IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-564

DANA WILLIAMSON,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)

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ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Appellant, Dana Williamson, was the defendant at trial and will be referred to as the "Defendant" or "Williamson". Appellee, the State of Florida, the prosecution below will be referred to as the "State." References to the records will be as follows: Direct appeal record - "R"; Postconviction record - "PC"; any supplemental records will be designated symbols "SR", and to the Appellant's brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On August 13, 1992, the defendant, Dana Williamson ("Williamson"), was indicted for the first-degree murder of Donna Decker, the attempted first-degree murder of Clyde Robert (Bob) Decker, Jr., Clyde Robert Decker, Sr. and Carl Decker, the armed burglary of the Decker dwelling and car, the armed burglary of Panoyan's car, the armed robbery of Bob, Clyde and Donna Decker and Panoyan, the armed kidnapping of Bob, Clyde, Donna and Carl Decker and Panoyan, and extortion, all stemming from an incident that occurred at the Decker residence on November 4, 1988 (R 4455-4459).

After jury trial, Williamson was found guilty as charged except for the armed burglary of Decker's car and Panoyan's car (R 4877-4893). On June 3, 1994, the jury recommended a sentence of death, by a vote of 11 to 1 (R 5275-5277). Williamson was sentenced to death on July 15, 1994, for the first-degree

murder of Donna Decker (R 5376-5402, 5403-05). He also received a consecutive life sentence for the 3 counts of attempted first-degree murder, a consecutive life sentence for the armed burglary of Bob and Donna Decker's dwelling, a consecutive life sentence for the armed robbery of Bob, Clyde, and Donna Decker and Panoyan, a consecutive life sentence for the armed kidnapping of Bob, Clyde, Carl and Donna Decker and Panoyan and a consecutive sentence of thirty (30) years imprisonment for the extortion of Panoyan (R 5376-5402, 5406-60).

On appeal, Williamson presented six issues. This Court found:

> On Friday, November 4, 1988, police responded to a 911 call made by Donna Decker from her home in Davie, Florida. During the call, Donna said that she had been stabbed, gave her address and referred to her husband and child. When the police arrived at the Decker house, they found Robert Decker, Donna's husband; Carl Decker, the Deckers' two-year-old son; and Clyde Decker, Robert's father, in the master bedroom. The two Decker men and the child had been shot in the head with a .22-caliber gun. Robert was shot twice in the back of the head, Clyde in the cheek, and Carl behind his ear. Despite their injuries, all three remained alive. Police found Donna Decker's body next to a telephone receiver in a closet the Deckers used as an office. She had been stabbed to death. Various items had been taken from the Decker residence.
>
> On August 13, 1992, Dana Williamson and Charles Panoyan were indicted by a grand jury in Broward County for acts arising out of the criminal episode that occurred at the Decker residence on the evening of November 4, 1988. The charges against Panoyan were eventually dismissed, and he was released. At Williamson's trial, Robert Decker, Clyde Decker, and Charles Panoyan gave testimony about the events surrounding the criminal episode. To effectively consider the issues presented by appellant in this case, we find it is necessary to recount in considerable detail the content of that testimony.

Testimony of Robert Decker

Robert and Donna Decker married in 1972 and lived in the home in which the criminal episode occurred for approximately two years prior to November 4, 1988. Clyde Decker moved in with Robert and Donna in October 1988, shortly after Clyde's wife died. Clyde then began assisting Robert in his construction business.

Panoyan also worked for Robert in 1988. Robert and Panoyan met each other in the early 1970s and had grown to know each other well. Panoyan had helped Robert extensively in the construction of Robert's home.

On November 4, 1988, Panoyan was working on a construction site with Robert and Clyde. It was payday, and Robert had given Panoyan $500 in cash. Later that evening Robert, Clyde, and Carl, the Decker's two-year-old son, went to a restaurant for dinner. Donna did not accompany them because she worked that evening. The Decker men and Carl arrived home from dinner at approximately 8:50 p.m. and found Panoyan waiting in his truck in the driveway. Robert estimated the time of arrival based upon the fact that he had arrived home in time to watch the television program "Dallas," which began at 9 p.m.

Robert asked Panoyan why he was there and then proceeded into the house. Panoyan and the Decker men sat down in front of the television. Robert, who was aware of Panoyan's tendency to talk, told Panoyan he would have to be quiet during "Dallas" or leave. Before the show began, Panoyan stood up from his chair and said something to Clyde which Robert could not hear. Clyde testified that Panoyan said he was going to his truck to get some venison. According to Clyde, Panoyan had indicated earlier in the day that he intended to deliver some venison to the Decker residence that evening.

Robert saw Panoyan bring a package of venison into the house. As soon as Panoyan returned to his chair in front of the television, another man entered the house and placed a gun to Clyde's head. Robert described the man as white and within two inches of five feet, ten inches tall. He said the gunman was wearing new work boots,

blue-jean pants, a blue-jean jacket, a yellow plaid shirt, brown work gloves, a stocking mask on his face, and a yellowish-white, straw cowboy hat.

The gunman said, "You all go over there, and I will put handcuffs on you. Lay on the floor in the living room." Robert asked Panoyan if he knew the gunman, but Panoyan was silent. Robert said he could tell by the look on Panoyan's face that Panoyan knew the gunman.

Panoyan, Clyde, and Robert followed the gunman's instructions. The gunman handcuffed all three men and had Robert show him the location of a floor safe in a walk-in closet in the master bedroom. After determining the safe might be hooked up to a burglar alarm, the gunman ordered Robert and Carl, who had followed his father into the bedroom, to lie on the floor. The gunman thereafter retrieved Clyde from the living room and pushed him onto the bed in the master bedroom. The gunman tied Robert's feet before returning to the living room.

Robert managed to loosen the rope around his feet and move to the bedroom doorway. From this position, he could see the gunman talking to Panoyan in the living room. Panoyan was seated in a reclining chair. While the gunman and Panoyan were whispering to each other, the gunman noticed Robert standing at the bedroom door. The gunman stormed back into the bedroom and tied up Robert again.

After retying Robert, the gunman began rummaging through drawers and cupboards in various parts of the house. While the gunman was going through the house, Robert managed to get loose again. The gunman, upon discovering that Robert had again freed himself, hog-tied Robert. After securing Robert, the gunman asked him where he kept his money and drugs. Although there was $2,000 in cash in the house which Clyde had brought with him when he moved in, Robert responded he had none. The cash, along with a number of other items, was missing after the episode.

The gunman continued to rummage through the house. While he was in the master bedroom, Donna arrived home. Robert estimated that the time was approximately 9:15 p.m. Donna asked Panoyan what he

was doing at the house and then went to the master bedroom. The gunman grabbed her, tied her hands, and dragged her into the hallway. Donna lost a shoe and cried during the struggle.

Robert could hear the gunman and Donna talking in another room. A short time later, Donna came back into the master bedroom and asked if the gunman was gone. The gunman suddenly appeared and pulled Donna from the bedroom. Robert did not see his wife alive again.

Robert continued to hear the gunman rummaging through the house. Robert surmised he was going through the kitchen or the office at this time. At approximately 9:50 p.m., the gunman returned to the bedroom with a legal-sized sheet of white paper, which had four straight lines drawn on it. Donna's signature was on one of these lines. The gunman asked Robert to sign the paper, but he did not like Robert's signature as compared to his driver's license signature and ordered him to sign a second time. At approximately 10 p.m., the gunman shot Robert, Clyde, and Carl.

Testimony of Charles Panoyan

Panoyan later identified the gunman as appellant, Dana Williamson. During his testimony, Panoyan indicated that Rodney Williamson, appellant's brother, also was present at the Decker house on the night of the murder. Panoyan explained that he knew the Williamson brothers because he was good friends with and often visited their father, Charlie Williamson. He had met Charlie Williamson at approximately the same time he met Robert Decker. Panoyan and Charlie Williamson were neighbors for a period of time and often returned favors for one another. Charlie Williamson also asked his son, the appellant, to help Panoyan on several occasions. On one such occasion, which occurred during the time Panoyan was helping Robert Decker build his house, Charlie Williamson asked appellant to give Panoyan a ride to the Decker house.

When Charlie Williamson suffered a stroke in 1987, Panoyan visited him on a regular basis. At that time, Rodney Williamson, appellant, and appellant's wife and two children lived with Charlie Williamson. On one of Panoyan's visits to the Williamson house, which occurred

approximately one to two weeks before the murder, appellant asked Panoyan whether he knew anything about Robert Decker's involvement with drugs. Panoyan answered that Robert Decker did not deal in drugs. While Panoyan was visiting Charlie Williamson the night before the murder, however, appellant continued to insist that he knew Robert Decker was dealing in drugs. Panoyan again told appellant that Robert did not. Panoyan and appellant went fishing together later that evening.

In his testimony recounting the events of November 4, 1988, Panoyan maintained he had no responsibility for the crimes that occurred at the Decker house. He testified that as he walked outside the house to retrieve the venison from his truck, the Williamson brothers approached him. The two brothers told him they were going to rob Robert Decker. When Panoyan protested, both of the brothers pointed guns at him. Appellant told Panoyan that if Panoyan said anything or failed to follow his instructions, he would signal the man in the bushes and somebody would go to his house to kill his family. Panoyan then reentered the house and appellant followed a few minutes later. Panoyan recognized as his own the gun appellant carried into the house and testified that appellant must have taken it from the glove compartment of his truck.

Panoyan testified, consistent with Robert Decker, that when appellant entered the house, he wore a nylon stocking mask, a cowboy hat, and gloves. He further testified, consistent with Robert Decker, that appellant ordered the three men to lie down on the floor so he could handcuff them. According to Panoyan, appellant then took Clyde Decker's wallet and asked Robert Decker for his wallet. Robert Decker told appellant his wallet was in the safe, and appellant asked where the safe was located. Robert Decker told appellant the safe was in the bedroom, and the gunman moved everyone there. Robert Decker was placed on the bed, and Clyde Decker, Carl Decker, and Panoyan were placed on the floor. The appellant tied Clyde and Robert Decker's feet and then took Panoyan back into the living room.

At this time, appellant asked Panoyan where Robert Decker put the drugs and money. When Panoyan insisted that he did not know anything about drugs or money, appellant began to hit and kick him.

Appellant again asked Panoyan where the drugs and money were hidden. While Panoyan was responding to appellant's question, he and appellant noticed Robert Decker watching them. After returning Robert to the bedroom, appellant continued without success to question Panoyan about the location of any drugs or money.

Appellant bound Panoyan in a chair and began walking around the house. A short time thereafter, Donna Decker arrived home. She said hello to Panoyan and asked where Robert Decker was located. The appellant grabbed Donna, and Panoyan put his head down. When he raised his head a few moments later, Panoyan saw the lights go on in the office. After about three or four minutes, the appellant exited the office and returned to the living room.

Appellant then hog-tied Panoyan and put him on the living room floor. While Panoyan was tied up, appellant took Panoyan's wallet. As appellant looked through the wallet, he told Panoyan, "[Y]ou know who I am and you know what I am capable of doing.... You know my reputation." Panoyan had in his wallet a list of names, addresses, and telephone numbers of coworkers, friends, and family members. Appellant told Panoyan that he would torture and kill members of his family to get to Panoyan. Panoyan asked if appellant intended to kill him, but appellant replied that he just wanted to get Panoyan's attention. Appellant then described in graphic detail how he would torture and kill Panoyan's wife, daughter, and son if Panoyan said anything about what occurred at the Decker house.

Appellant thereafter untied Panoyan and sent him outside with Rodney Williamson. Rodney Williamson held Panoyan at gunpoint and made him drive a short distance in his own truck. After ordering Panoyan to pull over, Rodney Williamson told Panoyan that if it were his decision, he would have killed Panoyan. Rodney Williamson also repeated the threats made by appellant against Panoyan's family.

