IN THE SUPREME COURT OF FLORIDA

DANA WILLIAMSON,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**CASE NO. SC07-564**
STATE OF FLORIDA,	)	**L.T. NO. 92-15642 CFA**
	)	
Appellee.	)	
	)	

_____

INITIAL BRIEF OF APPELLANT

_____

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida

_____

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PRELIMINARY STATEMENT

Appellant, Dana Williamson ("Williamson"), was the defendant and post-conviction movant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Appellee, State of Florida ("State"), was the plaintiff.

References to the Post-Conviction Record on Appeal will be designated by the symbol APCR@ followed the appropriate page number(s) and encased in parentheses.

References to the original trial Record will be designated by the symbol AR@ followed the appropriate page number(s) and encased in parentheses.

References to the original Trial Transcript will be designated by the symbol AT@ followed the appropriate page number(s) and encased in parentheses.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction to review a Circuit Court=s ruling upon a motion for post-conviction relief, pursuant to Fla. R. Crim. P. 3.850 and 3.851, in a death penalty case. Art. V, ' 3(b)(1), Fla. Const.; Fla.R.App.P. 9.030(a)(1)(A)(1).

STANDARD OF REVIEW

To uphold a trial court's summary denial of claims raised in a post-conviction motion pursuant to Fla. R. Crim. P. 3.850 and 3.851, the claims must be either facially insufficient or conclusively refuted by the record. *See* Fla. R. Crim. P. 3.850(d). Where no evidentiary hearing has been held below, the Supreme Court accepts the defendant's factual allegations as true to the extent they are not conclusively refuted by the record. Peede v. State, 748 So.2d 253, 257 (Fla. 1999).

STATEMENT OF THE CASE AND FACTS

On February 19, 1994, Appellant, Dana Williamson, was convicted of first degree murder, armed burglary, extortion, four counts of armed robbery five counts of armed kidnaping and three counts of attempted first degree murder. Williamson was sentenced to death for the 1988 killing of Donna Decker. (T 3203-04).

In 1988, Donna and Bob Decker resided in Davie, Florida, together with their infant son, Carl. (T 577, 1012). Bob Decker owned a construction business at the time. On the night of November 4, 1988, Bob, Carl, and Clyde Decker (Bob's father visiting from out of town) returned home to find Charles Panoyan ("Panoyan") in the driveway. (T 581, 1158). Panoyan was the Deckers' acquaintance and occasional employee. He had assisted in the construction of Decker's home and knew its dimensions and alarm system. Bob Decker testified that Panoyan rarely came to the home, and that Decker was surprised to see him. (T 646, 1023, 1158). The Deckers greeted Panoyan in the driveway and they all went inside. (T 583, 1162, 2105).

Panoyan then abruptly stated that he had to go outside to bring in some deer meat which he had forgotten to bring initially. (T 583, 1159). When Panoyan returned a moment later, Clyde Decker helped him put the deer meat in the kitchen. (T 583, 1061, 2105). Upon returning to the living room, they confronted a man with a gun wearing a

mask and a straw cowboy hat. (T 583, 1061). Bob Decker at first thought that it was a practical joke pulled by Panoyan, but soon discovered otherwise. (T 583, 1061). The Deckers were taken into the master bedroom, handcuffed and bound. (T 584, 1167). Panoyan claimed that he was hog-tied out in the family room, but showed no marks or burns when subsequently examined by police. (T 584, 649, 659, 1171, 2345). Bob Decker testified that he caught a glimpse of Panoyan talking to the gunman. (T 1067, 1172).

Meanwhile, Donna Decker arrived home from work, was overpowered by the intruders (T 584) and tied up. (T 585, 1077, 1179). Bob and Donna were questioned about the location of their money and were forced to sign some sort of legal form. (T 603, 1062, 1084, 1087). Donna was stabbed to death after putting up a struggle. (T 591, 1191). Bob, Carl, and Clyde were each shot in the head with a 22-caliber revolver. (T 587-88, 1132). Bob, Carl and Clyde, however, all survived. (T 589, 1191). Panoyan was released unharmed and eventually called police. (T 592, 1184). Panoyan, initially the prime suspect (T 613), never mentioned Williamson to police. (T 613, 2173). The belt and handcuff key, which fit the handcuffs used on Bob Decker (T 610, 2694, 2697), were found in Panoyan=s truck. (T 612). Neither Williamson=s finger prints nor blood were found at the scene. (T 661, 662).

In 1989, police received an anonymous tip that Williamson was the assailant and Panoyan innocent. (T 613, 2169). Prior to the tip, police had not considered Williamson a suspect. (T 613). They went to Ohio to speak with him. (T 613, 1337). Asked about the hat, Williamson stated that he had owned a similar one. (T 664, 2783, 2696, 3026). Police arrested Williamson and Panoyan. (T 666, 1382, 2172).

Panoyan was released on his own recognizance when he made a statement to police claiming Williamson was the perpetrator of the attack. (T 667, 2138, 2212). Panoyan alleged that he had been scared into silence by Williamson. (T 2123-24). Panoyan agreed to testify as the State=s chief witness. Panoyan testified that Williamson was the gunman and had let him live because of Panoyan=s friendship with Williamson's father. (T 2329). Panoyan stated that he had no involvement in the crime and was coerced into silence by threats from Williamson. (T 2123-24).

The State introduced evidence concerning Williamson's 1975 conviction as a minor for manslaughter. (T 1546, 2147). The record shows this evidence was introduced to bolster Panoyan's claims that he had reason to believe threats allegedly made by Williamson to induce his silence. The State also proffered the testimony of three jail house informants serving time for felony convictions (T 1537, 1915, 2487), who testified that Williamson had admitted the alleged acts. (T 1930, 1915, 2487).

Other than Panoyan=s testimony, the evidence was circumstantial, including a deed executed by Williamson to show his knowledge of legal forms (T 1472), the cowboy hat and a utility belt similar to the belt found at the scene. (T 2783, 3026). The jury returned guilty verdicts on 14 counts, including the 3 attempted first degree murders (T 3212-13; T 2899), proceeding on alternative theories of premeditation or attempted first degree felony murder. The attempted first degree murders were tried jointly with the other counts including the killing of Donna Decker.

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

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> 1. The defendant has been previously convicted of another capital offense or of a ***felony involving the use or threat of violence to some person.***
>
> ***The crime of Attempted Murder in the First Degree is a felony involving the use of violence to another person*** . . .

(R 3210) (emphasis added).

