IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Appellant,

vs. Case No. 05-1513

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST JR.
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO.0656879
1515 N. Flagler Dr.
SUITE 900
WEST PALM BEACH, FL. 33409
(561) 837-5000

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

MISCELLANEOUS

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Appellant,

vs. Case No. 05-1513

STATE OF FLORIDA,

Appellee.
_____/

PRELIMINARY STATEMENT

Appellant, WILLIAM VAN POYCK, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "PCR," and reference to the record on direct appeal will be by the symbol ROA@ followed by the appropriate page number(s).

STATEMENT OF THE CASE

Van Poyck=s culpability as the non-shooter in the murder of Officer Griffis, has been reviewed on numerous occasions beginning in 1988 at trial, again on direct appeal in 1990, again in state postconviction proceedings in 1997, again in federal court in 2002, again by this Court in 2005, and now in 2006. This current motion represents petitioner=s fourth state collateral challenge to his conviction and/or sentence based on the claim that Van Poyck was not the actual shooter of Officer Griffis. In total, Van Poyck=s status as the non-triggerman has been reviewed and disposed of in five prior published opinions. The issues were presented and rejected in the following manner.

First, on direct appeal, Van Poyck presented four claims addressed to the Atriggerman@ issue. He asserted: (1) the evidence against Van Poyck was insufficient to support of conviction for premeditated first-degree murder (2) the trial court=s Phase Two instructions failed to inform the jury of the mandatory Tison v. Arizona, 481 U.S. 137 (1987) and Enmund v. Florida, 458 U.S. 782 (1982) factual determination; (3) the trial court erred in failing to make the required findings under Enmund/Tison in the sentencing order; (4) the death sentence is not proportional because Van Poyck was not the triggerman. Van Poyck v. State, 564 So.2d 1066, 1069-70 (Fla. 1990). That opinion will be referred to as Van Poyck I.

In resolving these issues, this Court opined:

> With regard to point two, we agree with Van Poyck that the evidence is insufficient to establish first-degree *premeditated* murder. The state's evidence was conflicting as to where Van Poyck was at the time of the killing. We note that the trial judge, in his sentencing order, was not sure of Van Poyck's whereabouts: "Van Poyck *may* have in fact been the individual who pulled the trigger and shot Fred Griffis." (Emphasis added.) 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.

Van Poyck, 564 So.2d 1066, 1069 (Fla. 1990). Continuing with the penalty phase analysis, this Court found:

> We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In *DuBoise v. State*, 520 So.2d 260 (Fla. 1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is not the triggerman and discussed proportionate punishment, stating:
>
> > In *Tison* the Court stated that *Enmund* covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented

> "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "*that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement*."

Id. at 265-66 (citations omitted, emphasis added) (quoting *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). **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 1070-71 (footnote omitted) (emphasis supplied).

Second, in his initial postconviction motion, Van Poyck raised these issues again, and included a claim that counsel was ineffective in not pursuing evidence that would show Valdes as the triggerman. This Court determined that defense counsel Aclearly had tactical reasons for limiting his presentation of evidence that might indicate a triggerman other than Van Poyck....@ Van Poyck v. State, 694 So. 2d 686, 697, *cert. denied,* 522 U.S. 995(1997). That oinion will be referred to as Van Poyck II. Van Poyck also raised a claim based on Brady v. Maryland, 373 U.S. 83 (1963). Appellant alleged that the state withheld Aevidence@ in the form of the prosecutor=s notes suggesting the wound to the deceased came from the drive=s side of the van, i.e, from the side of the vehicle where Valdes had removed the victim. This Court opined, AThis [note] presumptively militated against a finding that Van Poyck was the triggerman. It would certainly have no effect on Van Poyck=s conviction for felony murder.@ Van Poyck, 694 So.2d at 698.

