IN THE SUPREME COURT OF FLORIDA

CASE NO._____

DANA WILLIAMSON

Petitioner

vs.

JAMES McDONOUGH
Secretary of the Florida
Department of Corrections

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner Dana Williamson ("Williamson") was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and appellant in this Court on direct criminal appeal of his guilt, penalty and sentencing proceedings. As he is in the custody of the Florida Department of Corrections, at Union Correctional Institution, in Raiford, Florida, James McDonough, as Secretary of the Department of Corrections is Williamson=s custodian and the Respondent.

The record of Williamson=s guilt, penalty and sentencing proceedings, including the trial transcript and other documents, is cited employing the symbol AR@ (documents) or AT@ (transcript) followed by page numbers, encased in parentheses.

JURISDICTION

This is a habeas corpus petition pursuant to Fla.R.App.P. Rule 9.l00(a) and Art. I, ' 13, Fla. Const. This Court has jurisdiction under Fla.R.App.P. 9.030(a)(3); Art. V, ' 3(b)(9), Fla. Const.; Smith v. State, 400 So.2d 956, 960 (Fla. 1981), as the fundamental constitutional error for review arose in a capital case this Court decided on direct appeal, Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969), and involves the appeal of his conviction and sentence of death. Habeas corpus is the proper remedy. *E.g.*, Way v.

Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987).

This Court also has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought. Williamson raises claims of fundamental constitutional error. *See* Dallas v.Wainwriqht, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of habeas corpus jurisdiction to correct constitutional error is particularly warranted in this action.

INTRODUCTION

A significant error occurred in the direct appeal of Williamson's capital murder conviction. A Apipeline@ change in the law was not presented to this Court due to the ineffective assistance of appellate counsel. An examination of the issue appellate counsel neglected to present demonstrates deficient performance and that deficiency prejudiced Williamson in the extreme. As "extant legal principles . . . provided a clear basis for . . . compelling appellate argument," Fitzpatrick v.Wainwright, 490 So.2d 938, 940 (Fla. 1986), appellate counsel=s failure to raise this fundamental issue falls "far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). As Williamson will demonstrate in the following sections, the omitted appellate pipeline

issue in this case clearly demonstrates that Aconfidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165.

STATEMENT OF THE CASE AND FACTS

On February 19, 1994, Petitioner, Dana Williamson (AWilliamson@), was convicted of first degree murder, armed burglary, extortion, four counts of armed robbery, five counts of armed kidnaping and three counts of attempted first degree murder. He was sentenced to death for the killing of Donna Decker. (T 3203-04).[1]

In 1988, Donna and Bob Decker resided in Davie, Florida, together with their infant son, Carl. (T 577, 1012). Bob Decker owned a construction business at the time. On the night of November 4, 1988, Bob, Carl, and Clyde Decker (Bob's father visiting from out of town) returned home to find Charles Panoyan ("Panoyan") in the driveway.

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[1] At trial, Williamson was represented by Steven Jeffrey Hammer, Esquire,
440 South Andrews Avenue, Ft. Lauderdale, FL 33301, and Charles Perry Johnson, Jr., Post Office Box 460639, Fort Lauderdale, FL 33346. On direct appeal, he was represented by Scott Allen Mager, 1 East Broward Boulevard, Fort Lauderdale, FL 33301, and Robert E. Hodapp, 10675 Northwest 38th Street, Coral Springs, FL 33065.

(T 581, 1158). Panoyan was the Deckers' acquaintance and occasional employee. He had assisted in the construction of the Decker home and knew its dimensions and alarm system. Bob Decker testified that Panoyan rarely came to the home, and that Decker was surprised to see him. (T 646, 1023, 1158). The Deckers greeted Panoyan in the driveway and they all went inside. (T 583, 1162, 2105).

