ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 12-132

STATE OF FLORIDA

Appellant/Cross-Appellee,

v.

THOMAS D. WOODEL

Appellee/Cross-Appellant

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT I -CROSS-APPEAL

THE LOWER COURT ERRED IN FINDING THAT COUNSEL'S DEFICIENT PERFORMANCE IN FAILING TO CONSULT WITH AN EXPERT ON THE EFFECTS OF ALCOHOL AND FAILING TO OBJECT TO ARTHUR WHITE'S TESTIMONY DID NOT PREJUDICE MR. WOODEL IN THE GUILT PHASE.

A. Failure to consult with a toxicologist as to guilt phase

The State argues that counsel's performance was within prevailing norms in failing to speak to or consult with an expert on the effects of alcohol in preparation for the Guilt Phase of Woodel's trial. (Appellant's Reply/Cross-Answer Brief , p. 23). The State argues that the lower court's finding of deficient performance was erroneous because counsel's decision was a matter of trial strategy. *Id.* The State's arguments are based on three points: 1) neither Smith nor Colon had ever used a toxicologist and were unaware of any defense attorneys using a toxicologist to establish blood alcohol levels or the like so to use one was outside prevailing norms, 2) that Colon felt Polk County jurors knew what it was like to be drunk and did not need an expert to explain the effects of alcohol, and 3) that Colon disfavored a "shotgun approach." *Id.* at p. 23 – 26. Each point will be addressed in turn. Since Smith was the attorney responsible for the investigation and preparation for the Guilt Phase portion of the trial, his testimony is most relevant to any analysis of this claim.

First, it is important to keep in mind that a decision not to investigate based on "strategy" is only reasonable to the extent it is based on a thorough investigation or a "reasoned" decision to limit the investigation:

> [S]trategic choices made after *thorough investigation of law and facts relevant to plausible options* are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (emphasis added). Consistent with Strickland, the post conviction court hinged its finding on deficient performance based on counsel's failure to even consult with an expert on the effects of alcohol. The lower court found that without even consulting such an expert, "counsel did not make a knowing and educated decision not to use a toxicologist or similar expert." (ROA V.36, p. 6057). The post conviction court's finding in this regard is supported by clear and competent evidence and clearly established federal law.

The State claims that both Smith and Colon were "familiar with the evidence a toxicologist could generally provide." *Id.* at p. 24. However, Smith stated he did not consult with or know how a toxicologist would come into play in this case because it never crossed his mind and he had never used a toxicologist at all. (ROA V. 11, p. 1718; p. 1735; pp. 1747-49; pp. 1763-65). Any attempt to ascribe to

Smith's testimony a reasoned decision based on an investigation is unsupported by the record. Smith admitted he simply didn't think about it. The post conviction court's determination was correct.

The State also credits testimony from both lawyers that they had "never heard" of a defense attorney using an expert to support a voluntary intoxication defense. (Appellant's Reply/Cross-Answer Brief, p. 24). The State uses this testimony in support of their argument that counsel's failure to consult with or even consider whether an expert could help a jury assess the effects of alcohol intoxication on their client was within the wide range of prevailing norms afforded capital defense attorneys in Florida because *no other defense lawyers were hiring experts on intoxication.* The State argues: "Like Smith, Colon *had never heard* of any defense attorney using a toxicologist to support a voluntary intoxication defense, despite his many years of experience and the fact that he maintained a close relationship with other defense practitioners." *Id.* at p. 24.

The State's argument is flawed in a number of respects. First, the testimony relied on by the State demonstrates Smith and Colon's limited knowledge and expertise. Simply because they were unaware of such a practice does not logically prove the practice did not exist. Further, their testimony was expressly refuted by Mr. Norgard's testimony and decisions laid down by this Court and the Florida District Courts of Appeal. Norgard explained that it is within prevailing norms for