While Rodney Williamson and Panoyan were talking, appellant ran up to the truck without wearing the hat or mask he had previously worn. He had three guns in his possession. The appellant told Rodney that something had gone wrong and ordered Panoyan to go home without contacting the police. Appellant reminded Panoyan that harm would

come to his family if he said anything about this incident.
Panoyan did not proceed directly home; he stopped at a shopping center and approached a security guard. He remembered asking the guard for a quarter to call his wife but did not recall any other details of their conversation. As a result of that conversation, however, the security guard summoned a police officer. The police officer detained Panoyan and escorted him to the Decker house. By the time Panoyan and the police officer arrived back at the house, other officers had responded to Donna's 911 call. The officers had already discovered that Donna Decker had been stabbed to death and that Robert, Clyde, and Carl Decker had been shot.

Panoyan was taken to the police station and questioned about the murder. He told investigators what occurred in the Decker house, but he did not indicate that he knew the identity of the assailant. He testified at trial that he did not reveal appellant's identity at that time because he had seen what had happened at the house and knew what appellant could do to his family. When questioned about his knowledge of appellant's reputation, Panoyan indicated he knew that appellant had previously killed a baby.

In May 1990, both Panoyan and the appellant were arrested and charged with murder. Panoyan had been a suspect for some time prior to his arrest. Appellant was arrested as a result of an anonymous tip to police. The two men were detained in the same jail facility. Panoyan testified that while in jail, appellant exploited his fear of appellant in order to maintain complete control over him.

Panoyan was released on his own recognizance after being incarcerated for eighteen months. Several months after his release, he told police that appellant was responsible for the crimes committed at the Decker residence. He explained at trial that he finally came forward with this information after approximately three years because he discovered that Rodney and appellant were the only two persons involved in the crime. Appellant had told Panoyan that there were a number of other men involved in the crime and that those unidentified men would help to carry out his threats. Shortly before his release, however, Panoyan discovered through a conversation with appellant that the claims regarding the involvement of other men were false.

After Panoyan testified before the grand jury, all charges against him were dropped.

Inmate Testimony

The State presented testimony from three inmates who were incarcerated with appellant. These inmates testified regarding various inculpatory statements appellant made to them. Specifically, the inmates provided testimony about their conversations with appellant in which he recounted the details of the crimes committed at the Decker house. One inmate, Patrick O'Brien, also testified regarding appellant's killing of a four-year-old child. Because O'Brien's testimony is pertinent to an issue raised by appellant, we recount its content here.

O'Brien stated in his testimony that he shared a cell with appellant for approximately eight days and that during that time, the two men discussed the crimes with which appellant was charged. Appellant initially told O'Brien that the victims had been shot and stabbed and that there was little evidence against him. Several times during their discussions, appellant implicated his brother Rodney Williamson in the crime, but eventually he admitted being the gunman and stabbing Donna Decker himself. He also told O'Brien that with Rodney's help he was still hunting the Deckers in order to prevent them from testifying.

With respect to what caused Rodney and appellant to commit this crime, appellant told O'Brien that he knew Robert Decker was a contractor and that Robert had a large sum of cash because he had recently received the first payment to build several new houses. Appellant explained to O'Brien that Panoyan was unaware of his plan to rob Robert Decker but that he did not think Panoyan would turn him in because Panoyan feared him. That fear, appellant told O'Brien, was the result of appellant's threats and Panoyan's knowledge that appellant had previously killed a four-year-old child with a baseball bat.

Other Evidence

> The State presented circumstantial evidence linking appellant to the crime. The State also presented evidence demonstrating that appellant owned a hat similar to the hat found following the murder at the Decker residence and evidence linking appellant and his brother to the utility belt found in the back of Panoyan's truck. The utility belt had on it the keys to the handcuffs that were used to bind Robert and Carl Decker.

Williamson v. State, 681 So.2d 688, 690-94 (Fla. 1996). Williamson filed a ***pro se*** Petition for Writ of Certiorari which the United States Supreme Court denied on April 28, 1997. Williamson v. Florida, 520 U.S. 1200 (1997).

Williamson's final postconviction motion was filed on or about March 6, 2002. On July 23, 2004 the trial court held the Huff hearing. Afterward, it requested further briefing on the Gray issue. A summary denial was rendered on February 9, 2007 in which the court made findings of fact and legal conclusions all supported by the record and case law. (PC.5: 803-839). This appeal followed.

SUMMARY OF THE ARGUMENT

Argument I - The court properly found Williamson did not carry his burden since he did not specify prejudice and refuted by the record.

Argument II - Williamson's claim of ineffectiveness related to the waiver of immunity and a Richardson hearing were procedurally barred and without merit.

Argument III - The record supports the court's ruling this claim is legally insufficient and meritless as the jury heard Panoyan did not initially identify the shooter and Williamson did not show prejudice.

Argument IV - The claim of ineffectiveness related to counsel's handling of expert testimony was pled insufficiently, is procedurally barred, and meritless.

Argument V - Counsel was not deficient for waiving a curative instruction.

Argument VI - The court properly found Williamson failed to carry his burden under Strickland regarding not objecting to the state's closing argument.

Argument VII - The State's comment about "inexcusable" crimes was neither prejudicial nor fundamental error.

Argument VIII - The trial court properly found the claim regarding the prosecutor's use of "excuses" in his penalty phase opening was refuted by the record, legally insufficient for not showing prejudice, and procedurally barred.

Argument X - Williamson is procedurally barred from claiming the three attempted murder convictions were illegal as potentially based upon a theory of attempted felony murder.

Argument XI - Not only is the challenge to the prior violent felony aggravator barred, but there are other violent felony convictions supporting it.

ARGUMENT

ARGUMENT I

COURT PROPERLY DENIED CLAIM OF INEFFECTIVENESS REGARDING GOLDEN RULE ARGUMENT. (Restated).

Williamson asserts the court improperly denied his claim of ineffective

assistance of trial counsel for failing to object to the prosecutor's comments during opening statement. He categorizes the statements as "Golden Rule" arguments. Williamson failed to meet the pleading requirements of deficient performance or prejudice in his moving papers. Even here, he merely concludes these statements were prejudicial without any further showing. The court properly dismissed this claim, specifically citing to the trial record to support its denial.

To demonstrate counsel was ineffective, Williamson must establish a prima facie case that defense counsel's performance was deficient and that the deficient performance affected the outcome of the trial. A court's summary denial of a postconviction motion will be affirmed where the law and competent, substantial evidence support its findings. Diaz v. Dugger, 719 So.2d 865, 868 (Fla. 1998). In Lucas v. State, 841 So.2d 380, 388 (Fla. 2003), this Court stated that: "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record." See State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Peede v. State, 748 So.2d 253, 257 (Fla. 1999). Also, "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." McLin v. State, 827 So.2d 948, 954 (Fla.

2002) (quoting Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993)).

For a defendant to prevail on an ineffectiveness claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 688, 688-89 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001). At all times, the defendant bears the burden of proving not only counsel's representation fell below an objective standard of reasonableness, and was not the result of a strategic decision, but also actual and substantial prejudice resulted from the deficiency. See Strickland, 466 at 688-89; Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's conduct was "outside the broad range of competent performance under prevailing

professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89 (citation omitted). The ability to create a more favorable strategy years later, does not prove deficiency. See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). Moreover, "[c]laims expressing mere disagreement with trial counsel's strategy are insufficient." Stewart v. State, 801 So.2d 59, 65 (Fla. 2001). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Investigation (even non-exhaustive, preliminary one) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 (stating "[s]trategic choices made after less than complete

investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

Here the trial court found:

> A thorough review of both parties' arguments, the record, and the un-objected to statements demonstrates to this Court that: (1) the statements made by the prosecutor were taken out of context by the Defendant without reference to the entirety of the prosecutor's opening remarks (See the State's Response to the Defendant's Second Amended February 2002 Motion and the discussion on pages 20-27 which refers to the trial transcript regarding the statements which were made at trail and the questioning of the venire). ...; (2) the purposes of the questions posed to the venire were to expose or indicate any bias held by a potential juror with regard to personal choices or actions in general or the effect of fear on their own individualized behavior or whether anyone could believe that another person may or might react or act or fail to act because of being afraid; (3) the sub-claims are conclusory, legally insufficient, and do not warrant an evidentiary hearing.

(PC.5: 815).

On the "Golden Rule" claim the court found "Defendant did not support his claim or provide legal argument regarding the manner in which the prosecutor's statements actually prejudiced the Defendant or affected the outcome of his trial." The court found "the prosecutor's statements did not reach the level of an impermissible 'golden rule argument'" and:

> that the prosecutor did not ask the potential jurors to place themselves in Panoyan's shoes. Rather, a fair reading of the statements when viewed in the context in which they were made regarding the explicit torture Mr. Williamson threatened to perform on members of Panoyan's family and the generalized questions that the prosecutor

> posed to the venire during voir dire involving questions about fear, behavior, harm to one's children, etc. were extremely relevant on the issue of a juror's ability to make a fair and impartial decision without personal bias. It is this Court's opinion that it cannot be inferred from a clear reading of the record that the prosecutor asked the jury to place themselves in Panoyan's 'shoes' under the totality of the circumstances of this case nor did the prosecutor ask the jury to do so. ...This Court finds that the statements regarding the alleged bolstering of witness credibility, as claimed by the Defendant, are equally without merit and conclusory."

(PC.5: 816-817).

The court correctly concluded Williamson's allegations were conclusory and legally insufficient. Summary denial was appropriate. Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (opining conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"); Kennedy, 547 So. 2d at 913 (opining "defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). See Gorham v. State, 521 So. 2d 1067, 1069(Fla. 1988)(finding claim legally insufficient where defendant asserted that undisclosed photographs might have proven another person was responsible for crime). Williamson does not explain how he was prejudiced by counsel's alleged failure and therefore, the motion does not meet the pleading requirements of Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) and Way v. State, 760 So. 2d 903, 910 (Fla. 2000). In his moving papers, as in the current

brief, Williamson only asserted that he was prejudiced without specifically pointing out the nature of any supposed prejudice by demonstrating how the result of the trial would have changed.

The court also specifically referenced the complete record which clearly showed this claim was, and is, without merit. The court's factual findings that the prosecutor did not bolster the witness nor did he make a "Golden Rule" argument are clearly supported by substantial evidence from the trial record.

During opening the prosecutor explained to the jury that the defendant "would have gotten away with murder, but he made three mistakes," one of which was letting Panoyan live. (R 591). The State explained that the defendant's apparent show of mercy to Panoyan was a double-edged sword, coupled with:

> extortion and threats to do the same thing to Charles Panoyan and worse threats, that you know my reputation, you know what I can and will do and I mean what I say. If you breathe a word of my identity or my brother's identity to the police or to anybody I will go after your wife. I'll go after your children.
>
> The words of [the defendant] to Charles Panoyan included I will castrate your son. He didn't use those words, he used a little more graphic words to what he would cut off. I will rape your daughter and after I rape your daughter and after we gang rape your daughter I will cut out her guts and place them there for you to see. I will do the same thing to your wife. I will cut off her nipples. I will skin your children and your wife alive in front of you. And you know that I will do it.

(R 591-92).

The State continued:

> Charles Panoyan is the person I was eluding to in voir dire when I asked if you had ever been between a rock and a hard place. Charles Panoyan was a long time friend of the Williamson family. He was a co-worker and friend of Charlie Williamson the father of Dana Williamson and Rodney Williamson.
>
> Charlie Williamson was a long time friend of Charles Panoyan. They went back twenty years. Helped each other in the construction business.

(R 592).

