In the

INDIANA COURT OF APPEALS

No. 69A05-1101-PC-113

STATE OF INDIANA,

Appellant (Respondent below),

v.

STEVEN R. HOLLIN,

Appellee (Petitioner below).

Appeal from the
Ripley Circuit Court,

Trial Court No: 69C01-0802-PC-1,

Hon. Carl H. Taul, Judge.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF THE ISSUES

I. Whether the trial court erred in finding that Petitioner had met his burden of establishing his claim of ineffective assistance of counsel where counsel's decisions were strategic regarding Petitioner's prior theft convictions and where the convictions were admissible to establish Petitioner's intent and to impeach his credibility.

II. Whether the trial court erred in finding that prosecutorial misconduct occurred when the prosecutor did not inform Petitioner of pending probation revocation and new offense proceedings concerning Nathan Vogel, Petitioner's accomplice, where the record reveals that Petitioner already knew of those proceedings because the same law firm that represented Vogel also represented Petitioner and where Vogel's attorney, who was also the sister of Petitioner's counsel, was seated at the defense table during Petitioner's trial.

STATEMENT OF THE CASE

Nature of the Appeal

Pursuant to Post-Conviction Rule 1 (7), the State appeals the grant of the post-conviction petition.

Course of Proceedings

On November 10, 2005, the State charged Petitioner with class B felony burglary of a dwelling, class D felony theft, and with being a habitual offender (App. 1, 20-22). After various amendments of the charging documents, the State went to trial on August 9, 2006, on class B felony conspiracy to commit burglary, theft, and the habitual offender allegation (Ex. E, p. 39). The jury found Petitioner guilty of both charges and that he was a habitual offender (App. 7). The trial court sentenced Petitioner on September 7, 2006, to twenty years for the conspiracy to commit burglary, enhanced by an additional twenty years due to Petitioner's habitual offender status (App. 8, 25). Petitioner's direct appeal resulted in the affirmance of his convictions, but the reduction of his sentence to ten years on the conspiracy to commit burglary enhanced by ten years for the habitual offender finding (App. 35, 40). *Hollin v. State*, 877 N.E.2d 462 (Ind. 2007).

Petitioner filed his pro se Petition for Post-Conviction Relief on February 25, 2008 (App. 41). An amended petition was filed by counsel on August 16, 2010 (App. 60). The court conducted a hearing on the petition on December 13, 2010 (App. 17; Tr. 1). Petitioner submitted his proposed findings to the court on December 27, 2010 (App. 71). The State tendered its proposed findings on January 3, 2011 (App. 100). Petitioner filed a response on January 12, 2011). On February 3, 2011, the post-conviction signed Petitioner's proposed findings granting relief (App. 116).

The State filed its notice of appeal on February 22, 2011 (App. 143). The trial court clerk issued the notice of completion of transcript on March 9, 2011, and the notice of completion of clerk's record on March 11, 2011 (App. 145, 146). On April 8, 2011, this Court granted the State until April 29, 2011, to file the brief of appellant. The State now files its timely brief of appellant.

STATEMENT OF THE FACTS

The facts, as set forth by the Supreme Court for Petitioner's direct appeal, are as follows:

> Eighteen-year-old Steven R. Hollin was released from jail on November 1, 2005. Less than a week later, he and Nathan Vogel ("Vogel") devised a plan to burglarize homes in a rural portion of Ripley County, Indiana. They planned to knock upon doors to locate unoccupied homes, from which they would steal money. On the morning of November 8, 2005, the two men ventured out by foot along a road in Ripley County. The first residence they approached was occupied. A woman answered the door, and to avoid suspicion Hollin and Vogel asked for directions to Greensburg, Indiana. They then left and continued their search for an unoccupied house. The next home they reached appeared to be empty. To be certain, Hollin and Vogel knocked upon both the front and back doors before entering the garage and proceeding into the kitchen. While Hollin remained in the kitchen, Vogel entered a bedroom. Vogel took a camera bag containing approximately six hundred dollars. The two then left the home, walking back toward town. At this point, the woman who had provided directions to Greensburg noticed them and called police to report this suspicious activity.
>
> Batesville Police Department Lieutenant Jeff Thielking responded to the call and recognized Hollin. He became suspicious about the possibility of criminal activity because, although it was approximately sixty-six degrees outside, Vogel wore a heavy winter coat and appeared to be hiding something inside of it. Vogel asserted that their car had broken down along the road, but Lieutenant Thielking had not seen any disabled vehicles in the vicinity. Lieutenant Thielking also knew of several recent burglaries in the area. Noting the name of Al Wuestefeld on the camera bag Vogel was carrying, Lieutenant Thielking arrested both men. A telephone call to the Wuestefeld residence confirmed that it had been burgled. Hollin and Vogel subsequently confessed.

Hollin, 877 N.E.2d at 463-64.

At trial, Nathan Vogel, Petitioner's accomplice, testified that he and Petitioner agreed the night before to find a home to burglarize (Ex. Vol. p. 129).[1] The State also elicited Vogel's testimony that he had pled guilty in this case (Ex. Vol. p. 143). On cross-examination, Vogel admitted that he did not tell police of the burglary plan initially, and that at first he had admitted only to entering the house to use the phone (Ex. Vol. p. 151). Vogel also admitted that when police originally stopped the two men, Petitioner had indicated he had no idea about what was going on (Ex. Vol. p. 151). Finally, Vogel also admitted that he had been convicted of theft before (Ex. Vol. p. 154).

Petitioner testified that he and Vogel were out walking to "waste a few hours" before Petitioner could call his mother for a ride home (Ex. Vol. p. 272). According to Petitioner, the two men went to a house to try to use the phone (Ex. Vol. p. 276). Petitioner claimed that he believed Vogel knew the people of the house because of the way Vogel simply walked into garage door and into house (Ex. Vol. p. 277). Petitioner testified that he followed Vogel inside the house and waited in the kitchen while Vogel went farther into the home (Ex. Vol. p. 277). Petitioner denied that he ever had any plan to commit any burglary (Ex. Vol. p. 287).

Immediately prior to cross-examination of Petitioner, the State asserted that Petitioner's testimony had essentially raised a contrary intent and that, therefore, Petitioner's prior theft convictions were admissible (Ex. Vol. p. 289). The trial court asserted that the State had two avenues of admitting the prior theft convictions, namely, credibility and intent (Ex. Vol. p. 289). Defense counsel agreed (Ex. Vol. p. 289). During cross-examination, Petitioner admitted that he had been convicted three times for auto theft (Ex. Vol. p. 315-318). Defense counsel, on

[1] The exhibits from the post-conviction hearing, including the trial transcript, have been combined together in volumes entitled "Exhibits" and sequentially numbered. The trial transcript appears from page 103 to 414.

redirect, established that each of Petitioner's convictions was for auto theft and that he had admitted to each of those offenses (Ex. Vol. p. 322).

During closing arguments, both sides addressed the credibility of Nathan Vogel (Ex. Vol. p. 347, 349, 360). The State argued that Vogel had admitted to lying to police and that he had "no reason to come in here and lie about it" because his case was over (Ex. Vol. p. 345). In the defense's closing, counsel repeated the State's assertion that Vogel's case was over, but added, "I don't know what the status of Mr. Vogel's cases are. Ongoing cases" (Ex. Vol. p. 350).

The jury found Petitioner guilty of conspiracy to commit burglary and found him to be a habitual offender (Ex. Vol. p. 370, 390). The trial court initially sentenced Petitioner to an aggregate forty-year sentence, a sentence which was later reduced by the Supreme Court on direct appeal to an aggregate term of twenty years (App. 40).

On post-conviction, Petitioner claimed that trial counsel was ineffective for failing to impeach Vogel, and for failing to exclude Petitioner's prior convictions (App. 60-61). Petitioner also claimed prosecutorial misconduct for failing to disclose that at the time Vogel testified he had pending cases involving revocation of his probation in Ripley and Decatur Counties, and a new Decatur County case of class C felony battery (App. 61). Petitioner also alleged prosecutorial misconduct in the prosecutor's closing argument that, despite knowing of Vogel's pending cases, the prosecutor argued that Vogel had no reason to lie (App. 61).

The court conducted a hearing on the petition at which evidence was presented. Deputy Prosecutor Ryan King testified that he would have known that Vogel had pending petitions to revoke his Ripley County probation but that King did not recall knowing about a more recent class C felony battery charge in Decatur County that Vogel had accrued by the time of trial (Tr. 13, 15).

Amy Streator, the sister and law partner of John Kellerman, Defendant's trial counsel, testified that she represented Nathan Vogel in his Decatur County cases (Tr. 100, 104-05; App. 671, 673). Streator also admitted sitting at defense table during Petitioner's trial after she had withdrawn from Vogel's class C felony case (Tr. 101). Streator stated she negotiated Vogel's plea terms for probation (Tr. 107, 109). She further testified that there "had to be some communication" with her brother, Petitoner's counsel, for her to withdraw from Vogel's case (Tr. 109). Kellerman himself testified to his belief that Streator would not have withdrawn without telling about her reason (Tr. 92-93). Further, Kellerman testified that the defense that was to be offered was that Petitioner had no intent to commit a theft inside the home when he and Vogel entered (Tr. 79). Kellerman stated that he made no objection to the admission of Petitioner's prior convictions because the defense itself may have offered the evidence if the State did not (Tr. 81).

The post-conviction court adopted Petitioner's proposed findings of facts and conclusions of law in whole (App. 116-142). The court found counsel ineffective for not telling the jury about Vogel's beneficial plea, for not obtaining an exclusion of Petitioner's prior theft convictions, and for not objecting to the State's reference to the underlying facts of those convictions (App. 128-134). The court also found Petitioner was entitled to relief because of prosecutorial misconduct due to the State's failure to disclose to Petitioner about Vogel's pending probation revocation proceedings and his new felony charge in Decatur County (App. 127).

SUMMARY OF THE ARGUMENT

I. The post-conviction court erred in granting relief. First, trial counsel's decisions did not render him ineffective. Counsel's decision not to challenge the admission of Petitioner's prior theft convictions was not deficient performance but, rather, was a strategic decision made consistent with the defense being raised at trial. Indeed, those decisions were consistent with the defense Petitioner himself had claimed from the time of his arrest. What defense to place before a jury is a strategic decision and as such does not rise to the level of ineffective assistance of counsel.

