IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-2198

DANA WILLIAMSON,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

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

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ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes & Treatises:

PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

On August 13, 1992, the defendant, Dana Williamson ("Williamson"), was indicted for the first-degree murder of Donna Decker, the attempted first-degree murder of Clyde Robert (Bob) Decker, Jr., Clyde Robert Decker, Sr. and Carl Decker, the armed burglary of Bob and Donna Decker's dwelling and car, the armed burglary of Panoyan's car, the armed robbery of Bob, Clyde and Donna Decker and Panoyan, the armed kidnapping of Bob, Clyde, Donna and Carl Decker and Panoyan, and extortion, all stemming from an incident that occurred at the Decker residence on November 4, 1988 (R35: 4455-4459).

After jury trial, Williamson was found guilty as charged on all counts except the armed burglary of Bob and Donna Decker's car and Panoyan's car (R27:

4877-4893). On June 3, 1994, the jury recommended a sentence of death, by a vote of 11 to 1 (R29: 5275-5277). Williamson was sentenced to death on July 15, 1994, for the first-degree murder of Donna Decker (R30: 5376-5402, 5403-05). He also received a consecutive life sentence for the 3 counts of attempted first-degree murder, a consecutive life sentence for the armed burglary of Bob and Donna Decker's dwelling, a consecutive life sentence for the armed robbery of Bob, Clyde, and Donna Decker and Panoyan, a consecutive life sentence for the armed kidnapping of Bob, Clyde, Carl and Donna Decker and Panoyan and a consecutive sentence of thirty (30) years imprisonment for the extortion of Panoyan (R30: 5376-5402, 5406-60).

On direct appeal, Williamson presented six issues. Affirming the convictions and sentences on direct appeal, this Court found the following facts:

> On Friday, November 4, 1988, police responded to a 911 call made by Donna Decker from her home in Davie, Florida. During the call, Donna said that she had been stabbed, gave her address and referred to her husband and child. When the police arrived at the Decker house, they found Robert Decker, Donna's husband; Carl Decker, the Deckers' two-year-old son; and Clyde Decker, Robert's father, in the master bedroom. The two Decker men and the child had been shot in the head with a .22-caliber gun. Robert was shot twice in the back of the head, Clyde in the cheek, and Carl behind his ear. Despite their injuries, all three remained alive. Police found Donna Decker's body next to a telephone receiver in a closet the Deckers used as an office. She had been stabbed to death. Various items had been taken from the Decker residence.
>
> On August 13, 1992, Dana Williamson and Charles Panoyan were indicted by a grand jury in Broward County for acts arising out of the criminal

episode that occurred at the Decker residence on the evening of November 4, 1988. The charges against Panoyan were eventually dismissed, and he was released. At Williamson's trial, Robert Decker, Clyde Decker, and Charles Panoyan gave testimony about the events surrounding the criminal episode. To effectively consider the issues presented by appellant in this case, we find it is necessary to recount in considerable detail the content of that testimony.

Testimony of Robert Decker

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

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

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

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

Robert saw Panoyan bring a package of venison into the house. As soon as

Panoyan returned to his chair in front of the television, another man entered the house and placed a gun to Clyde's head. Robert described the man as white and within two inches of five feet, ten inches tall. He said the gunman was wearing new work boots, blue-jean pants, a blue-jean jacket, a yellow plaid shirt, brown work gloves, a stocking mask on his face, and a yellowish-white, straw cowboy hat.

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

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

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

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

The gunman continued to rummage through the house. While he was in the master bedroom, Donna arrived home. Robert estimated that the time was

approximately 9:15 p.m. Donna asked Panoyan what he was doing at the house and then went to the master bedroom. The gunman grabbed her, tied her hands, and dragged her into the hallway. Donna lost a shoe and cried during the struggle.
Robert could hear the gunman and Donna talking in another room. A short time later, Donna came back into the master bedroom and asked if the gunman was gone. The gunman suddenly appeared and pulled Donna from the bedroom. Robert did not see his wife alive again.

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

Testimony of Charles Panoyan

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

When Charlie Williamson suffered a stroke in 1987, Panoyan visited him on a regular basis. At that time, Rodney Williamson, appellant, and appellant's wife and two children lived with Charlie Williamson. On one of Panoyan's visits to the Williamson house, which occurred approximately one to two weeks before the murder, appellant asked Panoyan whether he knew anything about Robert Decker's involvement with drugs. Panoyan answered

that Robert Decker did not deal in drugs. While Panoyan was visiting Charlie Williamson the night before the murder, however, appellant continued to insist that he knew Robert Decker was dealing in drugs. Panoyan again told appellant that Robert did not. Panoyan and appellant went fishing together later that evening.

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

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

At this time, appellant asked Panoyan where Robert Decker put the drugs and money. When Panoyan insisted that he did not know anything about drugs or money, appellant began to hit and kick him. Appellant again asked Panoyan where the drugs and money were hidden. While Panoyan was responding to appellant's question, he and appellant noticed Robert Decker watching them. After returning Robert to the bedroom, appellant continued without success to question Panoyan about the location of any drugs or money.

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

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

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

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

Panoyan did not proceed directly home; he stopped at a shopping center and approached a security guard. He remembered asking the guard for a quarter to call his wife but did not recall any other details of their conversation. As a result of that conversation, however, the security guard summoned a police

officer. The police officer detained Panoyan and escorted him to the Decker house. By the time Panoyan and the police officer arrived back at the house, other officers had responded to Donna's 911 call. The officers had already discovered that Donna Decker had been stabbed to death and that Robert, Clyde, and Carl Decker had been shot.

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

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

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

Inmate Testimony

The State presented testimony from three inmates who were incarcerated with appellant. These inmates testified regarding various inculpatory statements appellant made to them. Specifically, the inmates provided

testimony about their conversations with appellant in which he recounted the details of the crimes committed at the Decker house. One inmate, Patrick O'Brien, also testified regarding appellant's killing of a four-year-old child. Because O'Brien's testimony is pertinent to an issue raised by appellant, we recount its content here.

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

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

Other Evidence

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

Williamson v. State, 681 So.2d 688, 690-94 (Fla. 1996).

Thereafter, on February 24, 1997, Williamson filed a ***pro se*** Petition for Writ of

Certiorari in the United States Supreme Court. On April 28, 1997, certiorari was denied. Williamson v. Florida, 520 U.S. 1200 (1997).

CCRC filed a "shell" Fla. R. Crim. P. 3.850 motion on Williamson's behalf on March 20, 1998. The final postconviction motion was filed on or about March 6, 2002 due to the tolling of postconviction cases granted by this Court from April 1998 through June 1998 as well as the withdrawal of CCRC counsel after two years and the appointment of Kevin J. Kulick, Registry Counsel in March, 2001. On July 23, 2004 the trial court held the Huff[1] hearing. Afterward, it requested further briefing on the Gray issue. The trial court summarily denied all the claims.

Williamson appealed that denial. This Court denied the appeal to all issues save those involving Dr. Ofshe's testimony. It remanded the case ordering the trial court to hold both a Frye hearing on that testimony and an evidentiary hearing on whether trial counsel was ineffective for not objecting to that testimony in the original trial and not seeking a curative instruction. Williamson v. State, 994 So.2d 1000 (Fla. 2008). Specifically, this Court said:

> ... 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*, 293 F. at 1014. We find summary denial of this claim is inappropriate and thus reverse the circuit court's order and remand the claim for an evidentiary hearing. At the evidentiary hearing, the circuit court should consider evidence concerning the effectiveness of counsel, including the reasons

[1] Huff v. State, 622 So. 2d 982 (Fla. 1983).

