IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. SC 05-1513
	)	
STATE OF FLORIDA,	)	Circuit Court Case Nos. 87-CF006736 A02 and 88-CF011116 A02
	)	
Appellee.	)	
	)	
	)	

INITIAL BRIEF OF APPELLANT

Submitted by:

Mark Olive
Florida Bar No. 0578533
Law Office of Mark Olive
320 West Jefferson Street
Tallahassee, FL 32301

Of Counsel:

Jeffrey O. Davis
Wisconsin Bar No. 1011425
Lauri A. Rollings
Wisconsin Bar No. 1049543
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000

TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT 1

II. REQUEST FOR ORAL ARGUMENT....................................... 2

III. STATEMENT OF THE CASE 3

A. Procedural History 3

B. Relevant Facts 4

1. Mr. Van Poyck's Trial.. 4

2. The Motion For DNA Testing 6

3. The Motion to Vacate Based on the Testimony of Enrique Diaz.. 8

IV. SUMMARY OF THE ARGUMENT 9

V. ARGUMENT 11

A. If the U.S. Supreme Court Grants Van Poyck's Certiorari Petition, This Court Should Stay This Appeal Pending the U.S. Supreme Court's Final Resolution on the Merits........................... 11

B. If Van Poyck's Certiorari Petition Is Denied, This Court Should Reconsider Its Prior Holding on the Triggerman Issue in Light of Its Own Precedents and the U.S. Supreme Court's Holding in Bradshaw v. Stumpf............................. 13

VI. CONCLUSION 16

VII. CERTIFICATE OF SERVICE 18

VIII. CERTIFICATE OF COMPLIANCE..................................... 19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bradshaw v. Stumpf, ___ U.S. ____, 125 S.Ct. 2398 10, 15, 16

Tison v. Arizona, 481 U.S. 137 6

STATE CASES

Barrett v. State, 649 So.2d 219 14

Cooper v. State, 581 So.2d 49 14

Downs v. State, 572 So.2d 895 14

Lurie v. Automobile-Owners Insurance Co., 605 So.2d 1023 12

State v. Mills, 788 So.2d 249 .... 11, 12

The Florida Bar v. Arango, 461 So.2d 932 12

Van Poyck v. State, 564 So.2d 1066 .... 3, 4, 6

Van Poyck v. State, 906 So.2d 106, ... 7

Van Poyck v. State, 908 So.2d 326 .... 7, 13

Zerquera v. State, 549 So.2d 189 14

I. PRELIMINARY STATEMENT

In this Capital Case, William Van Poyck appeals the Circuit Court's denial of his Motion to Vacate and Set Aside Judgment, Conviction and/or Sentence, which was brought pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851, Citations to the record on appeal herein will be made using the symbol "R." followed by the correct pagination. Because Van Poyck's request for an evidentiary hearing was not granted, there are no transcripts. References to the original record on appeal will use the symbol "RA.," followed by the correct pagination. For the Court's convenience, appendices are attached containing Van Poyck's related Motion for Post Conviction DNA Testing, which was filed pursuant to Fla. R. Crim. P. 3.853, the trial court order denying that motion, and this Court's opinion on Van Poyck's appeal from the denial of that motion.

II. **REQUEST FOR ORAL ARGUMENT**

This is a capital case in which a Motion to Vacate and Set Aside Judgment, Conviction and/or Sentence has been denied. Oral argument is appropriate, given the seriousness of this case and the issues presented. Van Poyck accordingly requests that the Court hold oral argument in this case.

III. STATEMENT OF THE CASE

A. Procedural History.

Van Poyck and his co-defendant, Frank Valdes, were each charged with one count of first-degree murder arising out of an attempt to free state prisoner James O'Brien from a prison transport van in 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, Van Poyck was sentenced 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 conviction and the death sentence. *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990).

On April 26, 2005, Van Poyck filed a motion in the trial court under Rule 3.850, in which he submitted the sworn affidavit of Enrique J. Diaz. R. 1-19. Diaz stated under oath that Van Poyck's co-defendant, Frank Valdes, confessed to Diaz on numerous occasions that he, Valdes, was the individual who shot and killed Officer Griffis. R. 18.

On June 23, 2005, the Circuit Court denied Van Poyck's 3.850 motion, holding it did not present newly discovered

evidence. R. 48-49. On July 22, 2005, Van Poyck initiated this appeal by filing a timely Notice of Appeal. R. 50-53.

