IN THE SUPREME COURT OF FLORIDA

TRACI ANN GROSVENOR,

Petitioner,

v. CASE NO. SC02-1307

STATE OF FLORIDA,

Respondent.

_________________________/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with the statement of the case and facts as provided by Petitioner, but would supplement them with the following:

On June 15, 1990, Petitioner pled *nolo contendere* to one count of First Degree Murder, two counts of Attempted First Degree Murder with a Firearm, one count of Robbery with a Firearm and one count of Resisting Arrest with Violence; all crimes having occurred on April 14, 1989, and into April 15, 1989. (R159, Vol I) In return for her plea, the State agreed not to seek the death penalty and she received a life sentence with a minimum mandatory term of twenty-five years incarceration. (R138-141, Vol I) Also as part of the agreement, Petitioner agreed to testify at trial against her co-defendant. (R139, Vol I) Included in the written plea agreement executed by Petitioner is the following assertion: "My attorney has discussed with me the defense(s) that might be available to the charge(s) and has given me the benefit of his advice...." (R140, Vol I)

Petitioner filed a motion for post-conviction relief on June 15, 1992, asserting claims of ineffective assistance of counsel and involuntary plea. (R1-20, Vol I) The State filed a written response on September 7, 1992, requesting the trial judge

summarily deny Petitioner's claims. (R159-170, Vol I) Petitioner filed a reply to the State's response and the trial court granted Petitioner's request for an evidentiary hearing. (R383, 386, Vol II) The hearing date was continued several times at Petitioner's request. (R391,392,394, Vol II) A motion to hold a bifurcated hearing and initially address the prejudice prong was filed by Petitioner on May 11, 1993. (R397-99, Vol II) The State agreed to such an arrangement on May 24, 1993, and the trial court granted the motion for bifurcated hearing on June 15, 1993. (R402,404, Vol II) A hearing on the prejudice prong was finally set for February 24, 2000. (R411, Vol II)

The State and Petitioner stipulated to the admission of several exhibits and documents at the evidentiary hearing including the co-defendant's trial transcript. (R421,489, Vol III) Many exhibits were ultimately admitted at the hearing including, *inter alia*, the co-defendant's trial transcript, Petitioner's statement to police and a deposition of trial counsel, all of which were subsequently incorporated by the trial court in his findings of facts. (R512-513, Vol III; R552,555,556, Vol IV)

Trial counsel's deposition revealed he had consulted with an expert and other attorneys regarding the voluntary intoxication defense and concluded it was not viable. (R1641-

42,1645, Vol IX) When he spoke with Petitioner, she advised him that she only had a couple of beers at the time and was not intoxicated. (R1636, Vol IX) Allegedly, she was more forthcoming with the experts regarding her use of drugs and alcohol, but these experts concluded the use of intoxicants may be helpful for mitigation during the penalty phase, but would most likely be unsuccessful. (R1637, Vol IX) Her claim as revealed in her statement to law enforcement was that she was not the shooter, which was diametrically opposed to the testimony of the victims. (R1633-34, Vol IX) Finally, according to defense counsel, Sumter County juries do not consider voluntary intoxication as mitigation for murder. (R1655, Vol IX) Trial counsel indicated he could not recall whether or not he discussed the voluntary intoxication defense with Petitioner, but he did discuss her intoxication with her and she denied she was intoxicated. (R1636,1642, Vol IX)

Petitioner advised law enforcement during her interview in the hospital, after being advised of the intoxicants in her system, "well, if I was that intoxicated I don't think I would remember the incident, but I would say that I was a little high, tipsy." (R49, Vol I) Petitioner's statement to police was, as the trial court recognized, "largely self-serving and exculpatory." (R560, Vol IV) At the evidentiary hearing, she

agreed she could carry on an intelligent conversation the night of the shootings. (T69, Vol I) Moreover, her own expert noted Petitioner possessed a fairly extensive recollection of the events leading up to, during, and after the shootings. (R133, Vol I)

The two witnesses to the shootings both testified that they did not observe any indications of intoxication. According to the deputy, he was within five feet of Petitioner prior to the shootings[1] and he did not smell any alcoholic beverages on her person and her responses to his questions were appropriate. (R188-89, Vol I) After the owners of the automobile arrived, the deputy stepped back to permit them time to discuss whether or not to pursue charges against Petitioner and her co-defendant for stealing a tire. (R248, Vol II) While the deputy waited, Petitioner came around the car with a gun and pointed the firearm at him and the car owners. (R3248-49, Vol II) The deputy was trying to pull his weapon, when Petitioner stated something to the effect that she hated to do this, but this thing is ready to go and shot the deputy. (R250, Vol II) After having been hit and knocked to the ground, the deputy returned fire. Id. Petitioner moved behind the patrol car and there