Panoyan then abruptly stated that he had to go outside to bring in some deer meat which he had forgotten to bring initially. (T 583, 1159). When he came back a moment later, Clyde Decker helped Panoyan put the deer meat in the kitchen. (T 583, 1061, 2105). Upon returning to the living room, they confronted a man with a gun wearing a mask and a straw cowboy hat. (T 583, 1061). Bob Decker at first thought that it was a practical joke pulled by Panoyan, but soon discovered otherwise. (T 583, 1061). The Deckers were taken into the master bedroom, handcuffed and bound. (T 584, 1167). Panoyan later claimed that he was hog-tied out in the family room, but showed no marks or burns when subsequently examined by police. (T 584, 649, 659, 1171, 2345). Bob Decker testified that he caught a glimpse of Panoyan talking to the gunman. (T 1067, 1172). Meanwhile, Donna Decker arrived home from work, was overpowered (T 584) and tied up. (T 585, 1077, 1179). Bob and Donna were questioned about the location of their money and were forced to sign some sort of legal form. (T 603, 1062, 1084, 1087). Donna was stabbed to death during a struggle. (T 591, 1191). Bob, Carl, and Clyde were each shot in the head with a 22-caliber revolver (T 587-88, 1132), but survived. (T

589, 1191). Panoyan was released unharmed and eventually called police. (T 592, 1184). Panoyan was the prime suspect. (T 613). He never mentioned Williamson to police (T 613, 2173), and a utility belt and handcuff key fitting the handcuffs used on Bob Decker were found in Panoyan=s truck. (T 610, 612, 2694, 2697). Neither Williamson=s finger prints nor blood were found at the crime scene. (T 661, 662).

In November, 1989, police received an anonymous tip that Williamson was the assailant and that Panoyan was innocent. (T 613, 2169). Prior to the tip, police had never considered Williamson a suspect. (T 613). Police went to Williamson=s residence in Ohio and spoke with him. (T 613, 1337). Asked about the cowboy hat, Williamson stated that he had owned a similar hat. (T 664, 2783, 2696, 3026). The decision was then made to arrest Williamson and Panoyan. (T 666, 1382, 2172).

Panoyan was released on his own recognizance when he made a statement, eighteen months into his incarceration, that Williamson was the perpetrator. (T 667, 2138, 2212). Panoyan changed his story, claiming to have been scared into silence by Williamson (T 2123-24), and agreeing to testify as the State=s chief witness. Panoyan testified that Williamson was the gunman and let him live since Panoyan was a friend of Williamson's father (T 2329), that Panoyan had no involvement in the crime and had been scared into silence by threats from Williamson. (T 2123-24). The State introduced evidence concerning Williamson's 1975 conviction as a minor for manslaughter. (T 1546, 2147). The record shows this evidence was introduced to

bolster Panoyan's claims that he had reason to believe threats allegedly made by Williamson to induce his silence. The State also proffered the testimony of three jail house informants serving time for felony convictions (T 1537, 1915, 2487), who testified that Williamson had admitted the alleged acts. (T 1930, 1915, 2487).

Other than Panoyan=s testimony and the jailhouse matters, the evidence in this case was entirely circumstantial, including a deed executed by Williamson to show his knowledge of legal forms (T 1472), a black utility belt of the same type found at the crime scene, and the cowboy hat found at the scene. (T 2783, 3026). The jury returned guilty verdicts on fifteen of the seventeen counts charged, including, significantly, the three attempted first degree murder counts. (T 3212-13; T 2899).

The attempted first degree murder counts Bproceeding on alternative theories of premeditation or attempted first degree felony murder Bwere tried jointly with the first degree murder of Donna Decker, as well as the other counts.

Additionally, the trial court=s instructions to the jury on how to arrive at its advisory verdict included the following:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

> 1. The defendant has been previously convicted of another capital offense or of a ***felony involving the use or threat of violence to some person.***
>
> ***The crime of Attempted Murder in the First Degree is a felony involving the use of violence to another person*** . . .

The trial court then relied upon the jury=s arrival at the attempted first degree murder verdicts (reached on alternative theories of premeditation and/or attempted first degree felony murder) in its rationale for applying the other-violent-felony aggravator, stating in its sentencing order:

> [C]ontemporaneous convictions involving persons other than the homicide victim can also be used to prove this aggravating circumstance. The Defendant was convicted of four (4) other felonies involving persons other than the homicide victim as follows:
>
> 1. The Attempted First Degree Murder . . .
> 2. The Attempted First Degree Murder . . .
> 3. The Attempted First Degree Murder . . .
> 4. The Extortion . . .

