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

INITIAL BRIEF OF APPELLANT

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JURISDICTION

This Court has jurisdiction over this appeal of the summary denial of this capital Appellant's Rule 3.851 motion to vacate his death sentence pursuant to article V, section 3(b)(1), Florida Constitution.

PRELIMINARY STATEMENT

This is an appeal of the Circuit Court's summary denial of the capital Appellant's successive motion for postconviction relief pursuant to Rule 3.851, Florida Rules of Criminal Procedure.

The Record on appeal in this case consists of two (2) volumes, with the second volume consisting of the transcript of the February 17, 2011, case management conference conducted below. The following symbols will be used to designate record references in this appeal:

"PCR" (followed by the appropriate volume number) - - record on instant postconviction appeal.

"R" - - record on original direct appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Appellant William Van Poyck has been sentenced to death. The constitutionality of that death sentence has now been seriously undermined. The resolution of the issues presented herein will determine whether he lives or dies.

This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air these issues, which are of first impression in the absence of any controlling precedent from this Court, would be more than appropriate in this case given the seriousness of the claims involved and the stakes at issue. William Van Poyck, through counsel, accordingly urges this Court to permit oral argument.

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INTRODUCTION

Van Poyck's successive rule 3.851 motion filed below was predicated upon newly discovered evidence in the form of sworn affidavits from four (4) of the original penalty phase jurors stating they probably would have recommended life imprisonment for Van Poyck had they known then what is known now, that Van Poyck was not the triggerman. Van Poyck argued that a "cumulative analysis" of the "totality of all available evidence" was required by law, including evidence from prior evidentiary hearings and court proceedings, and that when such a cumulative analysis was conducted he had established that the newly discovered evidence "probably would have yielded a less severe sentence" at resentencing. *See, e.g., State v. Mills,* 788 So.2d 249, 250 (Fla. 2001)(newly discovered evidence that defendant was not the actual killer establishes, after a cumulative analysis, that the sentencing phase probably would have produced a different result at resentencing). Van Poyck challenged the constitutionality and validity of his death sentence in the face of the newly discovered evidence and urged the Court to invoke the manifest injustice doctrine to reconsider and correct prior rulings denying Van Poyck relief. The lower court summarily denied relief, refusing to grant an evidentiary hearing. This appeal follows.

STATEMENT OF THE CASE AND FACTS

I. Procedural History:

1. On July 14, 1987, a grand jury sitting in the Fifteenth Judicial Circuit, in and for Palm Beach County, issued an indictment charging Van Poyck, along with two (2) codefendants (Frank Valdes and James O'Brien) with one count of first-degree murder, seven counts of attempted murder, one count of armed robbery, two counts of aggravated assault, one count of aiding an attempted escape, and one count of possession of a firearm by a convicted felon. R3633-37. [1]

2. Van Poyck entered pleas of not guilty to the charges.

3. Van Poyck's trial was severed from those of his codefendants.

4. Van Poyck was represented at trial by court-appointed attorneys Cary Klein and Michael Dubiner.

5. Van Poyck's jury trial was held before the Honorable Michael Miller from October 31, 1988, to November 15, 1988. Van Poyck testified at his trial. The jury found Van Poyck guilty of first-degree murder, one count of attempted first-degree murder, armed robbery, one count of aggravated assault, aiding an attempted escape, and six counts of attempted manslaughter. R4138-43.

6. A penalty phase proceeding was held immediately after the jury

[1] References to the trial court record will utilize the symbol "R," and will refer to the 22 volumes of transcripts, pleading and orders, sequentially numbered from pages 1-4266.

returned its verdict, on November 16 and 18, 1988, during which Van Poyck's attorneys presented virtually no mitigating evidence. The jury returned a death recommendation by a vote of 11 to 1. [2]

7. On December 21, 1988, Judge Miller sentenced Van Poyck to death.

8. Codefendant Frank Valdes was subsequently tried, convicted and sentenced to death. On July 17, 1999, Valdes was beaten to death by prison guards in his Florida State Prison death row cell.

9. On July 5, 1990, this Court upheld Van Poyck's convictions and sentences on direct appeal. *Van Poyck v. State*, 564 So.2d 1066 (Fla.1990)(*Van Poyck I*). This Court specifically held that the State had failed to prove premeditated murder, and held that the evidence was insufficient to establish that Van Poyck was the triggerman, but the Court affirmed the first-degree murder conviction on the basis of felony murder, and upheld the death sentence after a brief *Tison v. Arizona* analysis. The Court did not address how its just-pronounced finding that the evidence was insufficient to establish that Van Poyck was the triggerman might have affected or tainted the jury's death recommendation. The United States Supreme Court declined certiorari review on March 18, 1991. *Van Poyck v. Florida*, 111 S.Ct. 1339 (1991).

[2] Van Poyck's trial attorneys later testified in post conviction proceedings that the trial court's refusal to grant a promised continuance between the guilt phase and penalty phase severely undermined their ability to investigate and present mitigating evidence.

10. On December 8, 1992, Van Poyck, represented by pro bono counsel, filed his initial Rule 3.850 motion in this cause. Judge Walter Colbath conducted a limited evidentiary hearing on the ineffective assistance of trial counsel claim, then denied all relief. On appeal a sharply divided Supreme Court, in a 4-3 decision, affirmed the denial of relief. *Van Poyck v. State*, 694 So.2d 686 (Fla.1997)(*Van Poyck II*). The U.S. Supreme Court declined certiorari review. *Van Poyck v. Florida*, 522 U.S. 995 (1997).

11. Van Poyck filed a state habeas corpus petition in this Court in February, 1997, raising a claim of ineffective assistance of appellate counsel. In another 4-3 decision a divided Court denied the petition. *Van Poyck v. Singletary*, 715 So.2d 930 (Fla.1998)(*Van Poyck III*). The U.S. Supreme Court declined certiorari review. *Van Poyck v. Singletary*, 199 S.Ct. 1252 (1999).

12. In February, 1999, Van Poyck filed a federal habeas corpus petition in the U.S. District Court, which denied all relief without an evidentiary hearing. The Eleventh Circuit Court of Appeals affirmed on May 9, 2002. *Van Poyck v. Fla. Dept. of Corrections*, 290 F.3d 1318 (2002). The U.S. Supreme Court declined certiorari review. *Van Poyck v. Moore*, 123 S.Ct. 869 (2003).

13. In December, 2002, Van Poyck filed a state habeas corpus petition in this Court raising a claim based upon *Ring v. Arizona*, 536 U.S. 584 (2002). The Court denied the petition without opinion on August 20, 2003. The U.S. Supreme Court declined certiorari review. *Van Poyck v. Crosby*, 124 S.Ct. 1884 (2004).

14. On September 30, 2003, Van Poyck filed in the trial court his Motion for Postconviction DNA Testing, pursuant to Rule 3.853, Fla.R.Crim.P. The basic issue in dispute was whether postconviction DNA testing establishing, to a scientific certainty, that Van Poyck was not the triggerman, combined with the Florida Supreme Court's direct appeal determination that Van Poyck was not the shooter, deprived Van Poyck of substantial mitigating evidence to such an extent that it tainted the jury's death recommendation and rendered the death sentence inherently unreliable. The Honorable Richard Wennett summarily denied the motion. On appeal, in a 6-1 decision, this Court affirmed, on May 19, 2005, *Van Poyck v. State*, 908 So.2d 326 (Fla.2005)(*Van Poyck IV*).

15. On April 26, 2005, while the above-described DNA testing motion was on appeal, Van Poyck filed in the trial Court his first successive Rule 3.850/3.851 motion to vacate his death sentence. The motion was based upon newly discovered evidence in the form of a sworn affidavit wherein the affiant stated that Van Poyck's codefendant, Frank Valdes, had repeatedly confessed to

him, and to others, that he, Valdes, had shot and killed Fred Griffis. This, Van Poyck asserted, rendered his jury's death recommendation tainted and the death sentence inherently unreliable. Judge Wennett summarily denied the motion. On appeal this Court rendered another 6-1 decision, affirming the denial, on May 3, 2007. *Van Poyck v. State*, 961 So.2d 220 (Fla.2007). Rehearing was denied on July 16, 2007. (*Van Poyck V*).

16. On October 31, 2008, Van Poyck filed a federal suit in the U.S. District Court, Northern District of Florida, pursuant to 42 U.S.C. § 1983, seeking post conviction DNA testing of the blood-stained clothing worn by Van Poyck, Frank Valdes, and the victim, Fred Griffis. On October 8, 2009, U.S. District Judge Robert L. Hinkle dismissed the suit. Van Poyck's timely appeal is currently pending before the Eleventh Circuit Court of Appeals.

II. Background Facts

The evidence presented at Van Poyck's trial has been summarized by this Court on direct appeal in *Van Poyck I*. Briefly, the record reflects that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported state prisoner James O'Brien from Glades Correctional Institution to a doctor's office in downtown West Palm Beach. After the officers parked the prison transport van they were confronted by Van Poyck and his accomplice, Frank Valdes, both armed

with pistols. Van Poyck took Turner's gun and forced him beneath the passenger's side of the van. While Turner was squeezing under the van he saw Valdes' feet, as Valdes forced officer Griffis to the rear of the van. While Turner watched these two sets of feet – Valdes' and Griffis' – at the rear of the van "he heard a series of shots and saw Griffis fall to the ground." *Id*. at 1067.

Both prior to, and during the trial, it became clear that the primary disputed fact would be the identity of the person who shot Fred Griffis. From the opening statement onward, up and through both the guilt and penalty phases, the state vigorously argued that Van Poyck was the triggerman. With no eyewitnesses to the actual shooting the prosecutor argued the circumstantial evidence, and the inferences, showed that Van Poyck was the shooter (even as he withheld a diagram and notes written by his own witness, the medical examiner, which demonstrated that Valdes was most certainly the shooter). The surviving officer, Steven Turner, also placed the murder weapon in Van Poyck's hand when he purported to identify the individual pistols. In contrast, Van Poyck testified and admitted that he had recruited Valdes to free O'Brien, but denied shooting officer Griffis.

