person. It governs present ability.

MR. PENNINGTON: I have no qualms to your language, and if she'll go with that language, then we've got no issue.

MS. CARDILLO: When I mention reasonable person standard also in my closing, I'm also going to indicate, given the situation, that they were scared, how they reacted. I mean, I think this part of the case has already been admitted into evidence.

THE COURT: Well, I think it's perfectly appropriate to argue totality of the circumstances, but

the governing standard is all of the evidence, would a reasonable person believe that he had the present ability to do this -- these injuries, types of injuries.

Certainly they get to argue because you might very well point out that he couldn't have possibly been pointing to both of them. If there's only evidence of one shot in which there was -- that we're talking about, the basis for the charge, because it's not a basis for the charge for the first boom that went off.

So for them to rebut your possible argument or just comment on the evidence, I think it's appropriate for them to say, obviously, in the heat of the moment, they were scared, and both of them, obviously, felt like the gun was being aimed at them and it couldn't have possibly been both of them, but it was reasonable for them to think that it was.

But as long as she doesn't, I guess, go into that as the standard by which you decide, but only that is argument on whether or not a gun was being pointed up or pointed at somebody, that would be the appropriate place to argue victim perspective.

MR. PENNINGTON: I completely agree.

THE COURT: It makes sense in my mind, but I don't often articulate it that way.

MS. CARDILLO: It does, Your Honor.

MR. PENNINGTON: I just don't want the argument to be that we could somehow substitute the jurors' perception of the chances of being hurt with what is the statute's requirement, the present ability to do so, and the act as accomplished by a means likely to, which I think has an objective quality that my big concern, big fear, is that the jury goes back and says, you know, We don't need to really worry about that kind of stuff by the agent or the realistic facts of this case because we're going to substitute in victim perception as a substitute.

And as long as they felt they could reasonably have been injured, then that's enough. We're done, and I think that there has to be a further analysis. I agree that with the relevance on all those other issues, but not in terms of meeting that standard of accomplished by a means likely to produce death or serious bodily injury as it's defined by the statute.

So I'm not sure where that leads us. I guess I'll listen to the argument, make an appropriate objection if it's necessary.

THE COURT: I think we're all talking about the same thing and we're all in agreement of the same thing. I guess we'll see how it develops.

MR. PENNINGTON: Yes, sir. Also, Mr. Payne,

if I may have a moment, wants me to renew at this time the argument I made earlier about the fact that the direct indictment did not provide timely notice of the charge. The Court has already ruled on this, but I renew that objection.

THE COURT: All right. Well, I didn't know that it's necessary to renew it, but it is the same ruling; that is, the motion is denied. I'm either right a bunch or wrong a bunch, but at least I'm consistent.

MR. PENNINGTON: Yes, sir. Thank you.

THE COURT: And we are still in agreement. You want me to charge first, then Mr. Pennington will argue, then the State will argue?

MS. CARDILLO: Yes, Your Honor.

THE COURT: All right. Y'all ready? Okay. Bring them in.

(In open court, jury present.)

THE COURT: All right. Welcome back, folks. We are now into the final phase of the trial, and that consists of the charge on the law and the closing arguments by the lawyers. I'll remind you that we at the beginning of the trial have different role. Everybody in the courtroom has a role, and your role as the jurors is, of course, to be fact-finders.

In other words, you are the sole judges of

the facts, and where there is a discrepancy in the facts, what you decide is what we live with. You determine how much weight to give the testimony and credibility of witnesses, you determine whether or not a witness has a bias, a prejudice, or an interest in the outcome. You can judge such things as demeanor and appearance on the witness stand and the reasonableness of people's statements that they make. That's your job as the fact finder.

One of my jobs, as I told you, is to charge you on the law. I'm the judge of the law, and so it's now my job to tell you what the law is that applies to the charges in this case, and you apply them to the facts as you find them, and that is how you determine your verdict.

If you have some idea as to what you think the law is or what the law ought to be and it does not agree with what I now tell you the law is, you are obligated, under the oath that you took at the beginning of this trial, to abandon that preconception on your part and to accept and apply the law precisely as I now state it to you.

I want to remind you that the fact that the defendant was arrested, charged, and indicted in this case is not evidence in this case and cannot be

considered by you as evidence of guilt in this case, nor does it create any presumption or inference of guilt. This document, those indictments, are simply the formal written instruments which contain the charges made against the defendant. It's the formal documents by which this case is brought into court.

The defendant pled not guilty to those indictments, and that plea therefore casts the burden on the State to prove the defendant guilty beyond a reasonable doubt. A person charged with committing a crime in South Carolina is never required to prove himself innocent. This is an important rule of law in this country, that the defendant in a criminal trial is always presumed to be innocent of the crime for which he is indicted, unless and until his guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of evidence is not just a mere legal theory. This is not a legal phrase. It's a substantial constitutional right which every defendant is entitled. This presumption of innocence accompanies the defendant from the time he is charged throughout the trial until you reach a verdict of guilt based upon evidence satisfying you of that guilt beyond a reasonable doubt.

Now, you've heard me say many times so far that the State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as a juror in civil cases and you were told it was only necessary to prove a fact is true or not true, such as by the greater weight of the evidence or the preponderance of the evidence.

In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find the defendant guilty.

If, on the other hand, if you think there is a real possibility that you think the defendant is not guilty, then you must give the defendant the benefit of the doubt and find him not guilty.

Now, I want to talk to you about the types of evidence that we have in a trial, and there are, generally speaking, two types of evidence. There is direct evidence and there is circumstantial evidence.

Direct evidence is testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. This is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances that indicate the existence of a fact. This is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and is not based on personal knowledge or observation. But, most importantly, the law makes absolutely no distinction between the weight or value to be given either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

You should weigh all of the evidence in this case and after weighing all of the evidence, if you are not convinced of the defendant's guilt beyond a reasonable doubt, you must find the defendant not guilty.

Now, I spoke to you about your job as fact-finders. Part of your job as fact-finders necessarily means that you judge the credibility of witnesses who testified in this case, and credibility simply means believability. It's your duty as jurors to analyze and evaluate the evidence and determine which

evidence convinces you of its truth. In determining the believability of witnesses who have testified in this case, you can believe one witness over several witnesses or several witnesses over one witness.

You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety, or you can reject the testimony of a witness in its entirety, and you may consider whether any witness has exhibited to you any interest, bias, or prejudice or other motive in this case and you can also consider appearance and the manner of a witness while on the witness stand.

Now, you heard evidence in this case that the defendant was convicted of a crime other than the one for which he's now on trial. That evidence may be considered by you if you find that it is true, only in deciding whether or not the defendant's testimony is believable and for no other purpose. You may not consider defendant's prior record as any evidence of the defendant's guilt of the charge we're trying today.

I also told you about expert witnesses, and I told you that we don't ordinarily permit witnesses to testify about opinions and conclusions, but we make an exception to the rule for witnesses that we call expert

witnesses, and those are people who, by education and experience, have become an expert in some art, science, profession, or calling, and they may state an opinion as to relevant and material matters in which the witness claims to be an expert and may also state the reasons for the opinion.

You should consider any expert opinion received in evidence in this case and, like any other evidence, give it the weight that you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience or if you conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you can disregard that opinion entirely.

Any expert witness's testimony is to be given no greater weight than that of any other witness simply because the witness is an expert. Further, you're not required to accept an expert's opinion, even if it's not contradicted.

Now, there were three separate indictments in this case, and I'll go over the first indictment for assault and battery in the first degree. The defendant was charged with assault and battery in the first degree in violation of South Carolina code section 16-3-600(c).

I see some of y'all are writing notes, and that's perfectly fine, but I'll give you a copy of these charges. But if you want to listen along now, I'll give you a copy of these to take back with you now, all right? So he's charged with assault and battery in the first degree.

A person commits the offense of assault and battery in the first degree if the person unlawfully offers or attempts to injure another person with the present ability to do so and the acts are accomplished by a means likely to produce death or great bodily injury. Great bodily injury is defined as meaning bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

Present ability to do so means whether in light of all of the evidence presented, a reasonable person would believe that the defendant's actions could have resulted in a great bodily injury to the victim had the offer or attempt to injure been accomplished.

If you do not find that the State has met its burden of proving the defendant is guilty of assault and battery in the first degree, then you can consider whether or not the defendant is guilty of the lesser included charge of assault and battery in the second

degree. Assault and battery in the second degree is committed by a person if the person offers or attempts to offer another person -- or attempts to injure -- let me rephrase that.

Assault and battery in the second degree is when a person offers or attempts to injure another person with the present ability to do so and moderate bodily injury to another person results or moderate bodily injury to another person could have resulted. Again, present ability to do so means whether, in light of all of the evidence presented, a reasonable person would believe that the defendant's actions could have resulted in a moderate bodily injury to the victim had the offer or attempt to injure been accomplished.

At to assault and battery in the second degree, if you do find that the State has not met the burden of proving the defendant is guilty of assault and battery in the second degree, or in the first degree, then you may consider whether the defendant is guilty of the lesser included charge of assault and battery in the third degree.

A person commits the offense of assault and battery in the third degree if the person offers or attempts to injure another person with the present ability to do so. And, again, present ability to do so

means whether in light of all of the evidence presented, a reasonable person would believe that the defendant's actions could have resulted in injury to the victim had the offer or attempt to injure been accomplished.

Now, the second indictment was for the charge of pointing and presenting a firearm in violation of South Carolina code 16-23-410, and in order for a person to be proven guilty of pointing and presenting a firearm, the State must prove beyond a reasonable doubt that the defendant presented or pointed at another person a loaded or unloaded firearm.

Now, the third indictment was for the charge of indecent exposure in violation of 16-15-130 of the South Carolina code of laws. In order to convict a person of the charge of indecent exposure, the State must prove beyond a reasonable doubt that the defendant willfully, maliciously, and indecently exposed his private parts in a public place on property of others or to the view of any person on a street or highway.

Willfully means that the act is not done by accident but that it is done knowingly, consciously, and of a stubborn purpose.

Maliciously means that the act was done with wicked or mischievous intentions or motives, wrongfully, and intentionally, without just cause or an excuse, and

indecent means offensive, immodest, grossly vulgar, obscene, unseemly, unbecoming, unfit to be seen or heard.

Indecent exposure involves the exposure of the private parts to public view. Private parts include the genitalia. The exposure must be willful and malicious. It cannot be unintentional or simply negligent. In order to be malicious, it must be done out of spirit wanton cruelty or wicked revenge, while willfully imports something more of determination to execute one's own will in spite -- in defiance of the law and voluntarily does some bad purpose; in other words, it does not import so much of wickedness as maliciously does. The act must be done from innate or sheer meanness and growing out of a heart fatally bent on mischief.

Now, the defendant claims that his actions in exposing his private parts was not done with maliciousness but, rather, was an expression of symbolic free speech which is protected by the First Amendment of the United States constitution. Symbolic speech is protected where a person intends to convey a particularized message by his actions, and there is a likelihood that the message would be understood by those who view it.

The law recognizes nudity as a constitutionally protected means of expression under

proper circumstances. The issue you must decide is whether the defendant's actions were intended as a message of disdain and approval of the victim, or whether the acts were done solely for the purpose of being malicious.

Again, I remind you, the State has a burden of proving that under the totality of the circumstances the defendant's actions were solely for the purpose of being malicious.

Finally, in determining the guilt or innocence of the defendant, you cannot consider any possible penalty for any particular crime. Punishment for a crime is a matter for me to determine and should never be considered by you in any way whatsoever at arriving at a fair and impartial verdict as to the guilt or innocence of the defendant. And, finally, your verdict must be unanimous. In other words, all 12 jurors must agree on what your verdict will be.

Now, I have a verdict form to go over with you, but I will wait until after the closing arguments to go over this verdict form with you. Under our rules, the defense will argue first, and then the State has the right to close, so you will hear from Mr. Pennington first, and then you will hear from the State.

Again, I remind you, lawyers' arguments are

not evidence. They are simply now reviewing the evidence that you've heard, taking the law that I've just charged you, and trying to give argument or persuade you to render a verdict on their side's behalf.

So, Mr. Pennington, if you're ready, you may begin.

MR. PENNINGTON: Thank you, Your Honor. May it please the Court: Madame forelady, members of the jury: Monday seems like a long time ago, but we visited with one another for a few minutes and talked about the fact that the evidence was going to show you that this was a case of simple discharging of a firearm in the town of Mount Pleasant, and what I'm going to do is I'm going to spend, I hope, no more than about 30 minutes with you before the State gets up and they present their arguments as to the reasons that you must find the defendant not guilty of these three offenses, but most particularly why you must, you have no choice, other than to find the defendant not guilty of the assault and battery in the first degree.

There are about five reasons that I'm going to talk about, things that are wrong with the State's claims, but the first and foremost reason is that you heard Robert Payne tell you what really happened today. He went on to the boat and there was a boom, and you

heard that that matched perfectly with the fact that the two witnesses, Mr. Anderson and Mr. Stone, said that they heard a boom but they didn't know where it came from, and then you have him describing for you that he went to the middle of the island, he fired again, walked out, discharging, or releasing the spent shell casing, and it fell right where it was, which is exactly what Mr. Stone saw.

So let's -- I'm going to deal with Mr. Payne's testimony in a moment, but I really want to really drill in on the State's evidence. I told you at the very start of this case that it was clear that the goal here -- this was a case about annoying someone, not assaulting them, about irritating them, but not injuring them, and I think the evidence is now clear that this is not a case where Mr. Payne was out there trying to act as a sniper, but let's think about what the evidence showed you.

There were about five major points. Number one: Were there two shots at people or one? We're going to talk about that. Another one was, who was that one shot -- because you're going to conclude there was really only one claim of a shot at people. Who was that one shot at? Then there is going to be a third question. We're going to talk about the direction of the shot, and

why there was so much trouble in figuring out the direction of the shot and why the testimony and the evidence -- or, rather, the statements that were given that day are so different than what was offered to you under oath here in this courtroom.

We're going to talk about distance, and that is a factor in terms of the degree of potential bodily injury, and we're going to talk about types of injuries that could have occurred.

So first of all, we know that Mr. Stone testified that there was a police call and that then there were -- they came, they talked to him, talked to him about the fact that he had seen the nude man outside. They came outside, and then he testified that Mr. Payne got off the boat. He went into the island. There was a boom, and then he said within a minute, if you recall the testimony, that he came right out, levelled a gun at him and fired again, and that's when he made the second call to the police, and so that would be the second boom after the police arrived. Correct?