[1]Petitioner verified during her video deposition that the deputy was four or five feet from her when they were talking prior to the shootings. (R1533, Vol VIII)

were several more shots. (R251,255, Vol II) The car owners' vehicle drove off and the deputy fired at the vehicle attempting to stop it. (R260,261, Vol II)

One of the car owners (the other shooting victim and father of the deceased) revealed that soon after the deputy advised Petitioner he was taking Petitioner to jail[2], Petitioner was pointing a gun at them. (R300,305, Vol II) All three told Petitioner to put the gun down and suddenly the victim realized his son was shot and watched his son fall to the ground. (R305, Vol II) The victim described Petitioner's demeanor as calm, in her right mind and professional. (R310, Vol II) She did not appear to be drunk. (R308-09, Vol II) Next time he observed the deputy, the deputy was on the ground. (R313, Vol II) Petitioner ran to the back of the patrol car and released the co-defendant. (R315, Vol II) Both Petitioner and her co-defendant headed back toward their vehicle and when he raised his head, Petitioner shot at him four or five times, wounding him. Id. There was more shooting after he was hit, but he did not know which of the two was doing the shooting. One of the two jumped in the front of his car and one jumped in the back.

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[2]Although the deputy could not recall this fact at his deposition, according to the officer first on the scene after the shootings, the deputy advised the officer that he was "going to go to the suspects' vehicle to go 10-15." The deputy explained that 10-15 means arrest. (R205-06, Vol I)

Id.

Petitioner testified at the hearing on her behalf. She indicated that on the date she and her co-defendant became embroiled in the shootings, they shared two twelve packs of beer (or one twelve pack, depending on which of her versions is believed). (R1485, Vol VIII; T31-32, Vol I) Moreover, they smoked the remaining one half of a baggy of cannabis. (T30, Vol I) She also consumed caffeine pills. (T63-64, Vol I) She admitted that on the day of the shooting, she could walk, talk and drive a car. (T66, Vol I) She could also carry on a coherent conversation and possessed a good recollection of the events of the shooting. (T68-69,70, Vol I) Finally, the State noted that after her arrest, she made no mention of having drugs in her system until the officer advised her blood tests indicated positive for cocaine and cannabis. (T80, Vol I)

Lori Mets, Petitioner's daughter's babysitter, testified that three days before Petitioner left for Georgia, it was obvious Petitioner was under the influence, primarily cannabis. Specifically, Petitioner was slurring her words, nervous and edgy. (T87,89,91,92,94, Vol I) Bonnie Wimmer, from whom Petitioner stole blank checks and jewelry, indicated Petitioner was "not normal" three days prior to the shootings. More specifically, Petitioner was staggering, disoriented, incoherent

and “out of it.” (T103,104,106,110, Vol I) Petitioner’s brother also revealed that when Petitioner was under the influence, it was obvious as her speech was slurred, she had red eyes and could not communicate coherently. (T182,208, Vol II)

Petitioner presented the testimony of Dr. Pamela Olcatt (Olcatt), a clinical psychologist. (T119, Vol II) Olcatt met with Petitioner for a total of seven hours in 1992 and three to four hours in 1999. (T134,135-36, Vol II) She opined that Petitioner was incapable of forming the intent to commit the criminal acts for which she was convicted, in that such an intent was too complex. (T139, Vol II) She believed that due to Petitioner’s long term abuse of drugs, Petitioner would not possess a good memory. (T159, Vol II) Olcatt admitted Petitioner was not a reliable historian of her use of drugs and alcohol prior to the shootings. (T158,176, Vol II)

Upon cross-examination, Olcatt conceded she was relying solely on information provided by Petitioner regarding the amount of alcohol and drug use prior to the shooting, as there was no way to corroborate Petitioner’s claims. (T167, Vol II) Olcatt never spoke to the victims who observed Petitioner immediately prior to and during the shootings, i.e., the deputy and father of the deceased, in making her assessment of

Petitioner's ability to form intent. (T169, Vol II)

When confronted with the testimony of the witnesses to the shooting who indicated Petitioner did not have the odor of an alcoholic beverage on or about her, that her speech was not slurred and she spoke coherently, Olcatt impliedly surmised Petitioner was a practiced drunk. (T164,167,173-74, Vol II) Olcatt was asked if the fact that witnesses testified that 72 hours prior to the shooting, Petitioner was demonstrating obvious indications of intoxication, i.e., staggering and swaying, would mitigate against a conclusion that Petitioner is a practiced drunk. (T177, Vol II) Olcatt admitted that it might. Id.

