IN THE SUPREME COURT OF FLORIDA

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

_____

REPLY BRIEF OF APPELLANT

_____

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

_____

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I. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE'S "GOLDEN RULE" ARGUMENT BOLSTERING THE CREDIBILITY OF THE STATE'S KEY WITNESS IN OPENING STATEMENTS

The State insists only certain words would amount to Golden Rule argument. Yet prejudice stems not from words, but urging jurors to put themselves in Panoyan's position. Counsel failed to object to the State's argument in opening, after listing numerous alleged threats by Williamson against Panoyan's wife and children:

> "Charles 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."

(R 592) (emphasis added).

The State contends the "you" here is not "you the jurors," but a "generic you," as in "you can't always get what you want." That theory fails, however, because the prosecutor is addressing jurors and is specifically referring to what the prosecutor told *them* in voir dire about wanting to protect *their* children. The comment reasonably invited jurors to place themselves in the belatedly self-proclaimed victim Panoyan's position. If it referred to something else, the State has yet to identify it.

The State's contention that this was a isolated comment, *State's Answer Brief, pages 20-21*, ignores that Panoyan took three years to come up with this new version of events alleging threats by Williamson--and was the only eye witness to identify Williamson as the killer. Jurors' belief that Panoyan was "between a rock and a hard place" was crucial–and the prosecutor was asking jurors if they had ever been there.

The denial's conclusion that Williamson "did not support his claim or provide legal argument regarding the manner in which the prosecutor's statements actually prejudiced [him] or affected the outcome of the trial," is refuted by motion page 14:

> Trial counsel's failure to object to the State's Golden Rule argument allowed to go unchallenged from the very start the idea that the State's key witness--formerly a co-defendant–was a victim in whose shoes throughout the upcoming trial jurors should unquestionably walk. The State's opening statement not only constituted *argument* instead of [opening] statement, but argument of the most pernicious timing and kind, infecting the fundamental fairness of the entire trial.
>
> Counsel's failure to object to the State's Golden Rule argument and request a curative instruction, moreover, precluded Williamson from raising this issue on direct appeal. 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 purposes of 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. Strickland v. Washington, *supra.*

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 defense counsel failed to object to the admission of Panoyan's written waiver of immunity when it was admitted into evidence, bolstering Panoyan's credibility, despite the State's failure to disclose the waiver's existence prior to trial (T 2217), prejudicing the very heart of the defense, which hinged almost uniquely on Panoyan's credibility, and waiving the issue for direct appeal.

This case was tried in July 1994. Later, in July 2003, Ch. 2003-259, § 1, Laws of Fla., amended § 90.104, Fla. Stat., to provide: "if the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

Prior to the 2003 amendment, the rule was that, notwithstanding any prior objection, if a defendant failed to renew an objection at the time the evidence was later introduced, the issue was waived and unpreserved for direct appellate review.

As this Court noted before the 2003 amendment of § 90.104, Fla. Stat.:

> Defense attorneys in the state are surely aware of the following rule:
> Failure to renew an objection at trial contemporaneously with admission of the contested evidence constitutes a waiver of the right to appellate review of an alleged error, even though issues of constitutional dimensions are claimed to exist.

G. E. G. v. State, 417 So.2d 975, 978 n.4 (Fla. 1982) *See also* Jones v. State, 360 So.2d 1293 (Fla. 3d DCA 1978) (failure to renew objection to evidence at time it is admitted into evidence waives right to review even if matter violates constitution).

Tolbert v. State, 922 So.2d 1013 (Fla. 5th DCA 2006), explained the effect of the amended preservation rule applied to cases after Williamson's trial and appeal:

> One of the intended consequences of the amendment is to alleviate the often harsh results that followed from application of decisions which held that although a litigant secured a prior evidentiary ruling from the trial court, waiver of the objection occurred, albeit unintended, if the litigant failed to lodge a timely renewal of the objection in the proceedings when the evidence was subsequently introduced.

Tolbert v. State, 922 So.2d at 1017.

Thus, the State's contention that Williamson's counsel preserved this issue for appeal by timely objection is *not* refuted by the record. Instead, the law at the time

of Williamson's trial required the objection be renewed at the time the evidence was admitted in order to preserve the issue for appeal--and Williamson's counsel did not.

