IN THE SUPREME COURT OF FLORIDA

William Van Poyck,

Appellant,

vs.

Case No. SC04-696
Circuit Court Case Nos.: 87-6736CF
88-11116CF
A02

CAPITAL CASE

State of Florida,

Appellee.

INITIAL BRIEF OF APPELLANT

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I. PRELIMINARY STATEMENT

In this CAPITAL CASE William Van Poyck appeals the circuit court's summary denial of his Motion for Postconviction DNA Testing, which was brought pursuant to Rule 3.853, Florida Rules of Criminal Procedure, and Section 925.11, Florida Statutes (2001). Citations to the record on appeal herein will be made utilizing the symbol "R." followed by the correct pagination. Because Van Poyck's request for a plenary evidentiary hearing was not granted there are no transcripts (other than the appellate briefs and trial transcripts which the State attached to its response). References to the original Record on Appeal will utilize the symbol "RA.", followed by the correct pagination. For the Court's convenience, all portions of the transcript from Mr. Van Poyck's original trial cited in this brief are attached hereto as a separate appendix.

II. REQUEST FOR ORAL ARGUMENT

This is a capital case in which DNA testing under Rule 3.853 has been denied. Oral argument is appropriate, given the seriousness of this case and the issues presented. Mr. Van Poyck accordingly requests that the Court hold oral argument in this case.

III. STATEMENT OF THE CASE

A. Procedural History

Mr. Van Poyck, and his codefendant, Frank Valdes, were each charged with one count of first-degree murder, seven counts of attempted first-degree murder, armed robbery with a firearm, aggravated assault, and aiding in an attempted escape, all arising out of an amateurish, poorly conceived attempt to free state prisoner James O'Brien from a prison transport van in downtown West Palm Beach. Correctional officer Fred Griffis was shot and killed during this attempt.

Following a jury trial Van Poyck was found guilty of first-degree murder. The penalty phase jury recommended a death sentence by a vote of 11 to 1. On December 21, 1988, the Honorable Michael D. Miller sentenced Van Poyck to death. As shown below, both the jury and trial court indicated on their verdict form and sentencing order respectively, a belief that Mr. Van Poyck actually shot and killed Officer Griffis. This Court affirmed Van Poyck's convictions and the death sentence. *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990).

Mr. Van Poyck subsequently filed a Rule 3.850 postconviction motion upon which the trial court granted a limited evidentiary hearing. Following the trial court's denial of this Rule 3.850 motion, a divided Supreme Court of

Florida, in a 4-3 decision, affirmed the trial court's denial. *Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997), *cert. denied, Van Poyck v. Florida*, 522 U.S. 995 (1997).

Thereafter, Van Poyck filed a habeas corpus petition in this Court raising, among other issues, a claim of ineffective assistance of appellate counsel. In another 4-3 decision this Court narrowly denied relief. *Van Poyck v. Singletary*, 715 So. 2d 930 (Fla. 1998), *cert. denied, Van Poyck v. Singletary*, 119 S. Ct. 1252 (1999).

In September 1999, the United States District Court denied Van Poyck's federal habeas corpus petition, and the Eleventh Circuit Court of Appeals affirmed that denial on May 9, 2002. *Van Poyck v. Moore*, 290 F. 3d 1318 (11th Cir. 2002), *cert denied, Van Poyck v. Moore*, 123 S. Ct. 869 (2003).

In December, 2002, Van Poyck filed a petition for writ of habeas corpus in this Court, raising two claims based upon the intervening decision in *Ring v. Arizona*, 536 U.S. 584 (2002). On August 20, 2003, this Court denied that petition.

On September 30, 2003, Van Poyck filed in the circuit court below his sworn, notarized Motion for Post Conviction DNA Testing, which is the subject of this appeal. R. 1-41. The motion requested DNA testing on blood-stained clothes which, Van Poyck asserted, would prove that he was not the

triggerman in the homicide for which he has been sentenced to die. The motion specifically moved for an evidentiary hearing. R. 8. On October 9, 2003, the lower court ordered the State to respond to the motion, R. 42, and on February 19, 2004, the State filed a 19-page response, along with 794 pages of "exhibits".[1] R. 47-65. Van Poyck's counsel received this filing on February 25, 2004.