Finally, the State asked Olcatt how the expert hired by trial counsel could have concluded Petitioner possessed a good sense of recall, yet Olcatt opined Petitioner did not. (T178, Vol II) Olcatt indicated expert opinions can differ. Id. At the conclusion of the hearing, the trial judge requested both sides to submit memoranda of law. (T211,214, Vol II)

On February 22, 2001, the trial court rendered an order denying the motion for post-conviction relief. (R552-563, Vol IV) The trial court set forth findings of fact including those set forth above, as well as trial counsel's unrefuted testimony at his deposition wherein he indicated he had considered and

rejected a voluntary intoxication defense. (R553-555, Vol IV) In applying these facts to the law, the trial court concluded prejudice was not established by trial counsel's alleged failure to advise Petitioner of, or to pursue, the voluntary intoxication defense. (R558, Vol IV)

Moreover, the court concluded, any information regarding the amount of alcohol and drug use would have been solely reliant upon Petitioner's claims. (R558, Vol IV) As such, Olcatt's reliance on these statements and ultimate conclusion of lack of intent would arguably not have been admissible at trial. (R559, Vol IV) Two witnesses, including a deputy and the father of the deceased victim, who had the opportunity to fully observe Petitioner's demeanor immediately prior to and during the shootings, testified Petitioner did not demonstrate any indications of intoxication. Id. Furthermore, Petitioner's witnesses were not present at the shooting and they all agreed that Petitioner demonstrated obvious indications of intoxication when under the influence. Id. As such, the trial court concluded Petitioner was not intoxicated at the time of the shootings such that the voluntary intoxication defense would have been viable. Id. Moreover, her actions in running to the patrol car after pulling the gun in order to release her co-defendant and escaping in the victim's vehicle, showed

Petitioner capable of hatching a plan and executing that plan, again indicating Petitioner was not intoxicated. Id.

Finally, noting that the Fifth District Court of Appeal (DCA) requires a showing of viability of a defense in order to prevail on a claim of ineffective assistance of counsel where a plea was entered, the trial judge concluded the voluntary intoxication defense was not viable. Petitioner's witnesses could not testify regarding her demeanor the evening of the shootings, so that her claim of intoxication would have solely relied upon her unreliable and self-serving claims. (R560, Vol IV) Petitioner appealed the order denying her motion for post-conviction relief to the Fifth DCA.

In its opinion affirming the trial court's order denying post-conviction relief, the Fifth DCA relied upon its decision in Siegel v. State, 586 So. 2d 1341 (Fla. 5th DCA 1991) and the Third District Court of Appeal's opinion in Diaz v. State, 534 (Fla. 3d DCA 1988). The DCA certified conflict with the Fourth and First District Courts of Appeal in Cousino v. State, 770 So. 2d 1258 (Fla. 4th DCA 2000) and Mason v. State, 742 So. 2d 370 (Fla. 1st DCA 1999), respectively. Grosvenor v. State, 816 So. 2d 822 (Fla. 5th DCA 2002).

This Court has postponed a decision on jurisdiction pursuant to an order issued on June 17, 2002.

SUMMARY OF ARGUMENT

POINT I: This Court should not take jurisdiction of this case and let stand the Fifth District Court of Appeal's (DCA) opinion affirming the trial court's denial of relief. Any conflict between the cases certified by the Fifth DCA are inapplicable to the instant case as the circumstances herein do not require or involve the application of or clarification of the allegedly conflicting positions set forth in Siegel v. State, 586 So. 2d 1341 (Fla. 5th DCA 1991), Mason v. State, 742 So. 2d 370 (Fla. 1st DCA 1999) or Cousino v. State, 770 So. 2d 1258 (Fla. 4th DCA 2000), since Petitioner received an evidentiary hearing on her claim of ineffective assistance of counsel after a plea.

Moreover, in denying relief the trial court properly considered whether or not the voluntary intoxication defense would likely have succeeded at trial in its prejudice analysis. Since the evidence adduced at the hearing established that such a defense would not have succeeded at trial, it would not have been reasonable for Petitioner's defense counsel to advise her to reject this plea and face the possibility of the death penalty. Petitioner cannot demonstrate prejudice and is entitled to no relief.

