IN THE SUPREME COURT OF FLORIDA

CASE NO. SC20-1589

QUENTIN MARCUS TRUEHILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR ST. JOHNS COUNTY, FLORIDA
Lower Tribunal No. 552010CF00763XXAXMX

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The postconviction record on appeal of the denial of Truehill's Motion to Vacate Death Sentence is comprised of one volume, initially compiled by the clerk, successively paginated beginning with page one. Cites to the postconviction record are R, __, Record followed by the page number. Cites to the direct appeal record are DAR, __, __, Direct Appeal Record followed by the volume number and then the page number.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Direct Appeal

The complete facts of Truehill's case are outlined below from this Court's direct appeal order:

> Quentin Truehill, who was twenty-two years old at the time, was charged with the kidnapping and murder of Vincent Binder, who was twenty-nine years old. Truehill's crime spree began on the evening of March 30, 2010, at the Avoyelles Parish Sheriff's Office in Mansura, Louisiana, when Truehill and two other cellmates, Kentrell F. Johnson and Peter Hughes, held the holding-cell officer hostage. Truehill then attacked the booking officer with a shank, after which the three cellmates fled the jail. Later that day, the men stole a black Chevy extended-cab truck, which contained tools, including saws and knives. The

truck was eventually found in Miami, and a search of the truck led to the murder weapon and other relevant physical evidence.

Truehill, Johnson, and Hughes committed a series of crimes between Louisiana and Florida as they made their way to Miami, which were all linked to the actual murder. In Broussard, Louisiana, in the parking lot of a shopping center, the men stole a purse from LeAnn Williams as she exited her car. They then used Williams' credit cards from her purse to fund their journey until her credit card company listed the card as stolen. A video from the shopping center showed images of the black Chevy truck backing into a parking spot near the incident. Williams' identification card was later found in the stolen truck.

On the afternoon of April 1, 2010, in Pensacola, Florida, the three men attacked Brenda Brown at an apartment complex. One of the men had initially approached her, asking for some water, and the three men followed her into an apartment that she was cleaning. After Brown filled a blue plastic cup with water, two of the men brandished large knives and demanded her money. One man displayed a large filleting knife, while the other man's knife was twelve inches in length with a brown wooden handle and did not have a point at the end. Brown gave them her money, at which point they taped her mouth with electrical tape, taped her hands behind her back, and took her to a back bedroom, where they hit her on her head with the knives. Brown put her hands up to protect herself and then pretended to be dead. Based on the injuries she sustained in the attack, she had five of her fingers amputated; she also had a skull fracture and two lacerations on her head. Brown identified Truehill as the person who approached her with the knife. After Truehill was apprehended, police found a pair of jeans in the codefendants' motel room with both Binder's and Brown's DNA on it, establishing that the person who battered Brown was also involved in Binder's death.

The codefendants continued east, arriving in Tallahassee that same day. At 10:30 p.m. on April 1, Johnson approached Mario Rios, who was visiting a friend at an apartment complex in Tallahassee, to ask Rios if the mall was still open. The question seemed odd since it was so late, and Rios began backing away from Johnson. Truehill, at that point, jumped out and grabbed Rios by his shirt with a twisting motion, demanding all of Rios's possessions as Truehill displayed a large knife. Rios identified the knife in evidence as being consistent with the knife that he saw. Rios pushed Truehill back and ran to his friend's apartment. He called the police immediately and gave law enforcement the shirt that Truehill grabbed. DNA testing on the portion of the shirt that Truehill grabbed was consistent with Truehill's DNA.

Later that same evening, around 11 p.m., Cris Pavlish and her friend were walking in a parking lot toward her car when a black four-door truck quickly approached and stopped in a manner that blocked them. The men in the truck asked them for directions, and Pavlish and her friend attempted to answer their questions. At that point, Truehill demanded her purse, swinging a machete with a wooden handle and a thin, gold band across it. Truehill initially attempted to grab Pavlish, but she was able to break free from his grip. During the scuffle, Pavlish's purse fell, so Truehill put the knife down to grab her purse. Pavlish used the opportunity to run away, and her friend followed shortly. Some of the personal items that Pavlish had in her purse were found in the stolen black truck.

That same evening, on April 1, Beth Frady, her husband David, and Rebecca Edwards met Vincent Binder for dinner in Tallahassee and then ended their evening at the Fradys' home, where Edwards and Beth Frady worked on a paper for school. Binder had his bankcard with him earlier that evening when he made a purchase at a gas station. Around midnight on April 2, Binder left the study

group to walk home since he lived only about a mile away. The next day, Beth Frady texted Binder numerous times, attempted to call him, and stopped by his house, but he never responded to any of the attempts. On April 8, she reported Binder as missing to the police, and during their investigation, the police learned that Binder's bankcard was used for two transactions that occurred at 12:15 and 12:21 a.m. at the Halftime Keg store in Tallahassee on April 2—fifteen minutes after Binder had left his friends' home. A video was obtained from the store, which showed Truehill using the victim's bankcard without the victim's presence. Additional transactions occurred with his bankcard in Madison County, Jacksonville, Fort Pierce, Daytona Beach, Opa Locka, and Miami, at which point the bankcard was blocked based on suspicious activity.

Shirley Marcus met Truehill, Johnson, and Hughes in Miami that month when the three men and her friend, Tony, picked her up in the four-door black truck. Marcus, who partied with the group at a hotel, recalled that the three men "had money." The next day, Marcus joined the codefendants to eat at Burger King and visit the beach. While at the beach, however, one of the men lost the keys to the truck. Marcus and Johnson left to retrieve Marcus's vehicle—a red Ford Sport Trac. When they returned to pick up Truehill and Hughes, Truehill and Hughes had Marcus's tennis shoes, even though she had left them in the locked, black truck. In addition, the men carried a large, black bag. Police eventually recovered the black truck at the beach in Miami with a shattered left rear window.

Shortly after this, the men had run out of money, so Marcus took the three men to her house. Marcus drove Truehill, Johnson, and Hughes to a local Wachovia bank, where they attempted to withdraw $1,300 from Binder's bank account, using Binder's bankcard and driver's license that Truehill had with him. The bank teller became suspicious because, while the driver's license submitted

belonged to a white male, the driver was a black female, and all of the passengers were black males. After the teller took a long time in processing the request, Johnson told Marcus to drive away. A bank security guard was able to write down Marcus's tag number before the vehicle disappeared, and a surveillance camera captured images of the vehicle.

Meanwhile, Peter Milian of the Miami-Dade Police Department noticed a black truck in a parking lot with a shattered left rear window and a missing license tag. After learning the vehicle was reported as stolen from Louisiana and searching the vehicle, he found a bloody knife underneath the front passenger seat. Subsequent testing of the knife revealed that eight of the bloodstains contained a complete DNA profile that matched Binder, and Johnson was found to be a minor contributor. Additional items were later found in the truck, including Williams' Louisiana identification card, ATM receipts, Pavlish's documents, and a green washcloth with blood on it. DNA testing of the washcloth revealed a blood stain that contained a complete DNA profile that matched Binder, and a mixed DNA profile that was consistent with Binder and Johnson.

On April 12, 2010, Marcus, Truehill, and Hughes were arrested at a Budget Inn Motel, and Johnson was arrested a block away shortly after. In the motel room shared by Marcus, Truehill, Hughes, and Johnson, police found significant incriminating evidence, including Binder's wallet, a black, heavy-duty garbage bag containing clothing, a metal handsaw, a machete, and a pair of black Levi's jeans. DNA testing on the machete resulted in a partial DNA profile that matched Truehill. DNA testing on the black Levi's revealed mixed DNA profiles, where Binder was the major contributor. A swab of the inside waistband revealed a mixed DNA profile that matched Truehill, Johnson, Hughes, and Marcus as possible contributors.

Police also conducted a search in Marcus's motel room, where Marcus had initially taken Truehill, Hughes, and Johnson after they ran out of money, and found a black sheath for a knife and a pair of Giovanni blue jeans on Marcus's bed, among other items. DNA testing on the Giovanni jeans revealed a complete DNA profile that matched Binder, a DNA profile that matched Brenda Brown, a mixed DNA profile with Brown as the major contributor and Johnson as a possible minor contributor, and a mixed DNA profile with Binder as the major contributor and Johnson as a possible minor contributor.

Law enforcement officers found Binder's decomposed body in an open field near I–95 in St. Augustine, Florida. Binder's hat was about twenty-five feet away from his body with a straight-line cut on the bill going toward the hat. Binder had four stab wounds to his back and blunt-force injuries to his left head area that penetrated into the cranium. Approximately ten chopping-type injuries to the back of Binder's head caused fractures and a four-inch hole in the back of his head. In addition, Binder's ribs were fractured, his ulna bone in the left forearm was fractured, and the radius was dislocated—classic defensive injuries. Binder also sustained chopping injuries on his hands, causing fractures that also could be considered to be defensive injuries. Dr. Frederick Hobin, the medical examiner, opined that two knives were used to kill the victim, and that some of the wounds were consistent with a machete, while the stab wounds were caused by a different knife. Michael Warren, the Assistant Director of the William R. Maples Center for Forensic Medicine, assisted in Binder's autopsy and opined that the knife in evidence could have caused the injuries to Binder's cranium.

The jury found Truehill guilty of both counts of murder and kidnapping.