This Court also rejected Van Poyck=s postconviction claims addressed to his sentence: A(6) the judge and jury weighed the invalid aggravating factors that the murder was premeditated or

that Van Poyck was the triggerman@ and (11) *Edmund/Tison* errors necessitate a reversal of Van Poyck=s death sentence.@ Id.[1]

Next, Van Poyck presented these claims in a federal habeas petition. The Eleventh Circuit found that Van Poyck=s status as the non-shooter did not impact his death sentence. The Court noted:

> Petitioner argues that Counsel's performance was constitutionally defective because he failed to present evidence that Petitioner was not the triggerman. He identifies two such pieces of evidence: that Valdes had blood on his clothes matching Officer Griffis's blood type, but that Petitioner did not; and that the murder weapon had been purchased by Valdes's girlfriend and that Valdes had been in possession of the gun when he and Petitioner left to commit the crime.
>
> ...
>
> We--in this instance--do not discuss the performance element of ineffective assistance

[1] Van Poyck filed a state habeas petition wherein the Enmund/Tison issue was broached for a third time in the state habeas corpus litigation, this Court again found the matter procedurally barred opining: AThis claim was raised and rejected on direct appeal, *Van Poyck*, 564 So. 2d at 1070-71, and also on te rule 3.850 appeal. *Van Poyck*, 694 So. 2d at 698.@ Van Poyck v. Singletary, 715 So. 2d 930, 931 n.1 (Fla. 1998). That opinion will be referred to as Van Poyck III.

of counsel because we conclude that the Florida Supreme Court could have reasonably concluded that no prejudice had been shown. A review of the penalty phase transcripts convinces us that Petitioner cannot establish that he was prejudiced by Counsel's failure to introduce this evidence. During the penalty phase, the witnesses called by the prosecutor only testified about Van POYCK's past crimes and about the fact that he was on parole when the instant offense was committed. The prosecutor did not present additional evidence suggesting that Petitioner was the triggerman.

> Even more telling is the prosecutor's closing argument. Petitioner's being the triggerman played only a very minor role in the prosecutor's argument. As aggravating factors, the prosecutor advanced these things: 1) that Petitioner was on parole when the crime was committed; 2) that the crime was committed for the purposes of effectuating an escape from prison; 3) that Petitioner knowingly created a great risk of death to many persons; and 4) that Petitioner had previously been convicted of a violent felony. The establishment of these elements did not require arguing that Petitioner was the triggerman. **The prosecutor never argued that it had been established beyond a reasonable doubt that Petitioner was the triggerman**.
>
> The only time the prosecutor did argue that the evidence tended to show that Petitioner was the triggerman was in rebutting Petitioner's argument that he was only an accomplice and played only a minor role in the crime. [FN8] Even in rebutting that argument, however, the prosecutor relied heavily on the idea that, "[r]egardless of who the triggerman is," death would still be appropriate. Rather than focusing the jury on who the triggerman was, the prosecutor stressed that Petitioner could not be considered a minor participant because he had been the one to come up with the idea of breaking O'Brien out of custody and had planned the crime. While the prosecutor did, on a few occasions in his closing argument, say that evidence in the

> case suggested that Petitioner was the triggerman, the main argument made by the prosecutor was that the death penalty--because of the four aggravating factors and because Petitioner was not a minor participant in the underlying violent felony--was an appropriate sentence for Petitioner, regardless of who actually shot Officer Griffis.
>
> **Especially because the prosecutor's main argument was that the death penalty was appropriate regardless of who the triggerman was, we see no reasonable probability that, if Counsel had presented the additional evidence that Petitioner was not the triggerman, the outcome of the sentencing phase would have been different**. The Florida Supreme Court could reasonably conclude that no prejudice existed. **The Florida Supreme Court did reasonably conclude that the triggerman-evidence claim entitled Petitioner to no relief**.
>
> _____
>
> [8.] Florida law provides that a mitigating circumstance exists where "[t]he defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." Fla. Stat. Ann. ' 921.141(6)(d).

Van Poyck v. Florida Department of Corrections, 290 F.3d 1318, 1325-26 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (emphasis supplied). That opinion will be referred to as Van Poyck IV.