On February 24, 2004, just five days after the State filed its response, and before Van Poyck's counsel even received the response, the trial court summarily denied Van Poyck's Motion in a one-sentence order of denial that 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.

R. 66.

On March 10, 2004, Van Poyck filed his timely motion for reconsideration wherein he objected, among other things, to the court denying the motion without conducting an evidentiary hearing, and to the court denying the motion without giving

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[1] These "exhibits" consisted of hundreds of pages of previously filed appellate briefs selected portions of the trial transcript. They do not appear to have been included in the Record on Appeal in this case.

Van Poyck any opportunity to do briefing or file a reply to the State's response. R. 67-73. On March 16, 2004, the lower court denied Van Poyck's motion for reconsideration, R. 74, and on April 14, 2004, Van Poyck filed his timely Notice of Appeal with this Court. R. 75-78.

B. Relevant Facts

1. Mr. Van Poyck's Trial

The evidence presented at Van Poyck's trial has been summarized by this Court in deciding Mr. Van Poyck's direct appeal. *Van Poyck v. State*, 564 So. 2d 1066 (Fla. 1990). Briefly, the record reflects that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported state prisoner James O'Brien from Glades Correctional Institution to a doctor's office in downtown West Palm Beach. After the officers parked the prison transport van behind the doctor's office, they were confronted by Van Poyck and his accomplice, Frank Valdes, both of whom were armed with pistols. Van Poyck took Turner's gun and forced him beneath the passenger's side of the van. While squeezing under the van, Turner saw Valdes' feet, as Valdes forced Officer Griffis to the rear of the van. While Turner was watching the two sets of feet at the rear of the van – Valdes'

and Officer Griffis' – "he heard a series of shots and saw Griffis fall to the ground." *Id.* at 1067.

Prior to Van Poyck's trial it became evident that the central factual issue that would be in dispute at trial would be the identity of the triggerman. Eventually the trial judge, the Honorable Michael Miller, granted defense motions for severances. Van Poyck was scheduled to be tried first.

Shortly before the scheduled trial, Van Poyck's appointed counsel moved for a continuance. The motion was based upon what counsel characterized as an urgent need to conduct then-nascent DNA testing, which counsel asserted was "crucial" to the defense. R. 13. Counsel informed the Court that the State's own expert witnesses had indicated that the gunshot to the rear of the victim's head was a "contact wound," made with the gun's barrel pressed against the skull. Such a wound, the State's witnesses had indicated, would result in "blowback" whereby substantial quantities of the victim's blood would be violently ejected back toward the shooter. R. 4; RA. 1903. DNA testing, it was asserted, would establish the presence of Griffis' DNA on Valdes' clothes, and the absence of Griffis' DNA on Van Poyck's clothes, thus establishing Valdes as the shooter while excluding Van Poyck as the shooter. The trial

court granted the requested continuance; however, no DNA testing of any type was ever conducted.[2]

At trial, Mr. Van Poyck testified at the guilt/innocence phase, denying that he was the shooter. Van Poyck testified that he was at the passenger's side of the van, forcing Officer Turner beneath the vehicle when Valdes, out of sight at the rear of the van, suddenly and without warning, shot Officer Griffis. RA. 2582. However, this testimony was called into question by the testimony of Officer Turner, who claimed that Van Poyck had stopped kicking him shortly before the fatal shots. He also claimed to have seen what ultimately turned out to be the murder weapon – a 9 mm. Hungarian Arms pistol – in Van Poyck's hand. RA. 1431, 1443, 1685. Accordingly, the prosecutor pressed the point that Van Poyck was the shooter, though telling the jury that the triggerman issue "was irrelevant to guilt phase and has more bearing as to the penalty…" RA. 2913; 2932-46.

