IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-724

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WILLIAM VAN POYCK,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

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

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# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

The State's answer brief (AB) only addresses three (3) of the six (6) specific subclaims presented in Van Poyck's initial brief, and in this reply brief Van Poyck specifically responds to the State's three positions.

The State's answer brief fails entirely to address those subclaims denominated in Van Poyck's initial brief as (a) (the lower court erred in failing to conduct an evidentiary hearing and in failing to accept as true Van Poyck's sworn factual allegations presented below); (d) (the lower court erred in failing to conduct a cumulative analysis of all the evidence and mitigation); and, (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, under this Court's manifest injustice doctrine). Van Poyck realleges and reiterates these subclaims in issue (d) herein.

**(a) The Newly Discovered Evidence is Admissible as Evidence and Thus Meets the Threshold Requirements of *Jones v. State***

On pages 16-20 of its answer brief, the State argues, as it did below, that the newly discovered evidence (i.e., the sworn affidavits of the jurors) are not "admissible evidence" and thus cannot meet the threshold requirements of *Jones v. State*, 709 So.2d 512 (Fla. 1998), which holds that in considering a claim of newly discovered evidence,

> the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility.

*Jones, supra*, at 521.[1] Van Poyck has no quarrel with the proposition that *Jones* means what it says and that a threshold admissibility requirement exists. However, in his initial brief Van Poyck expended considerable ink arguing why, in this particular case, the affidavits *would* be admissible and thus they *do* meet the threshold requirement of *Jones*. *See* pages 52-62 of Van Poyck's initial brief. Van Poyck will not belabor the point by repeating his arguments set forth in his initial brief. The State's answer brief, however, never addresses *any* of Van Poyck's arguments on this point. The State simply repeats, virtually verbatim, the



[1] Page 15 of the AB incorrectly states that the motion below was Van Poyck's "fourth motion for collateral relief pursuant to Fla.R.Crim.Proc. 3.851." In fact this was Van Poyck's third Rule 3.850/3.851 motion. The AB, at page 15, also disingenuously describes the juror interviews as "unauthorized" and violating "the spirit of the rule." In fact, there is no rule or statute requiring "authorization" by the court for a private investigator working directly for a non-attorney client to interview any jurors in any case.

argument it made in its unsworn response to Van Poyck's Rule 3.851 motion, and relies upon the same handful of cases which stand for the general proposition that affidavits of jurors may not be received for the purpose of avoiding a verdict where the affidavits show any matter which essentially inheres in the verdict itself.

In his initial brief Van Poyck went to lengths to distinguish the cases relied upon by the State (and by the lower court) and to explain why these particular juror affidavits would be admissible. The State has neither addressed nor rebutted Van Poyck's arguments on this matter. The State relies heavily on *Davoney v. State*, 717 So.2d 501 (Fla. 1998), but so does Van Poyck, because this Court in *Devoney* stated:

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

*Devoney*, *supra*, at 502 (quoting *Marks v. State Road Dept.*, 69 So.2d 771, 774-75 (Fla. 1954) (emphasis added). As this Court well knows, the rule (codified in Section 90.607 (2)(b), Fla.Stat.) is that affidavits of jurors to avoid a verdict "may not be received to show any matter which does essentially inhere in the verdict itself," *Devoney*, *supra*, at 502, but that affidavits of jurors *may be received* to avoid a verdict to show any matter which *does not* essentially inhere in the verdict itself. *Id*. As Van Poyck set forth in his initial brief (pages 52-55, and 57-

58) his position here is that the matter at bar in the affidavits *does not* essentially inhere in the verdict itself but rather is extrinsic thereto, and therefore they are admissible under *Devoney*. The State's answer brief utterly fails to address or rebut this position.

Likewise, Van Poyck argued on pages 55-57 of his initial brief, that a jury in a capital sentencing proceeding produces an advisory sentence recommendation, not a verdict, and thus section 90.607(2)(b), Fla.Stat., and the body of case law predicated upon it, is not controlling in this case. Again, the State's answer brief utterly fails to address or rebut this position.

Finally, on page 58-61 of his initial brief Van Poyck argued that the evidentiary rules barring admission of the jurors' affidavits must yield to Van Poyck's constitutional rights to fundamental fairness and due process of law, to an inherently reliable capital sentencing, and his right not to be executed where he is actually innocent of the death penalty.[2] And, once again the State's answer brief fails completely to address or rebut this argument.

