IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Appellant,

vs. Case No. SC04-696

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, WILLIAM VAN POYCK, was the defendant in the proceedings below, and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the proceedings below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R", reference to the supplemental pleadings will be by the symbols "SR[vol.]" and reference to the direct appeal record will be by the symbol “ROA”.

STATEMENT OF THE CASE AND FACTS

Appellant has been before this Court on three prior occasions. In 1990, Van Poyck's conviction for capital murder and sentence of death were upheld. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990). The facts as recounted by this Court were as follows:

> The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun

placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was a Hungarian Interarms nine millimeter semiautomatic pistol.

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

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

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

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

In the penalty phase, the state presented Van Poyck's parole officer who testified that Van Poyck was on parole at the time of the incident and that he had three previous convictions, two for robbery and one for burglary. Other witnesses for the state included victims of these offenses. Van Poyck presented five witnesses in mitigation, including himself. A nurse from the Palm Beach County jail stated that he helped other inmates in various ways. His brother, who was also in prison, testified about their home life, explaining that their father was frequently away from home on business and their mother had passed away when Van Poyck was young. Van Poyck's aunt testified that for a period of time the family lived with a housekeeper, who appeared to be strange and unstable. Van Poyck's stepmother testified about his family situation, noting that his brother and sister had juvenile records. She also indicated that Van Poyck felt remorse for his actions. Finally, Van Poyck testified in his own behalf, taking responsibility for

> the fact that Griffis was killed and expressing remorse for his actions.
>
> By an eleven-to-one vote, the jury recommended the death sentence for the first-degree murder conviction. The trial judge imposed the death sentence and found the following four aggravating circumstances: (1) that the crime was committed while Van Poyck was under a sentence of imprisonment in that he was on parole when he committed the act; (2) that the crime was committed for the purpose of effecting an escape from custody; (3) that Van Poyck knowingly created a great risk of death to many persons; and (4) that Van Poyck was previously convicted of another felony involving the use or threat of violence to some person.

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

> Although the evidence was insufficient to establish first-degree premeditated murder, we find that the evidence was clearly sufficient to convict him of first-degree felony murder. While this finding does not affect Van Poyck's guilt, it is a factor that should be considered in determining the appropriate sentence

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

Van Poyck then filed a motion for postconviction relief on December 8, 1992. Following a lengthy evidentiary hearing, all relief was denied. Van Poyck unsuccessfully appealed to this Court, raising sixteen issues. Van Poyck v. State, 694 So. 2d 686 (Fla 1997).

Van Poyck filed a state habeas petition before this Court on October 27, 1998. Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998). Again all relief was denied.

Van Poyck then sought federal habeas relief on February 3, 1999. Therein Van Poyck raised fifteen claims. Ultimately the district court denied relief without an evidentiary hearing on September 20, 1999, The Eleventh Circuit upheld that ruling on May 9, 2002. The United States Supreme Court denied review on October 7, 2002. On September 30, 2003, Van Poyck filed a motion pursuant to 3.853 seeking DNA testing. The trial court denied relief and this appeal follows.

SUMMARY OF ARGUMENT

The trial court properly denied appellant's motion for DNA testing without a hearing as he failed to meet the requirements of Rule 3.853 (c)(5)(C).

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST FOR DNA TESTING AS THE RESULTS WOULD NOT HAVE WARRANTED A SENTENCE LESS THAN DEATH

Van Poyck is challenging the trial court's summary denial of his request for DNA testing pursuant to Rule 3.853. It is alleged that the results of such testing would provide substantial mitigating evidence relevant to Van Poyck's sentence of death.

Van Poyck along with his co-defendant Frank Valdes were both convicted and sentenced to death for the shooting death of Officer Fred Griffis. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990) and Valdes v. State, 626 So. 2d 1316 (Fla. 1993). On direct appeal, this Court found insufficient evidence to sustain a conviction for premeditated murder, yet still upheld his conviction and sentence of death. Van Poyck, 564 So. 2d at 1069. Base on that determination, Van Poyck sought DNA testing to "conclusively prove" that it was his co-defendant Frank Valdez, who actually shot Officer Griffis. The trial court's summary denial was predicated solely on the fact that, appellant

could not meet the requirements of 3.853 (c)(5)(C). The court stated:

> The court finds that pursuant to exhibits contained in the court file which are incorporated herein as reference that there is no reasonable possibility that any DNA testing will result in exoneration or in a mitigated sentence.

