THE STATE OF SOUTH CAROLINA
In the Supreme Court

ORIGINAL

APPEAL FROM PICKENS COUNTY
Court of General Sessions

The Honorable G Edward Welmaker, Circuit Court Judge

Opinion No 4966 (S C App Filed April 25, 2012)

THE STATE, PETITIONER,

v

MAHAMMED AHAMAD ATIEH
(A/K/A MOHAMMED A ATIEH) RESPONDENT

APPENDIX- VOLUME 2

J FAULKNER WILKES
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Senior Assistant Deputy Attorney General

HAROLD M COOMBS, JR
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

W WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit
305 E North Street, Suite 325
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of General Sessions

The Honorable G Edward Welmaker, Circuit Court Judge

Opinion No 4966 (S C App Filed April 25, 2012)

THE STATE, PETITIONER,

v

MAHAMMED AHAMAD ATIEH
(A/K/A MOHAMMED A ATIEH) RESPONDENT

APPENDIX- VOLUME 2

J FAULKNER WILKES
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Senior Assistant Deputy Attorney General

HAROLD M COOMBS, JR
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

W WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit
305 E North Street, Suite 325
Greenville, SC 29601
(864) 467-8647

ATTORNEYS FOR PETITIONER

INDEX

same source as any future juror will be There's no reason for me to suppose that the case will ever be submitted to twelve more intelligent or impartial or conscientious or competent jurors than you, or that more or clearer evidence will be produced from one side or the other

I'm going to ask you, Mr Foreman, ladies and gentlemen, if you would return to your deliberations and with the hope that within a reasonable time you can arrive at a verdict on this matter that -- as you presently are at an impasse I'll ask you if you would go back, continue your deliberations for a reasonable time and if you can't reach a unanimous verdict, please just let the bailiff know and we'll call you back at that time Thank you very much

(WHEREUPON, the jury exited the open court at approximately 3 25 p m)

THE COURT All right We'll be at ease until we hear from our jury

(WHEREUPON, the Court stood at recess awaiting the verdict of the jury)

THE COURT I understand the jury has reached a verdict Is there anything we need to take care of before the jury comes in?

MR RICHARDSON Nothing from the State, Your

Honor

MR NEWTON No, Your Honor

THE COURT Many cases, and particularly cases of this nature, create a lot of emotion There's emotion on both sides I don't know what the jury verdict is It may be -- more than likely will be one to bring elation to one side and disappointment to the other Whatever the verdict of the jury is, we're going to respect that verdict They've worked awfully hard on this case They've deliberated long and hard They've given it their best and we're going to accept the verdict whatever it may be

If there's any person here, lawyers on down to people in the audience that feel like that you cannot control your emotion, I know we are emotional people and that sometimes that comes out, but if you believe you cannot control your emotions when the verdict is read, this would be a good time for you to excuse yourself from the courtroom I'll give you that opportunity You'll be able to hear what the verdict was very shortly after it's rendered But we're going to make sure that everyone who is in the courtroom is going to show the proper respect for this jury who's made the decision on the facts of the case If there is any disrespect toward the jury then obviously I want

everybody to understand that I'll deal with that as a contempt of court since I'm instructing everyone to respect that jury And I'm not saying you have to damper your emotions, but if you have those emotions this is the time to excuse yourself I hope everybody understands that If anybody wants to be excused, I'll give you an opportunity to do that

All right Let's have our jury come in

(WHEREUPON, the jury entered the open court at approximately 4 26 p m)

THE COURT Mr Foreman, I understand the jury has reached a verdict Is that correct?

MR FOREMAN Yes, sir

THE COURT Is it a unanimous verdict as to both charges?

MR FOREMAN It is

THE COURT If you would, please, hand the verdict form to the bailiff

(WHEREUPON, the verdict form was handed up to the Court)

THE COURT All right Madame Clerk, you may publish the verdicts

MADAME CLERK In the case of the State versus Mahammed Ahamad Atieh, 2010-GS-39-179, as to the charge of assault and battery of a high and aggravated

nature, we the jury unanimously find the defendant, Mahammed Ahamad Atieh, guilty James E Bolden, foreperson

State of South Carolina versus Mahammed Ahamad Atieh, 2010-GS-39-180, as to the charge of assault with intent to commit criminal sexual conduct third degree, we the jury unanimously find the defendant, Mahammed Ahamad Atieh, guilty James E Bolden, foreperson

If this is your verdict and still your verdict please raise your hand and say, yes

(WHEREUPON, all jurors' hands were raised and stated yes)

THE COURT Anything we need to take care of with the jury before they're discharged in this case?

MR RICHARDSON Nothing from the State, Your Honor

MR NEWTON No, Your Honor

THE COURT Mr Foreman, ladies and gentlemen, thank you very much for your service this week You've been a terrific jury for me to work with You've been conscientious You've participated well and I'm grateful for that opportunity I'm honored to have a chance to work with you You've been the fact finders, you've been the judges of the facts That makes our system work You may never have an

opportunity to serve as a juror again You may have had the opportunity in the past, but you've fulfilled a valuable service for your community You've directly participated in your government

You -- as citizens of this county, we don't get an opportunity to pass laws and be part of the legislative branch and make those decisions You can petition your city council member or your mayor or governor of the state or any legislator to pass laws or repeal laws or to do something different We can write letters and make calls, but we can't pass those laws And the same with the executive branch, those who administer those laws, the mayor of some town to carry out the laws that have been passed by the council We can't do anything about that We can write all the executive officers and -- from the mayor, to the governor, to the President of the United States and ask and petition them to do something about the laws, but we can't really pass them

But you've directly participated in the third branch of government, the judicial branch, because you've been a judge As I've told you, you've been a judge of the facts and you should be proud of yourself that you rendered this service to your community I'm grateful to have an opportunity to work with you

Some of you may need statements for your employers that you have been on jury service this week If that's the case please stop by the clerk's office downstairs They'll have those for you

You're dismissed for this week If you remembered what I said on qualification on Monday, this really excuses you for the next three years because if you remember you can be exempted from jury service every three years You don't have to serve more than that I hope if you get called next year that you'll want to serve again I know that jury service is not an easy service, but it's a high calling and I hope it's been an educational experience for you

You're dismissed at this time Thank you very much for your service Mr Foreman, I'll ask if you would please meet with the clerk in the hallway There's one additional piece of paper I need for you to sign Thank you very much, ladies and gentlemen

(WHEREUPON, the jury exited the open court at approximately 4 33 p m)

THE COURT All right Anything we need to take care of before sentence is imposed?

MR NEWTON No, Your Honor

MR RICHARDSON Nothing from the State

THE COURT Do you have sentencing sheets

ready?

MR RICHARDSON I just handed them to Mr Newton

THE COURT Mr Newton, Mr Hunt, be glad to hear from either one of you Be glad to hear from your client Be glad to hear from anyone from the State that would like to be heard before I impose sentence Anything you want to tell me, sir?

MR NEWTON Well, Your Honor, as you know, we've strongly maintained our client's innocence all along He is a married man He does have several young children He is the provider of those children and his family He is a successful businessman We would ask the court to consider a sentence of house arrest for these charges

MR RICHARDSON Your Honor, if it pleases the court, the victim would like to address the court at the appropriate time

THE COURT Mr Hunt, anything from you or Mr Atieh? I'd be glad to hear from you, sir

MR HUNT Please the Court, Your Honor I've gotten to know Mr Atieh over a period of time I have -- feel as though they've tried very hard to conduct themselves as well as they possibly could He, we -- Mr Newton became involved because he wanted a

stronger defense and he obtained him

That being said, Your Honor, I would ask that the Court take into consideration the fact that there were numerous, numerous, numerous people who worked in that business over soon to be ten years and I just would, I just would beseech the Court to consider the fact that he has three children, three years I think he told me, three years and two months -- fifteen months and two months His wife is here And any consideration the Court could give them, give him, would be most appreciated Thank you

THE COURT Mr Atieh, anything you want to tell me, sir I'll be glad to hear from you

DEFENDANT I swear to God I did not do anything wrong This is my, my, my final word I did not commit anything un-normal or unusual And I swear I'm pretty sure about that I'm talking about myself, you know I'm -- I lived in Italy for fifteen years and I've been here for fifteen years And I'm not a teenager and I know what, you know, I'm not going to damage a family We are in small community, damage myself, my family, my everything And the lawyer, he said, okay, there's a proposal, if you want to plead guilty, they going to give you eleven months probation and dismiss the other case I said, sir, I don't feel

like it because how can I plead guilty with something that I did not do I have opportunity to say, yes, I'm guilty to get out of it, get rid of it

But seriously, I really I have -- most of Easley, they know me I mean, because I been -- you know, I work really so hard and I never, ever had any problem since I'm in this country And I lived in Italy and I get my degree in Italy and I'm not, I'm not, you know, that stupid guy just come in to do something and for sure, I mean, here we are in free country If I really looking for this I could have anywhere I mean, you know, there is many places that offer you this It's not like that I'm looking for that or, you know, I need this

And I have I've been married with my wife She's not like -- she's twenty-six years old, she's not that old And I'm not -- and again, really I don't feel, I don't feel like any remorse I don't feel like any guilt in my, you know, in me that I did not And see, I have three kids, the oldest one is two years and nine months and then the youngest one is two months and ten days And the middle one is one year and two months I don't want to just leave my kids, I'm really very attached with them And, you know, I'm not -- I work really hard for them just to have a normal life And I

been -- I can't go back to my country because I have the political problem with the government This is why, you know, how can I just do stupid stuff just to put me in some situation that, you know, that just -- I mean, already I have problems just because I have nowhere to go I mean, I can't see my family and now to put myself where I am right now, United States, put myself in situation where I get convicted What I'm saying I been here almost fifteen years I never, ever -- you know, I know the law, I respect the law I got my degree It's not, I'm, you know, a teenager or I'm not uneducated Thank you

THE COURT Yes, sir Thank you Anybody else want to address me from the defense? I don't want to shut anybody off I'll be glad to hear from whomever

MR NEWTON You've heard from a number of witnesses who have worked with him or family members that worked with him and they've all said that he's a great guy They're here to support him

THE COURT All right I'll be glad to hear from anybody from the State who wants to address the Court

MR RICHARDSON State your name for the record and your relationship

MS MORGAN Dorothy Michelle Morgan, Megan Davis's mother

THE COURT Yes, ma'am I'll be glad to hear from you, Ms Morgan

MS MORGAN Your Honor, I don't want to see his wife and children suffer because they're innocent I don't want our tax dollars to put him away I don't want us to have to pay for him to be in prison But I feel like if you're going to be in this country that you have to abide by our rules It would be my wish that he leaves our country

THE COURT You understand that that's not part of the sentencing guideline that I have ---

MS MORGAN No, sir I didn't know that

THE COURT -- to extradite anybody Thank you Anything else you want to tell me?

MS MORGAN No, sir

THE COURT Anybody else?

MR RICHARDSON Your Honor, I just -- briefly the concern I have is out of his own mouth And that's the lack of remorse He said it I have no remorse And that in essence is what this whole thing has come down to

THE COURT Well, he's maintained his innocence

MR RICHARDSON I understand that And lack of acceptance of responsibility That's my position and that's the problem I have

THE COURT Yes, sir I certainly understand Do you want to say anything else?

DEFENDANT Yes, probably not because I'm forty now Probably sometimes I say something I don't mean it, you know, and because, you know, I try to say something probably they get it the wrong way This is -- when I say remorse, that mean I didn't do something, you know, that I feel right, really, really comfortable myself I really did not do anything to harm nobody And I promise, I swear to God I did not -- and I have, you know, I'm just -- I'm here to take care of my family and just to live the normal life And we have been doing -- been married almost for four years and -- three, four years and that's it

MR NEWTON The judge understood what you meant When you said, you don't feel remorse that meant you were maintaining your innocence?

DEFENDANT That's right, that's right

THE COURT Been married for how long?

DEFENDANT Like 2007

MR HUNT Your Honor

THE COURT Yes, sir Just a minute Yes,

sir, Mr Hunt

MR HUNT Your Honor, this is one of the employees that worked with Mr Atieh several, several years and she's been particularly concerned and she talked to me about, you know, about, you know, how he has interacted with both, with she and her family and I think she just wants to say something

THE COURT I'd be glad to hear from you If you'd state your name for the record, please, ma'am

MS SHIRLEY Michelle Shirley

THE COURT Ms Shirley, yes, ma'am

MS SHIRLEY I've been there for about three years and I'm a Christian and a woman with kids of my own And he's been, you know, a very good man to me, businessman, to let me off for the times for church and for everything that I have for school He is a very well liked person, you know, in the community And he really does extend his hand to help out anybody that needs help And I would really like it if you would go lightly because he really is a good man I mean he never -- I've never seen him do anything out of the way but be a really good person And he does have kids that really look up to him, Your Honor

MR HUNT Your Honor, Ms Shirley has related to me that he has -- she has a teenage daughter

who's fourteen years old and a son and both she's left with him in the store before ---

MS SHIRLEY My daughter and my niece, I don't know if you're familiar with like when they get in junior high they have to job shadow, you know And I, you know, adore my kids and everything and I wouldn't never put them in harms way, you know And I let both of them come job shadow, you know, me and left them, you know, with Marco and, you know, with his brother and they showed them around the store and everything And I would have never done, you know, something like that if I thought he was a bad person

THE COURT Thank you, ma'am, for sharing that

MS SHIRLEY Thank you

THE COURT Mr Atieh, I certainly understand your position The jury is the fact finders, I've explained to them as you're well aware I must comply with their findings of fact

This is case 2010-GS-39-180, the sentence of the court is that the defendant be committed to State Department of Corrections for a period of ten years, provided however upon the service of forty-four months The balance is suspended Placed on probation for four years Condition of probation to have counseling as

needed, random alcohol and drug testing as needed and substance abuse counseling as determined needed

Case number 2010-179, sentence is ten years, provided upon the service of forty-four months Suspended during probation This is a concurrent sentence to that previously imposed

I wish you the very best, sir And certainly wish the victim the very best

All right Court's adjourned

END OF REQUESTED TRANSCRIPT OF RECORD

SUBWAY Store 1 Total Hours Budget _____ Week Ending Date 6/17/08 Schedule Sh

283 6/11/2008	Tuesday 6/10		Wednesday 6/11		Thursday 6/12		Friday 6/13		Saturday 6/14		Sunday 6/15		Monday 6/16		Tuesday 6/17		Employee Signature / Hours Worked
	In	Out	In	Out	In	Out	In	Out	In	Out	In	Out	In	Out	In	Out	
Marco (part-time)	Scheduled																
	Worked																
	Total Hours Worked																
Michelle (part-time)	Scheduled	11	2:30	11	2:30	11	2:30	11	2:30				11	2:30	11	2:30	45
	Worked	3.5															
	Total Hours Worked																
Tonya (part-time)	Scheduled	11:30	1:30	11:30	5	11	5	5:30	11	3	10	11	5	11	5		38
	Worked	2		5 1/2		6		5 1/2		7		6		6			
	Total Hours Worked																
Magen (part-time)	Scheduled			5	10	5	11	~~11:30~~ ~~5~~ 11:30	12	5	10	5	10	5	10		11 1/
	Worked																
	Total Hours Worked																
Taylor (part-time)	Scheduled			5	10	5	10			11:30	3	5	10	5	10		23 1/
	Worked			5		5											
	Total Hours Worked																
Salwa (part-time)	Scheduled													10	2		7
	Worked													5	8		
	Total Hours Worked																
Mai (part-time)	Scheduled												5	10			
	Worked																
	Total Hours Worked																
	Scheduled																
	Worked																
	Total Hours Worked																
Total (Our Total Employees)																	

