IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 84,324

CORRECTED
INITIAL BRIEF

withdrawn
12/21/95
JB

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Van Poyck's motion for post-conviction relief, brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Van Poyck's claims after an evidentiary hearing on parts of his ineffective assistance of counsel claims.

Citations in this brief shall be as follows: The record on direct appeal will be referred to as "R. ___." The record of the pretrial depositions is cited as "Deposition ROA ___." The record on appeal from the denial of the Rule 3.850 motion will be referred to as "PR. ___." The transcript of the evidentiary hearing will be referred to as "T. ___." Exhibits introduced at the hearing will be referred to as "Def. Ex. __." The appendices filed in support of the Rule 3.850 motion were introduced into evidence at the hearing as Defense Exhibits 6 through 11; they will be referred to as "App. __." All other references will be self-explanatory or otherwise explained herein.

STATEMENT OF THE CASE

This is an appeal of the denial, after an evidentiary hearing on certain claims, of William Van Poyck's motion to vacate his convictions and death sentence, pursuant to Fla. R. Crim. P. 3.850.

Mr. Van Poyck's trial began October 31, 1988, before Circuit Judge Michael Miller. On November 15, 1988, Mr. Van Poyck was convicted of first-degree murder,[1] and on November 18, 1988, the jury recommended death. The trial court followed the jury's recommendation, imposing a death sentence on December 21, 1988. This court affirmed. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990).

Mr. Van Poyck filed a motion in the circuit court to vacate judgment and sentence on December 5, 1992. The State responded, and an evidentiary hearing was held on the motion from February 23 to March 1, 1994. After the hearing, Mr. Van Poyck moved for leave to supplement the record, reopen the hearing, or submit as a written proffer the affidavit of a witness who was not available during the hearing. PR. 4936-44. The trial court, per Circuit Judge Walter Colbath, denied the motion, PR. 4946, and on July 8, 1994, denied all relief. PR. 4973-85. The court denied Mr. Van Poyck's motion for rehearing. Appeal was timely taken on August 24, 1994. PR. 5311-12.

This Court has summarized the evidence presented at trial. Van Poyck v. State, 564 So. 2d at 1067-68. Briefly, the record reflects that on June 24, 1987, corrections officers Steven Turner and Fred

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[1]Mr. Van Poyck was also found guilty of one count of attempted first-degree murder, six counts of attempted manslaughter, one count of armed robbery, one count of possession of a firearm by a convicted felon, two counts of aggravated assault and one count of aiding escape.

Griffis transported James O'Brien, an inmate at Glades Correctional Institution, to a dermatologist's office. After they pulled into a parking space behind the office, they were confronted by Mr. Van Poyck and his co-defendant Frank Valdez, who were both armed. Mr. Van Poyck took Turner's gun and forced him under the van. While under the van, Turner "saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground." Id. at 1067. This court held that this evidence was insufficient to establish first-degree premeditated murder, but affirmed Mr. Van Poyck's first-degree murder conviction on the basis of felony murder. Id. at 1069.

The facts involved in this action, particularly those presented at the evidentiary hearing in the court below, are numerous and complex and are discussed in the body of the brief as they relate to the claims presented.

SUMMARY OF ARGUMENT

The court below erred in denying relief on the ineffective assistance of counsel at penalty phase claim, on the basis of testimony that Mr. Van Poyck had no adequate opportunity to rebut. At the outset of the hearing, the State revealed that trial counsel would testify concerning statements allegedly made by a mental health expert. Counsel was unable to obtain the expert's testimony during the hearing, and the court summarily and erroneously denied Mr. Van Poyck's request to reopen the hearing or supplement the record with the expert's affidavit, which contradicted counsel's testimony.

Defense counsel conducted no investigation of Mr. Van Poyck's life history or of his mental health until after the guilty verdict was returned. Counsel was unprepared and unable to offer meaningful mitigation. Defense counsel also failed to obtain and use readily available evidence to show that Mr. Van Poyck was not the trigger person, conducted a rambling and ineffective cross-examination of the State's key witness, and failed to investigate a defense of voluntary intoxication, instead relying on a defense that counsel themselves characterized as a "dead dog loser." But for counsel's unreasonable and deficient performance, it is reasonably likely that Mr. Van Poyck would have been convicted of a lesser degree of murder, and that he would not have received the death sentence.

Mr. Van Poyck's jury was instructed in the bare terms of the "great risk of death to many" aggravating factor, a factor that is unconstitutionally vague. Mr. Van Poyck fully preserved his objection to the vagueness of the instruction, and raised the issue on appeal.

Under Espinosa v. Florida, 112 S. Ct. 2926 (1992), and Jackson v. State, 648 So. 2d 85 (Fla. 1994), review of the merits of this claim is required. On the merits, it is clear that the vague jury instruction prejudicially violated the Eighth Amendment.

Numerous other errors occurred that require relief: the State withheld material, exculpatory evidence; Mr. Van Poyck was sentenced to death on the basis of the sentencers' belief that he was the trigger person, although this Court held that the State had failed to prove that fact and newly-discovered evidence further refutes it; the trial court denied challenges for cause on biased jurors; the prosecutor engaged in improper arguments throughout the trial; the court improperly instructed the jury in a manner that allowed them to recommend death although the minimal standard of culpability was not established, shifted the burden of persuading the jury that death was not proper to Mr. Van Poyck, allowed the jury to rely on an aggravating factor that was the basis for his eligibility for the death sentence, and precluded consideration of sympathy for Mr. Van Poyck; the instructions were unreasonably vague and confusing; the court failed to consider uncontroverted mitigation; and gave a fundamentally erroneous instruction on manslaughter.

ARGUMENT I

THE COURT BELOW ERRED IN DENYING RELIEF ON THE BASIS OF COUNSEL'S ACCOUNT OF HIS INTERACTIONS WITH A PRETRIAL MENTAL HEALTH EXPERT, WHILE DENYING MR. VAN POYCK ANY OPPORTUNITY TO PRESENT EVIDENCE CONTRADICTING THAT ACCOUNT

With respect to Mr. Van Poyck's claim that counsel were ineffective at penalty phase for failing to investigate and present compelling mitigation evidence, the trial court denied relief, based

almost entirely on trial counsel Cary Klein's testimony concerning his interactions with psychiatrist Alejandro Villalobos, M.D. The court interpreted Klein's testimony as establishing that Dr. Villalobos had interviewed Mr. Van Poyck, reviewed psychological test results, and determined that he "had nothing helpful to say" about Mr. Van Poyck, that Mr. Van Poyck was a sociopath, and that he "saw no evidence of organic brain syndrome." PR. 4984.

Accordingly, the court concluded that "Klein made a conscious, tactical judgment not to pursue this line of defense in the penalty phase of the trial for fear of opening a Pandora's box." Id. This was virtually the entire expressed basis for the court's denial of relief on this claim.[2]

For the reasons set forth in Argument II, infra, these conclusions were clearly erroneous based on the evidence presented. Even more egregiously, however, the court below relied totally on Klein's testimony concerning his interactions with Dr. Villalobos--and at the same time denied Mr. Van Poyck the opportunity to rebut Klein's testimony on that issue. These actions by the trial court deprived Mr. Van Poyck of a full and fair hearing, and require that this Court remand to the trial court, so that Mr. Van Poyck can present the testimony of Dr. Villalobos.

Counsel for Mr. Van Poyck first became aware that Klein would testify that Dr. Villalobos had diagnosed Van Poyck as suffering from antisocial personality disorder or sociopathy at the outset of the

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[2]The court also asserted, without elaboration or explanation, that Van Poyck had failed to establish prejudice. Id.

hearing, when counsel for the State disclosed the content of certain statements Klein had made to them.[3] Counsel for Mr. Van Poyck immediately notified the court and the State that it might be necessary to call Dr. Villalobos as a witness. See T. 151. Prior to that, although counsel for Mr. Van Poyck had met with Klein, Klein had not disclosed any such statement on the part of Dr. Villalobos, nor was there any indication of such a statement in the files of Klein or Dr. Villalobos. To the contrary, Klein had signed an affidavit stating that the defense team "ran out of time in our attempt to determine whether Bill suffered from a mental illness" and that the mental health experts did not have enough time to complete their evaluations. Def. Ex. 22, Affidavit of Cary Klein ¶ 12. Accordingly, before counsel for the State revealed the statements made to them by Klein, counsel for Mr. Van Poyck had no reason to believe that Dr. Villalobos was likely to be a necessary witness, particularly as he had virtually no files concerning the case and no recollection of it. See PR. 4942, Affidavit of Alejandro Villalobos, M.D., ¶ 3.

Once the undersigned counsel became aware that Dr. Villalobos might be a necessary witness, they attempted to secure his presence at the hearing. However, counsel was unable to locate him. T. 1251; PR. 4941, Villalobos Aff. ¶ 2. As soon as Van Poyck's 3.850 counsel were able to contact Dr. Villalobos, they provided him with materials concerning the case and met with him. After reviewing the materials,

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[3]Klein had met for three hours with counsel for the State a couple of days before the hearing and freely discussed with them all aspects of his representation of Mr. Van Poyck, including statements allegedly made by Mr. Van Poyck to Klein during the course of his representation. T. 1220-22.

Dr. Villalobos denied that he had been able to reach any diagnosis of Mr. Van Poyck or that he had diagnosed Mr. Van Poyck as antisocial or a sociopath:

> I conducted only a brief evaluation of Mr. Van Poyck for the purpose of determining his current sanity and competence to stand trial.
>
> In my opinion, a brief evaluation of that kind is sufficient only for the limited purpose of assessing current functioning. It is insufficient to render an opinion on more complex psychiatric and forensic issues, such as to arrive at a reliable diagnosis, to give an opinion on one's mental state at the time of an offense, or to offer an opinion concerning the presence or absence of mental health related statutory or non-statutory mitigating circumstances. . . .
>
> I was unable to provide any opinion as to the forensic issues that are significant in the penalty phase of a capital trial. In particular, I did not and was not able to render any diagnosis of Mr. Van Poyck, including a diagnosis that he suffered from antisocial personality disorder or sociopathy. The lack of time and information prevented me from expressing any conclusions, favorable or unfavorable.

PR. 4942-43, Villalobos Aff. ¶¶ 4, 5, 7 (emphasis supplied).

Mr. Van Poyck immediately moved to supplement the record with Dr. Villalobos' affidavit, or alternatively, to reopen the hearing. PR. 4936-40. The trial court summarily denied the motion, without explanation. PR. 4946.

The trial court's denial of the motion, coupled with its later reliance on Klein's testimony, deprived Mr. Van Poyck of his rights to due process and a full and fair hearing. Clearly, Dr. Villalobos was a crucial witness as his affidavit directly contradicts the testimony of Cary Klein, which the trial court credited and relied on as the basis for denying relief. Just as clearly, counsel for Mr. Van Poyck took every reasonable step, consistent with due diligence,

that was required to secure Dr. Villalobos' testimony or statement once they became aware that Klein would testify in a manner that made Dr. Villalobos a necessary witness.

Rule 3.850 proceedings, particularly in capital cases, are governed by the requirements of due process, including reasonable notice and the opportunity to be heard. See Huff v. State, 622 So. 2d 982 (Fla. 1993) (denial of oral argument in 3.850 proceedings challenging death sentence violated due process); Holland v. State, 503 So. 2d 1250 (Fla. 1987) (erroneous denial of right to an evidentiary hearing violated due process). The trial court's actions in the instant case violated those rights. A remand is required in order that Mr. Van Poyck may present the testimony of Dr. Villalobos.

ARGUMENT II

WILLIAM VAN POYCK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant establishes a violation of his right to the effective assistance of counsel if he can show that, at the penalty phase of his capital trial, his attorney rendered deficient performance and that there is a reasonable likelihood that the sentencing outcome would have been different had his attorney performed adequately. At the evidentiary hearing held below, Mr. Van Poyck presented ample proof of both prongs of the Strickland standard.

Counsel's most fundamental duty--particularly at the penalty phase of a capital case--is to conduct a reasonable investigation. Strickland v. Washington, 466 U.S. at 691; Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). In the absence of a reasonable

investigation, counsel who is unaware of the existence of mitigating evidence cannot possibly make an informed decision about whether to present that evidence. Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989) ("counsel's failure to investigate and present mitigating evidence was not the result of an informed decision because trial counsel was unaware the evidence existed"); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, 493 U.S. 1011 (1989) (counsel must conduct sufficient investigation to make "informed judgment" about what mitigation to present). In addition, counsel must ensure that his client receives adequate mental health assistance, particularly when, as in the penalty phase of this case, the client's mental state is--or should be--at issue. Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir.), cert. denied, 474 U.S. 998 (1985).

Here, counsel failed in all of these duties. Lead counsel Cary Klein waited until the guilt phase of the trial was over to begin any penalty phase investigation, counting on a promised one to three week extension between phases to conduct an investigation of Mr. Van Poyck's entire life and mental health history, to decide what evidence to present and to secure the presence of the necessary witnesses. When the extension did not materialize, Klein was totally unprepared for penalty phase. And as will be explained below, had Klein investigated this case, he would have discovered compelling mitigating evidence: William Van Poyck's mother died when he was an infant, and thereafter he suffered overwhelming neglect and abandonment; he was physically abused by housekeepers, his older brother and his stepmother; he was early exposed to alcohol and drugs, and eventually

became dependent on them; he was sent to juvenile institutions, including the Florida School for Boys at Okeechobee, at an early age and, instead of receiving appropriate treatment, was physically and sexually abused; he has an extensive history of treatment for mental illness; and at the time of the offense he was dependent on and suffering organic impairment from alcohol and drugs, as well as from a personality disorder that drove him to try to rescue the older inmate who had assisted him and then dominated him during one of his episodes of mental illness.

Because counsel did not do a penalty phase investigation prior to guilt phase and there was no continuance, counsel knew none of this. Instead, defense counsel was, by his own admission, "caught with [his] pants down," T. 1219, and scrambled to put on whatever witnesses could be found at the last moment. Confidence in the outcome of the proceedings is undermined because counsel never investigated, prepared or presented the case for a life sentence.

A. Failure To Investigate, Discover And Present Evidence Concerning William Van Poyck's Life History.

There was a wealth of available information regarding William Van Poyck's family history, upbringing and environment, but counsel failed to investigate, develop or present it. Counsel were aware of certain key facts that should have prompted such an investigation. These included the fact that Billy Van Poyck's mother had died when he was very young, that all three of the Van Poyck children had significant legal and emotional problems, and that the household in which he grew up was "bizarre." T. 1173. Counsel never investigated these facts, never talked to key family members, never obtained

records concerning the family dysfunctions, and never presented any of this information to a mental health expert.

Counsel never talked to Emily Wilkes and Charles Warren Hill, cousins of William Van Poyck who were adults when he was growing up and were familiar with the family situation. At the evidentiary hearing, they testified that Billy's mother, Phyllis, died in a tragic accident when he was less than two years old. T. 375, 401. Billy's father, Walter--a World War II veteran and amputee who never expressed love toward his children--was devastated by his wife's death and further withdrew from his children, devoting himself totally to his work and political activities. T. 376, 405-07.

All of the children--Billy, his sister Lisa and his brother, Jeff--had trouble dealing with the death of their mother. T. 402. After Billy's mother's death, Billy lost the only person who had expressed love towards him. Apps. 18, 20. Though his father, Walter, engaged a series of housekeepers to care for his three children for the next few years, none of these caretakers were competent to provide the kind of consistent love and nurturing that Billy and his brother and sister needed after the death of their mother. Indeed, one of them, a Ms. Dano, was a religious fanatic who physically abused the children. Apps. 18, 22. Another was an alcoholic. T. 377.

At this point, Billy's great aunt Phyllis moved into the Van Poyck household to care for the children. Phyllis had been diagnosed as suffering from Major Depression and was being treated with Electroconvulsive Therapy, or ECT. App. 29. She was later diagnosed as bipolar and treated with Lithium. App. 30. Aunt Phyllis

was subject to violent mood swings; drank heavily, frequently to the point of intoxication; abused pain killers and other prescription drugs; and was generally erratic and unstable. T. 378-80, 409-11. As Charles Warren Hill testified, she "was just a number one crackpot in my estimation. She was a psychotic." T. 409. She frequently screamed at the children for no reason, and engaged in bizarre behavior, such as frightening the children by pretending that she was going to drive their car into a canal, taking them off to strange hotels, and going for swims in the nude after telling the children that the sharks would eat her. Apps. 16, 21, 22. She also convinced Billy and Lisa that she was their real mother. App. 22.

All of the Van Poyck children were very upset when Walter remarried, to a woman named Lee Hightower. Jeff left the Van Poyck home soon after the marriage, while Billy and Lisa felt that their mother (Aunt Phyllis) was being driven out of the house. App. 22. After the marriage, Lee became very frustrated at her inability to control the Van Poyck children. She instituted severe discipline of them, including physical abuse of Billy especially, whom she tried to beat into following her rather than Jeff (who was already involved in illegal activities). Apps. 22, 26. Lee and eventually Walter lavished praise and affection on her daughter, Toni, while the Van Poyck children were beaten, yelled at, or ignored. T. 413; Apps. 22, 23.