Penalty Phase

In the penalty phase, the State first called Kenneth Stutes, a retired prosecutor from Lafayette, Louisiana, who testified that Truehill pled guilty to manslaughter in the shooting death of James Bourgeois. Truehill was sentenced to thirty years for this crime and was serving this sentence at the time of the escape from prison and subsequent murder. In addition, Truehill was convicted of a 2006 armed robbery in Louisiana, and the victim in that case testified that two masked men jumped into his vehicle and robbed him. Isadore White testified that Truehill was her neighbor and friend and admitted his own involvement in that robbery. Finally, the State submitted victim-impact statements from Beth Frady, Dr. Davis Houck (a Florida State University professor), and Binder's aunt, who raised him after his mother died when he was eleven years old.

Truehill presented several witnesses to establish mitigation. Eleanor Smith, the mother of Truehill's former girlfriend, testified that when Hurricane Katrina hit New Orleans, she and her daughter were unable to leave the city so Truehill came to their house to ride out the storm with them. They thought they had survived the storm with minimal damage, but after the levees burst, the flooding water drove them into the attic. They had to be rescued by boat from their rooftop, which was a very traumatic experience. Smith observed how Truehill changed after the hurricane and how the storm had a significant impact on him.

Walter Goodwin, a teacher and then principal in New Orleans, knew Truehill and testified that Truehill was more of a follower who wanted to be "one of the guys." Truehill became more withdrawn after his parents divorced, and Goodwin encouraged Truehill to get counseling.

Next, Truehill called his stepmother, Miranda Truehill, who testified that she stayed with Truehill's parents briefly

when her marriage was falling apart. She left for Australia and when she returned, she learned that Truehill's parents had divorced. She moved in with Truehill's father, and they married soon after. Truehill was just beginning high school and did not adjust well to his parents' divorce or his father's remarriage. She also stated that Truehill was an unhappy child and was more of a follower than a leader.

Marshall Truehill, Jr., Truehill's older brother, testified that when he was growing up at home with Truehill, they witnessed some domestic discord, which frightened Truehill. Jessica Truehill, Truehill's sister, also testified about their upbringing, discussing the fighting that occurred between their parents and how their father was a strict disciplinarian. She discussed how another student was shot at Truehill's school and how Truehill had a girlfriend whose child died of Sudden Infant Death Syndrome and who later died herself. Truehill became more angry and withdrawn and felt misunderstood. She also stated that although Truehill had previously shot someone, he was really scared and nervous after it happened.

Valli Truehill, Truehill's mother, testified about her marriage to Truehill's father, including the physical, verbal, and emotional abuse that she suffered in front of the children. She stated that when they divorced, Truehill's father sat the children down and explained why they were divorcing, including sexually graphic descriptions of their lack of sexual intercourse, which shocked the children. After the divorce, she had a difficult time obtaining child support and was finally forced to move in with her father. She described how Truehill was upset over the divorce and remarriage and how Hurricane Katrina only made him angrier and more hostile.

Mr. Aiken, a defense expert on prisons and prison life, testified that Truehill could be managed for the rest of his

life in a maximum security setting without a risk of harm to staff, inmates, or the general community. In addition, Dr. Fredrick Sauter, a clinical psychologist, testified that Truehill suffers from post-traumatic stress disorder (PTSD) and depression.

In rebuttal, the State called Dr. Prichard, who opined that the level of trauma experienced by Truehill did not rise to the level to support PTSD. He further asserted that, based on reviewing Truehill's history, he did not believe that Truehill was merely a follower, but was actually a leader. In addition, the State played a jailhouse conversation between Truehill and his mother where Truehill's mother suggested that he could attempt to use the storm to explain why he did strange things.

After hearing all of the aggravation and proposed mitigation, the jury recommended that Truehill be sentenced to death by a unanimous vote of twelve to zero.

During a Spencer hearing before the trial judge, the State submitted nine additional victim-impact statements. Truehill presented additional testimony from his aunt, Diedra Humphrey, who testified that she visits her nephew weekly and he has a calm demeanor and reads many books, including the Bible. His mother testified again, concerning additional traumas that Truehill encountered.

After considering the jury's recommendation and all of the evidence, the trial court found six aggravating factors applied, analyzing each aggravator in great detail, and assigning each great weight: (1) Truehill was under a sentence of imprisonment at the time of the crime; (2) Truehill had a prior violent felony; (3) Truehill committed the murder while engaged in the commission of a kidnapping or robbery; (4) the murder was committed for the purpose of preventing a lawful arrest; (5) the murder was especially heinous, atrocious, or cruel (HAC); and (6) the capital felony was committed in a cold, calculated, and

premeditated manner without any pretense of moral or legal justification (CCP).

The trial court then analyzed whether a sentence of death was appropriate based on an Enmund/Tison analysis and determined the death sentence was appropriate because Truehill was a major participant in Binder's murder and had demonstrated a reckless disregard for human life. The trial court concluded that Truehill's culpability in the robbery, kidnapping, and murder of the victim "is well established and conclusively proven beyond a reasonable doubt."
The court weighed this aggravation against five statutory mitigating circumstances and forty nonstatutory mitigating circumstances. The court found Truehill failed to prove the statutory mitigator pertaining to Truehill's age (he was 22) but did find four statutory mitigators had been proven by the greater weight of the evidence and gave mitigating circumstances 1-3 "less than slight weight," and mitigating circumstance 4 slight weight: (1) the defendant was under the influence of mental or emotional disturbance; (2) the capacity to appreciate the criminality of his conduct or conform to the requirements of law was substantially impaired; (3) the crime was committed by another person and Truehill had only a minor role; (4) Truehill acted under extreme duress or the substantial domination of another person.

The court then weighed the nonstatutory mitigation and found Truehill had proven forty nonstatutory mitigators, but gave most of the mitigation slight to no weight. The court, however, did find four mitigating factors were entitled to moderate weight: (1) Truehill experienced the trauma of witnessing the unfolding of a retaliatory murder; (2) he helped his girlfriend and her mother escape the flooding of Hurricane Katrina; (3) Truehill jumped into the water to save his girlfriend when she fell out of the boat; and (4) when escaping the flooding from Hurricane Katrina, Truehill was able to procure a car.

> The trial court agreed with the jury's unanimous vote and imposed a death sentence, finding that the presence of six aggravating factors outweighed four statutory mitigating circumstances and forty nonstatutory mitigating circumstances.

Truehill v. State, 211 So.3d 930, 936-41 (Fla. 2017)(internal notations omitted). Truehill's convictions and sentence were upheld on direct appeal.

Postconviction Proceedings

On October 3, 2018, Truehill filed an initial motion for postconviction relief. He raised the following claims: 1) St. John's County was an improper venue and his counsel was ineffective for failing to consider changing venue; 2) The systematic exclusion of African Americans by felony disenfranchisement violated his right to fair cross-section in the grand and petit juries; 3) He was not tried by an impartial jury and counsel was ineffective during jury selection; 4) The State withheld material DNA evidence and presented false and misleading evidence during the trial; 5) Counsel was ineffective for failing to impeach State witnesses and failing to elicit critical testimony; 6) Counsel was ineffective for failing to object to the mischaracterization of facts and improper arguments made by the

State; 7) Counsel was ineffective during the mitigation presentation in the penalty phase; 8) Cumulative error during the guilt and penalty phases; 9) Evidence of his codefendant's life sentences and new evidence presented in postconviction should compel the trial court to do a new proportionality review; 10) Racial bias in the proportionality review of the Florida Supreme Court violates the Equal Protection Clause; 11) Florida's capital sentencing scheme is unconstitutional for failing to prevent the arbitrary and capricious imposition of the death penalty. (R, 766-841).

The circuit court held an evidentiary hearing on most of Truehill's claims and sub-claims, summarily dismissed others, and claim 10 was abandoned by defense counsel prior to the hearing. Following a week-long hearing the circuit issued an order dismissing all of Truehill's claims. (R, 5074-8593). This appeal follows.

SUMMARY OF THE ARGUMENTS

ARGUMENT I: Trial counsel was not ineffective during jury selection. Although Truehill now says he would have preferred his trial counsel to question the venire on possible racial biases, there is no requirement to do so just because the defendant and victim were different races. Trial counsel employed sound strategy in choosing

how to structure his voir dire, focusing on getting types of jurors he had great success with in previous cases. Truehill's contention that two jurors were seated without ever being asked their views on the death penalty is rebutted by the record; every panel was asked this question, and many jurors spoke up for or against and revealed biases that justified cause challenges. There is no requirement to individually ask every single juror their opinions one by one, and trial counsel was not ineffective for choosing not to do so.

ARGUMENT II: Trial counsel was not ineffective during the guilt phase. Deciding not to impeach several robbery victims' in-court identifications of Truehill was a sound strategy based on trial counsel's experiences in prior trials and the large amount of other irrefutable evidence tying Truehill and his codefendants to the crimes. Trial counsel also did not provide deficient performance for not objecting to the State's comments during opening statement and closing argument. The prosecutor's statement referring to Truehill as of Williams's attackers was made during opening, when each side has an opportunity to lay out what they expect the evidence to show. Being unable to support some part of an opening statement with later evidence occurs frequently, and Truehill did not experience any

prejudice from it. In closing argument, the State referring to Truehill as the hatchet man was an accurate portrayal of the victims' accounts of his role in each attack. Neither comment was objectionable, and even if they were, any failure to object was not so prejudicial as to undermine our confidence in the outcome of the trial.

