IN THE SUPREME COURT OF FLORIDA

TRACI ANN GROSVENOR,

Petitioner,

v. Case No. SC02-1307

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER GROSVENOR'S INITIAL BRIEF ON THE MERITS

On Conflict Certification from the District Court of Appeal for the Fifth District, State of Florida

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PRELIMINARY STATEMENT

In this brief, Petitioner TRACI ANN GROSVENOR will be referred to by name or as the Petitioner. The Respondent will be referred to as the State.

References to the original ten-volume Record on Appeal will be made by the letter "R" followed by the appropriate volume and page number of the Record; e.g., "R-I-2" designates Volume I, page two of the Record. References to the two-volume transcript of the February 24, 2000 post-conviction evidentiary hearing will be made by the letter "R" followed by the appropriate volume of the Record, then the original page number of the transcript preceded by a "T"; e.g., "R-IX-T1" designates page 1 of the transcript found in Volume IX of the Record on Appeal.

References to the separately-bound Appendix will be made by the designation "App.", followed by the appropriate page number in the Appendix; e.g., "App., p. 1."

STATEMENT OF THE CASE AND OF THE FACTS

This proceeding invokes the discretionary jurisdiction of the Supreme Court to review the opinion of the Fifth District Court of Appeal in Traci Ann Grosvenor v. State, 27 Fla. L. Weekly D1171 (Fla. 5th DCA May 17, 2002) (App. 1, p. 1), which certified direct conflict with decisions of other District Courts of Appeal.

The relevant facts of this case began in early April 1989. At that time, the Petitioner lived with her daughter in Sarasota. She had no prior felony record. She worked two jobs and regularly used "speed" to stay awake, depriving herself of sleep for prolonged periods. (R-IX-T25, T82-83).

GROSVENOR first met Raymond Jeffrey McGuire in Sarasota around the second week of April. They started a week-long binge of drinking alcohol and using cocaine. The two traveled from Sarasota to Tampa on April 13 and continued to drink alcohol and smoke marijuana. (R-IX-T34). On April 14 they left Tampa on Interstate 75, northbound, drinking a 12-pack of beer and smoking half a sandwich bag of marijuana before exiting at Bushnell in Sumter County because of a tire problem. They stopped at an auto store that was closed for the night, where they continued to smoke marijuana while McGuire replaced the tire with one stolen from the lot. (R-IX-T30-31).

Sumter County Deputy Donald Dockham was patrolling the area, saw McGuire and GROSVENOR, approached and questioned them, and locked McGuire in the patrol car, leaving GROSVENOR in her car. Dockham called the store owner, Bartley Giddens, who drove to the lot with his son, Raymond Giddens. After their arrival, GROSVENOR exited her car with a handgun. Dockham testified that GROSVENOR shot him and released McGuire from the patrol car.

Dockham shot GROSVENOR in the ankle. Raymond Giddens was killed and Bartley Giddens was wounded. Dockham testified the shooting continued after McGuire was released but was unable to say who did the shooting. (R. IV-629-633). Bartley Giddens testified that GROSVENOR shot his son at least once, shot four or five other rounds, but was unclear about who fired other shots. (R. IV-647-650).

After leaving the scene, McGuire and GROSVENOR were arrested at a nearby hotel on April 15. GROSVENOR was transported to the Leesburg Regional Medical Center and underwent surgery. A laboratory report showed the presence of marijuana and cocaine in her system when she arrived at the hospital. (R. VI-1176-1178)(App., p. 2).

GROSVENOR was indicted for capital first degree murder[1], attempted first-degree murder of a law enforcement officer[2], attempted first-degree murder with a firearm[3], robbery with a firearm[4], and resisting arrest with violence[5]. McGuire was also indicted. GROSVENOR was represented by Hugh Lee and Michael

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[1]§782.04 (1)(a), Fla.Stat. (1987).

[2]§777.04(1), Fla.Stat. (1987).

[3]§782.04(1)(a), 777.04(1), 775.087, Fla.Stat. (1987).

[4]§812.13(2)(a), Fla.Stat. (1987).

[5]§843.01, Fla.Stat. (1987).

Johnson of the Public Defender's Office for the Fifth Judicial Circuit. (R. IV-661).