ARGUMENT

POINT I (POINTS I & II, COMBINED)

THERE IS NO CONFLICT BETWEEN THIS CASE AND THE CASES CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL; ACCORDINGLY, THIS COURT SHOULD REFUSE TO ACCEPT JURISDICTION AND LET STAND THE DECISION SUSTAINING THE TRIAL COURT'S DENIAL OF POST-CONVICTION RELIEF; RELIEF IS NOT WARRANTED AS THE EVIDENCE ADDUCED AT THE HEARING ESTABLISHED THAT THE VOLUNTARY INTOXICATION DEFENSE WOULD NOT HAVE BEEN SUCCESSFUL AT TRIAL.

The Fifth District Court of Appeal (DCA) certified conflict with decisions of the Fourth and First District Courts of Appeal, specifically, Cousino v. State, 770 So. 2d 1258 (Fla. 4th DCA 2000) and Mason v. State, 742 So. 2d 370 (Fla. 1st DCA 1999), respectively. Grosvenor v. State, 816 So. 2d 822 (Fla. 5th DCA 2002). The asserted conflict centers around the following: in order to be entitled to an evidentiary hearing on a claim of ineffective assistance of counsel after a plea the Fifth District requires that a defendant allege not only that had he or she known about a defense he or she would not have entered into the plea, but also that this defense would have been viable. See Siegel v. State, 586 So. 2d 1341, 1342 (Fla. 5th DCA 1991) (order summarily denying post-conviction motion sustained as defendant failed to show he had a viable defense). The First and Fourth disagree with the Fifth, and contend that the simple allegation that the defendant would not have entered

into the plea had he or she known of the existence of the defense was sufficient for purposes of entitlement to a hearing. See Cousino v. State, 770 So. 2d 1259 (order summarily denying a post-conviction motion reversed as it is not necessary to allege that a defense existed to the charge); Mason v. State, 742 So. 2d at 371 (order summarily denying post-conviction motion reversed in part as it is not necessary to allege that a defense existed to the charge). However, as will be revealed herein, this dispute has no application to this case.

Petitioner filed a motion for post-conviction relief on June 15, 1992, asserting claims of ineffective assistance of counsel and involuntary plea. The State filed a written response on September 7, 1992, requesting the trial judge summarily deny Petitioner's claims. Petitioner filed a reply to the State's response and the trial court granted Petitioner's request for an evidentiary hearing. The hearing date was continued several times at Petitioner's request. A motion to hold a bifurcated hearing and initially address the prejudice prong was filed by Petitioner on May 11, 1993. The State agreed to such an arrangement on May 24, 1993, and the trial court granted the motion for bifurcated hearing on June 15, 1993. A hearing on the prejudice prong was finally set for February 24, 2000.

On February 22, 2001, the trial court rendered an order

denying the motion for post-conviction relief with attachments from the record. The trial court set forth findings of fact including trial counsel's unrefuted testimony at his deposition wherein he indicated he had considered and rejected a voluntary intoxication defense. In applying the law to the facts, the trial court concluded prejudice was not established by trial counsel's alleged failure to advise Petitioner of, or to pursue, the voluntary intoxication defense.

Moreover, the court noted, any information regarding the amount of alcohol and drug use would have been solely reliant upon Petitioner's claims. As such, Dr. Olcatt's reliance on these statements and ultimate conclusion of lack of intent would arguably not have been admissible at trial. Two witnesses, including a deputy and the father of the deceased victim, who had the opportunity to fully observe Petitioner's demeanor immediately prior to and during the shootings, testified Petitioner did not demonstrate any indications of intoxication. Furthermore, Petitioner's witnesses were not present at the shooting and they all agreed that Petitioner demonstrated obvious indications of intoxication when under the influence. As such, the trial court concluded Petitioner was not intoxicated at the time of the shootings such that the voluntary intoxication defense would have been viable. Also, her actions

in running to the patrol car after pulling the gun in order to release her co-defendant and escaping in the victim's vehicle, showed Petitioner capable of hatching a plan and executing that plan, again indicating Petitioner was not intoxicated.

