IN THE SUPREME COURT OF FLORIDA

CASE NO: 94,365

ALEX PAGAN,

Appellant,

vs.

STATE OF FLORIDA

Appellee.
_____/

AMENDED
INITIAL BRIEF OF APPELLANT
ALEX PAGAN

On Appeal From The Imposition Of The Sentences Of Death
By Electrocution By The Circuit Court In And For
Broward County, Florida
Case No.: 93-3648 CF10B
Honorable Susan Lebow

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CERTIFICATE OF INTERESTED PARTIES

Undersigned counsel for Alex Pagan certifies that the following is a complete list of persons who have an interest in the outcome of this case. This is a criminal case and there are no identifiable corporate entities.

1. Dennis Colleran, Esquire, Counsel for Defendant;
2. Willie Graham, Co-Defendant;
3. A. Randall Haas, Esquire, Counsel for Defendant;
4. Freddy Jones, Victim;
5. Lafayette Jones, Victim;
6. Latoshia Jones, Victim;
7. Peter F. LaPorte, Assistant State Attorney;
8. Honorable Lawrence Korda, 17th Judicial Circuit Court Judge;
9. Honorable Susan Lebow, 17th Judicial Circuit Court Judge;
10. Michael Lynn, Victim;
11. Peter Magrino, Assistant State Attorney
12. Ken Malnick, Esquire, Counsel for Defendant;
13. Michael J. Rocque, Esquire, Special Public Defender;

CERTIFICATE OF INTERESTED PARTIES (Continued)

14. Richard L. Rosenbaum, Esquire, Counsel for Appellant;

15. Honorable Michael Satz, State Attorney for the 17th Judicial Circuit;

16. Alan Schreiber, Public Defender for the 17th Judicial Circuit;

17. Honorable Sheldon M. Shapiro, 17th Judicial Circuit Court Judge;

18. Michael Sobel, Esquire, Counsel for Co-Defendant, Graham

19. Honorable Howard M. Zeidwig, 17th Judicial Circuit Court Judge.

Respectfully submitted,

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BY_____
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CERTIFICATE REGARDING TYPE, SIZE AND STYLE

Appellant, Alex Pagan certifies that this Initial Brief of Appellant is typed in 14 point, Times New Roman.

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PRELIMINARY STATEMENT

The following symbols, abbreviations, and references will be utilized throughout this Initial Brief of Appellant, Alex Pagan:

The term "Appellant" shall refer to the Defendant in the Circuit Court below, Alex Pagan.

The term "Appellee" shall refer to the Plaintiff in the Circuit Court below, the State of Florida.

Record on appeal in this case contains pleadings and transcripts. There are six (6) volumes of pleadings contained in pages 1 through 1177. Citations to the pleadings contained in the Record on appeal shall be indicated by an "R" followed by the appropriate page number
(R). Transcripts of hearings and proceedings are contained in 32 volumes, pages 1 through 3848. Citations to the transcript of the hearings, trial, and sentencing proceedings shall be indicated by a "T" followed by the appropriate page number (T).

All emphasis indicated herein have been supplied by the Appellant unless otherwise specified.

ISSUES ON APPEAL

I. Whether the Evidence was Insufficient to Support Alex Pagan's Convictions; Whether The Trial Court Erred in Refusing to Grant a Judgment of Acquittal at the Close of the State's Case and Close of the Evidence, or in Refusing to Order a New Trial; and Whether Evidentiary Errors Singularly and/or Cumulatively Warrant a New Trial?

II. Whether the Evidence Was Insufficient To Support Alex Pagan's Convictions?

III. Whether the Trial Court Reversibly Erred in Allowing Williams Rule Evidence Concerning a January 23, 1993 Burglary That Was Dissimilar Factually And Temporally?

IV. Whether the Trial Court Erred in Denying The Defendant's Motion to Suppress Physical Evidence?

V. Whether the Trial Court Reversibly Erred by Refusing to Grant a New Trial And Refusing to Declare a Mistrial When The Prosecutor Impermissibly Bolstered The Credibility of a State Witness?

VI. Whether the Trial Court Reversibly Erred by Allowing a Surreptitiously Recorded Hearsay Conversation in Violation of Alex Pagan's State And Federal Constitutional Rights?

VII. Whether the Trial Court Reversibly Erred by Denying Alex Pagan's Motion For New Trial And Upholding The State's Batson Challenge to a Juror?

VIII. Whether the Trial Court Reversibly Erred in Refusing to Order a New Trial?

IX. Whether the Trial Court Reversibly Erred in Refusing to Grant One or More of Alex Pagan's Motions for Mistrial?

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XI. Whether the Trial Court Reversibly Erred by Denying a Motion for New Trial Based upon a Richardson Violation When Testimony Concerning A Voice Line-up Was Permitted?

XII. Whether the Trial Court Reversibly Erred by Denying the Defendant's Motion for Mistrial When the Prosecutor in Closing Argument Made References to the Golden Rule with Respect to Improper Inflammatory Reference to Preventing the Defendant from Committing Crimes Again?

XIII. Whether the Trial Court Reversibly Erred in Denying the Defendant's Motion for Mistrial When the Prosecutor in Closing Argument Made Reference to a Camouflage Jacket from the Desert Storm War Which Was Not in Evidence, and Which Was High Prejudicial to the Defense?

XIV. Whether the Trial Court Reversibly Erred by Permitting Over Defense Objection Testimony of Keith Jackson Concerning The Death of a Six (6) Year Old Child?

XV. Whether the Trial Court Reversibly Erred in Overruling Objections And Permitting The Medical Examiner to Express Expert Opinions on Glass Without Any Predicate When The Medical Examiner Lacked The Qualifications to Give Expert Opinions on The Characteristics of the Glass Manufacturer, Its Composition, And Whether Someone Would Be Injured Breaking Through Glass?

XVI. Whether the Trial Court Reversibly Erred in Granting the State's Motion for a Voice Line-up and in Allowing Testimony Relating to the Voice Line-up?

XVII. Whether Cumulative Errors Require Reversal And Remand?

XVIII. Whether Reversal is Required as Alex Pagan's Death Sentence is Disproportionate?

STATEMENT OF THE CASE

On February 23, 1993, a home invasion robbery left Freddy Jones and his son, Michael Lynn dead and his wife, Latoshia Jones and their infant son, Lafayette Jones, seriously injured.

On February 27, 1993, search and arrest warrants were issued by the Honorable Sheldon M. Shapiro, circuit court judge, calling for the arrest of Alejandro Ramirez for the murder of Freddy Jones and Michael Lynn while engaged in the perpetration of a robbery and the attempted murder of two (2) other individuals (R 1). A Probable Cause Affidavit was issued as to Alex Pagan, a/k/a Alejandro Ramirez (R 2). Alex Pagan was arrested the same date and on February 28, 1993 the Honorable Lawrence Korda, circuit court judge, found that probable cause existed and that Alex Pagan should be held to answer charges surrounding two (2) Counts of murder in the first degree and two (2) Counts of attempted murder (R 3). 23 year old Alex Pagan, a white male weighing 180 pounds, five (5) foot 11 inches tall, was held in custody without bond (R 4). He remains in custody ever since.

On March 25, 1993, an Indictment was returned in the 17th Judicial Circuit of the State of Florida charging Willie Graham a/k/a Shaikwam a/k/a Shay and Alex

Pagan a/k/a Lex[1] with the premeditated murder of six (6) year old Michael Lynn with a firearm contrary to Section 782.04, Florida Statutes (Count I), and with the premeditated murder of Freddy Lafayette Jones with a firearm contrary to the same statute (Count II) (R 5-8). Both of the Defendants were likewise charged in Counts III and IV with the attempted murder of Latoshia Jones and Lafayette Jones. Both Co-Defendants were additionally charged with the offense of unlawful entering the structure to commit the offense of armed robbery or grand theft contrary to Section 810.02, Florida Statutes (Count V) and with unlawfully taking a 1988 Jeep Cherokee with the intent to deprive Latoshia Jones and/or Freddy Jones of the property by force, violence, assault or putting them in fear, and in the course thereof, carrying a firearm or other deadly weapon contrary to Sections 812.13 and 775.087, Florida Statutes (R 5-8).

A Not Guilty Plea was entered.

In April 1993, the Defendant filed a Motion to Dismiss the Indictment based upon Rule 3.190(b), Florida Rules of Criminal Procedure. The defense noted that Alex Pagan was arrested pursuant to a warrant authorizing the arrest of Alejandro Ramirez. The defense asserted that the arrest of Alex Pagan on a warrant issued for

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[1]The State agreed to strike the alleged alias from the Indictment prior to trial (T 775).

another individual raised the presumption that unlawfully obtained evidence was presented to the grand jury. Further, a potential defense witness, Antonio Quezada was assaulted and battered by Miramar Police in an attempt to get the witness to change his statement concerning this case. The defense asserted that the use of physical violence by State law enforcement officers in order to divert evidence prior to the impanelment of the grand jury raised the presumption that illegally obtained evidence was presented to the grand jury (R 45-50). Subsequently, the Defendant filed an amended Motion to Discharge the Grand Jury (R 57-62). An Order Denying Motion to Dismiss Indictment was entered by the court (R 117).

Discovery ensued with the State's submission of discovery documents and supplemental discovery materials (R 93-100; 101; 103-4; 105-6; 107-8; 112; 113; 123-5; 126-7; 133; 140-1; 147; 148-9; 150; 152; 155; 157-8; 161-2; 166-7; 173; 175-6; 184-9; 349-50; 407-8; 423-7; 431-2; 437; 448-63; 490-2; 567-70; 863)

In December 1993, the State filed its Notice of Intent to Offer Evidence of Other Crimes (R 180-1). Specifically, the State notified the defense that pursuant to Section 90.404(2) it intended to offer evidence that:

> On or about January 22, 1993, Willie D. Graham and Alex Pagan did unlawfully enter or remain in a structure to wit: a dwelling located at 7941 Ramona Street, property of Freddy and Latoshia Jones, with intent to commit therein the offense of theft, to wit: the obtaining, using, or endeavoring or use the property of another, said property being of value, with the intent to permanently deprive the owner or any

> other person of said property or the use and benefit thereof contrary to Section 810.02(1) and 810.02(3).
>
> (R 180-1)

The State further alleged that on or about the same date Willie D. Graham and Alex Pagan:

> Did unlawfully obtain or endeavor to obtain the property of Freddy and Latoshia Jones to wit: jewelry, cash, and clothing with the intent to either permanently or temporarily appropriate the property to their own use or the use of any person not entitled thereto contrary to Section 812.014(b) and 812.014(2)(c), Florida Statutes. Id.

On December 3, 17, and 20, 1993, hearings on pretrial motions were conducted. Specifically, the court heard evidence and argument concerning a Motion to Suppress Statements. The court ruled that statements given in the police officer lobby should be suppressed, but denied the motion in all other respects (R 182).

Several motions attacking Section 921.141, Florida Statutes as being unconstitutional were filed pretrial. For example, the defense attacked Section 921.141(5)(d) claiming that aggravating circumstance 5(d) was unconstitutionally over broad, arbitrary, and capricious on its face and violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, and 16 of the Florida Constitution (R 192-9). The defense likewise filed a Motion to Declare Section 921.141, Florida Statutes Unconstitutional

because the death penalty in Florida is imposed in an arbitrary, discriminatory manner (R 200-39). A Motion to Declare Sections 921.141 and 922.10, Florida Statutes Unconstitutional was likewise filed (R 273-81). Similarly, the defense filed a Motion to Declare Sections 782.04 and 921.141 Unconstitutional (R 282-6; 287-93). Various other attacks were lodged. See Motion to Declare Section 921.141(5)(i) Unconstitutional (R 294-317); Defendant's Motion to Declare Section 921.141(5)(h) Unconstitutional (R 318-26); Defendant's Motion to Declare Section 921.141 Unconstitutional as Applied (R 327-48); Defendant's Motion to Declare Section 921.141 and 921.141(5)(c) Unconstitutional Facially and as Applied (R 351-7); Defendant's Motion to Declare Section 921.141(5)(g) and/or The Standard Jury Instruction Unconstitutional Facially and as Applied (R 367-74); Defendant's Motion to Declare Section 921.141 and/or Section 921.141(5)(e) Unconstitutional (R 375-85); Defendant's Motion to Declare Section 921.141 and/or 921.141(5)(f) Unconstitutional (R 386-92) and attacking 921.141(5)(b) (R 393-400). Each of the motions were denied (R 689-93; 694-703; 704-11; 712-36; 737-67; 777-85; 786-808; 805-9; 822-9; 830-40; 841-8; 849-55; 856-61).

In January 1994 a Motion for Bill of Particulars was filed by the defense (R 264-5).

In April 1994 the Defendant filed a Motion to Suppress Physical Evidence (

R 401-6). Subsequently, the defense filed a Motion to Suppress Statements (R 410-11) and a Motion in Limine seeking to prohibit the State from introducing evidence pursuant to Section 90.404(2), Florida Statutes (R 414-7). Thereafter, another Motion to Suppress Statements was filed (R 444-5). Similarly, a defense Motion in Limine regarding Williams[2] Rule evidence was likewise filed (R 446-7).

In late 1994, the court severed Willie Graham's trial from Alex Pagan's. Willie Graham was found guilty on all Counts as charged. He was sentenced to life on Counts I and II, and 30 years each on Counts III, IV, V, and VI. All sentences are to be served concurrently. On appeal in Graham v. State, 699 So. 2d 697 (4th DCA 1997), the judgment, conviction, and sentences were affirmed, per curiam. Willie Graham's Petition for Review was subsequently dismissed by the Florida Supreme Court in Graham v. State, 705 So. 2d 8 (Fla. 1997).

In early 1995, a Motion to Suppress Admissions and/or Confessions was filed by the defense (R 465-6). Following hearings, the court entered an Order denying the Defendant's Motion to Suppress Physical Evidence and an Order denying Defendant's Motion to Suppress Admissions and/or Confessions (R 487-8). In

[2]Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied 361 U.S. 847 (1959).

October 1996, the State filed its Notice of Intent to Seek the Death Penalty (R 591-2).

The case proceeded to trial on November 4, 1996. The State presented testimony and evidence and ultimately, on December 20, 1996 guilty verdicts were returned as to each and every Count (R 912-7). Thereafter, the Defendant filed a Motion for New Trial (R 950-3).

Penalty phase proceedings were conducted in March 1997 (R 1041-6; 1050; 1052). The jury rendered its advisory sentence, recommending death by a vote of seven (7) to five (5) (R 1058-61). Thereafter, a Spencer[3] hearing was conducted on July 1, 1997 (R 1065).

Prior to sentencing, a sentencing memorandum was submitted by the defense (R 1072-83). Ultimately, on October 15, 1998, the court entered its sentencing order (R 1114-1126). Alex Pagan was sentenced to death by electrocution as to Counts I and II, and to life imprisonment as to Counts III, IV, V and VI. All Counts are to run consecutively. A Sentencing Guideline Scoresheet was filed the same date (R 1149). A Judgment and Restitution Order were likewise entered (R 1150-1). A Judgment was formally entered (R 1152-3).