With the evidence thus disputed the case went to the jury under dual theories of first-degree murder: Felony murder or premeditated murder. The trial court submitted a "special verdict form" to the jury. The jury was first instructed to

unanimously determine if Van Poyck was guilty of "first-degree murder." The jury was then to specifically determine if Van Poyck was guilty of "premeditated murder" or "felony murder," and/or "both," with a box provided for checking the appropriate determination. The jury was instructed to check "premeditated murder" if *any* juror found Van Poyck guilty of only premeditated murder; and to check "felony murder" if *any* juror found him guilty of only felony murder; and to check "both" if *any* juror found him guilty of both. R3046-47. Thus, this aspect of the verdict was not required to be unanimous. The defense objected to this special verdict form's failure to reflect a numerical breakdown by each category to demonstrate how many, if any, jurors voted for a particular theory of guilt.

The jury returned a unanimous guilty verdict on first-degree murder and checked the boxes for "felony murder" and "both." R4138. This meant that anywhere from one (1) to eleven (11) jurors believed Van Poyck was guilty of premeditated murder, and, by necessity under the facts of this case, was the actual killer.

At the penalty phase the state continued to argue that Van Poyck was the triggerman while defense counsel argued that he was not. *See, e.g.*, R3511-12; 3522; 3524-65. The jury returned a death recommendation, by a vote of 11 to 1. Judge Miller followed the recommendation, finding four (4) statutory aggravating

circumstances and no mitigation. In his written sentencing order Judge Miller rejected Van Poyck's proposed mitigation that he was not the shooter by writing that the state had "in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis." R40; RA4199.

Thus, Van Poyck was recommended for death, and sentenced to death by a jury and judge that *erroneously* believed Van Poyck was the triggerman, as evidenced by the special verdict form and by Judge Miller's written sentencing order.

On direct appeal the Supreme Court of Florida found that the evidence was legally insufficient to sustain a verdict of premeditated murder, and legally insufficient to sustain a finding that Van Poyck was the triggerman. *Van Poyck I*, at 1069 ("the evidence was insufficient to establish first-degree premeditated murder"), and 1070 ("the record does not establish that Van Poyck was the triggerman"). The Court nonetheless upheld Van Poyck's conviction based upon first-degree felony murder, and then upheld the death sentence following a brief *Tison v. Arizona* analysis. *Id*. However, the Court failed to reconsider the verdict and/or sentence in light of its newly announced acquittals of premeditated murder and of being the actual killer, and failed to acknowledge that the jury's death

recommendation, and thus the actual sentence, may have been tainted and rendered unconstitutionally unreliable where it was at least partly predicated upon the jury's erroneous belief that Van Poyck was the triggerman, when in fact Van Poyck did not shoot Fred Griffis.

In his initial Rule 3.850 postconviction proceeding Van Poyck presented, *inter alia*, a claim of ineffective assistance of penalty phase counsel for failure to investigate and present a wealth of available mitigating evidence, the existence of which was established during the lengthy evidentiary hearing. Justices Anstead, Kogan and Shaw dissented from the denial of relief on this claim, stating in relevant part that:

> The undisputed facts in this case present a blatant example of counsel's failure to investigate and prepare a penalty phase defense. Once again, we have a lawyer appointed who had absolutely no experience in capital cases . . . an inexperienced lawyer who has conceded he was unprepared and, in his words "caught with his pants down. . ." We do not have to guess at whether counsel did a proper investigation and prepared a defense before the penalty phase began; counsel admits he did not. . . *In the postconviction hearing below the appellant presented a vast array of mitigating circumstances of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase* . . . All of this mitigating evidence was readily available to trial counsel, but none of it was discovered or presented . . . In our previous review of this case we found insufficient evidence of premeditation but affirmed appellant's guilt on a felony murder theory. In our opinion we upheld the sentence of death and expressly noted that the trial court properly rejected the meager mitigation offered by counsel. Van Poyck v. State, 564 So.2d 1066 (Fla.1990). Knowing what we do now, we

> should not give our approval to a sentence of death predicated upon a patent case of ineffective assistance of counsel. In doing so we are simply providing additional support to the already considerable body of evidence that the death penalty process is seriously flawed by the legal system's tolerance of incompetent counsel. We should apply our holding in Deaton v. Dugger and remand the case for a reliable penalty proceeding in which evidence of aggravation and mitigation can be presented by counsel prepared on both sides.

Van Poyck v. State, 694 So.2d 686 (Fla.1997) at 699-701 (emphasis added).

In the two decades since Van Poyck's conviction, the State, in its many court filings in response to Van Poyck's various pleadings, has freely (if belatedly) conceded that Van Poyck was not the triggerman, but has consistently argued that this "did not matter."

III. Specific Facts Pertaining to the Motion Below

i) The Motion for DNA Testing: In 2003 Van Poyck filed in the trial court his Rule 3.853 Motion for Postconviction DNA testing, the basis of which was that DNA testing of blood residue on the clothing worn by Van Poyck and Valdes on the day of the offense would conclusively and scientifically establish that Van Poyck was not the triggerman, contrary to what the state argued to Van Poyck's jury. This, Van Poyck contended, would create the requisite "reasonable probability" that he would have received a lesser sentence had the jury known he was not the shooter. The Honorable Richard J. Wennet summarily denied relief

and this Court affirmed in a 6-1 decision. *Van Poyck v. State*, 908 So.2d 326 (Fla.2005). In affirming, the majority put themselves in the place of the jury, attempting to discern what the jury would have done with the knowledge that Van Poyck did not kill the victim. The Court, specifically noting the lack of mitigation presented at trial, concluded that:

> [W]e 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.

Van Poyck IV, at 330. In reaching this conclusion, the majority failed to conduct the required cumulative analysis of *all* mitigating evidence, and specifically failed to consider and weigh the substantial mitigation developed in Van Poyck's initial postconviction proceeding, the "vast array of mitigating circumstances of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase . . . but [was not] discovered or presented." *Van Poyck II*, at 699 (Justices Anstead, Kogan and Shaw dissenting).

ii) **The First Successive Postconviction Motion**: In 2005, while the denial of the DNA motion was still pending on appeal, Van Poyck filed a successive Rule 3.851 motion based upon a sworn affidavit which stated that Van Poyck's codefendant, Frank Valdes, had repeatedly confessed to the affiant that he

had shot and killed Fred Griffis. This newly discovered evidence, the motion asserted, created the requisite "probability" that Van Poyck would have received a lesser sentence had his jury known he was not the triggerman. Judge Wennet summarily denied the motion and this Court in another 6-1 decision, affirmed. *Van Poyck v. State*, 961 So.2d 220 (Fla.2007). Referring back to its then-recent decision in *Van Poyck IV*, affirming the denial of the DNA testing motion, the majority held that:

> Having decided in *Van Poyck IV* that new evidence showing that Valdes was the triggerman would not create a "reasonable probability" of a different result, we are bound to conclude here that different evidence on the same fact would not "probably" create a different result.

Van Poyck, 961 So.2d at 225. However, the majority again failed to conduct the required cumulative analysis of <u>all</u> prior mitigating evidence before weighing the probable impact upon the jury of this newly discovered evidence, and specifically failed to consider and weigh the "vast array of mitigating circumstances of the most serious nature" which was developed during Van Poyck's initial Rule 3.850 proceeding. Instead, the majority emphasized the lack of mitigation presented at trial:

> At most, non-triggerman status would have constituted nonstatutory mitigation which, considering the four aggravating factors *and absence of other mitigation*, would probably not have yielded a lesser sentence.

Id. at 226 (emphasis added).

iii) <u>The Newly Discovered Evidence</u>: Following the conclusion of his postconviction proceedings Van Poyck, who was not and never has been represented by Court-appointed postconviction counsel, began contemplating, on his own *pro se* initiative, an executive clemency petition based upon the wealth of mitigating evidence developed in post-trial proceedings. [3] After saving up his own personal funds, and operating on his own initiative, Van Poyck retained Jan D. Rutter, a Florida licensed private investigator, to help him develop facts and evidence to support a clemency petition. *See:* PCR1-28 (Exhibit #1, Supporting Appendix (sworn affidavit of Jan D. Rutter)). As part of this effort it was decided to interview Van Poyck's original jurors to determine whether some or all would support a clemency bid. Investigator Rutter determined that two (2) of the original twelve jurors were deceased (Albert Baker and Terry Berkowitz), but she learned the location of the ten (10) remaining jurors: 1) Darline Hancock; 2) Virginia A.

[3] At all times during postconviction proceedings Van Poyck was represented by out-of-state *pro bono* attorneys. Van Poyck has never been represented by Capital Collateral Regional Counsel, Registry Counsel, Conflict Counsel, or any other postconviction counsel appointed under Section 27.702, Fla.Stat., or otherwise paid for by the State of Florida.

Dillon; 3) Christine Dowd; 4) Stephen Rich; 5) James Palmer; 6) Cheryl Daniels; 7) Goldie Moody; 8) Paul Engle; 9) Mary Bradford; and, 10) Debra Blanchard.

In January, 2010, Van Poyck paid Investigator Rutter her fees and costs, at which time Mrs. Rutter travelled to Georgia, Tennessee, New York, and throughout Florida in an attempt to personally interview each juror. Ultimately Mrs. Rutter was able to speak to eight (8) of the ten jurors; she was never able to speak with Goldie Moody or Cheryl Daniels. Of the eight (8) jurors Mrs. Rutter spoke to she was able to actually interview seven (7) jurors. Prior to interviewing each juror, Investigator Rutter handed each juror a typed form (which she also read aloud to each juror) which explained that the purpose of the interview was not to challenge Van Poyck's judgment of guilt or conviction, but rather was to obtain their "opinion about the suitability of Bill's death sentence" and ascertain their position on Van Poyck's "bid for clemency – to have his death sentence reduced to life imprisonment." Each interviewed juror signed a copy of this "Introduction to Jurors" form. *See, e.g.*, PCR1-30 (Exhibit #2, supporting appendix (copy of form signed by Virginia A. Dillon)).