Because the State has made no effort to refute Van Poyck's arguments regarding this subclaim that the newly discovered evidence is in fact admissible and does in fact meet the threshold requirement of *Jones v. State, supra*, Van



[2] Van Poyck has not argued that Rule 4-3.5(d)(4), Florida Rules of Professional Conduct is unconstitutional on its face, nor has he argued that section 90.607(2)(b), Fla.Stat. is facially unconstitutional.

Poyck will not repeat his arguments but instead will stand upon the arguments set forth in his initial brief.

***(b)*** **The Newly Discovered Evidence Does Meet the Materiality Prong of *Jones v. State***

On pages 20-25 of its answer brief the State purports to argue that the affidavits in question do not meet the "materiality prong" of *Jones v. State.* In *Riechmann v. State*, 966 So.2d 298 (Fla. 2007), this Court elaborated upon the *Jones* standard for newly discovered evidence. The second prong is the "materiality prong" and the *Riechmann* Court described it thusly:

> 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.

*Riechmann*, at 316. *Accord Henyard v. State*, 992 So.2d 120 (Fla. 2008) (Defendant seeking to vacate death sentence in postconviction motion alleging newly-discovered evidence must show that the newly-discovered evidence would probably yield a less severe sentence; *Power v. State*, 992 So.2d 218 (Fla. 2008) (same). This is the standard which Van Poyck was required to meet in order to

meet the second ("materiality") prong of *Jones*. In replying to the State's answer brief on this particular issue Van Poyck wishes to make several salient points:

**i) The State has Abandoned and Waived the Lower Court's basis for Denial on This Issue**

In his motion below Van Poyck presented a statistical analysis in order to meet the second prong of *Jones v. State. See,* PCR1-11-13; 19-25. When the trial court denied Van Poyck's motion it utilized three (3) separate grounds, to wit, 1) the affidavits were not admissible evidence and thus could not meet the threshold requirement of *Jones*; 2) even if they were admissible the affidavits were not "newly discovered" and therefore the motion was untimely and lacked due diligence; 3) the newly discovered evidence would not have yielded a less severe sentence because "the jury recommendation is simply an advisory sentence." *See* PCR1-102-105. The court's third basis for denial, *supra,* specifically addresses the second prong of *Jones*, and the lower court's rationale for denying this point can be found at PCR1-104-105. In brief, the court simply discounted Van Poyck's statistical analysis and focused only on the four (4) affidavits, stating that Van Poyck "has only adduced proof that five (5) members of the jury would have voted for a life sentence recommendation." PCR1-104. The court then went on and stated that in Florida "the trial judge is the ultimate sentencer," and that "The jury recommendation is simply an advisory sentence." *Id*. Thus, according to the

lower court's reasoning it does not matter whether a defendant receives a life recommendation or not because "the trial judge is the ultimate sentencer."

Van Poyck addressed and rebutted the trial court's findings on this point in his initial brief. *See* pages 37-49 of initial brief. There is no need for Van Poyck to repeat those arguments. What is noteworthy here is that the State's answer brief makes no effort at all to defend the trial court's basis for denying Van Poyck's motion on this point. The State never mentions Van Poyck's statistical analysis and never attempts to rebut it. Neither does the State ever mention, much less attempt to defend, the trial court's rationale for finding that Van Poyck's motion failed to meet the second prong of *Jones*. As such Van Poyck submits that the State has abandoned and waived the rationale utilized by the court below for finding that Van Poyck's newly discovered evidence does not meet the second prong of *Jones v. State*. Further, Van Poyck's statistical analysis stands unrebutted before this Court.[3]



[3] Recently, in *Coleman v. State*, 36 FLW S277 (Fla. 6/2/11), this Court reiterated the importance of a jury recommendation of life, stating "In *Tedder* we made clear that the focus of the test is on the reasonableness of the jury recommendation, not on the judge's determinations or personal inclinations," and that *Tedder's* "reasonable basis analysis must focus on finding support for the jury's recommendation and does not demand that the judge agree with the jury's conclusion." *Coleman*, at S231. *Coleman* alone disposes of the lower court's rationale for finding that Van Poyck failed to meet the second prong of *Jones*, i.e., that the trial judge can simply ignore the jury's life recommendation.

