IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK, Appellant	)	
vs.	)	Case No. SC04-696
STATE OF FLORIDA, Appellee	)	Circuit Court Case Nos.: 87-6736CF 88-11116CF A02

REPLY BRIEF OF APPELLANT

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THE LOWER COURT ERRED AS A MATTER OF FLORIDA LAW AND UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IN SUMMARILY DENYING VAN POYCK'S MOTION FOR POST-CONVICTION DNA TESTING

I. INTRODUCTION

The context for this appeal from a summary denial bears reiteration. In the proceeding below, neither the State nor the trial court ever questioned or challenged the existence of exculpatory DNA evidence, or Van Poyck's ability to produce, via proper scientific testing, that exculpatory DNA evidence, or the fact that such DNA evidence would conclusively establish that Van Poyck did not shoot Fred Griffis. Therefore, those factual allegations must be accepted as true. *See Foster v. State*, 810 So.2d 910, 914 (Fla. 2002) ("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."); *McLin v. State*, 827 So.2d 948 (Fla. 2002) (same). That this threshold requirement has been met should compel almost as a matter of course a remand for an evidentiary hearing for DNA testing.

The State has staked out only a single, narrowly circumscribed argument to oppose this initial step: *that Van Poyck's ability to now prove that he did not kill Fred Griffis is immaterial and irrelevant because the "triggerman issue"*

has already been litigated on direct appeal. That position misses the mark, as it misconstrues the previous proceedings, the findings at Van Poyck's trial and the nature of the issue now before this Court.

II. ARGUMENT

A. The Prior Proceedings: No Court Has Ever Found that Conclusive Evidence Absolving Van Poyck of Being the Triggerman Would Not Have Affected His Sentence.

The State expends much of its answer brief in describing how this Court, in 1990, rejected Van Poyck's *Tison v. Arizona* proportionality claim,[1] and affirmed Van Poyck's death sentence. It is that *Tison* claim which the State repeatedly refers to as "the triggerman issue" in its attempt to convince this Court that the "triggerman issue" has already been litigated. But the resolution of Van Poyck's 1990 *Tison* claim is irrelevant to the issue now before this Court.[2] The issue

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[1] *Tison v. Arizona*, 481 U.S. 137 (1987).

[2] *Tison v. Arizona* is not a general, catch-all "triggerman issue," as the state apparently believes. A *Tison* claim is a distinct Eighth Amendment issue dealing with the constitutional propriety of a death sentence for a non-triggerman, and it involves a unique two-part analysis. A *Tison* claim is a "threshold issue" concerning whether such a defendant is even eligible for a death sentence under the Eighth Amendment and "society's evolving standards of decency." That obviously is a far cry from the newly discovered evidence standard that governs this motion, i.e.,

currently before this Court is not a *Tison* claim and this Court's prior 1990 disposition of Van Poyck's *Tison* claim is immaterial to the entirely separate claim now before this Court. Whether Van Poyck was a "major participant" in the underlying felony, while germane to the issue of whether Van Poyck's sentence "was constitutionally permissible" (State Br. p. 13), is irrelevant to the issue on this appeal: whether it is reasonable to infer that DNA evidence showing that Van Poyck was not the triggerman would have resulted in a different sentence at trial.

Likewise, the State's lengthy quotation (pages 11-13 of its answer brief) of the Eleventh Circuit's denial of Van Poyck's federal habeas corpus appeal is also irrelevant. The Eleventh Circuit was not evaluating the merits of any "triggerman" issue *on its face,* but was instead analyzing it within the narrow context of an ineffective assistance of counsel [I.A.C.] claim, the same I.A.C. claim that this Court rejected in its 4-3 decision in *Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997). Neither that decision, nor the Eleventh Circuit addressed the effect of affirmative evidence

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whether there is a reasonable probability that the sentence would be different.

establishing Van Poyck's non-triggerman status. And, of course, the Eleventh Circuit was constrained by the strict parameters of the AEDPA (which limits federal review of state court convictions) and its decision was simply a refusal to second-guess this Court's 1997 I.A.C. decision.

In short, the issue presently before the Court is *not* how *this Court* viewed the constitutional propriety of Van Poyck's death sentence in 1990, when this Court upheld the sentence pursuant to a *Tison* analysis. Van Poyck is not, in other words, now challenging whether he was constitutionally eligible for the death penalty. Rather, Van Poyck is claiming, under a newly created right to seek DNA evidence, that there is a reasonable probability that affirmative evidence that he was not the triggerman would have resulted in a different sentence.