Moreover, no deficient performance occurred because Petitioner's prior theft convictions were admissible not only as crimes of dishonesty that serve to impeach the Petitioner's testimony, but also to establish an intent contrary to the lack of intent Petitioner asserted during his trial testimony. Other errors alleged to have been committed by counsel, even if error, did not result in undue prejudice to Petitioner's case and thus were erroneously found to warrant reversal of Petitioner's conviction.

II. The trial court erred in finding prosecutorial misconduct due to the State's failure to advise Petitioner of pending revocation and criminal proceedings concerning accomplice Nathan Vogel. First, such a claim is misplaced in post-conviction proceedings. Petitioner made no objection to any argument raised by the State at trial and Petitioner made no reference to alleged prosecutorial misconduct on direct appeal. Nor has Petitioner raised a claim of fundamental error here, a claim which is barred on post-conviction proceedings.

Yet, even if the claim is to be considered, it is meritless because Petitioner and his attorneys had that information. The law firm that represented Petitioner in Ripley County also represented Vogel in Decatur County. Vogel's attorney is the sister of Petitioner's attorney.

More importantly, Vogel's attorney withdrew from her representation of Vogel new criminal charge less than a week before Petitioner's trial *and* sat at Petitioner's table throughout Petitioner's trial. Thus, while the State may not have formally informed Petitioner of Vogel's pending criminal proceedings, this does not rise to the level of a reversible *Brady* violation.

ARGUMENT

Standard of Review

When the State appeals an award of post-conviction relief, this Court applies the standard of review prescribed in Indiana Trial Rule 52(A): the Court will "not set aside the findings or judgment unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See State v. Hammond*, 761 N.E.2d 812, 814 (Ind. 2002). The "clearly erroneous" standard is a review for sufficiency of the evidence, and thus the Court neither reweighs the evidence nor determines the credibility of witnesses but considers only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000). The Court will reverse only upon a showing of "clear error": that which leaves it with a definite and firm conviction that a mistake has been made. *Id.* The judgment of the post-conviction court granting relief will be affirmed if "there is any way the [post-conviction] court could have reached its decision." *Spranger v. State*, 650 N.E.2d 1117, 1120 (Ind.1995).

I.

THE COURT ERRED IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL

Trial counsel was not ineffective and the trial court's determination to that effect is error. Some of counsel's decisions relied upon by the trial court were strategic, and as such, do not

constitute deficient performance. Moreover, other deemed errors were either not error or were of minor importance which does not rise to the level of ineffectiveness.

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002). The law is clear that counsel's performance is presumed effective. *Stephenson v. State*, 864 N.E.2d 1022, 1031 (Ind. 2007). A petitioner must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential to counsel's decisions. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 261 (Ind. 2000). Moreover, our Supreme Court has observed that there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Stephenson*, 864 N.E.2d at 1031. Counsel is afforded considerable discretion in choosing strategy and tactics, and these decisions are entitled to deferential review. *Id.*

Furthermore, this Court need not even evaluate counsel's performance if the defendant suffered no prejudice from that performance, and most ineffective assistance claims can be resolved by a prejudice inquiry alone. *Vermillion v. State*, 719 N.E.2d 1201, 1208 (Ind. 1999); *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A. Petitioner's prior theft convictions were admissible.

The trial court erred in finding deficiency in counsel's decision not to challenge the admissibility of Petitioner's prior theft convictions. Those convictions were part of Petitioner's defense that he knew when he did wrong, that he pled guilty when he did wrong, and that he had done nothing wrong here. The theft convictions were also admissible pursuant to Indiana Evidence Rule 404(b) to rebut Petitioner's explicit testimony that he had an intent other than theft when he entered the victim's house. Finally, those convictions were admissible to impeach the credibility of Petitioner's trial testimony.

1. Prior convictions admissible under Evidence Rule 609

Petitioner's prior theft convictions were admissible to impeach his credibility once he chose to testify in his own behalf. Indiana Evidence Rule 609 permits the admission of convictions for certain enumerated crimes or for a "crime involving dishonesty or false statement." Indiana courts have repeatedly held that theft is such a crime and, therefore, is available as impeachment evidence. *Fassoth v. State*, 525 N.E.2d 318, 322 (Ind. 1988); *Gibson v. State*, 709 N.E.2d 11, 16 (Ind. Ct. App. 1999).

The trial court here found that Petitioner's three prior theft convictions were "all based on joyriding situations that do not indicate a lack of veracity" (App. 134). The court inplied, therefore, that such crimes were not admissible as impeaching evidence under Indiana Evidence Rule 609 and should have been excluded pursuant to *Fletcher v. State*, 264 Ind. 132, 136, 340 N.E.2d 771, 774 (1976) (App. 134).

Initially, the court's characterization of Petitioner's prior criminal act as "joyriding" ignores the law and the nature of Petitioner's convictions. "Joyriding" is the common term for the misdemeanor offense of conversion when the act is to steal someone else's car merely to drive it. Indiana Code Section 35-43-4-3 defines conversion as simply knowingly or

intentionally exerting unauthorized control over the property of another. Petitioner, however, was not convicted of misdemeanors. His convictions were for "auto theft" which is defined by statute as the unauthorized control over another's vehicle with the added intent to "deprive the owner of the vehicle's value or use." I.C. § 35-43-4-2.5. It was Petitioner's own self-serving testimony that his acts underlying his crimes were that he took cars for "Just driving. Burning rubber" (Ex. Vol. p. 321. The mere fact that his convictions were for theft, not conversion, reveals that Petitioner had admitted to more than just taking the cars out for a drive when he stole them. Rather, he took them with the intent to deprive the owners of the value or use of those vehicles. The trial court's reference to simple "joyriding" is contrary to the fact that Petitioner was convicted of auto theft.

Furthermore, the trial court's reliance on the dicta found in *Fletcher v. State* is questionable. In that pre-rule case, the Supreme Court considered whether a prior theft conviction is a crime of "dishonesty or false statement" which was impeaching evidence pursuant to *Ashton v. State*, 258 Ind. 51, 279 N.E.2d 210 (1972). *Fletcher*, 264 Ind. at, 136, 340 N.E.2d at 774. The Court concluded that it would be "too cumbersome to probe about the record of a witness' prior theft conviction to ascertain the common law equivalent, prior to admitting evidence of the conviction at trial." *Id.* The Court then held that proof of prior theft convictions is admissible for impeachment purposes under *Ashton*. *Id.* In dicta, the Court noted that in the future, defense counsel could seek a hearing to have the question of whether a particular theft conviction indicated a lack of veracity on the part of the witness. *Id.*

Nothing in the record, either at trial or post-conviction, is sufficient to rebut the presumption, established by *Fletcher* itself, that theft is a "crime of dishonesty" and therefore a theft conviction is admissible to impeach a witness' testimony. At most the evidence is at a

stalemate because Petitioner's self-serving statement that he was "[j]ust driving" and burning rubber," when he stole the three vehicles is more than counterbalanced by the undisputed fact that he pled guilty to three felonies, not conversions. Those felonies mandate established elements of doing something more than just unauthorized control over a person's property. Rather, the thief must "intend to deprive" the owner of the property's value or use. This elements, to which Petitioner admitted when he pled guilty for each of the prior auto theft convictions, do not match with his self-serving testimony suggesting that these were simple joyriding events. Thus, even if *Fletcher* were applied, Petitioner has failed to show any evidence to establish that his prior convictions were not "crimes of dishonesty."

The continuing validity of this "*Fletcher* rule" is also suspect in light of the evidence rules that were adopted sometime later. Furthermore, it is unlikely that being convicted of taking another's property and holding it out as being properly and legally possessed can be viewed as anything other than an act of dishonesty. Reasonable people would say that by stealing a car and driving it around as if it belongs to the thief is a dishonest act and is telling of the thief's credibility on other matters.

This question, however, need not be settled here. As argued below, the theft convictions were admissible to rebut Petitioner's affirmatively stated contrary intent and because Petitioner's counsel had use for Petitioner's prior theft convictions. Thus, the trial court's finding that counsel was deficient for not seeking a *Fletcher* ruling is contrary to the record.

2. Prior convictions admissible under Evidence Rule 404(b)

Petitioner's prior theft convictions were admissible under Indiana Evidence Rule 404(b). That Rule provides that evidence of other crimes or wrongful acts is not admissible to show propensity or action in conformity therewith. Ind. Evidence Rule 404(b). However, such

evidence may be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake. *Id.* When the trial court considers the admissibility of Rule 404(b) evidence, it must determine whether the evidence is relevant to a matter other than propensity, and whether the probative value is substantially outweighed by the prejudicial effect under Indiana Evidence Rule 403. *Hicks v. State*, 690 N.E.2d 215, 221 (Ind. 1997). The intent exception to Rule 404(b), however, is available only when a defendant "goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent." *Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993).

Here, Petitioner explicitly claimed that "particular contrary intent" when he testified on direct examination that he entered the house with Vogel to wait while Vogel used the phone (Ex. Vol. p. 288). Petitioner repeatedly confirmed this innocent intent on cross-examination (Ex. Vol. p. 308, 315). By this testimony, Petitioner was explicitly claiming that he had no intent to commit theft once inside the victim's residence. He was doing more than simply denying the necessary culpability. He was saying his intent was something else, the innocent, i.e. non-felonious, act of using a phone. This testimony rendered the prior theft convictions admissible for used in this manner, they did much more than just reveal simple propensity. Rather, the prior convictions revealed that theft intentions toward thievery were not unknown to Petitioner. As such, that evidence was admissible. *Id.*

The trial court's erroneous ruling appears to stem from the incorrect belief that intent to commit theft inside the house was not an element of conspiracy to commit burglary (App. 135). The court ruled that because the relevant time period was when Petitioner and Vogel agreed to commit the burglary, Petitioner's testimony that he only entered the house to use the phone did

not put his intent into issue (App. 135). The court, however, ignores that the intent to commit a felony inside the residence is an element of the crime of conspiracy to commit burglary.