Lead counsel Klein was aware, from having talked to Lee Van Poyck, that she was "zealously religious," and admitted that her effect on the children "probably would have been something we would

have followed up on." T. 1167. Klein was not aware--because he never reviewed the entire Department of Corrections file, see T. 1129-33--of a report prepared by S. Michael Robinson, a counselor with the Department of Health and Rehabilitative Services, concerning an incident in which Billy and a friend were accused of having stolen a car. Robinson noted that Billy had stolen the car as a means of getting away from home after an incident in which Lee attacked his sister, Lisa, and reached the following conclusions:

> After this Counselor's contact with all members of the family, it is felt that the home situation is a completely untenable one. Ward's mother is totally destructive in her open, maniacal hostility towards the children and her fanatical attitude of puritanical virtue that she bestows upon herself and evil and corruption which she assures reside in the children. Mr. Van Poyck is generally soft spoken, and well meaning, however he approaches the situation in a completely unrealistic manner and is influenced towards any direction by any demanding source.
>
> This Counselor recommends revocation, not as a means of rehabilitating, but as a means of immediately removing ward from a highly destructive environment.

Def. Ex. 3 (emphasis supplied).

Expert clinical social worker Jan Vogelsang summarized the effect of these experiences on Billy and the other Van Poyck children as follows:

> [A] lot of the developmental tasks that have to be accomplished even in infancy could not be accomplished because there were no adults, competent adults in the household to teach those skills and to offer the guidance and the love and the nurturance that should be there . . .
>
> . . . One of the things we know about Billy is that he became a very agitated child, was described as hyperactive. He talked constantly, that he could not sit still . . . and that he would not learn to pick up on social requests.
>
> . . .

> . . . I think another impact is cognitive development is certainly affected by the loss of caretakers, the lack of intervention, the ability to have insight, to make judgments, to think clearly. Children raised in this kind of environment, they grow physically, sometimes, but they don't really develop in terms of cognitive skills, understanding consequences, you know, they just more or less live with a sense of uncertainty about things the rest of us take for granted.

T. 180-82.

Again, counsel should have known or suspected the fact that Billy was seriously abused, based on what he and his brother told counsel, and on the fact that Billy was sent to the Florida School for Boys in Okeechobee, which was already a notorious institution at the time of trial. T. 971. Counsel, however, did nothing, although Klein acknowledged that he would have investigated if he had known about Okeechobee, T. 1017, and if he had had time to talk to anyone in the family other than Mr. Van Poyck's stepmother and brother. T. 1034.

If counsel had investigated, they would have learned that one of the housekeepers, Ms. Dano, frequently beat Billy and his siblings with wooden coat hangers, leaving bruises, and locked them in closets or out of the house. She threatened to chop them into pieces and feed them to the dogs if they told their father. Apps. 18, 22. Billy's brother Jeff frequently abused him, beating him often, on one occasion knocking him unconscious with a wooden "shield," and on several occasions holding him under water until he nearly drowned. T. 457; App. 22. Billy's stepmother, Lee, beat him at least two to three times a week on schedule, using a belt buckle, to teach him not to be like Jeff. When the bruises were too noticeable, she kept him home from school. Apps. 22, 23.

Billy was sent to youth hall for the first time at age 12. Shortly after he arrived there, he was raped. Two years later, he was sent to the Florida School for Boys at Okeechobee. At Okeechobee, Billy was hog tied, drenched in water and left over night in the "wet room," and frequently sent to the "ice cream room," where he was given thirty licks with straps and paddles, the process being repeated if he cried out during the beating. T. 486, 498; App. 32. He also saw other children be sexually abused, and was placed under the supervision of older and larger offenders. T. 205-09. The substandard conditions at Okeechobee are well documented, see generally App. 37, and were described in detail by juvenile justice expert Paul DeMuro. DeMuro described the dangerous, overcrowded conditions in the dormitories, where status offenders were not separated from violent offenders, nor smaller children from larger, leading to frequent physical and sexual assaults on the younger and smaller children; the absence of any attempt to treat or rehabilitate youthful offenders; and the fact that small, middle class white boys without a history of institutionalization (like Billy Van Poyck when he was first sent to Okeechobee) were at the greatest risk. T. 319-32.

As a result of these repeated assaults on him, Billy lived under a constant and ongoing threat of harm during virtually his entire childhood and adolescence, and lived in a state of hyper vigilance. T. 187, 194. Ms. Vogelsang described the effect of living in these circumstances as engendering feelings of powerlessness and

helplessness that become a part of such children's lives, and that cause long-term impairments in judgment. T. 212.

As set forth above, in 1970, the Department of Health and Rehabilitative Services determined that Billy needed to be removed from the "highly destructive environment" of his home. Def. Ex. 3. Psychiatric expert Dr. Robert Phillips explained that such recommendations are made with great reluctance, because removing a child from the home causes a major loss and psychological dilemma for the child. T. 584-85. Okeechobee, however, was incapable of providing the type of treatment that such children need. T. 332. Indeed, the lack of any treatment and the dangers and abuses at Okeechobee were so intolerable that Billy and other children frequently ran away. T. 477-86, 496 (as a friend of Billy who was also committed to Okeechobee testified, "Well, when something is bad, you run away from it, you know?").

After Billy was convicted of several felonies in 1972, the first recorded evaluation of his mental health was conducted by psychologist David Rothenberg, Ph.D. Dr. Rothenberg found that Billy was psychotic and recommended long-term in-patient treatment. Def. Ex. 4. Cary Klein did not recall having seen the synopsis of Dr. Rothenberg's report, although it was contained in a 1972 post-sentence report. T. 1168. As Ms. Vogelsang testified, a recommendation of long term in-patient treatment for an adolescent is basically a recommendation to start over "from scratch," using intense interaction with staff to attempt to repair the damage that has already been done to the child. T. 217. But there is no indication in the records that Dr.

Rothenberg's recommendation was followed up on. Instead, Billy was sent to Sumter Correctional Institution, a "gladiator school" where young inmates like Billy were at extreme risk, T. 418, 481-82, and where Billy was raped shortly after he was sent there. T. 211, 341, 292. The failure of institutions to intervene appropriately to protect children exacerbates the tendency of abused and neglected children to feel helpless and powerless, and causes impaired judgment. T. 212.

Approximately two years after Billy was sent to adult prison, he suffered a breakdown. For most of the next several years he received psychiatric treatment and medication, including "industrial strength" dosages of antipsychotic medications, and two admissions to the Florida State Hospital in Chattahoochee. T. 595-605; see generally Def. Exs. 23, 24. Dr. Rothenberg believes that this breakdown was the predictable result of the failure to provide the type of long term inpatient treatment he had recommended for Billy:

> This subsequent history confirms my initial diagnosis. It is predictable and almost inevitable that a young and vulnerable person, already suffering from psychosis, would deteriorate further when placed in an adult prison, without any therapeutic intervention. In the absence of the type of therapeutic intervention that I recommended, there is no reason to believe that Mr. Van Poyck's mental illness has ever dissipated. While the observability of such a mental illness fluctuates over time and may be masked by medication, the mental illness itself persists.

App. 46.

All of this mitigating evidence was readily available to trial counsel, but none of it was discovered or presented. The reasons for these failures are not far to seek. Mr. Van Poyck's lead attorney was Cary Klein. Klein was a general litigation attorney who had never

before handled a capital case. T. 1041-42. From the beginning of this difficult, complex case Klein believed a felony murder conviction likely, and that the case would almost certainly go to a penalty phase proceeding. T. 1145. Also, at the very outset of the case Klein discussed potential mitigation with Mr. Van Poyck. T. 1060-61. However, Klein did not investigate for mitigation at any time prior to the trial. Instead, he had decided to wait until the guilt phase of the trial was over to begin penalty investigation because he believed that the trial court would give a one to three week continuance between phases. T. 1158. He explained at the hearing that he was counting on this time to "investigate" penalty phase issues and felt safe in doing so because the court had "assured" him that there would be a few weeks between phases. Id. As it turned out, no continuance was forthcoming, and the record contains no written or oral order or promise of a continuance. See T. 1196.

In May 1988, attorney Michael Dubiner was appointed to assist in the representation of Mr. Van Poyck with respect to discovery matters. T. 822, 933. Dubiner's appointment came over his objection (he had made a personal decision that he would no longer accept capital cases). Id. Sometime thereafter Dubiner's role changed, again over his objection. He was informed by the court that he was to assist Klein as trial counsel on the case. T. 823, 934. At the time of his appointment as trial counsel, in July 1988, Dubiner had between 15 and 20 trials set before the Van Poyck case. Moreover, because his appointment came so late he spent most of his time just catching up. App. 4, Dubiner Affidavit ¶ 3; T. 826. Though he had

more experience than Klein, he was not lead counsel and did not know the case well enough to be lead counsel. T. 827. He did no work on penalty phase prior to trial, but assumed that penalty phase investigation and preparation was being handled by Klein. Id.[4]

When the jury convicted Mr. Van Poyck of first-degree murder, the court announced that it would begin penalty phase the next day. Shortly thereafter Dubiner learned to his dismay that his assumption that Klein had been handling penalty phase preparation was wrong. T. 849, 867. Klein had arranged for no investigation of the life history of his client, no mental health evaluations, no witness interviews--in short, literally nothing had been done with respect to a penalty phase investigation or preparation. T. 867, 923, 974.

At that point Dubiner realized that Mr. Van Poyck was essentially defenseless. Having done penalty phase work before, he knew that even the two weeks Klein thought he would have between phases, let alone the one evening they now had, was not nearly enough time to investigate and prepare a penalty phase from scratch:

> Q: How much time did you think that you would have?
>
> A: My recollection of somewhere between a week and three weeks. I can't recall exactly.
>
> Q: Alright sir. Was that adequate time to investigate a penalty phase from scratch?

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[4]This assumption, very much mistaken, highlights a major problem with the way in which counsel handled this case --there was no clear division of responsibility (Dubiner Aff. ¶ 4; T. 684, 1006) and no thought given or coordination between the attorneys as to any kind of defense theory, particularly in the penalty phase. T. 690-91, 818, 839; Dubiner Aff. ¶ 10.

A: No. That was an adequate time to you know clear up the loose ends in the phase 2 but not enough time to begin preparation for a penalty phase.

Q: In 1988 too?

A: In 1988 and in 1981 when I first started doing these cases.

T. 849-50. When Dubiner found out that no mental health evaluation and no penalty phase preparation had been done, he engaged in a heated exchange with Klein and threatened to report him to the court if a mental health evaluation was not arranged. T. 851-52; Dubiner Aff. ¶ 18. At the hearing, Dubiner admitted that he should have simply immediately reported the matter, since there was no possibility that any kind of effective or adequate mental health evaluation could be done in a single day. T. 851-52, 926. Klein agreed that he would have done the same had he been in Dubiner's position. T. 1219.

The next morning Klein told the court that if the jury was going to be brought back that day, the defense was not prepared to go forward. The court responded that the penalty phase would start that day, and that Klein could have mental health evaluations done that afternoon. R. 3130-34. Klein told the court that the mental health experts would be unable to see Mr. Van Poyck that afternoon. Dubiner added that no prejudice would result from a week's delay and that otherwise the defense would be unable to present "whatever evidence there is in mitigation." R. 3134. The court nonetheless began penalty phase proceedings that day, allowing only a one day hiatus the next day for any mental health testing.

Klein then "scrambled" to arrange for testimony from a few family members, T. 1198, including Mr. Van Poyck's brother Jeffrey, who had

19 prior felony convictions, an obvious interest in the outcome and was, according to Klein, "the most cold and chilling witness [he] had ever seen" and was "hated" by the jury, T. 1103; Mr. Van Poyck's aunt, who had to admit she knew little about the defendant; his stepmother who not surprisingly gave no indication of the "destructive environment" she had helped create as reported by the HRS in 1970; and a nurse who had met Mr. Van Poyck in prison. Counsel did not meet any witnesses until the morning of the hearing, much less interview or prepare them before testifying, T. 857-58; Dubiner Aff. ¶ 19, and there was no opportunity to make any reasoned evaluation of whether to put them on the stand. Dubiner Aff. ¶ 19. Much of their testimony came off, as expert capital trial attorney Carey Haughwout put it, as though they "were there were for the state." T. 988. The attorneys did not even recognize Mr. Van Poyck's aunt when she was in the courtroom and would have lost her testimony had the court not noted her presence. T. 861. As a result of the total lack of preparation and investigation, Klein was left with mere suspicions of a number of mitigating circumstances, none of which, by his own admission, he could show. (T. 964, "I must have listed 12 or 13 non-statutory so could not actually prove other than the couple that we tried to prove that I suspected were there but none could we show.")

At the evidentiary hearing, Ms. Haughwout's unrebutted testimony established that the trial record, counsel's extremely thorough time sheets and other material revealed a complete lack of investigation or preparation for penalty phase: "My opinion from reading all the

records is there was no preparedness. There is just no indication other than reviewing the prison records that there was anything done for Phase II." T. 974 (emphasis supplied). Ms. Haughwout further testified that based on her review of the records, there was no penalty phase investigation at all, and that the penalty phase presentation fell below the constitutional standard for effective assistance of counsel. T. 988.

The court below never addressed this overwhelming evidence that trial counsel totally failed to investigate, discover and present mitigating evidence based on Mr. Van Poyck's life history. There was no strategic or tactical reason for failing to discover and present such evidence--lead counsel simply waited until after the conviction to conduct any investigation, based on a supposed continuance between phases that was not recorded, never materialized, and in any event would have been insufficient to conduct a reasonably competent investigation.

Courts considering this issue have found counsel's complete lack of preparation or investigation for penalty phase to be ineffective assistance of counsel as a matter of course. In Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994), this Court found "clear evidence" that counsel "did not properly investigate and prepare for the penalty phase proceeding," based on testimony similar to that of Dubiner and Klein that counsel did not prepare for penalty phase prior to the verdict and only then "started scrambling for something to do about the penalty phase." Id. at 8. Similarly, the Eleventh Circuit Court of Appeals has found that effective penalty phase preparation cannot

await the conclusion of guilt phase: "[t]o save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir. 1991).

In this case, it was inexcusable enough that Klein would rely on a continuance purportedly given off the record without entry of a formal order.[5] But even if Klein had been granted a between-phase continuance, he still would have been grossly unprepared and well below acceptable standards for adequate investigation and preparation of a penalty phase. An adequate penalty phase case cannot be investigated and prepared in a couple of weeks, particularly after completion of a long and difficult guilt phase:

> First of all, it's just not enough time. Second of all, the lawyers are recovering from two weeks or more of very strenuous work in trial. You just can't turn around and then spend 22 hours a day doing the investigation to make up for what you should have been doing for the last - for the past year.

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[5]It is clear that counsel bear the primary responsibility for their failure to provide even minimally effective representation at the penalty phase of Mr. Van Poyck's trial. However, the State, through the courts, may also deprive a defendant of the effective assistance of counsel by creating conditions in which it is impossible for counsel to function effectively. United States v. Cronic, 466 U.S. 648 (1984); Valle v. State, 394 So. 2d 1004 (Fla. 1981). The record of the evidentiary hearing clearly demonstrates that at some point during the guilt phase of the trial the court reduced the time between phases from at least one week to one day. Although it was probably already too late for counsel to provide minimally effective representation at penalty phase, the court's eleventh hour change destroyed the last vestiges of any hope that Mr. Van Poyck would receive competent representation. Here, as in Valle, the prejudice is also clear, see infra, and relief is required.

T. 969-70. Ms. Haughwout further testified that Mr. Van Poyck's lengthy history of institutionalization made the necessary investigation even more time-consuming. T. 970.

Here, as in Deaton, supra, and Blanco, supra, counsel's total lack of preparation for penalty phase until after the verdict was rendered was clearly deficient performance.

B. Failure To Investigate, Discover And Present Mental Health Mitigation.

The only specific allegation of ineffectiveness addressed by the lower court was Mr. Van Poyck's claim that counsel was ineffective for failing to investigate, discover and present mental health mitigation. With respect to that claim, the lower court concluded that counsel "made a conscious, tactical judgment" not to use such evidence. PR. 4984. As set forth in Argument I, supra, the court reached that conclusion without allowing evidence bearing directly on it. Even on the record before the court below, however, its conclusion was clearly erroneous. While Klein may have decided not to introduce mental health testimony, that decision was clearly the result of his admitted and clearly unreasonable failure to investigate and discover readily available mental health records and background information, to provide such records and information to mental health experts, and to arrange for evaluation and testing of Mr. Van Poyck by mental health experts in sufficient time for them to arrive at reliable diagnoses and conclusions and prepare to testify concerning those conclusions.