> counsel failed to request a *Frye* hearing. In respect to prejudice, the circuit court is to make a determination as to whether this evidence was generally accepted in its particular field. If the circuit court determines that the evidence should not have been admitted into evidence, the court should determine whether the admission of the evidence was prejudicial under *Strickland*, i.e., whether there is a reasonable probability that "but for counsel's unprof[2]essional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. As we stressed above, "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Id. at 1010-11.

The trial court held the hearings on September 22 and 23, 2010.[1] Three expert witnesses testified for the State for the Frye hearing: Dr. Richard Ofshe ("Dr. Ofshe"), Dr. Lori Butts ("Butts"), and Dr. Michael Brannon ("Brannon"). The State admitted into evidence the *curriculum vitae* of each expert. The court also found each witness to be an expert in their field. Dr. Ofshe is an professor emeritus in sociology at the University of California at Berkeley. It was his 1993 testimony for which the Florida Supreme Court remanded this case. He studied decision making and influence in extreme circumstances for which most people have no experience. The underlying principles involved in those studies involve rational decision making theory and the way people process information. It is the

[1]All citations to the record from the evidentiary hearing will be "EH" followed by the page number. Citations from the original trial record will be "R" followed by the page number. Citations from the post-conviction record will be "PCR" followed by the page number.

underpinning of all the social sciences, including sociology, psychology, and social psychology. (EH 7-10) The theory is that people will react rationally given what they think is happening; it has been around for hundreds of years. (EH 11) The basic principle is that reward and punishment affect behavior and that people act based upon their perceptions of their situations. (EH 56, 65-66) Dr. Ofshe had spent the ten years prior to 1993 studying and interviewing actual people who had been manipulated and controlled. A researcher in that area could not do clinical studies since it is unethical to threaten people in such ways. (EH 57-60) His field work consisted of disciplined observations and interviewing of subjects as well as reviewing documentation. Dr. Ofshe wrote a number of papers and a book on rational decision making, all of which were peer reviewed before publication. (EH 62-64)

Dr. Ofshe testified that an expert in this area like himself would begin with the assumption of rational decision making and then start to apply varying circumstances to the decision making process. Experts use verified controlled laboratory studies to examine the interaction between rational decision making and social situations. (EH 12) He would examine an event and what people do in response to it. (EH 70-71) Generally, Dr. Ofshe used hallmarks of human behavior theory which are generally accepted in the fields of both psychology and sociology

and then sought corroborating circumstances when he evaluated an individual's account to see if their actions were consistent with known accounts of someone under coercion or threat. He did not and does not determine whether an individual is credible; that is the jury's purpose. (EH 23-28, 70-71) This is not an area conducive to statistical probabilities with error rates since the accounts are not test results which are either accurate or not. (EH 23-28)

In 1993 Dr. Ofshe testified about the tactics used to stress Panoyan and influence his behavior. (EH 32) He examined Panoyan's behavior and correlated it to the behavior of other individuals he had studied during his career. Panoyan refused to speak to his lawyers who sought to get him released into a normal environment in order to see if he would open up about what happened. (EH 68) The circumstances Panoyan found himself in during and following the crime were very unusual, leading him to feel that everyone was against him. (EH 57-60) Panoyan had not talked about the incident when he was released. Williamson had contact with him while he was in jail; an inmate testified to that at the trial. That contact kept the threat alive and helped explain why he was silent for so long. (EH 61-62) Dr. Ofshe used the word "pattern" in his prior testimony simply because what Panoyan described was similar to how others had behaved in similar extreme circumstances. He did not, and could not, testify that Panoyan's behavior was in

response to an actual death threat, i.e. that the death threat really existed. (EH 13-14, 71-72) Given the threats and circumstances Panoyan described, they influenced his behavior and that response was what an expert might expect to see and was consistent with accounts given by other people in similar situations that Dr. Ofshe had spent his career studying.(EH 13-22, 57-60) Dr. Ofshe said that his 1993 testimony in this case did not involve any thing like a syndrome. A syndrome is a group of symptoms that collectively characterize a disease or disorder. Panoyan did not have either a disease or disorder. (EH13-14) Dr. Ofshe believed that expert testimony in this area would aid a jury in its deliberations. While most people find a death threat very powerful, they do not have an appreciation of how they, or the majority of people, would behave in such an extreme situation of threats and violence; the resulting "typical" behavior is not what would commonly be expected. (EH 57-60) The average juror has no experience with an extremely dangerous and controlling individual, known to have hurt and killed before, who threatened them and their families. His work reviewing the literature of extreme situations and interviewing people who have experienced similar conditions provides the jury with a context in which to analyze a witness's testimony. (EH 32-35)

The State then presented Dr. Butts who is a licensed clinical and forensic

psychologist as well as an attorney. She has been accepted as an expert in both those areas of psychology before. (EH 76-78) Clinical and forensic psychologists rely on social psychology and sociology all the time. Together, all of these are the social sciences which consists of a body of work on which each separate area of expertise utilize and rely on to make decisions and opinions. Dr. Ofshe did a number of the foundational work in the field of behavior in extreme conditions which she and other professionals use in their work. He is highly respected in the fields, teaches at psychological conferences, and is a member of the American Psychological Association ("APA"). (EH 79-80) There is considerable overlap in the fields. (EH 81)

The grounding principle Dr. Ofshe used in his testimony was behaviorism or how human behavior and decision making change in response to coercion and control. Experts in the social sciences, Dr. Ofshe included, study how external variables affect behavior. These are the fundamental and accepted principles that act as the underpinnings for the social sciences and underlie the whole field for at least the last fifty years. Dr. Ofshe's own work acts as a foundation for much of the current work being done on terrorism, torture, and bullying. (EH 81)

Dr. Butts thought that expert testimony as given by Dr. Ofshe in this case is helpful to the jury and appropriate. A typical person is not exposed to extreme

methods of control and do not realize how effective they can be. Furthermore, the reactions of a person suffering under them is not what one might expect. Dr. Ofshe's research led to an understanding of the types of behavior that can be anticipated under certain circumstances. She gave an example an early study of the rape and killing of a woman (Kitty Genovese) in New York where none of the many people who heard her pleas for help actually helped her despite being close. The lay person does not understand how that could happen, nor does he realize that people do not know how to act in stressful situations unless they are told what to do. An individual expects another person to act so he does not feel compelled to act himself. Another example she gave was the behavior of citizens living in a gang dominated neighborhood. (EH 82-85)

Psychologists, sociologists, and social psychologists all rely on the same social and psychological principles of behavior in decision making. Those principles are not new or novel and are generally accepted within the fields. Dr. Butts then went through literature in the field examining such behavior, including some authored by Dr. Ofshe. (EH 86-87) The fields merge in several ways since the underpinnings for all are the same; it is the application of the theories and studies by each field which differs. A psychologist applies it to an individual or a forensic area and a sociologist applies it in academia. (EH 116) The articles were

based upon empirical studies of various aspects of human behavior. Researchers cannot do controlled clinical studies or experiments because of the ethical considerations of subjecting people to such destructive circumstances. The research is based upon field studies where social scientists examine and interview actual people involved in real life situations which have occurred. That same research is now utilized in the current work being done studying torture for example. (EH 88-89)

