IN THE SUPREME COURT OF FLORIDA

ALEX PAGAN,

Petitioner,

vs. Case No. SC07-1327

JAMES MCDONOUGH,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Appellant, Alex Pagan, Defendant below, will be referred to as "Pagan" and Appellee, State of Florida, will be referred to as "State". Record references are:

Trial record: "TR" in case number SC60-94365;
Trial transcripts: "TT" in case number SC60-94365
Postconviction record: "PCR";
Supplemental records: "S" before the record supplemented;
Initial Brief: IB.

References will be followed by volume and page number(s).

STATEMENT OF THE CASE AND FACTS

On March 25, 1993, Defendant, Alex Pagan ("Pagan"), and his co-defendant, Willie Graham ("Graham"), were indicted for two counts of premeditated murder for the deaths of Michael Lynn (six years old), and Freddy Jones, two counts of attempted murder of Latasha Jones and Lafayette Jones (18 months old), armed robbery, and armed burglary. Pagan v. State, 830 So.2d 792, 798-99 (Fla. 2002). The trials of the co-defendants were severed and on November 4, 1996, Pagan's trial commenced. On December 20, 1996, he was convicted on each count as charged in the indictment. Id. at 801 (TR.5 912-17).

Following the March 3 through March 5, 1997 penalty phase, by a vote of seven to five, the jury recommended death for the murders. (TR.6 1058-61). A Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing was held July 1, 1997, and on October 15,

1998, this Court imposed death sentences for the murders of Michael Lynn and Freddy Jones, and life imprisonment for the two counts of attempted murder, armed robbery, and armed burglary. All counts were to run consecutively. (TR.6 1114-26; 1150-53).

On direct appeal, this Court found:

> During the early morning hours of Tuesday, February 23, 1993, two men entered the master bedroom of the Joneses' home by crashing through the sliding glass doors. At the time, Latasha, Freddy and the couple's toddler were in bed together. No lights were on in the house except a light Latasha regularly left on above the kitchen stove. The two perpetrators were wearing ski masks.
>
> Testimony established that the two men, one hyper and the other calm, demanded money from the couple. One of the intruders indicated he was aware there was $12,000 or $13,000 in the house. He said he wanted that money and had messed up the first time. After Freddy Jones denied having any money, the hyper one began looking through the house for money. In the process, he found Michael, the couple's six-year-old son, in another room. He returned to the couple's bedroom with Michael in tow. He threw Michael on the bed and ordered Latasha to show him where the money was located.
>
> The hyper one grabbed Latasha by her arm with what felt like a gloved hand, placed a gun against her head, and walked her through the house in search of money. After finding no money, Latasha was returned to the bedroom and hit with the gun, causing her nose to bleed. The hyper one looked into the closet for the money, but was ordered by the quiet one to immediately close the door when a light came on inside. He feared they would see his face. Latasha testified the calm one's mask was partially off, and she could see that he was "very bright skinned, looked like he was white." This one called the hyper one a name that sounded like Zack or Sack.
>
> One of the gunmen asked for keys to the jeep. The calm one then told the other one to get rope. Latasha saw

the calm one tie up Freddy while the hyper one went into the garage and started up the couple's jeep. Latasha was also tied up and was looking in her husband's direction when she saw the calm one shoot him. She turned her head away and heard the calm one tell Michael, "Shorty, if you live through this, don't grow up to be like me." She heard more shots. After she was shot, Latasha pretended she was dead. More shots were fired and her baby began screaming. She believes she heard seven or eight shots and testified that the hyper one was standing in the doorway when the quiet one shot her husband.

Once the perpetrators left the house in the jeep, Latasha kicked herself free of the ropes and called out to her husband and Michael. After receiving no response, she grabbed her baby and fled into the street screaming for help. A neighborhood paramedic came to her aid. Police later discovered that Michael Lynn had been shot four times, three times in the head and once in the buttocks.

Latasha also testified her house was burglarized January 23, 1993, and that approximately $26,000 worth of clothes, jewelry, and cash was taken. She identified a picture of her wearing jewelry, including an anchor with a crucifix, and also identified pictures of a Honda ring and a Cadillac ring. She was able to identify the Cadillac ring, a chain with a large anchor, and a man's bracelet as her husband's. Some of these items were recovered from Pagan's residence on February 27, 1993, the day of his arrest. Other items of jewelry were taken by Graham to two pawn shops in the area.