From the beginning of his representation of Mr. Van Poyck, Klein was put on notice of the existence of mental health issues. At their

first meeting in late June 1988, Mr. Van Poyck told Klein about his history of mental health problems, including a history of treatment in mental health hospitals in the 1970s. T. 1046-47. Klein, by his admission, was "not terribly familiar" with the use of mental health experts in first-degree murder trials. T. 1050. Despite his limited experience with mental health issues, Klein was struck from the beginning by what he perceived as his client's self-destructive nature. Klein obviously was unable to reach any definitive conclusions as to the nature of Mr. Van Poyck's underlying mental health problems, but he questioned whether there was "something wrong . . . that we couldn't quite put a finger on." T. 1059. Klein described Mr. Van Poyck's self-destructive behavior as a "continuing problem" throughout the course of his representation. Mr. Van Poyck insisted on helping the man who he had earlier tried to free, James O'Brien, T. 1123; tried to take the blame for a crime committed by his brother, Jeff, T. 1059; and wrote numerous letters to the attorneys for co-defendants O'Brien and Valdez offering testimony that would help them but might be harmful to his own defense, without telling Klein. T. 1123.

Despite knowing about a history of mental health problems and despite having his own questions about his client's mental state, Klein did not retain a mental health expert for any purpose whatsoever until approximately May, 1988, when he moved for the appointment of Dr. McKinley Cheshire, a local psychiatrist, to perform a routine competency evaluation. Ironically, that same day Klein moved to appoint Mr. Van Poyck as co-counsel on the case. T. 1186.

Dr. Cheshire refused to take the case, R. 296, and another psychiatrist, Dr. Alejandro Villalobos, was appointed in August 1988. R. 4059-60. Dr. Villalobos apparently performed the sanity evaluation shortly after his appointment, but did virtually no other work on the case.[6]

In early August, 1988, co-counsel Michael Dubiner had a lunch meeting with Dr. Villalobos to "get him on board," ostensibly for purposes of a potential penalty phase defense. T. 830, 1188. The court entered an order appointing Dr. Villalobos as a psychiatric expert on August 10, 1988, a mere five days before the Van Poyck case had been set to go to trial.[7] T. 1189. Klein moved on October 21, 1988, ten days before the rescheduled trial began, to have payment authorized for Dr. Rahaim, a psychologist, to conduct testing for Mr. Van Poyck. T. 1193; see Appendix to Post-Hearing Brief, App. E. However, neither Dr. Villalobos nor Dr. Rahaim performed any kind of testing of Mr. Van Poyck prior to trial. T. 1201.

As set forth above, Dubiner discovered the total lack of preparation for penalty phase, including the lack of any mental health

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[6]The record indicates that Dr. Villalobos received $350, which included a $150 fee for a sanity determination and $200 for attorney consultations. T. 1050-51; see Appendix to Post-Hearing Brief, Apps. G, H. (Mr. Van Poyck filed the Appendix together with his Post-Hearing Brief. The Appendix was not made part of the record, and Mr. Van Poyck has moved for an order directing the clerk to complete the record to include the Appendix, which contains excerpts from the trial record and the circuit court files, of which the court below took judicial notice. T. 153; PR. 4822-24). See also PR. 4943, Villalobos Aff. ¶ 4.

[7]On August 1, 1988, counsel moved for a continuance on other grounds, R. 3990-92, which was granted on August 5, 1988. R. 4057.

expert, after the jury verdict was rendered at the guilt phase. In a meeting the next morning, Dubiner, Klein and Mr. Van Poyck had a "heated discussion." T. 851. Dubiner testified that "Mr. Klein was saying we don't need to have any mental health professionals see him." T. 852. Dubiner then threatened to tell Judge Miller that they were unprepared to proceed unless a mental health expert saw Mr. Van Poyck before penalty phase. T. 851-52. Klein and Dubiner then contacted Dr. Villalobos in an attempt to persuade him to testify the next day.

> Q. . . . And Dr. Villalobos then, as you recall, would not get involved on short notice?
>
> A. That's correct. It wasn't only short notice. It was lack of preparation. In fact, I don't think it was short notice at all. Short notice, when . . . you say short notice, it sounds like he just didn't have the time to do it. I don't think he wanted to become involved because he didn't have enough information or enough preparation for testifying.

T. 853-54. Dubiner went on to explain that a mental health expert who has only seen the defendant the night before he testifies has diminished credibility, and that the expert has to have sufficient knowledge of the facts of the case to reach reliable conclusions and to withstand cross-examination. T. 853-54.

Dubiner's recollection is confirmed by the trial record. The day that penalty phase was supposed to start, Klein asked for a continuance of the penalty phase, stating that Dr. Villalobos needed to see results of psychological tests that had not yet been performed before he could express an opinion. R. 3129-30. When the court suggested having the testing performed that day, Dubiner then interjected that Dr. Villalobos would need more time after reviewing the test results. R. 3134. It was clearly counsels' failure to

investigate and prepare in a timely fashion, and to have the testing conducted in a timely fashion, that forced the defense to abandon the use of mental health testimony. Mr. Dubiner testified unequivocally that there was no "strategic reason in this case," T. 921-22, for those failures, and that had he known of Mr. Van Poyck's mental health diagnoses, abuse as a child, and institutional and prison system abuse the defense "absolutely" would have presented such evidence. T. 868-69.

Abundant and powerful mental health mitigating evidence was available to the defense upon even minimal investigation. Mr. Van Poyck was exposed to alcohol and drugs at an early age and soon became drug and alcohol dependent. Billy's mother, Phyllis Van Poyck, drank during the time that she was pregnant with Billy. At times, she drank heavily enough to be considered an abuser of alcohol. T. 199, 700. One of the housekeepers brought in after her death was an alcoholic and was eventually dismissed after she drank to the point of passing out. T. 377-78. Aunt Phyllis drank constantly and also abused prescription drugs, including narcotics such as demerol and morphine. She was described as always having a drink in her hand and often being intoxicated in the presence of the children. T. 379, 409-10. Billy's stepmother, Lee, drank heavily and took tranquilizers, such as Librium. T. 199-200; App. 22.

Billy's brother Jeff began abusing alcohol and other drugs at an early age. He introduced Billy to alcohol when Billy was only eight years old, and enjoyed getting Billy drunk. T. 199; App. 18. Soon thereafter, he introduced Billy and other neighborhood children

to more powerful drugs, including heroin. As a result of Jeff's influence, several of these children became heroin addicts. T. 442-43.

Billy quickly became dependent on alcohol and other substances. He was smoking marijuana daily by age 12; was huffing inhalants by age 13; and was taking his stepmother's prescription drugs by age 14. He also habitually used whatever substances were available, whether in institutions or during the brief periods when he was free, including LSD and cocaine. T. 200, 499, 531, 669-77. His dependence on drugs and alcohol is confirmed by his statements to prison officials, prison reports, and prison mental health records. Def. Ex. 23; see generally, App. 8.

Expert psychiatrist Dr. Robert Phillips diagnosed Mr. Van Poyck as suffering from alcohol and cannabis dependence and psychoactive substance-induced organic mental disorder secondary to polydrug abuse, all in remission. T. 569-70; App. 48.[8] In summary, Dr. Phillips described Mr. Van Poyck as "someone who has suffered from the ravages of alcohol and drug dependency and at the height of their dependency is most dysfunctional. In ... the acute phase of use, this individual has a very high probability of being quite dysfunctional." T. 569-70.

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[8]A number of factors likely contributed to Mr. Van Poyck's early falling prey to drug and alcohol dependence. The heavy use of alcohol by his parents is significant because of the known genetic predisposition to chemical dependence. T. 571. Children, like Billy, who grow up in an environment that is chaotic and where substance abuse is common, frequently see drug and alcohol use as an escape and a way to be accepted. T. 200. In addition, children like Billy who are hyperactive often abuse substances as a form of self-medication. T. 574.

As set forth below, Mr. Van Poyck was in an "acute phase of use" at the time of the offense.

There is a history of mental illness in Mr. Van Poyck's family. Mr. Van Poyck also has a history of mental illness and of organic and other impairments to his mental functioning. Billy's maternal grandmother spent many years in a mental institution in New England and died there. T. 404; App. 13. His mother's aunt, Aunt Phyllis, was diagnosed and treated for both major depression and bipolar disorder. Apps. 29-30. There are usually strong genetic markers of mental illness. T. 578.

Billy was described by those who were around him as a child as "hyperactive," talking so fast he could not be understood, unable to sit still, impulsive and easily distracted. See, e.g., T. 445; Apps. 13, 18, 23, 27. Based on these accounts, school records, testing, and consultation with a neuropsychologist, Dr. Phillips has concluded that Billy suffered from attention deficit hyperactivity disorder as a child. T. 574-75, 665-66.

Mr. Van Poyck has a history of numerous traumatic head injuries. As a young boy, he was knocked unconscious by Jeff with a wooden "shield." T. 184-85. At the age of seven, he fell off a large boulder, striking his head and losing consciousness. After this incident, family members noticed changes in his behavior and olfactory hallucinations. App. 18. At the age of ten, he was accidentally hit with a golf club by a friend. In his mid-teens, he was involved in two motor vehicle accidents in which he lost consciousness. The multiple head injuries are one of the possible sources of the organic

brain syndrome diagnosed by Dr. Phillips. T. 606-11, 635-36, 699-700, 704-08.

As discussed above, psychologist David Rothenberg, Ph.D., diagnosed Billy Van Poyck as psychotic in 1972, when Billy was 17 years old, and recommended long-term in-patient treatment for Billy. Def. Ex. 4; App. 46. Also in 1972, a prison psychologist noted that Billy Van Poyck had engaged in heavy use of drugs, probably "in order to compensate for feelings of insecurity and worthlessness," and displayed hypomanic behavior "with the possibility of OBS [organic brain syndrome]...." Def. Exs. 18, 23.

In 1974, Billy was first diagnosed as suffering from paranoid schizophrenia and transferred to the Florida State Hospital in Chattahoochee. From 1974 through 1977, Billy was treated with a variety of powerful antipsychotic medications, including Prolixin, Mellaril, Thorazine and Haldol. He was also medicated for the side effects of Prolixin. Although the diagnoses varied, during virtually this entire time period he was maintained on major antipsychotic medications, regardless of the diagnosis. Prison records also reflect that on several occasions during this period Mr. Van Poyck inflicted harm on himself and otherwise engaged in self destructive behavior. Apps. 8, 44; Def. Ex. 23. Fellow inmates confirm that during this time Mr. Van Poyck was seriously disturbed and heavily medicated. T. 505-10; App. 47. Eventually, Mr. Van Poyck's condition improved to the point that he was taken off of antipsychotic medication. He was first placed on antidepressants and then released from psychiatric treatment. Def. Exs. 23, 24; see generally App. 8.

These psychiatric records clearly reflect that Mr. Van Poyck suffered from a serious thought disorder. As Dr. Phillips testified at length, that conclusion is supported by the diagnoses, including multiple diagnoses of paranoid schizophrenia, the lengthy history of treatment with antipsychotic medications, the two admissions to the Florida State Hospital, and the attempts at self harm. T. 596-605. Contrary diagnoses, such as antisocial personality disorder or malingering, are inconsistent with the lengthy history of Mr. Van Poyck's mental disorder and treatment with powerful antipsychotic medications. T. 622, 782-84.[9] Accordingly, Dr. Phillips diagnosed Mr. Van Poyck as having suffered from atypical psychosis by history. T. 623.

In addition to his history of mental illness, Mr. Van Poyck has a personality disorder with immature and dependent features. T. 633, 747-49; App. 48. Dr. Phillips described that where one parent is lost, as Mr. Van Poyck lost his mother, the child's "relationship with the surviving parent then becomes extraordinarily important in the development of the child." T. 582. Where the surviving parent is distant from or does not interact appropriately with the child, as was the case with Mr. Van Poyck's father, it "has a significant impact on the stability and development of that child's personality and such was the case with Mr. Van Poyck." T. 583.

As a child, Billy was extremely dependent on his brother Jeff, despite the fact that Jeff physically abused him and corrupted him

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[9]In addition, Mr. Van Poyck's history of mental problems prevented him from obtaining parole until years after he would have otherwise been paroled. T. 514-15; App. 36.

by exposing him to alcohol, drugs, and Jeff's criminal activities. T. 184-85, 194-96, 233-36, 414, 442-43. In Florida State Prison, during the period of his acute mental illness, he met and was befriended and protected by an older inmate, James O'Brien. Billy quickly became equally dependent on O'Brien. T. 513-14. In fact, O'Brien took the place of Billy's lost father:

> This is a young man who lost his mother, for all practical purposes lost his father, in an emotional sense. . . . This was a man, in layman's terms, who was constantly searching for his father and in a very clear psychiatric sense this Mr. O'Brien . . . became the personification of his father. He was that father figure and he attached to him [in] a very strong psychodynamic way. . . .

T. 617. Billy developed a pathological desire to please and be loyal to O'Brien because "in doing that he replaces internally something which he never had as a child." T. 618.

Mr. Van Poyck suffers from diffuse organic brain syndrome, which is currently in remission. In Dr. Phillips' opinion, this organic brain syndrome was caused by one or more of the following: his mother's drinking during pregnancy, his multiple head injuries, or his chronic polysubstance abuse. T. 609-10. The organic brain syndrome is exacerbated by the use of alcohol and drugs, and by the more complex tasks that have faced Mr. Van Poyck during the periods when he has not been institutionalized. T. 699-700, 703-07. There have been no incidents since Mr. Van Poyck's current incarceration that would have caused or exacerbated this condition; therefore it was present at the time of the offense, as well as for some considerable time prior to the offense. T. 615.

Mr. Van Poyck's impairments were not just historical; they were especially prominent at the time of the offense and drove his behavior. At the time of the offense, he was living with Traci Rose, a now recovering alcoholic. Mr. Van Poyck met Ms. Rose after his release from prison on parole. They saw each other frequently and then moved in together after a brief period during which Ms. Rose was absent from the area. During the time that Ms. Rose saw Mr. Van Poyck and then lived with him, the two drank constantly and heavily when they were together--over a liter of whiskey, vodka or other alcohol a day. T. 338-41, 344-45. Mr. Van Poyck also smoked marijuana all day like cigarettes--you could not "roll fast enough for him to smoke." T. 341, 347. He and Ms. Rose were in a state of intoxication most of the time they were together. T. 342. Mr. Van Poyck had little idea what to do outside of the structured prison environment to which he had become accustomed, and tended to do whatever others were doing, including alcohol and drugs. T. 343, 345-46.

About a week before the offense, in addition to the alcohol and marijuana use, which continued, Ms. Rose and Mr. Van Poyck started doing cocaine together. They would snort as much as two and a half grams of cocaine in a night. T. 347-48. The day before the offense, Ms. Rose and Mr. Van Poyck spent the whole day, starting around 2:00 p.m., drinking and taking cocaine. They stayed up all night, periodically snorting more cocaine. Before he left at about 7:00 a.m., Mr. Van Poyck did another line of cocaine, and took some more cocaine and beer with him. T. 350-54. Ms. Rose further

testified that cocaine gives the user an instant euphoria, followed by a period in which events are hazy and distorted, the judgment is impaired, and the user is edgy, fidgety and less inhibited. These symptoms last until the user sleeps off the effects. T. 354-56.

Dr. Phillips testified that Mr. Van Poyck's organic brain syndrome was "most prominent at the time of the instant offense and throughout the period of time when he was aggressively using alcohol" and drugs. T. 704. He opined that this condition, together with Mr. Van Poyck's history of psychosis and suicide attempts, personality disorder with immature and dependent features, and substance abuse, would support a finding of the mitigating circumstance of extreme mental or emotional disturbance. T. 632-33; App. 48. In addition, with respect to the mitigating circumstance of substantial domination by another, Mr. Van Poyck's dependent personality needs in general and in particular with respect to O'Brien "were very powerful psychodynamic factors which substantially influenced his ability to make decisions around the events at the time of this crime. I believe that those factors were powerful, and substantially contributed to the decisions he made with regard to this offense." T. 633-34. Indeed, this was perhaps the most powerful of the many clinical factors that contributed to Mr. Van Poyck's conduct: "I believe his behavior was significantly and compulsively driven by that rather misguided interpretation" of his relationship to O'Brien. T. 748. Finally, based on all of these factors, Dr. Phillips believes that Mr. Van Poyck "substantially lacked the capacity to conform his behavior." T. 634.

Mr. Dubiner testified that had he known of Mr. Van Poyck's mental health diagnoses, abuse as a child, and institutional and prison system abuse the defense "absolutely" would have presented such evidence. T. 868-69. Counsel did not make any reasonable decision, after timely and appropriate investigation, not to present mental health mitigation. Instead, counsel "ran out of time in our attempt to determine whether Bill suffered from a mental illness," Def. Ex. 22, Affidavit of Cary Klein ¶ 12. The fact that counsel ran out of time was a result of their failure to investigate and prepare prior to trial, as well as their reliance on a nonexistent continuation between phases. In a capital case, particularly a capital case where counsel characterized the guilt phase defense as a "dead dog loser," T. 862, counsel's performance was far below that of reasonably competent counsel.

C. Prejudice

The court below stated, without elaboration, that Mr. Van Poyck had failed to show the "probability of a different outcome." P.R. 4984. Mr. Van Poyck, however, was only required to show a "reasonable probability" that the "balance of aggravating and mitigating circumstances would have been different." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994), citing Strickland v. Washington, 466 U.S. 668, 687 (1984). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the case; a standard less than proof by a preponderance of the evidence." Agan v. Singletary, 12 F.3d 1012, 1018 (11th Cir. 1994), citing Strickland, 466 U.S. at 694. Mr. Van Poyck easily met that standard.