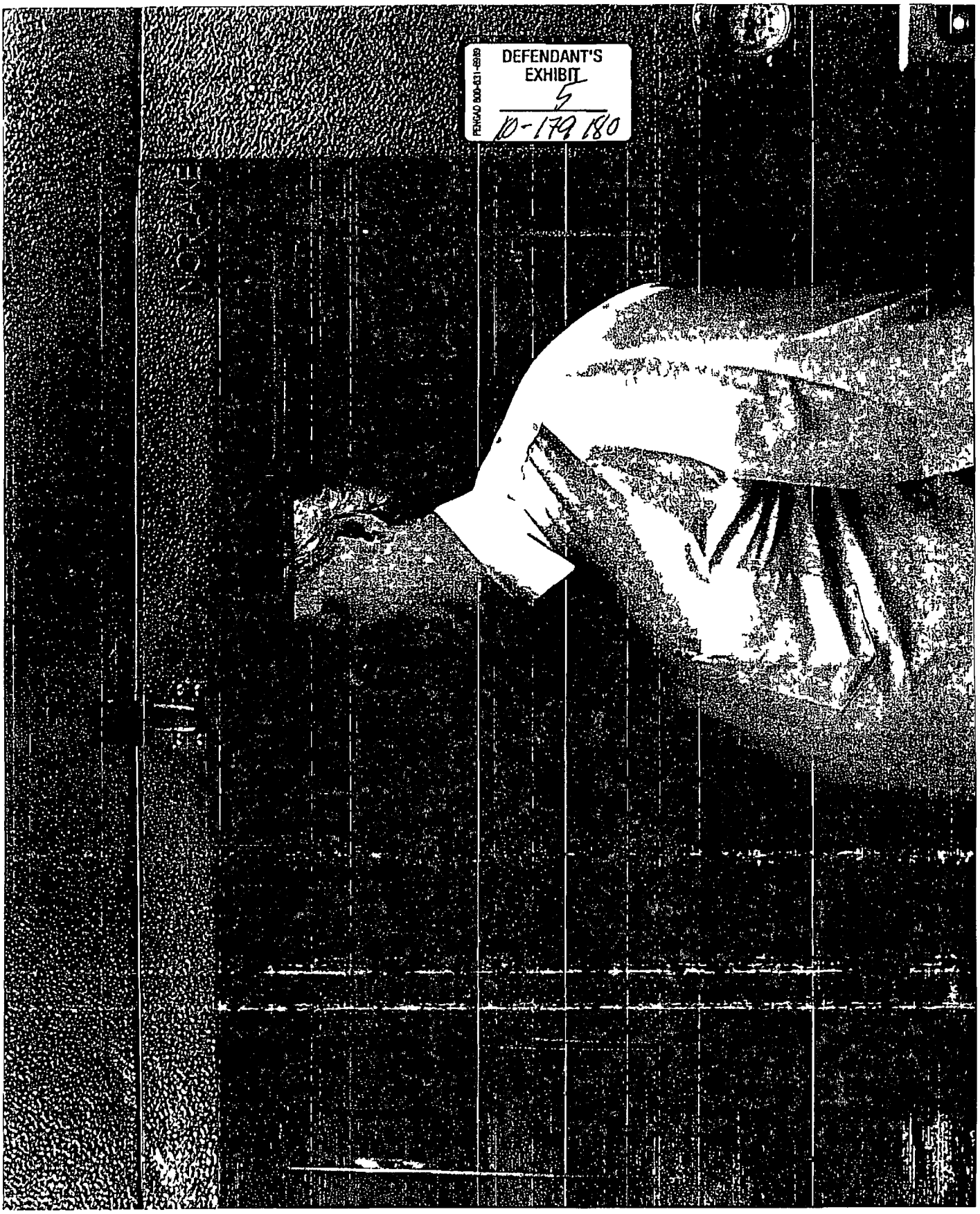
[redacted]

DEFENDANT'S EXHIBIT

ROA 515

516

PENGAD 800-631-6989
DEFENDANT'S
EXHIBIT
4
10-170-180


DEFENDANT'S
EXHIBIT
5
10-179 180
PENGAD 800-631-6989

519

DEFENDANT'S

8