Based in part on the foregoing aggravating circumstances, the trial court sentenced Williamson to death and, on direct appeal, Williamson=s appellate counsel raised the following issues:

A. THE ADMISSION OF A THIRTEEN YEAR-OLD CONVICTION WAS ERROR

B. THE TRIAL COURT ERRED IN FAILING TO SEVER THE EXTORTION COUNT FROM THE TRIAL

C. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE RELATING TO APPELLANT'S EXECUTION OF DIVORCE PAPERS AND A QUIT CLAIM DEED

D. THE JURY'S VERDICT IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE

E. THE APPELLANT'S MITIGATING CIRCUMSTANCES MANDATE THIS HIS DEATH SENTENCE BE VACATED

F. FLORIDA STATUTE '921.141 IS UNCONSTITUTIONAL, AS IT IS VAGUE AND OVERBROAD

Williamson had filed his notice of direct criminal appeal on ***August 3, 1994***.

While Williamson=s direct criminal appeal was pending, this Court, on ***May 4, 1995***, issued its opinion in State v. Gray, 654 So. 2d 552 (Fla. 1995), holding attempted first degree felony murder was a non-existent offense and announcing that the Gray decision was to "be applied to all cases pending on direct review or not yet final." 654 So. 2d at 554. At no time did Williamson=s appellate counsel, however, advise this Court that Gray was applicable to Williamson=s still-pending appeal in view of the fact that Williamson had been convicted of attempted first degree murder after the jury

had been instructed on alternative theories of premeditation or attempted first degree felony murder. Subsequent to the pipeline decision in Gray, this Court affirmed Dana Williamson=s judgment and sentence on ***September 19, 1996***. Williamson v. State, 681 So. 2d 688 (Fla. 1996).

This Habeas Corpus Petition follows.

GROUNDS FOR RELIEF

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE OR DISCUSS THE FACT THAT THE VERDICTS IN COUNTS II, III AND IV RESTED ON THE STATE=S ALTERNATIVE THEORY OF ATTEMPTED FIRST DEGREE FELONY MURDER, A NON-EXISTENT OFFENSE AND FUNDAMENTAL ERROR AT THE TIME THIS CASE BECAME FINAL ON DIRECT APPEAL

On August 3, 1994, Williamson filed his notice of direct appeal of the judgment and sentence herein. Thereafter, on May 4, 1995, this Court Florida issued its opinion in State v. Gray, 654 So. 2d 552 (Fla. 1995), holding attempted first degree felony murder was a non-existent offense. The Gray Court specifically stated its decision would "be applied to all cases pending on direct review or not yet final." 654 So. 2d at 554. Later, in an opinion dated September 19, 1996, the this Court affirmed Williamson=s judgment and sentence. Williamson v. State, 681 So. 2d 688 (Fla.

1996). Thus, Williamson=s case was Apending on direct review or not yet final" when Gray was decided and, under the terms of that opinion, he could not be convicted on a theory of attempted first degree felony murder.[2]

In Yates v. United States, 354 U.S. 298 (1957), significantly, the United States Supreme Court held a conviction under a general verdict is improper if it rests on multiple bases, one of which is legally inadequate. In such circumstances, the reviewing court cannot be certain which of the grounds the jury relied upon in reaching the verdict. The Yates Court stated:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground,

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[2] Indeed, the attempted first degree felony murder convictions of Rodney Williamson (Petitioner=s separately tried codefendant and brother) were reversed and remanded for a new trial in Williamson v. State, 671 So. 2d 281 (Fla. 4th DCA 1996) (retrial is appropriate where an alternative attempted felony murder instruction is given as it is impossible to determine whether the jury used premeditation or felony murder theories to convict and the facts could support guilty verdict on either theory).

> but not on another, and it is impossible to tell which ground the jury selected.