Juror James Palmer informed Jan Rutter that he was the lone juror who voted for a life recommendation. Jurors Darline Hancock, Virginia A. Dillon and Stephen Rich executed sworn affidavits stating that had they known in 1988 that

Van Poyck was not the person who killed Fred Griffis there "is at least a reasonable probability that I would have recommended a life sentence for Van Poyck." *See:* PCR1-31-33 (Exhibits #3, 4, and 5, Supporting Appendix). Juror Christine Dowd executed a sworn affidavit stating that she would "recommend life without parole if given the option." *See:* PCR1-34 (Exhibit #6). Jurors Paul Engle, Debra Blanchard and Mary Bradford declined to sign an affidavit, although Mary Bradford stated that she would do so if a relative of the victim asked her to. Jurors Goldie Moodie and Cheryl Daniels could not be contacted or interviewed despite Jan Rutter's best efforts to do so.

Thus, of the seven (7) jurors interviewed, four (4) jurors (57.2%) executed an affidavit stating they probably would have or would have recommended life imprisonment for Van Poyck knowing now that he was not the triggerman, while a fifth juror, James Palmer, stated that he had already recommended life imprisonment. Thus, five out of eight jurors (62.5%) either voted for life imprisonment, or probably would have voted for life had they known that Van Poyck was not the killer. Only three (3) jurors out of the eight located jurors (37.5%) declined to sign an affidavit supporting clemency. Four (4) jurors were either deceased or could not be interviewed. Even putting aside James Palmer, who originally voted for life, four of the remaining seven jurors interviewed

(57.2%) would have probably voted for life imprisonment had they known Van Poyck was not the triggerman. Applying these percentages (whether it is 62.5% or even 57.2%) to the four (4) jurors never interviewed demonstrates that, within a reasonable statistical probability, at least two, and most likely three of those jurors would also probably have voted for life imprisonment had they known Van Poyck was not the person who killed Fred Griffis. This means that the vote for life imprisonment probably would have been 7 to 5 (58.3%) or even 8 to 4 (66.6%) in favor of life. At a minimum, it would have been at least the 6 to 6 (50%) needed to garner Van Poyck a life recommendation. It is this newly discovered evidence – the sworn affidavits contained in the Supporting Appendix – upon which the Rule 3.851 motion below was premised. [4]

The last affidavit (of Darline Hancock) was executed on May 12, 2010. Following receipt of these affidavits Van Poyck retained the undersigned counsel to represent him in his Rule 3.851 motion.

IV. The Order of Denial Under Appeal:

On December 6, 2010, Van Poyck, represented by undersigned counsel, filed his Sworn Rule 3.851 Motion to Vacate and Set Aside Capital Sentence, with

[4] Sometime after Stephen Rich executed his sworn affidavit, Jan Rutter was informed, by Mr. Rich's wife (who witnessed Mr. Rich sign the affidavit) that her husband, Mr. Rich, had died.

Supporting Memorandum of Law; and, Motion for Evidentiary Hearing. PCR1-1-25. A supporting Appendix containing sworn affidavits was simultaneously filed. PCR1-26-35.

On January 26, 2011, the State filed its unsworn and unsupported Response to Van Poyck's Rule 3.851 motion. PCR1-38-60.

On February 15, 2011, Van Poyck filed his Sworn Reply to State's Response. PCR1-65-92.

On February 17, 2011, the lower court conducted a case management conference, pursuant to Rule 3.851(f)(5)(B), with counsel for both sides present. PCR2-1-64. The trial court heard some legal argument from both sides before announcing, at the conclusion of the conference, its intention to summarily deny the motion. PCR2-61.

On March 3, 2011, the trial court rendered its written order of summary denial, PCR1-93-107. The court gave three (3) independent grounds for denial. First, the court held that the jurors' affidavits "would not be admissible as evidence in any future evidentiary hearing or sentencing hearing," and thus the newly discovered evidence did not meet the threshold requirement of *Jones v. State*, 709 So.2d 512, 521 (Fla.1998). PCR1-101-103.

Second, the court held that "even if the juror affidavits were deemed to be admissible evidence, this Court finds that they are not 'newly discovered', and, therefore, Van Poyck's motion is untimely." PCR1-103.

Finally, the lower court held that Van Poyck had not proved that the newly discovered evidence probably would have yielded a less severe sentence because under Florida law "the jury recommendation is simply an advisory sentence," PCR1-104, and thus, presumably, no matter what a penalty phase jury recommended the sentencing judge could override that recommendation.

This timely appeal follows.

SUMMARY OF THE ARGUMENTS

a) The lower court erred in refusing to conduct the requested evidentiary hearing and in failing to accept as true the well-pled factual allegations contained in Van Poyck's sworn motion and sworn reply. These errors adversely affected all of Van Poyck's subclaims

b) The lower court erred in holding that the motion was untimely. Taking Van Poyck's factual allegations as true, it is clear that the motion was timely filed and that Van Poyck exercised due diligence in bringing his claim.

c) The lower court erred in holding that the newly discovered evidence would not probably produce a less severe sentence because under Florida law jury

recommendations are only advisory. The court failed to consider the different dynamics of a jury recommendation of life, as opposed to a recommendation of death, upon a sentencing judge, who must give "great weight" to the jury's recommendation.

d) The lower court erred in failing to conduct the required cumulative analysis of all the evidence and mitigation, including the evidence adduced in prior postconviction proceedings, before the court decided whether the newly discovered evidence met the second prong of the *Jones II* test.

e) The lower court erred in holding that the juror's affidavits would not be admissible; under the facts of this case the affidavits were admissible where Van Poyck was not challenging the verdict.

f) Van Poyck is entitled to a new penalty phase proceeding where his death sentence has been rendered constitutionally unreliable, fundamentally unjust, manifestly unjust, and he is "actually innocent" of the death penalty. This Court should invoke the doctrine of manifest injustice to reconsider and correct this Court's prior rulings in this case where those rulings have now been shown to be erroneous.

STANDARD OF REVIEW

The lower court summarily denied Van Poyck's constitutional claim of

newly discovered evidence, both on the merits and as being untimely, refusing to grant the requested evidentiary hearing. Because Van Poyck's claim was summarily denied this Court's review is de novo. *Walton v. State*, 3 So.3d 1000, 1005 (Fla. 2009) ("This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record").

Because the lower court summarily denied Van Poyck's claim (including the sub-claim regarding timeliness and due diligence) the facts alleged in Van Poyck's sworn Rule 3.851 motion, as well as in his sworn reply to the State's response, must be accepted as true by this Court in determining whether Van Poyck is entitled to an opportunity to present evidence in support of his factual allegations (including facts supporting his claim of timeliness and due diligence in filing his successive Rule 3.851 motion). *Walton, supra; Rutherford v. State*, 940 So.2d 1112, 1118 (Fla. 2006)("Because the motion was summarily denied, we must accept that [the defendant] could not have known about the evidence at the time of trial by the use of due diligence as required under the first prong of *Jones v. State*, 591 So.2d 911 (Fla. 1991), and that he could not have obtained the evidence earlier by the exercise of due diligence as required by rule 3.851(d)(2)(A)."); *Swafford v. State*, 679 So.2d 736, 739 (Fla. 1996); *Davis v. State*, 26 So.3d 519, 528 (Fla.

2009).

Moreover, the lower court's denial of Van Poyck's motion for an evidentiary hearing is also subject to de novo review by this Court. *See, Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008)("A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court; therefore, for all intents and purposes, its ruling constitutes a pure question of law and is subject to de novo review. *See, Rose v. State*, 985 So.2d 500, 505 (Fla. 2008).").

Accordingly, this Court owes no deference to any factual or legal findings made by the lower court in its summary order of denial. *Peede v. State*, 748 So.2d 253 (Fla. 1999); *Gaskin v. State*, 737 So.2d 509 (Fla. 1999); *Lightbourne v. Dugger*, 549 So.2d 1364 (Fla. 1989).

ISSUE PRESENTED

THE LOWER COURT ERRED IN SUMMARILY DENYING VAN POYCK'S RULE 3.851 CLAIM THAT NEWLY DISCOVERED EVIDENCE IN THE FORM OF JUROR AFFIDAVITS ESTABLISHES THAT HIS DEATH SENTENCE IS CONSTITUTIONALLY UNRELIABLE, FUNDAMENTALLY UNJUST, AND THAT HE IS ACTUALLY INNOCENT OF THE DEATH PENALTY, ENTITLING HIM TO RELIEF UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

ARGUMENT

In *Riechmann v. State*, 966 So.2d 298 (Fla. 2007), at 316, this Court repeated the well-established standard for newly discovered evidence presented in postconviction proceedings:

> To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)(*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 709 So.2d at 526 (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones I*, 591 So.2d at 915.

Van Poyck submits that the lower court erred when it summarily denied, both on the merits and, alternatively, as being untimely and lacking due diligence, his successive Rule 3.851 motion. The motion below presented newly discovered evidence in the form of sworn affidavits from Van Poyck's original penalty phase jurors averring that they would not have recommended a death sentence had they known then what is known now, to wit, that Van Poyck was not the person who

shot and killed Fred Griffis. This newly discovered evidence not only meets the *Jones II* test, it substantially undermines Van Poyck's death sentence, making Van Poyck "actually innocent" of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333 (1990), and progeny, and making the death sentence "fundamentally unjust" under *House v. Bell*, 547 U.S. 518 (2006) and *Schulp v. Delo*, 513 U.S. 295 (1996). Because Van Poyck's death sentence has now been rendered inherently unreliable, in violation of well-established Eighth Amendment jurisprudence, *see, e.g., Deck v. Missouri*, 544 U.S. 622 (2005), it stands in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and the corresponding provisions of the Florida Constitution, and Van Poyck is entitled to relief. *Accord, Allen v. Butterworth*, 756 So.2d 52, 59 (Fla. 2000), where this Court reaffirmed that:

> [W]e are also mindful that our primary responsibility is to follow the law in each case and to ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitution.

