FILED
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MAR 19 1997
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,	)	
	)	
Petitioner	)	
VS.	)	
	)	Case No.89,870
	)	
HARRY K. SINGLETARY, JR.	)	
	)	
Respondent.	)	

STATE'S RESPONSE TO PETITION FOR
EXTRAORDINARY RELIEF AND FOR WRIT OF HABEAS CORPUS

A. INTRODUCTION

Respondent accepts petitioner's Procedural History and statement regarding Jurisdiction. With regards to the statement of facts respondent would rely on the facts as outlined in this Court's opinion on direct appeal.

B. REASONS FOR DISMISSING THE PETITION

Van Poyck's petition for extraordinary relief and for habeas corpus must de dismissed due to its untimeliness. Fla. R. Crim P. 3.851(b) (2) effective January 1, 1994, requires writs to be filed simultaneously with the initial brief on appeal of a 3.850 motion. Given the fact that this rule was in effect long before the notice of appeal was filed in the pending postconviction appeal, Van Poyck was on notice regarding this requirement. See Rosers v. State, 21 Fla. L. Weekly S503 (Fla. November 27, 1996) (rejecting state's

time-bar argument regarding habeas petition only because defendant's brief in 3.850 appeal **was** filed before enactment of the new rule).

C. REASONS FOR DENYING THE PETITION

ISSUE I

PETITIONER'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS PROCEDURALLY BARRED AND IN THE ALTERNATIVE IS WITHOUT MERIT

Petitioner claims that the trial court committed reversible error by denying cause challenges on the following people: Ms. Butos, Ms. Moker, Mr. Carter, Mr. Nickerson, Mr. Miller, Mr. Framer, Mr. Aldridge. As a result, the jury panel contained two objectionable jurors: Goldie Moody and Mary Bradford. It is further alleged that appellate counsel was ineffective for failing to properly raise this issue on appeal. This claim should be denied based on irrevocable procedural default or in the alternative on the merits.

Petitioner has conceded that this issue was raised and rejected on appeal. Van Poyck, 564 So. 2d 1066, 1071 (Fla. 1990). Furthermore the factual basis for this claim was raised in petitioner's 3.850 appeal as issues IF, IG, and VIII. See Van Poyck v. State, Case No. 84,324. Given that this issue has previously been raised, review must be denied. Habeas corpus is

not to be used to relitigate an issue already raised on direct appeal. Bolender v. State, 564 So. 2d 1057 (Fla. 1990). Nor is habeas corpus to be used to relitigate issues raised in a rule 3.850 motion. Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994). Finally couching this claim in terms of ineffectiveness of appellate counsel will not circumvent the rule precluding review of issues which could have or were raised on direct appeal. Groover v. Sinsletary, 656 So. 2d 424 (Fla. 1995).

As for the merits, it is axiomatic that appellate counsel cannot be deemed ineffective for failing to pursue an issue that was not preserved at trial. Groover supra; Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). To preserve this issue, a defendant must exhaust all his peremptory challenges, request additional strikes, and indicate whom he would strike if his request for additional challenges was granted. If his request is denied, a defendant must then demonstrate that the panel contained an objectionable juror. Pentecost v. State, 545 so. 2d 861, 863 n.1 (Fla. 1989), and Trotter v. State, 576 So. 2d 691, 693 n. 5 (Fla. 1990). In the instant case, trial counsel did not satisfy these requirements. After the court denied counsel's cause challenge on Mary Bradford, counsel did not use one of the many peremptory strikes he had available to remove Bradford from the venire. (R 1359, 1363).

Given petitioner's failure to rectify the alleged error by removing Bradford peremptorily precludes review. Pentecost, 545 So. 2d at 863 n. 1 (Fla. 1989) (finding that to establish that an objectionable juror existed, defendant must use existing peremptory strike on juror who was unsuccessfully challenged for cause). Secondly trial counsel never requested an additional peremptory challenge to strike Bradford once he had exhausted the remainder of his challenges, His failure to do so especially after the trial court invited counsel to identify any other objectionable jurors, precludes review. Trotter 576 So. 2d at 693 n. 5.

A similar procedural deficiency exists regarding petitioner's challenge to juror Goldie Moody. Petitioner possessed several peremptory strikes at the time she was questioned.[1] Counsel failed to use one of those strikes to remove Ms. Moody. (R 1130, 1254). Review should be precluded. Pentecost supra. Additionally, petitioner passed up another chance to remove Moody when the trial court offered to strike her and Mr. Chase.[2] Counsel declined stating that he wanted an opportunity to talk with Chase. (R 1363-

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[1]Moody was not challenged for cause at the time she was questioned. It was not until he exhausted his peremptory challenges did trial counsel first attempt to remove Ms. Moody for cause.