(ROA 66). A review of the facts established at trial and on direct appeal clearly refute Van Poyck's claim, therefore the trial court's summary denial of the request must be upheld.

Relying on State v. Mills 788 So. 2d 249 (Fla. 2001) and similar cases for the proposition that newly discovered evidence regarding a defendant's status as the "non-triggerman" warrants imposition of a life sentence, Van Poyck argues that the trial court was incorrect to deny him relief. The state does not take issue with the general proposition that "non-triggerman status" is mitigating evidence. However, in the instant case, appellant's status as such has throughly been analyzed at trial and on direct appeal. Any new evidence to further bolster his status as the non-shooter would be cumulative and would not warrant any relief. Unlike the cases relied upon by appellant, Van Poyck's culpability as the major participant in the events culminating in Officer Griffis' death, has already been determined in great detail and would be unaffected by any new DNA testing.

For instance, the question of Van Poyck's culpability in the murder of Officer Griffis has been throughly reviewed by this Court on direct appeal[1];postconviction appeal[2] and state habeas review[3]; and by the federal courts as well. See Van Poyck v. State, 564 So. 2d 1066, (Fla.); Van Poyck v. State, 696 So. 2d 686, 689 (Fla. 1997); Van Poyck v. Singletary, 715 So. 2d 930, 931 n.1 (Fla. 1998); and Van Poyck v. Florida Department of Corrections, 290 F.3d 1318, 1325-26 (11th Cir. 2002), cert. denied, 537 U.S. 1105 (2003). Fatal to appellant's claim is that his culpability established at trial and affirmed on

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[1] On direct appeal, Van Poyck presented four claims addressed to the "triggerman" issue. He asserted: (1) the evidence against him was insufficient to support his conviction for premeditated first-degree murder (SR 35-45) (2) the trial court's Phase Two instructions failed to inform the jury of the mandatory Tison v. Arizona, 481 U.S. 137 (1987) and Enmund v. Florida, 458 U.S. 782 (1982) factual determination (SR 66-70); (3) the trial court erred in failing to make the required findings under Enmund/Tison in the sentencing order (SR 70-77); (4) the death sentence is not proportional because Van Poyck was not the triggerman (SR 99-101). Van Poyck v. State, 564 So.2d 1066, 1069-70 (Fla. 1990).

[2] Van Poyck's postconviction claims regarding his non-triggerman status for sentencing purposes were as follows: "(6) the judge and jury weighed the invalid aggravating factors that the murder was premeditated or that Van Poyck was the triggerman" and (11) *Edmund/Tison* errors necessitate a reversal of Van Poyck's death sentence." Van Poyck v. State, 694 So. 2d 686, 698 (Fla. 1997). This Court found appellant's claims to be procedurally barred. Id at n. 6.

[3] In his habeas petition appellant raised the Enmund/Tison issue for a third time. Review was again denied: "This claim was raised and rejected on direct appeal, *Van Poyck*, 564 So. 2d at 1070-71, and also on the rule 3.850 appeal. *Van Poyck*, 694 So. 2d at 698." Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998).

appeal, overwhelmingly supported imposition of his capital sentence regardless of the fact that he was not the shooter. The facts revealed the following:

> We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In DuBoise v. State, 520 So.2d 260 (Fla. 1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is not the triggerman and discussed proportionate punishment, stating:
>
> > In Tison the Court stated that Enmund covered two types of cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death

> penalty even absent an 'intent to kill.'" Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "*that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the* Enmund *culpability requirement*."
>
> *Id.* at 265-66 (citations omitted, emphasis added) (quoting Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)). **Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional**.

Van Poyck, 564 So.2d at 1070-71 (footnote omitted) (emphasis supplied).

The Eleventh Circuit Court of Appeals, determined that any mitigating effect arising from the conclusion Van Poyck was not the triggerman would not have made a difference in the sentence he received:

> Petitioner argues that Counsel's performance was constitutionally defective because he failed to present evidence that Petitioner was not the triggerman. He identifies two such pieces of evidence: that Valdes had blood on his clothes matching Officer Griffis's blood type, but that Petitioner did not; and that the murder weapon had been purchased by Valdes's girlfriend and that Valdes had been in

possession of the gun when he and Petitioner left to commit the crime.

