

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC89710

GEORGE JAMES TREPAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

TODD G. SCHER
Litigation Director
Florida Bar No. 0899641
Office of the Capital Collateral
Regional Counsel - Southern Region
101 NE 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR MR. TREPAL

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REPLY TO ARGUMENT I¹

A. MARTZ'S ROLE AND THE IMPORTANCE OF THE KIND OF THALLIUM CONTAINED IN EVIDENCE AT ISSUE IN THESE PROCEEDINGS.

In putting Roger Martz's role in this case "in context" (AB at 9), the State simply downplays Martz's role, the importance of the testing he conducted, and the significance to the jury of the results to which he testified. While conceding that Martz was the only witness who testified in front of the jury to the particular kind of thallium in the three Coke bottles (Q1-Q3) as well as the bottle found in Mr. Trepal's vacated shed (Q206) (AB at 10), the State, at this juncture, with Martz's credibility and his testing results in tatters, now wants to distance itself from the importance of Martz and his conclusions to its case at trial. Rather, the State's position now is that "thallium is thallium" and because Peggy Carr died of thallium poisoning, Martz's testimony identifying the specific type of thallium located in Q1-Q3 and Q206 was of no real significance to the State's case (AB at 9).

The State's latest position on Martz's role flatly contradicts the factual finding of the lower court that "[t]he testing results of the Coke samples and Q206 *were the only direct evidence of Trepal's guilt*" (2PCR. 2679) (emphasis added). This finding, not factually

¹This Reply Brief does not reply to every argument raised by Mr. Trepal and the State's response thereto. Mr. Trepal relies on his Initial Brief to refute those arguments of the State which are not addressed herein.

contested by the State, is due deference by this Court. Stephens v. State, 748 So. 2d 1028 (Fla. 1999). Moreover, the State's distancing from Martz is flatly contrary to its own actions regarding Martz prior to trial as well as the arguments it made to persuade the trial court to admit damaging evidence from DEA Agent Broughton and David Warren about Mr. Trepal's prior conviction in North Carolina. During the investigatory stage of the case, and even as the case went to trial, the State was not satisfied with the "thallium is thallium" theory it now espouses. The authorities knew early on (and certainly when they first interviewed Mr. Trepal), that the Carr family had been poisoned with thallium. The issue here is not that the Carr family was poisoned with thallium; rather, the State determined that it was significant to attempt to link the evidence of the contents of the Q1-Q3 bottles to the contents of Q206, and, of course, the contents of both to Mr. Trepal. The particular form of thallium contained in Q1-Q3 and Q206 was the dispositive factor and the foundation for Mr. Trepal's arrest and the ultimate linkage to Mr. Trepal of the Q1-Q3 and Q206 items. In other words, if this case had involved a shooting, Martz's testing provided the State with evidence that the lands and grooves of the bullet used to kill the victim matched a gun in Mr. Trepal's possession. Without the linkage between the specific bullet to a specific gun, the State would not be permitted to simply introduce "a" bullet and "a" gun and hope the

jury believes they are somehow related to the case and the defendant. Just as a "gunshot" is not any "gunshot" unless specifically tied to evidence in the possession of the defendant, so too this case, "thallium" is not just "thallium" where Martz provided the crucial linkage between the key evidentiary items and Mr. Trepal. As the lower court correctly stated at the closing argument following the evidentiary hearing, "I don't think there's any argument here about thallium being present. I think nitrates is what we're fighting about" (2PCR. 749).

The other reason the State needed to identify the particular form of thallium in the Coke samples and in Q206 was to demonstrate that the particular salt form of thallium used by the killer showed premeditation. Indeed, in its direct appeal brief, the State argued that because "Coca Cola with a solution of thallium one nitrate added does not appear different than plain Coke," the "use of thallium one nitrate shows that appellant intended to kill" (Answer Brief of Appellee, Trepal v. State, No. Sc77667, at 250). The reaction of the various salt forms of thallium became a key focus of the investigation and ultimate case presented at trial, including the

State's closing argument: *This*
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How does the State prove this to you, that this would have to be a coincidence? Through two sets of witnesses.

First of all, the FBI did a test. Havekost did an elemental analysis test. He figured out that it was thallium in the Coca-Cola bottles. *But that was all he knew at that point, that it was thallium.*

The washings had been tested and retested by him. All we knew was thallium. But the Coca-Cola -- let me backtrack.

Martz goes in there from the FBI and says I can test for nitrates or sulphates. And he finds out that it's Thallium I Nitrate -- Thallium Nitrate. Could be Thallium I as far as Martz knows, could be Thallium III as far as Martz knows, but he knows it's Thallium Nitrate.

What happens? Coca-Cola takes Thallium I, Thallium III, and they put it in a bunch of Coke bottles. *Well, isn't it an amazing, an astounding coincidence, just coincidence, a coincidence that a Coca-Cola bottle without any thallium in it looks like this, and a Coca-Cola bottle with up to a gram of thallium also looks like this (demonstrating). Just like this. No thallium, quarter*

gram, half gram, three quarters of a gram, a whole gram. No change. You cannot see this stuff. Isn't that amazing. Because if you take Thallium III and put it in Coca Cola, what happens? Coca-Cola becomes extremely discolored. Now who's going to drink this (demonstrating)?

Now, as far as the defense argument at the end that perhaps even if Mr. Trepal did this he didn't intend to kill anybody. *Why didn't he just put Thallium III in here? Nobody would drink this crap, but they certainly would have it tested and they would know that somebody was trying to poison them. That isn't what's in there. Thallium I Nitrate was in there.*

(R. 4193-94 (emphasis added)). The prosecutor's own theory of the case and the evidence the State chose to present to the jury belies the State's current attempts to distance itself from the critical importance of Martz's testing to its case.