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, on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported state prisoner James O'Brien to a doctor's office in West Palm Beach. The officers were confronted by Van Poyck and his accomplice, Frank Valdes. 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 "he heard a series of shots and saw Griffis fall to the ground." *Id.* at 1067.

At trial, Van Poyck testified at the guilt/innocence phase, denying that he was the shooter. 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. Turner 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 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".

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 the 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. The judge followed the recommendation, sentencing Van Poyck to death. In rejecting mitigation concerning the identity of the triggerman, Judge Miller 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." RA. 4199.

On direct appeal this Court found that the evidence was 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).

1. The Motion For DNA Testing

On September 30, 2003, Van Poyck filed his sworn Motion for Postconviction DNA Testing, pursuant to Fla. R. Crim. P. 3.853. Appendix A. The motion sought testing for the victim's DNA on the clothes worn by Van Poyck and Valdes on the day of the homicide. 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. RA. 1903, 1917, 2207.

Because the shooter's clothing would contain Officer Griffis' blood and the non-shooter's clothing would not, Van Poyck's motion affirmatively stated that DNA testing would establish that Valdes was in fact the shooter and that Van Poyck was not, which would entitle Van Poyck to a new sentencing hearing.

On February 24, 2004, the trial court summarily denied Van Poyck's Motion. Appendix B. After his timely motion for reconsideration was denied, Van Poyck appealed to the Florida Supreme Court, Case No. SC04-696 (the "Related Appeal"). In the Related Appeal, this Court upheld the denial of DNA testing on May 19, 2005, holding that Van Poyck's non-triggerman status was irrelevant to his death sentence. *Van Poyck v. State*, 908 So.2d 326, 330 (Fla 2005); Appendix C.

This Court denied Van Poyck's timely motion for rehearing on July 15, 2005. *Van Poyck v. State*, 906 So.2d 106, (Fla. 2005). On December 5, 2005, Van Poyck filed a timely Petition for Writ of *Certiorari* in the United States Supreme Court, which is pending.

2. The Motion to Vacate Based on the Testimony of Enrique Diaz.

On April 26, 2005, Van Poyck filed a motion under Fla. R. Crim. P. 3.850 in which he submitted the sworn affidavit of Enrique J. Diaz. R. 1-19. Diaz stated that, while incarcerated, he was a legal aide at the Florida State prison law library for a number of years during the 1990s. R. 18. During that period, Diaz met regularly with Van Poyck's co-defendant, Frank Valdes. Diaz stated that Valdes confessed on numerous occasions that he, Valdes, was the individual who shot and killed Officer Griffis. R. 18. Specifically, Diaz stated:

> During the years 1984 through 2001, I was a prisoner at Florida State Prison (F.S.P.) at Starke, Florida. Between the years 1990-1997, I worked, on and off, as a legal aide in the F.S.P. law library. During this period part of my job was helping other prisoners, including those on death row, with their various legal issues and problems.
>
> . . .
>
> During the above-referenced period I met, and became friends with Frank Valdes. Valdes regularly came to the F.S.P. law library (writ room) seeking legal assistance with his case (at the time he was filing many **pro se** pleadings in his own case).
>
> . . .
>
> During this period Frank Valdes regularly spoke to me about the details of his case. In particular Valdes repeatedly and consistently told me that he, Valdes, had shot and killed Officer Fred Griffis. Moreover, I personally witnessed Valdes make

> the same confession to several other inmate legal aides on numerous occasions.

Sworn Affidavit of Enrique J. Diaz, R. 18. In his affidavit, Diaz also stated he was unwilling to come forward with this information until he was released from prison due to concern for his personal safety, a concern that was reinforced when Valdes was later murdered in his cell by a group of prison guards. R. 18. Finally, Diaz stated he is willing to testify under oath to these facts in a court of law. R. 19.

On June 23, 2005, the Circuit Court denied Van Poyck's motion. The Court found the affidavit of Enrique J. Diaz did not present "newly discovered evidence" and that Van Poyck's grounds for relief had been addressed in previous published opinions. R. 48. Additionally, the Court stated "[o]ne of the central issues in the trial of this case and the above published opinions have addressed the 'triggerman issue.' The above published opinions have essentially held that even though the defendant was not the 'triggerman' the imposition of the death penalty was fair, just and proportional." R. 48-49. On July 22, 2005, Van Poyck initiated this appeal by filing a timely Notice of Appeal. R. 50-53.

