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.	)	
	)	
_____	)	

REPLY BRIEF OF APPELLANT

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I. ISSUE PRESENTED FOR REVIEW

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*.

II. INTRODUCTION

Van Poyck was sentenced to death by a jury and trial judge whose sentence and order expressed the belief that Van Poyck was the actual killer of a prison guard during an aborted attempt to free a friend from a prison van. Van Poyck has now produced an affidavit from a witness stating that Van Poyck's co-defendant, Frank Valdes (who is now deceased), confessed to being the actual killer. No evidentiary hearing concerning the merits of this claim has ever been conducted; instead, the claim was dismissed because of a legal finding that Van Poyck's status as the actual killer would have made no difference to the sentencer.

As previously noted in Van Poyck's initial brief, a similar issue was raised in a previous motion filed by Van Poyck to obtain post-conviction DNA testing under Florida Statute 3.853. *Van Poyck v. State,* 908 So.2d 326 (Fla. 2005). That motion was pending before this Court at the time that this motion was filed. And at the time of Van Poyck's initial brief to this Court, the denial of that Motion was still before the U.S. Supreme Court.

Unfortunately, the U.S. Supreme Court has declined review of the DNA motion, and we concede that the reasoning behind this Court's denial of the DNA motion is equally applicable to this motion. Nonetheless, we further submit that relief is warranted in this case because the U.S. Supreme Court's intervening decision in *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005) as well as this Court's prior jurisprudence, makes clear that this Court's "reasonable probability" analysis was in error.

III. ARGUMENT

This Court previously ruled that, as a matter of law, there was no "reasonable probability" that Van Poyck's status as a triggerman would make a difference to his sentence. As further described in our initial brief, this reasoning is belied by a recent U.S. Supreme court decision, *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005).

The State argues that *Bradshaw* is distinguishable because (1) the prosecution in that case took inconsistent positions regarding the shooter's identity at the separate trials of Stumpf and his co-defendant, and (2) the lower courts in that case did not address the impact of new evidence that the petitioner was not the triggerman. (State's Brief, p. 15, n. 2.)

These distinctions miss the point. The crucial holding in *Bradshaw* is the *effect* of the error -- the issue addressed by

this Court's reasonable probability analysis -- not the error itself. On this issue, Bradshaw is directly on point, and makes clear that this Court's prior analysis was incorrect:

> "The prosecutor's use of allegedly inconsistent theories may have a more direct effect on [the petitioner's] sentence, however, for *it is at least arguable that the sentencing panel's conclusion about [the petitioner's] principal role in the offense was material to its sentencing determination*."

Bradshaw, 125 S.Ct. at 2407-08. Consequently, the Court acknowledged that a sentencer's false belief that a defendant was the triggerman may have a "material" impact on the sentence.[1]

Here, Van Poyck's sentencers clearly believed that Van Poyck was the triggerman, and it is therefore "at least arguable" that this false belief "was material to [the] sentencing determination." Put another way, *Bradshaw* directly undermines this Court's prior determination that the impact of whether a capital defendant was the person who killed the victim can ever be deemed legally irrelevant to a sentencing determination.

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[1] The circumstances of *Bradshaw* make it all the more relevant to this case. In *Bradshaw*, the defendant had intentionally broken into the home of the victim with an accomplice, shot one family member in the head, twice, though not fatally, and then lied to police about his involvement, until he learned that the family member he shot had survived. Despite these facts, the U.S. Supreme Court remanded for further proceedings in light of the possible materiality of the triggerman issue on the death sentence.

Bradshaw puts the imprimatur of a U. S. Supreme Court-imposed Constitutional standard on what we know (as Justice Anstead pointed out in dissent, *Van Poyck*, *supra* 908 So.2d at 3310 (Anstead, J. dissenting)) as a matter of common sense. *Of course* it is important to a sentencer which of two defendants pulled the trigger, especially when (1) one of the defendants claims that he did not see the homicide occur and had no desire that it occur and (2) the jury and trial court had obviously rejected that version of events, in finding that he was the actual killer.

That there indeed is a "reasonable probability" of a different outcome when the sentencer knows the truth about the homicide is further borne out by empirical data concerning non-triggerman defendants. *See, e.g.*, Stephen P. Garvey, *Aggravation and Mitigation in capital cases: What Do Jurors Think?* 98 Colum. L. Rev. 1538, 1566 (1998) ("[S]upport for the death penalty in public opinion polls drops from 70-76% when respondents are asked whether or not they support the death penalty in the abstract to 25-29% when they are asked whether they support the death penalty for a defendant who was '[o]nly an accomplice to the killing.'"). This nationwide data is at least as valid in Florida as elsewhere. Florida juries rarely recommend a death sentence for a defendant who was not himself the triggerman; did not hire or solicit someone to kill a

victim; and did not engage in a scheme specifically designed to kill. A review of the factual circumstances underlying the convictions of the 372 Florida inmates currently on death row reveals that only 62 of these inmates were sentenced to death based, either in whole or in part, on convictions for felony murder. *See* Florida Dep't of Corrections, "Death Row Roster."[2] Of the 62 inmates on death row for felony murder convictions, 53 physically caused another's death in the commission of a felony. *See* Appendix A, *infra*. Another eight of these inmates either ordered their accomplices to commit murder or expressed a specific intention of killing witnesses prior to their crimes. See appendix B, *infra*. In only one instance was the conviction that led to the death sentence not based on evidence presented at trial that the defendant had either killed or wantonly directed or planned an intentional killing during the course of the underlying felony.