Lead counsel Cary Klein admitted that in closing argument at penalty phase he listed twelve or thirteen non-statutory mitigating factors that he suspected were present, "but none could we show." T. 1105. If counsel had performed a reasonable investigation, they could have established those mitigating factors and more, including statutory mitigating factors. In the evidentiary hearing below, Mr. Van Poyck presented testimony from an expert social worker and an expert psychiatrist concerning his background and mental health, as well as testimony from nine live witnesses and numerous affiants concerning his background and his mental state close to the time of the offense. The court below found that all of these witnesses would have been available at the time of trial. PR. 4983.

The testimony of these witnesses and the documentary evidence presented below--all of which was readily available had a reasonable investigation been conducted--provides such powerful mitigation that it is reasonably likely the outcome would have been different had this evidence been presented at the penalty phase. First, counsel could have presented evidence to the jury concerning the effect on William Van Poyck of the death of his mother and his numerous other experiences as a child of loss, abandonment and neglect. Mr. Van Poyck showed below that the entire Van Poyck family, including his father, was devastated by his mother's death; that the children were cared for by inappropriate caretakers, who physically abused them, abused alcohol and drugs, and one of whom was mentally ill and subject to violent mood swings and bizarre behavior; and that upon their father's remarriage their stepmother was "totally destructive in her

open, maniacal hostility towards the children." Def. Ex. 3. Mr. Van Poyck also proved that the effect of these experiences on him was that he suffered from hyperactivity as a child and had impaired cognitive development and social skills. T. 180-82, 574-75, 665-66. As Klein lamented, although he knew that the mother had died, the father was incapacitated, and all three children had developed "totally out of the norm," he had no "underlying psychological explanation" of those problems to present to the jury. T. 1102. That fact was the result of his complete failure to investigate.

Consequently, not only did counsel fail to present mitigation, they also left the court and presumably the jury with the totally inaccurate impression that William Van Poyck was "raised in a good family and by people that cared for him." R. 4199 (sentencing order). Counsel would have had to go no farther than the report of HRS counselor S. Michael Robinson to discover--and prove to the jury and the court--at least part of what went wrong in the Van Poyck family and why the court's conclusion was the exact opposite of the truth. Mr. Robinson, who had no personal interest in the case, described Billy's stepmother as "totally destructive in her open, maniacal hostility towards the children" and recommended Billy's removal from the "malignant milieu" of the Van Poyck home. Def. Ex. 3.

Second, counsel could have presented evidence of the repeated and nearly continuous physical abuse of William Van Poyck by the caretakers, by his brother Jeff, by his stepmother Lee and at the Florida School for Boys in Okeechobee. T. 183-88, 207-09. Such constant and ongoing threats of harm force the victim to live in a

state of hypervigilance and engender feelings of helplessness and powerlessness. T. 187, 194, 212. Such evidence is powerfully mitigating, and has been held to support a finding of prejudice. See, e.g., Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (evidence of abuse, neglect, and sexual assault at a school for boys).

Third, counsel could have presented significant mitigating evidence concerning William Van Poyck's early institutionalization and the failure of those institutions to provide appropriate intervention, protection and treatment. Counsel argued to the jury that the fact that Billy was institutionalized from the time he was eleven years old and was sent to adult prison at age 17 was a mitigating factor. R. 3567. Standing alone, however, that fact merely suggested to the jury that Billy had "gone bad" at an early age. Counsel never discovered, and therefore never told the jury, about the horrendous conditions and abuses Billy faced both at Okeechobee and in the Florida prison system, and never explained to the jury how the failure of those institutions to provide adequate treatment and protection for Billy, on the heels of the abuse, neglect and abandonment he had suffered at home, contributed further to his impairment. See T. 201-17, 317-32, 478-86, 585-92.

Fourth, counsel could have presented evidence of Mr. Van Poyck's early exposure to drugs and alcohol and eventual development of a dependence on drugs and alcohol. His dependence likely resulted from a number of factors that were beyond his control, including genetic factors, growing up in an environment that was chaotic and where substance abuse was common, and his own hyperactivity. T. 200, 571,

574. It also contributed greatly to his bouts of acute mental illness, to his organic brain disorders, and to the other impairments that were present at the time of the offense.

Fifth, counsel could have presented evidence of Mr. Van Poyck's history of serious mental illness. When he was only 17, psychologist David Rothenberg found that he was "profoundly psychotic" and recommended "long-term, intensive, in-patient treatment," Def. Ex. 4, a recommendation that was never followed. For several years, Mr. Van Poyck suffered from an acute thought disorder that required treatment with powerful antipsychotic medicines.

Sixth, counsel could have presented expert testimony that Mr. Van Poyck was psychologically dependent on James O'Brien, the inmate who befriended and protected him during one of his bouts of mental illness. In fact, O'Brien became a replacement father for Mr. Van Poyck, and Mr. Van Poyck had a pathological need to please and be loyal to O'Brien. T. 617-18. As it was, counsel could only argue that the offense was motivated by Billy's misguided friendship for O'Brien, R. 3554, 3566, although he admitted at the hearing that he had failed to prove this. T. 1105. Because counsel had never conducted an adequate investigation, however, nor provided the results of such an investigation to a mental health expert, counsel had no evidence that in fact Billy had effectively lost his father as well as his mother, that O'Brien became for him the "personification of his father," T. 617, and that it was the combination of his dependent personality and his obsessive fixation with rescuing O'Brien that

impaired his judgment and led in large part to his conduct at the time of the offense. See T. 617-18, 633, 748-52.

Seventh, counsel could have presented evidence that Mr. Van Poyck suffers from organic brain syndrome, and that this syndrome was especially prominent at the time of the offense, as a result of Mr. Van Poyck's aggressive abuse of the alcohol and drugs that he was dependent on. T. 704. Together, these facts would have supported three statutory mitigating factors, in addition to numerous non-statutory mitigators: (1) extreme mental or emotional disturbance, based on the organic brain syndrome, the history of psychosis and suicide attempts, his immature and dependent personality, and heavy substance abuse, T. 632-33; (2) substantial domination by another, based on his dependent personality and pathological dependence on O'Brien, T. 633-34; and (3) substantial inability to conform his behavior to the law, based on all of the above. T. 634.

Had even a portion of this overwhelmingly powerful mitigating evidence, which both explains who Mr. Van Poyck is and what his mental state was at the time of the offense, been presented to the jury, it is reasonably likely that they would have recommended a life sentence, and that a life sentence would have been ordered. This was not such a highly aggravated case that death was inevitable. Mr. Van Poyck did not kill the victim, and was guilty only of felony murder. The uniquely powerful aggravating factors related to a defendant's mental state and the manner of the offense--the "especially heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors--were not present. See, e.g.,

Breedlove v. Singletary, 595 So. 2d 8, 12 (Fla. 1992) ("A strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated.").

Had counsel performed competently, they would have presented evidence that both humanized Mr. Van Poyck and informed the jury of his history of mental illness and his impaired functioning at the time of the offense. Such mental health "mitigating evidence 'has the potential to totally change the evidentiary picture,'" Baxter v. Thomas, 45 F.3d 1501, 1515 (11th Cir. 1995), quoting Middleton v. Dugger, 849 F.2d at 495, because it can both act as mitigation and "significantly weaken the aggravating factors." Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987), citing Huckaby v. State, 343 So. 2d 29, 33-34 (Fla.), cert. denied, 434 U.S. 920 (1977). Here, the strongest aggravation was the fact that Mr. Van Poyck was on parole for prior violent felonies at the time of the offense, and that the offense occurred when he was trying to free O'Brien. The strength of those aggravating factors, however, would have been largely undercut by the evidence of Mr. Van Poyck's life history and mental disorders, particularly his dependence on and domination by O'Brien. Moreover, the great risk of death to many aggravating factor, if it could properly be found at all, see Argument IV, should also have been weakened by the evidence that Mr. Van Poyck did not intend to hurt anyone, much less cause great risk of death to many, but instead was obsessively fixated on rescuing O'Brien. T. 751-52; App. 48.

Against the aggravation presented by the State, much of which was automatic, based on Mr. Van Poyck's status, trial counsel offered nothing more than questions, speculation, and a laundry list of mitigation for which there was no evidence -- there was "none we could show." But there was abundant mitigation that could have been established, from the tragic circumstances of Mr. Van Poyck's life, to the impairment in his mental functioning caused by a combination of organic brain damage, alcohol and drug abuse, and his own dependent and disordered personality, to the fact that he did not kill the victim and never intended to harm him or anyone else. Had this evidence been presented, it would have totally altered the evidentiary picture from what was actually presented at trial. It is more than reasonably likely, therefore, that it would have altered the balance of aggravating and mitigating circumstances. Because that is so, confidence in the outcome of the sentencing decision is undermined. Mr. Van Poyck has established that his counsel were ineffective at penalty phase; he is entitled to a new sentencing proceeding at which he receives the effective assistance of counsel which every defendant is guaranteed by the United States and Florida Constitutions.

ARGUMENT III

MR. VAN POYCK WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL.

The proof presented at the evidentiary hearing demonstrated that trial counsel ineffectively failed to present evidence that would have demonstrated that Mr. Van Poyck was not the trigger person, ineffectively failed to impeach the State's key witness with readily available evidence and ineffectively failed to present a defense of

voluntary intoxication, as well as numerous other deficiencies. These deficiencies were clearly prejudicial.

Before detailing the specific instances of ineffectiveness, it is important to note again the context and conditions under which Mr. Van Poyck's defense was conducted. The lead defense attorney on the case, Cary Klein, had no capital trial experience when he took Mr. Van Poyck's case. Klein was the sole defense attorney for almost the first year of Van Poyck's representation. See R. 34. Though Klein moved for and was granted the appointment of a more experienced co-counsel, Michael Dubiner, see R. 99, 127, Dubiner testified that he agreed to the appointment only on the condition that his participation be limited to assisting with discovery. T. 822-23. Later, however, over Dubiner's objections, the court informed him that he was to assist Klein in all aspects of the trial; and by this time Dubiner had to spend most of his time just trying to catch up. Affidavit of Michael Dubiner, App. 4.

Other factors contributed to the defense problems at trial. Klein had simultaneously been retained to handle another first-degree murder case, which ended up going to trial shortly before Mr. Van Poyck's trial. Klein's father became seriously ill during the Van Poyck trial (and died shortly thereafter). Consequently, during the trial, Klein spent virtually every spare moment on the telephone with his father and other family members; seemed upset and depressed; and testified that he actually resented his client for having taken him away from his family during this time. T. 1207-08. Finally, there was no clear division of responsibility between the two attorneys,

T. 826, although it was loosely understood that Klein was lead counsel.

Against this backdrop, Mr. Van Poyck stood trial for first-degree murder. These circumstances, combined with Klein's undue and unreasonable reliance on his client, resulted in numerous trial errors and omissions that combined to deprive Mr. Van Poyck of the effective assistance of counsel. If counsel had prepared and performed effectively, there is a reasonable probability that the outcome would have been different; that is, that Mr. Van Poyck would have been convicted of a lesser offense rather than first- degree murder and would not now be facing the death sentence.

A. The Court Below Erred in Summarily Denying Certain Claims and Failing to Fully Consider the Prejudice Resulting from Counsel's Deficient Performance.

With respect to some of the claims of ineffective assistance of counsel at guilt phase, the rulings of the court below are confusing. Prior to the hearing, the court ruled that it could resolve six of those claims without a hearing. T. 65-66. However, it allowed evidence bearing on some of those claims to be introduced in support of the claim of ineffective assistance of counsel at penalty phase. T. 73. Nevertheless, in its Order the court did not address that evidence with respect to either claim. Indeed, it specifically denied two of the guilt phase claims on the grounds that Mr. Van Poyck had failed to show prejudice with respect to Phase I of the trial, PR. 4974, without ever addressing Mr. Van Poyck's contention that those errors affected the outcome of both Phase I and Phase II.

Mr. Van Poyck was deprived of a full and fair hearing as a result of the court's summary denial of claims II(c), (f), (i), (j), (k) and (m) as the claims were presented in the court below. PR. 4974-75. Remand for an evidentiary hearing on those claims is required. Furthermore, Mr. Van Poyck reiterates that each of the alleged deficiencies prejudiced him at the guilt phase of the trial and also that, if that contention is rejected, there was prejudice at penalty phase as well.

B. Counsel Was Ineffective In Failing To Investigate And Present Readily Available Evidence To Prove That Mr. Van Poyck Was Not The Trigger Person.

To the extent that counsel had any guilt or penalty phase strategy, it was clearly crucial to show that co-defendant Frank Valdez, not Mr. Van Poyck, killed the victim. Counsel presented Mr. Van Poyck to testify to that effect, and argued it at both guilt and penalty phases. See R. 2877, 3001, 3562-64. Yet counsel never presented to the jury crucial evidence to support this defense, evidence that was either in counsel's possession or readily available. These failures, which caused the trial court and perhaps as many as eleven members of the jury to determine that Van Poyck killed the victim, alone establish ineffectiveness. See Garcia v. State, 622 So. 2d 1325, 1329 (Fla. 1993).

Serological testing showed that Van Poyck's co-defendant Frank Valdez had blood on his clothes of a type that matched that of the victim, and that blood on Van Poyck's clothing did not. Def. Ex. 16. Furthermore, it was undisputed that the victim was shot at close range. R. 1916-18, 2207.

It was critical that this serological evidence be introduced and argued to the jury as tending to establish, along with the other physical evidence, that Mr. Van Poyck did not shoot the victim, but rather, as he testified, was taken totally by surprise by the shooting. In fact, Klein seemingly recognized the importance of this type of evidence prior to trial when he requested an adjournment in July 1988, specifically in order to obtain DNA blood sampling analysis which would have confirmed the initial serological report. He represented to the court that this testing was "crucial" to the case. R. 317. Following this representation, however, no DNA testing was in fact performed. His explanation at the evidentiary hearing:

> Once we determined that the blood on Mr. Van Poyck's clothing could not have been Mr. Griffis's, we decided not to go ahead with the DNA testing since it was a lose/lose situation. We could point out perfectly with the blood not being consistent with the DNA at all. That point could have only have proved one of two things: the blood on Valdez's clothing was Mr. Griffis's or was not Mr. Griffis's. If we ran DNA and found the blood on Mr. Valdez's clothes not Mr. Griffis's, we gain nothing. By not running the DNA we could argue that Mr. Valdez could have blood on him that could have been Mr. Griffis's and therefore he was most likely the shooter.

T. 1093.

Through this explanation--that the serological evidence would be sufficient to make his point--Klein went on to attempt to rationalize his decision not to follow through with DNA testing as a "tactical decision." T. 1093. The problem with this "tactical decision" however is that Klein <u>never</u> introduced the blood type testing that supposedly made the DNA testing unnecessary. Later, Klein had to admit that serologist Tanton's report was not offered at trial, and that he was not called at trial. Klein then claimed

that the reason for this was that he presented "some indication" of blood type evidence "through the back door":

> A: If I remember correctly we got it in the back door. We got some indication through one of the other officers, not directly from Tanton, some indication.
>
> Q: Would that be a person who is a qualified serologist?
>
> A: No it wouldn't. In order to call Tanton, we would have had to have given up the sandwich for that. I remember we got some evidence in on it and we were satisfied with what we got in without having to give up the sandwich.

T. 1210. In fact, the trial court record reveals that no blood type evidence came in--"through the back door" or otherwise. No witness testified as to blood type evidence at either phase, and it was never mentioned at closing argument for the defense.

In addition to the serological evidence and failure to pursue DNA testing, counsel was also ineffective in failing to introduce evidence that the murder weapon was not in Van Poyck's possession. Sales records from a Broward County gun shop indicated that the murder weapon was purchased by Lori Sondik, the girlfriend of Van Poyck's co-defendant, Frank Valdez. Ms. Sondik testified that not only did the murder weapon belong to Valdez, but that he left on the morning of the offense with that weapon tucked in his waistband. Unfortunately, however, she did not testify to this at Van Poyck's trial, but at Valdez' trial, months later. App. 12. Klein responded to Mr. Van Poyck's requests that he explore this issue by simply saying that it was "being worked on." Dubiner Aff. ¶ 7, App. 4.

This too was obviously crucial evidence necessary to rebut the prosecution's theory that Mr. Van Poyck was the trigger man. In

apparent recognition of that, Mr. Van Poyck's attorneys did in fact submit gun sales records to the trial court following the jury verdict, as evidence for the trial court to consider in determining whether to uphold the jury's sentencing recommendation. R. 4216-20. Dubiner testified at the hearing that the delay was because they simply had not bothered to obtain these records, despite knowing of their existence. T. 840-41. He further testified that this evidence "absolutely" would have been used at either phase of trial had they possessed them. T. 841.