[2]The court had earlier expressed concern because Mr. Chase had repeatedly been late reporting back to the jury room. (R 1038). Eventually Mr. Chase approached the court and asked to be excused due to his drug use, He was currently in a methadone maintenance program which caused him to continually nod out. (R 1209-1210). Mr. Chase's fitness for jury duty never became an issue since a jury was seated before his turn ever arose to be considered.

1365). Given appellant's acquiescence to Moody's presence on the jury, this issue is not preserved for appeal. Cf. Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994) (finding that after passing up opportunity to rehabilitate juror and then affirmatively acquiescing to judge's decision to excuse juror waives issue for review).

Irrespective of the fatal procedural deficiencies attached to this issue, petitioner would also have been unsuccessful on the merits. A juror is competent as long as he can lay aside any prejudices or biases he may have and render a verdict solely on the evidence. Lusk v. State, 446 So. 2d 1038, 1041 (Fla.), cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984). Deciding if a juror should be excused for cause should be based on what is observed and heard. Since the judge must evaluate the credibility of the responses, the court possesses discretion in its decision. Pentecost v. State, 545 So. 2d at 861 (Fla. 1989). To the extent that a juror's responses are ambiguous, it is well within the trial court's discretion to deny petitioner's cause challenge. See Watson v. State, 651 So. 2d 1159, 1162 (Fla. 1994). A challenge for cause is not appropriate simply because a person has a strong opinion about any particular subject. See Fitzpatrick v. State, 437 So. 2d 1072, 1075 (Fla. 1983) (ruling that strong feelings in favor of the death penalty do not render a

prospective juror incompetent in capital cases). As long as jurors indicate that they are able **to abide by the court's instructions,** irrespective of personal feelings, a cause challenge need not be granted. Penn v. State, 574 So. 2d 1079 (Fla. 1991). If there is record support for the judge's **conclusions** regarding juror competency, reversal is not warranted. Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995). With these principles in mind, the state **submits** that appellant has not established error.

Even if petitioner could demonstrate that the trial court erred in forcing him to use his peremptory strikes on jurors who should have been stricken for cause, petitioner would have to establish that his constitutional right to an impartial jury was violated. "Wasteful use" of peremptory challenges is of no moment. See Jefferson v. State, 595 SO. 2d 38 (Fla. 1992) (right to impartial jury is constitutionally protected rather than right to use of peremptory challenges). Consequently in order to prevail, petitioner must demonstrate that Moody and Bradford were incompetent to sit **as** jurors.

Ms. Moody never expressed any difficulty in being able to render a fair and impartial verdict. She would not prejudge the case, rather she would decide the case based on the evidence presented. (R 509). She consistently and unequivocally stated that she would follow the law and would not automatically recommend the

death penalty. (R 511-514). Given Ms. Moody's reasonable and fair responses, trial counsel appropriately did not challenge Moody for cause at the time of her responses. Her competency as a juror is also evidenced by counsel's failure to exercise a peremptory strike on her when he had the opportunity to do so. Petitioner cannot establish the requisite prejudice to prevail on appeal.

Equally unavailing is petitioner's claim against Mary Bradford's fitness as a juror. Ms. Bradford stated that she had no preconceived notion of guilt. The case should be tried in the courtroom and not in the media. (R 866). Her opinion about the appropriateness of the death penalty depended on the facts of the case. (R 87). Although she favors the death penalty she could not automatically recommend death. (R 871). The appropriateness of her responses is further evidenced by trial counsel's failure to exercise a peremptory challenge when the opportunity to do so existed and by counsel's failure to request an additional peremptory when required to do so. See Pentecost, supra. Given petitioner's failure to demonstrate that his constitutional right to an impartial jury was violated, this issue if raised on appeal would not have warranted relief. Jefferson supra. Appellate counsel's performance was not deficient. See Chandler v. State, 634 So. 2d 1066, 1068 (Fla. 1993) (rejecting claim of ineffective assistance of appellate counsel since counsel is not expected to

raise nonmeritorious claims).