ARGUMENT III: Trial counsel provided effective assistance during the penalty phase. The testimony provided by Truehill's family at the evidentiary hearing was largely similar or merely cumulative to the extensive mitigation that was presented at trial. The trial court found that Truehill's trial attorneys established the existence of four statutory mitigators and forty non-statutory mitigators, and in particular the fractious relationship and constant abuse Truehill suffered from his father featured heavily in the mitigation. Trial counsel effectively used Dr. Frederic Sautter to establish Truehill's PTSD diagnosis and tie his numerous childhood traumas to his adult outcomes. Dr. Mark Cunningham, presented at the evidentiary hearing, testified extensively but provided merely cumulative testimony to what Dr. Sautter had already explored, and much of his testimony was inadmissible hearsay or irrelevant to mitigation. As to

the State's rebuttal expert, Dr. Gregory Prichard, trial counsel's testimony at the evidentiary hearing revealed that the decision to limit his cross-examination was a well-thought out, well-supported reasonable trial strategy decision meant to limit the damage Dr. Prichard could do.

ARGUMENT IV: Trial counsel was not ineffective in how they addressed the State's DNA evidence. Although Truehill alleges several paths counsel could have followed to potentially exclude or discredit the State's DNA evidence, all of varying and unlikely degrees of success, in the end such a strategy would have been fruitless. The DNA evidence served to tie Truehill to the crime spree the three men engaged in from Louisiana to Miami, crimes easily tied to all three even had the jury never heard any DNA evidence. Almost every victim testified that three men attacked them, several identified Truehill as the one wielding a knife, the victims' personal effects were found in the truck the men stole, hundreds of miles from the scenes of the crimes, and the full DNA profiles of two of the victims were found in the blood on clothing in the codefendants' possession. Because of this, Truehill experienced no prejudice from his trial counsel not excluding or discrediting the lower-level DNA and mixed sample

evidence. The DNA was the cherry on top of the voluminous evidence the jury already had to convict him of his crimes.

ARGUMENT V: The State did not use false and misleading evidence in violation of *Giglio*. *Giglio* is violated when three criteria are met: 1) a state witness gives false testimony; 2) the prosecutor knew the testimony was false; and 3) the statement was material, meaning this a reasonable likelihood that the false testimony could have affected the judgment of the trier of fact. Truehill is again referring to Livingston's DNA testimony in this claim. Appellee contends that Livingston did not knowingly give false or misleading testimony, but even if she did, this claim necessarily fails just as Argument IV, *supra*, does, because her testimony did not have a material impact. Even if counsel had been successful in excluding all of her testimony or discrediting it completely before the jury, other corroborating evidence would have led the jury to the inevitable conclusion that Truehill was one of three men involved in this crime spree and murder.

ARGUMENT VI: The Circuit Court properly rejected Truehill's claim of newly discovered evidence based on a MIX13 report evaluating DNA laboratories. Even if we throw out all of the mixed DNA mixtures

as Truehill wants, there is overwhelming evidence tying him to the collateral crimes and the murder. Each victim testified that Truehill was the one wielding a knife; multiple personal effects of the robbery victims were found in the truck stolen by the three codefendants; full DNA profiles of two of the victims were found in blood on jeans the men owned; and Truehill is on camera using the victim's debit card shortly after the victim left his friends' apartment. This MIX13 report, even if it can be said to undermine the confidence in the DNA results such that Truehill's case should be evaluated without them, does not rebut the plethora of other evidence against him.

ARGUMENT VII: The circuit court correctly denied an evidentiary hearing on Claims I, II, and IX in Truehill's motion for postconviction relief and correctly summarily denied them. Claim I alleged venue was improper in St. John's County and trial counsel was ineffective for not moving to change venue. A review of similar cases shows that the venire was not so inundated with pretrial knowledge such that it was impossible to seat an unfair jury; the few members on the jury with prior knowledge of the case had very little, and had not formed a preconception about the case. A change in venue would not have been granted and trial counsel cannot be ineffective for deciding not

to pursue meritless or fruitless arguments. Claim II alleged that Florida's law revoking the right to vote from felons deprived Truehill of a fair cross-section of the community for his jury venires. This claim is procedurally barred as it should have been addressed on direct appeal, and thus was properly summarily denied. On the merits, Florida's felon disenfranchisement does not exclude persons with immutable characteristics, like gender or race, but instead excludes people who have a shared characteristic based on a variety of personal behavior: a felony conviction. Therefore, it is legal and not a violation of Truehill's rights. Claim IX alleged that Truehill's codefendant's life sentences and other evidence provided at the evidentiary hearing would justify a new proportionality analysis mandating his own life sentence. Both codefendant received life sentences for purely legal reasons, and therefore their sentences do not factor into any sort of relative culpability analysis. Additionally, this Court recently expressly receded from proportionality review *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), so the Court would not need to conduct any sort of new proportionality review with the allegedly new mitigation Truehill presented at the evidentiary hearing. The State argues that this court's recession from relative

proportionality implicitly also receded from relative culpability as well, and so Truehill's codefendants life sentences are irrelevant to his regardless of how they were received.

ARGUMENT VIII: There was no individual error, and so there was not cumulative error.

STANDARD OF REVIEW

Ineffective assistance of counsel claims are a mixed question of law and fact. As such, this Court reviews the lower court's legal rulings *de novo*, and defers to the lower court's factual findings as long as they are supported by competent substantial evidence. *See Foster v. State*, 132 So.3d 40, 52 (Fla. 2013)

A lower court's ruling on evidentiary matters is reviewed under an abuse of discretion standard. *Frances v. State*, 970 So. 2d 806, 813-14 (Fla. 2007).

INEFFECTIVE ASSISTANCE OF COUNSEL – APPLICABLE LEGAL STANDARDS

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) promulgated a two-pronged test to determine whether counsel's performance was so defective as to require a reversal of a verdict or sentence. *Strickland,* 466 U.S. at 687. First,

the defendant must show counsel's performance was deficient. This showing of deficiency requires the criminal defendant to establish that his counsel made errors so serious that the defendant was deprived of counsel as contemplated by the Sixth Amendment. Second, the defendant must establish counsel's deficient performance resulted in prejudice. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

Under *Strickland*, the claimant has the burden of identifying particular acts or omissions of the lawyer that are outside the broad range of reasonably competent performance under prevailing professional standards. Further, the movant must demonstrate that the clear, substantial deficiency so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. In *Strickland*, the United States Supreme Court refrained from providing specific guidelines to evaluate counsel's performance. Instead, the Court held "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. 668. In evaluating counsel's performance under *Strickland*, there is a strong

presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690.

The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Additionally, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689.

A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Ferrell v. State*, 29 So.3d 959, 969 (Fla. 2010), *citing Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Prejudice exists for purposes of ineffective assistance of counsel claims, only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is

a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see Porter v. McCollum*, 558 U.S. 30, 55-56 (2009) .

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to summary denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *Franqui v. State*, 59 So.3d 82 (Fla. 2011); *Troy v. State*, 57 So.3d 828, 828 (Fla. 2011); *Walls v. State*, 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial appropriate on ineffective assistance of counsel claim where evidence was cumulative); *Freeman v. State*, 761 So. 2d 1055, 1063 (Fla. 2000). *See also Duest v. State*, 12 So.3d 734, 747 (Fla. 2009); *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001) (Because the *Strickland* standard requires establishment of both the deficient performance and prejudice prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong). "Failure to sufficiently allege both prongs results in a summary denial of the claim." *Spera v. State*, 971 So. 2d 754, 758 (Fla. 2007) (*citing Thompson v. State*, 796 So. 2d 511, 514 n. 5 (Fla. 2001)).

ARGUMENT

ARGUMENT I: TRIAL COUNSEL WAS NOT INEFFECTIVE DURING JURY SELECTION, EMPLOYING REASONABLE TRIAL STRATEGIES, AND ANY PREJUDICE IS SPECULATIVE AND DOESN'T UNDERMINE CONFIDENCE IN THE OUTCOME

In this claim Truehill alleges that his trial counsel was ineffective during voir dire, failing to ask questions to expose juror racial bias, questions related to aggravation and mitigation, and that two jurors were seated without ever being asked their opinions on the death penalty.

Attorney Raymond Warren performed the voir dire in Truehill's case. (R, 8838). Warren became an attorney in October, 1985 and spent time as a prosecutor and private attorney until 2010 when he joined the Public Defender's Office in the high crimes unit, which he was in until 2019. (R, 8825). He tried eight first degree murder trials during this time. (R, 8825-6). He has attended seminars related to representing capital defendants and is familiar with the ABA guidelines for death penalty cases. (R, 8826-7). He stated that they knew the guilt phase was going to be difficult for them, and that the strategy was to present one of the codefendants as the ringleader. (R, 8835).

As to voir dire, he said the trial team had discussed asking the venire about racial bias but ultimately he did not. (R, 8839-40). He testified that "you have to have the right fact pattern" to bring up questions of racial bias, that such cases are rare, and that since the crime spree was clearly one of opportunity and not motivated by racial animus, he elected to avoid the topic as part of his strategy. (R, 8919-20). He said that he tailors his voir dire to the facts of each individual case. (R, 8922). In his experience, he often focuses questions on finding jurors who are more willing to participate in the deliberative process of reaching a verdict and a penalty phase recommendation, jurors who will take their time with the evidence. (R, 8922-3). This is a method of question that in his over three decades of experience he has had great success with, including a full acquittal on a first degree murder case. (R, 8924). He noted:

> The deliberation process that I—that I have utilized for all these years gets the jurors talking. You can actually see them in the transcript. They open up. They talk about this stuff. And they all agree that if they didn't listen to our arguments, if they didn't listen to the facts that we were focusing on, if they didn't discuss our facts, they would not be deliberating as the judge ordered them to.

(R, 8924-5). As to going into specific mitigation he mentioned there's a standard objection to that so you have to be more circumspect

about questioning. (R, 8923-4). Truehill was consulted extensively after voir dire was complete and before the jurors were selected, and accepted the panel. (R, 8925-6).