Van Poyck identifies and appeals the following errors contained in the lower court's order of denial:

a) <u>The Lower Court Erred in Refusing to Conduct the Requested Evidentiary Hearing and in Failing to Accept as True the Factual Allegations Set Forth in Van Poyck's Sworn Rule 3.851 Motion and his Sworn Reply to the State's Response.</u>

Van Poyck specifically moved for a "full, plenary evidentiary hearing," both

in the caption of his Rule 3.851 motion and in the body of the motion itself (PCR1-15-16) where he argued why he was entitled to an evidentiary hearing to support his uniquely fact-based claim. The lower court announced its intention to summarily deny the Rule 3.851 motion at the conclusion of the February 17, 2011, case management conference (PCR2-61), and entered its written order of denial thirteen days later (PCR1-93). The court denied the motion on its merits and on the alternative ground of untimeliness and/or lack of due diligence. The court never addressed the issue of the need, or lack thereof, for an evidentiary hearing to resolve Van Poyck's claim, or any of it necessarily included subclaims, such as the timeliness of the motion and/or Van Poyck's due diligence in bringing the claim. (it is worth noting that when the lower court announced its decision, at the conclusion of the February 17, 2001, case management conference, to summarily deny Van Poyck's motion, the court had conceded, at PCR2-28, that it had not even read Van Poyck's Sworn Reply to the State's Response (filed on February 15, 2011) which addressed all of the legal and factual issues raised by the State, and which further expanded on the issue of timeliness and due diligence and the acute need for an evidentiary hearing).

The lower court erred in denying Van Poyck an evidentiary hearing where he could prove the merits of his claim, and to establish the timeliness of the motion

and his due diligence in bringing the claim. To the extent there existed factual disputes, the court erred in failing to permit Van Poyck an opportunity to establish and prove his claims.

The lower court compounded this error by failing to accept as true the factual allegations set forth in Van Poyck's sworn Rule 3.851 motion, (and the sworn affidavits contained in the supporting Appendix), and his Sworn Reply to the State's Response. Rather than accepting Van Poyck's sworn, well-pled factual allegations as true the lower court made contrary factual conclusions, both as to the merits and as to the issue of timeliness/due diligence, without any evidentiary or record support. This failure to accept as true Van Poyck's factual allegations bled into and adversely affected all of the subclaims necessarily contained in the primary claim, as Van Poyck more specifically argues in each below-listed subclaim.

Rule 3.851(f)(5)(A)(i), Florida Rule of Criminal Procedure, governing successive motions, mandates that "the trial court shall schedule an evidentiary hearing, to be held within 90 days, on claims listed by the defendant as requiring a factual determination." In his motion Van Poyck specifically identified his claim as one requiring factual determinations. *See* PCR1-15 ("The instant claim requires

a factual determination(s) and thus an evidentiary hearing."). Moreover, throughout the motion Van Poyck identified those factual disputes which required an evidentiary hearing to be resolved.

In *Amendments to FCRP 3.851, 3.852 and 3.893*, 797 So.2d 1213 (Fla. 2001), this Court stated, at 1219, that:

> Although evidentiary hearings on factually based claims contained in successive motions are not automatically required under the new rule, we encourage courts to liberally allow them on timely raised newly discovered evidence claims . . .

Accord, Davis v. State, 26 So.3d 519, 526 (Fla. 2009), where this Court, in the context of granting evidentiary hearings on successive Rule 3.851 motions, wrote that:

> [T]his Court is guided by the principle that courts are encouraged to liberally view the allegations to allow evidentiary hearings on timely raised claims that commonly require a hearing.

See also, Swafford v. State, 679 So.2d 736, 740-41 (Fla. 1996) (specially concurring opinion) (emphasizing the importance of a full evidentiary process in successive postconviction proceedings in capital cases). In *Ventura v. State*, 2 So.3d 194 (Fla. 2009), at 197-98, this Court articulated the appropriate standard for denying an evidentiary hearing on a successive postconviction motion, and this Court's standard of review:

> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files and records in the case conclusively show that the movant is entitled to no relief." . . . The Court will uphold the summary denial of a newly-discovered evidence claim if the motion is legally insufficient or its allegations are conclusively refuted by the record. *See McLin v. State*, 827 So.2d 948, 954 (Fla. 2002).

In the case at bar "the motion, files and records in the case" did not conclusively show that Van Poyck "is entitled to no relief," nor was the "motion legally insufficient or its allegations conclusively refuted by the record." Accordingly, summary denial was inappropriate and the court erred in denying Van Poyck an evidentiary hearing. *See, Demps v. State*, 416 So.2d 808 (Fla. 1982)("Because we cannot say that the record conclusively shows [the defendant] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing.").

Moreover, the court below erred in failing to accept as true the factual allegations set forth in Van Poyck's sworn motion and his sworn reply to the state's response. *Ventura v. State, supra*, at 197-98 ("In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record."); *Walton v. State, supra; Davis v. State, supra; Rutherford v. State, supra*. In the individual subclaims argued, *infra*, Van Poyck elaborates on the specific

instances where the trial court's failure to accept as true Van Poyck's factual allegations, and the court's choosing to go beyond the four corners of "the written materials before the court," prejudiced Van Poyck's claims. Because the lower court erred in refusing to grant Van Poyck an evidentiary hearing the order under appeal should be reversed and this cause remanded for a full, plenary evidentiary hearing. *Demps v. State, supra.*

b) <u>The Lower Court Erred in Holding that the Evidence Was Not Newly Discovered and Thus the Motion Was Untimely</u>

In the context of filing a Rule 3.851 motion a timeliness and due diligence requirement is imposed by both rule and case law. Rule 3.851(d)(1) requires that any motion "shall be filed by the prisoner within 1 year after the judgment and sentence become final." An exception to this time limitation is set forth in Rule 3.851(d)(2)(A), which allows the filing of such motion if it alleges:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence.

Further, Rule 3.851(e)(2)(C)(iv), governing successive motions, requires "as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available."

Moreover, in the context of newly discovered evidence claims brought in

successive motions, case law also imposes a due diligence requirement. In *Riechmann v. State*, 966 So.2d 298, 305 (Fla. 2007), this Court repeated the oft-stated requirement that:

> [W]hen a claim is raised in a successive motion, the movant has the additional burden of demonstrating why the claim was not raised before.

Later on the *Reichmann* Court, at 316, repeated the *Jones v. State* standard:

> To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence.

In his sworn motion filed below Van Poyck set forth in detail why "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence," as required by Rule 3.851(d)(2)(A), and he supplied the required "statement of the reason why the witness or document was not previously available," as mandated by Rule 3.851(e)(2)(C)(iv). Van Poyck supplied these factual allegations throughout the body of the motion (*see, e.g.*, PCR1-11-13), and he also reiterated these factual allegations in a specific section titled "Statement of Due Diligence and Names, Addresses, and Telephone Numbers of Witnesses." *See*, PCR1-13-14.

Moreover, when the State asserted in its unsworn and unsupported response

that the motion was untimely due to a lack of due diligence, Van Poyck filed his Sworn Reply to State's Response to Defendant's Successive Rule 3.851 Motion, wherein he reiterated and expanded upon his sworn factual allegations supporting his due diligence and thus supporting the timeliness of the motion. *See, e.g.*, PCR1-85-90. As set forth in both his sworn motion and sworn reply, Van Poyck met his burden through his sworn, well-pled factual allegations which established, at the pleading stage, a *prima facie* case of timeliness and due diligence. Briefly stated, these factual allegations were:

- Neither the trial court, Van Poyck, or his attorneys knew or could have known, of the newly discovered evidence at the time of the trial, or during prior postconviction proceedings.

- Van Poyck did not learn of the existence of the newly discovered evidence until 2010, when Van Poyck, without assistance of or representation by any counsel, used his own funds to hire private investigator Jan Rutter to interview his penalty phase jurors for purposes of developing a clemency petition and the jurors offered up their statements, which were then reduced to the sworn affidavits filed with the motion. The motion was filed less than one year after Van Poyck obtained the affidavits, making the motion timely.

- No legal reason even existed to question the jurors on this subject

until 2007, when this Court decided *Van Poyck v. State*, 961 So.2d 220, and, putting themselves in the place of the jurors a majority of this Court held that even if the jurors had known that Van Poyck was not the triggerman it "probably" would not have resulted in a less severe sentence. It was only then, at the earliest, that the jurors' true opinions even became a possible issue.

- Van Poyck was confined out of state for over nine (9) years, from October 15, 1999, to October 30, 2008, after Governor Jeb Bush had Van Poyck transferred to Virginia's death row following the 1999 murder of Van Poyck's codefendant, Frank Valdes, by Florida State Prison guards. As an out-of-state prisoner Van Poyck had no access to Florida case law and legal materials, and case law holds that under these circumstances the time period for filing a postconviction motion should be tolled. *Demps v. State*, 696 So.2d 1296 (3d DCA 1997). Moreover, an evidentiary hearing may be necessary to determine whether, as here, Van Poyck's confinement in a foreign jurisdiction deprived him of meaningful access to Florida state legal materials. *Ballester v. State*, 781 So.2d 503 (3d DCA 2001); *Rolling v. State*, 755 So.2d 184 (3d DCA 2000).

- Rule 4-3.5(d)(4), Florida Rules of Professional Conduct prohibit any attorney involved in a case from interviewing or causing another to interview any juror "except to determine whether the verdict may be subject to challenge." Since

Van Poyck's position has always been that he is not challenging "the verdict," but instead is questioning a sentencing recommendation (see argument, *infra*) the clear and unambiguous language of the rule barred Van Poyck's attorneys from interviewing any jurors.

- The State of Florida has never appointed Capital Collateral Regional Counsel, Registry Counsel, Conflict Counsel or any other postconviction counsel to represent Van Poyck pursuant to section 27.702, Florida Statutes, or otherwise paid for any counsel to represent Van Poyck in any postconviction proceedings. For the most part Van Poyck has been represented by *pro bono*, out-of-state postconviction counsel on a somewhat *ad hoc* basis.

Importantly, as argued in more detail, *infra*, the trial court was required, at the pleading stage, to accept as true these sworn factual allegations regarding timeliness and due diligence. Instead, the lower court found Van Poyck's motion to be untimely due to a lack of due diligence. The Court's "factual finding" on this issue is as follows:

> Even if the juror affidavits were deemed to be admissible evidence, this Court finds that they are not "newly discovered," and therefore, Van Poyck's motion is untimely . . . The facts that formed the basis of the affidavits were known to the Defendant and counsel at trial. The position that this "new evidence" was not available until the decision was rendered in *Van Poyck V* is untenable and absurd. From the inception of this case, the issue as to whether the Defendant was

> the triggerman was important to the Defendant. At trial, the defense argued that Valdez was the shooter. Therefore, this "new evidence" could only properly be brought before this Court within one (1) year after the judgment and sentence became final, or by September 1991. Van Poyck's juror affidavits are nineteen (19) years out of time, Fla.R.Crim.P. 3.851(d)(1). Therefore, the motion is untimely.

