IN THE SUPREME COURT OF FLORIDA

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

INITIAL BRIEF OF APPELLANT

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

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PRELIMINARY STATEMENT

This is an appeal of the denial of postconviction relief after the remand in *Williamson v. State*, 994 So.2d 1000 (Fla. 2008). Appellant, Dana Williamson ("Williamson"), was defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Appellee, State of Florida ("the State"), was plaintiff. References to the transcript of the evidentiary hearing on remand are indicated by the symbol "HT" followed by pertinent page number(s), and encased in parentheses. References to the original Trial Transcript will be designated by the symbol "TT" followed the appropriate page number(s), and encased in parentheses.

JURISDICTIONAL STATEMENT

This Court has jurisdiction in this capital case. Art. V, § 3(b)(1), Fla. Const.

STANDARD OF REVIEW

"Because both prongs of the *Strickland* [*v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)] test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions *de novo*." *Coleman v. State*, 64 So.3d 1210, 1217 (Fla. 2011).

STATEMENT OF THE CASE AND FACTS

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

In 1988, Donna and Bob Decker resided in Davie, Florida, with their infant son, Carl. (TT 577, 1012). Bob Decker owned a construction business at the time. On the night of November 4, 1988, Bob, Carl, and Clyde Decker (Bob's father from out of town) returned home to find Charles Panoyan ("Panoyan") in the driveway. (TT 581, 1158). Panoyan was the Deckers' acquaintance and occasional employee. He had assisted in the construction of Decker's home and knew its dimensions and alarm system. Bob Decker testified Panoyan rarely came to the home, and that Decker was surprised to see him. (TT 646, 1023, 1158). The Deckers greeted Panoyan in the driveway and they all went inside. (TT 583, 1162, 2105).

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

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

Meanwhile, Donna Decker arrived home from work, was overpowered by the intruders (TT 584), and tied up. (TT 585, 1077, 1179). Bob and Donna were questioned about the location of their money and were forced to sign a legal form. (TT 603, 1062, 1084, 1087). Donna was stabbed to death after putting up a struggle. (TT 591, 1191). Bob, Carl, and Clyde were each shot in the head with a 22-caliber revolver. (TT 587-88, 1132). Bob, Carl and Clyde, however, all survived. (TT 589, 1191). Panoyan, who was unharmed, eventually called police. (TT 592, 1184).

Panoyan, initially the prime suspect (TT 613), never mentioned Williamson to police. (TT 613, 2173). A belt and handcuff key, which fit the handcuffs used on Bob Decker (TT 610, 2694, 2697), were found in Panoyan's truck. (TT 612). Neither Williamson's finger prints nor blood were found at the scene. (TT 661, 662).

In 1989, police got an anonymous tip that Williamson was the assailant, and not Panoyan. (TT 613, 2169). Before this tip, police did not deem Williamson a suspect (TT 613). Police went to Ohio to speak with him. (TT 613, 1337). Asked about a cowboy hat at the scene, Williamson said he once had a similar hat. (TT 664, 2783, 2696, 3026). Police arrested Williamson and Panoyan. (TT 666, 1382, 2172).

Panoyan was released on his own recognizance when he made a statement to police that Williamson was the gunman (TT 667, 2138, 2212), becoming the State's chief witness, and testifying that Williamson was the killer, that he let Panoyan live as he was friends with Williamson's father (TT 2329), that he had no involvement in the crimes, and was coerced into silence by threats from Williamson. (TT 2123-24).

The State introduced evidence concerning Williamson's 1975 conviction as a minor for manslaughter. (TT 1546, 2147). The record shows this evidence was introduced to bolster Panoyan's claims that he had reason to believe threats allegedly made by Williamson to induce his silence. The State also proffered the testimony of three jail house informants serving time for felony convictions (TT 1537, 1915, 2487), who testified that Williamson had admitted the acts. (TT 1930, 1915, 2487).

Other than Panoyan's testimony, the evidence was circumstantial, including a deed executed by Williamson to show his knowledge of legal forms (TT 1472), the

cowboy hat and a utility belt similar to a belt found at the scene. (TT 2783, 3026). The jury returned guilty verdicts on 14 counts (TT 3212-13; 2899). The trial court sentenced Williamson to death for the murder of Donna Decker. (T 3203-04).

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

a. Ineffectiveness of Defense Counsel

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

I. FAILED TO OBJECT TO THE STATE'S OPENING STATEMENT WHICH CONSTITUTED IMPERMISSIBLE "GOLDEN RULE" ARGUMENT AND BOLSTERED THE CREDIBILITY OF THE STATE'S KEY WITNESS;

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

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

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

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

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

a. TOLD JURORS "YOU BETTER BELIEVE THAT WE FILED THESE CHARGES BECAUSE IT'S WARRANTED";

b. VOUCHED FOR THE CREDIBILITY OF THE STATE'S KEY WITNESS BY CHARACTERIZING THREATS THE STATE WITNESS TESTIFIED WILLIAMSON MADE AS "BELIEVABLE THREATS";

c. DISCUSSED TESTIMONY OF "ANOTHER WITNESS THAT YOU DIDN'T HEAR FROM BECAUSE HE'S A CHILD AND A BABY" THAT HE HAD SEEN HIS MOTHER MURDERED;

VII. FAILED TO OBJECT TO THE STATE'S CHARACTERIZATION OF THE OFFENSE AS "INEXCUSABLE" DESPITE THE JURY'S INSTRUCTION ON EXCUSABLE HOMICIDE;

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

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

b. Fundamental Error

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

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

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

(PCR 525-576). The trial court summarily denied Williamson's postconviction motion (PCR 803-839), and Williamson appealed. (PCR 840).

This Court vacated Williamson's attempted first degree murder convictions due to the legal non-existence of one of the State's theories of guilt, and remanded for postconviction evidentiary hearings on "the claims pertaining to Dr. Ofshe." *Williamson v. State*, 994 So.2d 1000, 1017 (Fla. 2008). At trial, the State had called Sociology Professor Richard Ofshe as an expert in "extreme techniques of influence and control" in order to bolster the testimony of Charles Panoyan.[1] When Williamson's trial counsel declined the trial court's invitation to *voir dire* Dr. Ofshe, and failed to request a *Frye* hearing, the trial court declared Dr. Ofshe an expert in that field. (T 2231). *Williamson v. State*, 994 So.2d at 1009. This Court quoted Ofshe's testimony in its opinion remanding for evidentiary hearings:

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[1] Charles Panoyan, the sole original suspect and former co-defendant who, three (3) years after the crimes, including eighteen (18) months in jail, belatedly turned State's witness, claiming Williamson had threatened him not to identify him, and was immediately released and dropped from the Indictment. As this Court noted in its opinion affirming Williamson's convictions on direct appeal:

> [I]t was clear that Panoyan's credibility was a material issue on which the State's case depended. Panoyan was the State's key witness. Defense counsel, through his opening statement and cross-examination of the State's witnesses, had emphasized that Robert Decker saw Panoyan whispering to the gunman during the criminal episode; that Panoyan was the only person at the Decker house to be released unharmed; that police had considered Panoyan to be a suspect from the time of the criminal episode; and that Panoyan did not identify appellant as the assailant until three years after the criminal episode.

Williamson v. State, 681 So.2d 688, 695 (Fla. 1996).

> [I]n reviewing the history of Mr. Panoyan's experience in connection with the invasion and the death and the assaults at the Decker residence, and over the course of the investigation that followed, including his incarceration and ultimate decision to speak about what happened, the pattern that he displays is a pattern of someone who has, for one [sic] of 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 who (sic) 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.

Williamson v. State, 994 So.2d at 1017. This Court's opinion framed the three "claims pertaining to Dr. Ofshe," remanded for postconviction evidentiary hearing:

> [T]rial counsel was ineffective because counsel [1] failed to *voir dire* State expert Dr. Ofshe, [2] failed to request a *Frye* hearing for the novel science upon which Dr. Ofshe relied, and [3] failed to request a curative instruction after the trial court sustained objections to Dr. Ofshe's testimony.

Williamson v. State, 994 So.2d at 1008 (bracketed numerals added).

TESTIMONY AT EVIDENTIARY HEARINGS ON REMAND

On remand, evidentiary hearings were held September 22 and 23, 2010, on Williamson's postconviction motion as to "the claims pertaining to Dr. Ofshe." *Williamson v. State*, 994 So.2d 1000, 1017 (Fla. 2008). A review of the testimony adduced at the evidentiary hearings before the trial court on remand follows:

Dr. Richard Ofshe (Sociologist Who Gave Expert Opinion Testimony at Trial)

The State called Dr. Richard Ofshe, who recalled testifying at Williamson's trial about "influences of death threats on behavior" which is "a catch-all phrase that I invented for convenience sake." (HT 8-9). Asked what underlying social science principals are involved in his area of expertise, Dr. Ofshe replied "principals of rational decision-making," which is "the foundation for all social science." (HT 9). Asked how long "principals of rational decision-making" have been around, Dr. Ofshe answered: "We would really have to go back and look at the history of philosophy, and certainly the history of economics, to answer that question," though "it runs into the hundreds of years." (HT 11). Ofshe continued, "some of my other work has to do with building what's called a mathematical model, for decision-making, for how it is that people respond to an environment, in

which certain things happen with certain probabilities and other things happening with other probabilities, and the issue is to try to maximize their return in that environment, and see whether or not one can develop a simple formula that predicts how they will allocate their behavior. Now, that's in a highly verified laboratory setting, and that's the work that underlies one of my earlier publications, when I was still working on rational decision theory, and going to social interaction, which there was a volume of reports in that research. That kind of decision-making, in an abstract environment, a highly verified environment, is the kind of thing that studies and tests the theories of decision-making. One would then take the assumption that people are being rational, and now apply it with particular circumstances, as they apply it in the world, trying to understand how people cope with, deal with, react to the particular things facing them."(HT 11-12).

Under the State's questioning as to whether his testimony constituted "syndrome testimony," Dr. Ofshe stated that "syndrome is not something I utilize in any way." (HT 13).[2] Asked what he meant by "pattern" when he testified at Williamson's trial, Ofshe gave an example of a case in which another person was threatened with death, his family threatened with death, and he was told there was

[2] It is the law of the case, however, that Dr. Ofshe's testimony in this regard constituted "syndrome testimony." *Williamson v. State*, 994 So.2d at 1010.

no way to escape the threat, and stated: "I was analogizing Mr. Panoyan's situation to another situation which I had given, and they were quite similar." (HT 14).