Lee had primary responsibility for the case. GROSVENOR initially saw Lee at the Sumter County jail after her release from the hospital. GROSVENOR became concerned when Lee didn't continue to visit her and she could not reach him by phone. She wrote to Lee about his lack of communication. (R. IV-1181-1192, IX-T39-42, 73). She understood that Lee could not see her after working hours because he did not have a driver's license. (R. IX-T44). When he did visit, GROSVENOR smelled alcohol on his breath. (R. X-T193-194, 199-202).

In fact, Lee already had a history of alcohol-related problems when he represented GROSVENOR. (R. VII-1193-1260; IX-1663-1665). He had been arrested in Sumter County for driving while intoxicated in 1988 and, pursuant to a plea agreement with the State Attorney, pled nolo contendere to reckless driving in April, 1989. He was sentenced to three months probation and his driver's license was suspended. He also was arrested for driving on a suspended license in March, 1989 and entered a plea agreement with the State Attorney's Office in Sumter County in June, 1990. (R. VII-1193-1260; IX-1663-1665).[6]

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[6]Lee also had various complaints filed against him with the Florida Bar. Lee was again arrested for driving while intoxicated in August 1990, after GROSVENOR's plea. He pled

Throughout his representation of her, Lee never advised GROSVENOR about the defense of voluntary intoxication, although GROSVENOR told Lee that she had used drugs and alcohol prior to and on the day of the offenses. (R. IX-T46, 51, 54, 72-73, 83). Lee also received a tape recording (R. V) and transcript (R. VII-1264-1276) in discovery from the State of a statement made by GROSVENOR to a law enforcement officer after her arrest and while she was hospitalized, in which she told the officer about her drug and alcohol use at the time of the offenses.

Prior to the scheduled trial in May, 1990, Lee renewed contact with GROSVENOR. (R. IX-T39-43, 73). GROSVENOR told Lee she wanted to go to trial. (R. IX-T43). She also expressed this to Mr. Johnson, Lee's co-counsel. (R. IX-T44). GROSVENOR asked Lee not to speak with her family because he would explain, in detail, what happens during electrocution. Nonetheless, he did so. The family was told there were no trial defenses. (R. IX-T43, 45-48, 51, 54, 72-78: X-T196-202, 206). GROSVENOR's mother had a breakdown (R. IX-T49-50) and the Petitioner's brother, Michael Grosvenor, became involved in the plea discussions on Lee's request. (R. X-T193).

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guilty and was sentenced to probation and community service. This arrest led to a public reprimand By Order of the Supreme Court of Florida dated December 19, 1991. He was ordered by this Court to enter into evaluation and rehabilitative treatment for alcohol abuse. (R. VII-1226-1260).

Mr. Grosvenor had talked with his sister about her dissatisfaction with Lee. She had told her brother she did not want to plead and wanted to go to trial. (R. X-T197-200). When Mr. Grosvenor met Lee, Lee asked Michael Grosvenor to convince his sister to take the plea because there was no defense and she would get the electric chair. Voluntary intoxication was never discussed as a potential trial defense. (R. X-T196). As a consequence, Mr. Grosvenor advised his sister to take the plea to avoid the death penalty. (R. X-T198).

GROSVENOR, unaware of any trial defense, agreed to enter into a plea with the understanding that it would be nolo contendere. (R. IX-T52). On May 31, 1990, GROSVENOR appeared in Court. Her Plea and Waiver of Rights form she had been changed to read "guilty" and in GROSVENOR's "best interest." (R. I-1-142, Exhibit 11; R. V-777-81). GROSVENOR expressed concern to Lee that the plea paperwork stated that she was pleading guilty to first degree murder. Lee told her he would explain that to her after the plea hearing; however, he did not do so and would not accept her calls from the jail. GROSVENOR wrote to Lee, asking him to withdraw from her case; she received no response. (R. IX-T52).

GROSVENOR then called a local newspaper, the Daily Commercial. She told a reporter that she didn't kill anybody

and if she had a "split hair chance" at trial, she wanted to take it. (R. IX-T52-53). An article headlined "Sumter Suspect Recants" was printed June 5, 1990. The presiding Judge read the article and sua sponte vacated the plea on June 6, 1990, attaching a copy of the article to his Order. (R. V-782-84) (App., pp. 3-5).

Several days later an investigator for the Public Defender's Office interviewed GROSVENOR at the Sumter County jail. She told him about her drug use. (R. VII-1301, 1319-20; IX-T46). The investigator interviewed several witnesses in Sarasota who corroborated GROSVENOR's extensive drug use. The investigator, in turn, reported this to Lee. (R. VII-1301, 1319-20; 1323, 1334, 1359-63, 66).