Yates v. United States, 354 U.S. at 312. *See also* Mills v. Maryland, 486 U.S. 367, 376 (1988) ("With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching a verdict."). This Court has subsequently applied this firmly established principle to overturn first degree murder convictions and sentences of death in, for example, Valentine v. State, 688 So. 2d 313, 317 (Fla. 1996); Franqui v. State, 699 So. 2d 1332, 1339 (Fla. 1997) and Delgado v. State, 776 So. 2d 233 (Fla. 2000). In Valentine v. State, for instance, this Court stated:

> Valentine next argues that his conviction for attempted first-degree murder is error. We agree. The jury was instructed on two possible theories on this count, attempted first-degree felony murder and attempted first degree premeditated murder, and the verdict fails to state on which ground the jury relied. After Valentine was sentenced, this Court held that the crime of attempted first-degree felony murder does not exist in Florida. *See* State v. Gray, 654 So. 2d 552 (Fla. 1995). Because the jury may have relied on this legally unsupportable theory, the conviction for attempted first-degree murder must be reversed. *See* Griffin v. United

> States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).

Valentine v. State, 688 So. 2d at 317.At bar, the State proceeded against Williamson in these counts on alternative theories of premeditated first degree murder and attempted first degree felony murder and the jury was instructed on both. Jurors were given a form containing a general verdict (*i.e.,* guilty Aas charged in the indictment@). As the Fourth District stated in Tricarico v. State, 711 So. 2d 624 (Fla. 4th DCA 1998):

> [T]he trial court concluded that the error associated with the felony murder theory was harmless because the state's alternative theory of premeditation was supported by ample evidence. That holding does not address, however, the Yates concern regarding the alternative theory of felony murder and eliminate the possibility that the jury convicted on a legally improper theory.

Tricarico v. State, 711 So. 2d at 626.

Williamson=s conviction of a non-existent crime, moreover, comprises fundamental error. In Hill v. State, 730 So.2d 322 (Fla. 5th DCA 1999), a defendant charged with attempted first-degree murder with a firearm, possession of a firearm by a convicted felon and attempted armed robbery with a firearm, entered a plea of nolo contendere and sought relief. Hill sought to vacate and set

aside his judgment and sentence for attempted first-degree felony murder as it constituted a violation of due process in light of Gray=s abrogation of prior case law that had recognized the crime of attempted felony murder. Finding Gray applied to the facts, Hill noted:

> [F]undamental error---*i.e.,* "error...which amounts to a denial of due process"---can be raised for the first time in a post-conviction proceeding. Willie v. State, 600 So. 2d 479, 482 (Fla. 1st DCA 1992). As we noted in Vogel v. State, 365 So. 2d 1079, 1080 (Fla. 1st DCA 1979) (fundamental error required reversal of conviction of attempted possession of burglary tools, an offense that Supreme Court of Florida held was not a crime, in opinion issued while defendant's appeal was pending), the "[j]udicial conscience cannot allow a person to remain imprisoned for a crime which the Supreme Court has held does not exist."

Hill v. State, 730 So.2d at 323.

As Panoyan was, according to his trial testimony, hog-tied out in the family room when Donna Decker was killed (T 584, 649, 659, 1171, 2345), it is reasonable to infer jurors decided that if Williamson committed the attempted first degree murders under the theories upon which they had been instructedBplacing him at the murder scene independent of Panoyan=s equivocal testimonyBhe was also guilty of the first degree murder of Donna Decker, as well as the rest of the charges.

For the foregoing reasons, Williamson is entitled to a new direct criminal appeal of his judgments and sentences or, in the interest of judicial economy, to have his convictions and sentences vacated, set aside and reset for trial.

RELIEF SOUGHT

For the foregoing reasons, Dana Williamson should be accorded new guilt and penalty phase proceedings with directions that the jury not be instructed on the non-existent offense of attempted first degree felony murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to (1) Office of the State Attorney, Seventeenth Judicial Circuit, 201 S.E. Sixth

Street, Suite 675, Fort Lauderdale, FL 33301, (2) Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, (3) Honorable Richard Eade, 201 S.E. Sixth Street, Chambers 1030B, Fort Lauderdale, FL 33301, and (4) Dana Williamson, #048606, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-4410, by United States Mail, this _____ day of _____, 2007.

CERTIFICATE OF FONT AND TYPE SIZE

This petition is word-processed utilizing 14-point Times New Roman type.

_____

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