IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Case No. 84,324

REPLY BRIEF OF APPELLANT

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REPLY TO APPELLEE'S STATEMENT OF THE FACTS

The Statement of Facts supplied by the State is inaccurate, incomplete and biased in numerous respects. Mr. Van Poyck will address many of these inaccuracies in the course of addressing the specific issues to which they relate. It is appropriate, however, to address certain of them here at the outset.

The State seems incapable of accurately reflecting the testimony of the witnesses, especially the witnesses for Mr. Van Poyck. For example, the State says that expert social worker Janet Vogelsang "testified that the new Mrs. Van Poyck, Lee, spanked the appellant on the average of three times a week." Answer Brief, at 3, citing R 186.[1] This is what Ms. Vogelsang actually testified:

> There was a battle between [Billy's brother Jeff and Lee over Billy] and . . . Lee became so frustrated that she too started beating the children.
>
> Now, this is according to Lisa, but even in [Lee's] affidavit, the phone conversation I had with her, she admitted to spanking Billy at least three time a week on schedule.
>
> Q. She did?
>
> A. Lee, the stepmother. She called it spanking, not necessarily because he had done anything, but simply because she saw him as "salvageable". . . . In addition to that, she did keep the children home because she would get carried away with her discipline, leaving the children bruised, and on those days they were kept home from school.

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[1]Consistent with his practice in the initial brief, Mr. Van Poyck will cite the transcript of the evidentiary hearing as "T. #."

T. 186-87.[2]

In another example, the State says that Ms. Vogelsang testified that Billy's Aunt Phyllis--who cared for Billy and the other children for about two years--was mentally unstable but that she was not abusive and loved the children very much. Answer Brief, at 3. Here, there is at least a grain of truth--Ms. Vogelsang did testify that Aunt Phyllis loved the children. However, Ms. Vogelsang also testified that Aunt Phyllis was one of many adults who engaged in "psychological battering," T. 191, of Billy. She did this by threatening to drive into canals; running nude into the ocean at night, telling the children that the sharks were going to eat her and she would not come back; exposing them to her preoccupation with sexual issues; and drinking heavily around the children. T. 194, 195, 199-200. The implication that Ms. Vogelsang thought that Aunt Phyllis was in any way a positive influence is totally contradictory to her actual testimony.

Similarly, the State describes Mr. Van Poyck's cousin, Charles Hill, as having testified that Billy's father, Walter, was a successful man who worked hard. Answer Brief, at 5. This omits the significant portions of his testimony concerning Walter. Mr. Hill testified that as a result of Walter's business activities and major participation in veteran's organizations and the John Birch

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[2]The State also suggests that there is no evidence of any suicide attempts by Mr. Van Poyck. Answer Brief, at 4 and n.2. However, the Florida State Prison medical records indicate that Mr. Van Poyck was sent to the Reception and Medical Center on September 21, 1977, for self-inflicted wounds, and that he swallowed nails on August 11, 1977. App. 8; T. 794.

Society, Walter "didn't devote enough time" to the children, who "were all starved for love." T. 407. Indeed, he testified that even Billy's natural mother--who died when Bill was only one and a half--failed to give the children enough attention. T. 407-08. In addition to describing Aunt Phyllis as a crackpot who was addicted to prescription drugs, Mr. Hill testified that she was frequently intoxicated while around the children, stole demerol and morphine that had been prescribed for Mr. Hill's mother, T. 410, and in general was "more detrimental to the kids than anyone he ever had in the home." T. 411.

Consistent with the State's pattern of minimizing the testimony of defense witnesses, it characterizes Felix Melian as having testified that while in prison Mr. Van Poyck "would become withdrawn" at times. Answer Brief, at 7. In fact, Mr. Melian testified that Mr. Van Poyck would periodically "go through like mental lapse," at which times he would call himself "El Suprimo," have delusions of grandeur and be placed on heavy medication. T. 507. He also testified that when Mr. Van Poyck was in this state, he would not recognize his friends and that his mood changed drastically. T. 509. After coming out of the "El Suprimo trip" he would then become very depressed. T. 510. In addition to testifying that Mr. Van Poyck was "too loyal" to James O'Brien, Mr. Melian testified that Mr. Van Poyck was "always looking like a father figure" at O'Brien and followed O'Brien "like a little dog." T. 513-14.

Finally, in what is clearly argument rather than statement of the facts, the State asserts that expert psychiatrist Robert Phillips "remained undaunted in his diagnosis of organic brain disorder . . . in spite of the extensive history and opinion of several other psychiatrists who characterized appellant as manipulative, antisocial and sociopathic." Answer Brief, at 8. First, this characterization is inaccurate because it neglects the fact that there were numerous psychiatrists and psychologists, from Dr. Rothenberg on, who diagnosed Mr. Van Poyck as suffering at various times from a psychotic thought disorder. Def. Ex. 4; App. 46; T. 766, 769, 771, 774. Indeed, when he was admitted to prison, it was noted that Mr. Van Poyck showed symptoms of an organic brain syndrome. T. 793. Nothing in Dr. Phillips' conclusion that Mr. Van Poyck "suffered from the ravages of alcohol and drug dependency and at the height of [his] dependency is most dysfunctional," T. 570, is inconsistent with any of the conclusions of other mental health experts.

Second, the State's characterization totally omits the <u>reasons</u> Dr. Phillips gave for his conclusions. As Dr. Phillips repeatedly testified, any conclusion that Mr. Van Poyck did not suffer from a serious thought disorder while in prison is completely inconsistent with the fact that he was maintained on high doses of antipsychotic medications for two years. T. 773, 782-84. On direct, Dr. Phillips testified at length concerning the medications Mr. Van Poyck took and the significance of the fact that he was twice admitted to the prison psychiatric hospital and treated for

medications for such a long period of time. T. 595-606. Dr. Phillips' testimony, which was uncontroverted, was that these facts refute any suggestion that Mr. Van Poyck was malingering or antisocial. T. 622-27.