One commits the crime of conspiracy when, "*with the intent to commit the felony*" that person agrees with another person to commit that felony and an overt act is committed in furtherance of that agreement. I.C. § 35-41-5-2 (emphasis added). The crime of burglary is defined by statute as entering a structure (here a dwelling) with the intent to commit a felony inside. Ind. Code § 35-43-2-1. Burglary, therefore, has two essential intents elements: a general culpability and specific intent. *See Eby v. State*, 154 Ind. App. 509, 513, 290 N.E.2d 89, 93 (1972) (stating that in addition to the general intent for most offenses the state of mind which must accompany burglary requires another element and that is a specific intent to commit some felony).

These statutes, when viewed together establish the elements for conspiracy to commit burglary to be an agreement to enter a structure with the intent to commit a felony within and that an overt act is carried out in furtherance of that agreement. Petitioner's intention once he enters the residence, therefore, becomes an essential element of the crime of conspiracy to commit burglary. Where Petitioner asserted a contrary intent for his entry into the residence, he placed his burglary intent at issue. The State, therefore, was permitted, via *Wickizer*, to offer evidence contradicting that claim. The trial court's ruling here is contrary to statute and should be reversed.

3. Trial Strategy

Counsel Kellerman's decision to use Petitioner's prior theft convictions was legitimate trial strategy and was, in fact, consistent with the defense Petitioner himself essentially asserted from the beginning. As such, that decision does not rise to the level of deficient performance.

Both this Court and our Supreme Court have stated that strategic decisions made by trial counsel are to be given considerable deference and should not be second guessed. *See Morgan v. State*, 755 N.E.2d 1070, 1076 (Ind. 2001) (declining to find ineffective assistance of counsel where it "would have been a reasonable strategic decision for defense counsel to conclude that a voluntary manslaughter instruction would have been inconsistent with Defendant's testimony"); *Lambert v. State*, 743 N.E.2d 719, 735 (Ind. 2001) (declining to find ineffective assistance of counsel where trial counsel "could have reasonably decided" that raising certain objections would have harmed his client); *Maldonado v. State*, 908 N.E.2d 632, 638 (Ind. Ct. App. 2009) (finding it to be a reasonable trial strategy not to elicit evidence that the young victim had told defendant's son about a sexual encounter she had had with her imaginary brother). This Court stated that it does not "lightly speculate as to what may or may not have been an advantageous trial strategy" and that counsel should be given deference in deciding the best strategy under the particular circumstances of the case. *Maldonado*, 908 N.E.2d at 636.

Petitioner's trial counsel made that decision and made it reasonably. Kellerman testified that the defense strategy was that Petitioner knew when he was "doing bad things. And this time [he] wasn't." (Tr. 81). This was a very reasonable strategy under the particular circumstances of this case. Petitioner had testified at trial that he and Nathan Vogel were walking in the country to "waste a few hours" until Petitioner could call his mother for a ride home (Ex. Vol. p. 272). When Vogel had entered the victim's home, Petitioner believed Vogel knew the owner and that they were just going to use the phone (Ex. Vol. p. 277, 287-88). According to Petitioner there was no plan to burglarize or steal from the house (Ex. Vol. p. 287). This testimony was supported by Petitioner's conduct moments after the burglary when he and Vogel were confronted by police on the road near the home. Instead of running when police appeared,

Petitioner approached the officer and asked for a ride into town (Ex. Vol. p. 194). Vogel testified that when the officer mentioned the burglary, Petitioner immediately "shrugged," indicating that he had no knowledge of what was happening (Ex. Vol. p. 151). With this evidence, the fact that Petitioner had three auto theft convictions, products of three guilty pleas, reinforced the defense that Petitioner knew when he did wrong, admitted he did wrong, and pled guilty when he did wrong. As such, the fact that Petitioner was not admitting guilt here supported his claim that he committed no burglary on this occasion.

These factors reveal that counsel's chosen defense was not only consistent with Petitioner's own apparent assertion from the time of his arrest, it was also consistent with the evidence. The defense made the best possible use of prior convictions. Indeed, those convictions *furthered* the defense and made it even more reasonable. The mere fact that the defense proved unsuccessful does not render that defense unreasonable or tantamount to deficient performance. *Fugate v. State*, 608 N.E.2d 1370, 1373 (Ind. 1993) (noting that although a defense strategy is ultimately unsuccessful does not mean that the strategy was so deficient as to fall below an objective standard of reasonableness). The trial court's determination on counsel's decision not to challenge the admissibility of the prior convictions, therefore, is contrary to law and should be reversed.

B. Failure to inquire into Nathan Vogel's pending cases was not deficient performance.

The trial court also erred in finding deficient performance of counsel based on counsel's failure to challenge Nathan Vogel's credibility by referencing his pending cases in Ripley and Decatur Counties. The record reveals that Kellerman asked no question of Nathan Vogel concerning his guilty plea to theft in this case or any other pending probation or new offense case. Counsel did confirm with Vogel that Vogel had a prior theft conviction (Ex. Vol. p. 154).

Counsel's failure to address the pending cases was not deficient performance. Nothing in the trial or post-conviction record shows or even suggests that Vogel was testifying pursuant to any plea agreement on this case or any pending case. True, he had been charged with burglary, as was Petitioner, and he had pled guilty to the lesser crime of theft (Tr. 13). The record, however, reveals that the reduction to theft was not in exchange for Vogel's testimony, but rather because the State was concerned about the legality of the search that occurred when the officer first stopped Vogel and Petitioner (Tr. 42). At the post-conviction hearing, Petitioner established that at the time he testified at Petitioner's trial Vogel had been convicted in Decatur County of theft and placed on probation (Ex. Vol. p. 636, 640), and that that the Decatur County authorities were seeking to revoke that probation due to his new Ripley County theft conviction in the present case (Ex. Vol. p. 642-643). Nothing, however, reveals that Vogel's testimony at Petitioner's trial was purchased or influenced by any implicit or explicit deal with either county. Nothing in the record suggest that Vogel's testimony was due to some unsupported desire on his part to receive leniency in any of the pending cases. Absent some basis in the record that an inquiry would have revealed some bias on the part of Vogel, the strong presumption that Kellerman rendered competent performance is not overcome.

The court's reliance on *Hamner v. State* and *Smith v. State* is misplaced. In *Hamner*, the Court reversed a conviction because the defendant there was prohibited from exploring the deal or bias by a co-defendant. *Hamner v. State*, 553 N.E.2d 201, 203 (Ind. Ct. App. 1990). This Court rightly found that a jury should have all information "which cause or induce the witness to testify[.]" *Id.* *Smith* is equally unhelpful for Petitioner because that defendant, like Hamner, was prohibited from presenting evidence. *Smith v. State*, 721 N.E.2d 213, 219-20 (Ind. 1999)

In the present case, however, the record reveals no deal and no bias. Unlike Hamner and Smith, however, Petitioner has not been prohibited from asking any question or presenting any evidence, either at trial or at the post-conviction hearing. Petitioner failed to present any impeaching evidence that would have been disclosed had Kellerman questioned Vogel on the various pending cases. Thus, Petitioner's claim on these areas is insufficient to support the granting of post-conviction relief.

C. Lack of prejudice to supporting finding of ineffective assistance of counsel

The trial court erred in the finding of ineffective assistance of counsel because Petitioner suffered no real prejudice from any of the alleged errors of counsel. Petitioner was required to show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vermillion*, 719 N.E.2d at 1208. The necessary "reasonable probability" is one that is sufficient to undermine confidence in the outcome of Petitioner's trial. *Strickland*, 466 U.S. at 694. That is not found here.

Initially, any prejudice stemming from the admission of Petitioner's criminal history was reduced, if not negated, by a final instruction to the jury. The court instructed the jury as follows:

> Evidence has been introduced that the defendant was involved in crimes other than those charged in the information. This evidence has been received solely on the issues of defendant's intent and credibility. This evidence should be considered by you only for those limited purposes.

(Ex. Vol. p. 366-67). The law presumes that jurors follow instructions given to them by a trial court. *Buckner v. State*, 857 N.E.2d 1011, 1016 (Ind. Ct. App. 2006). Thus, any prejudice from counsel's failure to exclude evidence of Petitioner's prior convictions is substantially reduced and does not warrant a drastic remedy of reversing his conviction.

Furthermore, the virtually undisputed activities by Petitioner and Vogel on the morning of the crime reveal the strength of the resulting conviction independent of any now-challenged evidence. It should be remembered that the only contested issue at Petitioner's trial was his intent. Petitioner and Vogel were apprehended only a few hundred yards from the burglarized home shortly after the offense occurred (Ex. Vol. p. 201). Vogel had stolen items on him, as did Petitioner (Ex. Vol. p. 171, 182, 191). At the scene of the arrest, Petitioner, who had grown up in the area, first admitted to being lost and that their car had broken down (Ex. Vol. p. 179, 203). Petitioner admitted trial that he knew Vogel had taken something from the residence but simply "didn't want to tell on the guy" (Ex. Vol. p. 282). Petitioner's trial claim that he never claimed to be "lost" is belied by his own flip-flopping testimony. When asked by the prosecutor if he told the officer he was lost, Petitioner responded, "I did" (Ex. Vol. p. 312). He later then denied telling the officer they were lost (Ex. Vol. p. 331). This varying testimony by Petitioner would not have been lost on the jury and they could have easily found his entire testimony unworthy of credit.

The implausibility of Petitioner's story also supports the conviction because his tale strains the limit of credulity. Petitioner's claimed that he and Vogel approached one house and asked for directions to Greensburg, but that upon leaving that residence after receiving that direction, went in a direction not toward Greensburg (Ex. Vol. p. 295-96). Also, while they were only a few miles outside of Batesville, Petitioner testified that he and Vogel were walking around the country "to waste a few *hours*" before Petitioner could call his mother for a ride home (Ex. Vol. p. 272). That hours-long time frame would have permitted Petitioner to walk into Batesville to use a payphone to make the call from there. This is especially true in light of Petitioner's

testimony that he would never approach a random house and ask to use their telephone (Ex. Vol. p. 277).

This evidence, independent of Vogel's testimony that they had agreed to find a home to burglarize and independent of Petitioner's own prior theft convictions, reveals that Petitioner and Vogel entered the burglarized home and committed the felony of theft inside. Their act, done in concert, implies a previous agreement to commit this crime. Nothing about the evidence undermines the confidence that the outcome was correct or that had counsel made other decisions a different verdict would have resulted. As such, Petitioner failed to establish his claim of ineffective assistance of counsel. The trial court's determination that such proof existed is contrary to law and the record of this case. That ruling, therefore, should be reversed.