With the evidence thus disputed, the case went to the jury under dual theories of first-degree murder – premeditated

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[2] Almost seven years later Klein testified that the testing was not pursued because he thought serological blood-type evidence established the identify of the shooter. But no serological blood-type evidence was introduced, nor would it be sufficient to prove the point anyway, as Valdes and Officer Griffis had the same blood type.

murder and felony murder. The trial court submitted a separate "special verdict form" to the jury. The jury was first instructed to unanimously determine if Van Poyck was guilty of "first-degree murder." The jury was then asked to more specifically determine if it found Van Poyck guilty of "premeditated murder," "felony murder," and/or "both". They were to check "premeditated murder" if *any* juror found Van Poyck guilty of only "premeditated murder"; and to check "felony murder" if *any* juror found Van Poyck guilty of only "felony murder"; and to check "both" if *any* juror found Van Poyck guilty of "both". RA. 3046-47. Thus, this aspect of the verdict was not required to be unanimous.

The jury returned a unanimous guilty verdict on first-degree murder. With respect to the subcategories described above, the jury checked the box for "felony murder", and the box for "both." RA. 4138. This meant that anywhere from one to eleven jurors believed that Van Poyck was guilty of premeditated murder and, by necessity, the actual killer.

At penalty phase, the State continued to argue that Van Poyck was the triggerman, while Van Poyck's counsel argued that he was not. *See, e.g.,* RA. 3511-12, 3522, 3524-265. Following the penalty phase, the jury recommended a sentence of death by a vote of 11 to 1. Judge Miller followed the

recommendation, sentencing Mr. Van Poyck to death. He specifically found four aggravators, and no mitigation. In rejecting mitigation concerning the identity of the triggerman, Judge Miller specifically noted in his written sentencing order that the State "in reality presented competent evidence that Mr. Van Poyck may have in fact been the individual who pulled the trigger and shot Fred Griffis." R. 40; RA. 4199.

On direct appeal this Court found that the evidence was legally insufficient to sustain a finding of premeditation or that Van Poyck was the triggerman. *Van Poyck v. State*, 564 So. 2d 1066, at 1069 (Fla. 1990). This Court nonetheless went on to uphold Van Poyck's conviction for first degree *felony* murder, and then sustained Van Poyck's death sentence under a proportionality analysis guided by *Tison v. Arizona*, 481 U.S. 137 (1987).

2. Postconviction Proceedings

In December 1992, Van Poyck filed a motion under Rule 3.850. That motion was denied by the trial court and, on appeal, affirmed by this Court by a 4-3 vote. That motion raised various issues concerning the effect of the sentencing jury and trial court's unsubstantiated findings that Van Poyck was the triggerman – but at no point sought post-conviction DNA testing (the statute permitting it had not been passed) that would have conclusively proven that he was not the triggerman for purposes of establishing that fact as an affirmative mitigating factor. *Van Poyck v. State*, 694 So. 2d 686 (1997).

3. The Motion For DNA Testing

In 2001, the Florida legislature passed Section 925.11, Fla. Stat. and Fla. R. Crim. P. 3.853, which expressly granted a right of DNA testing to criminal defendants. On September 30, 2003, Van Poyck filed his sworn Motion for Postconviction DNA Testing, pursuant to Rule 3.853, Florida Rules of Criminal Procedure. R. 1. The motion sought testing for the victim's DNA on the clothes worn by Van Poyck and Valdes on the day of the homicide. All of the clothing – Van Poyck's, Valdes and Griffis – was admitted into evidence and remains part of the record in this case. RA. Exs. 42-44, 47-48 (victim's

clothing); Exs. 84-85 (Valdes shirt and pants); Exs. 86-87 (Van Poyck's shirt and pants). All of the clothing is blood-stained, and fully capable of being tested.[3] Testimony at trial established that the gunshot to Officer Griffis' head was a "contact" wound, meaning that blood of the victim would be spattered out of both the entrance and exit wounds, "sort of like a JFK effect." RA. 1903, 1917, 2207. The shooter will have Officer Griffis blood on his clothing; the non-shooter will not – it is that simple.