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

Even more telling is the prosecutor's closing argument. Petitioner's being the triggerman played only a very minor role in the prosecutor's argument. As aggravating factors, the prosecutor advanced these things: 1) that Petitioner was on parole when the crime was committed; 2) that the crime was committed for the purposes of effectuating an escape from prison; 3) that Petitioner knowingly created a great risk of death to many persons; and 4) that Petitioner had previously been convicted of a violent felony. The establishment of these elements did not require arguing that Petitioner was the triggerman. **The prosecutor never argued that it had been established beyond a reasonable doubt that Petitioner was the triggerman**.

The only time the prosecutor did argue that the evidence tended to show that Petitioner was the triggerman was in rebutting Petitioner's argument that he was only an accomplice and played only a minor role in the crime. [FN8] Even in rebutting that argument, however, the prosecutor relied heavily on the idea that,

> "[r]egardless of who the triggerman is," death would still be appropriate. Rather than focusing the jury on who the triggerman was, the prosecutor stressed that Petitioner could not be considered a minor participant because he had been the one to come up with the idea of breaking O'Brien out of custody and had planned the crime. While the prosecutor did, on a few occasions in his closing argument, say that evidence in the case suggested that Petitioner was the triggerman, the main argument made by the prosecutor was that the death penalty--because of the four aggravating factors and because Petitioner was not a minor participant in the underlying violent felony--was an appropriate sentence for Petitioner, regardless of who actually shot Officer Griffis.
>
> **Especially because the prosecutor's main argument was that the death penalty was appropriate regardless of who the triggerman was, we see no reasonable probability that, if Counsel had presented the additional evidence that Petitioner was not the triggerman, the outcome of the sentencing phase would have been different**. The Florida Supreme Court could reasonably conclude that no prejudice existed. **The Florida Supreme Court did reasonably conclude that the triggerman-evidence claim entitled Petitioner to no relief**.
>
> _____
>
> [8.] Florida law provides that a mitigating circumstance exists where "[t]he defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." Fla. Stat. Ann. § 921.141(6)(d).

Van Poyck, 290 F.3d at, 1325-26. (emphasis supplied). Because of appellant's major participation in the events that led up to the murder, his death sentence was constiutionally permissible.

See Galloway v. State, 802 So. 2d 1173 (Fla. 1st DCA 2002)(upholding denial of request for DNA testing because results could not refute evidence that defendant was present and was also participating with co-defendant in the crimes); Cf. Robinson v. State, 865 So. 2d 1259 (Fla. 2004)(explaining that DNA testing would not entitle defendant to relief given that there is no dispute that he was involved in the rape and murder).

Ignoring these appellate findings, appellant incredibly argues that DNA evidence will somehow magically shed light on his state of mind during the attempted escape and murder of Officer Griffis. In other words, not only will the physical evidence prove that he was not the shooter, it will also demonstrate that, "...nor did he anticipate or acquiesce in the victim's shooting," (ROA 5); **brief at 20**, and "indeed in this case [he] did not even want it to occur." **Brief at 21.** Appellant's claims are unpersuasive.

Van Poyck does not explain how DNA evidence could rebut the findings that he was the major participant in the felony committed and therefore equally culpable in the death of Officer Griffis. See Hitchcock v. State, 866 So. 2d 23, 28 (Fla. 2004)(explaining that defendant must establish the relevant nexus between the DNA results and "specific facts about

the crime" that would entitle him to mitigation of his sentence).