The circuit court made several findings related to this claim. First, that the trial record showed that Warren extensively questioned each venire pool to determine which jurors would consider mitigation evidence and deliberate thoughtfully and independently. (R, 5103). The court also found that Warren asked questions to figure out juror's attitudes toward mental health issues, including PTSD, which was the dominant mitigator used at trial, and asked many questions concerning the main defense strategy that Kentrell Johnson was the ringleader and Truehill was merely along for the ride. (R, 5104). However, as Warren noted at the evidentiary hearing, when he got too specific as Truehill now asserts he should have, he drew social contract objections which were sustained. *Id.* "The record demonstrates that Attorney Warren carefully treaded around the social contract objections and delved into the issues as best he could within the permitted bounds of questioning. *Id.* The court found that Warren was not ineffective, that his stated jury selection of seeking

jurors receptive to the deliberative process was reasonable strategy, and that any possible prejudice is wholly speculative. (R, 5104-5).

Regarding Truehill's claim about racial bias questions the court found that his inaction was the product of a reasonable strategic decision. (R, 5107). Attorneys Valerino and Warren both expressed the dangers of getting into racial bias and Warren stated he felt he needed to do it only under certain fact scenarios not present in this case. (R, 5107-8). The court also found that Truehill was unable to prove any prejudice even if counsel were defective because there was no evidence presented that any juror was actually biased against him. (R, 5109-10).

Finally, as to the two jurors Truehill claims were not asked about their views on the death penalty, the court pointed out that each of the three venire pools was assessed to determine whether any jurors were so opposed to the death penalty that they could never impose it, as well as whether any jurors were so strongly in support that they would always impose it in a first degree murder. (R, 5112-3). Warren also questioned each panel on whether they prescribed to an "eye for an eye" mentality and whether their impartiality could be affected by violent images. (R, 5113). Neither juror indicated by

Truehill indicated extremely partiality for the death penalty when their venire pool was questioned and neither said they subscribed to "an eye for an eye". (R, 5113). Additionally, when questioned in particular by Warren, juror Sheridan agreed that pondering "could be a good way to deliberate as far as with the facts you have at hand, taking time to think more about them, as long as it pertains to this case"; this evidenced the exact kind of juror mindset Warren was looking for, and showed no partiality for the death penalty. (R, 5114). The court found that the voir dire was sufficient for counsel to reasonably exclude biased jurors and remove for cause those who expressed prejudicial views about the death penalty; therefore, the performance was neither ineffective nor prejudicial. (R, 5114-5).

The heart of Truehill's racial bias claim is speculation that jurors who sat on the panel may have some racial bias, and speculation that jurors Krystin Sheridan and Ben Smith may have some propensity in favor of the death penalty. A postconviction ineffective assistance of counsel claims regarding trial counsel's voir dire is evaluated under an actual bias standard. Under that standard, the defendant must demonstrate that the juror in question was not impartial; in other words, that the juror was biased against

the defendant, and the evidence of bias **must be plain on the face of the record**. *See Carratelli v. State*, 915 So. 2d 1256, 1260 (Fla. 4th DCA 2005); *see also Patton v. Yount*, 467 U.S. 1025, 1038-40 (1984) (stating that in habeas review a state court's findings are presumed correct and that although the record showing the ambiguous voir dire answers of three jurors challenged for cause "arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty").

There is no record evidence to support any actual bias, as no juror who sat on the panel ever expressed any racial bias. Only one juror expressed any racial animus, and it was specifically toward the Hispanic judge, not Truehill, and the exchange occurred outside the presence of the rest of the panel. DAR, XXVI, 380-81. Also, despite Truehill's arguments, questioning as to racial bias is not mandated in mixed-race cases. In *Fennie v. State*, 855 So. 2d 597 (Fla. 2003), Alfred Fennie, a black man, had been convicted and sentenced to death for the murder of Mary Shearin, a white woman. In his postconviction appeal he made the same claim Defendant now makes: that his trial counsel was ineffective for failing to question jurors on the issues of race and racial tensions in the community. *Id.*

at 601. Similar to the arguments made by Defendant, Fennie claimed these questions were necessary due to the interracial nature of the crime, the history of racial tensions in the community, and the beating death of a white teenager by a group of black youths less than two years before the trial. *Id.* at 602. The court found that Fennie's counsel was not ineffective because his decision not to ask each juror specific race-based questions was based on sound trial strategy. *Id.* at 603. Fennie's counsel testified he does not always ask race-related questions in interracial crimes, tailoring his questions based on the composition of the panel and the facts of the crime. *Id.* He did not feel Fennie's case was racially motivated and, therefore, he didn't want to risk alienating or offending potential jurors with racial questions. *Id.* The holding in *Fennie* shows that rather than requiring racial bias questions for effective assistance of counsel, the decision to not ask race-related questions can be a valid trial strategy.

Attorney Warren's testimony supports that the decision not to ask racial bias questions was an intentional trial strategy and not an oversight. He testified that he feels such questions are only warranted in specific fact scenarios, and as the crimes in this case were ones of

opportunity, and not related to race, he didn't think questions as to racial bias were important or necessary. He testified that he can't say for sure it was a trial strategy, but as he testified that the team discussed voir dire topics beforehand, and gave his general approach of when to ask racial bias questions, it appears this was a legitimate trial strategy. Though postconviction counsel may now disagree with that strategy, it cannot be said that Warren's choice was objectively unreasonable given his nearly 30 years of experience at the time of trial and success in past first degree murder trials. Co-counsel James Valerino specifically pointed out the possible pitfall of bringing up such a charged topic:

> Q: Is it important in a capital trial, especially when you've got a black defendant and a white victim, to be aware of racial bias on the jury?
> A: I think it could be. I think it depends on the circumstances. You know, I could see a reason not to do it because I don't think most people want to admit that they might be racist. **And sometimes if you ask that question, it might offend them, and then if you get them on a jury, they're offended and they're already against you.**

(R, 8758-9) (emphasis added). In a case devoid of any evidence of racial motivation, it cannot be said that counsel was per se ineffective in choosing to omit such questions from voir dire.

The record also does not support Truehill's claim that jurors Krystin Sheridan and Ben Smith were not questioned about the views on the death penalty. Instead, it shows that the prosecutor asked the panel about their views to find jurors who wouldn't be able to be impartial in imposing the death penalty. He asked who was so opposed to the death penalty that they would never impose it, and who believed the death penalty was the only proper punishment for a first-degree murder. (DAR, XXV, 234-236). Jurors responded affirmatively to both questions some saying they could never impose the death penalty, and others saying they believed it was the only appropriate punishment for murder. *Id.* None of these jurors sat on the jury. While this was a question to the whole group, it was one that invited individual responses, and neither Sheridan nor Smith expressed a view that disqualified them from a death penalty jury.

When it was the defense attorney's turn to ask questions, he also went into the jurors' views on the death penalty. He asked them all if there were anything about their views that he would need to know, and got several responses from jurors. Again, a juror spoke up that they thought the death penalty was the only proper punishment, and trial counsel used that to explore other jurors' beliefs. (DAR XXV,

269). He later asked more questions regarding the death penalty, to find out if jurors would automatically impose the death penalty under certain circumstances. (DAR, XXV, 291-294). Both the prosecutor and the defense attorney gave the panel members an opportunity to voice their opinion on the death penalty. While several gave responses that showed they were not qualified for a death penalty jury, neither Juror Sheridan nor Juror Smith did so.

Finally, Truehill's determination of what his lawyer should have asked during jury selection seems more focused on his current disagreement with what topics his trial counsel decided to question the jurors on, rather than any true deficient performance. As has been noted by the Florida Supreme Court:

> [I]t must be recognized that the methods of jury voir dire are subjective and individualistic. Many experienced trial lawyers have a strong belief in short voir dire examinations. Conversely, others conduct as extensive an examination as the trial judge will allow. The views of what constitutes the best tactical approach are divergent, and the manner of the examination varies from community to community. What might be appropriate in Palm Beach or Fort Lauderdale may be unacceptable in Pensacola or Marianna.

Meeks v. State, 418 So. 2d 987, 988 (Fla. 1982). Truehill now says he would have preferred his trial counsel focused on different topics, but

that doesn't mean they were deficient in their performance. In fact, the record shows that trial counsel spent a great deal of time trying to explain to jurors the importance of their deliberative role in the process, and he was clearly trying to pinpoint and select jurors who would give the proceedings the consideration and thorough assessment and discussion it deserved. And as the circuit court observed in his order denying this claim, trial counsel did explore topics of mitigation and defense theories while having to also remain within the bounds of permissible questions.

Trial counsel's voir dire strategy was reasonable and his performance was not ineffective. Even if his performance was deficient, any prejudice is wholly speculative and doesn't rise to the level of undermining our confidence in the outcome of the trial given the extreme aggravation and overwhelming evidence of guilt in this case.

ARGUMENT II: TRIAL COUNSEL WAS NOT INEFFECTIVE DURING THE GUILT PHASE AND ANY ALLEGED INEFFECTIVENESS DID NOT RESULT IN PREJUDICE

Here, Truehill makes several arguments, alleging that trial counsel failed to properly cross-examine or impeach four State

witnesses, Leann Williams, Brenda Jo Brown, Chris Pavlish, and Mario Rios; and missed several objections during the State's opening statement and closing argument.

Handling of State Witnesses

Leann Williams

Truehill claims that trial counsel should have cross-examined Williams on the fact that prior to trial she had only ever identified Johnson as one of her attackers and the men who attacked her as Hispanic.