Okay. So what's the problem with that? Why don't we just accept that as being an accurate rendition? Well, we know that we had three trained police officers who were out there on the scene, and each one came in and spoke to you explicitly.

First of all, Benjamin Wells, the first officer on the scene, Zeitner, the gentleman that came in after him, the one that stayed around and collected the shell casing, and their lieutenant, Lieutenant Quick, and all three of them told you exactly the same thing, that they're trained to pay attention to gunshots, and, sure enough, they only heard the one gunshot.

Second: Mr. Anderson's testimony contradicts Mr. Stone's, because you remember that Mr. Anderson says that he heard a boom that was roughly, what he thought, about 30 minutes, at least that's what he told the officer. You remember the testimony was that yes, I wrote -- or I signed a statement that said 30 minutes after one boom before he came out and shot at me.

That was Mr. Anderson's statement, and then on the stand he began to kind of say, well, they did a lousy job of spelling. They didn't pay attention, so maybe it wasn't 30 minutes, but he conceded it was a substantial block of time between that first boom and that second boom.

Now, who does that fit? Does that fit Mr. Stone's rendition or does that come closer to what you heard from Mr. Payne about how he was in the boat, annoying people, firing into the air, just like he told you? When that didn't get the desired response, he goes

into the little island that you walked on yesterday, fires again, walks out, ejects the spent shell casing, and then proceeds down the causeway.

The best evidence -- and I'm not going to play it for you now, but if you need to have it played, you can. You can listen to the 911 calls. Remember I talked about those on Monday? If you listen real closely to those, what you're going to hear is first there is a rather calm call by Mr. Stone saying, There is a naked man. Send some help. They come, and then there is a second call.

Now, if you listen -- I suggest that what you do is you listen to the two calls, Mr. Anderson's call, and you'll hear in the background there is going to be mention of them talking to somebody else, and if you listen to Mr. Stone's second call, he keeps saying, Ma'am, ma'am, ma'am, ma'am, and he's very understandably and reasonably concerned and upset.

I mean, this was an alarming incident and he's worried about these officers being exposed to somebody with a firearm, but it's because they're talking to Mr. Anderson, and how do we know that? Because if you listen to the call, you hear reference to 355 Bayside {sic}, which, of course, is Mr. Anderson's address.

So these are overlapping calls that show

conclusively that not only were the officers right, that there was just one shot, but we know conclusively from that, that they were reporting the same shot at the same time.

Now, that poses a new problem. The new problem is, who was being shot at? And their testimony is understandable. At that distance, it's hard to see. You were out there and you walked the grounds yesterday. Could a reasonable person, seeing what they saw, seeing or hearing a boom, be alarmed? Certainly.

But we know beyond any possible doubt that that one boom could not simultaneously be pointed in two different directions. If you look at State's Exhibit No. 2, which you'll have back in the jury room, you folks have a lot of technical training. We looked for and hoped that we could find people who would be able to sift through a lot of the specifics, the minutiae of where things happen.

We're going to get into the stuff about the firearm in a second and this 20 gauge ammunition, but if you look, what you're going to see is that Mr. Stone's house, the house adjacent -- you remember Mr. Payne talked about two houses over here, not sure which one was which, and what you see is that if you were here and your goal is to shoot here, that's very different than

shooting over here, on this corner.

You remember the little -- I don't know if you can see it, but you'll see it in the jury room, the little carport that you walked through? And I dare say that you'll find that is about a 50-degree difference, in different directions, different sides of that boardwalk -- not boardwalk, the causeway that we walked on yesterday.

So there is the problem that the witnesses contradict each other about that very vital question, but how do we know beyond any doubt that there is a contradiction? We know beyond any doubt because the indictment itself doesn't know the answer, the charging paper; the State tells you it's not sure what he was doing out there and apparently don't find their own reliables reliable and clear enough to pick one, so what they've given you is a buffet of choices.

They really don't know what happened, so they're going to throw it into your lap, 20 minutes later, to tell us which way it went. Pick one, is what you're being told.

Mr. Stone also -- I think there was probably a critical moment of the trial that probably for me was the most decisive moment of the case, and don't get me wrong. There is not anyone ever that wants to have

someone in their neighborhood walking around with a shotgun and firing it in the air. Nobody wants that, and it's very understandably upsetting.

But when we're here for the purpose of figuring out what is the direction of the shot, because that matters so much, something happened in the courtroom on Tuesday that I think really tells the tale. Mr. Stone took the stand and demonstrated for you dramatically how he, Mr. Payne, allegedly levelled the gun and fired right at him.

What's the problem with that? Why doesn't that end the case right away? Well, because Mr. Stone completely is impeaching himself in that comment, in that description. If that's the way it was, you would think -- because in the moment it happened, you would say that's the way it was, but we know from Officer Basile who came in and testified not for the State but for the defense yesterday that he took written statements, that he went over those statements with Mr. Stone. Had Mr. Stone acknowledged that it had been either read or him or he read it to himself, and what does it say?

He pointed the gun at or above my house and fired it.

Later, just in case there's any doubt or question, did the suspect point the gun in your

direction?

It appeared to me it was at the house or above it.

What happened to that above it? Did that just go off into the ether? What about when I cross-examined Mr. Stone and he acknowledged freely, honestly, that when he was put under oath on a different day, not in this courtroom, but another courtroom like this, that he said that he couldn't tell the angle that the gun was fired at.

Now, why was that the truth that day? Because that was the truth when this thing happened, because you were there on his deck and you saw, this is a substantial distance. You get one glimpse at what's going on down there.

And so when he talked to Officer Basile, he tells the whole story. He tells the whole story to the judge. He's not sure in February. When my investigator goes out, he tells us, I couldn't tell if it was at me or above me. Couldn't tell. Only in February 2013, 20 months later, is it now different.

Could it be that this is a situation where someone who doesn't know much about guns hears a boom and is looking out there and sees a man walk out and eject a cartridge and says, He's shooting at me?

And why does that make sense? Because he gave us such clear and then verified testimony that he directed the officer to where he shot, and that was the precise point where you see the shell casing laying on the ground.

Could I have wolf vision, please? Okay. You see there State's Exhibit 23, and you're going to have this in the jury room, so you're going to be able to turn it because it's kind of a peculiar photograph because if you look at it this way, it's kind of not right. You have to kind of turn it on its side to see the ground, to see the golf cart, to see the shell where see shark TV, right above that, and that little path that you walked in the woods?

Now, why am I pointing that out? Because if you look at State's 24, it doesn't show the shell. I guess it's already been picked up, but it does show you, in this area -- you'll know the spot, because when you were out there yesterday, this is the beginning of the woods and you see that tree was laid down kind of sideways and the little path went right past here, so that positions that that is right where you emerge from the woods, you were there.

So could it be that the human mind sometimes plays tricks? I don't want to be understood to say that

these complainants are willfully, deliberately obfuscating the truth, distorting it and twisting it, but I am saying 20 months later sometimes wishful thinking can take over. You want it to be clear. You want to win the case. You want to get your point across. You don't want to be ambiguous.

The problem is that it's not reliable. The best evidence, we haven't dwelt on it much. The best evidence, State's 4. You were there. You couldn't think of a much better target if you were really trying to shoot at one where you were going to try to either shoot directly or lob shots at a house. You got the perfect target, a glass windows, a tin roof, and Mr. Stone was completely frank in telling you that he was out there on the deck. He heard no falling shot. He himself was not struck. He looked for damage. He looked for any signs at all that this had been in his direction or at him and there was nothing.

Now, let's talk a little bit about Mr. Anderson. He described that he heard this boom and that he didn't call anyone. There was a lapse of the time, we've already discussed that, and then this is an architect who is, by his own acknowledgement, precise, signed his statement after reading it, but then is trying to somehow collapse that 30 minutes that he put into his

statement into a shorter time frame.

Again, is this being willful, or is this just human nature, where you begin to believe what you need to believe in order to help your case along? The reality is that 30 minutes impeaches the first version.

Now, let's turn to what else is going on. Mr. Anderson describes that he sees my client come out of the woods, looked directly in his direction, levelled a shotgun and fired right at him, correct? He, we know, is at a distance of over two football fields away. I'll get to the exact distance. This is where they went out and they remeasured and they said 812 feet, which is 270 yards. We're talking over two-and-a-half football fields away.

Now, does he believe that's what happened? He appeared to. But is he accurate? Consider that these people had no contact and history whatsoever. What sense at all would it make that Mr. Payne decided that for no reason at all, he was just going to start shooting at a guy and his kid grilling out in the neighborhood? They had no communication that day. They were having no communication at that moment. There was no yelling, there was no hostility, and then afterwards, according to Mr. Anderson, he walked slowly up the causeway.

Also, you heard the description, and you're

going to see the photographs themselves. Look closely at the little area to see how many trees and bushes were there, at least on what would be the side closest to Mr. Moore.

Mr. Anderson said that he saw that clearly, that he was being shot at with his naked eye, but what is the first thing that he did? He picked up the BB gun scope because they really wanted to see if he saw what he thought he saw. The whole problem with the picture is, with all due respect to Mr. Anderson, hearing and believing that he absolutely wanted to protect that son, there is no question about it, he was not the kind of man that is going to be willy-nilly risking his child's life for anyone or anything.

If he really thought that he was going to be shot at, then would have he brought that child not -- you take the child in the house, make the call, bring the child with him back out into the yard and watch what's going on? If you think the man is coming for you, you get in your car and you go. You leave. You do something other than take your child right back into the line of fire.

I'm not saying -- I am saying that this case started out as people discharging a firearm in a neighborhood and this became the cause celeb to get this

guy out of their hair once and for all. It's the standard fix.

Consider, ladies and gentlemen, first of all, the choice of gun. If the purpose of Mr. Payne was to go out and to take out his neighbors by shooting at them, you've heard unimpeached testimony that he had the chance to go get any number of sniper quality rifles with ammunition, and do the worst, or, if it is his purpose had been to take someone out, why not just walk around over there and knock on their door?

Agent Kelly -- let's talk about distance. I'm not going to dwell on this much, because nobody likes the idea, and as a Boy Scout you learn basic firearms and you never shoot a gun at anybody you don't intend to hit. That's fundamental, 101, and I'm not trying to concede that Mr. Payne did shoot at anyone, but if you, for whatever reason, decide to discuss that, okay, what if he had pointed the gun in the general direction of Mr. Stone? What could have happened? Let's talk about distance.

The evidence is clear that the site that Mr. -- excuse me, Mr. Stone picked out, he said 175. They go back and remeasure it. You get to 179 to 180 yards. We know from the agent's testimony that that would mean a projectile is traveling between 388 and 366

feet per second, which is below the threshold of breaking skin, according to the manufacturer. Could it sting? Sure. Could it break skin? The unimpeached evidence is no.

Then they measured it as to Mr. Anderson's property. They got 812 feet, which is 270 yards. That is at 217 feet per second, which is just above half what it would take to break skin.

You know, I know, and the agent testified that with one shot, it's not going to be possible to assault both sides. Bullets don't turn corners, but it's up to you to go back and use your crystal ball or whatever to figure out what victim we're talking about in this indictment.

You saw the testimony of the officers. They said that he came out surprised, wanted to know what he was being charged with. You have, or are going to have, the judge's instructions in the case, and I don't get to argue again, because, again, the assumption is innocence in our state. There is a presumption of not guilty, a presumption of innocence, and so the State really has this heavy burden of convincing you to remove the doubts that you have in your mind about this case.

But I want to clear up one potential question that can pop up: There is a claim under the old common

law of South Carolina that if someone thought that they might get assaulted, then that was an assault, but in 2010 or legislature abolished the common law. Doesn't mean much to you. It means we're not going go off old English law anymore and we're going to amend these new statutes that the judge told you about.

So if you want to know what the law is, you have to use the plain meaning of the statute, that you're going have in that. It's laid out for you in his charge, so I ask you to look at it, and I'm going to go over it in just a moment.

Well, I'll do it now. Assault and battery -- the only way you can get an assault and battery in the first degree in South Carolina is that you injure another person, and this is the key language, with the present ability to do so and the acts are accomplished by a means likely to produce death or great bodily injury, which is defined by statute.

It's not that we just made this language up. It's defined by statute as a bodily injury which causes one of three things: Substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ.

So, the only possibility would be if you could imagine a falling -- a pellet, perhaps, striking

someone in the describe. Of course, Mr. Stone has glasses, eyeglasses, maybe not protective eyewear that you would wear at a firing range, but the reality here is that we know beyond any doubt one key fact: There was no falling pellet on Mr. Stone. There was no pellet that hit Mr. Stone, and I ask you not to forget that when you're back there in your deliberations.

You know, it's hard being a juror, but the judge has told you that you cannot worry about what somebody else is going to think of what you do, and you and have to put aside what your own points of view are of helping one side or the other, punishing somebody, not punishing somebody. But I think it's good to have the elevator speech that you can give to somebody when they ask you, why was it that you sat through a four-day trial? Aren't those people that go to trial guilty? I mean, why did you find him not guilty?

And I think it's important to be able to answer that question, and I think what you're going to tell me is, you know, the evidence wasn't there.

What do you mean by that, the evidence wasn't there?

Well, all 12 of us couldn't find or we're not sure that Mr. Payne assaulted anybody with the present ability to inflict a substantial risk of death or serious

permanent disfigurement or protracted loss of bodily functions organs.

Tell me why. Didn't he fire a gun?

Well, they said it wouldn't break the skin, and they have the perfect target and he didn't hit it, and Mr. Stone was inconsistent about whether he was aiming at him or over him, and another witness who testified under oath said he wasn't shooting at Mr. Stone at all. He was shooting at him, in a different direction.

And we've all been out there, and we looked around from the perspective to see what people could see, and you just couldn't see that clearly whether or not exactly what happened. It all happened in a matter of seconds.

Obviously, the witnesses believe their own versions but they contradicted each other about the direction, about what they told the officers. Plus, why did you find him not guilty? Well, because the man testified and he really told us what happened.

Now, in the cloud of confusion about the evidence, I believe that that is a completely clear explanation for why -- not that we know the truth. It's frustrating to come here and think, Goodness gracious, we're going to ferret out the truth like scientists, but

sometimes you have to admit that you just can't get there from here, and in this case, with the evidence you've been presented, there is no way to meet that burden.

