STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

v.

CHARLES PAGAN,

Appellant.

BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

W. BARNEY GIESE
Acting Solicitor, Twelfth Judicial Circuit
Post Office Box 1987
Columbia, South Carolina 29202-1987
(803) 748-4785

ATTORNEYS FOR RESPONDENT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF THE ISSUE ON APPEAL

DID THE TRIAL COURT PROPERLY ADMIT TAMIKA'S TESTIMONY THAT PETITIONER RAN FROM POLICE WHILE ON BOND FOR THIS MURDER CHARGE, AND TOLD HER HE WAS IN TROUBLE ALL BECAUSE OF STATE'S WITNESS MONIQUE, WHERE THE TESTIMONY WAS PROPERLY ADMITTED TO SHOW FLIGHT AND GUILTY CONSCIENCE, AS WELL AS TO CORROBORATE MONIQUE'S TESTIMONY ABOUT PETITIONER'S THREATS AGAINST HER AND DISPUTE PETITIONER'S DENIAL OF KNOWING ANYTHING ABOUT THE INCIDENT? IN ANY EVENT, WAS TAMIKA'S TESTIMONY HARMLESS AND CUMULATIVE TO THE VAST AMOUNT OF OTHER EVIDENCE OF PETITIONER'S FLIGHT TO AVOID ARREST AND OTHER WRONGDOING?

STATEMENT OF THE CASE

Petitioner, Charles Pagan, was indicted by the Florence County Grand Jury for murder (98-GS-21-0855). Specifically, the murder indictment alleged that, on or about December 11th, 1997, Petitioner killed Gloria Jean Cummings with malice aforethought by beating her about the head and face with a wooden board.

The Honorable L. Casey Manning conducted a jury trial from February 5th to February 12th, 2001. At trial, Petitioner was represented by Attorneys Jim Cox and Kernard E. Redmond, and Fifth Circuit Assistant Solicitors Knox McMahon and John Meadors prosecuted the case for the state due to a conflict on the part of the Twelfth Circuit Solicitor. On February 12th, 2001, the jury found Petitioner guilty of murder, and Judge Manning sentenced Petitioner to life imprisonment.

A Notice of Appeal was filed and served. Following briefing by both sides, and oral argument on December 9th, 2003, the Court of Appeals affirmed by opinion dated January 12th, 2004. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (2004). A Petition for Rehearing was filed before the Court of Appeals on April 28th, 2004; as requested, Respondent filed its Return to the Petition for Rehearing on June 1st, 2004. The Court of Appeals denied the petition for rehearing by order dated June 25th, 2004.

Petitioner then filed a Petition for Writ of Certiorari before this Court. The State responded with its Return to the Petition for Writ of Certiorari dated October 25th, 2004. This Court issued an Order on October 5th, 2005, in which it granted the Petition for Writ of Certiorari and ordered full briefing as provided by Rule 226(I), SCACR. Pagan filed his Brief of Petitioner on November 3rd, 2005. This Brief of Respondent follows.

STATEMENT OF FACTS

It is undisputed that the victim, Gloria Cummings, was brutally beaten to death with a board until her head was almost entirely crushed. However, Petitioner challenged identity at trial; the issue on appeal concerns admission of evidence that after bonding out on this murder charge Petitioner failed to stop for a blue light.

A. 8:00 a.m. 12/11/97: Gloria's body is discovered and identified

At about 8:00 or 9:00 a.m. on December 11th, 1997, Florence resident Herbert Robinson went outside to put leaves on the street for the trash pickup. As he walked down the side of his house, he noticed a body on the ground. At first, he just thought it was some drunk, but as he got close he noticed a large amount of blood. Henderson saw that the person did not appear to be breathing, so he called police. **{R. 12-20}**.

Florence police officers responded and discovered a grisly scene. Gloria was found face down on the ground next to some broken-down vehicles near an abandoned house. Her pants were down around her ankles and her shirt was saturated with blood. The first officer on the scene stated that Gloria's face had been smashed so badly her head appeared to be not much thicker than a Bible. Drag marks in the leaves led to were Gloria was found, and blood, tissue, brain matter littered the scene. An autopsy conducted at 1:00 p.m. that day revealed massive head trauma from multiple blows with a heavy object like an angled piece of board. There were a number of skull and jaw fractures, protruding brain matter, and defensive wounds on the hands. **{R. 2-11, 21-36; 45-51; 161-83; 499-502}**.

Police began their investigation, and found a crack pipe and black button at the

scene. Two girls who had gathered at the location told detectives that the victim might have been Gloria Bostick. Police then ultimately made contact with one Francina Bostick, who lived nearby. There, they learned that the victim was actually Gloria Cummings, who had lived with Francina. **{R. 52-54}**. They also located the victims mother, who told them Gloria may have been with a girl named Monique the previous evening. **{R. 67}**.