A Notice of Appeal was timely filed on November 13, 1998 (R 1155). This

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[3]Spencer v. State, 615 So. 2d 688 (Fla. 1993).

appeal ensues. Alex Pagan remains incarcerated at Union Correctional Institution in Raiford, Florida, on death row.

STATEMENT OF THE FACTS.

The State of Florida presented evidence and testimony from several witnesses in its quest to establish Alex Pagan's guilt beyond a reasonable doubt in this case.

Edan Jacobs testified that he lived nearby the Jones residence on Ramona Street in Miramar, Florida (T 1490). Early in the morning on February 23, 1993, while lying in bed, Mr. Jacobs heard gunfire (T 1491). Mr. Jacobs, a paramedic with Metro Dade Fire Rescue, grabbed his trauma bag and a weapon, called 911, and ran outside his residence (T 1493). He saw a black female later learned to be Latoshia Jones covered in blood, screaming hysterically (T 1493). She shouted "they've shot my baby." He observed a gunshot wound to her head (T 1494). He took the baby, Lafayette Jones from her arms and started treating him. Although Mr. Jacobs heard a truck speeding away, he did not see the occupants (T 1492; 1504).

Miramar Police Office Craig Bonczek received a call from dispatch at 1:13 a.m. on February 23, 1993. He was traveling in a marked unit and along with Officer Morton were the first to arrive at the Jones residence on Ramona Street. The officers entered the residence and found a dead male adult and male child each hogtied in the master bedroom (T 1509; 1513; State Exhibit 2). Officer Cynthia Brown, a Miramar Police Canine Handler arrived at the scene. She too saw

Latoshia Jones hysterical (T 1518-21).

Sergeant James Kammerer of the Broward Sheriffs Crime Scene Unit was the first person from the Sheriff's Department to arrive at the Jones' house on Ramona (T 1626). He walked the perimeter looking for any signs of physical evidence (T 1630). He noted that the location was wet, and that it had rained earlier (T 1630-1).

Inside the house, Sergeant Kammerer saw blood on the bed and shattered glass from the sliding glass window. He saw a bloody fingerprint on the wall (T 1632). Via Sergeant Kammerer, a video tape of the scene was introduced into evidence (T 1634; State Exhibit 9).

BSO Forensic Service Officer Charles Edel met the medical examiner, Dr. Ronald Wright, at the residence and observed the two (2) males who appeared to have died from gunshot wounds. The youngest, Michael Lynn,[4] was four (4) foot two (2) inches and weighed 71 pounds. The older man, Freddie Jones was five (5) foot nine (9) inches and approximately 200 pounds (T 1531). Officer Edel collected blood vials and gathered projectiles found alongside the decedents.

Latoshia Jones testified concerning the tragedy that occurred at her residence during the early morning hours of February 23, 1993. The day before, Latoshia

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[4]Freddy Jones and Michael Lynn were identified by Tammy West who grew up with Freddy Jones and lived in Dania, Florida (T 1711-12).

Jones and her husband, Freddy Jones had gone house shopping in their Jeep Cherokee (T 2035-36). They took their two (2) children, Lafayette Jones and Michael Lynn with them. Latoshia Jones' husband Freddy, nicknamed "Laff," because of his full name Freddy Lafayette Jones, owned and operated "Lil Laff's Soul Food and Seafood Restaurant." (T 2039) Their child, Michael was six (6) years old (T 2040). After house shopping, the family ate, and Latoshia Jones fell asleep in front of the television. Ultimately, she went to bed with her husband and child, "Lil Laff." (T 2040)

Latoshia Jones was awakened by the sound of breaking glass (T 2042). Both she and her husband woke up. It was very dark inside the residence except for a light over the stove in another part of the house (T 2042). Latoshia Jones testified that she observed two (2) men, one on each side of the bed. They had masks on their faces and she could not see much of their bodies (T 2043). She heard one of the men say "Mr. Loffin - we heard you had $12,000 or $13,000 and we want it." (T 2044) One of the men was waving a gun around (T 2046). The man said he messed up the first time (T 2049). Latoshia Jones took the statement to be a reference to a burglary which had occurred at the Jones' residence approximately one (1) month earlier (T 2049). At that juncture, the "hyper one"[5] forced Latoshia Jones to take

[5]Believed to be Willie Graham.

him through the house at gunpoint (T 2051). She knew that there was money in the house, but was unable to locate the bag of money in the location she thought. While being led around by the "hyper one" it felt like he was wearing a glove (T 2052).

When Latoshia Jones was unable to locate the money, the "hyper one" hit her on the side of the face with his gun (T 2056). Ultimately, the "quiet one" told the "hyper one" to go get some rope (T 2060). She saw her husband tied up on his stomach but never saw her son Michael tied (T 2062). She heard the quiet one shoot her husband and heard him state to her son "if you live through this make sure you go to school every day. You son, you don't have to grow up like me." (T 2064)

Latoshia Jones saw the shots. She laid there and played like she was dead (T 2065). She heard her baby crying (T 2066). There was glass all over, including on the bed. She heard seven (7) to eight (8) shots (T 2068-69). She heard the robbers grab the keys to the Jones' truck as they took her Jeep Cherokee and left (T 2060; 2074). She ran next door and cried for help (T 2070).

Latoshia Jones told law enforcement that the home invaders were both approximately five (5) foot four (4) inches and of medium build (T 2236). She is five (5) foot two (2) inches or five (5) foot three (3) inches, so she felt that this was a good estimate of their height. Latoshia Jones testified that one of the culprits

wore a beige trench coat and both wore masks. One (1) of the individuals had a high yellow tint or high red tint to his skin (T 2238-41). She admitted that she never met or saw Alex Pagan her entire life (T 2241).

Latoshia Jones admitted that she smoked marijuana the day before the incident (T 2243). She admitted that there was cocaine found at her residence. She likewise admitted knowing that her husband was thought to be having an affair with Dee Dee Mosley (T 2246). She had previously gotten angry at Dee Dee and slashed all four (4) of her tires (T 2247).

Immediately after the incident, Latoshia Jones did not believe that both of the Defendants were black males. After her memory was refreshed, she did recall a prior statement wherein she advised law enforcement that one (1) of the individuals had a New York accent (T 2249).

On redirect examination, Latoshia Jones testified concerning a voice line-up which was conducted at law enforcement's request. Although she was unable to positively identify anyone's voice, after the identification process was over, she told the officers she thought the individual might have been individual #2, Alex Pagan (T 2272-74).

Sergeant Kammerer noted that a black Honda was in the garage of the Jones residence (T 1633). He also noted that a latex glove was on the floor in the house,

as well as eight (8) spent shell casings, seven (7) in the bedroom and one (1) in the dining room (T 1636). Law enforcement collected nine (9) projectile fragments, all from the bedroom area (T 1636).

Sergeant Kammerer testified that blood samples were taken, fingerprints were gathered, and shell casings from the bed were taken into evidence (T 1667-76).

Sergeant Kammerer admitted that many of the members of law enforcement and other personnel at the crime scene were wearing latex gloves (T 1689). A latex glove was found close to the bed in the master bedroom. A box of latex gloves was found in the Jones residence (T 1691).

Sergeant Kammerer testified that there was marijuana residue in the ash tray in the garage, as well as three (3) marijuana cigarette butts (T 1695). He admitted that several people had been to the crime scene prior to his arrival (T 1697).

Sergeant Kammerer noted that the only light on in the house was a light over the stove (T 1698). The Sergeant testified that nobody touched the body before the medical examiner got there, and noted that the Honda in the garage was registered to Daniel and Darlene Nichols (T 1701).

Sergeant Kammerer accompanied Dr. Wright, the medical examiner, while Dr. Wright walked through the crime scene from 4:39 a.m. to 5:25 a.m. He noted that there were no footprints although it had been raining heavily (T 1463). While

Sergeant Kammerer was at the scene, the decedents were taken to the medical examiner's office (T 1646).

Detective Foley from the Crime Scene Unit took photographs of the scene and assisted in processing the crime scene (T 1904-17). Detective Foley testified that law enforcement officials found $109,000 in Freddy Jones' closet when searching the residence (T 1918-21).

The detective admitted that there were no foot prints found by the swing set (T 1940). The detective noted that the same colored sand was found underneath the swing set and in the kick plate of the truck (T 1942). $300 cash was found in Freddy Jones' blue jeans (T 1954).

Detective Foley noted that although the Jones' residence had an alarm system, the batteries were not working the night of the incident (T 1965).

Miramar Police Officer Jonathon Black located the Jeep Cherokee on State Road 441, behind an Extra Supermarket (T 1540). The car was found approximately five minutes away from the Jones residence (T 1545). Forensic Unit Officer Robert Cerat processed the passenger side of the vehicle (T 1575). He located four (4) latent prints on the passenger side of the interior of the vehicle. A tarp was placed on the car and it was transported back to headquarters. No identifiable prints ever linked the vehicle to Alex Pagan. BSO Deputy Mark

Suchomel assisted in the processing of the Jeep Cherokee (T 1594-1616). He took the tarp off the vehicle and took pictures of the vehicle (T 1600). He processed the vehicle for latent prints and actually made 19 or 20 lifts (T 1604). He also assisted Sergeant Eckard in taking aerial photographs of the scene (T 1605-14).

BSO Officer Dennis Shinaberry went to the Hollywood Memorial Hospital and took photographs of Latoshia and Lafayette Jones' injuries (T 1586). He also took possession of a fragment taken from the right temple of Latoshia Jones.

The district medical examiner for Broward County, Dr. Ronald Wright testified at length during the trial (T 1713-68). Although never declared an expert, Dr. Wright was permitted to provide expert opinion testimony. Objections were lodged concerning the doctor's opinion testimony without a predicate concerning the method of entry into the residence and other testimony concerning the sliding glass door (T 1724-5). The sliding glass door was found to be completely broken. Glass from the sliding glass door was found in the bedroom (T 1728).

Dr. Wright testified that both Freddy Jones and Michael Lynn were found "hogtied." Dr. Wright had the bodies removed and conducted an autopsy[6] (T 1733). Based upon his autopsy and the blood stippling, the doctor estimated that Freddy and Jones and Michael Lynn were shot from one (1) to three (3) feet away. The

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[6]Charles Edel likewise the autopsy (T 1810).

doctor opined that Freddy Jones died as a result of gunshot wound to the head. Michael Lynn had four (4) gunshot wounds, three (3) in the head and one (1) in the buttocks. The ammunition was hollow point bullets, designed to break into fragments

(T 1750-1).

Dr. Wright further testified that Freddy Jones had a .10 blood alcohol content.

On cross-examination, Dr. Wright admitted that he did not have a degree in structural engineering and had not specific expertise in engineering (T 1756-62). He did not witness anyone breaking into the house.

BSO latent fingerprint examiner Herb Jacoby, a fingerprint classifier assisted the State by conducting a fingerprint analysis. The only fingerprints that Detective Jacoby was able to identify were those of Freddy and Latoshia Jones (T 2011-31). None of the prints matched Alex Pagan (T 2034).

Deputy Paul Manzella testified that he went to arrest Willie Graham on February 25, 1993 (T 2285-87). He searched Willie Graham's room and found a California identification card with Willie Graham's picture bearing the name Willie Grahay (T 2288). Deputy Manzella met with Willie Graham when he surrendered on February 27, 1993 (T 2288).

After interviewing Keith Jackson, deputy Manzella learned where Alex Pagan lived (T 2291).

Deputy Manzella investigated the case and ascertained that it took approximately three (3) minutes to drive from Willie Graham's residence to the Jones' residence (T 2297). It took approximately six (6) minutes to travel the four (4) miles from the Extra Supermarket to the Jones' residence (T 2298).

Deputy Manzella was likewise involved in taking blood from Latoshia Jones as well as taking blood pursuant to a court order from Willie Graham and Alex Pagan after they had been arrested. Via Deputy Manzella the State was able to establish that between April 29, 1992 and February 15, 1993, there were 28 false alarms at the Jones' residence. Deputy Manzella likewise testified concerning the voice lineup (T 2325-27).

Deputy Manzella obtained an arrest warrant for Alejandro Ramirez (T 2328). The individual believed to be Alahandro Ramirez was in actuality, Alex Pagan (T 2330).

Deputy Manzella admitted that Keith Jackson, known as "red man," was a suspect in the case (T 2345). Likewise, Eric Miller, Anthony Graham, and Alphie Santiago were suspects (T 2346).

Miramar Police Officer Daniel Learned investigated the incident. Pursuant to

a search warrant, he and other officers searched the Jones' address and found the $109,000 in U.S. currency. The money was found in bundles, with much of it heat wrapped (T 2418). Freddy Jones was being investigated for his involvement in narcotics (T 2419).

Officer Learned likewise was involved in the arrest warrant and search warrant at 8450 North Shirman Circle, where Alex Pagan lived. The apartment, at Pier Club Apartments was entered without law enforcement knocking (T 2402). Alex Pagan was found in the west bedroom. Alex Pagan told law enforcement that they had the wrong individual. He was shown a right's waiver form, but refused to sign it (T 2408). Nevertheless, law enforcement officials engaged Alex Pagan in conversation and questioned where he was at the time of the incident. Ultimately, they asked Alex Pagan if Willie Graham could have committed the double homicide and Pagan stated "Willie is crazy enough." (T 2412)

Miramar Police Officer Gil Bueno arrived at the Jones' residence at 7941 Ramona Street at approximately 2:15 a.m. (T 2422). In investigating the case, Officer Bueno noted that the Extra Supermarket to Antonio Quezada's residence was a little less than 12 miles, and took approximately 18 minutes. The detective took the boots from Willie Graham and turned them over for processing (T 2426). Detective Bueno assisted in executing the search warrant at Alex Pagan's residence

(T 2428). There, the officer seized a Honda ring and necklace with an anchor and crucifix necklace (T 2429). Alex Pagan stated that he got the ring from Willie Graham (T 2434).

During the search of Alex Pagan's residence, law enforcement officials seized a jacket which belonged to Willie Graham (T 2437). Law enforcement took carpet samples, but the same were found to be inconclusive (T 2439).

23 year old Antonio Quezada testified that he first met Alex Pagan in Hollywood, Florida (T 2454). He and Alex Pagan became good friends. Antonio Quezada met Alex Pagan's family, and knew that Alex lived with his mother and sister (T 2456-58). Antonio Quezada admitted that his nickname is "Papito." At the time of the incident he was enrolled at Miami Dade Community College. He testified that Alex Pagan would sometimes go to the campus with him (T 2458).

Antonio Quezada met Willie Graham through Alex Pagan. He likewise met Keith Jackson at Alex Pagan's house.