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[2] The roster is available at http://www.dc.state.fl.us/activeinmates/deathrowroster.asp. Petitioner's name is not included on this roster, presumably because he is currently being held at a facility in Virginia and is not in custody of the Florida Department of Corrections. Because Mr. Van Poyck's guilt- and penalty-phase trial took place before a Florida jury, the sentencing patterns of juries in Florida, not Virginia, are mostly directly pertinent here. In any case, if Virginia law applied, Mr. Van Poyck would plainly not be death-eligible as a non-triggerman. *See Hancock v. Commonwealth*, 407 S.E.2d 301, 307 (Va. Ct. App. 1991).

A closer review of this lone exception, however, demonstrates that it is no exception at all. As reported in *Pearce v. State*, 880 So.2d 561 (Fla. 2004), inmate Faunce Pearce was involved in the murder of a teenage boy and the attempted murder of a second after the teenagers failed to purchase drugs that Pearce ordered them to buy for him. After holding the boys hostage, and forcing one of them to perform oral sex on him, Pearce and three friends drove the two boys to a remote location, where Pearce ordered one of the boys out of the truck and ordered one of his friends to "'break [the boy's] jaw'" or "'pop him in the jaw…'" *Id*. at 566. Pearce's accomplice instead shot the boy and announced (though mistakenly) to Pearce that he had killed him. Pearce then drove the truck another 200 yards and ordered the second boy out of the car, at which point one of Pearce's accomplices shot and killed the second boy. Although he did not expressly order his accomplice to kill the second boy, Pearce was the instigator of a crime in which killing was an essential component. In light of the murderous shooting of the first boy just moments earlier, Pearce's ordering the second boy out of the truck could have been viewed by the jury as nothing less than an order to kill.

No comparable evidence was presented to the jury in Mr. Van Poyck's case. Although Mr. Van Poyck and Valdes were both armed when they attempted to carry out the escape, killing was in no

way an essential component or purpose of the plan, nor did the State present any evidence either that Mr. Van Poyck planned, or knew in advance that Valdes intended, to kill anyone during the course of the felony.[3] Instead, the State relied entirely on inconclusive eye-witness testimony that, as the Florida Supreme Court previously held, was insufficient as a matter of law to prove that Mr. Van Poyck was the triggerman. *Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990). In short -- with Mr. Van Poyck's conviction for premeditated murder having been overturned, and no legitimate evidentiary proof in the record that he actually killed anyone -- Mr. Van Poyck's death sentence now stands alone as a disturbing exception among Florida's current death-row population.

This Court now has a chance -- perhaps the last one it will have -- to correct what can only be characterized as an

[3] To date, this Court's only basis for denying Van Poyck the benefit of this principal is that the circumstances of this case involved a "murder of a prison guard in a brutal armed attack planned by Van Poyck." *Van Poyck, supra,* 908 So.2d at 330. But if Van Poyck did not commit the killing and did not see it occur, it is hard to fathom how the degree of his culpability as a non-triggerman can be assessed by this Court as a matter of law. Moreover, other circumstances pointed to by the State - namely the testimony from the surviving guard, Stephen Turner, that Van Poyck pulled the trigger of the murder weapon and that he heard a "click" - would be totally undermined by the newly discovered evidence that Van Poyck never had the murder weapon at all. Combined with Turner's later admission at the subsequent trial of James O'Brien that the chamber of the gun pointed at him was open, it certainly cannot be said that, as a matter of law, this alleged incident would, beyond any reasonable probability, give rise to a death sentence.

anomalous result: Van Poyck was sentenced to death by a jury and trial court operating under a materially and demonstrably false set of facts concerning his role in the homicide.

In the final analysis, then, *Bradshaw* simply confirms in the context of a triggerman issue, the longstanding principal that a death sentence must be based on an "individualized consideration" in order to pass constitutional muster. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 605 (1978). No such individualized determination exists where the sentencer is relying on a false belief as to the defendant's status as the killer. Consequently, we emphatically urge the Court to reconsider its prior holding in the DNA decision in deciding whether Van Poyck's claim of newly discovered evidence warrants an evidentiary hearing. Upon reconsideration, we would ask that the Court reverse and remand this matter to the trial court for a hearing on the newly discovered evidence and, assuming it is found credible, further proceedings.

Dated this _____ day of May, 2006.

Respectfully submitted

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IV. CERTIFICATE OF SERVICE

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

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on this _____ day of May, 2006, by U.S. Mail.

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V. CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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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