Various defense motions were filed after the plea was vacated, including a request for appointment of a mental health expert. The Court granted that motion on June 10 and GROSVENOR was interviewed by a psychologist, to whom GROSVENOR reported her drug and alcohol use before and during the offenses. (R. VII-1380-1407). The psychologist wrote a report for defense counsel including those facts. (R. VII-1380-1407; IX-T53-54).

Michael Grosvenor had further conversations with his sister after her first plea. She told her brother she wanted to go to trial. Defense counsel continued to advise Mr. Grosvenor that

his sister should take the plea because there was no trial defense. (R-X-T203-206). GROSVENOR's uncontradicted testimony is that she was never advised in this post-plea period about voluntary intoxication as a possible defense to the charges she faced. (R. IX-T54).

Again unaware of any trial defense, GROSVENOR accepted her attorneys' advice and entered pleas of nolo contendere to all charges pending against her. She was sentenced pursuant to plea agreement to two life terms, two fifty-year terms and one five-year term, all running concurrently and imposed by the Circuit Court on June 15, 1990. (R. I-22-30). As part of her plea agreement she testified against Raymond McGuire, who the State contended killed Raymond Giddens. McGuire eventually was tried and convicted of first degree murder, attempted first degree murder with a firearm and robbery with a firearm.[7]

GROSVENOR filed her Motion for Post-Conviction Relief and Request for Evidentiary Hearing (hereafter Post-Conviction Motion)(R. I-1-142), seeking to vacate her Judgments and Sentences so that she might proceed to trial. GROSVENOR alleged that had she been informed by her trial counsel of any trial defense, including voluntary intoxication, she would not have

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[7]Raymond Jeffrey McGuire v. State, 584 So.2d 89 (Fla. 5th DCA 1991), appeal after remand, 639 So.2d 1043 (Fla. 5th DCA), rehearing denied, 649 So.2d 234 (1994).

entered her pleas and instead would have proceeded to trial. (R. I-18).

In response to GROSVENOR's unopposed motion, the Circuit Court bifurcated the post-conviction evidentiary hearing. (R. II-397-399, 402-403, 404-405)(App., pp. 6-7). The trial Court ordered the following procedure:

> The hearing on the Motion of Defendant Traci Ann Grosvenor for Post-conviction Relief will be bifurcated with the Court first considering the issue of prejudice to Petitioner, making the assumption arguendo that the deficiency of trial counsel's performance has been established. If the issue is resolved against the Petitioner, the Petitioner may take whatever action she deems appropriate, including appeal. If the issue of prejudice is resolved in favor of the Petitioner, upon request the issue of the alleged deficiency of trial counsel's performance will be considered at a separate hearing.

(R. II-404). Alleged deficiencies in trial counsel's representation of GROSVENOR, accepted as established, specifically included the failure to timely investigate the defense of voluntary intoxication and the failure to communicate with GROSVENOR and advise her about possible trial defenses, including voluntary intoxication. (R. I-1-12-17).

At the post-conviction evidentiary hearing, GROSVENOR presented expert testimony from a psychologist with special expertise in substance and alcohol addiction and abuse. (R. X-T129, 133). That witness substantiated GROSVENOR's defense of voluntary intoxication and testified that GROSVENOR's use of

alcohol and drugs before and on April 14, 1989 rendered GROSVENOR unable to specifically intend to commit the criminal acts to which she plead. (R. X-T139-140).

Grosvenor also testified at the post-conviction hearing, as did Michael Grosvenor. Their testimony is referenced in the factual statement above; in summary, they confirmed that GROSVENOR repeatedly expressed her desire to proceed to trial before and after her first plea, that neither she nor her family was advised of voluntary intoxication as a defense, and that had she known of a possible trial defense, GROSVENOR would not have entered a plea and would have proceeded to trial. Two other witnesses testified who had known GROSVENOR in Sarasota prior to her arrest. The State presented no witnesses. The parties stipulated to the entry of document exhibits as evidence. (R. V-776-990; VI-991-1192; VII-1193-1407; VIII-1408-1627; IX-1628-1678).