Antonio Quezada and Keith Jackson, both friends of the defendants, testified they spent some time with both Pagan and Graham after the January burglary and saw both of them wearing the same jewelry that was identified by Latasha as stolen from her home. Quezada testified that Pagan told him the next time they would do it right. On the night of the murders, Quezada drove Pagan and Graham to the Jones home. Quezada indicated he dropped Pagan and Graham off around the corner from the Joneses. En route Pagan said they would kill everybody, and Graham seemed to agree. Quezada also said Pagan and Graham had gloves, but he

did not see either guns or ski masks.

Quezada further testified that he went home after dropping off Pagan and Graham, and he did not expect to see them again that night. However, later the same night he responded to a knock on the door-it was Pagan. Pagan came into the apartment and told Quezada that he had killed everyone, including the children. Pagan asked Quezada to take Graham to the bus station. In response to Quezada's inquiry of how they had gotten to his house, Pagan said they had stolen the victim's car, left it at a supermarket, and offered someone gas money in exchange for a ride to Quezada's apartment.

Quezada agreed to take Graham to the bus station. Graham appeared upset and indicated he was mad because they "didn't get anything." Prior to going to the bus station, the three (Quezada, Pagan, and Graham) drove to South Beach and other parts of Miami for one and one-half to two hours. During this ride, the home invasion and murders were discussed, including the disposition of the gun that was used. When initially questioned by the police, Quezada maintained he was with Pagan all night on the night of the murders. He later said this alibi was a lie.

Keith Jackson also testified that Pagan admitted he committed the home invasion murders. He also explained that the Jones home was targeted for a burglary because the occupant was a big drug dealer and they could get some money from the house. Although Jackson said he was not really interested in burglarizing the house, he participated in several conversations with Pagan and Graham about a possible burglary. Jackson said that on January 23 he received a call from Pagan and Graham saying they had "hit" the house. When they came to Jackson's house, they had a lot of gold jewelry, including a chain with Latasha's name on it. At trial, Jackson identified some of the jewelry he had previously seen. Pagan and Graham took him to see the house they had burglarized and indicated they were going to go back because they had not gotten all of the money that was supposed to be in the house.

Jackson testified that on the day after the murders he tried to get in touch with Graham but was

unsuccessful. He got in touch with Pagan, and Pagan and Quezada came to Jackson's house. During a conversation in the bedroom between Jackson and Pagan, Pagan admitted to shooting everybody in the house. Additionally, Pagan told him they had dismantled the gun and scattered it over Miami. Jackson told Pagan that two witnesses were not dead, the baby and the female. On another occasion, Jackson said Pagan told him he shot the people because a light came on in the house and he thought they may have seen his face.

...

After the State presented evidence concerning Pagan's prior criminal record, a sexual battery and two aggravated batteries, the defense put on its case for mitigation. The witnesses included family, neighborhood friends, an attorney, and a records supervisor with the Broward Sheriff's Office. The first witness called was Pagan's uncle, Carmello Miranda. Mr. Miranda testified that Pagan's parents separated when he was approximately two years old. Mr. Miranda babysat and spent a lot of time with Pagan. He indicated Pagan was a good boy, who was always helpful around the house and in the neighborhood. Pagan told his children to stay in school and do their best.

Video depositions of Yolanda Esbro and Anthony Penia were played for the jury. Ms. Esbro knew Pagan from the neighborhood he grew up in; her son was a close friend of Pagan's when they were in the third grade and the two remained close thereafter. She opined that Pagan and his sister got along well. Anthony Penia was Pagan's best friend growing up. He said Pagan was a funny, nice, and good person.

Maria Rivera, Pagan's mother, testified concerning his childhood and relationship with his father, Michael Pagan. She indicated that Michael was married when she first met him. When Pagan was seven months old, she had an altercation with Michael, and Michael physically abused her. After her daughter Yvette was born, she tried to make up with Michael, but he said he did not love her and had someone else. Maria was able to take care of the children with the help of her grandmother. During this time, the father did not visit. When Pagan was eighteen years old, he was

charged with an offense against a girl. He spent four or five years in prison. After his release, he started drinking and his personality changed.

Pagan's great-grandmother, Provilencia Alasaya, testified that she raised him in New York. His sister, Yvette Pagan, testified he was a good brother to her and treated her with respect.

