IN THE SUPREME COURT OF FLORIDA

TRACI ANN GROSVENOR,

Petitioner,

v. Case No. SC02-1307

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER GROSVENOR'S REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitution

Rules

PRELIMINARY STATEMENT

Petitioner TRACI ANN GROSVENOR will use the same format for party and record references in this Reply Brief as were used in her Initial Brief on the Merits. Additionally, the Petitioner will refer to her Initial Brief by the designation "Initial Brief" and to the Respondent's Brief on the Merits as "Answer Brief," followed by the appropriate page number; e.g., "Initial Brief, p. 1."

STATEMENT OF THE CASE AND OF THE FACTS

One factual matter that must be reiterated is that the day the Petitioner was arrested – which was the day after the nighttime shooting – GROSVENOR was transported to the Leesburg Regional Medical Center and underwent laboratory blood testing for surgery. The resulting 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). This fact is not mentioned by the Respondent in its Answer Brief, which focuses almost exclusively on the Petitioner's admitted use of alcohol, makes no mention of her drug use and argues that a voluntary intoxication defense relied only on self-reporting. Laboratory testing proves otherwise.[1]

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[1] Similarly, in its Order Denying Defendant's Motion for Post-Conviction Relief with Attachments (R. IV-552-683)(App., pp. 8-19), the Circuit Court made no reference to the laboratory

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL'S DECISION IS IN DIRECT CONFLICT WITH OTHER DISTRICT COURTS OF APPEAL BY REQUIRING THE PETITIONER TO ALLEGE AND PROVE AT HEARING THAT VOLUNTARY INTOXICATION WAS A "VIABLE" TRIAL DEFENSE.

In the case before this Court, the Fifth 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). Grosvenor v. State, 816 So. 2d 822 (Fla. 5th DCA 2001). As certified by the District Court, Siegel and Diaz directly 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. The heart of this conflict centers on the determination of the proper standard under the prejudice prong of the Strickland test for ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). This Court must review the decisions of the District Courts of Appeal in order to resolve the conflict and avoid the precedential effect of those decisions that are incorrect and in conflict with decisions reflecting the correct rule of law.

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report, which was introduced as evidence by the Petitioner in the post-conviction hearing. (R. VI-1176-1178).

In Strickland v. Washington, the Supreme Court set forth two components of the test for ineffectiveness. Id. The first requirement is a showing that counsel's performance was deficient. Id. In the case at bench, Petitioner's trial counsel's ineffectiveness was presumed, including counsel's failure to communicate with Petitioner.[2] The second requirement of the Strickland test is a showing of prejudice. The analysis properly turns on a showing of prejudice.

The United States Supreme Court has extended the application of the Strickland test to allegations of ineffective assistance of counsel arising out of the plea process. Hill v. Lockhart, 474 U.S. 52 (1985). The "prejudice prong" is satisfied by an allegation 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. Id. at 59.

Florida's District Courts of Appeal are in direct conflict on what is required for a showing of prejudice in the context of plea agreements. The Respondent argues in its Answer Brief that

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[2] 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). 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).

there is no conflict between the Grosvenor decision and the precedent underlying Grosvenor because the Petitioner received an evidentiary hearing on her post-conviction Motion. (Answer Brief, pp. 11-15). This argument is incorrect. The Petitioner submits that the District Courts of Appeal uniformly have required an allegation that a defendant would not have entered a plea if she had known of a particular affirmative defense. The real issue presented in this case, and the conflict in the decisional law of the District Courts of Appeal in Florida, is what must be proved by the post-conviction defendant to establish prejudice under Strickland v. Washington and its progeny in the context of a defendant who has entered a plea and, by doing so, waived the right to trial. This is the issue that the Fifth District has certified in the case at bar.