10-179-180

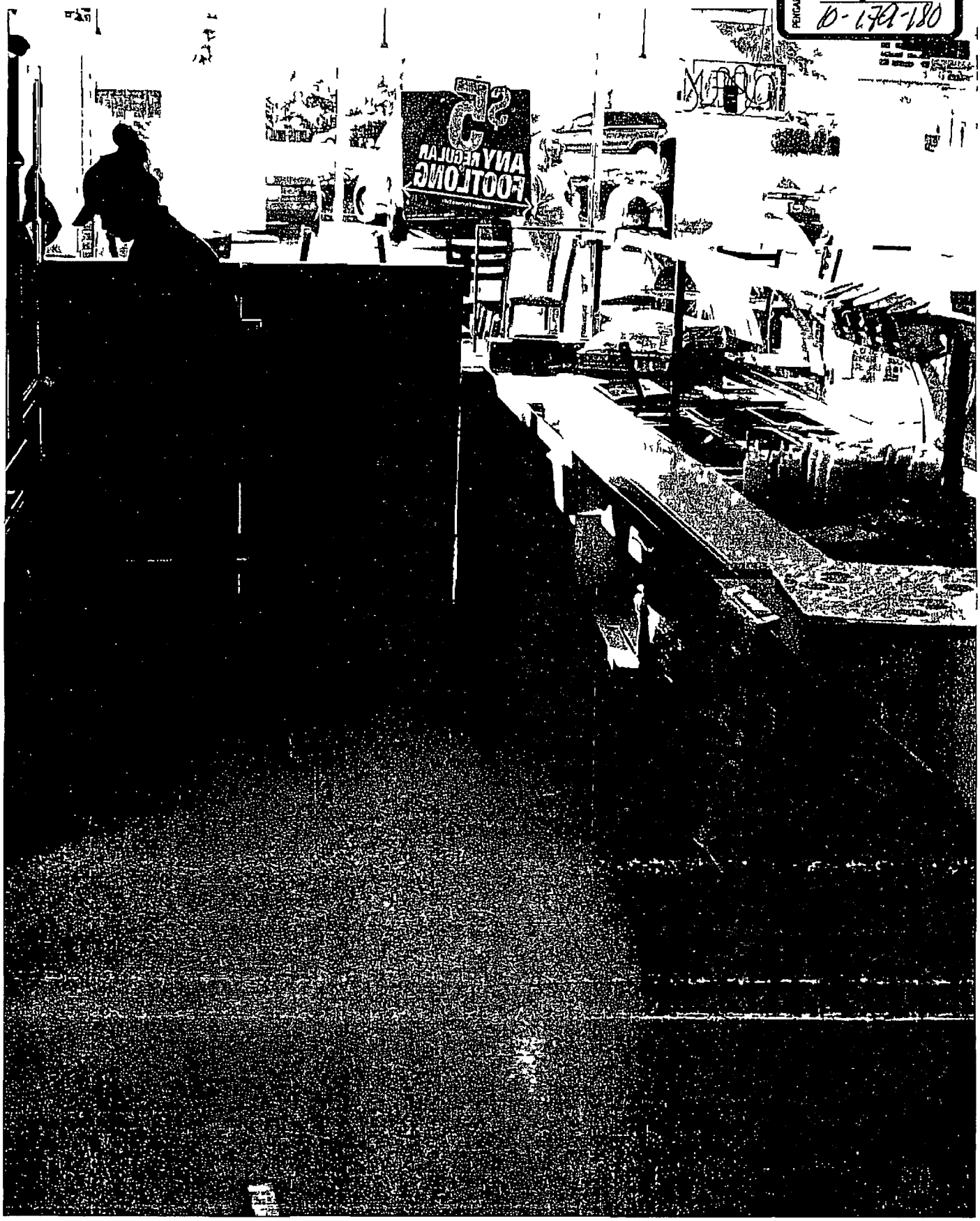
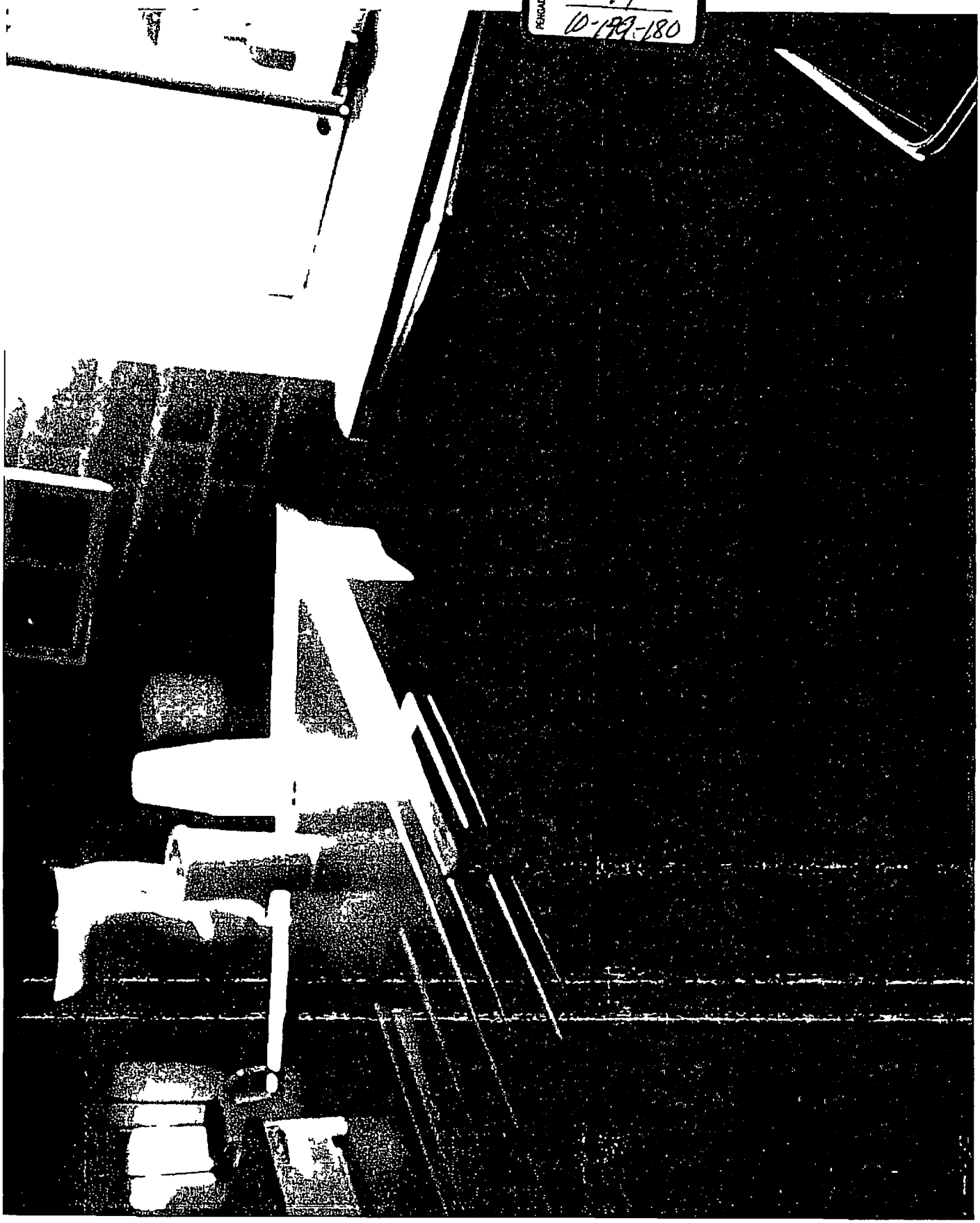
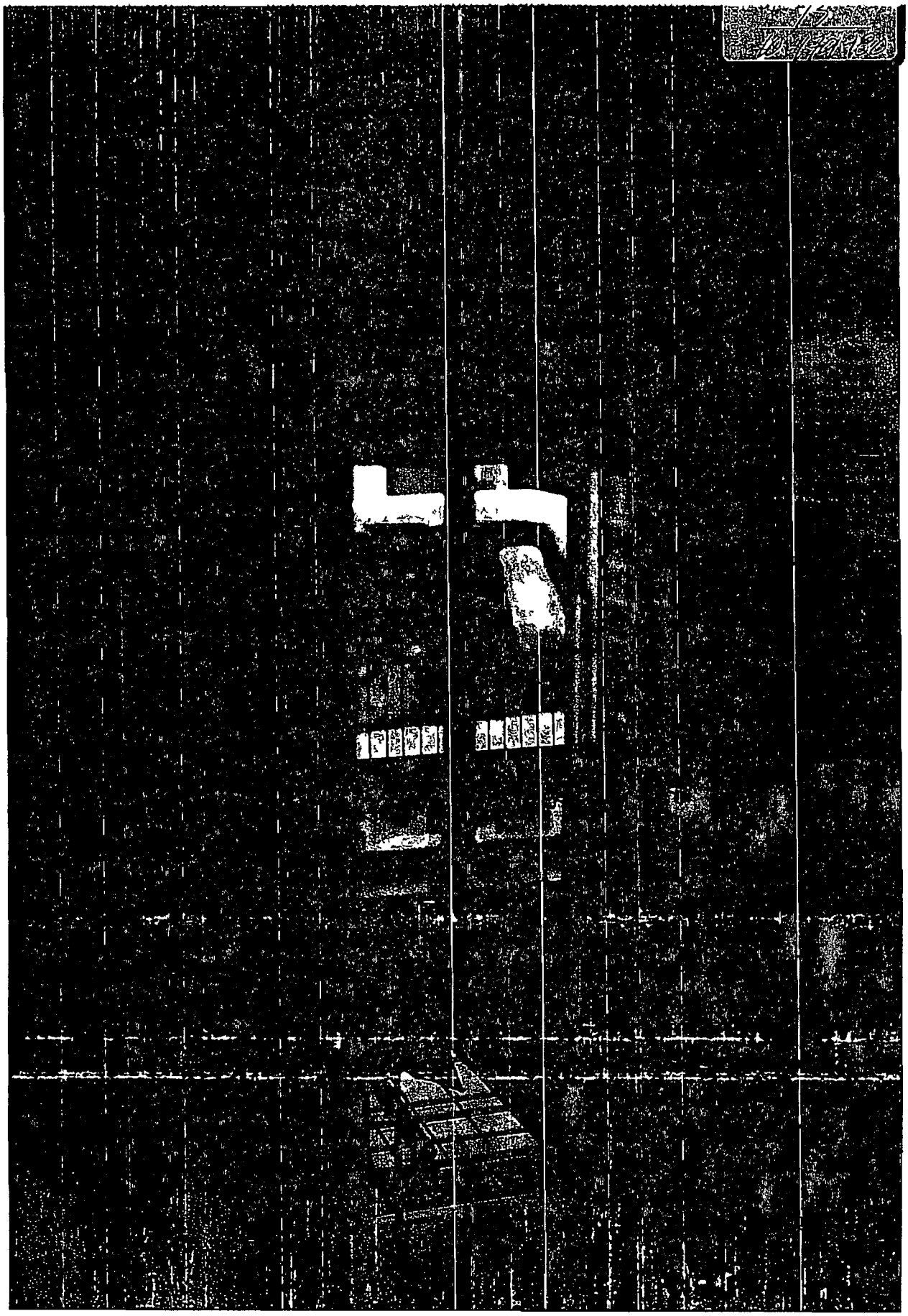
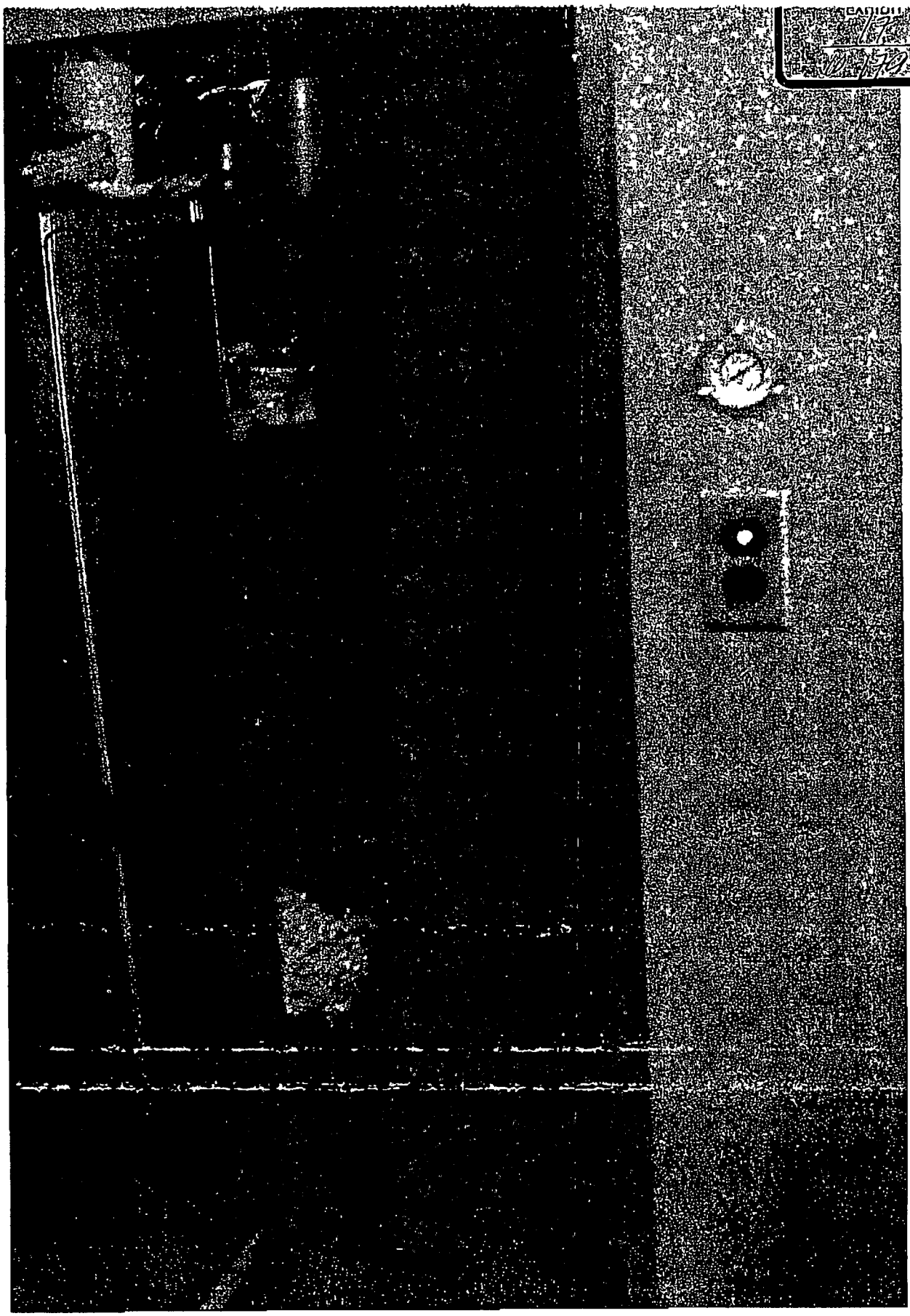
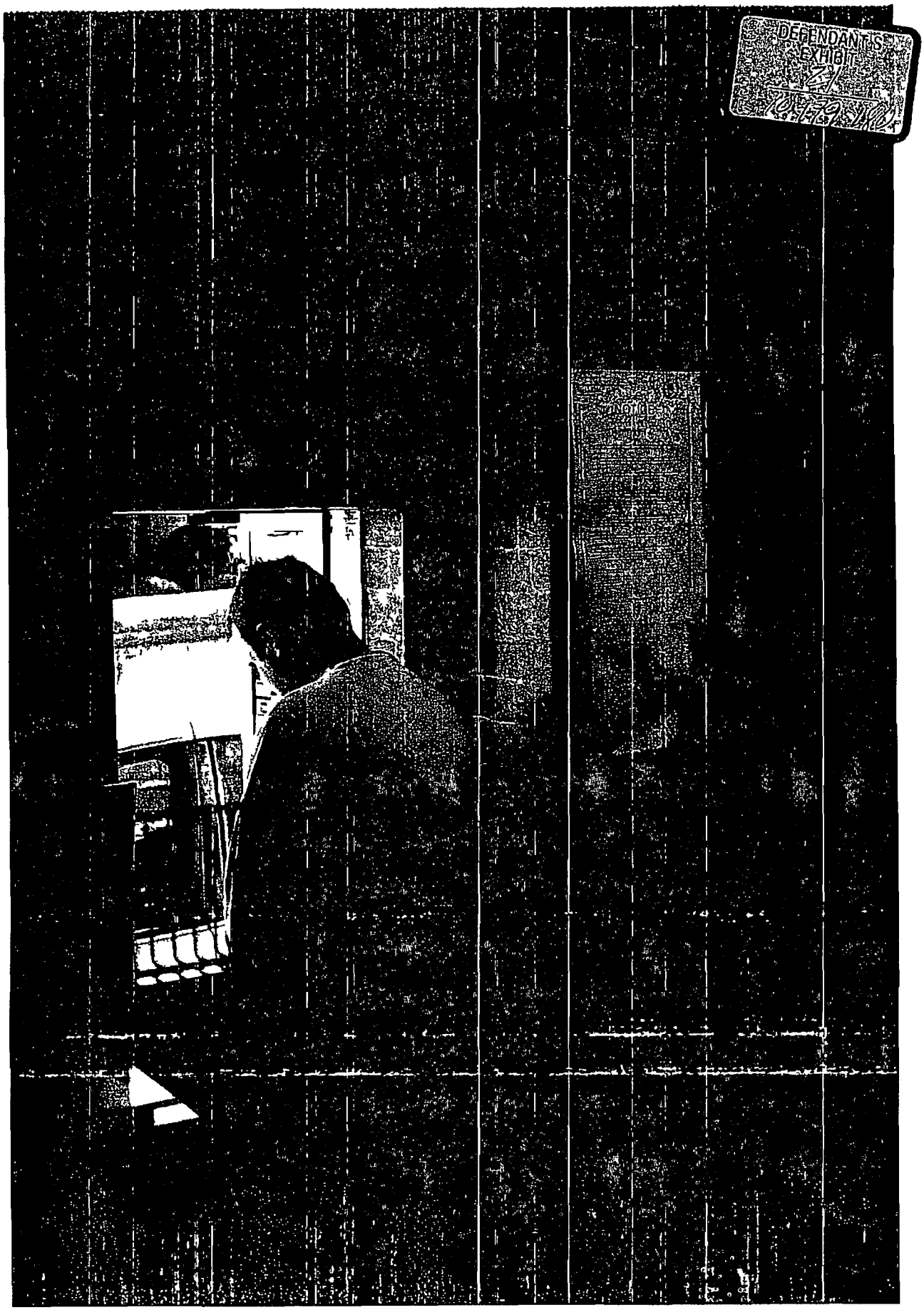