Antonio Quezada swore under oath on more than one (1) occasion that he was Alex Pagan's alibi as the two (2) were together the entire night of February 22, 1993. Ultimately, Antonio Quezada testified at trial that he lied to the police and lied to the judge in court when he testified that he was Alex Pagan's alibi the entire evening of the incident (T 2528). He admitted that the police beat him up and

assaulted him, even turning a table over on him and knocking him off his feet (T 2533-39). Quezada testified that the officers were attempting him to force him to say that he dropped off Alex Pagan and Willie Graham so that they could commit the home invasion. Antonio Quezada was charged with being an accessory after the fact

(T 2542).

Antonio Quezada admitted that he did not witness anything on Ramona Street that evening. The information he testified he claimed to have learned from Willie Graham and Alex Pagan. The defense contended that no such statements were made. Antonio Quezada testified that he learned that Willie Graham jumped through the sliding glass door to enter the residence and Alex Pagan told him to tie up everyone with the telephone cord.

Antonio Quezada admitted that many of the details that he knew about the home invasion he learned from law enforcement (T 2544). He learned important information and details including the name of the victim's family. He admitted that the police threatened to throw him out a window until he confessed (T 2545).

Antonio Quezada entered into an agreement with the state which resulted in the accessory after the fact charges being dropped (T 2547). Antonio Quezada was not charged with anything as part of his agreement to testify against Alex Pagan and

Willie Graham. He was not charged with perjury for lying under oath in and out of court. He was promised that no Federal charges would be filed against him also (T 2547-58).

Further, Antonio Quezada stated that he never saw any masks. He never saw any trench coats. He never saw a gun. Antonio Quezada admitted that its all right to lie under oath to save your life (T 2561).

Antonio Quezada testified that he spent the night of February 21st at Alex Pagan's residence. The next day, they slept in and then went to see Alex Pagan's girlfriend, Ann Marie Santiago (T 2461-62). Later that day, Alex got beeped. He told Antonio Quezada to pick up Shaikwam (Willie Graham) (T 2464-65). Antonio Quezada testified that he, Willie Graham, and Alex Pagan were going to see "Behito" to check out a job. Ultimately, Mr. Quezada got hired (T 2467). At approximately 11:00 or 11:30 p.m. they left Behito. Antonio Quezada with Alex Pagan in the front passenger seat and Willie Graham in the back. According to Quezada, a statement was made that "this would be a good night to go back into the house." (T 2471)

Antonio Quezada testified that Alex Pagan stated "we are going to kill everybody." (T 2475) Willie Graham agreed.

Alex Pagan was said to have been wearing black dress shoes the night of the

incident. According to Quezada, Pagan and Graham went to pick up Keith Jackson, but ultimately left without him. According to Quezada, Alex Pagan stated "fuck red man. He's taking too long." (T 2476)

Antonio Quezada saw Willie Graham wearing boots and sweat pants. He questioned Alex Pagan's attire, wondering whether he was going to a robbery or going to a club (T 2478). According to Quezada, Alex Pagan stated that he was going to war (T 2478). Antonio Quezada testified that he drove Willie Graham and Alex Pagan down Jones' street and dropped them off so that they could go in and rob Freddy Jones. According to Quezada, Alex Pagan stated "I'm going to kill everybody." (T 2478) Antonio Quezada testified that he replied "don't kill the kids." (T 2479)

Antonio Quezada testified that he dropped Alex Pagan and Willie Graham off around the corner from the Jones residence. He did not see any ski masks (T 2480). He did see Willie Graham give Alex Pagan surgical gloves and he saw Alex Pagan put them on. After dropping them off, Antonio Quezada went home to study for a test (T 2482). According to Quezada, later that evening, he saw Alex Pagan and heard Alex Pagan state "I killed everybody." (T 2483) Alex Pagan asked Antonio Quezada to take Shaikwam to the bus station (T 2483). Antonio Quezada detected the odor of gun powder (T 2484). Alex Pagan stated that they stole the victim's car

and left it at a supermarket. Willie Graham appeared to be upset because they did not get anything in the robbery. The three (3) men drove around and according to Quezada at Alex Pagan's trial, Pagan described what had happened (T 2487). He stated that they had utilized a telephone cord to tie up the people in the house (T 2488). Alex said that he shot everybody.

Antonio Quezada did not see any guns, however, he stated that Alex Pagan said that he had broken and scattered the pieces of a .9 mm firearm. Antonio Quezada had previously seen a .9 mm firearm before February 23 (T 2493).

Antonio Quezada testified that he saw Alex Pagan with the Honda ring sometime after January 1993. He saw that Willie Graham had a bracelet that said Latoshia, and saw other items of jewelry which he believed were taken during the January robbery. Antonio Quezada testified that he heard Willie Graham say, next time we are going to do it right (T 2523).

Kevin Noppinger from the BSO Crime Lab, DNA Unit testified concerning his investigation in the case (T 2733-58). Mr. Noppinger was declared an expert in DNA.[7] After thoroughly investigating, Mr. Noppinger could find no blood on the leather jacket, no blood stains on the glove, and was unable to match either Willie Graham or Alex Pagan's DNA to the DNA found on the scene. He ultimately

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[7]Deoxyribonucleic Acid

concluded that 87 million people would need to be tested to match the known samples in this case (T 2758).

Keith Jackson testified as a cooperating State witness. Mr. Jackson testified that in January and February 1993 he was working at Transus Freight and Trucking Company (T 3046). He was employed unloading and loading trucks.

Keith Jackson testified that as of February 1993, he had known Alex Pagan for approximately eight (8) years. They were acquaintances since high school (T 3047). Keith Jackson was likewise acquainted with Willie Graham. At the time, he had known him for about a year or so (T 3048). Keith Jackson was the individual that introduced Alex Pagan and Willie Graham (T 3049). Keith Jackson testified that he first learned Alex Pagan's last name when one of the detectives at Miramar Police Department told him. He only knew Alex's mother's last name, Ramirez (T 3050).[8]

Keith Jackson testified that he was at work between midnight and 9:00 a.m. on February 23, 1993. After work he went straight home where he received a phone call from Willie Graham's cousin, Anthony (T 3053). After speaking with Anthony, Keith Jackson paged Willie seven (7) times. He never answered, so he paged Alex (T 3053). Keith Jackson testified that Alex called him back and stated

[8]The witness subsequently corrected the name to be Rivera (T 3051).

that he had been with Shaikwam the night before. Keith Jackson stated "Alex, something happened in Miramar last night and Shaikwam's cousin is looking for him and everything." (T 3054) Approximately 30 to 45 minutes following the conversation, Alex Pagan and Antonio Quezada went to Keith Jackson's house. According to Keith Jackson, Alex Pagan admitted "we broke into the house and we did what we did in the house." (T 3056)

Keith Jackson alleged that Alex Pagan was asked if he killed the child and responded "he had to do it." (T 3056) He said he shot everybody in the house. He said he tied the kid up and asked where the money and where the dope was. Allegedly, Alex Pagan said that everyone was dead (T 3057). When told that not everyone was dead, that in fact a baby and her mother were still alive, Alex Pagan allegedly stated - - "I fucked up." (T 3058) Allegedly, Alex Pagan told Keith Jackson not to worry about the guns, they will never find them. He said that they were dismantled and were all over Miami (T 3059). Alex Pagan stated that Willie Graham had been dropped off at the bus station and that he went to Georgia (T 3059).

Keith Jackson also alleged that Alex Pagan admitted stealing the Jones' truck and driving is to Extra Supermarket. Alex Pagan allegedly told Keith Jackson that he did not leave any fingerprints because he had latex gloves on. He stated that

when he and Willie Graham got out of the truck and went to the front of Extra Supermarket, they met a Jamaican man that was on the phone who needed money. They needed a ride, so they gave the man some cash to take them to Miami to "Papito's house." (T 3061)

According to Keith Jackson, Alex Pagan stated that during the home invasion a light came on in the house, and he thought that everyone inside the house saw his face.

Alex Pagan told Keith Jackson that when the guy was lying down he told the little kid "if you make it through the night don't grow up to be like your father." (T 3062)

Keith Jackson explained that he and Alex Pagan learned about Freddy Jones through Jackson's cousin, Eric Miller. He, his cousin and Alex Pagan had a meeting there (3) or four (4) weeks before the burglary. Eric took them to "Laff's" house. Eric told them that there was money in the house (T 3065). Keith Jackson stated that he, Willie, and Alex discussed robbing the house on several occasions (T 3066).

Keith Jackson testified that he received a call from either Willie Graham or Alex Pagan on January 23, 1993. Willie Graham told him that they had just hit the house owned by "Laff." (T 3068) When they came into the house they had a lot of

gold jewelry on. Alex told him that they went into the house and ransacked it. Willie Graham was the first to break in. They took jewelry, a jacket and some other things. They also sat down and ate prior to leaving (T 3069). Willie Graham said that they were going to hit the house again because they did not get all the money that was supposed to be in the house (T 3070).

Keith Jackson stated that after the January burglary, Alex and Willie gave him $200 or $300 because he was "their boy." (T 3074) They spent the night visiting strip clubs in Miami, spending money (T 3074).

Keith Jackson testified that he saw Willie Graham with lots of jewelry that evening. He had a rope chain with a cross on it. He had a ring with diamonds on it. He had another little chain hooked to the rope with Latoshia's name on it. Also he had a big nugget watch (T 3075).

Keith Jackson testified that the night of the burglary in January he saw Alex Pagan with a .9 mm gun. He knew the gun to be Willie's Beretta.

Keith Jackson, Willie Graham, and David Benelli has each been arrested on January 25, 1992 in Dade County, Florida. They were charged with attempted first degree murder and armed robbery. Keith Jackson spent eight (8) months prior to being released. He was released when the charges were dropped. Subsequently, in 1996 the charges were reinstated. Ultimately, Keith Jackson plead guilty, agreed to

testify against his co-defendants in the Dade County case, and agreed to be a cooperating witness in the cases against Willie Graham and Alex Pagan. He had not yet been sentenced and was free on bond at the time of Alex Pagan's trial (T 3082).

After Keith Jackson began cooperating with law enforcement, he went to the flea market in Miami wearing an undercover law enforcement tape recorder. Law enforcement wanted him to get a taped conversation with "Papito" a/k/a Antonio Quezada (T 3083).

Keith Jackson admitted that his nickname is "red." (T 3139; 3089) His skin was lighter than most of the guys he hung out with. It was common for lighter skin people to be called red. According to Keith Jackson, he believed that the Jones' house contained $500,000 (T 3110).

Gerald Roelling, terminal manager for Transus Motor Freight in Hialeah testified that he employed Keith Jackson as a dock worker. Keith Jackson's time card was admitted into evidence (T 2764; State Exhibit 169). The time card indicated that Keith Jackson punched in for work on Monday at 11:55 p.m. and worked until 9:29 Tuesday evening (T 2775). Keith Jackson worked 53.4 hours that week. Nevertheless, Mr. Roelling was unable to testify as to any time or date when the trucks were unloaded (T 2787). He admitted that there were 500 freight

bills a day and that he personally did not work with Keith Jackson on February 22 or 23rd (T 2788).

Three (3) days after the home invasion, Keith Jackson gave a sworn statement to the police that he was never told who fired the gun (T 3124). Keith Jackson testified under oath that the watch that Willie Graham had that night had a face that you had to open up in order to look at - a clock watch (T 3124-25).

In a sworn statement, Keith Jackson testified that Anthony Graham told him where Willie Graham went (T 3126). In the same statement, Keith Jackson swore to the police that Alex Pagan never told him that the people were tied up or how they might have gotten tied up (T 3130). Keith Jackson admitted watching several special broadcasts concerning the Miramar homicides (T 3140-43).

Keith Jackson was impeached on several occasions concerning important matters such as how he learned how the sliding glass door was broken and where the truck was (T 3146). Mr. Jackson's testimony changed from statement to statement (T 3161-64).

Pursuant to the notice filed by the State pursuant to Section 90.404(2), Florida Statutes, Latoshia Jones testified that on January 23, 1993 a burglary had occurred at the Jones' residence (T 2084). Latoshia Jones testified that on January 23, 1993 she and her children came home to find that their house had been trashed

and there was stuff all over (T 2204). She and her husband filled out an inventory loss report and made an insurance claim listing approximately $26,000 in clothes, jewelry, and cash ($16,000) which had been taken (T 2207-2211). One (1) of the items taken was an anchor and crucifix necklace (T 2213). A Honda ring was likewise taken (T 2215). Her husband "Laff's" watch was taken (T 2244). Various rings and bracelets were likewise stolen (T 2227). She explained the $109,000 in the house as being her husband's money that he used to gamble. He used to go to the dog track, the race track, harness racing, and Jai Lai (T 2087).

Sergeant James Lind, who had been an officer with the City of Miramar processed the crime scene at the Jones residence on January 23, 1993 (T 1554). A burglary had occurred there (T 1556). Sergeant Lind lifted fingerprints from the scene and noted that the room was a bit ransacked (T 1567-70).

Herb Jacoby, latent fingerprint examiner testified that latent fingerprints were taken from the Jones's residence following the January burglary and the February invasion (T 2099-2108). None of the fingerprints identified Alex Pagan as being inside the Jones' residence in either January or February 1993 (T 2116). All the prints were either of value and unknown or of no value, or they belonged to Latoshia or Freddy Jones (T 2136).

During the February robbery, Latoshia Jones heard the quiet one state "we

messed up the last time." (T 2049)

Antonio Quezada testified that on January 23 he saw Keith Jackson, Willie Graham, and Alex Pagan after the robbery (T 2472).

Officer Bruce Ayala testified concerning the January burglary (T 2679-81). Robert Valentine, the owner of A & E Pawn Shops, introduced business records showing that Willie Graham pawned a man's Seiko watch with a nugget band and diamonds on February 14, 1993 (T 2711-2723). Although Robert Valentine identified the watch mechanism and crystal, he admitted on cross-examination that he is not a jeweler, he is only a pawn shop owner (T 2727). He likewise admitted that he had never met Alex Pagan in his life (T 2729-30).

i. Penalty Phase Proceedings

Penalty phase proceedings were conducted on March 3, 1997. Following the defense and State openings, the State introduced evidence concerning Alex Pagan's prior criminal record. His priors included a sexual battery and two (2) aggravated batteries. Sergeant Mary Gillogan of the Miramar Police Department testified concerning the conviction for sexual battery sometime ago. The girl, Linda Berry, was not yet 14 years old at the time of the sexual battery. Linda Berry's sworn statement taken subsequent to the incident was read to the jury (T 3442-50). Likewise, Alex Pagan's statement in response thereto was read to the jury (T 3468-

76).

The defense called Carmello Miranda as its first witness. Ms. Miranda, a former New York State court officer testified that Alex Pagan is her nephew. Ms. Miranda testified that Alex Pagan's mother and father split up when he was approximately two (2) years old (T 3483). She babysat Alex and spent a lot of time with him when he was small. Ms. Miranda testified that Alex was a good boy. He was always helpful around the neighborhood and around the house (T 3485). Ms. Miranda testified that Alex had been in custody for three (3) years since his arrest and that she had been in contact during that period (T 3496). Alex Pagan has told her children to stay in school and to be the best you can be (T 3497).

