IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-724

WILLIAM VAN POYCK

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA, (CAPITAL APPEALS DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, William Van Poyck, Defendant below, will be referred to as Appellant or Van Poyck and Appellee, State of Florida, will be referred to as “State”. Reference to the original appellate record will be by “ROA”, reference to the postconviction record will be “PCR”, reference to the case management transcript will be “Tr” and both will be followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The state rejects completely Van Poyck’s statement of facts as they are incomplete, improperly slanted, and argumentative. In the direct appeal opinion, this Court recounted the facts as follow:

> 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, 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. ... 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.

Van Poyck, 564 So. 2d 1066,1067-68 (Fla. 1990). (emphasis added). (Van Poyck I).

Van Poyck presented four claims in his direct appeal addressed to the "triggerman" 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 supra, 564 So.2d at 1069-70.

> 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.

Id at 1069. (emphasis added). 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**.

Id at 1070-71 (footnote omitted) (emphasis supplied).

Following his unsuccessful direct appeal challenge to his sentence, defendant filed his initial postconviction motion, wherein he raised the “triggerman status” issue again in the following manner. He argued that counsel was ineffective in not pursuing evidence that would show Valdes was the triggerman; as well as, “(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." Van Poyck, 694 So. 2d 686, 697, *cert. denied,* 522 U.S. 995(1997). (Van Poyck II). Again relief was denied as these claims were raised and rejected on direct appeal and therefore procedurally barred. Van Poyck, 694 So.2d at 698.[1]

Thereafter, Van Poyck presented these identical claims in a federal habeas petition. In affirming the federal district court's summary denial, the Eleventh Circuit Court of Appeals found that Van Poyck's status as the non-shooter did not impact his death sentence. The Court's detailed analysis is as follows:

> 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

[1] Van Poyck filed a state habeas petition wherein the Enmund/Tison issue was broached for a third time. Again relief was denied, "This 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). See also Van Poyck v. Singletary, 728 So. 2d 206 (Fla. 1998)(denying habeas relief in an unpublished order); Van Poyck v. Crosby, 860 So. 2d 980 (Fla. 2003)(denying habeas relief in an unpublished order)

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 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.

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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). (Van Poyck III)

In September of 2003, Van Poyck returned to state court and filed a motion pursuant to Florida Rule of Criminal Procedure 3.853, seeking DNA testing of the clothes worn by himself, Frank Valdes, and the victim. Such testing, "could exclude" him as the shooter and show Valdes was the triggerman. The circuit 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:

> 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.

Van Poyck v. State, 908 So. 2d 326, 331 (Fla. 2005). (Van Poyck IV). This Court further noted that the brutal armed attack of a prison guard was planned by Van Poyck and carried out with the assistance of his co-defendant. Consequently, there was no reasonable probability that Van Poyck would have received a lesser sentence. Id.

In April of 2005, Van Poyck filed another successive motion alleging that he obtained newly discovered evidence that

consisted of a sworn statement from former inmate Enrique Diaz, who resided at Florida State Prison with Frank Valdes between 1990 and 1997. Diaz alleged that he and Valdes became friends and during the course of that relationship, Valdes confessed he was the actual shooter of Officer Fred Griffis. The trial court summarily denied the claim.

In upholding the summary denial, this Court recounted the extensive procedural history of this case, discussing every prior published opinion. Van Poyck v. State, 961 So. 2d 220, 221 (Fla. 2007) (Van Poyck V). This Court explained as follows:

> The issue before us is whether Van Poyck is entitled to an evidentiary hearing on his claim asserting newly discovered evidence that Valdes was the triggerman in the murder of Griffis. We conclude that he is not. In Van Poyck I, we determined that Van Poyck's death sentence was a proportional punishment even though the evidence of premeditation was insufficient because the evidence was inconclusive on Van Poyck's whereabouts during the murder. In Van Poyck II, we rejected his claim that the jury and trial court invalidly considered as nonstatutory aggravation that the murder was premeditated or that Van Poyck was the triggerman, concluding that the issue had been resolved on direct appeal. In Van Poyck III, the United States Court of Appeals for the Eleventh Circuit concluded that additional evidence that Valdes was the triggerman would not have changed the outcome of the penalty phase. Finally, in Van Poyck IV, we ruled that DNA evidence proving that Valdes was the triggerman would not have created a reasonable probability of a different sentence for Van Poyck. Based on these

> decisions, particularly Van Poyck IV, which relies on the others and to which we adhere, we conclude that testimony by a former fellow inmate that Valdes confessed to being the triggerman in Griffis's murder probably would not have yielded a life sentence for Van Poyck. Accordingly, we affirm the trial court's summary denial of his successive motion for postconviction relief.

