IN THE SUPREME COURT OF FLORIDA

JUAN PANTOJA,

Petitioner,

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

STATE OF FLORIDA,

Respondent.

______________________/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATE OF FLORIDA, :

Respondent. :

______________________________:

INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from conviction at jury trial of sexual battery on a child and lewd molestation. The First District Court affirmed on appeal. Pantoja v. State, 990 So.2d 626 (Fla. 1st DCA 2008). All proceedings were held in Gadsden County before Circuit Judge P. Kevin Davey.

The two-volume record on appeal will be referred to as "R1" and “R2,” the four-volume trial transcript as “T1” to “T4,” sentencing transcript as “Sent,” and supplemental record (hearing held March 23, 2006) as “Supp.” The record also contains jury selection.

II STATEMENT OF THE CASE

Petitioner, Juan Pantoja, was charged in Gadsden County by information filed July 18, 2003, with capital sexual battery on a child under 12 by a person over the age of 18, and lewd and lascivious molestation by a person over the age of 18, the date alleged said "on various occasions" between June 16, 2002 and June 9, 2003 (R1 12).

The state filed a motion in limine to exclude evidence of a prior accusation by the child, V.R. against uncle; the motion was granted (Supp).

At trial March 28-29, 2006, before Judge Davey, Pantoja's motions for judgment of acquittal were denied (T3 300, T4 421). During deliberations, the jury asked for a TV set to play the videotape; the request was granted (T4 505). After a recess, the jury asked: 1) Does [the child] speak or understand Spanish? 2) Does Juan speak any English (even broken)? (T4 505). After consultation, the judge told the jury there was no evidence, so they could not be answered (T4 507). The jury asked to see a copy of the jury instructions (T4 508). After inquiry, the court reread the instructions on Count 2 (T4 509-13).

The jury found Pantoja guilty in Count 1 of the lesser-included offense of sexual battery on a child under age 12 by a defendant less than 18 years of age, and as charged of Count 2 (R2 110-11).

April 7, Pantoja filed motions for new trial and to vacate

the sexual battery conviction (R2 160-67), which were denied (Sent 6-10, 10-16).

April 20, Pantoja was sentenced to life in prison on Count 1 (30 years prison concurrent on Count 2), with credit for time served of 1003 days (R2 169-76). The record does not contain a Criminal Punishment Code scoresheet, but defense counsel said the range was 14 to 19 years (Sent 18).

Notice of appeal was timely filed April 25, 2006 (R2 177).

The convictions were affirmed on appeal; the district court certified conflict with Jaggers, infra. Pantoja, supra.

III STATEMENT OF THE FACTS

Pretrial hearing. Facts pertaining to the state's pretrial motion to exclude evidence about the child's previous accusation of sexual abuse against her uncle are included in the argument as needed and not summarized here.

Trial. The alleged victim will be referred to by her initials, "V.R." At the time of trial, she was 11 years old and in sixth grade and lives with her mother and siblings (T2 125). Petitioner, Juan Pantoja, was her mother's boyfriend and the father of her now 3-year-old brother, C. (T2 126-28). Pantoja sometimes stayed with them at the apartment (T2 126). Pantoja worked in construction. Her mother stopped working while she was pregnant with C. (T2 128). When V.R. was 8 years old, Pantoja touched her with his hand on her private part both over and under her clothing (T2 129-30). She did not tell her mother at the time because she was afraid of him. He said he would take her out to the forest and hurt her real bad (T2 131). His private part touched hers; he would lick her (T2 132). This happened at home (T2 132).

Once, on the side of Wal-Mart, inside the car, he got her to suck his private part (T2 133). Things happened at home. Sometimes her mother was at work; sometimes she was downstairs and V.R. was upstairs (T2 134). Her clothes were off; he told her to take them off (T2 134). He got on top of her on her mother's bed. Did that happen one time or more than one time?

A: I can't remember that good (T2 135). She went with him to the Wal-Mart that day because he said he had to get some washing powder. Her mother was at the laundromat (T2 136). Instead of getting out of the car, he told her to do that (T2 137). He got her a doll at the Wal-Mart (T2 137). Does she know what date it was? A: No (T2 137).

Q: A week or so before her birthday in June, 2003, did Pantoja leave home and not come back? A: Yes. After he moved out, she told her Aunt Michelle[1] (T2 138). Michelle told her grandmother, and her grandmother called these people. Q: Melia Flores [DCF] came to see her on her birthday? A: Yes. Q: She was later interviewed by Kim Ellis [CPT]? A: Yes (T2 139). Q: Did V.R. use anatomical drawings with Ms. Ellis? A: Yes (T2 140). Q: Do you know if his private got inside yours or did it make contact with yours? A: Contact. Q: You don't know if it got inside or not? A: (Shaking head negatively) (T2 141). Q: He told her not to tell; does that happen one time or more than one time? A: I can't remember how many times (T2 141). When V.R. talked to Ellis, she felt embarrassed (T2 142).

On cross, counsel asked if V.R. told about the touching after she found out that Pantoja had gotten out of jail. A: I don't remember. Q: But you did know he had gotten out of jail?

[1] Undersigned counsel refers to the child and her uncle by their initials; should this court mention other relatives in an opinion, it may wish to use initials or pseudonyms, but the use of numerous sets of initials became unwieldy, and counsel refers to other relatives by their actual first names.

A: No. She heard that he did, but she wasn't for sure. Q: After she heard that, she told her aunt? A: Yes (T2 145). Q: Did Pantoja take her to Wal-Mart to buy a doll because she was making good grades? A: No; she wasn't making good grades at the time. Q: When they went to Wal-Mart, did her sister, A., go too? A: No (T2 148). Q: At the Wal-Mart, didn't she say she saw a yucky fluid coming from his private part? A: Yes (T2 149). When her mother worked, her grandmother babysat her and the other children (T2 151). Q: You told Mary Van Tassel that Juan had not molested you, right? A: No (T2 152).

The defense proffered cross-examination. Q: Did she accuse her Uncle T.D. of sexually touching her? A: Yes. Q: That was before Pantoja was her mother's boyfriend? A: Yes. Q: Isn't it true that you later told your grandmother that you had lied on Uncle T.D.? A: No (T2 153). Q: Did you have a conversation with your grandmother, Jeanette,[2] about Uncle T.D.? A: No. Q: You never told your grandmother that Uncle T.D. had sexually molested you? A: Yes (T2 154). Q: Did you tell your grandmother that you had lied on Uncle T.D.? A: No. Q: Did you tell your Aunt Michelle that Uncle T.D. sexually molested you? A: "Not if I remember." Q: Did you tell Aunt Michelle that you had lied about your Uncle T.D.? A: No. Q: Did you tell your mother, Wendy, that you had lied about Uncle T.D.? A: No (T2 155). At deposition, V.R. had said she told Aunt Michelle once about Juan

[2]See n.1.

touching her, but she guessed that Michelle got mad at her uncle and said that he did it to Nana because her nana would believe anything. V.R. did not remember saying that (T2 157).