In Mason v. State, 742 So. 2d 370, 371 (Fla. 1st DCA 1999), the First District Court of Appeal noted that it has consistently held that it is not necessary to allege, in addition to an allegation satisfying Hill, that a defense existed to the charge. Id. at 371, citing Regan v. State, 730 So. 2d 828 (Fla. 1st DCA 1999); Richardson v. State, 677 So. 2d 43 (Fla. 1st DCA 1996); McCoy v. State, 598 So. 2d 169 (Fla. 1st DCA 1992). The Court in Mason noted apparent conflict with the holdings of Siegel v. State) and Diaz v. State, which require

that a defendant must additionally show that she had a viable defense to fulfill the prejudice prong. Mason v. State, 742 So. 2d at 371. See also Cousino v. State, 770 So. 2d 1258, 1260 (Fla. 4th DCA 2000). As fully argued by the Petitioner in her Initial Brief, Siegel and Diaz are the cases relied upon by the Fifth District Court of Appeal in Grosvenor v. State as the basis for that Court's conflict certification. (Initial Brief, pp. 14-19).

Of noteworthy absence in the Answer Brief is argument regarding the recent opinion of the First District Court of Appeal of Florida in Brazeail v. State, 27 Fla. L. Weekly D1606 (Fla. 1st DCA July 9, 2002).[3] In Brazeail the Court specifically addressed the conflict of law at issue in Petitioner's case. In holding that a defendant need not allege that he had a viable defense in addition to an allegation that, but for the ineffective assistance of counsel, he would not have entered his plea of guilty, the First District noted apparent conflict with decisions of other Florida District Courts of Appeal. Id. at D1606. In addition to relying on numerous Florida decisions, the First District also noted that its opinion followed the

[3]The Petitioner filed a Notice of Supplemental Authority with this Court regarding the Brazeail decision immediately after filing her Initial Brief. In this Reply Brief the Petitioner cites to the Florida Law Weekly citation because the Southern Second Citation, at 821 So. 2d 364 does not have on-line page references.

holdings of several United States Supreme Court decisions, as well as decisions from other Federal Circuit Courts of Appeal. Id. at D1607. Brazeail states the correct standard under the prejudice analysis and is in direct conflict with the holding of the Fifth District in Petitioner's case.

The Brazeail decision states that Hill clearly indicates that the required showing of prejudice in conjunction with a claim of attorney incompetence in the plea process differs from the required showing of prejudice in conjunction with a claim of attorney competence at trial. Id. at D1607 . The Court notes that while some other Courts have suggested that the prejudice test is the same in these situations, it rejects the notion that this heightened burden applies in the context of claims of attorney incompetence in the plea process. Id.

The Brazeail decision relies on Roe v. Flores-Ortega, a case in which the United States Supreme Court decided the proper framework for evaluating an ineffective assistance of counsel claim. Roe v. Flores-Ortega, 528 U.S. 470 (2000). The Roe Court held that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reasonable belief that the defendant reasonably demonstrated to counsel that he was interested in appealing. Id. at 480. In making this determination, Courts must take into account all the

information counsel knew or should have known. Id. By "consult," the Supreme Court referred to advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes. Id. at 478.

The record in Petitioner's case is replete with evidence that Petitioner 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 proceed to trial. (R. IX-T52-53). There is no evidence that Petitioner's trial counsel consulted with her about the strengths and weaknesses of the defense of voluntary intoxication so that she could make an informed choice whether to plea or go to trial. Not only did Petitioner's trial counsel fail to make a reasonable effort to discover her wishes, but he ignored her wishes when she specifically told him that if she had a defense she wanted to proceed to trial. This fact is not only presumed in the bifurcation procedure used in this post-conviction proceeding, but was also established without contradiction at the post-conviction hearing. (Initial Brief, pp. 6-8, 10).