Prejudice to the defense in admitting the previously undisclosed waiver of immunity, bolstering Panoyan's credibility as one who testified purely at his own peril, is evident in the opinion on direct appeal: "Panoyan's credibility was a material issue on which the State's case depended." Williamson v. State, 681 So. 2d at 695.

Rather than objecting to the admission of this powerful document to bolster Panoyan's otherwise lacking credibility (as recanted testimony is "exceedingly unreliable" Armstrong v. State, 642 So.2d 730 (Fla. 1994)), counsel sat on his hands.

Despite the State's insistence that a nominal "Richardson hearing" occurred, *State's Answer Brief, page 27*, defense counsel failed to object to the inadequacy of what the trial court termed a "Richardson hearing" for this discovery violation. The trial court was required to conduct a hearing which actually determined whether the violation was (1) inadvertent or willful, (2) trivial or substantial, and (3) what effect, if any, the violation had on 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 determine whether the State's noncompliance with the rule prejudiced the defense, requiring the imposition of sanctions, such as excluding the evidence. *Id.* at 775.

The hearing "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." Mondo v. State, 640 So.2d 1232 (Fla. 4th DCA 1994). The hearing at bar, however, consisted solely of the following:

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).

Contrary to Richardson, the trial court made no inquiry into whether the violation was inadvertent or willful, or whether it was trivial or substantial. Its

conclusion that "[i]t is not even prejudicial" (T 2216) was based not on whether admitting the waiver would unfairly bolster the recanting Panoyan's credibility, but whether "[t]he defense was aware that there were more deals made." (T 2216).

As "Panoyan's credibility was a material issue on which the State's case depended," Williamson v. State, 681 So.2d at 695, a reasonable probability remains that, on timely objection to the waiver's admission, it would have been excluded or, if admitted, would have incurred reversal on direct appeal as it unfairly bolstered Panoyan's credibility. Ineffective assistance of counsel resulted, undermining the trial's fairness and any reliability in its outcome.

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

Despite *other* attempts to attack Panoyan's credibility listed in the summary denial, Williamson's counsel failed to impeach Panoyan's damning testimony using his own original statement to police: an omission unattributable to trial strategy as "Panoyan's credibility was a material issue on which the State's case depended," Williamson v. State, 681 So. 2d at 695, resulting in prejudice: But for counsel's failure to impeach Panoyan with his own original statements to police which never inculpated Williamson, there

remains a reasonable probability jurors would have rejected Panoyan's testimony and acquitted. The State's notion that the motion's allegations are legally insufficient is contradicted by, *e.g.*, Porter v. State, 626 So.2d 268 (Fla. 2d DCA 1993) (such allegations state a *prima facie* case for relief).

Further, Kegler v. State, 712 So.2d 1167 (Fla. 2nd DCA 1998), is on all fours:

> 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 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.

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

The State's notion that Kegler is distinguishable since "the important fact is whether the jury knew about the contradictory statement, not which counsel brought forth that information," *State's Answer Brief, page 32*, ignores Williamson's right to confront his accusers. He was entitled to have his defense counsel test Panoyan's credibility by impeaching Panayon with his own contradictory statements to police over the course of three years, submitting Panoyan's demeanor to the jury's scrutiny.

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

The State's notion that this ground should have been raised on direct appeal misunderstands ineffective assistance of counsel claims and

misapprehends the requirements of preservation for review. It is trial counsel's failure to test the evidence in a manner that would not only provide for a fair trial, but also preserve the issue for appeal that forms the basis for such a claim. The State's contention that "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," *State's Answer Brief, page 36*, ignores the basics of preservation. *See* Glendening v. State, 536 So.2d 212, 221 (Fla. 1988) (holding that psychologist's improper vouching for credibility of the victim's allegation was not preserved where an objection was based only on relevance); Correia v. State, 695 So.2d 461 (Fla. 4th DCA 1997) (Objections that witness was not qualified as expert and was testifying outside her area of expertise did not preserve issue of whether expert was impermissibly vouching for credibility of child victim in testifying that child's statement was consistent with those of abused children). *See also* Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992) (condemning denial of 3.850 claims on the basis that

the matter should have been raised on direct appeal while overlooking fact the 3.850 claim is counsel's failure to object, barring direct review).