Finally, and as explained in detail in Mr. Trepal's Initial Brief, the State also needed Martz's testing and the conclusions therefrom in order to make its argument in support of the admissibility of Mr. Trepal's prior conviction in North Carolina through the testimony of DEA Agent Broughton and David Warren (Initial Brief at 52-54). The gist of Broughton's testimony concerned Mr. Trepal's prior knowledge that thallium III nitrate is used in the amphetamine manufacturing process, a process which produces a sediment of thallium I nitrate (R. 3480-81). Of course, this testimony is only meaningful in terms of linkage to Mr. Trepal if the contents of Q1-Q3 and Q206 contained thallium nitrate, and any

break in the chain, *i.e.* evidence that either the Q1-Q3 samples or the Q206 sample, or both, did not contain thallium nitrate, would render Broughton's testimony irrelevant and inadmissible.

The State recognizes the potential impact on the admissibility of Broughton's testimony, but argues that because the lower court found that "even if Martz could not identify thallium nitrate as having been `added' to the Coke, he could have properly testified that the test results on the tainted Coke were consistent with thallium nitrate having been added" (AB at 19). This, according to the State, "would have been a sufficient predicate for the relevance of Trepal's knowledge of and access to thallium nitrate as part of his participation in the methamphetamine lab" (*Id.*). The problem with the State's argument is that this is not what the lower court found. The lower court never found that Martz could have properly testified that the test results "were consistent with thallium nitrate having been added."² Rather, the lower court found that, as to Q1 and Q2, all Martz would have been justified in saying was that "test results were consistent with *the presence of nitrate in Q1 and Q2*"; as to Q3, "he could have testified that it contained an

²The State's brief makes the same misstatement in arguing that the lower court "agreed" that "Martz should have limited his testimony to an opinion that the results of his testing were consistent with *thallium nitrate having been added to the Coke* (AB at 14).

oxidizing agent" (2PCR. 2679). Indeed, the lower court expressly found that "[w]hile there is a possibility that the substance is in fact thallium I nitrate, *the court declines to so find* (2PCR. 2680).³ The lower court also found that "the measure of scientific proof required by the scientific community was not satisfied by Martz's testing sufficiently to permit Martz to conclude that thallium

³The State continues to rely on the quantitative or stoichiometric analysis conducted by Martz on the airplane to Florida as demonstrating the ultimate correctness of Martz's opinion that thallium nitrate had been added to the Coke; the State also notes that witnesses Jordan and Burmeister concurred with the stoichiometric analysis (AB at 13). The State fails to note, however, that the lower court rejected these conclusions on credibility grounds:

the court is concerned that the result may be unreliable because the data, taken from the IC chart, was flawed. Testimony at the hearing has indicated that the IC charts were flawed because of the graphing problems described earlier, the failure to run blanks, and the failure to run a standard consisting of nitrate and unadulterated Coke. Martz relied on the IC charts; Jourdan used data taken from Martz's notes. Burmeister's opinion of Martz's work was also shaped by the quantitative analysis. While there is a possibility that the substance is in fact thallium I nitrate, the court declines to so find. *The court rejects Jourdan's and Burmeister's conclusion that the data supports the conclusion to which Martz testified at trial.*

(2PCR. 2680) (emphasis added). Martz himself testified at the evidentiary hearing that, prior to trial, he "didn't think it was possible" to do the quantitative analysis because he had "misread" one of the charts (*Id.* at 2991). The court also noted that Jordan and Burmeister "colored their testimony" at the evidentiary hearing due to their roles in defending Martz during the Inspector General investigation (*Id.*). All these factual findings are supported by competent evidence, and the State makes no meaningful effort to explain otherwise.

nitrate was added to Q1 and Q2 (Id. at 2681). There is a world of difference between saying that the results were "consistent with *thallium nitrate* having been added" as opposed to "consistent with *the presence of nitrate*."⁴ Simply because a suspect sample is deemed to have "the presence of nitrate" does not mean that the substance is "thallium nitrate." In fact, one of the critical areas on which the lower court concluded that Martz "misled" the jury was his testimony at trial that known Coca-Cola contained no nitrate, when in fact he conducted testing (never disclosed to the defense) which revealed the presence of nitrate in known Coca-Cola (2PCR. 2972; 2974; 2985). As the lower court concluded, this fact "would have been useful to the jury" (2PCR. 2678), for, as defense counsel testified, it would have given the defense the ability to make a powerful argument that the "presence of nitrate" in the contaminated samples was attributable to the makeup of Coca-Cola itself (Id. at 3544).

The State incorrectly asserts that "there was no real issue presented below" with regard to Martz's testimony as to the contents of Q206 (AB at 10). This is not accurate. Martz himself was

⁴The State makes a similar misstatement of fact when arguing that Drs. Dulaney and Whitehurst "concluded that Martz's testing established only that the Coke samples were 'consistent with' thallium nitrate having been added" (AB at 13). The State cites no pages in the evidentiary hearing transcript reflecting such testimony. Both Dulaney and Whitehurst had serious concerns about Martz's conclusions as to the type of salt that may have been contained in the Coke samples. See Initial Brief at 33-38.

questioned extensively about his work on Q206 (2PCR. 3007-13), and admitted calling the results "debatable" when interviewed by the Office of the Inspector General (2PCR. 3013). When asked about the fact that the charts reflecting the results of x-ray diffraction testing he did on Q206 revealed peaks showing substances other than nitrate, Martz explained he was "not an expert on x-ray diffraction" Q206 (Id. at 3010). When asked about the IR testing he did on Q206 which showed discontinuity in the peaks, he acknowledged the difficulty in running thallium nitrate using the IR technology (Id. at 3012-13). Much of Dr. Frederic Whitehurst's testimony, which the lower court found to be "highly credible," dealt with Q206; upon review of the charts pertaining to the testing of Q206, Dr. Whitehurst indicated that the charts suggest that the sample was prepared improperly (2PCR. 3404). He also indicated that due to the poor quality of the charts, the tests should have been redone (Id.). Dr. Whitehurst concluded that while the readouts on the charts were consistent with the presence of thallium nitrate, the result needed to be confirmed through other testing methods which were not done (2PCR. 3405). Dr. Whitehurst clearly testified that stating the charts are consistent with thallium nitrate, is not the same as stating that Q206 contained thallium nitrate (2PCR. 3405-6). Dr. Dulaney also indicated that the results of the Q206 testing was debatable (2PCR. 3238). Thus, it is inaccurate to conclude that

there was "no real issue presented below" as to the Q206 sample.