I'm going to spend just a second with you on what is this idea of indecent exposure, because you're in a unique position. Most of the time you're dealing with somebody who is a flasher or maybe a stripper in a nightclub and there is a charge of indecent exposure where here we have a specific case that says I was looking at somebody and sending them a direct message of disdain and contempt, and when you get to that part of the discussion, if you turn to page eight of the judge's instructions, he lays it out beautifully, and he says that symbolic speech is protected under our First Amendment of the United States Constitution whenever it's intended to convey a particularized message and it's a likelihood that it would be understood by those who view it.

The law recognizes nudity as a constitutionally protected means of expression under proper circumstance. The issue you must decide is whether or not the defendant's actions were intended as, quote, an expression of disdain and disapproval of the victim or whether it was done solely for the purpose of being malicious.

You see how that's an either or? If you find that it was intended as an expression of disdain and disapproval, we don't like it? It's offensive? And it's also clearly protected under the constitution. Now, if he had been in a shopping mall, surrounded by people, if there had been other witnesses, we might have been in a different setting, but the law says that you look at the individual particularized facts that you have in front of you on each of these questions, and here he's in a marsh with -- there are no other reports of anybody seeing him naked. I asked Mr. Anderson, did you see him out there naked? No. And so you have an idea expression from person to person.

If you find that his actions were intended as an expression of disdain and approval, that's the end of the inquiry. You can look at the judge's charge.

Finally, there is this pointing and presenting of the weapon, and you have the issue of the distance to go back to. Common sense may say, I'm guilty of pointing and presenting if I stand outside your house and I pull out a gun, making sure you see it. This was, by all agreement, 179 to 180 yards, at least 175 yards away, so much so that when the witnesses looked down from the deck, they couldn't tell if it was a gun. They thought it was a stick.

Do you remember that? Presenting a weapon? So was it two shots at people or one? Contradictory directory evidence. Who was that one shot at? Contradictory evidence. What was the direction of the shot? Contradictory evidence. The distance of the shot, we know there wasn't no break in skin.

I realize that you have lives and you have responsibilities, and coming here and listening to me is painful. I appreciate your patience in taking this case seriously. I know that you will do justice, and I contend that the only just verdict in this case is one that will speak the truth loudly, that the State cannot and has not met its burden of showing that this is an assault and batter of the first degree or pointing and presenting, and certainly not an indecent exposure.

THE COURT: All right. Miss Cardillo?

MS. CARDILLO: Thank you, Your Honor. May it please the Court: Thank you.

As Mr. Pennington has said, you had to listen us to drag on and on all week. I appreciate your interest and taking this case so seriously because it is a serious offense. It's very serious to Mr. Stone and Mr. Anderson and especially to Mr. Noah Anderson. This is an event that they're not likely to forget for a long period of time.

In light of all the evidence presented, what would a reasonable, ordinary, everyday person believe that the defendant's actions could have resulted in serious bodily injury, worse? What would an ordinary person do? What would an ordinary, everyday person believe, given all these facts taken together?

That's what I want you to do today, and that is what the judge will instruct you -- sorry, he already has. We usually do that afterward.

The defendant's argument is two-fold: First, he didn't fire at anybody. He shot up in the air, first when he was inside his boat and then, from his own testimony, he hid in the woods on the island so nobody would see him and nobody would accuse him of firing a weapon at him. That's the second charge.

Even if you believe the second argument, even if you believe that he did fire at the victims, there is no way that ammunition would have ever made it that far. I said in my opening life is definitely stranger than fiction, and sometimes you just can't make this stuff up. Also in my opening, I talked about perception and, again, what would a reasonable, ordinary, everyday person believe?

And I have gone out to this area, wasn't very familiar with it first. Went out to it at least five or

six, maybe seven times now, and just stood there and looked around. Nobody understands -- or try to fathom how somebody could fire a loaded shotgun at people in while they're in their own houses, in their own yards, with their children during memorial weekend at the height of population of Shem Creek at this time?

And I also want to talk to you about what Mr. Pennington indicated what this case is about, but, first of all, I want to talk to you about what this case is definitely not about. It's not about this retired gentleman from Australia, U.S. citizen, out to get this man. That's not what this is about. This is not about him sending the police over and over and over while this defendant is doing whatever he wants to do on this houseboat, and that is why he wanted to get payback. This is not about that.

It's not about the defendant being annoying, which he is. It's not about the defendant being frustrated, which I think we can all agree that he is. It isn't whether this defendant had the right to un-moor his boat. If I'm using the proper terminology or improper on boating, I apologize. It's not about whether he had the right to be behind Mr. Moore's property or whether he had a right to leave his imprint in Shem Creek.

For all I know, for all the State concedes, he could have owned his own property. In his testimony he said at one time that he did own property there and then he said he didn't, so that is contradictory in and of itself, but even if he did, standing in the middle of the street or standing in the middle Mr. Moore's yard or even bought property and stood on it, he still can't fire a shotgun at people.

You don't do that today. You don't do that two years ago. You don't fire a shotgun, loaded, with what he self-admitted didn't know what was in there, at people. This is not about a political statement or freedom of speech.

I think what the annoyance is of the ten days preceding, of the defendant standing up on the houseboat, flipping off Mr. Stone, acting very frustrating, drinking, doing whatever, was, sure, an annoyance, and we're not here for that. Again, we're not here for him flipping off these people, we're here because his actions turned criminal when he decided to fire a loaded shotgun at the people surrounding this area.

This defendant thought it would be a great idea, while drunk, to carry a shotgun and terrorize the people surrounding him. The defense wants you to believe there is no way the bullets, ammunition, all the

different pellets would have made it that far. It's their argument most people who own firearms legally should be responsible. If you're going to shoot, you need to shoot to kill, as Mr. Pennington said.

The thought that the ammunition wouldn't go that far is an insult to common sense. This case again is not about all the other issues that was brought up. This is about this defendant and what he needs to be taking responsibility for. He needs to take responsibility for what he did on that date. That's about him. It's not about everything else and everything else that he said that he wants you to believe.

I want to go through, like Mr. Pennington did, some of the testimony. Start with Anne Stone. She testified right here that she woke up that morning and saw this boat, right behind her house, and for ten days she had to deal with this guy. It wasn't pretty, but wasn't enough to have the defendant arrested. It was merely annoying.

You heard how she would even avoid that area just so she wouldn't have to see him. You heard from Graham Stone, who the defense is trying to make again into this big, ugly person who is out to get Mr. Payne. That's his only reason for living.

Graham was involved with the HOA, or the

civic club. He took pride in his community. He had lived there for a very long time. It was important to him. There was conflict about where the houseboat was located. That's not a deal breaker, but it ended up behind his house, and that's when the defendant started escalating to the point where he fired, which he said he didn't know which house Mr. Stone lived in.

He didn't know if Mr. Stone was even home, so he's flipping people off and firing at people that he doesn't even know is there for a political statement, to annoy him, to get back at Mr. Payne. I'm sorry, Mr. Stone. I keep doing that for him to some reason. I apologize.

On this date, you heard Graham testify that he came home after taking his wife to the opera and the defendant had finally reached the point where enough is enough. He takes off his underwear, he demonstrated how he showed Mr. -- showed his frontal self to Mr. Stone while flipping him off, on the top of his houseboat, because he usually peed off the side of boat on the first floor, I'm not sure, but at this time he was on the top, keeping in mind that he didn't know, as he said, defendant said, from that chair, he didn't even know he was home, didn't even know which house he was at. Couldn't even see that far, so he had no clue.

Graham said, Enough. Call 911. I think y'all heard him several times now, as it is. Mr. Stone was pretty calm. Just a naked man in the marsh. Come out here. Please take care of this.

Mr. Stone was rightfully worried about the police after he saw the defendant fire in his direction. And I want to talk a little bit about perception. The perception of photographs, aerial Google maps, are far different than the perception when you walk out there and see where everything is located.

This looks so far away. If I looked at this and said somebody shot from here over here, there is no way. You couldn't even see it, but if you go out there, it's a completely different story.

Mr. Anderson, I'm getting ahead of myself, but I'll talk more of that perception in just a second.

Mr. Stone, Graham, sat here and just said, I heard a boom. I looked up. I saw the defendant coming out of the brush, saw what he looked like, pointed what I thought was a stick, pointed in my general direction, kind of above but at my house, at my direction, and fired. He said he ducked. He said he immediately went in and called 911, scared for his life. Went in called 911, because not only was he scared for his life, but he was scared for the police officers.

He thought he had set, I guess, a big giant snowball at the top of the mountain and let it go down and it got bigger and bigger. He was there for their safety. He didn't know they were talking to each other. He doesn't know anything about guns. He didn't know what kind of ammunition was in there. He didn't know what kind of gun until the defendant fired. He didn't know any of that. All he could go on what he was seeing and what he saw from the defendant's actions.

He also testified that the defendant had been drinking, and I think the defendant pretty much conceded that on direct. I'm stumbling around, police officer said that he was -- smelled of intoxicants, smelled of alcohol, slurring a little bit, so not only do you have a man firing a weapon that he doesn't know what ammunition is in it, but he's also drunk. So that is kind of like taking -- let's add some more gasoline to the fire.

Scott Anderson, he had no dog in this fight. If you believe that Mr. Stone was out to get Mr. Payne, okay, but Mr. Anderson had just moved in a couple months before. He was just there, with his son, having a good time on a long weekend, wanting to enjoy time out on the marsh.

Didn't know Mr. Payne. First time he saw when Mr. Payne was normally peeing off the side of his

boat. That's how you get introduced to your neighbors, or somebody who said that is his doghouse where he likes to go when he's not staying in his condo on Ben Sawyer. Mr. Anderson said he saw somebody come out, saw the defendant fire at him, at him and his son, who is scared out of his wits. He was scared for his son's life, grabbed his son, ran inside call 911.

You heard that. He also said all he saw was this guy coming towards land, coming toward what he thought was him. They both saw him still holding that shotgun that he still shot at them, still coming towards him.

He wanted to know where he was going. He had his son. He wasn't going to let his son out of his sight. I don't think that any way along the way that he put his son in danger. Who put him in danger was this man. This man put Noah, two-and-a-half-year-old little boy in danger for his life, and his father's life.

Now, I want to get back to perception. I do that sometimes. I apologize.

If you believe Mr. Anderson and Mr. Stone, perception is to each his own. Somebody might say that I'm wearing a white shirt; somebody else might say it's beige or different color. I don't know anything about colors. Somebody might say this is a brown suit or a

charcoal gray, who knows, but what you perceive is different. Each person perceives it differently.

They each -- I'm not saying it's an easy argument to make. It's not, but I think in their perception, in viewing this defendant's actions while he was drunk, firing a firearm like this, coming out, it could easily be perceived by both of them, from that distance, that he was pointing at both of them.

He could have been stumbling. He could have been doing all sorts of things, but when he comes out, I think it's very reasonable, given the circumstances, that they both received -- he was directing this shotgun at them and that little boy. I don't think that is too far of a stretch to overcome.

The day I got this case, I found it very incredible again that anybody would do this, and you got Vickery's right behind you. Everything is really close, and when you get out there, you really see how close it is. And, again, I think that the perception, from them, from when he -- what they saw the defendant doing, they both perceived a threat. They both perceived an assault, and the defendant's actions equal those.

Each one, Mr. Anderson grabbed his son, Mr. Stone ducked, defendant was still coming toward him, after he fired. They had no idea -- we know now that the

police were there, but he didn't have -- Mr. Anderson had no idea the police were even there. Mr. Stone knew, but he was worried about the police, and even if the police weren't there, this man would just fire a weapon at both of these men who he had never met, who didn't associate with each other, period, both say the same statement: This guy fired and it was coming towards us now. Fear.

I want to talk a little bit about the defendant's actions, his words. He said on direct -- I'm sorry, on his testimony, he thought the gun was loaded. Didn't know what kind of ammunition was in the shotgun when he fired at these victims. Didn't know. He said he pointed up in the air, but when he held the gun, it was kind of -- not that I'm left handed, but a little bit more down than straight up from whenever he showed it on the stand.

He also said that shooting a firearm is a minor reason why I am here today. He has still not grasped the difficulties that he put these people in or what he did. Shooting a firearm is a minor reason why I'm here today.

There has been nothing uncovered during this trial on why either victim would come in here and testify and lie. He himself is saying he was getting it out anyway. It was stuck. He had until June 4th. If he

hadn't fired this shotgun that day, he wouldn't be here.

He kept saying over and over on his testimony that he didn't know where the house was, but yet he's apparently making a political statement towards a man who didn't know his home, flipping him off and dropping his shorts to somebody he didn't even know was home, and then he fires a shotgun from his own words to annoy Mr. Stone, again, who he didn't know where his house was, or to -- or didn't know he was even home. Some heck of a way to try to annoy somebody.

I want to talk about, again, the law in this case, the assault and battery of the first degree. The defendant offered or attempted to offer with a present ability to do so, given the totality of the circumstances, taking all the evidence into account in this case, what would a reasonable person have believed or perceived from the defendant's actions?

It says in here if you believe he inflicted serious bodily injury or even death. We've talked a lot about Mark Kelly. He did testify. Half his stuff, honestly, I had no clue what he was talking about, I just know at one point he did say it could break the skin. He did say that, it could break the skin, which could cause impairment to a bodily function. Could have put an eye out.

I have my glasses on. I don't think anybody walks around with protective eye gear on, hoping they don't get shot when they leave their house that day, or while they're at their home, for that matter. It could have put an eye out, severe bodily injury, severe bodily impairment if you're blind, if it had hurt the two-and-a-half-year-old little boy.

Pointing and presenting: I think it's clear from all the evidence that the State has proven that he pointed or presented this firearm. Distance is not a matter. They both saw it. They both saw him with the weapon. Mr. Anderson will explain that he saw the firearm, and they were both pointing and presenting. Loaded or unloaded is a crime in this case, and, finally, indecent exposure. What was the statement, freedom of expression? For somebody who's making an argument that he's trying to make, a political statement against Mr. Stone, again, he didn't know where he lived and he didn't know if he was even home.