As Williamson's counsel failed to require the court to make a determination of whether Ofshe's expert testimony would assist jurors in making a fair determination of Panoyan's credibility, there remains a reasonable probability the outcome would have been different. There remains a reasonable probability that, had counsel *voir dired* and sought to exclude Ofshe's testimony when the trial court proposed doing so, the court would have followed the overwhelming 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 Issue 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[1] analysis before its admission. It cannot be said that Ofshe's novel "influence and control" testimony 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

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

> 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.

Only upon proper objection that novel scientific evidence is unreliable must a trial court make a Frye determination. Unless the party against whom the evidence is being offered makes this specific objection, a trial court will not have erred in admitting it. Archer v. State, 673 So. 2d 17 (Fla. 1996) (failure to object to error at trial provided no ruling by trial judge upon which to base a claim of error on appeal).

Dr. Ofshe's testimony that "the ***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.

As this Court stated in Flanagan v. State, 625 So.2d 827 (Fla. 1993), such pattern or profile testimony by an expert must be subjected to a Frye analysis:

> Profile testimony . . . by its nature necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony. The jury will naturally assume that the scientific principles underlying the expert's conclusion are valid. Accordingly, this type of testimony must meet the Frye test, designed to ensure that the jury will not be misled by experimental scientific methods which may ultimately prove to be unsound.

Flanagan v. State, 625 So.2d at 828.

A Frye hearing determines admissibility of evidence before jurors hear it. The issue at bar was not preserved for appeal as counsel did not timely object to the expert testifying without a Frye hearing, or even request a Frye hearing pretrial. Jordan v. State, 694 So. 2d at 716 n.8; Hadden v. State, 690 So. 2d 573, 580 (Fla. 1997) ("upon proper objection prior to the introduction 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 and adopted in Florida.") (citation omitted):

> 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.

The State's repetition of the trial court's notion that this was "pure opinion" testimony not subject to Frye, *State's Answer Brief, pages 38-39*, is only half true. Dr. Ofshe testified that "the ***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). As this Court held in Hadden, mixing such pattern or profile testimony with Ofshe's otherwise "pure opinion" subjects his testimony to a Frye analysis because combining these two kinds of testimony, by definition, removes it from the realm of "pure opinion":

> [W]e find that profile or syndrome evidence is not made admissible by combining such evidence with pure opinion testimony because such a combination is not pure opinion evidence based solely upon the expert's clinical experience.

Hadden v. State, 690 So. 2d at 580.

Contrary to the State's suggestion that Dr. Ofshe's theories had received general acceptance within the relevant scientific community, less than a month before Panoyan's and Williamson's May 1990 arrest, a U.S.

District Court in California detailed the utter ***lack*** of acceptance of Ofshe's theories in the relevant scientific community. United States v. Fishman, 743 F.Supp. 713 (N.D.Cal.,1990):

> A more significant barometer of prevailing views within the scientific community is provided by professional organizations such as the American Psychological Association ("APA") and American Sociological Association ("ASA"). The evidence before the Court, which is detailed below, shows that neither the APA nor the ASA has endorsed the views of Dr. Singer and Dr. Ofshe on thought reform.
>
> The APA considered the scientific merit of the Singer-Ofshe position on coercive persuasion in the mid-1980s. Specifically, the APA commissioned a task force to study and prepare a report on deceptive and indirect methods of persuasion and control. The APA named Dr. Singer to chair the task force. Before Dr. Singer's task force had completed its report, however, the APA publicly endorsed a position on coercive persuasion contrary to Dr. Singer's. In early 1987, the APA joined with certain behavioral and social scientists in submitting an *amicus* brief for a case where two individuals alleged they had been coerced into joining and maintaining membership in a religious cult. The case was at that time pending before the California Supreme Court. The APA brief argued that the trial court in the case had properly excluded the proffered expert testimony of Dr. Singer because her coercive persuasion theory did not represent a meaningful scientific concept.
>
> * * *
>
> Significantly, the APA ultimately rejected the Singer task force report on coercive persuasion when it was submitted for consideration in October 1988. The APA found that Dr. Singer's report lacked scientific merit and that the studies supporting its findings lacked methodological rigor.