The Court in Roe properly states the prejudice standard under Strickland. Where an ineffective assistance of counsel claim involves counsel's performance during the course of a

legal proceeding, the Court normally applies a strong presumption of reliability to the proceeding, requiring a defendant to overcome that presumption by demonstrating that attorney errors actually had an adverse effect on the defense. "[T]he complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because 'the adversary process itself' has been rendered 'presumptively unreliable.'" Roe v. Flores-Ortega, 528 U.S. at 483, quoting United States v. Cronic, 466 U. S. 648, 659 (1984). The even more serious denial of the entire judicial proceeding also demands a presumption of prejudice because no presumption of reliability can be accorded to judicial proceedings that never took place. Roe v. Flores-Ortega, 528 U.S. at 482.

Although Roe dealt specifically with an appeal, the Court stated that the prejudice standard it employed mirrors the prejudice inquiry in Hill v. Lockhart. Roe v. Flores-Ortega, 528 U.S. at 485. The Court in Roe stated that "[l]ike the decision whether to appeal, the decision whether to plead guilty (i.e., waive trial) rested with the defendant and, like this case, counsel's advice in Hill might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled." Id. In Roe, counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed

reliability, but rather to the forfeiture of a proceeding itself. Id. Similarly, in Petitioner Grosvenor's case, trial counsel's deficient performance led to the Petitioner's forfeiture of her fundamental right to a trial.

The Brazeail Court noted that Roe specifically addressed the issue in conflict throughout the Florida District Courts of Appeal as to whether the prejudice prong requires some showing by the defendant of the merits of her underlying claim. Brazeil v. State, 27 Fla. L. Weekly at D1605. Roe held, following the standards established in Strickland and Cronic, that "requiring a showing of actual prejudice (i.e., that, but for counsel's errors, the defendant might have prevailed) when the proceeding in question was presumptively reliable, but presuming prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent." 528 U.S. at 484. Therefore, prejudice must be presumed in Petitioner's case and no further showing is required of a "viable" defense. Siegel and Diaz and, therefore, Grosvenor v. State establish an incorrect standard of "prejudice" for the Petitioner to establish.

The Brazeail opinion agreed with the decision in Miller v. Champion, 262 F.3d 1066 (10th Cir. 2001). In Miller the Court

reviewed an order denying post-conviction relief based on the trial Court's ruling that in order to be entitled to relief, the defendant was required to show that had he not plead guilty, there was a reasonable probability that he would have been acquitted at trial. 262 F.2d at 1068-1069. The Tenth Circuit rejected the trial Court's ruling and held that when a defendant alleges that his attorney's assistance led him to plead guilty, the test for prejudice is whether he can show that he would not have pled guilty had his attorney performed in a constitutionally adequate manner. Id. at 1072. It is not necessary for the defendant to show that he actually would have prevailed at trial. Id. The same holds true for Petitioner Grosvenor, who should not be required that she would have had a "viable" trial defense.

The United States Supreme Court has held that among the most "basic duties" imposed upon defense counsel by the Sixth Amendment is the duty "to consult with the defendant on important decisions." Strickland v. Washington, 466 U.S. at 688. Whether to plead guilty is one of those critical decisions reserved for the defendant personally, rather than counsel. Roe v. Flores-Ortega, 528 U.S. at 484. While the defendant is entitled to make this decision personally, it involves the potential waiver of a critical right and requires "the guiding

hand of counsel." Powell v. Alabama, 287 U.S. 45, 69 (1932). Thus, counsel's basic duties in a criminal case include the duty to advise the defendant of the right to go to trial, to explain whether there are any available defenses, to determine whether the defendant wishes to take a plea or go to trial, and to take a case to trial if the defendant so desires. Criminal defendants, such as the Petitioner, cannot be expected to make a fundamental decision without the advice and assistance of an attorney. Available defenses to the crime of murder are not common knowledge that Petitioner could be expected to know in order to make an informed decision whether to plea.

In sum, the necessary showing of prejudice under Strickland, Hill, Roe, and Brazeail is a reasonable probability that, but for counsel's deficient performance, the defendant would have directed his lawyer to go to trial. The standard focuses on what the criminal defendant would have elected to do if competently counseled, and restores the defendant to the position he would have occupied if so counseled. This standard avoids penalizing the defendant for failing to forgo the plea offer and take her case to trial in the first instance when the failure is attributable to attorney error.