Sharon Livingston, a classification records supervisor with the Broward Sheriff's Office, testified she reviewed his file and noted he had been incarcerated since his arrest in 1993. During that time he had not accumulated any disciplinary reports; he had an exemplary prison record. Michael Rocque, a lawyer and law professor at Nova Law School, testified he represented Pagan for a year but had to withdraw from the case because of personal problems. Rocque indicated Pagan helped him by giving him positive advice concerning his personal life.

The penalty jury recommended the sic) Pagan be sentenced to death by a vote of seven to five.

Dr. Martha Jacobson, a licensed psychologist and an expert in the field of forensic psychology, testified on Pagan's behalf at the *Spencer* hearing. She indicated Pagan has a borderline personality disorder and suffered from attention deficit disorder as a child. In response to Dr. Jacobson's testimony, the State presented Dr. Harley Stock, a forensic psychologist, who disputed Jacobson's finding of borderline personality disorder, concluding instead that Pagan suffered from antisocial personality disorder. Dr. Stock also took issue with Dr. Jacobson's conclusion that Pagan suffered from attention deficit disorder, finding instead that Pagan scored high on tests requiring attention to detail and environment. Moreover, the doctor indicated Pagan had no problem paying attention during his lengthy jail interview.

Other defense evidence was presented at the Spencer hearing, including a videotaped deposition of Michael Pagan, the defendant's father. The testimony of Pagan's aunt, Doris Bardandaes, concerning Pagan's relationship with his family during the course of his

> life was also received by the trial judge. A former roommate, Cynthia Valera, presented evidence concerning Pagan's relationship with her two small children and Pagan's actions and attitudes when he had been drinking.
>
> The trial court entered its sentencing order on October 15, 1998, imposing a sentence of death for each of the murders. In support of the sentences, the trial court found three aggravating circumstances: that Pagan had been convicted of a prior violent felony; that the murder was committed during the course of a felony; and that the murder was cold, calculated, and premeditated. The trial court also found as a statutory mitigating circumstance, under the catch-all of any other factor, that Pagan had a deprived childhood. Several nonstatutory mitigators were found, including that Pagan suffered from attention deficit disorder; had a borderline personality disorder; was a loving brother; was a loving grandson and great grandson; was a loving friend; and displayed good conduct while in custody.

Pagan, 830 So.2d at 799-802 (footnotes omitted).

Seventeen issues[1] were raised on direct appeal, and this

[1] 1-The evidence was insufficient to support Alex Pagan's convictions; 2-The trial court reversibly erred in allowing Williams Rule evidence concerning a January 23, 1993 burglary that was dissimilar factually and temporally; 3-The trial court erred in denying the Defendant's Motion to Suppress Physical Evidence; 4-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; 5-The trial court reversibly erred by allowing a surreptiously recorded hearsay conversation in violation of Alex Pagan's state and federal constitutional rights; 6-The trial court reversibly erred by denying Alex Pagan's motion for new trial and upholding the state's Batson challenge to a juror; 7-The trial court reversibly erred in refusing to order a new trial; 8-The trial court reversibly erred in refusing to grant one or more of Alex Pagan's motion for mistrial; 9-The trial court reversibly erred in permitting prejudicial inflammatory photographs of the deceased to be shown to the jury; 10-The trial court reversibly erred by denying a motion for new trial

Court rejected the claims of error.[2] On November 7, 2002,

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based upon a Richardson violation when testimony concerning a voice line-up was permitted; 11-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 improper inflammatory reference to preventing the Defendant from committing crimes again; 12-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; 13-The trial court reversibly erred by permitting over defense objection testimony of Keith Jackson concerning the death of a six (6) year old child; 14-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; 15-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; 16-Cumulative errors require reversal and remand; 17-Reversal is required as Alex Pagan's death sentence is disproportionate. (Direct Appeal Brief in case number SC60-94365).