> The American Sociological Association has also recently considered the merits of the Singer-Ofshe thesis applying coercive persuasion to religious cults. In May 1989 the ASA joined the Society for the Scientific Study of Religion and a large group of individuals in submitting another *amicus* brief in the litigation, this time while the case was pending before the United States Supreme Court. As the APA had done, the ASA brief took a position in sharp contradiction to the Singer-Ofshe thesis.

United States v. Fishman, 743 F.Supp. at 717-18 (citations omitted).[2]

Fishman noted the American Psychological Association found Dr. Ofshe's theory "lacked scientific merit and that the studies supporting its findings lacked methodological rigor" in October 1988–*i.e.,* less than a month before the November 1988 events Dr. Ofshe gave expert opinion testimony on in the instant case; and that the American Sociological Association "took a position in sharp contradiction to the Singer-Ofshe thesis" in May 1989–*i.e.,* seven months after the killing.

A year later, in Greene & Ryan v. Maharishi Mahesh Yogi, Nos. 87-0015. 0016, (D.D.C., 1991), Senior Judge Gasch held that even under the lower standard of "substantial acceptability" applied in civil cases, Ofshe's theories were inadmissible).

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[2] Dr. Ofshe subsequently filed a civil lawsuit against the APA, the ASA and others, claiming they were part of a "conspiracy" within the scientific community against his and his colleague's "coercive persuasion" theory, which they had rejected. Ofshe's lawsuit was dismissed months before Williamson's trial. Margaret Singer and Richard Ofshe v. American Psychological Ass'n, 1993 WL 307782 (Aug 09, 1993).

Subsequent to Williamson's trial, an Illinois' appellate court affirmed exclusion of Ofshe's testimony on extreme influence after a Frye hearing:

> The trial court reasoned that the false confession evidence testimony that Ofshe would render added "little or nothing to what [the jurors] can glean from the testimony themselves." The trial court also noted that, under the Frye standard, it was not convinced that Ofshe's type of testimony had general acceptance within the psychiatric, psychological, or sociological community.

People v. Rivera, 333 Ill.App.3d 1092, 777 N.E.2d 360 (Ill.App. 2 DCA 2001).

More recently, the Supreme Court of New York excluded Dr. Ofshe's testimony on "extreme influence" after holding a 12-day Frye hearing:

> With regard to Dr. Ofshe's analysis [on "extreme influence"], the court has no doubt that it is of value and interest to the academic community in the field of social psychology. However, the court is not convinced that Dr. Ofshe's research or findings would be of assistance to a trial jury as far determining the voluntariness of the defendant's confession.

People v. Kogut, 10 Misc.3d 305, 309, 113, 806 N.Y.S.2d 366, 370, 373 (N.Y. Sup. 2005) (Under Frye, Dr. Ofshe was prohibited from testifying regarding model of interrogation technique which he considered to be form of extreme influence).

As recently as last year, noting "the court clearly questioned the extent and quality of publication and peer review in what it deemed to be an 'infant field,'" the

Mississippi Court of Appeals, naming Dr. Ofshe as a one of its proponents, held testimony on false confessions induced by "extreme influence" did not meet even the liberalized Daubert test. Edmonds v. State, 955 So.2d 864, 800, n.8 (Miss. App. 2006), *rev on other grounds*, Edmonds v. State, 955 So.2d 787 (Miss. 2007).

Dr. Ofshe's expert testimony was offered to prove Panoyan exhibited a profile compatible with a person who had (as Panoyan testified) been threatened, stalked and extorted after witnessing a capital crime. Such evidence (bolstering Panoyan's explanation for why, after 3 years, he suddenly fingered Williamson) was not found to be generally accepted in the relevant scientific community. Such testimony, "based upon evidence which has not been demonstrated to be sufficiently reliable . . . cast[s] doubt on the reliability of the factual resolutions," Hadden, 690 So.2d at 578, "undermining the reliability of the trial's outcome," Strickland v. Washington, 466 U.S. at 687--as Panoyan was the only witness to identify Williamson as the killer.