The gun sale records would have been important to both phases. T. 991-92. There is no excuse for counsels' failure to obtain them before the close of evidence, particularly since their existence was known. Likewise, there is no excuse for counsels' failure to interview Ms. Sondik to learn the circumstances of how the murder weapon was purchased and its possession by Frank Valdez on the morning of the offense. While Klein offered as an excuse the fact that he wanted to "save the sandwich" as a reason for not introducing the gun sales evidence, that is hardly a valid reason for holding back crucial evidence--but even if it was, Klein's subsequent failure to introduce the evidence during phase 2, where there is no "save the sandwich" rule and the evidence was just as important, T. 991-92, shows that the real reason it wasn't offered was simply because counsel didn't bother to look for it.

C. Counsel Failed To Adequately Impeach The Testimony Of Key State Witness Stephen Turner.

Easily the most important witness in Mr. Van Poyck's trial was Steve Turner, the surviving guard who testified that Mr. Van Poyck

forced him out of the prison van at gun point while Valdez was doing the same with the victim on the other side of the van. It was Turner who placed the murder weapon in Mr. Van Poyck's hand, allowing the prosecution to argue convincingly that Mr. Van Poyck was the one who shot the victim. Equally important, it was only Turner's testimony that had Mr. Van Poyck pointing the murder weapon at him and pulling the trigger, which might convince the finder of fact that Mr. Van Poyck was as culpable as his co-defendant. T. 1125.

It was therefore critical that, on Turner's cross-examination, the defense do everything it could to rebut his testimony. Yet according to Dubiner, this critical witness was cross-examined by Klein by simply "winging it" and "flipping through the...deposition." T. 835, 838. Dubiner was in fact disturbed enough by Klein's performance to express his concerns to his law partners and fellow attorney Barbara Heyer. T. 736, 838.

Dubiner's perception that Klein was unprepared for the Turner cross-examination is borne out by the record. As Ms. Haughwout pointed out, the record reveals that the cross-examination was confusing and unstructured and is consistent with the manner in which Dubiner described it. T. 998-99.

Klein's unpreparedness for the Turner cross resulted in a number of crucial errors:

- Klein failed to confront Turner with physical evidence that made his story physically impossible. For example, Turner testified that Valdez was shooting the "black handled" 9 mm pistol (the Sigsauer) -- but forensic evidence established that that weapon was never fired at the scene. R. 2171-72.

- Not a word was mentioned that Turner had told Dr. Yount, his treating physician, that he remembered nothing about the incident shortly after it happened. T. 1125. This evidence was deemed important enough at the Valdez trial (where Turner's testimony was not nearly as critical to the defense) to warrant a suppression hearing.

- No testimony was elicited from Turner that the chamber of the weapon in Mr. Van Poyck's hand was open, and that the gun was in fact empty. Turner testified at O'Brien's trial that that was the case. O'Brien 4/12/89 Transcript, p. 26.[10] Furthermore, the State's expert testified that no "click" would be heard with an empty semi-automatic. R. 2251. Testimony by Turner that the gun was empty would not only have bolstered Mr. Van Poyck's testimony on that point, R. 2599-2601, but would have shown an inconsistency with Turner's statement that he heard a click. Furthermore, at O'Brien's first trial, Turner testified that "nothing was in the weapon" and that he knew that Mr. Van Poyck pulled the trigger only because "the hammer went down." O'Brien 1/12/89 Transcript, p. 117. This too was inconsistent with Turner's testimony at the Van Poyck trial that Mr. Van Poyck was holding a semi-automatic, in that a semi-automatic does not have a "hammer."

- The blatant coaching of Turner by the prosecutor was never brought up in the cross or even later in the closing. For example, during the Turner direct examination he began his description of the incident by saying "that's when I saw a 9 mm pointed right at me." R. 1685. The prosecutor and he proceeded to call the weapon a 9 mm throughout the direct examination. In his sworn statement to police he could not identify the weapon at all. App. 6.

None of these errors can be justified as "tactical decisions." While Klein claims he decided to be "somewhat sensitive" with Turner, T. 1090, none of these things had to do with the manner or style in which Turner was approached in cross, but were simply fundamental

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[10]Co-defendant James O'Brien was tried separately on two occasions, resulting in a mistrial and an acquittal. The transcripts of those trials are cited as "O'Brien 4/12/89 Transcript" and "O'Brien 1/12/85 Transcript."

evidentiary points that had to be effectively made in order to show that Turner's account of the incident was erroneous. Klein had no explanation at the evidentiary hearing for these failures. T. 1124-26.

Both to support the independent act defense relied on by counsel--if it was to have any chance of success--and to lessen Van Poyck's culpability if the case went to penalty phase, it was absolutely necessary for counsel to establish that Van Poyck was not the shooter, and to impeach Turner's testimony. Because of counsel's totally inadequate preparation, they failed to do either. Had counsel performed competently and succeeded in doing so, it is reasonably likely that the outcome would have been different at guilt phase, and the evidence would also have been crucial to support the case for a life sentence.

D. Counsel Was Deficient In Failing To Investigate And Present A Voluntary Intoxication Defense, and Instead Knowingly Presented a Defense That Was Not Viable.

Under Florida law, voluntary intoxication is a valid defense to specific intent crimes, and a defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985). The defense of voluntary intoxication applies to felony murder when the underlying felony upon which the murder charge is based is a specific intent crime. Linehan v. State, 476 So. 2d 1262 (Fla. 1985). Robbery and attempted escape are specific intent crimes. Bella v. State, 394 So. 2d 979 (Fla. 1981). Moreover, testimony concerning a defendant's alcohol and drug use over a period

of time prior to the offense and expert testimony are admissible in support of the defense. See Burch v. State, 478 So. 2d 1050, 1051 (Fla. 1985). The standard governing a defendant's right to a jury instruction is well settled: any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue. Gardner, 480 So. 2d at 93 (evidence that, on day of commission of crimes of first degree murder and robbery, defendant consumed three and one-half cans of beer and, with his companions, two or three more quarts of beer, and defendants smoked high potency marijuana cigarettes, was sufficient to create questions of fact for a jury to decide whether defendant was under influence of alcohol or marijuana to degree necessary for voluntary intoxication instruction).

Mr. Van Poyck was denied effective assistance when counsel failed to investigate and present evidence of Mr. Van Poyck's drug and alcohol intoxication on the day of the offense. Mr. Van Poyck's prison records reflected a long history of substance abuse and dependance. See Florida State Records of William Van Poyck, App. 8. Eye witness testimony indicated that he was seen firing wildly in the air at the scene of the offense. App. 6. He was seen purchasing cans of Schlitz Malt liquor shortly before the offense and he continually asked his attorneys to look into the issue of a glassine envelope of cocaine in his car. R. 1937; Dubiner Aff., App. 4. Klein admitted that the fact that co-defendant Valdez was relying on the intoxication defense was a further reason to consider and investigate this defense. T. 1152-53.

But Klein failed to investigate or present evidence on this defense:

> Another issue that we never explored was any possible drug and alcohol use by Bill around the time of the offense. Bill claimed that there was a glassine bag with cocaine in it that should have been found in his car. I remember Bill asking Cary what had been done about the glassine bag issue. I don't know what efforts were made to follow up on that. I do not remember talking to Bill about any drug use the day of the offense or about his drug or alcohol abuse history. To my knowledge, no attempt was ever made to contact a girlfriend of Bill's or anyone else who might have had knowledge of drug or alcohol use by him. In fact, I do not recall if he had a girl friend prior to his arrest.

Affidavit of Michael Dubiner, App. 4.

Had Klein investigated the many indicators of intoxication, he would have learned that on the day of the offense his client had been up all night and that morning doing cocaine and took about a quarter of a gram of cocaine with him when he left. T. 350-54. Investigation of companion Traci Rose would have revealed Van Poyck's constant alcohol and drug consumption during the weeks prior to the offense and that Mr. Van Poyck was high the day of the incident when he left the house. T. 350-54. Mr. Van Poyck's history of drug and alcohol dependance should have been well known to counsel, as virtually the only records that counsel did obtain on Mr. Van Poyck--his prison records--were replete with references to substance abuse.

Klein ignored any possibility that an intoxication defense was available because his client told him that he was not intoxicated on the day of this offense. That did not relieve him of his duty to nonetheless investigate the defense. As established at the evidentiary hearing, clients are often reluctant to discuss these

type of issues, particularly when they have a personality make-up--self-destructiveness and tendency to "fake good"--like that of William Van Poyck. T. 996; see also Mason v. State, 489 So. 2d 734, 737 (Fla. 1986) (discussing unreliability of client self-report).

Investigating and presenting the intoxication defense was even more important since counsel knew that their "independent act" guilt-phase defense was a "dead dog loser." T. 844, 862, 968. According to Dubiner, the "independent act" defense was an act of desperation, not a viable defense. Affidavit of Michael Dubiner, App. 4. Counsel's reliance on this defense--that Valdez's shooting of Griffis was an unforeseeable "independent act"--as Mr. Van Poyck's only defense was unreasonable, as it clearly did not fit the facts of this case. Compare Bryant v. State, 412 So. 2d 347, 350 (Fla. 1982) (trial court erred in failing to give requested instruction on independent act where defendants, although participating in robbing the victim, subsequently withdrew from the criminal enterprise and did not participate in the subsequent sexual battery and murder of the victim, which were the independent acts of the co-defendants) with Parker v. State, 458 So. 2d 750, 752-53 (Fla. 1984) (Bryant's independent act defense not applicable where Parker created and participated in the circumstances leading to victim's death and remained on the scene during the murder rather than withdrawing from the criminal enterprise).

Had counsel investigated and presented a voluntary intoxication defense, the evidence would have been sufficient to require an instruction on the defense, and it is reasonably likely that Mr. Van

Poyck would have been convicted of a lesser offense than first-degree murder. Even if the jury found Mr. Van Poyck guilty of first-degree murder, the voluntary intoxication defense would have presented the jury with persuasive mitigating evidence. Thus, had counsel conducted a competent investigation of the voluntary intoxication defense, counsel would have been in a position to make a strategic decision concerning the guilt phase defense. Mr. Van Poyck's counsel, however, conducted no investigation of the voluntary intoxication defense, and the failure to consider and investigate that defense constitutes ineffective assistance of counsel. See Middleton v. Dugger, 849 F.2d 491, 494 (11th Cir. 1988). No strategic reason existed for the failure to investigate and present evidence.

E. Counsel Failed To Pursue A Motion For A Change Of Venue.

A defendant in a criminal case is entitled to a fair trial by an impartial jury that will render a verdict based on the evidence and the law, without being influenced by outside sources of information. See Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963). A trial court must grant a change of venue when the evidence shows that "the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." Manning v. State, 378 So. 2d 274, 276 (Fla. 1979). The Manning court reaffirmed its decision in Singer v. State, 109 So. 2d 7, 14 (Fla. 1959), that:

> [E]very reasonable precaution should be taken to preserve to a defendant trial by a [fair and impartial] jury and to this end, if there is a reasonable basis shown for a change of venue a motion therefore properly made should be granted.

Manning, 378 So. 2d at 277.

A motion for change of venue was originally brought by counsel for co-defendant James O'Brien. Klein joined in that motion, R. 47, and the court indicated that it would first determine whether an impartial jury could be chosen. R. 54. Though a number of jurors indicated that they had been exposed to publicity about the case, counsel failed to renew their motion for change of venue.

Because he was a law enforcement officer, Officer Griffis' death shook the community. The story was in all of the papers, on television, and was well known among the residents of Palm Beach County. See Newspaper Articles, App. 5. The media coverage was extensive, and falsely reported that Mr. Van Poyck was the one who killed the victim. See Newspaper Articles, App. 5. One newspaper story even commented on how difficult it would be to pick a jury in the case. See R. 607.

Voir dire confirmed the scope and extent of the vast publicity regarding the case. Roughly half of the jury polled (28 out of 60) had either read about the case, seen it on television or remembered hearing about it.[11] Six of the twelve jurors and both alternates had been exposed to pretrial publicity. See note 11, supra. A number of prospective jurors, including one who actually sat on the jury, knew many details regarding the case. Id. Several members of the jury panel indicated that it would be difficult to put aside the

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[11]See R. 455, 461, 490, 508-12, 515, 556, 575, 593, 602-07, 609, 620, 652, 695-706, 718, 734-40, 752, 761, 782, 812-21, 825, 832, 856, 865, 880, 892-95.

opinions they had formed as a result of their exposure to the media. Id.

The pervasive and overwhelming pretrial publicity in Palm Beach County concerning this case easily met or exceeded the standard set in Manning. The coverage was so intensive and prejudicial "that jurors could not possibly put these matters out of their minds and try the case solely on the evidence." McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977), quoting Kelley v. State, 212 So. 2d 27, 28 (Fla. 2d DCA 1968). In the circumstances, prejudice is appropriately presumed. Rideau v. Louisiana, 373 U.S. 723, 724-25 (1963); Murphy v. Florida, 421 U.S. 794 (1975). Based on the totality of the coverage, and the specific prejudice to Van Poyck, counsel's failure to move for a change of venue was inexcusable and deprived Mr. Van Poyck of a fair trial.

F. Counsel Rendered Ineffective Assistance During *Voir Dire*.

Counsel successfully moved for individual *voir dire*, but then failed to follow through with it. Although the jurors were initially questioned individually, they were later questioned as a group, during which time they responded to questions regarding pretrial publicity and their views on the death penalty. Hence, despite the precautions taken, and the fact that the whole purpose of individual *voir dire* was to prevent the jury from being tainted, the prosecutor was permitted, without objection by the defense, to question the jurors during group *voir dire* about their feelings on the death penalty. See R. 58, 974-86, 991-97, 1072-73, 1151-53.

In group *voir dire*, several jurors expressed their opinion, before the entire jury panel, that Mr. Van Poyck was guilty, and other jurors stated that the "verdict is already passed" and that their minds were already made up. See R. 968. Counsel's failure to object to this group *voir dire* after successfully moving for individual *voir dire*, was unreasonable and substantially prejudiced Mr. Van Poyck by exposing the entire panel to precisely the kind of prejudicial statements he sought to avoid in moving for individual *voir dire*.

Counsel rendered further ineffective assistance by unreasonably failing to challenge jurors with clear bias against the defense. Defense counsel allowed Steven Rich to sit on the jury, despite the fact that Rich wondered aloud why Ted Bundy had not yet then been executed. R. 478. Similarly, counsel left Deborah Blanchard on the jury despite her statement that she would recommend death if she truly believed Van Poyck guilty. R. 505. Counsel failed to challenge juror Goldie Moody for cause on the ground that she would automatically vote for death or that she had been exposed to pretrial publicity and felt that the crime was "a terrible thing." R. 1359, 1362, 508. Nor did counsel challenge or excuse Albert Baker, who had been robbed at gun point, R. 1057; Darlene Hancock, whose family's home had been broken into three times, R. 1144; or Virginia Dillon, whose brother was a detective for a parole agency in New York. R. 1339. Finally, counsel did not object to the prosecutor's clear implication that there would definitely be a penalty phase proceeding and to the prosecutor's statements that the jury was not to allow sympathy or emotion to play any part in their deliberations. R. 949, 997. This

ineffective assistance through *voir dire* severely prejudiced Van Poyck's ability to receive a fair trial.

G. Counsel Inexcusably Conceded The Underlying Felonies Of Robbery And Escape In A Felony Murder Case.

The state proceeded on the theory that Van Poyck was guilty of both premeditated and felony murder, with the underlying felonies being "robbery" of Turner's gun and attempted escape. There was very little, if any, evidence to support the claim of premeditated murder, as this Court concluded on direct appeal. Van Poyck v. State, 564 So. 2d 1066, 1069 (Fla. 1990). It was therefore inexcusable for counsel to concede that Van Poyck was guilty of the underlying felonies of robbery and attempted escape in this felony murder case.

Under the Sixth Amendment, a defense attorney may not admit his client's guilt to the jury without first obtaining his client's consent. Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985). A defendant's knowing and intelligent consent may not be presumed, but rather must be clearly apparent from the record. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). This is true even when the evidence against the defendant is overwhelming and the attorney admits guilt in a strategic attempt to retain his credibility with the jury. Francis, 720 F.2d at 1194. The reason for this protection is that counsel must hold the prosecution to its heavy burden of proof in criminal cases. United States v. Cronic, 466 U.S. 648, 656 n.19 (1984). Furthermore, prejudice may be presumed in Sixth Amendment contexts where counsel fails to subject the prosecution's case to meaningful adversarial testing. Cronic, 466 U.S. at 659. Prejudice should be presumed in

this case as a result of counsel's concession of guilt on the underlying felonies of robbery and attempted escape. Even if prejudice is not presumed, it is clear from the record that Mr. Van Poyck was prejudiced by his counsel's concessions.

To establish that Mr. Van Poyck was guilty of first-degree felony murder as to escape, the State had to prove beyond a reasonable doubt that Mr. Van Poyck was himself guilty as a principal in O'Brien's attempted escape. To do so, the State had to prove that O'Brien was actually attempting to, and had the intent to, escape. The only evidence presented by the State in support of the claim that O'Brien was attempting to escape was Turner's testimony that he heard O'Brien tell Mr. Van Poyck that the other guard (Griffis) had the keys, and testimony of a telephone company representative that two collect telephone calls had been made from Glades Correctional Institute to a number listed for Mr. Van Poyck. R. 2113. The evidence was simply insufficient to establish beyond a reasonable doubt that O'Brien attempted to escape. In fact, subsequent to Van Poyck's trial, O'Brien was acquitted of attempted escape. Yet defense counsel never argued this to the jury; instead counsel conceded attempted escape. R. 2903.