During Williamson's postconviction counsel's *voir dire* of Dr. Ofshe at the remand (a *voir dire* never conducted at trial), the following exchange occurred:

> [DEFENSE]: Well, we can assume, I think, that any normal person, when they receive a credible threat of death, it's going to influence their behavior.
>
> [DR. OFSHE]: I would think that's a fair statement.
>
> [DEFENSE]: It's not something that would be generally needed to be testified about?
>
> [DR. OFSHE]: About that, I don't know.

(HT 17). Ofshe also testified on *voir dire*: "for the last 20 some odd years, the bulk of my work is in the area of influence during police interrogations." (HT 18-19).[3]

Dr. Ofshe agreed he was aware of cases where jailhouse informants have been shown to have testified falsely and that it is possible Panoyan's motivation for changing his story was that of a jailhouse informant's (HT 19-21); that what he would have testified about at Williamson's trial was "that the account he gave me

[3] Though Dr. Ofshe testified on *voir dire* at the evidentiary hearing that for about 20 years the bulk of his work has been on influence in police interrogations (HT 18-19), the State objected: "he is not testifying about false confessions in this case, Judge. This is totally irrelevant, it's another area. It's irrelevant." (HT 32).

was consistent with other accounts given by people postulating some of those circumstances" (HT 22); that the method he used in reaching his opinion was "looking for corroboration of things that are part of the account or part of the confession" (HT 25); and that he did not consider the alternative theory that Panoyan was changing his identification story to get out of jail and the capital murder charge, much like a jailhouse informant (HT 25-27). Dr. Ofshe became defensive and evasive when asked about the American Sociological Association's and American Psychological Association's rejection of his theories. (HT 28-31).

Dr. Ofshe stated that he was in a better position than the jury to view the effect of a death threat on Panoyan "[b]ecause of my knowledge of the literature, and the particular investigations that I have done involving people who were in fact subjected to those kinds of conditions." (HT 33-34). When asked how he had any "measure of reliability for making those statements," Dr. Ofshe stated:

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

(HT 34-35). The following exchange then took place:

> [DEFENSE]: What about the alternate theory of Mr. Panoyan, that he was essentially doing it, and creating his testimony to get out of jail, that's also a rational theory, would you agree?
>
> [STATE]: Objection, Your Honor, it's taking facts out of context.
>
> [THE COURT]: Overruled.
>
> [DEFENSE]: Go ahead.
>
> [DR. OFSHE]: That theory, it's a possibility, it could have been evaluated, if someone wanted to evaluate it, if someone wanted to propose it, then they could have proposed it, whether to me, or to somebody else. Nobody proposed it to me. Nobody asked me to think about it. Nobody asked me to analyze it, so, it's not part of anything that I did in relation to this case.

(HT 35). The State brought out the number of times Dr. Ofshe has "testified as an expert in any type of sociological field," tendering him "as an expert in the field that he is testifying," and (unlike counsel at trial) the defense objected (HT 37-38), pointing out the lack of any scientific or empirical basis for his testimony, and that "any average juror is able to decide whether the person is testifying due to a credible death threat, or whether they are a jailhouse informant." (HT 39-42).

When the State argued that whether there was any scientific or empirical basis for Ofshe's testimony was "irrelevant" (HT 42-44), the defense noted Ofshe

seeks to testify "that he is an expert . . . to tell us about how a certain person is acting, because of a credible threat, versus being an informant"; that there is no "study, that has any empirical data, that's there's any rational human being who couldn't figure this out"; and that the "jury is the one to accept the credibility of the statement, and to make their decision" (HT 45-47). The State termed the defense position that the jury should have decided if Panoyan was a jailhouse informant motivated by release and freedom from the death penalty, a "contrived poppycock argument," arguing for the veracity of the State's theory at trial, as well as Dr. Ofshe's testimony, whereupon the trial court ordered a recess. (HT 47-48).

After a recess and review of the opinion remanding this case, the trial court stated it would "need to hear from the other (sic) psychologists, before I can determine whether or not Dr. Ofshe is an expert that can be qualified to testify about that which he testified to at trial, as opposed to an expert with regards to sociology" (HT 50) reserving ruling on Ofshe's qualification as an expert. (HT 51).

Asked the "underlying principles of [his] testimony," Dr. Ofshe replied: "The principle is simply that rewards and punishment affect behavior and decision-making, people act based on perceptions of the situation in which they find themselves, and you then connect that to the particularity of whatever it is that you

are looking at" (HT 56), adding: "I think that anyone understands that a death threat is a quite powerful threat, but I don't really think people have an appreciation how they would behave faced with that kind of threat," since "I doubt that you find many people that say, oh, yeah, that happens to me once a week or anything like that" (HT 57). The State then inquired as follows:

> [STATE]: And with respect to Panoyan and the fact that you found him credible, and in your opinion, you found him credible, based on your experience?
>
> [DR. OFSHE]: I focused on his behavior, and what he described was consistent with other accounts that I had gotten from people over the years about how they reacted under somewhat similar circumstances.

(HT 74-75). Asked whether he knew of an agreement wherein Panoyan would go free for his testimony against Williamson, Dr. Ofshe stated: "Well, I believe there was an agreement between Mr. Cavanagh and Mr. Panoyan's lawyer" (HT 68).

Dr. Lori Butts (State's Expert Witness for Remand Frye Hearing)

When the State called Dr. Lori Butts, a clinical psychologist (HT 76), the defense objected on grounds of relevancy, as Dr. Ofshe is a sociologist; not a psychologist. (HT 78). Dr. Butts testified that: "Oh sure. Clinical psychologists

and forensic psychologists rely on social psychology and sociology all the time" (HT 79); that she has relied on "Dr. Ofshe's work" in "memory syndrome issues"; that Dr. Ofshe's "research was on point with the areas of sexual abuse"; and agreed with the State that "his work, . . . is generally accepted" (HT 80). The trial court overruled the defense relevancy objection that Dr. Butts "says that he is a generally accepted and well respected guy. . . . She's testifying nothing specific to this case" (HT 80-81), declaring Butts an expert in clinical and forensic psychology. (HT 81).

Dr. Butts, who had been present for Dr. Ofshe's testimony, said the scientific principles Ofshe testified about were based on "punishment and reinforcements and how people behave" and that "through research that he spurned, we learned to understand what type of behaviors we can expect under certain circumstances" (HT 83-84). The State asked Butts whether Ofshe's testimony on Panoyan's pattern of behavior in the face of a threat constituted "syndrome testimony," and Butts said that it did not. (HT 86-87).[4]

According to Dr. Butts, Dr. Ofshe's testimony was about "[h]uman behaviors, typical human behavior under extreme influences" (HT 87). Butts

[4] It is the law of the case, however, that Dr. Ofshe's testimony in this regard constituted "syndrome testimony." *Williamson v. State*, 994 So.2d at 1010.

testified that although there exist studies on particular cases, there exist no controlled studies concerning the effects of death threats. (HT 88-89).

Butts, who conceded, "No, I'm not a sociologist" (HT 92), was unaware of the American Psychological Association and American Sociological Association rejection of Ofshe's theories (HT 94), and unaware of a Harvard study rejecting the use of Ofshe's theories in legal proceedings. (HT 94-95). Dr. Butts then testified:

> [DEFENSE]: So Dr. Ofshe is essentially giving an opinion that Mr. Panoyan believes that he had received a death threat?
>
> [DR. BUTTS]: That's my understanding.

(HT 97). Asked to explain Dr. Ofshe's "pattern-consistent-with-someone-acting-under-a-credible-threat" expert opinion testimony, Dr. Butts testified:

> [DR. BUTTS]: I mean, that's within the realm of, if you believe -- if someone were to believe a credible threat, being silent and protecting your family, if you feel that's the way to protect your family, would be a reaction to that credible threat.

(HT 99). Asked if she could just "talk to the individual and tell the jury whether that individual, in your opinion, is acting in response to a credible threat," Butts

replied: "[I]f that were asked of me, I would do a clinical -- I would do a clinical evaluation. I would submit tests. I would do a forensic evaluation" (HT 102).

Dr. Butts would want to know alternate theories or motivations for a person's testimony, and agreed recanted and/or jailhouse testimony is "dangerous testimony" (HT 103). Butts testified that, whereas she, as a clinical/forensic psychologist, could render an opinion in a competency or insanity proceeding as to whether a person was malingering, Dr. Ofshe, as a sociologist, could not properly testify about whether a person was being truthful. (HT 111). Butts stated that, since the average person does not receive death threats in everyday life, expert opinion testimony was justified, yet conceded that doing whatever one needs to do to mitigate a death threat is not counterintuitive. (HT 112).[5]

NOTE: Though Williamson's trial counsel, Steven J. Hammer, was then called out of turn without objection (HT 121, 122-143), Mr. Hammer's testimony is presented last in this Initial Brief for a more logical presentation.

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[5] Whereas the evidentiary hearing transcript here reads, "it's not kind of intuitive," this is a typographical error. The actual testimony and context in which it was used, should read: "it's not *counter*intuitive." (HT 112) (emphasis added).

Dr. Michael Brannon (State's Expert Witness for Remand Frye Hearing)

Dr. Michael Brannon, a forensic psychologist, was qualified as an expert in forensic psychology at the evidentiary hearing. (HT 147-148). After discussing historical studies involving social psychological theories seeking to explain counterintuitive behavior in controlled laboratory environments (HT 148-58), Brannon concluded, "People tend to avoid what they believe would be a negative outcome," and that Ofshe "is basing his work and his findings upon the predicate of all the research that's been done in social psychology already" (HT 158-60).

The State again sought to revisit, through Dr. Brannon's testimony, this Court's holding that Ofshe's testimony was "syndrome testimony" (HT 159-60).[8]

Brannon, who has never been qualified as an expert sociologist (HT 161) and is not an expert on what a sociologist would rely in forming an opinion, or how a sociologist would testify (HT 164), testified that if behavior is intuitive an expert is not needed to explain the subject to a jury (HT 165); that some of "coercive persuasion" is self-evident (HT 166); and that, knowing only about the death threat part of the case, as far as individual behavior, as opposed to what a group would do, "I would not make a prediction based on that. In terms of looking at social

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

Dr. Brannon testified there is a relationship between false confessions and behaving in a certain way under a death threat (HT 173); that it is intuitive a person would be more likely to testify falsely if it would help their release from jail; and that an expert would not be needed to assist jurors in that regard (HT 173-174). Asked if it is intuitive if a person receives a death threat they will act to mitigate it, Brannon stated "[i]t depends on the circumstances, what are the options in that person's mind in terms of their behavior," and that he "would be uncomfortable with trying to do a question, a real life question, in that kind of context, it's too complicit of the information to provide that kind of opinion" (HT 174).