See PCR1-103. The lower court's finding is erroneous on multiple grounds. First, the court misstated Van Poyck's claim. Van Poyck never stated the newly discovered evidence was not *available* until this Court rendered *Van Poyck V*, he merely stated that the newly discovered evidence had no legal relevance until *Van Poyck V* was rendered. It was *Van Poyck V* which first created the need to hear from the jurors themselves on this issue. Second, the lower court's "finding" that "The facts that formed the basis of the affidavits were known to the Defendant and counsel at trial" is without any factual support whatsoever and is simply inexplicable. Van Poyck's sworn allegations made it clear that he did not learn of the jurors' position until 2010 when the jurors offered up these statements to private investigator Jan Rutter during interviews being conducted in preparation for a proposed executive clemency petition. Obviously, a statement cannot be "available" until the person offering it chooses to do so. This position is supported by case law from this Court on this very issue.

For example, in *Davis v. State*, 26 So.3d 519, 528 (Fla. 2009), this Court rejected the lower court's finding that the capital defendant's postconviction

motion was untimely because the defendant "had years" to locate the witness:

> Here, as in *Swafford*, the State's only argument to due diligence was that defense counsel had "years" to find the witness. *See id.* Regardless of the time span from the time of trial to the discovery of the new testimony, recanted testimony cannot be "discovered" until the witness chooses to recant. *See Burns v. State*, 858 So.2d 1229, 1230 (Fla. 1st DCA 2003)("Even though the appellant knew at trial that the codefendant was lying, the appellant could not have gotten the codefendant to admit that he was lying earlier, and thus the recantation is newly discovered evidence that could not have been obtained earlier with due diligence."). Logically even if counsel had or could have located these witnesses at an earlier date such earlier date does not conclusively establish that the witness would have recanted their testimony at that earlier date.

Likewise, Van Poyck could not have obtained the jurors' affidavits until the jurors decided to make those statements, and Van Poyck had no reason to even interview the jurors until he chose to prepare a clemency petition. Moreover, the jurors' statements had no legal relevance whatsoever until this Court rendered *Van Poyck V* in 2007. The State's, and the lower court's assertion that Van Poyck "had years" to obtain the affidavits simply does not support a lack of due diligence.

Finally, at the pleading stage the trial court below was required to – but failed to – accept as true Van Poyck's sworn factual allegations regarding timeliness and due diligence. *See, e.g., Rutherford v. State*, 940 so.2d 1112, 1120 (Fla. 2006):

> Because the motion was summarily denied, we must accept that Rutherford could not have known about the evidence at the time of trial by the use of due diligence as required under the first prong of *Jones v. State*, 591 So.2d 911 (Fla. 1991), and that he could not have obtained the evidence earlier by the exercise of due diligence as required by rule 3.851(d)(2)(A).

See also: Card v. State, 652 So.2d 433 (Fla. 1995)(allegations of fact as to due diligence must be accepted as true at the pleading stage); *Swafford v. State*, 670 So.2d 736 (Fla. 1996)(same). In *Davis v. State, supra*, this Court recently rejected similarly conclusory assertions by the state and the trial court that that defendant had failed to demonstrate due diligence in bringing his newly discovered evidence claim:

> Under the first prong of *Jones II*, the statements made during the *Huff* hearing in conjunction with the assertions in the motion established a prima facie case of due diligence sufficient to require an evidentiary hearing . . . At the pleading stage this information was sufficient to establish due diligence. *See Swafford v. State*, 679 So.2d 736, 739 (Fla. 1996) . . . Here, as in *Swafford*, the state's only argument to dispute due diligence was that defense counsel had "years" to find the witness.

Davis, at 528. Had the lower court accepted at true, at the pleading stage, Van Poyck's sworn factual allegations concerning timeliness and due diligence, as it was required to, the lower court could not have made the finding that it did, that Van Poyck's motion was untimely. There is simply no factual support in the record for the circuit court's finding of a lack of due diligence.

Moreover, to the extent there existed factual disputes as to the issue of due diligence, the trial should have conducted an evidentiary hearing to resolve those factual disputes. *Swafford, supra* (remanding for evidentiary hearing to resolve due diligence issue). In *Davis, supra,* this Court recently held:

> The postconviction trial court appears to have incorrectly applied the heightened requirements to establish due diligence during an evidentiary hearing to evaluate the allegations at a pleading stage . . . The newly discovered evidence claim remains to be factually tested in an evidentiary hearing to determine whether the defendant has demonstrated that the successive motion has been filed within the time limit for when the statement was or could have been discovered through the exercise of due diligence . . . The motion here was sufficiently pled to allow the opportunity to prove through the testimony of witness that the threshold requirement of due diligence was satisfied. Accordingly, the postconviction trial court erred in summarily denying this claim on the basis that the pleading failed to sufficiently satisfy the due diligence requirement at that stage of the proceeding.

Davis, at 528-29. Likewise, in the instant case Van Poyck's motion was, "sufficiently pled" to require, at a minimum, an evidentiary hearing to prove the threshold issue of due diligence, and the lower court erred in summarily denying Van Poyck's claim on a finding of a lack of due diligence.

c) <u>The Lower Court Erred in Holding that the Newly Discovered Evidence Would Not Probably Produce a Less Severe Sentence at Re-Sentencing</u>

In *Riechmann v. State, supra,* at 316, this Court explained that:

> Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to

> a reasonable doubt as to his culpability." *Jones II*, So.2d at 526 (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones I*, 591 So.2d at 915.

See also, Williamson v. State, 961 So.2d 229, 237 (Fla. 2007)("In order to grant a new penalty phase based on newly discovered evidence, the newly discovered evidence must be of such a nature that it would probably result in a life sentence.").

In his sworn motion below Van Poyck explained in detail why the newly discovered evidence established, "within a reasonable statistical probability," that it would probably result in a less severe sentence at any resentencing. *See*: PCR1-11-13. Later, in the sworn memorandum of law, Van Poyck elaborated on this issue. PCR1-19-23. And, in his sworn reply to the state's response Van Poyck elaborated on this even further. PCR1-68-77. Briefly stated the evidence and sworn factual allegations are as follows:

- As a result of her investigation, private investigator Jan Rutter determined that two (2) of Van Poyck's original twelve penalty phase jurors (Albert Baker and Terry Berkowitz) were deceased by early 2010. However, Mrs. Rutter learned the probable location of the remaining ten (10) jurors.

- Ultimately Mrs. Rutter was able to speak, by telephone, to eight (8) of the ten jurors; she was never able to speak to two (2) of the jurors (Goldie Moody or Cheryl Daniels). Of the 8 jurors Mrs. Rutter spoke to she was able to actually interview, in person, seven (7) jurors.

- From the seven personal interviews the following facts were adduced: Juror James Palmer stated that he was the lone juror who originally voted for life imprisonment. Jurors Darline Hancock, Virginia A. Dillon and Stephen Rich executed sworn affidavits stating that had they known in 1988 that Van Poyck was not the person who killed Fred Griffis "there is at least a reasonable probability that I would have recommended a life sentence for Van Poyck." *See*, PCR1-31-33, respectively (sworn affidavits of jurors Hancock, Dillon and Rich). Juror Christine Dowd executed a sworn affidavit stating that she would "recommend life without parole if given the option." *See*, PCR1-34.

- Jurors Paul Engle, Debra Blanchard and Mary Bradford declined to sign an affidavit, although Mary Bradford stated that she would do so if a relative of the victim asked her to do so. Jurors Goldie Moody and Cheryl Daniels could not be contacted or interviewed despite Mrs. Rutter's best efforts to do so.

Thus, of the seven (7) jurors actually interviewed, four (4) jurors (57.2%) executed an affidavit stating that there was "at least" a reasonable probability that

they would have, or, they would have, recommended life in prison for Van Poyck, knowing now that he was not the triggerman. A fifth juror, James Palmer, stated he had already recommended life imprisonment. Thus, five out of eight jurors (62.5%) either voted for life imprisonment or probably would have voted for life had they known that Van Poyck was not the killer. Only three (3) out of the eight jurors located (37.5%) declined to sign an affidavit supporting clemency. Four (4) jurors were either deceased or could not be located or interviewed.

Even putting aside James Palmer, who originally voted for life, four of the remaining seven jurors interviewed (57.2%) would have probably voted for life imprisonment had they known Van Poyck was not the triggerman. Applying these percentages (whether it is 62.5% or even 57.2%) to the four (4) jurors never interviewed demonstrates that, within a reasonable statistical probability, at least two (2), and most likely three (3) of those jurors would also probably have voted for life imprisonment had they known Van Poyck was not the person who killed Fred Griffis. This means that the vote for life imprisonment probably would have been 7 to 5 (58.3%) or even 8 to 4 (66.6%) in favor of life. At a minimum it would have been at least the 6 to 6 (50%) needed to garner Van Poyck a life recommendation. *See, e.g., Rose v. State*, 425 So.2d 521 (Fla. 1983) (at least 7 jurors must vote for a death recommendation; a 6 to 6 tie constitutes a life

recommendation).

In *Van Poyck v. State*, 961 So.2d 220 (Fla. 2007), this Court had occasion to consider newly discovered evidence that Van Poyck was not the triggerman. In affirming the trial court's summary denial of postconviction relief this Court, without ever conducting any cumulative analysis, held that:

> At most, non-triggerman status would have constituted nonstatutory mitigation which, considering the four aggravating factors and absence of other mitigation, would probably not have yielded a lesser sentence.

Van Poyck V, at 226. In making this "probalistic determination" about what Van Poyck's jury probably would have done this Court necessarily put itself in the place of the jury to speculate what that jury would have done. In the motion below, however, Van Poyck presented newly discovered evidence which removes speculation from the equation and undermines and refutes this Court's holding in *Van Poyck V*. This new evidence demonstrates that the fact that Van Poyck did not kill Fred Griffis *would* have made a difference to the jurors, and they probably would have recommended life imprisonment had they known Van Poyck was not the shooter. *Accord*, *State v. Mills*, 788 So.2d 249, 250 (Fla. 2001) (affirming the trial court's granting of a new penalty phase proceeding where the defendant produced newly discovered evidence, in the form of a statement by a prisoner to

the effect that Mills' codefendant had confessed to being the actual killer, and stating that "the newly discovered evidence, when considered in conjunction with the evidence at Mills' trial and 3.850 proceedings, would have probably produced a different result at sentencing.").