B. The Findings at Trial: Van Poyck Was Sentenced to Death By Fact Finders Who Believed He was the Triggerman.

Van Poyck's DNA claim is made all the more compelling by the fact that his jury affirmatively made findings that he was the triggerman. Here, the State misses the point once again with its mocking assertion that Van Poyck seeks DNA testing to "magically shed light on his state of mind during the

attempted escape and murder of Office Griffis." No "magic" is necessary to see that Van Poyck's state of mind, according to the original sentencers, was that of the actual killer. DNA can show what both the law and logic say is a less culpable state of mind: that of an accomplice to the underlying felony, meaning Van Poyck's sentencing tribunal will simply know the truth. It is hard to imagine a more important or fundamental evidentiary issue in a penalty phase proceeding.

While ignored by the State, this one central fact is inescapable: Van Poyck was sentenced to death by a jury and judge who believed that he was, or was most likely, the person who shot and killed the victim. Contrary to the State's suggestion, we do not have to speculate about this or resort to what points the State "emphasized" in its arguments to the jury. Rather, we only need to look at the *jury verdict form*, in which the jury checked the box labeled "both first-degree premeditated murder and first-degree felony murder," and the *sentencing order* in which the trial judge expressed the view that Van Poyck was "the individual who pulled the trigger and shot Fred Griffis." R.4138 and 4199, attached as the Appendix of Initial Brief of Appellant. Given this documentation in the record of the fact-finder's belief that Van Poyck was

indeed the triggerman, it is impossible to conclude that there is no "reasonable probability" that the sentence would have been different had the true facts, which DNA evidence will establish, been known.[3]

C. The Nature of this Motion: There Is a Reasonable Probability that DNA Testing Could Result in a Sentence Other than Death.

The statute and implementing rule underlying this appeal, Rule 3.853, provides that for a motion for DNA testing to

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[3] Even in the absence of the verdict form and sentencing order Van Poyck's sentence can be linked to the belief that he was the triggerman. It is most likely that the premeditated murder findings made by the jury and trial judge came as a result of the State's arguments at trial, becoming an aggravating circumstance - certainly this issue was eliminated as a mitigating circumstance. Accord, *Sochor v. Florida*, 504 U.S. 527 (1992), and *Espinosa v. Florida*, 505 U.S. 1079 (1992) (In a weighing state like Florida, Eighth Amendment error occurs when the sentencer – either the jury or the judge – weighs an invalid aggravating factor in reaching the decision to impose a death sentence). *See also, Stringer v. Black*, 503 U.S. 222 (1992), where the Supreme Court addressed the role of a reviewing court when the sentencing body has weighed an invalid factor in its decision to impose a death sentence:

> [A] reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Id., at 232, 112 S. Ct. at 1137.

succeed there need only be "a reasonable probability that the movant would have been acquitted *or would have received a lesser sentence* if the DNA evidence had been admitted at trial". (emphasis added). It is impossible to see how such a reasonable probability could not exist in this case. Even the State concedes "the general proposition that 'non-triggerman status' is mitigating evidence" (page 8 of State's answer brief).

By statute, and under this Court's long-standing precedent governing newly discovered evidence cases, the significance of the newly discovered evidence must be viewed and weighed by its likely effect on a jury, and cannot simply be re-weighed by a reviewing court. *See, State v. Mills*, 788 So. 2d 249 (Fla. 2001). Accordingly, again contrary to the State's claim, this Court's *Tison* ruling in 1990 is not relevant to the present appeal. When the Florida Legislature adopted Section 925.11, Florida Statutes (2001), and when this Court issued Rule 3.853, the State of Florida extended to all convicted criminal defendants a new, substantive right – a right to use DNA evidence to either exonerate them if wrongfully convicted or to show that there would have been a "lesser sentence."

With its claim that Van Poyck's triggerman status "would not matter", the State is essentially reading the "received a lesser sentence" language out of the statute. This position is also contrary to *State v. Mills*, and the many other relevant post-conviction cases cited previously. In *every* post-conviction newly discovered evidence case where the death sentence has been vacated the original death sentence had, of course, been previously upheld on direct appeal.

