IN THE SUPREME COURT OF FLORIDA

DANA WILLIAMSON,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**CASE NO. SC11-2198**
STATE OF FLORIDA,	)	**L.T. NO. 92-15642 CFA**
	)	
Appellee.	)	
	)	

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REPLY BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE AND FACTS

Rather than accepting or rejecting the Initial Brief's Statement of Facts, the State's Answer Brief rewrites them. Appellant rejects the State's version of facts, and stands on the un-rejected, undisputed Statement of Facts in the Initial Brief.

Though Rule 9.210(c), Fla. R. App. P., provides an answer brief may omit a statement of facts, courts discourage restating facts unless necessary to show areas of disagreement. *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114 (Fla.1984); *Sabawi v. Carpentier*, 767 So.2d 585 (Fla. 5th DCA 2000); *Metropolitan Life & Travelers Insurance Company v. Antonucci*, 469 So.2d 952 (Fla. 1st DCA 1985).

The Answer Brief also impermissibly reorganizes Initial Brief Points I and II as though they were a single issue, presenting arguments on each of these distinct points in random order, and mixing the applicable legal standards to obscure them. See *Rolling v. State ex rel. Butterworth*, 630 So.2d 635, 636 n.1 (Fla. 1st DCA 1994) ("[a]n Appellee should address the issues in the same order as they are presented in the Initial Brief so that the court can be certain which arguments are being addressed."). See also *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114,

1122 (Fla.1984) (“answer briefs should be prepared in the same manner as the initial brief, so that the issues before the Court are joined.”).

SUMMARY OF ARGUMENT

The trial court erred in denying postconviction relief after the evidentiary hearing on remand, as the court's findings of fact are not supported by competent substantial evidence, and its legal conclusions erroneous as a matter of law.

Notwithstanding the State's contentions, the evidence adduced on remand shows counsel's (1) failure to *voir dire* expert witness Dr. Ofshe; (2) failure to request a *Frye* hearing on the novel science on which Dr. Ofshe's testimony relied; and (3) failure to request a curative jury instruction when the trial court sustained the defense objection to Dr. Ofshe's expert testimony that the trial testimony and behavior of key State witness Panoyan, who had belatedly changed his story to testify that Williamson was the perpetrator and threatened him into silence, was "completely consistent" with an individual who had received a "credible threat," were all serious deficiencies measurably below objective standards of reasonably competent representation by counsel in a capital case, causing a breakdown in the adversarial testing process, and rendering Williamson's trial fundamentally unfair.

But for these serious omissions, there remains a reasonable probability jurors would have acquitted Dana Williamson on all counts, as it was clear Panoyan's credibility was a material issue on which the State's case depended.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING WILLIAMSON POSTCONVICTION RELIEF AFTER EVIDENTIARY HEARING ON REMAND AS THE COURT'S FINDINGS OF FACT ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND ITS LEGAL CONCLUSIONS ERRONEOUS AS A MATTER OF LAW

The State's Answer Brief fails to refute the Initial Brief's showing that the evidence adduced on remand reveals the trial court's factual findings are not supported by competent, substantial evidence, and that the facts in this case satisfy both prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

1. Trial Counsel's Failure to *Voir Dire* Expert Witness Dr. Richard Ofshe

At trial, noting he had not taken Dr. Ofshe's deposition or questioned him, and requesting a 10 minute break to speak with him (TT 2221-22), defense counsel, Mr. Hammer, declined the trial court's invitation to *voir dire* Dr. Ofshe. (TT 2231).

The State's contention that the record supports the trial court's finding that Hammer's failure to question Ofshe's qualifications--*outside the jury's presence*--

was a matter of trial strategy (Answer Brief, pages 31-32), is belied by the State's citations to the record on remand. (HT 138-139). Also, not only would jurors be unaware of Ofshe's *voir dire* on his qualifications to render an expert opinion that Panoyan's story and behavior were consistent with receiving a "credible threat," but the testimony's exclusion would have removed the testimony's scale-tipping authoritarian force, invading the jury's province of determining credibility.

Dr. Ofshe, who would testify Panoyan's recantation story was consistent with his claimed *fear* from an alleged "credible threat," was not a psychologist, and even if he were, such testimony on fear is inadmissible. *Jordan v. State*, 694 So.2d 708, 717 (Fla. 1997) (expert testimony on person's sense of fear inadmissible).