B. 12:30 p.m. 12/11/02: Jessie Jones, Bobby Green, and Steven Blathers

That afternoon, detectives responded to a call from the nearby residence of Bobby Green. When they arrived, they found Bobby Green, Steven Blathers, and Jessie Jones, who had found in a doghouse a bloody black coat that was later linked to the button found at the murder scene. **{R. 55-64}**. In later conversations with police, Jessie recalled that about 2:00 a.m. that morning he came out of his house because he heard some screaming and yelling. He saw about seven or eight young people carrying on and hitting a pepsi sign with a stick. Jessie yelled at them to quit. He then noticed a tall guy and a short girl arguing, fighting, and hitting each other with sticks. Eventually, Jones went inside. **{R. 133-40; 148-51}**.

Blathers, who lived with the Greens, told police that he heard some noises sometime after 2:00 a.m. and looked outside. He saw a six-foot tall “shadow” come running across the street from the vacant lot. The shadow appeared to have something in his hand. **{R. 209-211}**. Police also made contact with another neighbor, who similarly testified that she was awakened at about 2:10 a.m. by dogs barking. Through her window, she saw a “shadow” run past and heard screaming. This shadow was followed by what she thought was two more “shadows”. **{R. 498}**.

C. 12/11/97-12/19/97: Monique calls Crimestoppers and Petitioner is interviewed

At about 6:35 p.m. on December 11th police received a crime stoppers tip from one Monique Ellerby. Ellerby stated that she was with the murdered woman the night before, and that Gloria had left with a tall Puerto Rican male with short curly hair and a gold tooth. Police finally located Monique on December 15th, 1997. She gave a taped statement in which she claimed she did not witness any murder. She also did not point out anyone in three lineups she was shown containing Steve Blathers, Harry Dobbie, and Petitioner, respectively. **{R. 68-80; 325-28}**.

Police took Monique to Columbia where she assisted in the drawing of a composite. **{R. 78-79}**. The next day, on December 18th, 1997, police took the composite out into the neighborhood. One person at the nearby White Sands club, Albert Smith, stated that the composite looked like his brother-in-law, Charles Pagan. **{R. 81-83; 504-05}**.

Police then visited with Petitioner. Petitioner stated he did not know Gloria, but agreed to come to the station for an interview. There, Petitioner admitted to being out on the town in the area where Gloria was killed. However, he stated that his wife picked him up from the White Sands club at about 10:30 p.m. As they were leaving the station, Petitioner paused to speak with his wife in private, and then Petitioner told police that she had picked him up at the Pub, not the White Sands club. Petitioner said he had people who could vouch for his whereabouts, but he never had any of them contact police. **{R. 84-96; 505-11}**.

On December 19th, the police again interviewed Monique. This time, she identified

Petitioner in a lineup as the person she saw with Gloria. Monique stated she had not identified him before because he was scared. **{R. 98-100}**.

D. January 1998: Monique tells her whole story

As police continued their investigation of the crimes, interviews of various other individuals led them back to reinterview Monique on January 14th, 1998. This time, Monique admitted to witnessing the murder. **{R. 100-02}**.

Monique stated that she and Gloria had been friends for years, and that Gloria, or "Muncie", was a crack addict "but not that bad of one". On the night of the incident, Monique went over to elderly Lee Mack's house, where a number of drug dealers and young people hung out. Gloria was already there, and Monique drank and smoked marijuana while Gloria smoked crack. After a while, the two walked together to the White Sands club. **{R. 268-80}**.

As they approached the White Sands, they saw some guys standing around who called out to them. Monique kept going but Gloria stopped to talk. One of the men asked Gloria to go with him, and she proceeded off. Monique called out, but Gloria just looked back. Monique decided to follow them because "it didn't seem right". **{R. 280-88}**.

As she followed, she heard the man and Gloria arguing about money and drugs. The man was demanding $20 from Gloria, who evidently had been fronted some crack. As they approached the abandoned house near Jessie's place, Monique saw some teenage boys beating on a Pepsi sign. Meanwhile, Gloria and the man continued to argue loudly, and then picked up sticks and started hitting each other. Eventually, Jessie came outside, and yelled for them to leave. **{R. 289-302}**.

Gloria and the man then moved towards the backyard of another house. The man started hitting Gloria, trying to drag her, and yelling, “Bitch, you gone give me my money.” Monique tried to offer the man $20, but he responded, “Bitch, I don’t want your $20". The man told Gloria, “if you don’t give me my $20, I’m going to beat my $20 out of you”. **{R. 303-08}**.