V. FAILURE TO REQUEST CURATIVE INSTRUCTION WHEN TRIAL COURT SUSTAINED DEFENSE OBJECTIONS TO TESTIMONY BY STATE EXPERT ON "INFLUENCE 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 "CREDIBLE THREAT"

The State takes some literary license in rewriting the allegations of Williamson's postconviction motion. A review of the facts is in order: At trial, Dr. Ofshe testified in the jury's presence, "the pattern that [Panoyan] 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 "involvement 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 "the believability and/or credibility of the threat to which Panoyan was exposed." (T 2237). Though the trial court agreed "[i]t is improper to talk about the credibility of the threat," and that ""[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 this effect to ensure jurors understood considering such expert testimony is forbidden.

The State's notion that "Williamson failed to specify what 'error' needed to be cured and the record does not support his position," *State's Answer Brief, page 46*, ignores the above record quotation and motion page 26, alleging counsel should have requested an instruction forbidding expert testimony about the credibility of a threat. No witness may vouch for the credibility of another. Glendening v. State, *supra. See also* Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998) ("Witness credibility is the sole province of the jury. . . . [A]llowing expert testimony to boost the credibility of the main witness against Snowden . . . violated his right to due process by making his criminal trial fundamentally unfair"); Price v. State, 627 So.2d 64

(Fla. 5th DCA 1993) (questioning conveying an impression counselor believed victim was telling truth impermissibly vouched for the victim's credibility); Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984) (invasion of jury's province for witness to offer personal view on credibility of fellow witness).

"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); Hunter v. State, 660 So.2d 244 (Fla. 1995) (on timely objection, an instruction that jurors disregard a witness' comment on credibility elicited by the State may be sufficient to avoid a mistrial). Section 90.107, Fla. Stat. provides, even where evidence is *properly* admitted for a limited purpose, affecting a witness' credibility, “the court, upon request, shall restrict such evidence to its proper scope and so inform the jury at the time it is admitted.”

Williamson’s trial counsel requested no curative instruction when the State’s expert vouched for the credibility of the State’s key witness and the trial court had sustained the objection. Dr. Ofshe was permitted to express his expert opinion on the credibility of Panoyan’s recanted version of events, newly fingering Williamson as the perpetrator, which depended entirely on

whether Panoyan had been threatened, rendering counsel's failure to request a curative instruction prejudicial.

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

> [E]xpert 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. 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. . . . When a fact is so basic that an expert opinion will not assist the jury, an expert should not be allowed to testify. Here, Strang's testimony served only to build sympathy within the jury for the victim. The trial judge erred in allowing such testimony.

Jordan v. State, 694 So.2d at 717 (citations and internal quotation marks omitted).

Dr. Ofshe opined Panoyan's story was credible--invading the province of the jury in determining what weight to place on Panoyan's testimony. That Ofshe's later testimony was at times based on hypotheticals (T 2234-2237), in no way lessened its unfairly prejudicial impact. Audano v. State, 641 So. 2d 1356 (Fla. 2d DCA 1994) ("[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,'" and the court held: "This 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.").

Ofshe's testimony amounted to an impermissible comment on the credibility of Panoyan's new story. Price. Unlike Glendening (where the non-testifying witness was age 3), such testimony was not helpful to the jury at bar as the witness (age 50) was capable of stating what did and did not happen out of his own mouth.

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. There therefore remains a reasonable probability that, but for counsel's omission to request such 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 State's attempts to distinguish the applicable cases, requiring magic words to apply their principles, does little to alter the facts. The prosecutor's telling jurors "[y]ou better believe that we filed the charges because it's warranted" (T 3062); that key witness Panoyan had been "subjected to very real, believable threats" (T 3068); "Which I suggest to you is credible" (T 3072), unfairly and prejudicially bolstered this key witness' recanted version of events and trial counsel should unquestionably have objected and requested an instruction that the jury disregard the remarks, or moved for a mistrial. Counsel's failure to do so resulted in a breakdown in the adversarial testing process, denied Williamson a fair trial, barred this misconduct from direct review and undermined reliability of the trial's outcome. 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 "[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"); 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 and seek a curative instruction was particularly prejudicial as Panoyan's credibility was the heart of the State's case. 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.