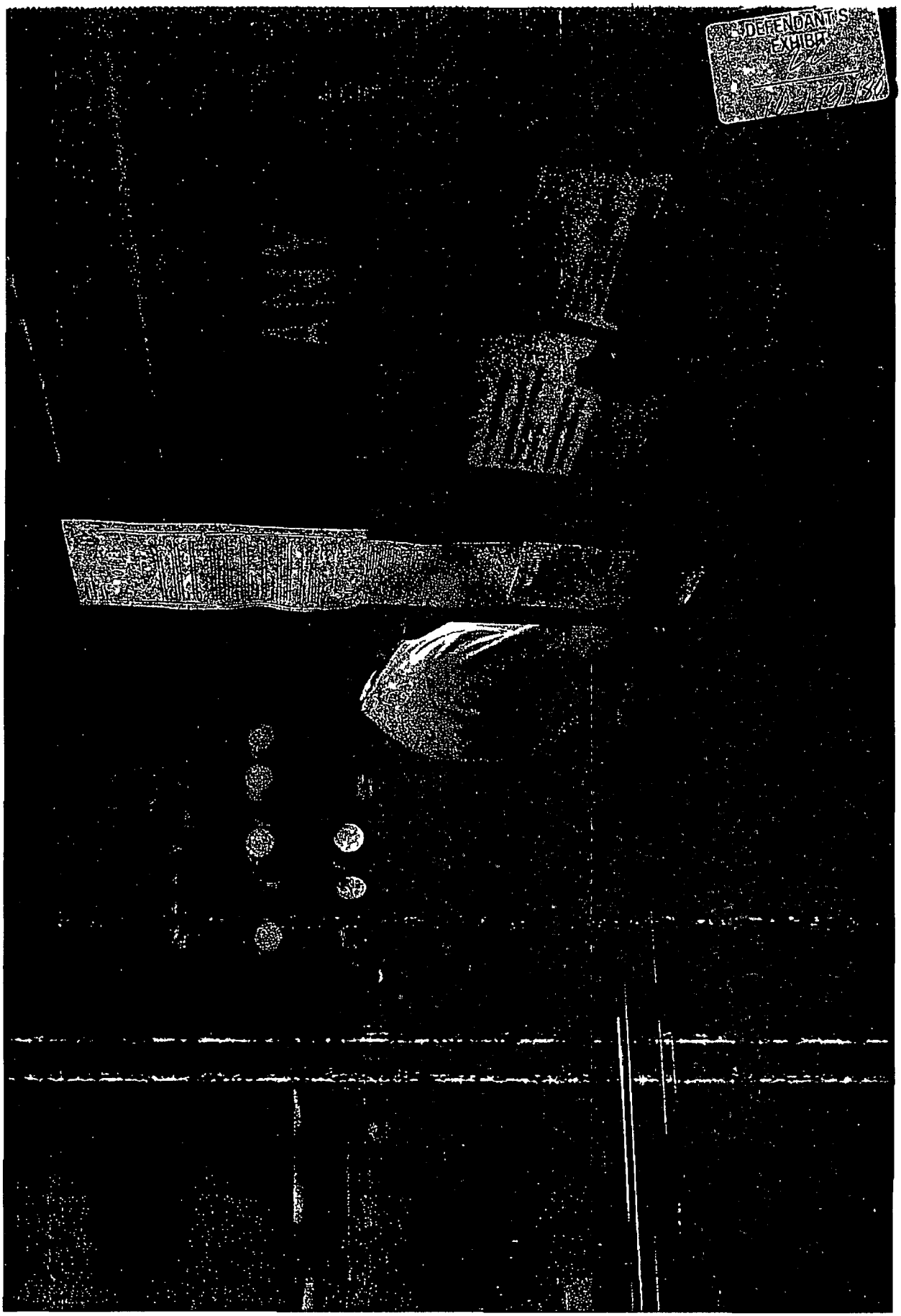
EXHIBIT
10
10-179-18

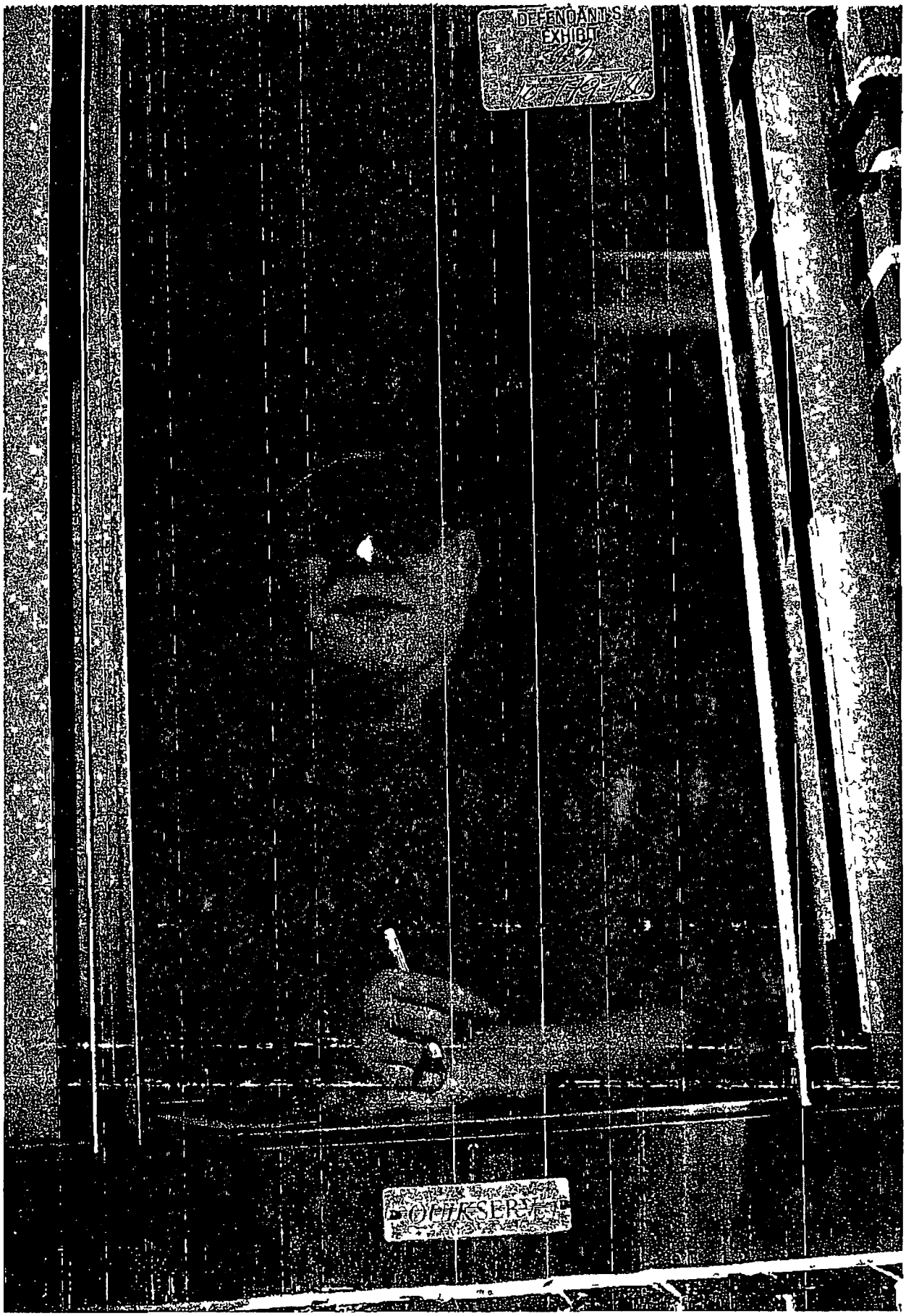


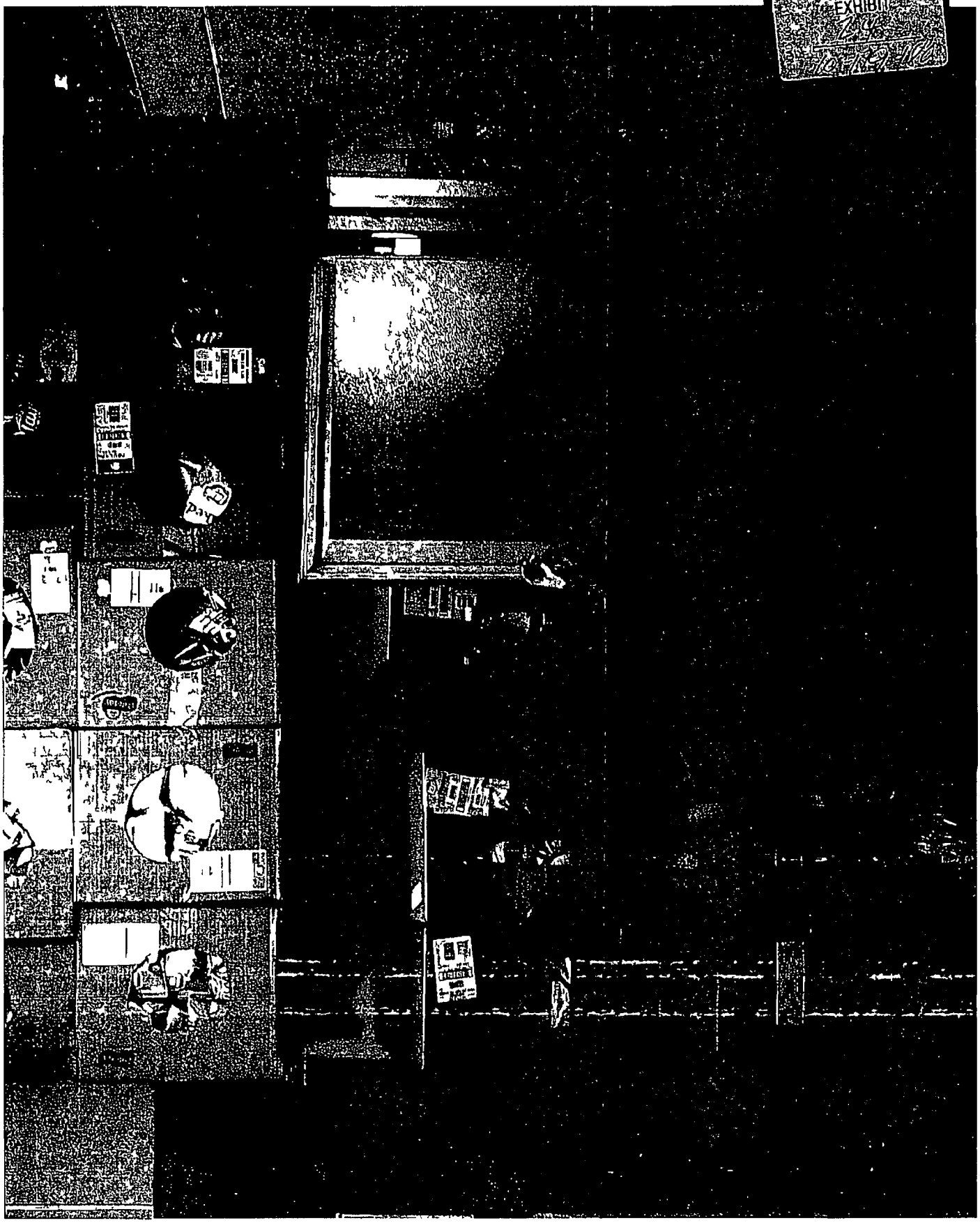


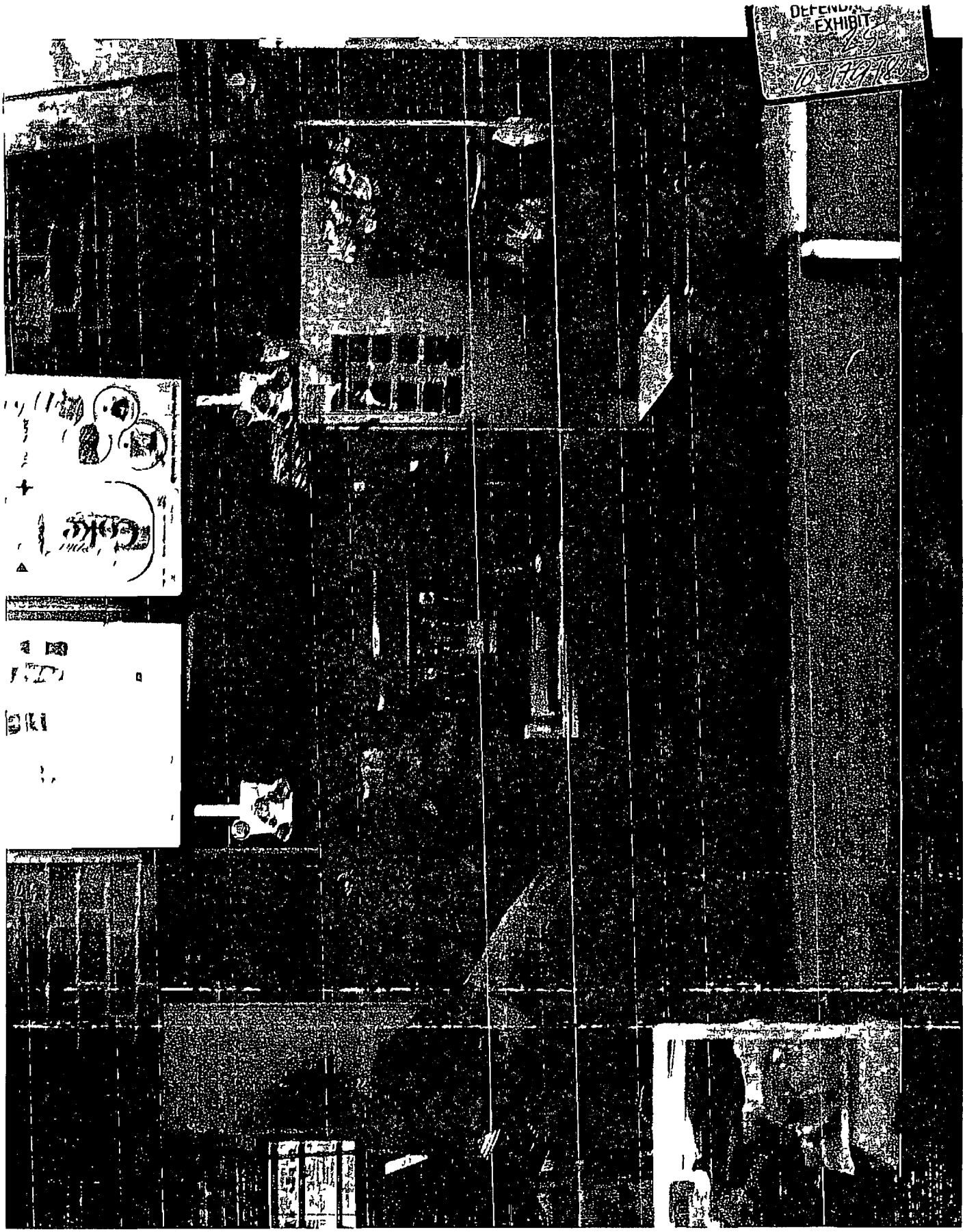



DEFENDANT'S
EXHIBIT
10-29-10


DEFENDANT'S
EXHIBIT


DEFENDANT'S
EXHIBIT


DEFENDANT'S
EXHIBIT


DEFENDANT'S
EXHIBIT

EXHIBIT

EXHIBIT

530

The State of South Carolina
In the Court of Appeals

Appeal from Pickens County
Court of General Sessions

G Edward Welmaker Circuit Court Judge

Case No 2010 GS-39-00179 and 00180

State of South Carolina, Respondent,

v

Mahammed Ahamad Ateih (aka Mohammed A Atieh), Appellant

CERTIFICATE

I certify that the Record on Appeal contains all of the matter designated by the Parties and no other matter

I further certify that the Record on Appeal has been redacted in accordance with the Supreme Court's Order on the redaction of private data, personal identifiers and other sensitive information

Respectfully submitted,

J Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271 6035 facsimile

Counsel for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
COURT OF GENERAL SESSIONS
G Edward Welmaker, Circuit Court Judge

Case No 2010-GS-39-179, 2010-GS-39-180

State of South Carolina, Respondent,

v

Mahammed Ahamas Atieh, Appellant

BRIEF OF APPELLANT

J Falkner Wilkes, (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1 Did the trial court commit reversible error in admitting evidence of prior bad acts?

2 Did the trial court commit reversible error in refusing to grant the Defendant's motion for a directed verdict on the charge of assault with intent to commit criminal sexual conduct in the third degree?

3 Where a prosecutrix testified that the defendant did not attempt or have intent to commit CSC, can the State introduce prior bad act evidence to transfer intent from prior case to present case?

4 Is prejudice of improperly admitted prior bad act evidence so pervasive as to require reversal on both charges?

STATEMENT OF THE CASE

Mahammed Ahamas Atieh was indicted by grand jury in Pickens County for Assault and Battery of a High and Aggravated Nature And just prior to trial, by direct presentment, Assault with Intent to Commit Criminal Sexual Conduct, Third Degree Appellant was arraigned on the later charge subsequent to the suppression hearing The trial proceeded before a jury in the Court of General Sessions for Pickens County on February 24, 25, and 26 of 2010, the Honorable G Edward Welmaker, presiding

Appellant was represented at trial by counsel, Daniel Hunt and Robert Newton The State was represented by Douglas Richardson, Jr , of the Office of the Solicitor for Pickens County The Appellant was found guilty and sentenced to a period of a ten years suspended to service of forty-four months and five years probation for each charge The sentences were run concurrent The Appellant is currently in the custody of the South Carolina Department of Corrections Notice of appeal was timely filed J Falkner Wilkes has been substituted as counsel for the Appellant and represents on appeal before this Court

STATEMENT OF THE FACTS

At the onset of the trial the defense moved to suppress the testimony of Appellant's former employees concerning allegations of past inappropriate behavior that the State contended admissible pursuant to Rule 404(b) During the suppression hearing the State called four witnesses, each of whom testified to allegations of other bad acts involving the Appellant The defense moved to suppress evidence of other bad acts based on the tendency of such evidence to show bad character, propensity and that such evidence was overly prejudicial A suppression hearing was held, after which the trial court ruled the other bad act testimony admissible

The prosecutrix in this case, M D , was17 years of age at the time of trial She testified that when she was 15 she worked at the local Subway for approximately one week During that time the Appellant was her manager R 9, 14

In the suppression hearing M D alleged that on four occasions at work the Appellant pressed his body up against her R 10 She claimed that the Appellant touched, rubbed or grabbed her butt possibly somewhere between seven to nine times R 11, 114 M D testified that the Appellant also put his hand inside of her bra and just inside the top of her pants R 11,1 18, 12-14 M D also testified that

the Appellant made her sit in his lap once while in his office R 137, 141

There was no testimony that the Appellant used force or coercion in regards to any of the above M D testified unequivocally that the Appellant was not trying to put his hand all the way down her pants or touch her "privates" 14 M D testified that the Appellant was not attempting to rape or make any penetration of her R 136

PRIOR BAD ACT TESTIMONY

Kayla Michelle Hamilton, 18 years of age, testified that she worked at the Subway when she was 16 years old R 18 Appellant was Hamilton's boss R 18 Hamilton testified that she and M D were friends from high school, and that M D would come by and help Hamilton at work prior to M D actually being hired R 22, 156 During the pretrial hearing Hamilton claimed to have told M D about the Appellant and that she didn't want to work there, but M D did anyway R 22-23 Before the jury Hamilton changed her story and said that she did not tell M D about her allegations against the Appellant R 158

Hamilton testified that Appellant was touchy and would try to rub against her from behind while she was at the sink R 19, 149-150 That he would try to massage her shoulders R 20 Hamilton claimed that Appellant would massage her shoulders and try to stick his hands down her shirt but that he would never get his

hand all the way down her shirt R 20, 151 Hamilton testified that the Appellant never put his hand in her pants R 25 Hamilton also testified that she would simply walk away from him when he did this and that she continued to work there until she was fired by another manager for arguing over how she should be doing her job R 151, 177

Kara Nicole Sheriff, 27 years of age, testified that she worked at the Subway when she was about 19 years old R 29 Sheriff claimed that on a single occasion the Appellant walked up on her really forcefully and kind of tried to push her against the wall while touching her around her breasts R 30 Sheriff did not make a police report until years later when the Appellant's charges became public R 187 On direct examination the State elicited testimony that Sheriff had contacted the police after so many years because she wanted to "let them know that this little girl wasn't the very first one that he had ever touched " R 187

Kaylalyn Goad, 22 years of age and a friend of Hamilton, testified that she had worked the Subway two or three years prior with the Appellant R 35, 40 Prior to Goad's testimony Defense counsel renewed his pre-trial objections R 197-198 Over the defendant's objection Goad was allowed to testify that on one occasion the Appellant brushed his hand against her butt while she was ringing up a customer at the cash register 36

Goad also testified that she witnessed the Appellant press against another employee but that the response of the employee was "playful" R 37 In characterizing her impression of the events, Goad testified only that she thought it was inappropriate when Appellant pressed up against her R 194 Goad testified that she had worked for several months before this happened and did not leave until a month and a half later R 195

The State also elicited testimony that the Appellant had asked her to marry him for money, only further placing the Appellant's character at issue

> He asked me to marry him one time, but I did think he was kidding around Then when he told me he was serious and he asked me to marry him for money, and to me it didn't make any sense because he was already married And in this country -- I mean, I'm not sure from where he's from how that works, but I know that you cannot have more than one wife 192

Rebekah Stark, 29 years of age, testified that she had worked at the Subway with the Appellant in 2000 R 47 Stark admitted that she had recently filed charges against the Appellant, "just to help" R 54 Stark testified that the Appellant had made sexual advances towards her R 48 That he would brush his hand across her rear and that he put his hand down her shirt while massaging her shoulders R 50