Mr. Van Poyck's motion affirmatively stated that "The DNA testing requested herein will establish that Valdes was in fact the shooter and that Van Poyck was not." Citing *State v. Mills*, 788 So. 2d 249 (Fla. 2001), Van Poyck asserted that this newly discovered DNA evidence, which would establish that he was not the triggerman, would entitle him to a new sentencing hearing. Finally, Van Poyck specifically moved for "a plenary evidentiary hearing to further develop the germane facts." R. 8.

On February 19, 2004, the State filed its response. R. 47. Relying on copies of appellate briefs and selected pages of trial transcripts, the State's primary argument was that it

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[3] Following the shooting, the escape was abandoned and Van Poyck and Valdes attempted to leave the scene, crashed their car, and were injured.

would not matter whether Van Poyck was or was not the triggerman. The State offered two grounds in support of this position. First, the State argued, Van Poyck's prosecutor at trial did not *exclusively* argue to the jury that Van Poyck was the triggerman. From this, the State claimed that it should be inferred that the jury did not impose the death penalty based on any conclusion that Van Poyck was the shooter. Second, the State claimed Van Poyck had already raised "the triggerman issue" on direct appeal and the issue had already been resolved, with Van Poyck's death sentence nevertheless being upheld.

Van Poyck was deprived of any opportunity to rebut, refute or address the State's position, because on February 24, 2004 – just five days after the State filed its response – the lower court summarily denied Van Poyck's motion:

> 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.

R. 66.

IV. SUMMARY OF THE ARGUMENT

Van Poyck was sentenced to death by a jury and trial judge that believed that he was the triggerman, as evidenced by the special verdict form and by the trial court's sentencing order. This Court has previously found the evidence insufficient to show whether he was or was not the triggerman. Now, Van Poyck seeks, under Fla. R. Crim. P. 3.853, the right to produce evidence conclusively establishing that he was not the triggerman. If such evidence is not sufficient to show a "reasonable probability" to "mitigate [his] sentence" under that statute, Van Poyck submits that nothing would ever be sufficient under the "mitigation" portion of the statute. Indeed, this Court has already, and recently, ruled that newly discovered evidence, in that case testimony from another prisoner, exonerating a defendant as a triggerman is potentially mitigating in a capital case. *State v. Mills*, 788 So.2d 249 (Fla. 2001).

Mills' reasoning is both self-evident and in accord with a long line of cases from this Court consistently holding that the identity of the actual killer is a crucial, determinative factor in capital sentencing proceedings. A defendant's newly-established ability to scientifically and conclusively show that he was not the triggerman is at least as powerful as

the newly-discovered, testimonial evidence was in *Mills*. That is particularly true here, where DNA testing would show that Mr. Van Poyck's testimony – that he never saw the killing took place and did not want it to take place – was the truth. *Mills* and its progeny are controlling here, and mandate that the order under review be reversed and this case remanded to allow DNA testing, or at the very least, that there be an evidentiary hearing to determine whether, and the extent to which, such evidence can be produced and its likely effect in a new sentencing hearing.

V. ARGUMENT

The Lower Court Erred As A Matter Of Florida Law, And Under The Eighth And Fourteenth Amendments To The Constitution In Summarily Denying Mr. Van Poyck's Motion For Postconviction DNA Testing On The Grounds That There Is No Reasonable Probability That DNA Evidence Proving That Van Poyck Was Not The Triggerman Will Result In A Different Sentence.

1. Controlling Law and Standard of Review

Section 925.11, Fla. Stat., which was adopted in 2001, extended to convicted criminal defendants the substantive right to obtain DNA testing in order to challenge their conviction or sentence. The statute was prompted by the well-publicized case of Frank Lee Smith, who was shown through DNA testing to be actually innocent shortly after his death in early 2000 from cancer, after having spent years on death row, with the State having fought DNA testing at every turn during this time.