Counsel's failure to object to the State's vouching for Panoyan's credibility 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

as “Panoyan's credibility was a material issue on which the State's case depended.” Williamson, 681 So. 2d at 695.

The prosecutor also argued: “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).

The State argues this case is distinguishable from Ruiz v. State, 743 So.2d 1 (Fla. 1999), since that case, in which the prosecutor referred to a “witness” who had no knowledge of the alleged acts, “involved a very different set of facts than present here,” *State’s Answer Brief, page 54*, without explaining *why* referring to the testimony of a witness who has not testified at trial is somehow less pernicious when the prosecutor claims, as here, that the “witness” perceived events charged in the indictment. If Ruiz is distinguishable, it argues *a fortiori* for reversal as injecting the “testimony” of a “witness” who did not testify at trial concerning acts alleged in the indictment deprived Williamson of his right to confront and cross-examine:

> 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. . . . [T]hings 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 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 cases quoted in Ruiz indicate, this was the law 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) ("It 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 "INEXCUSABLE" DESPITE THE JURY'S INSTRUCTION ON EXCUSABLE HOMICIDE

Williamson makes no further argument on this issue.

VIII. FAILURE TO OBJECT TO THE STATE'S ARGUMENT DURING PENALTY PHASE OPENING STATEMENTS THAT THE EVIDENCE IN MITIGATION CONSTITUTED MERE "EXCUSES"

In its opening statement for penalty phase proceedings, the State argued: “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. (T 3386) (emphasis added). (*Also* T 3385).

Failing to object to the State’s characterization of the mitigating circumstances offered by the defense as “excuses” was 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 “excuses” was “clearly an improper denigration of the case offered by [defendants] in mitigation.”). *See also* Urbin v. State, 714 So.2d 411, n. 14 (Fla. 1998). As 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**.**

Rather than reform its misconduct so severely criticized in Brooks, the State claims: "[t]he prosecutor did not state the mitigation constituted 'mere excuses,'" *State's Answer Brief, page 61*; that this issue should have been raised on direct appeal; *page 62*, and that the misconduct did not result in prejudice. *page 65.*

First, the magic words in Brooks and Urbin were not "*mere* excuses," but, as in the present case, "excuses." Brooks v. State, 762 So.2d at 904 ("characterizing such circumstances as 'excuses,' was clearly an improper denigration of the case offered by Brooks and Brown in mitigation"); Urbin v. State, 714 So.2d 411, 422 n.14 (Fla. 1998) (prosecutor "repeatedly labeled the mitigation as 'excuses'").

Second, this error could not have been raised on appeal as it was not preserved due to defense counsel's failure to object. *See* Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992) (condemning denial of 3.850 claims on the basis that the matter should have been raised on direct appeal while overlooking fact the 3.850 claim is counsel's failure to object, barring direct review); Downs v. Moore, 801 So.2d 906, 917 (Fla. 2001) ("If a defendant wishes to challenge trial counsel's failure to object to the purported fundamental error, the defendant may do so in a rule 3.850 motion.").

Third, concerning prejudice, the prosecution's denigration of Williamson's mitigating evidence as "excuses" should be read in combination with the numerous other instances of improper comments detailed in previous sections of this brief–as well as the fact that at least one of the three aggravating factors (prior violent felony) is predicated on three non-existent offenses.

As "the law against [denigrating mitigating evidence as 'excuses'] would seem to be so commonplace that any layman would be familiar with and observe it," Brooks, *supra,* and because the trial court found evidence of eleven (11) mitigating factors which jurors might reasonably have considered something more than "excuses" to return a recommendation of life rather than death, trial counsel's failure to object to the State's argument that the mitigators were mere "excuses" constituted a denial of the effective assistance of trial counsel guaranteed by the Sixth Amendment to the U.S. 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

The State attempts to mislead this Court by concealing key terms from this Court's wording of Rule 3.850(c). The State represents to this Court that rule 3.850:

> "does not authorize relief based on grounds that could have or should have been raised at trial ... [or] direct appeal."