The court said there was an allegation that the state had improperly coached the witness; the court did not find any evidence of that (T2 170). The court said it had already ruled to exclude evidence about the accusation against T.D. and, over objection, again excluded the evidence (T2 170-71).

Jeanette, V.R.'s grandmother, called the child abuse hot-line. Melia Flores, a child protection investigator for the Department of Children and Families (DCF), was the first responder (T2 176-77). Flores testified she went to the home on June 16, 2003, and talked to V.R. (T2 177). Flores had opened a report on June 9 [on a different matter], and the family was familiar with her. Q: The events of June 9 were not relevant to this case about ... what we - you found out on June 16? A: Yes (T2 178). V.R. said Pantoja had touched her privates (T2 187). Flores did not interview V.R. Their protocol is to contact the Child Protection Team (CPT) who will conduct a formal interview; Flores also contacted law enforcement. She told the family not to talk with V.R. (T2 188). Later, Flores took V.R. to the interview and watched it from an observation room (T2 190).

On cross, counsel asked if, from the day she opened the report [June 9] until June 16, was there any report that V.R. had been sexually molested? A: No. The phone call was on June 14

(T2 192).

Kimberly Ellis is a forensic interviewer with the CPT (T2 195). Her interview with V.R. on June 25, 2003 was videotaped (T2 197-98). Ellis had previously spoken with V.R. on June 11 on a totally different subject (T2 199). Q: Was V.R. somewhat hesitant to talk about it? A: Yes (T2 200). Ellis used other techniques. She had V.R. write it down. V.R. said it would be easier to write it than to talk about it. Ellis used anatomical drawings (T2 201). Parts of the videotape are difficult to hear because V.R.'s voice gets low at times (T2 202). The videotape is 50 minutes long (T4 441). It was played for the jury, but not transcribed (T2 212). (At the pretrial hearing, the state asked defense counsel for a transcript of the tape; counsel said it was impossible to transcribe (Supp 20-21).) The court overruled an objection to authenticity (T2 214-15).

The state argued that, if there is appellate review about the ruling involving T.D., it wanted to proffer the CPT report of the interview of V.R. where she was asked about the allegations about T.D. and did not recant, but said her grandmother did not believe her. The defense objected (T2 215-17). The court said this was on the issue of the state's motion to exclude questions to V.R. about T.D. Defense counsel asked if the state had copies of the arrest of T.D. "for this stuff here" on October 24, 2003. Defense counsel asked that the record reflect that T.D. had not been arrested on V.R.'s allegation (T2 216). The state agreed he

had not been arrested (T2 217). The court accepted the proffered report (T2 217).

Defense counsel said it intended to proffer the testimony of Jeanette that V.R. did accuse her uncle, T.D., then later said she had lied about it, and her grandmother did not believe her and did not report it. It goes to the credibility of the child (T2 217). The court said, “I think it goes to the credibility of the grandma, with all due respect.” Defense counsel said that was for the jury to decide. The judge said it does not go to the jury because of 90.610 (T2 218). The judge said he did not want to rehash it again, and “you all have preserved this to the nth degree for the record” (T2 218). On continued cross, Kimberly Ellis said V.R. said during the interview that he “put his private in her private” (T2 221). Towards the end, V.R. said “he keeps trying to put it in her, and she keeps scooting back” (T2 222).

Michael Devaney, a Florida Department of Law Enforcement (FDLE) agent, located the motor vehicle in which a sex act was alleged to have occurred; it was at a trailer park where Pantoja and another man lived (T2 225-26). Devaney also located two Barbie-type dolls in V.R.’s apartment (T2 228). The court sustained an objection because the state failed to lay an adequate foundation that the doll was the same one Pantoja bought for V.R. (T2 228-31). Devaney viewed a videotape of the Wal-Mart parking lot, but it revealed nothing (T2 232-33).

On cross, Devaney said the car was still registered to

Pantoja, but apparently he had sold it to his housemate (T2 234-36).

FDLE Crime Lab Analyst Shawn Yao processed the car for seminal fluid or semen residue (T2 244). He found 22 stains which fluoresced, but all tests were negative (T2 246-47).

Samuel Moorer, a pediatrician with the CPT, did a physical exam of V.R. on July 1, 2003 (T3 286). She had a normal exam with the hymen still intact (T3 288). There were no injuries, bleeding, tears, redness, discharge or sign of infection, and no old scars or injuries. Q: Does that rule out any allegation of sexual molestation? A: No. That's a common misperception. A defense objection was overruled (T3 289). Dr. Moorer said the general consensus is that you don't expect to find physical traces in a large number, even a majority, of children who have been sexually molested (T3 291). Injuries in this area heal very rapidly, within a couple of days. They very often heal without scars (T3 294,296).

On cross, Dr. Moorer said he was biased towards children (T3 296). A normal exam neither proves nor disproves whether sexual abuse occurred (T3 297-98).

After the state rested (T3 298), the court asked Pantoja about not testifying (T3 303-04). The defense again asked to introduce evidence about the allegations against T.D.; the request was denied (T3 305-313). The defense asked to proffer testimony of Mary Van Tassel that the child recanted, which is

recantation to a nonfamily member. The court said it doesn't change the ruling (T3 313-14). The court accepted Van Tassel's deposition as the proffer (T3 314).

The defense case began with a stipulation that Pantoja was arrested on June 10, 2003, for a battery against Wendy that occurred on June 9. On the same day, he was also arrested on an old warrant for domestic battery against Wendy from September, 2002 and an old charge from June, 2002 against Jeanette. Bond was set at $21,000; he bonded out on June 14 (T3 315).

Jeanette is V.R.'s grandmother and Wendy's mother. Jeanette testified she called Melia Flores on June 14, about Pantoja messing with V.R. (T3 317-18). Did she talk to Flores on the phone about Pantoja bonding out of jail? A: No (T3 318). Q: Did you have a conversation with Flores that Wendy was so upset that she had gone to get an injunction against Crystal Pantoja because Crystal helped Juan bond out of jail? A: I don't remember that (T3 319).

On cross, Jeanette was asked, after she made a complaint against Pantoja in June 2002 for battery, did the association between Pantoja and her daughter continue? A: Yes, but I moved out of the house with them (T3 320).