At trial, Williams testified that she did not get a good look at the attacker, but that he was "absolutely" bigger and heavier than her. DAR, XXXIV, 218; XXXIV, 226. Williams testified that she is 5'10" and an athlete. DAR, XXXIV, 226. While she did give a more exact description the day she was robbed, her testimony that her attacker was larger than her is not inconsistent with the description in her statement that the attacker was 6'3" and 230 pounds. Therefore, she could not be impeached on this point. Trial counsel could have asked for more details, however since both Williams and Truehill are 5'10", her testimony that the attacker was larger than her necessarily excludes him from the robbery. Additionally, Truehill stressed in his

motion that he was the lightest-skinned of the three codefendants, so bringing up the previous identification of her attackers as Hispanic, who are typically lighter-skinned, could only have served to hurt Truehill, not help. (R, 803).

Additionally, as the circuit court observed, there was additional evidence tying Truehill and his codefendants to this crime when reviewing the record. Video surveillance showed Truehill attempting to use her credit card at two locations and her identification card was ultimately found in the truck the three men stole from Louisianna. (R, 5144-6).

The circuit court found that there was no deficient performance or prejudice and this Court should affirm that finding.

Brenda Brown

At trial Brown identified Truehill as one of her attackers, but had not done so prior to trial, so he argues it was ineffective assistance of counsel to not cross-examinme her on that issue. Warren handled the cross-examination of Brown. (R, 8877). He was aware that Brown had previously not identified Truehill, but had described that attackers as potentially Hispanic. (R, 8877-8). Warren

did not cross-examine her, and at the evidentiary hearing explained why:

> A: I've thought about this over time. I'm not going to say this is prevailing wisdom, but this is personal experience, because I've had this happen before.
> …
> Q: I really just want your answer about why you didn't ask her about that on cross.
> A: Because if somebody's identified somebody on the stand, then you ask them, well, did you misidentify them in the past, and they say, well, yes, I did, but he's the man, all I've done is accomplished a second identification of a man in front of the jury that I caused by my own reckless question.
> So if I create a scenario where she says, I remember him now—at the time, I was looking at it, but now that he's in the courtroom in front of me, I know who he is, that's a dangerous question to ask.
> And that's the hypothetical that I was going to give. You run the risk of having a jury looking at Quentin Truehill and saying, you know what, he is the one. The State asked her about it, and all the defense attorney did is drill it in to them.

(R, 8879).

Warren's prolific experience as a trial attorney has given him the insight that questioning a witness on this particular subject can be more harmful than helpful under the circumstances, and it is a legitimate trial strategy to avoid hurting your client's defense. Additionally, Brown's DNA was found on jeans belonging to the three codefendants when they were arrested in Miami about a month after

Brown was attacked. Given this evidence definitively tying them to Brown, trial counsel may have decided it was not worth impeaching Brown and possibly alienating the jury in relation to a sympathetic witness who had severe injuries from being attacked, including five amputated fingers and a skull fracture. (R, 5147). Had she been impeached and her identification ignored by the jury, the jury still would have concluded the codefendants attacked her since there was consistent testimony throughout the trial of the three of them working together, she said there were three men involved, and her DNA was found on their clothing hundreds of miles away.

The circuit court found it was a reasonable strategic decision to not cross-examine Brown on her prior failure to identify Truehill given the possible effect of indentifying him multiple times in front of the jury and the corroborating DNA evidence. (R, 5150). The court also found that there was no prejudice because of that DNA evidence and that the jury was able to see her visible injuries. *Id*. This Court should affirm those findings.

Chris Pavlish

Pavlish, like Brown, testified that she was attacked by three men when she was in Tallahassee walking home. (DAR, XXXV, 361).

She had never specifically identified Truehill as one of her attackers prior to trial, but did so on the witness stand. (DAR, XXXV, 367-8). Warren did not cross-examine her on this issue, but this is another instance where he made a strategic choice, not a negligent omission, because he did not want to compound the issue of an on-the-stand identification:

> Q: And then in regards to Chris Pavlish, whose statements are Defense Exhibit F Composite, she also had prior inconsistent statements. Would that theory also hold true as to why you didn't cross-examine her about her prior inconsistent statements?
> A. Again, it was the very first—the second trial I ever assisted on in 1985, and I'm telling you that's why I'm cognizant of this issue.
> Q. Okay.
> A. I mean, I saw—
> Q. So—
> A. I've seen what happens when a defense attorney does that. It wasn't me. I wasn't a lawyer yet. I watched cocounsel, in a case, do that, and had a witness step down who had just said, I'm not sure I can identify him, and I'm not going to go into the graphic details of what my father tried to get the defense attorney to stop, but the defense attorney had the witness parade in front of—there were, I think, 13 defendants, and he had said, I don't think I see him in the courtroom.
> So he gets down and he's looking at – walking in front of each one, and he stops and he looks at him, and he says, yes, he's the one I saw, after he said he couldn't identify him. And the guy got convicted.
> And all the defense attorney did was hammer that point to the jury of having the witness identify his client after the State couldn't get him to.

(R, 8880-1).

Truehill calls this a post-hoc justification, but it's clear that Warren has experience with the very detrimental effects of trying to impeach a witness on an identification issue, especially in a case like this one where it's confirmed by other evidence that Truehill was involved in the crime. It was a reasonable strategic choice given Pavlish was attacked in Tallahassee, but several of her personal belongings were found in the codefendants' truck in Miami. *Truehill*, 211 So.3d at 937. Whether or not she had been able to previously identify Truehill as one of her attackers is irrelevant when her personal items are later found in his truck hundreds of miles away. Even without a specific identification, her testimony that she was attacked by multiple African-American men, other evidence of their consistent modus operandi of working together, and her belongings being found in the truck, would have led the jury to conclude that Truehill was involved in the attack.

The circuit court found that there was no deficient performance and no prejudice to Truehill because trial counsel's cross-examination decisions were sound trial strategy, and this Court should affirm that finding. (R, 5154).

Mario Rios

Truehill claims that he was prejudiced by the fact his counsel made the strategic decision not to cross-examine Mario Rios, who said he was attacked by three men in Tallahassee the night Vincent Binder was kidnapped. Rios testified that he was attacked by three men working together, one as a lookout, one who talked to him to distract him, and one who grabbed him. DAR, XXXV, 336-44. Truehill claims that the description of the attack Rios gave police the night of the incident switched the roles of two of the men when compared to his trial testimony. Truehill also argues that his trial counsel should have questioned Rios on his internet research of the case, and Rios's prior inability to identify anyone but Hughes in a photo lineup.

While his first report to police and his testimony did switch the roles of two defendants, pointing out that error would have done little to impeach his credibility or help Truehill's defense. Rios switched the roles of Hughes and Johnson, and was consistent that Truehill was the one who grabbed him. He also was consistent in his descriptions of the men, how many there were, and what they looked like. Most importantly, his testimony is corroborated by the fact a

DNA profile found on his shirt matched Truehill, but not Hughes or Johnson. DAR, XL, 909-10. Trial counsel Valerino testified that was the very evidence that made him make the strategic decision not to waste time trying to impeach a witness whom he knew was going to later be corroborated by DNA evidence:

> Q: Did you cross-examine any of the witnesses during the guilt/innocence phase?
> A: I was going to cross-examine Mario Rios, but I did not. I don't remember if there was anyone else. I do specifically recall I was going to cross-examine Mario Rios, and I did not ask him any questions.
> Q: What was the reasoning behind that?
> A: Mr. Rios had testified that he identified Mr. Truehill as an individual who grabbed him by the shirt in what was an alleged attempted robbery because Mr. Rios fled and got away. The shirt was turned over by Mr. Rios to the Tallahassee Police Department, it was checked for DNA, and they found that Mr. Truehill's DNA was on the shirt where Mr. Rios said he had been grabbed by the person who he identified as Mr. Truehill.
> So we figured rather than the jury hearing maybe what happened another one or two times, since Mr. Truehill had been placed, because of the DNA, as the person, decided it was probably better not to cross-examine. If there had not been DNA on the shirt, then obviously the strategy would have been totally different because then there definitely would have been a question about identification, but felt the DNA kind of corroborated his identification of Mr. Truehill.

(R, 3849-50).

The circuit court found that trial counsel chose a reasonable strategy by not cross-examining Rios when his was testimony was corroborated by DNA evidence that had been given directly to law enforcement, and thus had no contamination issues, and when the only changes in his testimony involved the codefendants and not Truehill. (R, 5157-8). Thus, the court found no deficiency or prejudice.

Even had trial counsel managed to cast doubt on Rios's account that he was attacked by Truehill, the jury would have had three other robbery and assaults other than Vincent Binder's tied directly to Truehill and his codefendants through physical evidence and DNA. Given the overwhelming evidence of guilt in this case and wealth of aggravation, there is no prejudice to Truehill even if this Court finds that trial counsel was deficient in failing to cross-examine Rios. This was a relatively minor incident in relation to the other evidence the jury heard, and there is no reasonable probability that the outcome of the guilty or penalty phases would have been different had the jury been convinced to discount Rios's story. This Court should reject this claim.

Alleged Prosecutorial Misconduct

Truehill first claims that trial counsel was ineffective for failing to object when the prosecutor said during opening statement that Truehill and Hughes attacked Leann Williams. He argues this was the prosecutor stating facts not in evidence, which is improper and objectionable. He also claims it was especially egregious because Williams's testimony of her attacker more closely resembled one of his codefendants instead of him.

The circuit court found that there was no deficient performance because the comment was not objectionable as lawyers often make statements during opening about evidence they anticipate the evidence to show which ultimately do not come true. (R, 5159-60).