The Circuit Court subsequently entered its written Order Denying Defendant's Motion for Post-Conviction Relief with Attachments (R. IV-552-683)(App., pp. 8-19). That Court found, in relevant part, that GROSVENOR and witnesses who testified at hearing on her behalf did not overcome Deputy Dockham and Bartley Giddens' prior testimony that GROSVENOR did not act or appear under the influence of intoxicants on the night of April

14, 1989 (R. IV-553-555, 559), and that the only evidence of intoxication was that self-reported by GROSVENOR (R. IV-558). The Court did not make any reference to the laboratory report introduced as evidence in the post-conviction hearing that showed the presence of marijuana and cocaine when GROSVENOR was hospitalized the day after the offenses. (R. VI-1176-1178). The Circuit Court concluded that the Petitioner had not shown voluntary intoxication to be a "viable" defense, citing Siegel v. State, 586 So.2d 1341 (Fla 5th DCA 1991). (R. IV-558-561)(App., p. 9).

GROSVENOR filed a timely Notice of Appeal and Suggestion of Certification to the Florida Supreme Court pursuant to Rule 9.125, Florida Rules of Appellate Procedure. (App., pp. 20-23). That Suggestion was deferred to the assigned merit panel. After oral argument, the District Court rendered its opinion, affirming the Circuit Court but certifying direct conflict between its opinion and decisions of the First and Fourth District Courts of Appeal. The Petitioner invoked jurisdiction of the Supreme Court of Florida pursuant to Rule 9.030(a)(2)(A)(vi) of the Florida Rules of Appellate Procedure and Article V, Section (b)(4) of the Constitution of the State of Florida. This Court postponed its decision on jurisdiction and ordered briefing on the merits.

SUMMARY OF THE ARGUMENT

This case presents this Court with the opportunity to resolve conflict in the District Courts of Appeal regarding the appropriate legal standard for determining the "prejudice" prong of Strickland v. Washington, 466 U.S. 668 (1984), rehearing denied, 467 U.S. 1267 (1984) in a post-conviction proceeding following a defendant's conviction pursuant to plea when the defendant has not been advised by trial counsel of an applicable affirmative defense. In this case, the Fifth District applied an incorrect legal standard based on its prior precedent in Siegel v. State, 586 So.2d 1341 (Fla 5th DCA 1991) and the Third District Court of Appeal's decision in Diaz v. State, 534 So.2d 817 (Fla. 3d DCA 1988). Siegel and Diaz require a defendant to establish that the affirmative defense would be "viable" at trial before post-conviction relief will be granted to vacate a plea. In the present case, the Fifth District Court of Appeal certified direct conflict with decisions of the First and Fourth District Courts of Appeal, which do not require a post-conviction defendant to establish the viability of an affirmative defense. The First and Fourth District Courts of Appeal correctly state the correct legal standard applicable to this case under state and federal constitutional analysis. This issue has not been certified as direct conflict in prior

decisions. This Court should resolve the conflict in the District Courts by reversing the Fifth District Court of Appeal in this case.

Further, under the specific facts of this case, it is clear that GROSVENOR would have gone to trial if she had known of a "split hair chance" of a defense (to quote her statement to the press). The bifurcated post-conviction procedure in this case presumed, and the unrefuted evidence at the post-conviction hearing established, that trial counsel was ineffective for failure to properly investigate and advise GROSVENOR of voluntary intoxication as a defense that was legally applicable to all pending charges against her. Accordingly, the Petitioner met the correct standard of review to establish prejudice from trial counsel's ineffective assistance, which requires "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-9 (1985). GROSVENOR's case should be reversed and remanded for further proceedings.

ARGUMENT

ISSUE I

THE FIFTH DISTRICT COURT OF APPEAL ERRED AS A MATTER OF LAW AND IS IN DIRECT CONFLICT WITH OTHER DISTRICT COURTS OF APPEAL BY REQUIRING THE PETITIONER, WHO WAS NOT ADVISED BY TRIAL COUNSEL OF THE DEFENSE OF INVOLUNTARY INTOXICATION PRIOR TO PETITIONER'S PLEA, TO SHOW THAT VOLUNTARY INTOXICATION WAS A "VIABLE" TRIAL DEFENSE TO MEET THE PREJUDICE PRONG FOR POST-CONVICTION RELIEF UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).