Stark further testified that the Appellant would block her in the cooler and

would not let her out until he touched her chest, thighs or rear R 50 Also that the Appellant tried to slip his hand down the front of her pants R 51 And that he had actually touched her breast and had his hand down her pants up to his knuckles R 212-214 And that he placed his hand between her thighs R 212-214

At the close of the State's case the Defense made a motion for directed verdict on the assault with intent to commit criminal sexual conduct based on the testimony of M D that the Appellant was not trying to commit an act that would constitute a sexual battery R 225-226 Despite the testimony of M D as to the lack of intent, the Court denied the motion for a directed verdict stating that intent was a question for the jury R 229

DEFENSE CASE

Ashley Benton testified that she worked at the Subway for three years R 243 During that time Hamilton always worked with her as the manager of the store R 243 That Hamilton was not a good worker, and had been fired for threatening a manager R 242-243, 249 Benton testified that the Appellant was rarely in the store and that he was never in the store with Hamilton alone R 244 Benton didn't think it possible that someone could be molested in the store without it being noticed R 245 Of all the time that she worked there she never saw the Appellant do anything inappropriate towards anyone, including her R

246 Benton testified that the Appellant was a good boss and very respectful of his employees R 249

Amanda Sterling testified that she worked at Subway for three years and worked for the Appellant although she was no longer employed there R 261-262 Sterling knew M D R 263 She also testified that the Appellant would rarely be at the store R 263 Appellant never made any inappropriate comments to her R 264

Michelle Shirley presently worked for the Appellant at the Subway and had worked for him for three years R 269 Shirley knew M D from both having worked at the Subway R 269 Shirley testified that M D was not the best of workers and wanted to play around at work R 270 She said that M D never acted like anything was bothering her or made any complaints about the Appellant R 270-271 Shirley testified that the day M D made the allegations Shirley had watched M D the whole time while she texted on the phone instead of working R 272 Shirley complained to Appellant who confronted M D about her texting at work R 272 Shirley was able to see M D the whole time and never saw any inappropriate touching R 272 M D never gave any indication of any problem and, to the contrary, talked and "cut up just like everybody" R 273 As far as Shirley knew, Appellant and M D were never even in the store alone together R

287 Shirley testified that the Appellant was a "very, very, very good man" and that he was respectful R 274

Shirley testified also that the mother of M D came by the Subway and asked to speak with the Appellant R 306 The mother told the Appellant's brother that she wanted to settle the matter without having attorneys R 306

Dorothy Michelle Morgan, mother of M D , testified that she went to the store to speak with the Appellant shortly after M D was fired R 288 She denied having told the Appellant that day that the whole thing could go away for money, but admitted that she had filed a lawsuit against the Appellant seeking $250,000 R 289

Lacy Bishop testified that she presently worked for the Appellant and had been employed by him for three years R 295 Bishop worked with Hamilton for about three months R 296 Bishop witnessed Hamilton making threatening comments regarding her firing R 296 When Appellant would correct Hamilton about her poor performance, Hamilton would say "I'll get him" R 297 Bishop testified that the Appellant had never made any inappropriate advances towards her and she had never seen him make any towards Hamilton R 297-298 Bishop also testified that there were always multiple employees at the store when the Appellant was there and that he was not there often R 299 Hamilton never

mentioned any of the allegations to Bishop R 300

Julie Renee Scully testified that she had worked at the Subway and that the Appellant had been her boss for about three years R 311 She testified that the Appellant had never made any inappropriate statements or acts towards her R 312 Nor did Scully, in three years of working for him, ever see him act inappropriately towards any other employee R 312 Scully testified that there were always at least two employees in the store at all times R 313

Riad Makhtoub, Appellant's brother, testified that he worked as a manager at the family run Subway R 316 While Makhtoub was manager Kayla Hamilton worked under him R 316 When confronted with her failure to do her job, Hamilton was rude and argumentative and threatened to make a sexual harassment charge against Makhtoub R 317 As a result, Hamilton was fired immediately but she tried to avoid leaving the store in an attempt to talk to the Appellant to get her job back R 318 Later, the mother of M D told Makhtoub that she wanted to settle the matter and drop the case without lawyers R 319 Makhtoub told her that he couldn't do anything about that and that she should talk to their lawyer about that R 319

Jessica Omar testified that, since about a month prior to the trial, she had worked full-time for the Appellant at the Subway since 2007 R 327 She had quit

because she had gotten into an argument with Makhtoub over scheduling R 328 During the time she worked for Appellant, she never saw any type of inappropriate conduct by Appellant R 328 Omar worked with M D and said that M D just didn't care about the job R 329 She said M D had gotten into a discussion with a customer about [M D] having condoms in her purse, to which the customer commented on being "trashy" R 330 The response of M D was that "she always had to be safe R 330 M D discussed her boyfriend, and not being a virgin with Omar R 331 Omar testified that M D never appeared scared of Appellant, and that she never observed any inappropriate behavior by the Appellant towards M D R 330 Omar testified that it was such a small place that it would not be possible for the Appellant to be harassing M D without Omar noticing it R 332 Omar testified that Appellant was a good boss and treated everyone the same R 333 Immediately upon hearing of the charges in the case Omar wrote a letter to the Appellant's attorney stating that she didn't believe the allegations and that either she or another employee was present during the time period covered in the allegations and that there was no inappropriate actions by the Appellant towards M D R 340

Jessica Bryant testified that she worked with Appellant at Subway and that she had never observed any inappropriate conduct by the Appellant R 344

Bryant identified the photos of the Subway and testified that the alleged acts would have been observable from various parts of the store or the drive through R 350-351

Mohammed Zahran, Appellant's nephew, testified that he works for the Appellant as a manager of the Subway R 359 Zahran started working at the Subway in 2001 and never had any employee make any complaints to him of the Appellant acting inappropriately R 359

Appellant, **Mahammed Ahamas Atieh**, testified R 362 Appellant had been in the U S since 1995 and was part owner of the family owned Subway R 363 Up to 2004 the Appellant worked at the Subway almost every day R 363 After that time the Appellant worked with his brother in construction but would come in to the Subway just to oversee the books, taxes, ordering, hiring, and to make sure things were running smoothly R 364 In 2008, around the time of the allegations, he had been working again almost every day until the time M D made the allegations R 365 Appellant testified that M D took off time without first making a request, and that he still allowed her to return to work R 366 When she did return she worked a few days until a Saturday she was fired R 367 M D was asked to prepare a liner for the bread R 367 Instead of doing what was asked of her M D was using her cell phone R 367 Shortly afterwards M D

received a call from her mother on the Subway phone R 368 After the call from her mother, M D told the Appellant that her grandmother was sick and left the store R 368 Appellant explained how the allegations made by M D could not have gone unseen if true by use of the store's diagrams R 403-404 Appellant admitted that he was alone with M D at the store on one occasion R 437

EVIDENCE

Photos were introduced of the Subway as evidence R 347 Scale diagrams of the store were admitted by the defense R 398, 406

At the close of the defense case the defense renewed its motion for directed verdict on the Attempt to Commit CSC charge R 441

ARGUMENT

I THE COURT ERRED IN ALLOWING EVIDENCE OF OTHER BAD ACTS

A THE ISSUE WAS ADEQUATELY PRESERVED FOR APPELLATE REVIEW

The defense properly raised the issue by way of a motion to suppress which was heard by the trial judge outside of the presence of the jury The judge ruled against the defense and the trial proceeded Without the introduction of any other evidence or witnesses the State proceeded to call the same bad act witnesses and elicited before the jury the same testimony elicited in the suppression hearing Before the third witness testified the defense expressly renewed its objection to the testimony Despite not raising an objection during the testimony of the first two witnesses, the issue is adequately preserved for appellate review

Generally, a motion *in limine* is not a final determination, a contemporaneous objection must be made when the evidence is introduced State v Forrester, 343 S C at 642, 541 S E 2d at 840 There is an exception to this general rule when a ruling on the motion in limine is made "immediately prior to the introduction of the evidence in question " *Id* This exception is based on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection *Id*, State v Mueller, 319 S C

266, 268-69, 460 S E 2d 409, 410 (Ct App 1995), State v Wiles, 383 S C 151 (2009)

In this case the ruling of the trial judge at the suppression hearing constitutes a final ruling The court gave no indication that its ruling was in any way tentative or preliminary Since there was no other evidence or testimony offered before the same testimony was presented to the jury, the ruling should be considered final such that no further objection was required The issue therefore was properly raised to the trial court and ruled upon to preserve the issue for appellate review

B EVIDENCE OF OTHER BAD ACTS WAS IMPROPER UNDER RULE 404(b), SCRE

Evidence of other bad acts tended to show bad character and propensity to commit a crime and was improper under Rule 404(b) The State offered testimony of four witnesses that the Appellant committed various inappropriate acts of touching against each of them Some of the other bad acts involved allegations many years distant from those charged in the present case Some of the acts were clearly distinct in nature from those alleged by the prosecutrix in the present case Due to the distance in time between many of the other bad acts and those charged, as well as their dissimilarities, the other bad acts were inadmissible under Rule

404(b)

Perhaps no tenet of evidence law in the context of "prior bad acts" is more firmly established than the principle that propensity or character evidence is inadmissible to prove the specific crime charged

> That contention is grounded upon the familiar and salutary general rule, universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged [p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence It raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it ' Lyle, 125 S C at 415-16, 118 S E at 807 (internal citations omitted)

State v Tuffour, 364 S C 497 (Ct App 2005)

This rule of evidence is universally recognized in American jurisprudence and is necessary to ensure that the presumption of innocence is not relegated to an empty phrase "It is a well-established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other offenses at other times, even though they are of the same nature as the one charged in the indictment, is inadmissible for the purpose of

showing the commission of the particular crime charged " State v Tuffour, 364 S C 497 (Ct App 2005), *quoting* Lyle, *supra*

There are exceptions to the general rule of inadmissibility [U]nder Lyle, evidence of these other bad acts may be admitted to prove the defendant's guilt if that evidence establishes (1) motive, (2) intent, (3) absence of mistake or accident, (4) identity, or (5) a common scheme or plan involving other crimes so closely related to the one charged that proof of one tends to prove the other State v Barroso, 328 S C 268, 271, 493 S E 2d 854, 855 (1997)

The initial analysis for admissibility is one of relevance The allegations of prior bad acts must be shown to be relevant to the present charges Similarity has been the touchstone of admissibility under Lyle and its prodigy But similarity and its relevance is time sensitive

> The importance of similarities diminishes with the passage of time It is true that there existed similarities between the rape and attempted rape, and the fingerprints on the window with the peeping-tom incident However, these similarities are diminished when the time frame of the offenses is considered Further, the danger of prejudice is enhanced when, as here, there has been no trial and conviction for the latter acts The subsequent acts remain accusations The manifest prejudice of this evidence is obvious

State v Wilson, 274 S C 635 (1980)

In State v Rogers, 293 S C 505, 362 S E 2d 7 (1987), the Supreme Court

held that the testimony of the victim's sister, regarding other abusive conduct by the defendant, did not tend to show a common scheme because the acts were dissimilar from the offense charged and occurred ten years apart

The time frame in which the prior bad acts and the alleged offense occurs is a relevant fact to consider when applying the clear and convincing standard Some of the other bad acts were years distant from the acts for which the Appellant was charged Stark testified to prior bad acts occurring in 2000 Sheriff testified to prior bad acts occurring around 2003

In the present case many of the alleged bad acts occurred years before the acts for which the Appellant was tried The allegations as to Stark, from which the State contends established intent to commit a battery in the present case, are almost ten years old Similarly, Sheriff testified to events alleged to have occurred in 2003 Such distant events fail to establish a common scheme or plan *See* State v Rogers, *supra*

In addition to being many years distant from the acts charged, many of the allegations were dissimilar in important aspects to the acts charged Those dissimilarities are also critical in determining admissibility, especially on events that occurred many years prior to the events for which the Appellant was charged Most important is the testimony of Stark which bears critical differences with the

allegations and testimony of the prosecutrix in this case The prosecutrix testified unequivocally that the Appellant *did not attempt* to commit a sexual battery Yet the State was allowed to introduced the testimony of Stark to show that the Appellant, ten years earlier, had the intent to touch Stark's privates and thus commit a sexual battery *on Stark* This was clearly improper as Stark's allegations directly contradicted the facts related by the prosecutrix in the present case

Stark testified that ten years earlier the Appellant had blocked her exit from the cooler, a confined space, and would not allow her out until he had touched her chest, thighs or rear 50 Stark also testified that the Appellant had put his hand down the front of her pants and that he tried to touch her "vaginal area" 56 Stark's testimony therefore may have established a *prima facia* case of an attempt to commit a sexual battery *on Stark* almost ten years earlier Stark's allegations were therefore completely inconsistent with those of the prosecutrix Stark's testimony was also dissimilar to all four of the other State witnesses, none of whom testified as to any attempt by the Appellant to commit a sexual battery Absent Stark's testimony, this case involved clear and unequivocal evidence of a lack of any intent to commit a sexual battery [1]

---

[1]This is a far different statement than saying the case involves a lack of any evidence as to intent On the contrary, this case involves evidence showing a lack of intent The State uses prior bad act evidence, not to fill a void, but to have the

Completely contrary to Stark's allegations, the prosecutrix in this case testified that the Appellant never attempted to touch her private area Her testimony was not the least bit equivocal She answered several questions, all clearly indicating that there was no intent on the part of the Appellant to commit a sexual battery There was therefore no void of evidence that only Stark's testimony could fill There was no lingering question, no ambiguity or uncertainty that Stark's testimony could answer, clarify or make certain By the prosecutrix's own testimony, there was simply no intent to commit a sexual battery in this case Stark's testimony as to her allegations from ten years prior only created for the jury something that simply did not otherwise exist in this case

There must be a connection between the crime charged and the prior bad act or the accused should be given the benefit of the doubt State v Rivers, 273 S C 75, 254 S E 2d 299 (1979) In this case, there was insufficient connection or probative value in the allegations of prior bad acts Based on dissimilarities and the passage of time, they fail to meet the criteria for admission This is especially true with the allegations of Stark which were disturbingly dissimilar and distant in time from the allegations charged in the present case It was therefore error for the

---

jury transfer intent from Stark's case to overcome proof of the lack of intent as to M D in this case

trial court to allow the admission of prior bad act evidence

C EVIDENCE OF OTHER BAD ACTS WAS OVERLY PREJUDICIAL UNDER RULE 403, SCRE

The prejudical effect of other bad act evidence in this case far outweighed any probative value it may have had Evidence of other bad acts tended to show bad character and a propensity to commit a crime while adding little in probative value to the case

The prejudicial effect is best illustrated by the use of Stark's testimony The prosecutrix in this case testified that the Appellant made no attempt to commit a sexual battery Her testimony was clear and unequivocal Yet the State overcame clear evidence that the Appellant had no intent to commit a sexual battery by offering inflammatory testimony of a prior bad act almost tens years ago One for which the Appellant had not been convicted The prejudice is obvious

In this case the prior bad acts were alleged to have occurred as much as seven to ten years ago Our courts have held that the admissibility of prior bad acts diminishes with time Similarities are diminished when the time frame of the offenses is considered State v Wilson, 274 S C 635 (1980) As time passes, the probative value of other bad act evidence decreases The danger of prejudice, however, is unaffected by the passage of time And, as in the present case, is

enhanced when there has been no trial and conviction for any of the other bad acts In this case, where the other bad acts remain merely accusations, the manifest prejudice of such evidence is obvious *See* State v Wilson, 274 S C 635 (1980)