An expert can testify and educate the jury about human behavioral responses to life threats. (EH 102) A person's reaction to a threat is intuitive to some degree but there is research and scientific literature which detail typical responses. Since most jurors do not experience the extraordinary circumstances from which such behavior stems, the expert is needed to explain how people have reacted in similar situations, especially since people often react quite differently than what a normal person would expect. (EH 112-113) The type of behavior seen in the Genovese case must be explained to a jury. (EH 114) Similarly, Dr. Butts said that it is not intuitive why someone would remain silent about such a crime for almost two years when he himself was incorrectly charged with its commission. In a situation like that, an expert can assist the jury in understanding "normal" human behavior in such an extreme situation. (EH 115) This kind of testimony or opinions do not

discuss “syndromes,” since a syndrome is a set of problems or symptoms of a specific person resulting from a disease or trauma. (EH 86-87)

In his testimony, Dr. Ofshe was talking about typical human behavior in an extreme situation; he was not diagnosing someone. (EH 86-87) He was only asked to talk about social psychology and use the field prospectuses to educate the jury on human behavior. (EH 104) He discussed how certain variables have an impact on human behavior. Dr. Ofshe, or another such expert, could testify about how a person is likely to behave based on how they perceive a threat given the “typical” responses seen in the studies. (EH 90) Essentially, Dr. Ofshe helped write the “Hornbook” in this area of social psychology and relied on that as well as the previous fundamental theories when he testified on Panoyan’s behavior. (EH 93) When examining behavior in response to a threat, the focus is on whether the person thought the threat was credible, not whether the person is credible. (EH 96) Dr. Ofshe examined Panoyan’s behavior to see if it was consistent with that of someone who had been subjected to a past verified threat. Dr. Ofshe concluded that Panoyan’s behavior was consistent with someone who believes the threat based upon what is known about human behavior. (EH 97-99) He was just explaining the comparison of Panoyan’s behavior to that of others. He did not need to consider alternative theories for the behavior since he was already testifying on whether his

behavior was consistent with behavior of a threatened person. (EH 105-107) He did not give an opinion on whether either Panoyan lied or was truthful or if the threat was real or not. He just said that the actions matched those of others who have experienced threats in the past. (111)

Dr. Brannon is also an expert in forensic psychology and has qualified about 2000 times as one in both state and federal courts. He has been appointed by the defense, the prosecution, and the courts. He is also a psychology professor at local universities. (EH 144-46) He stated that the principles in forensic psychology are broadly related to those in social psychology and sociology. The APA mandates that practitioners incorporate sociology and social psychology when making individual assessments. A forensic psychologist must analyze how an individual's traits interact with his culture and his sociological environment. (EH 147)

Dr. Ofshe used social psychological and sociological principles that deal with behaviors in certain contexts when factors like coercion and extreme actions are present. They focus on decision making and compliance when an individual interacts with the demands of a particular setting. Those theories, and the hallmark studies supporting them, are part of the teaching and training in psychology. They are generally accepted within the social science fields. (EH 148-49) This information and principles are in introductory psychology textbooks which are

widely taught and accepted. Dr. Brannon actually teaches them now and uses them daily in his forensic practice. The social science's sub-fields merge with these principles since one must know the context in which a person acts as well as the influence others have on him. (EH 150-52, 162-65, 178)

There have been a number of studies that examine behavior in social situations where levels of coercion and control are present. They routinely show that people act in ways that the lay public would not expect and that ethical people do unpredictable and unexpected things when under pressure. (EH 152-53) An expert can help explain why a person behaves in a certain way. (EH 180) Dr. Brannon then gave examples of three such studies. In the Milgram study volunteers were directed to apply electrical shocks to another person. People continued to shock even after they ceased to hear any response (screams) from the other person. (EH 153) In the Barley study, volunteers were randomly assigned to be guards or prisoners. The guards became increasingly coercive and violent while the prisoners became increasingly compliant and depressed. The six week study had to be stopped after six days in order to stop the abuse and harm. The results were completely counterintuitive and focused on the principles of decision making, influence, control, and susceptibility. (EH 154-56) Dr. Brannon also discussed the Genovese case with its "bystander effect" as well as behavior in gang

neighborhoods. (EH 156-57) These studies help explain that good people will not engage in standard behavior when confronted with certain influences. These are the principles of behaviorism where people avoid negative outcomes and the experts want to see what influences their choices in so doing. (EH 158) While some of the reactions may be intuitive, not all of it corresponds to what someone might expect so, therefore, an expert can point out the many factors involved in a more complex situation. (EH 165)

Dr. Brannon specifically said that behavior in such extraordinary situations is not a syndrome. An individual in such a situation does not have a disorder or conditions which causes symptoms. A syndrome creates a set of symptoms that continue even out of the context of the extraordinary state of affairs. The behaviorism Dr. Ofshe discussed involved actions which cease when the coercion or threat stops. Dr. Ofshe used the group norms discovered in his work to say whether a particular behavior was likely or probable given certain external factors being involved. (EH 159-161)

If Dr. Ofshe or another expert were to testify about a person's actions stemming from either a threat or a promised reward, he would need credible information on the facts and variables supporting each theory. (EH 162-72) If there were no facts supporting a "reward hypothesis" then it would not be considered.

(EH 180) The expert would then analyze the probabilities of certain behavior according to group norms and social pressures as established in the literature. Such an analysis is not predictive but is rather looking at the probability of such a behavior happening. (EH 167-72, 177) Predicting certain behavior is confined to areas like forensic psychology because the expert is able to do actual testing on a subject whereas behavior resulting from threats and force is not conducive to such testing. (EH 175-76)

Dr. Brannon went on to explain that there is a difference between a credible threat and the credibility of the person reporting it. The credibility of a threat has to do with the circumstances and is based on standard principles in psychology. Repeated or sustained contact with the person making the threat, such as being housed in the same jail, would increase the intensity and credibility of the threat as well as the control of the threatener over the person. If the person is removed from the threat then he would respond accordingly. Finally, there is a real difference between being a witness to a crime and being a jail house snitch who may overhear others talking about a crime. (EH 181-84)

Throughout his cross-examination of each of these three experts, Williamson's attorney repeatedly brought up the idea that Panoyan may have been telling his story in order to get himself out of jail and avoid being charged with the

crimes. He implied that the State induced Panoyan to say what he did and offered him a deal to testify against Williamson since there was little evidence against him otherwise. He asked each expert if Dr. Ofshe should have considered such a scenario when analyzing and explaining his behavior. The State repeatedly objected, saying that no such facts existed. Consequently, the hearing was expanded to include the testimony of one of Panoyan's trial attorney.