Melia Flores was recalled. On June 14, Jeanette told her Pantoja had been released from jail on bond, and the mom, Wendy, was upset (T3 323,328). Wendy believed Pantoja's wife, Crystal, had bonded him out. Did the grandmother say Wendy was upset and

was going to get an injunction against Crystal? A: "Yes. I do know that the mom did want to get an injunction against Crystal Pantoja" (T3 324). On June 16, the grandmother told her the mother had gone to court to try to file an injunction against Crystal (T3 328).

The defense proffered the testimony of Mary Jane Van Tassel that she asked V.R. whether Pantoja had touched her. At first, V.R. just looked at her and dropped her head. V.R. asked to talk to her but would not look her in the eye. When she asked if Pantoja had touched her, V.R. dropped her head and looked away and whispered "no" (T3 332). Van Tassel asked if T.D. had touched her and got the same answer, a whispered "no." V.R. had tears in her eyes and stopped talking (T3 332-33). Van Tassel said that all of the children's, but especially V.R.'s, attitude and whole demeanor changed since Pantoja came into the home. V.R. used to be outgoing and happy, and then she withdrew and wouldn't play with Van Tassel (T3 336).

Defense counsel argued that Van Tassel should not be allowed to testify about the change in demeanor because that was due to the fact that, when Wendy had a doctor's appointment about the baby [pregnancy], Pantoja wanted to take her to the doctor; Van Tassel also wanted to take Wendy to the doctor, and this caused conflict in the family (T3 340). The court asked why it was not admissible. Defense counsel said the state was going to argue the behavior was consistent with a child who is molested, but

such evidence is prohibited under the caselaw. However, the admission that Pantoja did not touch her is crucial to his defense (T3 341-42).

The state argued that, if the defense wanted to admit evidence that V.R. denied that Pantoja touched her, the state gets to ask why Van Tassel asked the question. "The defense is trying to pick and choose little phrases" (T3 342). The judge said he would not let the witness say V.R.'s behavior was consistent (T3 343). Defense counsel said Van Tassel could testify to the child's demeanor on the day of the statement, but not previously. Defense counsel again argued that Pantoja should be allowed to introduce evidence of V.R.'s recantation to a nonfamily member, who has no motive to protect T.D. (T3 344).

The judge said V.R. was asked did T.D. and Pantoja touch her, and says no, and this is hugely different than if she was asked about Pantoja only (T3 344-45). The court would not allow the matter about T.D. to be asked. The question will be just limited to Pantoja (T3 345). The state can ask about why she asked the question and about the child's demeanor (T3 345).

Wendy is V.R.'s mother. She was 14 when she had V.R. She has five children, one by Pantoja, C., who was born March 21, 2003 [which means the date of the alleged crimes was from before his birth through early infancy]. When she started dating Pantoja, Wendy and the children were living with her mother (T3 348-49). He would stay overnight once in a while. Around June,

2002, she, Juan and the children moved in together in a trailer park (T3 350-51). She thinks they stayed about two months (T3 352). She was working at Winn-Dixie (T3 352). Pantoja worked every day, but she does not recall where (T3 354). Did an investigator with the state attorney tell her to answer "I don't remember"? A: Yeah, I do remember that he did tell me that, yes (T3 353-54).

At some point Wendy moved to an apartment. Wendy stopped working in October because she was pregnant. She started working again in May. From May 29 to June 9 [i.e., 10 days], she was working at a tomato packing house (T3 354-55). Her mother babysat the children (T3 355). Pantoja sold his car to his brother-in-law in February (T3 356). Q: Did she recall Pantoja taking V.R. and [one of her sisters] to Wal-Mart twice? A: Yes. Q: Was one time to buy a doll to reward V.R. for her good grades? A: Yes (T3 357-358). From 2002 to June 9, 2003, did V.R. report sexual molestation by Pantoja? A: No. Q: Did Wendy notice any change in her behavior? A: No (T3 360).

On cross, Wendy said the dates are in a little book the state gave her (T3 363). Wendy testified that Pantoja and V.R. were seldom alone together (T3 370). When Wendy was cooking, V.R. would be upstairs; Juan would be downstairs (T3 370). Were there times sexual abuse could have occurred outside her presence? Over objection, Wendy said yes (T3 371). Did V.R. say anything about sexual abuse while Pantoja was living with them?

A: No (T3 372). The information came out after he left and was arrested? A: Yes (T3 373). On redirect, was Wendy mad when Pantoja bonded out of jail on June 14? A: Yes (T3 373).

Mary Jane Van Tassel works in the Early Head Start Program at Florida State. She goes into the homes of low income families and teaches prenatal and infant/child development up to the age of three. She had worked with Wendy's family for 5 years (T4 394). When she asked V.R. if Pantoja touched her, V.R. said no, ma'am, and dropped her head and looked away (T4 394-95).

On cross, the prosecutor said her answer was a little cut off by counsel. Van Tassel said V.R. dropped her head and looked away, and she had some tears in her eyes. Prior to that, V.R. had asked to speak to Van Tassel in private. She was trying to tell me something; she was very upset, very withdrawn. (T4 395). This was three months prior to June 9, 2003. Pantoja was in and out of the household, not permanently in the house. Van Tassel never did a visit when he was there. Wendy always cancelled the visits when he was home. On occasion, Van Tassel had been on the phone with Wendy and heard Pantoja yelling at the children to sit down and be quiet (T4 397).

On this day, V.R. was very agitated. Before that, she had been playful. She was upset and did not have her usual reaction to Van Tassel coming to visit (T4 398). She had changed since Juan had been in the household. All the girls had changed. The defense objection was sustained (T4 399). V.R. had become

withdrawn; V.R. told her she was afraid. A hearsay objection was sustained (T4 404). She wasn't as happy and outgoing as she used to be (T4 404).

On redirect, defense counsel asked: The reason you asked [V.R.] that day was because you knew she had made a sexual allegation against her uncle, correct? The state objected and asked for sanctions. Defense counsel said the state had opened the door and misled the jury. The court sustained the objection and told the jury to disregard the question (T4 407). Pantoja was a new person in the home? A: Yes. Wendy was pregnant? A: Yes (T4 409). V.R.'s grades were lower than before (T4 410).

IV SUMMARY OF THE ARGUMENT

The issue is whether a prior accusation of sexual abuse by the alleged victim, V.R., 11 year old at trial, against another person - her teenaged uncle - was admissible to impeach her. The First District Court of Appeal held the prior accusation was inadmissible and certified conflict with Jaggers, infra.