The circuit court's finding is correct. Truehill's argument misapprehends the purpose of opening statements. It's impossible to argue facts not in evidence at that point in the trial, because no witnesses have testified and there currently is not any evidence in front of the jury. "The purpose of an opening statement is for counsel to outline the facts expected to be proved at trial. It is not the appropriate place for argument." *First v. State*, 696 So. 2d 1357 (Fla. 2nd DCA 1997). The prosecutor here did not make arguments, and was merely outlining what he expected the evidence to show.

However, "[f]requently, attorneys make statements in opening that they reasonably expect the evidence to support, only to have witnesses change their testimony or become unavailable. Such comments are not reversible error." *Goutis v. Express Transport*, 699 So. 2d 757, 763 (Fla. 4th DCA 1997), disapproved of on other grounds, *Murphy v. Int'l Robotic Systems, Inc.* 766 So. 2d 1010 (Fla. 2010). Although the evidence did not later show what he expected it to, that does not make his arguments error. Therefore, trial counsel was not ineffective for failing to object to an unobjectionable comment. Additionally, the comment did not serve to inflame the jury, it was a simple accounting of the expected evidence. As Truehill points out, Williams's own testimony cured any possible prejudice he could have experienced from the comment as he did not fit the description she gave of her attacker. It was not even a completely inaccurate comment; Williams's cards were found in the truck in Miami, directly tying all three codefendants to her robbery. There is nothing about this comment that was so inflammatory that had trial counsel objected and asked for a mistrial, that it would have been granted. This Court should deny relief on this part of Truehill's claim.

Truehill argues trial counsel was ineffective during closing argument as well by failing to object to the State referring to him as the "hatchet man" who attacked Brown. He claims this misstated the evidence because Brown never identified who caused her injuries.

While trial counsel testified that he does not specifically recall hearing the term "hatchet man", he did testify that he generally avoids objecting to comments during something like opening statement (and presumably closing argument) because he know he also tends to go into objectionable areas. (R, 8881-2; 8936-7). He doesn't want to object to something, get a positive ruling, and then set himself up to get objected to and shutdown during his own presentation. (R, 8937).

The circuit court found that when reviewing the record the prosecutor was not referring to Truehill as Brown's attacker in particular, but his general role when the men worked together, so it was not a mischaracterization of the evidence. (R, 5161-2). So an objection would not have been sustained. Also, the court found that objecting would have only served to repeat the comment before the jury, and not objecting to inflammatory comments to avoid repetition was a sound strategy that Warren testified he employed throughout

the trial. (R, 5162). The court concluded trial counsel was not ineffective for not objecting, and there was no prejudice because the comment was not so outside the scope of evidence as to warrant a mistrial. *Id*.

Looking at the closing argument as a whole, it is clear that the prosecutor was not specifically accusing Truehill of injuring Brown, but was instead drawing a reasonable conclusion from the evidence presented that Truehill was always the one seen wielding a knife. As summarized by the trial court:

> His role was an active one in that he would be physically in contact with the victims. He was the one who held Mr. Rios during the attempted robbery of Mr. Rios just a couple of hours before Mr. Binder was kidnapped. It was Mr. Truehill who struggled with Ms. Pavlish over her purse during the robbery of Ms. Pavlish, again, just a couple of hours before Mr. Binder was robbed and kidnapped. It was Mr. Truehill who always brandished the knife during these events. And it was on his hand that the murder weapon was seen shortly before the robbery and kidnapping of Mr. Binder.

Truehill, 211 So.3d at 960. Referring to Truehill as the "hatchet man" was an accurate description of Truehill's consistent role in their crimes. Since these comments were not objectionable, trial counsel provided effective representation in not objecting. This Court should deny relief on this claim.

Finally, to the extent that Truehill tries to argue these errors are compounded by the further error of the jury hearing about collateral uncharged crimes, or that those crimes were made a feature of the trial, those arguments are not properly pled and have already been dismissed by this Court on direct appeal as meritless. This claim should be denied in its entirety.

ARGUMENT III: TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE DURING THE PENALTY PHASE

Truehill claims his trial counsel failed to provide effective assistance in three ways during his penalty phase. First, that they failed to properly investigate and present mitigation evidence. Second, that they failed to properly use a defense expert, Dr. Frederic Sautter, and failed to use experts to properly present the full scope of mitigation. And third, that they caused him prejudice by not properly cross-examining a State rebuttal expert, Dr. Gregory Prichard.

1. Investigation and Presentation of Familial Mitigation Evidence

Here, Truehill lays out two broad arguments. One is that the mitigation specialist, Susan Herrero, was improperly hamstrung in

her investigation because defense counsel denied requests to travel, and because the trial proceeded without her presence when she would have made herself available to be there. Second is that the trial attorneys improperly prepared Truehill's family to testify, and therefore the jury was prevented from hearing a full accounting of his childhood and mitigation. The circuit court properly denied both parts of this claim.

Mitigation Specialist

Susan Herrero testified that she had requested to be present at the trial because she was the main point of contact for the lay witnesses. (R, 8970-1). She also testified that she had wanted to travel out of state to speak to witnesses and pursue avenues of investigation, but was denied.

This testimony was directly contradicted by Warren, Valerino, and Robert Ryan, trial counsel's lead investigator, as well as by email exchanges between Herrero and the defense team. In particular, Valerino testified:

> Q: If she asked if she could perform any work on the case, like, if she wanted to travel somewhere, what was, generally, the response?
> A: Well, she never asked to travel out of state or anything like that. Most of the time—I was going through some of

> the e-mails that she had sent us saying, for instance, she was going to Lafayette, Louisiana, to go see Mr. Truehill's mom, Valley [sic]; she was going to go to Baton Rouge to interview witnesses.
> She—she would basically say, I'm going to do it, and that was fine with us. She even went to—there was an issue in the robbery case that Mr. Truehill had been convicted of in Louisiana where there was a receipt for a sofa or some piece of furniture that had been admitted into evidence at his trial out there for the robbery. And when I got all the paperwork from the prosecutor's office in Alexandria, I guess it was, it wasn't there.
> She went to Alexandria, Louisiana, and got a copy of the receipt because it had—it was somewhat important to his defense at the time of the Louisiana case.
> I remember now, even, she went to a jail, a prison, in Alexandria, Louisiana, to interview a Wilbert Norris, who had been, I think, a witness in the manslaughter case that Mr. Truehill had entered a plea to.
> So she never asked to leave the state and go to California and see anybody or anything like that. If she had asked to, we would have approved it. But we didn't put any restrictions on her going wherever she felt she needed to go to obtain documents or interview witnesses or try to locate witnesses.

(R, 8787-8).

Any miscommunication about Herrero's ability to be available for trial is solely on her, as well, and not the defense team as Truehill now suggests, and her testimony that she had requested to be present for trial is not corroborated by any evidence, and in fact her availability to be there is contradicted by evidence presented by Truehill at the evidentiary hearing. Trial counsel received in an email

on February 14th, 2014, that Herrero was having surgery on February 26th, 2014 and would be laid up for three to four weeks (R, 8792). The circuit court found that it was reasonable for trial counsel to rely on this representation, and Herrero's attempts to rewrite history do not line up with the testimony of three other witnesses and this email evidence, and is not supported by an email or documentation to back up her new assertions.

Family Witnesses

Miranda Farr Truehill

Miranda Truehill[1] is the Appellant's stepmother. At the evidentiary hearing she testified that she had felt nervous prior to her deposition, and when it came time to testify at trial that it was all "a bit of a blur" and that she fet unprepared. (R, 9056-8). She testified generally and specifically about the verbal and physical abuse she and Appellant received from his father, and gave her opinion that Appellant's aberrant behavior was a result of his father, Marshall Jr.'s, actions. (R, 9054-79).

[1] For clarity, witnesses who share Appellant's last name will be referred to by their first name.

Although she said she felt unprepared, her trial testimony was the basis for several mitigators. At trial she testified that Appellant was an unhappy teenager when she met him and he was clearly struggling with his parents' divorce. DAR, XLVIII, 250-74. Also, that the divorce caused separation between him and his siblings, who'd been his support system. *Id.* She also had observed some fear by Appellant toward his father and saw that he got most of his maternal guidance from an older sister, Breanna, as opposed to his own mother or herself. *Id.* Additionally, that Appellant had a girlfriend who was murdered, that the girlfriend's daughter had died from SIDS, that Appellant had been involved in a school shooting—and that Miranda and Marshall, Jr. were so uninvolved in Appellant's life that they didn't learn any of these facts for a substantial period of time. *Id.* She testified that during Hurricane Katrina she thought he was safe with his mother, but later found out he'd had to survive the storm with friends, which she thought was inappropriate because he was still a child. *Id.* Finally, she opined that he was a follower as opposed to a leader, which was in line with the defense's main penalty phase theory of the case. *Id.*

Her additional testimony at the evidentiary hearing about the extensive abuse she and Appellant suffered was directly contradicted by her trial testimony. This was not because she was unprepared, as Appellant now claims, but as the circuit court found, because she clearly was not willing to be forthcoming. More than six years and, as she testified, extensive therapy later and with the reality of Appellant actively sitting on death row, she is now willing to give a full accounting of her life with Truehill and Marshall, Jr.. However, at trial when given direct opportunities to answer she testified: that Appellant's mother was at fault for Appellant's behavior for providing too little discipline, and that his father was the disciplinarian; that Appellant's father was never violent toward her and never threatened her; that she did not remember Appellant's father being violent toward or threatening Appellant; that Appellant's father's discipline was appropriate; and that anger she saw in Appellant was a result of not being allowed to hang out in certain places. DAR, XLVIII, 250-74.