Brannon stated that where there are mathematical formulas with error rates very well established in the field, there can be some level of predictability, "[b]ut if you move outside of those areas where you have actuarials to do predictions from, it's much less likely the case" (HT 175-76). Brannon stated that, while depression and schizophrenia "are areas in which psychological testing can be conducted and actuarials I mentioned can be provided," looking into the effects of a death threat on a person is not only complicated by the fact that testing cannot ethically be

performed on persons under a death threat, but also by the small number of persons in any anecdotal study, lessening confidence in any prediction. (HT 176-77).

David Vinikoor, Esquire (Panoyan's Former Criminal Defense Attorney)

Though unrelated to this Court's remand for a *Frye* hearing and inquiry into the effectiveness of defense counsel as it pertained to Dr. Ofshe's trial testimony,[6] and in an effort to establish its claim that Panoyan had received "no benefit" for his testimony when he was released from jail and dropped from the capital murder Indictment (HT 186), the State called David Vinikoor, Panoyan's attorney while Panoyan remained charged with the capital murder (HT 196).[7]

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[6] This Court remanded this case for evidentiary hearings solely concerning "the claims pertaining to Dr. Ofshe." *Williamson v. State*, 994 So.2d at 1017.

[7] The State added Vinikoor to its witness list the day of the hearing stating postconviction counsel "has done a very effective job of injecting red herrings into this matter" by asking Ofshe if Panoyan receiving a benefit might have induced his testimony, and since Hammer "testified, in his opinion, that he did receive a benefit." (HT 185-86). But it was the State that first raised the terms of Panoyan's release, asking Ofshe on direct: "And were you aware, doctor, that when Panoyan was released from jail...it was just a stipulation of an ROR between his counsel and the State of Florida?" (HT 60). It was on cross that Ofshe was asked if he knew of an agreement with Panoyan, and Ofshe replied: "I believe there was an agreement between Mr. Cavanagh and Mr. Panoyan's lawyer" (HT 68). It was also the State that first raised the issue of a deal with Panoyan, asking Hammer on direct if there was any deal, and Hammer replied he believed the State had cut a deal with Panoyan, but was "road-blocked" by the State and Panoyan's attorneys from asking about deals, under the guise of attorney-client privilege. (HT 129-32, 134).

Vinikoor testified "Charles [Panoyan] was a different kind of fellow, like no one that I had ever met before, or have met since" (HT 188). Vinikoor had "made it clear to Brian Cavanagh that as long as Charles Panoyan remained in jail . . . the likelihood is that he would never learn the true facts." (HT 190-91). Vinikoor stated "there were things going on in this case that were too so out of the ordinary, meeting with the prosecutor's father...[a] former New York Detective." (HT 193). On cross, it was revealed prosecutor Cavanagh's father met alone with Panoyan, "and as out of the ordinary as it may be...[w]e left our client in the hands of the prosecutor's father" and Panoyan gave a statement accusing Williamson. (HT 201-02). Asked if he knew if Panoyan was secretly offered something by Cavanagh's father, Vinikoor stated it was "never revealed to me by my client." (HT 205).

Steven J. Hammer, Esquire (Williamson's Trial Counsel)

Asked how many capital murder trials he had participated in prior to Williamson's trial, Mr. Hammer testified: "[I]t's really at the beginning when I started doing those. This would have been one of my, among the first." (HT 126). Hammer had been appointed penalty phase counsel, but guilt phase counsel fell ill, and asked Hammer to take the case. Hammer's theory of Williamson's defense:

> [MR. HAMMER]: Essentially, that Dana didn't do it. That the State didn't have enough evidence, that it was totally circumstantial, other than Charles Panoyan's testimony, that came in during the trial. There was no evidence, basically, more than a hat that was found at the scene, and there were some real issues about the hat itself. Essentially, the hat didn't even fit Dana's head.

(HT 128). Hammer said Williamson told police the hat "looked like" one he once had; that in Davie, Florida, at the time, many people wore similar cowboy hats; and that the jailhouse testimony was questionable. (HT 128-29). When the State asked if there was evidence Panoyan received a benefit for his testimony, Hammer stated:

> [MR. HAMMER]: That was a major problem in the case, because Charles Panoyan was initially charged, and all the detectives in the case that were initially investigating the case thought that Charles Panoyan was involved, that's why he was charged. In fact, the prosecutor, Mr. Cavanagh, thought Charles Panoyan was involved, and argued against his release, initially....[Q]uite frankly, I mean, a lot of the details that [Panoyan] said didn't make sense with the evidence, did not add up to the evidence....[Panoyan] was there. I mean, you know, some victims lived, and they were able to say that Charles Panoyan was in the house. So, you know, it would be hard for Charles Panoyan to say he wasn't in the house. So, my theory was, he made up this story to save his own hide, and I still think he did that.

(HT 129-31). Under State questioning on any deals with Panoyan, Hammer said he was precluded from asking about deals Panoyan may have had with the State:

> [HAMMER]: In his deposition, when I tried to examine that area, I was road-blocked by the State and by [Panoyan's] attorneys, claiming that it was attorney-client privilege. There were discussions that were had between Mr. Panoyan and the Prosecutor, and his attorneys, and it was all subject to attorney-client. And then Judge Eade supported that. So I was precluded from going into that, but, I mean, when a man is facing a first degree murder charge, and with potentially the death penalty, and he gets out of jail free, I think that speaks a lot to the fact that he received some sort of benefit, that's what happened to Charles Panoyan.

(HT 131).

The State then turned to address the actual evidentiary issues on this Court's remand, and Mr. Hammer testified as follows:

> [MR. HAMMER]: I thought, throughout, that [Dr. Ofshe's] testimony was really vouching for the credibility of Mr. Panoyan, which is what really happened [b]ecause his testimony was 'consistent with what he had seen in other cases.' But, yeah, when it got -- when the questions got pinpointed to really focusing on whether or not it was credible, I made that objection.

(HT 135).

The State then attempted to show through Hammer's testimony that a hypothetical the trial prosecutor was attempting to link to Ofshe's *prior* trial testimony about "credible threats" had never been answered (HT 137), concluding:

"As a defense attorney, you know when an objection is sustained and there's no answer to the question, there's no reason for a curative instruction?" (HT 138). But the unanswered hypothetical the State was referring to in questioning Hammer came *after* the trial court sustained Hammer's side bar objection to Ofshe's *prior testimony* about a "credible threat." Ofshe's prior testimony before the jury is quoted in the opinion remanding this case. *Williamson v. State*, 994 So.2d at 1011.

Hammer testified he probably erred in failing to request a *Frye* hearing:

> [STATE]: Now we have just gone over the fact that you did object to, that the State was asking Dr. Ofshe to testify regarding the credibility of Panoyan. Why did you not ask for a Frye hearing?
>
> [MR. HAMMER]: I probably should have.

(HT 138).

Asked later about Ofshe's expert opinion testimony, "Did you consider it to be evidence necessary to substantiate under *Frye*?" (HT 138), Hammer stated:

> [MR. HAMMER]: In hindsight, I probably should have, because, obviously the jury must have given it some weight. And, so, you know, it probably should have been done, but it wasn't done.

(HT 139) (emphasis added).

Hammer noted he "was supposed to have an opportunity to actually take [Ofshe's] deposition[, b]ut that never took place" (HT 139). Hammer believed the State "barely touched upon" Ofshe's testimony in closing argument. (HT 139).[8]

Hammer did not recall performing research or investigating prior cases concerning the acceptance or admissibility of Ofshe's expert testimony. (HT 142).

The parties submitted post-evidentiary hearing memoranda, and the trial court entered an order denying Williamson's postconviction motion.

This Initial Brief follows.

[8] Though the judge had ruled it "improper to talk about the credibility of the threat....If you say the credibility of the threat, that's assuming the threat was ever given, which is an issue for the jury" (TT 2238), the State argued in closing:

[STATE]: He was scared. How was he described? He was scared. He was scared, ladies and gentleman. ***And as [Dr. Ofshe] testified, this is not unusual.*** This is something that when somebody is subjected to very real, believable threats, that when he knows that the accuser or the threatener is able to carry it out, it is something that a human being can react inappropriately to and be subjected to coercion and can come under the influence of the coercive party. (TT 3068). . . . He says to you just on the faith of Charles Panoyan's testimony alone. Which I suggest to you is credible. (TT 3072) (emphasis added).

SUMMARY OF ARGUMENT

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

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

But for counsel's failure to test Ofshe's qualifications and novel science, and request an instruction that jurors disregard credible threat testimony, there remains a reasonable probability jurors would have acquitted Mr. Williamson on all counts.

ARGUMENT

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

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The two-prong test for *in*effective assistance: (a) a showing counsel's performance was deficient, and (b) a showing of prejudice. *Id*. Prejudice is shown if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceedings whose result is being challenged," and whether the "result of the particular proceedings is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 697. As discussed in the following sections, the evidence adduced on remand satisfies both prongs of *Strickland*, revealing Williamson's trial was fundamentally unfair.

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

First, this Court remanded for evidentiary hearings on trial counsel's failure to *voir dire* Dr. Ofshe on his qualifications to testify as an expert in the field in which he was to testify. *Williamson*, 994 So.2d at 1009-10.[9] At trial, Williamson's counsel, Mr. Hammer, declined the trial court's invitation to *voir dire* Dr. Ofshe:

> [STATE]: Your Honor, the State of Florida offers Dr. Ofshe as an expert in the sociological field of extreme techniques of influence and control.
>
> [COURT]: Any voir dire, Mr. Hammer?
>
> [DEFENSE]: No, sir.
>
> [COURT]: Sir?
>
> [DEFENSE]: No, sir.
>
> [COURT]: . . . All right. The Court declares him to be an expert in his specialty and is therefore capable of rendering opinion testimony in that area of expertise.

(TT 2231).

[9] After Panoyan's direct examination at trial, the State announced it had an expert witness "flown in from California who can only get back tonight." (TT 2197). Williamson's trial counsel, Steven Hammer, noted he had not taken Dr. Ofshe's deposition and had not questioned him, but would only need "[p]robably about 15, 20 minutes" to talk to Ofshe before he testified. (TT 2197-99). Hammer requested a 10 minute break to speak with Ofshe, which the trial court allowed. (TT 2221-22).

Williamson's defense counsel's need to *voir dire* Dr. Ofshe was manifest. Dr. Ofshe, who would testify that Panoyan's recantation story was "consistent" with his claimed *fear* from an alleged threat, was not a psychologist. Though, at trial, Ofshe and the State labeled the particular field to which Ofshe's purported expertise belonged "the sociological field of extreme techniques of influence and control" (TT 2231),[10] the actual subject matter of Ofshe's trial testimony was an *individual*'s *subjective perception of fear and reaction to any such subjective fear* under the circumstances claimed in Panoyan's recanted version of events.