I don't think deciding to pee off the top of your boat and trying to make a political statement at the same time is really what the framers of the constitution had in mind when they wrote freedom of expression, freedom of speech. This man took off his shorts, flipped his fingers and, was doing exactly what he was doing out

of pure meanness, out of pure maliciousness, because he didn't like Mr. Stone and he thought, for whatever reason, that Mr. Stone was trampling all over his personal freedoms, but that still doesn't give him a right to drop his shorts, show himself, fire at people. Please don't reward him for being a lousy shot.

Scott said something on his examination that I found very poignant. I didn't know what he had in the gun. I know that with a shotgun, you do not want to be on the other end of it, and the facts are what they are. I can't make them better; I can't make them worse.

I'm not trying to give you a buffet by putting all the victims in. It's in the indictment. Everybody has testified to what they could testify here, and I hope, after you consider all the evidence, all the testimony, all the pictures, going out on your field trip, if you will, that you will find the defendant rightfully guilty of assault and battery first degree, pointing and presenting, and indecent exposure.

I thank you for your time and your patience.

THE COURT: Okay. Let me step down here and go over these verdict forms with you.

Normally, we would have you just write on the back of the indictments what the verdict form -- what the verdict is, but since we have these lesser included

charges, I printed out a verdict form to go over with you and have you write your verdict on this instead of on the back of the indictment.

I'm still going to send the indictments back, but, again, remember, they're not evidence. They're certainly the charging instruments in this case, all right?

So the first one we have is the indictment for assault and battery in the first degree. Two possible verdicts: Guilty or not guilty. If the jury unanimously decides the State did not meet their burden of proof of assault and battery in the first degree, as I charge you the law is, you mark not guilty.

On the other hand, if you find the State the met the burden of proving the defendant is guilty of assault and battery in the first degree, you mark guilty in the little block there. Where you mark assault and battery in the first degree, whatever the verdict is you sign it and date it, Madame Foreman.

All right? If it's guilty, you stop, as it's the indictment for guilty or assault and battery in the first degree. You don't go to second degree or third degree if you find guilty on the first degree, all right?

However, if the jury finds that the defendant is not guilty of assault and battery in the first

degree -- and this is written down here, so it will help you remember to get it right.

If you find not guilty on first degree, assault and battery, then and only then do you go and next consider assault and battery in the second degree. And, again, there is two possible verdicts, not guilty and guilty. Not guilty, you mark that. If you find guilty, then you mark that one, sign it, and date it, and stop your deliberations as to assault and battery.

If you find not guilty on the second degree, which, of course, means you've already found not guilty on first degree, then and only then do you go and consider third degree assault and battery, and, again, two possible verdicts; guilty, not guilty. Whatever the jury unanimously decides on that one, mark either guilty or not guilty.

All right? Sign it and date it. Now, as to the other two charges, there is no lesser included. There is simply the next one would be pointing and presenting a firearm, two verdicts, guilty or not guilty, whatever the jury unanimously decides.

You mark that one, sign it, and date it. Then for the final indictment, indecent exposure, it's either guilty or not guilty. You mark your verdict. Whatever the jury decides, sign it and date it.

When you have reached a verdict as to all three charges, then you let the bailiffs know you've reached a verdict and they'll bring you back in. Again, I will send these indictments back to the jury room with you. I'm also going to send a copy of the jury charges back with you.

Now, we won't send those back just yet because I have to give the lawyers the opportunity to say I just misspoke and you need to clarify something with the jury. It's a formality that we go through. We also get the evidence together that goes back, so when the bailiff brings the evidence and the verdict form, the indictments and the jury charges back, he will then say, The judge says you can begin deliberations. Then and only then can you begin deliberations.

Just be patient with us, and we'll get it right back to you or have it back in a minute, if I misspoke in some regard. All right? Thank you.

Oh, as to this firearm, we don't send that back at this time, but if you desire to have it brought back, we will send it back with you, if you want to see it. All right.

(Jury retires to deliberate, 3:24 p.m.)

THE COURT: Anything from the State?

MS. CARDILLO: No, Your Honor.

THE COURT: From the defense?

MR. PENNINGTON: No, sir.

THE COURT: All right. Let's get this evidence together and send it on back, and then I'll discharge the alternate. Go ahead and pull the alternate out. Tell them the 911 calls are available. If they want to listen to them, let us know, and we'll send them in for them to play.

(Recess taken.)

(February 8, 2013.)

(In open court, jury present.)

THE COURT: All right, folks. Welcome back. Before we start back this morning with your deliberations, I wanted to ask -- there was an article in this morning's paper. It was online late yesterday afternoon about the case. There hadn't been one all week long, but there was one yesterday afternoon online and in the paper this morning. Any member of the jury panel see this newspaper article?

(Two jurors raise their hands.)

A JUROR: I saw it, but I didn't read it.

THE COURT: Did you?

A JUROR: No.

THE COURT: I understand that y'all reached partial verdicts yesterday afternoon, and you wanted to

come back and finish your deliberations this morning. Obviously, you only deliberate when you're all together, but I just need to ask for the record, did anybody contact any other member of the jury panel to discuss the case after hours last night?

All indicate no. You haven't been contacted by anybody about the case or in any way? Okay. Good.

All right. Well, we will ask, then, that you go back to the jury room, and we'll send the evidence back, verdict forms, indictments, and continue your deliberations. Let us know when you have reached a final verdict.

All right? Thank you.

(Jury resumes deliberations.)

THE COURT: Okay. Anything from the State?

MS. CARDILLO: No, Your Honor.

THE COURT: From the defense?

MR. PENNINGTON: No, Your Honor.

THE COURT: Send Mr. Payne back, and then we'll pick up the bond hearings.

(Recess taken.)

THE COURT: All right. Bring the jury in.

(In open court, jury present.)

THE COURT: All right. Folks, you sent back a couple of notes. Let me go over one.

You asked for copies of police reports of Mr. Stone and Mr. Anderson. Those are not in evidence, so you cannot have those back there with you.

You want to see the shell casings, so we have that to send back with you, and the jury charges inadvertently didn't get back, so those will go back with you as well.

The last thing is the 911 calls, so we have that primed up to play that back right now. Is there anyone you want to hear first?

THE FOREPERSON: No, I don't think so.

THE COURT: Which one do you have there first?

MR. VOIGT: I'm going to start with the initial call from Graham Stone. It will then go into the second call from Graham Stone. I will switch CDs and get the Anderson call.

THE COURT: So you wanted to hear all three?

THE JURY: Yes.

MR. PENNINGTON: I think it will have to be fairly loud for them to hear the background which is something --

THE COURT: Crank the volume up.

(Whereupon, the CDs were played for the jury.)

THE COURT: Okay. Anything else? All right. We'll get this back to you, and you can resume your deliberations.

(Jury notes marked for identification as Court's Exhibit Nos. 1 through 6.)

(In open court, jury not present.)

THE COURT: Okay. Let's not wander off. They seem to be on a flurry of questions.

(Recess taken.)

THE COURT: All right. Let the record reflect the defendant is in the courtroom, and bring the jury in.

(12:22 p.m., in open court, jury present.)

THE COURT: All right. Folks, I understand that you have reached a verdict; is that correct, Madame Forman?

THE FOREPERSON: Yes.

THE COURT: Is it a unanimous verdict?

THE FOREPERSON: Yes.

THE COURT: Would you hand that to the bailiff, please. Okay. Clerk will publish.

THE CLERK: State of South Carolina, County of Charleston, in the Court of General Sessions, the Ninth Judicial Circuit, case 2013-GS-10-1300, 2012-GS-10-4844, 2011-GS-10-5232, State of South Carolina

versus Robert Harvey Payne: As to indictment number 2013-GS-10-1300, assault and battery in the first degree, we the jury unanimously find for the defendant, not guilty. Signed Donna Marie King, foreperson of the jury, dated 7 February 2013.

As to indictment number 2013-GS-10-1300, assault and battery in the second degree, we the jury unanimously find the defendant not guilty. Signed Donna Marie King, foreperson of the jury, dated 8 February 2013.

As to the indictment 2013-GS-10-1300, assault and battery in the third degree, we the jury unanimously fine the defendant not guilty. Signed Donna Marie King, foreperson of the jury, dated 8 February 2013.

As to indictment number 2012-GS-10-4844, pointing and presenting a firearm, we the jury unanimously find the defendant guilty of pointing and presenting a firearm, signed Donna Marie King, foreperson of jury, dated 7 February 2013.

As to indictment number 2011-GS-10-5232, indecent exposure, we the jury unanimously find the defendant guilty of indecent exposure, signed Donna Marie King, foreperson of the jury, dated 7 February 2013.

Madame forelady, ladies and gentlemen, if these are verdicts, please signifying by raising your

right hand.

Your Honor, let the report reflect all jurors have raised their right hands.

THE COURT: Does anyone wish to have the jury polled?

MS. CARDILLO: The State does not, Your Honor.

MR. PENNINGTON: Yes, Your Honor, please.

THE COURT: All right. The clerk will poll the jury.

(Whereupon, the jury was polled and all jurors indicated their agreement with the verdict.)

THE CLERK: The jury has been polled and the verdict stands.

THE COURT: All right.

Folks, I want to thank you for your service this week. It's been a long week. I know at the first of the week I told you it would probably be a couple days, four days is what we were aiming for, but circumstances are it took a little bit longer, but that's okay, because what you guys did was performed a valuable public service, and you should be proud of your service this week.

Very difficult case, you know, very unusual set of facts, and, you know, both sides are entitled to a

fair trial, and both sides got a fair trial, in my opinion, and we live with the verdict that you folks come up with.

You did the heavy lifting this week. You had to set and listen to all of the evidence that was presented, and then you had to take the law that I told you and figure out what is a just verdict, and it's clear that you took that duty very, very seriously throughout the trial. You know, I occasionally look up to make sure everybody was paying attention, never saw any signs that the jury wasn't paying attention, and it's clear by the fact that everybody showed up when we asked, clearly paid attention to the trial, and clearly you folks spent a long time deliberating. This was not a hasty verdict, in other words.

So the system works, as far as I'm concerned. It's a very, very difficult case and you folks should be very proud of your service. I told you at the beginning of the trial, or the week when we were qualifying, it's very, very special what you do, and when the State charges somebody with a crime, even if it's one of those that, you know, has some adverse publicity to it, that sort of thing, then, you know, it's not easy to do what you do, and I don't criticize verdicts. You folks did what we asked you to do, and that's all we can ask of

you, and on behalf of the State of South Carolina, I want to thank you for your service this week.

Now, if you recall from the beginning of the week, you will now realize that you are disqualified from service for the remainder of this year. We don't burden you with too much in the way of jury service, but you might also remember you are entitled to an exemption now for another two years if you want to be excused.

You can serve. You remember, I talked about how just because you're entitled to an exemption you're not required to exercise it, so if you get called again after the rest of this year and you want to serve, well, hopefully you enjoyed the experience enough that you would want to do it again.

If nothing else, I would hope that you enjoyed the experience enough and learned enough from it and left with a positive feeling about your experience so you can tell other people about it. People get their jury notice, and they don't want to do it. I get that. It's been a long week, and you haven't been able to do whatever you do with your lives, and we sure as heck don't pay you very much for it, but we depend on it. It's the way our system works. I think it's what makes us a more special country than any other country in the world, is the jury system, trial by juries, and I believe

in them, and so I'm perfectly comfortable with your verdict, and I want to thank you for your service.

Again, if anyone has any requirements for work or anything like that, the clerk's office can provide you with those slips, and we won't keep you any longer, so you are now free to go.

Thank you.

(Jury dismissed.)

THE COURT: All right. Well, it is now to the point where we impose sentencing on the two convictions. Pointing and presenting and indecent exposure. You popped up awful quick, Mr. Pennington.

MR. PENNINGTON: I think I'm required to renew my motions.

THE COURT: You're correct. Go ahead.

MR. PENNINGTON: Your Honor, insofar as, obviously, the jury has spoken on the question of pointing and presenting a firearm, in spite of that, we would renew our motion for the Court to now enter a directed verdict of not guilty, given the distance evidence in the case, and take it from the jury and make a finding as a matter of law that this does not constitute grounds that a reasonable person could find a presentment of a firearm or a pointing a firearm at another person.

As to the indecent exposure charge, of course, we are forced to revisit this First Amendment claim, and the Court, I think, does have now the jury -- the benefit of the jury's findings in that they must have, based on your instructions, found that this was malicious, rather than any other formulation that we have that this was a statement or expression; however, the quarrel that I have with this at this stage on Mr. Payne's behalf is that I think the Court still has the unique knowledge of the case law and the fact that Courts are forced at times to acknowledge that the First Amendment protects unsavory, unpopular, and what could be, I think, from a lay perspective, seen as malicious behaviors.

And in this case, given the clear way in which Mr. Stone described the incident, how he took the incident and the lack of any other evidence that there was other people involved, we would ask that you find this to be protected speech under the First Amendment as expression under these circumstances.

THE COURT: All right. Well, I find that there is sufficient evidence in the record to support both of his convictions for the reasons that I stated earlier. The motions are again denied.

MR. PENNINGTON: Very well, Your Honor.

THE COURT: All right. Let's move on to sentencing.

MS. CARDILLO: Your Honor, I have the sentencing sheets. I'm not sure if the State or the defense wants to sign them. These are a conviction, so I didn't sign.

THE COURT: They're not required.

What would you like to tell me about sentencing?

MS. CARDILLO: Your Honor, you already know the defendant's previous record, conviction of petty larceny. I would like to comment on the fact that this has kind of been an ongoing situation for many years, as you heard from the testimony, especially given the lawsuits. I think even though this was brought up briefly, I think that it's been a form of harassment to these poor people for all this time.

I know each of them wants to speak, as far as sentencing is concerned. The State is asking for additional prison time and extensive probation to follow him once he leaves the confines of the court. We are asking for a no contact with both of the victims and their families and with [redacted].

He does have a friend that still lives in the neighborhood. That is where his boat was stationed, and

we ask that they have no ability to be able to come in this area in general, including the causeway, Shem Creek, things of that nature, just as the Court is aware it's such an open area in general.

I know the bond judge set his bond that he couldn't have any contact with [redacted] by air, land, or sea, so we ask that be held over him as well.

I know that Mr. Stone -- I'm not sure Mr. Anderson would like to address the Court, but I know Mr. Stone would like to address the Court as far as sentencing is concerned. He can do so whenever the Court is ready for his statement.

