

IN THE SUPREME COURT OF FLORIDA

CASE NO: 94,365

ALEX PAGAN,

Appellant,

vs.

STATE OF FLORIDA

Appellee.

**REPLY 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 REGARDING TYPE, SIZE AND STYLE

Appellant, Alex Pagan certifies that this Reply 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 Reply 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.

The 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).

References to Appellant’s Initial Brief on Appeal shall be indicated by a “IB” followed by the appropriate page number (IB).

References to Appellee’s Answer Brief on Appeal shall be indicated by a “AEB” followed by the appropriate page number (AEB).

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

ISSUES ON APPEAL

- I. Whether the Evidence was Sufficient 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?
- X. Whether the Trial Court Reversibly Erred in Permitting Prejudicial Inflammatory Photographs of the Deceased to Be Shown to the Jury?

ISSUES ON APPEAL (cont'd)

- 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?

SUMMARY OF ARGUMENT

Alex Pagan asserts that the evidence was insufficient to support his convictions. Several reasonable hypothesis were supported by the evidence and warranted discharge. As a result of the wrongful convictions at bar, Alex Pagan has been wrongfully sentenced to death by electrocution.

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 fair 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 Batson¹ 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 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

¹Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

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.

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.

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 were 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.

Nothing in the State’s Answer Brief changes the quantum of evidence presented below. At the same time, nothing detracts from the reasonable hypothesis of innocence presented by the defense. Viewed as a whole, a death sentence is not appropriate at bar.

Sub judice, while the State’s slant on the evidence neatly fits a contrived theory, Alex Pagan’s hypothesis of innocence should have resulted in a judgment of acquittal, an outright acquittal by the jury, or a new trial. No physical evidence linked Alex Pagan to the offense. More so, no credible evidence linked Alex Pagan with the January burglary of the Jones’. The February Homicides were proven via the January Burglary. Accordingly, reversal is required.

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

Despite the State’s protestations to the contrary, 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 an armed robbery and armed

burglary on February 23, 1993, were all predicated upon two (2) false premises: 1) that Alex Pagan participated in an alleged burglary at the Jones' a month earlier, and 2) that Alex Pagan was the "quiet one" in the events which took place 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 incident.

The defense version of the facts in this case emanated directly from Latoshia Jones' report of a home invasion robbery murder to the police. The report was made a brief time after the events occurred, when they were fresh in her mind. The police quickly came to the scene and Latoshia Jones gave a description of each of the men. They were each slightly taller than she, wearing beige trench coats, cloth ski masks, and gloves.

Ultimately, the police developed information regarding Willie Graham. When the police investigated Willie Graham, they learned that he had been recently released from jail for an attempted first degree murder he committed with Keith Jackson. The police found Keith Jackson. Keith Jackson tried to drive away but was stopped. He said "no it was not me, but I will tell you who it was. It was Alahandro Ramirez that did it."

The police investigated a company named Premier Beverage and three individuals names came to light; Anthony Graham, Willie Graham, and Alex Ramirez. Keith Jackson told the police those people 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.

At trial, Keith Jackson attempted to portray his close friendship with Alex Pagan for eight (8) years. However, Keith Jackson admitted that he did not even know Alex Pagan's name.

The State asserted at trial that the testimony of two (2) witnesses, Mr. Quezada and Mr. Jackson, who each swore were close to Alex Pagan and Willie Graham warranted convictions. Now, on appeal, the State maintains in its Answer Brief that this is a direct evidence case, rather than one based upon circumstantial evidence because of the statements the State witnesses attributed to Alex Pagan. Surely, such "confessions" were considered crucial to the State's case. Neither of the witnesses were direct links to the evidence. The circumstances lead the officers to believe that Alex Pagan was one of the Defendants. In this case, because of the extremely poor credibility of the cooperating State witnesses, this court should determine whether the State overcame Alex Pagan's reasonable hypothesis of innocence.

No physical evidence whatsoever placed Mr. Pagan at the scene on Ramona Street either in January or February 1993. The State could not explain what happened

to the trench coat allegedly worn by the individual believed by law enforcement to be Alex Pagan. Further, the State failed to offer any reasonable explanation for law enforcement's failure to locate any alleged cloth ski masks, or explain what happened to the murder weapon in this case.

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

In its Answer Brief, the State failed to address the other individuals who closely fit the description given to law enforcement by Latoshia Jones. 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 has maintained that one or more of several other suspects in this case must be the culprit. He continues to proclaim that he did not commit the instant offense and has been wrongfully convicted and sentenced to death.

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 whereabouts during the time period of the February homicides. Clearly, Keith Jackson possessed a great deal of knowledge concerning the January offense, which supported the defense theory that Keith Jackson had participated in the February offense.²

Alex Pagan maintains that a special standard of review applies herein. State v. Law, 559 So. 2d 187 (Fla.1989). In this case, based upon insufficiency of the evidence, the judgment, conviction and sentence should be reversed and the Appellant discharged, or, alternatively, this matter remanded for a new trial or new sentencing proceedings.