In this case the District Court of Appeal affirmed the trial Court's denial of post-conviction relief, citing Siegel v. State, 586 So.2d 1341 (Fla 5th DCA 1991) and Diaz v. State, 534 So.2d 817 (Fla. 3d DCA 1988). As certified by the District Court, Siegel and Diaz directly conflict with Mason v. State, 742 So.2d 370 (Fla. 1st DCA 1999) and Cousino v. State, 770 So.2d 1258 (Fla. 4th DCA 2000). There are other recent decisions of the Florida District Courts of Appeal that are in apparent conflict.[8]

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[8]The Fifth District Court of Appeal noted but did not certify the same conflict of decisions in Young v. State, 789 So.2d 1160, 1162 (Fla. 5th DCA 2001). See also Maples v. State, 804 So.2d 599 (Fla. 5th DCA 2002), which relies on Siegel. In the Fourth District, Hobbs v. State, 790 So.2d 1164, 1165 (Fla. 4th DCA 2001) notes but does not certify conflict with Siegel and Diaz, citing to Mason and the Fourth District's decision in Worden v. State, 688 So.2d 958 (Fla. 4th DCA 1997). The First District Court of Appeal has addressed similar issues in O'Bryant v. State, 765 So.2d 745, 746 (Fla. 1st DCA 2000); Thomas v. State, 734 So.2d 1138, 1138 (Fla. 1st DCA 1999) and Grady v. State, 687 So.2d 931, 933 (Fla. 1st DCA 1997). Other decisions of the First District Court of Appeal on this issue are addressed elsewhere in this Brief.

The Petitioner respectfully submits that this Court should resolve the conflict in the District Courts of Appeal and disapprove Siegel's requirement that a "viable" defense must be established by a post-conviction defendant who has alleged and established, as has GROSVENOR, that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). This is an issue of constitutional law pertaining to the rights to counsel and due process of law[9] and is subject to de novo review.

The Petitioner's burden is properly stated in Cousino v. State, 770 So.2d 1258 (Fla. 4th DCA 2000). In that case the defendant argued that his trial counsel had not informed him of possible trial defenses prior to his plea. Id. at 1259. The Fourth District Court of Appeal held that the prejudice prong of the Strickland test is satisfied by showing that "'there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.'" 770 So.2d at 1259, citing Hill v. Lockhart, 474 U.S. 52, 59 (1985). The Fourth District also held

[9]The Petitioner's constitutional rights to due process of law and the right to assistance of counsel are affected by the incorrect application of this issue of law. Art. I, §9, Fla. Const.; Art. I, §16, Fla. Const.; Amend. V, U.S. Const.; Amend. VI, U.S. Const.; Amend. XIV, U.S. Const.

that "[i]t is not necessary to allege, in addition, that a defense existed to the charge." 770 So.2d at 1259, citing Worden v. State, 688 So.2d 958 (Fla. 4th DCA 1997) and Mason v. State, 742 So.2d 370 (Fla. 1st DCA 1999). Cousino noted but did not certify conflict with Siegel and Diaz. 770 So.2d at 1259.

In Mason v. State, 742 So.2d 370 (Fla. 1st DCA 1999), the First District Court of Appeal held that a defendant need only allege that she would have gone to trial rather than plead no contest but for her trial counsel's advice that she had no trial defense, also noting apparent conflict with Siegel and Diaz. Mason expressly referred to Hill v. Lockhart as authority, as well as other decisions of the First District Court of Appeal,[10] and also noted but did not certify conflict with Siegel and Diaz.

Siegel held that "[i]n order to maintain a claim of ineffective assistance of counsel in connection with either a nolo contendere or guilty plea, a complaining defendant must show that he, in fact, had a viable defense." Id. at 1342, citing Diaz v. State, 534 So.2d 817 (Fla. 3d DCA 1988) and Frazier v. State, 447 So.2d 959 (Fla. 1st DCA 1984). Diaz simply only cited to Frazier. Diaz v. State, 534 So.2d at 817.

[10]The First District specifically cited to Regan v. State, 730 So.2d 828 (Fla. 1st DCA 1999); Richardson v. State, 677 So.2d 43 (Fla. 1st DCA 1996) and McCoy v. State, 598 So.2d 169 (Fla. 1st DCA 1992).

Neither Siegel nor Diaz define "viable" or offer guidance in support of the requirement to show a viable defense.