A "Golden Rule" argument is when a prosecutor asks "the jurors to place themselves in the victim's position, [or] to think how they would feel if the crime happened to them." Shaara v. State, 581 So.2d 1339, 1341 (Fla. 1st DCA 1991). Contrary to Williamson's claims, the prosecutor's reference to Panoyan as "the person I was [alluding] to in voir dire when I asked if you [the venire] had ever been between a rock and a hard place," does not constitute an improper "Golden Rule" argument. The prosecutor's generic use of the word "you," without linking it to the case at trial, did not turn that questioning into a "Golden Rule" argument. (R. 306-8). See Grushoff v. Denny's, Inc., 693 So.2d 1068, 1069 (Fla. 4th DCA 1997)(holding that the generic use of the term "you" does not turn a remark into a "Golden Rule" argument, let alone a highly prejudicial argument that requires reversal despite objection); Sawczak v. Goldenberg, 710 So.2d 996 (Fla. 4th DCA 1998), (counsel's statement telling jury to "ask yourselves" is not golden rule argument). The prosecutor informed the jury during opening statement that

Panoyan was in a difficult position; he never asked the jury to put themselves into Panoyan's place. (R.591-2).

Williamson's reliance on Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985) is misplaced since the facts of that case are not at all analogous to those in this one. There the prosecutor made a classic "Golden Rule" argument when he asked "can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, fighting for her life, no lawyers to beg for her life." He specifically invited the jury to put themselves in the victim's place and to imagine the victim's final pain, terror and defenselessness. See also Urbin v. State, 714 So.2d 411, 421 (Fla. 1998)(holding prosecutor putting his own imaginary words into the victim's mouth--"Don't hurt me. Take my money, take my jewelry. Don't hurt me."– constituted impermissible "Golden Rule" argument); Reaves v. State, 639 So.2d 1, 5 (Fla. 1994)(holding comment "I submit to you that if you had a gun in your face in a store after hours at 3:00 in the morning is [sic] more than an eternity because . . ." was improper "Golden Rule" statement); Geske v. State, 770 So.2d 252, 253 (Fla. 5th DCA 2000)(holding comment "I submit to you if you were a young woman, 12:30 at night, and you're in your car and you have a man with his penis hanging out . . .," was "Golden Rule" comment).

Conversely, here, the prosecutor did not ask the jurors to place themselves in Panoyan's position and the comment cannot reasonably be interpreted as a "Golden

Rule" argument. See Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990)(holding statement that "we [the state] have an obligation to make you feel just a little bit ... of what Jeanne Bicker [the victim] felt," was not a pure "Golden Rule" argument and thus, not impermissible comment); Rimmer v. State, 825 So.2d 304 (Fla. 2002) (prosecutor's statement-- "I submit to you [co-defendant's] role was that of a look-out. That's why he did park in the front, that's why he initially came in the front door of the business. You know, we have some folks that were in the military and I'm sure you can, you can recall during tactical exercises"– was not "Golden Rule"); Parsonson v. State, 742 So.2d 858, 859 (Fla. 2d DCA 1999)(holding the prosecutor's argument "how are you going to get around that," was not "Golden Rule" violation but merely rhetorical). As in Parsonson, the prosecutor's statement in this case was merely rhetorical, and did not come close to a "Golden Rule" argument. The record refutes Williamson's claim.

Moreover, Williamson has failed to show the necessary prejudice because he has failed to show a reasonable probability the result of the proceeding would have been different had counsel objected. Because the comment is not a "Golden Rule" argument, any objection would have been overruled and any motion for mistrial denied. See Pagan v. State, 830 So.2d 792 (Fla. 2002)(holding motion for mistrial was properly denied where comment did not constitute "Golden Rule"). Further, even if the comment could be considered "Golden Rule" it was a single, isolated

comment that would not have warranted a mistrial, required reversal or constituted fundamental error. See Davis v. State, 604 So.2d 794 (Fla. 1992)(holding mistrial not warranted where "Golden Rule" comment came at end of lengthy and otherwise unemotional argument and was not so egregious as to fundamentally undermine jury's recommendation); Geske v. State, 770 So.2d 252 (Fla. 5th DCA 2000)(holding single, isolated comment does not constitute reversible error); Grant v. State, 677 So.2d 45 (Fla. 3d DCA 1996) (same).

Three eyewitnesses testified to the events of the night of Decker's murder--her husband, father-in-law and Panoyan. Donna's husband and her father-in-law described in detail the armed robbery that occurred that night. (R 1061-80, SR 59-85). They recounted how they were bound, gagged and shot in the face/head by the masked gunman. Panoyan told the jury he was confronted outside the Decker residence by Williamson and his brother Rodney, when he went to his truck, and was told they were there to steal. They threatened to mutilate and to kill him and his family if he told the police.

Three inmates also testified regarding Williamson's inculpatory statements to them. Williamson spoke to inmate O'Brien about the details of the robbery/murder and referred to himself as the gunman. (R 1540-41). He admitted that the police had his hat and utility belt, which he had left in Panoyan's truck. (R 1540, 1572). Williamson gave details to inmate Luchak. (R 1899-1901). He

admitted that the hat found at the scene was his. (R 1925). Inmate Aragones testified Williamson admitted he had tied up the family and shot them all. The mother died. (R 2491). Finally, Williamson admitted to police that the hat found was his that "came up missing from [his] house in Florida." (SR 13-14). Williamson theorized that his brother Vernon must have planted it. (SR 14, 22). Williamson admitted his brother Rodney owned a utility belt that looked just like the one found in Panoyan's truck. (SR 15). Based on the evidence, there is no reasonable probability that the single, isolated comment would have changed the trial outcome; therefore, any error was harmless. The court rested its factual finding that no "Golden Rule" argument even occurred on competent substantial evidence. Its denial of this particular ineffectiveness of counsel claim was proper under the law and should be affirmed.

ARGUMENT II

THE COURT PROPERLY DENIED CLAIM OF INEFFECTIVENESS REGARDING THE IMMUNITY WAIVER.

In his next claim Williamson contends that his trial counsel was ineffective for failing to object to the admission into evidence of Panoyan's written waiver of immunity and for failing to object to the trial court's inadequate Richardson hearing on the matter. He was prejudiced, Williamson contends, because this material improperly bolstered Panoyan's credibility which was crucial to the State's

case. The court properly found the claims were procedurally barred and meritless.

Trial court found:

> As to the Defendant's claim about Panoyan's written waiver of immunity, the record reflects that when the complete interchange between both parties' counsels and this Court is read in the actual context in which the discussion and objections were made: (a) defense counsel was not and had not been precluded from questioning Panoyan during his deposition about any deals he may have been offered by the State or any deals he may have made with the State, (b) although defense counsel claimed at a sidebar that prior to the trial he had not seen the waiver, the element of surprise could not have been validly claimed in the instant case because at Panoyan's deposition, defense counsel had the opportunity to inquire about any deals which may 'have been cut' (R. 2213-2219) and a Richardson inquiry was, indeed, held. ... Additionally, this Court finds that the record supports the State's contention that any error, if at all, was harmless beyond a reasonable doubt, and this Court's decision to admit into evidence the written waiver over defense counsel's objection was not for the purpose of bolstering Panoyan's credibility, rather, as this Court explained at sidebar, the State's credibility was in issue as was the existence or non-existence of any deals which may have been offered or actually made. The written waiver of immunity was considered only to be a document which reduced to writing what the agreement [the alleged waiver of immunity] was. **In this case, there was no agreement.**"

(PC.5: 818-819).

As the court mentioned, trial counsel objected to the introduction of Panoyan's written waiver of immunity and thus, the matter was preserved for appellate review. Muhammad v. State, 603 So. 2d at 489. During the State's direct examination of Panoyan, he was asked whether he had testified before the grand jury. When Panoyan answered "yes" defense counsel requested a side bar, arguing

he had not previously seen the waiver of immunity form that the State was now seeking to introduce and that he was precluded from asking Panoyan questions about it at deposition. (R. 2212). Defense counsel clarified that, at the deposition, when he "approached the subject about the grand jury testimony, [he was] precluded from going into that." (R. 2213). The State explained that defense counsel was precluded only from inquiring about the substance of Panoyan's testimony before the grand jury. (R. 2213).

The court noted that defense counsel had the right to go into the subject matter of any deals, whether there were any deals with the State:

> THE COURT: But you certainly had a right to go into it [whether any deal was made], and I am sure you did, as a competent attorney. Well, what deal was made with the State?
> THE PROSECUTOR: Exactly. No deal with the State . . . . he waived immunity. There was no immunity given. That's what he said. That's what he told him. He was given nothing.
> THE COURT: Well, then this is no surprise to the defense.
> THE STATE: Of course not.
> THE COURT: All this document does, it codified what Mr. Panoyan I am sure said in deposition.
> THE STATE: Exactly.

(R. 2213-14). The court stated that this could not be a surprise if defense counsel was allowed to go into the area of whether any deals were cut at deposition. (R. 2214). Defense counsel replied that the State should be limited to the answer "no" there were no deals and the document (written waiver) should be precluded as irrelevant because it goes to witness credibility. (R. 2214). The court disagreed:

> THE COURT: It doesn't go to the witness. It goes to the credibility of the State when he says, I didn't make any secret deals with the prosecution in this case. This document reflects that there was a waiver of immunity signed allegedly by Charles Panoyan where he is saying . . . when I testify, I am not under any grant of immunity. That means the State, if they wanted to, could prosecute me or continue to prosecute me for this matter for which I am voluntarily giving testimony.
> THE STATE: Which is exactly what he told me in his deposition, too.
> THE COURT: Well, the document certainly isn't any surprise. It is simply reduced to writing what the agreement was. There was the agreement being no agreement. The agreement being there was no deal made. That they could, if they wanted to, prosecute Mr. Panoyan, and he could actually incriminate himself in front of the grand jury, and it can be used against him. That's the waiver of it. That's just what that document says. Certainly no harm, no prejudice to the defense. All right. So I'm going to permit it.
> You want to treat this as a Richardson hearing?
> There is three prongs on a Richardson test. I mean, it is harmless. It is not even prejudicial. The defense was aware that there were more deals made; and therefore, I am going to permit it . . . . Since the deposition of Charles Panoyan certainly brought this out, this is nothing- no surprise.

(R. 2215-16).

With that the sidebar concluded and the State resumed questioning of Panoyan, eliciting that he remembered the document and remembered signing it (R. 2217). The State offered the document into evidence and it was admitted. Despite the foregoing lengthy sidebar, Williamson argues that defense counsel failed to object to the admission of the written waiver because he failed to object at the time the evidence was actually introduced. Defense counsel was not required to renew his objection after the trial court had just ruled against him sidebar. The

purpose of a contemporaneous objection is to put the trial court on notice that potential error has occurred and to give the trial court an opportunity to pass on the matter and correct any error. See Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Here, defense counsel clearly apprised the trial court of his objection to admission of the document at sidebar and the court had the opportunity to pass on the matter. Further argument on the point would have been fruitless; the argument was clearly preserved for appellate review. See Thomas v. State, 419 So.2d 634, 635 (Fla. 1982)(holding that objection to State's closing argument and request to make a motion, which the trial court denied, sufficed to preserve the point on appeal, as further argument on the point would have been pointless and defense counsel properly acceded to the trial court's direction); Hunt v. State, 613 So.2d 893, 898 (Fla. 1992)(holding futile efforts are not required to preserve an issue for appeal).

Further, Williamson claims that the failure to object to the actual admission of the written waiver compromised the fundamental fairness of his trial. A claim that evidence was improperly admitted is fundamental error and can always be raised on direct appeal. Archer v. State, 673 So.2d 17, 21 (Fla. 1996), relied upon by Williamson, is inapplicable for that reason. While the court noted that Archer had failed to object to jury instructions at trial, it also noted that it had reviewed the claims and did not find any fundamental error. Thus, Williamson's argument is procedurally barred as it could/should have been raised on direct appeal, even if

counsel had not objected. See Rivera v. State, 717 So.2d 477, 487 (Fla. 1998)(holding ineffective assistance claim based on counsel's failure to object to certain testimony was barred as it could/should have been raised on appeal).

The record clearly supports the court's finding that a Richardson hearing occurred; the adequacy or inadequacy of it surely could have been raised on direct appeal without a specific objection by counsel. Consequently, this claim is likewise procedurally barred. Muhammed, 630 So.2d at 489.