The prejudice presented in this case by other bad act testimony was further enhanced by the State in several ways which should be considered in the review of the issues presented Initially, the State began its case by calling on the jury "to look into the soul of the witnesses " 108 In closing its case, the State played directly on the prejudicial effect of the prior bad act evidence " [Appellant] took advantage of those girls We trust to send our teenagers and our kids out to these places and no girl or nobody, especially one that's sixteen years old, deserves the treatment that she got " 477 During the trial the State elicited testimony from Sheriff as to why she came forward with her allegations after almost ten years " I'm going to let them know that this little girl wasn't the very first one thta he had ever touched " 187, l 21-22 The State further placed the Appellant's character at issue with other bad act testimony that the Appellant had offered money to one of the witnesses to marry him even though he was already married In doing so the State put before the jury the Appellant's marital status, ethnic background, religion, and portrayed the Appellant as having bad moral character 192, l 8-17

In this case the prosecutrix testified that the Appellant did not intend to

commit an act that would constitute criminal sexual conduct Except for Stark, not one of the other prior bad act witnesses testified to any facts indicating clear and convincingly that Appellant made any attempt to commit a sexual battery by force or coercion None of the seven defense witnesses, all former employees, testified to any acts indicating any intent to commit a sexual battery by Appellant In all, of twelve former employees, only Stark testified that Appellant attempted an act that might constitute a sexual battery One single allegation from ten years earlier Despite there being clear evidence that no intent existed in this case, the jury found intent It was not intent to commit a sexual battery on the prosecutrix, what they found was intent to commit a sexual battery *against Stark ten years ago* The State was able to obtain a conviction against the Appellant based on prior bad acts rather than the acts for which he was indicted

Prejudice exists when there is "a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof " State v Martucci, 380 S C 232, 248, 669 S E 2d 598, 606 (Ct App 2008) Where a review of the whole record establishes that an error is harmless beyond a reasonable doubt, the conviction should not be reversed State v Thompson, 352 S C 552, 562, 575 S E 2d 77, 83 (Ct App 2003) "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained " State v Pagan, 369 S C

201, 212, 631 S E 2d 262, 267 (2006) "[I]n order to conclude that the error did not contribute to the verdict, the Court must find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record '" Lowry v State, 376 S C 499, 508, 657 S E 2d 760, 765 (2008) (*quoting* Yates v Evatt, 500 U S 391, 403, 111 S Ct 1884, 114 L Ed 2d 432 (1991)) State v Elders, 386 S C 474 (Ct App 2010) In this case the error can not be said unimportant in relation to the issues considered

The State relied solely on the prejudicial effect of other bad acts to inflame the jury into finding intent where none existed To overcome the unequivocal testimony by the prosecutrix that no intent to commit a sexual battery existed in the present case, the State offered the testimony of an alleged attempt at a sexual battery ten years earlier This is precisely the type of harm Rules 403 and 404 are intended to prevent The trial court erred in its admission of allegations of other bad acts In considering everything else that the jury considered on the issue, the error can not be held unimportant The admission of other bad acts evidence unfairly prejudiced the Appellant The convictions of the Appellant should therefore be reversed

II THE COURT ERRED IN DENYING A DIRECTED VERDICT WHERE THE VICTIM TESTIFIED THAT THE APPELLANT WAS NOT ATTEMPTING TO COMMIT A SEXUAL BATTERY

Based on the testimony of the prosecutrix that the Appellant had no intent to commit a sexual battery, the defense counsel timely moved for a directed verdict on the charge of criminal sexual conduct Despite the testimony of the prosecutrix being unequivocal on the Appellant's lack of intent to commit a sexual battery, the trial court refused to direct a verdict of acquittal [2]

When a motion for a directed verdict of acquittal is made in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight State v Morgan, 282 S C 409, 319 S E 2d 335 (1984) The accused is entitled to a directed verdict when the evidence merely raises a suspicion of guilt State v Schrock, 283 S C 129, 322 S E 2d 450 (1984), State v Brownlee, 318 S C 34, 455 S E 2d 704 (Ct App 1995) The accused also is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged State v McHoney, 344 S C 85, 544 S E 2d 30 (2001), State v Brown, 103 S C 437, 88 S E 21 (1916), State v Gore, 318 S C 157, 456 S E 2d 419 (Ct App 1995) State v Brown, 360 S C 581 (2004)

---

[2]Appellant incorporates the prior relevant portions of his argument into his argument under this heading

The court's denial of a directed verdict in this case is completely unsupported by the clear and unequivocal testimony of the prosecutrix, as well as the record as a whole To protect the record on the motion for a directed verdict the defense made a specific request to have the court place on record its factual findings that would establish the requisite intent to commit a sexual battery 228, l 21-24 In response the trial court made only a general reference to the testimony of the prosecutrix, but but failed to point out any specific facts or make any specific factual findings to support its ruling The court instead stated merely that intent was a matter for the jury 229, l 25-230, l 22 The record in this case fails to support the trial court's ruling that the testimony of the prosecutrix was sufficient to send the case to the jury

Assault is "an unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery " State v Mims, 286 S C 553, 554, 335 S E 2d 237, 237 (1985) Assault differs from battery in that assault does not involve a touching of the victim *Id*, *see also* State v Murphy, 322 S C 321, 325, 471 S E 2d 739, 741 (Ct App 1996) Although most attempted sexual batteries will involve a touching,[fn1] a person may be convicted of ACSC by proof of an assault with or without a battery State v Elliott, 346 S C 603 (2001)

Third degree Criminal Sexual Conduct occurs where the actor engages in sexual battery with the victim and one or more of the following circumstances are proven a) the actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances or b) the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery § 16-3-654 Criminal sexual conduct in the third degree, *See also* State v Lindsey, 355 S C 15 (2003)

"Sexual battery" does not mean any battery of a sexual nature Rather, it is statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some sort S C Code Ann § 16-3-651(h) (1985) Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes " S C Code Ann § 16-3-651(h) (2003) State v Geiger, 370 S C 600 (Ct App 2006)

Therefore, the record must show that the Appellant committed an assault with the intent to use force or coercion to accomplish a sexual battery (some sort

of penetration) against the prosecutrix in this case It simply does not

In the present case the prosecutrix testified that the Appellant was *not* attempting to commit any act that would constitute a sexual battery Absent proof that the Appellant intended, by force or coercion, to commit any act involving penetration of some sort, there can be no sexual battery Regardless of any testimony as to any other acts, inappropriate or not, there must be some evidence of an intent to commit an act of *1) penetration, 2) by force or coercion,* 3) *on the prosecutrix in this case* The testimony of the prosecutrix makes clear that the Appellant had no such intent towards her The record simply fails to show evidence sufficient to establish the offense charged

It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant When the State fails to present sufficient proof of all the elements, a conviction must be reversed and a judgment for the defendant must be rendered under the principles of Burks v United States, 437 U S 1, 98 S Ct 2141, 57 L Ed 2d 1 (1978) State v Brown, 360 S C 581 (2004) In this case there was insufficient evidence to support a finding of intent to commit criminal sexual conduct As a result, the trial court's refusal to grant a directed verdict was erroneous The conviction of the Appellant should therefore be reversed

CONCLUSION

Based on the foregoing, the convictions of the Appellant should be reversed

Respectfully submitted,

J Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Respondent

July 10, 2011

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
COURT OF GENERAL SESSIONS
G Edward Welmaker, Circuit Court Judge

Case No 2010-GS-39-179, 2010-GS-39-180

State of South Carolina, Respondent,

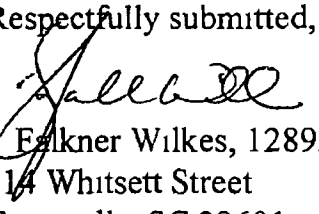
v

Mahammed Ahamas Atieh, Appellant

CERTIFICATE

I certify that the Appellant's Brief complies with Rule 211(b)

Respectfully submitted,



J Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Appellant

July 27, 2011

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
COURT OF GENERAL SESSIONS
G Edward Welmaker, Circuit Court Judge

Case No 2010-GS-39-179, 2010-GS-39-180

State of South Carolina, Respondent,

v

Mahammed Ahamas Atieh, Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of Appellant's Brief on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 14th day of July, 2011, addressed as follows

Salley Elliott
Office of the Attorney General
P O Box 11549
Columbia, S C 29211

Respectfully submitted,

J Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile
Counsel for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Pickens County
Honorable G Edward Welmaker Circuit Court Judge

THE STATE

Respondent

vs

MAHAMMED AHAMAS ATIEH

Appellant

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

HAROLD M COOMBS JR
Senior Assistant Attorney General

Post Office Box 11549
Columbia SC 29211
(803) 734 3727

W WALTER WILKINS JR
Solicitor Thirteenth Judicial Circuit

305 E North Street Suite 325
Greenville SC 29601
(864) 467 8647

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1 The defendant asks whether the court committed reversible error by admitting evidence of prior bad acts (Appellant s Statement of Issues on Appeal 1)

2 The defendant asks whether the court correctly denied his motion for directed verdict on assault with intent to commit third degree CSC (Appellant s Statement of Issues on Appeal 2)

3 The defendant says the victim testified that he did not attempt or have intent to commit CSC and asks whether that can be proven by prior bad acts (Appellant s Statement of Issues on Appeal 3)

4 The defendant asks whether prejudice from improperly admitted evidence of prior bad acts requires reversal of both charges (Appellant's Statement of Issues on Appeal 4)

STATEMENT OF THE CASE

The Pickens County Grand Jury charged the defendant with assault and battery of a high and aggravated nature (2010-GS 39-0179) and assault with intent to commit criminal sexual conduct third degree (2010-GS-39-0180) The defendant and his counsel came to trial February 24-26 2010 before the Honorable G Edward Welmaker Judge, and a jury The jury found the defendant guilty The court sentenced him to concurrent terms of ten years imprisonment suspended upon the service of forty four months and four years probation (2010 GS-39 0180) and ten years imprisonment suspended upon the service of forty-four months and probation (2010-GS 39-0179) The defendant served opposing counsel a timely notice of appeal

ARGUMENT

I

The court exercised sound discretion admitting evidence of prior bad acts (Appellant's Statement of Issues on Appeal 1)

The state proffered the testimony of the victim and four victims of other bad acts to show the defendant s common scheme or plan intent and motive (ROA pp 8-56) The testimony was basically the same - inappropriate touching actions' toward young women employed at the sandwich shop that showed a common scheme or plan the defendant utilized his position of authority to commit similar, continuous acts (ROA pp 58 and 60, p 61 line 10 - p 62, line 17) The other bad acts showed the want of accidental touching (ROA p 66, lines 6-14)

The court ruled in camera The evidence of the other acts was established by clear and convincing evidence substantially outweighing its prejudicial effect and was relevant under Rule 404 (b), SCRE and there was a close degree of similarity among the victim and the victims of the defendant's other bad acts The probative value substantially outweighed the prejudice (ROA p 62, line 18 - p 63, line 4, 68 lines 1-8)

At trial [February 24-26 2010] the victim was in twelfth grade She was friends with an employee of the sandwich shop who talked to the defendant about hiring her She interviewed with the defendant and he hired her in June of 2008 (ROA pp 110-113) She was hired at fifteen and turned sixteen during her week and a half or possibly six days employment (ROA pp 113 120 125) At first the defendant just put his arm around her but later he would come up to me and he would grab my butt It got worse while showing her items in the cooler he would put his arms around her and 'press his body up against [her]

from behind ' He also some two to three times approached her from behind when she was washing dishes facing the sink and pulled her close to him One time this included putting his hands down the front of her pants at the waistline or barely below the waistline While explaining how to clean the bathroom the defendant went inside her store T shirt and her bra and 'put his hand on [her] breast and kept it there about ten seconds The defendant committed these acts out of the sight of other employees When she was alone with the defendant closing the store the defendant talked on the phone summoned her apparently to talk about work and then rubbed her and put his hand up her shirt In his office the defendant made her sit in his lap (while showing her the location of a supply) The victim thought of the defendant as an older man had no idea of what he could do to her and was too scared to say anything to him On what was to be her last day, the defendant pressed his body against her and grabbed her butt She called her mother from work reported (ROA pp 113-121, 131 135 138) and gave a statement to the police the same day (ROA pp 141-143) She did not finish her junior year at school due to schoolmates finding out about her experience and making remarks (ROA p 138)

On cross examination the victim testified that her friend at the sandwich shop was other act victim 1 Over the state's objection, the defendant elicited the victim s testimony that after she was hired, other act victim 1 told her that "the boss was too over friendly and likes to touch on his employees (ROA p 123, line 19 - p 124) Further on cross examination the defendant challenged the victim about the confined space around the sink but the victim maintained there was room to walk around her (ROA p 129) The defendant also elicited the victim s testimony to the defendant s physical ability to rape her the victim s failing to cry out in alarm the limited size of the business, and the business'

popularity The victim denied that the defendant used force to penetrate her part of the body with even a finger (ROA pp 135 136)

Three of the four victims of other bad acts testified at trial Other act victim 1 testified to the defendant s hiring her at the sandwich shop and thereafter inappropriately leaning against her trying to reach down her shirt and pushing against her with his lower body when she was against the sink The defendant molested her when they were alone and basically every time they worked together She stayed about six months in 2007 2008 around age sixteen, just to have a job since her parents wanted her to work (ROA pp 147-176) Other act victim 2 worked at the sandwich shop about 3 to 4 months in 2003-2004 when she was about twenty years of age When the defendant touched her, she told him with some emphasis not to do it again The following day she was told that she no longer had a job (ROA pp 180 188) Other act victim 3 worked at the sandwich shop for a month and a half in 2008 when she was twenty years of age The defendant asked her to marry him for money and said he was serious The defendant brushed her bottom, and she saw him press his front against a girl at the sink and smack a girl s bottom while she was washing dishes (ROA pp 189 197)

Before other act victim 4 testified the defendant renewed his previous Lyle objection to other act victim 4 s testimony and objected on the ground that it went beyond what any other witness had testified Other act victim 4 - purportedly unlike the other witnesses - thought that the defendant was attempting to touch her vaginal area She was the only victim alleging more than an assault and battery of a high and aggravated nature Further it happened in the year 2000 The court ruled that other act victim 4 could not testify about any act greater than the victim s testimony, and she could not testify to her belief about what the

defendant was trying to do (ROA pp 198-207 line 14) The court found that other act victim 4's testimony about the defendant being aroused was admissible since it was relevant to the present case - the similarity to the incident (ROA pp 198 - p 207 line 14)

Other act victim 4 testified that she had worked at the sandwich shop in 2000 when she was 17 to 18 years old The defendant bought the shop where she worked and the defendant became her boss and an authority figure Gradually over a period of time the defendant began rubbing against her while passing in the store, touching her inappropriately on her rear, brushing his hand and arm against her front reaching inside her shirt and touching her breast rubbing and going between her thighs pressing against her back when he was excited and reaching inside the waistline of her pants When other act victim 4 confronted him with this conduct the defendant said that he should be allowed to have some fun She quit working when he put his fingers into the front of her pants She delayed reporting until 2008 since earlier she had thought that nobody would believe her against an authority figure (ROA pp 208-215)