Noting that the Fifth DCA requires a showing of viability of a defense in order to prevail on a claim of ineffective assistance of counsel where a plea was entered, the trial judge concluded the voluntary intoxication defense was not viable. Finally, the trial court held that Petitioner's witnesses could not testify regarding her demeanor the evening of the shootings, so that her claim of intoxication would have solely relied upon her unreliable and self-serving claims. On appeal and herein, Petitioner claims the trial court applied an incorrect standard by requiring her to demonstrate that a voluntary intoxication defense would have been viable in order to demonstrate prejudice.

Clearly, the issue certified by the Fifth DCA over the dispute regarding the necessity of an allegation that a potential defense is viable has no application or impact herein as Petitioner received an evidentiary hearing upon her claim of ineffective assistance of counsel after a plea. In her second point, Petitioner also complains that she was required to demonstrate at the hearing that her defense would have been

viable. However, the trial court properly considered whether or not the defense would have been successful at trial in its prejudice analysis.

It is well established that a defendant who asserts a claim of ineffective assistance of counsel must show that the legal representation at issue fell below an objective standard of performance, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Strickland v. Washington, 466 U.S. 668, 694, (1984). The defendant's burden of establishing prejudice applies not only to an alleged error at trial, but also to an alleged error in the course of a plea hearing. A defendant who asserts a claim of ineffective assistance of counsel in connection with a guilty plea must show that the result of the case would likely have been different. Hill v. Lockhart, 474 U.S. 52 (1985).

Furthermore, in Hill v. Lockhart, the Supreme Court explained that an error or omission of counsel during a plea hearing is not necessarily prejudicial:

> In many guilty pleas cases, the prejudice inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the

> determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill v. Lockhart, 474 U.S. at 59. In addressing the specific claim raised herein, the Court further explained in Hill that "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, **the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial**." Id. at 59(Emphasis added).

In Evans v. Meyer, 742 F.2d 371 (7th Cir.1984), a case cited with approval in Hill v. Lockhart, the defendant claimed he would not have entered a plea of guilty had his lawyer advised him of the potential defense of voluntary intoxication. This claim was denied without an evidentiary hearing. On appeal, the court weighed the benefit the defendant received by entering the plea against the potential benefit the defendant might have received had he taken the case to trial with a voluntary intoxication defense. After identifying the many limitations of the defense of voluntary intoxication, the court concluded its decision by saying that "no lawyer in his right mind would have

advised [the defendant] to go to trial with a defense of intoxication." Id. at 374. The court affirmed the summary denial of the defendant's claim on the ground that the defendant failed to allege prejudice. Odom v. State, 782 So. 2d 510, 512 (Fla. 1st DCA), Padovano, J., concurring.

Likewise, it is apparent that no lawyer in his or her right mind would have advised Petitioner to go to trial with a defense of voluntary intoxication since it is unlikely such a defense would have succeeded at trial. According to trial counsel, he consulted with an expert and other attorneys regarding the voluntary intoxication defense and concluded it was not viable. Not only was it not viable, but there was no possible voluntary intoxication defense. When counsel spoke with Petitioner, she advised him she only had a couple of beers at the time and *was not intoxicated*. Any attempt to establish such a defense at trial would have resulted in counsel suborning perjury since any testimony by Petitioner that she had been intoxicated would have directly contradicted her statement to counsel that she was not intoxicated. Moreover, Petitioner’s witnesses to her so-called intoxication could only speak to her demeanor three days prior to the shootings, whereas the State’s witnesses would have testified they did not observe any indications of intoxication prior to or during the shootings. Any expert testimony

regarding her alleged intoxication would have been based solely upon Petitioner's own unreliable (as even Petitioner's expert admitted) and self-serving statements. Assuming she was more forthcoming with the experts regarding the extent of her use of drugs and alcohol, these experts concluded the use of intoxicants may be helpful for mitigation during the penalty phase, but would most likely be unsuccessful. Additionally, according to defense counsel, Sumter County juries do not consider voluntary intoxication as mitigation for murder.

Even more problematic for Petitioner, her own statements fail to support a voluntary intoxication defense. She advised law enforcement during her interview in the hospital, after being advised of the intoxicants in her system, "well, if I was that intoxicated I don't think I would remember the incident, but I would say that I was a little high, tipsy." (R49, Vol I) At the evidentiary hearing, she agreed she could carry on an intelligent conversation the night of the shootings. Also, her own expert noted Petitioner possessed a fairly extensive recollection of the events leading up to, during, and after the shootings (excluding her true role in the shootings, of course). Her ability to recall the details of these events would obviously undermine the likelihood a jury would believe she had been intoxicated.