an attorney, faced with the facts of this case, especially since voluntary intoxication was a statutory defense to the crime, to at least consult with an expert about the facts of alcohol use and whether explaining the effects of alcohol needs to be explained to a jury in a scientific manner in a particular case. (ROA V. 29, p. 4937-40). Consistent with Norgard's testimony that defense attorneys were using experts for this purpose as early as the 1980s, numerous cases demonstrate that Florida defense attorneys have relied on expert testimony to present voluntary intoxication or insanity defenses based on voluntary intoxication throughout the 1980s and 1990s including in murder cases. *E.G. Barber v. State*, 576 So. 2d 825, 831 (Fla. 1st DCA 1991); *Easley v. State*, 629 So. 2d 1046, 1049 (Fla. 2nd DCA 1993); *Burch v. State*, 522 So.2d 810, 812 (Fla. 1985); *Foster v. State*, 929 So.2d 524 (Fla. 2006) (crime in 1993, trial in 1994); *Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000) (trial in the 1980s). Likewise, the 1989 ABA Guidelines, in effect at the time of Woodel's Guilt Phase trial, also set out the requirement that counsel consult with experts to prepare for the defense in the guilt phase. 1989 ABA Guidelines for the Performance and Appointment of Counsel in Death Penalty Cases 11.4.1(D)(7) ("Counsel should secure the assistance of experts where it is necessary or appropriate for: A. preparation of the defense . . ."). *See also,* Commentary, 11.4.1(D)(7)(A) (same). The post conviction court's finding, including the crediting of Norgard's testimony, was correct.

The State's reliance on *Grayson v. Thompson*, 257 F.3d 1194 (11th Cir. 2001) is not persuasive. The planned burglary and subsequent murder and rape of the elderly victim in *Grayson* occurred in 1980 Alabama. The trial occurred in 1982, also in Alabama. Therefore, the prevailing norms in effect were those in Alabama in 1980-82. That is an inappropriate metric by which to judge Woodel's counsel's performance in 1998 in Florida. At the time of Grayson's murder and trial, the State of Alabama limited expert funding for indigent capital defense to $500 and counsel was therefore unable to retain an expert, even though *he testified in post conviction* that *he needed a number of experts, including an expert on the effects of alcohol due to his client's excessive alcohol consumption which he felt was" critical" in demonstrating his client's lack of intent. Grayson,* 257 F.3d at 1211-12. The *Grayson* Court found counsel's failure to consult with and obtain an expert reasonable based, in part, on the lack of funding to retain an expert. *Id.* at 1221. Additionally, the federal habeas court's review was limited by AEDPA.

There is no testimony to suggest, and the State has not offered any, that the trial court in Woodel's case would have denied expert funding. In fact, the trial court appointed two experts to assist trial counsel in Woodel's case. The prevailing norms in effect in Alabama at the time of Grayson's trial were markedly different than the prevailing norms in effect in 1998 in Florida – the time of Mr. Woodel's guilt phase proceeding. *See Burch v. State*, 522 So.2d 810, 812 (noting the trial

court in a 1985-86 retrial of a 1982 murder, did not abuse its discretion in denying a $14,000 fee of an internationally known expert and requiring counsel to use a local toxicologist who could testify as to the effects of drugs and alcohol for $4,000 in the guilt phase of a capital murder trial.)

The State also makes a number of arguments, intermixing Mr. Colon's testimony wherein he was being asked to address his thought processes as to the 2004 Penalty Phase. *E.g.* Mr. Colon used the term, "shotgun defense," which he described as a defense where trial counsel uses multiple experts and that he only uses experts when it magnifies his case. (Appellant's Reply/Cross-Answer Brief , p. 25). Mr. Colon did not refer to the "shotgun defense" as it related to consulting with a toxicologist for the Guilt Phase. The State's arguments are not persuasive. As the post conviction court found, because trial counsel never consulted with and had never used an expert to assist in a voluntary intoxication defense, any reasoning offered at post conviction about how the expert would have fit into the specific facts of Mr. Woodel's case is mere speculation and does not reflect "a knowing and educated decision." Further, as Norgard explained and the post conviction credited, while a Polk County Juror may know what it is like to be drunk, "most jurors do not have the sophistication to really know about alcohol and the effects of alcohol, and particularly the long-term effects of alcohol abuse." (ROA V. 36, p. 6036). The notion of getting so drunk that you end up killing two

people is outside the realm of most jurors' experiences. Lastly, the State's arguments "resemble[ ] more a post hoc rationalization of counsel's conduct rather than an accurate description of deliberations prior to [the guilt phase]." *Wiggins v. Smith*, 539 U.S. 510, at 526-27 (2003).