At that point, Gloria took off running, with her assailant in pursuit. He caught her near the broken-down vehicles, and started to pull Gloria’s clothes off as she struggled in vain. The man pulled Gloria’s pants down and said, “Bitch, I’m going to get my $20 worth out of you”. The man could not force Gloria to the ground, so he picked up a piece of wood and hit in her in the face. He then started beating Gloria with the board. **{R. 308-17}**

At this point, Monique started screaming. The man looked up, told Monique to “shut your fucking mouth”, and threatened, “bitch, I’m gonna get you next”. Monique ran away until she reached a club called the Game Room. **{R. 317-21; 449}**.

Monique identified Petitioner as Gloria’s attacker. **{R. 319}**. She testified that she called Crimestoppers early that morning but only left a description because she was scared. Two days later, she told her story to a close friend, and then made another call to Crimestoppers. **{R. 322-24}**. Monique’s friend’s mother Joyce Cooper confirmed that Monique came by one night crying and upset, and after Cooper heard Monique’s story, she told Monique she had to call the police. **{R. 153-59}**. Monique said it took her so long to finally admit all she knew because she was scared that Petitioner could pay some crack head to find out where she was and kill her. She noted that after the incident she spent a lot of time in staying way out in the country with her aunt. **{R. 325-30; 345; 385-86; 429-**

30}.

E. January 1998: Blathers explains the DNA

As noted before, Blathers told the police about hearing the altercation outside his home at about 2 a.m. Blathers ultimately agreed to give blood and hair samples, and his DNA matched the semen found on Gloria's leggings and in her vagina. **{R. 113-18; 123; 124}**.

Blathers was confronted with the DNA results, and admitted that he had been with Gloria the night she died. Blathers said he went out that evening with his cousin Melton to the Pub. A girl asked him to get some drugs for her, so he went to Lee Mack's house at about 9:30 or 9:45 p.m. Outside Lee Mack's, he saw Petitioner leaning up against a light pole. Inside, he bought some crack and marijuana and spent a few minutes chatting with Lee. **{R. 191-97}**.

As he left Lee Mack's, he saw Gloria. He told Gloria he would give her "10 and 10", or $10 and $10 worth of crack, in return for sex. They then walked over alongside a house and had sex against a barrel. Gloria did not have a rag with which to clean up. **{R. 197-201}**.

Blathers then left Gloria and went back to the Pub. He ended up going with some friends to steal a TV from a motel and sell it. He then returned to the Pub and drank beer until about 12:35 a.m. when he and Melton left to walk home. As they approached Jessie came out a good-naturedly kidded them about being out so late. They talked for about a half an hour, and then he went inside and watched TV. Melton went home. **{R. 201-10}**.

As noted before, Blathers and his family heard the commotion at around 2:00 a.m.

Blathers thought the "shadow" that ran past his window was the person he had seen near the light pole at Lee Mack's earlier that evening. **{R. 209-211; 221}**.

Other evidence supported the conclusion that Blathers was not the murderer despite the presence of his DNA. Jessie Jones recalled seeing Steven Blathers and Melton Campbell come home around 12:00 or 12:30 that morning, and stated they were not acting unusual or excited. Jones stated that the man he saw fighting with the girl was definitely not Steve Blathers, as the assailant was six feet tall and light skinned, and Blathers is short. **{R. 130-33; 139-40}**. Melton Campbell generally corroborated Blathers' version of their evening, and stated he saw Blathers go inside his house around 1:00 a.m. **{R. 474-97}**. Barbara Green, Steve's mother, also testified to hearing the commotion outside sometime after 2:00 a.m., and she stated Steve had been home at least an hour when that happened. **{R. 462-65}**. Finally, Monique denied ever talking to Blathers on the day and night of the incident. **{R. 403}**.

F. January to February 1998: Petitioner attempts to elude police

After Monique gave her statement on January 14th, 1998, police issued an arrest warrant for Petitioner. The police made telephone contact with Petitioner; however, when they arrived at Petitioner's house to serve the warrant, only his wife and her mother were there. The police asked his wife if they could have the clothes Petitioner was wearing on the night of the killing, but she said Petitioner took the clothes and refused to let them any further into the house. Police advised the family that Petitioner was wanted for murder. **{R. 108-10; 565-67}**.

Officers came and talked to the family again on January 21st; Petitioner called them

later that day. Petitioner stated he would turn himself in the following Wednesday, January 28th. Petitioner refused to tell the police where he was, despite being advised that they would continue to attempt to apprehend him. **{R. 565-69}**.