[2] With respect to the challenge to the sufficiency of the evidence, this Court found Pagan's confession was direct evidence, Pagan, 830 So.2d at 803-04 and concluded his statements of intent connected him with Graham and their prior burglary of the Jones' home. Id., at 804. Such provided the motive for the subsequent murders and related crimes by the co-defendants. Id. The jewelry and other property found in Pagan's apartment was the victims', which, when combined with Pagan's admissions to Antonio Quezada ("Quzada") and Keith Jackson ("Jackson") established proof beyond a reasonable doubt that Pagan committed these crimes. Id., at 804. Pagan's challenge to the Williams rule evidence on the ground the January 1993 burglary was dissimilar and became a feature of the case was rejected. Pagan, 830 So.2d at 805-06. Addressing the denial of the motion to suppress, this Court concluded the affidavit for the search warrant established probable cause, that any omissions or inaccuracies were not sufficient to void the finding of probable cause, and the property seized did not exceed the scope of the search warrant. Id., at 806-09. The

Pagan's rehearing, raising various challenges to the opinion and adding the claim that the sentence was unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) was denied. Subsequently,

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claim of prosecutorial misconduct alleging improper bolstering a witness's credibility was rejected as the State's argument was in direct and fair response to a defense argument. The comments were fair statements of fact. Id., at 809. No error was found in the admission of a tape recording of a conversation between Quezada and Jackson. It was admissible to rebut the defense claim of recent fabrication. Id., at 809-10. The denial of a strike of Juror Laster on the grounds he was a conservative with conservative ideas was found unpreserved. Pagan, 830 So.2d at 810. Denial of a new trial and various motions for mistrial were affirmed where this Court found the issues were not argued with specificity, thus, were waived. Id., at 810-11. The challenge to the photographs of the deceased child was found unpreserved, and not an abuse of discretion. Id., at 811. The claim of a Richardson v. State, 246 So. 2d 771 (Fla. 1971) violation stemming from the notice given for the voice lineup was found refuted from the record as the witness's name had been disclosed. Further, out of an abundance of caution, counsel was allowed to depose the witness. Pagan, 830 So. 2d at 811-12. The admissibility of the voice lineup was unpreserved. Id., at 812. The claim the State improperly suggested the jury had the ability to prevent Pagan from getting away with the crime was rejected as the challenged comment "in no way violate[d]" the prohibition of "golden rule" arguments. Id., at 812-13. Pagan complained that a mistrial was warranted when the State referenced Graham wearing a Desert Storm camouflage jacket. This Court found the reference to the camouflage jacket proper as such was evidence, but identifying it as a Desert Storm jacket improper as that fact could not be reasonably inferred from the evidence. Yet, it was harmless. Id., at 813. Jackson's stated motivation to cooperate because of the child's death was relevant and a jury issue. There was no abuse of discretion in denying a mistrial. Id., at 813-14. There was no error in permitting Dr. Wright, the medical examiner, to testify about injuries caused by different types of glass. His answers were admissible expert testimony and assisted the jury in understanding the evidence. Id., at 814-15. The allegation of commutative errors was rejected. Because "only one error was demonstrated and that error was harmless, there is no ground for relief on this claim." Id., at 815. Also, Pagan's sentence was found proportional. Id., at 817.

on June 9, 2004, Pagan's petition for certiorari to the Supreme Court raising the Ring claim was denied. Pagan v. Florida, 539 U.S. 919 (2003).

On June 8, 2004, Pagan filed his motion for postconviction relief. The trial court granted an evidentiary hearing which was held on February 7 -9, 2005. Subsequently, the trial court denied relief, and Pagan appealed. Simultaneously, with the filing of his initial brief in his postconviction appeals under case no. SC06-378, he filed the instant petition for writ of habeas corpus. The State's response follows.

ARGUMENT

ISSUE I

PAGAN'S CHALLENGE TO THE CONSTITUTIONALITY OF JURY SELECTION IN HIS CASE IS PROCEDURALLY BARRED AND MERITLESS (restated)[3]

Pagan asserts that potential jurors, Julio Cruz ("Cruz") and Eugenio Olariaga ("Olariaga") were excused for cause improperly under state statutes as well as the equal protection clause of the United States Constitution as discussed in Hernandez v. New York, 500 U.S. 352 (1991). Pagan makes no claim of ineffective assistance of appellate counsel, but instead challenges directly the trial court's excusal for cause of these jurors because they could not understand English well. As such, the matter is barred as it is a direct appeal issue and could have been raised at that time. It is not proper to use a habeas petition to gain a second appeal. Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989) ("[H]abeas corpus petitions are not to be used for additional appeals on questions which ... were raised on appeal or in a rule 3.850 motion...."). Further, the claim is pled insufficiently even under Hernandez, as Pagan has failed to plead any racial animus, nor can he, given that his counsel agreed to the for cause excusal of these jurors. Moreover, the trial court properly excused these jurors under

[3] To the extent the constitutional question was raised in the Rule 3.851 litigation, it was rejected by the trial court. (PCR.4 656-58).