B. FRYE ISSUE.

The State admits that "had Martz's testing been subject to further scrutiny prior to being admitted at trial, any deficiencies could have been corrected with new, more reliable testing and data" (AB at 17).⁵ This concession more than acknowledges that confidence is undermined in the result of the trial. The State's argument certainly is an acknowledgement that Martz's testing was grossly inadequate, for there would be no reason to conduct "new, more reliable testing" had Martz's work been scientifically reliable enough on which to base any opinions. The State also fails to explain how its concession would assist its position at trial, where it would bear the burden under Frye of establishing the general acceptance of both the underlying scientific principle *and the testing procedures used to apply that principle to the facts of the case at hand*. Ramirez v. State, 2001 LEXIS 2305 at *18 (Fla. Dec. 20, 2001).

Despite its concession, the State argues that the "new, more reliable testing and data" it concedes should have been done in this

⁵The State cannot help but raise a procedural bar to the Frye issue, contending that a Frye challenge must be raised at trial (AB at 17). When evidence which could lead the defense to mount a Frye challenge is withheld by the State, the State cannot turn around and fault the defense for not raising the issue at trial.

case would have prevented the exclusion of this evidence (AB at 17). This is not only sheer speculation, but also contrary to prosecutor Aguero's representation below that "[i]f we have another trial, Mr. Martz is going to testify exactly like he did ... The only exception, the only exception is going to be that Mr. Martz now recognizes that he did not do a nitrate test on Q3, so I'm sure that he would not testify in that fashion in a new trial" (2PCR. 3632). This is hardly demonstrative of a true recognition by the prosecutor that "new, more reliable testing" would be done at a new trial or would have been done prior to trial had the defense known of the significant challenges to Martz's testing and conclusions.⁶ There is nothing in the record to indicate that the testing methods would have been

⁶The State suggests that "Martz should not be criticized for failing to reveal something that no one asked about" (AB at 16). This defense of Martz is puzzling, given the lower court's factual finding that "[t]here is no doubt that the data available at the time of trial did not support the opinion Martz offered and that he knew it" (2PCR. 2679). "The resolution of [capital] cases is not a game where the prosecution can declare, "It's for me to know and for you to find out." Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996). The State overlooks that, during Martz's pretrial deposition, after he discussed the few tests that he relied on to arrive at his conclusions as to both the Coke samples and the Q206 sample, he was asked "Does this that we have discussed so far today cover your entire involvement in the investigation of this case?" to which Martz responded "To my knowledge, it does, yes" (Deposition of Roger Martz at 13). The State fails to explain what else the defense was supposed to do when assured by Martz that what he discussed at the deposition constituted his "entire involvement" in the case. See Way v. State, 760 So. 2d 903, 912 (Fla. 2000). In any event, to the extent that the defense could have done more to look into this matter, defense counsel rendered deficient performance, as the lower court ultimately concluded (2PCR. 2687).

improved, nor is there any testimony which would have strengthened the results or shown that protocols will someday exist as to the testing of thallium in Coca-Cola. Martz never testified that the defects in his testing could be cured. In fact, Martz's notes were so sparse and misleading that the witnesses had difficulty in reconstructing what he did or did not do.

The State further asserts that "there is no allegation that the nature of the testing itself is such that, when properly conducted, the results would not be generally accepted within the scientific community" (AB at 17). This argument overlooks the premise of Frye, namely, that "a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments." Ramirez at *15. The State's view requires Mr. Trepal to speculate as to what evidence the State would present at a Frye hearing to meet its burden of general acceptance, and what a judge hearing the evidence at an adversarial Frye hearing at some future date would conclude. The State has shifted its burden under Frye to Mr. Trepal. Martz acknowledged, and the State concedes in its brief, that the reason he conducted the vast amount of testing on the questioned samples (both the Coke samples and Q206) was "because thallium was an uncommon substance" and "there were no protocols to govern his testing"; thus, Martz "tried a number of different tests -- some of them experimental in nature -- in an attempt to find out as much as he could" (AB at 15).

It is precisely because there are "no protocols" to govern the testing and Martz had to rely on "a number of different tests" some of which were "experimental in nature" that a Frye challenge exists and, had the evidence not been suppressed, would have been made prior to trial. Given the lower court's conclusions, particularly the finding that "the measure of scientific proof required by the scientific community was not satisfied by Martz's testing sufficiently to permit Martz to conclude that thallium nitrate was added to Q1 and Q2 (2PCR. at 2681),⁷ Mr. Trepal has established that there is a reasonable probability that a Frye challenge would have been successful had the evidence that defense counsel needed to mount such a challenge been disclosed by the State. Whether the evidence is re-tested under "new, more reliable" methods at some future date and whether the State can meet its burden under Frye is a matter to be addressed at a new trial, not in the present proceeding.