Counsel not only conceded the felony of escape, but also inexplicably conceded that Griffis was killed in the course of this felony:

> He's guilty of aiding an escape. Not a whole lot of time back there when you read the instructions and hear it from the judge deciding that he is guilty of that crime because he is.
>
> . . . .

> Then the other question is, is it felony murder? Did the death occur as a consequence of and while the crime of escape or robbery was being committed? And then the question and the answer to that, at least to this part, is yes, except that it was an independent act on the part of Valdez.

R. 2899, 2903. Furthermore, counsel failed to request an instruction that the jury had to find beyond a reasonable doubt that O'Brien had the intent to escape to establish the underlying felony. Rather, the court specifically instructed the jury, without any objection by the defense, that in deciding whether there was an attempted escape, it was to consider Turner's testimony that O'Brien told Van Poyck and Valdez that the other guard had the keys. R. 3037. There was no reason why counsel should have agreed to this instruction, since it ensured that Mr. Van Poyck would be found guilty of aiding and abetting O'Brien's attempted escape.

Counsel also inexplicably conceded the underlying felony of the "robbery" of Turner's gun. R. 2903. For two reasons, the evidence simply did not support any conclusion that Griffis was killed in furtherance or as a consequence of a "robbery" of Turner's gun. First, any seizure of Turner's weapon was not a "robbery", but a disarming, and the State failed to prove beyond a reasonable doubt that when Mr. Van Poyck took the gun away from Turner, it was with the intent to permanently deprive Turner of the gun. See Bailey v. State, 199 So. 2d 726, 727 (Fla. 1st DCA 1967) (intent to deprive must have existed at time of the taking). Second, the taking of Turner's gun was merely incidental and was not causally connected to Griffis' death. See Parker v. State, 570 So. 2d 1048 (Fla. 1st DCA 1990) (discussing the requirement in felony-murder cases of a

causal link between the robbery and the homicide). Mr. Van Poyck's counsel failed to make these arguments--to the contrary, they conceded the issue entirely.

Contrary to the ruling of the court below, PR. 4974, the record is clear that counsel conceded the underlying felonies. Prejudice is presumed. Francis, supra. Moreover, had counsel not conceded these felonies, but instead challenged them as set forth above, there is a reasonable probability that the jury would have concluded that one or both of these felonies had not been proven beyond a reasonable doubt and that Mr. Van Poyck was not guilty of first degree murder. It is apparent that the jury seriously deliberated whether Griffis was killed as a consequence of the escape (inasmuch as it asked for clarification of the word "consequence", and whether it was "always true that everything that happens during the commission of a crime is considered by law to be a consequence of the crime)." R. 3071. Had the defense argued that there was no robbery or attempted escape (something the State was unable to prove in O'Brien's trial), the jury may well have convicted Mr. Van Poyck of something less than first-degree murder.

H. Counsel Failed To Properly Preserve For Appeal The Issue Of A *Batson* Violation.

Counsel also was ineffective for failing to properly preserve for appeal an error in jury selection relating to the State's exercise of peremptory strikes. The State exercised a peremptory challenge on Ms. LaCounte, an African-American, allegedly because she was opposed to the death penalty. R. 1129. However, Ms. LaCounte made clear that she could follow the court's instructions. See R. 484-85.

And there was at least one other juror who actually served who expressed equal or greater reservations about the death penalty and his ability to impose death. See R. 1126.

Later, the State sought to strike juror Palmer, also an African-American, allegedly on the ground that Palmer was "worried" about the death penalty and because he believed other jurors were stronger for the State. R. 1254, 1282. The court refused to release Palmer and later explained that it disallowed the State's preemptory strike because Palmer had stated that he could recommend death. R. 1281. As such, the court apparently believed that the State's explanation was just a pretense for a racially-motivated jury strike. The trial court's refusal to excuse Palmer, when coupled with its earlier dismissal of LaCounte, led to an anomalous and unconstitutional result, as Palmer was far more equivocal about voting for death than was LaCounte. The striking of Ms. LaCounte was in violation of Batson v. Kentucky, 476 U.S. 79, 96 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988).

Counsel, however, failed to preserve this issue for appeal by failing to object to the reasons given for the excusal of LaCounte. To the extent that this claim is deemed to have been waived because it was not properly objected to, counsel rendered ineffective assistance. Under such circumstances, the only appropriate remedy is a new trial. See Blackshear v. State, 521 So. 2d 1083 (Fla. 1988); Marshall v. State, 593 So. 2d 1161, 1162-63 (Fla. 2d DCA 1992); Stubbs v. State, 540 So. 2d 255 (Fla. 2d DCA 1989).

I. Counsel Allowed The State To Shift The Burden Of Proof To The Defense By Arguing That The Defense Would Prove That Valdez Was The Trigger Person.

In closing argument to the jury at the guilt-innocence phase, Mr. Van Poyck's counsel repeatedly argued that Van Poyck had proven beyond a reasonable doubt "that Valdez, not Van Poyck, killed Officer Griffis." R. 2883-2891. Not surprisingly, the prosecution seized upon this invitation to lighten its burden of proof by arguing that the defense had not proven conclusively that Valdez was the shooter. R. 2938A-2946. No objection was made by the defense to the prosecution's repeated suggestion that Mr. Van Poyck bear the burden of proof to show that he was not the triggerman. The burden of proof was turned on its head. Counsel deprived Mr. Van Poyck of the effective assistance of counsel in assuming this burden, in violation of his right to a fair trial and the presumption of innocence. The prejudice was only magnified when the state successfully seized upon counsel's argument in stating that the defense had not conclusively shown that Valdez was the killer.

J. Counsel Inexcusably Relied On His Mentally Ill, Suicidal And Self-Destructive Client In Preparing And Presenting The Case.

Before Dubiner got involved in the case, Klein moved to have Mr. Van Poyck appointed as co-counsel at the same time he was moving to have a mental health expert evaluate Mr. Van Poyck's competency to stand trial. See R. 60. Counsel rendered ineffective assistance by moving for Mr. Van Poyck's appointment as co-counsel and by allowing Mr. Van Poyck to make critical decisions regarding his defense. Klein placed undue reliance on Mr. Van Poyck's experience

as a certified prison legal research aid, arguing to the court that Van Poyck was "as qualified as anybody that I've seen before, perhaps even the court." R. 435.

Counsel has a duty to investigate the facts of the case and relevant law, and to offer an informed opinion as to the best course to be followed in protecting his client's interest. See Stano v. Dugger, 921 F.2d 1125, 1151 (11th Cir. 1991). An attorney cannot blindly follow a defendant's instructions. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985). This principle is especially applicable "where a possible mental impairment prevents the client from exercising proper judgment." Foster v. Dugger, 823 F.2d 402, 407 n.16 (11th Cir. 1987); see also Thompson, 787 F.2d at 1451.

Klein failed to render such analysis on Mr. Van Poyck's behalf although he knew that his client was self-destructive and was not acting in his own best interest. See T. 1000 (counsel's reliance on Mr. Van Poyck was inappropriate). Mr. Van Poyck insisted on testifying for O'Brien, even though it might help the State obtain the death penalty in his case; R. 266; tried to take the blame for a crime committed by his brother, Jeff; and wrote numerous letters to the co-defendants offering testimony that would help them but might be harmful to his own defense, without telling Klein. R. 291. Counsel severely prejudiced Mr. Van Poyck by placing undue reliance on him as co-counsel, rather than treating him as a client who was self-destructive and impaired.

K. Counsel Failed To Object To Impermissible And Prejudicial Statements By The Prosecutor.

An attorney is charged with the responsibility of presenting legal objections and arguments in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980).

Counsel rendered ineffective assistance by failing to object to arguments that were completely unsupported by any evidence at trial. The failures to object to inflammatory and prejudicial statements included the following:

a) The prosector argued that Van Poyck was not surprised about Griffis being killed because "[t]hat was the plan from the start to get what they wanted or kill the guards." [closing argument, phase one] R. 2921.

b) The prosecutor distorted Van Poyck's trial testimony by arguing that Van Poyck lied by denying taking the gun from Turner, when in fact Van Poyck testified that he took the gun. R. 2961.

c) The prosecutor improperly argued that the jury should not be "taken in by partial jury instructions with just the parts they like written out and parts they don't like written in as little, small sentences added in there as if an after thought." R. 2987. The prosecutor knew very well that defense counsel was forced to handwrite a portion of the instructions on its exhibit because it was directed to do so by the court. If anything, the handwritten changes to the defense exhibit only served to highlight language that was not helpful to the defense.

d) The prosecutor stated in opening that "[A]t [the] end of all the testimony, . . . all the instructions, you will not only see that Mr. Van Poyck is guilty of first degree murder, you will also see that he should be put to death under the law in the State of Florida." R. 1446. It was absolutely impermissible for the prosecutor to anticipate the penalty phase in that way, and yet counsel made no objection to this highly prejudicial statement.

Each of these statements was highly inflammatory, unfounded in fact, and prejudicial to Mr. Van Poyck's case, yet there was no objection by counsel. Counsel's unreasonable failure to object to these statements prejudiced Mr. Van Poyck, as they made a conviction and death sentence more likely and deprived Mr. Van Poyck of a fair trial.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. VAN POYCK'S CLAIM THAT THE JURY WEIGHED A VAGUE AND INVALID AGGRAVATING CIRCUMSTANCE.

In Espinosa v. Florida, 112 S. Ct. 2926 (1992), the United States Supreme Court held that Florida's standard jury instruction on the "especially heinous, atrocious or cruel" ("HAC") aggravating circumstance was unconstitutionally vague, and that because the Florida penalty phase jury is a co-sentencer, it may not be "permitted to weigh invalid aggravating circumstances." Id. at 2928. In Jackson v. State, 648 So. 2d 85 (Fla. 1994), this Court extended the Espinosa holding, finding that the instruction on the "cold, calculated and premeditated" ("CCP") aggravating circumstance suffered from a similar defect. In the instant case, Mr. Van Poyck was sentenced to death after his jury received an unconstitutionally vague instruction on the "great risk of death to many" aggravating factor. § 921.141 (5)(c), Fla. Stat. His death sentence, tainted by the jury's consideration of that vague and invalid aggravating circumstance, violates the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 9 and 17 of the Florida Constitution.

A. The Jury Instruction on the "Great Risk of Death to Many" Aggravating Factor Was Vague

At the penalty phase of Mr. Van Poyck's trial, the court instructed the jury as follows with respect to the "great risk of death to many" aggravating factor:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> . . . .
>
> Three, the Defendant in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

R. 3578-80.

An aggravating circumstance is constitutionally invalid if "its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. When the jury is the sentencer (as Espinosa establishes that the Florida jury is):

> it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Walton v. Arizona, 497 U.S. 639, 653 (1990). On its face, the "great risk of death to many" aggravating circumstance is unconstitutionally vague. The language of the circumstance, standing alone, gives no guidance as to how great the risk of death must be, or how many people must be at great risk. Nor does it provide any guidance as to whether or not the great risk of death to many must occur in close relation to the capital homicide.

Because of the vagueness of the aggravating circumstance standing alone, this Court has attempted to establish limiting constructions of the factor for the guidance of trial courts. No limiting construction, however, was provided to the jury in this case. As a result, the jury was never adequately informed what it must find to recommend the death penalty. The jury instruction was unduly vague for the same reason as was the HAC jury instruction that was struck in Espinosa and the CCP instruction found invalid by this Court in Jackson--because the great risk factor "is so susceptible of misinterpretation and has been the subject of so many explanatory decisions," the instruction does not "sufficiently inform[] the jury of the nature of this aggravator." Jackson, 648 So.2d at 90.

The leading case with respect to the aggravator is Kampff v. State, 371 So. 2d 1007 (Fla. 1979), where this Court provided the following definitions:

> "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many," the legislature indicated that a great risk of death to a small number of persons would not establish this aggravating circumstance.

Id. at 1009-10. See also Williams v. State, 574 So. 2d 136, 138 (1991) (aggravating factor only present where proof beyond reasonable doubt that "the actions of the defendant created an immediate and present risk of death to many persons."). In addition, this Court has limited the aggravating factor by holding that three persons, in addition to the homicide victim, are not enough to constitute "many" persons, Bello v. State, 547 So. 2d 914 (Fla. 1989); Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986); Johnson v. State, 393 So.

2d 1069 (Fla. 1981), and that only conduct immediately surrounding the capital felony may be considered in support of the aggravating circumstance. Delap v. State, 440 So. 2d 1242 (Fla. 1983); Mines v. State, 390 So. 2d 332 (Fla. 1980); Elledge v. State, 346 So. 2d 998, 1004 (Fla. 1977).

Thus, in order to find the great risk aggravating factor under this Court's case law, the jury must determine that the defendant: (1) "knowingly"; (2) created a "high probability" or "immediate and present risk" (great risk); (3) of death to at least four persons (many); (4) as a result of conduct immediately surrounding the capital felony. Certainly these requirements call for more expansive instructions to give content to the great risk factor. See Jackson v. State, 648 So. 2d at 89 (more expansive instruction required for CCP aggravating factor).

Even with such limiting constructions, the aggravating circumstance is inherently subjective and can easily be misapplied, as illustrated by the large number of cases in which this Court has struck findings of the aggravating factor by trial courts knowledgeable in the law and aware of the limiting constructions.[12]

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[12]See, e.g., Jackson v. State, 599 So. 2d 103 (Fla. 1992); Hallman v. State, 560 So. 2d 223 (Fla. 1990); Alvin v. State, 548 So. 2d 1112 (Fla. 1989); Bello v. State, 547 So. 2d 914 (Fla. 1989); Lucas v. State, 490 So. 2d 943 (Fla. 1986); Mills v. State, 476 So. 2d 172 (Fla. 1985); Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Lusk v. State, 446 So. 2d 1038 (Fla. 1984); Delap v. State, 440 So. 2d 1242 (Fla. 1983); Mason v. State, 438 So. 2d 374 (Fla. 1983); Bolender v. State, 422 So. 2d 833 (Fla. 1982); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Francois v. State, 407 So. 2d 885 (Fla. 1981); White v. State, 403 So. 2d 331 (Fla. 1981); Jacobs v. State, 396 So. 2d 713 (Fla. 1981); Mines v. State, 390 So. 2d 332 (Fla. 1980); Brown v. State, 381 So. 2d 690 (Fla. 1980); Lewis v. State, 377 So. 2d 640 (Fla. 1979).

The inherent difficulty of applying the factor is also illustrated by the fact that there are at least two cases in which this Court has affirmed the aggravating factor in an initial appeal, but then struck the factor on a subsequent appeal. Compare King v. State, 514 So. 2d 354 (Fla. 1987), with King v. State, 390 So. 2d 315 (Fla. 1980); compare Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986), with Lucas v. State, 376 So. 2d 1149, 1153 (Fla. 1979). See also Scull v. State, 533 So. 2d 1137, 1141 (Fla. 1988). It is almost inevitable that a jury, given no limiting construction and set free to decide for itself whether the defendant "created a great risk of death to many persons," will find the aggravating circumstance in virtually any case in which it was possible that any person other than the victim could have been harmed, thus finding the factor based on facts that this Court has held cannot be used to support it.

In the instant case, it is highly likely that the jury considered facts that are not within the narrowing construction, since the prosecutor argued that the aggravating circumstance applied, based on such facts, and the trial court found the aggravating circumstance based on such facts. At penalty phase, the prosecutor first argued that the aggravating factor was supported by the presence of other people in the vicinity at the time that the capital felony took place. R. 3491-5. There was no evidence, however, that any violence was directed at these people, and their mere presence therefore does not support the aggravating factor. Bolender v. State, 422 So. 2d 833, 838 (Fla. 1982).

The only people who were even remotely threatened by the actions of Mr. Van Poyck were the Browns and Mitchell Ruble and Thomas Zimmerman. With respect to the Browns, however, the evidence showed that Mr. Van Poyck first pointed a gun at them and, when they would not leave, then smashed the windshield of their car in order to warn them to get out of the area. R. 2049, 2053-4, 2604-5. Thus, Mr. Van Poyck deliberately avoided harming them. Ruble and Zimmerman ran up to see what was going on. They testified that either Mr. Van Poyck or his co-defendant yelled at them, and they hid, then ran away. R. 1568-70 (Ruble); R. 1599-1602 (Zimmerman). A purported bullet hole was found in the exterior wall of the nurses' residence, which was in their general direction, R. 1943, 1977, but there was no evidence as to how or when the bullet got there, and thus no evidence that either defendant fired at Ruble or Zimmerman. At bottom, this portion of the State's argument was that any crime involving the use of guns in a public place per se creates a great risk of death to many persons. That argument was clearly inconsistent with Kampff[13], but there was no way for the jury to know that.