The trial court cited the attempted first degree murder verdicts in its rationale for applying the other-violent-felony aggravator, noting in its sentencing order:

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

(R 5378). The trial court sentenced Williamson to death (T 3203-04), and Williamson filed a direct appeal, raising the following issues:

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

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

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

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

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

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

This Court affirmed Willamson=s judgment and death sentence, Williamson v. State, 681 So. 2d 688 (Fla. 1996), and he moved for post-conviction relief, alleging:

a. Ineffectiveness of Defense Counsel

WILLIAMSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH & FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 & 16 OF THE FLORIDA CONSTITUTION WHEN DEFENSE COUNSEL:

I. FAILED TO OBJECT TO THE STATE=S OPENING STATEMENT WHICH CONSTITUTED IMPERMISSIBLE AGOLDEN RULE@ ARGUMENT AND BOLSTERED THE CREDIBILITY OF THE STATE=S KEY WITNESS;

II. FAILED TO OBJECT TO THE ADMISSION OF A WRITTEN WAIVER OF IMMUNITY BY THE STATE=S KEY WITNESS DESPITE THE STATE=S FAILURE TO EARLIER DISCLOSE THE WAIVER DURING DISCOVERY AND DESPITE THE COURT=S FAILURE TO HOLD AN ADEQUATE RICHARDSON HEARING;

III. FAILED TO IMPEACH THE STATE=S SOLE EYE-WITNESS IDENTIFICATION USING THE WITNESS= ORIGINAL STATEMENTS TO POLICE IN WHICH THE WITNESS CLAIMED NOT TO HAVE KNOWN THE PERPETRATOR;

IV. FAILED TO VOIR DIRE THE STATE=S EXPERT WITNESS ON AINFLUENCE AND CONTROL@ WHOSE EXPERT TESTIMONY WOULD NOT ASSIST THE JURY, OBVIATING THE REQUIREMENT OF HOLDING A FRYE HEARING OR OF MAKING A SHOWING OF ANY INDICIA OF RELIABILITY FOR THIS NOVEL SCIENCE;

V. FAILED TO REQUEST A CURATIVE INSTRUCTION AFTER THE COURT SUSTAINED A DEFENSE OBJECTION TO TESTIMONY BY THE STATE=S EXPERT WITNESS ON AINFLUENCE AND CONTROL@ WHO VOUCHED FOR THE CREDIBILITY OF THE STATE=S KEY WITNESS BY EXPRESSING AN EXPERT OPINION THAT THE WITNESS= THREE-YEAR DELAY IN CHANGING HIS STORY TO INCRIMINATE WILLIAMSON FOR THE FIRST TIME WAS CAUSED BY A ACREDIBLE THREAT@;

VI. FAILED TO OBJECT TO THE STATE=S UNFAIRLY PRE-JUDICIAL CLOSING ARGUMENT IN WHICH THE STATE:

a. TOLD JURORS AYOU BETTER BELIEVE THAT WE FILED THESE CHARGES BECAUSE IT=S WARRANTED@;

b. VOUCHED FOR THE CREDIBILITY OF THE STATE=S KEY WITNESS BY CHARACTERIZING THREATS THE STATE WITNESS TESTIFIED WILLIAMSON MADE AS ABELIEVABLE THREATS@;

c. DISCUSSED TESTIMONY OF AANOTHER WITNESS THAT YOU DIDN=T HEAR FROM BECAUSE HE=S A CHILD AND A BABY@THAT HE HAD SEEN HIS MOTHER MURDERED;

VII. FAILED TO OBJECT TO THE STATE=S CHARACTERIZATION OF THE OFFENSE AS AINEXCUSABLE@ DESPITE THE JURY=S INSTRUCTION ON EXCUSABLE HOMICIDE;

VIII. FAILED TO OBJECT TO THE STATE=S ARGUMENT DURING PENALTY PHASE OPENING STATEMENTS THAT THE EVIDENCE IN MITIGATION CONSTITUTED MERE AEXCUSES@

IX. COUNSEL=S UNAUTHORIZED CONCESSION OF WILLIAMSON=S GUILT DURING THE PENALTY PHASE CONSTITUTED INEFFECTIVE ASSISTANCE

b. Fundamental Error

THE LIKELIHOOD THAT THE VERDICTS IN COUNTS II THRU IV RESTED ON THE STATE=S ALTERNATIVE THEORY OF ATTEMPTED FIRST DEGREE FELONY MURDER [A NON-EXISTENT OFFENSE AT THE TIME THIS CASE BECAME FINAL ON DIRECT APPEAL] CONSTITUTES FUNDAMENTAL ERROR:

X. REQUIRING THE JUDGMENTS AND SENTENCES FOR ATTEMPTED MURDER BE VACATED AND SET ASIDE;

XI. REQUIRING A NEW PENALTY PHASE TRIAL UNDER THE EIGHTH AMENDMENT AS THESE CONVICTIONS TIPPED THE JURY=S SCALES IN FAVOR OF DEATH

(PCR 525-576). The State filed a response (PCR 612-707), and, after a Huff hearing, the trial court summarily denied the motion without an evidentiary hearing. (PCR 803-839). Williamson filed notice of appeal. (PCR 840).

This Initial Brief follows.

SUMMARY OF ARGUMENT

The trial court erred in summarily denying Williamson=s claims, as they are facially sufficient and not conclusively refuted by the record.

ARGUMENT

THE TRIAL COURT ERRED IN SUMMARILY DENYING DEFENDANT=S CLAIMS WITHOUT AN EVIDENTIARY HEARING AS THEY ARE FACIALLY SUFFICIENT AND NOT CONCLUSIVELY REFUTED BY THE RECORD

The trial court entered an Order on Williamson=s Sworn Motion for Post-conviction Relief, stating that no evidentiary hearing would be had on any of its grounds and that each of the claims would be summarily denied. (PCR 803-839).

To uphold a summary denial of claims raised in a post-conviction motion, the claims must be shown to be either facially insufficient or conclusively refuted by the record. McLin v. State, 827 So.2d 948 (Fla. 2002). In short, rule 3.850(d) requires: AIn those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief shall be attached to the order.@

Williamson has alleged a denial of his Sixth Amendment right to the effective assistance of counsel. As the files and records attached to the summary denial fail to conclusively show that the movant is entitled to no relief, reversal is required. McLin v. State. As the summarily denied claims and the stated grounds for their denial each differ in this case, individual review of each claim follows.

I. TRIAL COUNSEL=S FAILURE TO OBJECT TO THE STATE=S AGOLDEN RULE@ ARGUMENT BOLSTERING THE CREDIBILITY OF THE STATE=S KEY WITNESS IN OPENING STATEMENTS

In its opening statement, the State discussed Panoyan=s claim that Williamson had threatened Panoyan=s wife and children, purportedly telling Panoyan:

> AI will castrate your son . . . 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.@

(T 592). The State then went on to make the following argument:

> ACharles Panoyan is the person I was eluding (sic) to in voir dire when I asked if ***you*** had ever been between a rock and a hard place@ (emphasis added).

(T 592) (emphasis added).

At *voir dire*, the State had indeed alluded to one=s being between a rock and a hard place when it came to protecting one=s children. (T 306-308).

At no point did Williamson=s trial counsel object to the foregoing comment by the prosecution, which was calculated to, and did, *begin* Williamson=s trial by having jurors place themselves inside alleged victim Panoyan=s purported shoes, appealing to their

sympathies and urging them to abandon neutrality. This Court, however, in Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985), held such "Golden Rule" argument, asking jurors to place themselves in a victim=s shoes, is clearly prohibited.

Counsel=s failure to object to the State=s argument left unchallenged from the start the idea that the State=s chief witness (a flipped co-defendant) was a victim in whose shoes throughout trial jurors should put themselves. The State=s comment not only constituted argument rather than opening statement, but argument of the most pernicious kind and timing, infecting the fundamental fairness of the entire trial.

In LeRetilley v. Harris, 354 So. 2d 1213, 1214 (Fla. 4th DCA 1978), for example, defense counsel had objected to the State=s Golden Rule argument but failed to secure a ruling on the objection. The Fourth District held counsel=s failure to obtain a ruling or request a curative instruction rendered the otherwise reversible error waived for direct appeal. At bar, trial counsel=s failure to object to this unfairly prejudicial comment and failure to request a curative jury instruction compromised the fundamental fairness of Williamson=s trial from its inception and precluded him from raising it as reversible error on direct appeal. As such argument was unfairly prejudicial at trial, Bertolotti, and, if objected to, would have constituted reversible error on direct appeal, LeRetilley, there remains a reasonable probability that but for trial counsel=s failure to object or request a curative instruction, the outcome of the proceedings would have been different as jurors

would have taken a more objective view of the circumstantial evidence in this case. Strickland v. Washington.