Though, at trial, Dr. Ofshe and the State labeled the field to which Ofshe's purported expertise belonged "the sociological field of extreme techniques of influence and control" (TT 2231),[2] the subject matter of Ofshe's trial testimony

[2] Though Dr. Ofshe testified on remand that, at trial he had testified as an expert on "influences of death threats on behavior" (HT 8), he actually claimed at trial to be, and was declared an expert in, "extreme techniques of influence and control." (TT 2231). Dr. Ofshe testified on remand he had "invented" these "catch-all phrase[s]...for convenience sake." (HT 8-9). Also, though Dr. Ofshe testified "for the last 20 some odd years, the b[ulk] of my work is in the area of influence during police interrogations" (HT 18-19), the State objected on remand that "he is not

was an *individual*'s *subjective perception of fear and reaction to any such fear* under the circumstances claimed in Panoyan's recanted version of events.

Trial counsel's failure to *voir dire* Dr. Ofshe on his qualifications left untested whether Ofshe--a *sociology* professor--was qualified to testify as an expert on matters belonging to the field of *psychology*. See *Jordan v. State*, 694 So.2d 708, 715 (Fla. 1997) ("A witness may not testify to matters that fall outside h[is] area of expertise"); *Murray v. State*, 692 So.2d 157 (Fla. 1997) (erroneous qualification of expert witness in area outside expert's area of expertise not harmless in light of damaging nature of testimony offered in capital murder trial).

No record evidence supports the trial court's finding that Hammer "carefully considered"--after proper investigation--whether to *voir dire* Dr. Ofshe on his qualifications to testify as an expert on an individual's subjective sense of fear.

The State's "hindsight" argument (Answer Brief, page 32), is a red herring. In finding Hammer's admitted error in failing to *voir dire* Dr. Ofshe was a matter

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testifying about false confessions in this case, Judge. This is totally irrelevant, it's another area. It's irrelevant" (HT 32). Yet, if the "bulk of [Dr. Ofshe's] work" is irrelevant to the facts in this case, he was not qualified to testify as an expert.

of "hindsight," the trial court focused solely on Hammer's later use of that *word*, concluding that Hammer's inaction was a "strategic decision." (PCR 451-452).

No record evidence supports the trial court's notion the defense could gain any strategic advantage by omitting to *voir dire* Ofshe, or that Hammer's admitted error in failing to question Ofshe's qualifications was *in fact* a matter of hindsight.

The State's suggestion that Hammer's "choice to emphasize the State's grasping at straws appears to have been a strategic choice and, thus, not ineffective" (Answer Brief, pages 32-33), rests on speculation and just two cases. First, the State cites *Arbelaez v. State*, 898 So.2d 25 (Fla. 2005), wherein this Court noted "[t]he trial court found that counsel had adequately investigated [defendant's] history of epilepsy and presented it to the jury." *Id*., at 32. At bar, in contrast, there was no finding of an adequate *investigation*. The trial court's order never even hints at any "investigation" in making its conclusory finding that "Hammer carefully considered which course of conduct to pursue with regard to Ofshe's testimony, and ultimately made the strategic decision not to question Dr. Ofshe's qualifications or the usefulness of his testimony." (PCR 451-452). "Carefully considering" a matter is a far cry from properly *investigating* it, because, as here,

one may carefully consider a matter (such as astrology or necromancy) without any meaningful investigation. Second, and finally, the State relies upon *Orme v. State*, 896 So.2d 725 (Fla. 2005), which *reversed* a trial court's denial of relief based on trial counsel's ineffectiveness in failing to properly *investigate* one of the defenses.

Trial counsel's failure to *voir dire* Dr. Ofshe allowed expert testimony that Panoyan exhibited individual thought and behavior consistent with one who (as Panoyan only belatedly claimed) had been threatened, rationalizing his three-year delay in changing his story out of a purported subjective sense of fear, bolstering the credibility of this critical testimony with Dr. Ofshe's academic credentials.