Williamson's contention that defense counsel failed to object to the admission of Panoyan's written waiver of immunity is, as demonstrated above, refuted by the record. (R 2212-17). The trial court correctly denied this claim since Williamson failed to meet either prong of Strickland. Trial counsel was not deficient since he did object and apprise the court of his position against admitting the written waiver. Further, Williamson cannot demonstrate the requisite prejudice because the trial court actually considered the matter and ruled against him.

The court found, based upon specific record cites, it conducted a Richardson hearing at the trial. When a court is given notice of an alleged discovery violation, it must conduct a hearing in accordance with Richardson v. State, 246 So. 2d 771 (Fla. 1971), to consider whether the discovery violation was inadvertent or willful, whether it was trivial or substantial, and whether it affected the defendant's ability to prepare his case (i.e. whether there was undue prejudice to the defense). Id. at

775. The court has broad discretion in determining whether the defendant was prejudiced, and in determining what measure would best remedy the situation. See State v. Tascarella, 586 So. 2d 154, 157 (Fla. 1991); Lowery v. State, 610 So. 2d 657, 659 (Fla. 1st DCA 1993); Poe v. State, 431 So. 2d 266, 268 (Fla. 5th DCA 1989); Wright v. State, 428 So. 2d 746, 748 (Fla. 1st DCA 1983), affirmed, 446 So. 2d 86 (Fla. 1984).

The record shows the court conducted a Richardson inquiry and found the non-disclosure harmless, not prejudicial, and that the defense was aware, through the deposition of Panoyan, that no deals were made; therefore, this was no surprise. (R. 2215-16). Even if the Richardson hearing was inadequate, it is well-established, a court's failure to conduct a proper Richardson hearing does not constitute *per se* reversible error. State v Schopp, 653 So. 2d 1016, 1019 (Fla. 1995). Instead, a court's failure to conduct a Richardson hearing is subject to harmless error. Id. In determining whether a Richardson violation is harmless:

> the appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefitted the defendant. In making this determination every conceivable course of action must be considered. If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense

> was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

Schopp, at 1020-21.

Applying this analysis here, any error was harmless as the court found. The defense would not have altered its trial preparation or strategy had it known about the written *waiver* of immunity. Indeed, the main defense goal was to impeach Panoyan's credibility so the jury would discount his testimony, which was particularly harmful to Williamson. The gist of the defense objection was that this document added to Panoyan's credibility. The defense trial strategy would have remained the same. The admission of this evidence did not prejudice the defense. The court properly denied this claim as procedurally barred and without merit.

ARGUMENT III

> COURT PROPERLY DENIED RELIEF SINCE WILLIAMSON FAILED TO CARRY HIS BURDEN FOR A CLAIM OF INEFFECTIVENESS UNDER STRICKLAND WITH REGARD TO IMPEACHING PANOYAN AS LEGALLY INSUFFICIENT AND WITHOUT MERIT. (Restated).

Williamson claims that trial counsel was ineffective for failing to impeach Panoyan with his original statement to police, taken on November 5, 1988, where he claimed not to know whether the stocking-masked perpetrator's race was black or white. The statement is in stark contrast, he contends, with Panoyan's trial

testimony which positively identified Williamson as the perpetrator. The trial court properly found this claim legally insufficient and without merit.

Trial court found:

> ...that Capital Collateral Counsel initially mischaracterized Panoyan's November 1988 statements. ... Additionally, the jury was informed that Panoyan failed to identify the Defendant or his brother in Panoyan's initial statement to the police that evening, even though Panoyan provided an account of what happened at the Decker home. However, he gave inaccurate information as to the identity of the assailant. (R. at 2146). On direct examination, the State elicited from Panoyan that because he was afraid, he gave an inaccurate description to the police because of what he saw at the Decker home that evening and what Dana Williamson said he would do to Panoyan's family.
>
> The record also reflects that defense counsel attacked Panoyan's credibility from the onset of the trial, starting with his opening statement arguing that "Panoyan was going to come in and tell the jury 'one hell of a story' to avoid the electric chair." (Citation omitted, R. 675-676). Furthermore, defense counsel also reminded the jury that Panoyan was an original co-defendant in the case who never identified the Williamsons until three years after the crimes were committed and counsel also warned the jury that "the State had made a deal with the devil and that [the jury] should listen closely to Panoyan's account of the events which did not match .. The statements of the other two innocent victims." (Citation omitted).
>
> The instant record reflects that on Panoyan's cross examination, trial counsel did elicit from Panoyan that he was originally a defendant in the case, was arrested in May of 1990 and he was held without bond for eighteen months until he was "inexplicably" released on his own recognizance in November of 1992. trial counsel also elicited testimony from Panoyan that he never requested a court order to be kept separate and apart from Williamson while both were held in the same jail during that year an done half (½) and that Panoyan maintained a "friendship" with Williamson, and he laughed and joked with Williamson in jail. Panoyan was also impeached as to his deposition testimony regarding how he had spent his time waiting for Robert Decker to return to his home and Panoyan was also impeached

> about the cowboy hat worn by Dana Williamson (R. 2299-2306, 2322-23, 2332).
>
> Contrary to the Defendant's assertions, this Court finds that trial counsel continued to attack Panoyan's credibility describing each of the conflicts in Panoyan's testimony and trial counsel was constantly reminding the jury that Panoyan was initially thought to have been guilty of the crimes. Citation omitted
>
> **As to Claim III, this Court finds that the Defendant: (1) pled a conclusory claim which on its face is legally insufficient. Arguendo, even after reviewing the merits of the "incomplete" claim (2) this Court finds that CLAIM III is factually refuted by the record.**

(PC.5: 820-822).

The court properly applied the law when finding this claim insufficiently pled. Conclusory allegations are legally insufficient on their face and may be denied without a hearing. Ragsdale, 720 So. 2d at 207 (opining that a summary or conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"); Kennedy, 547 So. 2d at 913 (opining that "[a] defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). See Gorham, 521 So. 2d at 1069 (finding claim legally insufficient where defendant asserted that undisclosed photographs might have proven another person was responsible for crime). Williamson failed to explain how the defense was prejudiced by counsel's alleged failure and, therefore, does not meet the pleading requirements of Occhicone, 768 So. 2d at

1042 and Way, 760 So. 2d at 910.

Likewise, the court found the record refuted Williamson's claim of deficient performance. The jury already knew Panoyan failed to identify the Williamson brothers in his original statement and actually gave the police an inaccurate description. (R. 2146). The state elicited that testimony on direct examination. Panoyan explained that he did so because he was afraid of what Williamson would do to his family. (R. 2146). That fact distinguishes this case from Kegler v. State, 712 So.2d 1167 (Fla. 2d DCA 1998), relied upon by Williamson. In Kegler the jury *never heard* the information about a witness's contradictory police statement because the defense counsel failed to impeach him. The important fact is whether the jury knew about the contradictory statement, not which counsel brought forth that information.

In addition to not showing deficiency, Williamson failed to show prejudice. There is no reasonable probability that the trial result would have changed had defense counsel impeached Panoyan with that one statement from the police report. Defense counsel vigorously attacked Panoyan's credibility from the very beginning of the trial, starting with opening argument, where he declared that Panoyan would come in and tell the jury "one hell of a story" to avoid the electric chair. (R. 675-76). On cross-examination, defense counsel elicited that Panoyan was originally a defendant in this case, arrested in May, 1990 and held without

bond for 18 months until November, 1992 when he was inexplicably released on his own recognizance. (R. 2299-2302). Defense counsel reminded the jury that Panoyan was originally a co-defendant who never identified Williamson as the perpetrator until 3 years after the crime. He warned the jury that the State had made a deal with the devil and that it should listen closely to Panoyan's account of the events which did not match up with that of the other two innocent victims.

Counsel brought out the fact that Panoyan laughed and joked in court with Williamson during those 18 months and never asked for an order to keep him separated from Williamson (R. 2305-06). Counsel impeached Panoyan with his deposition testimony regarding how he spent his time waiting for Bob Decker to return home (R. 2322-23) and whether he ever saw the cowboy hat that Williamson was wearing again after Donna's murder (R. 2332).

Defense counsel continued his attack of Panoyan in closing argument, telling the jury that Panoyan has "told various versions of what happened," (R. 3005) and reminding the jury that Detective Woodruff thought Panoyan was lying from the beginning and that's why he swore out an arrest warrant against him and testified against him at his bond hearing (R. 3005-06). Defense counsel went through each conflict in Panoyan's version of what happened that night when compared with victim Bob and Clyde Decker's testimony. (R. 3006-19). He told the jury that it should question whether Panoyan had set up the whole thing.

Despite defense counsel's attack on Panoyan's credibility, the jury chose to believe that Williamson was the murderer; impeachment with that one statement would not have changed the jury's mind. The court properly summarily denied this claim.

ARGUMENT IV

TRIAL COURT PROPERLY DENIED RELIEF WITH REGARD TO QUESTIONING AN EXPERT WITNESS AND NOT SEEKING A FRYE HEARING AS LEGALLY INSUFFICIENT, PROCEDURALLY BARRED, AND WITHOUT MERIT. (Restated).

Williamson contends that his trial counsel was ineffective for failing to voir dire the State's expert, Dr. Richard Ofshe, on how his testimony on "influence and control" would assist the jury in understanding the evidence and for failing to request a Frye hearing on Dr. Ofshe's testimony. The court properly found Williamson's contentions were legally insufficient, barred, and meritless.

The trial court held:

> Contrary to Defendant's assertions, the record reflects that defense counsel had contact with Dr. Ofshe, was completely aware of his existence and the extent of the subject matter of Dr. Ofshe's testimony. Defense counsel informed this Court that he knew Dr. Ofshe's statement to the prosecutor. additionally, defense counsel also read Dr. Ofshe's interview with Panoyan (R. 2197-98). Since defense counsel was familiar with and had reviewed Dr. Ofshe's materials, he only needed ten (10) minutes to speak with Dr. Ofshe (R. at 2222).
>
> This Court agrees ...that the Defendant's arguments lack merit. First, ..., Capital Collateral Counsel has not alleged specific facts or information which would or could have been elicited during a voir dire of Dr.Ofshe that would have excluded Dr. Ofshe as an expert witness. This Court finds that the conclusory allegations made in the Defendant's Second Amended Motion are insufficient to raise a claim

> for relief. ...
>
> In the instant case, this Court agrees ... that the question of the propriety of this Court's admission into evidence of Dr. Ofshe's testimony was an issue which should have been raised on direct appeal. The issue was not raised and is therefore, procedurally barred. ... Even if this Court were to review the merits of the Defendants' claim, the record reveals that competent and substantial evidence about Dr. Ofshe was presented for this Court to have found Dr. Ofshe to be an expert in his field .... This Court also reiterates the legal principle regarding that the propriety of a trial court's decision to admit evidence at trial is an issue to be raised on direct appeal. ...
>
> This Court finds that there was no omission on the part of trial counsel because the opinion rendered by Dr. Ofshe was "pure opinion" and was not subject to a Frye test. The jury had the opportunity to accept or reject Dr. Ofshe's testimony ....
>
> **As to CLAIM IV and any sub-claims contained therein, this Court finds that the Defendant's claims are either barred or without merit.**

(PC.5: 823-826).

Williamson never alleged which facts or information would have been elicited during voir dire which would have required the exclusion of Dr. Ofshe as an expert. The court's summary denial was appropriate. The factual allegations must be specific and not mere conclusions. Reaves v. State, 593 So. 2d 1150 (Fla. 1st DCA 1992). For instance, if the claim is that counsel was ineffective for failing to call witnesses, the names of the witnesses and their potential testimony must be alleged to constitute a facially sufficient claim. See Sorgman v. State, 549 So. 2d 686 (Fla. 1st DCA 1989). Conclusory allegations are legally insufficient on their face and may be denied without a hearing. Ragsdale, 720 So. 2d at 207; Kennedy,

547 So. 2d at 913; See Gorham, 521 So. 2d at 1069.

Further, regardless of an objection by defense counsel, the trial court was required to determine whether Dr. Ofshe's testimony would assist the jury in understanding the evidence before accepting him as an expert. Therefore, Williamson could/should have raised this challenge on direct appeal as trial court error and is now procedurally barred from raising it.