II.

THE POST-CONVICTION COURT ERRED IN FINDING THE UNAVAILABLE PROSECUTORIAL MISCONDUCT CLAIM AS A BASIS FOR GRANTING RELIEF

The trial court also committed error in basis the grant of post-conviction relief on a procedurally defaulted issue. Post-conviction proceedings are not a substitute for a direct appeal and an issue that is known and available at the time of direct appeal is not to be raised in post-conviction proceedings. *Pruitt v. State*, 903 N.E.2d 899, 926 (Ind. 2009).

Initially, it must be noted that much of the confusion surround this case comes from the trial court's inconsistent findings concerning the disclosure or lack of disclosure of Nathan Vogel's pending criminal proceedings. The court found the State violated *Brady v. Maryland* when it did not disclose to the defense the information about Vogel's pending cases (App. 131). Yet, the trial court also found trial counsel deficient for not using that same evidence to impeach Vogel's trial testimony if counsel knew of it (App. 131). The court's ambiguous finding of who knew what when only lends considerable confusion on the exact nature of any factual findings

by the court and even more confusion as to the legal conclusions arising from those inconsistent findings.

The claim that the prosecutor committed misconduct by not advising the defense of certain criminal proceedings involving accomplice Vogel and by making argument about Vogel's credibility at trial is meritless. In reviewing claims of prosecutorial misconduct, the Court must consider "first whether the prosecutor committed misconduct and second, whether the alleged misconduct placed the defendant in grave peril." *Robinson v. State*, 693 N.E.2d 548, 551 (Ind. 1998). "The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury's decision, rather than the degree of the impropriety of the conduct." *Willoughby v. State*, 660 N.E.2d 570, 582 (Ind. 1996). To preserve a claim of prosecutorial misconduct, a defendant must object and request an admonishment. *Robinson*, 693 N.E.2d at 552. If the defendant is not satisfied with the admonishment, the defendant must move for a new trial. *Id.* Failure to comply waives the prosecutorial misconduct claim. *Id.*

Here, it is unclear on the totality of the State's knowledge concerning Vogel's criminal proceedings. The record is clear that there was no formal discovery on revocation proceedings or the new Decatur County cases (Tr. 14). The prosecutor testified that he would have known of the Ripley County probation revocation proceedings (Tr. 13). Testimony revealed, however, that there was no communication between the Decatur County prosecutor's office and the Ripley County prosecutor (Tr. 29). If the prosecutor knew of the new offense in Decatur County, the State acknowledges it would have been a better practice to formally inform Petitioner of that fact.

This, however, does not end the question of whether "prosecutorial misconduct" occurred, warranting a new trial. Such a remedy is mandated only where there is "grave peril"

and no such peril exists here for the simple fact that the record is replete with evidence that Petitioner and his lawyers were in possession of this "non-disclosed" information. First, and foremost, Amy Streator, Vogel's own counsel, served as a co-counsel of Petitioner *during Petitioner's trial*. Streator had represented Vogel in his Decatur County cases, including the new class C felony battery charge there, until she withdrew from that case six days before Petitioner's trial (Ex. Vol. p. 671). She sat at Petitioner's table throughout his trial (Tr. 101). She was not only a law partner to Kellerman, Petitioner's counsel, she is also his sister (Tr. 100). Thus, it can not be said legitimately that Petitioner did not know of Vogel's probation revocation proceedings in Decatur County or the new charge he accrued in that county. Indeed, in light of the fact that his counsel also served Petitioner, the defense had better access to that information than the Ripley County prosecutor.

Moreover, the record reveals other evidence that Petitioner and Kellerman, his led counsel, knew of Vogel's cases. Kellerman admitted at the post-conviction hearing that he knew of these facts by the time of trial (Tr. 58). He and his sister admitted at that hearing that she would not have withdrawn from Vogel's Decatur County felony case without discussing it with Kellerman (Tr. 93, 110). She admitted that she, of course, knew of the pending charge in Decatur County (Tr. 109). Even the trial transcript reveals considerable evidence that Petitioner and his counsel knew of Vogel's ongoing criminal proceedings. Petitioner testified to his belief that Vogel still had charges pending against him (Ex. Vol. p. 322). Kellerman also referenced Vogel's "ongoing cases" during closing argument (Ex. Vol. p. 350).

In light of the substantial quantity of evidence establishing that Petitioner and his counsel were in full possession of all the information concerning Vogel's pending criminal proceedings, there can be no "grave peril." It strains the limits of logic to find prejudice for not disclosing

formally evidence a defendant already knows. There is nothing magical about a formal discovery notice that renders already-known information to be anything more than it already is, namely, information to be used or not used as a party sees fit. There was no prejudice here. Thus, there was no prosecutorial misconduct here.

Similarly, and contrary to one suggested finding by the trial court, there was no *Brady* violation. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or the bad faith of the prosecution. *Stephenson v. State*, 864 N.E.2d 1022, 1056 (Ind. 2007) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). To establish a *Brady* violation, a defendant must show "(1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *Conner v. State*, 711 N.E.2d 1238, 1245-46 (Ind. 1999) (citing *Minnick v. State*, 698 N.E.2d 745, 755 (Ind. 1998)). Evidence is not considered to be suppressed if the information was available to defendant through the exercise of reasonable diligence. *Conner*, 711 N.E.2d at 1246 (citing *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996)). Further, evidence is material under *Brady* if "the defendant ... establish[es] a reasonable probability that the result of the proceeding would be different if the State had disclosed [the] evidence." *Stephenson*, 864 N.E.2d at 1057.

This Court considered an alleged *Brady* violation in *State v. Hollars* and found no such violation. There, the "suppressed" evidence was a page of Hollars' own medical records stemming from medical treatment he received after shooting an officer. *State v. Hollars*, 887 N.E.2d 197, 203 (Ind. Ct. App. 2008). This Court ruled that even if the non-disclosed page was material and favorable to Hollars, the fact remained that he could have obtained the document through the exercise of reasonable diligence. *Id.* Nothing in the record there suggested anything

but that Hollars had an equal or greater access to that evidence. *Id.* Thus, the "suppression" of that evidence by the State did not constitute a *Brady* violation. *Id.*

Likewise, there is no evidence in the present case that the State suppressed anything because the record reveals that Petitioner and his counsel already possessed the information, and indeed, probably had greater access to it. As stated more fully above, the record of the jury trial and the post-conviction proceedings is filled with evidence that the defense was in full possession of Vogel's ongoing criminal proceedings. Amy Streator, Vogel's counsel, sat at Petitioner's table throughout the jury trial and assisted Petitioner's counsel, her brother and law partner. (Tr. 100-101, 109). The record reveals she would have told her brother of Vogel's case (Tr. 58, 93, 110). Moreover, references by trial counsel at Petitioner's trial support the fact that both he and Petitioner knew of Vogel's "ongoing cases" (Ex. Vol. p. 322, 350). Thus, it can not be said legitimately that Petitioner did not know of Vogel's probation revocation proceedings in Decatur County or the new charge he accrued in that county. Indeed, in light of the fact that his counsel also served Petitioner, the defense had better access to that information than the Ripley County prosecutor.

This evidence reveals that the trial court's "finding" that counsel was unaware of Vogel's pending cases at the time of Petitioner's trial is completely contradicted by the record. Here, the record is replete with nearly uncontroverted evidence that Petitioner knew of Nathan Vogel's ongoing criminal proceedings in Ripley and Decatur County. As such, the trial court's finding of prosecutorial misconduct based on the alleged *Brady* violation is erroneous and should be reversed.

The trial court's second determination of prosecutorial misconduct due to the prosecutor's closing argument is also meritless. The prosecutor argued that Nathan Vogel had

already pled guilty and "had no reason to lie" (Ex. Vol. p. 360). Petitioner's contention that the prosecutor knew of Vogel's pending cases in Ripley and Decatur Counties and thus knew that Vogel had a reason to lie misconstrues the record. Deputy Prosecutor Ryan King testified that he knew of Vogel's plea in the present case and that at the time of trial he would have known that a petition to revoke Vogel's probation had been filed (Tr. 13). King, however, could not recall if he knew at the time of trial the status of Vogel's Decatur County probation (Tr. 15). These facts do not call the validity of the prosecutor's argument into question. Vogel's plea in the present case would have given him no reason to lie because that plea had already been entered; he had already pled guilty (Ex.Vol. p. 143). Moreover, the reason for that plea was not in exchange for Vogel's testimony against Petitioner but rather because of the State's concern over an evidentiary issue (Tr. 18, 42). Vogel's probation proceedings would give him no reason to curry the prosecutor's favor because the judge, not the prosecutor, controls the outcome of probation proceedings (Tr. 20). Vogel could not be viewed as seeking to seek a benefit from anybody by testifying as he did at Petitioner's trial. This is further supported by the fact that counsel, who knew of Vogel's criminal proceedings, raised no contemporaneous objection that the prosecutor's argument was in any way misleading.

The prosecutor's comment during argument, therefore, falls well short of being the misconduct envisoned by the doctrine of prosecutorial misconduct. The prosecutor legitimately knew of no reason why Vogel would come to court and lie about Petitioner's involvement in this conspiracy. The prosecutor was presenting a reasonable argument concerning Vogel's testimony to the jury. There was neither misconduct here, nor grave peril. The trial court's finding to the contrary is contrary to law and the record. That finding should be reversed.

CONCLUSION

Based on the foregoing, the State requests this Court to reverse the ruling on Petitioner's petition for post-conviction court and reinstate Petitioner's conviction and sentence.

Respectfully submitted,

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Atty. Number 1958-98

By: _____
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties for perjury that on April 29, 2011, I served the foregoing pleading upon the opposing counsel in the above-entitled cause by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

J. Michael Sauer
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IN THE CIRCUIT COURT OF RIPLEY COUNTY

STATE OF INDIANA

STEVEN RAY HOLLIN, Petitioner	)	
Vs.	)	CAUSE NO. 69C01-0802-PC-001
	)	69C01-0511-FB-0011
STATE OF INDIANA, Respondent	)	

ORDER ON PETITION FOR POST CONVICTION RELIEF

FINDINGS OF FACT

Pre-trial Proceedings

1. On November 8, 2003, Batesville Police Officer Jeff Thielking investigated a report that two suspicious males had gone to the door of a residence asking for directions. [Petitioner's Exhibit C, Transcript p. 127-30]. Officer Thielking found two persons walking down a Ripley County road, Nathan Vogel and Petitioner Steven Hollin. [Tr. 132-33] Vogel was in possession of a camera bag containing over $600.00 and a tag on the bag identified it as the property of Al Wuestefeld who lived less than 500 yards away. [Tr. 136-38]. Wuestefeld confirmed that the bag and money had been taken from his bedroom. [Tr. 114-17].