The State also argues that the record is incomplete and unclear based on Colon's testimony so this Court should deny this claim as to deficient performance. The State is mistaken. The post conviction court expressly found that trial counsel failed to consider consulting with an expert in this area. (ROA V. 36, p. 6055-56). As noted above, with record cites, Smith, who was in charge of the preparation of the Guilt Phase defense, conceded he did not consult a toxicologist, nor did he even consider it, prior to the 1998 trial. The same is true for Colon. Further, there was nothing in the attorneys' files or billing suggesting they did so. And while Colon testified that he "believed" he may have spoken to Dr. Dee, Colon's testimony was vague and inconsistent and he failed to have an accurate memory. Such failures go not to Woodel's failure of proof but to Mr. Colon's credibility. It is in the province of the finder of fact to weigh and assess a witness' credibility. A witness' failure to accurately recall events can be a basis upon which to reject their testimony or give it less weight. See Florida Standard Jury Instruction 3.9, Weighing the Evidence. The court below determined facts which are supported by competent and substantial evidence.

The State also argues that, even if counsel were deficient, the court properly rejected prejudice. (Appellant's Reply/Cross-Answer Brief, p. 29). The State argues that *Burch v. State*, 478 So. 2d 1050 (Fla. 1985), and *Cirack v. State*, 201 So. 2d 706 (Fla. 1967), compel a finding that an expert could not testify as to Woodel's alcohol consumption because Woodel did not testify in the guilt phase. The State argues that because Woodel did not testify in the guilt phase, Dr. Buffington, or a similar expert, could not rely on what Mr. Woodel told Dr. Buffington or Dr. McClane about his under estimating the amount he drank and that he actually had 24 to 30 beers. Firstly, *Cirack* and *Burch* have been superseded by Florida Statute 90.704 which states that an expert may testify to or rely on facts and data reasonably relied upon by an expert in his field, and the facts or data "need not be admissible in evidence." *Geralds v. State,* 674 So.2d 96, 100 (Fla. 1996); *Bender v. State*, 472 So. 2d 1370 (Fla. 3d DCA 1985). It would have been error in 1998 to preclude an expert from testifying about what Woodel told him about the amount of alcohol he consumed in support of a voluntary intoxication defense as that is exactly the type of fact relied on by experts in that field. *Barber v. State*, 576 So. 2d 825, 831 (Fla. 1st DCA 1991) (In case where defendant did testify, error, although harmless, in precluding expert from testifying as to amount of liquor defendant told him he had consumed prior to murder). *See also Easley v. State*, 629 So. 2d 1046, 1049 (Fla. 2nd DCA 1993) (Error to prohibit psychiatrist

from relying on criminal defendant's self reporting of history of clinical depression and use of alcohol and drugs in forming an opinion as to whether defendant had specific intent to commit murder.).

Further, even applying the overly stringent standard in *Cirak* and *Burch* urged by the State, there was sufficient evidence for expert testimony beyond Mr. Woodel's statement to McClane that he had 24 to 30 beers. The trial court determined there was sufficient evidence to support giving an instruction on voluntary intoxication. Further, Mr. Woodel could have testified in the guilt phase, giving the same testimony as he did in the second penalty phase, to establish the amount he drank.

The State also incorrectly asserts that Dr. Buffington failed to give an opinion on Woodel's level of intoxication after having 7 to 8 beers. (Appellant's Reply/Cross-Answer Brief, p. 30). The State is mistaken. Buffington calculated Woodel's BAL based on the consumption of 7 or 8 beers and opined that, at that level, Woodel would have been over a .10 and have experienced confusion and met the standard of voluntary intoxication. (ROA, V. 29, P. 4861-66). The State's argument is without merit.

The State also argues that *Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000) provides support for the argument that no prejudice is established because voluntary intoxication is a difficult defense to present. However, the State merely

cites to dicta wherein this Court found reasonable performance based on testimony that trial counsel considered both a voluntary intoxication defense and an insanity defense before deciding on an insanity defense.

Prejudice is established when counsel fails to present expert testimony regarding a defendant's acute alcohol intoxication. *Miller v. Terhune*, 510 F. Supp. 2d 486 (E.D. Cal. 2007). In a non-death case, after having found trial counsel performed deficiently in failing to consult an expert qualified to assess the effects of alcohol on cognitive thought processes, the federal district court found prejudice in the guilt phase of a trial. *Id.* at 506. The Court reasoned that the prosecutor had been able to discredit the defendant's version of events as not credible because counsel had failed to explain the effects of alcohol. The expert calculated the defendant's BAL to be above a .30 at the time of the offense. The expert explained that the defendant, especially if he was alcohol-tolerant, could still walk and talk but still be experiencing significant impairment in his ability to reason and make decisions and judgments. *Id.* at 504. He would also be able to call 911, as the defendant did in this case. If a sober person points a gun at someone and shoots them, a finder of fact could reasonably conclude that the shooter was making a rational decision. *Id.* The same cannot be said of someone with a BAL of .30. *Id.* He further explained that an accurate evaluation of the defendant's state of mind was not possible without specific consideration of his intoxication. *Id.* at 505.