Petitioner did not ever turn himself in, and the police sought help from the US Marshal's Office. They found out Petitioner's mother lived in New Jersey, and also traced calls from Petitioner's wife to New Jersey. That number was later disconnected. Ultimately, it took until February 20th, 1998 for the US Marshals to arrest Petitioner in Patterson, New Jersey, while he was on the way to the store. **{R. 570-74; 702}**.

G. Lavenia Helton and Tamika Lambert

Additional evidence against Petitioner came from Lavenia Helton and Tamika Lambert. Lavenia testified that Gloria was a close friend that often stayed at her apartment. Sometime in late November or early December of 1997, Petitioner was over at the apartment with Gloria. Gloria attempted to leave with a bag; Petitioner chased her down screaming "Give me my shit, bitch!". He eventually took the bag from Gloria, which contained an amount of crack. Petitioner then said, "Bitch, you gonna die." **{R. 533-40}**. Lavenia also noted that Petitioner used to come in a club called Charlie's looking for Gloria. **{R. 540-41}**.

Tamika Lambert testified about an incident on a night in February 1999 when she was picked up by a guy who called himself Derrick. She was riding with "Derrick" in his car when a police cruiser tried to stop them. "Derrick" drove the car off at a high rate of speed, smashing stop signs along the way. "Derrick" ultimately crashed the car, but managed to escape from the police on foot. A few hours after the police let her go, she ran into

"Derrick" walking on the street bleeding and barefooted. "Derrick" apologized, stating that he drove away from the police because he did not have a license, and because he was out on bond for killing a girl. "Derrick" told Tamika that it was all because of this girl named Monica or Monique that he was in trouble, and asked Tamika not to say anything to anyone. Tamika identified "Derrick" as Petitioner, and the car found wrecked after the high-speed chase was registered to Petitioner's wife. Of course, Petitioner's wife reported the car stolen later that night. **{R. 546-55}**.

H. The defense case

The defense first called Petitioner's wife, who testified about taking him to a friend's house, and later taking him to the White Sands club. She testified she picked up Petitioner from the club between 11:30 and midnight and took him home. **{R. 585-94}**.

Petitioner's wife's mother also testified that Petitioner and his wife came home between 11:00 p.m. and midnight. However, she also stated that she could hardly remember what she did the night before. **{R. 634-37}**.

Petitioner's friends Darren Burgess and Leroy Jones testified about meeting Petitioner at the Pub. Petitioner was showing off his new cell phone. According to the men, Petitioner eventually called his wife, who picked him up from the club at around 11:30 or midnight. **{R. 641-79}**.

Petitioner himself testified that on the afternoon of the incident, he first had his wife take him to the house of a friend he met while they were in prison. He and the friend later went to the White Sands club, and the friend left. Petitioner left the White Sands around 10:00 or 10:30 and went down to the Pub, where he ran into Darren and Leroy. Petitioner

was showing off his cell phone and making calls to his wife as well as allowing others to use the phone. He stated he called his wife to pick him up, and she showed up around midnight to take him home. Petitioner used the cell phone records to support his version of events. **{R. 716-29}**. Petitioner claimed he went to New Jersey because his mother was sick and needed his help. **{R. 737-40}**. He also denied ever wrecking his wife's car or knowing Tamika. **{R. 796}**.

ARGUMENT

TAMIKA'S TESTIMONY THAT PETITIONER RAN FROM POLICE WHILE ON BOND FOR THIS MURDER CHARGE, AND TOLD HER HE RAN BECAUSE HE WAS IN TROUBLE DUE TO STATE'S WITNESS MONIQUE, WAS PROPERLY ADMITTED TO SHOW FLIGHT AND GUILTY CONSCIENCE, AS WELL AS TO CORROBORATE MONIQUE'S TESTIMONY ABOUT PETITIONER'S THREATS AGAINST HER AND DISPUTE PETITIONER'S DENIAL OF KNOWING ANYTHING ABOUT THE MURDER. IN ANY EVENT, THE EVIDENCE WAS HARMLESS AND CUMULATIVE TO THE VAST AMOUNT OF OTHER EVIDENCE OF PETITIONER'S FLIGHT TO AVOID ARREST AND OTHER WRONGDOING.

Petitioner contends that the introduction of evidence from Tamika that he led the police on a high-speed chase while he was out on bail for the murder of Gloria was at best only slightly relevant yet highly prejudicial. He asserts the evidence did nothing to show identity under Rule 404(b), SCRE, and that it was not proper evidence of flight because Petitioner was not at the time being pursued for Gloria's murder. However, the evidence was admissible to show flight and guilty conscience. Moreover, it corroborated Monique's testimony as to Petitioner's threats to her as he killed Gloria, and disputed Petitioner's statement to police in which he claimed he left the general area before the crime and did not even know Gloria. Finally, given all the other admitted evidence of Petitioner's prior bad acts and flight from arrest, it cannot be fairly said that Tamika's testimony had any substantial effect on the trial.

