IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Petitioner,

v.

HARRY K. SINGLETARY, JR., Secretary, Florida Department of Corrections,

Respondent.

Case No. 89,870

REPLY BRIEF OF WILLIAM VAN POYCK IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF AND FOR WRIT OF HABEAS CORPUS

I. MR. VAN POYCK'S PETITION WAS TIMELY FILED.

Despite the clear and obvious time frames identified in Fla. R. Crim. P. 3.851, Respondent raises the specious argument that Mr. Van Poyck's petition was due at the time he filed his appeal in his 3.850 motion. Respondent then completely misconstrues a Florida case in an attempt to avoid the clear language of the statute.

By its terms, Rule 3.851(6) "will govern the cases of all death-sentenced individuals whose convictions and sentences became final after January 1, 1994." "Finality" is statutorily defined in Rule 3.851(b)(1):

> For the purposes of this rule, a judgment is final . . . (b) upon the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

Mr. Van Poyck's petition for certiorari was denied on March 18, 1991. Van Poyck v. Florida, 499 U.S. 932 (1991). Based on this certiorari denial, Mr. Van Poyck's Rule 3.850 motion had to be

filed by March 18, 1993. Clearly, by the unambiguous provisions of Rule 3.851, Mr. Van Poyck's conviction and sentence became final before January 1, 1994; hence, his habeas petition was not required to be filed with his 3.850 motion.

Respondent's citation to Rogers v. Singletary, 21 Fla. L. Weekly S 503 (Fla. November 27, 1996) stretches the boundaries of ethical citation. Respondent cites Rogers for the proposition that the Florida Supreme Court rejected the "state's time-bar argument regarding habeas petition only because defendant's brief in 3.850 appeal was filed before enactment of the new rule." (Response Br. at pp. 1-2). In fact, the Rogers court ruled that Rogers' habeas petition was timely because Rogers' appeal on his 3.850 motion was filed before the effective date of Rule 3.851. Obviously, if a defendant's Rule 3.850 appeal is filed before January 1, 1994, the defendant's sentence and conviction must be final before that date, because the 3.850 motion may be filed only after any certiorari to the United States Supreme Court is denied. Thus, the Rogers court was not overruling or even distinguishing Rule 3.851; it was simply following the clear language of the rule, using the later-filed 3.850 appeal as a time guidepost rather than the earlier denial of certiorari.

To state that the Rogers court rejected the respondent's time-bar argument "*only because* Defendant's Brief In 3.850 was filed before enactment of the new rule" is a blatant mischaracterization of that case. Mr. Van Poyck's Habeas Petition is timely.

II. MR. VAN POYCK'S PETITION SHOULD BE GRANTED BASED ON EACH OF THE CLAIMS RAISED.

A. Mr. Van Poyck Received Ineffective Assistance Of Counsel On His Direct Appeal When Appellate Counsel Failed To Adequately Raise The Issue Of The Trial Court's Error In Refusing To Grant Defense Challenges For Cause Regarding Jurors Who Indicated That They Would Automatically Vote For Death, And Who Were Convinced Of Mr. Van Poyck's Guilt, Contrary To The Sixth, Eighth And Fourteenth Amendments To The U.S. Constitution.

1. This Argument Is Not Procedurally Barred And The Court Should Review Its Merits.

The Respondent wrongly asserts that this argument is procedurally barred because it was raised on direct appeal and in Mr. Van Poyck's Rule 3.850 motion. A writ of habeas corpus is the proper vehicle for raising a claim of ineffective assistance of appellate counsel and Mr. Van Poyck has never before raised such a claim. Puiatti v. Dugger, 589 So. 2d 231, 234 (Fla. 1991).

Mr. Van Poyck's claim of ineffective assistance is premised on the fact that his appellate counsel generally raised a meritorious constitutional issue on direct appeal but did so in a wholly deficient manner when he "supported" the argument with evidence of two jurors who never sat on Mr. Van Poyck's jury and were excused for personal reasons, leading this Court to reject the argument for that very reason. Van Poyck v. State, 564 So. 2d 1066, 1071 (Fla. 1990). In other words, although appellate counsel raised the issue of erroneous denials of for cause challenges, this Court has never reviewed the actual error because counsel failed to properly bring it to this Court's attention.

Counsel can be ineffective for failing to raise an issue on direct appeal and also for raising an argument in a totally

deficient manner. See Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985); Puiatti, 589 So. 2d at 235. Contrary to the State's suggestion, an ineffective assistance of appellate counsel claim is not procedurally barred simply because the underlying constitutional error was raised on direct appeal. See, e.g., Wilson, 474 So. 2d at 1164.