The defense played a video deposition of Yolanda Esbro to the jury (T 3507). Ms. Esbro testified that she knows Alex from her neighborhood where he grew up. Alex and her son became close friends in the third grade and remain close thereafter (T 3508). Alex and his sister got along excellently (T 3509).

Next, a video deposition of Anthony Penia was played to the jury (T 3516). The witness and Alex were best friends growing up in the same neighborhood. He believed Alex to be a "funny person, a good person, a nice person." (T 3518)

Sharon Livingston, classification records supervisor for the Broward Sheriffs Office testified as a defense witness (T 3535). She reviewed Alex Pagan's file and

noted that he had been incarcerated since his arrest in 1993. Since being incarcerated he had not accumulated any "DR's".[9] Alex Pagan maintained an exemplary prison record.

Alex Pagan's mother, Maria Rivera testified (T 3540). She is employed as a transporter at Pembroke Pines Hospital. She detailed her rocky relationship with Alex's father, Michael (T 3540). Michael Pagan was married to another woman at the time she met him.

When Alex was seven (7) months old, his parents, Maria and Michael, had a confrontation. They got into an argument and he punched her. It was in front of her grandmother and his father (T 3542). After Yvette was born, she and her husband tried to make up but he advised that he no longer loved her. He had somebody else (T 3544).

Maria Rivera was able to take care of the kids along with the help of her grandmother. Thereafter, Michael did not come to see Alex (T 3544). Alex's mom detailed Alex's childhood and early years (T 3550-62).

When Alex was young, a threat was made against his family. A family friend, "Yogie" had a bodyguard put in the house. He stayed with them in the apartment (T 3565). He carried a weapon in the house at all times (T 3566). He

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[9]Disciplinary Reports.

stayed a couple months.

Alex was home when his grandfather died. Alex heard his mother scream out the window and Alex was one of the first ones that ran up the stairs. Alex tried to give him CPR, but was unable to revive his Grandpa. After that, he "freaked out." (T 3571)

Alex's mother testified that when he was turning 18, he was charged with an offense against a girl. He was sent to prison for four (4) or five (5) years. She visited with him and spoke with him on the phone (T 3571-72).

After Alex got out of prison he started drinking and his personality was different (T 3575). He was more to himself. His attitude changed. Through Alex's mother, several pictures of Alex in various stages of his life growing up were introduced (T 3578).

Provilencia Alasaya, Alex's great grandmother testified (T 3581). She raised him in New York. He spent a lot of time with her. They were quite close.

Michael Rocque, an attorney and law professor at Nova Law School testified on Alex Pagan's behalf (T 3586). He met Alex Pagan when he was appointed to represent Alex in the penalty phase of the trial. He represented Alex for approximately one (1) year. Mr. Rocque withdrew from the case because he was going through a divorce and had a lot of family problems. He had a lot of cases and

did not feel his continued representation would be fair to Alex (T 3588). Alex Pagan helped Michael Rocque, and the attorney attested to positive advice he had received from Alex Pagan concerning his personal life.

Yvette Pagan, the defendant's sister likewise testified on his behalf. She testified that Alex was a wonderful brother to her. She loves him dearly with all of her heart. He treated her wonderfully, with all due respect (T 3509; 3520; 3591).

ii. Spencer Hearing

A Spencer hearing was conducted on June 30, 1997. Dr. Martha Jacobson, a licensed psychologist, stipulated to be an expert in forensic psychology, testified concerning Alex Pagan. Based upon her extensive investigation, the expert doctor formed the opinion that Alex Pagan has a borderline personality disorder (T 3675). Alex Pagan has a fear of abandonment, instability of moods, and a difficulty with interpersonal relationships. He likewise has identity disturbances (T 3676). In the doctor's opinion, Alex Pagan met the criteria, although between minimal level, for schizophrenia or schizophrenic like systems on the Rorschach Test (T 3677). His MMPI Pattern Profile also indicated some naivety, immaturity, recklessness, a kind of emptiness, a kind of motor anxiety, and some paranoid ideation (T 3678).

The doctor found Alex Pagan to have a sense of diaspora[10] about him. Alex

[10]Diaspora is a negative sad affect, not quite depression (T 3683).

Pagan noted several times that he felt that his life amounted to nothing. The doctor found that Alex Pagan does not have an antisocial personality disorder based upon several reasons (T 3685-88).

Dr. Jacobson stated that there was no question in her mind that Alex Pagan has attention deficit disorder (ADD) and had it as a child (T 3692).

At the time of the offense, Alex Pagan was 23 years old (T 3697). The doctor opined that Alex Pagan's test results as well as his history and the diagnosis of disorders indicate that there was very good likelihood that there was some developmental and psychological immaturity on his part.

Dr. Jacobson testified that Alex Pagan did not have a normal childhood. "He was significantly lost in deprivation. In his childhood there was inconsistent parenting." ". . . he was not treated appropriately." (T 3698) His role models were not socially appropriate. For example, he was given a marijuana joint by his uncle[11] on his 12th birthday as a birthday gift.

Dr. Jacobson testified that Alex Pagan admitted to her that he drank excessively, particularly after he left prison and returned to Miramar. He stated that he would drink upwards of a gallon of rum a day (T 3699). While the doctor was not sure about the exact amount, she was sure it was a significant amount.

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[11]This was Alex Pagan's psychological father to some extent.

According to Dr. Jacobson's testing, Alex Pagan had a verbal intelligence quota of 98, a performance IQ of 121, and a full scale IQ of 107. That placed him in the 60 to 70th percentile. His performance IQ of 121 placed him in the 90th percentile. His verbal IQ of 98 placed him in about the 47th or 48th percentile (T 3700).

Dr. Jacobson testified that the psychological impact of having attention deficit disorder coupled with a borderline personality disorder would be critical in Alex Pagan's development. The doctor stated:

> So here is a child who is on the go, getting into things, not listening, not paying attention, not being able to concentrate who is going to get into trouble because all kids who are rambunctious do at the same time that the parental home and the developmental stage requires consistency in order to develop - - to end in the development of and the adequate sense of self. Sot he presence of ADD certainly exacerbated the parental pattern for borderline personality disorder. I believe they kind of worked on each other, and its hard to tease (sic) apart because ADD was therefore, I believe, the beginning or certainly early enough on. My guess is if, I mean, I shouldn't say because that is just a guess. You know, whether there was hyperactivity to what extent there was hyperactivity can only guess from the school records and Alex's descriptions.
>
> (T 3701-2).

Doris Barbandaes, Alex Pagan's aunt testified as a second witness on behalf of the defense at the Spencer hearing. Alex called her "Titi," a term of endearment for an aunt (T 3760). She testified concerning Alex and his relationship with family members over the course of his life (T 3759-72).

A video tape of Alex Pagan's homecoming was played to the jury but was not transcribed by the court reporter (T 3771). Doris Barbandeas was thereafter asked questions concerning the tape (T 3772-75).

A video taped deposition of Alex Pagan's father, Michael Pagan was likewise introduced into evidence (T 3776-91).

Cynthia Valera, a friend of Alex Pagan since the spring of 1992 testified during the Spencer hearing (T 3796-3804). Although she and Alex Pagan were never romantically involved, Alex Pagan was her roommate during 1992 for approximately nine (9) months. Her four (4) year old son and three (3) year old daughter were living with them at the time. Alex Pagan got along great with them (T 3798). Ms. Valera testified that for a period of time, Alex Pagan did not drink and everything was great. However, in the fall of 1992 he was drinking on a daily basis. He would drink a bottle of rum in one (1) sitting (T 3799). She perceived him on several occasions to be drunk. One night, she saw him chasing a train, getting very close to it. She was afraid that he was going to run in front of the train (T 3801). Of course, he had been drinking.

Ms. Valera also testified about a night that her friend "Papito," a/k/a Anthony Quezada, called her. He had a cold. He was drinking Formula 44, and was drinking beer. Alex Pagan stated that nobody loved him. After they hung up the phone, Ms.

Valera tried to get a cab to get to his house. As she got there, her brother came over and Alex had cut himself on the wrist and on the face and he laying on the floor totally drunk. This was in the fall of 1992. Alex kept on repeating that nobody loved him (T 3803).

iii. Sentencing

On October 15, 1998, a hearing was conducted in which the judge indicated that she had reviewed all transcripts concerning the Spencer hearing and the penalty phase and was prepared to proceed (T 3827). Alex Pagan had previously waived his right to address the jury. He had waived his right to address the court in a Spencer hearing and at sentencing (T 3829).

The trial court held that on December 20, 1996, Alex Pagan was found guilty of two (2) Counts of murder in the first degree, two (2) Counts of attempted murder in the first degree, burglary with a firearm, and robbery with a firearm (T 3830). The court specifically noted that a Spencer hearing was conducted on June 30, 1997, and concluded on July 31, 1997 (T 3831).

After considering all of the evidence and the sentencing proceedings, the court found the following aggravating factors: a) the defendant was previously convicted of another capital felony or a felony involving the use and/or threat of violence to some person. Secondly, Alex Pagan was on probation for the

aggravated battery charges and had committed the crime of indecent assault. The State produced evidence including the recorded statements of a 13 year old victim of the assault to establish that the sexual battery involved abuse and/or threat of violence to the victim (T 3832). Further, on September 26, 1988, Alex Pagan had been sentenced to seven (7) and one-half (½) year in Florida State Prison. He was released from prison on February 28, 1992. Additionally, as part of this case, on December 28, 1996, he was convicted of attempting to murder 18 month old Lafayette Jones and his mother Latoshia Jones. The evidence presented at trial reflected that the crimes were committed immediately after Freddy Jones was murdered and contemporaneously with the murder of Michael Lynn (T 3832).

The court considered Alex Pagan's conviction of the first degree murder of Freddy Jones as an aggravating circumstance as to the sentence to be imposed for the murder of Michael Lynn (T 3832). Further, the court considered the first degree murder conviction surrounding the murder of Michael Lynn as an aggravating circumstance as to the sentence to be imposed on Alex Pagan for the murder of Freddy Jones (T 3833).

Judge Lebow summarized the evidence presented at trial as follows:

> One, on the evening of February 23, 1993, the defendant and co-defendant, Willie Graham, crashed through the sliding glass doors or Freddy and Latoshia Jones' bedroom while they were sleeping. Two, the defendant and his partner wearing dark clothing, gloves and mask

> proceeded to interrogate the adults regarding the location of money, forced the mother, Latoshia Jones to awaken her sleeping 6 year old son, Michael Lynn, bring Michael back to the master bedroom and place him on the bed with the father, Freddy Jones, and 18 month old baby Lafayette Jones. Both the defendant and co-defendant carried firearms during the commission of these events. Third, once the entire family was located in the master bedroom, each of them was hogtied and ultimately shot. Four, the defendant and co-defendant stole money and a vehicle from the Jones' family.
>
> (T 3833-34).

In support of the death sentence, the trial judge found four (4) aggravating circumstances: 1) the Defendant was previously convicted of another felony involving the use and/or threat of violence to some persons; 2) the capital felonies were committed while the Defendant was engaged in the commission of or attempting to commit the crimes of armed burglary and armed robbery; 3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody; and 4) the offenses committed in a cold calculated and premeditated manner without any pretense of moral or legal justification (T 1114-7).

The court found two (2) statutory mitigating factors and eight (8) non-statutory mitigators but gave little weight to the non-statutory mitigators (T 1114-26). The court found the following mitigators were entitled to very little weight: 1) Alex Pagan has attention deficit disorder; 2) Alex Pagan has a borderline personality disorder; 3) Alex Pagan was an abused child; 4) Alex Pagan had a

history of emotional problems including suicide attempts; 5) Alex Pagan is a loving brother; 6) Alex Pagan is a loving son, grandson, and great grandson; 7) Alex Pagan engaged in good conduct while in custody awaiting trial; 8) and Alex Pagan was a loving friend and formed close and loving relationships (T 1122-4).

Accordingly, the court found that aggravating circumstances were proven to exist beyond a reasonable doubt and were afforded significant weight by the court in determining the appropriate sentence in the case. The court detailed all aggravating and mitigating factors which the court found to be present (T 3825-46). Ultimately, the court stated:

> Alex Pagan, you have not only forfeited your right to live among us, but under the laws of the State of Florida, you have forfeited your right to live at all. Accordingly, it is ordered and adjudged for the murder of Michael Lynn, the defendant is hereby sentenced to death. It is further ordered and adjudged for the murder of Freddy Lafayette Jones the defendant is hereby sentenced to death. It is further ordered and adjudged for the attempted first degree murder of Latoshia Jones the defendant is hereby sentenced to life in prison. It is further ordered and adjudged for the attempted first degree of Lafayette Rishod Jones, the defendant is hereby sentenced to life in prison. It is further ordered and adjudged for the offense of armed burglary the defendant is hereby sentenced to life imprisonment. It is further ordered and adjudged for the offense of armed robbery, the defendant is hereby sentenced to life imprisonment. Each of the sentences will run consecutive to each other and consecutive to the sentences of death.
>
> (T 3845-46).

Alex Pagan was sentenced to death by electrocution (T 3846). After being found to be indigent, the court ordered the public defenders office to be appointed

(T 3846). Ultimately, based upon a conflict, undersigned counsel was appointed as a special public defender. This appeal ensues.

SUMMARY OF ARGUMENT

Alex Pagan asserts that the evidence was insufficient to support his convictions. As a result of his wrongful convictions, he had been sentenced to death by electrocution.

The trial court erred in refusing to grant Alex Pagan's Motion for Judgment of Acquittal at the close of the State's case and the close of the evidence, and in refusing to order a new trial. Based upon evidentiary errors, singularly and/or cumulatively, a new trial was warranted.

No physical or direct evidence whatsoever linked Alex Pagan to the January burglary of the Jones residence or to the February home invasion murders. No DNA established that Alex Pagan was ever there. No fingerprints supported the State's theory that Alex Pagan was the "quiet one" during the homicides. Further, other individuals were prime suspects and had both motive and opportunity to commit the offenses. Each of the individuals had strong ties to Willie Graham, the Co-Defendant, who based upon circumstantial evidence appeared far more likely have been involved in the offense than Alex Pagan.

Alex Pagan asserts that the trial court reversibly erred in allowing Williams Rule evidence concerning the January 23, 1993 burglary that was dissimilar factually and temporarily. The evidence was devastating to Alex Pagan's defense

of actual innocence as it inferred guilt and made it impossible for Alex Pagan to receive a far trial and due process of law.

Both before and during trial, defense counsel objected to the admission of evidence of other crime evidence as it related to Alex Pagan. The evidence was inadmissible pursuant to Section 90.402, 90.403, and 90.404, Florida Statutes. Because the evidence failed to establish Alex Pagan's connection with the January offense, and because his presence at the February offense was inferred because of prejudicial error concerning an improper voice line-up, the judgment, sentence, and convictions should be overturned and Alex Pagan discharged, alternatively, this matter remanded for a new trial.

The trial court reversibly erred in denying Alex Pagan's Motion to Suppress Physical Evidence based upon an improper search warrant due to a false and misleading affidavit.