When this Court issued Fla. R. Crim P. 3.853, it established the court procedure to be employed when exercising that substantive right. *Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d 633 (Fla. 2001). Rule 3.853 sets forth the pleading requirements to be used by a convicted defendant to obtain DNA testing of biological evidence. "[T]he purpose of section 925.11 and rule 3.853 is to provide

defendants with a means by which to challenge convictions when there is a 'credible concern that an injustice may have occurred and DNA testing may resolve the issue.'" *Zollman v. State*, 820 So.2d 1059, 1062 (Fla. 2nd DCA 2002, quoting *In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d at 636 (Anstead, J., concurring).

The manner in which this right is implemented has constitutional dimensions. Where the State of Florida extends a right or a liberty interest, the right or liberty interest may only be extinguished in a manner that comports with due process. This was explained by the United States Supreme Court in *Evitts v. Lucey*, 469 U.S. 387 (1985). There, the Court noted that the States were not required to provide a right to a direct appeal of a criminal conviction. However, where the right was nonetheless extended, due process protection attached:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may chose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause.

Evitts, 469 U.S. at 400-01.[4]

Having extended to Mr. Van Poyck a right to obtain DNA testing of the physical evidence in his case, the State of Florida can only extinguish that right in a manner that comports with due process. To allow Mr. Van Poyck to be summarily denied DNA testing of the available physical evidence that would act as powerful mitigation to his sentence, would demonstrate an arbitrary process in violation of the Eighth and Fourteenth Amendments. This Court *sua sponte* ordered DNA testing in the case of *Duckett v. State*, Case No. SC01-2149 (Order dated

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[4] Similarly in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the United States Supreme Court found due process protection accompanied the extension of the right to seek clemency. In delivering the controlling plurality opinion for the Court, Justice O'Connor, along with three other justices concluded that, "[a] prisoner under a sentence of death remains a living person and consequently has an interest in his life." *Id.* at 288 (O'Connor, J., concurring in part and concurring in judgment). In finding that due process attached to the right to seek clemency, Justice O'Connor referenced her concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986). There, Justice O'Connor had found that " '[l]iberty interest protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause and the laws of the State.'" 477 U.S. 399, 428 (O'Connor, J., concurring in part, dissenting in part) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)). Justice O'Connor explained, "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest." *Ford*, 477 U.S. at 428-429.

3/21/03), at the request of the Appellant relinquished jurisdiction to permit DNA testing in *Rivera v. State*, Case No. SC01-2523 (Order dated 7/11/02), and recently ordered testing in *Swafford v. State*, Case No. SC03-931 (Order dated 3/26/04).

2. The "Reasonable Probability" Standard.

Rule 3.853 provides that a motion for DNA testing requires only that there be "a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence has been admitted at trial." Thus, a motion for DNA testing should be granted "if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial." *Knighten v. State*, 829 So.2d 249, 252 (Fla 2nd DCA 2002). In making this determination, the allegations contained in the motion must be taken as true. *Borland v. State*, 848 So.2d 1288, 1290 (Fla. 2003) ("If the State's response creates a factual dispute, the trial court should conduct an evidentiary hearing to resolve the dispute.")

The "reasonable probability" standard is a familiar legal standard first adopted and explained by the United

States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The next year, the Supreme Court used that standard for determining whether undisclosed exculpatory evidence was material. *United States v. Bagley*, 473 U.S. 667 (1985). As this Court has explained, exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. *Garcia v. State*, 622 So.2d 1325, 1330-31 (Fla. 1993). Under this standard, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 419, 434 (1995).[5]

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[5] Under this standard, it is not a question of whether there was sufficient evidence to convict. In *Kyles*, the U.S. Supreme Court explained:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence

3. The Trial Court Erred in Not Granting Van Poyck Relief.

Mr. Van Poyck seeks relief that is simple, inexpensive (and will be paid for by Mr. Van Poyck or his counsel if necessary) and can be expedited. The clothing worn by Mr. Van Poyck, Frank Valdes, and Officer Griffis on the day of the homicide were admitted into evidence and remain in the possession of the State. All of the clothing was stained with blood. As between Mr. Van Poyck and Valdes, only one set of clothing will have the blood of Officer Griffis – that being the shooter.