Moreover, in her statement to police she denied she was the

shooter. As this Court has found repeatedly, "counsel cannot be deemed ineffective for failing to pursue the voluntary intoxication defense as such a defense would have been inconsistent with [the defendant's] theory of the case." State v. Williams, 797 So. 2d 1235, 1239 (Fla. 2001); see also Gavilan v. State, 765 So. 2d 308, 308-09 (Fla. 5th DCA 2000) ("The defense of intoxication that could have negated proof of specific intent to commit the crimes was inconsistent with [the defense that the defendant did not commit the crime]."). Since Petitioner denied being the shooter, her claim she could not form the requisite intent to commit an attempted murder or murder (by shooting the victims with a firearm) would be inconsistent with her attempt to exculpate herself with the police. Presumably she would admit she had been the shooter at trial in order to utilize the voluntary intoxication defense, however, her prior statement to the contrary would be troublesome to explain at the very least.

Most problematic to her defense of voluntary intoxication would have been the two witnesses to the shootings who both testified they did not observe any outward indications of intoxication. According to the deputy, he was within five feet of Petitioner prior to the shooting[3] and he did not smell any

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[3]Petitioner verified during her video deposition that the deputy was four or five feet from her when they were talking

alcoholic beverages on her person and her responses to his questions were appropriate. After the owners of the automobile arrived, the deputy stepped back to permit them time to discuss whether or not to pursue charges against Petitioner and her co-defendant for stealing a tire. While the deputy waited, Petitioner came around the car with a gun and pointed the firearm at him and the car owners. The deputy was trying to pull his weapon, when Petitioner stated something to the effect that she hated to do this, but this thing is ready to go and shot the deputy. After having been hit and knocked to the ground, the deputy returned fire. Petitioner moved behind the patrol car and there were several more shots. The car owners' vehicle drove off and the deputy fired at the vehicle attempting to stop it.

One of the car owners (the other shooting victim and father of the deceased) revealed that soon after the deputy advised Petitioner he was taking her to jail[4], Petitioner was pointing a gun at them. All three told Petitioner to put the gun down and suddenly the victim realized his son was shot and watched

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prior to the shootings.

[4]Although the deputy could not recall this fact at his deposition, according to the officer first on the scene after the shootings, the deputy advised the officer that he was "going to go to the suspects' vehicle to go 10-15." The deputy explained that 10-15 means arrest. (R205-06, Vol I)

his son fall to the ground. The victim described Petitioner’s demeanor as calm, in her right mind and professional. She did not appear to be drunk. Next time the victim observed the deputy, the deputy was on the ground. Petitioner ran to the back of the patrol car and released the co-defendant. Both Petitioner and her co-defendant headed back toward their vehicle and when the victim raised his head, Petitioner shot at him four or five times, wounding him. There was more shooting after the victim was hit, but he did not know which of the two was doing the shooting.

Obviously, the testimony of these two victims/witnesses would be believed by a jury and Petitioner’s claim she was too intoxicated to form the requisite intent to shoot and kill would have failed miserably. Finally, as noted in Evans, supra, the voluntary intoxication defense rarely offers a realistic chance of success in any case. As such, even assuming trial counsel did fail to advise Petitioner of the voluntary intoxication defense, Petitioner cannot demonstrate prejudice.

Based on the foregoing facts and authorities, this Court should not take jurisdiction of this case and let stand the DCA’s opinion affirming the trial court’s denial of relief. Any conflict between the cases certified by the Fifth DCA are inapplicable to the instant case as the circumstances herein do not require or involve the application of or clarification of

the allegedly conflicting positions set forth in Siegel, Mason or Cousino since Petitioner received an evidentiary hearing on her claim of ineffective assistance of counsel after a plea.

Moreover, in denying relief the trial court properly considered whether or not the voluntary intoxication defense would likely have succeeded at trial in its prejudice analysis, i.e., was viable. Since the evidence adduced at the hearing established that such a defense would not have succeeded at trial, it would not have been reasonable for Petitioner’s defense counsel to advise her to reject this plea and face the possibility of the death penalty. Petitioner cannot demonstrate prejudice and is entitled to no relief.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this Honorable Court refuse to accept jurisdiction and let stand the decision of the Fifth District Court of Appeal denying relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief has been furnished by delivery by U.S. Mail to Robert S. Griscti, Esq., 204 West University Ave., Suite 6, Post Office Box 508, Gainesville, Florida 32602 this __ day of August, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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