A. Events at trial

As noted before, Tamika Lambert testified about an incident on a night in February 1999 when she was picked up by a guy who called himself Derrick. She was riding with "Derrick" in his car when a police cruiser tried to stop them. "Derrick" drove the car off at a high rate of speed, smashing stop signs along the way. "Derrick" ultimately crashed the

car, but managed to escape from the police on foot. A few hours after the police let her go, Monique ran into "Derrick" walking on the street bleeding and barefooted. "Derrick" apologized, stating that he drove away from the police because he did not have a license, and because he was out on bond for killing a girl. "Derrick" told Tamika that he it was all because of this girl named Monica or Monique that he was in trouble, and asked Tamika not to say anything to anyone. Tamika identified "Derrick" as Petitioner, and the car found wrecked after the high-speed chase was registered to Petitioner's wife. Interestingly, Petitioner's wife reported the car stolen late that night. **{R. 546-55}**.

Prior to Tamika's testimony, the defense objected. The State noted that the evidence went to identity inasmuch as Petitioner mentioned the case and Monique to a woman who had nothing to do with it. The State also noted that the evidence corroborated Monique's statements that Petitioner threatened her, and that the incident served to corroborate Monique's version of the events on the night of the murder. The State told the trial court it was not using the evidence to show flight, but did state that the evidence was general circumstantial evidence. **{R. 517-19; 523-25}**.

The defense argued that the evidence was unduly prejudicial and too remote inasmuch as it occurred some fourteen months after the murder. The defense claimed it would then be forced to defend two crimes at once. **{R. 519-22; 524}**.

The trial court ruled that the evidence was admissible under Rule 404(b) inasmuch as Monique testified she had also been threatened by Petitioner as he killed Gloria, and then two years later Petitioner was speaking about the very same witness as the cause of all his troubles. **{R. 530-32}**.

The defense renewed its objections when Tamika testified, and also moved for a mistrial based on the admission of Tamika's testimony. **{R. 576-78; 579; 800-01}**. The state in closing argument only briefly addressed Tamika's testimony, and only to counter Petitioner's assertion that he was not the driver of the car that fled from police. **{R. 813-14}**. The trial court gave a specific limiting instruction expressly aimed at Tamika's testimony which told the jury the evidence was admissible only as to identification. **{R. 815-16}**.

The Court of Appeals held that Tamika's testimony was admissible to prove defendant's flight and "guilty knowledge," to corroborate testimony given by particular individual, and to establish the defendant's identity. The Court also held the evidence was harmless:

> Because there was testimony regarding other episodes of flight, prior convictions, a parole violation, violations of Department of Corrections rules and regulations, and a previous incident of violence between Pagan and the victim, Lambert's testimony did not have a substantial effect upon Pagan's trial.

Pagan, 357 S.C. 132, 591 S.E.2d 646.

B. General Rules

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803

(1923). Admissible Lyle evidence may be excluded only if the danger of unfair prejudice *substantially outweighs* any probative value. Rule 403, SCRE (emphasis added) (cited in Adams, 322 S.C. at 118, 470 S.E.2d at 368-69).

C. Although the incident took place some time after the murder, Tamika's testimony about Petitioner's evasion of police was still admissible evidence of flight, as the reasonable inference that Petitioner was going to skip bond and avoid trial shows guilty knowledge and consciousness just as does flight from the scene itself.

First, Tamika's testimony showed Petitioner's flight and thus consciousness of guilt, which is relevant to show identity.

Many South Carolina decisions have held that testimony about flight, concealment of evidence, or destruction of evidence is admissible because it shows consciousness of guilt, identity, and intent. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (destruction of evidence and evidence of flight relevant as incriminating circumstance, and to show guilty knowledge and intent); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge and intent); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996) (in case where defendant ran and vial of crack was found nearby, evidence of flight shows guilty knowledge and intent).[1] See also United States v.

[1] Besides this case, the Court of Appeals has issued a few other recent decisions upholding the appropriate admission of flight evidence. See State v. Walker, Op. No. 4049, 2005 W.L. 3159664 (S.C. Ct. App. Nov. 28, 2005) (containing string cite of a number of South Carolina decision stretching back years affirming the use of flight evidence, and holding evidence that defendant did not remain at home despite being asked to by investigators was admissible despite defendant's arguments he did not know he was being sought and turned himself in later); State v. Robinson, 360 S.C. 187, 600 S.E.2d 100 (Ct. App. 2005) (evidence that defendant fled from police car admissible even though defendant was also told he was a suspect in an unrelated murder; while there must be a nexus between the flight and the crime charged, defendant was keenly aware of the armed robbery charge and was assisting police with it); State v. Crawford, 362 S.C. 627, 608

Robinson, 161 F.3d 463 (7th Cir. 1998) (evidence of flight shows consciousness of guilt under Rule 404(b)); United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) (evidence of flight and concealment is probative of guilty consciousness under Rule 404(b)).