II. FAILURE TO OBJECT TO THE ADMISSION OF A WRITTEN WAIVER OF IMMUNITY BY THE STATE=S KEY WITNESS DESPITE THE STATE=S FAILURE TO EARLIER DISCLOSE THE WAIVER DURING DISCOVERY AND DESPITE THE COURT=S FAILURE TO HOLD AN ADEQUATE RICHARDSON HEARING

Williamson=s trial counsel also failed to object to the admission into evidence of a written waiver of immunity executed by the State=s key witness, Charles Panoyan, upon his testimony before the Grand Jury inculpating Williamson. Panoyan=s Grand Jury testimony directly contradicted his original statements to police (in which he claimed not to have known the perpetrator) and the version he had maintained for 3 years. *See Ground III, infra*. Trial counsel failed to object to the admission of Panoyan=s waiver of immunity into evidence despite the State=s failure to disclose the waiver=s existence prior to trial. (T 2217)

Williamson=s trial counsel failed to object to the written waiver=s admission into evidence when the State tendered it, prejudicing the very heart of the defense, which hinged almost uniquely on Panoyan=s credibility, forever waiving the issue for purposes of direct appeal. Archer v. State, 673 So. 2d 17, 21 (Fla. 1996) (Defendant's failure to

object to a claimed error at trial provided no ruling by the trial judge upon which to base the claim of error on appeal).

When counsel complained the defense had been precluded from inquiring into the substance of Panoyan=s Grand Jury testimony at deposition, the trial court noted:

> ABut you certainly had a right to go into it, and I=m sure you did, as a competent attorney.@

(T 2213).[1] Trial counsel, however, never asked Panoyan at deposition whether he had waived immunity for his Grand Jury testimony. During neither of the opportunities trial counsel was given to depose Panoyan did counsel mention the Grand Jury. As the trial court=s rationale for admitting the waiver implied, counsel=s failure to do so was an act of incompetence. Its prejudice to the defense is evident from this Court=s opinion on direct appeal: APanoyan's credibility was a material issue on which the State's case depended.@ Williamson v. State, 681 So. 2d at 695.

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[1] *But cf.* Rainey v. State, 596 So.2d 1295 (Fla. 2d DCA 1992) (even though the defendant knew the witness' name and failed to depose him, the State was nonetheless required to disclose the witness' statement).

Without *some* reason to believe Panoyan=s new version of events over his recanted versions, the State sought to show he would at least risk prosecution for perjury were he found to be lying. Rather than objecting to admission of this powerful document to bolster Panoyan=s otherwise lacking credibility (as recanted testimony is Aexceedingly unreliable@ Armstrong v. State, 642 So.2d 730 (Fla. 1994)), trial counsel handed the State this reason for jurors= belief on a silver platter.

Moreover, defense counsel failed to object to the inadequacy of the trial court=s Richardson hearing for this discovery violation. Florida Rule of Criminal Procedure 3.220(b)(1)(vi), (xi) (1994) requires the State to disclose any tangible papers or objects it intends to use at trial. The State=s duty is continuing, Fla. R. Crim. P. 3.220(j), and applies to all witnesses and evidence. Smith v. State, 500 So.2d 125, 126-27 (Fla. 1986); Hicks v. State, 400 So.2d 955 (Fla. 1981).

If, during the course of the proceedings, it is brought to the attention of a trial court that the State has failed to comply with the rules of discovery, the court must conduct a hearing to determine whether the state's violation was (1) inadvertent or willful, (2) whether the violation was trivial or substantial, and (3) what effect, if any, the violation had upon the ability of the defendant to prepare adequately for trial. Richardson v. State, 246 So.2d 771, 775 (Fla. 1971). Only

after the court has made a sufficient inquiry into all of the surrounding circumstances may it exercise its discretion to determine whether the State's noncompliance with the rule resulted in harm or prejudice to the defendant, thereby requiring the imposition of sanctions, such as excluding the evidence. *Id.* at 775.

The elements of an adequate Richardson hearing are clear. Mondo v. State, 640 So.2d 1232 (Fla. 4th DCA 1994) (Ainquiry should at least cover the inadvertence or willfulness of the state's violation, whether [it] was trivial or substantial, and the effect the violation had on the defendant's ability to properly prepare for trial@).

At bar, counsel failed to object to the admission into evidence of Panoyan=s previously undisclosed waiver of immunity before the grand jury and failed to object to the adequacy of the trial court=s woefully inadequate Richardson hearing:

> THE COURT: Charlie, have you ever seen this document before?
>
> MR. JOHNSON: No. I thought this grant of immunity - -
>
> THE COURT: There is (sic) 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=m going to permit it.
>
> All right. I consider this a Richardson hearing, in an abundance of caution. Since the deposition of Charles Panoyan brought this out, this is nothing -- no surprise.

(T 2216).

Williamson=s trial counsel had never asked Panoyan at deposition whether he had waived immunity Bor anything about his testimony before the Grand Jury. Contrary to Richardson, the trial court made no inquiry whatsoever into whether the State=s non-disclosure was inadvertent or willful or whether the violation was trivial or substantial. The trial court=s conclusion that A[i]t is not even prejudicial@ (T 2216) was based not on whether admitting the waiver would unfairly bolster the recanting Panoyan=s credibility in the eyes of the jury, but only on whether A[t]he defense was aware that there were more deals made.@ (T 2216).

Panoyan=s waiver of immunity, bolstering his changed version of events, was admitted into evidence without objection. (T 2217). Because, as this Court has previously noted, APanoyan's credibility was a material issue on which the State's case depended,@ Williamson v. State, 681 So. 2d at 695, there remains a reasonable probability that, had Williamson=s defense counsel objected to the waiver=s admission, it would have been excluded from evidence or, if admitted--

harmfully bolstering Panoyan=s credibility. It would have incurred reversal on direct appeal. A denial of effective assistance of counsel resulted, undermining the trial=s fairness and any remaining reliability in its outcome.

III. FAILURE TO IMPEACH THE STATE=S SOLE EYE-WITNESS USING WITNESS= ORIGINAL STATEMENTS TO POLICE CLAIMING NOT TO HAVE KNOWN THE PERPETRATOR

The State=s sole eye-witness, originally a suspect in the case, testified at trial that the masked perpetrator was actually Williamson. The trial testimony of key witness Charles Panoyan stands in stark contrast, however, with his original statements to police and the version he had otherwise maintained for over 3 years.

Though in his 1988 statement to police Panoyan did not know whether the stocking-masked perpetrator was black or white, he testified at trial that Williamson was the perpetrator (T 96-98) and that he had seen Williamson outside the home without a mask before Williamson and his brother committed the acts. (T 98-99).

Trial counsel=s omission to impeach Panoyan=s damning trial testimony using Panoyan=s own original statement to police cannot be attributed to reasonable trial strategy as APanoyan's credibility was a material issue on which

the State's case depended.@ Williamson v. State, 681 So. 2d at 695. For this reason, trial counsel=s failure to so impeach Panoyan resulted in prejudice under the Strickland standard: But for ineffective defense counsel=s failure to impeach Panoyan with his own original statements to police, in which he failed to inculpate Williamson, there remains a reasonable probability jurors would have rejected Panoyan=s testimony and acquitted Williamson on each of the offenses charged. *See* Porter v. State, 626 So.2d 268 (Fla. 2d DCA 1993) (such allegations state a *prima facie* case for relief).