This case turns wholly on the credibility of V.R.; there was no physical evidence. The overarching question for this court is whether Pantoja had a fair trial with a fair opportunity to confront the only meaningful witness against him. He contends he was deprived of the rights to confront a witness, to present a defense and to fair trial.

The evidence was ambiguous as to whether the prior accusa-

tion was true or false, but the prior accusation was admissible whether true or false, and the question of whether it was true or false was for the jury, not the trial court, to decide.

Assuming the prior accusation was false, the district court held it was inadmissible evidence of specific misconduct, which is "general credibility" evidence under Davis v. Alaska, infra, but petitioner contends it was admissible as evidence of bias or motive to lie, which Davis termed "particular credibility" evidence.

Finally, if the prior accusation were true, it would be admissible to show an alternate source of the young child's knowledge of and ability to describe a sex act.

V 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.

Standard of review

As a general rule, whether evidence is excluded or cross-examination limited, the standard of review is abuse of discretion. "Limitation of cross-examination is subject to an abuse of discretion standard." Moore v. State, 701 So.2d 545, 549 (Fla. 1997). "However, a court's discretion [to admit or exclude evidence] is limited by the evidence code and applicable case law. A court's erroneous interpretation of these authorities is subject to de novo review." McCray v. State, 919 So. 2d 647 (Fla. 1st DCA 2006). Petitioner contends the court did not follow the applicable authority in this case.

Argument

Petitioner, Juan Pantoja, was convicted of sexual battery on a child under age 12 and lewd and lascivious molestation. The child, V.R., 11 years old at the time of trial, is the daughter of Pantoja's then-girlfriend and mother of his child, Wendy.[3] The issue is whether a prior accusation of sexual molestation by the

[3]See n.1.

alleged victim against another person - her teenaged uncle - was admissible to impeach her. The First District Court held the prior accusation was inadmissible and certified conflict with Jaggers. Pantoja v. State, 990 So.2d 626 (Fla. 1st DCA 2008); Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988).

The overarching question for this court is whether Pantoja had a fair trial with a fair opportunity to confront the key witness - the only meaningful witness - against him. This case turns wholly on the credibility of V.R. The crimes were allegedly committed three to four years before trial, when she was 7 or 8 years old. Without her there would be no case; there was no physical evidence of any kind. The trial court's exclusion of evidence pertaining to V.R.'s credibility was reversible error. Not only was the evidence admissible, but in refusing to allow Pantoja to test the credibility of the state's key witness on the issue of her credibility, the court deprived him of his constitutional rights to fair trial, to present a defense and to confront the witness.

The issues are whether the prior accusation against the uncle was admissible. There was no dispute that V.R. had made a prior accusation against her uncle. The evidence was disputed and ambiguous as to whether the prior accusation was true or false, but petitioner contends the prior accusation was admissible whether true or false (although on different grounds), and the question of whether it was true or false was for the jury,

not the trial court, to decide.

Assuming the prior accusation was false, the next question is whether the prior accusation pertains to a general attack on credibility or a particular attack on credibility. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). This question was the main focus of the district court's opinion below, and petitioner contends, wrongly decided. These concepts will be discussed at greater length, infra, but general credibility is, essentially, prior record. As the U.S. Supreme Court said, the use of a prior conviction for the purpose of having a jury "infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony" is a general attack on credibility. 94 S.Ct. at 1110. Evidence of prior record is admissible any time a witness testifies in any type of case, and it does not require any link between the prior conviction and the crime being tried.

Particular credibility, on the other hand, pertains to evidence of bias, interest or motive to lie. While such evidence must be linked to the crime being tried, the link does not necessarily require similarity between the evidence of bias and the crime being tried, contrary to the opinion below. 990 So.2d at 632. Petitioner contends the prior false accusation against the uncle - assuming arguendo it was false - was admissible to impeach V.R. for bias and motive to lie. The district court's error was in treating the prior accusation as general credibility

evidence when it was actually particular credibility evidence, and the decision below is in error and must be reversed, and petitioner granted new trial.

Moreover, petitioner would point out that, if this were the true standard, that evidence of a prior accusation was inadmissible unless it resulted in conviction, such evidence would rarely be admissible, and would certainly never be admissible in a case involving a child under the age of 12. It is inconceivable that a child under 12 would be prosecuted for making a false statement in such a case. And yet, if it could be conceived, and a hypothetical child were ever prosecuted, it would result at most in a juvenile disposition, and a juvenile disposition is not a conviction for purposes of impeachment. §90.610, Fla.Stat.; Rivers v. State, 792 So.2d 564, 566 (Fla. 1st DCA 2001). Assuming there were any doubt, the consequence of the opinion below is that evidence of a prior false accusation would NEVER be admissible. Moreover, viewing the case for the moment in the light most favorable to the defendant, the child has made two false accusations - against Pantoja and against her uncle. This leads to the question of how many false accusations would the courts require before such evidence would be admitted to impeach the credibility of the witness. Would a third be sufficient? If the child had made prior accusations against five men, would the court still find them not admissible to impeach her?

Evidence of motive is always admissible by the state to

prove the accused committed the crime charged. Under the Williams rule, codified as section 90.404, Florida Statutes, evidence of other crimes and bad acts is admissible to prove motive without any requirement of similarity. Williams v. State, 110 So.2d 654 (Fla. 1959). The key is not similarity, but rather, the link between the crimes. See C. Ehrhardt, Florida Evidence, §404.14 (2008 ed.). Petitioner contends the corollary is also true - proof of motive to lie is also admissible, as long as it is connected to the particular defendant, alleged victim or situation.

Petitioner next makes some general comments about motive and false accusations of sexual abuse, then summarizes the district court's rulings and his arguments to the contrary; a more complete explanation will follow:

First, that some accusations of sex crimes are true and some false is well-settled. While this is true of alleged crimes against both children and adults, this case involves alleged crimes against a child under age 12. See, e.g., Tara Ney, Ph.D., editor, True and False Allegations of Child Sexual Abuse: Assessment and Case Management (1995), reviewed in J. Amer. Academy of Child & Adolescent Psychiatry, V. 35, Iss. 11, pp. 1564-65 (Nov. 1996). Petitioner's defense is that he did not commit the crimes charged, and the child's testimony against him is false. He is not certain whether the prior accusation against her uncle is true or false. He believes the accusation against the uncle may

have been false, but there was evidence both that it was true and false, and he does not know for certain. The question is whether the trial court may properly exclude evidence of the child's prior accusation of sexual abuse against another person. In its opinion below, the district court acknowledges that, if the child had made a previous accusation against Pantoja, it would have been admissible. The court indicated the prior accusation was not admissible because it involved a different person. See 990 So.2d at 632.