As argued above, petitioner's inability to establish prejudice is dispositive of this issue. However for the sake of completeness respondent will address petitioner's contentions regarding the trial court's denial of remainder of his cause challenges. Petitioner claims that Wilma Busto should have been stricken because she was in favor of the death penalty and she would like to see the defendant present evidence. Contrary to petitioner's assertions otherwise defense counsel did not challenge Ms. Busto for cause based on any of her responses. She was challenged for cause because the trial court said 'This is a case of first degree murder" rather than saying this is case where there is an allegation of first degree murder. The court's presumption of guilt tainted Ms. Buto's ability to br impartial. (R 733). The fact that the argument presented in this petition was not the argument raised at trial, review on direct appeal would have been precluded. See Occhicone v. State, 570 so. 2d 902, 905 (Fla. 1990) (finding that failure to raise at trial the specific argument advanced on appeal precludes review). Consequently Van Poyck's appellate counsel did not provide deficient performance. See Fersuson.

Also fatal to petitioner's claim is the fact that Busto's responses did not demonstrate that she could not be fair and

impartial. When told that the law was different from her personal beliefs, she unequivocally and clearly stated that she would follow the law as instructed, she would consider all that was presented and she could make a life recommendation. (R 725, 726, 727, 730, 732). The trial court's denial of a cause challenge for Ms. Busto was correct. Lusk; Penn.

Petitioner claims that prospective jurors Linda Moker, Charles Carter, Ronald Nickerson, Derek Miller and George Farmer were all objectionable and should have been removed for cause based on their 'bias for the death penalty." All five prospective jurors unequivocally stated that they would base their decisions on the evidence presented in court, including both mitigating and aggravating evidence and would not automatically recommend life or death. They all stated that they would follow the law irrespective of personal feelings. All five stated that they would have no problem making a life recommendation. (R 455-459, 628, 631-632, 638-639, 635, 653-657, 661, 664, 667-670). The trial court properly denied cause challenges for all four people. See Johnson. her ability to set aside any biases or preconceived opinions, the trial court properly denied a cause challenge. See Fitzgerald; Johnson.

Lastly petitioner challenges the trial court's denial of a cause challenge to Frank Aldridge. When asked if he had formed an

opinion regarding petitioner's guilt because of what he had read in the paper, Aldridge stated that the defendant was probably guilty. After receiving an instruction from the court regarding the presumption of innocence, Aldridge stated that petitioner was not guilty and he would hope that he would follow the law. (R 704). Petitioner cannot demonstrate that the trial court abused its discretion in denying the cause challenge. Watson.

In conclusion, petitioner cannot establish that defense counsel was ineffective for failing to present this argument on appeal. Review would have been precluded given that the claim was not preserved. Ferauson. Secondly petitioner cannot establish that his constitutional right to an impartial jury was violated. Jefferson ; Johnson; Chandler.

ISSUE II

PETITIONER HAS FAILED TO ESTABLISH THAT HE IS ENTITLED TO FURTHER REVIEW OF HIS DEATH SENTENCE GIVEN HIS INABILITY TO UNDERMINE THIS COURT'S DETERMINATION THAT HE WAS THE INSTIGATOR AND MAIN PARTICIPANT IN THIS CRIME IRRESPECTIVE OF THE FACT THAT HE WAS NOT THE TRIGGERMAN

On direct appeal, petitioner successfully challenged the sufficiency of the evidence to sustain his conviction for premeditated murder, Van Poyck, 564 So. 2 at 1069.[3] Relying on

[3] On appeal petitioner argued that the special jury verdict indicated that the jury had acquitted him of premeditated murder. (See initial brief at pp 30). Now on collateral review petitioner argues the opposite position that the jury based their recommendation on a finding of

Delap v. Dugser, 890 F. 2d 285 (11th Cir. 1989) petitioner claims that his acquittal for premeditated murder renders his sentence of death unreliable and unconstitutional. Also on direct appeal, petitioner unsuccessfully challenged the jury's and trial court's findings that irrespective of whether he was the actual shooter, his participation in the crime justified imposition of the death penalty. Van Povck 564 So. 2d at 1070. In an attempt to relitigate these findings on collateral review, petitioner relies on 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). For the following reasons this issue is procedurally barred and without merit.

As noted above, petitioner has already presented these issues on direct appeal. Van Povck, 564 So. 2d at 1069-1070. Since habeas corpus is not to be used to relitigate issues this petition must be dismissed. Bolener v. State, 564 So, 2d 1057 (Fla. 1990). This irrevocable procedural bar is not overcome by reliance on the above cited United States Supreme Court opinions. See Sims v. Singletary, 622 So. 2d 980 (Fla. 1993)(rejecting petitioner's claim that recent United States Supreme Court opinions overcome procedural bar and warrant revisit of death sentence).