State's Answer Brief, page 67. In reality, however, Rule 3.850(c) provides it:

> "does not authorize relief based on grounds that could have or should have been raised at trial and, ***if properly preserved***, on direct appeal ..."

Rule 3.850(c), Florida Rules of Criminal Procedure.

The omitted language is, of course, crucial to a fair consideration of this ground as this ground could not possibly have been preserved for direct appeal by objection or motion in the trial court as the decision in Gray had not

yet been issued. Because, in reality, this ground was *not* properly preserved for direct appeal, Rule 3.850 does not operate to preclude relief.

The State's notion that Gray does not apply retroactively to Williamson, *State's Answer Brief, page 68*, is contradicted by Gray itself. On ***August 3, 1994***, Williamson filed notice of direct appeal of his judgments. Later, on ***May 4, 1995***, the 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. This Court's decision in Gray specifically provided its decision would "be applied to all cases pending on direct review or not yet final." 654 So.2d at 554. Because Williamson's direct appeal had not yet been decided, his case was "pending on direct review or not yet final," as a case becomes "final" upon the termination of direct appeal. Ward v. Dugger, 508 So.2d 778 (Fla. 1 DCA 1987). Later, in an opinion dated ***September 19, 1996***, this Court affirmed Williamson's convictions. Williamson v. State, 681 So. 2d 688 (Fla. 1996). Because Williamson's case was pending on direct review and not yet final at the time of the decision in Gray, he may not legally remain convicted on a theory of attempted first degree felony murder.

The State cites State v. Hampton, 699 So.2d 235 (Fla. 1997), and State v. Woodley, 695 So.2d 297 (Fla. 1997), in an effort to make Williamson's case

appear to fall into a different category, *i.e.,* one that had already become final at the time Gray was decided. The State's reliance on those cases is misplaced, however, as Williamson's case was *not* yet final when Gray was decided:

> "Consistent with this rationale, and with our statement in Gray itself that the decision 'must be applied to all cases pending on direct review or not yet final,' we hold that Gray does not apply retroactively ***to those cases where the convictions had already become final before the issuance of the opinion***."

Hampton, 699 So.2d at 235; Woodley, 695 So.2d at 298 (emphasis added).

Contrary to the State's contention, moreover, Williamson's conviction of a non-existent crime 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 firearm, possession of a firearm by a convicted felon, and attempted armed robbery with a firearm, pled no contest and moved for post-conviction relief seeking to vacate his judgment and sentence for attempted first-degree felony murder as it constituted a violation of due process in light of Gray. 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. *See also* Moore v. State, 924 So.2d 840 (Fla. 4th DCA 2006) ("A conviction for a non-existent crime is fundamental error that can be raised at any time, even if the error was invited by acceptance of a negotiated plea or by a request for jury instructions.").

The State's notion that Hill, "failed completely to analyze the fact that Gray claims do not apply retroactively," *State's Answer Brief, page 69*, ignores that Hill, like Williamson, fall into the category of cases "pending on direct review or not yet final," to which Gray states it shall be retroactively applied. 654 So.2d at 554.

Significantly, this Court's opinion in State v. Wilson, 680 So.2d 411 (Fla. 1996), indicates any retrial on these counts in Williamson's case should be on any of the *lesser included offenses* that were contained in jury instructions at Williamson's original trial. Wilson, 680 So.2d at 412-13 ("Because [attempted felony murder] was a valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate.").

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

The State's reliance on its argument in Issue X (*i.e.,* that State v. Gray does not apply since that ground "should/could have been raised on direct appeal"), is unavailing as the State's argument in Issue X rests on the State's misquotation of Rule 3.850, concealing key terms from this Court's wording of Rule 3.850(c), as well as the State's misguided reliance on cases where, unlike Williamson's, the convictions had already become final before the issuance of the opinion in Gray.

The State argues that–although the jury was instructed to find Williamson guilty of the attempted murders even if it did not find that he committed any act beyond participating in the underlying felony, the error, according to the State, could not have affected the jury's advisory verdict such that a new penalty phase proceeding should be required. *State's Answer Brief, page 70-75*.