Similarly, the State totally omits Dr. Phillips' explanation of the reasons he concluded that Mr. Van Poyck did not intend to harm anyone on the day of the offense. Dr. Phillips testified that Mr. Van Poyck was "singularly fixated on O'Brien" and that his acts were committed in an obsessional fashion "coupled with his excessive use of alcohol and drugs," rather than by someone who was "looking to go out and harm a large group of people." T. 752, 756.

The State is equally inaccurate concerning the testimony of its own sole witness, Cary Klein. The State says that Mr. Klein testified that Mr. Van Poyck "did not have organic brain disorder." Answer Brief, at 10, citing T. 1180-82. In fact, what Mr. Klein testified to at that point was that he would have put on evidence of organic brain disorder if he had had it, but that he was not aware of any such evidence and that the records and the psychological testing he had had performed on Mr. Van Poyck were insufficient either to find or rule out an organic brain disorder. T. 1180-82.[3] Perhaps most incredibly, while the Statement of Facts purports to summarize the testimony of each witness, it says not a word about the testimony of defense co-counsel Michael

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[3]In fact, the prison records contained a reference to a possible organic brain syndrome, T. 793, but as Mr. Klein testified, "If it was in there, I missed it 'cause I didn't see any." T. 1181.

Dubiner and expert defense attorney Carey Haughwout. Clearly, the State wishes that these witnesses did not exist, but they do. Mr. Dubiner, in particular, was a crucial witness. Although Cary Klein was the lead counsel for the defense, Mr. Dubiner was co-counsel and was present throughout the trial. Mr. Dubiner's testimony is most important because he reached the conclusion at the time of the trial--not just in hindsight--that the penalty phase investigation and preparation was totally inadequate. T. 849-52. The testimony of Mr. Dubiner and Ms. Haughwout is described in some detail in the initial brief, and will not be repeated here.

ARGUMENT I

THE COURT BELOW ERRED IN DENYING RELIEF ON THE BASIS OF MR. KLEIN'S ACCOUNT OF HIS INTERACTIONS WITH DR. VILLALOBOS, WHILE DENYING MR. VAN POYCK ANY OPPORTUNITY TO PRESENT EVIDENCE CONTRADICTING THAT ACCOUNT.

The trial court should have granted Mr. Van Poyck's motion to supplement the record with the rebuttal affidavit of Dr. Villalobos or, in the alternative, reopened the hearing. The proffered evidence became critical to this case when Van Poyck's trial counsel Cary Klein testified that Villalobos said that he had made an unfavorable diagnosis. Up until then, Klein had said--in a sworn affidavit--that the reason for the lack of mental health testimony was that he had "run out of time" to get an appropriate expert involved.

The State claims that post-conviction counsel for Mr. Van Poyck "waived" the opportunity to rebut Klein's testimony concerning Dr. Villalobos by choosing "instead" to attempt to

suppress any such statements based on attorney-client privilege. Only when that effort failed, the argument goes, did counsel urge that Dr. Villalobos was a necessary witness.

This argument is a non-sequitur--an unsuccessful asserting of attorney-client privilege does not "waive" the right to present rebuttal evidence. In any event, the state misconstrues the facts. This argument mischaracterizes the facts. Mr. Van Poyck's counsel learned of the meeting between Klein and the State the day before the evidentiary hearing. T. 148, 150-51. In addition to discovering that Klein would testify about statements Dr. Villalobos allegedly made to Klein, counsel was informed that Klein would be revealing the contents of conversations between Klein and Mr. Van Poyck (it was these latter statements that were sought to be suppressed based on the attorney-client privilege). This was the first time counsel for Mr. Van Poyck heard Klein's story that Dr. Villalobos told him of an unfavorable diagnosis. The story came as a complete surprise since Klein had previously signed an affidavit that there was insufficient time to determine Mr. Van Poyck's mental status. Def. Ex. 22.

Upon learning that Klein had changed his story, post-conviction counsel notified the court that it might be necessary to call Dr. Villalobos as a witness. See T. 151. Counsel then made numerous, unsuccessful attempts to locate Dr. Villalobos before and during the hearing, see T. 1251; PR. 4941, Villalobos Aff. ¶ 2. Finally, after the hearing had concluded, counsel met with Dr. Villalobos who denied having been able to reach any diagnosis of

Mr. Van Poyck and denied having diagnosed Mr. Van Poyck as antisocial or a sociopath. PR. 4942, Villalobos Aff. ¶¶ 4, 5, 7 (*emphasis added*). There is no evidence in the record that counsel for Mr. Van Poyck knew that Klein was going to attribute a different statement to Doctor Villalobos.

The State next claims that counsel for Mr. Van Poyck "should have known" that Dr. Villalobos would be a necessary witness. Counsel for Mr. Van Poyck, however, had no reason to know that Dr. Villalobos had any worthwhile testimony to offer. As counsel for Mr. Van Poyck proffered at the hearing, an investigator contacted Dr. Villalobos during preparation of the Rule 3.850 motion and determined that Dr. Villalobos had no files, no records or reports and no recollection of his examination of Mr. Van Poyck. T. 1252. That being the case, counsel had no reason to think that Dr. Villalobos could provide any probative testimony, particularly since Klein had previously signed an affidavit stating that he "ran out of time in our attempt to determine whether Bill suffered from a mental illness" and that the mental health experts did not have enough time to complete their evaluations. Def. Ex. 22, Affidavit of Cary Klein ¶ 12. It was only after Klein revealed that he would testify otherwise that counsel realized it was necessary to present Dr. Villalobos to rebut Klein's testimony, but at that point it was impossible to locate Dr. Villalobos in time to present his testimony. T. 1251; PR. 4941, Villalobos Aff. ¶ 2. Furthermore, Klein's co-counsel, Michael Dubiner, testified that he learned the night before penalty phase that his assumption that adequate mental

health evaluation had been done by Klein was incorrect; that Villalobos told Dubiner that he did not have sufficient time; and that Villalobos could reach no conclusion regarding Mr. Van Poyck.[4]

Clearly, Klein's testimony changed between the time he signed the affidavit and the evidentiary hearing. Mr. Van Poyck should be allowed the opportunity to rebut Klein's testimony. Mr. Van Poyck's counsel had no reason to believe, based on Klein's sworn statements, that it would be necessary to examine Dr. Villalobos to reaffirm that he did not have time to reach a diagnosis. How was counsel for Mr. Van Poyck to know that Klein would later tell a story that was at odds with his sworn statement?