THE COURT: Yes. Who would like to speak first, Mr. Stone?

MR. STONE: Yes, Your Honor. Since this matter began, I've been in court 11 times with seven different judges, and reiterating what the prosecuting attorney said, Judge Gosnell set the bond at 300,000 and then added that this man is clearly a danger to society, and because of that, he added to the bond that he couldn't come within four miles of [redacted] by land, sea, and air.

Judge Lombard, when I applied for a restraining order, agreed with the same thing and added the same condition when she gave us the restraining

order. Right from the beginning of this matter, I had reported that there were two gunshots. Mr. Pennington went to great lengths in the last four days to say that there was only one gunshot, based on the fact that the police said there was only one gunshot, and then when Mr. Pennington's client was on the stand, he admitted that he fired the loaded gun twice.

I would like to mention that it's public record that the defendant has been in 78 trials in recent years, 78 trials. That must be some kind of a record. And, finally, Your Honor, there was a lawsuit -- since this is relevant to this case, although it sounds like it is, in the beginning there was a lawsuit that Mr. Moore and the defendant filed against the civic club, and when that lawsuit finally went to court, the judge, Judge Scarborough, ruled in the civic club's favor, and ruled that Mr. Moore and the defendant would have to pay $2,000 in damages to the civic club, and he said he couldn't expect the defendant to pay this half of the fine, being incarcerated, and so he said that he would have to sign a promissory note in the court that day that he repay Mr. Moore, if Mr. Moore paid the whole amount, which he did, that the defendant would have to pay half of that.

And here is the point, Your Honor: He added that if -- oh, and the defendant refused to sign that

promissory note, and Judge Scarborough said it's his right to not sign the note, but he was going to see that 90 days was added to whatever sentence came down on this trial.

That's all I have, Your Honor.

THE COURT: Thank you.

MR. STONE: Oh, I'm sorry. Personally, I would just like to see the maximum sentence on the charges that he's been charged with.

Thank you, Your Honor.

THE COURT: Well, I can only give him the maximum of which he's been convicted.

MR. STONE: Right.

THE COURT: Not what he was charged with.

MR. STONE: I understand. Yes.

THE COURT: Mr. Anderson?

MR. ANDERSON: Your Honor, I just want to reiterate Mr. Stone's request, and it is my request that Mr. Payne get the maximum for the charges that he's convicted of. I want to tell you that I do appreciate the jury and the process.

I do express that I didn't ask for any of this. All I want to do is lead a normal life, and I'm extremely concerned about his relationship with my neighbor, and his reference to payback, which Mr. --

well, one gentleman said the equivalent of revenge. I am still very concerned for the safety of my family and would ask that you take that into account when sentencing.

THE COURT: Thank you. Anything further from the State?

MS. CARDILLO: No, Your Honor.

THE COURT: Mr. Pennington?

MR. PENNINGTON: If it please the Court: I'll start right off where Mr. Anderson left off, because I think that is a very legitimate concern. I know there is no disputing the fact that both Mr. Stone and Mr. Anderson were understandably alarmed by what happened here, but let's revisit what happened here.

The jury has acquitted of assault, which means at least we know there is no proof beyond a reasonable doubt of assault, so what we're left with is that I don't dispute, and have never disputed, that there were two discharges of the weapon and that he had the weapon in the neighborhood, and the jury must have found that by presenting it at them that that constituted the elements of this offense.

I accept that verdict. I believe Mr. Payne, although he may appeal, has to accept that as the jury's finding. The concern prospectively is this: My client

has discussed with me several times that he knows that he will be barred forever under state and federal law from ever possessing firearms as a consequence of this conviction.

He at one time in his past had discovered his wife in the act of adultery, and while that -- it seems irrelevant. It wasn't in this case because he went out of his way, by the reports of both him and Mr. Moore, to take what he had owned at that time, which was personal firearms, and give them to someone else to hold on his behalf, and therefore there was no risk of violence of armed violence in that circumstance.

Now, I have had many conversations with my client about the notion that when this case is over, time, no time, probation, no probation, whatever, he has expressed to me the notion that he understands that he must and should, forever, not just a period of Court supervision, stay away from these good people who have a right to live where they live.

That said, I am concerned that at times the idea that four-mile boundary would be essentially that you could not go into Mount Pleasant. I think that that would be and is excessive, and my client was not represented in any of those hearings. I note that when this same request was given to Magistrate Kane for the

protection order in February that she declined to adopt that particular request on the four-mile limit.

I do take issue with the notion that Mr. Payne is a bad man because he has filed legal actions because we are a country of laws where we rely on Courts to view the disputes, and as difficult as it may be to be a defendant in a lawsuit, and perhaps even costly, there are remedies for that in the Courts of Common Pleas that protect the litigants against excessive harassment, I believe.

More to the point, in this instance, my client has been literally sitting in the county jail in what was a solitary unit for 20 months -- excuse me, 621 days to present, and I can tell you that this has been a substantial period of suffering.

Now, he is a complainer, and so I've had lots of opportunities to try to sort out the frivolous from the more reliable kinds of complaints, and I think I can say, with some degree of accuracy, that there was a message that was received long ago that he was aware of and sorry that he had put himself in this predicament by stupidly firing this gun in that neighborhood and scaring those good people and putting himself in this position.

But he does not have a consistent history of violence. If you look back at the prior criminal

history, 67-year-old man who has a petty larceny conviction that I would point out was actually another one of these questions about boat ownership, a man who he thought had abandoned a boat and when he went and occupied it was charged with petty larceny and pro se entered a plea to one day time served. Other than that, he has had some DUI convictions, and that is the extent of his record.

As far as where he will go and what he will do, he has been working with Meredith Miller, who is the court liaison for the Veteran's Administration, and I've talked to her expressly about where he would live if he was to be released on bond. His intent would be to either use resources that are available to him through his friends to get an apartment while he's applying for VA housing, or, actually go live at Crisis Ministries, which has a special room where veterans who are placed there have a little bit more of a semi-permanent dormitory, or a single room that acts as a dormitory. That would be his intent.

Given the clear reality that there was no battery in the sense of no physical injury or no falling shot toward these people, I think that the jury verdict could well have been that he did exactly what he said he did, which was to shoot in the air and be brandishing

this weapon after the fact and that that's what the Court needs to consider, the criminal conduct at play here, and while it's not commendable to be waving a shotgun around in the back of a public neighborhood, it was, as we know, a minimum of 179 to 180 yards in one instance and 200 yards in the other.

And, by all accounts, I know it was the perception that Mr. Stone described that he was coming toward his house, but actually we know from the officers that he was coming back to Moore's house where the causeway leads.

I cannot reliably tell the Court what people are going to do in the future. Free well is a free will scenario, but I do not think the conviction nor the history supports him acting out violently toward other people.

This creates the opportunity for the Court to consider a split sentence, whereas I understand the maximum of pointing and presenting is a five-year max. With regard to indecent exposure, it's a three-year max, and the Court has the discretion to essentially impose that period of time, giving credit for time served, and put him under a period of supervision that I think would provide the greatest degree of supervision and safety for the community with what would be the conditions, or

whatever relevant conditions, the Court wishes to impose.

I did not believe -- looking at it conversely, that if you would adopt the recommendation of the State and give an active sentence, then we know what happens when people reenter from prison. They have no supervision. This is not one of those cases that would call for community supervision after release. This would be a max out, walk out the door and put you on the bus back to Charleston kind of release that I do not think does anything to provide for the kind of launch that he needs to be successful and stay out of these folks' hair and get his feet on the ground in moving again in his life.

So I would ask the Court to consider a sentence which -- a split sentence, in light of the totality of the circumstances, and while that may not -- I think that provides the best safety and security for all concerned, and I don't know if Mr. Payne wishes to express himself to the Court about his feelings about this matter.

THE COURT: Mr. Payne, this is your opportunity to say anything, if you would like.

THE DEFENDANT: I need a minute, sir, a moment's time.

I'm sorry for all the trouble I've caused the

State and Mr. Pennington and the county. A year ago the solicitor offered me a plea bargain of time served. I walked out. I said no. I'm not guilty of these crimes. I would like to opportunity to prove I'm innocent of the crimes.

I offered to plead guilty at that time on two conditions: One, I flunked a polygraph test and Mr. Stone and Mr. Anderson passed the polygraph test. Mr. Stone swore under oath that he would take it and Mr. Anderson refused to take it.

MR. PENNINGTON: Let me intervene and say, with all due respect to Mr. Payne, I told Mr. Payne that I never acted on that and did not approach either victim, felt that was inappropriate, and I was not going to ask -- I was not going to ask them to submit to a polygraph under those circumstances, so I don't want -- they never had the opportunity. They were not asked to do that.

THE DEFENDANT: That's not entirely true. I sent both of them certified letters asking them to contact Mr. Pennington. Mr. Stone swore under oath he would take it. I gave him the certified letter asking him to take the test and he refused to do it.

You've all heard about Miss Stone having cancer. Well, I had cancer too, and as you know,

Mr. Stone disagreed with me being allowed to go into the hospital for treatment. I was being treated every day. I haven't had any treatment since I've been here. My cancer has spread. I could have gotten treatment in jail. They refused. Can't even get a cavity filled in jail.

Send me on up to Columbia for another year or so, but it's a death sentence without treatment. You don't get any treatment in prison. I'm as innocent of these crimes as I've never pointed a gun at anybody in my life. I know how he feels. I've had them pointed at me. Never my intent to scare anybody. They overreacted. I haven't attempted to do that, it just happened.

I worked all day long the day this thing happened, right next door to Mr. Anderson. I don't remember seeing him, but if I had wanted to cause him harm, I could have drawn the shotgun that far and hit him, just walk 300 yards down to the marsh. I never intended to harm anyone.

You heard from Mrs. Stone I was on the boat all day long. I never even went out there until 7:00 at night. Never even climbed on top of the boat. Don't sentence me to death. Just let me have treatment at the VA. Thank you.

One other thing, Your Honor. I have a motion

in there for advice that I think that Teddy Roosevelt gave the judge. Do what's right, not what's popular or unpopular. I'm asking for justice. I haven't gotten any in 21 months. Thank you.

MR. PENNINGTON: Your Honor, I will point out in the courtroom is his friend Jerry Moore. The Court heard his testimony, described their lifelong friendship, and the other gentleman in the red tie is Kenny Donaldson, who has been involved with helping me and has been a lifelong friend, and indicates that he knows that Robert was, of course, in the wrong in what he did in firing his weapon and annoying these people, but he stands by him, is interested in the outcome, and supports him and will continue to help him to the extent that he can.

THE COURT: All right. Thank you.

Well, you know, Mr. Payne, you seem to be your own worst enemy. You know, we live -- we're very fortunate, we live in a town, in an area in which not only are people very tolerant of those that we would consider to be eccentrics -- not only do we live in an area that is tolerant of people that could be considered eccentric, they actually embrace them in many respects, find them colorful, but you step over the line when you fired off a shotgun. No question about that happening.

The only question, really, was whether or not you aimed it at somebody or you just shot it up in the air. But you shot off a firearm in a residential area, and you scared a lot of people, and I think part of your problem is you don't think about other people. You think about yourself too much from, what I gathered from listening in this court.

This was all about you and your rights and you wanting to go out there and be on a houseboat on having have a nice view where everybody else's view was kind of blocked off, and you don't understand why anybody could not want to have you out in that area. And you're standing up there, flipping people off. You're 67 years old and been there -- so you're 65 years old when you did this. That's the best you can come up with, is sitting there to flip people off? That's what 13-year-olds do and 15 year-olds do, not 65-year-olds do to express disdain for other people.

I don't understand, really, that lack of imagination, more than anything else. All you were concerned about was your rights, and you wanted to show off your disdain for the government, the man, these folks who were just trying to enjoy their own property, and they were going about it in legal, peaceable means using the legal system to do it.

There was nobody shooting a gun at you, trying to get you off that property. They were going through the proper authorities, and for whatever reason, you decided you didn't want to operate by those rules, and I don't know whether or not it's just because you got -- you weren't thinking straight or you got drunk that day, but you went out and you fired off a shotgun.

These folks from that far away -- we all went out and saw that property, and your big message was, Well, I wasn't aiming at them, and, in any event, it couldn't possibly have hit them.

From that perspective, and those folks' perspective, they didn't know what kind of gun you had. They only knew that some crazy person was out there shooting off a gun in their direction, and it scared the hell out of them.

That lady over there was undergoing cancer treatment and couldn't even enjoy the meditation of being able to look out her window without you sitting there flipping her off every five minutes.

You weren't thinking about, Wow, I wonder if there is anybody over there that is not interested in seeing my act.

That lady was sick. She couldn't enjoy her home, and she couldn't enjoy the view -- apparently she's

recovered from it, or at least it's in remission, but she couldn't enjoy that nice view and be able to meditate and look at that because you were standing out there flipping her off and decided to go out there and exposed yourself.

Well, you know, as I said, a serious lack of imagination, and you want to send a message to these people? Well, it wasn't a very good way to send a message. Think about Mr. Anderson. He had his young son out there, probably the first time his wife ever allowed him to be with alone with his kid, if I know the way young mothers are, and that weekend got ruined pretty quick.

Luckily, the little kid is probably so young he doesn't remember it, but I guarantee you, Mr. Anderson will never forget it, and the irony is you fired off a shotgun to scare these people, or send them a message, as you like to say it. You're very lucky you didn't get shot. I'm telling you, if you would have been in some parts of town, you would have fired off that shotgun, you would have people shooting at you, but as a practical matter, when you were carrying that gun and walking down the causeway and came across those two police officers carrying that firearm, you were lucky you didn't get shot then yourself.

Your behavior here -- I get the jury's

verdict, and I love juries. I think they do a remarkable job of weeding through the facts and the law and difficult cases, and you know what? They bought your argument that there wasn't enough proof that you aimed at these folks, and even if you did aim it at them, it couldn't have possibly hurt them, because of the distance and the caliber of the firearm.

The jury had a difficult job, and they clearly took a long time to get to that conclusion, but they got to that conclusion, and we'll live with that. But you did point and present a firearm. There is evidence of that, and you did stand up on top of your boat, and you might want to say the thrusting of your hips was a political message, maybe so, but standing off the top of the boat, standing off the side of the boat and urinating in front of people is vulgar and disgusting, and nobody should have to look out and see that.