Kegler v. State, 712 So.2d 1167 (Fla. 2d DCA 1998) is factually indistinguishable. In Kegler, the court stated:

> We agree that counsel's failure at trial to impeach one of those witnesses, Victor Caraballo, satisfies the test of ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984), and requires reversal for a new trial.Caraballo's testimony at trial regarding the shooting of the victim contradicted his statements to police, which are contained in the interviewing officer's police report and deposition, on the night of the murder. At trial, Caraballo testified that he was with the victim at a specified location and that he saw Kegler shoot the victim when the victim confronted Kegler while he was robbing Caraballo. On the night of the murder, Caraballo told police Officer Puig that he had dropped the victim off earlier in the evening and, while he was driving around that night, he just happened to hear gunshots and see the victim running from two men. Caraballo could not describe the location of the shooting or the

> two men. A gunshot residue test of Caraballo's hands produced a positive result, and he was charged with the murder. However, five months later, after Sandra Thomas came forward and identified the murder weapon and implicated Kegler, Caraballo was able to pick Kegler's photo out of a photopak and also implicate him. Up to that point, neither Thomas's nor Kegler's names had come up in the investigation of the murder. The charges against Caraballo were dropped and an indictment was filed against Kegler charging him with first degree murder and armed robbery.
>
> Trial counsel's failure to impeach Caraballo with the statements he made on the night of the murder was not reasonable under the circumstances of this case. Caraballo did not mention Kegler or the version of events he testified to at trial until Sandra Thomas came forward five months after the murder. Up until that time, he asserted that two men who he could not identify had shot the victim. This is a significant contradiction in Caraballo's position. There is that shows a reasonable probability that the result of Kegler's trial would have been different but for counsel's failure to bring this information to the jury's attention.Accordingly, we reverse Kegler's convictions and remand for a new trial.

Kegler v. State, 712 So.2d at 1168.

The indistinguishable facts at bar amount to a denial of the effective assistance of defense counsel guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, Section 9, Florida Constitution, entitling Williamson to a new trial.

IV. FAILURE TO VOIR DIRE THE STATE=S EXPERT WITNESS ON A*INFLUENCE AND CONTROL@ WHOSE TESTIMONY WOULD NOT ASSIST THE JURY, OBVIATING THE REQUIREMENT OF HOLDING A FRYE HEARING OR OF REQUIRING THE STATE TO SHOW ANY INDICIA OF RELIABILITY FOR THIS NOVEL A*SCIENCE@

At the close of the State=s direct of Panoyan, the prosecutor stated he had an expert witness Aflown in from California who can only get back tonight.@ (T 2197). Williamson=s trial counsel indicated he had not taken the witness= deposition and had not questioned the witness, Dr. Richard Ofshe, but would only need A[p]robably about 15, 20 minutes@ to talk to the expert witness before he testified. (T 2197-2199). Trial counsel requested a 10 minute break to talk with Ofshe and the trial court agreed, stating A[a]ll you can have is ten minutes with this.@ (T 2221-2222).

After Panoyan=s testimony for the State and before defense cross-examination, the State was allowed to put on Dr. Ofshe. (T 2224-2225), who had a Ph.D. in sociology. (T 2225-2226). Seeking to define his area of expertise, the State queried:

> [STATE]: What was your doctoral disorientation (sic) about, Dr. Ofshe?

[OFSHE]: It was work on how it is that people handle competing demands on their behavior, what are called reference conflicts. How it is that people attempt to resolve unresolved competing demands so that when B

For example, there are two groups of individuals who are pressing them to do exactly opposite things. How they try to handle that problem and ultimately resolve it.

(T 2226).

After reviewing the particulars of Dr. Ofshe=s career (*e.g.,* investigating a cult where Apeople were being literally kidnapped off public highways, beaten, assaulted@) (T 227-228), the following transpired:

[STATE]: Your Honor, the State of Florida offers Dr. Ofshe as an expert in the sociological field of extreme techniques of influence and control.

[COURT]: Any voir dire, Mr. Hammer?

[DEFENSE]: No, sir.

[COURT]: Sir?

[DEFENSE]: No, sir.

[COURT]: ...All right. The Court declares him to be an expert in his specialty and is therefore capable of rendering opinion testimony in that area of expertise.

(T 2231).

Without requiring the State to show that Dr. Ofshe=s testimony would assist the jury in understanding the evidence or whether Dr. Ofshe=s testimony on Ainfluence and control@ met the Frye[2] standard, trial counsel sat back as the State put on Ascientific@ expert testimony without objection.

But absent some indicia of reliability, opinion evidence on a particular subject could hardly be helpful to a jury as required by Section 90.702, Fla. Stat. *See* Hadden v. State, 690 So. 2d 573, 578 (Fla. 1997) (''Reliability is fundamental to issues involved in the admission of evidence.").

The admission into evidence of expert opinion testimony concerning a new or novel scientific principle, such as Ainfluence and control,@ is a four-step

[2] The Frye standard is whether an expert=s testimony is based on a scientific
principle or discovery "sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (prohibiting admission of Alie detector@ results because the test had not been generally accepted by the scientific community).

process. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995). First, the trial judge must determine whether the expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. *Id.* Second, the trial judge must decide whether the expert's testimony meets the Frye standard. *Id.* Next, the trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. *Id.* Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and the jury is entitled to determine the credibility of the expert's opinion. *Id.* Hence, under Ramirez, a Frye analysis is necessary only if a trial judge rules that the opinion testimony would assist the jury.

Because Williamson=s counsel failed to require the trial court in this case to make a determination of whether Ofshe=s expert testimony would assist the jury in making a fair determination concerning Panoyan=s credibility, there remains a reasonable probability the outcome would have been different. Strickland, *supra.* There remains a reasonable probability that, had Williamson=s counsel *voir dired* and sought to exclude Ofshe=s testimony when the trial court proposed doing so, the trial court would have followed the overwhelming weight of authority against allowing an expert to vouch for a witness= credibility--particularly where the

credibility of the perpetrator versus that of the victim is at issue. *See Ground V, Infra.*

Trial counsel=s failure to require a determination of whether Ofshe=s expert testimony would assist the jury, moreover, waived Williamson=s right to a Frye analysis before its admission. Ramirez, *supra.* It cannot be said that Ofshe=s novel Ainfluence and control@ testimony, however, would survive a Frye analysis. In Jordan v. State, 694 So. 2d 708 (Fla. 1997), where a psychologist had been allowed to render an expert opinion concerning offender profile evidence, this Court stated:

> [T]his profile evidence should have been tested for general acceptance within the relevant scientific community. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). It is this type of new or novel scientific profile evidence for which the safeguards of a Frye test are needed in order to guarantee reliability. The defense did not, however, specifically object on Frye grounds, leaving this issue unpreserved. *See* Hadden v. State, [690 So. 2d 573, 580 (Fla. 1997)].