Likewise, in *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003), the court found a capital defendant was prejudiced when trial counsel failed to present expert testimony on drug and alcohol intoxication at the sentencing phase. The expert testimony of Dr. Levin presented at post-conviction supported a finding that the manner of killing, which involved shooting, then striking the victim with a tire iron and then trying to drown him and shoot him again, "reflected erratic behavior," and thought processes. *Id.* at 1169. The defendant's "cloudy" memory also evidenced diminished cognitive functioning. Id. Ironically, another expert called at post conviction, Dr. Dee, offered his opinion that the defendant was "acutely intoxicated" at the time, that the manner of death was consistent of an individual under the influence of drugs and alcohol, and that the defendant's ability to form "specific intent was diminished." *Id.* at 1170. Evidence was also offered that the defendant had a history of blackouts. *Id.* at 1174. The court also found that, "although the [expert] conclusions as to mitigation factors under the Florida statute were essentially the same in [the post conviction] proceeding, the judge and jury heard none of this testimony." *Id.* at 1172. Basing its holding on *Williams v. Taylor,* 529 U.S. 420 (2000), the court found that trial counsel's failure to understand the need for background testimony from additional family members and the failure to present evidence of the defendant's drug and alcohol use,

"confidence in the fundamental fairness of the state adjudication" is undermined. *Id.* at 1174.

At the 1998 Guilt phase, defense counsel failed to offer any expert testimony on the effects of alcohol, Tommy's level of impairment on the night of the crime or genetic predisposition to alcoholism. The prosecution presented his statement to police in which he said he couldn't remember much of the crime because he had been drinking but said he had only 7 to 8 beers. Counsel conceded his theory was that Tommy was very, very drunk, had been drinking extensively and was in an alcohol induced "coma." Yet, counsel offered no expert evidence to explain this theory. Counsel was left to argue in his closing argument that Tommy was in a drunken state but his "misperceptions sound incredible." 1999 Trial ROA V. 17, p. 2658. Counsel's failure prejudiced Tommy because he failed to give the jury a scientific and informed basis to evaluate the significance of Tommy's drinking in relation to the crime and to assess his mental status, specifically his ability to form the requisite intent.

The prosecutor was able to argue in his closing that Tommy's drinking of alcohol was not impairing him enough to eliminate his intent and that Tommy was able to make choices, walk and do other things that an impaired person could not do. The prosecutor further argued there was no corroboration to support the voluntary intoxication defense other than Tommy's claim of drinking 7 to 8 beers.

1999Trial, V.17, p. 2626. "Based upon that, and that alone, the Defendant now asks you to say he can't be guilty . . . because he was intoxicated." *Id.* at 2626-27. The prosecutor further argued there was no corroborating testimony to tell the jury how the alcohol was affecting him. *Id.* at 2631. The prosecutor also stressed that there was a "*lack of evidence* to help [you the jury] understand; was he merely intoxicated to this level, or did it get to this level?" He further argued that Woodel "cannot hide behind voluntary intoxication." *Id.* at 2641.

Had counsel presented expert testimony he could have offered a science based alternative to the prosecutor's arguments. Dr. Buffington testified that Tommy was in a partial blackout which "is a cognitive phenomenon" where the individual can be functioning, talking, walking, having thought processes, having behaviors and have no memory of them. He also explained that "behavior disinhibition and violence" are common with high blood alcohol levels. Observers may think the person is behaving in a way that involves cognitive thought processes but the person is acting in a way that he would not normally act and his brain is unable to lay memory foundation. Alcohol affects the cerebral cortex which is responsible for judgment, thought and perception. It also affects the limbic system which regulates emotion and behavior and other parts of the brain. Dr. Buffington calculated Tommy's BAL and felt it was probably under a .4 at the time of the crime but above a .10 at the lowest range. Tommy would have vomited

at a .18 or .20 and there was testimony that he had vomited while walking back to the trailer park. Buffington explained that the blood alcohol levels in this case are so significant that the statutory mental mitigators would apply. Had the jury heard Buffington's testimony, there is a reasonable probability that at least one juror would have had reasonable doubt as to whether Tommy had the intent to commit first degree murder, burglary or robbery.