In any event petitioner cannot establish that his death

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premeditation. (See petition at pp 26).

sentence is now unreliable. Van Poyck's reliance on Delap is of no moment. The issue in Delap was whether the state would be barred by double jeopardy from relitigating an issue already decided against the state. Delap, 890 F. 2d at 318. After this Court determined that Delap could only be convicted of premeditated murder and not felony murder, the state would be precluded from relying on the aggravating factor of "the crime was committed during the course of a felony" on retrial.[4] Id 313-314. The 11th Circuit concluded that the felony murder aggravator presented the same issue, in the collateral estoppel sense, as did the crime of felony murder. Id at 316.

In the instant case, Van Poyck was convicted of first degree felony murder. This Court upheld the existence of the four aggravating factors: (1) that the crime was committed while petitioner was under a sentence of imprisonment; (2) the crime was committed for purposes of effecting an escape; (3) petitioner knowingly created a great risk of death to many persons; (4) petitioner was previously convicted of another felony involving violence to some person. Van Poyck, 564 So. 2d at 1068. The validity of these factors do not depend on whether Van Poyck was the triggerman. Consequently Delap does not apply. What remains unassailed is Van Poyck's participation in the murder of Officer

[4]Fla. Stat. 921.141 (5)(d).

Griffis:

> 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. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional."

Van Poyck, 564 So. 2d at 1070-1071. Petitioner is not entitled to relief.

ISSUE III

> VAN POYCK'S CONVICTIONS FOR CRIMES THAT WERE IN EXISTENCE AT THE TIME OF TRIAL SHOULD NOT BE OVERTURNED BASED ON A CHANGE IN THE LAW THAT OCCURRED NINE YEARS LATER.

Along with his capital conviction petitioner was convicted of attempted first degree murder and six counts of attempted manslaughter. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). In 1995 this Court issued its opinion in State v. Grav, 654 So. 2d 552 (Fla. 1995) finding that the crime of attempted felony murder should no longer exist. Relying principally on Woodley v. State, 673 So. 2d 127 (Fla. 3d DCA 1996) petitioner claims that he is entitled to the benefit of Gray. He requests this Court to enter judgements of acquittal for the six counts of attempted manslaughter and remand for retrial for the one count of attempted first degree murder. For the following procedural and substantive

reasons, petitioner's claim must be denied.

This Court has determined that Gray will be applied to cases which are pending on direct review or not yet final at the time that Gray was issued. State v. Grinage, 656 So. 2d 457, 458 (Fla. 1995). Petitioner's direct appeal has been final for the past seven years. Van Povck, supra. In an attempt to circumvent this express procedural rule, petitioner claims that to uphold a conviction for a nonexistent crime violates fundamental fairness and due process. Woodley supra. However the continued validity of Woodlev is very uncertain given this Court's pronouncement in State v. Wilson, 679 So. 2d 411 (Fla. 1996). As this Court explained due process is not violated when one is convicted of a crime that was valid at the time of trial. The fact that the crime is later repealed is of no constitutional significance. This Court distinguished that from a conviction for a crime that never existed. Attempted felony murder was a valid offense for eleven years prior to Grav. pi lson, 679 So. 2d at 412.[5] Van Poyck was convicted of crimes that were in existence at the time of his trial. Van Poyck, 564 So. 2d at 1068. Petitioner is not entitled to retroactive application of Gray. See Freeman v. State, 679 So.

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[5]The Third District Court of appeal acknowledged that its opinion in Woodley v. State, 673 So. 2d 127 (Fla. 3rd DCA 1996) may not survive given this Court's treatment of the Gray issue in State v. Wilson, 679 So. 2d 411 (Fla. 1996); Miller v. State, 678 So. 2d 465,466 (Fla. 3rd DCA 1996). See also Freeman v. State, 679 So. 2d 364 (Fla. 4th DCA 1996); Motes v. State, 2 Fla. L. Weekly D2644 (Fla. 5th DCA December 15, 1996).

2d 364 (Fla. 4th DCA 1996)(refusing to apply Gray in postconviction proceedings); See Mathis v. State, 680 SO. 2d 633 (Fla. 4th DCA 1996); Surgim v. State, 680 So. 2d 634 (Fla. 4th DCA 1996);(same).