I know you folks would like me to give him the max. The max in this case is five years, and as a practical matter with the way our system works, if I gave him the max of five years, he gets credit for the time he's been in there, he gets credit for good behavior, bottom line is, you don't have to do much not to get good behavior, but he wouldn't be in for a long time if I gave

him the max on the five years on the pointing and presenting.

What I think is a sentence that helps you folks out as much as anything else is to give him a split sentence, and I do that for the victim's benefit, but I also do it because I would like to see Mr. Payne understand that he might not like it at the county jail, but I want him to see the inside of what an SCDC facility is.

I bet he likes it less. I'll send him there for little while. The maximum on the indecent exposure is three years. I'm going to give him the five-year sentence on the pointing and presenting. I'm going to suspend it upon service of three years. He's done close to two, but he has to leave here, he has to go up to SCDC, and he has to spend some time in an SCDC facility on this. A few months is probably what it will boil down to, but then I'm going to put him on probation for five years and order that he doesn't have any contact with you folks. I'm going to order that he can't go within 500 feet of your home.

I looked it up on the map yesterday, and basically that allows him to drive Coleman Boulevard, but I'm prohibiting him from entering [redacted] by any means, road, boat, air. He can't go in that neighborhood

for five years, and if he does, then he will get brought back in.

If he gets in any other trouble, he gets brought back in, but if he violates those terms of probation and comes in your neighborhood after he gets out, then he's going to have to go back and finish up the rest of whatever time he has on his sentence at that time.

That, I think, offers the best protection to the victims so that they don't have to worry about Mr. Payne coming in and wanting to send him another message when he decides he doesn't want to play within the legal system that we have set up. Sounds like he's got litigation going on, and that makes him happy, and if he wants to do that, that's fine, but he's proven to the Court that he's not willing to be satisfied with the legal procedures and his means of self-help in sending messages, including guns, and I'm not going to tolerate that.

So that is the sentence of the Court. On the indecent exposure, it's three years with credit for time served. Pointing and presenting, five years, suspended to three years, follow that up with five years of probation. It will run concurrent. He's get credit for the 621 days, no contact with the victims, can't go

within 500 feet of their house, and cannot enter [redacted] subdivision by any means whatsoever.

Good luck.

MR. PENNINGTON: I have two housekeeping matters I need to address before we leave the record. One is that I think, by agreement, the Court should put on the sentencing sheet for the sex -- or, rather, for the indecent exposure that the Court does not find grounds for placement on the sex offender registry.

That's supposed to be the default position, but I have had so many experiences where the Department of Corrections does the opposite. I think if you just wrote no sex offender registry since this is not a sex type crime.

THE COURT: All right.

MR. PENNINGTON: The other matter is that Mr. Payne has requested me that if he was sentenced to an active prison term that he would ask if the Court consider setting an appeal bond on the active sentence.

THE COURT: Well, I will not require him to register as a sex offender. I don't think it's appropriate under the facts of this case, but I will not allow him out on bond during the pendency of his appeal.

MS. CARDILLO: Your Honor, just for clarification, the little island where he fired from, is

he also banned from that as well, considering it was where he was convicted of the firing from? It's over 500 feet.

THE COURT: I'll add that on there.

(It's over the 500 feet.)

MR. PENNINGTON: I guess while we're being clear --

THE COURT: I think the town of Mount Pleasant clearly controls anybody having access, and they don't want him or anyone else having access to it as well, but --

MR. PENNINGTON: I may not have heard or understood. So we can be perfectly crystal clear on the record about the walkway, the boardwalk, I assume the boardwalk is off limits as well, that boardwalk that we walked on?

THE COURT: That is my intention, that these folks during the time of pendency of the appeal do not have to put up with Mr. Payne sending any more expressions in whatever form towards them. That includes within the view of that boardwalk or that island, and we'll fashion a means to accomplish that.

MR. PENNINGTON: Thank you for clarifying that, Your Honor.

MS. CARDILLO: Thank you.

THE DEFENDANT: Thank you, Your Honor.

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(Whereupon, the proceedings were concluded.)