Contrary to the defendant's position on appeal, the defendant wants a trial objection to the evidence by other acts victims 1 2 and 3 In limine motion hearings are for the purpose of preventing prejudicial matter coming before the jury but they are not final rulings on the admissibility of evidence State v Floyd 295 S C 518, 369 S E 2d 842 (1988), State v King 349 S C 142 561 S E 2d 640 (Ct App 2002)(where defendant moved in limine to suppress evidence the trial court denied the motion and defendant did not renew his objection at trial when the evidence was actually introduced recognizing that raising no objection when evidence is introduced at trial preserves no matter for appeal) Accord, State v Forrester 343 S C 637 541 S E 2d 837 (2001)(no evidence between the in camera ruling

admitting the evidence (cocaine) and the admission of the evidence at trial and there was no opportunity for the trial court to change its ruling, In most cases making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination The moving party therefore must make a contemporaneous objection when the evidence is introduced) State v Mueller 319 S C 266 460 S E 2d 409 (Ct App 1995)(admissibility of a defense witness conviction for impeachment purposes, and the witness testified immediately), State v Floyd 295 S C 518 369 S E 2d 842 (1988)(Chandler J , observing peril of treating an in limine ruling as final) Thereafter the testimony by other act victim 4 was cumulative to the testimony of the other three victims of the other acts No error in the admission of evidence of other acts is preserved for review State v Blackburn, 271 S C 324, 247 S E 2d 334 (1978)(admission of even improper evidence is harmless where it is merely cumulative)

Moreover, the testimony of other bad acts and the acts upon the victim all concerned young female employees in the same age range subject to the defendant's direction in the sandwich shop and abuse at opportune times There was no error in the admission of the evidence of other bad acts State v Wallace 384 S C 428, 683 S E 2d 275 (2009)(When determining whether evidence is admissible as common scheme or plan the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity *State v Parker* 315 S C 230 433 S E 2d 831 (1993) When the similarities outweigh the dissimilarities the bad act evidence is admissible under Rule 404(b) ')(suggesting factors to guide the trial court s determining whether there is a close degree of similarity between the bad act and the crime charged 1 age of the victims when the abuse occurred 2 relationship between the victims

and the perpetrator, 3 location where the abuse occurred 4 use of coercion or threats 5 manner of the occurrence) Accord State v Hubner 384 S C 436 683 S E 2d 279 (2009) reversing State v Hubner 362 S C 572 608 S E 2d 463 (Ct App 2005)(reversing trial court s admitting hugging kissing and inappropriate touching [but not allowing intercourse and other acts] 11 to 12 year old neighbor occurring in Maine in 1981 and 1982 to establish defendant s using church activities to initiate sexually oriented conduct with 12 year old in August 1996 and continuing to August 1997)

Finally, during the charge conference the court said that it would charge other bad acts will not be proof toward guilt (ROA p 445) Thereafter, the court instructed the jury on the evidence of a bad act other than the one for which the defendant was presently on trial

> This testimony, if you conclude it is true, may only be considered by you on the question of intent or a common scheme or plan or absence of mistake and for no other reason and no other purpose You may give the this evidence the weight and value, if any which you find it should have on that sole issue of intent or common scheme or absence of mistake You must not consider evidence of any bad acts as proof of the defendant s guilt of the charge that we re trying today

(ROA p 485 line 21 - p 486 line 7) Neither the defense nor the state objected

II

The court correctly denied the motion for directed verdict on assault with intent to commit third degree CSC (Appellant's Statement of Issues on Appeal 2)

In camera the victim testified that the defendant was not at one point physically trying to force his hands inside her pants to the point of touching her genitals (Tr p 14) and her trial testimony acknowledged that the defendant did not use his superior strength to overpower her (ROA pp 135 136) Also there was a cornucopia of testimony from which one could reasonably infer that the defendant used his position of authority to intimidate and to touch the young and vulnerable victim in a sexually suggestive manner with the intent of committing sexual battery Please see summary of testimony in Argument I

The motion for directed verdict on assault with intent to commit third degree CSC was soundly denied (ROA pp 229 and 442)

III

Intent can be proven by prior bad acts (Appellant's Statement of Issues on Appeal 3)

Contrary to the defendant's position the victim's trial testimony reasonably established assault with intent to commit criminal sexual conduct third degree Please see Argument I (victim's testimony) and Argument II supra Intent can be established through other bad acts Rule 404 (b) SCRF

IV

There was no unfair prejudice from evidence of prior bad acts, and there should be no reversal of charges (Appellant's Statement of Issues on Appeal 4)

No evidence of prior bad acts was improperly admitted The defendant raises no issue requiring reversal of his convictions

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the judgment and conviction of the lower court be affirmed

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

HAROLD M COOMBS, JR
Senior Assistant Attorney General

W WALTER WILKINS, JR
Solicitor Thirteenth Judicial Circuit

BY _____
Harold M Coombs Jr

Office of the Attorney General
Post Office Box 11549
Columbia SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 6 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Pickens County
Honorable G Edward Welmaker Circuit Court Judge

THE STATE

Respondent

vs

MAHAMMED AHAMAS ATIEH

Appellant

PROOF OF SERVICE

I Harold M Coombs, Jr certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail postage prepaid, addressed to his attorney of record J Faulkner Wilkes, Esquire 114 Whitsett Street Greenville South Carolina 29601

I further certify that all parties required by Rule to be served have been served

This 6th day of July 2011

Harold M Coombs

HAROLD M COOMBS JR

Office of Attorney General
Post Office Box 11549
Columbia SC 29211
(803) 734-3727

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Pickens County
Honorable G Edward Welmaker Circuit Court Judge

THE STATE

Respondent

vs

MAHAMMED AHAMAS ATIEH

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

HAROLD M COOMBS, JR
Senior Assistant Attorney General

W WALTER WILKINS III
Solicitor Thirteenth Judicial Circuit

By Harold M Coombs Jr
Harold M Coombs Jr

Office of Attorney General
Post Office Box 11549
Columbia SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 6 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v

Mahammed Ahamad Atieh
(a/k/a Mohammed A Atieh), Appellant

Appeal From Pickens County
G Edward Welmaker, Circuit Court Judge

Opinion No 4966
Submitted March 1, 2012 – Filed April 25, 2012

AFFIRMED IN PART AND REVERSED IN PART

J Falkner Wilkes, of Greenville, for Appellant

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Senior Assistant Deputy Attorney General Salley W Elliott, and Senior Assistant Attorney General Harold M Coombs, all of Columbia, and Solicitor W Walter Wilkins, III, of Greenville, for Respondent

KONDUROS, J Mahammed Ahamad Atieh[1] appeals his conviction for assault and battery of a high and aggravated nature (ABHAN) and assault with intent to commit third-degree criminal sexual conduct (CSC) We affirm in part and reverse in part

FACTS/PROCEDURAL HISTORY

Mahammed Ahamad Atieh owned two Subway stores in Easley, South Carolina One of his employees (Victim) reported to the police that Atieh had touched her inappropriately on several occasions A Pickens County grand jury indicted Atieh for ABHAN and assault with intent to commit third-degree CSC During pretrial motions, Atieh moved to suppress the testimonies of four former employees concerning allegations of past inappropriate touching He argued the testimonies involved prior bad acts and were inadmissible under Rule 404(b), SCRE Atieh further argued the testimonies would have a prejudicial effect while offering no probative value

In considering Atieh's motion to suppress, the court heard in camera testimony from Victim and the former employees Victim testified Atieh had touched and squeezed her rear end, put his hand down her shirt, pressed against her when she was washing dishes and in the restaurant's cooler, and that he had put his hand inside the waistband of her pants The first former employee (Employee 1) testified Atieh pressed against her in the cooler and while she washed dishes and would try to put his hand down her shirt The second former employee (Employee 2) stated Atieh put his hands up her shirt near the cooler area The third former employee (Employee 3) testified Atieh touched her rear end and placed his hand on her back, and she observed him

---

[1] Atieh's name is spelled differently on each sentencing sheet, the record on appeal, and the briefs The sentencing sheet for ABHAN lists his name as Mohammed A Atieh, while the assault with intent to commit third-degree criminal sexual conduct sentencing sheet refers to him as Mahammed Ahamad Atieh The record on appeal lists his name as Mahammed Ahamad Ateih (a/k/a Mohammed A Atieh) Both briefs refer to him as Mahammed Ahamas Atieh

press against another female employee as the employee washed dishes The fourth former employee (Employee 4) testified of past inappropriate touching She indicated Atieh had pressed against her while she washed dishes and in the cooler, put his hand down her shirt, and put his hand inside the waistband of her pants The trial court found the testimonies relevant under Rule 404(b), SCRE, and noted the similarities in each witness's testimony as indicative of a common scheme or plan The trial court also found the probative value of the former employees' testimonies substantially outweighed the prejudicial effect and ruled the testimonies admissible

When the trial began, the State called Victim as its first witness After Victim testified, the State began calling each of the four former employees to testify Atieh did not make any contemporaneous objections to the testimony of the first three former employees However, prior to Employee 4 being called, Atieh renewed his objection to her testimony, arguing it went beyond common scheme or plan and beyond what Victim alleged Atieh had done The trial court ruled Employee 4's testimony admissible, however, it limited her testimony to events that fell within the common scheme or plan, and the trial court prohibited her from speculating on what Atieh's intent might have been regarding putting his hand in her pants After the trial court ruled, Atieh renewed his objection to Employee 4's entire testimony being admitted

After the State rested, Atieh moved for a directed verdict on the charge of assault with intent to commit third-degree CSC He argued no testimony was introduced showing Atieh attempted a sexual battery because, under the statute, that offense requires an attempt to penetrate the victim's body Atieh emphasized the fact that Victim testified Atieh's hand did not come near her vaginal area when he put his hand inside her waistband The trial court denied the motion, finding the State presented "substantial circumstantial evidence which reasonably could tend to prove guilt, or from which guilt could be fairly and logically deduced [and that it was] a jury question as to what the intent was" Atieh then asked the trial court, "Judge, for the record, could I ask for a ruling on what evidence with any weight at all the court is saying there's some evidence that the jury could find?" The trial court stated, "The evidence for the intent is what is on the record of what's been testified to by [Victim]" The motion was again denied

At the close of Atieh's case, he renewed his motion for a directed verdict on the charge of assault with intent to commit third-degree CSC The trial court denied the motion During the charge conference, the trial court indicated it would "charge that evidence of other bad acts is only to be used for the sole issue of credibility not any proof of guilt It'd only be, if they considered it at all, it would be common scheme and plan or intent or absence of mistake " Atieh did not object After the trial court gave the jury charge, it inquired whether either attorney had any exceptions to it Atieh stated, "No objections to the charge, Judge "

Ultimately, the jury convicted Atieh of ABHAN and assault with intent to commit third-degree CSC The trial court sentenced Atieh to ten years' imprisonment suspended to forty-four months' imprisonment and four years of probation for each charge, to be served concurrently This appeal followed

LAW/ANALYSIS

I Prior Bad Acts

Atieh contends the trial court committed reversible error in allowing testimony from four former employees alleging prior bad acts He further argues the prejudice of this prior bad act evidence is so pervasive it requires a reversal on both convictions We disagree

A ruling in limine is not final, unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review See State v Wannamaker, 346 S C 495, 499, 552 S E 2d 284, 286 (2001) An exception to this rule is when the motion in limine is made "immediately prior to the introduction of the evidence in question " State v Forrester, 343 S C 637, 642, 541 S E 2d 837, 840 (2001) The South Carolina Supreme Court expanded this exception in State v Wiles, holding that even when the evidence does not immediately follow the motion in limine, if the trial court clearly indicates its ruling is final, rather than preliminary, the issue is preserved for appellate review 383 S C 151, 157, 679 S E 2d 172, 175 (2009) In Wiles, the trial court had commented to the

jury about the evidence that was the subject of the motion in limine before any evidence was admitted Id

Any issue regarding the first three former employees' testimonies is unpreserved The exception in Forrester regarding motions in limine is not applicable in this case because the former employees were not called as witnesses immediately after the motion in limine As to the exception in Wiles, nothing in the record indicates the trial court commented to the jury the State would present testimony by former employees Furthermore, the preliminary nature of the motion in limine allowed the trial court to adjust its ruling in accordance with developments in the trial Specifically, when Employee 4 was called, the trial court heard Atieh's objection and limited her testimony, thereby demonstrating the trial court's flexibility with the earlier ruling As to the testimony of Employee 4, Atieh made a contemporaneous objection when she was called to testify before the jury Thus, that issue is preserved for our consideration

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion " State v Pagan, 369 S C 201, 208, 631 S E 2d 262, 265 (2006) "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law " Id

Rule 404(b), SCRE, states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent " (emphasis added)

> Rule 404(b) allows the admission of evidence of a common scheme or plan Such evidence is relevant because proof of one is strong proof of the other When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of

> similarity When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b) Although not a complete list, in this type of case, the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged (1) the age of the victims when the abuse occurred, (2) the relationship between the victims and the perpetrator, (3) the location where the abuse occurred, (4) the use of coercion or threats, and (5) the manner of the occurrence, for example, the type of sexual battery

State v Wallace, 384 S C 428, 433-34 683 S E 2d 275, 277-78 (2009) (citations omitted) After determining evidence supports a finding the defendant committed a prior bad act, the court must determine whether the evidence falls within the common scheme or plan exception State v Tutton, 354 S C 319, 326, 580 S E 2d 186, 190 (Ct App 2003) This determination is a matter of law Id at 326-27, 580 S E 2d at 190

Under the factors delineated in Wallace, we agree with the trial court that Employee 4's testimony was admissible under the common scheme or plan exception Victim and Employee 4 were both young women, aged 16 and 17 to 18 respectively, when the inappropriate touching occurred They were both employees of Atieh and the inappropriate touching took place at the restaurant primarily around the sink or cooler There was no direct coercion or threat in either case, although both Victim and Employee 4 were subordinate employees The specific instances of touching in both cases included Atieh pressing against Victim and Employee 4, touching their rear ends, putting his hand up or down their shirts, and putting his hand inside the waistband of their pants The similarities of both women's testimonies far outweigh the differences, increasing the probative value of Employee 4's testimony

However, even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant

Pagan, 369 S C at 211, 631 S E 2d at 267 "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof" State v Martucci, 380 S C 232, 248, 669 S E 2d 598, 606 (Ct App 2008)

In ruling on Atieh's objection, the trial court limited Employee 4's testimony to matters that would aid in establishing a common scheme or plan, allowing no speculation on what Atieh's intent might have been in putting his hand in the waistband of her pants The trial court instructed the jury it could not consider evidence of bad acts for any reason other than intent, common scheme or plan, or absence of mistake It specifically cautioned the jury against considering the testimony as proof of Atieh's guilt The trial court took all precautions to reduce any prejudice Employee 4's testimony may have created and Atieh has shown no clear evidence Employee 4's testimony improperly influenced the jury's verdict Therefore, we find the trial court did not abuse its discretion in admitting Employee 4's testimony

II Directed Verdict

Atieh argues the trial court committed reversible error in refusing to grant his motion for a directed verdict on the charge of assault with intent to commit third-degree CSC We agree

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence not its weight" State v Weston, 367 S C 279, 292, 625 S E 2d 641, 648 (2006) "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged" Id "When reviewing a denial of a directed verdict, [the appellate court] views the evidence and all reasonable inferences in the light most favorable to the [S]tate" Id

Section 16-3-656 of the South Carolina Code (2003) states "[a]ssault with intent to commit [CSC] shall be punishable as if the criminal sexual conduct was committed" To be guilty of third-degree CSC, the defendant must have engaged in sexual battery with the victim S C Code Ann § 16-3-654 (2003) Sexual battery is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a

person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes " S C Code Ann § 16-3-651(h) (2003)

"Intent is a question of fact and is ordinarily for jury determination " State v Lee-Grigg, 374 S C 388, 403, 649 S E 2d 41, 49 (Ct App 2007) (citing State v Tuckness, 257 S C 295, 299, 185 S E 2d 607, 607 (1971)) "Intent may be shown by acts and conduct from which a jury may naturally and reasonably infer intent " Id "In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts compromising the choate offense In other words, the completion of such acts is the defendant's purpose " State v Sutton, 340 S C 393, 397, 532 S E 2d 283, 285 (2000)

While intent can be inferred from conduct, Victim's testimony does not raise the inference that Atich intended to commit the conduct required to establish third-degree CSC On direct examination, Victim testified as follows

> Q Okay And at any time did he ever attempt to put his hands down your pants?
>
> A Yes, sir
>
> Q And when was that? Can you explain - -
>
> A While I was washing dishes
>
> Q Can you explain to the jury what happened then?
>
> A I was standing towards the sink, I was washing dishes, and he came up behind me and kind of pressed his body up against me And he put his hands down the front of my pants, not all the way, just at the waistline

Q Okay Now, what was your response to that?