But it is important to make clear that this case is not - at least not at this stage - about Mr. Van Poyck's ability to establish and produce the exculpatory DNA evidence in question. The State below never challenged or questioned the existence of the DNA evidence on the

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and its significance for the prosecution.

514 U.S. at 453. Thus, for example, the fact that an eyewitness identified the defendant at trial is no bar to obtaining DNA testing under Rule 3.853. *Manual v. State*, 28 Fla. L. Weekly D1399 (Fla. 2nd DCA June 13, 2003); *Knighten v. State*, 829 So.2d 249, 251 (Fla. 2nd DCA 2002). With favorable DNA results, the eyewitness "testimony may not have been sufficient to convict." *Riley v. State*, 28 Fla. L. Weekly D1790 (Fla. 2nd DCA July 30, 2003. Given that assumption, it simply cannot be said that the verdict in this case – or more precisely, since this is a mitigation case, the sentence – is "worthy of confidence".

clothes, nor did it challenge or question Van Poyck's ability to produce, through DNA testing, exculpatory evidence that would conclusively prove that Valdes, and not Van Poyck, killed Fred Griffis. Indeed, any such challenge is not permissible at this stage of proceedings. *McLin v. State*, 827 So. 2d 948 (Fla. 2002), instructs that in the absence of an evidentiary hearing on a postconviction motion asserting newly discovered evidence, the motion's factual allegations must be accepted as true. Here, Van Poyck's motion for DNA testing unequivocally states that:

> The DNA testing requested herein will establish that Valdes was in fact the shooter and that Van Poyck was not. Van Poyck did not shoot the victim, nor did he anticipate or acquiesce in the victim's shooting. Van Poyck did not even witness the shooting, which occurred suddenly and without warning at the rear of the van, and out of Van Poyck's sight.

R. 5.

Neither the State, nor the lower court ever questioned Van Poyck's ability to produce the exculpatory DNA evidence, or that it would in fact conclusively establish that he was not the shooter. That being the case, Van Poyck's motion for DNA testing should have been allowed to proceed as a matter of course. No sentencer

in his case has ever had the benefit of the knowledge that would be gained from DNA testing, namely that Van Poyck did not kill the victim. Indeed, the sentencer (the jury and trial court) believed that he *did* kill the victim.

That the defendant did not actually kill the victim in a first degree murder case, indeed in this case did not even see or want it to occur, is powerful mitigation. *Mills* is only the latest in a long line of cases from this Court to so hold. *See, e.g., Garcia v. State*, 622 So.2d 1325 (1995) (counsel's failure to obtain witness statement concerning defendant's role in robbery as non-triggerman, and State's failure to turn over same, warranted new sentencing hearing); *Scott v. Singletary*, 657 So.2d 1129 (1995) (same). *Barrett v. State*, 649 So.2d 219, 223 (Fla. 1995) ("conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment."); *Cooper v. State*, 581 So. 2d 49, 51 (Fla. 1991) (same); *Downs v. State*, 572 So.2d 895 (1991) (trial court erred in excluding evidence and testimony at sentencing hearing that would have supported defendant's claim that he was not the triggerman); *Zerquera v. State*, 549 So.2d 189, 193 (Fla.

1989) (Grimes, J. concurring and dissenting) (reversing where trial error concerned identity of triggerman; "the question of who did the actual shooting directly bears on whether [defendant] should receive the death penalty…"). It is inescapable that Van Poyck's ability to show this fact as mitigation gives rise to a "reasonable probability" that DNA testing would mitigate his sentence.

Despite this authority, the State's only argument to date has been that "it would not matter" whether Van Poyck was the triggerman. In the trial court, the State claimed two specific grounds for this position: (1) that it did not "exclusively" argue that Van Poyck was the triggerman at trial, and (2) that this Court has previously decided that the issue was irrelevant. Neither argument holds up to scrutiny.