While Mr. Van Poyck raised the trial court's error in not granting for cause challenges in his Rule 3.850 motion (Argument VI), the State responded that the claim was procedurally barred because it was or could have been raised on direct appeal. If the Court accepts the State's response in that proceeding, and finds the 3.850 argument barred, no court will have reviewed Mr. Van Poyck's true claim as raised herein. Finding the argument procedurally barred here will only serve to compound counsel's error and its prejudice to Mr. Van Poyck and would effectively forever preclude him from raising a meritorious IAC claim. That cannot be the law.

This case is easily distinguishable from Bolender v. Dugger, 564 So. 2d 1057, 1059 (Fla. 1990) and the other cases cited by the Respondent for the proposition that an ineffective assistance of appellate counsel claim does not permit a second appeal. Here, Mr. Van Poyck is not seeking to relitigate an issue previously considered because no court has yet reviewed the real issue raised in this argument. To the contrary, it is precisely appellate counsel's error in raising the wrong argument that gives rise to the ineffective assistance claim.

2. Mr. Van Poyck Has Established All Elements Of Constitutional Error By The Trial Court.

To show constitutional error, Mr. Van Poyck must demonstrate that: (1) the trial court erred in not striking at least one juror for cause, requiring Mr. Van Poyck to expend a peremptory challenge, (2) he exhausted his peremptory challenges, (3) he asked for and was denied an additional peremptory challenge, and (4) an objectionable juror sat on the jury. Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995); Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990). Mr. Van Poyck has satisfied all of these elements.

a. The Court erroneously denied for cause challenges to pro-death jurors and jurors who did not presume Mr. Van Poyck to be innocent.

Contrary to the Respondent's suggestion, a potential juror who shows an improper death penalty bias or does not presume the defendant innocent is not rendered competent to sit as a juror simply because he or she states that he or she will follow the law or the court's instructions. Bryant, 656 So. 2d at 428; Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990); Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989); Singer v. State, 109 So. 2d 7, 24 (Fla. 1959); Huber v. State, 669 So. 2d 1079, 1081 (Fla. 4th DCA 1996). This Court has held, rather, that a juror must be struck if there is "any reasonable doubt" as to his or her impartiality, regardless of whether he or she says the magic words that he or she will follow the court's instructions and the law. Singer, 109 So. 2d at 24 (emphasis added).

For instance, in Bryant, a prospective juror stated he was strongly in favor of the death penalty, that it was appropriate for

anyone convicted of first-degree murder, and that life in prison would be too lenient a sentence for such a crime. 656 So. 2d at 428. Although the juror later stated he could follow the court's instructions, this Court held the trial court had erred in not striking the juror for cause. Id.; see also Floyd v. State, 569 So. 2d 1225, 1230 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Hill v. State, 477 So. 2d 553 (Fla. 1985).

Here, although Ms. Moker, Mr. Carter, Mr. Nickerson, Mr. Miller and Mr. Farmer all said at one point that they would follow the court's instructions and/or the law, their responses as a whole are no different from those found objectionable in Bryant.[1] The court should have struck them for cause rather than force Mr. Van Poyck to use peremptory challenges on them.

In Hamilton, this Court found the trial court had erred in not striking for cause a prospective juror who evidenced a preconceived notion of the defendant's guilt. The juror stated that she thought the defendant was guilty and would expect him to present evidence

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[1] This Court held that Ms. Abufaris and Mr. Bruschi, the two potential jurors named by appellate counsel, should have been struck for cause due to their pro-death biases, Van Poyck, 564 So. 2d at 1071, even though they stated they would follow the court's instructions. For instance, Ms. Abufaris said she would follow the court's instructions both before and after stating she thought death was the appropriate sentence for any intentional murder. R. 741-50. Mr. Bruschi alternately stated he could follow the court's instructions regardless of his personal feelings, R. 815, that he thought death was the appropriate penalty in any premeditated murder case, R. 822-23, and that he could base his decision on the law and the Court's instructions. R. 824. Because the responses of Ms. Moker, Mr. Carter, Mr. Nickerson, Mr. Miller and Mr. Farmer are indistinguishable from those of Ms. Abufaris and Mr. Bruchi, they, too, should have been struck for cause.

to convince her he was not. 547 So. 2d at 632. She eventually stated she would follow the court's instructions, but this Court found reversible error because her responses, as a whole, demonstrated she did not presume the defendant innocent. Id.