Mr. Colon himself identified Tommy's excessive use of alcohol as a significant factor in the case. He described Tommy as being in an "alcohol induced coma." This was *not* a case where a defendant denied responsibility for the crime so a decision to limit the investigation into alcoholism and the effects of alcohol could reasonably be made based on a rejection of inconsistent theories. *See Jones v. State*, 885 So. 2d 611, 616 (counsel made reasoned decision to reject voluntary intoxication claim where client told attorney he was not intoxicated and that he was innocent.); *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000) (voluntary intoxication inconsistent with innocence defense).

Further, the crime itself reflected a bizarre, irrational set of events indicative of an individual who was impaired. *See White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) (no ineffective assistance in failure to present intoxication defense where defendant's actions during robbery of parking his car to access an easy get away, bringing a gun with him, walking victims into a freezer in order to kill them,

and bringing a change of clothes was inconsistent with a claim of voluntary intoxication.).

Further, regardless of whether Woodel testified or not, evidence of his drinking was put before the jury by the prosecution through his statement. Tommy's excessive drinking was the theory by necessity. Woodel's statement to law enforcement, obtained after many hours of "discussion," reflected his disjointed and poor memory of events, a fact which supports a finding of an alcoholic blackout.

Lastly, even though the jury was instructed on felony murder, there exists a reasonable probability that the jury would have rendered a verdict of second degree murder based on the facts of this case as set out supra.

The State's argument is without merit and this Court should find prejudice was established.

B. Failure to Object to Impermissible Testimony by Arthur White

The State argues that Woodel is precluded from establishing prejudice under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) based on this Court's holding in *Chandler v. State*, 848 So.2d 1031 (Fla. 2003). In *Chandler*, this Court held that because the issue of unobjected to improper comments by the prosecutor had been raised on direct appeal by Chandler, and denied under *this Court's fundamental error standard*, Chandler

would be unable to obtain relief on an ineffective assistance of counsel claim for failure to object to the improper comments because he could not establish prejudice under *Strickland*. *Chandler*, 848 So. 2d at 1043-46.

This Court has defined fundamental error as "error that must reach down into the validity of the trial itself *to the extent that a verdict of guilty could not have been obtained* without the assistance of the alleged error." *Chandler* at 1045, quoting *Brown v. State*, 124 So.2d 481, 484 (Fla. 1960). This Court also stated, "Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test." *Id.* at 1046.

Respectfully, in *Chandler*, this Court misapprehended the *Strickland* prejudice standard in two major ways. First, the fundamental error standard described by this Court in *Chandler* is a higher standard than the *Strickland* prejudice standard. Secondly, prejudice under *Strickland* cannot be determined piecemeal; it requires a totality of the evidence evaluation which this Court failed to do as to Chandler's claim of trial counsel's failure to object to prosecutorial misconduct.

Strickland prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. " *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Because the right to effective assistance of counsel is a fundamental right, where the Defendant has been deprived of that right, the standard for proving prejudice in the *Strickland* context is low:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be show by a preponderance of the evidence to have determined the outcome.*
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> * * * *
>
> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors...When a defendant challenges a death sentence...the question is whether there is *a reasonable probability* that, absent the errors, the sentencer – including an appellate court to the extent it independently reweighs the evidence – would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim, must consider the totality of the evidence before the judge and the jury.

Strickland v. Washington, at 694-696 (emphasis added). Further, when a court fails to consider the totality of the evidence presented at trial and at post conviction, it's

decision is unreasonable within the meaning of *Strickland. (Terry) Williams v. Taylor,* 529 U.S. 362 (2000).

Therefore, in assessing prejudice in Woodel's case, this Court cannot look at Arthur White's comments in isolation. This Court must look at the totality of the proceedings, including the additional mitigation presented in post conviction, in determining whether prejudice has been established. Further, this Court must apply the *Strickland* standard of "reasonable probability" and not this Court's fundamental error standard.