Cook v. State, 542 So.2d 964, 966-70 (Fla. 1989) and Wilson v. State, 753 So.2d 683, 685-86 (Fla. 3d DCA 2000). Relief must be denied.

A petition for "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings." White v. Dugger, 511 So. 2d 554, 555 (Fla. 1987). See Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987); Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987). The Court "has made clear that habeas is not proper to argue a variant to an already decided issue." Jones v. Moore, 794 So. 2d 579, 583 n.6 (Fla. 2001). Likewise, while petitions for writ of habeas corpus properly address claims of ineffective assistance of appellate counsel, Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000), such “may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion." Freeman v. State, 761 So. 2d 1055, 1069, 1072 (Fla. 2000). Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987) (declining petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court) (quoting Steinhorst v. Wainwright, 477 So. 2d 537, 540 (Fla. 1985)).

In addition to being procedurally barred, this Court should

find the matter, as it relates to the equal protection claim, legally insufficient because Pagan does not relate how the excusal of jurors who cannot understand English was a denial of equal protection. Even under the case he relies upon, Hernanzez, the excusal of jurors who cannot understand English is not a constitutional violation unless there is a showing that the excusal is for same racial animus. Pagan has neither shown nor plead that there was any racial undertones in the excusal of these jurors. In fact, they brought the problem to the court's attention and defense counsel agreed to their excusal. Merely asserting error in the heading, and noting such later without full elucidation is not sufficient to convey the issue to the reviewing court. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (noting failure to elucidate issue is insufficient and issue will be deemed waived).

Similar claims were raised and rejected in the rule 3.852 litigation.[4] Once this matter is put in context, it is clear that the court did not err in excusing the jurors as such was with the assent of defense counsel. Further, it was in compliance with the law.

[4] Below, Pagan asserted it was ineffective assistance of trial counsel not to object to the excusal of these jurors for cause and that the excusal was in violation of his equal protection rights.

When initially inquiring of the jury panel, the court asked the jurors to indicate if they had any hardship or opinions about the death penalty and noted these jurors would be questioned individually (TT.8 786-87). Subsequently, the court announced the procedure for the individual voir dire -- if after hearing the juror's concern and questioning him, the judge were to ask the parties for any objections, and the parties had none, the juror would be excused. Conversely, if the judge were to ask if the parties had any questions, the juror was not excused, but would be subject to further questioning. (TT.8 792).

When Cruz had his opportunity to discuss his hardship during individual voir dire, he advised the parties that his English was poor. In response, the court said that how well a person speaks was not important, but how well the person understands English was the question. Cruz replied that he understood "a little bit", but "[m]aybe you were talking, the Court, I didn't understand." **Neither party had an objection** to the excusal of Cruz from the jury. (TT.8 866-67). Similarly, Olariaga noted he did not speak English well. (TT.10 1013). In responding to the court's inquiry as to how well Olariaga understood English, he stated: "I understand some words but it's very difficult to find to all the words that you say. I don't understand them all." **Again, neither party objected** to the excusal of the juror. (TT.10 1014).

It is uncontested that these jurors did not comprehend English well. This was their unchallenged testimony to the court. Pagan's sole allegation is that the jurors should not have been excused; instead, they should have been given interpreters. Such is not provided for under Florida law, nor has Pagan shown that such is required under the federal constitution.

Pagan points to several statutes as outlining how a venire should be culled from the community, questioned by the court, and under what circumstances a juror may be exempt from service or excused for cause. Pursuant to section 913.03, Florida Statutes, a juror may be excused for cause for only one of twelve enumerated reasons. Of import here are section 913.03 (1) and (2) which provide that a juror may be excused: (1) if "the juror does not have the qualifications required by law" or (2) "the juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror." Under Florida Rule of Criminal Procedure 3.300(c):

> If, after the examination of any prospective juror, the court is of the opinion that the juror is not qualified to serve as a trial juror, the court shall excuse the juror from the trial of the cause. If, however, the court does not excuse the juror, either

> party may then challenge the juror, as provided by law or by these rules.