Jordan v. State, 694 So. 2d at 716, n. 8.[3]

[3] It is only upon proper objection that the novel scientific evidence offered is unreliable that a trial court must make a Frye determination. Unless the party against whom the evidence is being offered makes this specific objection, the trial court will not itself have committed error in admitting the

Dr. Ofshe=s testimony that Athe ***pattern*** that [Panoyan] 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***@(T 2233) (emphasis added), argued that Panoyan fit the ***profile*** of one who had experienced the threat he claimed in his testimony and that it was credible. Counsel had a duty to ensure such testimony was generally accepted in the relevant scientific community under Frye. Jordan, *supra.*

The purpose of a Frye hearing is to determine the admissibility of evidence before the jury is permitted to hear it. The issue at bar was not preserved for appeal because defense counsel did not timely object to the expert testifying without a separate Frye hearing being held, nor was there any request for a Frye hearing pre- trial. *See* Jordan v. State, 694 So. 2d at 716 n.8; Hadden v. State, 690 So. 2d at 580 (AWe hold that upon proper objection prior to the introduction

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evidence. *See* Archer v. State, 673 So. 2d 17, 21 (Fla.) (Holding defendant's failure to object to a claimed error at trial provided no ruling by the trial judge upon which to base the claim of error on appeal), *cert. denied,* 117 S. Ct. 197 (1996).

of a psychologist's expert testimony offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused, the trial court must find the psychologist's testimony is admissible under the standard for admissibility of novel scientific evidence announced in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and adopted in Florida.@). As the this Court stated in Hadden:

> Novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion. In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

Hadden v. State, 690 So. 2d at 578.

In essence, Dr. Ofshe=s expert testimony was offered to prove Panoyan exhibited a profile compatible with a person who had in fact been threatened, stalked and extorted after witnessing a capital crime. Such evidence (which bolstered Panoyan=s explanation for why, after 3 years of singing a different tune, he suddenly accused Williamson of being the perpetrator) has not to date been

found to be generally accepted in the relevant scientific community and must be subjected to a Frye analysis. As Ofshe=s testimony was Abased upon evidence which has not been demonstrated to be sufficiently reliable,@ it Athereby cast[s] doubt on the reliability of the factual resolutions,@ Hadden v. State, 690 So. 2d at 578, Aundermining the reliability of the trial=s outcome.@ Strickland v. Washington, 466 U.S. at 687. Ineffective assistance of trial counsel resulted, entitling Williamson to a new trial.

V. FAILURE TO REQUEST CURATIVE INSTRUCTION WHEN TRIAL COURT SUSTAINED DEFENSE OBJECTIONS TO TESTIMONY BY STATE EXPERT ON AINFLUENCE AND CONTROL@ WHO VOUCHED FOR THE CREDIBILITY OF THE STATE=S KEY WITNESS BY OFFERING EXPERT OPINION THAT THE WITNESS= 3-YEAR DELAY IN ALTERING HIS STORY TO IMPLICATE WILLIAMSON WAS CAUSED BY A ACREDIBLE THREAT@

At trial, Dr. Ofshe testified in the jury=s presence as follows:

> [OFSHE]: Well, in reviewing 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 another word, been terrorized and someone who is

> acting in response to a credible threat, not only to himself, but also, 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.

(T 2233-2234).

Though Williamson=s trial counsel did not object to this testimony concerning Panoyan=s purported sociological pattern or profile and whether his belated decision to change his story was a result of Ainvolvement that=s consistent with this,@ *id.,* counsel later objected and then resisted only *at side bar* the State=s explicit attempt to link a hypothetical with Athe believability and/or credibility of the threat to which Panoyan was exposed.@ (T 2237). Though the Trial Court

agreed A[i]t is improper to talk about the credibility of the threat,@ and that A@[i]f you say the credibility of the threat, that=s assuming the threat was ever given, which is an issue for the jury, not for the witness,@ (T 2238), trial counsel never requested a curative instruction to ensure jurors would understand that considering such expert testimony is forbidden.

The State later capitalized on this windfall from the defense by arguing in closing that Panoyan had received Abelievable threats.@ *See Ground VI(b), infra.*

No witness is permitted to vouch for the credibility of another witness or give an opinion as to the guilt or innocence of the accused. *See* Glendening v. State, 536 So. 2d 212 (Fla. 1988), *cert. denied,* 492 U.S. 907, (1989); Tingle v. State, 536 So. 2d 202 (Fla. 1988); Morgan v. State, 639 So. 2d 6 (Fla. 1994); United States v. Azure, 801 F.2d 336, 340-41 (8th Cir.1986) (expert testimony concerning the credibility of an alleged victim improperly invades the province of the jury, which "may well have relied on [the expert's] opinion and surrender[ed] their own common sense in weighing testimony") (citation and internal quotation marks omitted).

In Price v. State, 627 So.2d 64 (Fla. 5th DCA 1993), for example, questioning that resulted in an impression that a counselor believed the victim

was telling the truth impermissibly vouched for the victim's credibility. *See also* Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984) (invasion of jury's exclusive province for witness to offer his personal view on the credibility of a fellow witness.

In Duest v. State, 462 So.2d 446, 448 (Fla. 1985), this Court reaffirmed: "[t]he proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." In Hunter v. State, 660 So.2d 244 (Fla. 1995), this Court indicated that, on timely objection, an instruction that jurors disregard a witness' comment on credibility elicited by the State may be sufficient to avoid a mistrial. At bar,

however, trial counsel failed to request such an instruction. *E.g.,* Olson v. State, 705 So.2d 687 (Fla. 5th DCA 1998).[4]

[4] Section 90.107, Florida Statutes, provides that where evidence is *properly* admitted for a limited purpose such as to cast doubt on a witness's credibility, Athe court, upon request, shall restrict such evidence to its proper scope and so inform the jury at the time it is admitted.@ (emphasis supplied.)" Lightfoot v. State, 591 So. 2d 305, 306 (Fla. 1st DCA 1991); Charles W. Ehrhardt, Florida Evidence '' 608.4, at 424 (1998 ed.). Thus, even assuming this testimony were properly admitted, defense counsel was remiss in failing to request the trial court to instruct the jury that such testimony was admissible only for the purpose of assessing Panoyan=s credibility and that it was not evidence of defendant's guilt. There remains substantial danger the jury may have given disproportionate weight to this Ascientific@ means of assessing credibility, both of Williamson=s purported threat and Panoyan=s claim that it was ever made.

Williamson=s trial counsel requested no curative instruction when the State=s expert prejudicially vouched for the credibility of the State=s key witness and the trial court had sustained the objection. Ofshe=s testimony constituted an expression of his expert opinion on Williamson=s guilt because the credibility of Panoyan=s recanted version of events, newly fingering Williamson as the perpetrator, depended entirely on whether Panoyan had been threatened, rendering counsel=s failure to request a curative jury instruction exquisitely prejudicial.[5]

---

[5] Moreover, Ofshe=s expert testimony that Panoyan=s 3-year delay in changing his story was caused by the purported conduct of Williamson which constituted a Acredible threat@ also amounted to expert testimony that Williamson had committed a crime. Section 784.048(3), Fla. Stat., after all, provides:

> Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a ***credible threat*** with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

AThe opinion of a witness as to the guilt or innocence of an accused person is not admissible in evidence.@ Farley v. State, 324 So.2d 662, 663-64 (Fla. 4th DCA 1975), *cert. denied,* 336 So.2d 1184 (Fla. 1976) (same).

In reversing a death sentence due to analogous Ahighly prejudicial@ testimony, this Court, in Jordan v. State, 694 So. 2d 708 (Fla. 1997), stated:

> We have stated that "expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts." Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980). In this case, there was certainly no need for an expert to testify as to the fear Mintner was feeling in her confrontation with Jordan. Our common experiences dictate that an elderly woman approached in public by a man with a gun will be terrified. When a fact is so basic that an expert opinion will not assist the jury, an expert should not be allowed to testify. Ehrhardt, Section(s) 702.2 at 518. *See also* Lewis v. State, 572 So. 2d 908, 911 (Fla. 1990) (finding no error in exclusion of expert testimony to matters well within the common understanding of jury). Here, Strang's testimony served only to build sympathy within the jury for the victim. The trial judge erred in allowing such testimony. *See generally* Smith v. State, 674 So. 2d 791 (Fla. 5th DCA 1996), *review denied,* 684 So. 2d 1352 (Fla. 1996) (finding improper expert testimony irrelevant to the proper jury role); Florida Power Corp. v. Barron, 481 So. 2d 1309 (Fla. 2d DCA 1986) (finding improper expert testimony to matters of common understanding).