Again, the problem with the manner in which the State has

⁷The State asserts that three witnesses testified at the evidentiary hearing that Martz's conclusion that thallium nitrate was added to the Coke samples was proven within a reasonable degree of scientific certainty (AB at 17). This testimony, of course, was from Martz, Jourdan, and Burmeister, all of whose relevant testimony the lower court rejected on credibility grounds. Moreover, to the extent that the State relies on Martz to prove the scientific acceptance and reliability of his own testing, this argument fails. Ramirez, 2001 LEXIS 2305 at *16 ("A bald assertion by the expert that his deduction is premised upon well-recognized scientific principles is inadequate to establish its admissibility of the witness' application of these principles is untested and lacks indicia of acceptability").

twisted the Frye issue is that it overlooks that when establishing the admissibility of scientific evidence, it is *the State's burden* to demonstrate general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case. Ramirez at *19. Just as "[t]he theory underlying tool mark evidence" at issue in Ramirez "has long" been generally accepted, here too Mr. Trepal does not argue that the machinery used by Martz to conduct the testing were not generally accepted. However, when the examiner's particular "theory" or method of applying this methodology "departs" from the generally-accepted methodology, Ramirez at *21, Frye is implicated. Thus, that no protocol existed for Martz's testing and that he had to rely on experiments in the laboratory "in an attempt to find out as much as he could" (AB at 15), is precisely the reason that his conclusions were inadmissible at Mr. Trepal's trial. An "expert" who is either incompetent or who is "quite skilled and knowingly colored his testimony" (2PCR. 2679), does not provide a reliable basis for providing a capital jury with opinions on "the only direct evidence of guilt":

In order to preserve the integrity of the criminal justice system in Florida, particularly in the face of rising nationwide criticism of forensic evidence in general, our state courts--both trial and appellate--must apply the Frye test in a prudent manner to cull scientific fiction and junk science from fact. Any doubt as to admissibility under Frye should be resolved in a manner that minimizes

the chance of a wrongful conviction, especially in a capital case.

Ramirez at 846.

Finally, the State contends that "there has never been any evidence presented that the Coke samples did not, in fact, contain thallium nitrate" (AB at 18). The State apparently overlooked one of the more important findings by the lower court on this very issue: "[w]hile there is a possibility that the substance is in fact thallium I nitrate, *the court declines to so find*" (2PCR. 2680) (emphasis added). All the lower court indicated was that Martz's test results were "consistent with the presence of nitrate," not *thallium nitrate*. As noted in the previous section of this brief, there is a world of difference between these two facts. The experts on whom the lower court relied and who it found to be highly credible both testified that the most that could be said about the contents of the Coke samples was that they contained thallium; without more research, there was no way to determine what thallium salt was present (2PCR. 3394; 3228). Other than bald disagreement and a general statement about its "concerns with a few of the findings" made by the lower court (AB at 8 n.1), the State points to nothing except an inaccurate reading of the lower court's finding to support its contention that no evidence was presented regarding the content

of the Coke samples.⁸

C. GIGLIO ISSUE.

In his initial brief, Mr. Trepal argued that the lower court employed an incorrect legal standard in denying relief based upon a Giglio violation. In its brief, the State asserts that the lower court did indeed apply the correct legal standard but rejects the lower court's Giglio analysis as "improperly beneficial to Trepal" and asserts that this case should be viewed under a "straight newly discovered evidence issue."⁹ The State's complaints about the lower court's legal analysis, however, are waived, for the State did not appeal. See Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (procedural defaults apply to the State as well as to defendants).

In arguing that the lower court's Giglio analysis was correct, the State simply points to the incorrect standard directly from the lower court's order (AB at 20). Although the lower court identified the Giglio test as requiring relief if "there is a reasonable likelihood that [the false information] could have affected the jury

⁸In terms of the admissibility of Broughton and Warren's testimony, Mr. Trepal addresses this more specifically in the previous subsection of his Reply Brief.

⁹The State contends that "this entire claim was presented to the court below as one of newly discovered evidence" (AB at 21). This is not accurate. This claim was presented below as newly discovered Giglio and Brady violations, in addition to a straightforward "newly discovered evidence" claim. All these grounds for relief are asserted herein as well.

verdict" (2PCR. 2680), the court went on to conclude that "for this analysis the actual testimony should be compared to what Martz could have truthfully testified to at trial," and that "there is no reasonable likelihood that the verdict would have been different" (Id.).¹⁰ This is an incorrect analysis.¹¹ Under Giglio, a court does not look to what a perjurer "could have truthfully testified to." This stands the Giglio test on its head. Rather, the focus is on the effect on the jury of the false testimony. Giglio v. United States, 405 U.S. 150, 154 (1972) (presentation of false evidence, whether knowing or unknowing, requires a new trial "if the `false testimony could . . . in any reasonable likelihood have affected the judgment of the jury") (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)).¹² Accord United States v. Biberfeld, 957 F. 2d 98, 105 (3d

¹⁰The lower court relied on this Court's opinion in Rose v. State, 774 So. 2d 629 Fla. 2000), for the proposition that the materiality analysis of a Giglio violation is the same as for a Brady violation (2PCR. 2689). Mr. Trepal addressed this issue in his Initial Brief at p. 56 n.75, yet the State does not address this argument. Apparently then the State concedes that the lower court's reliance on Rose was misplaced; indeed, Rose is never mentioned, cited, or discussed by the State.

¹¹It is also an analysis that is impossible to satisfy. It is simply an impossibility to compare Martz' false testimony with what he could have truthfully testified to at trial. The jury never heard truthful testimony from Martz, and to make this issue even clearer, the lower court's order makes a factual finding declining to find that Q1, Q2, and Q3 contained thallium I nitrate (2PCR. 2680). Thus, there is no truthful testimony to compare to the false.