Van Poyck, 961 So. 2d at 227. [2]

In December of 2010, Van Poyck filed his **fourth** state collateral challenge to his sentence, alleging that he has obtained newly discovered evidence, i.e., juror affidavits that entitle him to a new sentencing hearing. Following the state's response, the trial court held a case management conference. (Tr. 2-61). At the time of the case management hearing, the trial court had not received Van Poyck's rely. (Tr. 28). Counsel did not offer a copy to the Court at that time, nor did he request that the Court recess or continue the case management conference until the Court had an opportunity to review the reply.

[2] The Eleventh Circuit Court of Appeals recently denied Van Poyck's challenge to a federal district's dismissal of his 42 U.S.C. §1983. Therein he alleged that he has a constitutional right to DNA testing in state court. The federal district dismissed the petition for failure to state a cause of action. Van Poyck v. McCollum and McAuliffe, __F.3rd. __2011 WL 2732505 (11th Cir. July 15, 2011)

When questioned by the trial court regarding the inadmissibility of the juror affidavits at a resentencing proceeding, counsel somewhat altered his argument and stated that he would not attempt to call the jurors at a resentencing hearing. (Tr. 12, 13, 17). When pressed on that issue, counsel stated that the relevant evidence was actually this Court's opinion from 2007, Van Poyck *VI*. (Tr. 13, 14, 18, 19, 40, 42, 43, 48, 54).

When asked how he would describe the definition of "due diligence" counsel stated that no lawyer would think about approaching a juror regarding this issue until the Florida Supreme Court issued its opinion in 2007. (Tr, 49-53).

The trial court stated that it was going to summarily deny the motion for the following reasons:

> First, that the interviews of jurors to be sought as newly discovered evidence is not competent evidence to be admitted at a penalty phase proceeding or at a hearing to determine whether Mr. Van Poyck should receive a new penalty phase proceeding.
> It is not allowed by Florida law pursuant to 90.607 and the cases cited by the Assistant Attorney General in support of her motion in opposition to the defendant's motion.
> Secondly, I find that even if it is evidence that is not newly discovered. This evidence would have been available to the defendant as early as 1992 when it became ripe.
> In fact, these are just the people that could have been contacted if lawful at any time and, therefore it is not newly discovered nor is it evidence. That would be the only vehicle by with which Mr. Van Poyck could get a new penalty phase proceeding.

> Now, the defendant in this oral argument has somewhat changed his position that the juror affidavits are not really evidence but they are persuasive to a Court that a jury would have thought different and ruled differently because the gravamen of the presentation is the same as it has always been.
> That is, in essence, that the evidence really is Mr. Van Poyck is not the shooter and that Mr. Valdez was the shooter. I find that that has been litigated ad nauseam in this case.
> Finally, in 2005 that exact same argument was presented to Judge Wennet in a successive 3851. It was summarily denied by Judge Wennet, and I find that the Supreme Court of the State of Florida even given- in that case, it would be admissible evidence.
> That was the confession of Mr. Valdez to another inmate that would have shown that Mr. Valdez was the shooter. That is admissible evidence, and it was summarily denied because it wouldn't have made a legal difference in the case, and that's what the Supreme Court found.
> And to ask me now to go behind the Supreme Court's ruling and grant a new—on the same exact argument is something I'm not prepared to do not am I willing to do it.

(Tr. At 61-62).

The trial court reduced his findings to a written order on March 2, 2011. (PCR 93-107). Consistent with the oral pronouncement, the trial court summarily denied relief as the juror affidavits are not competent admissible evidence and therefore cannot qualify as evidence (PCR 102-103); Van Poyck's motion was untimely (PCR 103); and even if admissible, it is not material. (PCR 104-105). This appeal follows.

SUMMARY OF THE ARGUMENT

This appeal represents Van Poyck's **fourth** appeal of a motion for postconviction relief, and **seventh** overall state collateral challenge to his capital sentence. This litigation is a repeated attempt to re-litigate an issue that has been adversely decided in **seven published opinions over the span of two decades.**