Even if Gray should be applied retroactively, petitioner would not be entitled to the relief requested. Petitioner claims that he should be acquitted of the six counts of attempted manslaughter and should be retried for the attempted murder of Officer Turner. Generally speaking the remedy for a Gray violation is remand for retrial on the any lesser included offense which was instructed on at trial. See Wilson supra; State v. Ellis, 22 Fla. L. Weekly S30 (Fla. December 19, 1996) State v. Jones, 22 Fla. L. Weekly S21 (Fla. December 19, 1996) Harris v. State, 658 So. 2d 1226 (Fla. 4th DCA 1995); Thompson v. State, 667 So. 2d 470 (Fla. 3rd DCA 1996). However in the instant case a retrial on either the six convictions for attempted manslaughter or the one count of attempted first degree murder is not necessary.

With regards to the six counts of attempted manslaughter, petitioner's requested relief of acquittal is not warranted because Van Poyck was not convicted of the contested offense of attempted felony murder but of a valid lesser included offense, i.e.,

attempted manslaughter.[6] Van Poyck, 564 So. at 1069. Consequently even assuming that it was erroneous to instruct the jury on attempted felony murder, petitioner cannot establish prejudice. See Cobb v. State, 213 So. 2d 492, 494 (Fla. 1968)(finding no prejudice for erroneous instruction on felony murder where defendant is convicted of lesser included offense of third degree murder); See also Espinosa v. State, 496 so. 2d 236, 237 (Fla. 3rd DCA 1986) (finding harmless erroneous instruction on element of first degree murder where defendant convicted of crime that did not include a finding of that element). Petitioner offers no support for this illogical request. Relief must be denied.

Petitioner's request that he be retried for attempted first degree murder of Officer Turner is also not warranted. There is no question that the factual basis for the charge of attempted murder of Officer Turner was that of premeditation. (1) Turner testified that Van Poyck held a gun to his head, threatened to kill him and then pulled the trigger. (R 1703-1705). (2) At trial petitioner admitted that he aimed a gun at Officer Turner's head and repeatedly threatened to kill him. What he denies is that he

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[6]The evidence to sustain these convictions was overwhelming. In addition to the testimony of the six officers petitioner shot at, Van Poyck admitted at trial that he shot at the pursuing officers. (R 2611-2612). Van Poyck conceded in his initial brief that his attempted manslaughter convictions arose out of his leaning out a car window and shooting at the police cars. (Initial brief at pp 35). This Court's opinion includes those factual findings. Van Poyck v. State, 564 So. 2d 1066, 1068 (Fla. 1990).

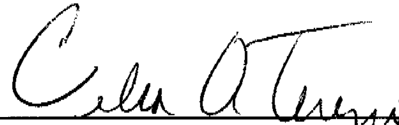
pulled the trigger. (R 2579, 2590-2602). (3) In his initial brief on direct appeal, petitioner concedes that the basis for the attempted murder charge is solely the testimony of Officer Turner. (4) Finally this Court found sufficient evidence to sustain the conviction based on Turner's testimony that Van Poyck aimed a gun at his head threatened to kill him and then pulled the trigger. Van Poyck, 564 So. 2d at 1068-1069. Given the absolute certainty that the conviction was based on premeditation remand for retrial is simply not necessary. See Miller, supra (finding no need to remand **for consideration of whether record** and factual basis exist for case of attempted first degree murder after charge of attempted felony murder was vacated); Glinton v. State, 22 Fla. L. Weekly D64 (Fla. 3rd DCA December 26, 1996) (same).

In summary, petitioner's request for acquittal of his six counts of attempted manslaughter and remand for retrial for his conviction of attempted first degree murder must be denied. Petitioner is not entitled to retroactive application of Gray. Furthermore application of Gray would not entitle petitioner to any relief since any erroneous instructions regarding attempted felony murder were harmless beyond **a** reasonable doubt. State v. DiGuillio, 491 so. 2d 1129 (Fla. 1987); Cobb Miller.

WHEREFORE, the State respectfully requests that this Honorable Court dismiss this petition based on prodedural default, or in the alternative deny all relief based on the merits.

Respectfully submitted,

ROBERT A. BUTTERWORTH,
ATTORNEY GENERAL



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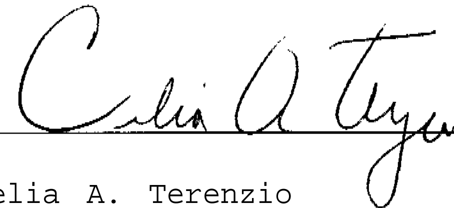
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Jeffrey 0. Davis, ESQUIRE, Quarles & Brady, 411 East Wisconsin Avenue, Milwaukee, WI 53202, this 17th day of March, 1996.



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