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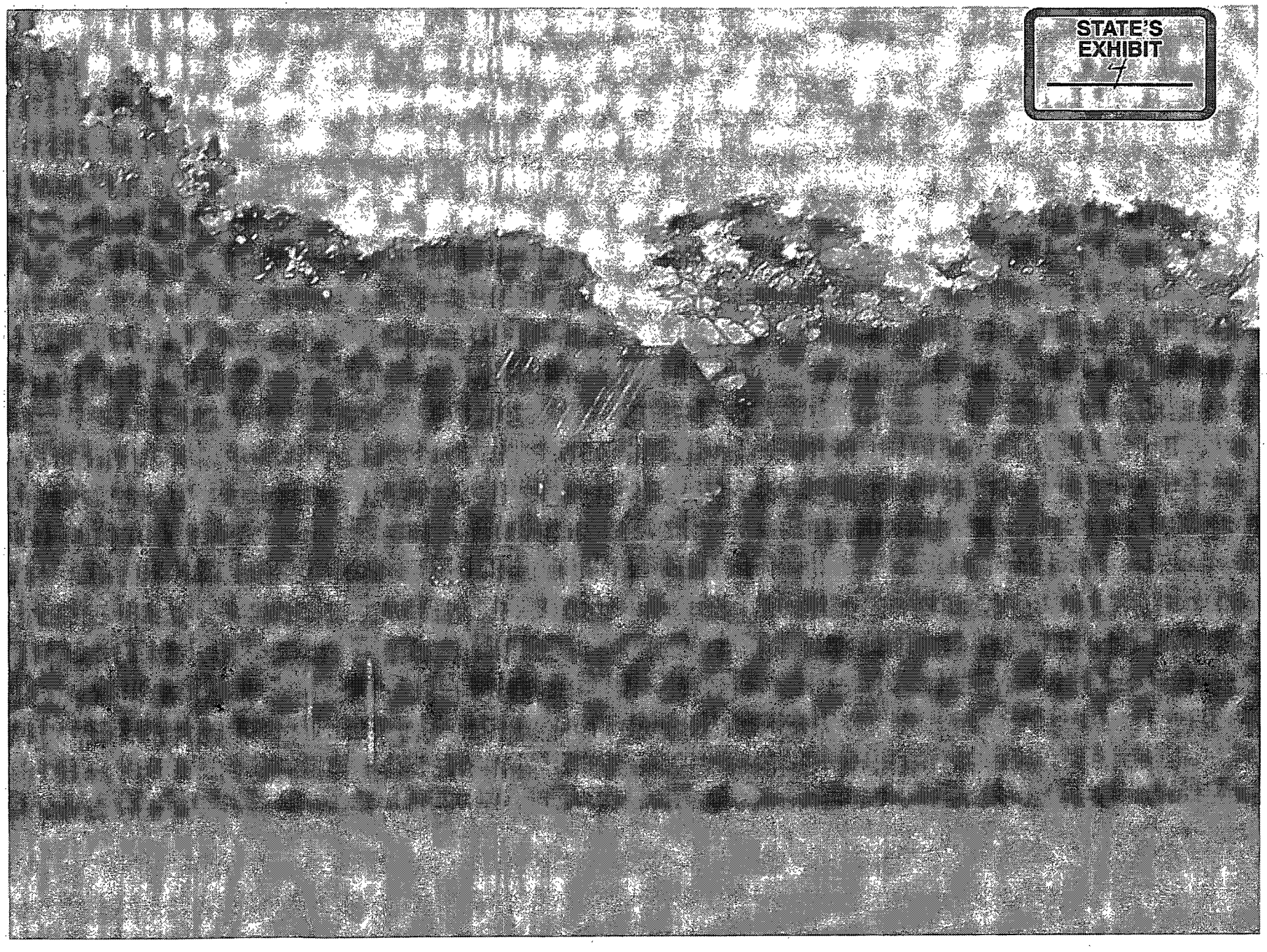
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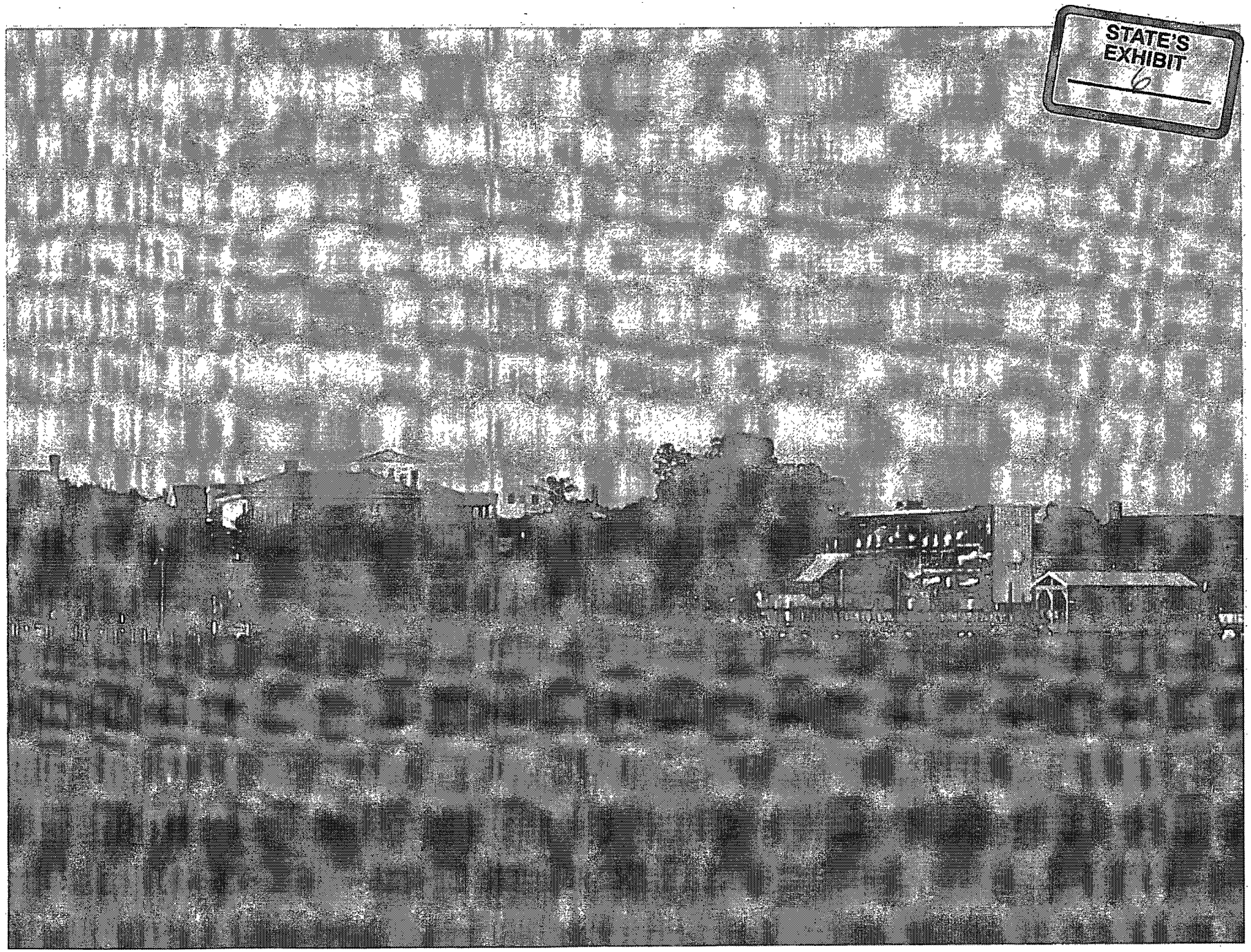
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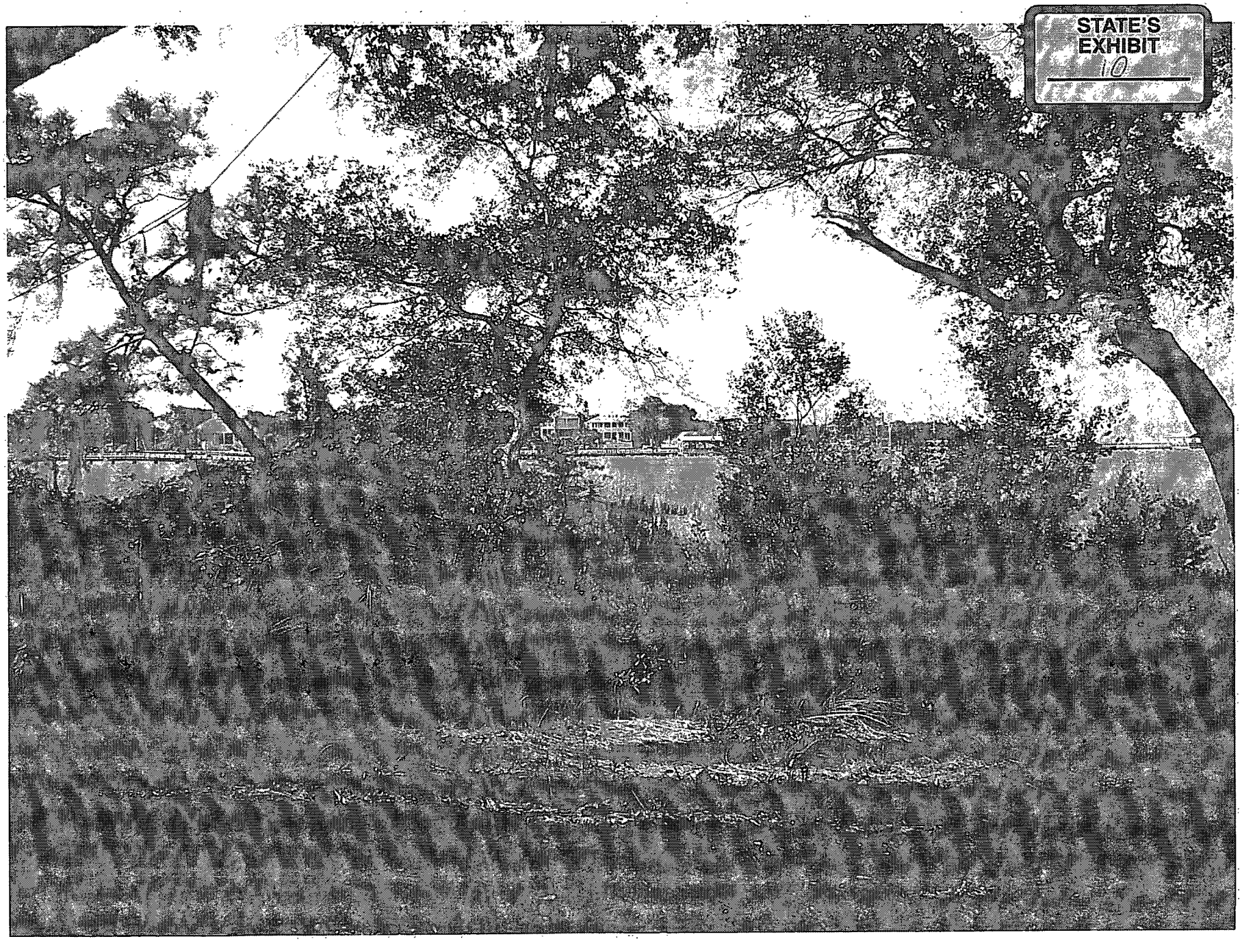
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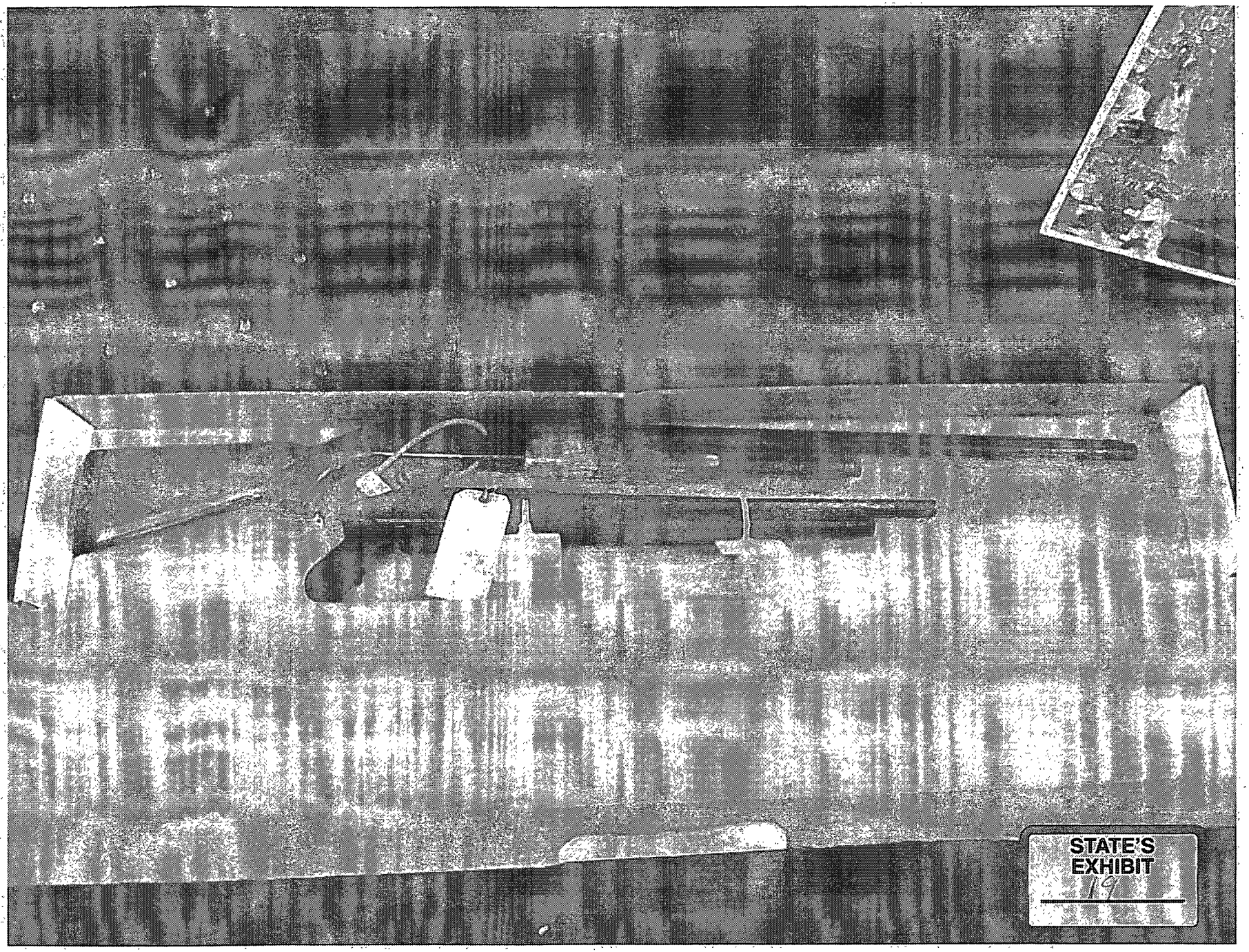
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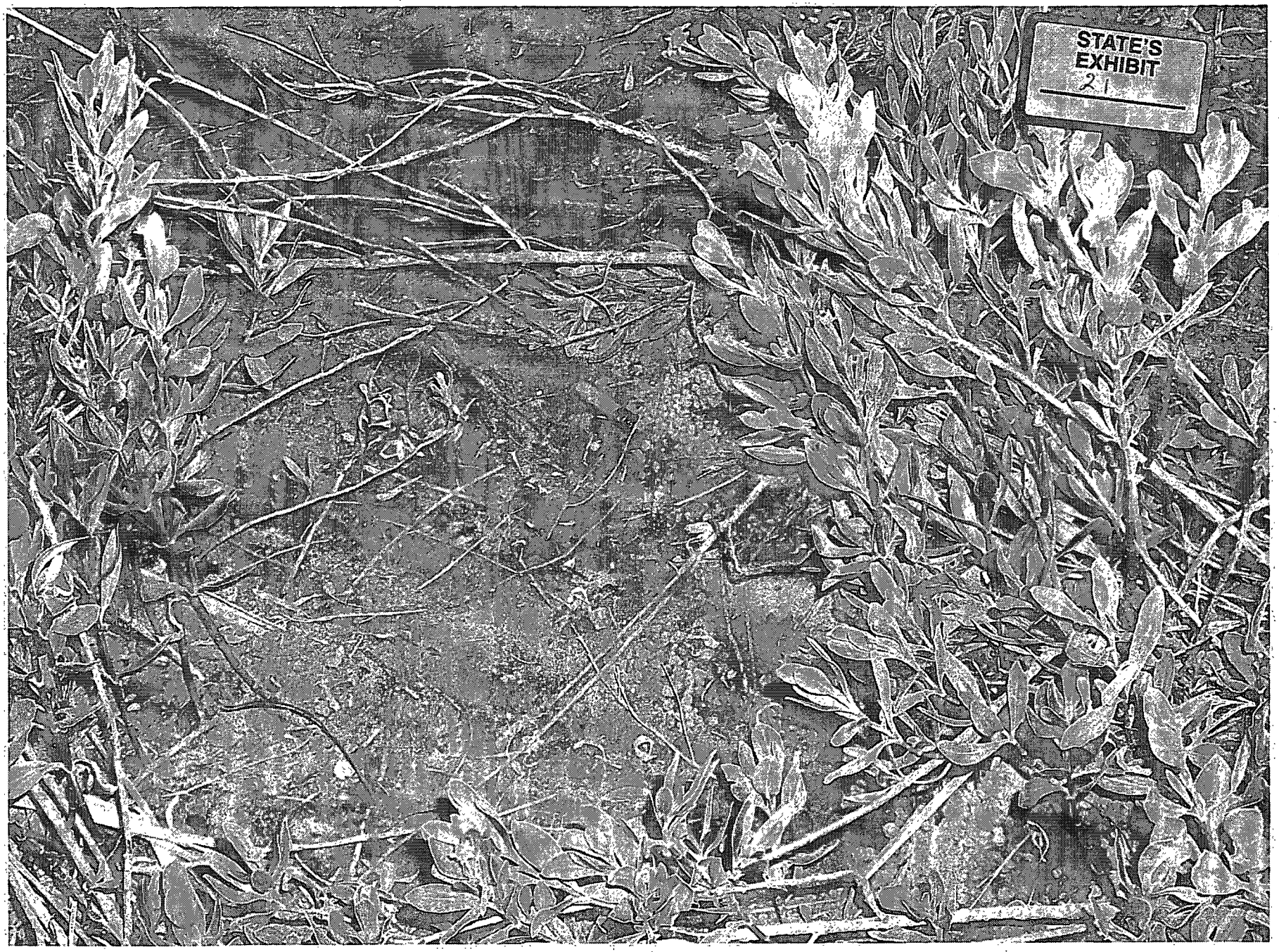
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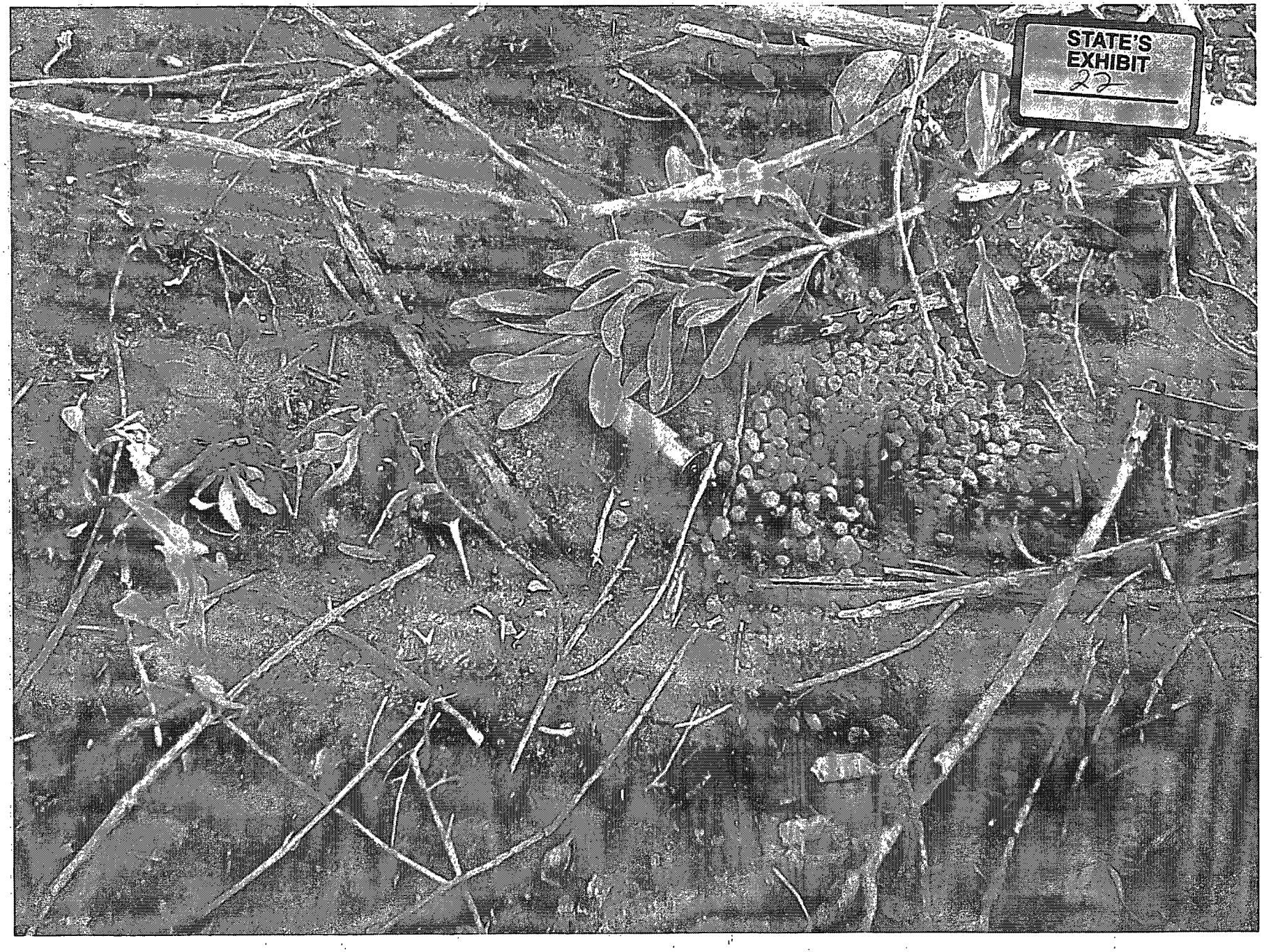
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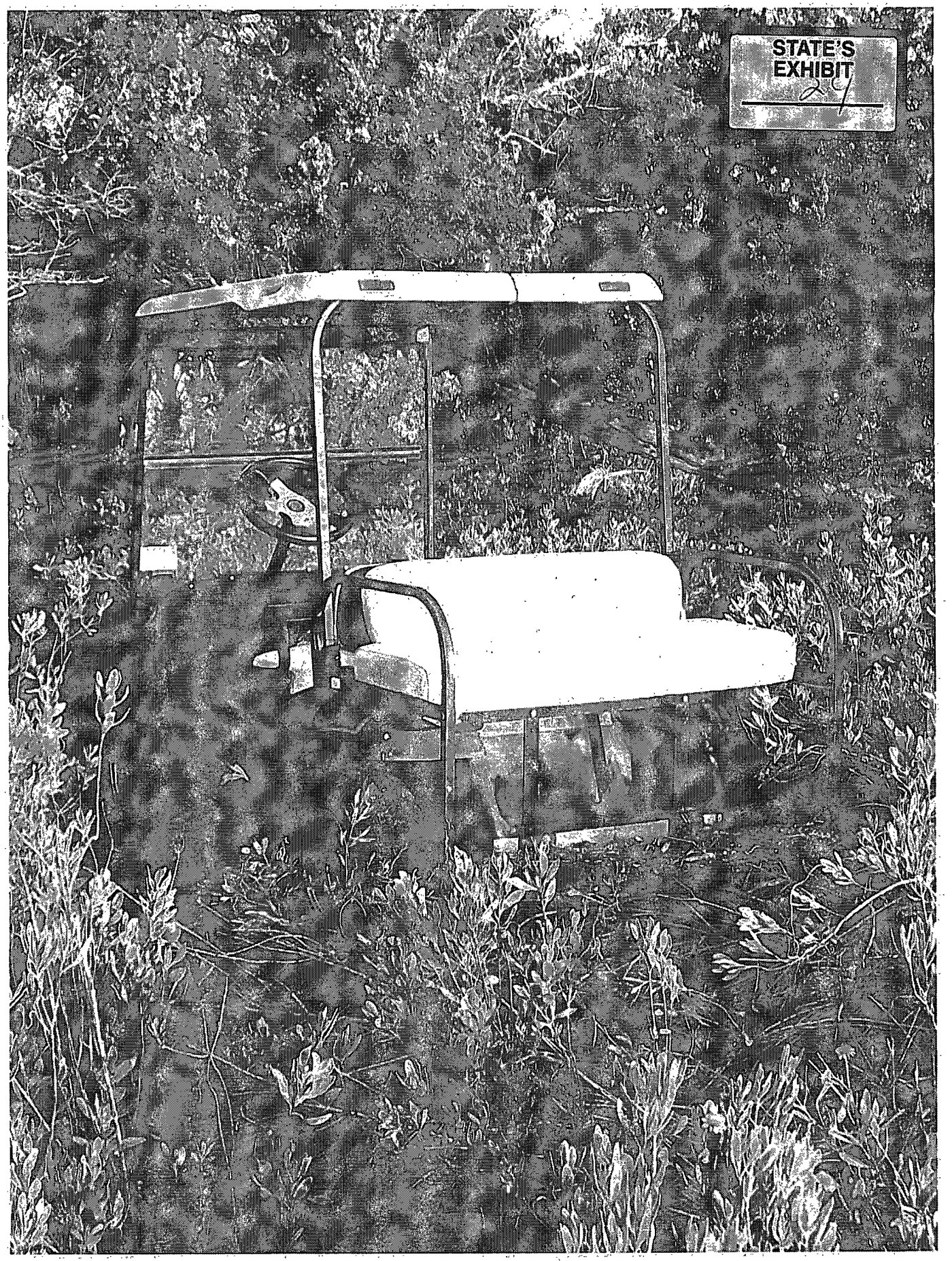
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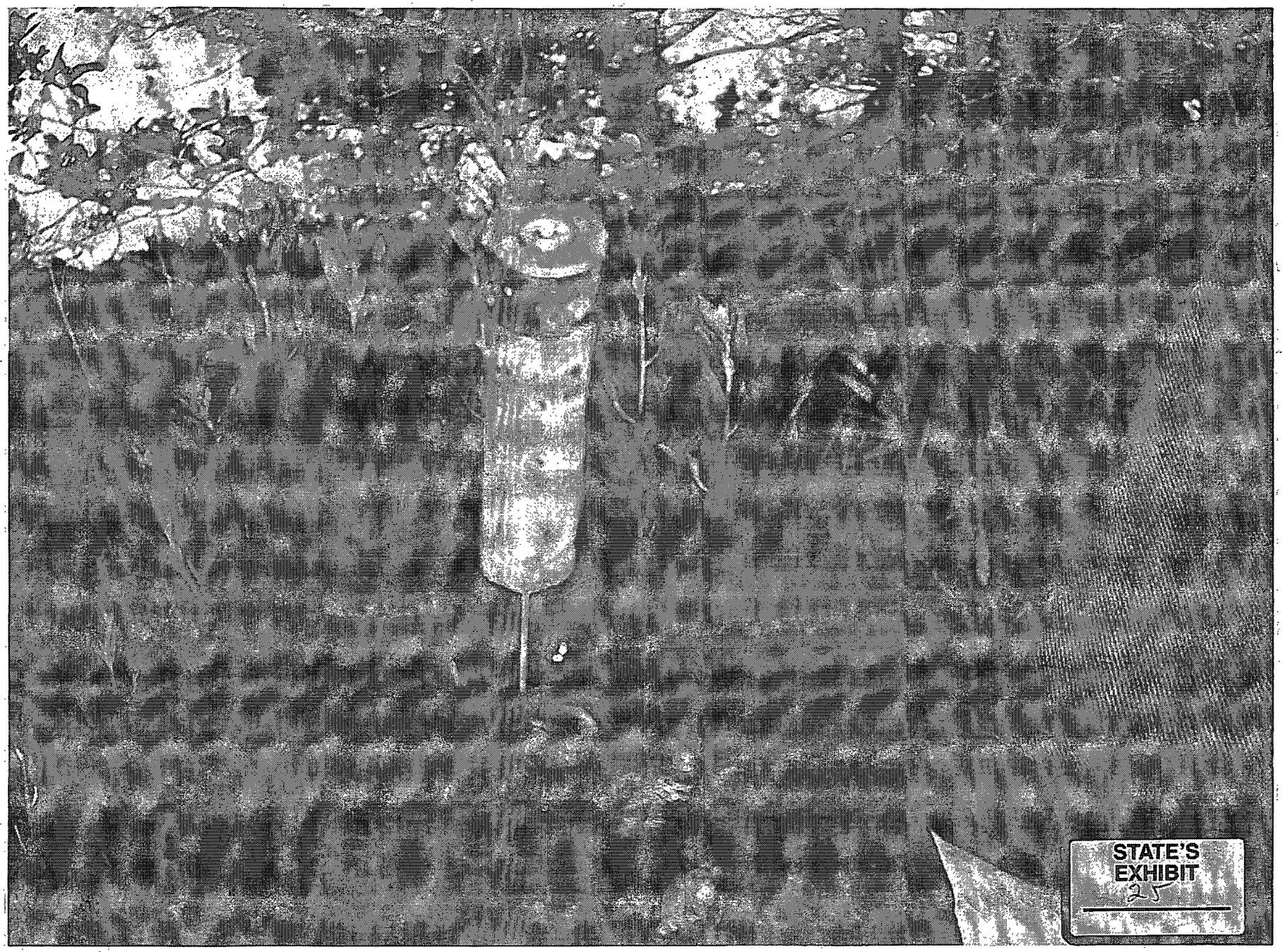
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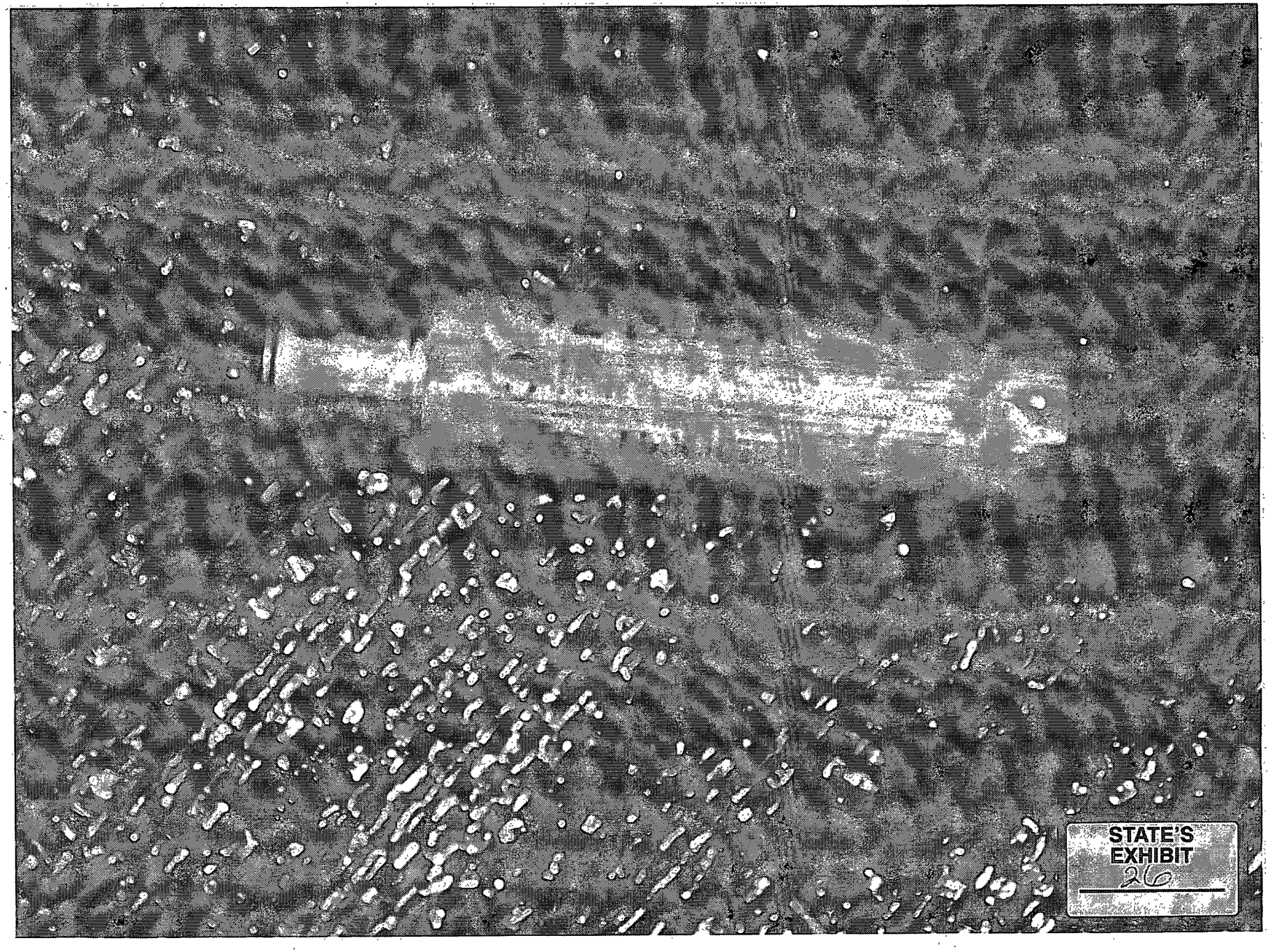
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SOUTH CAROLINA
29464