The State then argued that the jury could consider the facts of the chase that took place after the completion of the homicide in support of the aggravating factor. The court overruled a defense objection, thus informing the jury that they could and should consider those facts. R. 3495. Yet this Court has prohibited sentencers from

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[13]See, e.g., Williams v. State, 574 So. 2d 136 (Fla. 1991) (no great risk of death to many where guard shot in bank); Hallman v. State, 560 So. 2d 223 (Fla. 1990) (no great risk of death to many where 10 people in area of shoot-out outside bank); Jacobs v. State, 396 So. 2d 713 (Fla. 1981) (shooting in rest stop).

considering pre- or post-homicide facts in determining whether the great risk of death to many factor is present. Delap v. State, 440 So. 2d 1242 (Fla. 1983) (erratic driving while struggling with victim prior to homicide); Mines v. State, 390 So. 2d 332 (Fla. 1980) (violence during flight after homicide); Trawick v. State, 473 So. 2d 1235 (Fla. 1985) (shooting from car just prior to robbery homicide). The State and the court encouraged the jury to consider irrelevant and prejudicial facts, vitiating the application of any possible limiting principle.

The State thus urged the jury to engage in precisely the type of speculation prohibited by Kampff. A "person may not be condemned for what might have occurred." White v. State, 403 So. 2d 331, 337 (Fla. 1981). The aggravating factor "must be based on a high probability, not a mere possibility or speculation." Diaz v. State, 513 So. 2d 1045, 1048 (Fla. 1987), citing Lusk v. State, 446 So. 2d 1038 (Fla. 1984); Francois v. State, 407 So. 2d 885 (Fla. 1981). Encouraging a jury to engage in such speculation with respect to an aggravating factor leaves the jury with the kind of open-ended discretion that was held invalid in Furman v. Georgia, 408 U.S. 238 (1972). It thereby invalidates the factor, and hence the death sentence.

B. This Claim Was Properly Preserved at Trial and Raised on Direct Appeal; No Procedural Bar Applies and Consideration of the Merits Is Required

The court below held that this claim was "procedurely (sic) barred because the same has been raised and denied on direct appeal." PR. 4976. In fact, this Court's treatment of Espinosa claims

demonstrates that it is precisely because the claim was properly preserved and raised on appeal that review of the merits of the claim is required.

Prior to penalty phase, Mr. Van Poyck specifically objected to the vagueness of this aggravating factor, in the absence of any limiting construction, R. 3799, 4128-29, and requested special jury instructions to limit the application of the aggravating circumstance. R. 4165-68. The court rejected the requested special instructions, and instructed the jury as set forth above. R. 3241-42. Mr. Van Poyck specifically challenged the vagueness of the jury instructions on direct appeal. See Initial Brief of Appellant at 41-44, Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990) (No. 73,662). This Court rejected the claim on the merits. Id. at 1070.

Under these circumstances, there is no procedural bar. In James v. State, 615 So. 2d 668 (Fla. 1993), this Court held that Espinosa must be retroactively applied when the instruction was objected to at trial and the issue was raised on appeal:

> Claims that the instruction on the heinous, atrocious or cruel aggravator is unconstitutionally vague are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal. James, however, objected to the then-standard instruction, and argued on appeal against the constitutionality of the instruction his jury received. Because of this it would not be fair to deprive him of the Espinosa ruling.

Id. at 669 (footnote and citation omitted). Significantly, James involved a successive Rule 3.850 motion. See also Atwater v. State, 626 So. 2d 1325, 1328-29 (Fla. 1993) (issue preserved by request for special jury instruction).

Similarly, in Jackson, this Court reconsidered its earlier rejection of challenges to the constitutionality of the CCP instruction, because the challenge to the instruction had been preserved and its prior decisions were undercut by Espinosa and its progeny. Jackson, 648 So. 2d at 88. See also State v. Breedlove, 20 FLW S155 (Fla., April 6, 1995) (addressing merits of challenge to HAC instruction where issue was preserved at trial and raised on appeal, even though issue was rejected on direct appeal and treated as procedurally barred--because the issue was fully considered on direct appeal--in first Rule 3.850 motion).

Because Mr. Van Poyck preserved his challenge to the great risk instruction at trial and raised it on direct appeal, here--as in James, Atwater, Jackson and Breedlove--"it would not be fair" to deprive him of the benefit of Espinosa and its progeny. Accordingly, his claim must be addressed on the merits.

On the merits, it is clear that the instruction violated the Eighth Amendment, as set forth above. That violation requires that Mr. Van Poyck receive a new sentencing proceeding, in which the jury is properly instructed. Consideration and weighing by the jury of a vague aggravating factor biases the weighing process in favor of death, and therefore invalidates the death sentence. Stringer v. Black, 503 U.S. 222 (1992). It would be impossible for this Court to determine what impact the error had on the sentencing jury, Hitchcock v. State, 614 So. 2d 483, 484 (Fla. 1993), and therefore the error cannot be considered harmless. Resentencing is required.

ARGUMENT V

THE COURT ERRED IN SUMMARILY DENYING MR. VAN POYCK'S CLAIM THAT THE STATE WITHHELD MATERIAL, EXCULPATORY EVIDENCE REGARDING THE IDENTITY OF THE TRIGGER PERSON.

The prosecution's suppression of material, exculpatory evidence violates due process. Brady v. State of Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985). The standard of materiality is whether there is a reasonable likelihood that the suppressed information would have made a difference in the outcome of either the guilt or penalty phase. Gorham v. State, 597 So. 2d 782, 785 (Fla. 1992); United States v. Bagley, 473 U.S. 667, 682 (1985).

A key issue at trial was whether Mr. Van Poyck or his co-defendant, Frank Valdez, was the person who fatally shot the victim. The state argued that Mr. Van Poyck was the shooter, based on the testimony of surviving guard Steven Turner that Mr. Van Poyck had the murder weapon. However, Turner also testified that just prior to the shooting he was lying under the van, looking toward the rear of the van, where he could see two sets of shoes, those of the victim and of Frank Valdez, and that Mr. Van Poyck had been kicking him to get him under the van, but that the kicking stopped and that he did not know where Van Poyck was immediately before the shooting. R. 1694-98. If the shooter was standing at the rear of the van of the driver's side, it was very unlikely that Mr. Van Poyck was the trigger person.

In deposition, defense counsel asked the medical examiner, Dr. Marraccini, if he had any opinion concerning the relative positions

of the shooter and the victim. Dr. Marraccini answered that he had no opinion, but only speculation that the victim was shot at the right rear of the van from the direction of the driver's side. Deposition ROA 1600. None of the other information provided by the State in discovery contains any evidence or conclusion concerning the direction from which the gun shots were fired at the victim.

It is now known, though, that the State Attorney's office had information that would have confirmed Dr. Marraccini's "speculation" concerning the relative positions of the parties, providing crucial exculpatory information for Mr. Van Poyck. In a set of notes that was part of the State Attorney's file, produced after trial pursuant to a request for public records under Fla. Stat. § 119, is a crude sketch map of the scene of the offense and some notes. The notes state as follows:

> Clothing points to exit.
> Shirt consistent w/straight ahead.
> Marraccini says wound is 90 [degrees].
> Wound coming from driver's side.

Note from State Attorney file, Appendix 9 (emphasis added).

The court below rejected this claim without a hearing, on the grounds that the note was work product, and that it could not have affected the outcome. PR. 4976. However, Mr. Van Poyck sought and should have been given the opportunity to discover the evidence on which the note was based. Moreover, the identity of the trigger person was clearly material, at least as to the outcome of the sentencing proceeding. This Court should remand for an evidentiary hearing on this claim.

ARGUMENT VI

MR. VAN POYCK'S DEATH SENTENCE MUST BE REVERSED AND RESENTENCING ORDERED BECAUSE BOTH THE SENTENCING JUDGE AND THE JURY WEIGHED INVALID AGGRAVATING CIRCUMSTANCES.

The United States Supreme Court has unequivocally declared that in a State where the sentencer weighs aggravating and mitigating circumstances, "the weighing of an invalid aggravating circumstance violates the Eighth Amendment." Espinosa v. Florida, 112 S. Ct. 2926, 2928, 120 L.Ed.2d 854 (1992). This is true even in cases where the jury's verdict does not indicate specific findings of aggravating and mitigating circumstances, because where an invalid aggravating circumstance exists, the law presumes that the jury weighed it in recommending a sentence. Id. Weighing invalid aggravating factors, either directly or indirectly, "creates the same potential for arbitrariness" and the result is error. Id.

In this case, "presuming" that the jury relied upon an invalid aggravating circumstance in sentencing Mr. Van Poyck is unnecessary--there is direct proof of it. The special verdict form used at the guilt phase of Mr. Van Poyck's trial established that at least one and possibly as many as eleven jurors found Mr. Van Poyck guilty of first degree premeditated murder. R. 3124; 4138.[14] Because a person who kills with premeditation is more culpable than one who does not,

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[14]The special verdict form contained three places for the jury to indicate whether, if they convicted on first degree murder, the murder was premeditated, felony murder, or both. R. 4112. The court instructed the jury to check each theory at least one juror found the State had proved. R. 3045-6. "Felony murder" and "both" were checked; "premeditated murder" was left blank, however.

the belief that Mr. Van Poyck committed premeditated murder had the effect of aggravating the offense.

Moreover, even though the trial court must give "great weight" to the jury's recommendation, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988), the trial court must itself "weig[h] the aggravating and mitigating circumstances" before rendering the ultimate sentence. § 921.141(3). If the court imposes death, it is required to make written findings as to its reasons for imposing the death sentence. Id. The judge ultimately found that the State had proven four aggravating circumstances and that Mr. Van Poyck had failed to establish any mitigating circumstances, and imposed death. R. 4197-98. Significantly, the sentencing order stated that (1) the State had presented competent and substantial evidence that the murder was premeditated, and (2) the evidence suggested that Mr. Van Poyck was the triggerman.

In contrast to both the jury's special verdict and the trial court's written findings, this Court decided on direct appeal, see Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), that (1) there was insufficient evidence that the murder was premeditated, and (2) there was insufficient evidence that Mr. Van Poyck was the triggerman:

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

> While this finding does not affect Van Poyck's guilt, it is a factor that should be considered in determining the appropriate sentence.

Id. at 1069 (emphasis in original). This finding effectively acquitted Van Poyck of both first degree premeditated murder and of being the triggerman. See Burks v. United States, 437 U.S. 1 (1978) (appellate finding of insufficient evidence to convict amounts to acquittal).

Clearly, the sentencing of Van Poyck was infected with the consideration of improper aggravators. As a result, the verdict imposing death was inherently unreliable, and, under Florida law, a new sentencing trial is required. In Burns v. State, 609 So. 2d 600 (Fla. 1992), for example, the court found that because there was insufficient evidence to support one of the aggravators, the defendant was entitled to a resentencing:

> [W]e cannot determine what weight the trial judge gave to the various aggravators and mitigators he found or what part the invalid aggravator played in Burns' sentence. Therefore, although we affirm Burns' convictions, we vacate his death sentence and remand for a new sentencing proceeding.

Id. at 607. See also Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Lawrence v. State, 614 So. 2d 1092 (Fla. 1993); Crump v. State, 622 So. 2d 963 (Fla. 1993); Rivera v. Dugger, 629 So. 2d 105 (Fla. 1993).

Not only did the improper aggravators taint the sentencing process, but they also deprived Mr. Van Poyck of valid nonstatutory mitigation. Both the acquittal of premeditated murder and the fact that the defendant was not the triggerman are nonstatutory mitigating circumstances sufficient to support a life sentence. Reilly v. State, 601 So. 2d 222 (Fla. 1992); Cooper v. State, 581 So. 2d 49 (Fla.

1991). Mr. Van Poyck argued both of these mitigating circumstances at the penalty phase, R. 3564-65, but the sentencing judge, R. 4198-99, and presumably the jury, rejected them. In fact, the judge found that Mr. Van Poyck had failed to establish any mitigating circumstances. The sentencers' failure to recognize that the State had failed to prove both premeditated murder and that Mr. Van Poyck was not the triggerman placed a thumb on "death's side of the scale," Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 1137 (1992), and removed one of the weights from life's side of the scale.

The court below found this claim barred because raised and denied on direct appeal. PR. 4977. However, the claim was not available until this Court acquitted Mr. Van Poyck of premeditated murder and found that the State failed to prove he was the trigger person. Those rulings constitute newly-discovered evidence that may be presented for the first time in Rule 3.850 proceedings. See Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Moreover, Espinosa is a fundamental change in Florida law that requires consideration of this claim. James v. State, 615 So. 2d 668 (Fla. 1993). On the merits, consideration by the jury and court of improper aggravation requires reversal.

ARGUMENT VII

THE TRIAL COURT'S JURY INSTRUCTIONS AS WELL AS THE PROSECUTOR'S ARGUMENT SHIFTED TO MR. VAN POYCK THE BURDEN OF PROVING THAT MITIGATING FACTORS OUTWEIGHED AGGRAVATING FACTORS, CREATING AN UNCONSTITUTIONAL PRESUMPTION THAT DEATH WAS THE APPROPRIATE PENALTY.

During the penalty phase of Mr. Van Poyck's trial, the trial court directed the jury to impose the death penalty if any aggravating circumstances existed unless Mr. Van Poyck could prove the existence of mitigating circumstances which outweighed the aggravators. R. 3580. The prosecutor likewise impressed this upon the jury:

> Clearly under the law in the State of Florida, the death sentence is warranted unless these aggravating factors are overcome . . . Of course, it is not my burden to prove the mitigating factors. It is the defendant's burden to establish these mitigating factors and they must override these aggravating circumstances . . . so they must reasonably convince you that there are mitigating factors that exist and that the mitigating factors outweigh the aggravating--that they overcome the aggravating factors.

R. 3500-01 (emphasis supplied).

Shifting to Mr. Van Poyck the burden of disproving the appropriateness of the death penalty when one or more aggravators were established is akin to a presumption that death is the appropriate penalty.[15] The Eleventh Circuit has declared that this sort of scheme precludes individualized sentencing and is therefore unconstitutional. Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988). The jury instruction at issue in Jackson, which also applied Florida's death penalty statute, was substantially identical to the instruction given in this case.

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[15]Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979).

Because shifting the burden of proof to Mr. Van Poyck created an unconstitutional presumption of the death penalty, this case must be remanded for resentencing. See Mills v. Maryland, 486 U.S. 367 (1988) ("[u]nless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing"). Had the jury recommended a life sentence for Mr. Van Poyck, the court could not have overridden that recommendation if there was a discernable, reasonable basis in the record supporting the recommendation. Tedder v. State, 322 So. 2d 908 (Fla. 1975); Ferry v. State, 507 So. 2d 1373 (Fla. 1987) (override reversed). The error in the jury instructions is not harmless beyond a reasonable doubt, as the record supports a reasonable basis for a recommendation of a life sentence, and thus, a life sentence recommendation by the jury could not have been overridden by the court.

ARGUMENT VIII

MR. VAN POYCK'S RIGHT TO AN IMPARTIAL JURY WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO GRANT DEFENSE CHALLENGES FOR CAUSE REGARDING JURORS WHO INDICATED THAT THEY WOULD AUTOMATICALLY VOTE FOR DEATH.

The case of Morgan v. Illinois, 504 U.S. 719, 119 L.Ed.2d 492 (1992), makes clear that Mr. Van Poyck's fundamental constitutional right to a fair trial by an impartial jury was violated. In Morgan, the Court held that a capital defendant is entitled to challenge for cause a prospective juror who would automatically vote for the death penalty irrespective of the facts or the trial court's instructions of law:

> A capital defendant may challenge for cause any prospective juror who [would automatically vote for death]. If even one such juror is impaneled and the death sentence is imposed, the state is disentitled to execute the sentence.

Id., 119 L.Ed.2d at 502-03.

Van Poyck was deprived of his rights to an impartial jury because the defense challenged for cause eleven jurors who had indicated that they would automatically vote for death.[16] Two of these jurors actually sat on the jury, despite their clear bias. Ms. Moody stated that she is absolutely for the death penalty "if they are guilty." R. 509, 1359-61. Ms. Bradford indicated that she would vote for death in every case where premeditation is proven. R. 871.

As a result, the defense was forced to use seven of its peremptory challenges to get these "automatic death" jurors off the jury. See R. 1131, 1207, 1283, 1344, 1354 (Ronald Knickerson, Derek Miller, George Farmer, William Busto, Carol Clement, Charles Carter, and Linda Moker). Morgan makes clear that under these circumstances, the State is disentitled to execute the sentence.

This Court denied this claim on direct appeal, ruling that although the pro-death jurors should have been excused for cause, the jurors were subsequently excused for personal reasons. Van Poyck v. State, 564 S. 2d 1066, 1071 (Fla. 1990). This was inaccurate and clear error under Morgan. Because Morgan has undercut the reasoning of this Court in its prior decision, it should now reconsider that

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[16]See R. 460, 636 (Ronald Knickerson); R. 509, 1359-61 (Goldie Moody); R. 620, 636 (Derek Miller); R. 750 (Adibe Abufaris); R. 661, 665 (George Farmer); R. 725, 729 (Wilma Busto); R. 791-92, 1111-12, 1131 (Carol Clement); R. 816-25 (Dean Bruschi); R. 843-44 (Charles Carter); R. 871-73 (Mary Bradford); and R. 1111-12, 1131 (Linda Moker).

decision. See Jackson v. State, 648 So. 2d 85, 88 (Fla. 1994); Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980).