¹²This principle was not announced in Giglio but was applied in the pre-Giglio context when, for example, the Supreme Court found

Cir. 1992) (Giglio required new trial because "[i]f DiLauro's alleged perjury were before the jury, it is reasonably likely that the jury would have had a very different picture of *actual* DEA practice regarding the K-39 clause, thus affecting the judgment of the jury with respect to the false statement counts ..."); State v. Yates, 137 N.H. 495, 629 A.2d 807 (N.H. 1993) ("Although the trial court found that `there was more than sufficient evidence from which the jury could conclude' that Yates [committed the crime], the test for resolving Yates' claim is not whether the jury's verdict is supported by sufficient evidence, but whether there is any reasonable likelihood that the false testimony could have affected the verdict. . . It may be enough for the defendant to show that exposing the lie during trial could have damaged the credibility of the witness" (citing Giglio, 405 U.S. at 154; Napue, 360 U.S. at 269)). Thus, the lower court's analysis looking at what Martz "could rightfully have testified about" is incorrect. The test employed by the lower court and espoused by the State on appeal shifts the focus away from the effect that Martz's false testimony might have had on the jury. Given the factual findings of the lower court, when the correct legal standard is applied, it could not be clearer that Mr. Trepal is entitled to a new trial. As the lower court found, "if Martz had

that when a witness "gave the jury the false impression" on a material fact of the prosecution's case, a new trial was warranted. Alcorta v. Texas, 355 U.S. 28, 31-32 (1957).

testified truthfully the only direct evidence in the case would have been greatly weakened" (2PCR. 2679). This is more than a sufficient finding under Giglio to warrant relief.

Citing Smith v. Massey, 235 F. 3d 1259 (10th Cir. 2000), the State argues that the principle of imputed knowledge to the prosecution of false testimony "may not be applied mechanistically" and should not be applied in this case (AB at 21-22).¹³ The State's reliance on Smith is misplaced for a number of reasons. In Smith, the defendant alleged that a blood spatter expert presented by the prosecution at trial was not qualified to render blood spatter analysis, and that the "interpretation" rendered by the witness was outside the bounds of science. Smith, 235 F. 3d at 1270.¹⁴ In

¹³The State appears to restrict its view of Giglio only to actual knowledge, as opposed to whether the prosecutor knew *or should have known* of the false testimony. The lower court did acknowledge that the test was "knew or should have known" (2PCR. 2689). This is the correct standard, as discussed more fully infra. It also bears pointing out that at the closing arguments following the evidentiary hearing, prosecutor Aguero, in attempting to defend Martz, argued that "[w]hat is important to understand is Mr. Martz was responding to my question. . . I was in charge at that point. I was the trial lawyer. I was asking all the questions" (2PCR. 3611). Aguero's own argument supports the proposition that he knew or should have known of the falsity of Martz's testimony. Moreover, "[t]he State in a criminal trial assumes a heavy responsibility in vouching for an expert's credentials, for if the State is duped along with everyone else, the consequences can be dire." Correll v. State, 698 So. 2d 522, 526 (Fla. 1997) (Shaw, J., concurring in result with separate opinion).

¹⁴The claim raised in Smith appears to be similar to the claim raised in and addressed by this Court in Correll v. State, 698 So. 2d 522 (Fla. 1997), regarding Florida "blood spatter expert" Judith

seeking relief, Smith argued that the witness' exaggeration of his credentials amounted to false testimony imputable to the prosecution. Id. at 1270-71. The Tenth Circuit rejected this claim, concluding first that "there has been no factual finding by the state courts or the district court that Ede knowingly provided scientifically inaccurate testimony." Id. at 1272. The Court went on to note that, in its view, the Supreme Court has not "clearly established" that knowledge of falsity on part of a prosecution witness is imputable to the State, although it acknowledged that "there appears to be a split of opinion among the circuits on the issue." Id.

Mr. Trepal submits that the Tenth Circuit's conclusion is not in accordance with Giglio, which itself addressed a situation of imputed knowledge from one prosecutor who had no involvement in the prosecution being attacked, to the actual prosecutor on the case under review.¹⁵ Indeed, in Smith v. Phillips, 455 U.S. 209 (1981), the Supreme Court emphasized that Giglio's materiality analysis "implicitly recognizes that the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due

Bunker.

¹⁵Moreover, there was no finding in Smith that the witness actually testified falsely, unlike the instant case, where the lower court's order could not be clearer in its factual findings that Martz knowingly presented false testimony to Mr. Trepal's jury. See, e.g. 2PCR. 2679 ("[t]here is no doubt that the data available at the time of trial did not support the opinion Martz offered and that he knew it"). Thus, Smith is inapposite.

process purposes. Id. at 220 n.10.¹⁶ Most significantly, the State does not mention that the Eleventh Circuit, which is the federal circuit for Florida, does hold that knowledge of falsity of a prosecution witness, when that witness is a member of the "prosecution team" such as law enforcement, is imputed to the prosecutor. See Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984) ("It is of no consequence that the facts pointed to may only support knowledge of the police because such knowledge will be imputed on the state prosecutors") (citing Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977); Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969)). Accord United States v. Antone, 603 F. 2d 566, 569 (5th Cir. 1979). Indeed, numerous state and federal courts have held in accordance with the Eleventh Circuit. See United States v. Biberfeld, 957 F. 2d 98, 102 (3d Cir. 1992) ("The government argues it did not actually know of any falsity in DeLauro's testimony, and thus even if it was false, Biberfeld is not entitled to relief ... The touchstone of due process analysis is not prosecutorial misconduct, but the fairness of the

¹⁶The Tenth Circuit in Smith v. Massey cited to Briscoe v. LaHue, 460 U.S. 325 (1983), for the proposition that the Supreme Court "has not directly addressed the issue" of imputed knowledge of false testimony. Smith, 235 F. 3d at 1272. Mr. Trepal respectfully disagrees with the Tenth Circuit, as Giglio itself involved a case of imputed knowledge. Moreover, Briscoe v. LaHue is not a case addressing a constitutional violation, but rather "a question of statutory construction" involving an immunity issue arising from a §1983 action for damages brought by a convicted person against a police officer for giving perjured testimony at his criminal trial. Briscoe, 460 U.S. at 326.

trial");