**ii) The State's Position is Meritless where it is Presented for the First Time on Appeal and it Fails to Consider the Required Cumulative Analysis**

Rather than defend the lower court's basis for denial on this point the State, for the first time, raises a new claim and urges this Court to use that as a basis to find that Van Poyck's newly discovered evidence does not meet the second prong of *Jones*. (*See* pages 20-25 of AB). First, the State repeatedly and incorrectly frames Van Poyck's issue as just another attempt to litigate "the triggerman issue," and bitterly complains that "Van Poyck continues to ignore the fact that every court to review this issue, has explicitly and consistently found that his own actions, which have been established through unrefutted [sic] evidence, warranted the sentence of death." AB at 20. The State then goes on at great length summarizing the evidence and testimony at trial in an attempt to convince this Court that Van Poyck simply deserves to die.

What the State fails to grasp is that the instant claim is not another "triggerman issue." Van Poyck is not trying to establish that he was not the triggerman; that has now been established. Neither is Van Poyck now trying to establish (as he was in prior litigations) that his status as the non-triggerman would probably have yielded a lesser sentence, for the newly discovered evidence, Van Poyck asserts, now also establishes that ultimate fact. The whole point of the

instant litigation is that Van Poyck, by going directly to the source (the jurors), has eliminated any doubt or ambiguity as to whether it would have made any difference to the jurors that Van Poyck was not the triggerman. Whereas in the last two prior postconviction litigations this Court *speculated* that it probably would not have made any difference to the jurors whether Van Poyck was not the triggerman, we now *know*, from the jurors themselves, that Van Poyck probably would have received a life recommendation had the jurors known that Van Poyck was not the triggerman.

The State's recitation of the evidence and testimony adduced at trial is irrelevant to the claim at bar, for these same jurors sat through that trial, they heard and saw the testimony and evidence, yet they nonetheless now state under oath that they probably would have recommended life imprisonment had they known that Van Poyck was not the triggerman.

The State simply overlooks the fact that this is a newly discovered evidence claim which by its nature often requires revisiting prior decisions by the courts. *See, e.g., Wright v. State*, 857 So.2d 862, 870-71 (Fla. 2003)("Additionally, we have said that newly discovered evidence by its very nature, is evidence that existed but was unknown at the time of the prior proceeding."). For example, in *Lightbourne v. State*, 742 So.2d 238 (Fla. 1999), this Court ordered an evidentiary

hearing on a previously rejected *Brady* claim because subsequent to the rejection of that claim a witness was located who had not been available at the previous hearing when the *Brady* claim was first heard on the merits. *See also Swafford v. State*, 679 So.2d 736 (Fla. 1996)(evidentiary hearing ordered in light of new affidavits which required revisiting issues previously presented); *State v. Gunsby*, 670 So.2d 920 (Fla. 1996); *State v. Mills*, 788 So.2d 249 (Fla. 2001)(affirming the grant of a new penalty phase based on newly discovered evidence casting doubt on the defendant being the triggerman, after Court had previously rejected similar claim in *Mills v. State*, 786 So.2d 547 (Fla. 2001)).

The basis the State now advances for denying this aspect of Van Poyck's claim, which can be boiled down to a "Van Poyck is a bad man and deserves to die" argument, was *not* the basis used by the lower court. Because this is a new argument presented here for the first time it should be rejected by this Court. *Accord Jones v. State*, 998 So.2d 573, 581 (Fla. 2008) ("To be preserved, the issue or legal argument must be raised and ruled on by the trial court"); *Valle v. State*, 36 FLWS467, 469 (Fla. 8/23/11) (This court will not consider issues on appeal which are insufficiently pled).

Finally, the State, like the Court below, has totally failed to address, consider or even mention the need for a cumulative analysis in considering any newly

discovered evidence claim. A cumulative analysis of *all* evidence and mitigation previously presented at trial and in all previous postconvictions proceedings is absolutely required, and is inextricably linked to any consideration of the second prong of *Jones v. State*. That is, it is impossible to make a finding regarding the second prong of *Jones* without first conducting the required cumulative analysis. *See, e.g.*, *Kokal v. State*, 901 So.2d 766 (Fla. 2005) at 776:

> 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)].

In *Lightbourne v. State*, 742 So.2d 238 (Fla. 1999), at 247-48, this Court explained:

> As we held recently, in *Jones v. State*, 709 So.2d 512, 521-22 (Fla. 1997) . . . when a prior evidentiary hearing has been conducted "the trial court is required to consider all newly discoverable evidence which would be admissible at trial" and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial" in determining whether the evidence would probably produce a different result in retrial. This cumulative analysis must be conducted so that the trial court has "a total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a *Brady* claim. *See, Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