On September 30, 2003, Van Poyck filed a motion seeking DNA testing of the clothes he, co-defendant, Frank Valdes, and victim, wore the day of the murder, pursuant to Florida Rule of Criminal Procedure 3.853. Such testing, Acould exclude@ him as

the shooter and show Valdes was the triggerman. The trial court summarily denied the claim finding that Van Poyck could not establish an entitlement to relief irrespective of the DNA tests results. That ruling was upheld on appeal. This Court found:

> Evidence establishing that Van POYCK was not the triggerman would not change the fact that he played a major role in the felony murder and that he acted with reckless indifference to human life.
> For the foregoing reasons, we hold that there is no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial. We do not hold, as Justice Anstead asserts, that it makes no difference in the capital sentencing process which of two codefendants actually committed the killing. Rather, we determine only that under the circumstances of this case involving a murder of a prison guard in a brutal armed attack planned by Van Poyck and carried out with Valdez, DNA evidence indicating that Van Poyck was not the triggerman would not have created a reasonable probability of a lesser sentence, which is the standard for ordering DNA testing under rule 3.853(c)(5)(C). Accordingly, we affirm the circuit court's order summarily denying Van Poyck's motion for postconviction DNA testing.

Van Poyck v. State, 908 So. 2d 326, 330 (Fla. 2005). That opinion will be refered to as Van Poyck V. This Court further noted that the brutal armed attack of a prison guard was planned by petitioner and carried out with his co-defendant. Consequently, there was no reasonable probability that Van Poyck would have received a lesser sentence. Id.

In yet a sixth attempt to challenge his death sentence based on his non-triggerman status, petitioner filed a successive motion for postconviction relief based on the claim of newly discovered evidence that would demonstrate that Frank Valdes was the shooter. Following the state=s response, the trial court summarily denied relief finding th motion untimely, noting that this issue had been litigated on five prior occasions. (PCR 48). Van Poyck appealed.

STATEMENT OF THE FACTS

In 1990, Van Poyck=s conviction for capital murder and sentence of death were upheld. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). The facts as recounted by this Court were as follows:

> The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis

exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger. Although no bullet was fired, Turner stated that he heard the gun click. Turner then fled the scene when Van Poyck turned his attention to Valdez, who was smashing one of the windows on the van. After Van Poyck noticed that two cars had just driven into the alley, he and Valdez approached the cars and Van Poyck shattered the windshield of one of the cars with the butt of a gun. Van Poyck and Valdez then ran to a Cadillac parked in an adjacent parking lot and departed from the scene. A police officer, who arrived at the scene and witnessed the two men leaving, radioed for help and a chase followed. During the chase, Van Poyck leaned out of the car window and fired numerous shots at the police cars in pursuit, hitting three of them.

Valdez eventually lost control of the Cadillac and the car crashed into a tree. Van Poyck and Valdez were immediately taken into custody and four pistols were recovered from the car: a Hungarian Interarms nine millimeter semiautomatic pistol, a Sig Sauer nine millimeter semiautomatic pistol, a Starr .22 caliber semiautomatic pistol, and Turner's Smith and Wesson .38 caliber service revolver.

Van Poyck, testifying in his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

The jury found Van Poyck guilty of first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aggravated assault, and aiding in an attempted escape. With regard to the first-degree murder charge, the jury was given a special verdict form which contained blanks for "premeditated murder," "felony murder," and "both." The jury returned the verdict form with "felony murder" and "both" checked and "premeditated murder" left blank.

In the penalty phase, the state presented Van Poyck's parole officer who testified that Van Poyck was on parole at the time of the incident and that he had three previous convictions, two for robbery and one for burglary. Other witnesses for the state included victims of these offenses. Van Poyck presented five witnesses in mitigation, including himself. A nurse from the Palm Beach County jail stated that he helped other inmates in various ways. His brother, who was also in prison, testified about their home life, explaining that their father was frequently away from home on

> business and their mother had passed away when Van Poyck was young. Van Poyck's aunt testified that for a period of time the family lived with a housekeeper, who appeared to be strange and unstable. Van Poyck's stepmother testified about his family situation, noting that his brother and sister had juvenile records. She also indicated that Van Poyck felt remorse for his actions. Finally, Van Poyck testified in his own behalf, taking responsibility for the fact that Griffis was killed and expressing remorse for his actions.
>
> By an eleven-to-one vote, the jury recommended the death sentence for the first-degree murder conviction. The trial judge imposed the death sentence and found the following four aggravating circumstances: (1) that the crime was committed while Van Poyck was under a sentence of imprisonment in that he was on parole when he committed the act; (2) that the crime was committed for the purpose of effecting an escape from custody; (3) that Van Poyck knowingly created a great risk of death to many persons; and (4) that Van Poyck was previously convicted of another felony involving the use or threat of violence to some person.