The facts remain, as admitted to by Van Poyck when he testified at trial, he wanted to help his friend, James O'Brien escape from prison, and he, and he alone had been contemplating this for approximately two years (ROA 2619-22; SR 443-446). Van Poyck put the escape plan together, recruited Valdes to assist, and gave Valdes orders about how to proceed. (ROA 2622, 2626-27, 2630-31; SR 446, 450-451, 454-455). While Valdes provided the guns, Van Poyck verified they were loaded. (ROA 2628, 2656-57; SR 452, 480-481). The plan was for Valdes to secure the correction van driver and Van Poyck would get the officer who was in the passenger seat (ROA 2647; SR 473). Van Poyck admitted telling the passenger, Officer Turner, to get under the van or he was a dead man (RAO 2648; SR 474). Following Officer Griffis' murder, Van Poyck turned to Officer Turner and demanded the key to the van and threatened his life (ROA 2649-50; 473-474). Van Poyck also noted that Valdes went through Officer Griffis' pockets after he was shot and that there was blood around (ROA 2650; SR 474). It was Van Poyck's admission that he was not under the influence of any substance that might have impaired his ability to think or reason - Van Poyck knew exactly what he was doing on the day of the murder. He was not impaired by any mental infirmity (ROA 2629-31, 2639; 453-455, 463). He

also reiterated that he set up the entire criminal plan which resulted in Officer Griffis' death. (ROA 2662; SR 486).

The state relied on this evidence, at the penalty phase to argue that appellant deserved a death sentence. For instance, the trial court, with the agreement of the parties, confirmed that emphasis would not be placed upon either first-degree murder theory. The trial judge inquired: "Does everybody then agree as to, [the instruction] 'Ladies and gentlemen of the jury, you have found the Defendant guilty of first degree murder,' and I leave it at that?" (ROA 3183; SR 692). Defense counsel agreed. (Id.). As is clear from the penalty phase record, the State sought and discussed the four statutory aggravating factors[4], and the State never relied upon the triggerman theory for imposition of a death sentence. Rather, the State told the jury to assume that Valdez was the triggerman. (ROA 3511-12; SR 766-767). It was the defense that argued Van Poyck's participation was minor and that he was not the triggerman, and to this, the State commented on Van Poyck's major role in the crime and noted in passing the triggerman theory, but he never stated that this was proven beyond a reasonable doubt. (ROA 3477-3540, 3562-65; SR 795, 817-820).

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

The cases appellant relies on are unpersuasive as they all involve an open question regarding the defendant's culpability. For instance in Mills, a jury override case, the state's theory at the trial was that Mills was the actual shooter. Mills v. State, 476 So. 2d 172, 175 (Fla. 1985). Therefore the record was completely void of any factual development regarding Mills' culpability as the non-triggerman.

Likewise in Garcia v. State, 622 So. 2d 1325 (Fla. 1993), the state's theory of prosecution was that Garcia was the shooter, an accusation that Garcia continued to deny. Garcia, 622 So. 2d at 1331. During postconviction litigation, evidence was uncovered which rebutted the state's theory. In granting a new sentencing hearing this Court stated:

> Although this Court affirmed Garcia's death sentences in spite of the life sentences given the co-defendants, much of the information addressed in our present opinion was not briefed or available on direct appeal. This information raises real questions requiring factual resolution concerning the extent of Garcia's participation in the shootings

Id, at 1332.(emphasis added).

The remainder of appellant's cases are similarly distinguishable, and are therefore of no help. Zerquera v. State, 549 So. 2d 189 (Fla. 1989)(reversing conviction on direct appeal where evidence regarding identity of trigger-man was never fully developed due to erroneous evidentiary rulings);

Scott v, State, 657 So. 2d 1129 (Fla. 1995)(remanding case for evidentiary hearing to consider new evidence regarding question of identity of actual killer as between co-defendants); Cooper v. State, 581 So. 2d 49, 51 (Fla. 1991)(overturning trial court's override sentence of death finding that jury's recommendation for life could have been based on uncertainty regarding identity of shooter); Barrett v. State, 649 So. 2d 219, 221 (Fla. 1995)(reversing conviction on direct appeal where state committed discovery violation by withholding evidence in support of defendant's theory that co-defendant was shooter).

In summary, appellant's fifth attempt to relitigate the issue of his non-triggerman status was rejected properly by the trial court. The un-assailed evidence, including appellant's own admissions, establish that he was the major participant in this crime. Consequently, the trial court's conclusion that DNA testing would not in any way assail those findings was correct.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's DENIAL of DNA testing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Jeffrey O. Davis, Quarles & Brady, 411 E. Wisconsin Ave., Milwaukee, WI. 53202-4497, this ____ day of November, 2004.

CERTIFICATE OF FONT

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

_____
CELIA A. TERENZIO
Assistant Attorney General