In summarily denying Van Poyck's motion on this particular point, the lower court, without accepting Van Poyck's factual allegations as true at the pleading stage, without conducting an evidentiary hearing, and without conducting the required cumulative analysis (*see* subclaim (d), *infra*), stated:

> As to the second prong, the Defendant must establish that the evidence is of such a nature that it will probably produce an acquittal on retrial or a lesser sentence at re-sentencing. *Id.* The Defendant asserts that there is a reasonable probability that seven (7) jurors would have voted for life, but has only adduced proof that five (5) members of the jury would have voted for a life recommendation. Therefore, the Defendant's affidavits do not demonstrate an entitlement to relief.

See, PCR1-104. In reaching this conclusion the trial court totally ignored Van Poyck's statistical analysis and extrapolation to the four (4) jurors never interviewed. The trial court simply *assumed*, without any factual foundation, that these four jurors would all have voted for death even after learning that Van Poyck was not the triggerman. The second prong of the *Jones* test is all about "probabilities," not absolute certainties. Van Poyck's newly discovered evidence

combined with the law of probabilities compels the conclusion that at least six, and most probably seven or eight of the jurors probably would have voted for life had they known Van Poyck did not kill the victim. It is worth recalling this Court's instruction from the *Jones* decision, that "Newly discovered evidence satisfies the second prong of the *Jones II* test if it 'weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.'" *Riechmann v. State, supra*, at 316 (quoting *Jones II*, 709 So.2d at 526). Accordingly, the trial court erred in denying this claim on this basis.

The lower court also denied this claim on the following alternate ground:

> Moreover, and most importantly, this Court and the Florida Supreme Court have previously addressed and rejected the contention that Van Poyck's non-triggerman status was the determinative factor in sentencing. *See Van Poyck V*, 961 So.2d 220 at 227. Adducing proof that the jury recommendation would potentially be different had the facts of the case been more clear (or different) does not change the fact that in Florida, the trial judge is the "ultimate sentence." *Pope v. Wainwright*, 496 So.2d 798, 805 (Fla. 1986); § 921.141(2), Fla.Stat. (2010). Therefore, the trial judge's written findings that the death penalty was an appropriate sentence because "the mitigating evidence was insufficient to outweigh the aggravating circumstances" would not be disturbed by the "new evidence" produced by Van Poyck. *Van Poyck IV*, 908 So.2d at 329.

PCR1-104. This analysis, which essentially boils down to a finding that a jury recommendation of life imprisonment is irrelevant to the ultimate sentence, is seriously flawed and directly contrary to well-established case law. As Van Poyck

pointed out in this his motion, PCR1-20-21, if Van Poyck had received a jury recommendation of life Judge Miller would have been required to accord "great weight" to that recommendation. *Tedder v. State*, 322 So.2d 908 (Fla. 1975). The lower court simply assumed, without any factual foundation, that Judge Miller would have sentenced Van Poyck to death even if the jury had recommended life imprisonment. Yet even if Judge Miller overrode that life recommendation the override would not have been sustained on direct appeal. *See, e.g., Wright v. State*, 586 So.2d 1024, 1031 (Fla. 1991):

> To sustain a jury override, this Court must conclude that facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). Hence, we will not sustain an override unless the jury's life recommendation was entirely unreasonable.

Under the facts of this case – an unpremeditated felony murder where Van Poyck did not kill the victim or intend the victim to be killed – a jury recommendation of life would not be "entirely unreasonable." This Court has consistently held that the fact that the defendant did not actually kill the victim is sufficient mitigation to sustain a life recommendation in the face of a jury override. *See, Barrett v. State*, 649 So.2d 219, 223 (Fla. 1994)("Conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment"). And, in *Cooper v. State*, 581 So.2d 49, 51 (Fla. 1991), this Court

reversed the trial court's override of a jury's life recommendation, noting that the evidence supporting the trial court's finding that the defendant committed the killing was "far from certain" and that "conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment."

The lower court's reasoning cannot withstand scrutiny on a more fundamental level. All newly discovered evidence claims which challenge the death sentence (as opposed to seeking a new trial) must focus on the jury recommendation, not the judge's ultimate sentence, when trying to meet the second prong of the *Jones* test. Using the lower court's logic *no capital defendant* could ever meet the second prong of *Jones* (that the newly discovered evidence would probably result in a less severe sentence) because in *all* cases the trial judge is the "ultimate sentencer" and thus, in theory, could override any jury recommendation of life imprisonment. The lower court's opinion accords no weight, value or benefit to a jury's life recommendation, and no matter how powerful or persuasive any newly discovered evidence might be it would be for naught because "the trial judge is the ultimate sentence" and thus could override any jury recommendation of life. *Accord, Espinosa v. Florida*, 505 U.S. 1070 (1992) (recognizing constitutional significance of jury recommendation in Florida's capital statutory scheme).

The lower court also failed to conduct the required cumulative analysis before it reached the issue of whether the newly discovered evidence would probably yield a less severe sentence. This was in error, as explained in subclaim (d), *infra*. No court, including this Court, has ever conducted the required cumulative analysis in any of Van Poyck's postconviction proceedings. Subclaim (d), *infra*.

To the extent the lower court's ruling on this issue can be read as an assertion that because the trial court, and this Court, have already addressed and rejected "the triggerman claim," then the instant claim cannot be entertained, the lower court erred. First, unlike in his prior postconviction motions Van Poyck is not presenting newly discovered evidence that he was not the triggerman, and the issue here is not, as it was during the trial, whether Van Poyck was the triggerman. That issue has been resolved, post-trial. We now know, and the state has repeatedly (if belatedly) conceded in its prior pleadings, that contrary to what the prosecutor argued to the jury at trial, Van Poyck did not shoot Fred Griffis. Likewise, the issue here is no longer as it was in 2005 (Van Poyck IV) and 2007 (Van Poyck V) whether it would make a difference to a majority of the jury that Van Poyck did not kill the victim. That question has now been answered in the affirmative by the newly discovered evidence. We now know it would have made

a difference to the jury.

Second, the lower court overlooked the fact that newly discovered evidence claims often require courts to revisit previously rejected claims (whether under the rubric of cumulative analysis or otherwise). *See, e.g., State v. Gunsby*, 670 so.2d 920 (Fla. 1996); *Lightbourne v. State*, 742 So.2d 238 (Fla. 1999)(previously rejected *Brady* claim had to be reconsidered in light of newly discovered evidence). *See* subclaim (d), *infra*.

And, the lower court failed to address Van Poyck's federal and state constitutional claims that his death sentence has been rendered inherently unreliable and fundamentally unjust, and that he is "actually innocent" of the death penalty, as argued in his motion below. *See* PCR1-15; 17; and 23. As Van Poyck also argued in detail in his sworn reply to the State's response, under Florida law the doctrine of manifest injustice permits appellate courts, under exceptional circumstances, to reconsider and correct prior erroneous rulings where the prior ruling would result in a "manifest injustice." *See, e.g., Muehlman v. State*, 3 So.3d 1149, 1165 (Fla. 2009). *See also* PCR1-85; *see*, subclaim (f), *infra*. While the trial court, perhaps, could not invoke the doctrine of manifest injustice to reconsider a prior decision by this Court, Van Poyck submits it could have invoked the doctrine

to reconsider the prior circuit court summary denials of Van Poyck's postconviction motions. At a minimum the court below could have granted an evidentiary hearing and made the findings of fact necessary for this Court to invoke the doctrine.

Finally, the lower court took issue with the precise language utilized in some of the sworn affidavits, stating that the jurors used the "reasonable probability" standard rather than the "probably" standard. *See,* PCR1-104. However, the court overlooked the fact that only one (1) juror (Virginia A. Dillon) used that precise language in an unqualified manner. *See* PCR1-32. Jurors Stephen Rich and Christine Dowd did not qualify their statements with a "reasonable probability" phrase. *See* PCR1-33 and 34. And, juror Darline Hancock stated that ". . . there is *at least* a reasonable probability that I would not have recommended a death sentence for Van Poyck," (emphasis added). *See*: PCR1-31. The addition of the qualifying "at least" strongly implies that juror Hancock was willing to invoke an even higher degree of certainty. Moreover, a layman's statement should not be parsed as if it was executed by an attorney. And, to the extent there exists any ambiguity in the precise meaning or intention of one or two of the jurors' statements, that is just one more reason the lower court should have conducted an evidentiary hearing where these jurors could have testified and made their

intentions clear.

d) <u>The Lower Court Erred in Failing to Conduct a Cumulative Analysis of all the Evidence and Mitigation</u>

In his motion below Van Poyck explained that "[i]n determining whether a defendant has met the second prong of the *Jones II* test the trial court must employ a "cumulative analysis," analyzing the "totality of the evidence" (i.e., the weight of the newly discovered evidence *combined* with the evidence produced at trial and any evidence produced in any postconviction proceedings) rather than just weighing the new evidence in isolation." *See*, PCR1-21-22. This, of course, is a correct statement of law. *See, e.g., Kokal v. State*, 901 So.2d 766, 777 (Fla. 2005):

> Finally, in conducting a cumulative analysis of newly discovered evidence, we must evaluate the newly discovered evidence in conjunction with the evidence submitted at trial and the evidence presented at prior evidentiary hearings. *See Jones [v. State]* 709 So.2d [512] at 522 [(Fla. 1998)].

See also, Robinson v. State, 770 So.2d 1167, 1170 (Fla. 2000)(discussing the required "cumulative analysis by evaluating the newly discovered evidence in conjunction with evidence presented at all prior evidentiary hearings and evidence presented at trial."); *Wright v. State*, 857 So.2d 861, 870-71 (Fla. 2003)("In conducting a cumulative analysis of newly discovered evidence, we must the newly discovered evidence in conjunction with the evidence submitted at the trial and the evidence submitted at prior evidentiary hearings."). *See also, State v.*

Gunsby, 670 so.2d 920, 924 (Fla. 1996)(granting a new trial on the basis of the combined effect of newly discovered evidence, the erroneous withholding of evidence, and the ineffective assistance of counsel; the newly discovered evidence must be evaluated cumulatively with evidence that the jury did not hear because of trial counsel's failure to adequately investigate, or any other error present in the case otherwise considered harmless in order to determine whether confidence is undermined in the reliability of the outcome of the adversarial process); *Lightbourne v. State*, 742 So.2d 238 (Fla. 1999) (previously rejected *Brady* claim had to be reconsidered in light of newly discovered witness).