Steve Hammer was Williamson's trial attorney and testified at the evidentiary hearing of the issue of ineffective assistance of counsel. (EH 122-26) He conducted the guilt phase of the trial and used the theory that Williamson was innocent. The state had no evidence and what it did have was wholly circumstantial. He believed that Panoyan was involved. (EH 128-29) Panoyan was clearly present at the crime and told the police some of what happened, although his account did not match all the evidence. (EH 130) Hammer worked on the theory that Panoyan made up the story to save his own hide. He took several depositions from Panoyan but was always precluded from questioning him about any inducements the state may have given him to testify. Panoyan's attorney claimed attorney-client privilege and the State also objected. At trial, the judge agreed with them and forbade him from going into the area. Hammer thought that it was obvious that Panoyan received some sort of benefit since he was released

with no charges. (EH 131, 133-34) It was also odd that the first person Panoyan told that Williamson was the perpetrator, besides his attorneys, was the Assistant State Attorney Brian Cavanagh's father. He has no idea to this day whether the State offered Panoyan a deal. (EH 132, 141-42)

According to Hammer, Dr. Ofshe testified throughout the trial by way of hypotheticals. Hammer repeatedly objected because he felt the questions asked Dr. Ofshe to vouch for the credibility of Panoyan. The judge repeatedly sustained those objections and Dr. Ofshe never answered any of the questions. He did not request a curative instruction because Dr. Ofshe never said anything, having not answered any of the objectionable questions. There was simply nothing to disregard. (EH 135-38) The judge had told the jury that Dr. Ofshe was not going to comment on Panoyan's credibility; given that, no curative was necessary. (EH 143)

Hammer testified that he read Panoyan's statements the State gave Dr. Ofshe and all the other information Dr. Ofshe reviewed. He spoke to Dr. Ofshe before he testified but did not do a deposition. He personally did not give any weight to Dr. Ofshe's opinion and did not think the jury would either which is why he did not object to his qualifications or his testimony. (EH 138-39) Dr. Ofshe seemed pompous and the State seemed to be grasping at straws in putting him on at all. Hammer thought it was apparent, both to himself and to the jury, that the State did

not have confidence in its own case and the jury would give Dr. Ofshe's testimony no weight. Neither the State nor Hammer used the testimony in closing arguments. In hindsight, Hammer thinks he should have asked for a Frye hearing but at the time reasoned that the testimony was glaringly worthless so he did not object. (EH 138-43)

The final witness at the evidentiary hearing was Panoyan's trial attorney, David Vinikoor. Panoyan was charged with the murder and other crimes since the surviving victims identified him. (EH 185-88,198) Vinikoor testified that he and his co-counsel Paul Stark knew very little about the perpetrators of this crime. They continually asked Panoyan for information about what happened so they could prepare his defense but he refused to answer their questions or give them information about who was present. He acted extremely fearful and refused to disclose details.

Panoyan repeatedly told them that he was fearful for his family and himself because there had been explicit and violent threats made. (EH 185-89, 194, 198) Panoyan never told his attorneys the name of the person threatening him. (EH 199-200). He was in jail with Williamson and they had contact with each other. Panoyan was extremely afraid of Williamson, as testified to by another inmate. (EH 204) He knew Williamson's family very well and had been a long term friend

of the father. He knew that Williamson had committed murder before. (EH 195) Because of Panoyan's emotional state, Vinikoor wanted him released from jail in the hope that he would speak and his information would exonerate him. (EH 196)

Vinikoor and Stark believed that Panoyan knew who had committed the killing and went about trying to convince Cavanagh to agree to a release of him from jail. They told him that as long as Panoyan was in jail he would not speak to them. (EH 190) They wanted him out of jail in order to get him to open up. (EH 192-94) Although Panoyan was eventually released, it was an on-going process to get that to happen. (EH 190-91) Once he was released, a considerable period of time went by before he said anything. He remained afraid and silent. (EH 192-94) The attorneys gave him a recording machine with the idea that his release would look like a deal had been made and that would prompt the person making the threats to contact Panoyan. (EH 191, 199-200) Panoyan never made any recordings. (EH 192-94, 201) For a long time after he was released Panoyan had trouble speaking to anyone about the crime because of his long standing fear. Although he was not certain of the sequence of events exactly, Vinikoor thought that Panoyan eventually told Stark and him about Williamson; they then contacted Cavanagh. (EH 192-94, 205) They had not known about Williamson's role and identity as the threatener while Panoyan was in jail. (EH 197)

After Panoyan had told them what happened, Vinikoor and Stark arranged a series of meetings with Cavanagh. Cavanagh could not get Panoyan to speak and so told him about his father, a famous detective from the New York City Police Department. Apparently Panoyan was impressed and asked to speak with him. Vinikoor then set up a series of meetings with the elder Cavanagh. (EH 192-94) Eventually, Panoyan told the State about Dana and Rodney Williamson but it was a long and complicated process. (EH 201-03) The charges were still pending against Panoyan throughout that time. (EH 197)

The prosecutor then took the case back to the grand jury and had Panoyan testify. The grand jury chose to indict Rodney and Dana Williamson but not Panoyan. The State never actually dismissed a case against Panoyan. (EH 197) At no point during this process did the attorneys ever ask for a deal in exchange for Panoyan's statements and testimony, nor did the State ever offer one. (EH 191, 192-94, 196-97) Panoyan also never mentioned any secret deals with the police or the prosecutor; Vinikoor had no reason to believe that such an arrangement existed. (EH 205) Panoyan never even knew that the attorneys were arranging his release and was very surprised when he was. (EH 197)

The trial court denied relief and this appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied relief on the claims of ineffective assistance of counsel and its findings were supported by competent substantial evidence which showed that counsel's performance was not deficient nor could Williamson demonstrate the necessary prejudice required by Strickland.

The evidence adduced at the preliminary hearing demonstrated that trial counsel made a reasoned decision not to voir dire because he thought it was apparent that the State's case was weak and the jury would see the expert in a negative light. The hearing further demonstrated that the standards used by Dr. Ofshe at the trial did meet the requirements of Frye and were broadly accepted in the community of psychology, psychiatry, and sociology. Consequently, the trial court properly allowed the testimony and counsel could not be ineffective for failing to object to admissible evidence. Further, the trial record and that of the evidentiary hearing showed that no objectionable testimony was admitted or allowed after trial counsel objected to an improper question and the court sustained the objection. Since no objectionable evidence came before the jury, no curative instruction was necessary and counsel was not deficient for failing to request one. Finally, Williamson failed to meet the prejudice prong in any of the sub-claims as required under Strickland. This Court should affirm the denial of relief.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED WILLIAMSON POST-CONVICTION RELIEF AFTER AN EVIDENTIARY HEARING IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE. (Restated)

Williamson argues that his trial counsel was ineffective in the following three ways: for failing to voir dire the State's expert, Dr. Richard Dr. Ofshe, on his qualifications as an expert; for failing to request a Frye hearing on Dr. Ofshe's testimony; and for failing to request a curative jury instruction.

The standard of review for ineffectiveness claims following an evidentiary hearing is *de novo*, with deference given the court's factual findings. "For ineffective assistance of counsel claims raised in postconviction proceedings, the appellate court affords deference to findings of fact based on competent, substantial evidence, and independently reviews deficiency and prejudice as mixed questions of law and fact." Freeman v. State, 858 So.2d 319, 323 (Fla. 2003).

> ... we review the deficiency and prejudice prongs as mixed questions of law and fact subject to a de novo review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence.

Arbelaez v. State, 898 So.2d 25, 32 (Fla. 2005). See Reed v. State, 875 So.2d 415 (Fla. 2004); State v. Riechmann, 777 So. 2d 342 (Fla. 2000).

To prevail on an ineffectiveness claim, the defendant must prove (1) counsel's representation fell below an objective standard of reasonableness and (2), but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

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

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

In Davis v. State, 875 So.2d 359, 365 (Fla. 2003), this Court reiterated that the deficiency prong of Strickland requires the defendant establish counsel's

conduct was "outside the broad range of competent performance under prevailing professional standards." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989)). With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d at 365. In assessing the claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. The ability to create a more favorable strategy years later does not prove deficiency. See Patton v. State, 784 So.2d 380 (Fla. 2000); Cherry v. State, 659 So.2d 1069 (Fla. 1995). "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986).

Expounding upon Strickland, the Supreme Court cautioned in Wiggins v. Smith, 539 U.S. 510, 533 (2003):

> In finding that [the] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of

> *Strickland*.... We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ... A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 533. From Williams v. Taylor, 529 U.S. 362 (2000), it is clear the focus is on what efforts were undertaken and why a strategy was chosen. Investigation (even non-exhaustive, preliminary) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, 466 U.S. at 690-91 ("[s]trategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.").