Similarly, in Singer, a venireperson stated that he knew the victim's family and that knowledge might affect his ability to render an impartial verdict. 109 So. 2d at 20. He then stated it would take substantial evidence to remove his opinions about the case. Finally, he stated he would base his verdict on the testimony presented at trial. Notwithstanding this last unequivocal statement, this Court held the trial court erred in not striking the potential juror for cause because of reasonable doubt as to his ability to render a verdict free from his preconceived opinions. Id. at 24-5; see also Huber, 669 So. 2d at 1081-82.

Here, Mr. Aldridge stated he would make his decision based on the evidence to be presented at trial, R. 700, but then stated that, based on what he had read about the case, he believed Mr. Van Poyck was guilty. R. 703. He further stated he would have a difficult time finding Mr. Van Poyck not guilty unless he presented evidence that he had not committed the crime. R. 704. Then, in response to repeated questioning from the court as to whether he would be able to follow its instructions, not form an opinion until he had heard all of the evidence, and place the burden of proof on the State, Mr. Aldridge simply managed to respond that he "hoped" he could. R. 704-05. His responses as a whole, especially when the statements showing his bias were given after his statement that

he could based his verdict on the evidence, are indistinguishable from those of the prospective jurors in Hamilton, Singer and Huber. Therefore, the court erred in not granting the defendant's for cause challenge to Mr. Aldridge.

b. Mr. Van Poyck exhausted and then was denied peremptory challenges.

Mr. Van Poyck thereafter exhausted his peremptory challenges and asked the court for an additional one to strike Ms. Moody. The court stated it would only grant the additional peremptory if the defendant agreed to strike another potential juror, Mr. Chase, without being able to question him. The court recognized that the appellate court would not like its proposed bargain. (R. 1364) By offering this "deal," the court forced Mr. Van Poyck into a Hobson's choice: either give up his constitutional right to question a prospective juror, see, e.g., O'Connell v. State, 480 So. 2d 1284, 1286-87 (Fla. 1985), or give up his constitutional right to an additional peremptory challenge after he had been forced to exhaust them on jurors who should have been struck for cause. By choosing the latter, Mr. Van Poyck's defense counsel in no way can be said to have waived his right to the additional peremptory challenge and did not "pass up" an opportunity to strike Ms. Moody.

Respondent's cited case of Rhodes v. State, 638 So. 2d 920 (Fla. 1994) is easily distinguishable because there the defendant was not forced to give up a constitutional right in exchange for his constitutional right to rehabilitate two anti-death penalty jurors the court proposed striking for cause. Instead, the

defendant declined to question the two jurors after being offered the chance to do so by the court. Obviously, by so doing, the Rhodes defendant waived his right to rely on the court's error in striking them without the defendant first questioning them. Here, however, defense counsel's refusal to accept the trial court's "bargain" cannot be seen as a voluntary relinquishment of Mr. Van Poyck's right to an additional peremptory challenge, as suggested by the Respondent. Rather, this Court should find that the "bargain" constituted a refusal by the trial court to grant the extra challenge.

c. An objectionable juror sat on Mr. Van Poyck's jury.

Finally, Respondent incorrectly states without citation, on page 6 of its brief, that Mr. Van Poyck cannot show constitutional error because Ms. Bradford and Ms. Moody were competent to sit as jurors. It is clearly established, however, that this constitutional claim does not require proof that jurors who should have been struck for cause actually sat on the jury, but only requires proof that someone objectionable, someone the defendant did not want for whatever reason, sat on the jury. See, e.g., Trotter, 576 So. 2d at 692; Hill, 477 So. 2d at 556 (finding reversible error with no discussion of objectionable juror's response to voir dire); Jones v. State, 660 So. 2d 291, 293 (Fla. 2d DCA 1995) (question is not whether juror who sat was competent, but whether other potential jurors who defendant struck with peremptory challenges should have been struck for cause).