But for trial counsel's failure to *voir dire* Dr. Ofshe, there exists a reasonable probability such expert testimony would have been excluded, and the credibility of Panoyan's recantation, accusing Williamson and obtaining his own release, would have been left for the jury. This bolstering of Panoyan's testimony made Panoyan, who was first the sole prime suspect, appear significantly more credible.

Hammer had never taken Dr. Ofshe's deposition, never investigated whether he was qualified to express an expert opinion on an individual's subjective sense of fear, and only spoke with him for 10 minutes just before he testified. (TT 2221-22).

Hammer never considered--after reasonable investigation--*voir diring* Dr. Ofshe's qualifications, as he failed to "make reasonable investigations or to make a reasonable decision that ma[de] particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. Where, as here, an expert is called to bolster the State's key witness whose "credibility was a material issue on which the State's case depended," *Williamson v. State*, 681 So.2d 688, 695 (Fla. 1996), it is not a "reasonable decision," *Strickland, supra*, not to investigate the expert's credentials.

This case came down to a swearing match between Williamson and Panoyan, making the credibility of Panoyan's altered story that Williamson was the assailant, and had threatened Panoyan not to tell, the pivotal issue at trial.

The very nature of Dr. Ofshe's "pattern," "consistent with," "fear" and "credible threat" expert testimony--bolstering Panoyan's belatedly altered version of events to incriminate Williamson--would have led a "reasonable attorney to investigate [Ofshe's qualifications] further," *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527 (2003), as "it was clear that Panoyan's credibility was a material issue on which the State's case depended." *Williamson v. State*, 681 So.2d at 695.

Had Hammer accepted the trial court's invitation to *voir dire* Dr. Ofshe on his qualifications to testify about an individual's subjective sense of fear, he would have elicited virtually the same testimony Ofshe gave before the jury, which the trial court would have rejected--*as it later did upon objection*--because it bolstered the credibility of Panoyan's testimony that Williamson had threatened him; that any such threat was credible; and that Panoyan's story, belatedly altered to point his finger at Williamson, was consistent with having received such a threat.

But for trial counsel's failure to accept the trial court's invitation to *voir dire* Dr. Ofshe on his qualifications to express an expert opinion belonging to the field of psychology, there remains a reasonable probability the trial court would have excluded Dr. Ofshe's testimony, and a reasonable probability the jury would have rejected Panoyan's new and different story identifying Williamson as the perpetrator, returning acquittals as to each of the counts charged, as "it was clear that Panoyan's credibility was a material issue on which the State's case depended," *id*., "undermin[ing] confidence in the outcome." *Strickland*, 466 U.S. at 694.

2. Trial Counsel's Failure to Request a *Frye* Hearing Concerning the Novel Science on which Dr. Ofshe's Testimony Relied

This Court also remanded for an evidentiary hearing on trial counsel's failure to request a *Frye* hearing on the novel science upon which Dr. Ofshe relied. *Williamson v. State*, 994 So.2d at 1010-1011. The State's spin on the evidence adduced at the hearing, *without record citations* (Answer Brief, page 33) is slanted.

The State's argument that "Dr. Ofshe said that he used the word 'pattern' because he believed, based on his knowledge and experience in the field, that Panoyan's behavior was analogous to other individuals' who believed they were under threat" (Answer Brief, page 35), merely shows Ofshe was testifying, based on his credentials, that Panoyan seemed to be telling the truth, since his behavior was similar to others who experienced circumstances similar to those Panoyan only belatedly claimed.

The State's argument that the experts testified that "Dr. Ofshe just discussed typical human behavior in extreme situations with a number of similar variables" (Answer Brief, page 36), inadvertently argues typical humans should decide whether Panoyan's changed story--*in particular*--was worthy of belief, without such bolstering.

Resting on mischaracterizations of the evidence adduced on remand, the State erroneously argues that no *Frye* hearing was required (Answer Brief, page

33), cf. *Demeniuk v. State*, 965 So.2d 295 (Fla. 5th DCA 2007),[3] and suggests that this Court's holding that Dr. Ofshe's pattern testimony comprised "syndrome testimony"[4] did not become the law of the case (Answer Brief, page 36-37). But, as this Court's holding that "similar to *Hadden*, this was syndrome testimony," *Williamson v. State*, 994 So.2d at 1009, 1010, was a question of law, it remains the law of the case.[5]

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[3] As in *Demeniuk v. State*, 965 So.2d 295 (Fla. 5th DCA 2007):

> [Appellant's] contention that her experts' testimony was not subject to *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), is barred by the law of the case doctrine because in State v. Demeniuk, 888 So.2d 655 (Fla. 5th DCA 2004), we held that a *Frye* hearing was necessary and ordered the lower court to conduct one.