2. Later that morning, Batesville Police Officer Stanley Holt took tape recorded statements from Vogel and Hollin. [Tr. 176-82]. Vogel told Officer Holt that he entered the house intending to use the phone, but then went to the master bedroom and emptied a big jar of change into a camera bag he found in the closet. [Tr. 183].Vogel said "Stevie", whose last name

he did not know, had stayed in the kitchen. [Tr. 184]. Vogel did not say that Hollin knew he was going to steal anything from the house. [Tr. 176-85].

3. Hollin told Officer Holt that they knocked on the doors of the house because they needed to find a phone. [Tr. 187]. Hollin said he followed Vogel into the kitchen, waited for about two minutes, then Vogel returned with a little pack and said, "Let's go, let's get out of here." [Tr. 188].

4. On November 10, 2005, both Vogel (Cause No. 69C01-0511-FB-10) and Hollin (Cause No. 69C01-0511-FB-11) were charged with Burglary, a class B felony, and Theft, a class D felony. [Petitioner's Exhibit E, Appendix p. 2, 10-11; Petitioner's Exhibit Q (FB-10, CCS, p. 1)]. Hollin was also charged with being a Habitual Offender. [App. 2, 12].

5. At the time he was charged in Ripley County, Vogel had a pending charge of Theft, a class D felony, in Decatur County Cause No. 16C01-0506-FD-143. [State's PCR Exhibit 5 (FD-143, CCS)]. Amy Streator, a member of Kellerman Law Office, represented Vogel in Decatur County. [Id.].

6. On November 14, 2005, attorney John L. Kellerman, II was appointed to represent Hollin. [App. 2, 15]. Kellerman is Streator's brother and also a member of Kellerman Law Office. [PCR testimony of John L. Kellerman, II].

7. Also on November 14, 2005, the Court issued its Reciprocal Order of Discovery, which required the State to "disclose to the defense . . . the substance of any oral statements made by . . . a co-defendant[.] [App. 16].

8. On January 13, 2006, Vogel and the Ripley County Prosecutor submitted a joint plea agreement in Cause No. 69C01-0511-FB-10. [State's PCR Exhibit 1]. On February 17, 2006, Vogel pled guilty to Theft, a class D felony, to be converted to a class A misdemeanor

upon successful completion of probation. [Petitioner's Exhibit Q, p. 2-3]. Vogel was sentenced to 545 days, with credit for time served and the rest suspended to probation. [Id.]. The class B felony Burglary charge was dismissed pursuant to the plea agreement. [Id.; State's PCR Exhibit 1].

9. On March 1, 2006, Vogel was sentenced pursuant to a plea agreement in Decatur County Cause No. 16C01-0506-FD-143. [Petitioner's Exhibit]. Vogel pled guilty to Theft, a class D felony, to be converted to a class A misdemeanor upon successful completion of probation. [State's PCR Exhibit 5]. Vogel was sentenced to 1 ½ years, with all but 60 days suspended to supervised probation. [Id.].

10. On May 16, 2006, Vogel was charged with Battery With a Deadly Weapon, a class C felony, in Decatur County Cause No. 16C01-0605-FC-58. [Petitioner's Exhibit T (FC-58 CCS, p. 1]. Streator was again appointed to represent Vogel. [Id. at 2].

11. On May 25, 2006, petitions to revoke Vogel's suspended sentences were filed in Decatur County Cause No. 16C01-0506-FD-143 [Petitioner's Exhibit P], and Ripley County Cause No. 69C01-0511-FB-10 [Petitioner's Exhibit S]. At the time of Hollin's trial, neither Kellerman nor Streator were aware of these petitions to revoke. [PCR testimony of Kellerman and Streator].

12. On July 11, 2006, upon motion of the Ripley County Prosecutor, Count II against Hollin was amended from Theft, a class D felony, to Conspiracy to Commit Burglary, a class B felony. [App. 3, 37-39].

13. On July 24, 2006, Officer Holt and Ripley County Chief Deputy Prosecutor Ryan King met with Vogel at the Ripley County Jail. [Tr. 206-14]. For the first time, Vogel said he

and Hollin had agreed with each other to look for houses to break into and take property. [Tr. 212].

14. On August 2, 2006, Holt and King again met with Vogel at the Ripley County Jail. [Tr. 207-14].

15. After these two meetings, Deputy Prosecutor King knew Vogel had a pending class C felony charge in Decatur County, and a pending petition to revoke his suspended sentence in Ripley County. [PCR testimony of King]. King testified at the PCR hearing that he could not recall whether he knew Vogel also had a pending petition to revoke his probation in Decatur County. The Court finds it highly likely that King learned of Vogel's pending Decatur County probation revocation during his pretrial meetings with Vogel.

16. Defense counsel Kellerman testified at the PCR hearing that he could not recall whether he knew of the pending petition to revoke Vogel's Ripley County probation at the time of trial. There is no evidence to indicate Kellerman did know, or should have known, about this pending revocation petition.

17. Kellerman also testified at the PCR hearing that he could not recall whether he knew of Vogel's pending class C felony charge in Decatur County at the time of trial. Streator knew of this pending charge, as she had represented Vogel for two months before withdrawing on August 1, 2006. [State's PCR Exhibit 4]. However, Streator testified at the PCR hearing that she did not recall whether she advised Kellerman of Vogel's pending felony charge. The Court finds there is no evidence that Kellerman knew of this pending charge at the time of trial.

18. Kellerman and Streator were not aware of the pending petition to revoke Vogel's Decatur County probation at the time of trial. [PCR Testimony of Kellerman and Streator].

19. On August 7, 2006, the day before Hollin's trial was to begin, the State filed a Motion to Dismiss Count I (Burglary), which was granted the following day. [App. 4, 56-57].

Trial Proceedings

20. On August 8 and 9, 2006, a jury trial was conducted on the charge of Conspiracy to Commit Burglary, a class B felony. [App. 84].

21. Wearing an orange jail jumpsuit, Vogel testified that he and Hollin agreed on a plan to commit burglaries on November 8, 2005 [Tr. 83-92], and that he had pled guilty [Tr. 97]. Vogel also testified that he had pled guilty to a prior Theft charge in Decatur County. [Tr. 108].

22. The jury did not know:

(1) Vogel had pled guilty only to Theft, a class D felony;

(2) Vogel's plea agreement called for dismissal of the charge of Burglary, a class B felony;

(3) Vogel was facing a maximum sentence of 23 years when he entered into his plea agreement;

(4) Vogel was sentenced to probation for the Theft charge;

(5) Vogel's class D felony would be reduced to a misdemeanor if he completed probation successfully;

(6) there was a pending petition to revoke Vogel's Ripley County probation;

(7) Vogel's Decatur County Theft conviction was also a class D felony that would be reduced to a misdemeanor if he completed probation successfully;

(8) there was a pending petition to revoke Vogel's Decatur County probation;

(9) there was a pending charge of Battery With a Deadly Weapon, a class C felony, against Vogel in Decatur County; and

(10) Vogel did not implicate Hollin in the burglary until after he was charged with Battery With a Deadly Weapon and the two petitions to revoke his probation were filed.

23. Attorney Kellerman testified at the PCR hearing that, for the most part, he did not have any strategic reason for failing to cross-examine Vogel or present evidence in a manner that would have apprised the jury of the matters set forth in ¶ 22. Kellerman testified he was under the impression that if he had brought out the details of Vogel's plea agreement and sentence in the Ripley County case, it might have opened the door to evidence of Hollin's prior criminal record.

24. Kellerman was unaware that Vogel did not implicate Hollin until after the new charge and probation revocation petitions had been filed, for two reasons:

(1) Kellerman did not know of Vogel's new felony charge and pending probation revocations; and

(2) Kellerman did not know that Vogel had implicated Hollin in his pretrial meetings with Officer Holt and Deputy Prosecutor King. This is demonstrated by Kellerman's opening statement:

> Nobody can control what [Vogel's] gonna say today, but if he tries to say today that this was some kind of a plan, this will be the first time he's come up with that story.

[Tr. 73-74]. King admitted at the PCR hearing that he did not disclose to Kellerman anything Vogel had said during their pretrial meetings.

25. Hollin testified at trial that he never agreed with Vogel to burglarize houses, and that he thought Vogel was just going into the Wuestefeld house to use the phone. [Tr. 241-42]. This was consistent with his initial statement to Officer Holt. [Tr. 187-88].

26. After Hollin testified, Deputy Prosecutor King argued outside the presence of the jury that Hollin's three prior Auto Theft convictions were admissible to impeach his credibility under Ind. Evidence Rule 609, and to show his intent under Ind. Evidence Rule 404(b). [Tr. 243]. Attorney Kellerman agreed. [Id.].

27. Kellerman testified at the PCR hearing that he did not have any strategic reason for agreeing that Hollin's three prior Auto Theft convictions were admissible to impeach his credibility under Ind. Evidence Rule 609, and to show his intent under Ind. Evidence Rule 404(b). Kellerman also testified that at the time of Hollin's trial, he was unaware of the Indiana Supreme Court's holding in ***Fletcher v. State***, 340 N.E.2d 771 (Ind. 1976), regarding the use of theft convictions to impeach the credibility of a witness.

28. All three of Hollin's Auto Theft convictions arose from instances where Hollin drove motor vehicles without the knowledge or consent of the owners. [Petitioner's Exhibits U (Affidavit of Probable Cause, Ripley County Cause No. 69D01-0311-FD-218), V (Affidavit of Probable Cause, Ripley County Cause No. 69D01-0312-FD-232), and W (Affidavit of Probable Cause, Ripley County Cause No. 69C01-0410-FC-28)].