First, contrary to the State's suggestion below, the State did indeed argue that Van Poyck was the triggerman at trial. How often, how vigorously or at what phase it did so is beside the point. The State's theory that Van Poyck was the triggerman was asserted, and more importantly, it *was accepted*, by as many as 11 jurors, as well as by the trial judge. While one could argue that

it thus became a kind of *de facto* aggravator, it is enough to say that Mr. Van Poyck was deprived of a critical mitigating factor that "directly bears on whether [he] should receive the death penalty". *Zerquera*, *supra*. That is because, of course, neither sentencer was operating under the affirmative, and highly mitigating, knowledge that Van Poyck was, in fact, not the triggerman.

Second, neither this Court nor any other court in postconviction proceedings has *ever* found that conclusive proof that Mr. Van Poyck was not the triggerman "would not matter" for purposes of determining whether there is a "reasonable probability" that the trier of fact would have decided differently. That is because we have never had any such conclusive proof. Moreover, if such a finding had been made, it would have been contrary to all of the decisions from this Court concerning this issue, culminating in *Mills*, in which this Court specifically found that newly discovered, testimonial evidence indicating that the death row defendant was not the

triggerman was sufficient to warrant a new sentencing hearing.[6]

Finally, the trial court completely overlooked the wealth of exculpatory evidence that was not presented at trial, but has been discovered during postconviction proceedings and previously presented to this Court. To summarize:

- Contrary to the trial court's conclusion that he was raised in a "good family and by people that cared for him" the truth is that Mr. Van Poyck endured a chaotic and deprived upbringing involving a series of incompetent and abusive caretakers, with intermittent institutionalization beginning at the age of 11. The true conditions of Van Poyck's upbringing were perhaps best summarized by the contemporaneous, 1970 report of an HHS supervisor, who described Mr. Van Poyck's stepmother as "totally destructive in her open, maniacal hostility towards the [Van Poyck] children" and recommended Mr. Van Poyck's revocation "not as a means of rehabilitation but as a means of immediately removing [Van Poyck] from a highly destructive environment."

- A lengthy history of abuses beginning in his teen years at places such as the notorious Okeechobee School for Boys, and Sumter Correctional Institute;

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[6] The earlier decision of this Court upholding the death sentence despite the lack of evidence showing that Van Poyck was the triggerman was based on a proportionality analysis, i.e., whether Van Poyck constitutionally could be sentenced to death. That obviously is a different question than whether there is a reasonable probability that the actual sentence would have been different if it was conclusively shown that he was not the shooter.

- A mental health history, and current organic brain syndrome, in remission, which leads to impaired judgment;
- A history of substance abuse, including on the day of the offense in question that further led to impaired judgment.

This previously unpresented evidence must be considered as part of the full mitigation picture when considering whether mitigating DNA evidence would create a "reasonable probability" of a different outcome. *Lightbourne v. State*, 742 So. 238 (Fla. 1999); *State v. Gunsby*, 670 So.2d 920 (Fla. 1996). Here, three justices of this Court have already concluded, based upon just the mitigating evidence developed during the postconviction process, i.e., *without* considering the lack of evidence excluding him as the triggerman, that Mr. Van Poyck's jury probably would have reached a different result had it been informed of this evidence. *See Van Poyck*, *supra*, 694 So. 2d at 699 (Anstead, J. dissenting) ("in the post-conviction hearing below the appellant presented a vast array of mitigating circumstances of the most serious nature that should have been thoroughly investigated and presented . . .").

4. The Lower Court Erred in Denying the Motion for An Evidentiary Hearing.

Van Poyck submits that if he can prove that DNA testing conclusively establishes that he is not the triggerman – and the State apparently now concedes that he can – he should be entitled to testing as a matter of course. But at the very least he is entitled to an evidentiary hearing as he specifically requested. In *McLin v. State*, 827 So. 2d 948 (Fla. 2002), a case with remarkable parallels to the case at bar, this Court instructed that:

> [O]rdinarily an evidentiary hearing is required for the trial court to properly determine, in accordance with *Jones*, whether the newly discovered evidence is of "such nature that it would probably produce an acquittal or retrial."

McLin, at 956.