[4] In remanding this case for evidentiary hearings, this Court held:

> Dr. Ofshe testified that Panoyan "displayed a pattern of someone who has . . . been terrorized, and someone who is acting in response to a credible threat." We find that, similar to *Hadden*, ***this was syndrome testimony*** and should have been tested as to whether it was sufficiently established to have general acceptance in the particular field in which it belongs. *Frye*.

Williamson v. State, 994 So.2d at 1009, 1010 (emphasis added).

[5] As in *Brunner Enterprises, Inc. v. Dept. of Revenue*, 452 So.2d 550 (Fla. 1984):

> It is the general rule in Florida that all questions of law which have been decided by the highest appellate court become the law of the case which, except in

The State's contentions that Dr. Ofshe "laid the foundation for the entire study of human behavior in extreme situations," and that "[t]his testimony did not concern the voluntariness of any statement nor did it touch upon Dr. Ofshe's latter work on coerced confessions," concluding that "Williamson's reliance on cases which rejected the doctor's theories regarding coerced confessions is misplaced since the theory involved in those cases was different from those involved in this *Frye* hearing," as "[t]hose courts did not find that *all* of Dr. Ofshe research, findings, and theories fail the *Frye* test, but only the specific one regarding coerced confessions" (Answer Brief, page 34), ignores the academic scientific community's published rejection of the very *underlying basis for any* of Dr. Ofshe's theories.

One year before Dr. Ofshe's expert testimony in this case, an article in *Behavioral Sciences and the Law*, Vol.10, 5-29 (1992) (Anthony & Robbins), rejected the *basic theoretical framework* underlying *all* of Dr. Ofshe's theories:

> Unlike the softly deterministic perspectives advocated by Schein and Lifton, then, which fall within the contemporary philosophical and scientific mainstream, Singer's and Ofshe's theories fall within a

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extraordinary circumstances, must be followed in subsequent proceedings, both in the lower and the appellate courts.

> class, that is, behavioristic hard determinism, that is *no longer taken seriously in the academic world*. (emphasis added).

Moreover, to be admissible under *Frye*, expert testimony must not only be based on a scientific principle or theory that is shown to be scientifically valid, but *the procedures followed to apply the technique or process* must also be generally accepted in the scientific community.[6] Courts consider the *quality* of the evidence.[7]

The evidentiary hearing testimony did not demonstrate that the *procedures* Dr. Ofshe used to reach his ultimate conclusions could meet the *Frye* standard. Ofshe said his trial testimony entailed "influences of death threats on behavior,"[8] which is "a catch-all phrase that I invented for convenience sake," based on "principals of rational decision-making." (HT 8-9). Despite this newly-invented

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[6] See *Hayes v. State*, 660 So.2d 257 (Fla.1995); *State v. Demeniuk*, 888 So.2d 655, 658 (Fla. 5th DCA 2004).

[7] *Brim v. State*, 695 So.2d 268 (Fla. 1997). See also *Harvard Journal of Law and Public Policy* (1999) Vol. 22, pp. 523-602 ("Because of the high error rate and failure to follow accepted research techniques, courts should not allow expert testimony resting on Leo and Ofshe's analysis.").

terminology, Dr. Ofshe's trial testimony rested on the same *theoretical framework* underlying his coercive persuasion theory rejected by the field to which it belongs. *U.S. v. Fishman*, 743 F.Supp. 713, 717-18 (N.D. Cal. 1990); *Behavioral Sciences and the Law*, Vol.10, 5-29 (1992) (quoted supra) (rejecting *basis* for his theories).