He once again is arguing that he is in possession of newly discovered evidence that entitles him to a new sentencing proceeding premised on his non-triggerman status. The trial court summarily denied relief properly as this motion is legally insufficient on its face. Moreover, the trial court found that Van Poyck could not overcome the procedural bars attached to his successive and untimely motion. Van Poyck's characterization of juror affidavits as evidence pursuant is frivolous as the jurors' post trial statements which reveal their thought processes could never be considered competent admissible evidence under Florida law at any proceeding, nor under any legal theory. The trial court denied properly without an evidentiary hearing Van Poyck's claim.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED WIHOUT AN EVIDENTIARY HEAIRNG VAN POYCK'S CLAIM THAT AFFIDAVITS OBTAINED FROM HIS FORMER JURY ABOUT A SUBJECT THAT INERRED IN THEIR SENTENCING PHASE RECOMMENDATION MEETS THE

DEFINTION OF NEWLY DISCOVERED EVIDCENCE IN FLORIDA

In this appeal, which represents the **sixth** collateral challenge of his capital conviction and sentence. Van Poyck is appealing the trial court's summary denial of his fourth motion for collateral relief pursuant to Fla.R. Crim. Pro. 3.851. The legal basis for the motion filed below was a claim of newly discovered evidence premised under Jones v. State, 709 So. 2d 512 (Fla. 1998). The alleged newly discovered evidence consists of the sworn affidavits of four jurors who served on Van Poyck's trial over twenty-three years ago, which essentially state that if they had known that Van Poyck was not the shooter, "there is at least a reasonable probability that I would have recommended a life sentence." (PCR 31-33).[1] These affidavits were obtained following the unauthorized interview of the jurors by an investigator hired by Van Poyck. [2] The trial court denied relief because Van Poyck failed to establish any of the requirements of Jones,supra. Specifically the Court found that these affidavits are not newly discovered evidence as they are not competent evidence that would be admissible at a new sentencing hearing;

[1] A fourth juror signed an affidavit that stated that she would, "recommend life without parole if given the option." (PCR 34).
[2] The trial court expressed its explicit disapproval of Van Poyck's counsel use of these affidavits. Irrespective of the fact that counsel did not interview the jurors, the trial court noted that the rule was violated in spirit by the attorney. (Tr. 34-39; PCR 105-107).

even if the affidavits could be considered admissible evidence, Van Poyck's motion is grossly untimely and therefore his lack of due diligence bars this claim; and the affidavits are not material as they would not produce a different sentence under. Jones (PCR 103-107, Tr. 61-62).

In challenging the trial court's summary denial of his fourth collateral motion for relief, Van Poyck claims that the trial court should have granted an evidentiary hearing on the disputed facts including the issue of due diligence. Moreover, Van Poyck also alleges that the information contained in the juror affidavits is not information that inheres in the verdict and even if it were, prohibition of access to such information under §90.607 is unconstitutional. Based on the undisputed facts and relevant law, the trial court's ruling must be affirmed on appeal, as Van Poyck's arguments are completely void of any merit whatsoever.

First, summary denial was proper as Van Poyck's "new evidence", i.e., juror statements that they would change their respective recommendation of death to life if they were informed that Van Poyck was not the shooter, cannot form the basis for a claim of newly discovered **evidence.** As explained by this Court, in Jones;

> the trial court should initially consider whether the evidence would have been admissible at

> trial or whether there would have been any evidentiary bars to its admissibility.

Id, 709 So. 2d at 521. Juror affidavits which includes information that inheres in the verdict cannot qualify as competent admissible evidence under Florida law. This universal and long standing rule of evidence bars admission of Van Poyck's "evidence" and is fatal to his claim. The Court has clearly explained as follows:

> Many years ago, this Court established guidelines with respect to the propriety of inquiry into matters occurring in the jury room. We explained
>
> [t]hat affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or

> judgment, or other matter resting alone in the juror's breast.
>
> Marks v. State Road Dep't, 69 So.2d 771, 774-75 (Fla.1954) (quoting Wright v. Illinois & Mississippi Tel. Co., 20 Iowa 195, 210 (1866)(emphasis omitted)). In short, matters that inhere in the verdict are subjective in nature, whereas matters that are extrinsic to the verdict are objective.
>
> The Florida Evidence Code codifies the sanctity of the jury verdict by providing that "[u]pon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment." § 90.607(2)(b), Fla. Stat. (1993).
>
> Consistent with the foregoing rule, our courts have been vigilant in prohibiting inquiry into jury deliberations of matters necessarily arising out of the trial.