The circuit properly found that not only did these questions not require extensive preparation to answer, but that Miranda's deposition had explored these areas, and so she'd had ample time to reflect on them and give accurate responses at trial. The circuit court

did not, and this Court should not find trial counsel deficient because a witness was not forthcoming with additional mitigation. *See*, *San Martin v. State*, 995 So. 2d 247, 256-7 (Fla. 2008) ("Counsel cannot be faulted for failing to uncover testimony from Daisy, Francisca, and Javier San Martin regarding the family's alleged poverty or Defendant's father's abuse and alcoholism" when they testified to the opposite); and *Correll v. Dugger*, 558 So. 2d 422, 426 n.3 (Fla. 1990) (recognizing that counsel cannot be faulted for failing to know of the defendant's alleged abusive background where the defendant and his mother gave "diametrically opposite testimony" at trial). Additionally, the circuit court pointed out that many of the details of Miranda's relationship with Appellant's father would have been inadmissible, and in fact State objections in that area were sustained at trial.

The circuit court found that trial counsel was not ineffective for failing to adequately prepare Miranda for trial. The court also found that there was no prejudice because Appellant's fractured relationship with his father and the abuse he and his family experienced were elicited through other witnesses. As this Court has previously held, backround evidence that would have been cumulative is not a basis for an ineffective assistance claim. *See*,

Downs v. State, 740 So. 2d 506, 515 (Fla.1999); *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla.1997). Also, when the substantive evidence is presented through the testimony of other witnesses, counsel is not ineffective even if another witness could have been more detailed. *Darling v. State*, 966 So. 2d 366, 377 (Fla.2007).

Jessica Truehill Gresko

Jessica Truehill Gresko is Truehill's sister and testified both at the penalty phase hearing and at the evidentiary hearing. She testified that she only met with trial counsel once for about 45 minutes before trial, but had been contact by Herrero several times. (R, 9107-8). However, she never said she felt unprepared or that she was unable to related any relevant experiences at trial. She had also been deposed prior to trial. (R, 9107). She testified that her father had a bad temper, was aggressive and controlling, and would mete out corporal punishment in an arbitrary manner, so everyone was always on edge. (R, 9109-12). She recounted specific instances of abuse she and her mother received, and a time Marshall, Jr. struck a three-year-old Truehill in the face. (9113-22).

The circuit court properly found that this was substantially similar to her penalty phase testimony. At trial she testified that their

parents often got physically violent in front of the kids, and her dad would initiate it. DAR, XLVIII, 325. The fighting was so bad the children could hear it behind closed doors, and that there was "screaming, yelling, stuff being thrown, … bodies hitting walls and … doors." DAR, XLVIII, 327. She also recounted several instances of child abuse directed at her, Truehill, and their siblings. For example, trial counsel elicited a very visceral experience, which the other children, including Truehill, were privy to because they could hear Gresko crying and yelling throughout the attack:

> MRS. GRESKO: There was an incident, um, one day where, you know, if we weren't in bed by a certain time, let's just say ten o'clock, and we weren't showered and everything was absolutely done by ten o'clock on the dot, you know, we would get disciplined.
>
> And I remember one day in particular, he had asked me if I had showered before I gone to bed. And I had said yes, and he didn't believe me. So I went to go in to take another shower. And I'm in the bathroom, and I'm not getting in the shower yet, but he comes in with the belt and he just starts hitting me over the head.
>
> …
>
> ATTORNEY PEOPLES: He came into the bathroom, and he was striking you about the head?
>
> MRS. GRESKO: He was, um – he – well, I – I crouched down between the bathtub and the toilet, and I had my hands up like this. And he was just hitting me and hitting

> me and hitting me, just over my hands, my arms and my head.

DAR, XLVIII, 329-33. She also testified at trial about a time Marshall, Jr. slammed one of her sisters onto a bed by her throat, causing Gresko to flee the room in fear. DAR, XLVIII, 334. She said Marshall, Jr. evenly spread his physical abuse, but was harder on the boys, Truehill and his brother, emotionally and mentally. DAR, XLVIII, 335.

She testified at trial that their parents' divorce was especially difficult on her and Truehill, as the youngest siblings, and she saw a noticeable change in Truehill's demeanor and behavior when their father remarried. DAR, XLVIII, 337. She testified that the deaths Truehill experienced at a young age of his girlfriend and her baby to SIDS, and the school shooting he experienced, left him with emotional and mental trauma he had no outlet for because he felt abandoned by his siblings. DAR, XLVIII, 339. As in the evidentiary hearing, she also testified about Truehill's change after Hurricane Katrina and how he was angry, hostile, and operating in essentially a "survivalist" state. DAR, XLVIII, 352-4. All of this is in line with defense counsel's theme at the evidentiary hearing—and one they claim trial counsel did not present at trial, despite Gresko's clear

testimony to the contrary—differentiating the degree of trauma Truehill experienced in relation to his siblings.

Because the testimony Gresko gave at the evidentiary hearing was either the same or cumulative to what she gave at the penalty phase trial, the circuit court found no deficiency or prejudice, and this Court should affirm those rulings for the same reasons cited *supra* under Miranda Truehill's testimony.

Valli Trahan

Valli Trahan is Truehill's mother and testified at both the penalty phase and evidentiary on his behalf. At the evidentiary hearing she testified that although she had been prepared for her deposition, she did not meet trial counsel until right before her penalty phase testimony and she did not feel prepared when she testified. (9132-7).

At the evidentiary hearing, Trahan testified generally and specifically that she suffered physical, emotional, and verbal abuse from Truehill's father. (R, 9132-80). She recounted how the abuse would occur weekly at times, that she had visible injuries to her face, that he would drag her by hair, and that sometimes she would have to seek medical attention for her injuries. (R, 9140). Her children,

including Truehill, often witnessed this abuse, and after one occasion a ten-year-old Truehill said to her, "if Daddy hurts you again, I'm going to kill him." (R, 9140-1). She also witnessed him abuse the children as well, including giving them welts with a belt. (R, 9141).

This, as with Gresko's, was substantially similar to the testimony she gave at the penalty phase. She testified at trial that she and Marshall, Jr., had marital problems preceding Truehill's birth that continued to escalate after he was born. DAR, XLIX, 378-342. She told the jury that Truehill's father was physically, emotionally, and verbally abusive of her, and that this abuse was not hidden from Truehill. DAR, XLIX, 390-91 The jury also heard an incredibly traumatic, if not physically abusive, story from Truehill's childhood. When she and Marshall, Jr. decided to get divorced, Truehill's father gathered all the children to inform them the parents were splitting up because Trahan could not satisfy him sexually, calling her "frigid" and a "nun". DAR, XLIX, 398. He went into vulgar and excruciating detail explaining how she failed to satisfy him, shocking and embarrassing the children. DAR, XLIX, 398-9. Finally, she testified that Truehil got very angry and upset at the divorce and his father's subsequent remarriage. DAR, XLIX, 403-6.

The circuit court found that the evidentiary hearing testimony Trahan provided was largely cumulative to her trial testimony, and that much of her additional testimony, such as about the private sexual details of her relationship with Marshall, Jr., including rapes, would have likely not been admissible. Accordingly, the circuit court found no deficient performance or prejudice, and this Court should affirm for the reasons cited *supra*.

Conclusion

The mitigation presented through Truehill's family was holistic and comprehensive, despite his protestations to the contrary now. trial court found four statutory mitigators and forty nonstatutory mitigators. Truehill points out several facts discovered during the postconviction investigation that should have been presented to the jury. However, with the exception of the allegation that his father disowned him after Truehill's manslaughter conviction, then died before reconciling, all of the mitigation Truehill lists was among the forty-four mitigators found by the trial court. *Truehill*, 211 So.3d at 958 n.6. Given that both the judge and the jury heard extensive testimony about the fractured and troubled relationship Truehill had with his father, there is no reasonable probability that this forty-sixth

mitigator would have been enough to tip the scales when the trial court found that the aggravators "overwhelmingly and substantially outweigh[ed] all of the statutory and nonstatutory evidence of mitigation combined." DAR, LV, 5.

At the penalty phase, the defendant presented the testimony of Mrs. Truehill to support that the defendant suffered from the death of his high school girlfriend, Hurricane Katrina, and a school shooting. The defense team presented the testimony of the defendant's brother, Marshall, III, (who was not called at the evidentiary hearing) who testified that the defendant was frequently frightened by his parents' violent arguments. DAR, XLVIII, 274-323. Marshall, III, testified that the defendant was distraught by his parents' divorce and uncomfortable with the presence of Mrs. Truehill; and that he witnessed the defendant exhibit rebellious behavior in response to these influences. DAR, XLVIII, 291. Marshall, III, additionally provided testimony supporting that the defendant's father would discipline the children by belting them. DAR, XLVIII, 299-300. Marshall, III, provided substantial insight into the impact of their parents' divorce on the defendant, as well as into the impact Hurricane Katrina had on the defendant. DAR, XLVIII, 301-22

Also at the penalty phase, defense counsel presented a thorough and compelling direct examination of Mrs. Gresko, during which she testified extensively as to specific instances of abuse she and the defendant suffered at the hands of their father. Mrs. Gresko was able to paint a poignant picture of the myriad factors leading up to the defendant's change in demeanor and behavior; and the record demonstrates Attorney Peoples diligently fought for Mrs. Gresko to form opinions about the impact of various life events on the defendant's psyche, from Katrina to their parent's divorce and remarriage to the events surrounding the defendant's initial conviction for manslaughter. Mrs. Gresko's testimony was factually rich and extremely powerful. She explored the diverse details of the defendant's traumatic experiences with such emotional conviction that, at one point, the proceedings were paused to allow her to regain her composure.