> 1. & 2. Trial counsel was not deficient for failing to ask for a Frye hearing or for not doing voir dire since defense counsel made a reasoned decision not to challenge the expert, Dr. Ofshe's testimony was admissible even under Frye, and Williamson cannot show prejudice as required under Strickland**.**

After hearing and evaluating the testimony of Hammer at the evidentiary hearing, the trial court found that his performance was not deficient but was rather the product of strategy for handling Dr. Ofshe's testimony. On the claim that trial counsel was ineffective for not conducting voir dire on Dr. Ofshe or requesting a Frye hearing the trial court found:

> This Court finds that Hammer carefully considered which course of conduct to pursue with regard to Dr. Ofshe's testimony, and ultimately made the strategic decision not to question Dr. Ofshe's qualifications or the usefulness of his testimony, and not to request a *Frye* hearing. He cannot be found to

> have been ineffective simply because, with the benefit of hindsight, he would have made a different choice.

(PCR 451-52) The record clearly supports this finding. Williamson characterizes Hammer's decision as a "whim" (IB 33) but Hammer had prepared for Dr. Ofshe's testimony prior to trial. He specifically stated that he read Panoyan's statements the State gave Dr. Ofshe and all the other information Dr. Ofshe reviewed. Hammer knew what Dr. Ofshe was going to say and had time to reflect on how to handle it. He spoke to Dr. Ofshe before he testified which reinforced his belief that the testimony was worthless. Hammer testified that he did not put much credence in Dr. Ofshe's opinion, nor did he think the jury would either. (EH 138-39) (EH 138-39) He believed that Dr. Ofshe was so full of himself that the jury would be put off by his demeanor and statements. In fact, he thought that the fact the State put him on at all showed that it was "grasping at straws" which would be apparent to the jury. He made a reasoned decision at the time of the trial; his testimony that, in hindsight, he should have had a Frye hearing is the sort of second guessing that cannot be done when conducting a Strickland analysis. (EH 138-43) "[E]very effort" must "be made to eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Davis, 875 So.2d 365; Chandler v. U.S.,

218 F.3d 1305, 1313 n.12 (11th Cir. 2000). Nor is that comment dispositive in determining whether he was ineffective at trial. Routly v. State, 590 So.2d 397, 401 n. 4 (Fla.1991)(An attorney's admission that he was ineffective is of little persuasion in determining effectiveness.) Furthermore, it is clear that Hammer considered which course of conduct to pursue with regards to Dr. Ofshe's testimony. His choice to emphasize the State's grasping at straws appears to have been a strategic choice and, thus, not ineffective. Arbelaez, 889 So.2d at 31-32; Orme v. State, 896 So.2d 725 (Fla. 2005)(agreeing "a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision"). Williamson has failed to demonstrate ineffectiveness.

This Court directed the trial court to hold a Frye hearing and to determine whether the testimony given by Dr. Ofshe met the Frye standards in order to assess whether the evidence prejudiced Williamson. Based upon the evidence presented at the hearing the State clearly showed that this type of testimony is based upon long established and widely accepted principles of sociology and psychology and is in no way new or novel. Further, all the experts agreed that such testimony was a proper topic for an expert in this field and would definitely assist the jury in analyzing the behavior and testimony of Panoyan. Finally, both Dr. Butts and Dr.

Brannon unreservedly agreed that Dr. Ofshe was a leading expert in the subject of human behavior in extreme and coercive settings; indeed, he helped write the "Hornbook" for it. After these experts testified it was apparent that a Frye hearing was not appropriate or required at all.

Courts in Florida follow the test set out in Frye v. United States, 293 F. 1013 (D.C.Cir.1923). "This test requires that the scientific principles undergirding this evidence be found by the trial court to be generally accepted by the relevant members of its particular field." Hadden v. State, 690 So.2d 573, 576 (Fla.1997). Courts should only utilize the Frye test in cases of new and novel scientific evidence. See, U.S. Sugar Corp. v. Henson, 823 So.2d 104 (Fla.2002); Brim v. State, 695 So.2d 268, 271-72 (Fla.1997). "By definition, the Frye standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques." U.S. Sugar, 823 So.2d at 109 (citing Ramirez v. State, 651 So.2d 1164, 1166-67 (Fla.1995)). Not all expert testimony must meet the Frye test in order to be admissible. See Flanagan v. State, 625 So.2d 827, 828 (Fla. 1993). On remand, a court should consider whether the scientific principle or discovery is generally accepted at the current time, rather than whether it was generally accepted at the time of the trial. See Brim, 695 So.2d at 275; Hadden, 690 So.2d at 579.

This Court was concerned that Dr. Ofshe was giving "syndrome testimony" since he used the word "pattern." Williamson, 994 So.2d at 1010. The trial court used the Frye standards in analyzing the testimony at the evidentiary hearing in determining if the principals Dr. Ofshe relied on were widely accepted in the psycholoical/pyschiatric communities, if he was an expert in the field, and if the testimony was beyond the knowledge of the common juror and would, therefore, assist them in their deliberations. Again, the Frye test requires that the scientific principles undergirding the evidence must be generally accepted by the relevant members of a particular field. This Court has defined "general acceptance" as meaning acceptance by a clear majority of the members of the relevant scientific community, with consideration by the trial court of both the quality and quantity of those opinions. Brim, 695 So.2d 268. The trial court found that Dr. Ofshe's testimony met the requirements set out in Frye:

> The State clearly established at the evidentiary hearing that this type of testimony is based upon long-established and widely-accepted principles of sociology and psychology. Dr. Butts and Dr. Brannon testified that Dr. Ofshe's work is highly respected in the social science community (comprising sociologists, psychologists, and social psychologists), and is frequently relied upon by forensic and clinical psychologists as well as sociologists. Dr. Brannon testified that Dr. Ofshe's specific sociological principles regarding human behaviors in response to extreme coercion are generally accepted within the social science community and are part of the training and teaching in psychology. Therefore, this Court finds that the principles upon which Dr. Ofshe's testimony was based are generally accepted in the field.

(PCR 452-53) Again, the record fully supports this finding. Dr. Ofshe, Dr. Butts, and Dr. Brannon all said that the underlying principles used at the trial come from literature review along with standards derived from disciplined observation and interviews of individuals who had been subjected to extreme situations and behavior controls; they are widely accepted in the socio-psychological communities. (EH 7-11, 23-28, 56, 62-66, 70-71, 81, 86-89, 148-52, 158, 162-65, 178) 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. (EH 13-14, 32-35, 71-72) All three experts also agreed that such testimony did not involve using or discussing a "syndrome," which is a group of symptoms that collectively characterize a disease or disorder. Dr. Ofshe just discussed typical human behavior in extreme situations with a number of similar variables. (EH 13-14, 86-87, 104, 159-61) Dr. Butts and Dr. Brannon distinguished child abuse and other syndromes from the type of *situational* behaviors used by Dr. Ofshe. In true syndromes, an individual has specific problems or symptoms caused by an event or a disease which will ***persist*** after the person is removed from the underlying situation. The types of behavior Dr. Ofshe spoke of cease when the triggering event or threat ceases; the person does not carry those behaviors on to more

ordinary situations. (EH 86-87, 159-61)