Interpreters, Pagan argues, are permitted in grand and petit juries where the juror is hearing impaired, thus, the same should be permitted when the juror is not proficient in English. He points to Hernandez for the proposition that Batson v. Kentucky, 476 U.S. 79 (1986) would preclude the use of peremptory challenges on the basis of "national origin, in addition to race." His arguments are meritless and present errors of fact and law.

In his analysis, Pagan mis-characterizes the trial court's ruling. He identifies the dismissal as being based upon the jurors' inability to speak English. Such is refuted from the record. This Court rejected the jurors' suggestions that they were not qualified because they did not speak English well, instead, making specific note that the issue was how well the jurors understood English. This inquiry and factual findings comport with Cook v. State, 542 So.2d 964, 966-70 (Fla. 1989).

In Cook, this Court affirmed the denial of for cause challenges for two jurors who had expressed an inability to understand English, not because such challenges were improper, but because the court's questioning revealed both jurors comprehended English very well. Id. After noting judges are given wide discretion in ruling on challenges for cause due to

their superior vantage point, the Court reasoned: "With the large influx of persons of Hispanic origin, it can now be expected that many jury venires in south Florida will contain persons who do not use textbook English grammar. However, it is the ability to understand English rather than to speak it perfectly which is important." Cook, 542 So.2da t 970. The import of Cook is that a juror may be stricken for cause if his understanding of English is of such a low level that he is not competent to serve. See Wilson v. State, 753 So.2d 683, 685-86 (Fla. 3d DCA 2000) (recognizing court has discretion to strike for cause those jurors who do not have an adequate comprehension of English to serve on a jury).

Consequently, while Pagan points to Boykins v. State, 783 So.2d 317 (Fla. 5th DCA 2001) and Allen v. State, 596 So.2d 1083 (Fla. 3d DCA 1992) to support his position that only those 12 enumerated areas under section 913.03 would support a cause challenge, such does not establish that a juror's inability to understand English does not qualify as a valid basis for a cause challenge. Jurors who cannot understand English do not have the qualifications required by law to sit on a jury, i.e., "to serve fairly on the jury." See Cook, 542 So.2d at 970; Wilson, 753 So.2d at 685-86.

Moreover, when Olariaga and Cruz responded they did not understand English, the Court inquired of the parties and

neither had an objection to removal of the jurors. (TT.8 866-67; TT.10 1013-14). For Pagan to now claim judicial error is improper. This is akin to the decried “gotcha” tactic. "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." Czubak v. State, 570 So.2d 925, 928 (Fla. 1990). See Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983) (same). Furthermore, the excusals did not run afoul of Florida’s requirement that the deciding factor to be considered is the juror’s understanding of English, not the ability to speak with grammatical perfection.

Pagan also misapplies section 905.15, Florida Statutes to suggest interpreters are provided for jurors. The provision allows for the appointment of interpreters of witnesses testifying before the grand jury; it does not offer interpreters for jurors who cannot understand English. Section 905.15 does not address use of interpreters in petit juries nor can the statute be read as permitting the use of foreign language interpreters during grand jury deliberations. Section 905.15 speaks to the appointment of interpreters for grand jury witness testimony alone.

Suggesting that state law does not prohibit providing interpreters for Cruez and Olariaga, or other similarly situated persons, and that failure to provide such interpreters is a constitutional violation, Pagan identifies the several state

statutes dealing with the qualifications and selection of jurors as well as case law on the subject. Pagan points to section 90.6063, however there, as in section 913.03(2), the appointment of an interpreter for a juror was based upon the juror's physical disability, not the inability to understand English. Dilorenzo v. State, 711 So.2d 1362 (Fla. 4th DCA 1998) is instructive. There, the defendant challenged the judge's appointment of an interpreter for a juror who appeared to have difficulty understanding English, although this was not clear during *voir dire*. Dilorenzo, 711 So.2d at 1361-62. The interpreter remained with the juror during deliberations. Id. The District Court reversed noting the "sanctity of the jury room has been so zealously protected that the introduction or intrusion therein of an unauthorized person during jury deliberations had been regarded as fundamental error requiring either a mistrial or a new trial." Id. at 1363. Recognizing that section 90.6063(2) was adopted in 1993 to provide for interpreters in civil cases for those with a hearing impairment, the District Court held: "only in a circumstance expressly authorized by statute or rule is it proper in a criminal trial to send an interpreter into the jury room with the jurors during their deliberations." Id. The existing statutes and rules do not provide for language interpreters for those jurors who do not understand English and as will be evident below, the federal

constitution does not require appointment of interpreters.