Devoney v. State, 717 So. 2d 501, 502 (Fla. 1998)(emphasis added). There is no question that Florida case law on this point is explicit and abundant. Duckett v. State, 981 So. 2d 224, 231 fn.7 (Fla. 2005)(affirming summary denial of postconviction claim based on claim of newly discovered evidence via juror interviews as allegations involved the verdict itself); Walters v. State, 786 So. 2d 1227(Fla. 4th DCA 2001)(describing juror affidavit which stated that had juror known that defendant would be incarcerated she would have

changed guilty verdict, was inadmissible at a motion for new trial.); Jones v. State, 928 So. 2d 1178 (Fla. 2006)(explaining that juror statement that does not reveal any misconduct or improper external influence is not admissible evidence in support of a new trial); Simpson v. State, 3 So.3d. 1135, 1143 (Fla. 2009)(same); United States v. Sjeklocha, 843 F.2d 485, 488 (11th Cir. 1988)(precluding former juror testimony regarding his thought process that he would change verdict had he known about other information as such testimony inhered in the verdict and was inadmissible at motion for new trial); Tanner v. United States, 483 U.S. 107,117 (1987)(recognizing the constitutionality and rationale behind of the long standing and firmly established common law that flatly prohibits the admission of juror testimony regarding a verdict).

And contrary to Van Poyck's assertion otherwise, this rule does apply to the sentencing phase of a capital case. See Songer v. State, 463 SO.2d 229 (Fla. 1985)(upholding denial of successive motion for postconviction relief, in part because the juror affidavit that she believed she could not consider non statutory mitigating evidence is inadmissible evidence at penalty phase pursuant to Fla. Stat. §90.607(2)(b)); Johnson v. State, 593 So. 2d 206 (Fla. 1992)(permitting defense attorney to interview jury foreman about matters that inhered in the jury's sentencing recommendation was error pursuant to §90.607(2)(b));

State v. Hamilton, 574 So. 2d 124, 128 (Fla. 1991)(recognizing, that §90.607(2)(b)) which is similar to many other jurisdictions, absolutely forbids any judicial inquiry into emotions, mental processes, or mistaken beliefs of jurors, at the guilt of sentencing phase); Jones v. State, 928 So. 2d 1178, 1191 (Fla. 2006)(same). Van Poyck's arguments completely ignore the evidence code and case law that without question forecloses this claim. Because his "evidence" is not **competent admissible evidence**, summary denial was proper as Van Poyck's motion is legally insufficient on its face.

Second, even if the affidavits could be considered admissible evidence, Van Poyck cannot meet the remaining requirements of Jones. With regard to the materiality prong of Jones, Van Poyck continues to ignore the fact that every court to review this issue, has explicitly and consistently found that his **own** actions, which have been established through **unrefutted** evidence, warranted the sentence of death.[3] In other words, "evidence" that he was not the shooter is not of such a nature that it would probably produce an acquittal on retrial. Jones, 709 So. 2d at 521. The facts remain, as admitted to by Van

[3] Van Poyck claims that the state has freely conceded that he was not the shooter of Officer Griffis. **I.B. at 11.** That is incorrect. The State has consistently acknowledged that this Court determined that as a matter of law there was insufficient evidence to sustain a finding of premeditated murder. That does not translate into a factual finding that he was not the shooter.

Poyck when he testified at trial, that 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; SR 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). It was **his** idea, and he and Valdes acted together in carrying it out. Van Poyck attempted to kill Officer Turner when he pointed a loaded gun at Turner's face and 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 also noted that Valdes went through Officer Griffis' pockets after he was shot and that there was blood around (ROA 2650; SR 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). Van Poyck was convicted of the **attempted murder** of Turner as well as six counts of attempted manslaughter of the police officers who Van Poyck aimed and shot at during the high speed chase through the streets of West Palm Beach.[3] Van Poyck, 564 So. 2d at 1067.

The record clearly demonstrates that the State's presentation at the penalty phase, focused on the defendant's culpability as the major participant in the escape attempt as justification to impose the death sentence. For instance, prior to 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: "Does 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; SR 692). Defense counsel agreed. (Id.). As is clear from the

[3] Therefore regardless of whether Van Poyck actually killed Officer Griffis, he did attempt to kill Officer Turner, and he did shoot at six other officers clearly establish that he possessed the required culpability to justify his death sentence.

penalty phase record, the State sought and discussed the four statutory aggravating factors[4], and the State never relied upon the triggerman theory for imposition of a death sentence. Rather, the State told the jury to assume that Valdez was the triggerman. (ROA 3511-12; SR 766-767). It was the defense that argued Van Poyck's participation was minor and that he was not the triggerman, and to this, the State commented on Van Poyck's major role in the crime and noted in passing the triggerman theory, but the prosecutor never stated that this was proven beyond a reasonable doubt. (ROA 3477-3540, 3562-65; SR 795, 817-820). Based on the overwhelming facts detailed above, every court who has reviewed this claim, including this Court on numerous prior occasions, has determined that evidence of his non-triggerman status would not entitle him to relief under Jones.