A I was in shock I was just standing there I didn't know what to do

On cross-examination she testified

Q How far down your pants did his hands go?

A Just barely below the waistline?

Q Just barely below the waistline?

A Yes, sir

Q Did it come anywhere near your vaginal area?

A No, sir

Victim's testimony does not indicate she did anything to disrupt whatever Atieh intended to do She stated she was in shock and just standing there She did not testify to some outside force interrupting or prematurely halting his actions The only evidence is that Atieh put his hand just inside the waistline of Victim's pants and then withdrew it This action was consistent with inappropriately touching Victim but does not, under the specific circumstances and testimony in this case, give rise to an inference he intended to do more than what he did While this conduct constitutes an assault, a jury could not "reasonably and naturally" infer that Atieh intended to penetrate any orifice of Victim's body Consequently, the trial court erred in denying Atieh's directed verdict motion as to the charge of assault with intent to commit third-degree CSC

CONCLUSION

Any issue regarding the admissibility of Employee 1, 2, or 3's testimonies is not preserved for our review Further, the trial court did not

abuse its discretion in admitting Employee 4's testimony under the common scheme or plan exception to admission of prior bad acts With respect to Atieh's conviction for assault and battery with intent to commit third-degree CSC, we conclude the trial court erred in denying Atieh's motion for directed verdict as the State presented no evidence from which the jury could have reasonably and naturally inferred his intent to commit the underlying offense as specified in the statute

AFFIRMED IN PART and REVERSED IN PART

PIEPER and GEATHERS, JJ , concur

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Pickens County
Honorable G Edward Welmaker Circuit Court Judge

THE STATE

Respondent

vs

MAHAMMED AHAMAD ATIEH
(A/K/A MOHAMMED A ATIEH)

Appellant

PETITION FOR REHEARING

Pursuant to Rule 221 SCACR Petitioner submits points the Court may have overlooked or misapprehended

1 South Carolina law precludes evidence of a defendant s prior crimes or other bad acts to prove the defendant s guilt for the crime charged except to establish (1) motive (2) intent (3) absence of mistake or accident (4) a common scheme or plan or (5) identity State v Adams 322 S C 114, 470 S E 2d 366 (1996) When evidence of prior crimes or other bad acts is admitted pursuant to Rule 404(b) SCRE it is evidence for the charged offense(s) State v Adams Ralph King Anderson Jr South Carolina Requests to Charge Criminal, 2007 §§ 1 16 and 1-17

The opinion states [The trial court] specifically cautioned the jury against considering [testimony about other bad acts] as proof of Atieh s guilt The referenced instruction cautioning the jury is not consistent with the admission of evidence of other bad acts to prove

the defendant s guilt for the crime charged and this Court s opinion could be understood as approving the instruction

2 In considering assault with intent to commit criminal sexual conduct third degree the opinion cites State v Sutton 340 S C 393 532 S E 2d 283 (2000) about intent in the context of an attempt crime In an attempt crime specific intent means that the defendant consciously intended the completion of acts comprising the choate offense (emphasis added) The crime of assault is an unlawful attempt or offer to commit a violent injury upon the person of another coupled with a present ability to complete the attempt or offer by a battery The crime of assault is accomplished when by words and conduct one intentionally creates a reasonable apprehension of bodily harm in the mind of the victim In re McGee 278 S C 506 299 S E 2d 334 (1983) cited in State v Sutton 340 S C 393 532 S E 2d 283 (2000)

The defendant hired the victim to work in the sandwich shop when she was fifteen years old and she turned sixteen during her week and a half or possibly six days employment (ROA pp 110-113 120 125) The victim testified to the defendant s numerous opportune advances during the employment when he would grab [her] butt press his body up against [her] from behind put his hands down the front of her pants at the waistline or barely below the waistline went inside her shirt and her bra and put his hand on [her] breast and kept it there about ten seconds and made her sit in his lap The victim had no idea of what the defendant could do to her and was too scared to say anything to him On what was to be her last day the defendant pressed his body against her and grabbed her butt She called her mother from work and reported (ROA pp 113 121 131 135 138) This was testimony from which one could reasonably infer that the defendant used his

position of authority to intimidate and to touch the young and vulnerable victim in a sexually suggestive manner with the intent of committing sexual battery The trial judge denied the motion for directed verdict on assault with intent to commit third degree CSC (ROA pp 229 and 442) and the record supports that ruling (Please see PBOR pp 3-4 p 9) On appeal from the denial of a motion for a directed verdict the appellate court is concerned with the existence of evidence not the weight of the evidence and can only reverse the trial judge if the record contains no evidence to support the trial judge s ruling State v Douglas 359 S C 187 597 S E 2d 1 (Ct App 2004)

Wherefore Petitioner asks that the Court may rehear the case

Respectfully submitted

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Senior Assistant Deputy Attorney General

HAROLD M COOMBS JR
Senior Assistant Attorney General

W WALTER WILKINS
Solicitor Thirteenth Judicial Circuit

BY Harold M Coombs Jr
Harold M Coombs Jr

Office of the Attorney General
Post Office Box 11549
Columbia SC 29211
(803) 734 3727

ATTORNEYS FOR RESPONDENT

April 27 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Pickens County
Honorable G Edward Welmaker Circuit Court Judge

THE STATE

Respondent

vs

MAHAMMED AHAMAD ATIEH
(A/K/A MOHAMMED A ATIEH) Appellant

PROOF OF SERVICE

I Harold M Coombs Jr certify that I have served the within Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail postage prepaid addressed to his attorney of record J Faulkner Wilkes Esquire 114 Whitsett Street Greenville South Carolina 29601

I further certify that all parties required by Rule to be served have been served

This 27th day of April 2012

Harold M Coombs Jr
HAROLD M COOMBS JR

Office of Attorney General
Post Office Box 11549
Columbia SC 29211
(803) 734 3727

ATTORNEY FOR PETITIONER

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
COURT OF GENERAL SESSIONS
G Edward Welmaker, Circuit Court Judge

Case No 2010-GS-39-179, 2010-GS-39-180

State of South Carolina, Respondent,

v

Mahammed Ahamas Atieh, Appellant

APPELLANT'S PETITION FOR REHEARING

J Falkner Wilkes, (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile

Counsel for Appellant

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, the Appellant petitions this Court to grant a rehearing in the present case The Appellant submits this Court may have overlooked or misapprehended important facts and points of law as follows

I ISSUE PRESERVATION

The Court's opinion misperceives the facts relevant to the application of State v Forrester and the issue of preservation

In its opinion the Court states that Forrester does not apply because the former employees were not called as witnesses immediately after the motion *in limine* This is not a correct statement of facts in light of the holding in Forrester

The present case began with a 404(b) motion hearing *in limine* at which the State called Megan Davis, Kayla Hamilton, Kara Sheriff, Kaylalyn Goad, and Rebekah Stark After opening statements the State called Megan Davis, Kayla Hamilton, Kara Sheriff, Kaylalyn Goad, and Rebekah Stark There was no other evidence offered between the motion *in limine* and the exact same evidence being presented to the jury

Holding the that the evidence in question did not immediately follow the

ruling *in limine*, the Court's opinion rests on the general rule that a motion *in limine* is not a final determination and thus a contemporaneous objection must be made when the evidence is introduced State v Forrester, 343 S C at 642, 541 S E 2d at 840 While recognizing the exception to general rule, this Court has either overlooked the relevant facts or misconstrued the holding of Forrester The exception in Forrester applies when there is no intervening offer of evidence from which there could be a basis for the trial court to possibly change its ruling *See* State v Mueller, 319 S C 266, 268-69, 460 S E 2d 409, 410 (Ct App 1995), State v Wiles, 383 S C 151 (2009) In this case, there was no intervening offer of evidence

It is the intervening offer of evidence which determines whether or not the evidence in question is offered "immediately" after the ruling *in limine* as contemplated by Forrester This being because the intervening offer of evidence gives rises to the opportunity of the trial court to change its decision In Forrester, the court held that without the intervening offer of evidence, there is no opportunity for the trial court to change its ruling As a result, no requirement that any additional objection be made

> In most cases, "[m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for

review because a motion *in limine* is not a final determination The moving party, therefore, must make a contemporaneous objection when the evidence is introduced " *See* State v Simpson, 325 S C 37, 479 S E 2d 57 (1996) However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection The issue is preserved

> Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling Thus, [the] motion was not a motion in limine The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal

State v Forrester, 343 S C 637, 642, 541 S E 2d 837, 840 (2001), *quoting* State v Mueller, 319 S C 266, 268-69, 460 S E 2d 409, 410 (Ct App 1995)

In the present case, as in Forrester, there was no evidence introduced between the *in limine* testimony and the trial testimony There was no basis on which the trial court could change its ruling As a result, there was no reason for the defense attorney to believe that he had to make any further objection In this case where the same evidence was offered in the same order immediately following the *in limine* hearing, defense counsel had a right to rely on Forrester and consider his motion sufficient for preservation purposes

It is also important to note that the record shows nothing that would give defense counsel any indication that the trial judge's ruling *in limine* was anything but final Immediately after the trial judge ruled on the admissibility issue he read the names of the 404(b) witnesses to the jury as potential witnesses Also, in opening statements, the State told the jury that prior bad act witnesses would be testifying in the case R 104 Given the record in this case there was nothing that would have given defense counsel any reason believe that further objection was necessary given the holding in Forrester

The facts of this case simply can not be distinguished from those of Forrester As in the present case, the trial judge in Forrester heard the suppression motion prior to opening arguments Afterwards, the case proceeded to trial As in Forrester, the testimony subject to the suppression motion was the first evidence offered by the State In Forrester the Court considered this as the trial court having made its ruling "immediately prior to the introduction of the evidence in question" and held that an objection was not necessary to preserve the issue for appeal The operative fact being that no evidence other than what was offered *in limine* was introduced between the trial court's ruling in limine and the admission of the evidence in question

Since no opportunity existed for the court to change its ruling after the

motion in limine, Atieh did not need to object to the introduction of the prior bad act evidence for the issue to be properly preserved for review *See* State v State v Forrester, 343 S C 637, 541 S E 2d 837, Samples v Mitchell, 329 S C 105, 495 S E 2d 213 (Ct App 1997), *see also* Toal, Vafai, & Muckenfuss, Appellate Practice in South Carolina 76 (1999) As a result, it was error for this Court to hold that the Appellant's issue was not properly preserved in this case

II ADMISSIBILITY OF 404(b) EVIDENCE - TESTIMONY OF STARK

The Court's opinion fails to address the passage of time as a necessary factor in the 404(b) analysis as set forth by the Supreme Court in State v Wilson, 274 S C 635 (1980) In its analysis this Court has overlooked the fact that the events to which Stark was allowed to testify occurred over ten years prior to the incident for which the Appellant was charged

The initial 404(b) analysis for admissibility is one of relevance The allegations of prior bad acts must be shown to be relevant to the present charges Similarity has been the touchstone of admissibility under Lyle and its prodigy However, similarity and its relevance are time sensitive It is the time sensitive nature of the evidence in question that this Court's opinion failes to address

It is true that there existed similarities between the rape and attempted

> rape, and the fingerprints on the window with the peeping-tom incident However, these similarities are diminished when the time frame of the offenses is considered Further, the danger of prejudice is enhanced when, as here, there has been no trial and conviction for the latter acts The subsequent acts remain accusations The manifest prejudice of this evidence is obvious A new trial must be granted

State v Wilson, 274 S C 635 (1980)

In State v Rogers, 293 S C 505, 362 S E 2d 7 (1987), the Supreme Court held that other allegations of abusive conduct by the defendant did not tend to show a common scheme where the other acts and the offense charged occurred ten years apart An analysis of the passage of time in the present case is essential This is especially true where, as in Wilson, the prior allegations in the present case never resulted in a trial or conviction As stated in Wilson, the manifest prejudice of such evidence is obvious Here, as in Rogers, where ten years passed between the unproven allegations and the offense charged, its admission constitutes prejudicial error The Court's opinion in this case fails to properly include time as a relevant factor in its analysis and is therefore in conflict with the Supreme Court's holdings in Wilson and Rogers

CONCLUSION

Based on the foregoing argument, the Appellant moves this Court to rehear this case

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY
COURT OF GENERAL SESSIONS
G Edward Welmaker, Circuit Court Judge

Case No 2010-GS-39 179, 2010-GS-39-180

State of South Carolina, Respondent,

v

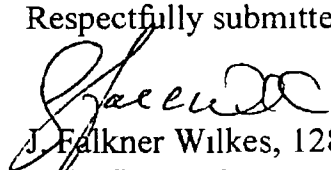
Mahammed Ahamas Atieh, Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of Appellant's Petition for Rehearing on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, this 8th day of May, 2012, addressed as follows and by facsimile as indicated

Salley Elliott
Office of the Attorney General
P O Box 11549
Columbia, S C 29211
via facsimile also to (803) 253-6283

Respectfully submitted,



J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile
Counsel for Appellant

The South Carolina Court of Appeals

The State, Respondent,

v

Mahammed Ahamad Atich (a/k/a Mohammed A Atich), Appellant

Appellate Case No 2010-153946

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing Accordingly the petition for rehearing is denied

Daniel G. Pieper J

J

J

Columbia, South Carolina

cc
John W McIntosh
J Falkner Wilkes
Salley W Elliott
Harold M Coombs, Jr
Alan McCrory Wilson