The obvious aim of Ofshe's testimony was to express an opinion on whether Panoyan or Williamson was telling the truth. Such testimony is highly improper and invades the province of the jury in determining what weight to place on a witness's testimony. That Ofshe=s subsequent testimony was at times

framed as being based on Ahypotheticals@ (T 2234-2237), in no way lessened its unfairly prejudicial impact. In Audano v. State, 641 So. 2d 1356 (Fla. 2d DCA 1994), for example, where, A[i]n a lengthy hypothetical question, the prosecutor summarized the trial evidence and asked whether such a claim of abuse would be >consistent with the disclosure of a false allegation,= [the witness] answered that in her expert opinion, >that type of disclosure is more consistent with a true allegation of sexual abuse,=" the court held: AThis type of testimony is inherently prejudicial to the defendant, especially in a case where the credibility of the perpetrator and the victim is the sole issue.@ *Id. See also* Hidalgo v. State, 689 So.2d 1142 (Fla. 3d DCA 1997).

Ofshe gave no foundation in science or other area of specialized knowledge for his belief that Panoyan had been threatened. As there was no foundation for this belief, its expression amounted to an impermissible comment on the credibility of Panoyan=s new story. Price v. State, 627 So. 2d 64 (Fla. 5th DCA 1993). As Ofshe provided no basis for his belief Panoyan was threatened, it was irrelevant. Ofshe's testimony, unlike the expert in Glendening, was not helpful to the jury as, unlike in Glendening (where the non-testifying witness was

age 3), the witness at bar (who was 50) was capable of stating what did and did not happen out of his own mouth.

> Witness credibility is the sole province of the jury....[W]e conclude that allowing expert testimony to boost the credibility of the main witness against Snowden--considering the lack of other evidence of guilt--violated his right to due process by making his criminal trial fundamentally unfair.

Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998).

The credibility of the State=s key witness--who, in a newly revised story, cast himself as victim rather than suspect--was pivotal. As Panoyan's credibility was the determinative issue at trial, Williamson=s trial counsel should have requested a curative instruction after objecting to expert testimony vouching for Panoyan=s credibility. Given its significance, there remains a reasonable probability that, but for counsel's omission to request an instruction, the outcome of the proceeding would have been different. Strickland. There remains a reasonable probability jurors would have weighed conflicts between Williamson=s statements to police and Panoyan=s new story and decided the swearing contest in Williamson=s favor.

VI. COUNSEL=S FAILURE TO OBJECT TO THE STATE=S UNFAIRLY PREJUDICIAL CLOSING ARGUMENT

"The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." Duest v. State, 462 So.2d 446, 448 (Fla. 1985). At bar, counsel=s failure to object to the State=s unfairly prejudicial closing argument discarded Williamson=s right to a fair trial and barred this misconduct from review. Garcia v. State, 644 So. 2d 59 (Fla. 1994). Examples of the State=s impermissible closing argument at trial follow:

a. TELLING JURORS AYOU BETTER BELIEVE THAT WE FILED THESE CHARGES BECAUSE IT=S WARRANTED@

In closing arguments, the State commented as follows:

> [STATE]: The other way to commit first degree murder is if someone 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 it=s warranted***.

(T 3062) (emphasis added).

The State=s assurance that it had elected to bring a felony murder charge because such a charge was warranted was impermissible. A long line of cases in this and other jurisdictions deems such argument reversible. McGuire v. State, 411 So. 2d 939 (Fla. 4th DCA 1982) (improper for State to comment it was not State=s job to prosecute innocent people); Duque v. State, 460 So.2d 416 (Fla. 2d DCA 1984) (State=s comment AI don't come into a courtroom with the wrong persons@ impermissible); Buckhann v. State, 356 So.2d 1327 (Fla. 4th DCA 1978) (argument A[D]on't you think for one second that the State of Florida does not believe [defendant] is guilty, or we would not be here@ reversible); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976) (reversible to argue AWe prosecute them because we believe they are guilty of crimes"); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984) (asking jury ADo 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? . . . impermissibly suggest[ed] the State of Florida feels [he] was guilty and would not have wasted time and money prosecuting the case if she was not guilty.@).

As this Court stated in Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999):

> It is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant.The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused

> is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.
>
> * * *
>
> This statement takes guilt as a pre-determined fact. The remark is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them. Or, arguably it may be construed to mean that as a pretrial administrative matter the defendant has been found guilty as charged else he would not have been prosecuted, and that the administrative level determination is either binding upon the jury or else highly persuasive to it. Appellant's trial was held and the jury impaneled to pass on his guilt or innocence, and he was clothed in the presumption of innocence. The prosecutor may neither dispense with the presumption of innocence nor denigrate the function of the trial nor sit as a thirteenth juror.

Ruiz v. State, 743 So. 2d at 5 (quoting Hall v. U. S., 419 F.2d 582 (5th Cir. 1969)).

At bar, the State=s telling jurors A[y]ou better believe that we filed the charges because it=s warranted@ (T 3062), was unfairly prejudicial and trial counsel should unquestionably have objected and requested a curative instruction or mistrial. Counsel=s failure to do so resulted in a breakdown in the adversarial testing process, denied Williamson a fair trial and undermined reliability of its outcome. Strickland.

b. VOUCHING FOR THE CREDIBILITY OF THE STATE=S KEY WITNESS BY CHARACTERIZING THREATS THE STATE WITNESS TESTIFIED WILLIAMSON MADE AS ABELIEVABLE THREATS@

The State also made the following arguments to the jury without objection by Williamson=s defense counsel during closing arguments:

> [STATE]: He was scared. How was he described? He was scared. He was scared, ladies and gentleman.
>
> And as Dr. 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 the threatener is able to carry it out, it is something that a human being can react inappropriately to and be subjected to coercion and can come under the influence of the coercive party, particularly when you're in between a rock and a hard place.

(T 3068) (emphasis supplied).

As the trial court had earlier ruled A[i]t is improper to talk about the credibility of the threat,@ and A[i]f you say the credibility of the threat, that's assuming the threat was ever given, which is an issue for the jury, not for the witness@ (T 2238), an objection to these comments about Dr. Ofshe's testimony would likely have been sustained and, upon a request from defense counsel, a curative instruction given.

Apparently emboldened by trial counsel's inaction in the face of this comment explicitly prohibited by the Court, the State took this line of argument a step further:

> [STATE]: He [defense counsel] says to you, just on the faith of Charles Panoyan's testimony alone. ***Which I suggest to you is credible.***

(T 3072) (emphasis added).

Thus, Williamson's trial counsel sat mute as the prosecution vouched for the credibility of alleged victim and State key witness Charles Panoyan, opining Williamson's guilt, despite the trial court's earlier ruling to the contrary and the myriad cases in this jurisdiction specifically prohibiting such argument. *See*,

e.g., Gorby v. State, 630 So. 2d 544, 547 (Fla. 1993) ("It is improper to bolster a witness' testimony by vouching for his or her credibility"); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993) (where prosecutor bolstered State witness= testimony, district court held that A[b]ecause this case came down to a swearing match between the [state=s witnesses] and appellant=s witnesses, the error cannot be considered harmless.@). *See also* State v. Ramos, 579 So. 2d 360 (Fla. 4th DCA 1991) (prosecutor=s expression of personal belief is impermissible); Wilson v. State, 371 So. 2d 126 (Fla. 1st DCA 1978) (same); Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975) (same) Dukes v. State, 356 So. 2d 873 (Fla. 4thth DCA 1978) (vouching and expression of belief destroys the essential fairness of a criminal trial).