Alex Pagan suggests that the State seeks this Court to apply an incorrect standard of review at bar. (AEB 34-35) The State suggests that the statements alleged to have been made by Alex Pagan to Mr. Quezada and Mr. Jackson was direct evidence and that as a result of "direct" and circumstantial evidence, Alex Pagan's claim that the special standard of review for circumstantial evidence cases is inapplicable. The question is whether, out-of-court hearsay evidence presented via cooperating State witnesses seeking to avoid blame themselves can be considered "competent substantial evidence" requiring the State to establish guilt under a "direct evidence" standard rather than one based on "circumstantial evidence." The issue is extremely important, especially since this is a death case. F.S. v. Danciu, ___ So. 2d ___

²Being the second perpetrator along with Willie Graham.

(Fla. 4th DCA October 27, 2000)[2000 Fla. App. Lexis 14770]. The evidence below was easily distinguishable from those Florida decisions which upheld the trial court's refusal to consider cases under circumstantial evidence standard based upon a statement made prior to the commission of the offense or a confession made thereafter. Based upon Alex Pagan's innocence, reversal is required.

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 maintains that 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. The State's attempt to distinguish Terranova is unavailing. (AEB 38-39) Despite the State's assertions, the record contains a multitude of inferences into individuals who could have easily been the culprit at bar,

rather than Alex Pagan.

In this case, the evidence created nothing more than a strong suspicion that Alex Pagan committed either the February 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 to Alex Pagan as the perpetrator of these crimes.

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 n.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.

Despite the State's reframing of the instant issue, it is clear that the trial court reversibly erred in permitting evidence concerning an uncharged January 23, 1993 burglary that was dissimilar factually and temporarily, to the February home invasion robbery, 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 hearing on the issue was conducted pretrial. Nevertheless, remarkably, the State erroneously insists that no contemporaneous objection was lodged to the evidence (AEB 40).

Below, the defense argued that there was no credible evidence³ that Mr. 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.

³Asserting that Mr. Quezada and Mr. Jackson's testimony lacked credibility.

Alex Pagan asserts that the collateral evidence admitted pursuant to Section 90.404, Fla. Stat., in the case at bar, was not “inextricably intertwined” to the murders for which Alex Pagan was being tried. While the State’s theory of inextricably intertwined evidence is well crafted, it was not born out of the facts presented (AEB 41-6). Not only was said collateral crime evidence remote in time and place, it was not properly established as “inseparable crime” evidence. Further, it was made the feature of the trial, 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. The burglary in January was never proven to be “Pagan’s burglary” as coined by the State (AEB 41). Sub judice, the collateral evidence introduced in the case at bar was not necessary to adequately describe the deeds which Alex Pagan was accused of committing. Thus, when analyzing the collateral evidence which was admitted in its totality, it is evident that the same should not have been admitted, and should not have been permitted to become the feature of the trial.

As this court explained in Griffin v State, 639 So. 2d 966 (Fla. 1994), cert. denied 139 L.Ed.2d 198 (1995), 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.

However, 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.

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 was alleged to have been perpetrated by Willie Graham and others on or about January 23, 1993. It was not similar to the crimes which Alex Pagan was charged in this case. No substantial connection between 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. The importance of the collateral crime evidence cannot be underscored. Alex Pagan maintains he is to be judged upon the facts alleged in the Indictment, not evidence of "other crimes" he was alleged to have been involved in.

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). 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). State v Bush, 690 So. 2d 670 (Fla. 1st DCA 1997).

In this case, the collateral evidence which was admitted so overwhelmed evidence concerning the homicides that it constituted 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,⁴ 578 So. 2d 793 (Fla. 1st DCA) review denied, 584 So. 2d 1000 (Fla. 1991).

Given the prejudicial effect of the court permitting the State to admit collateral evidence, renders the admission as harmless error. The conviction, judgment, and sentences imposed 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). The defense asserted below that the trial court reversibly erred in denying a Motion for Suppress Evidence. The seizure violated Alex Pagan's State and Federal Constitutional rights.

⁴Another case not referred to by the State.

Despite the State’s factual recitation of the securing of the arrest warrant, as well as the execution of the warrant, constitutional errors of State and Federal dimensions occurred below (AEB 46-54).

While Alex Pagan takes no issue with the standard of review suggested by the Appellee (AEB 54-5), the Appellant maintains errors severely prejudiced his case. Absent introduction of the illegally seized evidence, the evidence would have clearly been insufficient to establish Alex Pagan’s guilt.⁵

The State mistakenly alleges in its Answer Brief that “Pagan does not argue that the officers were unlawfully in position when the jewelry was discovered.” (AEB 58-9). Such is clearly not the case. Alex Pagan asserted that the affidavit submitted to gain access to the search was false and misleading. He contested whether probable cause existed for the search or arrest, i.e. for law enforcement to be there. He maintained the officers failed to “knock and announce”⁶ themselves. He asserted that the officers exceeded the scope of their search and arrest powers. Clearly, a far cry from a waiver of the issue.