The First District characterized the prior accusation as a specific act of misconduct; then it said specific acts of misconduct are inadmissible unless they result in a criminal conviction; and as the prior accusation here did not result in a conviction, it was not admissible. The court said:

> Only one of the issues, whether the trial court erred in excluding evidence that the victim recanted a prior accusation of molestation against another person, merits discussion. We hold that the trial court properly excluded this evidence under the well-settled rule that a witness' credibility may not be attacked by proof that she committed specific acts of misconduct that did not end in a criminal conviction.

990 So.2d at 628. Petitioner contends, with all due respect, that the district court has misconceived the reason the prior accusation is admissible, and its ruling was error. The prior accusation is admissible not as a specific act of misconduct but as general bias/motive to lie impeachment. Assuming arguendo it could be both, it is still admissible if admissible on any

ground. See Breedlove v. State, 413 So.2d 1 (Fla. 1982) ("Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose.")

The district court says the Florida evidence code does not contain a false accusation exception, and it cannot judicially create one. Petitioner does not seek the judicial creation of an exception to the evidence rules. He contends, to the contrary, that the court is creating a restriction which is not present in the evidence code. He seeks to admit the evidence to impeach the witness for bias and motive to lie. Yet, the court is judicially restricting evidence which is properly admissible as impeachment for bias, and the court's ruling to the contrary is premised on an improperly narrow interpretation of the impeachment provisions of the evidence code and the broad, constitutional right to confront and impeach witnesses. See Breedlove v. State, 580 So.2d 605, 608-09 (Fla. 1991)("A defendant in a criminal case has considerable latitude in cross-examination to elicit testimony showing the bias of a witness).

The district court did acknowledge the dichotomy drawn in Davis v. Alaska, supra, between general credibility evidence and particular credibility evidence, but then, the court misapplied the law and excluded the evidence as general credibility evidence when it was actually particular credibility evidence. The paradigm of general credibility evidence is prior record. It means the jury may consider whether the witness is credible, given that

he or she has previously been convicted of a crime. If the evidence meets the statutory criteria (conviction of a felony or crime of dishonesty), it is admissible per se against the defendant or any witness in any kind of case, and the party need not show any particular relevance to the case for admission.

In contrast, particular credibility evidence is the type which shows the witness has a bias or a motive to lie as to the crime now being tried. The primary error in the district court's finding that the child's prior accusation is general not particular credibility evidence is that the court views the issue too narrowly. The court said that, if the child had made a prior false accusation against Pantoja, it would be admissible as bias or motive to lie impeachment, but because the accusation alleged a sex crime committed by a third party, it was not relevant to the accusation that Pantoja committed sex crimes on the child. With all due respect, this view is too restrictive, either for the rule permitting impeachment for bias and motive, or to implement Pantoja's constitutional rights.

This is what Ehrhardt says about proof of specific acts of misconduct:

> As a general rule, credibility may not be attacked by proof that a witness has committed specific acts of misconduct that bear on the truthfulness of the witness. Under section 90.610 only conduct which results in a criminal conviction is admissible to prove bad character. Thus, a witness cannot be asked upon cross-examination whether charges are pending against the witness, whether the witness's employer reprimanded the witness, whether the witness received a dishonorable discharge, or whether the witness has filed other per-

sonal injury lawsuits. (footnotes and cites omitted)

Ehrhardt, Florida Evidence, §610.8. All of these examples pertain to credibility of the witness per se, and are not related to the facts of an individual case. Thus, under Davis v. Alaska, they relate to general credibility, but if they did pertain to the case being tried, they would be admissible as particular credibility. The U.S. Supreme Court has suggested that a particular attack on credibility is entitled to special protection under the Confrontation Clause. Davis, 94 S.Ct. at 1110-11. The Court "recognized that the exposure of a witness' motivation [such as bias] in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id.

In the same section, Professor Ehrhardt went on to criticize Jaggers and a few other cases saying they "ignore the limitation and permit impeachment with prior acts of misconduct of a witness when they involve prior false accusations of a crime by the witness." Ehrhardt, §610.8. The professor then acknowledged that specific acts of misconduct may be admissible to prove bias or interest. Id. With all due respect, these comments by Professor Ehrhardt incorrectly equate general credibility impeachment with particular credibility impeachment, and that leads to an incorrect result.

The district court's mistake is in limiting evidence of the child's bias or motive to lie only to where the child has made a

prior accusation of sexual abuse against the same person. The court acknowledges that a prior accusation against the same person would have been admissible to prove bias or motive to lie. The fallacy is that the child's motive to lie may be related to the child and the situation and may be coincidental to the accused, rather than specific to the accused; however, it would still be proof of bias or motive to lie and would still be admissible. The child, V.R., made a prior accusation against her uncle; the evidence is not clear whether it was true or false; if it were false, she may have accused the uncle because she was "mad" at him (Supp 42). The child had some motive or expectation when she made the prior accusation, whether true or false. She wanted attention or help, or she was acting out due to a family dysfunction. Whatever her motive was, it was thwarted; the family believed the accusation to be false and did not report it.

It may be difficult to determine exactly the dysfunctional family dynamics which lead to a false accusation of sexual abuse, but the record does reveal family dysfunction. Wendy was 14 when V.R. was born and has 5 children (T3 348). The family had been visited for 5 years by Mary Jane Van Tassel, a Head Start counselor. The fact that V.R. made a prior accusation of sexual abuse against her uncle was not disputed, although the evidence is not clear whether it was true or false. While the jury did not hear of it, V.R.'s 2-year-old sister, S.F., had died just before this. Pantoja was briefly jailed in connection with the death, then

before he could be released, he was arrested on battery warrants, from which he bonded out (R1 55-56). V.R. made the accusation against him on the day he was released from jail, about a week after S.'s death.

If the child wanted - due to dysfunction or stress - to make an accusation, she had already accused her uncle and - true or false - the family treated it as false, and no action was taken. Who else was even available as a target? She accused her uncle and her mother's boyfriend/father of her baby brother. Pantoja was a quasi-member of V.R.'s family, even if they were not related by blood. V.R. was 7 or 8 years old; there was no evi-dence she had other male relatives or teachers, or contact with any other men. Assuming the accusation against Pantoja was false, he was the only other man it was possible to accuse, because he was the only other man who had any contact with V.R.

