IN THE SUPREME COURT OF FLORIDA

JUAN PANTOJA,

Petitioner,

v. CASE NO. **SC08-1879**

STATE OF FLORIDA,

Respondent.

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 South Monroe, Suite 401
Tallahassee, Florida 32301
(850) 606-1000
Kathys@leoncountyfl.gov
ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

JUAN PANTOJA, Petitioner,	:	
VS.	:	CASE NO. SC08-1879
STATE OF FLORIDA, Respondent.	:	

REPLY BRIEF OF PETITIONER ON THE MERITS

I ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED REVERSIBLY IN LIMITING CROSS-EXAMINATION OF THE ALLEGED CHILD-VICTIM ABOUT HER PRIOR ACCUSATION AGAINST HER UNCLE OF SEXUAL MISCONDUCT, AND IN EXCLUDING OTHER EVIDENCE OF THE ACCUSATION. EXCLUDING THE EVIDENCE DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS TO FAIR TRIAL, TO PRESENT A DEFENSE, AND TO CONFRONT THE WITNESS.

Petitioner was convicted of capital sexual battery based solely on the testimony of the alleged victim, V.R., a child who was 8 years old at the time of the alleged offense and 11 at the time of trial. No physical evidence or other evidence corroborated the claim. The other evidence presented at trial consisted of the child's hearsay statements (which depend for credibility solely on the child) and evidence of certain behavior of the child, which demonstrated stress. While this behavior might be consistent with sexual battery, it does not lead inevitably to sexual battery as the source of the child's stress, and was equally consistent with other causes not related to petitioner, Juan Pantoja. On conviction, a mandatory sentence of life without parole was imposed.

The district court below erred in both its statutory and constitutional rulings. First, calling the prior false accusation an attack on character was an arbitrary and incorrect categorization. Second, the court erred in construing the confrontation clause issue too narrowly and in denying petitioner the right to confront the witness with the prior false accusation.

As to its statutory ruling, the district court chose arbitrarily from the list of proper ways to impeach a witness to categorize the alleged prior false accusation as an attack on character by reputation or prior conviction (section 90.608(3), Florida Statutes) rather than as evidence of bias (90.608(2)). The court did not explain this arbitrary choice, and it was wrong, or at least, too narrow.

Based on this arbitrary choice, the court then opined that section 90.609(1) does not permit proof of reputation for truthfulness or untruthfulness by evidence of specific acts, and section 90.610 permits evidence only of certain prior convictions and not specific acts without conviction. Petitioner agrees with the interpretation of sections 90.609 and 90.610; he disagrees that these provisions apply to him. The court then said Jaggers judicially created an exception to the evidence code, which the courts have no right to do. Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988). The court's explication was based on the false dichotomy that the false accusation evidence must fit into the reputation or prior

conviction category and not the bias category of impeachment, and this seems to be based on a too-narrow view of what constitutes bias. Bias is a "broad general principle of law," Pantoja, not a narrow one. Pantoja v. State, 990 So.2d 626, 630 (Fla. 1st DCA 2008), citing Jaggers.

The district court did not explain why the false accusation could be only reputation or prior conviction evidence and not bias. The court criticized Jaggers, but only on its reference to "corruptness"; it did not explain why a prior false accusation is not evidence of bias. The court said:

> The Second District reached this holding [that evidence of a false accusation was admissible] after concluding that such evidence is "relevant to the possible bias, prejudice, motive, intent or corruptness" of the wit-ness. Evidence that is relevant to a witness' bias is admissible under section 90.608(2). **Prejudice, motive to testify, and intent in testifying are all ways of showing the witness' bias, and, thus, are also proper grounds for impeachment under section 90.608(2).** However, there is no provision in the Evidence Code allowing general evidence of "corruptness" as a means of impeaching a witness. The only such admissible evidence is evidence of a prior conviction under sec-tion 90.610 or evidence that the witness has a poor reputation for truthfulness under section 90.609. (Emphasis added)

Pantoja, 990 So.2d at 630. Petitioner agrees with the court that prejudice, motive to testify and intent all ways of showing bias. He contends the prior false accusation of sexual misconduct shows bias in this case.

Moreover, holding that a previous false accusation must meet the criteria for either reputation or prior conviction evidence means

that, when a child sex crime is charged, the false accusation will never be admissible. A child's false accusation will never result in conviction. First, it is inconceivable that a child under age 12 would ever be prosecuted for making a false accusation. Second, if it could be conceived, such a prosecution would result in a juvenile adjudication, not a "conviction" as a term of art, and only adult convictions are admissible to impeach under section 90.610.

