IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1787

DANA WILLIAMSON

Petitioner

vs.

JAMES McDONOUGH
Secretary of the Florida
Department of Corrections

Respondent

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT

The State's Response essentially concedes Williamson's convictions and sentences for attempted first degree felony murder are invalidated by this Court's opinion in State v. Gray, 654 So.2d 552 (Fla. 1995), which held that attempted first degree felony murder was a non-existent offense and that its opinion would be "applied to all cases pending on direct review or not yet final." 654 So.2d at 554.[1]

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[1] Contrary to the State Response, conviction of a non-existent crime equals 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, pled no contest and sought to vacate his judgment and sentence for attempted first-degree felony murder as violating due process in light of Gray's abrogation of prior case law recognizing the crime of attempted felony murder. Finding Gray applicable, Hill noted:

> 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.

The State, however, argues that (although the jury was instructed to find Williamson guilty of the attempted murders even if it did not find that he committed any act beyond participating in the underlying felony) the error, according to the State, could not have affected the capital murder verdict such that a new guilt phase proceeding should be required. *State's Response, pages 7-8*.

The flaw in the State's argument in opposition to a new guilt phase proceeding is that if jurors found Williamson guilty of the attempted first degree murders on the faulty felony murder theory, this militated for a finding of guilt on the capital murder charge as the attempted first degree murder counts were tried jointly with the first degree murder of Donna Decker–which also hinged on such alternative theories–resulting in a pyramiding of alternative legal theory upon alternative legal theory (at least one of them flawed) to reach an inevitable finding of guilt in a case which this Court has acknowledged rests largely on circumstantial evidence.

The State's reliance on cases which did not squarely address the issue for the proposition that charges tried jointly with non-existent offenses cannot be harmfully infected by instruction on a non-existent offense is belied by this Court's opinion in Delgado v. State, 776 So.2d 233 (Fla. 2000), which held

murder convictions could not be upheld where an underlying burglary conviction was vacated as legally inadequate.

As for the necessity of reversal for a new penalty phase proceeding, it is significant that the trial court's instructions to jurors on how to arrive at the advisory verdict ultimately rendered in this case 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 State's argument that "even if this Court vacates the attempted murder convictions, the jury was never exposed to materially inaccurate information," *State's Response*, *page 12*, as well as the State's conjecture about how jurors might have viewed the facts in the absence of this materially inaccurate information, is therefore unavailing. There remains a reasonable probability jurors might have recommended life, rather than death, given proper instructions on these three charges.

The State's suggestion that the existence of other factors upon which jurors could have possibly hung their hats (despite having received instructions which permitted *exclusive* consideration of the convictions on the three non-existent offenses in arriving at a prior violent felony aggravator) somehow renders their consideration of these three invalid violent felony convictions harmless is a matter best left to a jury. Arrival at an advisory verdict is not a linear or mathematical process, but a judgement based on the *totality of facts and law* presented before a jury of the defendant's peers.

The State's analogy to other cases wherein lesser, unrelated prior violent convictions were later overturned misses the point. The offenses at bar involve contemporaneous attempts to commit the very crime for which Williamson has been sentenced to death. If jurors are instructed a defendant is equally culpable for participating in the underlying offense wherein a murder is attempted by another as he would be for premeditatedly attempting to commit first degree murder, the likelihood jurors convicted on the flawed attempted felony murder theory logically also applies to the likelihood they recommended death on the same flawed standard.

Indeed, the State's likening of this issue to a claim under Johnson v. Mississippi, 486 U.S. 578 (1988), in light of this Court's opinions applying Johnson,

merely demonstrates that a new penalty phase is required. In Armstrong v. State, 862 So.2d 705 (Fla. 2003), a defendant's prior violent felony conviction was vacated as unconstitutional and this Court held a new penalty phase was required despite the existence of two contemporaneous convictions of attempted murder and robbery, as well as a subsequent robbery, that would be admissible upon resentencing:

> In closing penalty-phase arguments, the State urged the jury to find the aggravating circumstance that Armstrong had "previously been convicted of a violent felony" on the basis of Armstrong's two contemporaneous convictions of attempted murder and robbery and this prior Massachusetts conviction. The jury recommended a death sentence, and the trial court based its finding of that aggravating circumstance, in part, on the Massachusetts conviction.
> After Armstrong's direct appeal to this Court, he filed a motion for new trial with the Massachusetts court regarding his 1985 conviction. In 1999, that court vacated Armstrong's conviction of indecent assault and battery on a child of the age of fourteen, finding it constitutionally invalid. Therefore, Armstrong asserted in his subsequent 3.850 motion for postconviction relief that he was entitled to a new penalty-phase proceeding. The postconviction court granted an evidentiary hearing on the issue but denied relief, concluding that error under *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), had been shown but was harmless beyond a reasonable doubt in light of an armed robbery conviction obtained against Armstrong after his penalty phase that would be admissible upon resentencing as evidence of another valid, prior violent felony conviction to be considered in lieu of the vacated conviction.
>
> In this appeal, Armstrong asserts, on the basis of *Johnson*, that the postconviction court erred in denying relief as to this issue. We agree.

Armstrong v. State, 862 So.2d at 717. *See also* Lebron v. State, 799 So.2d 997 (Fla.

2001) (instruction to jury that capital murder defendant had been on felony probation at time murder was committed and finding of felony probation aggravating circumstance, in violation of *ex post facto* provisions of federal and state constitutions, required vacation of death sentence and remand for new penalty-phase proceeding, despite fact that at least one of defendant's remaining two properly-found aggravators was grave and there was no issue as to relative culpability of codefendants).

Following the jury's advisory verdict in Williamson's case , the trial court relied on the jury's arrival at the attempted first degree murder verdicts 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 . . .

It was largely upon these aggravating circumstances that the trial court found the prior violent felony aggravator and sentenced Williamson to death.

For the State to argue that appellate counsel was not ineffective for failing to bring to this Court's attention the fact that Williamson's case was in

the pipeline when this Court held that three offenses with which Williamson had been jointly charged, jointly tried with the capital murder charge, convicted and sentenced–and which had been considered by the jury and sentencing court in recommending and imposing his sentence of death, is unfathomable. Appellate counsel failed to raise this fundamental error which would have resulted in the reversal of three convictions which, in turn, within reasonably probability, may have resulted in new guilt or penalty proceedings.

For the foregoing reasons, Dana Williamson should be accorded both 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) Lisa-Marie Lerner, Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401; and to (3) Dana Williamson, #048606, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-4410, by U.S. 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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KEVIN J. KULIK, ESQUIRE
Florida Bar Number 475841