Moreover, defense counsel was not deficient for neither conducting voir dire on Dr. Ofshe nor challenging his testimony as not helpful to the trier of fact. As noted above, the trial court had to decide whether the testimony was helpful before accepting Dr. Ofshe as an expert in the area of "influence and control." Defense counsel cannot be deemed deficient for failing to raise an issue that the trial court had to consider before accepting the expert.

Williamson failed to meet the prejudice prong under Strickland because there is no "reasonable probability" that the result of the proceeding would have been different had defense counsel questioned Dr. Ofshe or challenged his testimony. The trial court found Dr. Ofshe's testimony would aid the jurors in understanding the issues and Williamson failed to allege what information would have been elicited which would have changed the trial court's ruling. In determining whether an expert's testimony will aid jurors' understanding of the issues, the court looks to whether a reliable body of scientific or other specialized

knowledge has developed to support the opinion testimony. See generally Charles W. Ehrhardt, Florida Evidence section 702.1 (citing Ramirez v. State, 651 So.2d 1164 (Fla. 1995). Id.

Here, Dr. Ofshe testified that he has specialized in the area of extreme influence and control and the tactics used therein for the past 20 years. He's been accepted as an expert in the field of extreme techniques of influence and control on 25 occasions and in 9 different states. (R. 2329-31). His educational background includes a PhD in sociology and a Bachelor's degree in psychology. Dr. Ofshe has been a sociology professor at the University of California at Berkley since 1971 and his principal work has been in the area of social psychology. (R. 2225-27).

Dr. Ofshe's doctoral dissertation was about how people try to resolve "reference conflicts," which are competing demands on their behavior. He was awarded the Pulitzer Prize in 1979 for distinguished public service regarding his investigation into a local cult. Dr. Ofshe has authored numerous articles and books in his field (3 ½ pages of his CV) and presented his findings at numerous workshops and seminars (3 2/3 pages of CV). (R. 2226-30). The trial court had ample evidence to find Dr. Ofshe qualified as an expert on "influence and control;" and, therefore, the court's summary denial was appropriate.

Williamson's second argument, that defense counsel was ineffective for failing to request a Frye hearing on "influence and control" is likewise without

merit. Not all expert testimony must meet the Frye test in order to be admissible. See Flanagan v. State, 625 So.2d 827, 828 (Fla. 1993). Florida courts distinguish between pure opinion testimony and opinion testimony that is based upon a psychological profile or syndrome. "[P]ure opinion testimony, such as an expert's opinion that a defendant is incompetent, does not have to meet Frye, because this type of testimony is based on the expert's personal experience and training." Id. See also Westerheide v. State, 767 So.2d 637, 657 (Fla. 2000); Hadden v. State, 690 So.2d 573 (Fla. 1997). The jury is able to analyze this testimony as it would any other personal opinion or factual testimony from a witness. Id. "Profile" or "syndrome" testimony, on the other hand, must be subjected to a Frye analysis because it "relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony." Id. "The jury will naturally assume that the scientific principles underlying the expert's conclusion are valid." Id.

"'Pure opinion' refers to expert opinion developed from inductive reasoning based on the experts' own experience, observation, or research, whereas the Frye test applies when an expert witness reaches a conclusion by deduction, from applying new and novel scientific principle, formula, or procedure developed by others." Holy Cross Hosp. Inc. v. Marrone, 816 So.2d 1113, 1117 (Fla. 4th DCA 2001).

A review of Dr. Ofshe's testimony confirms that his was pure opinion

testimony based upon his own experience, research, and observation. Dr. Ofshe interviewed Panoyan and reviewed Panoyan's depositions and police statements. (R. 2232). Based on his review of those materials, Dr. Ofshe opined that:

> [R]eviewing the history of Mr. Panoyan's experience in connection with the invasion and the death and the assaults at the Decker residence, and over the course of the investigation that followed, including his incarceration and ultimate decision to speak about what happened, the pattern that he displays is a pattern of someone who has, for one (sic) of a better word, been terrorized, and someone who is acting in response to a credible threat, not only to himself, but also, and to some degree, more importantly, to members of his family.
>
> And that the manner in which he responds at various points indicates quite clearly that he has a great concern about something happening to his family, which he revealed to me in the interview I did with him, and I gather, revealed again in testimony that you heard.
>
> And there is a sequence over the course of his involvement that's consistent with this, including how he tried to compromise between the fear that he had for himself, the fear that he had for his family and his desire to aid the Decker family.
>
> The point at which he chose to do certain things reflects the kind of threat and fear he was acting under, and the particular decisions that he made to me are completely consistent with what he says about the sort of threats that he was exposed to.

(R. 2233-34). Williamson argues that Dr. Ofshe's use of the word "pattern" in the above quote means that his testimony was profile or syndrome testimony, requiring a Frye hearing. However, read in context, it is clear that Dr. Ofshe was merely opining that Panoyan's behavior was that of someone who had been terrorized. Dr. Ofshe never testified that Panoyan fit any "profile" or "syndrome" and it is clear from his testimony that he did not rely upon any procedure, techniques or studies

developed by others in reaching that conclusion. Rather, Dr. Ofshe relied solely upon his review of the materials, interview with Panoyan and his own experience, observation and research in determining that Panoyan had been terrorized. That is the classic definition of "pure opinion" testimony. See also Westerheide, 767 So.2d 637 at 657 (noting expert psychologists' use of Minnesota Multiphastic Personality Inventory (MMPI) to predict defendant's potential for re-offense did not require Frye hearing because the experts' testimony was based on their training and experience and not on any psychological profile or syndrome designed to identify violent sexual predators); Florida Power & Light v. Tursi, 729 So.2d 995, 997 (Fla. 4th DCA 1999)(holding ophthalmologist's testimony that cataract was caused by electrical transformer fluid was opinion testimony that did not need to meet Frye standard).

Hadden, 690 So.2d 573 at 579-81, relied upon by Williamson, is distinguishable because the expert's testimony in that case clearly went beyond "pure opinion" testimony since his opinion was based, in part, upon syndromes, conclusions derived from studies and tests, and related diagnostic criteria. Jordan v. State, 694 So.2d 708 (Fla. 1997), is also distinguishable because the expert in that case testified that the defendant met a certain, complicated "profile." See also Marrone, 816 So.2d at 1117-18 (holding that expert's testimony as to when patient's cancer spread to lymph nodes was subject to Frye hearing because it was,

at least in part, derived from staging studies done by others); Cerna v. South Florida Bioavailability Clinic, 815 So.2d 652 (Fla. 3d DCA 2002) (expert's opinion in pharmaceutical and chemical ingestion cases are uniformly tested in Florida under Frye). Because Dr. Ofshe's testimony was "pure opinion" and not subject to a Frye hearing, counsel cannot be considered deficient for failing to request a such a hearing. The lower court based its summary denial on competent, substantial evidence which this court should affirm.

ARGUMENT V

TRIAL COURT PROPERLY DENIED INEFFECTIVE CLAIM FOR NOT REQUESTING A CURATIVE INSTRUCTION AS LEGALLY INSUFFICIENT AND WITHOUT MERIT. (Restated).

Williamson claims that trial counsel was ineffective for failing to request a curative instruction after the trial court sustained his objection to "the State's explicit attempt to link a hypothetical with the believability and/or credibility of the threat to which Panoyan was exposed." (IB p. 30). Williamson's claim is legally insufficient and without merit.

In its order denying relief, the trial court stated:

> This Court further agrees ... that because defense counsel's objection was sustained before any testimony was heard by the jury, the alleged impermissible testimony as not heard by the jury. Therefore, there was not error and this sub-issue is moot. The Defendant has failed [sic] set forth the contents of any proposed curative instruction which could or should have been requested and, the Defendant's claim that Dr. Ofshe allegedly "vouched"for

> Panoyan's credibility is not supported by any record references and is therefore, insufficiently pled.
>
> Additionally, this Court has reviewed the record and has found that the Defendant mischaracterized the circumstances surrounding Dr. Ofshe's testimony. The portion of Dr. Ofshe's testimony was not objected to (R. 2233-34) and the sustained objection cited by the Defendant was the prosecutor's question which **was not** answered by Dr. Ofshe (R. 2237-38). Furthermore, with respect to the alleged failure to request a "curative instruction," there was no error and therefore, **this Court finds that defense counsel's actions were not deficient**.
>
> **As to CLAIM V and any sub-claims contained therein , this Court finds that the Defendant's claims are either barred or without merit.**

(PC.5: 826-827).

A detailed look at the record cited by the court substantiates the court's ruling. Dr. Ofshe began his testimony by explaining that he interviewed Panoyan and reviewed his depositions and police statements. (R. 2232). Based upon his review of those materials and the interview, Dr. Ofshe opined that:

> [R]eviewing the history of Mr. Panoyan's experience in connection with the invasion and the death and the assaults at the Decker residence, and over the course of the investigation that followed, including his incarceration and ultimate decision to speak about what happened, the pattern that he displays is a pattern of someone who has, for one (sic) of a better word, been terrorized, and someone who is acting in response to a credible threat, not only to himself, but also, and to some degree, more importantly, to members of his family.
>
> And that the manner in which he responds at various points indicates quite clearly that he has a great concern about something happening to his family, which he revealed to me in the interview I did with him, and I gather, revealed again in testimony that you heard.

> And there is a sequence over the course of his involvement that's consistent with this, including how he tried to compromise between the fear that he had for himself, the fear that he had for his family and his desire to aid the Decker family.
>
> The point at which he chose to do certain things reflects the kind of threat and fear he was acting under, and the particular decisions that he made to me are completely consistent with what he says about the sort of threats that he was exposed to.

(R. 2233-34). The State then asked Dr. Ofshe the following hypothetical:

> Doctor, for the sake of a hypothetical, if, as you have gleaned from your interview and depositions, if Mr. Panoyan was present at a scene of a home invasion robbery where two men whom he knew who were the sons of a good friend of his, placed guns in his face. He was told that his family was being watched. That he would be watched by one of these gunman upon re-entry into the residence, and he was told that if he did not obey the demands of these two gunman, harm would come to his family.
>
> That there was another person in the vicinity who would be signaled, and that person would contact another individual who was surveilling the Panoyan residence where his wife and three children resided. And assume too, that there came a time when this man, Mr. Panoyan, was released that horrible things would happen to his family. That his young children would be mutilated. That his wife would be mutilated and gang raped in various horrific ways and that this harm would befall his family and himself before his own eyes as each and every member of his family would be skinned alive.
>
> In addition to being subjected to this, and assume, Dr, Ofshe, that this man, Charles Panoyan, was told that if he breathed a word as to the identity of either of these two gunman, that all of these things would befall his family and himself.
>
> Assume, too, that he was placed in a position at some point during the home invasion, after the rest of the family had been secured, in which he was subjected to some measure of force and told what would happen to him if he did not abide by the threats of the gunman.
>
> Are the kinds of control, doctor, exercised by Dana Williamson and Rodney Williamson over Charles Panoyan sufficient to explain

his behavior?