It is true that the State at trial stated that it was not necessarily introducing the evidence as flight evidence. **{R. 523}**. However, this Court may affirm on any ground apparent in the record. Rule 220(c), SCACR. Moreover, the trial court did admit the evidence as going to identity, and flight evidence can be identity evidence as it shows guilty conscience.

Petitioner's primary contention in this case is that Petitioner's high speed, exceptionally determined, and reckless flight from police some months after the murder supposedly does nothing to show his guilty knowledge, because he had already been arrested and placed on bond and thus must not have been fleeing apprehension for this murder charge. However, Petitioner confuses permissible inferences for argument to the jury with issues of admissibility.

The actual testimony at issue here is as follows:

> TAMIKA. I don't want to make no mistake. Okay. He was telling me B He start out telling me that he couldn't stop because he didn't have o license. Then he told me that he was on B I'm trying to see which one he told me first. He was on a $100,000 bond because they had B This girl B They accused him of killing some girl. And it was all because of some girl named Monica *[sic]*.
>
> Q. Now, back up just a minute. He said he had been charged with murder?

S.E.2d 886 (Ct. App. 2005) (testimony that defendant fled the scene was admissible as flight evidence).

TAMIKA. Yeah.

Q. Did he tell you that?

TAMIKA. Uh-huh.

Q. And he was out on bond?

TAMIKA. Yeah.

Q. $100,000 bond?

TAMIKA. Yeah.

Q. Is that right. He tell you this girl B That this murder had occurred B not that he did it. But this murder had occurred had in Florence?

TAMIKA. Yeah.

Q. And that's another reason he couldn't stop; is that right?

TAMIKA. Yeah.

Q. That's what he told you?

TAMIKA. That's what he told me.

Q. Did he say anything to you about not saying anything to anybody?

TAMIKA. Yeah, he ask me that.

Q. And what did he ask you?

TAMIKA. He just ask me B Will you promise me you want say any thing to anybody. And I'm trying to recall. I know he said that. And I think that's when he brought up Monique name because that's why he in this trouble because of some other girl.

{R. 554 line 1 - 555 line 9}.

The relevance of flight evidence does depend on a sufficient nexus between the flight and the offense on trial in the case. State v. Robinson, 360 S.C. 187, 600 S.E.2d 100

(Ct. App. 2005) (citing United States v. Beahm, 664 F.2d 414, 419-20 (4th Cir. 1981)). And, one could surely argue from Tamika's testimony that Petitioner was madly fleeing to the point that he almost killed himself and others for the simple and relatively mundane reason that he did not have a driver's license and was out on bond. But the mere fact that Petitioner might have had other coexisting reasons for fleeing does not render the evidence inadmissible. State v. Hagen, 391 N.W.2d 888, 892 (Minn. App.1986). See also United States v. Dierling, 131 F.3d 722, 731 (8th Cir.1997) (concluding that evidence of a defendant's flight and struggle with a police officer attempting to arrest the defendant for violation of a domestic protection order was admissible as evidence of consciousness of guilt with respect to a conviction for conspiracy to distribute narcotics; and stating that "[t]he intended purpose of the attempted stop need not be related to the conspiracy.... The real question is what is in the mind of the person who flees and whether there is sufficient evidence to allow the inference that the flight was prompted by consciousness of guilt."); United States v. Clark, 45 F.3d 1247, 1251 (8th Cir.1995) ("The existence of other possible reasons for flight does not render the inference [of guilt] impermissible or irrational.").

Here, one might easily ask which is the *more reasonable* inference B that Appellant led police on an extremely dangerous and reckless high speed chase because he simply did not have a license, or because he had decided while out on bond to avoid subjecting himself to any further apprehension *at all* in this case. The jury could reasonably infer from this testimony that Petitioner was attempting to evade capture and jump bond entirely for this charge, which would certainly indicate consciousness of guilt.

Undoubtedly, getting out on bond and then skipping out to avoid trial and conviction for a serious felony carrying the possibility of life without parole is not, relatively speaking,

an uncommon or unusual action B and it can show guilty consciousness or knowledge just as much as one who evades initial capture after the crime. Petitioner should not have the benefit of excluding relevant evidence simply because he happened to be apprehended more close in time to the crime but only decided to make a run for it after being fortunate enough to get out on bond. Indeed, a person might make the decision to flee long after initial apprehension because he discovered the extent of the evidence the State amassed against him, as opposed to the beginning when he thought he had sufficiently covered his tracks.