29. In cross-examining Hollin, Deputy Prosecutor King elicited testimony regarding details of Hollin's criminal history, including:

(1) the names of the victims of his Auto Theft convictions;

(2) his attempt to flee from the police in one of his Auto Theft cases;

(3) on one Auto Theft case charged as a felony, he pled down to a misdemeanor; and

(4) he was released from jail seven days before he was arrested for this offense. [Tr. 266-72].

30. Attorney Kellerman testified at the PCR hearing that he did not have any strategic reason for failing to prevent the State from cross-examining Hollin in a manner that apprised the jury of the matters set forth in ¶ 29. Kellerman testified that once this evidence began coming in, he decided it was best to refrain from objecting and instead try to use it to Hollin's advantage.

31. On redirect examination, Kellerman established that Hollin was a juvenile when he committed his Auto Theft offenses; he did not take property from the vehicles; and he fled from police in one case to avoid arrest because he knew he had done something wrong. [Tr. 272-73].

32. On recross examination, Deputy Prosecutor King:

(1) twice more elicited testimony that Hollin had been out of jail for being a "car thief" for seven days when he was picked up on this case;

(2) showed Hollin was prosecuted as an adult on his Auto Theft cases, although he was a juvenile, because of his poor juvenile record; and

(3) suggested that Hollin lied to the police about being lost and having their car break down, in conformity with his prior act of fleeing the police in a stolen vehicle to avoid arrest. [Tr. 282-83].

33. In closing argument, Deputy Prosecutor King made the following statements:

> What about his intent? The thing I find pretty persuasive as to his intent is the fact that he has three (3) previous convictions for stealing. That's pretty telling on someone's intent. Especially when he just got out of jail seven (7) days before. [Tr. 294]
>
> * * *
>
> And we have heard a lot of evidence about the agreement. Number one, most importantly, comes out of Nathan Vogel, the co- defendant's mouth, he had no reason to come in here and lie, his case is over with. [Tr. 296]
>
> * * *

> Ladies and gentlemen, there's just one thing that you have to decide. Did these two (2) people act together or was poor Stevie Hollin just completely oblivious and taken advantage of by Nathan Vogel. Tricked. Tricked him into going into that house. He had no idea what was going on. Someone that had just been released. Had no idea what was happening. [Tr. 299]
>
> * * *
>
> And I believe Mr. Kellerman asked one question about, you know, Mr. Hollin's avoiding the police. You know, in one of the prior cases there was a resisting arrest allegation. What did you do that for? To avoid arrest. To avoid the law. To avoid justice. I wasn't trying to trick Mr. Hollin that's why he made up the lost story and the broken down car story. Hey, if we tell them something they might just talk to us and let us go. Hide the bag. That's what Mr. Vogel did but that wasn't the case. They got caught red-handed. But the intent behind those statements was to avoid arrest. The same intent as he used in a previous case. [Tr. 312]

34. Attorney Kellerman testified at the PCR hearing that he did not object to any statements by Deputy Prosecutor King set forth in ¶ 33 because it was his practice to refrain from objecting during closing argument.

Verdict and Sentencing

35. On August 9, 2006, the jury found Hollin guilty of Conspiracy to Commit Burglary, a class B felony. [Petitioner's Exhibit E, App. 4, 82, 86]. The jury also found Hollin to be a Habitual Offender. [App. 4, 83, 86].

36. On September 7, 2006, Hollin was ordered to serve 20 years for Conspiracy to Commit Burglary and 20 years for Habitual Offender, resulting in an executed sentence of forty (40) years. [App. 4, 88-90].

Appellate Proceedings

37. Attorney Leanna Weissmann was appointed to represent Hollin on direct appeal [App. 4, 92], and filed an Appellant's Brief in the Indiana Court of Appeals in Cause No. 69A01-0609-CR-401 on December 4, 2006. [Petitioner's Exhibit G].

38. On March 29, 2007, the Indiana Court of Appeals issued its memorandum decision affirming Hollin's convictions and sentence. [Petitioner's Exhibit J].

39. On December 5, 2007, the Indiana Supreme Court issued its transfer decision affirming Hollin's conviction but finding his 40-year sentence inappropriate, revising his sentence to ten years for Conspiracy to Commit Burglary and ten years for Habitual Offender, resulting in a sentence of 20 years. [Petitioner's Exhibit L].

Post-Conviction Relief Proceedings

40. Hollin filed his *pro se* Petition for Post-Conviction Relief on February 25, 2008. The Indiana Public Defender entered its Appearance for Hollin on April 7, 2008.

41. Hollin amended his Petition for Post-Conviction Relief on August 16, 2010.

42. The State has never filed an Answer to either Hollin's *pro se* Petition for Post-Conviction Relief or his Amended Petition for Post-Conviction Relief.

43. The amended petition presents six grounds for relief:

(1) ineffective assistance of trial counsel, for failing to discover and/or present evidence that would have impeached the credibility of Nathan Vogel;

(2) ineffective assistance of trial counsel, for conceding to the use of inadmissible evidence of Hollin's prior auto theft convictions under Ind. Evidence Rule 609;

(3) ineffective assistance of trial counsel, for conceding to the use of inadmissible evidence of Hollin's prior auto theft convictions under Ind. Evidence Rule 404(b);

(4) ineffective assistance of trial counsel, for failing to object to evidence and argument regarding inadmissible details of Hollin's prior criminal history pursuant to Ind. Evidence Rule 404(b);

(5) denial of due process, for the State's failure to disclose the existence of pending proceedings to revoke Vogel's probation in both this case and another case, and a pending prosecution for Battery With a Deadly Weapon, a class C felony; and

(6) prosecutorial misconduct, for Chief Deputy Prosecutor Ryan King arguing to the jury that Vogel had no reason to lie about Hollin's guilt because his case was over with, despite King's knowledge of pending proceedings to revoke Vogel's probation.

CONCLUSIONS OF LAW

Standard of Review for Ineffective Assistance of Counsel

1. Claims of ineffective assistance of trial counsel are decided under the two-pronged standard first enunciated in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052 (1984). A new trial is required when a petitioner shows that his attorney's performance was deficient because it fell below an objective standard of reasonableness, and there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, 466 U. S. at 694, 104 S.Ct. at 2064, 2068. Under the "reasonable probability" standard, a petitioner must demonstrate that the chance of a different outcome was "better than negligible." ***Julian v. Bartley***, 495 F.3d 487, 500 (7th Cir. 2007). He does not have to prove that his attorney's inadequate performance caused him to be convicted:

> (A) defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case. . . . The result of the 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 693-94, 104 S.Ct. at 2068.

Admissions of Fact by State

2. The State's failure to answer Hollin's Amended Petition for Post-Conviction Relief is deemed an admission of the factual allegations in the petition. ***Curry v. State***, 674 N.E.2d 160, 162 (Ind. 1996); ***Sedberry v. State***, 610 N.E.2d 284, 286 (Ind.Ct.App. 1993), *trans. denied.* In particular, the State has admitted:

(1) it failed to disclose to Hollin that there were pending proceedings to revoke the probation of State's witness Nathan Vogel in both Ripley County Cause No. 69C01-0511-FB-10 and Decatur County Cause No. 16C01-0506-FD-143, and a pending class C felony charged against Vogel in Decatur County Cause No. 16C01-0605-FC-58. [Amendment to *Pro Se* Petition for Post-Conviction Relief, ¶ 9(b)];

(2) when Deputy Prosecutor King argued to the jury that Vogel had no reason to lie about Hollin's guilt because Vogel's case was over, King knew there were pending proceedings to revoke Vogel's probation in both Ripley County Cause No. 69C01-0511-FB-10 and Decatur County Cause No. 16C01-0506-FD-143. [Amendment to *Pro Se* Petition for Post-Conviction Relief, ¶ 9(c)].

Deficient Performance of Trial Counsel

3. Trial counsel's overall performance fell below an objective standard of reasonableness because he failed to use readily available evidence to impeach the credibility of Vogel, the State's chief witness, and failed to prevent the State from improperly impeaching the credibility and character of his client, Steven Hollin.

Nathan Vogel's credibility

4. Trial counsel knew, or should have known by the exercise of reasonable diligence, that Vogel:

(1) was originally charged with Burglary, a class B felony, and Theft, a class D felony, in Cause No. 69C01-0511-FB-10, which subjected him to a maximum sentence of twenty-three (23) years; and

(2) entered into a plea agreement by which:

(a) his class B felony Burglary charge was dismissed;

(b) he pled guilty to the class D felony Theft;

(c) he was sentenced to 545 days with credit for time served and the rest suspended to probation; and

(d) his class D felony was to be reduced to a misdemeanor if he successfully completed probation.

5. The jury knew only that Vogel had pled guilty and was in jail. [Tr. 97]. Thus, the jury likely presumed that Vogel pled guilty to the same charge for which Hollin was being tried, Conspiracy to Commit Burglary, a class B felony, and was serving a lengthy sentence for that offense. The jury had no idea that Vogel, the only person who took any property from the Wuestefeld residence, avoided a potential 23-year sentence by pleading guilty and was given probation.

6. Hollin was entitled to have the jury know the potential penalties Vogel faced and the benefits he actually received under the terms of his plea agreement. ***Hamner v. State***, 553 N.E.2d 201, 204 (Ind.Ct.App. 1990) reversed a conviction for possession of cocaine because the trial court refused to permit the defendant to question his co-offender concerning his possible

sentence for pleading guilty to possession of marijuana, even though the jury knew his possession of cocaine charge was dismissed. Here, the jury was not only unaware of the favorable sentence Vogel received by pleading guilty to theft, they also did not know that his class B felony burglary charge had been dismissed pursuant to his plea agreement.

7. There is no legal authority to support trial counsel's professed belief that he risked opening the door to evidence of Hollin's criminal history if he alerted the jury to the benefits Vogel received under his plea agreement. If this was his strategy, it was based on a misunderstanding of the law, and trial counsel permitted the jury to hear extensive evidence of Hollin's criminal history anyway. Regardless of the reason, trial counsel's failure to inform the jury of the details of Vogel's plea agreement amounts to deficient performance.