Arthur White's statement was inflammatory, irrelevant, inadmissible and the admission of the statement to Woodel's jury violated Woodel's Due Process rights under the Federal Constitution. The statement was of the type that had "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *McDuffie v. State*, 970 So.2d at 327 , *(citing Brown v. State*, 719 So. 2d 882, 885 (Fla. 1998), relying on *Old Chief v. United States*, 519 U.S. 172, 180, 117 S.Ct. 644 (1997)). The statement created the "yuck factor" and cast the entire incident in a twisted light. Woodel was never charged with a sexual battery and there was no forensic evidence suggesting the victim had been sexually battered. The prosecutor credited White's testimony in his closing argument. ROA 1999 Trial, V. 17, p. 2603-2610. He claimed, "Arthur White only had [Woodel's] best interest at heart." *Id.* at 2608. The prosecutor claimed "He

didn't get any deal, he didn't get anything. In fact, he said it kind of hurt him because now he's here as a witness where he really doesn't want to be." *Id.* at p. 2608-09. He also argued that White's testimony was corroborated by the physical evidence. *Id.* at 2609-10.

Prejudice is established by the fact that this crime was so bizarre and irrational that if the jurors had been given a meaningful scientific explanation of the extent and effect of alcohol on Woodel's functioning on the night of the murders so they could meaningfully apply the voluntary intoxication instruction, there exists a reasonable probability that the results of the proceeding would have been different and confidence in the outcome is undermined. Likewise, Arthur White's testimony was so prejudicial, providing a false, distasteful motive to an otherwise completely illogical crime, that it deprived Mr. Woodel of a fair trial. White's testimony was self-serving, consistent with his history of criminal behavior and knowledge of how to "game" the system.

The lower court was correct in finding deficient performance. This Court should find that Woodel established prejudice.

ARGUMENT CROSS-APPEAL ISSUE II

THE LOWER COURT ERRED IN FINDING THAT THE PROSECUTOR DID NOT VIOLATE BRADY/GIGLIO IN ITS PRESENTATION OF ARTHUR WHITE.

A. False Testimony/Failure to Disclose Benefit for Testifying

The State argues that Woodel failed to establish a "deal" under *Brady/Giglio/ Napue* and their progeny because White denied a deal and claimed he was hurt, rather than helped, by testifying at Woodel's 1998 Guilt Phase and 2004 Re-Sentencing Proceeding. (Appellant's Reply/Cross-Answer Brief, p. 36-37). The State also argues there is "no evidence" of any agreement. *Id.* at 37. However, a reading of White's testimony in totality strains the credibility of the argument that White did not receive a benefit. Further, his claim that he was losing Gain Time by testifying was false. In reality, he lost Gain Time due to repeated violence and misconduct in prison.

Arthur White has been in and out of prison since 1972-73. ROA V. 31, p. 5224. He has used three different aliases. *Id.* at 5219. In 1991 he was sentenced to nine years in prison for a crime occurring in Orange County. *Id.* at 5221 He was released early on controlled release (aka parole) in 1996. *Id.* He was back in custody almost immediately with a charge of possession of cocaine and burglary of his sister's house, Polk County Circuit Court Case Nos. 96-5805 and 96-5889. *Id.* at 5222 and 5231-32. He was also charged with extortion and threatening a witness for telling a relative that he was going to "burn down her shop and kill [his sister] if she calls the police [about the burglary] because I ain't going back to prison for no bullshit." *Id.* at 522. This statement was detailed in his arrest affidavit which was contained in the court file of the case. Def. Exhibit 10, composite A to G. Mr.

White denied making that statement but admitted, "Don't nobody want to go back [to prison]." *Id.* at 5224-25.

While White was in jail awaiting resolution of his charges, Woodel was arrested for the murders of the Moodys and placed in the same jail as White. White made an effort to speak to Woodel. White admitted that the case was a high profile case covered on the television news and he had access to television in jail. *Id.* at 5226-27.

White wrote a letter to Assistant State Attorney Aguerro who sent detectives Cash and Cloud to see him. *Id.* at 5227. White told them, "I'm willing to give you information if you can help me with my charges, I'm willing to give you information on that." *Id.* at 5227-5228. He also drew a map of the trailer but refused to give it to the Detectives, calling it his "bargaining chip." *Id.* at 5230-31.

Mr. White was also noticed as an HFO so he was facing 30 years on the burglary charge. *Id.* at 5231-32. Woodel's case had not yet gone to trial but in September of 1997, about a year after he was arrested, he got a "pretty sweet deal." *Id.* On the burglary case, he pled to a grand theft and a misdemeanor and received a 15 month prison sentence, *concurrent and coterminous* with his controlled release violation. *Id.* at 5233-34. The cocaine charge was reduced to a misdemeanor or dropped. The prosecutor who gave him the deal on these cases was John Kirkland. *Id.* at 5235.