Van Poyck, 564 So. 2d at 1067-1068. This Court found insufficient evidence to sustain Van Poyck=s first degree murder under a theory of premeditation, however the conviction was upheld based on the following:

> 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

Id. at 1069. Van Poyck=s sentence of death was upheld irrespective of lack of evidence in support of premeditation as this Court determined that , A[w]e find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. Id.

SUMMARY OF ARGUMENT

Issue I - The trial court=s summary denial of Van Poyck=s successive motion for postconviction relief was proper.

ARGUMENT

ISSUE I

THE TRIAL COURT DENIED PROPERLY APPELLANT=S CLAIM OF NEWLY DISCOVERED EVIDENCE REGARDING HIS STATUS AS THE NON TRIGGERMAN

On April 21, 2005, Van Poyck filed a successive motion for postconviction relief claiming that he recently discovered evidence that would have entitled him to a new sentencing hearing. The evidence was a sworn statement from former inmate Enrique Diaz, who resided at Florida State Prison with appellant=s co-defendant, Frank Valdes. Between 1990 and 1997, Diaz alleged that he and Valdes met in the law library and became friends. The content of some of their conversations were as follows, AValdes regularly spoke to me about the details of this case. In particular Valdes repeatedly and consistently told me that he, Valdes, had shot and killed Officer Fred

Griffis. Moreover, I personally witnessed Valdes make the same confession to several other inmate legal aides on numerous occasions.@ (PCR 7). Following the state=s response, the trial court denied relief finding,

> The court rejects the defendant=s assertion that the affidavit of Enrique J. Diaz represents newly discovered evidence. On of the central issues in the trial of this case and the above published opinions have addressed the Atriggerman issue.@ The above opinions have essentially held that even though the defendant was not the Atriggerman@ the imposition of the death penalty was fair, just and proportional.

(PCR 48-49).

On appeal, appellant does not specifically challenge the trial court=s ruling recounted above. Instead, he argues, AVan Poyck acknowledges this appeal is controlled by this Court=s determination in the Related Appeal that whether Van Poyck was the triggerman is irrelevant to his sentence.@ **Initial brief at 10.** Relying on the recent case of Bradshaw v. Stumpf, 162 L. Ed. 2d 143 (2005), appellant asserts that this Court=s rational in the prior decision is constitutionally suspect and should not be followed herein. The fatal flaw in appellant=s argument is that it completely mischaracterizes the prior holding of this Court in Van Poyck v. State, 908 So. 2d 326 (Fla. 2005). Relief must be denied.

In 2005, this Court upheld the summary denial of appellant's request for relief pursuant to Fla. R.Crim. Pro. 3.853. Van Poyck V supra. Appellant sought DNA testing of his clothes, the victim's clothes as well as Valdes' clothes, in an effort to establish that it was Valdes who actually shot and killed Officer Griffis. The trial court summarily denied relief finding that regardless of the test result, there was no reasonable probability that result of the sentencing hearing would have been different. In upholding that ruling, this Court determined that the record on appeal establishes plainly that appellant was not sentenced to death because of an erroneous assumption that he was the shooter. The state did not argue that death was appropriate because he was the shooter; the trial court did not sentence him to death based on that erroneous assumption; and this Court did not rely on that erroneous assumption when it affirmed the death sentence on direct appeal. Van Poyck, 908 So. 2d at 329-330.[2] In other words, appellant was not sentenced to death based on the erroneous assumption

[2] Because of this finding, this case is completely distinguishable from Bradshaw v. Stumpf, 162 L. Ed. 2d 143 (2005). Therein, the United State Supreme Court was asked to review the impact of newly discovered evidence which would prove that the defendant was not the shooter. The Court noted that because the state had taken inconsistent positions regarding the shooter's identity at the respective trials of Stump and his co-defendant, and because the lower courts had not addressed the impact of the new evidence for sentencing purposes, remand was necessary. Neither of the two facts are present in the instant case.

that he was the shooter, therefore any further evidence which corroborates his known status as the non-shooter would not have changed the outcome of the sentencing proceedings.