Alex Pagan maintains that the physical evidence in this case should have been suppressed based upon four constitutional violations. First, no probable cause existed to believe that contraband would be found at Alex Pagan's residence. Second, false statements involved and statements which represented a reckless disregard for the truth were given to the judge in securing the search warrant. Third, suppression was warranted in that law enforcement officers exceeded the

scope of the search and conducted a general search in violation of the particularity requirement of search warrants. Finally, the officers failed to knock and announce, thereby violating Alex Pagan's State and Federal Constitutional rights.

The trial court further reversibly erred by allowing a surreptitiously recorded hearsay conversation to be played to the jury in violation of Alex Pagan's State and Federal Constitutional rights. Specifically, the court allowed an undercover recorded conversation between Keith Jackson and Antonio Quezada which the defense could not cross-examine at trial. Based upon a violation of Alex Pagan's State and Federal Constitutional rights, reversal is required.

Further errors warrant a new trial in this cause. For example, the trial court reversibly erred by refusing to grant a new trial and refusing to declare a mistrial when the prosecutor impermissibly bolstered the credibility of Latoshia Jones. Likewise, reversible error occurred when the court denied Alex Pagan's Motion for a New Trial, upholding the State's Batson[12] challenge to a juror. Alex Pagan maintains that the court should have entered an order granting a new trial, or should have granted one or more of his Motions for Mistrial.

Alex Pagan suggests that one of the critical factors leading to his conviction was the voice line-up identification. While a voice line-up was conducted over

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[12]Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

defense objection, Latoshia Jones was unable to identify anyone's voice. It was only in the midst of trial that the defense first learned that after the formal voice identification procedures ended, when only law enforcement was around, Latoshia Jones indicated that the voice might be individual number 2, Alex Pagan. Such evidence was extremely prejudicial, and warrants a new trial.

Additionally, the trial court reversibly erred by denying the Defendant's Motion for Mistrial when the prosecutor in closing argument made reference to the Golden Rule with respect to the improper inflammatory references to preventing the Defendant from committing crimes again. Further, the court erred in denying Alex Pagan's Motion for Mistrial when the prosecutor in closing argument made reference to a camouflage jacket from the Dessert Storm War which was not in evidence.

The trial court reversibly erred in overruling objections and permitting the medical examiner to express expert opinions concerning glass. The medical examiner was not determined to be an expert. There was no predicate layed for his expert opinion. The medical examiner lacked the qualifications to give expert opinions on the characteristics of a glass manufacturer, the composition of glass, and whether someone would be injured breaking through glass. As a result of the improper testimony and evidence, reversal and remand for new trial is required.

Based upon all of the errors which occurred at trial, singularly and cumulatively, Alex Pagan asserts reversal and remand is required.

Finally, with regards to the sentence, reversal is required as Alex Pagan's death sentence is disproportionate. Willie Graham was sentenced to life on two Counts and 30 years on the remaining four Counts, to be served concurrently. Others believed to be involved in the homicides or January burglary were given immunity or where not charged in exchange for their cooperation in this case. Clearly, Alex Pagan's sentence to death by execution is disproportionate, and should be reversed.

ARGUMENTS

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT ALEX PAGAN'S CONVICTIONS; THE TRIAL COURT ERRED IN REFUSING TO GRANT A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND CLOSE OF THE EVIDENCE, OR IN REFUSING TO ORDER A NEW TRIAL; EVIDENTIARY ERRORS SINGULARLY AND/OR CUMULATIVELY WARRANT A NEW TRIAL.

Alex Pagan maintains his innocence. True, he has prior criminal convictions. That is a sentencing issue - not a factor this court should consider in determining whether the trial court reversibly erred in refusing to order a new trial or grant a judgment of acquittal, and ultimately, in sentencing Alex Pagan to death by electrocution.[13] Alex Pagan requests this court review the trial court's errors, singularly, and cumulatively, requiring discharge based upon insufficiency of the evidence. Alternatively, a new trial or resentencing is required.

A. The Evidence Was Insufficient To Support Alex Pagan's Convictions

Alex Pagan's claims of insufficiency of the evidence are well founded. Alex Pagan's convictions for two (2) murders and two (2) attempted murders, as well as

[13]Because the Death Penalty Reform Act of 2000 is not presently in effect and cannot take effect until the court rules on its constitutionality, Appellant herein has not raised the Act's unconstitutionality as a separate issue on direct appeal.

an armed robbery and armed burglary on February 23, 1993, were all predicated upon two (2) false premises: 1) that Alex Pagan participated in or had knowledge of a burglary at the Jones' in January 1993; and 2) that Alex Pagan was a principal or co-conspirator on February 23, 1993.

No physical or direct evidence whatsoever linked Alex Pagan to the home invasion murders or the January burglary. No DNA connected him with the scene on either occasion. No blood linked his presence. No fingerprints supported the State's theory that he was the "quiet one" during the homicides.

The defense version of the facts in this case stemmed from Latoshia Jones' report of a home invasion robbery murder to the police. The police quickly came to the scene and Latoshia Jones gave a description of the men sometime later as slightly taller than she is, wearing a beige trench coat, cloth ski masks, and gloves. Detective Manzella's version was slightly different. The detective testified that Latoshia Jones initially said that based on their dialect and their language they were two (2) black males, but she was not sure. Armed with this description that Latoshia gave the police, the two (2) ski masked men were sought by the police.

Ultimately, the police developed information regarding Willie Graham. When the police investigated Willie Graham, they learned that he had been recently from jail for attempted first degree murder he committed with a man by the name of

Keith Jackson. The police found Keith Jackson. Keith Jackson tried to drive away but they stopped him. He said "no it was not me, but I will tell you who it was. It was Alahandro Ramirez that did it." Mr. Jackson knew that he was quickly going back to the Dade County jail. He testified about the fear he had from the first time he talked to the police about this situation (T 3317). Thereafter, the police investigated a company named Premier Beverage and three individuals names - Anthony Graham, Willie Graham, and Alex Ramirez. These are the men that Keith Jackson told the police were involved in the crime. Armed with a warrant in the name of Alejandro Ramirez, Keith Jackson took the police over to Alex Pagan's house and said here, that's the man.

Interestingly, Keith Jackson attempted to portray his close friendship with Alex Pagan for eight (8) years. This is somewhat strange as Keith Jackson testified he did not know Alex Pagan's name. Everything that occurred thereafter was an attempt by the police and the State to make it seem as if enough circumstantial evidence could be spun to result in a Alex Pagan's conviction.

The State argued that the testimony of two (2) witnesses who alleged to have been close to Alex Pagan and Willie Graham warranted convictions, however, no physical evidence whatsoever placed Mr. Pagan at the scene on Ramona Street either in January or February 1993. Further, the State could not explain what

happened to the trench coat, what happened to the cloth ski masks, or what happened to the murder weapon in this case.

The State failed to establish that Alex Pagan had the opportunity to drive all over Miami to disassemble a gun. According to Antonio Quezada, Mr. Pagan and Mr. Jackson showed up moments after the incident at Antonio Quezada's house. No mention of where the trench coats, mask, gloves and murder weapon might have gone.

The defense suggested that several other individuals closely fit the description Latoshia Jones gave. For example, Willie Graham and his brother Anthony look a lot alike according to Detective Manzella. Each are five (5) foot five (5) inches or five (5) foot six (6) inch tall black men. Keith Jackson and Willie Graham likewise fit the description. Others that fit the description are Eric Miller, Darryle Featherstone, and Dee Dee Mosley. Alex Pagan maintains that any one or more of several other suspects in this case must be the culprit. It is not him.

Law enforcement initially believed Keith Jackson was the individual who acted with Willie Graham and killed the father and son. The State presented weak alibi evidence supporting Keith Jackson's denial of participation in the February homicides. Clearly, Keith Jackson possessed a great deal of knowledge concerning the January offense, suggesting his participation therein.

Alex Pagan did not testify pretrial, at trial, or during the sentencing proceedings. For a truly innocent individual, like Alex Pagan, exercising his constitutional right and refusing to testify is far better than testifying poorly or not being believed by a juror. See Davis v. State, 703 So. 2d 1055, 1060 (Fla. 1997), cert. denied 118 S.Ct. 2327 (1998).

Where the state's case is circumstantial, such as at bar, a special standard of review applies. State v. Law, 559 So. 2d 187 (Fla.1989). In this case, based upon insufficiency of the evidence, a judgment of acquittal should have been granted.

A Motion for Judgment of Acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.

> That view of the evidence must be taken in the light most favorable to the state. The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.
>
> Id. at 188-89 (citations omitted).

In Orme v. State, 677 So. 2d 258 (Fla.1996), the supreme court quoted Law and elaborated, stating:

> [T]he sole function of the trial court on motion for directed verdict in a circumstantial-evidence case is to determine whether there is prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories. If there is such inconsistency, then the question is for the finder of fact to resolve.

> The trial court's finding in this regard will be reserved on appeal only where unsupported by competent substantial evidence.
>
> Id. at 262.

As set forth in James v. State, __ So. 2d __ (Fla. 4th DCA 1999)[24 Fla. L. Weekly D1712]:

> Once again, we must reiterate the standard upon which the trial court may grant a judgment of acquittal in a circumstantial evidence case: if the state does not offer evidence which is inconsistent with the defendant's hypothesis, 'the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law.' 293 So. 2d at 45. The state's evidence would be as a matter of law 'insufficient to warrant a conviction.' Rule 3.380, Fla. R. Crim. P.
>
> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See Toole v. State, 472 So. 2d 1174, 1176 (Fla.1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. State v. Law, 559 So. 2d 187, 189 (Fla.1989)(emphasis supplied)(footnote omitted).
>
> Id.

Dissecting the proper, lawfully obtained evidence from the unlawful prejudicial evidence at bar, Alex Pagan maintains that the evidence was insufficient to support his convictions.

Absent the improper evidence, the State failed to establish Alex Pagan's presence at either the January or February incidents on Ramona Street. Alex Pagan's hypothesis of innocence - that he was not there and did not do it - corroborated by the most damaging witness against him who subsequently recanted his sworn testimony, was never refuted. It could not be refuted by any credible evidence - because Alex Pagan's innocence is truthful.

Alex Pagan asserts that the recent decision in Terranova v. State, __ So. 2d __ (Fla. 2d DCA 1999)[1999 WL979593], supports his assertions of insufficiency of the evidence at bar. As set forth in Terranova, our courts have long held that a conviction based on circumstantial evidence cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

In this case, the evidence created nothing more than a strong suspicion that Alex Pagan committed either the home invasion or even less likely the January burglary. Alex Pagan's hypothesis of innocence was simply that he did not commit the charged offenses. The evidence offered by the State was insufficient to point Alex Pagan as the perpetrator of these crimes. See Terranova at **3.

Because the evidence failed to rebut Alex Pagan's reasonable hypothesis of innocence, the trial court erred in failing to grant his Judgment of Acquittal. Terranova at **3; Smolka v. State, 662 So. 2d 1255 (Fla. 5th DCA 1995); Dudley v.

State, 511 So. 2d 1052 (Fla. 3d DCA 1987). Reversal and discharge, or alternatively, reversal and remand is required.

B. The Trial Court Reversibly Erred in Allowing Williams Rule Evidence Concerning a January 23, 1993 Burglary That Was Dissimilar Factually And Temporally.

Alex Pagan asserts that the trial court reversibly erred in allowing Williams Rule evidence

concerning a January 23, 1993 burglary that was dissimilar factually and temporarily, and which was not proven to have been committed by Alex Pagan. Further, the court erred in denying Alex Pagan's Motion for New Trial based upon the same grounds (T 3807).

Over repeated defense objections, the trial court allowed the State to introduce evidence concerning the January 23, 1993 burglary at the Jones residence which took place approximately four (4) weeks before the incident for which Alex Pagan was charged (T 1553-4; 2029; 2084; 2108; 2204; 2229; 2233; 2471; 2472; 2479; 2495; 2503; 2521; 2680; 2731; 2841; 3063). A pretrial hearing was conducted.

Below, the defense argued that there was no credible evidence[14] that Mr.

[14]Arguing that Mr. Quezada and Mr. Jackson's testimony was not credible based upon a plethora of reasons.

Pagan was involved or a part of the January 23rd incident. Further, the evidence was temporally remote.

Both before and during trial, defense counsel objected to the admission into evidence of testimony concerning crimes and/or bad acts allegedly committed by Alex Pagan. Defense counsel argued that the alleged crimes and/or bad acts were not admissible under the Williams Rule, Sections 90.403 or 90.404(2)(a), Florida Statutes, and that the evidence violated Alex Pagan's State and Federal Constitutional rights. The evidence, which became a feature of the trial, was not similar to the charged crimes. Defense counsel argued that the January burglary was not relevant, material or necessary to the prosecution of the crimes charged in the Indictment and that introduction of the evidence severely prejudiced the Defendant.

Pursuant to Tumulty v. State, 489 So. 2d 150 (4th DCA 1986), collateral crimes evidence can only be properly admitted if proven to be relevant. Id. at 150. In Tumulty, the court held that a series of prior drug smuggling trips in which the defendant was allegedly involved in was found to be admissible pursuant to Section 90.402, Fla. Stat., as relevant evidence in the defendant's murder trial. The court specifically held that said trips were relevant because they were "inextricably intertwined" in the scenario of evidence that explained the murder for which the

defendant was being prosecuted. Id. at 153. In Tumulty, the court held that the collateral evidence was directly related to proving the motive for killing, thus finding such to be inseparable crimes.

To the contrary, the collateral evidence admitted pursuant to Section 90.402, Fla. Stat., in the case at bar, was not "inextricably intertwined" to the murders for which Alex Pagan was being tried. Specifically, the burglary was not inextricably intertwined pursuant to Section 90.402, Florida Statutes. Not only was said collateral crime evidence remote in time and place, it was not established as "inseparable crime" evidence and, thus, was inadmissible pursuant to both Section 90.404(2)(a) and Section 90.402, Florida Statutes.

Clearly, the collateral evidence introduced against Alex Pagan was neither relevant nor an inseparable part of the crime for which he was being tried. Unlike the facts and circumstances surrounding the Tumulty case, the collateral evidence introduced in the case at bar was not necessary to adequately describe the deeds which Alex Pagan was accused of committing. Id. at 153. Thus, in the case at bar, when analyzing the collateral evidence which was admitted in its totality, it is evident that such should not have been admitted, and that additionally that such became the feature of the trial.

The Williams Rule was codified in Section 90.404 (2)(a), Florida Statutes,

and is limited to "similar fact evidence." Griffin v State, 639 So. 2d 966 (Fla. 1994), cert. denied 139 L.Ed.2d 198 (1995). "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact and issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." Id. at 967. As the court explained in Griffin, evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams Rule evidence. It is admissible under Section 90.402, Fla. Stat., because "it is relevant and inseparable part of the act which is in issue....it is necessary to admit the evidence to adequately describe the deed." Id. at 968. Such evidence is always subject to Section 90.403, Florida Statute's balancing test. The court must always consider whether the evidence is relevant and thereafter assess whether the prejudicial effect of the evidence substantially outweighs its probative value. If it does, the evidence must be excluded.

