IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1787

DANA WILLIAMSON,

Petitioner,

VS.

JAMES McDONOUGH
Secretary of the Florida
Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Dana Williamson, was the defendant at trial and will be referred to as the "Defendant" or "Williamson". Respondent, James McDonough, Secretary for the Department of Corrections as well as the prosecuting authority at trial, the State of Florida, will be referred to as the "State." References to the appellate record in Florida Supreme Court case number SC60-84198 will be by the symbol "ROA" and the record in the related postconviction case number SC07-564 will be noted as "PCR" followed by the appropriate page number(s). The direct appeal briefs in case number SC60-84198 will be noted as "DA" followed by the document title. Any supplemental records will be designated by the symbol "S" preceding the type of record. Lowe's petition will be referred to as "P."

STATEMENT OF THE FACTS AND OF THE CASE

Williamson filed this Petition for Writ of Habeas Corpus in conjunction with his appeal from the denial of his motion for postconviction relief (Case No. SC07-564). The State has submitted an Answer Brief in that case outlining a detailed Statement of the Facts and of the Case; consequently, recitation of the underlying facts and procedural history will not be repeated in this response.

ARGUMENT

Williamson's habeas petition raises two related claims of ineffective assistance of appellate counsel. His claims revolve around the fact that this Court issued its opinion in State v. Gray, 654 So.2d 552 (Fla. 1995) approximately a month before appellate counsel filed his initial brief in the direct appeal from his convictions. Williamson is requesting relief on two separate aspects of his trial and conviction in this petition as a result of Gray. He asks for this Court to grant him both a new guilt phase as well as a new penalty phase. Each is distinct and the State will address them separately.

ISSUE I

WHILE GRAY PROPERLY APPLIES TO THE ATTEMPTED MURDER CONVICTIONS, ANY REMAND SHOULD BE LIMITED TO THOSE COUNTS ALONE.

Williamson filed his Notice of Appeal on August 3, 1994, approximately 9 months before the Supreme Court issued its opinion in Gray on May 4, 1995. Although Williamson's Initial Brief was not filed until June 12, 1995, more than 1 month after Gray was issued, it failed to argue that Williamson's convictions on Counts II-IV should be vacated because of Gray. In fact, his appellate counsel

never brought the issue to the attention of this Court, even though it did not issue its opinion affirming Williamson's judgments and sentences until September 19, 1996. Williamson v. State, 681 So.2d 688 (Fla. 1996).

As this Court is aware, Williamson was convicted of one count of first degree murder, armed burglary, extortion, five counts of armed kidnapping, four counts of armed robbery, and, finally, three counts of attempted murder. The trial court instructed the jury on both attempted felony murder and premeditated attempted murder; the jury was provided with and returned a general verdict on the attempted murder charges. Gray held that attempted first degree felony murder was a non-existent offense.

A habeas corpus petition is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel. See Downs v. Moore, 801 So. 2d 906, 909 (Fla. 2001); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995). "The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland v. Washington ... standard for claims of trial counsel ineffectiveness." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002)(citations omitted).

In Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000), this Court reiterated the burden a petitioner must meet in order to prove ineffective assistance of appellate counsel:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine
>
> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> ... The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. ... "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." ... In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy....

Freeman, 761 So. 2d at 1069 (citation omitted). See Armstrong v. State, 862 So.2d 705, 718 (Fla. 2003); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993).

Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle, 837 So.2d at 907-08 (citations omitted). See Owen v. Crosby, 854 So.2d 182, 191 (Fla. 2003) (affirming "counsel cannot be considered ineffective for failing to raise issues that were unpreserved and do not constitute fundamental error); Downs, 801 So. 2d at 910; Johnson v. Singletary, 695 So. 2d 263, 266 (Fla. 1996). Fundamental error is error that reaches "down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Spencer v. State, 842 So. 2d 52, 74 (Fla. 2003). Further, appellate counsel is not ineffective for failing to raise nonmeritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong. See also Jones v. Barnes, 463 U.S. 745, 751-753 (1983); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). Additionally, a habeas corpus petition "is not a vehicle for obtaining a second appeal of issues which were

raised, or should have been raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). See Jones v. Moore, 794 So.2d 579, 586 (Fla. 2001) (reiterating "[t]his Court previously has made clear that habeas is not proper to argue a variant to an already decided issue.").