[10] Contrary to Dr. Ofshe's evidentiary hearing testimony that, at Williamson's trial, he had testified as an expert on "influences of death threats on behavior" (HT 8), Ofshe had actually claimed at Williamson's trial to be, and was declared an expert in, "extreme techniques of influence and control." (TT 2231). Ofshe's penchant for "inventing" by fiat such "catch-all phrase[s]...for convenience sake" (HT 8-9), whose definitions change according to the question posed, makes it difficult to pinpoint just what particular "science" he is asking to be qualified to testify about. Also, though Ofshe testified that "for the last 20 some odd years, the b[ulk] of my work is in the area of influence during police interrogations" (HT 18-19), the State later objected at the evidentiary hearing that "he is not testifying about false confessions in this case, Judge. This is totally irrelevant, it's another area. It's irrelevant" (HT 32). As a consequence, either: (a) the "bulk of [Ofshe's] work" was relevant to the circumstances in this case, or (b) the "bu[lk] of [Ofshe's] work" was irrelevant to the circumstances in this case. If the "bulk of [Ofshe's] work" was relevant to the circumstances in this case, it is also relevant that the basis for Ofshe's work in false confessions, "coercive persuasion," has been roundly rejected by the APA, the ASA, and numerous academics. See *U.S. v. Fishman*, 743 F.Supp. 713, 717-18 (N.D.Cal.1990), case authorities and academic articles cited in section 2 of this brief. If the "bulk of [Dr. Ofshe's] work" is irrelevant to the circumstances in this case, Dr. Ofshe was not qualified to testify as an expert.

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

Mr. Hammer testified at the evidentiary hearing he "probably should have" *voir dired* Dr. Ofshe on such qualifications. (HT 139). In finding that Hammer's admission of error in failing to *voir dire* Dr. Ofshe was a matter of "hindsight," the trial court focused solely on Hammer's use of that particular *word*:

> Hammer stated, "In hindsight, I probably should have [questioned Dr. Ofshe's qualifications or requested a Frye hearing], because, obviously the jury must have given [his testimony] some weight."

(Order Denying Relief on Remand, Page 14) [bracketed portions the trial court's].

From Hammer's mere use of the *word* "hindsight," the trial court concluded Hammer's inaction in the face of expert testimony offered to bolster the credibility of Panoyan, on whom the State's case depended, was a "strategic decision":

> Hammer testified that he chose not to question Dr. Ofshe's qualifications or request a *Frye* hearing because he did not give any weight or credibility to Dr. Ofshe's testimony and he did not believe the jury would either.
>
> * * *
>
> This Court finds that Hammer carefully considered which course of conduct to pursue with regard to Ofshe's testimony, and ultimately made the strategic decision not to question Dr. Ofshe's qualifications or the usefulness of his testimony. . . . He cannot be found to have been ineffective simply because, with the benefit of hindsight, he would have made a different choice.

(Order Denying Relief on Remand, Page 17).

No record evidence, however, supports the trial court's finding that Hammer "carefully considered" whether to *voir dire* Ofshe about his qualifications to testify as an expert on an individual's subjective perception of fear; no record evidence supports the trial court's suggestion that the defense could have gained any strategic advantage by omitting to *voir dire* Ofshe on his qualifications to so testify; and no record evidence supports the conclusion that Hammer's admitted error in failing to question Ofshe's qualifications to state an expert opinion in the field of psychology was *in fact* merely a matter of "hindsight."

Omitting to test the qualifications of the State's expert, offered to bolster, as he did, the State's key witness's recantation story on a whim, hardly counts as

having “carefully considered” what to do about Ofshe (particularly as counsel had failed to investigate him), and there was nothing to be gained by omitting to do so.

In concluding that Hammer’s admission that he “probably should have” conducted a *voir dire* on Dr. Ofshe’s qualifications rested on “hindsight,” the trial court properly quoted--yet failed to properly abide by--*Strickland*’s requirement that “every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at that time." *Strickland*, 466 U.S. at 689.

The trial court’s reliance on Hammer’s mere use of the *word* “hindsight” in testifying that he probably should have *voir dired* Ofshe is, in itself, insufficient to fall within *Strickland*’s prohibition against evaluating ineffective assistance claims in hindsight (as all *post*conviction claims are inherently considered in retrospect), and impermissibly discounts Hammer’s position *at trial*, as required by *Strickland*, 466 U.S. at 689. Hammer’s mention of the word “hindsight” should therefore be eliminated from the equation, and the reasonableness of Hammer’s omission to *voir dire* Ofshe concerning his qualifications to testify as an expert on the subject of an individual’s subjective perception of fear and reaction to any such fear, should be evaluated according to whether it was a reasonable course of conduct not

to *voir dire* a professor of *sociology* purporting to be qualified to express an expert opinion on an *individual's subjective sense of fear*--an area belonging to the field of *psychology*--which would bolster the credibility of the State's key witness.

Moreover, in reversing a death sentence based on similar expert testimony on a witness's "fear," this Court, in *Jordan v. State*, 694 So. 2d 708 (Fla. 1997), noted:

> In this case, there was certainly no need for an expert to testify as to the fear Mintner was feeling in her confrontation with Jordan. Our common experiences dictate that an elderly woman approached in public by a man with a gun will be terrified. When a fact is so basic that an expert opinion will not assist the jury, an expert should not be allowed to testify. Here, [clinical gerontologist] Strang's testimony served only to build sympathy within the jury for the victim. The trial judge erred in allowing such testimony.

Jordan v. State, 694 So. 2d at 717 (citations omitted).

The result of trial counsel's failure to *voir dire* Ofshe was to allow expert opinion testimony offered to prove that Panoyan exhibited individual thought and behavior consistent with one who (as Panoyan only belatedly claimed) had been threatened after witnessing a capital crime, rationalizing his three-year delay in changing his story out of his purported subjective perception of fear, and bolstering the credibility of this critical testimony with Dr. Ofshe's academic credentials.

But for trial counsel's failure to *voir dire* Dr. Ofshe, there exists a reasonable probability such expert testimony would have been excluded, and the credibility of Panoyan's belated recantation, accusing Williamson and obtaining his own release, would have been left for the jury. This bolstering of Panoyan's testimony with the gilded *imprimatur* of Dr. Ofshe's academic credentials—which were unquestioned by the defense--made this recanting witness, who was first the sole prime suspect, appear significantly more credible. As more succinctly stated in Justice Wells's special concurrence to this Court's remand, which suggested vacating Williamson's judgments and sentences without the need for an evidentiary hearing: "The value of hearing an expert vouch for Mr. Panoyan clearly could have tipped the scales in this tragic case. Dr. Ofshe's testimony undermines my confidence in the verdict." *Williamson*, 994 So.2d at 1018 (WELLS, J., specially concurring).

Ofshe's expert testimony that Panoyan's conduct in maintaining his original story for three years before fingering Williamson and walking away scot free, was consistent with one acting out of fear of a "credible threat," bolstered Panoyan's otherwise tenuous credibility, as "recanted testimony is exceedingly unreliable."[11] Whether Panoyan was "once a liar, always a liar," or previously maintaining a

[11] A long line of Florida cases has expounded on the inherent unreliability of such recantation testimony: "As this Court has noted repeatedly, recanted testimony is 'exceedingly unreliable.'" *Lambrix v. State*, 39 So.3d 260 (Fla. 2010).

different story out of fear from an alleged threat, was a matter within the common knowledge of jurors, *Jordan v. State*, 694 So. 2d at 717, but here was skewed.

Absent Dr. Ofshe's expert testimony that Panoyan evidenced having experienced fear consistent with having received a "credible threat," the credibility of Panoyan's testimony would have been decided entirely by the jury, who had many reasons to reject Panoyan's altered story placing the blame on Williamson.

Though in denying relief after this Court's remand, the trial court concluded, "Hammer chose not to question Dr. Ofshe's qualifications . . . because he did not give any weight or credibility to Dr. Ofshe's testimony and he did not believe the jury would either" (Order Denying Relief After Remand, Page 14), the point at which Mr. Hammer declined the trial court's invitation to *voir dire* Dr. Ofshe was one at which Hammer had never taken Dr. Ofshe's deposition, had never investigated whether Ofshe was qualified to express an expert opinion concerning an individual's subjective perception of fear, and had only spoken with Dr. Ofshe for 10 minutes immediately before Ofshe testified. (TT 2221-22).

Thus, Mr. Hammer never considered, *after a reasonable investigation*, the alternative course of conducting a *voir dire* on Dr. Ofshe's qualifications to testify concerning matters belonging to the field of psychology, as Hammer failed to

"make reasonable investigations or to make a reasonable decision that ma[de] particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. Where, as here, an expert is called to bolster the State's key witness whose "credibility was a material issue on which the State's case depended," *Williamson v. State*, 681 So.2d 688, 695 (Fla. 1996), it is simply not a "reasonable decision," *id*., not to investigate the nature of the expert's testimony or credentials at all.

To render adequate assistance under *Strickland*'s first prong, counsel must conduct a reasonable investigation in relation to the representation. *Id.,* 466 U.S. at 690, 104 S.Ct. at 2066. In assessing counsel's decision not to investigate, courts "must consider...whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527 (2003).

The "known evidence," *id*., at bar, was that "it was clear that Panoyan's credibility was a material issue on which the State's case depended," *Williamson v. State*, 681 So.2d at 695; that defense counsel "had emphasized that Robert Decker saw Panoyan whispering to the gunman during the criminal episode; that Panoyan was the only person at the Decker house to be released unharmed; that police had considered Panoyan [not Williamson] to be a suspect from the time of the criminal episode; and that Panoyan did not identify appellant as the assailant until three

years after the criminal episode." *Id*. This case therefore came down to a swearing match between Williamson on the one hand, and Panoyan on the other, making the credibility of Panoyan's belatedly altered story that Williamson was the assailant, and that Williamson had threatened Panoyan not to tell, the pivotal issue at trial.

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

Had defense counsel properly accepted the trial court's invitation to *voir dire* Ofshe on his qualifications to testify about an individual's subjective sense of fear (*i.e.*, had he conducted a belated "investigation"), he would have elicited virtually the same testimony Ofshe later gave before the jury, which (as discussed in part 3), the trial court would have rejected--*as it later did upon objection*--because it bolstered the credibility of Panoyan's testimony that Williamson threatened him; that any such threat was credible; and that Panoyan's story, belatedly altered to point his finger at Williamson, was consistent with having received such a threat.