Section 90.401, Fla. Stat. (1997), defines relevant evidence as "evidence tending to prove or disprove a material fact." Relevant evidence is generally admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of

cumulative evidence. See Section 90.403, Fla. Stat. (1997).

In deciding whether to reverse a conviction based on improper admission of evidence, appellate courts will apply a harmless error test. See Gore v State, 719 So. 2d 1197 (Fla. 1998); Steverson v State, 695 So. 2d 687 (Fla. 1997). In this case, the evidence was far from harmless as the voluminous amount of collateral crime evidence admitted was certain to taint the jury and thus absent its admission, Alex Pagan would not have been convicted.

In Porter v State, 715 So. 2d 1018 (Fla. 2d DCA 1998), the appellate court held that the limited probative value of the defendant's wife's statement "he's trying to kill me," was substantially outweighed by the danger of unfair prejudice, such that the statement was inadmissable. The court held that the admission of the statement was deemed by the appellate court as not being harmless prompting a reversal.

In order for evidence to be admissible under Section 90.402, Fla. Stat., it must be inextricably intertwined in time and place with the crimes charged and necessary to fully describe the way in which the criminal deed happened. See Erickson v State, 565 So. 2d 328, 333 (Fla. 4th DCA 1990) review denied, 576 So. 2d 286 (Fla. 1991). Inextricably intertwined evidence or inseparable crime evidence may be admitted to establish the entire context out of which a criminal act

arose. See Hunter v State, 660 So. 2d 244, 251 (Fla. 1995), cert. denied, ___U.S.____, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996). Furthermore, in Williams v State, 692 So. 2d 1014, 1015 (Fla. 4th DCA 1997), quoting Straight v State, 397 So.2d 903 (Fla. 1981), the Court held that improper collateral crime evidence is presumptively harmful because of "the danger that the jury will take the bad character or propensity to commit a crime thus demonstrated as evidence of guilt of the crime charged". Courts have held that even in instances wherein an inadvertent admission of collateral crime evidence came out at trial, such was justification for granting a mistrial. See e.g., Czubak v State, 570 So.2d 925 (Fla. 1990) [witness stated Defendant was an escaped convict]; Willis v State, 669 So.2d 1090, 1093 (Fla. 3rd DCA 1996) [police officer testified regarding prior police contact]; Ward v State, 559 So.2d 450 (Fla. 1st DCA 1990) [witness stated Defendant had been in prison and released].

In the case at bar, the trial court erred in permitting the State to introduce evidence of collateral crimes and bad acts, as the evidence was not relevant to prove any material issue in the case. The burglary alleged to have been perpetrated by Willie Graham on or about January 23, 1993 was not similar to the crimes which Alex Pagan was charged in this case; thus, it should not have been admitted under Section 90.404 (2)(a), Fla. Stat. (1998). No substantial connection to the two (2)

offenses were proven by the State. Further, and of equal importance is the fact that the evidence failed to establish that Alex Pagan was involved with the burglary in January.

When evidence of other crimes is not limited to other crimes with similar facts, a requirement must be met that the evidence is relevant and its probative value outweighs that of its prejudicial effect. See Section 90.401, Fla. Stat. (1997). Such acts must be shown to be similar in time and place. It is undisputed that the incident involving a the burglary took place approximately one (1) month prior to the murders at the Jones residence. Such a long span of time is too remote when considering whether or not evidence should be admitted pursuant to Section 90.402, Florida Statutes.

A court may consider collateral evidence that has become a feature of the trial to be fundamental error. Perry v State, 718 So. 2d 1258 (Fla. 1st DCA 1998). In the case at bar, the testimony and evidence concerning collateral evidence was both voluminous and excessive (T 1553-4; 2029; 2084; 2108; 2204; 2229; 2233; 2471; 2472; 2479; 2495; 2503; 2521; 2680; 2731; 2841; 3063).

Sub judice, the admission of collateral crimes or bad acts evidence became the overwhelming feature at trial resulting in reversible error. It is well settled that unfair prejudice results when the State makes a collateral offense a feature, instead

of an incident, at trial. State v Bush, 690 So. 2d 670 (Fla. 1st DCA 1997). Additionally, the State's presentation of evidence of collateral offenses must not transcend the bounds of relevance to the offense being tried. The collateral evidence which was admitted so overwhelmed evidence of the charged crime that it should be considered as an impermissible attack on the Appellant's character or propensity to commit crimes. Admission of excessive evidence of other crimes is fundamental error to the extent that it becomes a feature of the trial. See Travers v State, 578 So. 2d 793 (Fla. 1st DCA) review denied, 584 So. 2d 1000 (Fla. 1991).

In Travers, the court stated that the danger of such evidence is that it frequently prompts a jury to more readily believe that the appellant in fact committed the charged offense, predisposing the minds of the jurors to believe the appellant is guilty. Travers at 797, citing Nichols v State, 90 Fla. 659, 685, 106 So. 479, 488 (1925).

In the case at hand, the State called several witnesses who testified solely regarding collateral evidence. Furthermore, the testimony of several witnesses for the State was comprised of large portions of facts and circumstances surrounding the collateral evidence, which was intermingled with testimony regarding the charged offense. The trial court's admission of excessive evidence of other crimes and/or bad acts rose to the level of becoming a feature of the trial, as such

fundamental error was committed and reversal is required. Because it cannot be established beyond a reasonable doubt that Alex Pagan would have been convicted of the charged offenses absent the improper collateral evidence, the harmless error doctrine does not apply. See Holland v State, 503 So. 2d 1250 (Fla. 1987); State v DiGuilio, 491 So. 2d 1129 (Fla. 1986). Erroneous admission of collateral crimes evidence is presumptively harmful. Castro v State, 547 So. 2d 111 (Fla. 1989); Straight v State, 397 So. 2d 903, 908 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Error is harmless only if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error. See Ciccarelli v State, 531 So. 2d 129, 132 (Fla. 1988).

Given the prejudicial effect of the admittance of collateral evidence, its admission cannot be deemed harmless error. Thus, Alex Pagan's conviction, judgment and sentences should be reversed and this case be remanded for a new trial.

C. The Trial Court Erred in Denying The Defendant's Motion to Suppress Physical Evidence

Pretrial, a Motion to Suppress Physical Evidence was filed on Alex Pagan's behalf (T 401-6). An evidentiary pretrial hearing was conducted (T 459-762).

Tameka Roberts testified that she heard at Miramar High School that some people in Miramar had been robbed and shot (T 474). She was dating Anthony

Graham at the time (T 475). She had never met a man by the name of Alejandro Ramirez (T 478). She did not know Alex Pagan (T 477).

Detective Paul Manzella testified at the pretrial suppression hearing. Detective Manzella obtained information from Sharon Foster and was present when Detective Peluso had contact with Mrs. Jackson (T 489). On February 23, Sharon Foster called the Miramar Police Department anonymously. She came to the police department on the 25th, stating that she had knowledge of a homicide and wished to speak to a detective (T 490). She stated that she heard on the street as well as from her daughter, Tameka Roberts, that Tameka was seeing a boy by the name of Anthony Graham, who was a cousin of Willie Graham, who went by "some type of Moslem name" and that he was the one who committed the homicide (T 490). Sharon Foster further stated that Eric Miller had orchestrated the homicide and a prior burglary that Willie Graham committed at the same residence a month earlier (T 492).

The two (2) individuals who were not named in the affidavit were Sharon Foster and Ms. Jackson (T 494). The officer admitted that he failed to include in his affidavit the information that independent sources had named somebody that might have been involved instead of Alex Pagan (T 494). Detective Manzella did not recall who the first man was to the front door of Alex Pagan's apartment (T 501).

He believed that he was forcing his way inside. It was definitely one of the first group of officers that went in (T 502). The officer admitted that jewelry was not listed in the list of things that could be searched for or seized (T 505). The detective put in the warrant that one of the independent sources advised that Mr. Graham was involved in a burglary at the residence of the homicide approximately one (1) month earlier (T 520).

The defense asserted below, and re-raised in a Motion for New Trial, that the trial court reversibly erred in denying a Motion for Suppress Evidence. The seizure violated Alex Pagan's State and Federal Constitutional rights. For example, Detective Manzella testified that the photographic lineup was provided to Mr. Jackson after the search warrant had been secured from Judge Shapiro and after Mr. Pagan had been arrested. During the hearing conducted on the Motion to Suppress, it is clear that the search warrant was based upon the testimony of Keith Jackson and what was referred to as independent witnesses, i.e. Keith Jackson's wife and Sharon Foster, whose daughter came in and testified that she heard rumors on the street that Willie Graham and a man by the name of Alex had been involved in this incident (T 3809). In arguing Alex Pagan's Motion for New Trial, the defense cited Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) and highlighted misstatements and fraudulent representations made by law enforcement

officials.

Alex Pagan requested suppression of jewelry, including a gold ring with the shape of the letter "H," a gold cross, and a jacket which was seized from his residence on February 27, 1993 alleging that the execution of the search warrant and arrest warrant violated his rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the Florida Constitution (R 401-6). Alex Pagan asserted below and maintains herein that the physical evidence in this case should have been suppressed based upon three (3) constitutional violations. First, no probable cause existed to believe that contraband would be found at Alex Pagan's residence based upon the doctrine outlined in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1982). Second, false statements involved and/or statements or evidence which represent a reckless disregard for the truth in securing the search warrant violates Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); and third, suppression was warranted in that the law enforcement officers exceeded the scope of the search and conducted a general search in violation of the particularity requirement of search warrants as set forth in Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987).

First and foremost, law enforcement lacked probable cause to believe that any

contraband would be found at Alex Pagan's abode. The search warrant listed two (2) independent sources as a basis for obtaining the warrant. No facts whatsoever were given to establish the reliability of those sources. The failure of an affiant to establish the reliability of his confidential informant renders the search warrant legally insufficient. See for example Brown v. State, 561 So. 2d 1248 (Fla. 2d DCA 1990); Baker v. State, 150 So. 2d 729, 730 (Fla. 3d DCA 1963)[disclosure required where informant executes affidavit upon which search warrant is issued for search of defendant's home]. The officers involved based the affidavit on statements allegedly given by Keith Jackson. The officers provided no information establishing the reliability of Keith Jackson, whom the defense asserted was one of the most unreliable individuals in this case. Keith Jackson was discovered by law enforcement because he was a co-defendant in an attempted homicide case in Dade County. Further, the warrant itself stated that Jackson initially claimed to have no knowledge, but later changed his story.

In Schmitt v. State, 590 So. 2d 404 (Fla. 1991), the Florida Supreme Court held that probable cause must be established within the four (4) corners of the affidavit. The affidavit at bar lacked sufficient probable cause for the search.

Alex Pagan maintains that reversible error occurred when the police officers failed to inform the judge that Keith Jackson was a suspect in the Ramona Street

homicides. Nor was the court informed that the original contact with Keith Jackson was to question him about the homicides. Secondly, the police officer affiants falsely mislead the issuing judge by stating that two (2) independent sources related that Alex Pagan committed the crime. The first source used by law enforcement was a teenage high school student who testified that she repeated rumors heard at her school involving Willie Graham. The student, Tameka Roberts, admitted in a pretrial deposition that she did not know who Alex Pagan was. The second source cited by police was Co-Defendant, Willie Graham's girlfriend who testified that she never stated that Willie Graham told her that he committed the crimes and she did not even know who Alex Pagan was. Further, Keith Jackson told the officers that the name of one of the perpetrators of the crime was a man by the name of Alejandro Ramirez. Both the arrest warrant and search warrant identify a man named Alejandro Ramirez. As the defense asserted below, Mr. Ramirez was believed to be a co-worker of Co-Defendant, Willie Graham (R 405). Finally, the search warrant authorized the seizure of weapons, drugs, paraphernalia, money, and certain clothes. The police far exceeded the scope of the warrant certain items of jewelry.

It is further clear from the evidence educed below, that the arresting officers violated Alex Pagan's State and Federal Constitutional rights by failing to "knock

and announce." (T 2402) Title 18 U.S.C. Section 3101; United States v. Hromada, 49 F.3d 685 (11th Cir. 1995).

In United States v. Ramirez, 118 S.Ct. 992, 523 U.S. 65, 180 L.Ed.2d 191 (1998), the United States Supreme Court once again dealt "no - knock" entries into one's residence.

In this case, officers lacked any founded suspicion that knocking and announcing their presence before entering would be "dangerous or futile, . . . inhibit the effective investigation of the crime." Richards v. Wisconsin, 520 U.S. 385, 390, 117 S.Ct. 1416, 1421, 137 L.Ed.2d 615 (1997). Undisputedly, no Record evidence suggests any reasonable suspicion that knocking and announcing the officers' presence before entering would have been dangerous at bar. There were no incidents surrounding Alex Pagan's apprehension. He lived at home, with his sister and mother.

Based upon law enforcement's failure to knock and announce, the trial court reversibly erred in refusing to suppress physical evidence seized and testimony relating thereto. Reversal and remand for new trial is required.

D. The Trial Court Reversibly Erred by Refusing to Grant a New Trial And Refusing to Declare a Mistrial When The Prosecutor Impermissibly Bolstered The Credibility of a State Witness.

Alex Pagan maintains that the trial court reversibly erred by refusing to order

a new trial and refusing to grant his request for a mistrial when the prosecutor improperly bolstered the credibility of a key State witness. Specifically, the defense timely objected to the prosecutor's improper bolstering of the credibility of Latoshia Jones. The prosecutor stated "I think Latoshia indicated that she guesstimates for the police that the people in the room were 5 foot 3 inches or 5 foot 4 inches, and I ask her, are you good at estimating heights and things like that, no she is not. When you consider counsel's argument about Ms. Jones, bear in mind that few people are forced to experience the terror and horror, the fear and subjugation (T 3233). The court denied the defense Motion for Mistrial (T 3234).

Subsequently, the prosecutor continued:

> Counsel also made quite a bit about the fact that this is supposed to be according to our theory, a home invasion robbery and nothing was taken, of course, he points to a couple of watches that I think, there was one picture of a watch sitting by the bed on the headboard of the bed, then there is a watch that was found in the Cherokee by Detective Suchomel and he says, well gee, why didn't they take this to the jewelry here. Whey didn't they take this to the jewelry here. I think we looked at the watch that Detective Suchomel found. I think it had a leather band. It was Giniva 8, that the watch looked like it might be worth - - .

An objection was lodged but not ruled upon (T 3281). Thereafter, the State continued

> By the time they talked to Keith Jackson, of course they had already over to Willie Graham's house and the jacket here from Willie Graham's house, we know that's not the jacket that, you know Bruce

> Ayala inspected it. He found fibers on it. So, he said, well, you know, go back over to the house, get some fibers. Analyze the fibers on this jacket. He said, no, they don't match the fibers in the house. These guys aren't trying to make up evidence. They don't match, that's it. And of course, right, they don't match, they that hat, they couldn't match, of course they couldn't. That jacket never left Mr. Graham's house. He wore a camouflage jacket.
>
> (T 3284).