*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."); *State v. Gunsby*, 670 So.2d 920, 924 (Fla. 1996)(granting new trial after a cumulative analysis of the combined effect of newly discovered evidence, the erroneous withholding of evidence, and ineffective assistance of counsel); *State v. Mills*, 788 So.2d 249, 250 (Fla. 2001)(affirming lower court's granting of a new penalty phase proceeding based upon postconviction claim of newly discovered evidence that codefendant was the actual triggerman, where "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 his Rule 3.851 motion below Van Poyck exhaustively explained the need for a cumulative analysis. *See* PCR1-21-23. However, in its order of denial the lower court never even mentioned, much less considered, any cumulative analysis. Likewise, in its answer brief the State has steadfastly ignored the subject of cumulative analysis. In his initial brief Van Poyck has devoted an entire subclaim to this subject, pages 49-52, and Van Poyck sees no need to repeat that argument here. However, it bears repeating that to date no court has ever conducted the required cumulative analysis in considering (and denying) any of Van Poyck's prior postconviction proceedings. In particular, in *Van Poyck v. State*, 908 So.2d

326 (Fla. 2005), and *Van Poyck v. State* 961 So.2d 220 (Fla. 2007), this Court inexplicably failed to conduct any cumulative analysis before affirming the lower court's summary denial of the respective postconviction motions, despite Van Poyck's urging of this Court to do so. Specifically, this Court (and the lower courts) failed to weigh and consider 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 v. State*, 694 So.2d 686, 699-701 (Fla. 1997)(Justices Anstead, Kogan and Shaw, dissenting). The existence of this "vast array of mitigating circumstances" which were uncovered and developed in Van Poyck's first postconviction proceeding is *undisputed* and was never considered by Van Poyck's jury.

In 2007, when this Court affirmed the summary denial of Van Poyck's Rule 3.851 motion which presented newly discovered evidence that Van Poyck was not the triggerman, this Court inexplicably failed to conduct the required cumulative analysis prior to holding that the newly discovered evidence probably would not have yielded a less severe sentence. Instead, this Court simply noted that there were four (4) statutory aggravating circumstances established at trial, and *no mitigation.* It was against that stark backdrop that this Court denied relief:

> At most, non-triggerman status would have constituted nonstatutory mitigation which, considered the four aggravating factors *and absence*

> *of other mitigation*, would probably not have yielded a lesser sentence.

*Van Poyck v. State*, 961 So.2d 220 (Fla. 2007), at 226 (emphasis added). We now know that there *was* mitigation, a "vast array of mitigating circumstances of the most serious nature" that was never presented to Van Poyck's jury and which, to date, has *never* been considered and weighed by any court. Van Poyck submits that if this Court were to consider and weigh that "vast array of mitigating circumstances of the most serious nature," in conjunction with the newly discovered evidence at bar, this Court would conclude that the totality of the evidence "weakens the case against [Van Poyck] so as to give rise to a reasonable doubt as to his culpability," *Jones v. State*, 709 So.2d 512 at 526 (Fla. 1998), and that this evidence "would probably yield a less severe sentence." *Id.*

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 required cumulative analysis when this Court considered whether the newly discovered evidence met the second prong of the *Jones* standard, while Van Poyck has never received the benefit of any cumulative analysis. This Court has the authority to "reconsider and correct" this situation under the manifest injustice doctrine (*see* pages 62-66 of initial brief) and Van Poyck urges this Court to do so.

**(c) The Rule 3.851 Motion Was Timely Filed**

One of the three (3) grounds which the lower court used to deny relief was its finding that Van Poyck's motion was not timely filed and/or that Van Poyck failed to demonstrate due diligence. In his initial brief Van Poyck fully addressed and rebutted the lower court's finding. *See* 29-37 of initial brief. Van Poyck also addressed this in a separate subsection of the initial brief, pages 24-29, dealing with the lower court's failure to conduct an evidentiary hearing on the issue of due diligence, and the court's failure to accept as true the sworn factual allegations regarding due diligence contained in Van Poyck's sworn Rule 3.851 motion and his sworn reply to the States' response to Van Poyck's Rule 3.851 motion. The only *sworn* factual allegations on the subject of due diligence before the lower court were those provided by Van Poyck. The State provided no sworn factual allegations on the subject of due diligence and because the lower court refused to

conduct an evidentiary hearing on the issue of due diligence that court – as well as this Court on appeal – was required to accept those factual allegations as true. *See, e.g., Rutherford v. State*, 940 So.2d 1112 (Fla. 2006)(Because defendant's motion based on newly discovered evidence was summarily denied, this Court is required to accept that the defendant could not have known about the evidence at the time of trial by the use of due diligence and that he could not have obtained the evidence earlier by the exercise of due diligence); *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); *Davis v. State*, 26 So.3d 519, 528 (Fla. 2009)(same).