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

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

Second, this Court remanded for an evidentiary hearing on trial counsel's failure to request a *Frye* hearing on the novel science upon which Dr. Ofshe relied:

> At the evidentiary hearing, the circuit court should consider evidence concerning the effectiveness of counsel, including the reasons 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 admission of the evidence was prejudicial under *Strickland*.

Williamson v. State, 994 So.2d at 1010-1011.

"[T]he reasons counsel failed to request a *Frye* hearing," *id.*, were adduced at the evidentiary hearing. Asked his reason for failing to request a *Frye* hearing:

> [MR. HAMMER]: I didn't think the jury would put a whole lot of weight in it, so that's why I didn't, you know, object to his qualifications or anything, or actually request a *Frye* hearing.

(HT 139). Defense counsel Hammer then candidly admitted his error in failing to request a *Frye* hearing:

> [STATE]: Now we have just gone over the fact that you did object to, that the State was asking Dr. Ofshe to testify regarding the credibility of Panoyan. Why did you not ask for a Frye hearing?
>
> [MR. HAMMER]: I probably should have.

(HT 138).

Asked later, concerning Ofshe's expert opinion testimony "Did you consider it to be evidence necessary to substantiate under *Frye*?" (HT 138), Hammer stated:

> [MR. HAMMER]: In hindsight, I probably should have, because, obviously the jury must have given it some weight. And, so, you know, ***it probably should have been done, but it wasn't done***.

(HT 139) (emphasis added).[12] The question to which Mr. Hammer so testified **("Did you consider it to be evidence necessary to substantiate under *Frye*?")** (HT 138), was not asking Hammer about a matter of trial strategy, but whether he believed Ofshe's profile testimony was legally required to be tested under *Frye*.

In concluding Hammer's admission he probably should have requested a *Frye* hearing rested on "hindsight," the trial court quoted--*yet failed to abide by*--*Strickland*'s requirement that "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at that time." *Strickland*, 466 U.S. at 689. The trial court's reliance on Hammer's use of the *word* "hindsight" in admitting he should have requested a *Frye* hearing impermissibly discounts Hammer's duty, existing *at the time of trial*, *Strickland*,

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[12] The trial court took Hammer's use of the word "hindsight" out of context:

> Hammer stated, "In hindsight, I probably should have [questioned Dr. Ofshe's qualifications or requested a Frye hearing], because, obviously the jury must have given [his testimony] some weight."

(Order Denying Relief on Remand, Page 14) [bracketed insertion the trial court's]. Immediately following the trial court's edited quotation, Hammer testified:

> [HAMMER]: . . . And, so, you know, it probably should have been done, but it wasn't done.

(HT 139).

466 U.S. at 689, to request a *Frye* hearing. Any mention of the word "hindsight" should thus be removed from the equation, and the reasonableness of Hammer's omission to request a *Frye* hearing on Ofshe's expert testimony should be evaluated according to this Court's controlling case precedent on the necessity of requesting and holding a *Frye* hearing on Ofshe's novel science at the time of trial.

Williamson's trial began January 24, 1994, and ended February 19, 1994. Prior to Williamson's trial, on September 9, 1993, in *Flanagan v. State*, 625 So.2d 827 (Fla.1993), this Court "reaffirmed the proposition that new and novel scientific evidence is inadmissible unless it meets the *Frye* test." *Hadden v. State*, 690 So.2d 573, 576 (Fla. 1997) (citing *Flanagan*). Because "any refinements or additions to the *Frye* analysis which have evolved since the trial . . . cannot be applied in evaluating the effectiveness of trial counsel's performance," *Armstrong v. State*, 862 So.2d 705, 713 (Fla. 2003), *Flanagan* was the objective standard of reasonableness by which Hammer's failure to request a *Frye* hearing should be evaluated--a standard to which Hammer's performance fell short.

Moreover, this Court's holding that Dr. Ofshe's trial testimony was "syndrome testimony," requiring a *Frye* analysis, is the law of the case:

> It was defense counsel's obligation to request a *Frye* hearing regarding the general acceptance of the underlying scientific principles and methodology, and if he had done so, the burden would have shifted to the State to show that Dr. Ofshe's testimony could meet the *Frye* test.
>
> * * *
>
> Dr. Ofshe testified that Panoyan "displayed a pattern of someone who has . . . been terrorized, and someone who is acting in response to a credible threat." We find that, similar to *Hadden*, this was syndrome testimony and should have been tested as to whether it was sufficiently established to have general acceptance in the particular field in which it belongs. *Frye*.

Williamson v. State, 994 So.2d at 1009, 1010. The evidentiary hearing testimony did not demonstrate that Dr. Ofshe's novel science could meet the *Frye* standard. At the evidentiary hearing, Ofshe said his trial testimony entailed "influences of death threats on behavior," which is "a catch-all phrase that I invented for convenience sake," based on "principals of rational decisionmaking." (HT 8-9).[13] Despite this newly invented label, however, Dr. Ofshe's trial testimony rested on

[13] Contrary to his evidentiary hearing testimony that at Williamson's trial, he had testified as an expert on "influences of death threats on behavior" (HT 8), Ofshe had actually claimed at Williamson's trial to be, and was declared an expert in, "extreme techniques of influence and control." (TT 2231). Ofshe's penchant for "inventing" such "catch-all phrase[s]...for convenience sake" (HT 8-9), whose definitions shift according to the question that is posed, makes it difficult to pinpoint just what particular "science" he is testifying as an expert on.

the very same "coercive persuasion" theory rejected by the field to which it belongs. See *U.S. v. Fishman*, 743 F.Supp. 713, 717-718 (N.D. Cal. 1990).[14]

Ofshe stated the "underlying principle" of his trial testimony "is simply that rewards and punishment affect behavior and decisionmaking, people act based on perceptions of the situation in which they find themselves, and you then connect that to the particularity of whatever it is that you are looking at" (HT 56). Ofshe's *method* is to "take the assumption that people are being rational" and "apply it with particular circumstances, as they apply it in the world, trying to understand how

[14] After Ofshe's "coercive persuasion" theory was roundly rejected by the APA and ASA, he began referring to the same theory by various other names, such as the aforementioned labels, in an apparent attempt to avoid judicial rejections. At the evidentiary hearing, for example, Ofshe was asked whether there is a relationship between his "coercive persuasion" theory and his theory underlying his testimony in this case. Ofshe termed the question "a *non sequitur*," stating that, at trial, he had "testified about the stress that was directed at Mr. Panoyan, and the tactic that was used to lead Mr. Panoyan to believe that he could not escape those threats....That is not coercive persuasion by any definition of coercive persuasion that exists anywhere in the social sciences, end of story." (HT 32-33). Yet in his own contribution to the *Encyclopedia of Sociology*, Vol. 1, Macmillan Publishing Company (1994), in an article entitled "Coercive Persuasion and Attitude Change," Ofshe relied on a definition of "coercive persuasion" completely at odds with his evidentiary hearing testimony that it did not apply to "the tactic that was used to lead Mr. Panoyan to believe that he could not escape those threats." (HT 32):

> "[I]n his definition of the coercive-persuasion phenomenon[,] Schein noted that even for prisoners, what happened was a subjection to 'unusually intense and prolonged persuasion' that they could not avoid; thus, 'they were coerced into allowing themselves to be persuaded' (Schein 1961, p. 18)."

people cope with, deal with, react to the particular things facing them" (HT 12). Ofshe's "pattern" testimony "analogiz[ed] Mr. Panoyan's situation to another situation which I had given, and they were quite similar" (HT 14). Ofshe stated persons exposed to similar such threats tended to comply. (HT 34). Asked how he had any measure of *reliability* for making those statements, Ofshe testified:

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

(HT 34-35). Dr. Ofshe's evidentiary hearing testimony that his only measure of reliability is his own belief in his own opinion flies in the face of this Court's admonition in *Hadden v. State*, 690 So.2d 573 (Fla. 1997):

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

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

Not only must expert testimony relying on a new or novel scientific principle, theory or methodology be based on a scientific principle, theory or methodology that is scientifically valid, but *the procedures followed to apply the technique or process* must also be generally accepted in the scientific community.[15] Courts must also consider the *quality* of evidence supporting the principle.[16]

Analogous to the expert opinion testimony at bar is the testimony in *Flanagan v. State*, 625 So.2d 827 (Fla. 1993) (applying *Frye* to exclude offender profile syndrome.). See also *Smith v. State*, 674 So.2d 791 (Fla. 5th DCA 1996) (Expert testimony that "most children who are abused come from single family households, and that children who have been abused are at greater risk of being abused a second time, was not shown to be relevant because there was no

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[15] *Hayes v. State*, 660 So.2d 257 (Fla.1995) (expert DNA testimony inadmissible as there was no foundation to show DNA "band-shifting" technique met *Frye*); *State v. Demeniuk*, 888 So.2d 655, 658 (Fla. 5th DCA 2004) ("the gate of admissibility is not opened unless the proponent of new scientific evidence can demonstrate by the greater weight of the evidence that the scientific principle upon which the evidence is based, and *the testing procedures used to apply the principle to the facts of the case*, have gained general acceptance for reliability among impartial and disinterested experts within the particular scientific community").

[16] *Brim v. State*, 695 So.2d 268 (Fla. 1997) (quoting *People v. Guerra*, 37 Cal.3d 385, 208 Cal.Rptr. 162, 183, 690 P.2d 635, 656 (1984)). See also *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So.2d 539, 547 (Fla. 4th DCA 2001) (same).

testimony showing how these statistics make it more likely than not that a crime was committed against this child and/or that Smith committed it. Since the testimony was irrelevant, it was inadmissible regardless of whether or not the *Frye* test should be applied in cases like this. To the extent the testimony was intended to show a propensity on the part of the child to be victimized, it was inadmissible character evidence."); *J.H.C. v. State*, 642 So.2d 601, 602–03 (Fla. 2nd DCA 1994) (error to admit psychologist's testimony that girl 17 years old at trial "fit within the sexually abused child profile. . . . This record does not suggest that psychology, as a science, has determined that this battery of common psychological exams can validly and reliably identify persons who have been subjected to sexual abuse. At best, these exams can provide information that is supportive of or consistent with the story told by the alleged victim. Thus, the sexual abuse profile is not comparable to a typical medical diagnosis but rather is primarily an opinion that the patient is telling the truth about a prior event in history. At this stage in the science of psychology, an expert's opinion concerning the sexual abuse profile of an older victim impermissibly intrudes into the jury's function to determine credibility."); *Carter v. State*, 697 So. 2d 529, 533 (Fla. 1st DCA 1997) (expert testimony relying on Grisso Test, used to determine whether *Miranda* rights were

understood, was properly excluded as the test was not a "commonly used, nationally recognized test" and *Frye* was not met).