Further, the fact that one was ultimately present for trial does not preclude the relevance of information that at one point while the matter was pending the person decided to jump bond. Even a brief period of intent and effort to jump bond would be admissible evidence of guilty knowledge. Cf. generally Dierling, 131 F.3d at 731(the real question is what is in the mind of the person who flees). That Petitioner's presence was ultimately secured for trial is again simply but part of the reasonable inferences to be argued to the jury, not a question of admissibility.

The fact remains that it is for the jury to determine which is the appropriate inference to draw from Petitioner's extreme actions to avoid apprehension in this case B whether it was something as mundane as a not having a license, or something more sinister and logical like avoiding his murder trial. Given that Petitioner fled South Carolina and had to be tracked down by US Marshals in New Jersey despite knowing he had an outstanding murder arrest warrant **{R. 565-74}**, and Petitioner asked Tamika not to tell anyone he was driving the car, it seems the latter inference is the more reasonable one B certainly reasonable enough for appropriate submission to a jury. It cannot be said that this very

reasonable inference was insufficiently probative for admission. See, e.g. See State v. Walker, Op. No. 4049, 2005 W.L. 3159664 (S.C. Ct. App. Nov. 28, 2005) (finding flight evidence admissible despite defendant's arguments he did not know he was being sought and did in fact turn himself in later, by noting that it could be inferred from the defendant's sudden disappearance that he was planning to escape); State v. Robinson, 360 S.C. 187, 600 S.E.2d 100 (Ct. App. 2005) (admitting armed robbery defendant's flight even though he had been also told he was a suspect in a murder investigation, by noting that the inquiry must be objective, that the defendant own explanation that he fled because of the murder charge and not the armed robbery charge is not dispositive, and the alternative inferences from the flight were for argument to the jury).

Finally, it should be noted that the present issue does not involve the rule in Petitioner's cited case of McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2001), which precludes arguing guilt because one is tried in *absentia* (ATIA"). The Court in McFadden noted that: A [f]light from a police officer or a crime scene as a means of escape is an entirely different matter than failure appear at trial." Id. at 444-45, 539 S.E.2d at 395. But this case is different from *absentia* cases too. While jumping bond might ultimately lead to TIA, in this case there is proof of active attempts to flee from police officers, as opposed to a mere failure to show up for trial. Also, the defendant expressly assigned reason for his flight to the charge at issue and the primary state's witness. While the rule in McFadden is justified in that a TIA possibly could result from *any* number of unexplained reasons, such as illness, car wreck, or mistake of notice, active attempts to flee do not suffer from such an ambiguity of inference. See State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (where, long after the crime, an arrest warrant is issued as the defendant leaves town

under guise of a family vacation, evidence of the trip was admissible as flight evidence as it shows that the defendant had knowledge the officers were aware of his wrongdoing and were seeking him).

The Court of Appeals properly applied the law in this case.

D. The trial court correctly concluded that the evidence was relevant to corroborate Petitioner's identity as the perpetrator based on Petitioner's reference to Tamika and thus knowledge of a state's witness who testified Petitioner threatened her at the scene of the murder.

In the alternative, the trial court also correctly concluded that the testimony was admissible as corroborative evidence of identity.

As noted before, Monique testified that Petitioner threatened to kill her as she watched the assault on Gloria in horror. Monique stated she did not come forward and tell the truth because she was scared of Petitioner. **{R. 317; 449}**. In his statement to police and in his subsequent testimony, Petitioner simply claimed he left the general area at 10:30 and "didn't even know the girl [Gloria]". **{R. 85-97; 507-11}**. In contrast, Petitioner told Tamika months after the crime that he was in trouble for murder all because of some girl named Monica or Monique. **{R. 554-55}**. In admitting the testimony, the trial noted that some months after the incident Petitioner was speaking of and identifying the very witness who said Petitioner threatened her as he murdered Gloria. **{R. 530}**.

Therefore, the fact that Petitioner was mentioning Monique by name as the person who was causing him trouble shows his knowledge of her, which (1) disputes his statement to police that he was not there and did not know anything about Gloria, and (2) corroborates Monique's statement that Petitioner saw her at the murder scene and

threatened to kill her too. The failure to stop incident itself is necessary *res gestae* to explain why Petitioner was confiding in Tamika these things B because he had refused to stop for police and almost killed or hurt her in the ensuing chase. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (one of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case).