In this case, it is clear that Petitioner was denied her Sixth Amendment right to advice and assistance of counsel in

deciding whether to plea guilty. Counsel's vital function was rendered meaningless by his failure to advice and consult with Petitioner regarding the possibility of going to trial and the defenses potentially available to her. Had counsel adequately consulted with Petitioner regarding her plea, the record conclusively establishes that she would have decided to take her chances at trial. The most telling proof of her desire to go to trial was that she, as soon as she discovered there was a possible defense available to her, began seeking a chance to go to trial. The trial court was incorrect in considering whether or not the voluntary intoxication defense was likely to succeed at trial in its prejudice analysis.

The Respondent claims that it would not have been reasonable for Petitioner's trial counsel to advise her to reject the plea and face the possibility of the death penalty. While trial counsel was free to strongly advise Petitioner to accept the plea offer, he had a constitutionally-required duty to discuss the plea and the options available to Petitioner. It was Petitioner's ultimate decision to waive her right to trial and accept the plea. Trial counsel's duty was to advise and assist her in making this decision, not to make the decision for her without giving her the opportunity to make an informed decision.

The State cites Evans v. Meyer, 742 F. 2d 371, 374 (7th Cir.

1984) for the proposition that, after weighing the evidence, the court was correct in its denial of post-conviction relief because "no lawyer in his right mind would have advised [the defendant] to go to trial with a defense of intoxication." Id. at 374. Judge Posner, writing for the majority, explained the decision by applying the uncontested facts to the specific crimes charged and concluded that intoxication was not a bona fide defense to those charges. Id. Evans is distinct from Petitioner's case because in Evans the Court reached its decision based on two conclusions. First, Evans was charged with general intent crimes so intoxication would not be relevant since intent is not required. Id. Second, Evans claim of prejudice was not supported by any evidence indicating that the defendant would have decided to forgo the plea and take his case to trial had his trial counsel advised him of the intoxication defense. Id. Conversely, Petitioner's intoxication defense was relevant to her case because she was charged with a specific intent crime. Additionally, Petitioner has repeatedly alleged that had she known there was any chance of a defense, she would have insisted on going to trial. Therefore, Evans is factually distinguished from the instant case.

The State argues that no lawyer "in his or her right mind would have advised Petitioner to go to trial with a voluntary

intoxication defense." (Answer Brief, p. 17). The Respondent bases this argument on trial counsel's claim that he consulted with an expert and other attorneys regarding the defense and concluded that it was not viable. Since trial counsel's ineffectiveness was presumed at the bifurcated evidentiary hearing, the reliability of his conclusion is not relevant to the inquiry before the Court.

Furthermore, the Respondent argues that, "according to trial counsel, Sumter County juries do not consider voluntary intoxication as mitigation for murder." (Answer Brief, p. 18). However, the Court in Strickland v. Washington stated that the assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. Strickland v. Washington, 466 U.S. at 700. Therefore, trial counsel's beliefs regarding the possible effects of the intoxication defense should not be part of the prejudice assessment.

CONCLUSION

In Kimmelman v. Morrison, the United States Supreme Court remanded the case for application of the second component of the Strickland test, the showing of prejudice. Kimmelman v. Morrison, 477 U.S. 365 (1986). While instructing the District

Court to redetermine the prejudice inquiry under the Strickland standard, the Supreme Court stated that the rights of the Constitution are granted to the innocent and the guilty alike; the Sixth Amendment guarantee of effective assistance of counsel does not attach only to matters "affecting the determination of actual guilt." Kimmelman at 323. Applying this principle to the instant case, 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, insofar as prejudice has been established as a matter of law.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this REPLY BRIEF has been furnished by regular United States mail to Pamela J. Koller, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32218 this 7th day of September 2002.

ROBERT S. GRISCTI

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I CERTIFY that this computer-generated REPLY 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 7th day of September 2002.

ROBERT S. GRISCTI