Ofshe's expert opinion sought to show Panoyan had a profile consistent with one who had been threatened after witnessing a crime. That opinion, bolstering Panoyan's account of why, after 3 years singing a different tune, he suddenly accused Williamson, had to be *Frye*-tested. As the opinion was "based upon evidence which has not been demonstrated to be sufficiently reliable," it "cast[s] doubt on the reliability of the factual resolutions," *Hadden*, 690 So.2d at 578, "undermining the reliability of the trial's outcome." *Strickland*, 466 U.S. at 687.

Dr. Butts testified there are no controlled studies on effects of death threats. (HT 89). Asked if Ofshe is essentially giving an opinion that Panoyan believes that he had received a death threat, Butts replied "That's my understanding." (HT 97). Asked if she could just talk to a person and opine whether they acted under a credible threat, Butts testified: "[I]f that were asked of me, I would do a clinical--I would do a clinical evaluation. I would submit tests. I would do a forensic evaluation." (HT 102). Butts, a psychologist, can state her opinion whether a person is malingering; but Ofshe, a sociologist, cannot opine whether a person is being truthful. (HT 111). Butts believes that, since the average person does not

receive death threats every day, expert testimony could help, but that doing whatever one has to do to mitigate a death threat is not counterintuitive. (HT 112).

Dr. Brannon testified that if behavior is intuitive, an expert is not needed to explain it to the jury (HT 165); that some things about coercive persuasion are self-evident (HT 166); and that, knowing only of a threat to an individual and their behavior, as opposed to a group, "I would not make a prediction based on that. In terms of looking at social psychological principles, I would not try to do a prediction. It's different from doing testing, actuarial testing." (HT 170-171).

The *Frye* standard is whether an expert opinion is based on a scientific principle "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) (excluding expert opinion testimony on "lie detector" results as it is not generally accepted by the scientific community). The expert opinion at bar is akin to an opinion by a human "lie detector." In *Frye*, the murder defendant tendered a polygraph expert, the trial court held the expert's testimony was inadmissible, and the defendant appealed. The appellate court observed that the polygraph test sought to measure "fear and attempted control of that fear":

> Scientific experiments, it is claimed, have demonstrated that fear, rage, and pain always produce a rise of systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure in a curve, which corresponds exactly to the struggle going on in the subject's mind, between fear and attempted control of that fear.

293 F. at 1013. In excluding the testimony, *Frye* identified the fields to which the study of deception by observing "fear and attempted control of that fear" belongs:

> We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among ***physiological*** and ***psychological*** authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

Frye, 293 F. at 1014. Dr. Ofshe is not a physiologist or a psychologist, but a sociologist, who may not render a *psychological* opinion on Panoyan's fear.

Ofshe's testimony added no special knowledge or experience for jurors to form conclusions from facts, as any juror knows threats may cause fear, and that one usually acts to reduce risks associated with threats. Ofshe's testimony entailed the existence and effects of *fear* on Panoyan's failure to finger Williamson and go free for years, and *fear* of a "credible threat" coercing him not to change his story.

Yet expert testimony on the effects of fear on a statement is inadmissible. *Bullard v. State*, 650 So.2d 631 (Fla. 4th DCA 1995) ("no expert was required at bar since it is safe to say that the jury was capable of assessing without the aid of an expert witness that the threat of death in the electric chair may have a coercive effect on whether a suspect gives an in-custody statement"); *Mitchell v. State*, 965 So.2d 246 (Fla. 4th DCA 2007) (expert's "proffered testimony boils down to a statement that, based upon what Mitchell told him, Mitchell reasonably believed that he had to defend himself or be killed. There is nothing in his testimony which concerns a subject beyond the common understanding of the average person. If the jury believed Mitchell, then it would find that he acted in self-defense. Thus, the issue is not one on which expert testimony should be permitted. It merely allowed an expert witness to bolster Mitchell's credibility which is improper").

This Court and others have expressed doubt whether expert testimony on the voluntariness of a statement is *ever* admissible. *Derrick v. State*, 983 So.2d 443 (Fla. 2008) ("We question whether the testimony of an expert 'confessionologist' would even be admissible"); *Beltran v. State*, 700 So.2d 132 (Fla. 4th DCA 1997) ("We question whether such testimony, which amounts to no more than an expert's assessment that the confession is involuntary, is ever admissible.").

Prior to Williamson's trial, a U.S. District Court, had detailed the utter lack of acceptance of Ofshe's theories in the scientific community to which it belongs:

> A more significant barometer of prevailing views within the scientific community is provided by professional organizations such as the American Psychological Association . . . and American Sociological Association. . . . The APA considered the scientific merit of the Singer-Ofshe position on coercive persuasion in the mid-1980s. . . . The [ASA] has also recently considered the merits of the Singer-Ofshe thesis applying coercive persuasion to religious cults. In May 1989 the ASA joined the Society for the Scientific Study of Religion and a large group of individuals in submitting another *amicus* brief in the litigation, this time while the case was pending before the United States Supreme Court. As the APA had done, the ASA brief took a position in sharp contradiction to the Singer-Ofshe thesis.

U.S. v. Fishman, 743 F.Supp. 713, 717-718 (N.D.Cal.1990) (citations omitted).[17]

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[17] In the wake of *Fishman*, Ofshe brought a federal civil lawsuit against the APA, the ASA, academic scholars and law firms, alleging a "conspiracy" in the scientific community to contradict his theories, which both the APA and ASA had rejected, *Margaret Singer and Richard Ofshe v. American Psychological Ass'n*, 1993 WL 307782 (S.D.N.Y. Aug 9, 1993), in an attempt to use the judicial system to accomplish what he could not within the field of social science. In dismissing Ofshe's lawsuit 5 months before Williamson's trial, the U.S. District Court stated:

> In this Court's view, several defendants lack any malevolent motivation, financial, political, religious or other, to participate in the alleged conspiracy; notably, the APA, the ASA and the lawyers and law firms involved were acting within the normal course of their respective professional activities.

Margaret Singer and Richard Ofshe v. American Psychological Ass'n, 1993 WL 307782, p.7 n5.

Since Williamson's trial, numerous courts have rejected Ofshe's testimony. Exclusion of Ofshe's testimony after a *Frye* hearing, was affirmed in Illinois:

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

People v. Rivera, 333 Ill.App.3d 1092, 777 N.E.2d 360 (Ill.App.2 Dist. 2001). Four years later, Ofshe's testimony was excluded after a 12-day *Frye* hearing:

> With regard to Dr. Ofshe's analysis, the court has no doubt that it is of value and interest to the academic community in the field of social psychology. However, the court is not convinced that Dr. Ofshe's research or findings would be of assistance to a trial jury.

People v. Kogut, 10 Misc.3d 305, 113, 806 N.Y.S.2d 366, 370 (N.Y. Sup. 2005).

In 2007, noting it "clearly questioned the extent and quality of publication and peer review in what it deemed to be an 'infant field,'" an appeals court, naming Ofshe, held testimony on confessions, based on Ofshe's theories, did not even meet the more liberal *Daubert* test. *Edmonds v. State*, 955 So.2d 864, 800, n.8 (Miss. App. 2006), *rev. on other grounds*, 955 So.2d 787 (Miss. 2007).

Just since this Court's remand in the present case, numerous courts have affirmed rejections of Ofshe's expert testimony, including: *People v. Thompson*, 2010 WL 293055 (Mich. App. 2010) (affirming exclusion of Ofshe's expert testimony in a first-degree murder case, noting "[c]redibility is a question for the jury--not for expert witnesses"); *People v. Ekblom*, 2010 WL 2882939 (Cal. App. 6th Dist. 2010) (affirming exclusion of Ofshe's expert testimony on a massage therapist's digital sexual penetration of his client); *State v. Lamonica*, 44 So.3d 895 (La. App. 1st Cir. 2010) (affirming exclusion of Ofshe's expert testimony on false confessions and what Ofshe then called "high-control" under the more liberal *Daubert* standard in a child sexual abuse case); *Gomez v. AutoZone Stores, Inc*, 2010 WL 895030 (Cal. App. 4th Dist. 2010) (affirming trial court's order restricting Ofshe's expert testimony in a civil case so that Ofshe "would not be allowed to relate his theories to the evidence in this case," noting "[t]he proposed testimony amounted to the expert's personal beliefs and interpretations of the particular facts of this case, as learned from the . . . deposition testimony. It was the role of the jury to draw conclusions from the same evidence, to decide the ultimate facts"); *U.S. v. Deputee*, 349 Fed.Appx. 227 (9th Cir. 2009) (affirming finding that Ofshe's false confession testimony would not be helpful to the jury); *Brown v. Horell*, 2009

WL 453114 (E.D. Cal. 2009) (upholding, on federal habeas corpus, state trial court's finding that Ofshe's expert testimony based on his theories "did not relate to a subject beyond the juror's common experience, and thus would not be helpful to the jurors"); *Contreras v. State*, 2009 WL 50601 (Tex. App.-El Paso 2009) (affirming exclusion of Ofshe's testimony in double-murder case, noting "Ofshe's testimony was not beyond that of the average juror's knowledge and experience and that his testimony would not help the jury understand the evidence or determine . . . the voluntariness of [defendant's] second statement.").

The foregoing cases, judicially rejecting Dr. Ofshe's expert testimony based on his theories (just since this Court's remand and before the evidentiary hearing), parallel the academic scientific community's longstanding decisive, published rejection of even the very underlying *basis* for any of Dr. Ofshe's novel theories,[18]

[18] A year before Williamson's trial, an article in *Behavioral Sciences and the Law*, Vol.10, 5-29 (1992) (Anthony & Robbins) examined theorists in the field:

> Unlike the softly deterministic perspectives advocated by Schein and Lifton, then, which fall within the contemporary philosophical and scientific mainstream, Singer's and Ofshe's theories fall within a class, that is, behavioristic hard determinism, that is *no longer taken seriously in the academic world*. (emphasis added).