Curran v. Delaware, 259 F. 2d 707, 713 (3d Cir. 1958) (although prosecution had no knowledge of perjury by a local police detective, that testimony's potential prejudicial effect on the jury "cause[d] the defendant's trial to pass the line of intolerable imperfection and fall into the field of fundamental unfairness"); Jones v. Kentucky, 97 F. 2d 335, 338 (6th Cir. 1938) ("`The fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered"); Sanders v. Sullivan, 863 F.2d 218, 224 (2d Cir. 1988) ("There is no logical reason to limit a due process violation to state action defined as prosecutorial knowledge of perjured testimony or even false testimony by witnesses with some affiliation with a government agency. Such a rule elevates form over substance"); Ex Parte Adams, 768 S.W.2d 281, 291-92 (Tx. Ct. Crim. App. 1989) (that prosecutor did not know that eyewitness identified someone other than defendant is "insufficient to remove the taint of the prosecution's knowing use of perjured testimony. . . [W]hether the prosecutor had actual knowledge of the falsity of the testimony is irrelevant. If the prosecutor should have known is sufficient. . . [Because police agent had knowledge of falsity of the witness's testimony], as a part of the investigating

team his knowledge of [the witness's] lack of identification at the lineup and his assistance to her is imputed to [the prosecution]"); Ex Parte Castellano, 863 S.W.2d 476, 480-81 (Tx. Ct. Crim. App. 1993) ("knowledge of perjured testimony is imputable to the prosecution where such knowledge is possessed by anyone on the 'prosecution team' which includes both investigative and prosecutorial personnel. . . It is now settled law that a prosecutor need not have actual knowledge of perjured testimony in order for there to be a due process violation"); Hamann v. State, 324 N.W.2d 906 (Iowa 1982) ("The knowledge [of false testimony] need not be personal to the trial prosecutor, but may be imputed from one government attorney to another within the prosecutor's office. . . Similarly, knowledge on the part of the police within the prosecutor's jurisdiction is attributed to the prosecutor's office, based on the investigatory, law-enforcement 'team' relationship presumed to exist"); In the Matter of an Investigation of the W. Virginia State Police Crime Lab, Serology Division, 190 W. Va. 321, 325 438 S.E.2d 501, 505 (W. Va. 1993) ("it matters not whether a prosecutor using Trooper Zain as his expert ever knew that Trooper Zain was falsifying the State's evidence. The State must bear the responsibility for the false evidence. The law forbids the State from obtaining a conviction based on false evidence").

The lower court applied an incorrect standard under Giglio. What the lower court's order misses and what the State sidesteps is the effect that the false and perjured testimony had on the jury. As noted by the lower court, Martz falsely testified about "the only direct evidence of Trepal's guilt," and that "if Martz had testified truthfully the only direct evidence in the case would have been greatly weakened." Martz not only provided false testimony about the contents of the Coke samples and Q206, he also lied about testing sample Q3, lied about stating that a positive result on the DP test will yield a blue color indicating the presence of nitrate, "mislead" the jury when testifying that nitrate was not present in unadulterated Coke, and "knew" that the data available at the trial did not support the opinions he offered (2PCR. 2678-79). Given that all of these opinions related to "the only direct evidence of Trepal's guilt" (2PCR. 2689), Giglio is more than satisfied. Compare Buenoano v. State, 708 So. 2d 941, 948 (Fla. 1998) (rejecting as "baseless" a Giglio claim because "none of the new evidence demonstrates that Martz's conclusions concerning the content of the capsules was inaccurate").

Finally, the State contends that "other evidence at trial" establishes that no relief is warranted (AB at 20). The State

discusses none of this "other evidence," nor did the lower court.¹⁷ That there is "other evidence" to support the verdict is not the dispositive inquiry in a Giglio analysis; as noted above, the inquiry is on the effect that the false testimony might have had on the jury. The State's desire to sweep Martz's false testimony under the rug and ignore its impact on the jury simply eviscerates Giglio and its progeny. As the Fifth Circuit long ago explained:

There is no doubt that the evidence in this case was sufficient to support a verdict of guilty. ***But the fact that we would sustain a conviction untainted by the false evidence is not the question.*** After all, we are not the body which, under the Constitution, is given the responsibility of deciding guilt or innocence. The jury is that body, and, again under the Constitution, the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence with all its ramifications.

United States v. Barham, 595 F. 2d 231, 242 (5th Cir. 1979) (emphasis added). Relief is warranted.

D. BRADY ISSUE.

In accordance with the lower court's conclusion, the State argues that Martz's underlying data, notes, and charts were not

¹⁷As noted in his Initial Brief, all the "other evidence" used by the State against Mr. Trepal was known for years before Mr. Trepal was arrested. His arrest came only (and immediately) after Martz's test results came back identifying thallium I nitrate in the Q206 bottle. See Initial Brief at 22 n.27. It is thus highly disingenuous to argue that the "other evidence" adduced at trial supported a conviction beyond a reasonable doubt when in fact that "other evidence" did not even support a belief by law enforcement that they should issue an arrest warrant for Mr. Trepal.

exculpatory prior to trial, but could only be considered exculpatory after he testified falsely (AB at 23). This is a difficult argument to respond to, for it is premised on circular logic. First, it bears noting at the outset that even assuming *any* logic in this argument, the State never disclosed the evidence *after* Martz testified at trial, despite the fact that Martz knew that the data he possessed did not support his opinions offered at trial (2PCR. 2679). This duty is imputed to the State, which has a duty to learn of exculpatory evidence. Kyles v. Whitley, 514 U.S. 419 (1995). Indeed, the underlying data produced by Martz when he tested the evidence in the case was not disclosed by the State until the Inspector General's Office began its investigation of the FBI Crime Laboratory, years after Martz testified falsely at Mr. Trepal's trial. Thus, the State's own argument, as illogical as it is, fails to contemplate that years went by following Martz's false testimony before this information came to light.