ARGUMENT IX

THE PROSECUTOR'S IMPROPER CONDUCT DURING CLOSING ARGUMENT OF THE GUILT AND PENALTY PHASES RENDERED VAN POYCK'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF HIS RIGHTS UNDER ARTICLE I, SECTION 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A prosecutor's concern in a criminal prosecution "is not that it shall win a case, but that justice shall be done." United States v. Modica, 663 F.2d 1173, 1181 (2d Cir. 1981), cert. denied, 450 U.S. 989 (1982). While the prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Id. See ABA Standards for Criminal Justice, 3-5.8. In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), this Court reaffirmed the long-standing principle that the sole purpose of closing argument is to:

> review the evidence and explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the passions and minds of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Id. at 134; see Garron v. State, 528 So. 2d 353, 359 (1988). These principles are fully applicable to the closing argument at penalty phase. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983). A new sentencing proceeding is required where misleading prosecutorial comments create an "unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously.'" Caldwell v. Mississippi, 472 U.S. 320, 343 (1985) (opinion of O'Connor, J.). Florida courts have recognized that prejudicial prosecutorial

comments, "taken as a whole," can deprive a defendant of his fundamental right to a fair trial. Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979), cert. denied, 386 So. 2d 642 (Fla. 1980).

The prosecutor acted improperly by asking for death in anticipation of a guilty verdict, R. 1443; by telling the jury to not base their decision on emotion, because to do so might cause them to recommend life, R. 3477-78; by telling the jury to disregard lesser included offense instructions as they were merely given because the court "had to given them," R. 271-74; and by arguing that Mr. Van Poyck had failed to meet a burden to show that he was not the trigger person. R. 2938-A through 2946. The prosecutor also made various arguments as to purported "evidence" that did not appear during trial, including statements that Van Poyck intended to testify at the O'Brien trial, R. 2958-59; that Officer Griffis was killed out of "spite" and "meanness" because Griffis would not give Mr. Van Poyck the keys, R. 2925; that Mr. Van Poyck was not surprised about Griffis being killed because "[that] was the plan from the start to get what they wanted or kill the guards," R. 2921; and that the escape plan "was designed from the beginning to create a great risk of death to many." R. 3496. Finally, the prosecutor deceptively and unfairly argued that defense counsel had done something improper or was trying to deceive the jury as a result of handwritten notes on the independent act instruction. R. 2916-17. The handwritten notes were there because of the court's late ruling to give a modified version of the independent act instruction. R. 2847.

The cumulative effect of the pronounced and persistent misconduct in this case was to deprive Van Poyck of his fundamental right to a fair trial and sentencing proceeding, in violation of due process and the prohibition against cruel and unusual punishment.

ARGUMENT X

NEWLY-DISCOVERED EVIDENCE--THE SUBSEQUENT ACQUITTAL OF VAN POYCK'S CO-DEFENDANT, JAMES O'BRIEN, ON THE CHARGE OF ATTEMPTED ESCAPE, A SWORN AFFIDAVIT FROM JAMES O'BRIEN, AND SWORN TESTIMONY BY STEVEN TURNER GIVEN AFTER VAN POYCK'S TRIAL--SHOWS THAT VAN POYCK IS INNOCENT OF THE UNDERLYING FELONY OF ATTEMPTED ESCAPE AND THAT VAN POYCK DID NOT KILL OFFICER GRIFFIS.

The state's key witness, Steven Turner, testified on direct examination in co-defendant O'Brien's trial that he was positive that Mr. Van Poyck was on the passenger side of the van when the shooting started. Deposition ROA 1955-58. Furthermore, James O'Brien was acquitted of attempted escape and has stated in an affidavit that he was looking right at Mr. Van Poyck when the shots were fired. Affidavit of James O'Brien, App. 45.

Taken together, this highly exculpatory evidence makes it clear that it was physically impossible for Mr. Van Poyck to have killed Griffis, and therefore that he could not have been guilty of premeditated murder, contrary to the conclusion of at least one member of the jury. Moreover, this fact would have constituted compelling mitigating evidence that probably would have led to a different result at penalty phase. Furthermore, O'Brien's acquittal constitutes newly discovered evidence indicating that there was no underlying felony of attempted escape. See Scott v. Dugger, 604 So. 2d 465 (1992); Johnson v. Mississippi, 486 U.S. 578 (1988) (prior violent felony

conviction cannot be used in aggravation when that conviction is subsequently overturned). If a single juror based his verdict of felony murder on attempted escape rather than robbery, then Van Poyck's right to a unanimous jury verdict was violated and his conviction was unconstitutionally obtained.

ARGUMENT XI

MR. VAN POYCK'S DEATH SENTENCE MUST BE REVERSED AND RESENTENCING ORDERED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY TO APPLY, AND ITSELF APPLIED, A TRUNCATED AND ERRONEOUS VERSION OF THE ENMUND/TISON FACTUAL DETERMINATIONS AND LEGAL STANDARD.

Imposition of the death penalty under circumstances where one neither takes life, attempts to take life, nor intends to take life, but merely contemplates that lethal force might be used, is unconstitutional. Enmund v. Florida, 458 U.S. 782 (1982). Here, the trial court instructed the jury that it could recommend death if it found that Mr. Van Poyck "contemplated . . . that illegal (sic) force might be used." R. 3582. This instruction was unconstitutional. Subsequent to Enmund, the United States Supreme Court in Tison v. Arizona, 481 U.S. 137 (1987), emphasized that Arizona's use of the "contemplation of the use of lethal force" element rendered the definition of the "intent to kill" standard in Enmund overly broad. Id. at 150-151. Because the use of this element "amounts to little more than a restatement of the felony-murder rule itself," the Court rejected the Arizona Supreme Court's attempt to "reformulate 'intent to kill' as a species of foreseeability." Id.; see also Jackson v. State, 575 So. 2d 181, 191 (Fla. 1991). Consequently, the use of the "lethal force" jury instruction and the possibility that Mr. Van

Poyck was sentenced to death for simply contemplating the use of lethal force render his death sentence unconstitutional.

The court compounded its error when it miscommunicated a key element of an already impermissible instruction. The court not only used the improper "lethal force" instruction, but also mistakenly inserted the term "illegal" for "lethal" force. R. 3582. Thus, the jury may well have found that Van Poyck used "illegal" force based on their belief that Van Poyck kicked Officer Turner under the van or that he pointed a gun at Dr. Brown. Such conduct comes nowhere near the Enmund/Tison standard of killing, attempting to kill, intending to kill, or reckless indifference to human life, and is obviously insufficient to support the death penalty.

The court below held this claim to be barred, on the ground that it was raised and denied on direct appeal. PR. 4978. Jackson, decided after Van Poyck, makes clear that this Court's previous denial of a similar claim was erroneous. The improper instruction given to the jury was a fundamental constitutional error, reviewable in Rule 3.850 proceedings. See Willie v. State, 600 So. 2d 479 (Fla. 1st DCA 1992). Because the jury instructions conveyed to the jury an improper basis for imposing the death sentence, Mr. Van Poyck's death sentence is arbitrary, capricious, and unreliable and must be reversed.

ARGUMENT XII

THE TRIAL COURT INSTRUCTED THE JURY TO CONSIDER, AND RELIED ON IN SENTENCING MR. VAN POYCK TO DEATH, AN AGGRAVATING FACTOR THAT MADE THE DEFENDANT DEATH-QUALIFIED IN THE FIRST INSTANCE, THEREBY FAILING TO NARROW THE CLASS OF DEATH ELIGIBLE DEFENDANTS AND VIOLATING MR. VAN POYCK'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

Mr. Van Poyck was eligible for the death penalty in this case only because of the felony murder rule, since the evidence was insufficient to convict Mr. Van Poyck of premeditated murder or of being the person who killed Fred Griffis. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). It was constitutionally impermissible to use as an aggravating factor the conclusion that Mr. Van Poyck had committed the offense for the purpose of effecting an escape from custody, R. 4197, the same fact that made him eligible for the death sentence. As a result, commission of the underlying felony served not only to make the defendant eligible for consideration of the death penalty, but also served automatically to bootstrap imposition of that penalty. This leads to a capricious result:

> A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived.

State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551, 567 (N.C. 1979).

Such a scheme violates the constitutional requirement that death be assessed as the appropriate sentence only after it is determined

that the defendant falls in the narrow category of persons who are "death qualified." It is fundamental that any constitutionally permissible death penalty scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Zant v. Stephens, 462 U.S. 862, 877 (1983). See also Engberg v. Meyer, 820 P.2d 70, 89-91 (Wyo. 1991) (when an element of felony murder is itself listed as an aggravating circumstance, the requirement that at least one "aggravating circumstance" be found before a death sentence becomes meaningless); State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) (even though additional aggravating factor had been shown, the court was unable to state beyond a reasonable doubt that consideration of the underlying felony as an aggravator was harmless error, remanding the case for resentencing), cert. dismissed, 114 S. Ct. 651 (1993). Mr. Van Poyck's sentence must therefore be vacated for resentencing with a proper consideration of the mitigating and aggravating factors.

ARGUMENT XIII

MR. VAN POYCK WAS UNCONSTITUTIONALLY DEPRIVED OF A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION BECAUSE THE COURT AND PROSECUTOR IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY WERE INAPPROPRIATE CONSIDERATIONS FOR THE JURY.

Throughout *voir dire*, the prosecutor told the prospective jurors that they were not to consider sympathy or emotion toward Mr. Van Poyck with regard to either the guilt or penalty phase determinations. R. 1074, 1155, 1341, 1350, 1356. The court similarly instructed the jury prior to the guilt phase deliberations. R. 3043-44. At the penalty phase, the court reiterated to the jury that it could only

base its sentencing recommendation on the law and the evidence. R. 3578. Finally, in closing arguments at the penalty stage, the prosecutor repeatedly instructed the jury not to consider sympathy, mercy, or the like in reaching a verdict. R. 3478, 3479, 3513, 3540. The prosecutor specifically urged the jury to disregard the testimony of Mr. Van Poyck's stepmother because it might engender an emotional response. R. 3530. These acts unconstitutionally deprived Mr. Van Poyck of a reliable and individualized sentencing determination.

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987). Further, the Eighth Amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). These principles require that the jury be free to consider feelings of sympathy and mercy that are engendered by the evidence in making its sentencing recommendation.

Here, by contrast, the statements made at several junctures in the trial undermined the jury's ability to weigh and evaluate all of the mitigating evidence. See, e.g., Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), rev'd on other grounds sub. nom. Saffle v. Parks, 494 U.S. 484 (1990); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Accordingly, the

imposition of the death sentence in this case was unconstitutional and requires reversal.

ARGUMENT XIV

THE TRIAL COURT FAILED TO CONDUCT AN INDEPENDENT EVALUATION OF THE MITIGATING EVIDENCE OFFERED BY MR. VAN POYCK, THEREBY DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION.

At the penalty phase in this case, Mr. Van Poyck attempted to demonstrate the existence of at least five mitigating factors: (1) that he was not the person who actually killed the victim and was not guilty of premeditated murder; (2) that he had led a deprived childhood; (3) that he was under the influence and control of another, to wit, his brother Jeffrey and James O'Brien; (4) that he was very remorseful as to his part in the escape attempt that resulted in the victim's death; and (5) that he possessed legal skills which he willingly used to help his fellow inmates who would otherwise have no legal representation.

Despite the uncontroverted evidence as to each of these factors, the trial court found no mitigating circumstances to exist. With respect to the first, the trial court found that "the state clearly presented competent and substantial evidence to the crime of first degree felony murder and/or premeditated murder and in reality presented competent evidence that Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis." R. 4199. This finding was subsequently reversed on appeal by this Court. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). With respect to the next two mitigating circumstances, the trial court, with virtually no discussion, found that they were unsupported by the evidence.

R. 4198-99. And the trial court did not even bother to consider or evaluate the last two, despite the fact that these were the only circumstances standing between Van Poyck and a death sentence.

Contrary to decisions of both the United States Supreme Court and this Court[17], the trial court's Order in this case was a woefully deficient exercise of its duty to afford a capital defendant a "reasoned judgment in determining the existence of mitigating circumstances in imposing the death sentence." Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). Mr. Van Poyck's death sentence must accordingly be reversed.

ARGUMENT XV

THE COURT BELOW ERRED IN SUMMARILY DENYING MR. VAN POYCK'S CLAIM THAT THE JURY INSTRUCTIONS AT THE PENALTY PHASE WERE UNREASONABLY VAGUE AND CONFUSING.

The penalty phase jury instructions given at Mr. Van Poyck's trial, namely those concerning aggravating and mitigating circumstances (see, e.g., R. 3578, R. 3580-81), were vague and confusing, thereby creating a "reasonable likelihood that the jury . . . applied the challenged instruction[s] in a way that prevent[ed] the consideration of constitutionally relevant evidence." Boyde v.

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[17]See, e.g., Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) ("when addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant") (emphasis supplied); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (where "a reasonable quantum of competent, uncontroverted evidence is presented, the trial court must find that the mitigating circumstance has been proved."); Skipper v. South Carolina, 476 U.S. 1, 4 (1986), quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (in a capital case, "the sentencer may not refuse to consider or be precluded from considering any mitigating evidence.").

California, 494 U.S. 370, 380 (1990). As such, Van Poyck's death sentence is unconstitutional. Id.

The court below summarily denied this claim without a hearing, on the grounds that it had been raised and denied on direct appeal. PR. 4978. Mr. Van Poyck, however, proffered newly discovered evidence, not available at trial, substantiating that the instructions are indeed unreasonably vague and confusing to jurors. Specifically, he proffered testimony presented in support of a similar claim at an evidentiary hearing held in State v. Hayes, Case No. 89-6211 (Seventh Judicial Circuit, Volusia Co.). PR. 5319-20.[18] Because this evidence was not available at the time of trial, and because it probably would have required the holding of a new sentencing proceeding, the court below erred in denying this claim without a hearing. See Jones v. State, 591 So. 2d 911 (Fla. 1991). This Court should remand for an evidentiary hearing so that Mr. Van Poyck can present the proffered evidence in support of this claim.

ARGUMENT XVI

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO INSTRUCT THE JURY ON THE DEFENSES OF JUSTIFIABLE OR EXCUSABLE HOMICIDE AS PART OF THE INSTRUCTION ON MANSLAUGHTER.

The indictment charged Mr. Van Poyck with seven counts of attempted first-degree murder. The jury returned a verdict of guilty on the lesser offense of attempted manslaughter for six of those counts. The trial court committed fundamental error by failing to

[18]Apparently as a result of a clerical error, the testimony proffered was not included in the record on appeal. Mr. Van Poyck has moved for an order directing the clerk to complete the record to include the proffered testimony.

instruct the jury on the defenses of justifiable or excusable homicide as part of the manslaughter instruction. Rojas v. State, 552 So. 2d 914 (Fla. 1989); Miller v. State, 573 So. 2d 337 (Fla. 1991). Accordingly, the convictions and sentences for these counts must be reversed.

At no point did the court instruct the jury on the defenses of justifiable or excusable homicide, as required by law, in its instructions to the jury on the attempted first-degree murder counts. See R. 3033-34. Moreover, the court's "short form definition" of manslaughter with regard to Count I, see R. 3022-23, was insufficient. See Rojas (omission of any reference to justifiable or excusable homicide when instructing jury on definition of manslaughter is reversible error, even where the judge defined excusable and justifiable homicide at beginning of homicide instruction; instruction did not clarify to jury that defendant could not be guilty of manslaughter if killing was either justifiable or excusable homicide). Because such error is fundamental, Rojas v. State, 552 So. 2d 914 (Fla. 1989), this issue is properly raised in this post-conviction proceeding. Plowman v. State, 586 So. 2d 454 (Fla. 2d DCA 1991). The trial court's holding to the contrary, PR. 4979, ignores the clear and express holdings of Rojas, Miller and Plowman.

The trial court failed to state clearly that attempted manslaughter was a lesser included offense of attempted first-degree murder. Moreover, the trial court failed to adequately instruct on justifiable or excusable homicide for the attempted first-degree

murder counts. Accordingly, these convictions should be reversed and set aside, and remanded for a new trial.

CONCLUSION

For the foregoing reasons, Mr. Van Poyck respectfully requests that this matter be remanded for an evidentiary hearing and proper consideration of those claims with respect to which a hearing was wrongfully denied, and that this Court vacate the judgment of the court below and set aside Mr. Van Poyck's unconstitutional capital conviction and sentence of death.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by first class U.S. mail, postage prepaid, to Celia A. Terenzio, Esquire, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 1655 Palm Beach Lakes Blvd, Third Floor, West Palm Beach, FL 33401-2299, and Office of the State Attorney, Post Office Box 2905, West Palm Beach, FL 33402, this 1st day of May, 1995.

Attorney