It was this rejection of the very *basis* for *any* of his theories as falling outside the "scientific mainstream" that Ofshe named the article's authors in his federal civil lawsuit, dismissed 5 months before Williamson's trial. See FN 17, *supra*.

as well as the legal-scientific community's objection to the use of Ofshe's theories (whose basis is "no longer taken seriously in the academic world," FN 18, *supra*) within the context of criminal jury trials.[19]

In 1998, an article copyrighted by the APA, entitled *The Facade of Scientific Documentation: A Case Study of Richard Ofshe's Analysis of the Paul Ingram Case*, by Karen A. Olio and William F. Cornell, was published in *Psychology, Public Policy, and Law*, 1998, Vol. 4, No. 4, 1182-1197. This article in the field of psychology documents the effects of the dissemination of Dr. Ofshe's theories--

[19] In 1998, Dr. Ofshe, as an Advisory Board Member of the "False Memory Syndrome Foundation," and self-proclaimed expert on "coercive persuasion," wrote an article entitled, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, published in 88 J. Crim. L. & Criminology 429. One year later, in 1999, Harvard Law Professor Paul Cassell investigated several cases Dr. Ofshe had claimed were false confessions allegedly resulting in wrongful convictions, and found Ofshe had used secondary sources and misstated numerous facts in coming to his conclusions. Professor Cassell documented his findings in *The Guilty and the Innocent: an Examination of Alleged Cases of Wrongful Convictions from False Confessions*, published in the *Harvard Journal of Law and Public Policy*, concluding:

> Because of the high error rate and failure to follow accepted research techniques, courts should not allow expert testimony resting on Leo and Ofshe's analysis.

Harvard Journal of Law and Public Policy (1999) Vol. 22, pp. 523-602. Professor Cassell's findings echo those of the *Fishman* Court, academics in the field, the APA and the ASA, that Dr. Ofshe's theories "lacked scientific merit and that the studies supporting its findings lacked methodological rigor." *Id*.

never generally accepted in the field of psychology--on the beliefs of the public through the media, and on the judicial system through information concerning other courts' sporadic and scientifically erroneous acceptance of Dr. Ofshe's pseudoscience, which is generally *rejected* by the scientific and legal communities.

U.S. v. Fishman, supra, was a published case authority documenting the American Psychological Association's and American Sociological Association's rejection of Dr. Ofshe's theories at the time of Williamson's trial. Had counsel researched whether this testimony could meet the *Frye* standard at trial, he would have had ample grounds to challenge the testimony by requesting a *Frye* hearing.[20]

[20] Hammer testified at the evidentiary hearing he did not recall researching prior cases dealing with the admissibility of Ofshe's testimony. (HT 142). Whereas, on remand, "a new *Frye* determination [must be] based on that method's general acceptance within the relevant scientific community at the time of the hearing," *Brim v. State*, 695 So.2d 268, 275 (Fla.1997), "rather than at the time of trial," *Hadden v. State*, 690 So.2d 573, 579 (Fla.1997), "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Accord *Armstrong v. State*, 862 So.2d 705, 713 (Fla. 2003) ("any refinements or additions to the *Frye* analysis which have evolved since the trial . . . cannot be applied in evaluating the effectiveness of trial counsel's performance."). As an "appellate court may examine expert testimony, scientific and legal writings, and judicial opinions in making its determination," *Hadden v. State*, 690 So.2d at 579, this brief cites both materials existing at the time of trial, which go to counsel's performance at the time of trial, *Strickland*, *supra*, as well as "scientific and legal writings, and judicial opinions," *Hadden*, concerning the lack of Ofshe's "method's general acceptance within the relevant scientific community at the time of the [remand] hearing." *Brim*, *supra*.

Ofshe's claim to have developed an alchemic skill of divining the veracity of a person emerging with an altered story about a crime, and being able to express an expert opinion that their conduct and story are consistent with one whose original story was motivated by fear from a credible threat, by talking to them, is capable of no replication, testing or verification beyond Ofshe's own claim to have it.[21]

Though the State pointed below to criminal cases where Ofshe was qualified as an expert, in the vast majority of those cases, Ofshe testified *for the defense*. The principle underlying the admission of Ofshe's testimony in such cases is a criminal defendant's fundamental constitutional right--not applicable to the State--to present his defense by showing reasonable doubt. *Vannier v. State,* 714 So.2d 470, 472 (Fla. 4th DCA 1998) ("While the defense is bound by the same rules of

[21] While the trial court found "the principles on which Dr. Ofshe's testimony was based are generally accepted in the field" (Order Denying Relief on Remand, Page 19), neither of the State's experts claimed to have such a non-emprical skill. Asked if she could just talk to a person and opine whether they acted under a credible threat, Dr. Butts testified: "[I]f that were asked of me, I would do a clinical--I would do a clinical evaluation. I would submit tests. I would do a forensic evaluation." (HT 102). Dr. Brannon testified that, knowing only about a threat to an individual and their behavior, "I would not make a prediction based on that. In terms of looking at social psychological principles, I would not try to do a prediction. It's different from doing testing, actuarial testing." (HT 170-171). See *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 151, 119 S.Ct. 1167 (1999) ("Nor... does [general acceptance] help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy").

evidence as the state, the question of what is relevant to show a reasonable doubt may present different considerations than the question of what is relevant to show the commission of the crime itself. If there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility") (citing *Rivera v. State*, 561 So.2d 536 (Fla. 1990)).

Among the plethora of cases rejecting Dr. Ofshe's testimony--many where even *the defense* sought to introduce Ofshe's testimony in the defendant's exercise of his constitutional right to present a defense--courts have rejected the testimony as lacking an empirical foundation and as invading the province of the jury. In *U.S. v. Mamah*, 332 F.3d 475 (7th Cir. 2003), for example, an accused seeking as part of his defense to introduce Ofshe's testimony concerning his confession, was convicted and appealed. The U.S. Court of Appeals for the Seventh Circuit stated:

> The district court concluded that the proposed testimony of . . . Dr. Ofshe was unreliable and thus inadmissible . . . The court reasoned that . . . Dr. Ofshe was [not] a clinical psychologist qualified to assess Mamah's susceptibility to the interrogation techniques used. . . . Whether or not . . . Dr. Ofshe grounded [his] work in sound social science principles and methods, the court still needed to satisfy itself that [his] work yielded facts and data sufficient to support [his] proposed testimony. As we have observed, experts' opinions are worthless without data and reasons. . . . [T]he problem is the absence of an empirical link between that research and the opinion. . . . Dr. Ofshe's testimony was inadmissible . . . He could testify that false

> confessions do occur, but he could not establish that [defendant] was interrogated under circumstances that could produce a false confession. Without an indication that [the defendant] was unusually susceptible to the . . . methods of interrogation, Dr. Ofshe could not connect his research to the particulars of [the defendant's] case.

U.S. v. Mamah, 332 F.3d at 477-478 (citations, internal quotation marks omitted).

The U.S. Navy-Marine Corps Court of Criminal Appeals has also affirmed the trial court's exclusion of Dr. Ofshe's expert testimony based on his theories in *U.S. v. Anthony Wilson, Machinist's Mate First Class*, 2007 WL 1701866 (2007):

> [T]he military judge found that Dr. Ofshe's theory regarding coercive interrogations was not based on rigorous scientific analysis or even subject to scientific testing but was rather Dr. Ofshe's own subjective review of a group of particularly selected cases....Having determined that Dr. Ofshe's theory was not based on sufficient scientific rigor to be reliable and that it was not widely accepted within the relevant scientific community, the military judge went on to rule that the witness could testify only to his rather commonsensical opinions... [and]...that the opinions Dr. Ofshe could legitimately testify to were not beyond the experience of the average member and therefore of such minimal value as to be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The underlying basis for the military judge's decision, however, was that Dr. Ofshe's expert opinion testimony was not scientifically reliable. We find, therefore, that there was ample evidence supporting the inadmissibility of Dr. Ofshe's expert testimony.

U.S. v. Anthony v. Wilson, Machinist's Mate First Class, 2007 WL 1701866 at 4.

Dr. Ofshe's testimony was also rejected in *People v. Brown*, 2006 WL 1726896 (Cal. App. 3 Dist. 2006), where, as here, a murder, attempted murder and robbery defendant (like Panoyan), claimed to have made a false original statement because a co-defendant had threatened to kill his loved ones. Id., at 7. In that case:

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

Id., at 11. In upholding the trial court's rejection of Dr. Ofshe's expert testimony based on his theories, the appellate court noted:

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

Id., at 12. *People v. Brown*, decided in a jurisdiction applying the *Frye* standard,[22] along with the many other cases rejecting Ofshe's expert testimony under both the *Frye* and (more liberal) *Daubert* standards, cited *supra,* demonstrate the judiciary's

[22] California adopted the *Frye* standard for new scientific methods of proof in *People v. Kelly* 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976).

general rejection of Dr. Ofshe's expert testimony based on his theories, as it is not based on reliable scientific methodology and would usurp the role of the jury.[23]

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[23] Cases upholding admission of Ofshe's testimony have generally relied on *U.S. v. Hall*, 93 F.3d 1337 (7th Cir. 1996), which here would be folly. Florida employs the *Frye* general acceptance test. *Hadden supra*. As *Hall* was decided under the more liberal *Daubert* standard, states employing *Frye* have rejected *Hall*. *State v. Free*, 351 N.J.Super. 203, 798 A.2d 83 (N.J.Super.A.D.2002) ("We find *Hall* unpersuasive....it is based on the *Daubert* standard rather than the *Frye* test, and is thereby inconsistent with our state jurisprudence"); *People v. Green*, 250 A.D.2d 143, 683 N.Y.S.2d 597 (N.Y.App.Div.1998) (*Hall* "does not offer persuasive precedent since, instead of applying the *Frye* 'general acceptance test' that we apply, they followed the more liberal *Daubert* standard") (cites omitted). *Hall* vacated a conviction because no hearing was had to determine whether the testimony was admissible even under *Daubert*, and "assum[ed] for the sake of argument that it was valid." *Hall*, 93 F.3d at 1344. The expert testimony in *Hall* was based on a diagnosed personality disorder, *id.*, at 1341, and *Hall* held expert testimony on that issue was relevant as "juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions." *Id*., at 1345. Panoyan was not diagnosed with such a disorder. Any notion *Hall* supports admission of Ofshe's testimony that Panoyan's conduct was "consistent" with his testimony that he was threatened is negated by *Hall*'s limitation on Dr. Ofshe's testimony on remand in that case:

> Dr. Ofshe cannot testify about the specifics of the post-admission narrative statement in this case. Such an endeavor would require Dr. Ofshe to assess the inconsistencies between Hall's statements to the police and the evidence presented at trial. Dr. Ofshe has no more expertise to perform this task than any juror. It is beyond Dr. Ofshe's knowledge as a social psychologist to assess the weight of the evidence and the credibility of witnesses...he cannot go so far as to analyze Hall's post-admission narrative statement in this manner. That task is for the jury alone.

U.S. v. Hall, 974 F.Supp. 1198, 1205 (C.D.Ill.1997), *affirmed*, *U.S. v. Hall*, 165 F.3d 1095 (7th Cir.1999), *cert. denied*, 527 U.S. 1029, 119 S.Ct. 2381 (1999).