In the instant case Van Poyck informed the lower court that in addition to the newly discovered evidence supporting the Rule 3.851 motion, a cumulative analysis required the court to also consider the facts and mitigation presented at trial, the direct appeal acquittals and findings by this Court in *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990), the facts and mitigation established at Van Poyck's 1993 evidentiary hearing (the "vast array of mitigating circumstances of the most serious nature that should have been thoroughly investigated and presented at the original penalty phase," *Van Poyck II*, at 699-701), the facts and mitigation set forth in Van Poyck's prior Rule 3.853 motion for DNA testing, and the facts affidavit and mitigation set forth in Van Poyck's prior successive Rule 3.851

motion.

In denying Van Poyck's motion based upon the trial court's conclusion that the newly discovered evidence did not meet the second prong of *Jones II* (i.e., that it would not probably result in a less severe sentence), the trial court utterly failed to conduct the required cumulative analysis, and in fact the court did not even acknowledge that such an analysis was necessary before reaching a conclusion on the second prong of *Jones II*. *See*: PCR1-104; *see also*, subclaim (c), *supra*. In fact, to date *no court* has ever conducted a cumulative analysis in this case when considering Van Poyck's prior newly discovered evidence claims.

Van Poyck contends that if a cumulative analysis of the totality of the mitigating evidence is conducted in this case it would "weaken the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability," *Riechmann v. State*, *supra,* at 316, quoting *Jones II*, and would undermine confidence in the reliability of Van Poyck's death sentence. In short, such a cumulative analysis compels the conclusion that "the newly discovered evidence would probably yield a less severe sentence," and thus it meets the second prong of the *Jones II* standard. *Riechmann, supra,* at 316 ("If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence."). *See State v. Gunsby, supra*

(granting new trial after cumulative analysis).

And, in the capital case of *State v. Mills*, 788 So.2d 249 (Fla. 2001), this Court approved the trial court's granting of a new penalty phase trial where the defendant had produced newly discovered evidence in the form of an affidavit by a prisoner to the effect that Mills' codefendant had confessed to being the actual killer in that case. In holding that this new evidence met the *Jones* standard this Court started that "the newly discovered evidence, *when considered in conjunction with the evidence at Mills' trial and 3.850 proceedings*, would have probably produced a different result at sentencing." *Mills*, at 250 (emphasis added). Van Poyck's case is remarkably similar to *Mills* in that in both cases the prior newly discovered evidence was evidence that the defendant did not kill the victim, contrary to what their respective jurors were told at trial. Mills received a new penalty phase when he received the benefit of a cumulative analysis. Van Poyck, on the other hand, has never received the benefit of a cumulative analysis by any court, including this Court. The lower court erred in failing to conduct the required cumulative analysis and for that reason the order of denial should be reversed.

e) <u>The Lower Court Erred in Holding that the Newly Discovered Evidence Would Not be Admissible</u>

One of the three (3) grounds upon which the lower court denied Van Poyck's motion was its conclusion that the jurors' affidavits "would not be

admissible as evidence in any future evidentiary hearing or sentencing hearing." PCR1-102. Thus, the court concluded, the newly discovered evidence could not meet the threshold requirement of admissibility required by *Jones II*, which mandates that as an initial matter a trial court faced with a newly discovered evidence claim must first determine whether the evidence would be admissible at trial or whether any "evidentiary bars" exist. *Jones II*, at 521. The lower court relied upon section 90.607(b), Florida Statutes (2010), as well as *Powell v. State*, 414 So.2d 1095 (Fla. 5th DCA 1982), and *Walters v. State*, 786 So.2d 1227 (Fla. 4th DCA 2001), to support its conclusion, PCR1-102-103, as well as *State v. Hamilton*, 574 So.2d 124 (Fla. 1991). Quoting section 90.607(b), Florida Statutes, the trial court stated that "upon 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." Central to the lower court's conclusion of inadmissibility was its assumption that Van Poyck was challenging "the verdict" and that the issue at hand was one that "essentially inhere[d] in the verdict." Van Poyck submits that for the following reasons the lower court erred in denying Van Poyck's motion on this ground.

In *Devoney v. State*, 717 So.2d 501 (Fla. 1998), this Court observed:

> 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 during the trial or in the jury room, *which does not essentially inhere in the verdict itself* . . . but that such affidavit *to avoid the verdict* may not be received *to show any matter which does essentially inhere in the verdict itself* . . . In short, matters that inhere in the verdict are subjective in nature, whereas matters that are extrinsic to the verdict are objective.

Devoney, supra, at 502 (emphasis added). The *Devoney* Court cited to the relevant section of the Florida Evidence Code with approval:

> The Florida Evidence Code codifies the sanctity of *the jury verdict* by providing that "upon 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." Section 90.607(2)(b), Fla. Stat. (1993).

Devoney, supra, at 502 (emphasis added). From the foregoing, and other relevant case law, several germane points are clear. First, there is no complete bar to the admission of jurors' affidavits. Rather, "the affidavits of jurors may be received" as long as the purpose is "to show any matter . . . which does not essentially inhere in the verdict." *Devoney,* at 502. Thus, as long as the issue sought to be established "does not essentially inhere in the verdict" a juror's affidavit is admissible. Conversely, such jurors' affidavits are not admissible "to avoid the verdict" where the matter "does essentially inhere in the verdict itself." *Devoney*, at 502.

Van Poyck submits that there exists at least three separate grounds for rejecting the lower court's conclusion and for permitting the submitted jurors' affidavits to support Van Poyck's Rule 3.851 motion:

i) A Jury in a Capital Sentencing Proceeding Produces an Advisory Sentence Recommendation, Not a Verdict

Van Poyck is not challenging a verdict nor is he asking any of his jurors to avoid their verdict. The case law cited in the State's response and by the lower court, and the prohibitions codified in Section 90.607(2)(b), Florida Statutes are not applicable to this case. Section 921.141, Florida Statutes (2010), sets forth the procedures to be utilized by a jury in a capital case and nowhere in the statutory language does the word "verdict" appear. Rather, the statute repeatedly uses the term "advisory sentence" to describe the jury's ultimate product. For example, Section 921.141(1), states:

> (1) SEPARATE PROCEEDING ON ISSUE OF PENALTY–
> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct *a separate sentencing proceeding* to determine whether the defendant should be sentenced to death or life imprisonment . . .

(emphasis added). Subsection (2) then states:

> (2) ADVISORY SENTENCE BY THE JURY –
> After hearing all the evidence, the jury shall deliberate

and render *an advisory sentence* to the court.

(emphasis added). Importantly, the jury's advisory sentence recommendation need not be unanimous, but need only be by a majority. *See*, Section 921.141(3), Florida Statutes. The trial court is not bound by the advisory sentence recommendation, but can instead reject that recommendation. A jury's advisory sentence recommendation is not a "verdict" within the meaning of the law.

Under Florida law, a "verdict" in a criminal case *must be unanimous. See*, Rule 3.440, Fla.R.Crim.Proc. ("No verdict may be rendered unless all of the trial jurors concur in it."). *See also*, Section 919.09, Florida Statutes (2010). And, *Black's Law Dictionary* defines "verdict" as follows:

> **Verdict**. The formal decision or finding made by a jury, impaneled and sworn *for the trial of a cause*, and reported to the court (and accepted by it), upon the matters or questions duly submitted to them *upon the trial. The definitive answer* given by the jury to the court concerning the matters of fact committed to the jury for their deliberation and determination.

(emphasis added). A penalty phase proceeding is not a trial and there is nothing definitive about the jury's advisory sentence recommendation. It is advisory only, and it is a recommendation, nothing more. Because Van Poyck is not challenging his jury's verdict, nor is he asking his jurors to avoid their verdict, none of the cases cited by and relied upon by the lower court are germane or dispositive. Accordingly, the sworn affidavits submitted by Van Poyck are admissible in

support of his Rule 3.851 motion.

ii) The Matter at Bar Does Not Essentially Inhere in the Verdict But Instead is Extrinsic Thereto

Even if the jury's nonunanimous advisory sentence recommendation can be construed to constitute a verdict within the meaning of Section 90.607(2)(b), Florida Statutes, the affidavits submitted below are nonetheless admissible because they do not essentially inhere in the verdict itself but rather they are extrinsic to that verdict. In *Devoney, supra,* the Court held:

> [t]hat affidavits of jurors *may be received* for the purpose of avoiding a verdict, to show any matter during the trial or in the jury room, *which does not essentially inhere in the verdict itself* . . .

Devoney, supra, at 502 (emphasis added). Florida's courts have consistently defined matters which do not essentially inhere in the verdict itself as matters extrinsic to, or outside of the verdict. *Devoney*, at 503 ("Federal courts also use the external/internal distinction to decide the admissibility of jurors' testimony to impeach their own verdict"). As the *Devoney* Court noted, at 502, "In short, matters that inhere in the verdict are subjective in nature, whereas matters that are extrinsic to the verdict are objective." *See also, Jones v. State*, 928 So.2d 1178 (Fla. 2006) (matters which occur inside the jury room, including emotions and mental processes of jurors, are examples of matters which essentially inhere in the

verdict and thus are intrinsic thereto, while external influences or matters coming from outside the jury room are examples of matters which do not essentially inhere in the verdict and thus are extrinsic thereto).