Frazier v. State, 447 So.2d 959 (Fla. 1st DCA 1984) is a pre-Strickland v. Washington decision that also provides little guidance. It is unclear what form of ineffective assistance of counsel was at issue, although the decision does make reference to whether further investigation by defense counsel would have affected the defendant's decision to enter a plea. 447 So.2d at 960. The Frazier Court cited to Knight v. State, 394 So.2d 997 (Fla. 1981), a pre-Strickland decision by this Court that required a showing that deficient conduct by trial counsel "affected the outcome of the court proceedings." 447 So.2d at 960. Neither Frazier nor Knight impose a requirement that a post-conviction defendant establish that a defense was "viable." Both do address the need to establish prejudice if counsel has been ineffective, which Strickland ultimately required.

Frazier was a First District Court of Appeal decision. In subsequent, post-Strickland cases that Court, as in Mason, has diverged from Siegel and Diaz. Most recently, in Odom v. State, 782 So.2d 510 (Fla. 1st DCA 2001), the First District reversed and remanded for an evidentiary hearing on the issue of whether defense counsel was ineffective for not advising the defendant of a voluntary intoxication defense and not interviewing

witnesses for that defense. Id. at 510.

In his concurring opinion in Mason, Judge Padovano specifically addressed the context of a defendant who has entered a plea without being advised of the defense of voluntary intoxication. He concluded that the federal constitutional standard under Hill v. Lockhart is more trial-result oriented and "is not whether the defendant would have entered the plea, but whether there is a reasonable likelihood that the defendant would have prevailed on the merits of the case at trial had the plea not been entered." 782 So.2d at 511. Judge Padovano's conclusion is based on language from Hill v. Lockhart about the application of that Court's holding to various case examples, including when a defendant has not been counseled about a potential affirmative defense prior to entry of a plea. That dicta stated 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." 474 U.S. at 59, citing Evans v. Meyer, 742 F.2d 371 (7th Cir. 1984). This analysis in at apparent odds with the holding of Hill v. Lockhart, which focuses on the effect of ineffective assistance of counsel on a defendant's decision to plea.

At a minimum, Judge Padovano's opinion reinforces the conflict in the appellate Courts of this State and among judges within the same Court on the standard which a post-conviction defendant must meet to establish the "prejudice" prong as it applies to post-conviction motions to withdraw pleas based on allegations of ineffective assistance of counsel.

The Petitioner submits that the focus in post-conviction plea cases must remain on the impact of ineffective assistance of counsel on the voluntariness of the defendant's plea. If a defendant is not advised by trial counsel of a possible trial defense, that failure to advise necessarily renders suspect the defendant's plea. In the present case, GROSVENOR should have had "'an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial.'" State v. Ginebra, 511 So.2d 960, 961-962 (Fla. 1987), quoting Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984).

In sum, Cousino, Mason and related cases of the Fourth and First District Courts of Appeal accurately state the "prejudice" prong of Strickland v. Washington. The Petitioner urges this Court to adopt the standard in those cases and reverse the decision of the Fifth District Court of Appeal in the present case.

ISSUE II

THE PETITIONER MET HER BURDEN OF SHOWING PREJUDICE FOR POST-CONVICTION RELIEF BY PROOF THAT IF SHE HAD BEEN ADVISED BY TRIAL COUNSEL OF THE DEFENSE OF VOLUNTARY INTOXICATION, SHE WOULD HAVE PROCEEDED TO TRIAL.

As recited in THE STATEMENT OF THE CASE AND OF THE FACTS, supra, the Record in this case is replete with evidence that the GROSVENOR resisted entering her pleas and unequivocally advised her counsel and the trial Court that if she had a "split hair chance" of a defense she wanted to take it. (R. IX-T52-53). There is no evidence that her trial counsel advised her of the strengths or weaknesses of the defense of voluntary intoxication[11] so that she could make an informed choice whether to plea or go to trial. This fact is not only presumed under the bifurcation procedure used in the post-conviction proceeding, but also was established by GROSVENOR without contradiction by the State at her post-conviction hearing.

The Fifth District's application of an incorrect standard for assessing the "prejudice" prong of Strickland v. Washington

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[11]As to voluntary intoxication, that affirmative defense was a complete defense to the specific intent charges filed against the Petitioner by the State. Linehan v. State, 476 So.2d 1262 (Fla. 1985); Gurganus v. State, 451 So.2d 817 (Fla. 1984); Cirack v. State, 201 So. 706 (Fla. 1967); Garner v. State, 9 So. 835 (Fla. 1891). "When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant." Gurganus v. State, 451 So.2d at 822-23.

must be reversed, prejudice found under the facts of this case, and the case remanded for further hearing under the bifurcated procedure originally ordered by the Circuit Court. There is a "reasonable probability" that the outcome of this case would have been different – that is, that GROSVENOR would not have entered a plea and instead would have proceeded to trial – if she had known that she had even a remote possibility of a trial defense.