Dr. Ofshe's expert testimony was offered to prove that Panoyan exhibited a pattern or profile consistent with one who--as Panoyan testified--had been threatened, stalked and extorted after witnessing a murder. Such expert testimony, bolstering Panoyan's version of why he took 3 years to change his story and become the key against Williamson, was "based upon evidence which has not been demonstrated to be sufficiently reliable . . . casting doubt on the reliability of the factual resolutions," *Hadden*, 690 So.2d at 578, and, consequently, "undermining the reliability of the trial's outcome," *Strickland*, 466 U.S. at 687.

In remanding this case, in *Williamson v. State*, 994 So.2d 1000 (Fla. 2008), this Court noted the burden of proof upon a *Frye* inquiry:

> This Court has recognized in *Frye* hearings that "[t]he proponent of the evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology." *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1268 (Fla. 2003). . . . It was defense counsel's obligation to request a *Frye* hearing regarding the general acceptance of the underlying scientific principles and methodology, and if he had done so, the burden would have shifted to the State to show that Dr. Ofshe's testimony could meet the *Frye* test.

Williamson v. State, 994 So.2d at 1009-10.

The State thus had the burden on remand to "establish[] by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology," *id*., a burden never met through the testimony adduced at the evidentiary hearing on remand, and a proposition directly refuted by the numerous case authorities and scholarly articles cited on remand and in this Initial Brief.

"Any doubt as to admissibility under *Frye* should be resolved in a manner that minimizes the chance of a wrongful conviction." *Ramirez v. State,* 810 So.2d 836, 853 (Fla. 2001). The doubt at bar as to this expert testimony's admissibility under *Frye*, "cast[s] doubt on the reliability of the factual resolutions," *Hadden*, 690 So.2d at 578, requiring Williamson's convictions be vacated, with a new trial barring this expert opinion testimony's invasion of the jury's function.

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

Third, this Court reversed and remanded for evidentiary hearings on trial counsel's failure to request a curative instruction after the trial court sustained the defense objection to Dr. Ofshe's expert testimony bolstering Panoyan's testimony that he had been threatened, and Ofshe's suggestion any such threat was credible. The opinion remanding for evidentiary hearings framed this issue as follows:

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

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

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

Though the State attempted to create an illusion at the evidentiary hearing that trial counsel's objection was solely to the hypothetical which had not been answered (HT 135-37, 143), the defense objection was actually, as this Court

pointed out, to Ofshe's "prior testimony," *Williamson*, 994 So.2d at 1011, vouching for Panoyan's credibility, which is "the subject of the claim upon which [this Court] reverse[d] and remand[ed] for an evidentiary hearing." *Id*.

The trial court relied on Ofshe's ***evidentiary hearing*** testimony to conclude:

> Dr. Ofshe did not, and could not testify that Panoyan's behavior was in response to an actual credible threat, i.e., he did not and could not attempt to vouch for Panoyan's credibility. (HT 26-27, 72).

(Order Denying Postconviction Relief After Remand, Page 13). The trial court's rationale for this conclusion was as follows:

> During Dr. Ofshe'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 137-381, 43). Therefore, Hammer did not believe a curative instruction was necessary. (HT 143).

(Order Denying Postconviction Relief After Remand, Page 15).

But regardless of what either Ofshe or Hammer stated *at evidentiary hearing* about Ofshe's *trial* testimony, the testimony actually adduced from Ofshe before

jurors remains the same. This Court's recitation of Ofshe's record testimony before the jury in *Williamson v. State*, 994 So.2d 1000 (Fla. 2008), is the law of the case:

> On direct examination, Dr. Ofshe testified that he reviewed two depositions taken of Panoyan, examined statements Panoyan gave to the police, and interviewed Panoyan. Dr. Ofshe then provided his opinion as to this case:
> Q. [The State] But did you have the opportunity to discern any kind of control or influence that had been exercised by Dana Williamson according to the attestation of Charles Panoyan, which degrees or kinds of control you recognized?
> A. [Dr. Ofshe] Yes.
> Q. Would you tell us, please.
> A. Well, in reviewing the history of Mr. Panoyan's experience in connection with the invasion and the death and the assaults at the Decker residence, and over the course of the investigation that followed, including his incarceration and ultimate decision to speak about what happened, the pattern that he displays is a pattern of someone who has, for one [sic] of 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 who 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.

Williamson v. State, 994 So.2d at 1009.

The trial court's finding that the foregoing expert testimony was not placed before the jury is not supported by competent substantial evidence. The trial court's finding that this testimony did not invade the jury's province is erroneous as a matter of law. In denying relief, the trial court made the following finding:

> 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.

(Order Denying Postconviction Relief After Remand, Page 18).

The first flaw in the trial court's findings in this regard is that Dr. Ofshe was asked for his expert opinion concerning alleged threats "according to the attestation of Charles Panoyan," *Williamson v. State*, 994 So.2d at 1009, and was therefore asked to express an opinion concerning Panoyan's claim to have been threatened. Second, Ofshe testified "the pattern that he displays is a pattern of someone who has...been terrorized, and someone who is acting in response to a *credible threat*," *id*., implying the alleged threat was credible, and that Panoyan's testimony before the jury was more believable than his earlier version of events, which had not

implicated Williamson. Third, Ofshe testified "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*," suggesting to jurors that, as Panoyan had testified, he had, *in fact*, been experiencing fear from a threat. Fourth, Ofshe's testimony "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," *id*., served only as an expert opinion that Panoyan's threat story was consistent with the fear that he claimed in his testimony. Finally, Ofshe's testimony that "[t]he 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," *id*., was not based on any evidence the jury needed to understand other than whether Panoyan's testimony was consistent with that of a person who had been threatened and was belatedly telling the truth—*i.e.*, Panoyan's credibility.

Dr. Ofshe's testimony on Panoyan's credibility was already before the jury and, as the trial judge sustained defense objections to it, the objections should have

been followed by a request for a curative instruction that jurors not consider it in their deliberations.[24] The State capitalized on this omission in closing argument, urging that Panoyan received "believable threats." *Williamson*, 994 So.2d at 1009.

In *Tumblin v. State*, 29 So.3d 1093 (Fla. 2010), this Court reaffirmed the principle that one witness may not testify concerning the credibility of another:

> Allowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness's credibility. It is clearly error for one witness to testify as to the credibility of another witness.

Tumblin, 29 So.3d at 1101 (cites & quotes omitted). The vouching or bolstering of the other witness need not be overt to violate this rule. *Hitchcock v. State*, 636 So.2d 572 (Fla. 4th DCA 1994) (though psychologist who interviewed child did not overtly vouch for child's credibility by testifying to child's believability, "if the juxtaposition of the questions the State asked gave the jury the clear impression that [he] believed the victim was telling the truth, that testimony was improper.").

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[24] The record does not support Mr. Hammer's belief, expressed at the evidentiary hearing, that "I don't think that [the judge's ruling on the objection] was at sidebar," but "was in front of the jury." (HT 143). Trial counsel had no independent recollection of the sidebar and was not provided a transcript during the State's questioning on this matter, though he had told the State as the State got into the subject, "I don't remember it word for word, so it might help if I had it in front of me." (HT 135-136). The trial record, however, does show that the trial judge's ruling on the trial objection occurred only at sidebar. (TT 2237-2238).

Dr. Ofshe's expert testimony that Panoyan's behavior and testimony fit the pattern of, and were consistent with, that of a person who had received a "credible threat" gave jurors the impression Dr. Ofshe believed that Panoyan (at least at trial) was telling the truth, and this was the defense objection. (TT 2237-38).

In *Duest v. State*, 462 So.2d 446, 448 (Fla. 1985), this Court reaffirmed: "The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." *Id*. Though trial counsel explained the objection at sidebar, *the jury* never heard the *reason* for the objection or the judge's ruling, and trial counsel failed to follow the "proper procedure to take when objectionable comments are made," *id.*, which was to "request an instruction from the court that the jury disregard the remarks." *Id*.

This was a serious omission falling below the professional standard, *Duest*, of reasonably effective assistance of counsel in this capital case. An instruction for jurors to disregard Dr. Ofshe's "credible threat" testimony, and that credibility was entirely for the jury, might have dissipated the taint of this expert testimony, which gave jurors the impression Dr. Ofshe, with the aid of his academic credentials, believed Panoyan was telling the truth. Trial counsel's failure to request such an

instruction left uncured this expert testimony suggesting Panoyan was telling the truth about having been threatened, and that any such threat was credible.

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

"[T]he ultimate focus of [this] inquiry must be on the fundamental fairness of [these] proceedings whose result is being challenged" and whether "the result of [these] proceedings is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*. 466 U.S. at 697.

As the testimony of Charles Panoyan--belatedly casting himself as victim rather than sole original suspect--was pivotal, trial counsel had a duty to request a curative instruction after objecting to the State's bolstering, through Dr. Ofshe, the credibility of Panoyan's testimony, given only upon being dropped from the

Indictment, freed from execution and immediately released. Given the impact of Panoyan's new story that he was threatened into maintaining his original account--which had not previously implicated Williamson--there remains a reasonable probability that, but for counsel's failure to request a curative instruction for this testimony on Panoyan's credibility, the outcome would have been different. *Strickland*, 466 U.S. at 694. There remains a reasonable probability jurors would have weighed the conflicts between Panoyan's original and recantation stories, against his incentives to lie--untainted by Dr. Ofshe's impressive academic credentials--finding reasonable doubt that Panoyan's testimony was credible, and leaving reasonably probable Dana Williamson's acquittal.[25]

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[25] The special concurrence to the remand found prejudice on the face of the record, suggesting reversal for a new trial without need for an evidentiary hearing:

> I concur with the majority opinion in all parts except that I would reverse and remand for a new trial rather than an evidentiary hearing. The decision as to guilt in this case was essentially a decision as to the credibility of Mr. Panoyan. I conclude that the admission of the testimony of Dr. Ofshe was error and that the error was prejudicial because Dr. Ofshe's testimony improperly bolstered the credibility of Mr. Panoyan....[U]nder the circumstances of this case, Dr. Ofshe's testimony was prejudicial. The State relied upon Dr. Ofshe's testimony in its closing argument. The value of hearing an expert vouch for Mr. Panoyan clearly could have tipped the scales in this tragic case. Dr. Ofshe's testimony undermines my confidence in the verdict.

Williamson, 994 So.2d at 1017-18 (Fla. 2008) (WELLS, J., specially concurring).

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) Assistant State Attorney Susan Bailey, 201 S.E. 6th Street, Suite 675, Fort Lauderdale, FL 33301, (2) Assistant Attorney General Leslie Campbell, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, and (3) Mr. Dana Williamson, #048606, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, by United States Mail, this 14th day of December, 2011.

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