Here, Mr. Van Poyck specifically asked the court for an additional peremptory challenge in order to strike Ms. Moody and attempted to strike Ms. Bradford for cause. This meets his burden.[2] Trotter, 576 So. 2d at 693 (must show defendant objected to juror by attempting to strike for cause or peremptorily). Contrary to the State's argument, the fact that he could have used a peremptory challenge to strike these women earlier in the jury selection process does not matter. The Supreme Court in Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989), on which the Respondent relies, found no constitutional error because the defendant could point to no juror whom the trial court had erroneously refused to strike for cause. Although the Court noted that Pentecost had peremptory challenges available with which to strike the jurors he objected to, that was irrelevant to the Court's decision. In fact, when actually faced with the issue, this Court rejected Respondent's argument. In Hamilton, 547 So. 2d at 632, this Court found constitutional error where a defendant was refused an additional peremptory challenge even though he had a peremptory challenge available earlier with which he could have struck the objectionable juror. Accordingly, Mr. Van Poyck has demonstrated constitutional error.

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[2] Mr. Van Poyck need only show that the trial court erroneously denied one for cause challenge and that one objectionable juror sat on his jury. Bryant, 656 So. 2d at 428.

3. Mr. Van Poyck's Appellate Counsel Rendered Ineffective Assistance On Direct Appeal.

Finally, it is clear that appellate counsel's performance regarding this issue was constitutionally deficient. Indeed, the Respondent does not even bother to argue that appellate counsel's performance was not deficient, but rather simply claims that Mr. Van Poyck was not prejudiced because the argument was without merit. However, Mr. Van Poyck need not show to a certainty that he would have prevailed had the argument been properly raised below, but instead must simply show that counsel's deficiency "undermines confidence in the fairness and correctness of the appellate result." Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994) (internal quotations omitted).

Clearly, appellate counsel's errors regarding this issue undermine any confidence in the appellate result. Perhaps the clearest demonstration that this is so is the fact that this Court held that the two jurors named by appellate counsel should have been struck for cause -- it rejected the argument on direct appeal not for any of the reasons now advanced by Respondent, but simply because these two jurors had been struck, for personal reasons. But these were the wrong jurors, and the argument was completely undeveloped. Mr. Van Poyck has shown ineffective assistance of appellate counsel, and the Court should grant this writ.

B. Mr. Van Poyck's Sentence Of Death Is Arbitrary, Capricious And Inherently Unreliable, And In Violation Of The Double Jeopardy Clause, Where The Jury Recommendation Of Death As Well As The Actual Sentence Of Death Are Based On Erroneous "Factual Findings" Which Are Legally Insufficient As A Matter Of Law And Which The Florida Supreme Court Acquitted Mr. Van Poyck Of, Contrary To The Fifth, Eighth And Fourteenth Amendments to The Constitution.

Respondent completely mischaracterizes Mr. Van Poyck's argument on this claim. Respondent would like Mr. Van Poyck to argue that because he was not the triggerperson, his minimal participation in the incident did not justify imposition of the death penalty. (See Response Br. at p. 11) Thus characterized, Respondent argues procedural bar.

Mr. Van Poyck is not relitigating the participation issue; he is litigating the improper use of the premeditated murder conviction and triggerman findings--issues upon which Mr. Van Poyck was acquitted--during the sentencing phase. Because Mr. Van Poyck was acquitted of premeditated murder and of being the triggerman, it was improper for the jury to consider these as facts, and for the trial court to rely on them, in sentencing Mr. Van Poyck to death. These issues impermissibly affected potential aggravators and kept the jury and court from considering proper non-statutory mitigators, rendering the death sentence unreliable and unconstitutional.

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) is directly analogous. The use of a conviction upon which the defendant has been acquitted impermissibly taints the balance of aggravators and mitigators. Respondent has not addressed--and cannot address--the

fact that the improper conviction and evidentiary fact prevented the jury and court from recognizing the non-statutory mitigating circumstances of the murder not being premeditated and Mr. Van Poyck not being the triggerman. This improper weighing of aggravators and mitigators constitutes constitutional error, rendering the death sentence arbitrary, capricious and inherently unreliable.

C. Mr. Van Poyck's Convictions For Non-Existent Crimes Should Be Overturned.

Mr. Van Poyck's "attempt" convictions were all based, or at least may have been, on "attempted felony murder"--which is not a crime. State v. Gray, 654 So. 2d 552 (Fla. 1995). Seeking to rebut this claim, the State first argues that Gray should not be given retroactive application. While, as noted in our opening brief, this is an open question under Florida law (and in fact the Court of Appeals in, among others, the State's cited case of Freeman v. State, 679 So. 2d 364 (Fla. 4th DCA 1996) has certified the question to this Court), this Court in State v. Wilson, 680 So. 2d 411 (Fla. 1996) was not deciding the retroactivity question, but simply whether retrial was appropriate on lesser included offenses following reversal for a Gray violation. That is a different issue than the question of whether Gray should be applied retroactively.