In its answer brief, pages 25-26 therein, the State, without any factual basis whatsoever, simply alleges that Van Poyck "had years" to contact and interview the jurors and "discover" the newly discovered evidence. As argued in Van Poyck's initial brief, this Court has previously rejected similar arguments by the State in other cases. *See Davis v. State, supra; Swafford v. State, supra; Burns v. State*, 858 So.2d 1129, 1230 (Fla. 1st DCA 2003).

Contrary to the State's claim, in footnote 8, page 26, Van Poyck *did* explain how his financial situation was relevant to the issue of due diligence. Because Van Poyck had to proceed on his own, without assistance of retained counsel, Van

Poyck had to save up the money necessary to hire the private investigator who ultimately conducted the juror interviews. To the extent there are any questions of fact on this issue in the State's mind, these questions could have and should have been resolved in an evidentiary hearing.

Likewise, the State's claim that Van Poyck has been continuously represented by counsel since his 1988 trial is without factual basis in the record. And, even if true this is irrelevant since Rule 4-3.5 (d)(4), Florida Rules of Professional Conduct prohibits 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, the clear and unambiguous language of the rule barred any of Van Poyck's attorneys from interviewing any jurors. To the extent there existed any factual disputes regarding this point these could have been resolved at an evidentiary hearing. However, the lower court refused to conduct an evidentiary hearing and then improperly refused to accept as true and correct the factual allegations regarding due diligence set forth in Van Poyck's sworn motion and his sworn reply (which elaborated greatly on the issue of due diligence). The record in this case demonstrates that Van Poyck's motion was timely filed and he exercised

due diligence.

**(d) The State's Answer Brief Fails to Address Van Poyck's Claim That His Death Sentence Has Been Rendered Constitutionally Unreliable, Fundamentally Unjust, Manifestly Unjust, and That He is "Actually Innocent" of the Death Penalty, and That This Court Should Invoke the Doctrine of Manifest Injustice**

Van Poyck squarely presented this claim to the lower court in his rule 3.851 motion. *See* PCR1-14-15; 17. This claim was embodied in the caption itself. The lower court's order of denial, however, fails to even acknowledge this issue, much less rule on it. Van Poyck has repeated this claim in his initial brief, pages 62-66 therein. The State's answer brief, however, utterly fails to even mention this constitutional claim, much less address it. Accordingly, this claim stands unaddressed and unrebutted by either the lower court or the State. In *Nixon v. State*, 932 So.2d 1009 (Fla. 2006), at 1018, this Court reiterated that:

> In order to support summary denial, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claim. *See Anderson v. State*, 627 So.2d 1170, 1171 (Fla. 1993). Additionally, where no evidentiary hearing has been held, an appellate court must accept the defendant's factual allegations as true to the extent that such allegations are not refuted by the record. *See Peede v. State*, 748 so.2d 253, 257 (Fla. 1999).

The lower court never stated its rationale for summarily denying this claim and did not attach any portions of the record that would refute this claim. Accordingly, this Court's review of this claim is *de novo. See, e.g., D'Angelo v.*

*Fitzmaurice*, 863 So.2d 311, 314 (Fla. 2003)("The standard of review for the pure questions of law before us is de novo."). Van Poyck stands upon his claim as set forth in his initial brief, pages 62-66 therein, and he again urges this Court to find that his death sentence has been rendered constitutionally unreliable and to invoke the doctrine of manifest injustice to revisit and correct this Court's prior decision in *Van Poyck v. State*, 961 So.2d 220 (Fla. 2007) where this Court failed to utilize the required cumulative analysis in deciding that newly discovered evidence claim. As the Supreme Court once reminded us:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Van Poyck's death sentence has been rendered constitutionally unreliable by post-trial findings and rulings, a fact demonstrated by the juror's affidavits at bar. This Court should take this opportunity to revisit its prior decisions in this case and correct the manifest injustice.

## CONCLUSION

WHEREFORE, based upon the foregoing facts and arguments Van Poyck urges this Court to reverse the order of denial being appealed and to remand this cause to the lower court with instructions to conduct a new penalty phase proceeding.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of this foregoing Reply Brief of Appellant has been furnished to: Celia A. Terenzio, Assistant Attorney General, Department of Legal Affairs, 1515 North Flagler Drive, #900, West Palm Beach, Florida, 33401, on this 20th day of September, 2011, by U.S. Mail.

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

*Gerald S. Bettman*_____
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