In fact that identical analysis along with the identical findings were mirrored by the Eleventh Circuit Court of Appeals.

> A review of the penalty phase transcripts convinces us that Petitioner cannot establish that he was prejudiced by Counsel's failure to introduce this evidence. During the penalty phase, the witnesses called by the prosecutor only testified about Van Poyck's past crimes and about the fact that he was on parole when the instant offense was committed. The prosecutor did not present additional evidence suggesting that Petitioner was the triggerman.
>
> Even more telling is the prosecutor's closing argument. Petitioner's being the triggerman played only a very minor role in the prosecutor's argument. As aggravating factors, the prosecutor advanced these things: 1) that Petitioner was on parole when the crime was committed; 2) that the crime was committed for the purposes of effectuating an escape from prison; 3) that Petitioner knowingly created a great risk of death to many persons; and 4) that Petitioner had previously been convicted of a violent felony. The establishment of these elements did not require arguing that Petitioner was the triggerman. The prosecutor never argued that it had been established beyond a reasonable doubt that Petitioner was the triggerman.
>
> The only time the prosecutor did argue that the evidence tended to show that Petitioner was the triggerman was in rebutting Petitioner's argument that he was only an accomplice and played only a minor

role in the crime. Even in rebutting that argument, however, the prosecutor relied heavily on the idea that, "[r]egardless of who the triggerman is," death would still be appropriate. Rather than focusing the jury on who the triggerman was, the prosecutor stressed that Petitioner could not be considered a minor participant because he had been the one to come up with the idea of breaking O'Brien out of custody and had planned the crime. While the prosecutor did, on a few occasions in his closing argument, say that evidence in the case suggested that Petitioner was the triggerman, the main argument made by the prosecutor was that the death penalty--because of the four aggravating factors and because Petitioner was not a minor participant in the underlying violent felony--was an appropriate sentence for Petitioner, regardless of who actually shot Officer Griffis.

Especially because the prosecutor's main argument was that the death penalty was appropriate regardless of who the triggerman was, we see no reasonable probability that, if Counsel had presented the additional evidence that Petitioner was not the triggerman, the outcome of the sentencing phase would have been different. The Florida Supreme Court could reasonably conclude that no prejudice existed. The Florida Supreme Court did reasonably conclude that the triggerman-evidence claim entitled Petitioner to no relief.

[8.] Florida law provides that a mitigating circumstance exists where "[t]he defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." Fla. Stat. Ann. ' 921.141(6)(d).

Van Poyck v. Deartment of Corrections, 290 F.3d 1318,1325-26 (11th Cir. 2002). (emphasis supplied). Appellant=s assertion that this Court=s has now determined that non-shooter status is irrelevant for capital sentencing purposes is patently erroneous.

With regards to the order under review in this appeal, the rationale applied by this Court in Van Poyck, V, applies with equal force herein and warrants the identical outcome. Moreover, the state would point to the following additional facts for support. In essence the jury acquitted Van Poyck of premeditated murder because it failed to make a unanimous finding of premeditation on the special verdict form. Yet the jury was unanimous in its finding that Van Poyck was guilty of felony murder. (ROA 3112, 4138). Prior to the commencement of the penalty phase, the trial court, with the agreement of the parties, confirmed that emphasis would not be placed upon either first-degree murder theory. The trial judge inquired: ADoes everybody then agree as to, [the instruction] >Ladies and gentlemen of the jury, you have found the Defendant guilty of first degree murder,= and I leave it at that?@ (ROA 3183; SROA 692). Defense counsel agreed. (Id.). In fact the prosecutor affirmatively told the jury to assume that Van Poyck was not the shooter. (ROA 3511-12; SROA 766-767). And consistent with that