In *McLin*, this court squarely addressed the correct standard of appellate review of a trial court's summary denial of a Rule 3.850 motion asserting newly discovered evidence casting doubt upon the identity of the triggerman. The defendant in *McLin* had been convicted of first-degree murder for allegedly shooting a man during a robbery. Following an unsuccessful direct appeal, *McLin* filed a Rule 3.850 motion asserting newly discovered evidence in the form of a sworn affidavit from a codefendant who had witnessed the murder.

The affidavit called into question McLin's identity as the shooter. The trial court summarily denied relief on this claim without conducting an evidentiary hearing. The court of appeals affirmed, and this Court accepted review in order to clarify the correct standard of appellate review of a trial court's summary denial of a Rule 3.850 motion asserting newly discovered evidence.

The *McLin* court reversed, holding that the trial court erred in failing to conduct an evidentiary hearing, and that the appellate court erred in affirming the trial court's summary denial. The *McLin* court initially stated that:

> We begin with the legal principles governing when a trial court may properly deny a motion for postconviction relief without an evidentiary hearing. This Court has explained that "to support summary denial without a hearing, a trial court must either *state its rationale* in its decision or attach those *specific parts of the record* that refute *each claim* presented in the motion.

McLin, *supra*, at 954 (emphasis added). Then, quoting *Foster v. State*, 810 So. 2d 910, 914 (Fla. 2002), the Court continued:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either *facially invalid or conclusively refuted by the record*. Further, where no evidentiary hearing is held below, *we must accept the defendant's*

> *factual allegations* to the extent they are not refuted by the record.

Id., at 954 (emphasis added).

In such summary denial cases, "the sole focus of legal inquiry [is] whether the files and records conclusively refuted the allegations of the motion." *Id.*, at 954. As made clear in the body of Van Poyck's main argument, *supra*, the "exhibits" submitted to the lower court in the State's response (which the lower court relied upon to deny the motion) do not "conclusively refute the allegations of the motion," (allegations which must be accepted as true), and thus the lower court erred in summarily denying Van Poyck's motion without first conducting an evidentiary hearing.[7] Moreover, because, unlike *McLin*, this is a capital case, this issue is governed by Rule 3.851, which, the *McLin* court pointed out, "now mandates on evidentiary hearing on claims listed by the defendant as requiring a factual determination." *McLin*, at 954, footnote 3. Based upon *McLin*, the lower court erred in failing to conduct the evidentiary hearing requested

[7] The error is especially egregious here where the lower court denied Van Poyck's motion just five days after the state filed its 813-page response, thus depriving Van Poyck of the opportunity to refute and rebut the "exhibits" contained in the state's response, the same "exhibits" which the trial court specifically relied upon to deny Van Poyck's motion.

in Van Poyck’s motion.

VI. CONCLUSION

This Court has already been bitterly divided twice as to Mr. Van Poyck's fate, with three justices finding that it is "kind of scary" that he is on death row in light of the serious questions surrounding the legitimacy of proceedings resulting in that sentence. *Van Poyck v. Singletary*, 715 So.2d at 938 (Anstead, J. dissenting). Now, due to the advent of DNA and the legislature's recognition of the pivotal role it can play in divining the truth in these kinds of cases, the opportunity exists to have his sentence based on the absolute truth – that he did not kill the victim and did not see or want it to occur – rather than the belief that he did kill the victim, or the later decision from this Court that the evidence was inconclusive on that point.

The request for DNA testing in this case meets the standard set forth in Rule 3.853 and *Mills*, *supra*, for allowance of DNA testing in that there is a reasonable probability that the results of such testing will mitigate his sentence of death. Accordingly, this case should be remanded to the trial court to allow such testing or, in the alternative, for an evidentiary hearing to determine the existence and mitigating nature of such evidence.

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

I here certify that a true and correct copy of the foregoing initial appellant's brief has been furnished to: Celia A. Terenzio, Senior Assistant Attorney General, Department of Legal Affairs, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL., 33401, on this 7th day of September, 2004, by U.S. Mail.

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VIII. CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief of Appellant was generated in Courier New 12 point font, which complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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Mark Olive