(R. 2234-35). Before Dr. Ofshe could answer, defense counsel objected, stating:

> DEFENSE COUNSEL: Judge, if I could just interpose an objection here. I just want to make certain that this is a hypothetical that Mr. Cavanagh is presenting.
> THE COURT: I believe he rephrased it with a hypothetical; am I correct, Mr. Cavanagh [prosecutor]?
> THE STATE: Yes, sir.
> THE COURT: With that understanding, I heard him say hypothetically and assuming thus and thus.
> DEFENSE COUNSEL: Thank you, Judge.
> THE COURT: All right.
> DR. OFSHE: Yes, especially— I mean, as you give the hypothetical, it collapses the time frame, which is extremely important. The points that you mentioned were introduced in a way that in combination with what I'm told, Mr. Panoyan knew about the history of the people involved, the way in which the threat was induced. That there were other people involved, which was extremely important. That it was more than just two people involved in this home invasion. That happened at a point in this process very early on before. The significance of that was really clear, and perhaps, before it was even thought through, as to how important this would be later.
>
> So that early on he was told that there was someone in the bushes. He was also told that there was someone who was surveilling his house, and as he told me, he was told that there was someone at his house and he at that point - – -

(R. 2236). Defense counsel objected again, arguing that they were "talking about a hypothetical that was presented by the prosecutor," and that "the witness should limit his answer to that hypothetical." (R. 2236-37). The trial court sustained the objection. (R. 2236-37). The prosecutor rephrased the question as follows:

> THE STATE: Okay. With respect to the extent that the hypothetical includes the fact that Mr. Panoyan was told that there was another

> confederate hiding in the bushes and that this person was capable of signaling another individual who was surveilling the Panoyan family residence and was prepared to exercise harm upon his family, how does that interface, doctor, with the believability and/or credibility of the threat to which Mr. Panoyan was exposed.
> DR. OFSHE: Well - - -
> DEFENSE COUNSEL: Judge, in reference to that question, I have got an objection, if we can come sidebar.

(R. 2237). With that, the court held the following sidebar conference:

> DEFENSE COUNSEL: Judge, as far as Dr. Ofshe's testimony, if he is going to testify as to his opinion based on his expertise on the hypotheticals that are given, that is not objectionable. But if Mr. Cavanagh is going to ask this witness to testify as to the credibility of Charles Panoyan, and to make a determination as to whether or not what Charles Panoyan told his doctor was credible, that's improper.
> THE STATE: What [defense counsel] is objected to is on a different wavelength from the approach that I am making. I'm - - my question is geared to the believability of the threat which in sociological terms increases the magnitude of it, and what I am asking the doctor to do is explain the sociological terms. I'm not talking in terms of Mr. Panoyan's credibility, but in terms of the objective aspect of the threat, itself.

(R. 2237-38). The court agreed that it was improper to talk about the credibility of the threat since the jury must decide whether the threat was even given, not the witness. (R. 2238). The court noted that they had to be careful to not ask the witness about the credibility of the threat; rather, the questions had to require Dr. Ofshe to assume a hypothetical situation and then ask what he would expect Mr. Panoyan's behavior to be under the hypothetical:

> THE COURT: So let's be careful about this. It is not the credibility of the threat. It is assuming this hypothetical, if we assume this

> hypothetical.
>
> What would you say about the behavior and the conduct of Mr. Panoyan? Is this what you would expect under this hypothetical? Because the hypothetical, itself, is a jury question. All you are simply saying is this. Assume this hypothetical as an expert. What would you expect from, as far as the behavior of the witness, Mr. Panoyan, what you would expect him to do or not to do? In other words, what he is indirectly saying without saying it to the jury, he is saying, ladies and gentlemen of the jury, if you find this hypothetical, which is your province, to be true and accurate, as an expert in the field, it is what I would expect or not expect a person to do, or their behavior, or act, or whatever might go through their mind.
>
> But when you start talking in terms of how credible was the threat, now you are mixing apples and oranges. You are asking him to comment on part of the hypothetical yourself, and I want you to keep away from that. You have already done what you need to do. You have given him the hypothetical.
>
> Now, all he has to do as an expert in the field is tell the jury, because, if the hypothetical is true, without actually saying that, then this is what I expect or don't expect, or this is how people act in conformity or not act —

(R. 2239-40).

Williamson argues that defense counsel was ineffective for not requesting a curative instruction after the trial court sustained his objection to the prosecutor's last question in the above quoted portion. As the court explained, this claim fails because Williamson failed to specify what "error" needed to be cured and the record does not support his position. The portion of Dr. Ofshe's testimony Williamson quoted was not objected to (R. 2233-34) and the sustained objection he cites was to a prosecutor's question that Dr. Ofshe did not answer (R. 2237-38). Since defense counsel's objection was sustained before Dr. Ofshe answered the

question, the jury did not hear any impermissible testimony, nor did the doctor give his opinion about the nature or veracity of any threat; there was no error to "cure." Further, although Williamson makes conclusory allegations throughout this point that Dr. Ofshe vouched for Panoyan's credibility, and the court sustained counsel's objections, the record does not support that contention. This Court should affirm the summary denial.

ARGUMENT VI

THE COURT PROPERLY DENIED RELIEF FOR WILLIAMSON FAILING TO CARRY HIS BURDEN REGARDING COUNSEL NOT OBJECTING TO THE STATE'S CLOSING AS LEGALLY INSUFFICIENT AND WITHOUT MERIT. (Restated).

Williamson next argues his trial counsel's failure to object to the prosecutor's closing argument deprived him of a fair trial and, thus, constituted ineffective assistance of counsel. Specifically, he contends the prosecutor: claimed the State filed charges because they were true; vouched for the credibility of Panoyan as well as for the believability of threats to him; and referred to a non-testifying witness's "statement." Trial counsel was not deficient for failing to object to these three comments during the prosecutor's guilt phase closing argument. These comments were not objectionable when viewed in the context of the arguments. Even if they were objectionable, Williamson cannot prove prejudice because there is no reasonable probability that the result of the guilt

phase would have been different had trial counsel objected. He asserts these comments were prejudicial because they impermissibly bolstered a "circumstantial" State case; he does not, however, detail the prejudice beyond that proclamation.

The court denied relief, finding this claim to be without merit.

> This Court also agrees that the prosecutor's comment that charges were filed against Dana Williamson was not an impermissible statement. Rather, the prosecutor was in the process of explaining to the jury the seventeen (17) counts and the factual bases supporting each count ®. 3062-63). Additionally, the prosecutor informed the jury exactly the opposite of what [defense counsel] has claimed, by making sure that the jury knew that the burden of proof was entirely the State's responsibility [citing State's Response at 60]. It is this Court's opinion that the prosecutor's statement was a fair comment on the evidence, and even if there was an error, the error was not fundamental and would have been harmless beyond a reasonable doubt.

(PC 5: 828-29).

The court also found that the prosecutor did not vouch for the witness.

> The prosecutor's argument was a generalized statement about witness credibility and he was not improperly "vouching" for the witness in question. Additionally, this Court's review of the second allegedly erroneous statement during closing argument reveals that the prosecutor's comments were considered a "fair reply" to defense counsel's statements ....
>
> This Court agrees with the State that the failure to object was neither fundamental error nor was the prosecutor's comment prejudicial to the Defendant. ... This Court finds that even if the comment was improper, it did not give rise to an error in which there would have been a reasonable probability that the outcome of the proceeding would have been different."

(PC 5: 898-30).

Defense counsel bracketed his closing arguments to the prosecutor's. He began the guilt phase argument by attacking the State's case. Defense counsel told the jury that the State put on 46 witnesses and 230 pieces of evidence, trying to make up in quantity what it lacked in quality. (R. 3002-04). Defense counsel argued that the State's whole case could be winnowed down to maybe 10 relevant witnesses to the events of November 4, 1988. Defense counsel then attacked the credibility of the witnesses who identified Williamson as Donna's murderer: Panoyan, an eyewitness to the murder; and inmates O'Brien, Luchak and Aragones, who each testified to inculpatory statements by Williamson. He pointed out that there was no physical evidence connecting Williamson to the murder other than a mass produced cowboy hat, commonly worn in Davie, Florida, and a Ninja outfit utility belt found in Panoyan's truck (which had the key to the handcuffs used on the Decker men).

The prosecutor responded by explaining that the State had not wasted the jury's time by presenting four weeks of testimony, 45 witnesses, and 230 exhibits; it had presented that much testimony and evidence because it had the burden of proving, beyond a reasonable doubt, that the defendant had committed first-degree murder and 16 other felonies. (R. 3057-58). He then summarized the law on first-

degree murder, telling the jury that it could either be premeditated or felony murder:

> The other way to commit first degree murder is if somebody dies or is killed during the course of committing a robbery or burglary. Which is also known as armed burglary. A burglary is a crime against property, against house. You also have robbery at the same time because you have people inside the house. Robbery is a crime against persons.
>
> You better believe that we filed the charges, because its warranted. Robbery against each person in the house who had property in the house that was taken or any control over that property. Burglary against house and two vehicles that were taken or anything taken out of the house.

(R. 3062-63). The prosecutor then listed each of the 17 counts against Williamson and explained the factual basis, based upon the trial evidence, for each count.

As seen from the flow of the argument cited above, the comment was simply part of an explanation as to why there were so many counts (17) as well as the factual basis for each count. The prosecutor simply told the jury the State had the burden of proof on each count which is that why it presented so many witnesses and exhibits.

Further, the cases relied upon by Williamson involve materially different comments from the one made here. Two of them involve prosecutors who actually stated that they thought the defendant was guilty, Buckhann v. State, 356 So.2d 1327 (Fla. 4th DCA 1978) ("don't you think for one second that the Sate of Florida does not believe that [defendant] is guilty, or we would not be here"); Reed v.

State, 333 So.2d 524 (Fla. 1st DCA 1976)("we prosecute them because we believe they are guilty of the crimes"). The others involved overt suggestions that the defendant was guilty-- "What interest do we as representatives of the citizens of this county have in convicting somebody other than the person –" Ruiz v. State, 743 So.2d 1, 5 (Fla. 1999), "It is not my job to prosecute innocent people," McGuire v. State, 411 So.2d 939, 940 (Fla. 4th DCA 1992), "I don't come into a courtroom with the wrong persons," Duque v. State, 460 So.2d 416 (Fla. 2d DCA 1984), and "Do you think that they would bring this to you and have the State spend its time and money if there wasn't evidence that they wanted you to consider?" Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984). The comment in this case cannot reasonably be construed as a suggestion the defendant was guilty.

The record also refutes the claim of deficient performance for trial counsel not objecting to the second alleged improper comment. Responding to defense counsel's attack on Panoyan's credibility and his assertion that Panoyan told several different versions of his story, the prosecutor stated:

> If you reflect back on the testimony right up all the way through Kelly Woodruff and Lieutenant Cavanagh and back to the testimony of Howard Leach, you heard the testimony of the officers who had contact with Panoyan at the beginning of the case. Panoyan hasn't told all these different versions. He would have you believe Panoyan told different versions. Panoyan has told one consistent version and going back to all the witnesses he has told one consistent version., He remember sit as he remembers it. The only difference is, initially he would not disclose Dana and Rodney's identity because he was scared

> for his life and for his family's life. That's the only thing he held back.
>
> And what did he tell officers throughout every sequence of the case that night, the next day, days later, and as Kelly Woodruff said, he said at least several times during the whole course of the investigation, I'm afraid for my wife and children. I'm afraid. He even came back down to the police station the next day or the police were asked to go out to his house. He was scared. How was he described? He was scared. He was scared, ladies and gentlemen.
>
> And as Doctor Ongley (sic) testified, this is not unusual. This is something that when somebody is subjected to very real, believable threats, that when he knows that the accuser or threatener is able to carry out, it is something a human being can react inappropriately to and be subjected to coercion and can come under the influence of coercive party, particularly when you're in between a rock and a hard place ...
>
> [Defense counsel] criticizes other aspects of Charles Panoyan's testimony. He says to you, just on the faith of Charles Panoyan's testimony alone. Which I suggest to you is credible.

(R. 3067-68, 3071-72). Williamson argues that the prosecutor improperly vouched for Panoyan by referring to the threats as "very real, believable" and suggesting his testimony was credible. It is clear from the record, however, that the prosecutor was merely arguing the credibility of the witness based on the evidence. See U.S. v. Fuentes, 877 F.2d 895(11th Cir. 1989)(holding that prosecutor who commented that a government witness's testimony was "very forthright" "very honest" and that he told the jury "the truth," was not vouching for the credibility of the witness, but rather, was proper argument of his credibility based on the evidence in the record).