argument, the state did not present any evidence at the penalty phase in support of a claim that appellant was the shooter. Appellant=s claim that there was erroneous evidence presented/relied on by the jury which now must be countered by newly discovered evidence is both factually and legally incorrect. Moreover, the state would have no reason to rely on a theory that was rejected by the jury at the guilt phase when there was overwhelming evidence that established Van Poyck=s role as the major participant in the escape attempt. For instance, the un-assailed facts heard at trial and admitted to by Van Poyck were the following, Van Poyck testified he wanted to help his friend, James O=Brien escape from prison, and he, and he alone had been contemplating this for approximately two years (ROA 2619-22; SROA 443-446). Van Poyck put the escape plan together, recruited Valdes to assist, and gave Valdes orders about how to proceed. (ROA 2622, 2626-27, 2630-31; SR 446, 450-451, 454-455). While Valdes provided the guns, Van Poyck verified they were loaded. (ROA 2628, 2656-57; SR 452, 480-481). The plan was for Valdes to secure the correction van driver and Van Poyck would get the officer who was in the passenger seat (ROA 2647; SR 473). Van Poyck admitted telling the passenger, Officer Turner, to get under the van or he was a dead man (RAO 2648; SR 474). Following Officer Griffis= murder, Van Poyck turned to Officer Turner and demanded the key to the van and

threatened his life (ROA 2649-50; 473-474).[3] Van Poyck also noted that Valdes went through Officer Griffis= pockets after he was shot and that there was blood around (ROA 2650; SROA 474). Van Poyck admitted that he was not under the influence of any substance that might have impaired his ability to think or reason - Van Poyck knew exactly what he was doing on the day of the murder. He was not impaired by any mental infirmity (ROA 2629-31, 2639; 453-455, 463). He also reiterated that he set up the entire criminal plan which resulted in Officer Griffis= death. (ROA 2662; SR 486).

In conclusion, the trial court=s summary denial of Van Poyck=s postconviction motion must be affirmed. Although, non-triggerman status is a relevant consideration for sentencing

[3] Van Poyck=s repeated protestations in his postconviction pleadings that Anor did he intend that anyone should die,@ is a gross mischaracterization of the record. (PCR 13). Officer Steven Turner testified that Van Poyck pointed a gun at his head told him he was a dead man and pulled the trigger. (ROA 1706-1708). Turner heard a click as the gun misfired and he was then able to run away. (Id.) Van Poyck was convicted of the attempted murder of Turner. To continue to claim that he did not intend that anyone die is patently false and a blatant misrepresentation of the record.

purposes in death penalty cases, including this one, that issue has been fully litigated by this Court on four prior occasions and in federal court on one prior occasion. The appellate record clearly establishes that the primary focus at the penalty phase was the overwhelming evidence of Van Poyck=s major participation in the underlying felony. There was no evidence presented at the penalty phase in support of a theory that Van Poyck was the actual shooter. Consistent with this Court=s previous determination in Van Poyck, V, there is no reasonable probability that the statement of Diaz if heard by the jury and judge would have resulted in an life sentence under the standard of Jones v. State, 591 So. 2d 911 (Fla. 1991). Van Poyck cannot establish otherwise. See Glock v. Moore, 776 So. 2d 243 (Fla. 2001)(upholding finding that the newly discovered evidence did not refute testimony at trial); Davis v. State, 736 So. 2d 1156 (Fla. 1999)(same) Cf. Galloway v. State, 802 So. 2d 1173 (Fla. 1st DCA 2002)(upholding denial of request for DNA testing because results could not refute evidence that defendant was present and was also participating with co-defendant in the crimes); Cf. Robinson v. State, 865 So. 2d 1259 (Fla. 2004)(explaining that DNA testing would not entitle defendant to relief given that there is no dispute that he was involved in the rape and murder).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court:s summary denial of his motion for postconviction relief.

Respectfully submitted,

CHARLES J. CRIST Jr.
Attorney General

_____
CELIA A. TERENZIO
Assistant Attorney General
Fla. Bar No. 0656879
1515 N. Flagler Dr.
Suite 900
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Jeffrey O. Davis & Lauri A. Rollings, Quarles & Brady LLP, 411 East Wisconsin Ave., Milwaukee Wi. 53202-4497, and Mark Olive 320 West Jefferson St. Tallahassee, Florida 32301 this 9th day of March, 2006.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
CELIA A. TERENZIO
Assistant Attorney General