Williamson should 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. Significantly, the trial court's instructions to jurors on how to arrive at the advisory verdict ultimately rendered in this case included the following:

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

The State's argument that "even if the attempted murder convictions were to be vacated, the jury was never exposed to materially inaccurate information," *State's Answer Brief*, *page 72*, as well as the State's conjecture about how jurors might have viewed the facts in the absence of this materially inaccurate information, is therefore unavailing. There remains a reasonable probability jurors might have recommended life, rather than death, given proper instructions on these three charges.

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

The State's analogy to other cases wherein lesser, unrelated prior violent convictions were later overturned misses the point. The offenses at bar involve contemporaneous attempts to commit the very crime for which

Williamson was sentenced to death. If jurors are instructed a defendant is equally culpable for participating in the underlying offense wherein a murder is attempted by another as he would be for premeditatedly attempting to commit first degree murder, the likelihood jurors convicted on the flawed attempted felony murder theory logically also applies to the likelihood they recommended death on the same flawed standard.

Indeed, the State's likening of this issue to a claim under Johnson v. Mississippi, 486 U.S. 578 (1988), *State's Answer Brief*, *page 70*, in light of this Court's opinions applying Johnson, merely demonstrates that a new penalty phase is required. In Armstrong v. State, 862 So.2d 705 (Fla. 2003), a defendant's prior violent felony conviction was vacated as unconstitutional and this Court held a new penalty phase was required despite the existence of two contemporaneous convictions of attempted murder and robbery, as well as a subsequent robbery, that would be admissible upon resentencing:

> In closing penalty-phase arguments, the State urged the jury to find the aggravating circumstance that Armstrong had "previously been convicted of a violent felony" on the basis of Armstrong's two contemporaneous convictions of attempted murder and robbery and this prior Massachusetts conviction. The jury recommended a death sentence, and the trial court based its finding of that aggravating circumstance, in part, on the Massachusetts conviction.
> After Armstrong's direct appeal to this Court, he filed a motion for new trial with the Massachusetts court regarding his 1985 conviction. In

> 1999, that court vacated Armstrong's conviction of indecent assault and battery on a child of the age of fourteen, finding it constitutionally invalid. Therefore, Armstrong asserted in his subsequent 3.850 motion for postconviction relief that he was entitled to a new penalty-phase proceeding. The postconviction court granted an evidentiary hearing on the issue but denied relief, concluding that error under *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), had been shown but was harmless beyond a reasonable doubt in light of an armed robbery conviction obtained against Armstrong after his penalty phase that would be admissible upon resentencing as evidence of another valid, prior violent felony conviction to be considered in lieu of the vacated conviction.
>
> In this appeal, Armstrong asserts, on the basis of *Johnson*, that the postconviction court erred in denying relief as to this issue. We agree.

Armstrong v. State, 862 So.2d at 717. *See also* Lebron v. State, 799 So.2d 997 (Fla. 2001) (jury instruction that capital murder defendant was on felony probation at time murder was committed and finding of felony probation aggravating circumstance, in violation of *ex post facto* provisions of federal and state constitutions, required vacation of death sentence and remand for new penalty-phase proceeding, despite fact that at least one of defendant's remaining 2 properly-found aggravators was grave and there was no issue as to relative culpability of codefendants).

The State's endeavor to distinguish Armstrong, *supra*, on the notion that "[u]nlike 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," *State's Answer*

Brief, page 74, is directly contradicted by this Court's opinion in State v. Sykes, 434 So.2d 325 (Fla. 1983) ("The district court correctly stated that established authority in Florida holds that one cannot be punished based on a judgment of guilt of a purported crime when the "offense" in question does not exist. Stated differently, it is a fundamental matter of due process that the state may only punish one who has committed an offense.").

Following the jury's advisory verdict in Williamson's case, the trial court relied on the jury's arrival at the attempted first degree murder verdicts in its rationale for applying the violent-felony aggravator, stating in its sentencing order:

> [C]ontemporaneous convictions involving persons other than the homicide victim can also be used to prove this aggravating circumstance. The Defendant was convicted of four (4) other felonies involving persons other than the homicide victim as follows:
>
> 10. The Attempted First Degree Murder . . .
> 2. The Attempted First Degree Murder . . .
> 3. The Attempted First Degree Murder . . .
> 4. The Extortion . . .

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

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

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

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