Citing Buenoano v. State, 708 So. 2d 941, 949 n.5 (Fla. 1998), the State argues that it had no duty to disclose information which would have established that Martz was testifying falsely (AB at 23-24). Buenoano stands for no such proposition. In the footnote cited by the State from Buenoano, all the Court discussed was that information obtained from "a recent interview with Frederic Whitehurst cannot be characterized as Brady material." Buenoano, 708

So. 2d at 949 n.5. The Brady claim in Buenoano did not involve allegations of withholding of underlying data produced by Martz, but rather Martz's "practices at the FBI lab" as recounted through an interview of Dr. Whitehurst. In fact, Martz did not even testify in Ms. Buenoano's trial. This is in no way similar to the allegations made by Mr. Trepal, which involve the failure to disclose the underlying notes, charts, and data produced by Martz prior to trial which are the evidence of his false testimony. It cannot be seriously suggested that evidence establishing that a forensic scientist's conclusions are false is not exculpatory evidence under Brady. See, e.g. In re Brown, 17 Cal. 4th 873, 879, 952 P.2d 715, 719 (Cal. 1998) (Brady violation occurred when prosecutor failed to disclose underlying lab data of serological testing; "[t]he prosecutor thus had the obligation to determine if the lab's files contained any exculpatory evidence, such as the worksheet, and disclose it to petitioner. Whether or not he actually did examine the files, the lab personnel's knowledge is imputed").

As to materiality, the State's argument fails to contemplate that the disclosure of the underlying data would have provided defense counsel with the ability to fully investigate Martz's testing, including bringing to light Martz's lies during his deposition as to the scope of the testing he conducted. Part of a proper materiality test contemplates that the withheld information

could also have been used by defense counsel to further investigate. "[C]ourts should consider not only how the State's suppression of favorable evidence deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d 373, 385 (Fla. 2001). As the lower court found, the additional testing conducted by Martz, but which he failed to disclose both at trial and deposition, would have been "particularly important because the defense could have used this information to suggest that Martz was not satisfied with his initial results and sought additional data" (2PCR. 2679). Moreover, given the State's open acknowledgement that the underlying data was in fact the evidence of Martz's false testimony, its disclosure would have led (as defense counsel testified) to a Frye challenge prior to trial. All of these factors demonstrate the materiality of the suppressed evidence in this case.

Finally, the State argues that "no reasonable likelihood of an acquittal exists" because of "the other strong circumstantial evidence presented at trial" and that Martz's testimony, even if "weakened" by impeachment, "would still be highly incriminating" (AB at 24). The State continues to insist that Mr. Trepal must establish a reasonable likelihood of an acquittal in order to establish a Brady violation, despite explicit holdings that this is *not* the test. Kyles, 514 U.S. at 434-35; Young v. State, 739 So. 2d 553 (Fla.

1999). It also continues to insist that the existence of alleged "strong circumstantial evidence" also demonstrates that no relief is warranted, despite explicit holdings in Kyles and other cases that sufficiency of the evidence is not the test for materiality. Finally, the State's bald assertion that Martz's testimony "would still be highly incriminating" remains unexplained, particularly given its argument that it was only after trial that the falsity of Martz's testimony came to light and thus it had no duty to disclose his underlying data. Relief is warranted.

E. FAILURE TO HIRE TOXICOLOGY EXPERT.

The State believes that because Peggy Carr died of thallium poisoning, any attempt by the defense to address arsenic poisoning, which did not directly cause Peggy's death, would not have been exculpatory. The State misses the point of Mr. Trepal's argument. As Mr. Trepal's initial brief pointed out, evidence of arsenic in all three victims is an indication of a separate and distinct poisoning attempt. A separate poisoning attempt with the use of arsenic is exculpatory to Mr. Trepal because there has never been any evidence showing he had access to arsenic or access to the Carr family on more than one occasion.

Additionally, the State concludes that counsel's failure to secure an expert was not ineffective because counsel was not happy with the results of the Georgia Tech lab (AB at 32). However, Georgia Tech was hired only to test the three Coke bottles which were the subject of the FBI testing. Mr. Trepal's assertion is not failure to hire an expert to test those samples, or further test the samples after the results from Georgia Tech, but rather the failure to hire a toxicology expert to assist in preparation and trial of the case, particularly with respect to the arsenic issue and other issues relating to thallium. It was necessary to hire an expert to explain to the jury the significance of the high levels of arsenic found in the victims. As the trial court stated, "the presence of arsenic

raised some questions, but trial counsel had to focus on what they knew" (PCR. 3340). The problem is that counsel did not know the significance of the arsenic readings from the hospital and rather than rely on an expert, they relied on Dabney Connor whose elementary knowledge of chemistry was insufficient. This was deficient performance:

Under these circumstances, a reasonable defense lawyer would take some measures to understand the laboratory tests performed and the inferences that one could logically draw from the results. As discussed above, expert testimony was available to counter the false evidence presented by the State, yet counsel, without a reasonable strategic reason, did not challenge the State's case. At the very least, any reasonable attorney under the circumstances would study the state's laboratory report with sufficient care so that if the prosecution advanced a theory at trial that was at odds with the [toxicology] evidence, the defense would be in a position to expose it on cross examination.

Driscoll v. Delo, 71 F.3d 701, 709 (8th Cir. 1995).

While the State, in addressing the Giglio issue, writes that "Martz's overstated testimony should not imputed on the prosecutor, who may be skilled in the law but not an expert in complex scientific issues" (AB at 22), this is precisely the problem with the defense team's reliance on Connor's chemistry knowledge. While he may have had some rudimentary scientific background, he was not an expert in the complex scientific issues prevalent throughout this case. It is contradictory for the State to argue their lack of scientific knowledge to side-step the Giglio claim, and at the same time argue

that the defense was not deficient in failing to obtain another expert to assist in preparation and trial of the case.

As to the remainder of the State's arguments on the guilt phase claim, Mr. Trepal relies on the arguments set forth in his Initial Brief, as they adequately rebut the assertions of the State.