Thus, under the district court's rationale, a child's false accusation against a third party would never be admissible. In contrast, a previous accusation against the defendant is always admissible. See, e.g., Blue v. State, 8 So.3d 454, 455 (Fla. 1st DCA 2009)("A defendant has a constitutional right to pursue a full cross-examination to expose a witness's bias or improper motive in testifying against the defendant. . .Because the attempted cross-examination related to the witness's credibility, [Blue]'s constitutionally protected right to a full cross-examination was denied").

The district court said there would be an exception for a due process violation. Theoretically, that would cover the hypothetical case in which a child made repeated false accusations, but where the child has made only one, the court is unlikely to admit it.

As for reputation evidence, a child under age 12 is unlikely to have either a reputation or a "community," and character evidence could not be admitted against a child, if only because his or her

character is still being formed. A child too young for school could not have a "reputation." A child in school could conceivably have a "reputation" at school, but even if a child had a reputation for lying, this would typically be treated as a psychological problem or a matter to be dealt with in building her character, not as evidence of bad character. The result is the district court's arbitrary categorization of the evidence means a child's false accusation against a third person will never be admissible.

The state argues that the rationale behind the prohibition is the recognition that evidence of specific acts may be given inordinate weight by the jury and such evidence would subject the witness to inquiry regarding specific acts of misconduct through-out the person's lifetime (State's Brief (SB), p.20). These arguments do not apply to child witnesses. What could be the specific acts of misconduct over the lifetime of a child under age 12? They would be childish things, and such a cross-examination is hard to imagine - Did you fight with your brother? Did you take candy without permission? Nor is there any basis to believe a jury would give "inordinate weight" to evidence of a prior accusation by a child. Even if this were true of adults, it is not true, or far less true of the testimony of a child.

The district court below also rejected a confrontation clause challenge on the ground that false accusation evidence

is typically relevant only to the witness' general

> character, and not his or her particular bias against the defendant on trial.
>
> * * *
>
> In the instant case, Appellant argues that the evidence showed the victim's bias against him and her motive to lie. The record does not support such a claim. Even assuming Appellant could show that the victim's prior allegation against her uncle was false, this showing would not tend to prove that she had a motive to make an accusation against Appellant. Even though the evidence would relate to the victim's propensity to lie about sexual molestation specifically, it is still general propensity evidence under Davis, as it does not relate to this defendant in particular or the facts of this case in particular.

990 So.2d at 632, citing Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)(holding evidence of a pending juvenile charge (not a conviction) was admissible to prove bias (particular credibility)).

The district court's view of what constitutes evidence of the child's motive to lie which is particular to this defendant or the facts of this case is too narrow. The court said there could be a case in which the circumstances surrounding a false accusation are so similar it would have to be admitted, but this is not such a case. 990 So.2d at 632. Petitioner must extract from this explanation that the district court believes the facts of the allegation against the uncle are not similar enough to the allegation against him to be admissible.

There is first the problem of requiring motive evidence to meet a test of similarity, when similarity is really the test for the admissibility of similar crime evidence under the Williams rule.

Williams v. State, 110 So.2d 654 (Fla.), cert. denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), codified section 90.404(2)(a), Fla.Stat. However, if similarity of the accusations is relevant, the district court did not explain its conclusion, but in order to reach its conclusion, the court had to overlook substantial similarities in the two allegations and focus only on the differences.

Before addressing the similarities between the child's two accusations, counsel interjects that child witnesses are different from adult witnesses. When petitioner argues the child was "lying," it means her accusation and testimony were not factually true. However, because of the child's young age, because of the psychological motivations as to why a child would lie, and because a child's motives and psychology are not the same as an adult's, it is not clear that saying a child is "lying" is the legal equivalent of saying an adult is lying.

When an adult lies, it is more clearly a reflection of character (although there may be an explanation); when a child lies, it may not implicate character at all, assuming arguendo "character" in terms of the evidence code can even be applied to a child under age 12. This is another reason why the district court erred in categorizing the prior false accusation as character evidence. In an article cited later in this brief, an expert used this more neutral phrase to describe a child's lie about sexual abuse allegations - "the internal dynamics involved in a child's production of an invalid

report." Sachsenmaier, Investigating Child Sexual Abuse Allegations: Do Experts Agree on Anything?, American Academy of Experts in Traumatic Stress (AAETS)(1998)(www.aaets.org/article50.htm). When petitioner argues that the child has lied, it is an attack on her credibility and reliability as a witness, but it is not per se an attack on her character.