II. SUMMARY OF THE ARGUMENT

The U.S. Supreme Court's resolution of Van Poyck's *certiorari* petition in the Related Appeal will have a

significant impact on the outcome of this appeal. Indeed, given the briefing schedules in both cases, it is likely that Van Poyck's *certiorari* petition will have been resolved by the time this Court has an opportunity to decide this appeal. As a result, if the U.S. Supreme Court grants *certiorari* in the Related Appeal, this Court should stay resolution of this appeal pending the U.S. Supreme Court's final resolution of Van Poyck's case.

If, however, the *certiorari* petition is denied, Van Poyck acknowledges this appeal is controlled by this Court's determination in the Related Appeal that whether Van Poyck was the triggerman is irrelevant to his sentence. However, Van Poyck reiterates his argument, raised in both the Related Appeal and in his Rule 3.850 motion in this case, that whether or not he pulled the trigger would have been crucial to the finder of fact in determining the propriety of his death sentence. He also urges this Court to reconsider its position on the triggerman issue in light of a recent U.S. Supreme Court opinion, *Bradshaw v. Stumpf,* ___ U.S. ____, 125 S.Ct. 2398 (2005), in which the Court suggested that whether or not a capital defendant was the triggerman is an important consideration to the sentencing process. *See id.* at 2407-08.

III. ARGUMENT

A. If the U.S. Supreme Court Grants Van Poyck's *Certiorari* Petition, This Court Should Stay This Appeal Pending the U.S. Supreme Court's Final Resolution on the Merits

Because the fundamental issue in this appeal is the same as that in the Related Appeal — *i.e.*, the significance of Van Poyck's non-triggerman status to his sentence — if the U.S. Supreme Court grants Van Poyck's *certiorari* petition, its resolution of the merits would have a significant impact on the resolution of this case. Therefore, in the interests of justice and judicial economy, this Court should stay proceedings in this case if the U.S. Supreme Court grants Van Poyck's petition for *certiorari*.

The issues in this case and the Related Appeal (and thus in Van Poyck's *certiorari* petition) are fundamentally the same. In this appeal, this Court must determine whether newly discovered evidence (the Diaz testimony) submitted pursuant to Fla. R. Crim. P. 3.850 "would have probably produced a different result at sentencing" had it been presented to the jury and judge. *State v. Mills*, 788 So.2d 249, 250 (Fla. 2001). In the Related Appeal, this Court addressed whether, under § 925.11, Fla. Stat. (2001), and Fla. R. Crim. P. 3.853, DNA evidence suggesting Van Poyck was not the triggerman would have created a "reasonable

probability" that Van Poyck "would have received a lesser sentence."

Thus, if the U.S. Supreme Court grants *certiorari* with respect to the Related Appeal, it will consider the merits of Van Poyck's argument that evidence he was not the triggerman would have created a reasonable probability of a lesser sentence. Its resolution of those issues will have a significant impact on the central issue in this case, which is also whether evidence Van Poyck was not the triggerman "would have probably produced a different result at sentencing." *Mills*, 788 So.2d at 250.

This Court may stay proceedings in a case pending before it to allow a litigant to seek review in the U.S. Supreme Court. *See The Florida Bar v. Arango*, 461 So.2d 932, 935 (Fla. 1985). A court may also stay appeal proceedings in the interest of justice and judicial economy. *See Lurie v. Auto-Owners Ins. Co.*, 605 So.2d 1023, 1025 (Fla. 1st DCA 1992) (staying appeal and relinquishing jurisdiction to trial to conduct juror interview where juror allegedly failed to disclose material information during voir dire). Here, justice and judicial economy weigh in favor of staying this appeal if the U.S. Supreme Court grants Van Poyck's *certiorari* petition because both cases involve resolution of the identical issue.

Therefore, if the U.S. Supreme Court's grants Van Poyck's *certiorari* petition, this Court should stay this appeal pending that court's resolution of the merits of Van Poyck's claims.

B. If Van Poyck's *Certiorari* Petition Is Denied, This Court Should Reconsider Its Prior Holding on the Triggerman Issue in Light of Its Own Precedents and the U.S. Supreme Court's Holding in *Bradshaw v. Stumpf*

Van Poyck acknowledges that if the U.S. Supreme Court denies his *certiorari* petition, this Court's holding in the Related Appeal will stand and be controlling as to this appeal. In upholding the denial of Van Poyck's motion for DNA testing in the Related Appeal, this Court held "there is no reasonable probability that Van Poyck would have received a lesser sentence had DNA evidence establishing that he was not the triggerman been presented at trial." *Van Poyck v. State*, 908 So. 2d at 330; Appendix C. This was so because, "[e]vidence establishing that Van Poyck was not the triggerman would not change the fact that he played a major role in the felony murder and that he acted with reckless indifference to human life." *Id*.