Given Cook; Dilorenzo; and Wilson, the trial court cannot be faulted in seeking any objection from counsel, and hearing none, removing Olariaga and Cruz for cause. Interpreters could not be provided under the existing law, and Pagan has not shown that the trial court erred in not *sua sponte* offering such interpreters where none were requested. This is not a proper argument for a state habeas petition. Pagan has not shown that there was any provision which allowed for appointment of interpreters in this situation and has not shown that a new constitutional right to have interpreters appointed for non-English understanding jurors has been recognized and made to apply retroactively.

Furthermore, there is no showing of a deprivation of equal protection. The Florida and United States Constitutions guarantee the right to an "impartial jury', but Pagan has failed to show a deprivation of this right. A "litigant is entitled not to a jury which mirrors the composition of racial, ethnic and religious groups in the community wherein he resides, but rather merely a jury which is fairly selected." Grech v. Wainwright, 492 F.2d 747, 749 (5th Cir. 1974).

> The fair-cross-section requirement mandates the use of a neutral selection mechanism to generate a jury representative of the community. It does not dictate that any particular group or race have representation on a jury. ... The Constitution does not permit the

> easy assumption that a community would be fairly represented by a jury selected by proportional representation of different races any more than it does that a community would be represented by a jury composed of quotas of jurors of different classes.... In fact, while a racially balanced jury would be representative of the racial groups in a community, the focus on race would likely distort the jury's reflection of other groups in society, characterized by age, sex, ethnicity, religion, education level, or economic class. What the Constitution does require is "a fair possibility for obtaining a representative cross-section of the community."

Holland v. Illinois, 493 U.S. 474, 512-13 (1990) (footnotes and citations omitted).

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977). There is no showing of a discriminatory purpose, thus, no showing of a violation of Equal Protection. See McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (opining "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'"). The burden lies with the defendant. See Batson, 476 U.S. at 93.

A juror's difficulty with English has been recognized as a basis for a strike. See Young v. State, 744 So.2d 1077, 1083 (Fla. 4th DCA 1999) (noting heavy accent may signal difficulty in comprehending English and is facially race-neutral basis for a peremptory strike). Even the plurality in Hernandez, 500 U.S.

at 368-72 recognizes that exclusion of bilingual jurors does not establish a constitutional violation absent a showing of discriminatory intent.

The fact two jurors who came forward voluntarily and informed the trial court that they could not understand English and were subsequently excused without objection from the defense does not establish a discriminatory intent by the State. Certainly bilingual jurors, proficient in English sufficient to understand the proceedings and fully deliberate with their fellow jurors may serve on a jury; and Pagan has pointed to none in this category who were removed for cause. There has been no showing Pagan was denied a fair trial, thus, there is no violation of the equal protection clause. This habeas issue must be denied.

ISSUE II

THE CHALLENGE TO THE DEATH SENTENCE BASED UPON CALDWELL IS PROCEDURALLY BARRED AND WITHOUT MERIT (restated)

Pagan asserts that in light of Ring v. Arizona, 536 U.S. 584 (2002), the standard jury instructions are no longer valid under Caldwell v. Mississippi, 472 U.S. 320 (1985).[5] This claim is procedurally barred as the matter could have been raised at trial and on direct appeal. Moreover, it is without merit as it

[5] This issue was raised and rejected in the Rule 3.851 postconviction litigation. (PCR.4 658).

has been rejected by this Court previously in Robinson v. State, 865 So.2d 1259, 1266 (Fla. 2004) and Pagan has not shown a basis for revisiting the prior decision. In fact, Pagan even fails to mention Robinson which directly addresses this issue. This Court should deny relief.

At trial, Pagan challenged on constitutional grounds various aspects of Florida capital sentencing statute. Caldwell was decided in 1985 and had generated case law from this Court prior to Pagan's trial. As such, the issue was one which could have been raised at trial and direct appeal. Failure to do so bars consideration here. A petition for "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings." White, 511 So.2d at 555. See Blanco, 507 So.2d at 1377; Copeland, 505 So.2d at 425; Routly, 502 So.2d at 903 (declining petitioner's invitation to utilize the writ of habeas as a vehicle for the re-argument of issues which have been raised and ruled on by this Court).