REPLY TO ARGUMENT II

Mr. Trepal argued that pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the prosecution had an obligation to disclose to the defense, for impeachment purposes, the true extent of law enforcement's ambition to peddle the death of Peggy Carr as a movie, book, and as a sensationalized story for sale to a media production company. Mr. Trepal also asserted that these allegations amounted to a conflict of interest on law enforcement's part. As detailed in Mr. Trepal's Initial Brief, the law enforcement agency that so zealously sought evidence of Mr. Trepal's guilt, and went to great but fruitless lengths to uncover anything that tied him to Peggy Carr's death, had definite financial interests in "solving" this case with as much dramatic value as possible. The lower court denied an evidentiary hearing on this issue because there were no allegations that movie offers or negotiations had actually been made *prior* to trial (1PCR. 3347).

The State correctly points out that the factual allegations made by Mr. Trepal must be accepted as true in light of the summary denial (AB at 45). Most significantly, the State concedes that Mr. Trepal "provides a number of allegations to suggest that the Polk County Sheriff's Office was interested in and contemplated a movie deal during this investigation" (AB at 46). However, the State argues that Mr. Trepal does not explain "any actual influence or

affect that this alleged motivation may have had on the investigation" (AB at 46). The State appears to be confusing the issue of whether Mr. Trepal made sufficient allegations to warrant an evidentiary hearing, as opposed to his entitlement to relief on the merits of the claim. But in any event, the State's assertion is belied by Mr. Trepal's brief:

Mr. Trepal clearly alleged that the department was discussing movie possibilities even before Mr. Trepal's arrest, and that tremendous pressure was laid to bear on the investigators to find evidence to warrant an arrest warrant. This information, which clearly should have been disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963), would have been powerful impeachment at trial, particularly given that the focus of the defense was on the 'rush to judgment' of the Sheriff's Department, as well as the specter that the brown bottle found in Mr. Trepal's vacated garage was planted. Knowing that the Sheriff's Department was obsessed about making a movie about the case to the point of speculating on which actors would play Mr. Trepal would have been cannon-fodder for devastating impeachment in the hands of competent counsel.

(Initial Brief at 82-83). Thus, Mr. Trepal in fact did allege how this information could have been used by trial counsel to impeach the integrity of the investigation. Particularly given prosecutor Agüero's vouching before the jury at the closing argument that this "was the most outstanding piece of police work that you will likely ever see in your life" (R. 4181), Mr. Trepal's allegations were more than sufficient to warrant an evidentiary hearing.

The State argues that evidence of law enforcement's desire to make a movie and thus reap a financial benefit "is neither

exculpatory or material to Trepal's case" because there are "[no] facts suggesting that any of the evidence against Trepal was compromised" (AB at 48). The evidence alleged by Mr. Trepal is clearly impeachment evidence going to the motivations of the police in investigating the case and identifying Mr. Trepal as the suspect. "[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis v. Alaska, 415 U.S. 308, 316 (1974). That an entire law enforcement agency had a clear financial motivation to solve this case, and finger Mr. Trepal as the suspect, is classic impeachment evidence. See §90.608 (1)(b), Fla. Evidence Code. "[T]he financial stake of a witness in the outcome of the case being litigated" is recognized as a valid method of impeachment. Ehrhardt, FLORIDA EVIDENCE at § 608.5 (2000 Ed.). Mr. Trepal does not have to allege, or even prove, that any evidence was "compromised" due to the financial stake on part of law enforcement, for the underlying constitutional principle goes to the exposure to the jury of a witness' motivation in testifying. This is particularly true in Mr. Trepal's case, where a main focus of the defense was on the adequacy and integrity of the investigation undertaken by the Polk County Sheriff's Office. An evidentiary hearing is warranted.

REPLY TO ARGUMENT III

"I would appreciate it if you don't visit the office of the newspaper anymore" (R. 3201). Those are the words of the trial judge prior to the testimony of Susan Goreck. The trial judge told the jurors that he had spoken with the editor of the POLK COUNTY DEMOCRAT, who had called the judge about providing the jurors with copies of a picture that appeared in the paper. Despite the fact that at least some of the jurors had obviously visited the newspaper office, and after the judge questioned the jurors *en masse* about whether they had read any of the news stories about the case, only "some jurors" indicated negatively (*id.*), trial counsel failed to object, move for a mistrial, or inquire further as to what prompted this highly unusual and startling comment from the judge in the middle of a capital trial.

The State generally agrees that the lower court's order was correct when it denied Mr. Trepal relief and stated that "[n]o error was apparent, however, since the court explored the facts and failed to uncover any indication of juror misconduct" (AB at 49). Notwithstanding the State's claim that the substantive issue is procedurally barred, trial counsel's failure to object or move for a mistrial when it became entirely clear that jurors had been communicating with the local newspaper is properly raised in a Rule 3.850 motion as an ineffective assistance of counsel claim.

The State argues that because there was no basis for a finding of deficient performance, there was no basis for allowing the jurors to be interviewed in order for Mr. Trepal to establish his entitlement to relief (AB at 51). However, the lower court did not find that there was "no basis" for a finding of deficient performance; rather, the court concluded that "it is impossible for the court to determine if trial counsel was ineffective if the lawyers and trial judge do not even remember the event occurring" (1PCR. 3373). Given this situation, the necessity for juror interviews became even more apparent, not less. The whole point of Mr. Trepal's claim is that counsel failed to investigate what occurred between the jurors and the newspaper office. Given counsel's lack of recollection, only the jurors could be in a position to provide information about this incident. However, counsel are prevented from interviewing jurors absent a court order. Under the particular facts of this case, juror interviews should have been ordered, and should be ordered at this time.

CONCLUSION

On the basis of the arguments presented herein, Mr. Trepal urges that this Honorable Court set aside his unconstitutional convictions and sentences, including his death sentence.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Carol Dittmar, Asst. Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, Suite 700, Tampa, FL 33607-2366, on April 17, 2002.

TODD G. SCHER
Florida Bar No. 0899641
Capital Collateral Regional
Counsel-South
101 N.E. 3rd Ave., Ste. 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Trepal

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

TODD G. SCHER
Florida Bar No. 0899641
Litigation Director
CCRC-South
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

Attorney for Mr. Trepal