Thus, the "reasonable probability" question with respect to triggerman evidence has already been answered by this Court in newly-discovered evidence cases. This Court vacates death sentences when it is shown newly discovered evidence casts doubt upon the defendant's identity as the triggerman, recognizing what is surely just a matter of fairness and common sense: *of course* doubt about the defendant's status as the actual killer creates "a reasonable probability" that the sentence would have been different. *See, e.g., State v. Mills*, 788 So. 2d 249 (Fla. 2001) (holding, in capital case, that newly discovered evidence casting doubt upon defendant's identity as the actual killer meets the "reasonable probability" test that his jury might have recommended life had they known of the new evidence); *McLin v. State*, 827 So.

2d 948 (Fla. 2002) (In first-degree murder case, newly discovered evidence, in the form of an affidavit from a co-defendant swearing that the defendant was not the actual shooter, was sufficient to meet the "reasonable probability" standard); *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993) (death sentences vacated where newly discovered evidence in post-conviction proceedings undermined State's original theory that the defendant was the actual shooter).

The reasonable probability standard is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). It is inherently subjective, requiring the Court to view the evidence through the eyes of a jury. In making this evaluation, a number of concluding points bear emphasis.

First, with exonerating DNA evidence in hand, Van Poyck would be a non-triggerman convicted of an unpremeditated murder. Van Poyck did not kill anyone nor did he intend that anyone should die. In contrast, at his original trial, not only was his believed triggerman status a likely *de facto* aggravating factor, given the jury and trial judge findings, but Van Poyck was also deprived of a significant mitigating factor, as even the State concedes. State Ans. Brief p. 8.

Second, there now exists a wealth of substantial mitigating evidence, unearthed during post-conviction proceedings, which was not known to Van Poyck's jury and judge, nor to this Court on direct appeal. This mitigating evidence is set forth in *Van Poyck v. State*, 694 So. 2d 686 (Fla. 1997), and formed the basis for this Court's 4-3 split decision in that case. The existence of this mitigating evidence should be taken into consideration in deciding whether a new penalty phase jury, now also armed with the knowledge that Van Poyck did not kill anyone, would recommend a different sentence.

Third, notably absent from this case are Florida's two most egregious aggravating factors, to wit, heinous, atrocious or cruel, and cold, calculated and premeditated. In numerous other cases where this Court has vacated death sentences this Court has made a specific point of observing the absence of these aggravators (notwithstanding the fact that in all of those cases the defendant was the actual killer). *See, e.g., Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999), where this Court reduced the death sentence to life imprisonment despite the fact that the defendant shot and killed the store clerk during the robbery ("We also note that neither the heinous,

atrocious, or cruel nor the cold, calculated, and premeditated aggravators are present in this case. These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is not without some relevance to a proportionality analysis.") In *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988), the defendant had shot and killed a police officer while holding several people hostage. Despite the existence of five aggravating factors, this Court vacated the death sentence on proportionality grounds. In doing so this Court observed that, "[i]n contrast, [to the mitigating evidence] the aggravating circumstances of heinous, atrocious and cruel, and cold calculated and premeditated are conspicuously absent." *Id*., at 812. *See also, Duest v. State*, 855 So. 2d 33, 54 ("Additionally, we have repeatedly stated that HAC is one of the most serious aggravating circumstances set out in Florida's sentencing scheme.").

Finally, in judging how a jury might weigh the fact that Van Poyck did not kill the victim, it should be reiterated that, "[i]n Florida, we have repeatedly stated that the ultimate punishment of death is reserved for the most aggravated and indefensible of crimes committed by the most

culpable of offenders." *Brennan v. State*, 754 So. 2d 1, 10 (Fla. 1999). *See also, DeAngelo v. State*, 626 So. 2d 440, 443 (Fla. 1993) ("This Court has repeatedly noted that the death penalty is reserved for the most aggravated and unmitigated of crimes."); *Larkins, supra*, at 93 ("As we have stated time and again, death is a unique punishment [citations omitted]. Accordingly, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders.").

Against this backdrop Van Poyck submits that there exists more than "a reasonable probability" that a penalty phase jury, upon learning that Van Poyck did not kill anyone, would recommend life imprisonment over death. With this question answered in the affirmative the order under appeal must be reversed.

CONCLUSION

WHEREFORE, because Van Poyck's underlying motion for DNA testing meets the "reasonable probability" standard set forth in Rule 3.853, Fla. R. Cr. Proc., and *State v. Mills, supra*, this case should be remanded for a full plenary evidentiary hearing in order that the requested DNA tests be conducted and applied in accordance with law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant 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 22nd day of December, 2004, by U.S. Mail.

/s/_____

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 Rule 9.210, F.R.A.P.

/s/_____