There was evidence V.R. had animus or hostility towards Pantoja. While the state believed this evidence was probative of the crimes charged, petitioner contends it was probative of V.R. having a motive to lie - Van Tassel testified that V.R.'s demean-or changed after Pantoja joined the household (T3 336). Defense counsel said there was conflict in the family because Pantoja wanted to go on doctor's visits with Wendy while she was preg-nant, and so did Van Tassel (T3 340). Van Tassel testified that Wendy cancelled appointments with her whenever Pantoja was home (T4 397). The state wanted the jury to infer from this and other

similar evidence that Pantoja was angry or controlling or a child abuser, but it could just as easily been due to conflict with Van Tassel when Pantoja was present. In any event, this evidence of tension and stress in the household surrounding Pantoja is also evidence V.R. may have had a motive to lie about him.

As to the events immediately preceding V.R.'s accusation against Pantoja, the family was in an uproar when they learned Pantoja had bonded out of jail; V.R.'s accusation followed almost immediately after the family learned this news. The child could have responded to the stress of the family events by acting out and accusing Pantoja, with whom she may have already had a strained relationship. She could also intuit that the audience would be far more receptive to an accusation against Pantoja than it had been to an accusation against her uncle.

On the continuum from general credibility - the child having a prior conviction (although that is impossible) - to particular credibility - the strongest of which would be irrefutable proof of a prior false accusation against Pantoja, the evidence at issue shows animus and hostility towards Pantoja, and the possibility the child was making an accusation under conditions of tension and emotion, when she had previously accused another man in her family circle. This is an attack on particular credibility in this particular case. It is not merely a general attack on credibility, intended, in the words of Davis, to "infer that the witness' character is such that he would be less likely than the

average trustworthy citizen to be truthful in his testimony." 94 S.Ct. at 1110.

Nevertheless, the district court said it was not error to exclude the evidence:

> Several federal courts of appeals have concluded that there is no constitutional error in prohibiting cross-examination of a witness regarding an alleged false accusation against someone other than the defendant.

990 So.2d at 631, citing Boggs v. Collins, 226 F.3d 728, 739 (6th Cir. 2000), Hogan v. Hanks, 97 F.3d 189, 192 (7th Cir. 1996), and see also State v. Raines, 118 S.W.3d 205, 213 (Mo. Ct. App. 2003). While all three cases held evidence of prior false accusations were inadmissible, all did so based on the specific facts of the cases, primarily, the utter failure to link the prior accusations to the current charges. All three cases involved adult victims. While the district court opinion would apply the same rule to prior accusations by both child and adult alleged victims, these cases may indicate that admissible, linked prior accusations may be more likely to arise in child sex cases, than with adult victims, but they could occur in either.

In Hogan, a federal habeas corpus case, the prior accusations were several years before the current charges, and were not particularly linked to the case being tried. Further, the court ruled the defendant had not met the higher burden for post-conviction relief, but the instant case is distinguishable. In Raines, the victim had been beaten and suffered significant

injuries in the current crimes, which had no corollary to the prior accusations, which again, were not particularly linked to the present crimes.

Most interesting, however, is Boggs, because a later case distinguished Boggs on a claim which suggests that excluding motive evidence here was error. In Lewis v. Wilkinson, 307 F.3d 413 (6th Cir. 2002), the court reviewed denial of federal habeas. It is an acquaintance rape/date rape case; Lewis and the alleged victim were college students and friends; the alleged rape took place in the woman's dormitory room. The defense was consent. The evidence at issue was excerpts from the woman's post-alleged-rape diary - part of which indicated she had consented; the other, that she sought revenge for having been taken advantage of by men in the past by alleging that Lewis raped her. In other words, her desire for revenge was not necessarily personal to Lewis, but he was a convenient target in which to act out this motive. The court said:

> The Boggs case involved the trial court's exclusion of evidence in a rape trial of an alleged prior false accusation of rape. The defense sought to introduce such evidence so that the jury could infer that if the victim lied or fabricated once, she would do so again. . .The court found this to be an attack on the witness's general credibility. "Under Davis and its progeny, the Sixth Amendment only compels cross-examination if that examination aims to reveal the motive, bias or prejudice of a witness/accuser." . . The court was unable to find a plausible theory of motive or bias for allowing such evidence to be presented, and concluded that Boggs did not demonstrate a Confrontation Clause infraction. (cites omitted)

307 F.3d at 420. In reviewing denial of habeas:

> This court's duty "is not to determine whether the exclusion of the evidence by the trial judge was correct or incorrect under state law, but rather whether such exclusion rendered petitioner's trial so fundamentally unfair as to constitute a denial of federal constitutional rights." Logan v. Marshall, 680 F.2d 1121, 1123 (6th Cir. 1982). On motion for reconsideration, the district court concluded that the excluded diary excerpts went to the victim's general credibility, and were therefore properly excluded pursuant to Williams and Boggs. (footnote omitted)

Id. The circuit court disagreed:

> In this court's view, the excluded excerpts are evidence of consent and motive * * *
>
> [Insofar as some of the statements might be ambiguous], the statements can reasonably be taken to infer consent and motive, and should have been given to the jury to make the ultimate determination.

Id. at 420-21.

> The court held that evidence going to motive
>
> carries with it the constitutionally 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 of the witness. 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.
>
> Boggs, 226 F.3d at 739 (citations omitted).

307 F.3d at 421. In the instant case, the district court said

that, although Pantoja was not permitted to impeach V.R. with the prior accusation, he did present to the jury other grounds for discrediting her testimony: 1) he questioned her regarding "perceived inconsistencies" between her out-of-court statements and her trial testimony, and between her direct testimony and testimony on cross, and defense counsel asked V.R. about what she said to Van Tassel, the Head Start counselor, and called Van Tassel to testify that V.R. denied that Pantoja had touched her. 990 So.2d at 628-29. However, this is cold comfort, since the inconsistencies in V.R.'s statements were relatively minor, and while Van Tassel testified as noted, the state was aggressively trying to persuade the jury that, while V.R.'s words to Van Tassel may have said "no," it did not happen, her actions (looking down or away and crying) said "yes," it did.

Although it is not clear that Florida requires the next step, in Lewis, supra, the court reviewed the evidence to determine whether the jury had enough information to assess the defense theory of improper motive and found:

> The court agrees with [Lewis] that, without the excluded statements, the jury did not have adequate information to assess the defense theories of consent and improper motive.

Id.

> The statements have substantial probative value as to both consent and the victim's motive in pressing charges against [Lewis]. The constitutional violations. . .are significant enough to outweigh any violation of the rape shield law. . .

Id. at 422. The error was not harmless. Id. The court concluded:

> [Lewis] was denied his Sixth Amendment right to confrontation when the trial court excluded several statements from the alleged victim's diary. The statements at issue. . .can reasonably be said to form a **particularized attack on the witness's credibility** directed toward revealing possible ulterior motives, as well as implying her consent... **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.