Particularly since the trial court relied on Klein's revised, self-serving testimony in concluding that Klein's decision not to pursue the mental health angle further was reasonable (and thus that there was no ineffective assistance of counsel for failing to investigate and present compelling mitigating evidence), it is patently unfair for the trial court to have denied Mr. Van Poyck's request to either reopen the hearing or accept Dr. Villalobos' affidavit. Indeed, the importance of this issue is underscored by the State's heavy reliance in this appeal, on Klein's description of his discussion with Dr. Villalobos. The State contends that Dr. Villalobos reviewed Mr. Van Poyck's prison files, Answer Brief at 24, although the State offers no record citation in support and Dr. Villalobos had no files in his possession. T. 1252; PR. 4942. The

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[4]These facts in and of themselves demonstrate ineffective assistance of counsel, as discussed below.

State also relies on Klein's testimony that Dr. Villalobos found Mr. Van Poyck to be sociopathic. T. 1183. That testimony, however, is directly contradicted by Dr. Villalobos' sworn affidavit that he "was not able to render any diagnosis of Mr. Van Poyck, including a diagnosis that he suffered from antisocial personality disorder or sociopathy." PR. 4943. Dr. Villalobos states that he was simply unable to reach any reliable conclusions on penalty phase issues--a conclusion which is buttressed by the evidence of record as to the minimal time he had (one day between phases) to perform testing and reach a diagnosis. Id. Nonetheless, it is clear that both the State and the trial court placed heavy reliance on this aspect of Klein's testimony. Given the importance of the issue, it is fundamentally unfair to Mr. Van Poyck to rely on Klein's testimony without first resolving the conflict between Klein's testimony and that which Dr. Villalobos would offer.

The issue of whether or not Klein's decision not to pursue this line of defense was reasonable cannot meaningfully be resolved without reliably determining what Dr. Villalobos in fact concluded. The evidence is therefore crucial to the central issue in this case of ineffective assistance of counsel. "[F]actors [courts] consider in deciding to grant a motion to supplement include whether the additional material would be dispositive of pending issues in the case and whether interests of justice and judicial economy would thereby be served." Young v. City of Augusta, Georgia, 59 F.3d 1160, 1168 (11th Cir. 1995). Dr. Villalobos' testimony falls

squarely within the contours of this standard; remand is required to permit the presentation and consideration of Dr. Villalobos' testimony.

ARGUMENT II

MR. VAN POYCK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

As pointed out in Mr. Van Poyck's opening brief, an ineffective assistance of counsel claim requires a two-part analysis. First, it must be determined if counsel's performance was deficient. Second, it must be determined if the defendant was prejudiced by the deficient performance. The State fails to analyze these issues separately, but instead has simply marshalled every negative piece of evidence it can find and claims that this evidence justified Klein's failure to investigate. This attempt by the State to merge the concepts of deficient performance and prejudice is not surprising, for the facts are that Klein completely failed to investigate the penalty phase in this case, leading easily to a finding of deficient performance. And once that is shown, Mr. Van Poyck need only show a "reasonable probability" that the "balance of aggravating and mitigating circumstances would have been different." Bolander v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994).

Consequently, the State's after-the-fact attempt to turn Klein's failure to investigate into a reasonable trial strategy should not be countenanced. Indeed Strickland v. Washington, 466 U.S. 668 (1984)--at the very passage cited by the State--requires

that "every effort be made to eliminate the distorting effects of hindsight." Id. at 687. More specifically, the Eleventh Circuit has made clear that once it is shown that an attorney failed to conduct an adequate investigation, the only question becomes whether there was any tactical reason for not performing the investigation. Middleton v. Dugger, 849 F.2d 491, 493-94 (11th Cir. 1988). Any tactical reason that could have been given for not presenting evidence that the investigation would have yielded is irrelevant in assessing deficiency.

A. The State Has Failed To Rebut Mr. Van Poyck's Showing That Counsel's Performance Was Deficient.

The State completely ignores the key facts underlying Klein's representation in this case, the most obvious being his failure to perform any investigation or preparation for penalty phase until after penalty phase had already begun. Likewise, the State's response fails even to acknowledge the ample precedent that such a failure constitutes ineffective assistance as a matter of course. See, e.g., Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993); Cave v. Singletary, 971 F.2d 1513, 1519 (11th Cir. 1992); Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir. 1991). The State ignores the undisputed fact that Klein did no penalty phase investigation because he was counting on a two to three week extension of time between phases, an extension which was never granted. While even the period of time that would have been given by the extension was not nearly enough time to investigate a penalty phase from scratch, Klein did not even have the benefit of

the extension because he inexplicably failed to secure it in writing. T. 1196. As are result, Klein was, by his own admission, "caught with [his] pants down" when the trial court announced, after the guilt phase verdict, that the penalty phase was to begin the next day.

Instead of addressing or in any way coming to grips with these facts, the State simply recites all the negative evidence it can find in Mr. Van Poyck's prison records and then claims that this evidence justified a "tactical decision" on Klein's part not to present mitigating evidence. But Klein's cursory review of Mr. Van Poyck's prison records, while not a sufficient "investigation" in any event, is largely irrelevant to the issue of deficient performance. The State asserts without supporting citation that Klein obtained Mr. Van Poyck's prison files. Answer Brief, at 21. In fact, the record shows that Klein did not have Mr. Van Poyck's entire file, including medical records that showed his history of psychiatric and psychological treatment, T. 1130-33, and his partial review of Mr. Van Poyck's DOC file was in large measure connected with Mr. Van Poyck's parole revocation hearing, T. 1134. And while Klein formally retained Dr. Villalobos prior to trial, he did not attempt to arrange for any psychological testing until after guilt phase was over--and the night before penalty phase was to begin. T. 1202. While Dr. Villalobos allegedly told Klein that his opinion "would not have been helpful," that statement, if it was in fact made, would hardly be surprising given the fact that Mr. Van Poyck was not even examined until the guilt phase was over;

neuropsychological testing that would have revealed Mr. Van Poyck's organic brain syndrome was never done; and the "exam" could not have encompassed the type of comprehensive work-up described by Dr. Phillips as making up the "standard of care" for a mental health evaluation. T. 560-63. In fact, according to Klein's co-counsel, Michael Dubiner, Dr. Villalobos said that he could not perform a competent evaluation on such short notice, T. 854-55--and that certainly stands to reason. As Dubiner, Ms. Haughwout, and Dr. Phillips testified and, to a large extent, even Klein admitted at the evidentiary hearing, this was far too late for any kind of effective mental health presentation to be made. T. 560-63, 853-55, 961, 1219.

Again, this is not an example of the type of attack on counsel's performance in hindsight criticized by Strickland v. Washington, 466 U.S. 668, 687 (1984). When Dubiner realized that there was no real preparation for penalty phase and no mental health expert, he told Klein

> that if he didn't have a mental health professional see Mr. Van Poyck by the time Phase II was to start, which was the next day, that I was going to go out and tell Judge Miller . . . that it was poorly prepared, that we were not prepared to proceed.
>
> Q. Was that an adequate compromise, Mr. Dubiner?
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> A. . . . [W]hat I believe was happening at that time was that Mr. Klein was saying we didn't need to have any mental health professional see him. And that's when my threat was made and in retrospect and probably even at the time that was clearly insufficient to have done what was needed for any Phase II.

T. 851-52. Klein concurred with Dubiner's assessment:

> November 16th, [the day penalty phase was scheduled to begin] if I was in [Dubiner's] place, I would have objected. I would have told -- I object to what this other guy was doing. I wasn't. I hope he didn't think I had enough time on November 16th. That's why I moved for continuance. Maybe we got caught with our pants down a little bit but we had reason to have our pants down when we were assured we would have the time.

T. 1219-20. Mr. Van Poyck, of course, stands to suffer the most serious possible consequence as a result of counsel getting "caught with our pants down."

The State nevertheless contends that counsel made a reasonable strategic decision not to pursue mental health mitigation. Answer Brief, at 25. However, before counsel can make a reasonable decision concerning whether to present mitigating evidence, counsel must have enough knowledge of the potential mitigating evidence to make an informed judgment, and must have enough information to make an "accurate life profile" of the defendant:

> In order for counsel to make a professionally reasonable decision whether or not to present certain mitigating evidence . . . that counsel must be informed of the available options . . . .
>
> In cases where sentencing counsel did not conduct enough investigation to formulate an accurate life profile of a defendant, we have held the representation beneath professionally competent standards.

Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995) (citations omitted). Here, it is clear that counsel completely failed to accomplish these tasks before it was too late. Counsel never made a strategic decision not to put on mental health mitigation; as a result of their own mistakes and the trial court's change in the timing of penalty phase, they ran out of time before they had any mental health mitigation to present.

The State's whole line of argument, of course, pertains only to the mental health evidence. The State has little to say about Klein's failure to do any kind of investigation into other mitigating evidence, including physical abuse while growing up, drug and alcohol abuse, abandonment and neglect and the many other facts shown at the evidentiary hearing. None of this evidence was investigated. Such a failure has been universally condemned by the courts as deficient performance. Dugger v. Middleton, supra; Heiney v. State, 620 So. 2d 1701 (Fla. 1993) (counsel's failure to investigate client's background constitutes deficiency); Phillips v. State, 608 So. 2d 778 (Fla. 1992) (IAC where counsel did virtually no preparation for penalty phase); Stevens v. State, 552 So. 2d 1082 (Fla. 1989) (failure to investigate background mitigation is not the result of reasoned professional judgement, and constitutes abandonment of representation during sentencing); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991) (failure to investigate background, by waiting until after the jury's guilt verdict, constitutes deficiency).

B. Mr. Van Poyck Was Prejudiced By Counsel's Failure To Investigate And Present Mitigation Evidence.

The State also claims that Appellant cannot establish prejudice. Answer Brief, at 26. Again, in assessing prejudice, the standard is not the same as deficiency: all that need be shown is proof "sufficient to undermine confidence in the outcome of the case." Agan v. Singletary, 12 F.3d 1012, 1018 (11th Cir. 1994).

That there also exists "negative" evidence that might give the State an argument for death does not show the lack of prejudice.

The State first claims that Dr. Phillips' opinion is "severely undermined by the fact that there is absolutely no evidence to corroborate his theory that appellant was high that day." Answer Brief, at 28. The State ignores all of the evidence showing the contrary, including testimony of Traci Rose that she and Mr. Van Poyck had stayed up all night the night before ingesting cocaine, T. 350-54; evidence that beer was purchased by Mr. Van Poyck's accomplice as the two were on their way to the scene of the incident; and that Mr. Van Poyck was seen shooting in the air at the time of the offense. Furthermore, Dr. Phillips' opinion concerning the mental health mitigating factors was not solely dependent on a finding that Mr. Van Poyck was intoxicated on the day of the offense.

Phillips' opinion that Mr. Van Poyck had no intent to harm anyone on the day of the offense was based in significant part on his conclusion that Mr. Van Poyck was obsessed by a compulsion to rescue the man who served as a father figure for him, James O'Brien. T. 633-34, 748. This conclusion certainly is not "totally refuted by the facts of the case." Mr. Van Poyck was entitled to his day in court, with a qualified expert to testify as to the underlying psychological factors driving Mr. Van Poyck's actions that day. The State's claim that Mr. Van Poyck's mitigation case would have been based on a "decision to use illicit drugs," "long history of criminal activity," "repeated behavioral

problems in prison" and "a consistent return to crime" totally mischaracterizes the kind of case that would have been presented had a competent mental health expert been retained by Klein and provided with the results of a competent investigation at an appropriate stage of the case.

Such an expert would have been able to testify that neuropsychological test results showed objective evidence of an organic brain syndrome, and that Mr. Van Poyck's actions were the result of the fact that as a child Billy Van Poyck effectively lost his father as well as his mother, that O'Brien became for him the "personification of his father," T. 617, and that it was a combination of his dependent personality and his obsessive fixation with rescuing O'Brien that impaired his judgment and led in large part to his decision to free O'Brien. In fact, the jury was already well aware of much of Mr. Van Poyck's history of criminal activity, since his prior convictions were introduced at penalty phase as aggravating factors. What the jury was not told, because it was not presented, was any explanation--the type of explanation that could have come from a review of Mr. Van Poyck's life history and one that a psychiatrist or psychologist could have placed in context from a mental health standpoint.

Next, the State claims that the Rule 3.850 hearing evidence was "cumulative" of evidence presented at penalty phase. Answer Brief, at 30. The State's case rests on the notion that it was sufficient for Klein to simply call a couple of family members, and with no preparation or investigation, elicit from them whatever

testimony they might be able to provide. But the whole point of requiring an adequate investigation is that this kind of last minute, thrown together penalty phase is insufficient. As explained by Ms. Haughwout:

> A. Well, what appears to have been done is they knew that it might be important to put some family members on, so the family members, they're told to show up and they do and they ask some questions of those family members. There's no indication that there was any theme to the mitigation that was being presented or any effort to explain why the defendant acted the way he did at the time of the offense or why -- how it has any bearing on the jury's decision.
>
> Q. Is there a difference between merely presenting the information based on that short review and the results of a thorough 12 to 18 month investigation, as you have discussed?
>
> A. Certainly. I mean if nothing else, jurors are instructed the same thing in penalty phase that they are in the guilt phase, they consider what is -- they hear from the witness stand, they're given rather specific instructions on how to make a very, very important decision so information has to be charged into the way in which they are being told they have to make their decision.
>
> Q. And they can reject it if they don't find the evidence credible, and that is they can't substantiate it and present it in a convincing manner?
>
> A. Correct.
>
> Q. And that sort of substantiation and compelling manner is what you find to be developed through extensive investigation?
>
> A. Absolutely . . .

T. 1026-28. Ms. Haughwout's opinion reflects not only prevailing professional norms, but is consistent with well established

precedent regarding effective assistance of counsel in a capital case. See, e.g., Deaton, supra; Middleton, supra.

In order to make the argument that the evidence was "cumulative," the State first has to throw out all of Dr. Phillips' testimony, which supported finding the mental health mitigating factors, as well as the statutory factor of duress (or a non-statutory mitigating factor of psychological compulsion) and numerous other non-statutory mitigating factors, including learning disability as a child, organic brain dysfunction, history of drug and alcohol abuse, history of traumatic brain injury, history of psychosis and suicide attempts, emotional abandonment by his father, physical and emotional abuse, early institutionalization, and dependent personality. T. 632-38. Significantly, the State's desire to ignore Dr. Phillips' testimony is supported neither by the slightest suggestion that counsel would have failed to use such testimony--if their failure to investigate and prepare had not prevented them from presenting it--or that there is any reason why a jury would not have found such testimony credible and powerfully mitigating. At the actual penalty phase, counsel presented witnesses like Mr. Van Poyck himself and his brother, Jeff, whom he called "the most cold and chilling witness [he] had ever seen," T. 1103, and listed, rather than proved, a number of mitigating factors "that I suspected were there but none we could show." T. 1105.

Clearly, the mitigating evidence presented at the Rule 3.850 hearing would have significantly changed the "balance of

aggravating and mitigating circumstances," Bolander, 16 F.3d at 1557, compared with what was actually presented at trial. Counsel were ineffective at penalty phase, and Mr. Van Poyck was prejudiced as a result. A new penalty phase proceeding is required.

ARGUMENT III

MR. VAN POYCK WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL.

Counsel's ineffective assistance was not confined to the penalty phase of the case. Numerous errors were made at the guilt phase, affecting the result of the case.

A. Counsel Failed To Investigate And Introduce Available Evidence To Support A Voluntary Intoxication Defense.

Counsel's failure to investigate and present evidence of Mr. Van Poyck's drug and alcohol intoxication on the day of the offense deprived Mr. Van Poyck of a voluntary intoxication defense. Armed with evidence of Mr. Van Poyck's drug history and Traci Rose's testimony as to Mr. Van Poyck's drug and alcohol ingestion before the incident, counsel could have presented a viable voluntary intoxication defense.

The State contends that Klein properly investigated the voluntary intoxication defense, simply relying on Klein's conclusory testimony that he did investigate the possibility of this defense. T. 1086-88. But there is no evidence that Klein did in fact perform this investigation; Klein did not specify any actions taken, and Dubiner was not aware that any investigation took place. (Dubiner Aff., App. 4). Looking for evidence of

cocaine in the car and "pursu[ing] that avenue during depositions" was insufficient to uncover the vast information available on Mr. Van Poyck's drug and alcohol intake.

Even the most minimal investigation of Mr. Van Poyck's life and circumstances around the time of the offense would have led counsel to contact Mr. Van Poyck's girlfriend, Traci Rose. Had counsel done so, he would have learned the facts concerning Mr. Van Poyck's ingestion of massive quantities of cocaine shortly before the offense. T. 350-54. Moreover, regardless of Mr. Van Poyck's denial of intoxication, counsel had the duty to investigate this defense, because counsel were well aware of his tendency of "faking good." T. 1177. Indeed, counsel characterized Mr. Van Poyck's denial of intoxication as an attempt by Mr. Van Poyck to give the impression that he would not have screwed the escape attempt up by getting drunk. T. 1087. Given the lack of any other defense--the independent act defense actually used was a "dead dog loser"--competent counsel would have investigated to see if this was not another example of Mr. Van Poyck faking good, at least to the extent of talking to Mr. Van Poyck's girlfriend (which counsel should have done in any event).

The State also contends that Ms. Rose's testimony was contradicted by unspecified testimony of Klein and of trial witnesses. Answer Brief, at 36. The State does not explain how either Klein or anyone who testified at trial could have contradicted Ms. Rose's testimony concerning the amount of cocaine

she and Mr. Van Poyck consumed during the night and morning before the offense. None of the other witnesses was there.

The investigation and presentation of a voluntary intoxication defense would have required an instruction on the defense, and it is reasonably likely that Mr. Van Poyck would have been convicted of a lesser offense had such an instruction been included. In addition, the voluntary intoxication defense would have presented the jury with persuasive mitigating evidence at the penalty phase.

B. Counsel Failed To Investigate And Present Available Evidence That Mr. Van Poyck Was Not The Triggerperson.

Counsel was also ineffective in failing to investigate and present readily available evidence to prove that Mr. Van Poyck did not kill the victim. Central to this issue was counsel's failure to present the serological evidence and to pursue DNA testing that would have shown conclusively that Mr. Van Poyck was not the triggerperson. The State argues that the DNA testing was not necessary because serological blood-type evidence sufficiently showed that Mr. Van Poyck was not the triggerperson. Klein may have been right--blood test evidence showed that the victim's blood was on Valez' clothing and not on Mr. Van Poyck's clothing--but the State refuses to address the critical fact that this evidence was never introduced. It is reasonably likely that Mr. Van Poyck would have received a different result had this evidence been investigated and presented; in any event, this information would have been crucial at the penalty phase.

In addition to the blood evidence, counsel failed to investigate and produce evidence that the murder weapon was not in Mr. Van Poyck's possession. Both the gun shop records indicating that Lori Sondik purchased the weapon, as well as Ms. Sondik's testimony that Valdez left on the morning of the offense with that weapon tucked in his waistband, would have further proven that Mr. Van Poyck was not the triggerperson. But this evidence was neither investigated nor presented during the guilt phase of trial.

The State contends, without the benefit of record citation, that Klein was prepared to call Ms. Sondik at trial. The State then contends that Klein made the "tactical decision" to not do so because of ballistic evidence tending to show that Valdez was the shooter and because Mr. Van Poyck had testified that Valdez supplied all of the weapons. Despite the State's attempt to limit the impact of the gun shop records and Ms. Sondik's testimony, that evidence was critical to show that Mr. Van Poyck was not the triggerperson, especially coming from an unbiased witness. The fact that Mr. Van Poyck had a weapon in his hand during the escape made it even more critical that counsel show that the murder weapon was not in Van Poyck's possession at the time of the shooting. It is reasonably likely that this evidence, in conjunction with the blood evidence, would reasonably have changed the outcome of the trial in both the guilt and penalty phases. See Zerquera v. State, 549 So. 2d 189, 192 (Fla. 1989) (State's exclusion of evidence suggesting that codefendant owned murder weapon not harmless, where issue was which defendant was the trigger man.)

C. Counsel Failed To Bring Out Crucial Evidentiary Points In The Cross Examination Of The State's Key Witness Steven Turner.

Easily the State's most important witness was Steven Turner, the surviving guard, for it was only Mr. Turner who placed the murder weapon in Mr. Van Poyck's hand. He also testified that he hear a "click" when Mr. Van Poyck aimed that weapon at him. Yet despite the importance of this witness, Klein failed to prepare and failed to bring out crucial points as shown in the initial brief. The State argues that Klein's lack of preparation and lack of clarity in cross-examining Turner do not rise to the level of deficient performance. It is the substantive ineffectiveness of Klein's performance, however, coupled with his lack of preparation, that caused ineffective assistance. Klein testified that he did not know why he failed to impeach Turner on his statements to Dr. Yount (T. 1125). The State fails to address counsel's failure to bring out the inconsistencies listed on pp. 50-51 of Appellant's Initial Brief.

Instead, the State contends that the testimony of firearms expert Albert Rathbone corroborated the theory suggested by the State at trial that Mr. Van Poyck's gun had misfired, thus causing the click that Turner allegedly heard. Answer Brief, at 35 n.23. In fact, Mr. Rathbone testified that if there had been a misfire, the shooter would have had to clear out the entire unfired bullet in order to fire again, T. 472, leaving such a bullet to be discovered later (which it was not). The other suggested mechanism for causing the click that Turner allegedly heard was an attempt to

fire a pistol that had an empty clip. However, Mr. Rathbone testified that with respect to each of the firearms that were involved, emptying the clip causes the slide to come back in a way that would be immediately obvious to anyone trying to shoot the gun. T. 464-66. Thus, Mr. Rathbone's testimony in fact exposed a significant inconsistency between Turner's testimony and the physical evidence.

The State does contend that Klein "thought along [sic] time about the cross examination of Turner." Answer Brief, at 36. In fact, Klein testified only that he had a long time to think about the Turner cross examination, not that he actually performed any work on it in advance. T. 1090. Klein also testified that he underestimated the importance of the Turner cross examination, the critical importance of which he now understands. T. 1125. While the State would like to now contend that Turner was "thoroughly impeached," it is clear that Klein's preparation and performance were substantially deficient. Considering Turner to be a potentially "sympathetic" witness does not justify Klein's failure to prepare for and address the key substantive issues in his testimony.

D. Counsel's Concession Of The Underlying Felonies Of Robbery And Escape Was Ineffective.

No further argument is necessary in regard to the other instances of counsel's ineffective assistance of counsel at the guilt phase, with the exception of Klein's concession of the underlying felonies of robbery and attempted escape. The State

would brush aside these concessions as "tak[ing] Klein's closing argument out of context," but counsel's concessions are altogether clear. As quoted in Mr. Van Poyck's initial brief, counsel plainly conceded that Mr. Van Poyck was guilty of the underlying felonies of robbery and attempted escape, and further conceded that Griffis was killed in the course of the felony. (Initial Brief, pp. 60-62).

These concessions were unreasonable based on the elements the State would have had to prove. The claimed "robbery" was simply a disarming, and the State failed to prove beyond a reasonable doubt that Mr. Van Poyck's intent was to permanently deprive Turner of the gun. In addition, the taking of Turner's gun was simply incidental and not causally connected to Griffis' death. Furthermore, O'Brien's lack of intent to escape nullifies the felony under the escape statute. Florida's escape statute specifically refers to escape of the prisoner actually confined in a penal institution, Fla. Stat. § 944.40, with intent being a specific element. For a person to be convicted of aiding or otherwise procuring a crime to be committed by another person, such other person must have committed or attempted to commit the crime. Turner v. State, 369 So. 2d 670, 671 (Fla. Dist. Ct. App. 1979). O'Brien's intent was central to Van Poyck's alleged commission of the felony of escape, yet that element was completely ignored. While Mr. Van Poyck arguably may have committed some crime in attempting to free O'Brien, the crime was neither robbery nor

escape and the State could not have proven felony/murder without a concession of these felonies.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. VAN POYCK'S CLAIM THAT THE JURY WEIGHED A VAGUE AND INVALID AGGRAVATOR CIRCUMSTANCE.

The State agrees, as it must, that this claim is properly before this Court in light of the Court's decision in Jackson v. State, 648 So. 2d 85 (Fla. 1994). Answer Brief, at 45. The State contends, however, that the trial court's refusal to consider the argument should nonetheless be upheld because of three things: the prosecutor did not misstate the law during his closing argument, persons of ordinary intelligence understand the meaning of "great risk of death to many," and this Court has previously found that sufficient evidence supports the aggravating factor.

The State first maintains that "the prosecutor's closing argument was a correct statement of what the jury could consider." Answer Brief, at 46. To the contrary, the prosecutor's closing argument included numerous facts that could not legally support the "great risk" factor, and hence only added to the confusion created by what was already a vague instruction. As discussed in Mr. Van Poyck's original brief, Mr. Van Poyck's actions did not place anyone in the nearby doctor's office in a great risk of death. No evidence established that Mr. Van Poyck shot his weapon in the direction of the office. See Williams v. State, 574 So. 2d 136, 138 (Fla. 1991) (other persons in bank where guard fatally wounded not in danger "immediate and present"); Hallman v. State, 560

So. 2d 223, 226 (Fla. 1990) (no risk to people in parking lot because defendant did not fire in their direction); Bolander v. State, 422 So. 2d 833, 839 (Fla. 1982). And in any event, their presence inside the building protected these people from any danger. See Hallman, 560 So. 2d at 226 (no risk to people inside bank); Bello v. State, 547 So. 2d 914, 917 (Fla. 1989) (people separated by several walls or not in direct line of gunfire do not support aggravator).

Although a ricochet bullet hit Officer Turner, no one else was in the immediate vicinity or in danger of sustaining a similar injury. Mr. Van Poyck specifically sought to remove the Browns (R. 2049, 2053-4, 2604-5), who had inadvertently stumbled onto the scene, and did not expose them to any, let alone a probable or "great," risk of death. Likewise, Mr. Van Poyck, or his co-defendant, warned Ruble and Zimmerman to leave the scene, thereby removing them from danger. R. 1568-70, 1599-1602. Although police discovered a bullet hole in the exterior wall of the office building, nothing indicates the source or timing of that damage.

In addition, contrary to the State's argument, the prosecutor impermissibly argued the facts regarding the chase following the homicide. This Court has consistently held that only conduct directly involved in the homicide for which the defendant is being sentenced can be considered in imposing the "great risk" aggravator. E.g., Elledge v. State, 346 So. 2d 998, 1004 (Fla. 1977). Thus, this Court has prohibited the consideration of pre-

or post-homicide facts. Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985) (shooting from car just prior to robbery homicide); Mines v. State, 390 So. 2d 332 (Fla. 1980) (violence during flight after homicide). The State cites Delap v. State, 447 So. 2d 1242, 1257 (Fla. 1983), as support for its argument that testimony regarding the chase was relevant. In Delap, however, the defendant's erratic driving, and consequent risk to others, occurred during his fatal struggle with the victim. In Suarez v. State, 481 So. 2d 1201, 1209 (Fla.), cert. denied, 476 U.S. 1178 (1985), the other case cited by the State, this Court specifically upheld the aggravator without reference to a high speed chase directly preceding the homicide.[5] Absent consideration of these impermissible factors, Mr. Van Poyck did not pose a "great risk of death to many persons."

Moreover, even if the State's argument did not exacerbate the effect of the erroneous instruction, it neither did nor could cure the effect of the instruction. It is well established that it is

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[5] This case is also distinguishable from the situation involved in Parker v. State, 641 So. 2d 369 (Fla. 1994), cert. denied, 115 S.Ct. 944 (1995), a case not cited by the State, where the Florida Supreme Court affirmed the imposition of this aggravator. In Parker, the defendant fired several random shots during his robbery of a crowded restaurant, fired his gun into a car full of people after leaving the restaurant, then shot and fatally wounded a pursuing civilian. Everyone considered placed in great risk of death was in the defendant's line of fire and all events occurred in essentially one location in rapid succession. Here, the chase commenced after the homicide and thus constitutes conduct the sentencer should not have considered.

the Court's instructions that are controlling, not the arguments of counsel. Juries are instructed to rely on the instructions as a definitive statement of the law, and it must be presumed that they do so, while treating the prosecutor's arguments as the mere statements of an advocate. Boyde v. California, 494 U.S. 370, 384 (1990) (arguments of counsel "generally carry less weight" with jury than instructions, which "are viewed as definitive and binding statements of the law"); Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978) ("arguments of counsel cannot substitute for instructions by the court."). A prosecutor cannot cure instruction error, and clearly did not do so here.

The State next claims that this Court has previously held that persons of ordinary intelligence and knowledge can understand the meaning of the "great risk" aggravator, citing State v. Dixon, 283 So. 2d 1, 9 (Fla. 1983). However, in Dixon this Court also held that people of ordinary intelligence could understand the terms heinous, atrocious, and cruel (HAC), and that part of the case was effectively overruled by Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992), where the U.S. Supreme Court held that the HAC aggravator factor, absent any limiting instructions, was unconstitutionally vague. This Court has since developed limiting constructions for the "great risk" aggravating factor, none of which were given in this case. See, e.g., Kampf v. State, 371 So. 2d 1007, 1009-10 (Fla. 1979); see also Jackson, 648 So. 2d at 89 (in holding CCP aggravator vague, noted it had previously given further definition to that phrase). Even trial courts aware of the "great risk"

factor's constructions have misapplied it, thus demonstrating the difficulty of applying it to different factual situations. See Defendant's Opening Brief at p. 71, n. 12) (citing numerous Florida Supreme Court cases reversing findings on this factor).

Just as most people could assume that all murders are "especially heinous," Maynard v. Cartwright, 486 U.S. 356, 364 (1988) (invalidating Oklahoma instruction as too vague), it is likely that most jurors will assume that a defendant qualifies for the "great risk" aggravator anytime any person other than the victim is near the scene of the homicide. See Jackson, 648 So. 2d at p. 9 (CCP aggravator unconstitutionally vague because "a jury may automatically characterize every premeditated murder as involving the CCP aggravator"). The Florida legislature did not intend such a result and this Court must hold the factor, absent any limiting instructions, unconstitutionally vague.

Finally, the State argues that the defendant ignores this Court's previous finding of sufficient evidence to support this factor, thereby making any error harmless. Van Poyck v. State, 546 So. 2d 1067, 1071 (Fla. 1990). This argument completely ignores the fact that the error being considered is a jury instruction error. That means that the issue on harmless error review is not whether there was sufficient evidence to support a finding of the great risk aggravating factor, but rather whether the State can prove, beyond a reasonable doubt, that the Eighth Amendment error had no effect on the jury's weighing of aggravation and mitigation. See Sullivan v. Louisiana, 124 L. Ed. 2d 182, 189 (1993) (reviewing

court must determine whether outcome before trial jury "was surely unattributable to the error."). Under Espinosa, this Court must presume that the jury in fact weighed the invalid great risk aggravating circumstance, id., 112 S. Ct. at 2928, and "may not assume" that the error "would have made no difference. . . ." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

In the instant case, there were mitigating circumstances in the record for the jury to weigh against the aggravation. Indeed, the State contends that all of the evidence produced at the Rule 3.850 hearing was merely "cumulative" of evidence introduced at penalty phase. Answer Brief, at 30; see also Initial Brief, at 94. Accordingly, it is likely that weighing of the invalid aggravating circumstance tipped the scales and resulted in the jury's death verdict. Moreover, in considering both whether the instruction was harmless error and whether Mr. Van Poyck was prejudiced by counsel's ineffectiveness at the penalty phase, this Court should consider the fact that counsel's deficient performance was compounded by the Espinosa/Jackson error in the instruction on the great risk aggravating factor. Bottoson v. State, No. 81.411, slip op. at 17 (Kogan, J., dissenting) (deficient performance compounded by Hitchcock error).

Moreover, this Court did not, on direct appeal, specifically discuss the "great risk" factor, nor did it inquire as to whether the error in refusing limiting instruction was harmless beyond a reasonable doubt. If it finds the instruction unconstitutionally vague this Court must apply the harmless error standard, meaning it

must reconsider the evidence as it did in Foster v. State, 654 So. 2d 112, 115 (Fla. 1995), cert. denied, 116 S. Ct. 31 (1995) (reconsidering evidence to support CCP aggravator because instruction was unconstitutional even though had previously found aggravator adequately supported). Moreover, this Court has reconsidered its prior findings on the "great risk" aggravator in cases where the harmless error analysis was not required, see King v. State, 514 So. 2d 354, 360 (Fla. 1987) (reversing decision in King v. State, 390 So. 2d 315, 320 (Fla. 1980)); Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986) (reversing finding in Lucas v. State, 376 So. 2d 1149, 1153 (Fla. 1979)), and should also do so here. Reconsideration will demonstrate that, in light of the precedents cited herein, the record does not support the aggravator. Thus, the trial court's error was not harmless and, accordingly, the error mandates resentencing.

CONCLUSION

Based on the entire record, Mr. Van Poyck respectfully requests that this Court vacate the judgment of the Court below and set aside Mr. Van Poyck's unconstitutional capital conviction and sentence of death. Alternatively, Mr. Van Poyck respectfully requests that this Court remand this matter for an evidentiary hearing and proper consideration of the claims for which a hearing was improperly denied.

Dated this 26th day of February, 1996.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by first class U.S. mail, postage prepaid, to Celia A. Terenzio, Esq., Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401-2299, and Allan Geesey, Esq., Office of the State Attorney, Post Office Box 2905, West Palm Beach, Florida 33402, this 26th day of February, 1996.

Attorney

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