The prosecutor was also attempting to rehabilitate Panoyan against whom defense counsel had launched a full credibility attack in his opening argument. His

comment was a fair reply" to defense counsel's contention that the jury should not believe Panoyan because of the conflicts in his version of the events, the fact that he took 3 years to come forward with the identification, and the essential unbelievability of his story. See Hazelwood v. State, 658 So.2d 1241, 1243 (Fla. 4th DCA 1995) (it is "universal that counsel is accorded a wide latitude in making arguments to the jury particularly in retaliation to prior comments made by opposing counsel.").

As noted in a preceding section, the court ruled that the expert could not opine on the credibility of any threat; that ruling did not affect the State's ability, even obligation, to argue its witness's credibility and testimony in closing argument. Arguing that a witness was credible based upon the testimony itself and the facts brought into evidence is not personally vouching for the witness. Further, the cases relied upon by Williamson are inapplicable here. In Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993), for example, the crux of the defense was that the police officers were covering up their excessive use of force by fabricating a story that he had tried to assault them. In closing, the prosecutor asked why the police would risk their unblemished records to lie in this case and referred several times to their unblemished records. However, there was no record evidence of the police having unblemished records and, therefore, such statements constituted impermissible bolstering. Reversal was warranted because the case came down to

a swearing match between the defendant and the officers. In Gorby v. State, 630 So.2d 544, 547 (Fla. 1993) this Court found no improper bolstering where the "prosecutor's comments simply drew the jury's attention to evidence of the expert's experience and qualifications after defense counsel sought to cast doubt on her testimony in cross-examination."

Trial counsel also was not deficient for failing to object to the prosecutor's reference to a third witness, Donna's baby Carl, who did not testify. (R. 3106). From the testimony presented, the jury already knew that Carl Decker was a witness to the crimes of that night. He was bound and gagged like his father and grandfather, witnessed them being shot, and then was shot behind the right ear. The prosecutorial misconduct in argument detailed in Ruiz v. State, 743 So.2d 1 (Fla. 1999) involved a very different set of facts than present here. In Ruiz the prosecutor detailed how her father went off to the Gulf War when he had brain cancer because it was his duty, thereby injecting improper emotional sympathy for the State as opposed to the evil defendant. That case is not at all analogous to the prosecutor here mentioning a *named victim* of one of the charged crimes during the closing argument.

Finally, even if one or all of the comments were objectionable, Williamson cannot show prejudice. There is no reasonable probability the result of this case would have been different. Three victims/eyewitnesses testified as to the events of

the night of Donna Decker's murder-- her husband, father-in-law and Panoyan. Donna's husband Bob and her father-in-law Clyde described in detail for the jury the armed robbery that occurred in their home that night (R. 1061-80, SR. 59-85). They recounted for the jury how they were bound, gagged, and shot in the face/head by the masked gunman. Panoyan, a visitor in the Decker home that night, told the jury Williamson confronted him outside the Decker residence when he went to retrieve venison from his truck, telling him they were there to steal Bob's drugs and money. They threatened to mutilate and to kill him and his family if he told the police.

Three inmates also testified regarding inculpatory statements made by Williamson. Williamson spoke to inmate O'Brien about details of the robbery/murder and referred to himself as the gunman. (R 1540-41). He admitted that the cops had his hat and his utility belt, which he left in Panoyan's truck. (R. 1540, 1572). Williamson also gave details of the crime to inmate Luchak. (R. 1899-1901). He admitted that the cowboy hat left at the scene was his. (R. 1925). Inmate Aragones testified that Williamson admitted to him that he tied up the family and shot them all in the head. The mother died. (R. 2491). Finally, Williamson admitted in a statement to police that the cowboy hat found at the scene was his that "came up missing from [his] house in Florida." (SR. 13-14). Williamson theorized that his brother, Vernon, must have taken the hat and planted

it at the scene. (SR. 14, 22). Williamson admitted that his brother Rodney owned a utility belt that looked just like the one found in Panoyan's truck. (SR. 15). "The comments could not be construed to cause substantial harm or cause material prejudice and thus would not have constituted reversible error." Mann v. State, 482 So.2d 1360, 1361 (Fla.1986).

Finally, Williamson also failed to meet the necessary prejudice prong for an ineffective assistance of counsel claim. Williamson has failed to allege, other than in mere conclusory terms, how he was prejudiced by trial counsel's failure to object to the three comments. Conclusory allegations are legally insufficient on their face and may be denied without a hearing. Ragsdale, 720 So. 2d at 207(opining that a summary or conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"); Kennedy, 547 So. 2d at 913 (opining "defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). See Gorham, 521 So. 2d at 1069 (finding claim legally insufficient where defendant asserted that undisclosed photographs might have proven another person was responsible for crime). These claims are without merit. The court properly denied relief.

ARGUMENT VII

THE COURT PROPERLY DENIED RELIEF AS WILLIAMSON FAILED TO CARRY HIS BURDEN FOR A CLAIM OF INEFFECTIVENESS UNDER STRICKLAND WITH REGARD TO NOT OBJECTING TO THE STATE'S PENALTY PHASE OPENING AS LEGALLY INSUFFICIENT AND MERITLESS.

In his next claim Williamson argues that trial counsel was ineffective for not objecting to the State's *penalty phase* opening statement referring to the crimes as "inexcusable." He says that since the court had instructed the jury on excusable homicide *during the guilt phase* the prosecutor should not have used that word since the jury may have been confused and misled. He does not mention that the jury had already returned verdicts of guilt, thereby finding that the homicide was not only not excusable, but was, in fact, first degree murder. Williamson also merely asserted prejudice in conclusory terms thereby insufficiently pleading this.

The Court found the claim either legally insufficient or without merit.

> This Court agrees with the State that the Defendant failed to allege or demonstrate how he was prejudiced by the prosecutor's penalty phase opening comment because it is abundantly clear that the jury could not have been mislead [sic] by that comment, after having already found the Defendant guilty of Donna Decker's homicide.
>
> ... This Court further finds that even though the Defendant's claim was insufficiently pled and is conclusory, there is absolutely no merit to the Defendant's contention. ... In the case at bar, the Court finds that the unobjected to comments did not give rise to fundamental error.

(PC 5: 831-32).

Williamson fails to allege how a jury instruction given during guilt phase,

which was obviously rejected by the jury, has any bearing on the State's opening argument during penalty phase. Williamson fails to allege how trial counsel can be deemed deficient for not objecting to the State's characterization of Williamson's actions as "inexcusable" in penalty phase opening arguments when the jury had already rejected any "excusable homicide" defense in the guilt phase by finding Williamson guilty of first-degree murder. Further, Williamson has failed to allege how he was prejudiced by counsel's failure to object; in other words, how the result of his penalty phase proceeding would have been different had counsel objected. See LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998)(affirming summary denial of ineffectiveness claim that counsel failed to question venire about mental mitigation and death penalty, where defendant failed to allege, much less show, how trial counsel's failure to question the jurors on these subjects prejudiced him).

Trial counsel cannot be deemed deficient and Williamson cannot prove that he was prejudiced by trial counsel's failure to object to the State's characterization of Williamson's actions as "inexcusable" during opening argument in penalty phase based on a jury instruction given during guilt phase. As already noted, the jury rejected the "excusable homicide" instruction by finding Williamson guilty of first-degree murder; thus, it could not provide a basis for objecting to the State's comment during penalty phase opening argument. Further, Young v. State, 509 So.2d 1339 (Fla. 1st DCA 1987), relied upon by Williamson, is inapposite. Young

is not a death case and involved a comment that was made during closing argument before the jury had considered whether the killing was excusable homicide. The prosecutor stated that to be excusable, a killing must be done without a dangerous weapon. The First District held that comment might have misled the jury, especially because it occurred in conjunction with an erroneous "excusable homicide" instruction.

A completely different scenario is presented here where the allegedly improper comment was made during penalty phase opening argument and, therefore, could not possibly have impacted the jury's guilt phase determination of the "excusable homicide" instruction.

In sum, Williamson did not prove the requisite deficiency and prejudice r under Strickland as the jury already had determined in the guilt phase that Donna Decker's murder was not excusable, but rather, Williamson was guilty of first-degree murder. The court properly summarily denied relief. This Court should affirm that denial.

ARGUMENT VIII

THE COURT PROPERLY DENIED RELIEF AS WILLIAMSON FAILED TO PROVE INEFFECTIVENESS FOR NOT OBJECTING TO THE STATE'S USE OF THE WORD "EXCUSES" IN THE PENALTY PHASE OPENING AS LEGALLY INSUFFICIENT, PROCEDURALLY BARRED, AND WITHOUT MERIT. (Restated).

Williamson continues with his critique of the prosecutor's opening penalty

phase statement in his next claim. He asserts that the prosecutor minimized mitigating circumstances as "excuses" and trial counsel was ineffective by failing to object to those comments. He does not allege how an objection to this word would have altered the ultimate outcome of the penalty phase and, thus, failed to adequately plead the necessary prejudice for a successful claim.

The court made the following finding based upon its record review: "Although This Court finds that the prosecutor could have chosen his words more carefully, he did not refer to a mitigating circumstance as a 'mere excuse.'" (PC 5: 832). The court went on to find the claim procedurally barred. The court then commented that:

> even if defense counsel were to have made an error by failing to object, the Defendant has not shown prejudice. The jury was thoroughly instructed on aggravators and mitigating circumstances and the correct method of considering and weighing the aggravators presented by the State and the mitigators presented by the defense. Additionally, the jury was instructed that arguments of counsel were not to be considered as evidence. This Court finds that the State's extensive discussion of the cases on prosecutorial comments and fundamental error to be correct. This Court further finds that there were no fundamental errors in the opening penalty phase argument which would have resulted in the jury finding that the mitigators outweighed the aggravators in the instant case.

(PC 5: 832-33). The court found the claims either legally insufficient, barred, or without merit.

A close review of the record shows that the court had substantial competent

evidence to support its ruling. The prosecutor began his opening argument by explaining to the jury the four aggravating circumstances that the State would present in support of a death recommendation: prior violent felonies; murder committed for the purpose of pecuniary gain (merged with felony murder); heinous, atrocious, and cruel; and cold, calculated, and premeditated. (R. 3372-84). The prosecutor then mentioned some of the mitigation theories Williamson might offer, such as his abusive childhood and alleged brain damage, and asked the jury to listen carefully:

> And listen, ladies and gentlemen, to the mitigating circumstances. And as you listen to them, as you listen to these excuses, think about whether or not these excuses outweigh the inexcusable thing he did. The inexcusable thing that Dana Williamson did to Donna Decker. Inexcusable thing he did to Donna Decker's family. Her husband. Her father-in-law. Her baby.

(R. 3384-86). The prosecutor did not state the mitigation constituted "mere excuses." Rather, he referred to it as excuses and asked the jury to think about whether such outweighed the inexcusable thing Williamson did to Donna Decker and her family.

Williamson's contention is based entirely upon Brooks v. State, 762 So.2d 879 (Fla. 2000) and Urbin v. State, 714 So.2d 411 (Fla. 1998), cases that were decided well after his penalty phase trial. However, as Williamson notes, the Supreme Court expressly noted that Urbin did not announce a new rule of law, but

rather, merely reiterated what the Supreme Court had declared. Thus, the same argument advanced in those cases was available to Williamson on appeal.

Brooks and Urbin were reversed because the cumulative effect of the objectionable prosecutorial comments constituted fundamental error. Hence, Williamson's claim has to be that the State's characterization of his mitigation evidence as "excuses" constitutes fundamental error, an issue which could and should have been raised on direct appeal. This claim is, thus, procedurally barred. See Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995) (holding "issues that could have been, but were not, raised on direct appeal are not cognizable through collateral attack).