Indeed, this Court has determined previously on more than one occasion that Van Poyck's non-triggerman status as demonstrated through **admissible evidence** has not entitled him to a new sentencing hearing. Van Poyck *IV*; Van Poyck *V*; and Van Poyck, 961 So. 2d at 227. (Van Poyck *VI*). Therefore, Van

[4] Those factors are: (1) crime committed while Van Poyck was on parole; (2) crime was committed for purpose of effecting an escape from custody; (3) great risk of death to many persons; and (4) prior violent felony. (ROA 3482-3500, 3507-08). See Van Poyck v. State, 564 So. 2d 1066, 1068-69, 1071 (Fla. 1990) (affirming aggravating factors found by trial court).

Poyck's latest attempt to reverse those findings with **incompetent inadmissible juror** affidavits, was properly denied without an evidentiary hearing. His non-triggerman status regardless of how it is presented, does not alter the fact that Van Poyck was the major participant in the events that led up to the murder of Officer Griffis. His death sentence is constitutionally permissible.[4] Cf.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

[4] In fact this Court has relied upon the facts of this case in support of upholding other death sentences despite the non-triggerman status of the defendant:

> We have previously affirmed death sentences where the defendant is a principal in a felony or premeditated murder. See Stephens v. State, 787 So. 2d 747, 760 (Fla. 2001) (finding death sentence proportionate in case where defendant did not actually commit murder, but personally committed crimes of burglary and robbery and actions displayed reckless disregard for human life); Van Poyck v. State, 564 So. 2d 1066, 1070-71 (Fla. 1990) (finding the death sentence proportionate where the defendant was the instigator and primary participant in the underlying crimes, came to the scene "armed to the teeth," and knew lethal force could be used).

Chamberlain v. State, 881 So. 2d 1087,1109 (Fla. 2004)(emphasis added).

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).

Lastly, the trial court denied properly without an evidentiary hearing, Van Poyck's claim this motion was timely under Jones. The identity and whereabouts of the jurors were obviously known at trial and there is no indication asserted by Van Poyck that the jurors could not have been contacted after the direct appeal was final. Van Poyck has always been represented by counsel throughout the past twenty one years since his conviction became final and he continues to be represented by counsel today.[5]

Moreover although he claims, "the facts upon which this motion is predicated had no legal relevancy until the Supreme Court of Florida rendered its decision in *Van Poyck V*...." I.B. at 31-32. He does not explain how that is so. As found by the

[5] Van Poyck was represented by Carey Klein and Mark Dubiner at trial. On direct appeal he was represented by William Lasley and Peter Grable. Van Poyck I. In every collateral proceeding since, he has been represented by Jeffrey Davis and various other members of the law firm of Quarles & Brady, who currently represent him in his appeal of the denial of his 42 U.S.C. §1983 claim in the Eleventh Circuit Court of Appeals. Van Poyck v. McCollom and McAuliffe, __F.3d __ 2011 WL 2732505 (11th Cir. July 15, 2001).

trial court, the his non-triggerman status came into existence by virtue of this Court's opinion on direct appeal which determined that there was insufficient to sustain his conviction for premeditated first degree murder. Van Poyck, 564 So. 2d at 1069. Consequently, the trial court correctly found that the claim became ripe at that time and this motion is grossly untimely. (PCR 103).[6] If legitimate grounds exist, counsel could have sought funds from the trial court to pursue a claim as outlined in the Florida Rules of Criminal Procedures, in conjunction with the Rules Regulating the Florida Bar, to obtain permission to interview jurors. Aragon v. State, 853 So. 2d 584, 588-589 & f.n. 4. (Fla. 5th DCA 2003).

The trial court's summary denial of Van Poyck's fourth motion for postconviction relief was proper as the motion was legally insufficient as a matter of law. Moreover, Van Poyck's legal argument regarding the timeliness of this motion was also legally untenable. (PCR 103). An evidentiary hearing could not cure that legal defect. And finally, Van Poyck's non-triggerman status has been found to be immaterial on at least seven prior occasions, therefore this issue is barred from further consideration.

CONCLUSION

[6] Van Poyck does not explain how his alleged "financial predicament" has any legal relevance to his duty to exercise due diligence.

WHEREOFRE, Based upon the foregoing facts and authority, the State requests respectfully this Court AFFIRM the trial court's denial of Appellant's postconviction challenge to his sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: GERALD S. BETTMAN, Esquire, 5515 Philips Highway, Jacksonville, Florida 32207 this ___ day of August, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a) (2).

Respectfully submitted,

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