Defense counsel=s failure to object in this regard and to seek a curative instruction was particularly prejudicial in the present case as Panoyan=s credibility was the heart of the State=s case. Yet bolstering Panoyan=s credibility while asking jurors to place themselves in his shoes were chances the prosecution was willing to take because, without the otherwise *in*credible recanting Panoyan, their case teetered precariously on circumstantial evidence. As this Court observed on direct review, Williamson=s defense rested on evidence that

> Robert Decker saw Panoyan whispering to the gunman during the criminal episode; that Panoyan was the only person at the Decker house to be released unharmed; that police had considered Panoyan to be a suspect from the time of the criminal episode; and that Panoyan did not identify appellant as the assailant until three years after the criminal episode.

Williamson v. State, 681 So. 2d at 695.

Marginally effective defense counsel would have objected to this argument intended to vouch for this key witness= credibility. Instead, defense counsel sat by and allowed the State to vouch for Panoyan=s credibility and allowed Williamson to be unfairly convicted of 14 crimes, including capital murder, on unfairly prejudicial argument and innuendo. Counsel=s failure to object and to request a curative instruction deprived Williamson of the effective assistance of *defense* counsel guaranteed by the Sixth Amendment. It constituted a complete breakdown in the adversarial testing process, depriving Williamson of a fair trial whose outcome, within reasonable probability, might otherwise have been different.

c. DISCUSSING TESTIMONY OF AANOTHER WITNESS THAT YOU DIDN=T HEAR FROM BECAUSE HE=S A CHILD AND A BABY@ THAT HE HAD SEEN HIS MOTHER MURDERED

Also in the course of its closing argument during the guilt phase of jury trial, the State actually argued:

> [STATE]: There=s another witness that you didn=t hear from, because he=s a child and he=s a baby. He=s still a baby. He=s just 9 years old. He saw this piece of bathrobe around his mother=s neck. I submit to you, ladies and gentlemen, that how I know is because Yvonne Rutherford came on the witness stand and told you, among other things, the worst thing I had to do was tell this little boy that his momma died.
>
> And this is what he was doing, he=s putting a gag around his toy=s mouth, and that=s not right. And used his hand like a knife was in it and was stabbing at the doll. What does this tell us? That he=s a witness to everything that happened that night, including his mother=s location in the hallway. His mother losing her life in that hallway that night. Donna Decker fought for her life that night.

(T 3106-3107).

This Court, in Ruiz v. State, 743 So.2d 1 (Fla. 1999), reaffirmed the longstanding principle that closing argument which makes reference to the testimony of witnesses who have not testified is strictly prohibited:

> As his first two points, Ruiz contends that the prosecutors engaged in egregious misconduct during closing argument in both the guilt and penalty phases of the trial. We agree. A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence:A criminal trial provides a neutral arena for the presentation of evidence upon which alone the jury must base its determination of a defendant's innocence or guilt. Attorneys for both sides, following rules of evidence and procedure designed to protect the neutrality and fairness of the trial, must stage their versions of the truth within that arena. That which has gone before cannot be considered by the jury except to the extent it can be properly presented at the trial and those things that cannot properly be presented must not be considered at all.
>
> * * *
>
> This blatant appeal to jurors' emotions was improper for a number of reasons: it personalized the prosecutor in the eyes of the jury and gained sympathy for the prosecutor and her family; it contrasted the defendant (who at that point had been convicted of murder) unfavorably with Ms. Cox's heroic and dutiful father; it put before the jury new evidence highly favorable to the prosecutor; it exempted this new evidence from admissibility requirements and from the crucible of cross-examination

Ruiz v. State, 743 So. 2d 1 (Fla. 1999).

As the cases quoted elsewhere in Ruiz indicate, this was the standard at the time of Williamson's trial. *See also* Silva v. Nightingale, 619 So. 2d 4 (Fla. 5th DCA 1993) (prosecutor improperly expressed his personal opinion, either directly or by inference, as to credibility of witnesses and commented on matters

not in evidence), Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975) (AIt is quite obvious that in the case at bar, where the jury's verdict hinged upon a weighing of the credibility of a single State's witness and a single defense witness, the prosecutor's allusion to additional witnesses and evidence could have had the effect of unfairly tipping the scales.@).

In sum, the closing argument at bar was improper and extremely prejudicial. The accompanying duties of defense counsel to register objections and request curative instructions constitute objective standards of reasonably competent representation by attorneys handling capital cases of which Williamson=s trial counsel fell woefully short. In view of the circumstantial nature of the State=s case (aside from its key witness whose credibility was bolstered by Golden Rule argument in opening, improper expert opinion testimony on credibility at trial and vouching by the State in closing) this blatant emotional appeal concerning matters not in evidence seriously undermines reliability in the outcome of Williamson=s trial. Williamson was denied the effective assistance of counsel guaranteed by the Sixth Amendment, entitling him to a new trial with the assistance of competent counsel.

VII. FAILURE TO OBJECT TO THE STATE=S CHARACTERIZATION OF THE OFFENSE AS AINEXCUSABLE@ DESPITE THE JURY=S INSTRUCTION ON EXCUSABLE HOMICIDE

The trial court instructed jurors on Excusable Homicide. (T 3137). During its opening statement at penalty phase, however, the State argued without objection:

> [STATE]: 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.

(T 3385) (emphasis added).

The prosecution=s argument that a homicide is inexcusable when the jury has been instructed on excusable homicide is prejudicial error to which competent counsel should have objected. The defendant in Young v. State, 509 So.2d 1339 (Fla. 1st DCA 1987), for example, was convicted of murder after the prosecution argued that a killing is excusable only if a dangerous weapon is not used or the killing is not done in a cruel or unusual manner. The trial court overruled the defense attorney=s objection that the argument was a misstatement of the law, and the appellate court reversed on the rationale of Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983), where it had been the jury instruction that Amight have misled the jury by inaccurately appearing to suggest that a killing can never be excusable if committed with a dangerous weapon." *See also* Evans v. State, 572 So. 2d 20 Fla. 4th DCA 1990) (same).

The argument at bar, like that in Young and the jury instruction in Blitch, misled jurors by inaccurately suggesting that the homicide could never be excusable.

VIII. FAILURE TO OBJECT TO THE STATE=S ARGUMENT DURING PENALTY PHASE OPENING STATEMENTS THAT THE EVIDENCE IN MITIGATION CONSTITUTED MERE AEXCUSES@

In the course of its opening statement during the penalty phase proceedings, the State argued:

> [STATE]: 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.

(T 3386) (emphasis added). (*See also* T 3385).

Failing to object to the State=s characterization of the mitigating circumstances offered by the defense as Aexcuses@ was clearly an act of incompetence. In Brooks v. State, 762 So. 2d 879 (Fla. 2000), this Court reiterated the rule against such argument, holding the State's characterization of mitigating circumstances as Aexcuses@ was Aclearly an improper denigration of the case offered by [defendants] in mitigation.@). *See also* Urbin v. State, 714 So.2d 411, n. 14 (Fla. 1998).