Some of the similarities between the two alleged crimes - by Pantoja and the uncle - point out that the analysis of false accusation evidence might be different for child victims than for adult victims. For example, when the alleged victim is a child of tender years the jury wants to know how the child would know enough to lie about sex. The mere fact that a child made a sexual allegation may be some proof of its truth in the minds of jurors because the jury would assume a young child does not have a comprehension of sex. In contrast, no such assumption would be made in the case of an adult, or even a teenager old enough to have had a high school biology class. One purpose of questioning the child about prior accusations is to explain that the child has some comprehension of sex which the jury would not otherwise know.

Turning to the similarities - both alleged crimes involved relatively similar sex acts; both accusations were directed at members of the child's family and/or household; both allegedly occurred during more or less the same time frame; both took place at home. No Williams rule evidence was introduced in this case.

However, a comparison with the law governing Williams rule evidence shows that, if an accusation like the one against the uncle had been made against Pantoja, it would clearly be admissible as similar crime evidence under section 90.404(b)(2). The amendment to the statute was enacted in 2001, before the date of the crime alleged here. See McLean v. State, 934 So.2d 1248, 1258 (Fla. 2006). The district court said in effect that the accusation against the uncle was not similar enough to require admission under the due process clause. This makes the requirement for similarity of an accusation with which to impeach a witness (who is not on trial) greater than that to admit evidence against the defendant who is on trial. As a matter of due process and fair trial, this cannot be true. If an accusation were similar enough to be admitted as collateral crime evidence, it is similar enough to impeach the witness.

In Gutierrez v. State, 747 So.2d 429, 433 (Fla. 4th DCA 1999), the Fourth District held evidence a teenaged girl had made a prior false accusation of sexual battery was admissible as "reverse Williams rule" evidence:

> Under Rivera, both the state and the defendant may offer evidence under section 90.404(2). The credibility of the victim is the central issue in cases involving sexual assault committed within the familial context... In such cases, if the state may introduce similar fact evidence of other sexual assaults to bolster the credibility of the victim, it follows that the defense may offer similar fact evidence to support its theory of the case and deflate the credibility of the victim.

Although Gutierrez was cited as supplemental authority, the state did

not address it in its answer brief.

Pantoja cited Lewis v. Wilkinson, 307 F.3d 413 (6th Cir. 2002), in his initial brief on the merits. In Lewis, the Sixth Circuit held part of the alleged adult victim's post-alleged-rape diary was admissible to prove that she consented and part to prove that she had a motive to seek revenge for sexual abuse committed by other men by making a false accusation against Lewis. The point is that witness's motive to lie against Lewis was not personal to him, but rather, personal to the witness. That is the point here - the district court held the child's prior accusation against her uncle did not give her a motive to lie against Pantoja, but this reasoning is too narrow. It certainly could have been said of Lewis - why would having been raped before give the witness a motive to lie about another man who had not raped her? And yet, it does. It is a form of acting out which has psychological roots, or meets psychological needs, and may choose another object when the "right" one is not available. Why would V.R. lie about Pantoja committing sexual battery? There are several possibilities, and the fact that she had made a prior accusation was crucial for him to have any chance of the jury understanding that she might have lied in this case and why.

The district court did not see the connection between the two accusations. As argued above, the court's view did not take into account any of the substantial similarities between the accusations. Even more importantly, the district court viewed the issue through

the eyes of an adult, while the child's motivation is rooted in the psychology of children. The court did not explain its ruling, but if, for example, it thought that for the child to accuse the uncle of sexual abuse was an overreaction for having gotten mad at him, petitioner would say that is from an adult's view. An accusation which seems to an adult to be dis-proportionate to the triggering event, from a child's perspective could be equivalent. Young children live in the present more and have less awareness of consequences than adults, so the emotions of the moment are paramount, and the future consequences of a false accusation much less of a consideration for a young child than they would be for an adult. And that child's perspective or lack of perspective also colors her accusation against Pantoja.

While the district court acknowledged that Jaggers admitted the false accusation evidence where the defendant was charged with a sex crime against a child and "there is no independent evidence of the abuse and the defendant's sole defense is either fabrication or mistake on the part of the alleged victims," 990 So.2d at 630, the court did not address the issue of the critical importance of the child's credibility when there is no corroborating evidence. On the subject of the importance of credibility, Lewis, involving an adult alleged victim, said:

> [evidence of motive] carries with it the constitution-ally protected right of cross-examination. This court disagrees with the district court's characterization of the excluded

> diary entries as going solely to general credibility. . .**When a trial court has limited cross- examination from which a jury could have assessed a witness's motive to testify**, a court must take two additional steps:
>
> **First, a reviewing court must assess whether the jury had enough information**, despite the limits placed on otherwise permitted cross-examination, **to assess the defense theory of ... improper motive**. **Second**, if this is not the case, and there is indeed a denial or significant diminution of cross-examination that implicates the Confrontation Clause, the **Court applies a balancing test,** weighing the violation against the competing interests at stake. (emphasis added)
>
> Boggs, 226 F.3d at 739 [citing Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)](citations omitted).