The State brought White from prison to testify in Woodel's case in 1998. White denied receiving any benefit from the prosecution. He continued to deny any benefit during his testimony during the post conviction hearing but admitted he saw offering himself up as a witness against another inmate as his "job." When questioned further, he explained that his "job is to help [himself] be free." *Id.* at 5238-39. He didn't deny that he got a benefit, he just denied direct knowledge of it: "I did my part ...as to taking the stand and testifying, hoping for something. . . . *I don't know if a deal* came from me giving the information or whatever or whatnot. But nobody ever approached me and let me know that something was getting done in my behalf." *Id.* at 5252.

White got out of prison shortly after Woodel's first trial and again almost immediately committed two violent crimes. He was charged with two separate robberies, including the robbery of a local woman with family in law enforcement and who was involved in local politics. *Id.* at 5235-36. While in custody on these cases, White admitted he called Corp. Henry of the Bartow Police Department seeking "substantial assistance." *Id.* at 5236.

White told Corp. Henry that he knew Paul Wallace and that Wallace could vouch for his ability as a witness. *Id.* at 5237. White called Paul Wallace himself and even knew Wallace's secretary's name, Pat. *Id.* at 5238. White was again noticed as an HFO and was facing 30 years on each robbery. *Id.* at 5263. He got a

plea deal on those charges also. One of the cases was dropped and he got 5 years prison, followed by 5 years probation on the robbery involving the woman with prominent friends and family. *Id.* The other case was dropped. *Id.* The prosecutor who gave him the deal on the robbery cases and helped him avoid 60 years in prison, was the same prosecutor who gave him the deal in 1997, John Kirkland. *Id.* at 411.

The State relies on *Floyd v. State,* 18 So. 3d 432, 451-52 (Fla. 2009) for the principle that a "claim that the State withheld a deal is only viable where the defense can establish that there was an actual agreement to provide favorable evidence in exchange for the trial testimony provided." (Appellant's Reply/Cross-Answer Brief, p. 37). However, that is not what this Court said in *Floyd.* This Court denied Floyd's claim because there "was *no evidence* offered to indicate there was an agreement." *Floyd,* 18 So. 3d at 451-52. In this case, there was evidence offered. As demonstrated supra, the totality of the facts support a finding that White made an offer to testify in exchange for leniency, that he did testify, and that he received a substantially lower sentence than he was facing under Florida law in a prosecution by the same prosecutor's office with which he had offered himself up to testify. *See also* Defense Exhibits 55-64, ROA V. 28, pp. 4658-4722 (Certified Copies of Arthur White's convictions, arrest reports and Scoresheet). The State has not denied or refuted that White contacted the State Attorney's

Office offering himself up in exchange for a benefit, that a prosecutor and two detectives went to see White, that White gave them information about the case, that White testified in the case, that White knew Wallace, and was on a first name basis with Wallace's secretary. White told Assistant State Attorney Aguerro and the Detectives who saw him in jail, that he only agreed to testify or give additional information if he was "helped." *Id.* at 5227-28.

In light of this evidence, the State has put on no credible direct evidence that there was not a deal, nor has the State tried to refute any of those facts. On its face, it is apparent that White is a hardened criminal, who has repeatedly attacked and victimized people, and repeatedly re-offended almost immediately after release from various Florida penal institutions. How such a dangerous individual with such an extensive record of violent crimes could manage to receive such light sentences establishes there was more at play here than mere happenstance.

B. False Testimony as to Prior Convictions at 2004 Re-Sentencing

The State also argues that there was no *Giglio* violation when White testified falsely about his number of prior convictions because evidence of his prior convictions was public record and that, because five is "about" eight, the testimony was not false and White "did not lie." (Appellant's Reply/Cross-Answer Brief, p. 40). The State's argument is inconsistent with Florida law.

This Court has held that when a witness gives an incorrect number regarding his or her prior convictions, or does not answer the question in a "straightforward manner," offering a "guesstimation" of their priors, the opposing party is allowed to impeach by cross-examining the witness as to the correct number of convictions and introducing certified copies of the prior convictions. *Perez v. State*, 648 So. 2d 715, 718-19 (Fla. 1995). *See also Cannon v. State*, 777 So. 2d 997, 998 (Fla. 2nd DCA 2000); Fla. Stat. 610.6. White's use of the term "about" was a "guesstimation," that White cleverly used to answer the question in a less than straightforward manner. White mislead the jury as to his prior history. White's answer was untrue under this Court's holding in *Perez*.