Williamson also argues that this Court's characterization of Dr. Ofshe's testimony as "law of the case" and is, therefore, binding on the trial court. Even it that were so, the trial court held a Frye hearing and found that it passed muster under those standards. However, law of the case is not applicable to this issue since this Court sent the case back to the trial court to conduct a Frye and evidentiary hearings and to make factual findings in those hearings, which it did. The law of the case does not affect the trial court's factual findings that are based on credibility determinations it made after review of competent, substantial evidence. See Shaw v. Shaw, 334 So.2d 13, 16 (Fla.1976) ("Subject to the appellate court's right to reject 'inherently incredible and improbable testimony or evidence,' it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court.") (footnote omitted); Bare Necessities, Inc. v. Estrada, 902 So.2d 184, 185 (Fla. 3d DCA 2005) (noting that a trial court's resolution of conflicting evidence must be affirmed on appeal if supported by competent substantial evidence). Here the trial court did make such factual findings which were supported by the record. Williamson did not present any evidence to show that this testimony was, in fact, syndrome testimony like that in Hadden, 690 So.2d 573. In Hadden this Court held that "there is no consensus

among experts that [the child sexual abuse accommodation syndrome] is useful as substantive evidence of guilt. Id. 579. Similarly, in Flanagan v. State, 625 So.2d 827 (Fla. 1993) this Court determined that sexual offender profile evidence, used as substantive evidence of guilt, did not meet the Frye test. Such is not the case here. The expert in Smith v. State, 674 So.2d 791 (Fla. 5th DCA 1996) had no foundation in science nor any specialized knowledge to support her opinion that the child had been abused. That is a far cry from Dr. Ofshe's specialized knowledge and training in the scientific underpinnings of this field, as testified to by all three experts at the evidentiary hearing and which Williamson could not rebut.

The trial court also determined that Dr. Ofshe's testimony was admissible expert testimony that would aid the jury in its deliberations. It found:

> Dr. Butts and Dr. Brannon both testified that Dr. Ofshe's testimony would definitely have assisted the jury in analyzing Panoyan's behavior and testimony, since it dealt with behavior and situations rarely encountered by the average layperson. Furthermore, Dr. Ofshe's testimony did not invade the province of the jury, because he did not testify as to whether Panoyan's testimony was credible or whether the threat against him was credible; he testified only that Panoyan's behavior was consistent with a person who was acting under a threat perceived to be credible. Therefore, this Court finds that Dr. Ofshe's testimony might have assisted the jury in understanding the evidence.

(PCR 452) The evidence also supported this finding. Dr. Ofshe testified that, while the average layperson would accept that a death threat is powerful, he would not

have an appreciation of how a "normal" person would behave under such a threat since the resulting "typical" behavior is not what would commonly be expected. (EH 56-60.) Dr. Butts testified that a typical person is not exposed to extreme methods of control and, therefore, does not realize how effective they can be nor that the reactions of a person suffering under them is not what one might expect. (EH 83-85, 112-13.) Dr. Brannon stated that studies routinely show that people under coercion or control behave and respond in ways the lay public would not expect. (EH 152-53.) The trial court found Dr. Ofshe's testimony would aid the jurors in understanding the issues, a finding further bolstered by the expert testimony given at the evidentiary hearing. In determining whether an expert's testimony will aid jurors' understanding of the issues, a court looks to whether a reliable body of scientific or other specialized knowledge has developed to support the opinion testimony. See generally Charles W. Ehrhardt, Florida Evidence section 702.1 (citing Ramirez v. State, 651 So.2d 1164 (Fla. 1995)). Here, the trial court expressly found that Dr. Ofshe's testimony would aid the juror and that finding was soundly supported by the evidence presented at the evidentiary hearing. Williamson presented nothing to contradict that evidence.

Finally, the trial court determined that Dr. Ofshe was an expert in the field of behavior under extreme control and coercion. It stated:

The Court has little doubt that Dr. Ofshe is qualified as an expert in the

> subject of human behavior in extreme and coercive settings. He is a professor emeritus of sociology; he holds a bachelor's degree in psychology, a master's degree in sociology, and a Ph.D. in social psychology. Dr. Butts and Dr. Brannon both testified that Dr. Ofshe is a leading expert in the field and has authored many important works that are relied upon by both sociologists and psychologists. Although Dr. Ofshe is a sociologist rather than a psychologist, it is clear to this Court from the testimony that there is a great deal of overlap between the fields of sociology and psychology. Dr. Ofshe's studies are multidisciplinary, bridging the social science fields of sociology, psychology, and social psychology. This Court finds that Dr. Ofshe is qualified as an expert to present opinion testimony on the subject of human behavior in extreme and coercive settings, as he did in this case.

(PCR 453) The record supports this finding. All three experts said that there is a great deal of overlap between the fields of sociology and psychology. Both Dr. Butts and Dr. Brannon stated that Dr. Ofshe is an expert in the area of human behavior in extreme situations and under coercive conditions. He conducted a number of the seminal studies and work in the field and wrote a number of the foundational papers and books on the subject. Essentially he wrote the “Hornbook” on the topic. They both routinely utilize his work in their own clinical and academic work. (EH 79-81, 93, 116, 147) All of Dr. Ofshe’s work was peer reviewed before it was published. (EH 62-64) His work now forms the basis of current research and examination in areas of human behavior like bullying and torture. (EH 88-89) Consequently, the two fields share this body of work in social psychology as a foundation of each’s specialty.

Williamson insinuates that Dr. Ofshe was not qualified to be an expert at

the 1994 trial since his work since then has been in coerced confessions which is inapplicable to the evidence here and routinely rejected by courts. As noted above, Dr. Ofshe laid the foundation for the entire study of human behavior in extreme situations and it was that work which qualified, and qualifies, him as an expert in this case. This testimony *did not* concern the voluntariness of any statement nor did it touch upon Dr. Ofshe's latter work on coerced confessions. 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. Those 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 where there was no supporting evidence of coercion, threats, or violence. Again, there was such corroborating evidence here in Panoyan's case as argued in this brief.

An expert in this field may appropriately testify in this unique and extreme factual situation about how a person is likely to behave based upon how he perceives a threat given the typical responses seen in the studies in similar very rare factual scenarios.[1] (EH 90) Dr. Ofshe did not testify on whether Panoyan was

[1]The factual sets of events, both in Panoyan's case and the other studies documented in the research, discussed by Ofshe, Dr. Butts, and Dr. Brannon in this case are significantly different from that discussed in U.S. v. Fishman, 743 F.Supp. 713 (N.D.Cal. 1990) because of the presence of actual violence, extreme

credible or if the threat was real; his testimony concerned the unusual behavior of a person in the face of what he perceives as a credible threat and if Panoyan's behavior was consistent with those seen in the scientific studies. (EH 13-14, 23-28, 70-72 96, 181-84) Dr. Ofshe concluded that Panoyan's behavior was consistent with someone who believes the threat, based on what is known about human behavior. (EH 13-22, 57-60, 97-99, 111) He never claimed to know if Panoyan was telling the truth. This type of testimony is limited to this very particular factual scenario.

Finally, the trial court properly admitted the testimony and did not abuse its discretion in so doing. The evidentiary hearing court found:

> All three components being satisfied, this Court finds that Dr. Ofshe's testimony was properly introduced into evidence. There is no reasonable probability, sufficient to undermine this Court's confidence, that Dr. Ofshe's testimony would have been excluded had defense counsel challenged Dr. Ofshe's qualifications, questioned Dr. Ofshe on how his testimony would assist the jury in understanding the evidence, or requested a Frye hearing on Dr. Ofshe's testimony.