That neither Urbin nor Brooks had been decided at the time Williamson=s defense counsel failed to object to the State=s Aexcuses@ argument is of no moment. As this Court noted in Brooks:

> Urbin simply reiterated what this Court's decisions have declared time and time again. Clearly, the State ignores the extensive case law citations throughout the opinion in Urbin, as well as the penultimate paragraph which begins, "The fact that so many of these instances of misconduct are literally verbatim examples of conduct we have unambiguously prohibited in Bertolotti, Garron, and their progeny. . . ." Urbin, 714 So. 2d at 422.
>
> The State also overlooks the statement, "This Court has so many times condemned pronouncements of this character in the prosecution of criminal cases that the law against it would seem to be so commonplace that any layman would be familiar with and observe it," commentary found in a 1951 opinion. Stewart v. State, 51 So. 2d 494 (Fla. 1951).

Brooks v. State,762 So. 2d at n. 29.

This unfairly prejudicial argument by the prosecution (calling mitigating factors Aexcuses@) could not be raised on direct appeal as Williamson=s trial counsel failed to preserve it for review. In cases too numerous to cite, this Court has continued to observe the rule that complaints about closing argument would not be recognized on direct appeal where there has been no contemporaneous objection.

As Athe law against [such argument] would seem to be so commonplace that any layman would be familiar with and observe it," Brooks, *supra,* and because the sentencing court found evidence of eleven (11) mitigating factors which jurors might reasonably have considered something more than Aexcuses@ and returned a recommendation of life imprisonment rather than death, trial counsel=s failure to object to the State=s argument that the mitigators were mere Aexcuses@ constituted a denial of the effective assistance of trial counsel guaranteed by the Sixth Amendment to the United States Constitution requiring a new penalty phase proceeding.

IX. COUNSEL=S UNAUTHORIZED CONCESSION OF GUILT DURING PENALTY PHASE CONSTITUTED INEFFECTIVE ASSISTANCE

[WITHDRAWN]

b. Fundamental Error

THE LIKELIHOOD THAT THE VERDICTS IN COUNTS II THRU IV RESTED ON THE STATE=S ALTERNATIVE THEORY OF ATTEMPTED FIRST DEGREE FELONY MURDER [A NON-EXISTENT OFFENSE AT THE TIME WILLIAMSON=S CASE BECAME FINAL ON DIRECT APPEAL] CONSTITUTES FUNDAMENTAL ERROR AND:

X. REQUIRES THE JUDGMENTS AND SENTENCES FOR ATTEMPTED MURDER BE VACATED AND SET ASIDE

On ***August 3, 1994***, Williamson filed notice of direct appeal of his judgments. Later, on ***May 4, 1995***, this Court issued its opinion in State v. Gray, 654 So. 2d 552 (Fla. 1995), holding the offense of attempted first degree felony murder was a nonexistent crime. Gray specifically held its decision would "be applied to all cases pending on direct review or not yet final." 654 So.2d at 554. In an opinion dated ***September 19, 1996***, this Court affirmed Williamson=s convictions. Williamson v. State, 681 So. 2d 688 (Fla. 1996). Thus, Williamson=s case was pending on direct review or not yet final at the time of the decision in Gray and, under that decision, could not legally remain convicted of attempted first degree felony murder.[6]

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

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

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

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

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

> first-degree murder must be reversed. See Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).

Valentine v. State, 688 So. 2d at 317. At bar, the State proceeded against Williamson in the attempted murder counts on alternative theories of premeditation and attempted felony murder. Williamson=s jury was instructed on both the premeditated and felony murder theories of attempted first degree murder.[7] Jurors were then given a form that contained only a general verdict (*i.e.*, guilty Aas charged in the indictment@). As the Fourth District stated in Tricarico v. State, 711 So. 2d 624 (Fla. 4th DCA 1998):

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

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

Williamson=s conviction of a non-existent crime, moreover, resulted in fundamental error. In Hill v. State, 730 So.2d 322 (Fla. 5th DCA 1999), a defendant charged with attempted first-degree murder with a

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[7] As Williamson=s counsel did not object to these jury instructions at trial, however understandably, this claim was not preserved for appellate review. *See, e.g.,* Gunsby v. State, 574 So.2d 1085, 1088 (Fla. 1991); Fla. R. Crim. P. 3.390(d).

firearm, possession of a firearm by a convicted felon, and attempted armed robbery with a firearm, entered a plea of nolo contendere and moved for post-conviction relief. Hill sought to vacate and set aside the judgment and sentence for attempted first-degree felony murder as it constituted a violation of due process in light of Gray-s abrogation of prior case law that had recognized the crime of attempted felony murder. Finding Gray applied to the facts of that case, Hill considered the appropriateness of using rule 3.850 to attack the due process violation created by conviction of a non-existent offense:

> Although Rule 3.850(c) "does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence," fundamental error---i.e., "error...which amounts to a denial of due process"---can be raised for the first time in a post-conviction proceeding. Willie v. State, 600 So. 2d 479, 482 (Fla. 1st DCA 1992). As we noted in Vogel v. State, 365 So. 2d 1079, 1080 (Fla. 1st DCA 1979) (fundamental error required reversal of conviction of attempted possession of burglary tools, an offense that Supreme Court of Florida held was not a crime, in opinion issued while defendant's appeal was pending), the "[j]udicial conscience cannot allow a person to remain imprisoned for a crime which the Supreme Court has held does not exist." Accordingly, we conclude that Ground One stated a facially sufficient claim for relief.

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

For these reasons, Williamson-s convictions for attempted first degree murder should be vacated, set aside and reset for trial.

XI. FUNDAMENTAL ERROR REQUIRES A NEW PENALTY PHASE TRIAL UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS THE

ATTEMPTED FIRST DEGREE FELONY MURDER CONVICTIONS TIPPED THE JURY=S SCALES IN FAVOR OF A DEATH RECOMMENDATION

Williamson should also be accorded a new penalty phase proceeding as it cannot be said that the jury=s recommendation of death was not improperly influenced (if not driven) by the fact that, *according to the attempted first degree felony murder instructions they were given*, Williamson had also committed 3 attempted first degree murders. In the trial court=s instructions to the jury concerning their Advisory Sentence, the court told jurors:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> 1. The defendant has been previously convicted of another capital offense or of a ***felony involving the use or threat of violence to some person.***
>
> ***The crime of Attempted Murder in the First Degree is a felony involving the use of violence to another person*** . . .[8]

[8] The Trial Court also used the jury=s arrival at the attempted first degree murder convictions in its rationale for applying the other-violent-felony

As it is impossible to know whether the jury=s attempted murder verdict was based on a finding of premeditation or upon the attempted first degree felony murder theory, it is impossible to know whether and to what degree the jury=s advisory verdict relied on the notion that Williamson had committed the offense of attempted murder in the first degree under the attempted first degree felony murder doctrine. As such a finding would have**B**and may have--produced an advisory sentence of death based on a non-existent crime, a new penalty phase trial is required.

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aggravator, stating in its Order:

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

Moreover, in a weighing State like Florida, an Eighth Amendment error occurs when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. *See* Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness" by placing a "thumb on death's side of the scale," Stringer v. Black, 503 U.S. 222, 232 (1992). Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, supra, at 752.

CONCLUSION

The trial court erred in summarily denying Williamson=s claims as they are facially sufficient and are not conclusively refuted by the record. The trial court=s order summarily denying these claims should therefore be reversed and remanded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) Assistant State Attorney Susan Bailey, 201 S.E. 6th Street, Suite 675, Fort Lauderdale, FL 33301, (2) Assistant Attorney General Leslie Campbell, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, and (3) Mr. Dana Williamson, #048606, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, by United States Mail, this _____ day of _____, 2007.

CERTIFICATE OF FONT AND TYPE SIZE

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

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