Ofshe's theory "is simply that rewards and punishment affect behavior and decision-making, people act based on perceptions of the situation in which they find themselves, and you then connect that to the particularity of whatever it is that you are looking at" (HT 56). His *method* is to "take the assumption that people are being rational" and "apply it with particular circumstances, as they apply it in the world, trying to understand how people cope with, deal with, react to the particular things facing them" (HT 12). His pattern testimony "analogiz[ed] Mr. Panoyan's situation to another situation which I had given, and they were quite similar" (HT 14), as persons exposed to similar such threats tended to comply. (HT 34). Asked how he had any measure of *reliability* for making those statements, Ofshe testified:

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[8] Contrary to his testimony on remand that, at trial, he testified as an expert on "influences of death threats on behavior" (HT 8), Ofshe actually claimed at trial to be, and was dubbed an expert in, "extreme techniques of influence and control."

> [DR. OFSHE]: Well, my reliability has to do with whether or not I'm a liar. And since I know I'm telling the truth, I don't know what reliability would go, would go beyond that.

(HT 34-35) (emphasis added).

Dr. Ofshe's testimony that his only measure of reliability is his own belief in his own opinion defies *Hadden v. State*, 690 So.2d 573, 578 (Fla. 1997) ("[R]eliability is fundamental to issues involved in the admissibility of evidence.... [S]cientific 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.").

The State's experts' testimony at the evidentiary hearing on remand corroborated this lack of any measure of reliability for Dr. Ofshe's methodology. Dr. Butts stated there are no controlled studies on effects of death threats. (HT 89). Asked if she could just talk to a person and opine whether they acted on a credible threat, Butts stated: "[I]f that were asked of me, I would do a clinical -- I would do a clinical evaluation. I would submit tests. I would do a forensic evaluation." (HT 102). Dr. Brannon testified that, knowing only of a threat to an individual and their behavior, rather than a group, "I would not make a prediction based on that.

In terms of looking at social psychological principles, I would not try to do a prediction. It's different from doing testing, actuarial testing." (HT 170-71).

Dr. Ofshe's opinion that Panoyan's story and conduct were consistent with one whose original story was motivated by fear of a credible threat is capable of no replication, testing or verification, but rests only on his own opinion. Cf. *Hadden*.

The State had the burden on remand to "establish[] by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology," *Williamson*, 994 So.2d at 1009-10--a burden never met through the testimony adduced at the evidentiary hearing on remand, and negated by numerous case authorities and scholarly articles cited in the Initial Brief and this Reply Brief.

The existence and effects of fear of a credible threat (including whether any such threat was made and whether any such threat was credible) were for the jury.[9]

[9] Dr. Ofshe's testimony was thus rejected in the rather similar case of *People v. Brown*, 2006 WL 1726896 (Cal. App. 3 Dist. 2006), where a murder, attempted murder and robbery defendant (like Panoyan) claimed he made a false original statement because a co-defendant threatened to kill his loved ones. Id., at 7. There:

> The [trial] court expressly found that the reason defendant gave for making false statements--that Sirrano [an at-large co-defendant] threatened to kill someone close to him--was within the common experience of a jury to understand and evaluate.

The State's efforts to distinguish *Jordan v. State*, 694 So.2d 708 (Fla. 1997), are strained. In *Jordan*, a gerontologist testified "I would assume [the deceased victim] was in abject terror, that this was probably her worst nightmare come true," *Jordan v. State*, 694 So.2d at 717; not, as here, that a flipped co-defendant's behavior pattern and trial testimony incriminating the defendant were completely consistent with someone who had been terrorized and acting out of fear in response to a "credible threat" to himself and his family. *Williamson*, 994 So.2d at 1017.

Concerning prejudice, the State recites trial testimony wherein the credibility of Panoyan's story was both attacked by the defense and corroborated by the State (Answer Brief, pages 44-47). But the State's argument in this regard only *underscores* the prejudicial effect of trial counsel's failure to request a *Frye*

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Defendant's only stated reason for recanting his admissions, that is, the threat to Jaynelle [the defendant's pregnant girlfriend], was clearly within the common understanding and experience of jurors. Accordingly, the trial court properly ruled that Ofshe's testimony would be of no assistance to the jurors.