(PCR 453) The admissibility of evidence is within the sound discretion of the court and its ruling will not be reversed unless there has been a clear abuse of that

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force, and physical coercion which was not present in Fishman or many of the alleged coerced confession cases where the behavior involved "thought reform" and other behavior modification variables which did not include the presence of actual violence. The Fishman court acknowledged that the social scientific community did accept behavior changes in the face of actual threats and violence. Id. at 716-717.

discretion. Ray v. State, 755 So.2d 604, 610 (Fla.2000); Zack v. State, 753 So.2d 9, 25 (Fla.2000); Cole v. State, 701 So.2d 845, 854 (Fla.1997); Jent v. State, 408 So.2d 1024, 1039 (Fla.1981); General Elec. Co. v. Joiner, 522 U.S. 136(1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion"). Under this standard, the Court's ruling will be upheld "unless ... no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); See Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla.1990).

The situation in this case differs from the one presented in Jordan v. State, 694 So.2d 708 (Fla. 1997) in several respects and does not further Williamson's case. In Jordan two experts testified in the penalty phase, one regarding the defendant and the one about the victim. The first expert was a counselor with only a bachelor's degree in psychology who testified about profiles described in scientific literature which she then used to diagnosis the defendant based on those readings and to speculate about his feelings during the time of the crime. This Court held that those opinions were outside her area of expertise and, therefore, she was not qualified to give them since she never worked with compiling or studying such evidence; she only read the literature but never worked with or deeply studied

it. Id. 716. Here, Dr. Ofshe not only deeply studied and taught the subject and literature, he was one of the founding experts in the field itself, writing the seminal source from which other experts used to either expand the field or use in their practices. Additionally, there was unrebutted testimony that the fields of sociology and psychology overlapped in this area and that Dr. Ofshe was an expert in the field. Williamson failed to counter this testimony and, thus, failed to carry his burden of showing his trial counsel ineffective for not doing voir dire or asking for a Frye hearing.

The second expert in Jordan was a clinical gerontologist who testified about the fear that elderly women *generally* fear when on a street with a stranger and had no knowledge about the individual thoughts and fears of the victim. This Court found such testimony impermissible since the jurors common experience could inform them *of the basic fact* that an older woman would be scared when approached and robbed by a stranger with a gun. Id. 717. Here, all three experts testified that an individual's reaction to an extreme control and threat is *outside* the common knowledge and that such people react in ways that are both counterintuitive and contradictory to what a common person would expect. Consequently, this area is appropriate for a expert to explain to a jury. Again, Williamson presented nothing to the contrary and did not carry his burden under

Strickland.

Williamson can show no prejudice resulting from Dr. Ofshe's testimony. Defense counsel vigorously attacked Panoyan's credibility throughout the trial and the jury knew all the inconsistencies and oddities with that testimony. In his opening argument, counsel stated that Panoyan was going to come in and tell the jury "one hell of a story" to avoid the electric chair (R 675-76). He reminded the jury that Panoyan was originally a co-defendant who never identified Williamson until 3 years after the crime. He warned the jury that the State had made a deal with the devil and that it should listen closely to Panoyan's account of the events which did not match up with those as related by the other two innocent victims. On cross-examination of Panoyan, defense counsel elicited that Panoyan was originally a defendant in this case, arrested in May 1990, and held without bond for 18 months until November 1992 when he was inexplicably released on his own recognizance (R 2299-2302). Counsel brought out the fact that Panoyan laughed and joked in court with Williamson during those 18 months and never asked for an order to keep him separated from Williamson (R 2305-06). Panoyan was also impeached with the inconsistencies between his deposition and trial testimonies regarding how he spent his time waiting for Bob Decker to return home (2322-23) and whether he ever saw the cowboy hat that Williamson was wearing again after

Donna's murder (R 2332). Defense counsel continued his attack on Panoyan in closing argument, telling the jury that Panoyan has "told various versions of what happened," (R 3005) and reminding them that Detective Woodruff thought Panoyan was lying from the beginning and that's why he swore out an arrest warrant against him and testified against him at his bond hearing (R 3005-06). Defense counsel went through each conflict in Panoyan's version of what happened that night when compared with victim Bob and Clyde Decker's testimony. He told the jury that it would question whether Panoyan had set up the whole thing. (R 3006-19) Counsel's impeachment of Panoyan covered every possible area and the jury had all the information to assess his credibility.

Further, the State presented several witnesses who corroborated Panoyan's testimony about his fear and actions. Detective Marcus testified that Panoyan seemed afraid and tried to contact him while he conducted undercover surveillance of Panoyan's office. He was forced to identify himself when Panoyan confronted him with a gun. (R 2429-30, 2432-34) Security guard Greenfield confirmed that Panoyan drove into his parking lot that night very upset, saying he had been robbed. Panoyan called his wife and told her to leave the house with their children. (R 1768-70, 1774) Officer Carter responded to the parking lot. She said that Panoyan was nervous, frightened, and very concerned about the safety of his

children. (R 1811) Officer Spencer also testified that Panoyan repeatedly expressed his fear about the safety of his family. (R 1292, 1332) Panoyan's wife Darla testified about Panoyan's behavior the night of the crime when he ordered her and the children out of the house. (R 2450-51) He also had his children live elsewhere for two weeks because he was so afraid for their safety. (R 2457) While Panoyan was at home before his arrest, he acted extremely paranoid, hiding, not sleeping, and carrying a gun around. (R 2457, 2462) He never told her what happened until several months after he was released from jail. (R 2470-76) All of this testimony corroborated Panoyan's account of the threats he received and how he responded to them.

Williamson's family testified that the hat found at the scene looked like the one Williamson wore. (R 1699, 1797, 1703, 2627-28) Two friends of Williamson testified that the utility belt found in Panoyan's truck looked like one of the two owned by Rodney and Dana Williamson. (R 1992, 2018) Williamson's ex-wife testified that it was his belt. (R 2627-28) Woodruff testified that the utility belt had a label showing it was purchased from Asian World of Martial Arts where the police confirmed Williamson's brother Rodney had purchased two in August 1988. A catalog from that company was found in Williamson's Oho house. (R 2585-96)

Three inmates testified about inculpatory statements Williamson made to

them. Williamson told Patrick O'Brien details about the crime and said that he was the gunman. (R 1539-41) O'Brien testified that Williamson told him that the police had his hat and utility belt, the latter of which he had left in Panoyan's truck. (R 1540, 1572) Williamson told him that he stabbed Mrs. Decker because the gun misfired and he "lost it." (R 1540, 1543, 1560) Williamson further admitted that he threatened Panoyan and his family and that Panoyan did not know about the plan to commit the crime. (R 1545-46)

Stephen Luchak was cellmates with Williamson for six months, during which time Williamson gave him details of the crime. He further said that he wanted Panoyan killed. (R 1899-1901, 1917) He admitted that the cowboy hat left at the scene was his. (R 1925) Edward Aragones then testified that Williamson told him that he tied up the entire family and shot each of them in the head. The mother died. (R 2491) The record clearly supports the trial court's finding that Williamson failed to prove the necessary prejudice to prevail on his effective assistance of counsel claim. Strickland, 466 U.S. at 694; Arbelaez, 889 So.2d at 31-32.

The State met its burden to prove that Dr. Ofshe testimony in the original 1994 trial met the Frye standards as seen in a review of the evidence at the hearing. Williamson, meanwhile, has failed to meet either prong required by Strickland to

show ineffective assistance of counsel and the trial court properly denied his claim that trial counsel was ineffective. This Court should affirm that denial.