A timely objection was lodged. The court overruled the objection. Likewise, the prosecutor stated:

> I talked about yesterday, about all that Ms. Jones was going through in her ordeal and her family's tragedy, and you know there were a couple of things that were pulled out of her statement, presented to her as far as description is concerned and her statements were taken by the police shortly after the order and she is in the hospital, and I mention here, she is on the bed upside down hogtied part of the time, the other time is face down in the bed with her head turned, maybe a broken nose, blood pouring out of her face, and the descriptions that she gives are influenced by all of that, and I know she mentioned what she believed to the police to be a beige or beige coat. We have heard that Mr. Pagan had on a black coat and Graham had on a camouflaged army jacket, and back around 1992, they were talking about Desert Storm and camouflaged, Desert camouflage is different than - -
>
> (T 3287).

An objection was immediately lodged. The objection was sustained. The court found that there was no evidence of anything, any different kind of camouflage (T 3288). A Motion for Mistrial was denied (T 3289). Reversal and remand is required.

E. The Trial Court Reversibly Erred by Allowing a

Surreptitiously Recorded Hearsay Conversation in Violation of Alex Pagan's State And Federal Constitutional Rights.

Antonio Quezada was a key witness for the State at trial. Initially, Antonio Quezada gave sworn testimony that he was with Alex Pagan all evening. Antonio Quezada even testified before Judge Lebow in a preliminary hearing to these facts. Ultimately, he changed his version of the events after being threatened by the police (T 2528; 2545). Thereafter, Antonio Quezada's testimony was always the same; he was not with Alex Pagan and Alex Pagan was said to have shot the individuals on Ramona Street that night.

During the examination of Antonio Quezada, over defense objection, the court permitted the State to introduce into evidence an undercover tape recorded conversation between Antonio Quezada and Keith Jackson (T 2640). Alex Pagan asserts that the trial court erred in admitting the evidence under the theory it was a prior consistent statement of Antonio Quezada. Additionally, the recorded conversations were not relevant, and could not survive a Section 90.403, Florida Statutes, probative value/prejudicial effect analysis.

The Florida Supreme Court has stated:

> We have long held that prior consistent statements 'are generally admissible to corroborate or bolster a witness' trial testimony.' Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992); Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986); Parker v. State, 476 So. 2d 134, 137

> (Fla. 1985); Van Gallon v. State, 50 So. 2d 882 (Fla. 1951). Since there statements are usually hearsay, 'they are inadmissible as substantive evidence unless they qualify under an exception to the rule excluding hearsay.' Rodriguez, 609 So. 2d at 500 (citing Charles W. Erhardt, Florida Evidence, Section 801.8 (1992 Ed.). However, inconsistent statements are considered non-hearsay if the following conditions are met. The person who made the prior consistent statement testifies at trial and is subject to cross-examination concerning that statement; and the statement is offered to rebut an express or implied charge . . . of improper influence, motive, or recent fabrication. Rodriguez, 609 So. 2d at 500 (quoting Section 90.801(2)(b), Florida Statutes [1989].
>
> Chandler v. State, 702 So. 2d 186, 198 (Fla. 1997).

In this case, there was no express or implied charge of improper influence, motive or recent fabrication. The fabrication was old, and the undercover conversation distorted the actual evidence.

First, the conversation, recorded surreptitiously in Keith Jackson's car, was not a "statement" with any indicia of trustworthiness based upon the facts and circumstances. In was not sworn. Keith Jackson was engaging Antonio Quezada in conversation hoping he would make a confession concerning his own involvement in the double homicide. Anything else was hearsay information. The defense asserted it was "double hearsay" when Antonio Quezada and Keith Jackson's conversations were played to the jury (T 2635). Because the conversation relied upon hearsay statements, it should not have been permitted over timely objection (T 2567; 2569; 2575; 2635; 2638). A defendant Motion for Mistrial was likewise

lodged and denied (T 2573).

Even assuming arguendo that the State successfully crafted a hearsay exception, the evidence was still subject to the general requirement that only relevant evidence may be admitted. 90.402, Florida Statutes. Here, the evidence was not relevant to whether or not Alex Pagan committed the murders but was involved in the Williams Rule burglary a month earlier, so it was error to admit it. The evidence was presented in the State's case in chief and the tape recorded evidence replayed to the jury by the prosecutor during closing argument (T 3254). Clearly, evidence which tends only to show bad character or propensity is not relevant and should not be admitted. 90.404(2)(a), Florida Statutes; Moore v. State, 701 So. 2d 545, 549 (Fla. 1997); Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988). Further, the evidence was far more prejudicial than probative and cannot withstand Section 90.403, Florida Statutes' scrutiny.

The Appellant asserts that huge error occurred resulting in extreme prejudice as a result of the trial court's ruling, over defense objection, that the State was permitted to introduce a tape which it contended was a prior consistent statement of Antonio Quezada. Although the State asserted that the "prior consistent statement" was admissible to rebut a recent fabrication by the witness, the same is untrue. Approximately three years had elapsed since Antonio Quezada's statement

changed. The comments made on the tapes were not statements, nor were they consistent statements. They were inadmissable comments by Antonio Quezada and another individual, Keith Jackson.

The defense reminded the court during the hearing on the Motion for New Trial that timely objections had been lodged as to all evidence concerning Willie Graham (T 3815). The majority of the evidence concerning the incident in February on Ramona Street was brought in against Willie Graham, under the premise that there was a conspiracy and that therefore all evidence admissible against Willie Graham was attributable to Alex Pagan. Again, the defense asserted that the allowance of the evidence constituted reversible error. Despite the fact that the physical evidence against Willie Graham might have been strong, the same was not relevant to the question of whether or not Alex Pagan was involved in the offenses. While Willie Graham may well have been involved in the January and/or February incident, such did not prove and was not relevant to prove whether or not Mr. Pagan knowingly participated or was present on either occasion (T 3815).

Alex Pagan asserts that the prior consistent statement exception to the hearsay rule is inapplicable here because the motive to fabricate arose before Antonio Quezada made the State engaged in the conversation. The improper admission of prior consistent statements is subject to a harmless error analysis.

Chandler v. State, 702 So. 2d 186, 199 (Fla. 1997); Anderson v. State, 574 So. 2d 87, 93 (Fla. 1991). At bar, because of the importance of the evidence, and the fact that it was relied upon by the State both during its case-in-chief as well as during closing argument, the error cannot be deemed harmless. Reversal and remand is required.

F. The Trial Court Reversibly Erred by Denying Alex Pagan's Motion For New Trial And Upholding The State's Batson[15] Challenge to a Juror.

Alex Pagan maintains that prejudicial error occurred warranting a new trial when the trial court reversibly erred in refusing to allow the defense to strike Mr. Laster (T 3811). The defense asserted that Mr. Laster had given answers to a number of questions which lead the defense to believe that he was a more conservative juror with more conservative ideas. The State challenged a Neil[16] basis and the court upheld the challenge. The defense admitted below that had it been allowed to strike Mr. Laster, the case would have been different and the Defendant was prejudiced (T 3811).

G. The Trial Court Reversibly Erred in Refusing to Order a New Trial.

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[15]Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986)

[16]Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972).

Alex Pagan asserts that the trial court reversibly erred in refusing to grant his Motion for New Trial predicated upon each of the grounds raised in the Motion. In so asserting, Alex Pagan is mindful of the standard that a court's great discretion to a trial judge who assesses the weight of credibility of evidence on a Motion for New Trial. See State v. Monroe, 691 So. 2d 518 (Fla. 2d DCA 1997). The judge sits "the seventh juror with a veto over the unanimous vote of the other six." State v. Smyly, 646 So. 2d 238, 241 (Fla. 4th DCA), citing Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981).

The trial court's discretion, however, is not unbounded. In this case, Judge Lebow exceeded her limits in allowing impermissible evidence.

H. The Trial Court Reversibly Erred in Refusing to Grant One or More of Alex Pagan's Motions for Mistrial.

Alex Pagan asserts that the trial court reversibly erred in refusing to grant one or more of his Motions for Mistrial as the same was necessary to insure that he received a fair trial. See Gudinas v. State, 693 So. 2d 953, 964 (Fla. 1997); Power v. State, 605 So. 2d 856, 861 (Fla. 1992), cert. denied 507 U.S. 1037, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1993). In this case, the trial judge abused her discretion in denying Alex Pagan's Motions for Mistrial.

Sub judice, singularly and cumulatively, the errors complained of during trial

thwarted Alex Pagan's efforts to obtain a fair trial. The improper Williams Rule evidence permeated the entire case and poisoned the juror's minds. (See Argument I(B), supra).

Alex Pagan moved for a mistrial based upon a succession of leading questions by the prosecutor (T 2508). He likewise objected to impermissible hearsay which the State justified under a "prior consistent statement" theory (T 2573). A Motion for Mistrial was likewise denied when the State presented evidence that Keith Jackson was working on the night in question, but it was learned on cross-examination that the individual testifying did not work with Keith Jackson that night (T 2788; 2804). Further, a Motion for Mistrial was lodged during the testimony of George Fundora, the owner of Advantage Point and Loan Company (T 2854). The court refused to give a curative instruction (T 2857). Additionally, a Motion for Mistrial during Keith Jackson's testimony was similarly denied (T 3154).

Alex Pagan asserts that the trial court reversibly erred in denying his Motions for Mistrial and in allowing the State to lodge leading questions to witnesses (T 2508; 3812).

Below, defense counsel asserted that leading questions were asked in this case on a multitude of occasions. Leading questions were directed to Antonio

Quezada, Keith Jackson, the lead detectives, and Detective Manzella. The defense argued that this was a case where there was no physical evidence brought by the State regarding what happened in the house in Ramona Street, except as it related to Willie Graham, the Co-Defendant. Alex Pagan's conviction was predicated upon State witnesses offered promises of leniency and other benefits in exchange for favorable testimony. The defense asserted below that because the case was so weak and circumstantial, the fact that the assistant state attorney lead witnesses during questioning warranted a mistrial (T 3813). The defense asserted below, and reasserts herein that singularly or cumulatively, the effect of the improper questions should have prompted a mistrial.

Based upon the facts and circumstances surrounding this case, a mistrial was necessary to insure that Alex Pagan received a fair trial. The trial court's refusal to grant a mistrial constitutes reversible error. Reversal and remand is required.

I. The Trial Court Reversibly Erred in Permitting Prejudicial Inflammatory Photographs of the Deceased to Be Shown to the Jury.

Alex Pagan asserts that his State and Federal Constitutional rights were violated by the admission of inflammatory pictures of a deceased young child which were cumulative, prejudicial, and violative of Rule 90.403, Florida Statutes.

J. The Trial Court Reversibly Erred by Denying a

Motion for New Trial Based upon a Richardson[17] Violation When Testimony Concerning A Voice Line-up Was Permitted

Alex Pagan asserts that the trial court reversibly erred by denying his Motion for Mistrial based upon a Richardson violation when Deputy McFall was allowed to testify concerning voice line-up procedures (T 2441-3). Unbeknownst to the defense, Latoshia Jones allegedly told law enforcement after the conclusion of the voice line-up wherein she was unable to identify anyone's voice that she believes that individual number 2 was probably the culprit. She had previously sworn that she did not know, or could not recognize any of the voices. She had ample time in which to thoroughly review the voices of individuals in the line-up.

The defense asserted below that when Deputy McFall was brought into testify about the live-up procedures, a Richardson violation occurred when the defense was unapprised that the deputy would be a witness in the case and was not afforded the opportunity to investigate her testimony. No one was able to investigate the Broward Sheriffs guidelines and whether or not they cover up the names of the individuals (T 2443). The court found that no Richardson violation had occurred without much ado (T 2443). No hearing was conducted. Reversal and remand is required.

[17]Richardson v. State, 246 So. 2d 771 (Fla. 1971).

K. The Trial Court Reversibly Erred by Denying the Defendant's Motion for Mistrial When the Prosecutor in Closing Argument Made References to the Golden Rule with Respect to Improper Inflammatory Reference to Preventing the Defendant from Committing Crimes Again.

Alex Pagan asserts that the prosecutor engaged in prosecutorial misconduct during closing argument in referring to the fact that if the jury did not convict Alex Pagan, or if the jury did not convict people who made or committed the substantive crimes, Alex Pagan would go out and commit other crimes (T 3817). Specifically, the prosecutor argued:

> They wore the gloves, they destroyed the guns, they wore the masks, they ditched the car, they designed and tailored their actions to get away with these horrible brutal murders, senseless murders, murder that appears to be committed with as much feeling as stepping on a roach and they designed those crimes so that he can get away with them. He wanted to get away with it. Now he wants to get away with them now. You are the only force on earth that can prevent that from happened.
>
> (T 3308).

The court denied a defense Motion for Mistrial, but asked the prosecutor to be careful in his phraseology (T 3309).

Alex Pagan maintains that the prosecutor's comments deprived him of a fair trial, materially contributing to his convictions. The comments were so harmful and fundamentally tainted that a new trial is required. The comments were so

inflammatory that they might have influenced the jury's verdict. Voorhees v. State, 699 So. 2d 602, 614 (Fla. 1997); Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994).

Clearly, the prosecutor's argument was inflammatory, and because the evidence in this case is highly suspect, and far from overwhelming, the violation of the "Golden Rule" specifically telling the jurors what might happen to them was highly prejudicial and warrants reversal.

L. The Trial Court Reversibly Erred in Denying the Defendant's Motion for Mistrial When the Prosecutor in Closing Argument Made Reference to a Camouflage Jacket from the Desert Storm War Which Was Not in Evidence, and Which Was High Prejudicial to the Defense.

Alex Pagan asserts that the trial court reversibly erred in denying his Motion for Mistrial when the prosecutor made reference to a camouflaged jacket from the Desert Storm War during closing argument, despite the fact that the jacket was not in evidence (T 3818).

During closing argument, the State proffered that "maybe" the camouflaged jacket was from the Desert Storm War and that the camouflage was beige and therefore the victim's initial statements that the perpetrators in the case wore tan long coats indicated or suggested that it was because of Willie Graham's involvement in the Desert Storm War (T 3818). Clearly, there was never any evidence that camouflage jackets from the Desert Storm War were beige in color.

In fact, there was never any evidence that a camouflage jacket was worn at all in this case. By extrapolating evidence or suggesting what the evidence might mean, the State prejudicially erred, warranting a new trial (T 3818).

The Appellant asserts that the trial court reversibly erred by permitting Keith Jackson to testify that he became a State witness because a six (6) year old child had been killed (T 3819). The Appellant suggests that Keith Jackson's motive for becoming a State witness was self-serving, was irrelevant and not probative, and was highly inflammatory and prejudicial. As stated below, "the defense objected but the cat was out of the bag." (T 3819) Reversal and remand is required.