307 F.3d at 422-23. That is what happened here: in the court's desire to protect the child, it overlooked the defendant's right to confront the witness and to have a fully-informed jury decide where the truth lay. Evidence of the prior accusation was not a general attack on the child's credibility - that it made her less trustworthy than the average trustworthy citizen. Rather, as Lewis, indicates, it was a particularized attack on her credibility that, when in a stressful, emotional situation, she again accused a family member.

Not only did the trial court abuse its discretion by excluding admissible evidence and limiting cross-examination of V.R., these rulings also deprived Pantoja of his constitutional rights to confront the witness against him, to present a defense and to

a fair trial.

As for cross-examination, it is axiomatic that the defendant has the absolute right to conduct a full and fair cross-examination. Steinhorst v. State, 412 So.2d 332, 337 (Fla.1982). This right is "especially necessary when the witness being cross-examined is the key witness on whose credibility the State's case relies." Docekal v. State, 929 So.2d 1139, 1142 (Fla. 5th DCA 2006) (quoting Tomengo v. State, 864 So.2d 525, 530 (Fla. 5th DCA 2004)):

> Docekal was entitled to impeach the victim's credibility. "All [testifying] witnesses ... place their credibility in issue.... [A] party on cross-examination may inquire into matters that affect the truthfulness of the witness' testimony. Although cross-examination is generally limited to the scope of the direct examination, the credibility of the witness is always a proper subject...." Chandler v. State, 702 So.2d 186, 195 (Fla. 1997)(quoting Charles W. Ehrhardt, Florida Evidence § 608.1 at 385 (1997 ed.)); see also Minus v. State, 901 So.2d 344, 348 (Fla. 4th DCA 2005) (noting the breadth of the defendant's right to attack the credibility of a testifying witness in a criminal case). (citations and internal quotation marks omitted).

929 So.2d at 1143. The impeachment evidence in Docekal was **not** a prior accusation, but the rule is the same for impeachment by a prior accusation.

Bias is never collateral, and the defendant may cross-examine for bias, even when it is beyond the scope of direct examination. See Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377, 1390-91 (1959)(noting that ability of accused to challenge witness's motivation by showing "malice,

vindictiveness, intolerance, prejudice, or jealousy" has "ancient roots" that have "remained relatively immutable in our jurisprudence").

The New Jersey Supreme Court made the following observations about the relevance of prior record and general reputation evidence vis-a-vis a prior false accusation in the case of a sex crime with a minor victim:

> That a victim-witness uttered a prior false accusation may be no less relevant, or powerful as an impeachment tool, than opinion testimony that the witness has a reputation for lying. Moreover, a prior criminal conviction for criminal mischief or aggravated assault probably has far less bearing on the trustworthiness of a victim's testimony than a prior false accusation, but there is no question concerning the admissibility of the prior conviction.

State v. Guenther, 181 N.J. 129, 854 A.2d 308, 323 (2004). The court went on to say that care must be taken that such evidence did not get out of hand:

> Yet, proving a prior false accusation - unlike presenting reputation testimony or evidence of a prior conviction - if not strictly regulated, could cause the very type of sideshow trial that N.J.R.E. 608 was intended to prevent. We are confident, however, that trial courts, with proper guidance and limitations, can decide appropriately when the admission of prior false accusation evidence is **central to deciding a case that hinges on the credibility of a victim-witness**. (Emphasis added)

Id. It may be noted that linking admissibility of evidence to whether the evidence is central to deciding a case that hinges on the credibility of the victim-witness seems strange. It is not clear why that makes a difference. If the court is engaging in

some sort of sub silentio balancing test, the court does not say what it is.

Petitioner contends that a more workable model for admissibility is that a prior accusation with a sufficient link to the crime charged, or to the alleged victim and the situation, means this evidence - assuming arguendo it is evidence of a specific act of misconduct - crosses over from what might otherwise be characterized as general credibility evidence to particular credibility evidence. Moreover, Florida law requires the defendant to prove only relevance; there is no requirement in Florida that the prior false accusation must be "so similar" to the circumstances surrounding the case being tried. Pantoja, 990 So.2d at 632.

As for the constitutional issues, the due process clauses of state and federal constitutions guarantee a criminal defendant the right to a fair trial. U.S. Const., am. XIV; Fla. Const., art. I, §9. The ability to call witnesses to testify on one's own behalf has "long been recognized as essential to due pro-cess." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

A defendant has the right to confront witnesses against him as guaranteed by the Sixth Amendment to the U.S. Constitution and article I, section 16, of the Florida Constitution. See Davis v. Alaska, supra; Conner v. State, 748 So. 2d 950, 954-55 (Fla. 1999). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend

against the State's accusations." Chambers, 410 U.S. at 294. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Id. Pantoja was deprived of these constitutional rights.

For example, during the pretrial hearing, the court said inter alia:

> I mean, it would be a sad day in the law if someone who got abused would be somehow discredited because she truthfully testified that she'd been abused by somebody else some other time, and that was somehow used against her.

(Supp 47). Petitioner responds that it would be no less a sad day when a defendant (charged with a crime on which he was sentenced to life in prison) is precluded from challenging the credibility of the key witness against him, especially where no physical evidence or other evidence corroborates the witness's testimony, yet that is what happened in the trial court below.

At the hearing, defense counsel argued that, if V.R. recanted, and she has made inconsistent statements about the accusation against the uncle, or she falsely accused another person, the evidence is admissible (Supp 38). If the child's accusation against the uncle was true, but her family did not believe her, that is another motive for accusing Pantoja of sexual abuse, that she did not get the attention and the respect when she made the first allegation. And so, she may make another allegation now against another man in the household to get the attention and

respect that she needs and she deserves. So there's motive (Supp 39). If the prior allegation was false, then that is a proper ground for cross (Supp 39). There is no corroborating evidence. Even if she did not falsely accuse someone else, there may still be motive to lie, citing Dixon v. State, 605 So.2d 960 (Fla. 2d DCA 1992)(Supp 40).

In Dixon, the trial court was skeptical of the defense theory that the allegations were fabricated, but nonetheless, it was error to exclude the evidence (Supp 40). Dixon cited Lewis v. State, 591 So.2d 922 (Fla. 1991), in which the Florida Supreme Court held the rape shield statute must give way to a defendant's confrontation rights and his ability to present a defense. Excluding this testimony deprives the defendant of the opportunity to confront his accuser and the right to present a defense (Supp 41).