The fact that Petitioner may have found out about Monique from other sources is again a matter of alternative inferences for presentation to the jury, not a question of admissibility. The probative value of disputing the Petitioner's statement and corroborating the state's witness is not substantially outweighed by the mere fact that alternative inferences could potentially be made. Resolution of alternative inferences is what the factfinder at trial is for.

E. The probative value was not substantially outweighed by the prejudicial effect where identity was a disputed issue.

South Carolina decisions have held that where 404(b) evidence goes to a disputed issue or necessary element of the state's proof, the probative value is heightened and outweighs any prejudicial effect. See, e.g. State v. George Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (since defendant was not the triggerman, probative value of prior robbery was heightened, because state had to show defendant's intent to combine with accomplice under "hand of one is hand of all" theory); State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) (where intent was contested on burglary charge, the probative value of defendant's prior attacks on elderly women outweighed the prejudicial effect), overruled on other grounds, 512 U.S. 154 (1994); State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991)

(prejudicial effect of other crimes outweighs probative value where purpose for admission was not contested); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (because defendants disputed state's allegations about their motive and intent, evidence of prior robbery of victim was "highly probative"); State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998) (statement has "substantial probative value" because it shows intent to rob).

In this case, of course, identity was the main contested issue. Thus, since the evidence properly went to identity, any prejudicial effect did not *substantially outweigh* the probative value. Rule 403, SCRE. See also State v. Waddle, 873 P.2d 171 (Idaho Ct. App. 1994) (where defendant denies being the perpetrator, evidence tending to establish identity is always relevant).

F. Regardless of admissibility, the evidence from Tamika was harmless and cumulative.

Finally, Petitioner contends the evidence was not harmless because there were credibility issues in the case. Where guilt is conclusively proven by competent evidence, so that no other rational conclusion could be reached, reversal will not result from insubstantial errors not affecting the result. See, e.g. State v. Parker, 315 S.C. 320, 433 S.E.2d 831 (1993); State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990) (error is harmless if it could not have reasonably affected the outcome of trial). Moreover, evidence is harmless where it is cumulative to that admitted without objection. See State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990).

While there were credibility issues in the case, Petitioner is the criminal defendant equivalent of the "libel-proof plaintiff". Here, there was admitted without objection a whole

class of evidence regarding Petitioner's attempts at various times throughout his life to avoid arrest or prosecution. The State presented without objection the fact that Petitioner fled the jurisdiction and refused to return, and that he had to finally be tracked down and arrested by US Marshals in New Jersey for the murder charge at issue in this case. **{R. 565-74; 702}**. Moreover, Petitioner's prior record, on which he was questioned, included an entirely separate 1995 charge for failure to stop for a blue light, which is the exact offense to which Tamika testified. **{R. 754}**. Indeed, Petitioner was violating parole when he ran from police in 1995, which is remarkably analogous to the bond Petitioner was violating when he ran from police with Tamika. The similarity of this other evidence alone would prevent reversible error resulting from Tamika's testimony.

Moreover, this record is absolutely replete with unobjected-to evidence of Petitioner's wrongdoing. Inasmuch as Petitioner contends Tamika's evidence was devastating to him in a "credibility contest", Respondent would note that Petitioner's prior record included a 1986 conviction for conspiracy to distribute drugs, a 1989 conviction for conspiracy to distribute drugs, and a 1995 parole violation and failure to stop. **{R. 708-09}**. Further, extensive testimony was presented as to Petitioner's various stays in prison. Indeed, Petitioner admitted violating prison rules by leaving to get married and having a cell phone. **{R. 708-10; 744-61; 802-10}**. Finally, Lavenia Helton testified to a prior incident where Petitioner beat up Gloria to get his crack cocaine back. **{R. 533-39}**.

Given all this other admitted evidence of flight from arrest and prior bad acts, it cannot be fairly said that Tamika's testimony had any substantial effect on the trial. As such, the conviction was properly affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals should be affirmed.

HENRY DARGAN McMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

W. BARNEY GIESE
Acting Solicitor, Twelfth Judicial Circuit
Post Office Box 1987
Columbia, South Carolina 29202-1987
(803) 748-4785

_____
S. CREIGHTON WATERS

ATTORNEYS FOR RESPONDENT

March 25, 2003

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

v.

CHARLES PAGAN,

Appellant.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the ***Brief of Respondent***, dated January 4, 2006, on Appellant by depositing three (3) copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Joseph L. Savitz, III
Acting Chief Attorney
South Carolina Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, South Carolina 29201

I further certify that I have served all parties required by Rule to be served.

This 4th day of January, 2006.

_____
S. CREIGHTON WATERS
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
ATTORNEY FOR RESPONDENT