In the instant case, the matter at bar is Van Poyck's post-trial, direct appeal acquittal of the ultimate fact of being the triggerman, as well as his acquittal of first-degree premeditated murder. *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990). This acquittal of this crucial ultimate fact is an *objective* matter outside of the jury room, a matter extrinsic to and external to the jury's deliberations and thus it does not essentially inhere in the verdict itself. It is this external matter which the jurors' affidavits expound upon and as such these affidavits are admissible under Section 90.607(2)(b), and *Devoney v. State, supra*. Under the facts of this case Van Poyck should be permitted to prove that he is entitled to the relief for which he prays.

iii) The Evidentiary Rule Barring Admission of the Jurors' Affidavits Must Yield to Van Poyck's Constitutional Rights to Fundamental Fairness and Due Process of Law, to a Trial by Jury, to an Inherently Reliable Capital Sentencing, and his Right Not to be Executed Where he is Actually Innocent of the Death Penalty

It is well-established that state evidentiary rules must yield where they serve

to deprive a criminal defendant of his constitutional rights. *See, e.g., Washington v. Texas*, 388 U.S. 14 (1967)(state evidentiary rule barring defendant from calling as a witness a person who had been charged and convicted of committing the same murder which defendant was being tried for, deprived the defendant of his constitutional right to present a meaningful defense.). In *Holmes v. South Carolina*, 126 S.Ct. 272 (2006), the Court held that the right to present a meaningful defense:

> is abridged by evidence rules that "infringe upon a weighty interest of the accused and are "arbitrary" or "disproportionate to the purposes they are designed to serve."

Holmes, 126 S.Ct., at 276 (quoting *Rock v. Arkansas*, 483 U.S. 44, 58 (1987). The Supreme Court has never countenanced rules or rulings excluding reliable evidence bearing directly upon a defendant's innocence. The Court has repeatedly struck down arbitrary rules regarding witness competence and mechanistic approaches to the reliability of evidence. *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973); *Washington, supra,* at 23. Accordingly, "[T]he Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote." *Holmes, supra,* 126 S.Ct. at 279.

The Supreme Court has invalidated numerous evidentiary bars to the

admission of defense witness testimony. *E.g., Crane v. Kentucky*, 476 U.S. 683 (1986) (overturning bar on the introduction of evidence regarding the circumstances of a confession); *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (overturning bar to admission of hypnotically refreshed testimony); *Washington, supra*, 388 U.S. at 22 (overturning bar on testimony by accomplices or accessories); *Chambers v. Mississippi, supra* (overturning state hearsay rules that precluded introduction of third-party confessions); *Holmes v. South Carolina, supra* (overturning state evidentiary rule that served to deprive the defendant of his right to present a meaningful defense).

Moreover, Florida courts have in fact made exceptions to the rule that matters intrinsic to the jury's deliberations, thought processes or emotions essentially inhere in the verdict and thus cannot be inquired into. *See, e.g., Powell v. Allstate Insurance Co.*, 652 So.2d 354 (Fla. 1995) (setting aside verdict where members of jury made racial jokes and statements about the black Jamaican plaintiffs). As the *Devoney* Court noted about the *Powell* decision:

> *Powell* identifies a special circumstance where the high court deemed interference necessary in order to "jealously guard our sacred trust to assure equal treatment before the law."

Devoney, at 504. *See also: Wilding v. State*, 674 So.2d 114 (Fla. 1996), and *Sconyers v. State*, 513 So.2d 1113 (Fla. 2d DCA 1987). In *Sconyers*, the Court

permitted postverdict juror interviews despite the language of Section 90.607(2)(b), Florida Statutes, stating that, "There are times, as here, when these processes, generally held to be inviolate, must be penetrated in order to secure the integrity of the entire judicial process." *Sconyers*, at 1116.

In the instant case, Van Poyck submits that if he is barred from presenting the affidavits in support of his Rule 3.851 motion, he will be deprived of his Constitutional rights to fundamental fairness and due process of law; to his Sixth amendment right to have *a jury* determine all of the facts relevant to the imposition of his sentence, contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002); to his Eighth amendment right to an inherently reliable capital sentencing, contrary to *Sochor v. Florida*, 504 U.S. 527 (1992), *Stringer v. Black*, 503 U.S. 222 (1992), and *Deck v. Missouri*, 544 U.S. 622 (2005); and would result in a manifest injustice and a fundamental miscarriage of justice where Van Poyck is actually innocent of the death penalty, contrary to *Sawyer v. Whitley*, 505 U.S. 333 (1990); *House v. Bell*, 126 S.Ct. 2064 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995), and *Herrera v. Collins*, 506 U.S. 390 (1993). Accordingly, section 90.607(2)(b), Florida Statutes, should yield and Van Poyck should be permitted to present his evidence. For the foregoing reasons the lower court's order of denial on this ground should be reversed.

f) Van Poyck is Entitled to a New Penalty Phase Proceeding Where His Death Sentence Has Been Rendered Constitutionally Unreliable, Fundamentally Unjust, Manifestly Unjust, and He is Actually Innocent of the Death Penalty

In the section of his motion below titled "Grounds for Postconviction relief" (PCR1-14-15), and in his "Claim Presented" (and supporting argument)(PCR1-17), Van Poyck asserted complementary federal and state constitutional grounds for relief over and above the *Jones*-based newly discovered evidence claim. Van Poyck repeated these arguments in his Sworn Reply to the State's Response. PCR1-69; 85. Van Poyck realleges and reargues these claims here.

Besides being entitled to relief as a matter of state law under *Jones II* and *Riechmann, supra,* Van Poyck submits that under the unique facts of this case his death sentence has been rendered constitutionally unreliable, fundamentally unjust, and manifestly unjust, and that he is "actually innocent" of the death penalty, contrary to the Eighth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the state constitution. The lower court never addressed these claims in its order of denial.

A common and consistent thread running through the United States Supreme Court's body of capital jurisprudence is the mandate for heightened reliability in the imposition of death sentences. *See, e.g., Deck v. Missouri*, 544 U.S. 622, 632-33 (2005):

> The Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. *Mongue [v. California*, 524 U.S. 721] at 732 (citing *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978)(plurality opinion)).

See also, Lowenfield v. Phelps, 484 U.S. 231, 238-39 (1988)("[Q]ualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion))). This requirement for heightened reliability in capital sentences is grounded in the Eighth Amendment, *Lowenfield, supra,* and is part and parcel of "the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." *Stringer v. Black*, 503 U.S. 222, 230 (1992). The *Stringer* court emphasized "our long line of authority setting for the dual constitutional criteria of precise and individualized sentencing." *Id*, at 232. *Enmund v. Florida*, 458 U.S. 782, 798 (1982)(culpability of individual defendant is a focal concern in determining validity of death sentence).

In the instant case Van Poyck's culpability has been undermined, as has any confidence in the reliability of his death sentence, by the post-trial determination that he was not in fact the triggerman. As the *Stringer* court held in an only slightly different context, "a reviewing court may not assume it would have made no difference if the thumb has been removed from death's side of the scale." *Id.*,

503 U.S. at 232. Under the facts of this case there can be no real confidence in the reliability of Van Poyck's death sentence and this Court should vacate that sentence and remand for a new penalty phase proceeding.

As he did below Van Poyck also argues that his death sentence is "fundamentally unjust" within the meaning of *House v. Bell,* 126 S.Ct. 2064 (2006) and *Schulp v. Delo*, 513 U.S. 295 (1996), and that he is "actually innocent of the death penalty" within the meaning of *Sawyer v. Whitley*, 505 U.S. 333 (1990), and *Herrera v. Collins*, 506 U.S. 390 (1992).

This Court, under the doctrine of manifest injustice, has the authority to correct this patently unreliable death sentence. As Van Poyck argued below, PCR1-69-70, well-established Florida law recognizes a "manifest injustice exception" to the law of the case doctrine as well as the *res judicata* and collateral estoppel doctrines. *See*, *State v. McBride*, 848 So.2d 287 (Fla. 2003), at 291-92:

> This Court has long recognized that res judicata will not be invoked where it would defeat the ends of justice. . . The law of the case doctrine also contains such an exception . . . We [now] hold that collateral estoppels will not be invoked to bar relief where its application would result in manifest injustice.

Accord, Baker v. State, 878 So.2d 1236, 1246 (Fla. 2004) (reminding courts to be alert for cases of manifest injustice and stating that no fundamental injustices occur); *Henry v. State*, 649 So.2d 1361, 1364 (Fla. 1994)(holding that under the

law of the case doctrine, a point of law previously adjudicated by a majority of the Supreme Court of Florida "may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice.").

And, just recently, in *State v. Akins*, 36 Fla.L.Weekly S215, 217 (Fla. May 26, 2011), this Court invoked the doctrine of manifest injustice to overcome an alleged procedural bar, and in the process reiterated that:

> Under Florida law, appellate courts have "the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *Muehlman v. State*, 3 So.3d 1149, 1165 (Fla. 2009)(attention in original)(recognizing this Court's authority to revisit a prior ruling if that ruling was erroneous)(quoting *Parker v. State*, 873 So.2d 270, 278 (Fla. 2004)) . . . *See also Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 106 (Fla. 2001)("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" quoting *Strazulla v. Hendrick*, 177 So.2d 1,3 (Fla. 1965))).

Van Poyck urges this Court to compare his case to the remarkably similar case of *State v. Mills*, 788 So.2d 249 (Fla. 2001), where this Court approved the trial court's granting of a new penalty phase proceeding where the defendant had produced newly discovered evidence in the form of an affidavit by a prisoner to the effect that Mills' codefendant had confessed to being the actual killer. In both Van

Poyck's case, and Mills' case, the defendants produced newly discovered evidence demonstrating that they were not the triggerman. Mills received a new penalty phase hearing while Van Poyck did not. The operative difference between the two cases is that Mills received the requisite cumulative analysis when the Court considered whether the newly discovered evidence met the *Jones II* standard, while Van Poyck has never received the benefit of any cumulative analysis. This Court has the authority to "reconsider and correct" this situation and Van Poyck urges this Court to do so.

CONCLUSION

WHEREFORE, based upon the foregoing facts and arguments Van Poyck urges this Court to reverse the order of denial under appeal and to vacate his death sentence and remand this cause to the lower court for a new sentencing hearing. Alternatively, Van Poyck urges this Court to remand this cause to the trial court for a full, plenary evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of this foregoing Initial Brief has been furnished to: Celia A. Terenzio, Assistant Attorney General, Dept. of Legal Affairs, 1515 N. Flagler Drive, #900, West Palm Beach, Florida, 33401, on this 5th day of July, 2011, by U.S. Mail.

I FURTHER HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

s/ Gerald S. Bettman

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