The State acknowledges that Gray was a pipeline case which did indeed apply to Williamson's attempted murder convictions and which appellate counsel should have addressed on the direct appeal. The State notes as well that this Court ruled that Gray is not to be applied retroactively. See State v. Hampton, 699 So.2d 235 (Fla. 1997). In Hampton, the Supreme Court held that the crime of "attempted felony murder" was not a "nonexistent" offense, i.e. it was not a crime that had never been a valid statutory offense in Florida. Rather, "it was a valid offense, with enumerated elements and identifiable lesser offenses, for approximately eleven years. It only became "nonexistent" when we decided Gray." Id. Thus, the Supreme Court held that "Gray does not apply retroactively to those cases where the convictions had already become final before the issuance of the opinion." See State v. Woodley, 695 So.2d 297 (Fla. 1997) (holding Gray

is not to be applied retroactively). Such is not the case with Williamson's convictions since his appeal was not final at the time of its publication. Gray, 654 So.2d at 554.

Williamson is asking for a new guilt phase trial. Gray addressed only the convictions on the three attempted murder charges; it did not apply or affect any of the other convictions including that of the first degree murder. Addressing the impact of Gray on other "pipeline" cases, this Court has fashioned a remedy of remanding for new trial only on the attempted murder charges in question but affirming the convictions for murder and other felonies. In Valentine v. State, 688 So.2d 313 (Fla. 1996) the defendant was convicted of armed burglary, two counts of kidnapping, grand theft, first degree murder, and attempted first degree murder; he was sentenced to death. Gary came out before the appeal became final, thus affecting the attempted murder conviction. This court reversed the conviction for attempted murder "because the jury may have relied on this legally unsupportable theory." However, it went on to affirm all of the other convictions as well as the death sentence. Id. at 317-318.

In Franqui v. State, 699 So.2d 1312 (Fla. 1997) the defendant was convicted of first degree murder, armed robbery, grand theft, possession of a firearm, and two counts of attempted first degree murder and was sentenced to death. Again, Gray

changed the law during the course of the proceedings. Again, there as here, the court instructed the jury on the alternate theories of felony and premeditated attempted murder. This Court reversed the attempted murder convictions. It affirmed all of the other convictions as well as the death sentence, remanding only the charges of attempted murder for further proceedings. Id. at 1329.

While this Court may decide that it must reverse Williamson's convictions for the three counts of attempted murder based upon its decision in Gray, it is clear from the case law that any remand for a new guilt trial must be limited to the attempted murder charges alone. Neither Gray nor the problem instructing on faulty alternative theories of attempted first degree murder apply to any of Williamson's other convictions in this case. This Court should affirm the convictions for the first degree murder, armed burglary, extortion, five counts of armed kidnapping, and four counts of armed robbery.

ISSUE II

APPELLATE COUNSEL WAS NOT INEFFECTIVE AND WILLIAMSON IS NOT ENTITLED TO A NEW PENALTY PHASE TRIAL.

Williamson is also asking for a new penalty phase based on fundamental error grounds, arguing that the jury improperly considered the three attempted first-degree murder convictions as part of the "prior violent felony" aggravator

and, therefore, improperly considered an "invalid" aggravator. Williamson claims that he is entitled to a new penalty phase because his three convictions for attempted first-degree murder, which he argues are invalidated by Gray since they tipped the jury's scale in favor of a death recommendation. The State asserts that there was not ineffective assistance of counsel nor is there fundamental error.

Williamson cannot show fundamental error. Even absent his convictions for attempted first-degree murder, he still has two other prior violent felonies which satisfied the prior violent felony aggravator. Williamson's argument is akin to a Johnson v. Mississippi, 486 U.S. 578 (1988), claim, wherein a defendant alleges that his sentence of death is invalid because a conviction relied upon to establish the "prior violent felony" aggravator is subsequently vacated. However, the case law establishes that in those types of cases, prejudicial error is not automatically presumed. Instead, any error in relying upon a then-valid conviction which is subsequently vacated, is subjected to a harmless error analysis. Only one prior violent felony conviction is necessary to support the aggravator. Consequently, the jury did not consider an invalid aggravator here, as Williamson argues, because there are two valid prior violent felony convictions to support the aggravator and the jury's consideration of the other three is harmless beyond a reasonable doubt. Occhicone v. State, 768 So.2d 1037, 1040 f.n.3 (Fla. 2000)(finding that even

absent one prior violent felony, death sentence still appropriate given that the contemporaneous prior violent felony was sufficient to establish existence of this factor); Henderson v. Singletary, 617 So. 2d 313, 316 (Fla. 1993)(same); Buenoano v. State, 708 So. 2d 941, 952 (Fla. 1998)(same).