In this case, the jury was instructed that its "recommendation as to what sentence should be imposed on this defendant is entitled by law and would be given great weight by this Court in determining what sentence to be imposed in this case" and that "[i]t is only under rare circumstances that this

Court could impose a sentence other than what you recommend." (TT.31 3646, 3649-50).

Caldwell addresses the Eighth Amendment whereas Ring discusses the Sixth Amendment and comes into play when the sentence exceeds the statutory maximum. As such, Ring does not invalidate jury instructions found constitutional under the Eighth Amendment.[6] A Caldwell error is committed when a jury is misled regarding its sentencing duty so as to diminish its sense

[6] To the extent Pagan suggests Ring renders Florida's capital sentencing statute unconstitutional, this has been rejected repeatedly. This Court has concluded Ring did not invalidate Florida's capital sentencing, Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) (rejecting claim Ring invalidated Florida's capital sentencing). Furthermore, it has determined that death eligibility occurs at time of conviction; Mills v. Moore, 786 So. 2d 532, 536-38 (Fla. 2001), and has rejected all other challenges under Ring and Apprendi v. New Jersey, 530 U.S. 466 (2000) such as unanimous jury as to death recommendation and that the aggravation must be listed in the indictment and unanimously found by jury. See Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Suggs v. State, 923 So.2d 419, 442 (Fla. 2005) (rejecting claims capital sentencing unconstitutional under Ring); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003) (rejecting argument aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Brown v. Moore, 800 So.2d 223, 224-25 (Fla. 2001) (rejecting constitutional challenge based on Ring where aggravators were not listed on indictment). Moreover, both the prior violent felony and felony murder aggravators were found in his case. See Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim); Doorbal v. State, 837 So.2d 940, 963 (Fla.) (same), cert. denied, 539 U.S. 962 (2003).

of responsibility for the decision.[7] This Court has rejected a challenge to the standard jury instructions under Caldwell in light of Ring.[8]

> ... we address Robinson's claim that he is entitled to relief because Florida's standard jury instructions in capital cases violate *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Specifically, Robinson claims that Florida's standard jury instructions in capital cases do not comply with *Caldwell*, in light of the *Ring* opinion, because *Ring* requires the jury to play a vital role in sentencing and the jury instructions currently diminish that role. *Caldwell* and *Ring* involve independent concerns. *Ring*'s focus is on jury findings that render a defendant eligible for the death penalty, while *Caldwell*'s focus as applied in this state is on the jury's role in the decision to recommend a sentence for death-eligible defendants. Therefore, *Ring* does not require that we reconsider the *Caldwell* issue raised in this case.

Robinson, 865 So.2d at 1266 (footnote omitted). See Franklin v. State, 2007 WL 1774414, at 17 (Fla. 2007) (rejecting claim capital sentencing unconstitutional under Caldwell based on

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[7] "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized the jury's sentencing role is advisory, and the standard instructions adequately, correctly, and constitutionally advise the jury of its responsibility. Cook v. State, 792 So.2d 1197, 1201 (Fla. 2001); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998).

[8] See Tuilaepa v. California, 512 U.S. 967, 979-80 (1994) (considering the Eighth Amendment and reasoning "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment"); Poland v. Arizona, 476 U.S. 147, 156 (1986) (explaining aggravators are not separate penalties or offenses, but are guides for selecting between sentences).

Ring); Mansfield v. State, 911 So.2d 1160, 1180 (Fla. 2005). Cf. Globe v. State, 877 So.2d 663, 673-74 (Fla. 2004) (noting "Caldwell and Ring involve independent concerns. Ring's focus is on jury findings that render a defendant eligible for the death penalty, while Caldwell centers on the jury's role in the decision to impose death upon death-eligible defendants," but refusing to reach issue as it was unpreserved). There is no question Pagan's jury was instructed properly. The standard instructions were given and the jury was told its decision would be given great weight and only under rare circumstances overridden. (TT.31 3646). This is in compliance with constitutional dictates and is not implicated by Ring.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court deny the petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Peter J. Cannon, Esq., Office of the Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619 this 17th day of October, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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