Further, although the prosecutor characterized Williamson's mitigation as "excuses," his intent was not to denigrate the mitigators, but rather to ask the jury to not let them outweigh the heinous crime committed. In Cox v. State, 819 So.2d 705, 718 (Fla. 2002), this Court held that the State's argument asking the jury to put the defendant's traumatic childhood "in its proper context, it happened more than twenty-five years before the defendant decided to kill Thomas Baker," was not a denigration of valid mitigation, but rather, a comment designed to convey that while the mitigator may be valid its weight should be discounted due to the passage of time and lack of an evidentiary nexus to the defendant.

In so holding, the Cox court distinguished Brooks where the prosecutor

referred to the defendant's mitigation as "flimsy," "phantom," and repeatedly characterized it as "excuses." The comment made here is more akin to Cox than Brooks. Consequently, defense counsel was not deficient for failing to object to it.

Williamson's contention also lacks merit because he cannot show prejudice; that is, there is no reasonable probability, based upon Brooks and Urbin, that the result of the penalty phase proceeding would have been different had defense counsel objected. Brooks and Urbin were reversed based upon the cumulative effect of numerous, sometimes overlapping errors; neither case was reversed because the prosecutor characterized the defendant's mitigation as "excuses."

In Brooks, for example, the prosecutor impermissibly inflamed the passions and prejudices of the jury with elements of emotion and fear by using the word "executed" or "executing" at least six times; engaged in pejorative characterizations of the defendant (characterized the defendants as persons of "true deep-seated, violent character", "people of longstanding violence", "they commit violent, brutal crimes of violence", "it's a character of violence", "both of these defendants are men of longstanding violence, deep-seated violence, vicious violence, brutal violence, hard violence ... those defendants are violent to the core, violent in every atom of their body."); urged the jurors to show the defendant the same mercy shown the dead victim; impermissibly argued "prosecutorial expertise" in stating that the State had already determined that this was a genuine

death-penalty case; misstated the law regarding the merged robbery and pecuniary gain aggravating circumstances; personally attacked defense counsel; and improperly denigrated the defendant's mitigation evidence by characterizing the mitigating circumstances as "flimsy," "phantom," and "excuses."

Similarly, in Urbin, the prosecutor's closing penalty-phase argument was full of emotional fear and efforts to dehumanize/ demonize the defendant. The prosecutor used the word "executed" or "executing" at least nine times, described the 17-year old defendant as a cold-blooded and ruthless killer, stated several times the offenses exhibited deep-seated, vicious or brutal violence, that the defendant was violent to the core and in every atom of his body, and that he showed his true, violent, and brutal and vicious character in committing the murder. The prosecutor invited the jury to disregard the law, asserted that a life vote would be irresponsible and a violation of the juror's lawful duty, emotionally created an imaginary script demonstrating that the victim was shot while pleading for his life, attacked the character of the defendant's mother and made an impermissible mercy argument.

None of those fundamental errors were present in this penalty phase opening argument. In Moore v. State, 820 So.2d 199, 207-08 (Fla. 2002), the defendant alleged in a post-conviction motion that defense counsel was ineffective for failing to object to two (2) remarks made by the prosecutor during the State's guilt and penalty phase arguments, referring to the defendant as "the devil." The claim was

denied without an evidentiary hearing.

On appeal, the Supreme Court affirmed the summary denial, noting that the two isolated references to the defendant as "the devil", although ill advised, was less problematic than the pervasive and extensive conduct condemned in Brooks and Urbin. The Court found the case to be more like Chandler v. State, 702 So.2d 186, 191 n. 5 (Fla.1997), where the Supreme Court held that a prosecutor's isolated comments that defense counsel engaged in "cowardly" and "despicable" conduct and that the defendant was a "malevolent ... a brutal rapist and conscienceless murderer" was not so prejudicial as to vitiate the entire trial. See also Carroll v. State, 815 So.2d 601 (Fla.2002) (finding prosecutor's isolated statements that defendant was the "boogie man" and a "creature that stalked the night" who "must die" not so egregious or cumulative in scope to be error).

The Court concluded that given the case evidence and the finding of three aggravating circumstances and only one statutory mitigator which was given slight weight, there was no reasonable probability that, but for the deficiency, the result of the proceeding would have been different. Moore, 820 So.2d at 207-08. Similarly, here, there is no reasonable probability that the result of the proceeding would be different. The court found three (3) aggravators, no statutory mitigators, and several non-statutory mitigators, to which it gave some or little weight.

ARGUMENT X

WILLIAMSON'S CLAIM THAT HIS CONVICTIONS IN COUNTS II THROUGH IV CONSTITUTE FUNDAMENTAL ERROR IS PROCEDURALLY BARRED.

Relying upon State v. Gray, 654 So.2d 552 (Fla. 1995), Williamson argues that his convictions on Counts II-IV for attempted first-degree murder constitute fundamental error because the verdicts rested on the State's alternative theory of attempted first-degree felony murder, a crime that was abolished in Gray. Williamson's argument is procedurally barred.

Williamson's Notice of Appeal was filed 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, the issue was never brought 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 is procedurally barred from raising the Gray issue in his 3.850 motion because he could/should have raised the issue on direct appeal. This Court questioned whether it had jurisdiction, under 3.850, to review the claim on fundamental error grounds. The State submits that it does not.

Rule 3.850 provides that the following grounds may be claims for relief:

(1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.
(2) The court did not have jurisdiction to enter the judgment.
(3) The court did not have jurisdiction to impose the sentence.
(4) The sentence exceeded the maximum authorized by law.
(5) The plea was involuntary.
(6) The judgment or sentence is otherwise subject to collateral attack.

The court questioned whether it had jurisdiction, pursuant to subsection (6), to grant relief. The State submits that it did not have jurisdiction under subsection (6) because it is subject to the same limitation, provided in subsection (c), as the other grounds. That is, rule 3.850 "does not authorize relief based on grounds that could have or should have been raised at trial . . . [or] on direct appeal." Rules 3.850 and 3.851 expressly prohibit their use to seek relief based upon grounds which could have or should have been raised on direct appeal. Fla.R.Crim.P. 3.850(c); Fla.R.Crim.P. 3.851(e)(1)(E). Those claims which could/should have been raised on direct appeal are procedurally barred from being raised here. The doctrine of fundamental error does operate as a narrow exception to the procedural bar; however, it only allows those claims constituting "fundamental error" to be raised for the first time in a post-conviction motion. Smith v. State, 741 So.2d 576 (Fla. 1st DCA 1999); Bell v. State, 585 So.2d 1125 (Fla. 2d DCA 1991); Stephens v. State, 478 So.2d 419 (Fla. 3d DCA 1985); Johnson v. State, 460 So.2d 954 (Fla. 5th DCA 1984). Fundamental error is defined as error that amounts to a denial of due process of law. See Sochor v. State, 580 So.2d 595 (Fla. 1991); Ray v. State,

403 So.2d 956 (Fla. 1981).

Williamson's claim that his three (3) convictions for attempted first-degree murder (Counts II-IV) should be vacated pursuant to Gray cannot constitute fundamental error since this Court has already 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).

Since Gray is not required to be applied retroactively, it cannot be "fundamental error" or error that amounts to a denial of due process. Moreover, the lower court questioned at the hearing whether it could address the issue as an illegal sentence. The State contends that it could not. First, the challenge made by Williamson's motion is not to an illegal sentence, but rather is a claim that the underlying convictions should be vacated due to Gray. Second, the sentences, standing alone, are not illegal because they do not exceeded the statutory

maximum or fall below it. If the underlying convictions cannot be challenged because they do not constitute fundamental error, the sentences that flow from them cannot be considered illegal. Finally, the State notes that Hill v. State, 730 So.2d 322 (Fla. 1st DCA 1999), which found a Gray issue to be fundamental error, failed completely to analyze the fact that Gray claims do not apply retroactively and, therefore, cannot constitute fundamental error. This claim should be denied.

ARGUMENT XI

WILLIAMSON'S CLAIM THAT HE IS ENTITLED TO A NEW PENALTY PHASE BECAUSE HIS THREE CONVICTIONS FOR ATTEMPTED FIRST-DEGREE MURDER TIPPED THE JURY'S SCALES IN FAVOR OF A DEATH RECOMMENDATION IS WITHOUT MERIT.

Claim XI seeks a new penalty phase, 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 alleges must be vacated pursuant to Gray, tipped the jury's scale in favor of a death recommendation. Again, there is no fundamental error and no jurisdiction.

To begin, Williamson's argument is premised upon his contention that his three attempted first-degree murder convictions must be vacated because of Gray.

As noted under Point X, that argument is procedurally barred in the 3.850 proceeding because it could/should have been raised on direct appeal. Thus, Williamson's claim in this point fails at the outset. Second, even absent Williamson's convictions for attempted first-degree murder, there were still two other prior violent felonies that 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, 768 So.2d at 1040 f.n.3(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.

In support of the sentence of death, the trial court relied upon three aggravating factors. Those factors were as follows: (1) prior conviction of a violent felony; (2) committed while engaged in a robbery; (3) heinous, atrocious, and cruel. Williamson v. State, 681 So. 2d 688, 694 (Fla. 1996). 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 were vacated, there are still two convictions supporting the "prior violent felony" aggravator.

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 the attempted murder convictions were to be vacated, 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).Furthermore, Williamson cannot present this claim unless and until his convictions are actually vacated. That is, at present, these three convictions are valid; therefore, it cannot be presumed that the jury considered invalid convictions and it cannot constitute fundamental error. Even assuming that the three convictions for attempted first-degree murder were subsequently vacated, it does not automatically render the "prior violent felony" aggravator an invalid aggravator. Thus, even assuming arguendo, that the three convictions for attempted first-degree murder were subsequently vacated, any error in the jury considering them was harmless beyond a reasonable doubt.

This case is completely distinguishable from those where the consideration of a subsequently vacated conviction has been found harmful. For example, in Armstrong v. State, 862 So.2d 705 (Fla. 2003), the State presented three (3) prior violent felonies to support the "prior violent felony" aggravator: (1) a 1985 Massachusetts conviction of indecent assault and battery on a child of the age of fourteen; and (2) two (2) contemporaneous convictions for attempted first-degree murder of a second victim and robbery of a third. Subsequent to the affirmance of Armstrong's convictions and sentence, he successfully got the Massachusetts conviction vacated.

The trial court denied relief, concluding that error under Johnson v.

Mississippi 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. The Supreme Court disagreed, noting that in Armstrong's case, the jury considered, in support of an aggravating factor, evidence of a conviction that had since been revealed to be materially inaccurate as that conviction has been vacated. "Given the nature of the crime underlying the vacated conviction--a sexual offense upon a child--and the detailed testimony given by the young victim of that crime at Armstrong's penalty phase, we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt."

Unlike Armstrong, the convictions in this case would not be vacated because they are constitutionally invalid, but rather, because this Court decided to abolish the crime of attempted first-degree felony-murder after Williamson's trial. Thus, the jury didn't hear inaccurate information as it did in Armstrong. Unlike Armstrong, Williamson's conviction for beating a four year-old child to death has not been vacated in this case. The other cases wherein the error has been found harmful are likewise distinguishable.

The Eleventh Circuit found harmful error in Duest v. Singletary, 997 F.2d

1336 (11th Cir. 1993), based on the following: the jury recommended death by a 7-5 vote and there was sufficient mitigation to preclude an override of the life recommendation; the jury requested to see the evidence in support of the prior violent felonies; the vacated charge was for armed assault with intent to commit murder which made Duest look like a recidivist killer; and there were no other violent convictions to support the aggravator. Id at 1339-1340. Duest is distinguishable because it involved a 7-5 jury vote for death and only the one suspect prior violent felony conviction supporting the aggravator. Obviously the reviewing courts hold these two factors to be essential components in finding harmful error. Notably both of these facts are absent in the instant case. The vote for death here was much more compelling, 11-1, and there would remain two separate prior violent felonies to satisfy the aggravating factor under consideration, including the brutal beating death of a child. This claim should be denied.

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court affirm the denial of post-conviction 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