Owen v. State, 596 So. 2d 985, 990 (Fla. 1992) is instructive. Therein the jury heard evidence regarding Owen's three separate convictions for murder, sexual battery, and armed burglary of a fourteen year old girl. Those crimes were very similar in nature to the crimes for which he was on trial. A review of the direct appeal opinion regarding the suspect convictions clearly depicts the horrific nature of the prior violent felonies. Owen v. State, 560 So. 2d 207 (Fla. 1987). Although all three of those convictions were latter vacated, this Court found the error harmless given that there still remained one prior violent felony for attempted first degree murder. Owen, 596 So. 2d at 989-990. The state asserts that given the harmlessness attached to the jury's impermissible reliance on three horrific convictions, including one for murder, there can be no doubt that reliance on the three attempted first-degree murder convictions, even if subsequently vacated, would be harmless.

This Court addressed this issue head on in Franqui, 699 So.2d 1312 . There the trial court used the two attempted murder as part of the basis for finding the

aggravator of prior violent felony. In upholding the death sentence, this Court said

> We note that the two attempted murder convictions imposed in this case were among the prior violent felonies enumerated by the trial court in finding the statutory aggravator of prior conviction of a felony involving the use or threat of violence to the person. Because we are reversing the attempted murder convictions, the trial court's reliance upon them in finding the existence of this aggravator was error. However, we are convinced that the error was harmless beyond a reasonable doubt because the trial court also found that Franqui had been previously convicted of the crimes of aggravated assault and attempted armed robbery in one case and armed robbery and armed kidnapping in another.

Id. at 1328. Just as no fundamental error existed in that situation, the same holds true for Williamson.

In support of the sentence of death, the Williamson trial court relied upon three aggravating factors. Those factors were: (1) prior conviction of a violent felony; (2) committed while engaged in a robbery; (3) heinous, atrocious, and cruel. Williamson, 681 So. 2d at 694. In finding the aggravating factor of "prior violent felony," the court relied on five prior convictions. Those convictions included: a 1975 manslaughter conviction for brutally beating a four year-old to death; the contemporaneous attempted murder convictions of Bob Decker, Clyde Decker, and Carl Decker; and the contemporaneous extortion conviction of Panoyan, who was threatened with death and serious bodily harm to him and his family. (R 5376-78). Thus, even if the attempted murder convictions are vacated,

there are still two convictions supporting the "prior violent felony" aggravator. Any error is harmless.

The State also notes that the jury knew the facts surrounding the contemporaneous attempted murder convictions in this case. Bob and Clyde Decker testified in detail at the guilt phase, informing the jury that Williamson committed armed robbery of the Decker home and then shot Bob Decker twice in the back of the head with a .22 caliber handgun, shot Clyde Decker once in the face with the same .22 caliber gun, and shot Carl Decker, a 30 month-old child, once on the right side of his head. The jury could assess the strength and relevancy of Williamson's conduct. As explained by the Florida Supreme Court in Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989), "[t]estimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Consequently, even if this Court vacates the attempted murder convictions, the jury was never exposed to materially inaccurate information. Any error must be considered harmless. See Spivey v. Head, 207 F.3d. 1263, 1282 (11 Cir. 2000)(finding that reversal of prior violent felony conviction is of marginal impact given that the jury heard extensive evidence regarding the underlying conduct). Under this factual situation, the “prior

violent felony" aggravator is not an invalid aggravator and would remain. The weighing process by the jury and the trial court would not change. Again, there is no fundamental error and, thus, no deficient performance by appellate counsel on this penalty phase issue. " Valle, 837 So.2d at 907-08. See Owen, 854 So.2d 182; Downs, 801 So. 2d at 910; Johnson, 695 So. 2d at 266. Williamson is not entitled to habeas relief.

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court to deny Petitioner habeas corpus relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Kevin J. Kulik, Esq., 600 S. Andrews Ave., Suite 500, Ft. Lauderdale, FL 33301 on November 15, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on November 15, 2007.

_____

LISA-MARIE LERNER