8. Hollin was entitled to have the jury know there was a basis for undue pressure on Vogel to provide biased testimony against him because of pending proceedings:

(1) to revoke his suspended sentence in Ripley County Cause No. 69C01-0511-FB-10;

(2) to revoke his suspended sentence in Decatur County Cause No. 16C01-0506-FD-143; and

(3) to prosecute him for a class C felony charge of Battery With a Deadly Weapon in Decatur County Cause No. 16C01-0605-FC-58.

In ***Davis v. Alaska***, 415 U.S. 308, 94 S.Ct. 1105 (1974), the United States Supreme Court held the trial court's refusal to allow the defendant to cross-examine the key prosecution witness to show he was on probation for a juvenile delinquency adjudication denied Davis his constitutional right to confrontation.

> (D)efense counsel sought to show the existence of possible bias and prejudice of Green . . . (T)he jurors were entitled to have the benefit of the defense theory

> before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided a "crucial link in the proof" . . . . The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer. . . . (D)efense counsel should have been permitted to expose to the jury the facts from which the jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

415 U.S. at 317-18, 94 S.Ct. at 1111 (citations and footnotes omitted).

9. In ***Smith v. State***, 721 N.E.2d 213 (Ind. 1999), the Indiana Supreme Court found the trial court erred by refusing to allow Smith to cross-examine two witnesses concerning pending criminal charges against them. Smith argued that the pending charges gave the witnesses "a motive to testify as the prosecution desired in an effort to curry favor and gain favorable treatment." 721 N.E.2d at 218. The State argued that the court did not abuse its discretion because there were no actual offers of leniency given to either witness. ***Id.*** The Supreme Court disagreed as to witness Brandle: "By refusing to permit Smith to question Brandle about her pending charges and any possible bias, the trial court abused its discretion and violated Smith's right to confrontation." ***Id.*** at 219. As to witness Lampley, Smith was permitted to question him about his release from jail after giving a statement regarding the murder at issue, but was not allowed to cross-examine him about his pending charges. "The trial court ruled, correctly under Rule 609, that it is not proper to impeach by evidence of charged crimes not reduced to conviction. This is not the end of the analysis however." ***Id.*** (citation omitted). ***Smith*** concluded that regardless of whether the prosecutor had any deal with Lampley, "Smith had a constitutional right to confront the witness on the point and refusal to permit him to identify the charges or to inquire of Lampley's perceptions of the arrangement that resulted in his release on his own recognizance violated that right." ***Id.*** at 220.

10. Hollin was also entitled to have the jury know that Vogel never implicated him in a burglary conspiracy until after Vogel was charged with a class C felony and proceedings to revoke his suspended sentences had begun. It was incumbent upon trial counsel to provide the jury with reasons to doubt the reliability of Vogel's testimony. *See* ***Wright v. State***, 581 N.E.2d 978, 980 (Ind.Ct.App. 1991) (counsel's failure to use prior inconsistent statements to impeach witness who provided only direct evidence of defendant's guilt amounted to ineffective assistance; "it was crucial for the defense to admit any evidence that would have questioned her credibility").

11. If trial counsel knew of Vogel's pending probation revocation proceedings and class C felony prosecution, his failure to impeach Vogel's credibility by informing the jury about the pending proceedings and their relationship to the timing of Vogel's implication of Hollin would amount to deficient performance.

State's Violation of *Brady v. Maryland*

12. However, it appears from the evidence before the Court that trial counsel was not aware of Vogel's pending probation revocation proceedings and class C felony prosecution, because the State never disclosed this information. This conclusion is supported by counsel's closing argument:

> Well, you know the State says, Mr. Vogel has got nothing to gain. His case is over with. I don't know what the status of Mr. Vogel's cases are. Ongoing cases. I don't know what he has got to gain by coming up with something about Mr. Hollin.

[Tr. 301].

13. The State has an affirmative duty to disclose material evidence favorable to the defendant. ***Brady v. Maryland***, 373 U.S. 83, 83 S.Ct. 1194 (1963); ***Kyles v. Whitley***, 514 U.S. 419, 115 S.Ct. 1555 (1995). To prevail on his claim that the State failed to disclose evidence,

Hollin must show: (1) the State suppressed evidence, either willfully or inadvertently; (2) the suppressed evidence was favorable to Hollin because it was either exculpatory or impeaching; and (3) the suppressed evidence was material to an issue at trial. ***United States v. Bagley***, 473 U.S. 667, 674, 105 S.Ct. 3375, 3379 (1985); ***Brady***, 373 U.S. at 87, 83 S.Ct. at 1196-97. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different." ***Kyles***, 514 U.S. at 433-34, 115 S.Ct. at 1565-66 (quoting ***Bagley***, 473 U.S. at 682, 105 S.Ct. at 3383). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial. ***Kyles***, 514 U.S. at 434, 115 S.Ct. at 1566.

14. Despite Deputy Prosecutor King's knowledge that there were pending proceedings to revoke Vogel's probation in both Ripley County and Decatur County, and a pending class C felony charge in Decatur County, he failed to disclose this information to Hollin. This evidence was favorable to Hollin because it was impeaching – it showed a motivating factor for Vogel to cooperate with the State that would have affected the jury's assessment of his credibility. *See* ***Rowe v. State***, 704 N.E.2d 1104, 1107-09 (Ind.Ct.App. 1999), *trans. denied* (State's failure to disclose prior convictions and pending probation revocation proceedings of key witness required reversal under ***Brady***; "considering that probation revocation proceedings were already pending against Hodges, Rowe should have had an opportunity to explore whether Hodges expected favorable treatment in exchange for his testimony").

Steven Hollin's credibility

15. In order to attack the credibility of a witness, Ind. Evidence Rule 609(a)(2) allows evidence of convictions for crimes "involving dishonesty or false statement." Theft convictions

are presumed admissible "under that portion of ***Ashton*** [***v. Anderson***, 279 N.E.2d 210, 216-17 (Ind. 1972)] which allows proof of crimes involving 'dishonesty or false statement.'" ***Fletcher v. State***, 340 N.E.2d 771, 774 (Ind. 1976). However, if the theft conviction arose from a factual situation which does not indicate a "lack of veracity" on the part of the witness, "counsel should make such facts known to the court through a pre-trial motion in limine, supported by appropriate affidavits, thereby allowing the court the opportunity to exclude, in its discretion, any reference to such prior conviction." ***Id.*** at 775.

16. ***Fletcher*** was decided before the Indiana Rules of Evidence were adopted effective January 1, 1994. But Indiana permitted evidence of convictions for "crimes involving dishonesty or false statement" to impeach the credibility of a witness when ***Fletcher*** was decided. ***Ashton***, 279 N.E.2d at 216-17. Thus, the adoption of Indiana Evidence Rule 609(a)(2) did not alter ***Fletcher*** in any way. *See also* ***Brown v. State***, 703 N.E.2d 1010, 1018 (Ind. 1998) (holding Brown's conviction for entering automobile with intent to commit theft admissible for impeachment purposes because he failed to make offer of proof pursuant to ***Fletcher*** to rebut presumption of admissibility). ***Fletcher*** is still good law, and was good law at the time of Hollin's trial in August, 2006.

17. As to determining whether a theft conviction involves a "lack of veracity," ***Fletcher*** noted that conduct which constitutes theft would have previously sustained a conviction for such diverse offenses as grand larceny, petit larceny, larceny by trick, obtaining property by false pretenses, blackmail, embezzlement, and receiving stolen property. 340 N.E.2d at 774.

> If we examine the elements of these crimes, particularly focusing upon the method of the wrongful taking, we will find some which directly correlate with the propensity of the witness for truth and veracity. In others, however, any relation between the offense and the witness's inclination to tell the truth is tenuous or nonexistent. . . . "(A)ll crimes have some element of dishonesty in the broad sense of moral depravity." The word dishonesty as used in ***Ashton*** was not

used in such a broad sense, and our holding here should not be construed as granting approval for such a reading.

340 N.E.2d at 774-75 (citations omitted). The Indiana Supreme Court has upheld a trial court's exclusion of the prior conviction of a State witness because the State "showed by affidavit in support of its Motion in Limine that the disputed offense, although arguably attempted theft, was not the type of theft offense which bespeaks a lack of veracity." ***Sweet v. State***, 498 N.E.2d 924, 927 (Ind. 1986). Virtually all federal circuits have concluded that stealing is not a crime of "dishonesty or false statement" for purposes of Federal Evidence Rule 609(a)(2). ***United States v. Amaechi***, 991 F.2d 374, 378, n.1 (7th Cir. 1993).

18. Hollin's convictions for Auto Theft were all based on joyriding situations that do not indicate a lack of veracity. *See* Petitioner's Exhibits U, V, and W. Trial counsel's concession to the use of Hollin's Auto Theft convictions for impeachment was based on his failure to understand the applicable law, and thus amounts to deficient performance.

19. Although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, Ind. Evidence Rule 404(b) allows such evidence to show intent. The Indiana Supreme Court has adopted a "narrow construction of the intent exception in Evid. R. 404(b). It does not authorize the general use of prior conduct evidence as proof of the general or specific intent element in criminal offenses." ***Wickizer v. State***, 626 N.E.2d 795, 799 (Ind. 1993). The intent exception is available only when the defendant "goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent." ***Id.*** When the defense raises such a contrary intent at trial, the State may respond by offering evidence of his prior acts, but only "to the extent genuinely relevant to prove the defendant's intent at the time of the charged offense." ***Id.***

20. Hollin was charged with Conspiracy to Commit Burglary: "agreed with Nathan Vogel to commit the crime of Residential Burglary with the intent to commit the crime of Residential Burglary, and Hollin and/or Vogel performed an overt act in furtherance of the agreement." [App. 39]. Hollin testified that he did not agree with Vogel to commit burglary, and followed Vogel into the house because he thought Vogel was going to use the phone. [Tr. 241-42]. Therefore, Hollin did not admit that he agreed to commit the crime of residential burglary, but had a "particular contrary intent." Hollin denied that he committed the charged act of agreeing to commit burglary at all.

21. Under ***Wickizer*** and the charging information, the "time of the charged offense" was when Hollin and Vogel agreed to commit residential burglary, not when Hollin and Vogel entered the house. Thus, Hollin did not put his "intent at the time of the charged offense" at issue by denying that he intended to commit burglary when he entered the house.