The State additionally argues that because there was "no showing that the prosecutor was aware of White's true record" because White used aliases, that White's cases were handled by a "different prosecutor," and that White's prior record was available to trial counsel had he bothered to look, there can be no *Brady/Giglio* violation. (Appellant's Reply/Cross-Answer Brief, p. 40). The State is mistaken. The Supreme Court of the United States has held when a prosecutor has an "open file policy," it is unlikely that counsel would have suspected that additional impeaching evidence was being withheld." *Strickler v. Greene*, 527 U.S. 263, 286, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The testimony at post conviction was that Colon relied on and asked Wallace what White's prior record

was and that Wallace may have even shown him his file on White. ROA V. 14, p. 2196. "He may have had a folder and I looked at it, or I may have just taken him at his word." *Id.* at 2197.

Further, an individual prosecutor's lack of knowledge does not defeat Woodel's claim. The State is mistaken in this argument and the lower court erred in basing its rejection of this claim on Wallace's purported lack of knowledge. The suppression of evidence favorable to the accused upon request, including impeachment evidence, violates a defendant's Due Process rights. This rule encompasses evidence that may only be known by the police and not the individual prosecutor. The "*individual prosecutor has a duty to learn* of any favorable evidence known to the others acting on the government's behalf . . ." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed. 2d 490 (1995). While Mr. Wallace may not have been the prosecutor in his office who researched White's prior history when making a sentencing decision/plea offer, he had a duty to learn White's prior history and the knowledge of White's criminal background that was known to the Bartow Police and other prosecutors in the same office. A prosecutor plays a "special role . . . in the search for truth," whose obligation is "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S., 78, 88, 55 S.Ct. 629, 79 L.Ed. 2d 1314 (1935).

Lastly, as argued in Appellee's/Cross Appellant's Answer/Initial Brief, Woodel has met the low *Giglio* materiality standard. Woodel's sentence of death was by the thinnest of margins, a mere seven to five majority, and, as trial counsel testified, White's self-serving testimony was damaging and provided the "yuck factor." White's prior record was extensive, especially compared to Woodel's record. The lower court erred. Woodel has established a *Brady/Napue/Giglio* violation.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court properly found counsel to render deficient performance in the Guilt phase. This Court should affirm that Order. The lower court erred, however, in not finding prejudice was established. The lower court further erred when it denied Woodel's *Brady/Giglio* claim regarding the testimony of the snitch, Arthur White. This Court should order that his convictions be vacated and remand the case for a new guilt phase trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellee/Cross-Appellant has been furnished by e-service to Carol M. Dittmar, Assistant Attorney General, at Carol.Dittmar@myfloridalegal.com, and CapApp@myfloridalegal.com and Thomas D. Woodel, DOC #H06832, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026 on this 11th day of February, 2013.

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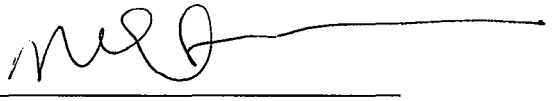
CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Appelle/Cross-Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.



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February 11, 2013

The Honorable Thomas D. Hall
Clerk, Supreme Court of Florida
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Supreme Court Building
500 South Duval Street
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Re: *State of Florida v. Thomas Woodel*
Case No. SC12-132

Dear Mr. Hall:

Enclosed for immediate filing in the above-captioned case are:

1. Original and seven (7) copies of Reply Brief of Appellee/Cross-Appellant (which has also been electronically submitted to e-mail@flcourts.org on this date);

2. A copy of the first and last pages of the above-referenced documents for return to CCRC-M after stamping with the date of filing;

3. A pre-addressed, stamped envelope.

Please use the enclosed envelope to return the copies of the first (date-stamped) and signature pages of the documents to our office.

Copies have been provided to opposing counsel of record by first class mail and/or e-file service. Thank you for your assistance in this matter.

Sincerely,

Marie-Louise Samuels Parmer
Assistant CCRC

Enclosures

cc: Carol Dittmar, Assistant Attorney General
Thomas Woodel, Defendant