Id., at 11-12. In *Brown*, as here, Dr. Ofshe's testimony added no special knowledge or experience from which jurors could form conclusions from facts, as any juror knows threats *may* cause fear, and that people *may* act to reduce risks associated with threats. For this reason, expert opinion testimony concerning the

hearing on Dr. Ofshe's expert testimony, tipping the scales in this swearing match and undermining confidence in the verdict, *Strickland*, 466 U.S. at 687, because, as this Court noted on direct appeal, "it was clear that Panoyan's credibility was a material issue on which the State's case depended." *Williamson*, 681 So.2d at 695.

Dr. Ofshe's expert testimony bolstered Panoyan's credibility in changing his story to implicate Williamson with the authority of Ofshe's academic credentials concerning the existence and effects of Panoyan's fear from a "credible threat."

"Any doubt as to admissibility under *Frye* should be resolved in a manner that minimizes the chance of a wrongful conviction." *Ramirez v. State*, 810 So.2d 836, 853 (Fla. 2001). Dr. Ofshe's expert testimony operated to show that Panoyan had a profile consistent with one who had been threatened after witnessing a crime. That expert opinion, bolstering Panoyan's altered account of why, after three years singing a different tune, he suddenly accused Williamson, had to be *Frye*-tested. *Williamson*, 994 So.2d at 1009, 1010. As Ofshe's expert opinion testimony was "based upon evidence which has not been demonstrated to be sufficiently reliable," its admission "cast[s] doubt on the reliability of the factual resolutions," *Hadden*,

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effects of fear on a witness's statement is inadmissible. *Bullard v. State*, 650 So.2d

690 So.2d at 578, "undermining the reliability of the trial's outcome," *Strickland*, 466 U.S. at 687, and requiring Williamson's convictions be vacated, with a new trial barring this species of expert testimony's invasion of the jury's function.

3. Trial Counsel's Failure to Request a Curative Instruction When the Defense Objection to Dr. Ofshe's "Credible Threat" Testimony was Sustained

This Court, finally, remanded for evidentiary hearings on trial counsel's failure to request a curative instruction after the trial court sustained the defense objection to Dr. Ofshe's expert testimony bolstering Panoyan's testimony that he had been threatened, and Dr. Ofshe's suggestion that any such threat was credible.

The State's notion that, since the trial court "specifically found that Dr. Ofshe never testified to either the credibility of the threat or Panoyan's credibility," its finding that Williamson has met neither prong of *Strickland* (Answer Brief, page 52), lacks force, as the trial court's finding in this regard is not supported by competent, substantial evidence. *Coleman v. State*, 64 So.3d 1210, 1217 (Fla. 2011). The record is, instead, clear, in both the trial court and in this Court on this appeal, that Dr. Ofshe testified Panoyan's behavior pattern and trial testimony incriminating

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631 (Fla. 4th DCA 1995); *Mitchell v. State*, 965 So.2d 246 (Fla. 4th DCA 2007).

Williamson were "completely consistent" with someone who had been terrorized and acting out of fear in response to a "credible threat" to himself and his family, "which he revealed to me in the interview I did with him, and I gather, revealed again in testimony that you heard." *Williamson*, 994 So.2d at 1017. (TT 2233-34).

Dr. Ofshe's foregoing expert testimony unequivocally told jurors Panoyan's testimony was "completely consistent" with "testimony that you heard." *Id*.

The State's effort to muster record support for the trial court's finding that "[b]ecause Dr. Ofshe never answered the question regarding the credibility of the threat, no objectionable testimony was ever heard by the jury" (PCR 455-56), (Answer Brief, page 53-54), comprises an attempt to circumvent the true focus of this Court's remand on this Claim, and is unavailing for the following reasons:

This Court's opinion remanding this case framed this issue as follows:

> that [Williamson's] counsel was ineffective ***because counsel resisted only at sidebar when the State attempted to link a hypothetical with the believability and credibility of the threat to which Panoyan testified*** and that his counsel was ineffective when the trial court sustained his objections and counsel did not seek curative instructions ***based on the prior testimony***. Since the actual statements to which defense counsel objects are the subject of the claim upon which we reverse and remand for an evidentiary hearing, we likewise remand this claim to the postconviction court for an evidentiary hearing.

Williamson v. State, 994 So.2d at 1011 (emphasis added).