22. If Hollin had been tried on the original charge of Burglary, the issue would have been whether he broke and entered the building or structure of another person "with intent to commit a felony in it." Ind. Code 35-43-2-1. Thus, his denial of intent to commit the felony of theft inside the house ("claim of particular contrary intent") at the time he entered the house ("intent at the time of the charged offense") would have been relevant and admissible under ***Wickizer***. But because he was charged with Conspiracy to Commit Burglary, ***Wickizer*** precluded the State from using his prior Auto Theft convictions to prove his intent at the time of the alleged agreement.

23. By testifying that he did not agree to commit residential burglary and did not intend to commit burglary when he entered the house, Hollin did not put his intent at the time of the alleged offense at issue. Trial counsel's concession to the use of Hollin's Auto Theft

convictions under the intent exception of Evidence Rule 404(b) was based on his failure to understand the applicable law, and thus amounts to deficient performance.

24. A witness may be questioned only about whether he had previously been convicted of a particular crime that is admissible for impeachment. The details of the prior convictions may not be explored. ***Hansford v. State***, 490 N.E.2d 1083, 1091 (Ind. 1986); ***Banks v. State***, 761 N.E.2d 403, 405 (Ind. 2002)

25. The deputy prosecutor went far beyond cross-examining Hollin about whether he had been previously convicted of Auto Theft. He elicited the victims' names, that he resisted arrest by fleeing in one instance, he pled down to a misdemeanor from a felony in the first prosecution, and had been released from jail just seven days before he was alleged to have committed this offense. Even if Hollin's prior Auto Theft convictions had been admissible, trial counsel's failure to object to the State using details related to the convictions to show his bad character and action in conformity therewith in violation of Evidence Rule 404(b) amounts to deficient performance.

26. Once this prejudicial evidence had been admitted without objection, trial counsel attempted to mitigate the harm by showing that Hollin was a juvenile when he committed the offenses, did not take property from the vehicles, and resisted by fleeing because he knew he had broken the law. This in itself was not deficient performance. However, it opened the door for further cross-examination of Hollin in which the deputy prosecutor showed that Hollin was waived into adult court due to his poor juvenile record, and suggested that Hollin acted in conformity with his prior act of fleeing from the police to avoid arrest by lying to the arresting officer in this case about being lost. The deputy prosecutor also twice more reminded the jury that Hollin had been released from jail for being a "car thief" just seven days before the burglary.

27. In closing argument, the deputy prosecutor made two express invitations for the jury to infer Hollin's guilt from the fact that he had been released from jail seven days before the burglary. He also urged the jury to conclude that Hollin gave false excuses to the arresting officer to avoid arrest because he was acting in conformity with his character, as shown by the inadmissible evidence of his flight from police in a prior case. This argument violated Evidence Rule 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith"). In essence, Deputy Prosecutor King "harp[ed] on [Hollin's] crime[s], parade[d them] lovingly before the jury in all [their] gruesome details, and thereby shift[ed] the focus of attention from the events at issue" to the events surrounding Hollin's previous convictions. ***Campbell v. Greer***, 831 F.2d 700, 707 (7th Cir. 1987).

28. Considering trial counsel's failure to use available evidence to call Vogel's credibility into question, and counsel's failure to prevent the State from using inadmissible evidence regarding Hollin's prior convictions to call his character and credibility into question, Hollin has shown by a preponderance of the evidence that trial counsel's overall performance fell below an objective standard of reasonableness.

Prejudice Resulting from Deficient Performance of Trial Counsel

29. This case was essentially a credibility contest. As the deputy prosecutor argued: "This case really boils down to one question that you have to decide. Was there an agreement?" [Tr. 296]. Vogel testified that Hollin agreed with him to commit a burglary. Hollin testified that he did not. Thus, any evidence bearing on the respective credibility of Vogel and Hollin was critical to the outcome of this jury trial.

30. As to Hollin's credibility, the jury should not have been made aware of his prior Auto Theft convictions. Thus, the jury instruction that evidence of Hollin's other crimes should be considered only as to his intent and credibility did not diminish the prejudice: such evidence should not have been considered at all. In addition to permitting inadmissible evidence regarding Hollin's prior convictions, counsel also allowed the State to elicit prejudicial details of the convictions and emphasize them in closing argument. Most significantly, the deputy prosecutor invited the jury to discredit Hollin's testimony and infer that he was guilty because he had been released from jail just seven days earlier.

31. As to Vogel's credibility, trial counsel failed to apprise the jury of the benefits Vogel received as a result of his guilty plea: facing a possible 23-year sentence, he pled guilty to a class D felony that would be reduced to a misdemeanor if he successfully completed probation, and was sentenced to time served. Knowing only that Vogel pled guilty and was in jail, the jury could only assume he was serving a lengthy sentence for Conspiracy to Commit Burglary, a class B felony.

32. Errors by counsel that are not individually sufficient to prove ineffective representation may add up to ineffective assistance of counsel when considered cumulatively. ***Pennycuff v. State***, 745 N.E.2d 804, 816-17 (Ind. 2001). The cumulative effect of the multiple instances of counsel's deficient performance caused such prejudice to Hollin's defense that a finding of ineffective assistance of trial counsel is required. Trial counsel's conduct undermined the proper functioning of the adversarial process at Hollin's trial. ***Strickland***, 466 U.S. 686, 104 S.Ct. 2064. The Court finds there is a reasonable probability that, absent the errors of trial counsel, the jury would have had a reasonable doubt respecting Hollin's guilt.

Additional Prejudice Resulting from Misconduct of Prosecutor

33. Just as with ineffective assistance of counsel, the effect of suppressed ***Brady*** evidence must be considered collectively, rather than item by item. ***Kyles***, 514 U.S. at 436-37. The test for prejudice resulting from ineffective assistance of counsel was adopted from the test for materiality of suppressed ***Brady*** evidence: whether there is a reasonable probability that, but for (counsel's errors/suppressed evidence), the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694 (citing ***United States v. Agurs***, 427 U.S. 97, 104, 96 S.Ct. 2392 (1976)). Therefore, it is appropriate to consider the collective effect of trial counsel's errors and the suppressed evidence on the outcome of Hollin's trial.

34. There is a reasonable probability that, had Vogel's pending felony prosecution and probation revocation proceedings been disclosed to the defense, the result of the trial would have been different. The State not only denied Hollin the opportunity to fully expose Vogel's motivations for testifying against him, but the deputy prosecutor falsely represented to the jury that Vogel had no reason to lie because his case was "over with." In ***McIntyre v. State***, 717 N.E.2d 114, 128 (Ind. 1999), the State failed to disclose that one of its witnesses had a pending petition for revocation of his suspended sentence and an outstanding arrest warrant. The Supreme Court held the trial court erred in finding these pending proceedings would have been inadmissible to show bias of the witness. ***Id.*** at 129. The materiality element of ***Brady*** was not met in ***McIntyre***, and reversal not required, because the facts provided by the witness "were generally available through other evidence." ***Id.*** Here, Vogel's testimony provided the only evidence that he and Hollin agreed to commit the charged offense.

35. The prejudicial effect of counsel's errors was compounded by the State's failure to disclose Vogel's pending felony charge and probation revocations. When this combined

prejudicial effect is considered, it becomes even more apparent that Hollin did not receive a fair trial. ***Kyles***, 514 U.S. at 434, 115 S.Ct. at 1566.

Prosecutorial Misconduct

36. In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal. ***Canaan v. State***, 683 N.E.2d 227, 235, n.6 (Ind. 1997).

37. Deputy Prosecutor King knew there were pending proceedings to revoke Vogel's Ripley County probation, yet he argued to the jury that Vogel would not falsely implicate Hollin because Vogel's case was finished. Because King failed to disclose these pending revocation proceedings, trial counsel was unaware that Vogel's case was not finished. As a result, Hollin's claim of prosecutorial misconduct was demonstrably unavailable to him at the time of his trial and direct appeal.

38. In order to establish a claim of prosecutorial misconduct, it must be shown: (1) the prosecutor engaged in misconduct; and (2) the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. ***Wright v. State***, 690 N.E.2d 1098, 1110 (Ind. 1997). Whether the prosecutor has placed the defendant in a position of grave peril is measured by the probable persuasive effect of the misconduct on the jury's decision, and whether there were repeated instances of misconduct which would evidence a deliberate attempt to improperly prejudice the defendant. ***Id.*** at 1111. The strength of the State's case is also relevant. ***Moore v. State***, 669 N.E.2d 733, 740 (Ind. 1996).

39. All attorneys have a duty of candor toward tribunals, but prosecutors are held to an even higher standard of conduct. ***Brown v. State***, 746 N.E.2d 63, 70 (Ind. 2001). Deputy Prosecutor King engaged in misconduct by failing to disclose material evidence regarding Vogel's credibility, then making a statement to the jury that he knew was not true.

40. This misconduct probably had a significant persuasive effect on the jury's decision, because the most important task facing the jury was to evaluate Vogel's credibility. King's misconduct improperly bolstered Vogel's credibility. In addition, this was not the only instance of misconduct by the deputy prosecutor. Although the pretrial discovery order required the State to disclose "the substance of any oral statements made by . . . a co-defendant" [App. 16], King failed to disclose the oral statements Vogel made to him and Officer Holt on July 24 and August 2, 2006. Hollin cannot prove specific harm from this misconduct, but it evidences a deliberate attempt to improperly prejudice him. The State's case was not particularly strong, as it depended primarily on Vogel's credibility. Considering all the circumstances, the deputy prosecutor's misconduct placed Hollin in a position of grave peril to which he should not have been subjected.

Conclusion

The appropriate remedy for ineffective assistance of trial counsel is remand for a new trial. ***Perez v. State***, 748 N.E.2d 853, 855 (Ind. 2001). The appropriate remedy for ***Brady*** violations and prosecutorial misconduct is also remand for a new trial. ***Goodner v. State***, 714 N.E.2d 638, 642 (Ind. 1999).

Because of the ineffective assistance of trial counsel and the suppression of evidence by the Ripley County Prosecutor's Office, Steven Hollin is entitled to a new trial.

WHEREFORE, IT IS ORDERED that Petitioner Steven Hollin's Amended Petition for Post-Conviction Relief is GRANTED; his conviction is reversed; and a new trial shall be scheduled.

Ordered this 3 day of February, 2011.

Carl H. Taul

Hon. Carl H. Taul
Judge, Ripley Circuit Court