M. The Trial Court Reversibly Erred by Permitting Over Defense Objection Testimony of Keith Jackson Concerning The Death of a Six (6) Year Old Child.

Alex Pagan asserts that the trial court reversibly erred by permitting Keith Jackson to make it look as if his testimony was the result of his life-shattering experience of being related to the death of a six (6) year old child (T 3154). Specifically, an objection was lodged and the State asked the following question "have you given the death of that 6 year old and his father a lot of thought?" The defense immediately moved for mistrial based upon the leading questions of the prosecutor and that the State was attempting to bolster the witness' credibility based upon feelings changing his testimony (T 3154). The court stated " I sustained

objections because they are leading. I sustain this objection because it is leading. Motion for mistrial denied." Although the prosecutor argued that his questions were not leading, the court stated "the way you said it suggested a response on that particular question. You suggested a question, your whole phraseology and volume." (T 3155) Reversal and remand is required.

N. The Trial Court Reversibly Erred in Overruling Objections And Permitting The Medical Examiner to Express Expert Opinions on Glass Without Any Predicate When The Medical Examiner Lacked The Qualifications to Give Expert Opinions on The Characteristics of the Glass Manufacturer, Its Composition, And Whether Someone Would Be Injured Breaking Through Glass.

The district medical examiner of Broward County, Dr. Ronald Wright, testified concerning the autopsies he performed and the causes of death by gunshot wounds sustained by Freddy Jones and Michael Lynn (T 1713-69). Although the medical examiner's qualifications were discussed with the jury, at no time whatsoever was the doctor declared an expert in any field.

Sub judice, Dr. Wright was permitted over objection to give opinion testimony without any predicate concerning the type of glass he believed he observed on the floor of the house (T 1720-5). He was permitted to testify as an expert concerning whether a person breaking through a sliding glass door to the Jones' bedroom would have been injured based upon his experience concerning

glass injuring people[18] (T 1720). The prosecutor questioned what the doctor's opinion would be if someone who either kicked in a glass window or crashed through it with a shoulder would cut themselves (T 1724). A contemporaneously objection was lodged (T 1724-5). The court allowed the question to be answered with an expert opinion. Additionally, without establishing the doctor's expertise or declaring him an expert, the State was permitted to ask the doctor over defense objection how much force is required to break tempered safety glass (T 1725). The medical examiner was further permitted to testify concerning Sintered glass (T 1730). On cross-examination, the doctor admitted that he does not have any engineering degree (T 1756-61).

At bar, Dr. Wright's testimony was far beyond his area of expertise as a forensic pathologist or a typical medical examiner. The State never attempted to qualify him as an expert in glass characteristics or qualify him to give him an opinion concerning persons crashing through glass doors without injury. There was no predicate for the doctor's opinion and the characteristics of the glass and the manner in which the persons went through it, were outside the evidence as well.

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[18]The opinion evidence cannot withstand a Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) analysis. It was not shown to be reliable under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The evidence was further inadmissible under Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999).

The law is well settled that medical examiners may not testify to facts which are beyond their expertise and when proof an important fact is allowed to be substantially assisted over objection by unqualified testimony, reversible error occurs. Wright v. State, 348 So. 2d 26 (Fla. 1st DCA 1977), cert. denied 353 So. 2d 679 (1977). At the same time, whether a witness is questioned to express an opinion is a matter within the discretion of the trial judge. Brennan v. State, __ So. 2d __ (Fla. 1999)[1999 WL506966].

In Wright, a forensic pathologist opined outside his area of expertise and supplied important facts leading to a potential jury conclusion that the accused had intentionally buried his wife while she was alive. However, the court ruled that the facts upon which the pathologist was allowed to give his opinion were not within an area he was qualified as an expert, thus the First District Court of Appeal reversed the case because the testimony was important and was related to the conviction.

In Behn v. State, 621 So. 2d 534 (Fla. 1st DCA 1993), the First District again ruled that an accident reconstruction cannot opine as to what would have happened if conditions had existed that were not established by the evidence. This is precisely what occurred in this case. The testimony that Alex Pagan would have been uninjured, even if he broke through the glass with his head, was completely inadmissible. It was prejudicial since Alex Pagan was not shown by any testimony

to have been injured. A photograph of Alex Pagan taken three (3) days after his arrest was admitted into evidence, and did not reveal any injuries whatsoever. Thus, the medical examiner's testimony aided the State in a real and important manner.

Based upon Dr. Wright's improper opinion testimony which went well beyond his expertise as a medical examiner, which was prejudicial to Alex Pagan's defense that the witnesses who placed the blame on him for this crime were lying, requiring reversal and remand for a new trial.

O. The Trial Court Reversibly Erred in Granting the State's Motion for a Voice Line-up and in Allowing Testimony Relating to the Voice Line-up.

Alex Pagan asserts that the trial court reversibly erred in granting the State's Motion for a Voice Line-Up pursuant to Rule 3.220, Florida Rules of Criminal Procedure (T 100-11).

Impermissibly suggestive identification procedures causing a likelihood of irreparable misidentification violated a defendant's right to a fair trial resulting in a denial of due process. See Macies v. State, 673 So. 2d 176, 179 (Fla. 4th DCA 1996); Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Irreparable misidentification violates the defendant's to a fair trial resulting in a denial of due process. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401

(1972); Grant v. State, 390 S.Ct. 341, 343 (Fla. 1980), cert. denied 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981).

"[I]dentification by voice alone has long been thought to involve 'grave dangers of prejudice to the suspect.'" Commonwealth v. Miles, 420 Mass. 67, 648 N.E.2d 718, 719, 728 (1995)[quoting Palmer v. Peyton, 359 F.2d 199, 201 (4th Cir. 1966). As stated in Palmer, "where the witness basis the identification on only part of the suspect's total personality, such as height alone, or eyes alone, or voice alone, prior suggestions will have most fertile soil in which to grow to conviction. This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect. 359 F.2d at 201; see also Macias at 180.

Alex Pagan asserts the same concern about mistaken identification stemming from voice identification as presented to the New York Court of Appeals in People v. Collins, 60 N.Y.2d 214, 469 N.Y.S.2d 65, 67-68, 456 N.Ed.2d 1188, 1190-91 (1983). In Collins, the New York Court of Appeals stated:

> Although voice identifications are less common [than visual identifications] there is no reason to believe that the risk of mistaken identification is reduced when they have been employed by police prior to trial. It would seem that the ability of a person to make a reliable identification of another on the basis of his voice is at least as difficult as, and perhaps more difficult than, identifying him on the basis of his appearance. Id.

Given the potential for misidentification if suggestive procedures are employed, courts throughout the country have recognized that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up has been widely condemned. Stoveall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967); Perez v. State, 648 So. 2d 715, 719 (Fla. 1995).

In this case, based upon the totality of the circumstances, the State should have been prohibited from introducing evidence concerning Latoshia Jones changing her mind after the formal voice identification line-up and her alleged belief that the perpetrator was the individual associated with voice number 2, Alex Pagan. Latoshia Jones had ample opportunity to listen to the voice line-up. She was unable to positively identify anyone. To allow her to subsequently change her mind, in the presence of law enforcement officers only, and to utilize said evidence at trial, severely prejudiced the defense, and warrants reversal and remand for new trial.

The defense asserted that for the first time, six (6) months after Alex Pagan's arrest, the State asked for a line-up which the defense asserted would be extremely prejudicial. The defense cited Crosley v. State, 580 So. 2d 891 (Fla. 1st DCA 1991). The defense asserted that the overly suggestive nature of the pretrial line-up that the

State sought should be impermissible.

After the voice line-up occurred, matters got worse. Although the defense had been given written notice that Latoshia Jones was unable to identify Alex Pagan's voice at the voice line-up, Latoshia Jones was permitted to testify on redirect examination that although she unable to identify anyone from the voice line-up, she thought it was individual number 2 (T 2272). The jury was informed that individual number 2 was Alex Pagan (T 2274). Further, Irene McPhaul testified at length concerning the voice line-up (T 2825-31).

P. Cumulative Errors Require Reversal And Remand

Alex Pagan suggests that the totality of the errors below rose to the level of fundamental error and that under this standard, Alex Pagan's sentence should be reversed where singularly and cumulatively the effect of the trial court's actions caused fundamental error. While one error in isolation may not be sufficient to rise to the level of fundamental error, if it contributes to the overall cumulative effect of error, reversal is required. See Freeman v. State, 717 So. 2d 105, 106 (Fla. 5th DCA 1998); DeFreitas v. State, 701 So. 2d 539 (Fla. 4th DCA 1997). See for example Cochran v. State, 711 So. 2d 1159 (Fla. 4th DCA 1998)[cumulative effect of errors in prosecutor's closing argument amounted to fundamental error].

II. REVERSAL IS REQUIRED AS ALEX PAGAN'S DEATH SENTENCE IS DISPROPORTIONATE.

Alex Pagan contends that the death penalty was unwarranted in this case. Clearly, a proportionality review involves consideration of the totality of the circumstances of a case in comparison of that case with other death penalty cases. Snipes v. State, __ So. 2d __ (Fla. 1999)[1999 WL 247242]; Urbin v. State, 714 So. 2d 411 (Fla. 1998). The totality of the circumstances reveals that Alex Pagan should be sentenced to life imprisonment based upon the jury's seven (7) to five (5) vote. Additionally, based upon the facts presented at the remanded penalty proceedings, a death sentence is disproportionate.

As set forth by Justice Anstead in a recent dissenting opinion in Cave v. State, 727 So. 2d 233, 234 (Fla. 1998):

> This Court has recently reaffirmed the constitutional basis of its proportionality review in death penalty cases, while emphasizing its singular role in ensuring the integrity of Florida's capital sentencing process:
>
> In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). See also Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) (reasoning that '[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes.'')(footnote omitted).
>
> Proportionality review 'requires a discrete analysis of the facts,' Terry

v. State, 668 So. 2d 954, 965 (Fla. 1996), entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. We underscored this imperative in Tillman v. State, 591 So. 2d 167 (Fla. 1991):

> We have described the 'proportionality review' conducted by this Court as follows:
>
> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is 'unusual' to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.
>
> ... Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. Id. at 169 (alterations in original) (citations and footnote omitted). As we recently reaffirmed, proportionality review involves consideration of 'the totality of the circumstances in a case' in comparison with other death penalty cases. Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (citing Terry, 668 So. 2d at 965). Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998). The statement from Tillman quoted in Urbin should be emphasized: '[P]roportionality review

> is a unique and highly serious function of this Court.' Cave's death sentence cannot withstand this stringent standard of review.
>
> Id. at 234.

When this Honorable court compares the totality of the circumstances of this case to other similar cases, it is clear that Alex Pagan's sentence of death cannot with stand proportionality review.

In Snipes, supra, there were two (2) aggravating circumstances presented: 1) that the murder was cold, calculated, and premeditated without pretense of legal or moral justification; and 2) that the murder was committed for pecuniary gain. In Snipes, there was some mitigation, since Snipes was only 17 at the time he committed the murder. He was sexually abused for a number of years as a child, abused drugs and alcohol, and had no prior violent history. Snipes voluntary confessed to the crime, told others about it, and expressed remorse. In Snipes the court stated:

> Given these circumstances, we find this case to be closer those cases in which we have reversed the death penalty for the imposition of a life sentence. For example, in Urbin, there were 2 valid aggravating circumstances (prior violent felony and pecuniary gain) and there were a number of mitigating circumstances (age of 17, substantial impairment, drug and alcohol abuse, dyslexia, employment history, and lack of a father). We found in Urbin that the defendant's age of 17 was particularly compelling when coupled with the substantial impairment and family neglect. As in Urbin, here we find Snipes age of 17 to be particularly compelling when coupled with the history of sex and drug abuse, and the other mitigating circumstances. See also

> Livingston v. State, 565 So. 2d 1288 (Fla. 1988)[defendant's youth, inexperience, and immaturity in addition to limited intellectual functioning and extensive use of cocaine and marijuana counted against 2 aggravating circumstances of prior violent felony in commission during robbery warranting life sentence.
>
> Id. at 1999 WL 2472424 *8.

In Sinclair, the defendant robbed and fatally shot a cab driver. He was convicted of first degree murder and sentenced to death. The trial court found one (1) aggravating factor, that the murder was committed while engaged in the commission of a felony and, no statutory mitigating factors, three (3) non-statutory mitigating factors (cooperation with the police; dull - below normal intelligence level; and Sinclair was raised without a father figure). In Sinclair, the Florida Supreme Court held that death would be a disproportionate penalty. Id. at 1142.

In light of the totality of the factors surrounding this case, together with the statutory and non-statutory mitigating circumstances, imposition of the death penalty in this case is a disproportionate punishment when compared to other capital cases. The Florida Supreme Court has repeated noted that the death penalty is reserved only for "the most aggravated and unmitigated of most serious crimes." State v. Dickson, 283 So. 2d 1 (Fla. 1973). Clearly, the offense below is not the most aggravated and unmitigated of capital crimes.

Alex Pagan cites the case of Scott v. Dugger, 604 So. 2d 465 (Fla. 1992) in

support of his quest for a life sentence. In Scott, a death sentence was originally upheld based upon five (5) aggravators and two (2) mitigators. The sentence was ultimately reduced to life imprisonment based upon new mitigators including Scott's good behavior in prison. Alex Pagan asserts that the situation herein is analogous to that presented in Scott, and that his sentence should be reduced to life imprisonment.

Based upon uncontroverted testimony, Alex Pagan's actions are aligned with the two (2) statutory mental mitigators which the Florida Supreme Court has ruled are the two (2) most significant. See Santos v. State, 629 So. 2d 838 (Fla. 1994).

Similarly, Alex Pagan relies upon the factually analogous case of Nivert v. State, 574 So. 2d 1059 (Fla. 1990) in support of his position. Nivert, like Pagan, was so impaired during his life by alcohol that testimony indicated he was a completely different person sober rather than drunk. In Nivert the court held that this factor outweighed even a finding of heinous, atrocious, and cruel. The testimony in the case at bar indicates that Alex Pagan was seen as a sweet person when sober. When intoxicated, however, Alex Pagan was not in control of his actions. However, this case is distinguishable from Nivert because sub judice, the facts do not support HAC an important aggravator. Instead, the aggravator in this case deal more with Alex Pagan's past rather than with heinous facts of the case (R

270).

Reversal and remand is required.

CONCLUSION

WHEREFORE, based upon the foregoing grounds and authority, Alex Pagan requests this Honorable Court enter an Order reversing the Judgment, Conviction, and Sentences imposed and discharging based upon insufficiency of the evidence. Alternatively, Alex Pagan requests this Honorable Court reverse this matter and remand for a new trial. Assuming arguendo, that discharge or new trial are not appropriate, reversal and remand for resentencing is required.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this **13th day of April, 2000** the original plus seven (7) copies of the Amended Initial Brief were mailed to: Clerk of Court, Florida Supreme Court, 500 Duval Street, Tallahassee, FL 32399-1925 and a copy mailed to: AAG Leslie Campbell, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401.

Respectfully submitted,

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