Because this appeal addresses the identical issue raised in the Related Appeal — whether evidence suggesting Van Poyck was not the triggerman would have created a probability of a lesser sentence — this Court's holding in the Related Appeal would control this appeal in the absence of a reversal by the U.S. Supreme Court or this Court's reconsideration of the triggerman

issue. Therefore, if the U.S. Supreme Court denies Van Poyck's *certiorari* petition, Van Poyck urges this Court to reconsider its pronouncement that Van Poyck's non-triggerman status is irrelevant to whether his death sentence is appropriate.

As Van Poyck argued in his 3.850 motion below, evidence that he was not the triggerman would constitute powerful mitigating evidence (which was denied to him at his original trial) at any new penalty phase proceeding. This Court has repeatedly emphasized the mitigating significance of evidence showing that the defendant did not actually kill the victim. *See, e.g., 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, 899 (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. . .").

Likewise, the U.S. Supreme Court recognized the significance of the triggerman issue to the capital sentencing

question in *Bradshaw v. Stumpf,* ___ U.S. ___, 125 S.Ct. 2398 (2005). There, defendant Stumpf and his co-defendant committed armed robbery, during which one of the victims was shot to death. *See id.* at 2402. Stumpf steadfastly maintained he was not the triggerman. Prior to trial, Stumpf entered a plea agreement under which he pleaded guilty to aggravated murder. He also pleaded guilty to one of three capital specifications, which made him eligible for the death penalty. *See id.* at 2403. During the penalty hearing, Stumpf argued that his co-defendant fired the fatal shots. The state, on the other hand, argued Stumpf was the triggerman. *See id.* Stumpf was sentenced to death. *See id.*

Afterward, the co-defendant was tried by the same prosecutor. By the time of the co-defendant's trial, the prosecutor had obtained new evidence: testimony from the co-defendant's cellmate that the co-defendant had admitted firing the fatal shots. The prosecutor introduced this evidence, and argued the co-defendant was the triggerman. *See id.* at 2403-04. Although the U.S. Supreme Court held the prosecutor's actions did not void Stumpf's guilty plea, it remanded as to sentencing, stating the prosecutor's use of inconsistent triggerman theories "may have a more direct effect on Stumpf's sentence, however, for it is at least arguable that the sentencing panel's

conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Id.* at 2407-08.

Clearly, under *Bradshaw*, triggerman status is — contrary to what this Court held in the Related Appeal — an important sentencing consideration in capital cases. Therefore, Van Poyck urges this Court to reconsider its holding in the Related Appeal that evidence he was not the triggerman could not make a difference to his sentence. The newly discovered evidence Van Poyck seeks to develop in this case – the Diaz testimony – goes directly to the issue of whether Van Poyck was the triggerman.

Therefore, although Van Poyck acknowledges this Court's holding in the Related Appeal will be dispositive of this appeal if the U.S. Supreme Court does not grant his *certiorari* petition, he urges this Court to reconsider that holding in light of its own prior precedents and *Bradshaw*.

IV. CONCLUSION

For the foregoing reasons, if the U.S. Supreme Court grants *certiorari* in the Related Appeal, this Court should stay resolution of this appeal pending the U.S. Supreme Court's final resolution of Van Poyck's case. If, however, the *certiorari* petition is denied, Van Poyck urges this Court to reconsider its prior holding on the triggerman issue in light of its own precedents and the U.S. Supreme Court's recent decision in *Bradshaw*.

Dated this _____ day of January, 2006.

Respectfully submitted

____

Mark Olive
Florida Bar No. 0578533
Law Office of Mark Olive
320 West Jefferson Street
Tallahassee, FL 32301

Of Counsel:
Jeffrey O. Davis
Wisconsin Bar No. 1011425
Lauri A. Rollings
Wisconsin Bar No. 1049543
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000

V. <u>CERTIFICATE OF SERVICE</u>

I hereby certify that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to:

Celia Terenzio
Senior Assistant Attorney General
Department of Legal Affairs
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401

on this ____ day of January, 2006, by U.S. Mail.

____

VI. 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.

____