3. Trial counsel was not deficient for failing to request a curative instruction since no answer came into evidence from the objectionable questions; Williamson has failed carry his burden under Strickland.

The Florida Supreme Court also remanded the case for an evidentiary hearing on whether Hammer was ineffective for failing to ask for a curative instruction when his objection to a question asking for Dr. Ofshe's opinion on whether the threat to Panoyan was credible. The State respectfully incorporates the relevant discussion and law detailed above into this argument. The Court was concerned that there had been prior testimony on this subject which had been allowed in for which counsel should have sought a curative instruction. Williamson, 994 So.2d at 1011. This Court held an evidentiary hearing on this claim as well. As discussed in detail above, Williamson bears the burden of proving this claim. Strickland, 466 U.S. 688; Orme v. State, 896 So.2d 725, 731(Fla. 2005)(To establish a claim of ineffective assistance of counsel, a defendant must prove two elements: first, that counsel's performance was deficient; and second, that the deficient performance prejudiced the defense.). Williamson has failed to carry that burden. After such an evidentiary hearing, the trial court denied this claim as well.

The complete section of the objectionable questioning follows, beginning with Dr. Ofshe:

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

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

> Doctor, for the sake of a hypothetical, if, as you have gleaned from your interview and depositions, if Mr. Panoyan was present at a scene of a home invasion robbery where two men whom he knew who were the sons of a good friend of his, placed guns in his face. He was told that his family was being watched. That he would be watched by one of these gunman upon re-entry into the residence, and he was told that if he did not obey the demands of these two gunman, harm would come to his family.
>
> That there was another person in the vicinity who would be signaled, and that person would contact another individual who was surveilling the Panoyan residence where his wife and three children resided. And assume too, that there came a time when this man, Mr. Panoyan, was released that horrible things would happen to his family. That his young children would

be mutilated. That his wife would be mutilated and gang raped in various horrific ways and that this harm would befall his family and himself before his own eyes as each and every member of his family would be skinned alive.

In addition to being subjected to this, and assume, Dr. Ofshe, that this man, Charles Panoyan, was told that if he breathed a word as to the identity of either of these two gunman, that all of these things would befall his family and himself.

Assume, too, that he was placed in a position at some point during the home invasion, after the rest of the family had been secured, in which he was subjected to some measure of force and told what would happen to him if he did not abide by the threats of the gunman.

Are the kinds of control, doctor, exercised by Dana Williamson and Rodney Williamson over Charles Panoyan sufficient to explain his behavior?

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

DEFENSE COUNSEL: Judge, if I could just interpose an objection here. I just want to make certain that this is a hypothetical that Mr. Cavanagh is presenting.

THE COURT: I believe he rephrased it with a hypothetical; am I correct, Mr. Cavanagh [prosecutor]?

PROSECUTOR: Yes, sir.

THE COURT: With that understanding, I heard him say hypothetically and assuming thus and thus.

DEFENSE COUNSEL: Thank you, Judge.

THE COURT: All right.

DR. OFSHE: Yes, especially— I mean, as you give the hypothetical, it collapses the time frame, which is extremely important. The points that you mentioned were introduced in a way that in combination with what I'm told, Mr. Panoyan knew about the history of the people involved, the way in which the threat was induced. That there were other people involved, which was extremely important. That it was more than just two people involved in this home invasion. That happened at a point in this process very early on before. The significance of that was really clear, and perhaps, before it was even thought through, as to how important this would be later.

So that early on he was told that there was someone in the bushes. He was also told that there was someone who was surveilling his house, and as he

told me, he was told that there was someone at his house and he at that point - – -

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

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

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

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

(R. 2237-38). The court agreed that it was improper to talk about the reality of

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

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

(R. 2239-40).

The trial court made the following factual findings:

> During Dr. Of she's trial testimony, Hammer objected because he felt the State's line of questioning was asking Dr. Ofshe to vouch for Panoyan's credibility. (TT 2236-41; HT 134-35.) The judge sustained the objection and Dr. Ofshe never answered any of the questions to which Hammer objected. (TT 2236-41; HT 136-37.) Hammer testified that he did not request a curative instruction because Dr. Ofshe never answered the objectionable

> question, and no objectionable testimony was heard by the jury. (HT 137-38, 143.) Therefore, Hammer did not believe a curative instruction was necessary. (HT 143.)

(PCR 449) It specifically found that Dr. Ofshe never testified to either the credibility of the threat or Panoyan's credibility. The court determined that Williamson failed to meet either Strickland prong.

> Here, defense counsel cannot be found ineffective for failing to request a curative instruction which was not necessary. Because Dr. Ofshe never answered the question regarding the credibility of the threat, no objectionable testimony was ever heard by the jury. As set forth in this Court's findings above, Dr. Ofshe was never permitted to testify as to Panoyan's credibility or the actual credibility of the threat. The State established at the evidentiary hearing that Dr. Ofshe would not have been equipped to testify on those points. As further set forth in this Court's findings above, the remainder of Dr. Ofshe's testimony was properly introduced into evidence. Therefore, this Court finds the Defendant has failed to establish ineffective assistance of counsel for failure to request a curative instruction.

(PCR 455-56) The record at the trial and the evidentiary hearing support the trial court's conclusions.

The portion of Dr. Ofshe's testimony Williamson quoted was not objected to (R. 2233-34) and the sustained objection he cites was to a prosecutor's question that Dr. Ofshe did not answer (R. 2237-38). Since defense counsel's objection was sustained before Dr. Ofshe answered the question, the jury did not hear any impermissible testimony, nor did the doctor give his opinion about the nature or veracity of any threat; there was no error to "cure." In his previous answer Dr.

Ofshe did not comment or opine on either whether the threat truly existed or on Panoyan's credibility as a witness. (R 2236)

As discussed in detail previously, trial counsel Hammer testified at the evidentiary hearing. His defense strategy was that Williamson was innocent and that Panoyan made up this story to protect himself. (EH 128-29, 131, 133-34) His cross-examination and treatment of Dr. Ofshe as a witness was consistent with that approach. He recalled that Dr. Ofshe testified by way of hypotheticals throughout. Hammer was very conscious and wary of Dr. Ofshe straying into testimony about the credibility of Panoyan as a witness or the veracity of any threat against him. He repeatedly objected on those grounds, all of which were sustained by the court. Dr. Ofshe never answered any of the objectionable questions. He did not request a curative instruction because Dr. Ofshe, the witness, never said anything regarding the credibility of Panoyan or the threat since he never answered the questions. The only time the issue came up was in the prosecutor's questions; the jury saw the court sustain the objections to each of those questions. There simply was nothing in the record to disregard. (EH 135-38) The court had told the attorneys and the jury that Dr. Ofshe was restricted to responding only to the hypothetical, not commenting on Panoyan himself. (R2236-37) Consequently, Hammer did not see how a curative was necessary or even allowable given the actual evidence

presented. (EH 143) Questions are not evidence.

The burden at the evidentiary hearing on this issue was Williamson's which he failed to carry. The trial record supports Hammer's position that a curative instruction was unnecessary since no objectionable answer came in. Counsel cannot be deemed ineffective for failing to raise a non-meritorious objection. Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1988). Williamson has demonstrated neither ineffectiveness nor prejudice under Strickland and the trial court's denial of the claim should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Kevin J. Kulik, Esq., 600 S. Andrews Ave., Suite 500, Ft. Lauderdale, FL 33301 on April 25, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on April 25, 2012.

_____

LISA-MARIE LERNER