May 27, 2011

POSTED ON VESSEL

Mr. Robert Payne

RE: *Notice of Unauthorized and Illegal Activity*
Abandoned Boat / Trespassing on Town Property
Without Town Authorization and Permission

Dear Robert:

I am writing as a follow-up to my May 24th letter to you relative to your abandoned and inoperable houseboat/property located on Town property at Shem Creek. Note that the referenced letter included a copy of The Notice of Unauthorized and Illegal Activity which was posted on your houseboat/property.

As a result of our meeting and discussion on this date, it is my understanding that you have represented to me that you will voluntarily remove your boat/property from the Town's Shem Creek property on or before June 4th, 2011. It is further my understanding that your removal plan will take advantage of the high tides which are scheduled to occur during the period of June 1st through June 4th.

Accordingly, please now know that I am willing to accept the referenced representation by you on behalf of the Town and, as a result, will suspend any Town removal action prior to the referenced June 4th. Please know, however, that if the referenced boat/property is not removed as represented, the Mount Pleasant Police Department will take action to remove the same.

Sincerely,

Harry Sewell
Chief of Police

DEFENDANT'S EXHIBIT
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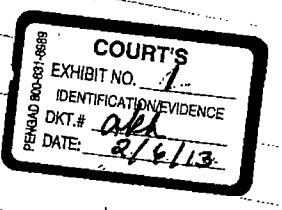
ALH 2/6/13

Judge,

Juror # 173 would like a cigarette break. Is that possible.

Thanks

Donna Marie King



Is there a law or maritime rule about boats in the ~~water~~ marsh.

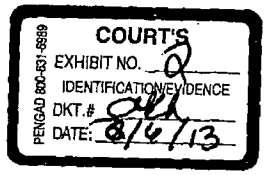
This was not discussed just brought up to me by Juror # 28.

Thanks

Donna Marie King

Please do NOT Discuss the Case in any way. I will instruct you on any law that applies to this Case.

Ron Yoy

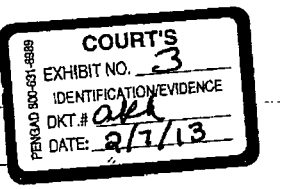


Please clarify your wording on Pointing and Presenting a fire arm. Is it
B. The State must prove beyond a reasonable doubt that the Defendent presented or pointed at another person a loaded or unloaded firearm.

If we remove "or pointed" does present mean at another person or just presenting a weapon.

Donna Marie King

You should read it to mean it is unlawful to present AT another person ....
OR it is unlawful to point At another person...



Is there a time limit tonight? Where we can stop or do we go through the night

Donna Marie King

We have 1 charge left.
We have 3 people that need to leave by 6:30

We can stop as late as you desire or we can break for the night and return tomorrow morning whenever you wish.

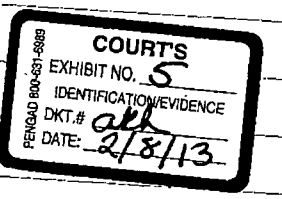
Ryan Ung

COURT'S EXHIBIT NO. 4
IDENTIFICATION/EVIDENCE
DKT.# akl
DATE: 2/7/13
PENGAD 800-631-6989

We would like to see the police reports of Mr. Stone & Mr. Anderson.

Donna Marie King

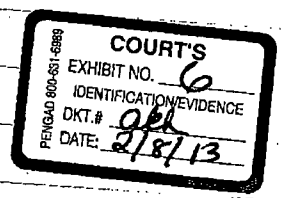
NOT IN evidence



May we please listen to the 911 calls and can we physically see the shell casing.

We also need the description of charges that was not returned today.

Donna Marie King



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2011-GS-10-05232
Case No.: 2011-GS-19-04844

The State of South Carolina.....Respondent,

v.

Robert Harvey Payne..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties.

Ginger D. Gelforth
LAZENBY LAW FIRM, LLC
PO Box 6099
Spartanburg, SC 29304
(864) 804-5050

Robert M. Dudek
Chief Appellate Defender
SC Commission on Indigent Defense
Appellate Division
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330
ATTORNEYS FOR APPELLANT

RECEIVED
JAN 14 2015
SC Court of Appeals

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PROOF OF SERVICE

I, the undersigned, hereby certify the Record on Appeal in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, T. Parkin C. Hunter, Assistant Attorney General, by sending to the SC Attorney General's Office at PO Box 11549, Columbia, SC 29211-1549, on December 5, 2014.

Ginger D. Goforth
LAZENBY LAW FIRM, LLC
PO Box 6099
Spartanburg, SC 29304
(864) 804-5050

Robert M. Dudek
Chief Appellate Defender
SC Commission on Indigent Defense
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Columbia, SC 29201-1589
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ATTORNEYS FOR APPELLANT

December 5, 2014