In United States v. Loughery, 908 F.2d 1014 (D.C.Cir. 1990), the Court of Appeals found that a defendant met the second prong "Prejudice" standard because she showed "there is at least a reasonable probability – sufficient to undermine any confidence to the contrary – that but [trial counsel's] failure to inform her of [a defense] and its implications," the defendant would not have entered a plea. Id. at 1019. In that case the defendant testified without contradiction from any evidence in the record that she would not have entered a plea if she had known of a defense. The same applies in the present case. There is no contradiction to GROSVENOR's longstanding assertion that she would have gone to trial if she knoew of any trial defense.

In Patterson v. LeMaster, 21 P.3d 1032 (N.M. 2001), the Supreme Court of New Mexico recognized that "a defendant's pre-

conviction statements or actions may indicate whether he or she was disposed to plead or go to trial." Id. at 1039. In that case the defendant "repeatedly expressed his desire to go to trial." Defense counsel advised him to plead because he likely faced at conviction at trial. Counsel did not move to suppress identification evidence from two key witnesses for the State. The Supreme Court held that "[p]etitioner's insistence on his innocence and his desire to challenge the charges against him at trial indicate that there is a reasonable probability that Petitioner would have chosen to go to trial instead of pleading no contest had trial counsel moved to suppress the showup identifications."[12]

Similarly, GROSVENOR repeatedly expressed her innocence of killing Mr. Giddens. Her statement to the media that lead to the trial Court's vacating her original plea is contemporaneous evidence, in additional to her statements to her family and lawyers throughout her case, that she wanted to go to trial if she had any – a "split hair" – chance of defense.

Because this issue involves primarily a question of law, and perhaps a mixed question of fact and law, it is subject to de

[12]It should be noted that in the present case, the Petitioner pleaded in her post-conviction motion and testified without contradiction at trial that had she known her counsel could have moved to suppress her hospital statement to Lt. Farmer, she would not have entered her plea.

novo review by this Court. The issue of whether a correct standard for determining "prejudice" was applied is a question of law, while the issue of whether GROSVENOR met that standard involves issues of fact. Because both the District Court and the Circuit Court applied an incorrect standard of law, neither addressed whether GROSVENOR would have entered her plea if she had known of a voluntary intoxication defense. The Petitioner should receive this Court's de novo review of that question based on the Record.

To the extent that this Court deems it appropriate to examine findings of fact by the trial Court, a clearly erroneous standard of review should be applied. That standard is met in this case. For example, the trial Court found that GROSVENOR's voluntary intoxication defense rested solely on self-reporting, which is "self-serving" (R. IV-560). The trial Court simply ignored the lesson of Holsworth v. State, 522 So.2d 348 (Fla. 1988) that objective evidence of "proof of injestion" of intoxicants renders admissible other hearsay evidence on the issue. (R. IV-559, quoting Holsworth at 352). That objective evidence is the medical records at Leesburg Regional Medical Center. Those records indicated "the presence of certain controlled substances in her blood stream on admission [on April 15, 1989]," specifically cocaine (benzoylecgonine) and THC

(cannabinoid). (R. VI-1176-1178). Further, GROSVENOR made a statement to Lt. Farmer on April 21, 1989, without having consulted with defense counsel or any others about a voluntary intoxication defense. Lt. Farmer initiated the inquiry about GROSVENOR's use of drugs and alcohol on the night in question because he knew of the hospital laboratory results. GROSVENOR candidly responded that she had used cocaine, marijuana and alcohol and was "high" at the time this happened. (R. VII 1274-75).

CONCLUSION

The Fifth District Court of Appeal's decision should be reversed and this proceeding remanded to the Circuit Court for an evidentiary hearing on whether Petitioner's trial counsel rendered ineffective assistance of counsel under the bifurcated procedure ordered by the trial Court once prejudice has been established, as it has, by Petitioner TRACI ANN GROSVENOR.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this INITIAL BRIEF ON THE MERITS has been furnished by regular United States mail to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32218 this 12th day of July 2002.

ROBERT S. GRISCTI

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I CERTIFY that this computer-generated INITIAL BRIEF is submitted in Courier New 12-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure. Dated this 12th day of July 2002.

ROBERT S. GRISCTI