Whether a change in decisional law should be retroactively applied does not merely involve a determination as to whether the offense was a "statutorily defined offense." Freeman, supra at 365, quoting State v. Wilson, 680 So. 2d 411 (Fla. 1996). Rather, the question of retroactivity depends on whether the new rule (1)

originates in either the United States Supreme Court or the Florida Supreme Court; (2) is constitutional in nature; and (3) has fundamental significance. State v. Callaway, 658 So. 2d 983 (Fla. 1995). As noted in Woodley v. State, 673 So. 2d 127, 128 (Fla. 3d DCA 1996) Gray meets each of these criteria: it was decided by the Florida Supreme Court; it affects due process rights and liberty interests inasmuch as it means that those individuals affected by it had been convicted--and presumably sentenced--on the basis of a non-existent crime; and it is of fundamental significance because it places beyond the authority of the State the power to regulate certain conduct or impose certain penalties, namely attempted murder during the commission of a felony. See Woodley, supra. Whether this "non-existent crime" was a "statutorily defined offense with enumerated elements and identifiable lesser offenses" may, under Wilson, affect the ability to retry a defendant on lesser included offenses--but should have nothing to do with the more fundamental question of whether the decision itself should be retroactively applied.

Respondent next claims that Mr. Van Poyck's "attempted manslaughter" convictions should stand even if Gray is applied retroactively since this was a "valid lesser included offense." This argument fails for two reasons. First, as previously pointed out, any "attempted manslaughter" conviction is no less problematic than "attempted felony murder." "Manslaughter," requires death caused by an intentional unlawful act or culpable negligence--by definition, it is exclusive of an intentional killing. Hence, the

"attempted manslaughter" convictions (i.e., the intent to commit manslaughter) must have been based on what was tantamount to a felony murder theory. Second, the "attempted manslaughter" convictions suffer from still another fatal defect: Mr. Van Poyck's jury was instructed on "attempted manslaughter" by being told that the underlying crime of manslaughter was proven by showing death caused by "the act of William Van Poyck or procurement of William Van Poyck or culpable negligence of William Van Poyck." (R. 3028-29, 3033) By providing the "culpable negligence" standard, condemned by this Court in numerous cases, and by not including any limiting language to indicate that this was not applicable to "attempt crimes," the Court erred. Reid v. State, 656 So. 2d 191, 192 (Fla. 1st DCA 1995).[3] And the error was fundamental and hence not barred. Id.

Finally, Respondent urges the Court to uphold the conviction for attempted first degree murder of Officer Turner. In so doing, Respondent all but ignores Harris v. State, 658 So. 2d 1226 (DCA 4th Dist. 1995), which holds that a conviction for attempted first degree murder which could have been premised on either of two alternative grounds is not valid if one of the grounds is based on an underlying crime which does not exist. Here, the jury was instructed on first degree murder under both a premeditation, as well as a felony murder, theory. It is not at all clear which of

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[3] It is no answer to conclude that the evidence would suggest a conviction on something other than "culpable negligence" because the instruction as given did not contain the mandatory language "intentional act or procurement." Cf. Reid, supra at 192.

the two theories the jury relied on in finding Mr. Van Poyck guilty of the attempted murder of Officer Turner. The evidence relied on by the State--that Mr. Van Poyck allegedly pulled the trigger of a gun pointed at Officer Turner--was hotly disputed by Mr. Van Poyck at trial. (R. 2602)[4] Yet, under the trial court's instructions, a finding on this point was not necessary for the jury to reach an attempted first degree murder conviction. This Court cannot say with any degree of certainty, let alone beyond a reasonable doubt, that the "attempted first degree murder" conviction was based on premeditation. Harris, supra at 1227; Allen v. State, 676 So. 2d 491, 492 (Fla. DCA 1996).

CONCLUSION

For the reasons set forth above and in Mr. Van Poyck's petition, Mr. Van Poyck respectfully requests that the petition for writ of habeas corpus be granted, and that he be granted the relief requested.

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[4] Indeed, as shown in the 3.850 Petition, the physical evidence that could have and should have been presented, showed that the Turner testimony about hearing a "click" was virtually impossible due to internal inconsistencies in Turner's testimony.

Dated this 27th day of March, 1997.

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the foregoing document was sent via fascimile to Celia A. Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401, this 27 day of March, 1997.

Jeffrey D. Davis