During trial, after a proffer in which V.R. denied recanting the accusation against her uncle, T.D., the court again excluded the evidence. Defense counsel argued the evidence was admissible because it tested the child's credibility. The court said it would not allow the evidence for at least three reasons. First, it was a prior act of misconduct by a witness, and improper impeachment under section 90.610, according to Ehrhardt. (Petitioner has previously explained the error in this reasoning.) Second, there was no evidence by this witness that she had recanted the charge against her uncle. The testimony of other

people would be hearsay. Other people who said V.R. did recant, "are family members that well could have the motive of trying to protect T.D." (T2 171). There is no "admissible or credible" evidence that the child recanted the charge against her uncle (T2 171-72). Petitioner contends this ruling was error.

Defense counsel argued it was for the jury to determine the child's credibility:

> The judge is now making a determination that the other witnesses are not credible when the jury has not even had the chance to view their credibility.

(T2 172). Under section 90.405, specific incidents of conduct, where the evidence is used to prove a particular trait, is admissible, not just the section the court indicated (T2 172). The child, V.R., has now said she did not admit to her family that she lied. The defense is entitled to impeach her by introducing evidence that she, in fact, told them that she lied (T2 173).

The judge said that, if counsel is right, "we'll get to try this case again." The court said V.R. could not be impeached by such evidence (T2 173).

After the state rested, the defense again objected to excluding evidence of the accusation against T.D. The court said:

> ... the child has consistently testified that this happened. There are family members who are close to [T.D.] who have testified that she somehow either recanted or somehow said she was lying about this, and what have you.

> The bottom line is that the child hasn't recanted. These other witnesses have strong motivations to dissuade her to recant, and she still hasn't and - in court.
>
> Thirdly, the probative value, I think, is extremely limited in this case by the family situation, and what I've indicated as credibility problems for those witnesses. I don't think it comes in under 90.403, either. I think it has a tendency to become a feature of the trial.
>
> And basically, the defense in this case is that it didn't happen, and the defense. . .is that this was some sort of retaliation by the family against Mr. Pantoja, that they've somehow put the child up to this, yet there's been no testimony of that, or even any questions about that, that it's been some sort of retaliation for him either leaving [Wendy], or having alleged domestic batteries on every single person in the. . .family except for [T.D.], I guess. And I do not think it's admissible as impeachment for this child under. . .90.610, so it's not proper impeachment.

(T3 311-12). As argued, supra, the evidence is admissible whether it is true or false, and whether it was recanted or not. For the rest, the judge excluded the evidence explicitly because he did not believe the witnesses, but it not up to the court to determine credibility in deciding whether to admit evidence.

As the U.S. Supreme Court said, the denial of the right to effective cross-examination

> "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. . ." (cites omitted)

Davis, 415 U.S. at 318, 94 S.Ct. at 1111. This is especially true given that Pantoja was subjected to evidence which insinu-

ated guilt but did not prove it - V.R.'s demeanor changed after he entered the household; V.R. was afraid of him; Van Tassel, the Head Start counselor's, testimony that V.R. was crying and looked down and away when she recanted, which was intended to lead the jury to believe the recantation was not credible, etc. This evidence may have been consistent with guilt, but it was also consistent with innocence.

The state's case depended wholly on V.R.'s testimony. There was no physical evidence. The only "corroboration" was V.R.'s hearsay statements, which also depended wholly on her credibility. The only evidence of V.R.'s motive to testify which the court allowed was that she made the accusation the same day that Pantoja was released from jail. The district court said Pantoja had an opportunity to cross-examine V.R., but cross was restricted, and he was deprived of the opportunity conduct a full and fair cross-examination.

Further, because the information charged the crimes were committed on "various occasions" over a period of almost a year, and even though he was seldom alone with V.R., it was impossible for Pantoja to disprove the charges. Under these circumstances, depriving him of the right to question V.R. about the prior accusation deprived him of the rights to fair trial, to present a defense, and to confront the witness.

That distinction between general and particular credibility is key to deciding this case. In Roebuck, the district court

cited Jackson v. State, 545 So.2d 260, 264 (Fla. 1989), for the general rule that "credibility may not be attacked by proof that a witness committed specific acts of misconduct which did not end in a criminal conviction." Roebuck v. State, 953 So.2d 40 (Fla. 1st DCA 2007), review dism., 982 So.2d 683 (Fla. 2008). In Jackson, the state introduced evidence of the defendant's arrest without conviction, which was error, but it goes to general credibility, not particular credibility. The district court said:

> First, the Legislature adopted the express wording of section 90.610, Florida Statutes, in an effort to bar all character impeachment based on prior misconduct that did not involve a criminal conviction.

Roebuck at 43, but this rule pertains to impeachment of general credibility, while the issue here is particular credibility under Davis v. Alaska.

If the prior accusation was true, not false, then the fact that her family did not believe V.R. and did not report it, and it was not handled appropriately, is relevant to show bias or motive. That is, V.R. may have been motivated to accuse Pantoja in light of the turmoil surrounding her sister's death and Pantoja's unexpected release from jail. Even though the family did not believe her prior accusations against T.D., V.R. could easily believe they would be more receptive to accusations against Pantoja made on the same day he was released from jail. From V.R.'s point of view, the accusation could benefit her or her

family or both, and thus, gives her a motive to testify.

That the family did not believe the accusation against T.D. explains the situation, but it does not determine V.R.'s credibility. The jury could be given a limiting instruction, to the effect that the family not believing her is relevant only as it explains what the family did or did not do; it is solely up to the jury to decide which witnesses to believe.

Challenging the child's credibility was essential to Pantoja's defense, yet it was improperly restricted. This was reversible error. Because Jaggers ruled such evidence was admissible as a character trait under Rule 90.405, counsel did argue this theory in the district court. However, on further reflection, this approach seems to be trying to put a square peg in a round whole; it almost fits but not quite. The prior accusation evidence is properly viewed as bias/motive to lie impeachment under Rule 90.608, and also permitted by the Confrontation Clause, Davis, supra, and the right to fair trial and to present a defense, Chambers v. Mississippi, supra.

Finally, if the prior accusation against the uncle were true, it would also be admissible on another separate ground. In Bisbee, this court held that

> Due to [the child]'s tender years, the jury was likely to perceive her as naive and innocent and unable to imagine sexual activity in detail.

Bisbee v. State, 719 So.2d 993, 995 (Fla. 1st DCA 1998); see also Dixon, supra. The jury will always want to know how a child of

tender years can describe a sex act. As the state offered no other source of this knowledge, the prior accusation against the uncle was also admissible on this separate ground.

VI 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,

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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 February, 2009.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

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KATHLEEN STOVER