307 F.3d at 421. Boggs v. Collins, 226 F.3d 728, 739 (6th Cir. 2000), was cited for the first time in this case in the district court's opinion. (The state had not cited it in its brief). The district court did not cite Lewis, and although Lewis was cited in the initial brief in this court, the state did not address Lewis in its answer brief.

In Lewis, the court concluded the statements formed "a **particularized attack on the witness's credibility** directed toward revealing possible ulterior motives. . ." 307 F.3d at 422. The court said:

> **The trial court took the state's interests** in protecting rape victims **into account in excluding the statements, but did not adequately consider the defendant's constitutional right to confrontation.** The jury should have been given the opportunity to hear the excluded diary statements and some cross examination, from which they could have inferred, if they chose, that the alleged victim consented to have sex with [Lewis] and/ or that the alleged victim pursued charges against [him] as a way of getting back at

> other men who previously took advantage of her. (emphasis added)

307 F.3d at 422-23. Something similar happened here. The trial court explicitly was trying to protect the child from impeachment. The district court did not state a motive but the result of its decision is the same. The child had various motives to falsely accuse Pantoja, and no evidence corroborated her testimony, but the jury heard no evidence of bias or motive to lie. She accused Pantoja almost immediately after her family learned that he had been released from jail. Yet, the court prevented the defense from asking her about having made another accusation of sexual abuse in a moment of emotion or stress, and that was reversible error.

This ruling sacrificed Pantoja's bedrock constitutional right to confront the witness to protecting the witness. More-over, the trial court said and the state on appeal has argued that the child did not recant at trial and that her mother and grandmother's testimony that she previously recanted was not credible. It is not the role of the trial court to decide whether evidence is credible, and this ruling was erroneous. However, the district court did **not** decide the case based on credibility. On the other hand, the state again argues lack of credibility in its brief in this court (SB 25). And to repeat from the initial brief, the evidence of the prior accusation would also be admissible if the accusation were true.

Other factors common to trials of sex crimes against children

which are ever-present but hard to assess and prevent are the desire by the jury, as well as others in the criminal justice system, to protect children who have allegedly been sexually abused and the widespread, if mistaken, belief that children do not lie about sexual abuse. A common term for this is “moral panic.” An article explains:

> While some scientists have focused on the main question of how to figure out if a child's story is true, others have focused on the formulation of investigative techniques that are less likely to facilitate the false authentication of invalid reports, and on the internal dynamics involved in a child's production of an invalid report. Still others have focused on the social phenomenon characterized by the public's response to the tremendous rise in the incidence of reported child sex abuse. Due at least in part to the vulnerability of children and the sense of responsibility associated with the need to protect them from harm, it may be the case that people involved in that process overreact to allegations of sexual abuse. This overreaction has been termed "moral panic" by some writers (Edwards & Lohman, 1994). The moral aspect of this phenomenon derives from the sexual component, which is highly charged in our society, as well as from the already charged situation which exists when the protection of children is at issue. It could be reasonably argued that protection of children from harm, particularly sexual abuse, is the moral imperative our society has adopted as the most important. In the arena of child sexual abuse allegations there is, therefore, a particular opportunity for the desire to exhibit "good intentions" to overshadow the need for objective, consistent, and ongoing dynamic tension which exists societally with regards to the question of whether child sexual abuse occurs and, if so, how prevalent it is. **This debate also goes on in the realms of law,** psychology, and throughout the child protective services network. (Emphasis added)

Sachsenmaier, supra.

These beliefs do not exist for adults. Juries do not assume as

a general principle that an adult witness would not lie about sex; they would evaluate. While a jury might feel a desire to protect an adult victim, such a feeling is commonplace when the alleged victim is a child. These widespread impediments to the jury's dispassionate review of the evidence illustrate why it is so important not to unfairly limit impeachment on credibility.

II CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court find the prior accusation evidence was admissible as bias/motive impeachment and excluding it violated his rights to confrontation and fair trial and remand for new trial.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(850) 606-1000

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Giselle Lylen, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Juan Pantoja, inmate no. N01519, Okaloosa Correctional Institution, 3189 Little

Silver Road, Crestview, FL 32539-6708, this _____ day of July, 2009.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER