IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Petitioner,

v.

HARRY K. SINGLETARY, JR., Secretary, Florida Department of Corrections,

Respondent,

Case No. 89870

PETITION FOR EXTRAORDINARY RELIEF AND FOR WRIT OF HABEAS CORPUS

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PETITION FOR EXTRAORDINARY RELIEF AND FOR WRIT OF HABEAS CORPUS

PROCEDURAL HISTORY

1. The circuit court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, entered the judgment and sentence at issue.

2. On July 14, 1987, a grand jury issued an indictment of Mr. Van Poyck and two co-defendants on one count of first degree murder, seven counts of attempted murder, one count of armed robbery, one count of possession of a firearm by a convicted felon, two counts of aggravated assault, and one count of aiding escape. The State later withdrew one of the attempted first degree murder charges and refiled it by information.

3. Mr. Van Poyck entered pleas of not guilty to the indictment and to the information.

4. Mr. Van Poyck's trial was severed from those of his co-defendants.

5. Mr. Van Poyck's trial was held from October 31, 1988, to November 15, 1988. The State nol prossed the possession of a firearm charge and one of the aggravated assault charges. The jury found Mr. Van Poyck guilty of first degree murder, one count of attempted first degree murder, six counts of attempted manslaughter, and the remaining charges.

6. A penalty phase proceeding was conducted on November 16 and 18, 1988, after which the jury recommended that Mr. Van Poyck be sentenced to death.

7. An allocution hearing was held on November 28, 1988. Thereafter, the court sentenced Mr. Van Poyck to death on December 21, 1988.

8. Mr. Van Poyck appealed his convictions and sentences. On July 5, 1990, the Florida Supreme Court held that the State had failed to prove that Mr. Van Poyck committed first degree premeditated murder and had failed to prove that Mr. Van Poyck was the triggerman, but affirmed the murder conviction on the basis of felony murder and affirmed the remaining convictions and sentences. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). Rehearing was denied on September 4, 1990.

9. Mr. Van Poyck filed a petition for writ of certiorari in the United States Supreme Court. Certiorari was denied on March 18, 1991. Van Poyck v. Florida, 111 S. Ct. 1339 (1991). Based on the date of the certiorari denial, a Rule 3.850 motion was not required to be filed until March 18, 1993.

10. On December 5, 1992, Mr. Van Poyck filed a Section 3.850 motion. An evidentiary hearing was conducted on some of the issues raised from February 23, 1994 to March 1, 1994. The circuit court denied the 3.850 motion in all respects, and denied rehearing as well. A timely notice of appeal to this court was subsequently filed and the appeal was docketed as Case No. 84,324. Oral argument was held on April 1, 1996 and the case is currently pending before this court.

11. Other than that set forth above, no other post-conviction proceedings are pending in this or any other court, nor have any been previously filed.

JURISDICTION

This court has jurisdiction to entertain and grant the habeas corpus relief requested pursuant to Sections 3(b)(1) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure. This court has not hesitated to exercise its inherent jurisdiction whenever claims are presented which undermine confidence and the fundamental fairness of Proceedings. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1986); Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985).

STATEMENT OF FACTS

The basic facts of this case are set forth in this Court's opinion on Mr. Van Poyck's direct appeal, Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). Moreover, the facts are more fully set forth in Mr. Van Poyck's appellate brief, and on the documents filed in the appeal of the lower court's denial of Mr. Van Poyck's

Rule 3.850 motion. The facts relevant to the issues raised herein are more fully set forth in the body of the individual arguments. The record reference made herein are to the record presently before the court in connection with the Rule 3.850 appeal. Finally, appendix cites are cited as ["App. ___"].

GROUNDS FOR HABEAS RELIEF

I. MR. VAN POYCK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL WHEN APPELLATE COUNSEL FAILED TO ADEQUATELY RAISE THE ISSUE OF THE TRIAL COURT'S ERROR IN REFUSING TO GRANT DEFENSE CHALLENGES FOR CAUSE REGARDING JURORS WHO INDICATED THAT THEY WOULD AUTOMATICALLY VOTE FOR DEATH, AND WHO WERE CONVINCED OF MR. VAN POYCK'S GUILT, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Mr. Van Poyck's first claim is based on the fundamental Sixth and Fourteenth Amendment premise that a defendant in a capital case is entitled to have that case heard by a jury with no preconceived notions of guilt or personal views that death is always the appropriate sentence for one convicted of first degree murder. Such jurors must be struck for cause. It is reversible constitutional error if they are not--even if the juror or jurors do not sit on the panel, so long as the defendant then uses a peremptory strike on that juror or jurors and then does not have one available to strike another objectionable juror. That circumstance occurred here. Unfortunately, for Mr. Van Poyck, his appellate counsel named the wrong jurors, then compounded the problem by failing to articulate a coherent argument on the issue, cite any relevant authority or engage in any analysis whatsoever.

A. The Trial Court Committed Reversible Error Denying For Cause Challenges To Impartial Jurors, Thereby Requiring Mr. Van Poyck To Use Peremptory Challenges And Then Denying Additional Requested Peremptory Challenges.

As a starting point, a review of the underlying legal error involved is in order. A juror must be struck for cause if so challenged and "there is basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial. . . ." Singer v. State, 109 So. 2d 7, 24 (Fla. 1959) (emphasis added). If a potential juror demonstrates a bias toward the death penalty, the juror must be excused even if he later states that he would follow the court's instructions and the law. See, e.g., Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995); Floyd v. State, 569 So. 2d 1225, 1230 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Hill v. State, 477 So. 2d 553, 555 (Fla. 1985). Similarly, a court must strike for cause a juror who does not presume the defendant innocent or who expects the defendant to produce evidence of his innocence, again even if he later says he will follow the Court's instructions. See, e.g., Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989); Huber v. State, 669 So. 2d 1079, 1081 (Fla. 4th DCA 1996); Perea v. State, 657 So. 2d 8, 9 (Fla. 3d DCA), rev. denied, 662 So. 2d 632 (Fla. 1995).

It is *per se* reversible error for the court to erroneously deny a for cause challenge if the defendant then uses a peremptory challenge to strike the juror, eventually exhausts his peremptory challenges and asks for, but is denied, an additional peremptory challenge. Trotter v. State, 576 So. 2d 691, 693 (Fla. 1991). The

defendant must identify a juror that he found objectionable who sat on the jury after the court denied his request for an additional peremptory challenge. The juror need only be somehow objectionable--the defendant need not show that the juror should have been struck for cause. Id.; Diaz v. State, 608 So. 2d 888, 890 (Fla. 3d DCA 1992), rev. denied, 613 So. 2d 9 (Fla. 1993). In the case at bar, two such objectionable jurors eventually sat on Mr. Van Poyck's jury: Goldie Moody and Mary Bradford. Both were challenged for cause, unsuccessfully, and both sat on the jury because Mr. Van Poyck was forced to expend his peremptory challenges on other jurors who should have been excused for cause.

1. The Trial Court Erroneously Denied For Cause Challenges To Pro-death Jurors And Jurors Who Did Not Presume Mr. Van Poyck To Be Innocent.

During jury selection in this matter, Mr. Van Poyck moved to strike for cause several potential jurors, which challenges the Court denied. Mr. Van Poyck was then forced to use peremptory challenges on those venirepersons who had demonstrated a bias for the death penalty and/or a presumption of Mr. Van Poyck's guilt. Specifically, Wilma Busto evidenced a clear bias for the death penalty and said she would require Mr. Van Poyck to submit evidence of his innocence:

THE COURT: Do you feel that you, personally, could sit on a jury and hear the evidence and hear my instructions on the law and follow them and personally make a recommendation of death?

MS. BUSTO: Yes.

THE COURT: Do you feel in the alternative that you could personally recommend life?

MS. BUSTO: No.

THE COURT: You think you would recommend death in all cases?

MS. BUSTO: If I considered that the person is a criminal then --

R. 724-25

* * *

THE COURT: Suppose an aggravated factor, that aggravated factor is presented, can you conceive of an aggravating factor of somebody having a prior record, being a criminal, would you conceive of a case where you could bring back a life recommendation even with that aggravating factor knowing the person is a criminal?

MS. BUSTO: No. If he's already a criminal, he's going to be a criminal. That's the way I think about it.

MR. KLEIN: Only appropriate sentence in a case where somebody like that who's already criminal would be death.

MS. BUSTO: Yeah.

R. 728-29

* * *

MR. KLEIN: Would you, if you knew that, let's put it this way, Miss Busto, would you make me present any evidence on behalf of the defendant to prove that --

MS. BUSTO: Yes.

MR. KLEIN: -- that he was innocent?

MS. BUSTO: Yes. I would like to see some proof, yes.

R. 730. This exchange is indistinguishable from the voir dire in Hill, 477 So. 2d at 555, where the Court found the trial court erred by not striking the juror for cause. See also Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989) (juror who said she would

require the defendant to present evidence to demonstrate he was not guilty should have been struck for cause). The Court here denied the defendant's challenge for cause, R. 733, forcing him to strike Ms. Busto from the panel with a peremptory challenge. R. 1344.

Linda Moker also demonstrated an unacceptable bias for the death penalty:

> MR. KLEIN: Suppose the case involves the shooting of a police officer or prison guard. Would you think that that kind of first degree murder if it was done in premeditation would automatically warrant the death penalty?
>
> S. MOKER: Yes, I believe so.
>
> MR. KLEIN: Are there any circumstances that you can think of under which you would not recommend the death penalty other than that kind of case involving a premeditated killing of a police officer or a prison guard?
>
> MS. MOKER: Premeditated, no, I don't think so.
>
> MR. KLEIN: Do you feel strongly about that? How strongly is that belief?
>
> MS. MOKER: Quite strong.
>
> * * *

R. 641-42. Mr. Van Poyck challenged Ms. Moker for cause, which the Court denied, R. 1131, forcing the defense to use another peremptory challenge. R. 1131-32.

Similarly, Charles Carter evidenced a pro-death penalty bias:

> MR. DUBINER: If you found someone guilty of premeditated first degree murder and let me even add something else, premeditated first degree murder of a police officer or prison guard would you think that the death penalty would be an appropriate penalty in that case?

MR. CARTER: I think it would be the appropriate punishment regardless of whether it was a civilian or officer.

MR. DUBINER: That's just because it's premeditated?

MR. CARTER: Exactly.

MR. DUBINER: In a premeditated first degree murder case, then you think that the appropriate punishment is the death penalty?

MR. CARTER: Yes.

MR. DUBINER: And you feel that way in basically all premeditated first degree murder cases. We're talking about premeditated, not other types.

MR. CARTER: Yes.

R. 842-43. Mr. Carter was challenged for cause, which the Court denied. R. 844. He was then struck using one of the defendant's peremptory challenges. R. 1207.

Ronald Nickerson demonstrated a pro-death penalty bias and his inability to follow the Court's instructions:

MR. KLEIN: I don't know whether I'm overstepping my bounds or not, but Mr. Nickerson, initially, at least, do you have any preconceptions about what kind of a case would deserve the death penalty?

MR. NICKERSON: Most any kind of a premeditated murder deserves the death penalty.

MR. KLEIN: You say most any kind. Do you feel so strongly about the death penalty that you think you would vote for it, for death in any kind of case where you found the Defendant guilty of premeditated murder?

MR. NICKERSON: I probably would.

* * *

R. 457.

THE COURT: Would you follow those instructions irregardless of your personal views? Because I am telling you, you have to follow them?

MR. NICKERSON: I, I probably would, but I did not know for sure. I would have to hear all of the evidence.

* * *

R. 458-59. The Court denied the defendant's for cause challenge to Mr. Nickerson, R. 460, and Mr. Van Poyck used yet another peremptory challenge to strike him. R. 1283.

Similarly, Derek Miller demonstrated an unacceptable pro-death penalty bias:

THE COURT: Okay, would you agree, sir, that it is a fair statement that capital punishment or the death penalty is not an appropriate sentence in all first degree murder cases, that it depends on the case?

MR. MILLER: Right. The thing, if a person is without a doubt proven guilty, you know, for a rape or murder, I believe, you know, death ought to be the sentence.

THE COURT: In every case no matter what?

MR. MILLER: Without a doubt, yes, if it's proved without a doubt.

* * *

R. 628-69.

MR. KLEIN: Mr. Miller, you told us before that you would consider yourself strongly in favor of the death penalty, capital punishment?

MR. MILLER: Yes, sir.

MR. KLEIN: This is a recently-held belief or have you felt that way before?

MR. MILLER: I felt that way a long time. Feel more strongly about it because of the prison

overcrowding, the taxpayers' money, you know, you know, going to house and feed those --

* * *

R. 632.

MR. KLEIN: Would you feel that same way if you were to know that the alternative to the death penalty that a person should spend the rest of his life in prison, you as a taxpayer would have to house and feed him for the rest of his natural life, would you, would you feel hesitant to give a life recommendation under those circumstances?

MR. MILLER: Yes.

* * *

R. 634. The Court denied the defendant's challenge for cause, R. 636, and a peremptory challenge was later used. R. 1206.

George Farmer showed both a pro-death penalty bias and a presumption that Mr. Van Poyck was guilty:

MR. KLEIN: Are there some mitigating circumstances under those circumstances that could convince you to bring back a recommendation of life?

MR. FARMER: As opposed to the death penalty?

MR. KLEIN: Yes.

MR. FARMER: Yes, I think I would so long as you did not plan to do it, then a murder ended up happening. I mean, you plan to escape and all this stuff and you have this big plan all made up. And if somebody gets killed, it's okay; if somebody did not get it, killed, it's okay to then, that would mean you really did not plan ahead to kill somebody.

MR. KLEIN: Okay. What about --

MR. FARMER: Make sense?

MR. KLEIN: Yeah, it does, actually.

What about if the case, how do you feel if the case involved the death of a prison guard, police officer, you feel the same way?

MR. FARMER: No, I guess I would have to change my mind on that.

MR. KLEIN: Okay. Why would that be?

MR. FARMER: Because these guys are trying to do a service to society and they are trying to be protected as well as they could be.

MR. KLEIN: Okay. Well, how would you feel, generally, about somebody if you knew they intentionally killed a police officer or a prison guard?

MR. FARMER: I would have to bring the death penalty.

* * *

R. 659-61.

MR. KLEIN: From, as a result of what you have heard or heard around you, on TV about this case, you feel that Mr. Van Poyck is guilty as he sits here?

MR. FARMER: You know, I do not know what evidence you're going to bring in both directions.

MR. KLEIN: From what you have read?

MR. FARMER: From what I've read, this man is accused of this crime.

MR. KLEIN: Well, from what you read and what you think he's probably guilty?

MR. FARMER: Okay, yeah, I think he is probably guilty.

* * *

R. 662-63. The Court denied the defendant's challenge for cause, R. 665, and Mr. Van Poyck was forced to use yet another peremptory challenge. R. 1354.

Finally, Frank Aldridge demonstrated a presumption of Mr. Van Poyck's guilt, which he "hoped" he could put aside. Yet he expected Mr. Van Poyck to present evidence of his innocence:

THE COURT: What you read in the paper, did it really stick with you, I mean or did you breeze through it?

MR. ALDRIDGE: I read it in the paper Monday morning because I was coming to jury duty, it stuck in my mind.

THE COURT: That's a recapitulation or where they go back?

MR. ALDRIDGE: Uh-huh.

THE COURT: Could you disregard what you've read in that article Monday and base the verdict solely on what you hear in the courtroom and the instructions of the law that I would give you?

MR. ALDRIDGE: I don't know.

THE COURT: Have you formed an opinion as to the person's guilt or innocence based on that article in the paper? Obviously, we want a jury to find a person guilty or not guilty based on what they hear in the courtroom, not on what you read in the paper. Could you do that?

MR. ALDRIDGE: I understand that, but possibly I have formed an opinion.

* * *

R. 696-97.

MR. KLEIN: Mr. Aldridge, as a result of what you have read, have you formed any opinion, at all, about this case or about Mr. Van Poyck?

MR. ALDRIDGE: Based on the facts presented in the newspaper, my opinion is that the defendant is guilty.

MR. KLEIN: Okay. Based upon what you read, would you have, would you, before you could bring back a verdict of not guilty would you ask for evidence, would you ask for us as defense to present evidence to persuade you otherwise?

MR. ALDRIDGE: Yes, certainly.

MR. KLEIN: Would you have a difficult time finding Mr. Van Poyck not guilty unless you heard some evidence from the defense to convince you that he was innocent in view of what you have heard?

MR. ALDRIDGE: Yes, in view of what I have read, yes.

THE COURT: Mr. Aldridge, let me ask you something. If I instructed you that under the law of our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed innocent and that presumption stays with him until the time the state presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow that instruction?

MR. ALDRIDGE: I would hope that I could.

* * *

R. 703-04.

THE COURT: Would you be able to follow that if you were a juror and not form an opinion or fix in your mind a verdict until you have heard all the evidence in the courtroom?

MR. ALDRIDGE: I would hope that I could.

* * *

THE COURT: Also, under our system the defendant in any criminal case is not required to testify nor present evidence. The reason for that is that the burden of proof in a criminal case is on the state, not on the defense. Would you agree with that?

MR. ALDRIDGE: Yes.

THE COURT: Would you be able to do that even if you read the papers?

MR. ALDRIDGE: I would hope that I could.

* * *

R. 705. The Court denied Mr. Van Poyck's motion to strike Mr. Aldridge for cause, R. 706, and Mr. Van Poyck used a peremptory challenge to prevent him from sitting. R. 1132.[1]

Finally, Mary Bradford was challenged for cause, which challenge was denied. R. 871, 873. As a result, this objectionable juror actually sat on Mr. Van Poyck's jury. Had Mr. Van Poyck received the additional peremptories he should have received, he would have struck this objectionable juror.

Although most of the jurors discussed above eventually said they would follow the Court's instructions, such responses did not render them unobjectionable; the equivocal nature of their responses as a whole raised a reasonable doubt as to their impartiality. In fact, defense counsel Michael Dubiner moved to strike the entire panel based on death qualification. R. 1368-69. This motion was denied. The trial court thus erred in not striking the jurors for cause.

2. The Trial Court Improperly Denied The Defendant An Additional Peremptory Challenge.

After exhausting his peremptory challenges, most of them on jurors who should have been struck for cause, Mr. Van Poyck moved

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[1] Mr. Aldridge's comments were similar to those in Huber v. State, 669 So. 2d 1079, 1081 (Fla. 4th DCA 1996), where a potential juror said he could not presume the defendant innocent but then recanted that statement. The Court held that the juror did not show the required impartiality: "[w]hen a juror admits that he 'probably' would be prejudiced but says he 'probably' could follow the Judge's instructions, it is error for the trial judge to refuse to dismiss him for cause." Id. at 1081; see also Jones v. State, 660 So. 2d 291, 292 (Fla. 2d DCA 1995). Here, Mr. Aldridge made virtually undistinguishable comments and should have also been struck for cause.

to strike Goldie Moody for cause, which the Court denied. R. 1360. Mr. Van Poyck's trial counsel then asked the Court for an additional peremptory challenge so he could strike Ms. Moody. R. 1363. The Court said that it would only grant an additional peremptory challenge if Mr. Van Poyck waived one of his other rights--the right to conduct voir dire on a juror the court wanted to disqualify "for cause."

MR. DUBINER: Do we get the additional peremptory?

THE COURT: I am going to make a bargain with you, that the Appellate Court won't like if it ever gets up there. I will go along with that, if that guy Chase gets up there, he goes for cause. That's the guy in the methadone program.

MR. KLEIN: We cannot agree until we examine him. Other than the fact he's on methadone --

THE COURT: That guy has not been in here ten minutes. He has been in and out of the revolving doors.

I am going to bump him if he gets up there. . . .

* * *

R. at 1364.

MR. KLEIN: We cannot live with the court's opinion. Mr. Chase, I think is his name, going in and out of the court, we will excuse him for cause at that point. We cannot live with that. We'd just as soon withdraw our motion for extra peremptories at this point rather than have Mr. Chase summarily removed for cause.

* * *

R. 1365.

A defendant has a right to conduct individual voir dire of a juror that is being struck for cause. O'Connell v. State, 480 So. 2d 1284, 1286-87 (Fla. 1985); see also Boggs v. State, 667 So. 2d

765, 768 (Fla. 1996); Hernandez v. State, 621 So. 2d 1353 (Fla. 1993); Green v. State, 575 So. 2d 796 (Fla. 4th DCA 1991). In O'Connell, the trial court struck a juror for cause and denied defense counsel's objection that he had had no opportunity to first examine the juror. The Supreme Court cited Florida Rule of Criminal Procedure 3.300(b), which allows both sides to examine prospective jurors orally. It then recognized that "there may be situations where the trial court is justified in curtailing voir dire, [and where] it has considerable discretion in determining the extent of counsel's examination of prospective jurors." 480 So. 2d at 1286 (internal quotations and citations omitted). However, the trial court's decision in O'Connell could not be viewed as an "exercise of control of reasonably repetitious and argumentative voir dire questioning." Id. (internal quotations and citations omitted). The court thus erred, requiring a new trial.

Similarly in Green, supra, the trial court had struck two jurors who expressed doubt about their ability to be impartial. The Court of Appeals held that the trial court erred in striking the jurors without permitting defense counsel to question them because its decision could not be categorized as the discretionary avoidance of repetitive or argumentative voir dire. 575 So. 2d at 797.

Here, the trial court refused to allow the defense to conduct voir dire of Mr. Chase, whom it said it intended to strike for cause, by conditioning the defendant's request for additional peremptory challenges on his waiver of his right to conduct voir

dire of another juror before he was struck. This was error: as in O'Connell and Green, the trial court's refusal to allow any questioning cannot be considered an exercise of the court's discretion to control repetitive or argumentative questioning. Mr. Van Poyck's trial counsel had not posed any questions to Mr. Chase and was told he would not be allowed to do so. Thus, by conditioning the requested additional peremptory challenges, which was Mr. Van Poyck's right, on his waiver of another right, the trial court effectively denied the additional peremptory challenge. As a result, at least two objectionable jurors, Goldie Moody and Mary Bradford,[2] actually sat on Mr. Van Poyck's jury. Thus, all the elements of reversible error were present in this case. The only remaining issue is how that reversible error was presented by appellate counsel.

B. Appellate Counsel's Performance Constituted Ineffective Assistance Of Counsel.

In order to prove ineffective assistance of appellate counsel, Mr. Van Poyck must demonstrate "(1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance; and (2) the deficiencies of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate

[2]Although Mr. Van Poyck did not specifically ask for an additional peremptory challenge to use on Ms. Bradford, the court's prior denial of his challenge to her for cause and the court's proposed "deal" would have made it a futile request.

result." Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994), cert. denied, 116 S. Ct. 146 (1995), quoting Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985). While appellate counsel is not required to raise every conceivable argument on appeal, he must present errors "which worked some detriment to the defendant or violated any of his substantive or procedural rights." Johnson, 463 So. 2d at 211.

1. Appellate Counsel's Performance Was Deficient.

Here, appellate counsel rendered ineffective assistance in a very specific, and egregious manner: he identified the wrong jurors and then compounded the error by failing to adequately argue the issue in any depth, with any discussion, analysis or citations to any relevant authority. As a result this Court on direct appeal rejected the argument, specifically because the jurors who were identified (i.e., the wrong jurors) subsequently had been struck "for personal reasons."

In the direct appeal, counsel's brief claimed that denials of "for cause" challenges to two jurors were erroneously denied. The argument regarding the improper denial of challenges for cause consisted of one sentence: "In two instances, Brouscette [sic] (R. 812-825) and Abefarmis (R. 741-750), denial of the defendant's motions to strike for cause was error." (Direct Appeal Brief, App. 1, p. 58). Appellate counsel provided no argument or discussion of this issue, no legal authority relevant to the issue and pointed to no objectionable juror who was permitted to sit on Mr. Van Poyck's jury.

Instead, appellate counsel referenced two jurors who, although unsuccessfully challenged for cause, were later excused by the Court for personal reasons. This erroneously implied that Mr. Van Poyck did not have to use any of his peremptory challenges on those jurors and they did not sit on his jury. They therefore did not support the argument.

Following the filing of the initial brief, appellate counsel's colleague filed a notice of intent to rely on additional authority, App. 2, which cited, among others, a few cases discussing the erroneous denial of for cause challenges and requests for additional peremptory challenges. This notice did not indicate which arguments any of the cited cases supported or any discussion of the cases and their applicability. This obviously did not cure the problem with the wrong identification--and did not cure the previous lack of argument either. See Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985) (descriptive listing of cases without application to facts of case was deficient).

Unlike the "inventive and highly technical" argument involved in Johnson, the argument in this case was obvious from the Record and straightforward. Indeed, its merit was recognized by the trial court even as it committed error--it recognized that its "bargain" was something the Appellate Court "won't like." R. 1364. The trial court's reticence was well-founded--the argument was based on recent, controlling case law, including Hill, 477 So. 2d 553 (Fla. 1985) and O'Connell, 480 So. 2d 1284 (Fla. 1985), both of which had been decided well before the direct appeal. See State v. Stacey,

482 So. 2d 1350, 1351 (Fla. 1985) (counsel was ineffective in failing to research and raise case law showing clear constitutional error based on existing authority).

Finally, the issue of impartial jury selection is one of paramount importance and cannot be ignored. In Wilson, 474 So. 2d at 1163-64, the Court found appellate counsel deficient for failing to raise the sufficiency of the evidence for the jury's finding of premeditation and cursorily arguing the appropriateness of the death penalty, both of which it found were fundamental issues. The issue of the jury's impartiality and errors in the jury selection phase cannot be considered any less important than the issues deficiently raised (or not raised at all) in Wilson.[3]

2. Appellate Counsel's Deficient Performance Prejudiced The Defendant.

Appellate counsel's deficient performance clearly prejudiced Mr. Van Poyck and undermines any confidence in the appellate process, thus requiring that the writ be granted. As a direct result of appellate counsel's deficient performance Mr. Van Poyck was deprived of the new trial and new penalty phase which he would have received on direct appeal had counsel's performance not been deficient. Van Poyck was denied a trial by a fair and impartial jury and absent appellate counsel's inexplicable failure to

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[3] Nor can Appellate counsel's failure to adequately and correctly present this claim be considered tactical: counsel attempted to raise the error, but did so with no analysis and, worse yet, named the wrong jurors. His failure to raise this issue adequately must be found to fall below the norm of acceptable representation.

properly brief this issue Mr. Van Poyck would have received the new trial to which he was entitled. Certainly this Court cannot countenance an important appellate issue, in a capital case, which consisted of one sentence, devoid of supporting case law, and which named the wrong jurors. The naming of the wrong jurors alone resulted, inevitably, in rejection of the argument by this Court:

> "[w]e note, that although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and that issue is moot." Van Poyck v. State, 564 S. 2d 1066, 1071 (Fla. 1990).

It is telling that the Court found that the two jurors named in the direct appeal should have been struck for cause, i.e. reversal was not required only because they were subsequently struck for "personal reasons." The voir dire responses of the jurors who should have been named are virtually indistinguishable in content from those two named jurors, or jurors this Court held should have been struck in the cases cited above; this leads to the inescapable conclusion that, had the correct jurors been named, and had any kind of coherent argument been made, this Court would have found error in the trial court's denial of any number of Mr. Van Poyck's "for cause" challenges and in denial of additional peremptory challenges. This undermines any confidence in the appellate process and mandates either a new trial (as to those jurors who expressed a belief in Mr. Van Poyck's guilt: Busto, Farmer and Aldridge) or sentencing hearing (as to those jurors who were biased towards the death penalty: Busto, Moker, Carter,

Nickerson, Miller and Farmer).[4] The trial court's error in refusing to grant a challenge for cause can never be harmless error. Hill, 477 So. 2d at 556.

II. MR. VAN POYCK'S SENTENCE OF DEATH IS ARBITRARY, CAPRICIOUS AND INHERENTLY UNRELIABLE, AND IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE, WHERE THE JURY RECOMMENDATION OF DEATH AS WELL AS THE ACTUAL SENTENCE OF DEATH ARE BASED ON ERRONEOUS "FACTUAL FINDINGS" WHICH ARE LEGALLY INSUFFICIENT AS A MATTER OF LAW AND WHICH THE FLORIDA SUPREME COURT ACQUITTED MR. VAN POYCK OF, CONTRARY TO THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The second ground on which relief is sought is, again, based on a fundamental premise: a defendant cannot be sentenced to death on the basis of a legal theory on which he is ultimately acquitted, or on factual findings which were later found to be unsupported by the evidence by a reviewing court. Any such sentence is inherently unreliable, violates basic principles of double jeopardy and collateral estoppel and is unconstitutional under the Fifth, Eighth and Fourteenth Amendments.

The facts necessary to the resolution of this claim are as follows. Mr. Van Poyck was prosecuted under two separate theories of first degree murder: premeditated murder and first degree felony murder. At trial, both during the guilt/innocence phase and at the penalty phase, the state argued that the murder was

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[4] See Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990); Huber, 669 So. 2d at 1083 (new trial ordered when jurors not struck who presumed defendant guilty). See, e.g., Hill, 477 So. 2d at 556 (new sentencing hearing where jurors not struck who evidenced unacceptable pro death penalty bias).

premeditated and that Van Poyck was the triggerman; Mr. Van Poyck contested these issues throughout trial.

The defense requested, and was granted, a special verdict form for the charge of first degree murder; the verdict form contained a blank for "premeditated murder," a blank for "felony murder" and a blank for "both." The trial Court instructed the jury to check the "premeditated murder" and "felony murder" blanks only if their votes were unanimous, but the "both" blank should be checked if any of them voted for both theories. The defense timely objected to the blank for "both" and also objected to the court's refusal to require a numerical breakdown of the votes (i.e., how many voted for "felony murder" and how many, if any, voted for "premeditated murder").

The jury returned a verdict of guilty on the first degree murder charge; the blank for "felony murder" was checked and the blank for "both" was checked. The blank for "premeditated murder," however, remained blank. Because of the verdict form's failure to have a numerical breakdown it is impossible to know how many jurors voted for felony murder alone and how many voted for "both"--yet clearly at least one and perhaps as many as eleven jurors bought into the State's theory of the case that Mr. Van Poyck was the triggerman.

During the penalty phase the State continued to argue that Van Poyck was the triggerman and that the murder was premeditated. At the conclusion of the penalty phase, the jury returned a recommendation of death on a vote of 11 to 1. The trial judge

followed this recommendation and sentenced Van Poyck to death. In his written sentencing order Judge Miller made the following "factual finding" to support the death sentence:

> The Court further finds that the state clearly presented competent and substantial evidence as to the crime of first degree felony murder and or first degree premeditated murder and in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis.

R-4199 (emphasis added).

On direct appeal Mr. Van Poyck argued that the evidence was legally insufficient to support a conviction of first degree premeditated murder, and was legally insufficient to support a finding that Van Poyck was the triggerman. This Court agreed with both arguments:

> With regard to point two, we agree with Van Poyck that the evidence is insufficient to establish first-degree premeditated murder . . . . Although the evidence was insufficient to establish first-degree premeditated murder, we find that the evidence was clearly sufficient to convict him of first-degree felony murder. While this finding does not affect Van Poyck's guilt, it is a factor that should be considered in determining the appropriate sentence . . . . Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime.

Van Poyck v. State, 564 So. 2d 1066, 1069-1070 (Fla. 1990) (emphasis in original).

Thus, on direct appeal, this Court, in essence, acquitted Mr. Van Poyck (based upon insufficiency of the evidence) of first degree premeditated murder and of being the triggerman. See Burks v. United States, 437 U.S. 1 (1978). Paradoxically, however, the jury recommendation of death, as well as Judge Miller's sentence of

death, was based, at least in part, upon a "finding" that Van Poyck was guilty of premeditated murder and that he was the triggerman. Consequently, Mr. Van Poyck's death sentence was based at least in part on findings that this Court found were not supported by the evidence! And because Mr. Van Poyck was not "acquitted" of premeditated murder until the direct appellate decision, this claim was not ripe until that point; accordingly, it is properly before this Court in this habeas corpus petition.

A. The Florida Supreme Court Acquitted Mr. Van Poyck Of Premeditated Murder And Of Being the Triggerman.

The findings by the Florida Supreme Court that the evidence was insufficient to prove premeditated murder and that the evidence was insufficient to prove that Mr. Van Poyck was the triggerman serve as a judgment of acquittal on these issues:

> [A] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal . . . Similarly, the State may not retry a defendant when a reviewing court reverses a conviction on the ground that the evidence was insufficient to sustain the adverse verdict. Burks v. United States, 437 U.S. 1, 16 . . . (1978). Delap v. Dugger, 890 F.2d 285, 307 (11th Cir. 1989).

B. The Sentencing Court Cannot Rely On Aggravators Upon Which Mr. Van Poyck Was Acquitted.

Given his acquittal on premeditated murder and of being the triggerman, Mr. Van Poyck's death sentence, which was based on such findings, cannot stand. That is because the doctrines of double jeopardy and collateral estoppel disallow a court from sentencing

a defendant based on aggravators upon which he was acquitted. Delap, 890 F.2d at 307-17, cert. denied, 496 U.S. 929 (1990).

In Delap, the defendant was prosecuted under the theories of premeditated murder and felony murder. At trial, Delap was acquitted of felony murder but was convicted of premeditated murder, and sentenced to death. The Florida Supreme Court reversed and remanded for a new trial because the transcripts were not complete. On retrial, the jury was not instructed on the felony murder issue at the guilt phase, but was allowed to consider as an aggravating factor that the crime occurred in the course of the commission or attempt to commit a felony. The jury convicted Delap of premeditated murder and sentenced him to death, perhaps based in part on the felony murder aggravator.

The issue before the Delap court was "whether Delap's acquittal of felony murder at the guilt phase of his first trial serves, through collateral estoppel principles, to bar a finding that the murder occurred during the commission of a felony so as to constitute an aggravating factor justifying imposition of the death penalty." Id. at 314. Analyzing both the double jeopardy clause and collateral estoppel principles, the Eleventh Circuit ruled that the acquittal of felony murder should be applied to the sentencing phase:

> Thus, where a defendant has been acquitted of felony murder because there was insufficient evidence that he committed the felony, and where double jeopardy principles bar any subsequent prosecution for that felony murder, the defendant cannot then be charged in a Florida death sentence proceeding with the aggravated circumstance that the killing occurred while the

> defendant was engaged in committing the same felony for which he was acquitted.

Id. at 316. Simply put, a person "should not be sentenced to death on the basis of a felony murder for which he has been acquitted." Id. at 317.

These principles apply directly to Mr. Van Poyck's sentence. Mr. Van Poyck was acquitted of premeditated murder and of being the triggerman, yet both the conviction (of premeditated murder) and the evidentiary fact (of being the triggerman) were used as aggravators in Mr. Van Poyck's sentencing phase. Because collateral estoppel applies to convictions as well as evidentiary facts, Johnson v. Estelle, 506 F.2d 347, 349 (5th Cir.), cert. denied, 422 U.S. 1024 (1975), the improper application of either the conviction or the evidentiary fact as an aggravator runs afoul of collateral estoppel principles; here both were improperly used as aggravators.

Because collateral estoppel principles should have barred the use of the conviction or the evidentiary fact against Mr. Van Poyck at the sentencing phase, the subsequent jury recommendation of death and actual sentence of death were tainted and the sentence of death was imposed illegally and unconstitutionally. At a minimum, the principles of double jeopardy and collateral estoppel must now bar the enforcement of Mr. Van Poyck's sentence. Delap is directly on point with respect to these issues and the death sentence must therefore be overturned.

C. The Eighth Amendment Bars Mr. Van Poyck's Death Sentence.

In addition to the double jeopardy and collateral estoppel violations, the jurors' reliance on improper aggravators improperly tainted the death sentence under Eighth Amendment principles. The Delap court reached the same conclusion:

> In addition to double jeopardy and collateral estoppel principles, Eighth Amendment values support our decision. This case is analogous to Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988). There, a 1982 Mississippi death sentence was based in part on the aggravating circumstance that Johnson had been convicted in 1963 of a felony in New York. Following the Mississippi sentence, Johnson collaterally attacked the prior conviction in New York and succeeded in having the conviction vacated. The Supreme Court held that the Mississippi death sentence had to be reexamined. Like the similar situation in Johnson, we conclude that Eighth Amendment values, i.e., the need for reliability and the need to reduce the risk that a death sentence will be imposed arbitrarily--are implicated when a death sentence is based in part on the commission of a felony of which the defendant has been acquitted.

Moreover, since this Court's decision in the direct appeal in this case, and since Delap, the U.S. Supreme Court has rendered a series of decisions which bear directly upon the issue of "jury taint" and how it impacts upon an ultimate sentence of death under Florida's particular capital sentencing procedure. See Stringer v. Black, 503 U.S. 222 (1992); Sochor v. Florida, 504 U.S. 527 (1992); and Espinosa v. Florida, 505 U.S. 1079 (1992). These cases show that, in Florida, the jury is "a sentencer" and that any constitutional error which infected the jury's consideration and weighing of the aggravating and mitigating circumstances taints their recommendation; this taint, in turn, carries over to and is necessarily incorporated into the trial judge's actual sentence of

death because by law the judge must give "great weight" to that jury recommendation.

In Mr. Van Poyck's case the error was especially egregious because not only did both erroneous findings constitute aggravators, but they necessarily precluded a finding as to two non-statutory mitigating circumstances. The fact that the murder was not premeditated, and the fact that Mr. Van Poyck was not the triggerman, are both recognized non-statutory mitigating circumstances. See, e.g., Reilly v. State, 601 So. 2d 222 (Fla. 1992); Cooper v. State, 581 So. 2d 49 (Fla. 1991); Harmon v. State, 527 So. 2d 182 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Down v. State, 572 So. 2d 895, 899 (Fla. 1990), cert. denied, 502 U.S. 829 (1991); Terry v. State, 668 So. 2d 954 (Fla. 1996). Thus, the sentencers' failure to recognize that the State had failed to prove either premeditated murder or that Van Poyck was the triggerman both placed a thumb on "death's side of the scale," Stringer, 503 U.S. at 232, and removed weight from life's side of the scale. Van Poyck's sentencing process was infected by both aggravation and mitigation error of constitutional magnitude, rendering his death sentence arbitrary, capricious and inherently unreliable.

III. MR. VAN POYCK WAS DEPRIVED OF FUNDAMENTAL FAIRNESS AND DUE PROCESS OF LAW, AND HAD IMPOSED UPON HIM CRUEL AND/OR UNUSUAL PUNISHMENT, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 2, 9 AND 17 OF THE FLORIDA CONSTITUTION, WHERE HE WAS CHARGED WITH AND CONVICTED OF CRIMINAL OFFENSES WHICH DID NOT EXIST AS A MATTER OF LAW.

In addition to being found guilty of first degree murder, Mr. Van Poyck was also convicted of "attempted first degree felony murder" and "attempted manslaughter." These convictions arose out of an allegation that Mr. Van Poyck pulled the trigger of a gun that did not fire, and shot at police vehicles during an ensuing chase. While these circumstances are the subject of other claims in Mr. Van Poyck's 3.850 petition currently pending before this Court, one thing is clear in any event: the conviction for "attempted felony murder" cannot stand following this Court's decision in State v. Gray, 654 So. 2d 552 (Fla. 1995).

This past year in Gray, supra the Court held that the criminal offense of attempted first degree felony murder is a "logical impossibility" and "without basis in law." Id. at 553. In so doing, the Court overturned more than a decade of case law. This complete and dramatic change in the law makes this claim appropriate for review at this time.[5] See, e.g., Witt v. State,

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[5] While Gray did not specifically state that its ruling was to be applied retroactively, it did hold that "This decision must be applied to all cases pending on direct review or not yet final," Id. at 554, thus implying that it would not be given retroactive application. However, in Woodley v. State, 673 So. 2d 127, 128 (Fla. 3d DCA 1996) the Court of Appeals ruled that fundamental fairness and due process principles dictate that Gray be applied retroactively. See also Hampton v. State, ___ So. 2d ___, 21 Fla. L. Weekly D2114 (Fla. 1st DCA 9/24/96) (Gray decision must be given retroactive application and may now be (continued...)

387 So. 2d 922 (Fla.) (Only a change in the law emanating from the U.S. Supreme Court or the Florida Supreme Court will justify collateral consideration of the merits of a claim which was not presented upon direct appeal or presented in prior post conviction proceeding), cert. denied, 449 U.S. 1067 (1980).

At trial the State prosecuted Van Poyck for all of the attempted murder charges on the theory of attempted first degree felony murder and/or attempted first degree premeditated murder. The trial court instructed the jury on both attempted first degree felony/murder and attempted premeditated murder. The jury returned general verdicts, (i.e., there was no indication as to whether its findings were based on attempted felony/murder theories or upon attempted premeditated murder theories), finding Mr. Van Poyck guilty of "attempted first degree murder" and guilty of six counts of "attempted manslaughter".[6]

In Gray, supra, the Court first noted that it had previously approved the legal fiction of a presumed existence of the specific

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[5](...continued)
raised in post-conviction proceedings); Brown v. State, ___ So. 2d ___, 21 Fla. L. Weekly D1318 (Fla. 3d DCA 6/5/96); see also St. Hilare v. State, 669 So. 2d 1135 (Fla. 3d DCA 1996); Campbell v. State, 671 So. 2d 876 (Fla. 4th DCA 1996) (fundamental error to instruct jury on non-existent crime of attempted first degree felony murder, and such error cannot be harmless).

[6] At least with respect to the verdicts of "attempted manslaughter" the verdicts must have been based on a "felony murder" theory since any form of "premeditation finding" would necessarily preclude, and be inconsistent with, a verdict of "manslaughter" (or any attempt). Manslaughter, (as well as its attempt), by definition precludes any finding of premeditation.

intent required to prove attempt in an attempted first degree felony/murder charge in Amlotte v. State, 456 So. 2d 448 (Fla. 1984). The Gray Court went on to note Justice Overton's dissent in Amlotte in which he had stated, in regard to the "legal fiction" of presumed intent, that,

> Further extension of the felony murder doctrine so as to make intent irrelevant for purposes of the attempt crime is illogical and without basis in law.

Gray, supra, at 553, quoting Amlotte, supra, at 451. The Gray Court then went on to state that it had now come to the realization that Justice Overton had been correct after all:

> We now believe that the application of the majority's holding in Amlotte has proven more troublesome than beneficial and that Justice Overton's view is the more logical and correct position . . . although receding from a decision is not something we undertake lightly, we find that twenty-twenty hindsight has shown difficulties with applying Amlotte that twenty-twenty foresight could not predict.

Gray, supra, at 553. Clearly, under Gray, the trial court erroneously instructed Mr. Van Poyck's jury on "attempted felony murder" and erroneously permitted it to consider a verdict form that made possible a conviction under such a theory. And it is no answer that the jury may have been properly instructed on some other theory of attempted first degree murder. That very argument was made and rejected in Harris v. State, 658 So. 2d 1226 (Fla. 4th DCA 1995). In Harris, a post-Gray decision, the Court of Appeals ruled that where the jury was instructed on alternate theories of attempted premeditated murder or attempted felony murder, a reversal for a retrial was required. The Court rejected the

State's argument that the instruction for attempted felony murder was "harmless":

> We reject the State's contention that the trial court's instruction on attempted felony murder, which the State requested in this case, was harmless, especially in light of the fact that the jury was told it could convict defendant on the basis of a nonexistent crime. See, State v. Sykes, 434 So. 2d 325 (Fla. 1983). We are unable to conclude beyond a reasonable doubt that the instruction did not contribute to the jury convicting defendant of attempted first-degree murder. Compare Knight v. State, 394 So. 2d 997 (Fla. 1981); see State v. DeGuilio, 491 So. 2d 1129 (Fla. 1986).

Harris, supra, at 1227. This holding is in keeping with the due process principle that when a verdict is based on either of two theories and one theory is later invalidated or rejected, then the conviction cannot stand. See, e.g., Stromberg v. California, 283 U.S. 359 (1931).

In Thompson v. State, 667 So. 2d 470 (Fla. DCA 1996), rev. granted, 675 So. 2d 931 (Fla. 5/29/96), the Court held that following a reversal based upon Gray, a retrial could be ordered where the evidence was such that, on retrial, a jury could find the defendant guilty of attempted premeditated murder. A simple reduction to a lesser included offense by the appellate court is not an option, however. Accord State v. Wilson, 680 So. 2d 411 (Fla. 1996) (The proper remedy following a reversal based upon Gray is to remand for a retrial on any of the other lesser offenses instructed on at the original trial; rejecting the state's argument that pursuant to Section 924.34, Florida Statutes, the appellate court may simply reduce the conviction to a lesser included offense). And, in Upshaw v. State, 665 So. 2d 303 (Fla. 2d DCA

1995), the Court held that a conviction for a nonexistent crime (under Gray) is fundamental reversible error, not required to be preserved for appeal:

> As observed in Brown v. State, 550 So. 2d 142 (Fla. 1st DCA 1989), a defendant's conviction for a nonexistent offense is reversible fundamental error that need not have been preserved for appeal. Since the nolo plea was entered on a material mistake of law, it was invalid, and no legal sentence could be imposed. Jolly v. State, 392 So. 2d 54 (Fla. 5th DCA 1981).

Upshaw, supra, at 303-304. Finally, in Woodley v. State, 673 So. 2d 127 (Fla. 3d DCA 1996), the Court held that Gray must be applied retroactively because "it is a fundamental matter of due process that the state may only punish one who has committed an offense." Id. at 127. It is worth noting that in Woodley the defendant's conviction for attempted first degree murder was already final when Gray was decided, and the Court granted the defendant her relief in a post-conviction proceeding.

Based upon Gray, and the appellate decisions it has since produced, it is obvious that Van Poyck's conviction on count three and counts six through eleven, were invalid and illegal ab initio; these convictions are fundamental reversible error, Upshaw, supra, and can be raised in this post-conviction proceeding because Gray must be applied retroactively, Woodley, supra. Mr. Van Poyck is entitled to a new trial on count three, Thompson, supra, and is entitled to an acquittal on the six (6) convictions for attempted manslaughter, Wilson, supra; Harris, supra.

CONCLUSION

For the reasons set forth above, Mr. Van Poyck respectfully requests that the petition for writ of habeas corpus be granted, and that he be granted the relief requested.

Dated this 6TH day of February, 1997.

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CERTIFICATE OF SERVICE

I, Gerald S. Bettman, do hereby certify that a true and correct copy of the foregoing petition, along with a copy of the supporting Appendix, has been furnished to Mr. Robert Butterworth, Attorney General, The Capital Building, Tallahassee, Florida 32399-1050, on this 6th day of February, 1997, by U.S. Mail.

Gerald S. Bettman

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK, Petitioner, v. HARRY K. SINGLETARY, JR., Secretary, Florida Department of Corrections, Respondent,	)	Case No. _____

PETITIONER'S SUPPORTING APPENDIX

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Appendix Index

1. Direct Appeal Brief, pages 58-60
2. Notice of Intent to Rely on Additional Authority

CT

IN THE

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK

Appellant,

v.

STATE OF FLORIDA

Appellee,

CASE NO: 73,662

_____/

INITIAL BRIEF OF APPELLANT

(On Appeal from the 15th Judicial Circuit
In and For Palm Beach County, Florida)

Brief Due
10/13/89

Brief Due
9/18/89

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life. The sentence clearly does not comply with Jackson v. State, Enmund, Tison, or Fleming v Kemp, 748 F.2d 1435 (11th Cir. 1984) which held that where a felony murder has been presented to the jury there must be a finding of malice murder. Accordingly, this sentence must be reversed and remanded.

G.

APPELLANT'S DEATH SENTENCE IS INVALID DUE TO TRIAL COURT'S IMPROPER FAVORITISM OF PRO-DEATH JURORS AND IMPROPER EXCLUSION OF PROSPECTIVE JUROR'S WHO OPPOSED THE DEATH PENALTY: ALL IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY.

On November 1, 1988, the trial court exhibited bias toward jurors who support the death penalty and against those who opposed the death penalty. (R679-905). In the cases of jurors with strong feelings favoring the death penalty where premeditation was proved, (Alridge (R695-705), Carter (R837-844), Abefarmis (R741-750)), the judge properly allowed rehabilitation though the State's questioning regarding the juror's ability to follow instructions. Even in cases where jurors had specific knowledge of the Appellant's case and preconceived ideas of Van Poyck's role, the court refused to grant defense motions and allowed the State to rehabilitate. In two instances, Bruscette (R812-825) and Abefarmis (R741-750), denial of the Defendant's motions to strike for cause was error.

More importantly, the court erred in denying defense the chance to rehabilitate prospective juror Beatrice Bouie, who had expressed a position strongly opposed to the death penalty

(R674). Ms. Bouie indicated she would be fair and impartial. (R680). She would try to follow the law in the case. (R681). The court granted the State's motion to strike. (R681).

The court's demonstrated clear preference for death oriented jurors led to a defense motion to strike the jury panel. This was denied. (R805). The trial court thus denied Van Poyck his Sixth and Fourteenth Amendment rights to a fair and impartial jury.

In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985), the U.S. Supreme Court reaffirmed its prior decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980) as enunciating the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment:

> "That standard is whether the juror's views would substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" at 852..

The colloquy between the trial court, the prosecutor and Mrs. Bouie was at best ambiguous and certainly did not rise to the standard enunciated above. At first, Ms. Bouie indicated that she had not thought about the death penalty and had no strong feelings. (R673). The State elicited another response when she agreed that she was "firmly against the death penalty." (R677). The court lead her into agreeing that she could not "perform her civic duty" (to recommend the death penalty). (R679). However, in rehabilitation she said she would be fair and impartial (R680), and "despite her feelings about the death

penalty she could follow the law." (R681).

Justice Rehinquist instructed that it was not so much the juror's feelings regarding capital punishment, but rather the ability to put those feelings aside:

> "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death sentence is unjust may never the less serve as juror in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in defense to the rule of law." Lockhart v. McGree, 476 U.S. 162, 106 S.Ct. 1758 (1986).

Under the rule of Adams v. Texas, Ms. Bouie should not have been excluded. Her exclusion was merely due to her views regarding capital punishment and not for her inability to follow the law or abide by the court's instructions.

The trial court was inconsistent in applying the Wainwright / Adams, rule in allowing pro-death penalty jurors rehabilitation, but in denying Ms. Bouie to rehabilitate her anti-death penalty stand by agreeing to honor her oath and follow the courts instructions. Accordingly Appellant's sentence of death should be reversed.

H.

FLORIDA'S DEATH PENALTY STATUTE, SECTION 921.141, IS UNCONSTITUTIONAL AS APPLIED; JURY IS DE FACTO SENTENCER AND THEIR RECOMMENDATION IS UNREVIEWABLE.

The Florida death penalty statutory scheme, as currently applied, is unconstitutional. While F.S. 921.141 was held to be constitutional on it's face in Proffit v. Florida, 428 U.S. 242,

IN THE

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK

Appellant,

v.

CASE NO: 73,662

STATE OF FLORIDA,

Appellee.

_____/

NOTICE OF INTENT TO RELY ON ADDITIONAL AUTHORITY

COMES NOW, Appellant, WILLIAM VAN POYCK, by and through the undersigned counsel and files this Notice of Intent to Rely on Additional Authority to wit:

Peterson v. State, 542 So.2d 417 (Fla. App. 4 Dist. 1989)

Singer v. State, Fla., 109 So.2d 7

Hill v. State, 477 So.2d 553 (Fla. 1985)

Longshore v. Fronrath Chevrolet, Inc. 527 So.2d 922 (Fla. App. 4 Dist. 1988)

Price v. Florida, 538 So.2d 486 (Fla. App. 3 Dist. 1989)

Hamilton v. State, 547 So.2d 630 (Fla. 1989)

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, Don Rogers, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida this 6 day of March, 1990.

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