At trial, when the State sought to link Dr. Ofshe's *prior testimony* with a hypothetical, the defense objected, explaining the objection at side bar. (TT 2237). Though the trial court sustained *at sidebar* "[i]t is improper to talk about the credibility of the threat," and "[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" (TT 2238), trial counsel failed to request a curative instruction so *the jury* would understand they could not consider the *prior* "credible threat" testimony as evidence that Williamson threatened Panoyan, or that any such threat was credible.

Though the State focused at the evidentiary hearing on the fact that trial counsel's objection was solely to the hypothetical which had not been answered (HT 135-37, 143), Williamson's postconviction claim is that the defense objection and unrequested instruction should have been--as this Court pointed out in remanding this case--to Ofshe's "prior testimony," *Williamson*, 994 So.2d at 1011, vouching for Panoyan's credibility, which is "the subject of the claim upon which [this Court] reverse[d] and remand[ed] for an evidentiary hearing." *Id*.

Though the trial court relied on *evidentiary hearing* testimony to find no objectionable testimony was adduced *at trial* (PCR 449), regardless what Ofshe or Hammer stated *at evidentiary hearing* about Ofshe's *trial* testimony, the testimony adduced from Ofshe before jurors speaks for itself. This Court recited Ofshe's testimony before the jury in *Williamson v. State*, 994 So.2d 1000, 1009 (Fla. 2008).

The State's suggestion (Answer Brief, pages 53-54), like the trial court's finding (PCR 449) that this testimony was not placed before jurors is not supported by competent, substantial evidence. The trial court's finding that this testimony did not invade the jury's province (PCR 452), is erroneous as a matter of law.

As a matter of law, no witness may testify about the credibility of another. *Tumblin v. State*, 29 So.3d 1093, 1101 (Fla. 2010). The vouching or bolstering of the other witness *need not be overt* to violate this rule. *Hitchcock v. State*, 636 So.2d 572 (Fla. 4th DCA 1994) (though psychologist who interviewed child did not overtly vouch for child's credibility by testifying to child's believability, "if the juxtaposition of the questions the State asked gave the jury the clear impression that [he] believed the victim was telling the truth, that testimony was improper.").

"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). Though trial counsel explained the objection to court and counsel at sidebar, *the jury* never heard the *reason* for the objection or the judge's ruling, and trial counsel failed to follow the "proper procedure to take when objectionable comments are made," *id.*, which was to "request an instruction from the court that the jury disregard the remarks." *Id*.

This was a serious omission falling below the professional standard, *Duest*, of reasonably effective assistance of counsel in this capital case. An instruction for jurors to disregard Dr. Ofshe's "credible threat" testimony, and that credibility was entirely for the jury, might have cured this improper expert testimony, which told jurors that Dr. Ofshe, backed by the aura of his academic credentials, believed Panoyan was telling the truth. Counsel's failure to request a curative instruction left uncured this expert testimony suggesting to jurors that Panoyan was telling the truth about having been threatened, and that any such threat was credible.

The State capitalized on counsel's omission in closing argument, urging that Panoyan had received "believable threats." *Williamson,* 994 So.2d at 1009.

There remains a substantial danger jurors may have given disproportionate weight to Dr. Ofshe's "scientific" means of assessing the credibility of Williamson's purported threat, Panoyan's claim that a threat was ever made, and whether Panoyan's conduct fit the pattern or profile of one who had received such a threat, going to the heart of Panoyan's testimony and the heart of the State's case, because--as this Court noted on direct appeal--"Panoyan's credibility was a material issue on which the State's case depended." *Williamson*, 681 So.2d at 695.

The impact of Panoyan's new story that he was threatened into maintaining his original account--which had not previously even mentioned Williamson--there remains a reasonable probability that, but for counsel's failure to request a curative instruction for this expert testimony on Panoyan's credibility, the outcome would have been different. *Strickland*, 466 U.S. at 694. There remains a reasonable probability jurors would have weighed the conflicts between Panoyan's original and recantation stories against his incentives to lie--untainted by the authoritative force of Dr. Ofshe's academic credentials--finding reasonable doubt Panoyan's testimony was credible, and reasonably probable Dana Williamson's acquittal.

CONCLUSION

The trial court's order denying each of the claims should be reversed, and this case remanded for a new trial with instructions to exclude similar expert testimony.

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 _____, 2012.

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