Alex Pagan relies upon the facts and argument set forth in Argument I(c) of his

⁵See Argument I, supra.

⁶Noticeably absent from the State’s Answer Brief is any reference to United States v. Ramirez, 118 S.Ct. 992, 523 U.S. 65, 180 L.Ed.2d 191 (1998), in which the United States Supreme Court recently dealt “no-knock” entries into one’s residence.

Initial Brief in support of his claims (AB 68-72). In so doing, he maintains 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). 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).

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 grant his request for a mistrial or a new trial 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.

A detailed review of the improper argument and objections thereto establish that the trial court abused its discretion below. Reversal 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.

Alex Pagan maintains that the prior out-of-court statements of Antonio Quezada should have been prohibited at trial. The instant case did not fall within the limited exception to Rule 90.801(2)(b), Fla. Stat. (1999), as Mr. Quezada's prior consistent statements were inadmissible to corroborate his testimony. Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986).

Factually, 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; that 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). The recorded conversations were inadmissible and irrelevant. They could not survive a Section 90.403, Florida Statutes, probative value/prejudicial effect analysis.

The conversation, recorded surreptitiously in Keith Jackson's car, was not a

“statement” with any indicia of trustworthiness based upon the facts and circumstances. It was not sworn to. 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 evidence.

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. See Section 90.402, Florida Statutes. Here, the evidence was not relevant to whether or not Alex Pagan committed the murders but was involved in a burglary a month earlier, thus, 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. Section 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). As the evidence was far more prejudicial than probative it did not withstand Section 90.403, Florida Statutes’ scrutiny.

Alex Pagan maintains 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. 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 Batson⁷ Challenge to a Juror.

Alex Pagan relies upon the argument set forth in his Initial Brief in reply to the State’s Answer Brief. He maintains that prejudicial error occurred warranting a new trial when the trial court reversibly erred in refusing to allow the defense to strike a juror for cause (T 3811).

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

Alex Pagan maintains 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. The Motion for New Trial referred to is contained in the Record and is self-explanatory (R 950-3). Accordingly, the State is misplaced in asserting that “failure to specify and provide argument as to the alleged error and ruling precludes review and reversal here.” (AEB 74) Nothing could be further from the truth.⁸ In so asserting, Alex Pagan is mindful of the standard that a court has great discretion to allow a trial judge who assesses the weight of credibility of evidence on a Motion for New Trial. See State v.

⁷Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986)

⁸Interestingly, the State relies upon “the prosecutor’s response below.” (AEB 74)

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. Reversal and remand is required.

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 State and Federal rights to due process of law and to a fair trial. Reversal is required.

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

Alex Pagan maintains 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.

Fundamental error occurred as a result of the admission of the evidence. Reversal and remand is required.

J. The Trial Court Reversibly Erred by Denying a Motion for New Trial Based upon a Richardson⁹ 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).

The defense asserted below that when Deputy McFall was brought into testify about the line-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. Despite the State's response in its Answer Brief, reversal and remand is required.

⁹Richardson 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).

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). Reversal is required.

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 Highly Prejudicial to the Defense.

Alex Pagan further maintains 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).

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 maintains 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 (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.¹⁰

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

¹⁰The State artfully dodges the Appellant’s assertion by stating that the doctor is an “experienced” medical examiner who had been declared an expert in forensic pathology more than one thousand times (T 1716-18). The State does not contest the fact that Dr. Wright was not declared an expert in this case.

glass injuring people¹¹ (T 1720).

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.

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].

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,

¹¹The 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).

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). Contrary to the State’s suggestion, Alex Pagan did not “open the door” to the testimony. Reversal and remand is required.

P. Cumulative Errors Require Reversal And Remand

Alex Pagan maintains 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. 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. 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 and his co-Defendant's life sentences. Additionally, based upon the facts presented at the remanded penalty proceedings, a death sentence is disproportionate.

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.

Although Snipes was cited in support of proportionality by the State in its Answer Brief, it failed to address the issue properly. Specifically, in Snipes 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 voluntarily 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 n.8.

In Sinclair,¹⁶ 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

¹⁶The State failed to address Sinclair in its Answer Brief.

penalty in this case is a disproportionate punishment when compared to other capital cases. The Florida Supreme Court has repeatedly 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.

Finally, noticeably absent from the Answer Brief is any response to a key case relied upon by Alex Pagan, Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). 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 maintains 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).

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 remand for a new trial are not appropriate, reversal and remand for resentencing is required.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 7th day of December, 2000 the original plus seven (7) copies of the Reply Brief were mailed to: Clerk of Court, Florida Supreme Court, 500 Duval Street, Tallahassee, FL 32399-1925 and a copy mailed to: AAG Scott A. Browne, Office of the Attorney General, Westwood Center, Suite 700, 2002 N. Lois Avenue, Tampa, Florida 33607-2366.

Respectfully submitted,

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