This Court should affirm the circuit court's order denying relif on this claim.

2. Defense Expert Witnesses

In this claim, Truehill argues that his trial counsel was ineffective in failing to properly prepare and utilize Dr. Frederick

Sautter, a post-traumatic stress disorder ("PTSD) specialist, and for failing to use an expert to properly tie Truehill's childhood trauma to his criminal behavior.

Dr. Frederic Sautter

Dr. Sautter is a clinical psychologist who specializes in trauma and PTSD. (R, 9001). At the evidentiary hearing he testified that he felt inadequately prepared for his deposition. (R, 9009-11). After his deposition, he testified he received no more information from the defense team until arriving for trial. (R, 9012). When he arrived, he thought Valerino would be doing the direct examination, but learned that Warren would be doing the examination instead. (R, 9013-4). Sautter testified that he believed Truehill's childhood trauma coupled with his experiences during Hurricane Katrina caused Truehill's PTSD and affected how the disorder expressed itself in Truehill. (R, 9017). He stated that when he was questioned at trial, he felt he was not asked sufficient questions to get this sentiment across to the jury, and was unable to give an appropriately comprehensive expert opinion on Truehill's diagnosis and its effect on him. (R, 9017-9).

Warren, on the other hand, testified that he did not feel Sautter was unprepapred to testify, and he felt that he was able to sufficiently

communicate with the expert prior to trial. (R, 8895-8). He also testified that the switch for direct examination from Valerino to himself was done to allow Valerino additional time to prepare for closing argument. *Id.* Warren did *not* testify that he was unprepared to question Sautter at trial, but instead said that while his initial reaction was that he was unready, he had a night to sleep on it and an opportunity to prepare with Sautter before he was called to the stand. (R, 8896-7; 8944-5).

The circuit court properly found that a review of the record refutes that Sautter and trial counsel were not prepared at trial. Trial counsel performed a lengthy and thorough direct examination of Sautter that spans nearly one hundred pages of the trial transcript. In it, Sautter explains the many ways PTSD forms, and how the events surrounding Hurricane Katrina caused a spike in PTSD among survivors. He also explained that he spoke to several people involved in Truehill's life and tied several events in Truehill's life into his diagnosis. Sautter may have wished more pre-trial communication with trial counsel, but the record refutes any allegation either he or trial counsel were not sufficiently prepared. Also, although he was unable to authenticate some photographs

depicting the damage Hurricane Katrina did to New Orleans and showed what people lived through, trial counsel was permitted to show a five-minute National Geographic video depicting the same material in much more detail. DAR, LII, 727-730. Any deficiency in preparation for trial appears to be on Dr. Sautter personally, as at the evidentiary, in response to being asked if there were any restrictions placed on him by defense counsel, he responded, "No, no. I got everything I asked for." (R, 9007). The circuit court also found that the switch to Warren from Valerino for questioning Sautter was a strategic decision to allow Valerino to focus on closing argument, and Truehill experienced no prejudice from this.

Dr. Mark Cunningham

Truehill alleges trial counsel should have retained someone like Dr. Cunningham, or more properly questioned Sautter, to show the nexus between Truehill's adverse developmental factors in his childhood and the negative outcomes in his life.

Dr. Cunningham is a clinical and forensic psychologist who works primarily in criminal cases, from assessing defendants for competency to stand trial, to mitigation in capital cases, and postconviction work like in Truehill's case. (R, 9234-5). He was hired

postconviction counsel to identify adverse developmental factors in Truehill's life that could have been considered at the penalty phase. (R, 9239). He testified that he was able to identify those factors in Truehill's life, and would have been able to illustrate for the jury the nexus between them and Truehill's bad outcomes, including criminal violence. (R, 9238). He listed the many risk factors he identified with Truehil (the vast majority of which would also apply to his four law-abiding, well-adjusted, gainfully employed siblings).

The circuit court properly found that this testimony was largely cumulative to what was in fact presented at trial. Any contention that trial counsel did not give a cohesive mitigation presentation tying Truehill's childhood trauma to his criminal behavior is refuted by the record, specifically Dr. Sautter's testimony. Sautter detailed many traumatic events in Truehill's life, and identified twelve to fifteen individual traumas Truehill suffered over time. DAR, LI, 692. He used this information to diagnose Truehill with PTSD and explained that his experience in Hurricane Katrina is the straw that broke the camel's back after a lifetime of trauma. DAR, LI, 693-94. The record shows that trial counsel used Sautter to present a cohesive mitigation theory that it was a lifetime of traumas that led to Truehill developing

mental health problems that prevent him from being able to respond to issues in a healthy and mature fashion. Truehill's claim that he has now found a more favorable expert whose conclusions he prefers to Sautter's is not grounds for relief. *See Card v. State*, 992 So. 2d 810, 818 (Fla. 2008) ("This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defense has now found a more favorable expert."). Additionally, the vast majority of the testimony defense counsel presented through Dr. Cunningham would have been inadmissible hearsay conversations with Truehill's family and friends, or cumulative, and therefore inadmissible at trial.

3. Cross-Examination of Dr. Prichard

Truehill argues his counsel was deficient for not objecting to certain parts of Dr. Prichard's direct examination and for not cross-examining Prichard beyond calling him out for initially leading the jury to believe he had been court-appointed when he'd actually been hired by the defense. Truehill argues that trial counsel did not have any rational reason for how they handled Dr. Prichard's testimony and accuses Warren of using post hoc rationalization for his decisions. That could be not further from the truth, and Warren

testified at length at the evidentiary hearing he did not just negligently ignore Prichard or that he merely stayed up late, but that he approached Prichard in a nuanced fashion considering many factors:

> Q. Do you recall when Dr. Prichard testified, that he had been appointed by the Court at the request of the State to evaluate Quentin Truehill?
> A. That one I have a very clear, independent recollection of, yes.
> Q. Okay. At that time did you know whether Dr. Prichard had been appointed by the Court?
> A. Yes. I knew that he had been hired by the state attorney's office.
> Q. Did you object—
> A. Appointed by the Court -- did I object? No, I did not object.
> Q. Why not?
> A. I had already thought that was a good impeachment question.
> …
> Q. You decided to drastically limit Dr. Prichard's cross-examination?
> A. Yes.
> Q Why?
> A. I was up until about 2:30 or 3:00 in the morning, weighing, back and forth, the pros and cons of doing a full cross-examination or hammering him for attempting to mislead the jury and whether a jury would accept the idea of a man saying the Court appointed him when the Court did not. And he admitted that the Court did not appoint him, and that what he had said was not—I think he used the term "misspoke," but I may be wrong on that. But he acknowledged that he had not been appointed by the Court.

On the “pro” side, cross-examining him about qualifications, the step-by-step process of what he went through with Mr. Truehill, things of that nature, I thought was outweighed by the “con” side of, one, I thought the State had not asked him everything they could have asked him, which means if I cross-examine him any broader than impeaching him on that one subject matter, it opens up a redirect, which means a jury would hear—three times would hear in my cross-examination my attempt to minimize or point out flaws in his assessment after they’ve just heard him testify about his assessment.

Then if I cross-examine him, it gets him into that slippery slope of him saying a second time what his assessment is. No, you misunderstand, Mr. Warren, this is why I did this, and I have my well-worn DSM, and this is this, and then having the State come in a third time on redirect saying, now, did you mean, when you told Mr. Warren this, that this is what really is your interpretation? Well, yes, that’s my interpretation.

So, in my mind’s eye, one, they were holding back—they had not asked him everything and they were holding something back for redirect; and two, he was going to weasel around my efforts to cross-examine him to say, well, this is, you know, classical PTSD, when—and we talked about this for about 45 minutes before trial, as a full team, sitting down in an office. I got to the office early, everybody else was there early, we didn’t have to be there until a particular time.

And we talked about the pros and cons and weighed it out, and I said, what do you think? We can hammer him on this and cut off any effort of the State to rehabilitate him and add to his testimony and cut off his ability to try and weasel around my argument and say, no, you don’t understand this; this is what it really means, my interpretation of PTSD.

Or just ask him, you sat in front of this jury yesterday and told this jury that the Court had appointed you in order to make you look like an independent witness who had been appointed by the Court when, in reality, the State had

hired you, the State was paying you, and you are indeed a paid witness for the State in this case, which he acknowledged.

And so was this a judgment call? Yes. Was it mine in the end? Yes. Was I right? People smarter than me will tell me was I—was I right. Did I impeach him? Yes. Did Jim make it a central part of, his closing argument on that subject matter? Yes.

We selected a choice that I knew was controversial, I knew that I would—I could be criticized for it. But asking a question to which you do not know the answer is many a lawyer's downfall in an individual case.

…

Q. Would cross-examining Dr. Prichard possibly have affected the credibility and weight of that PTSD mitigator?

A. Well, of course. Cross-examination—I agree with the phrase "cross-examination can be the greatest search for truth—the greatest engine," I think? What is the phrase? I think it was Dr.—I mean a Supreme Court justice wrote, Learned Hand, or someone along those lines, that cross-examination was the greatest engine in the search for truth ever devised by the mind of mankind. Rough paraphrase.

So cross-examination—nobody knows what cross-examination would bring out if you don't engage in it. Well, the problem is sometimes cross-examination brings out adverse answers too.

And so, yes, that's when I said I knew that I was going to be criticized for that decision when I made the decision that I made, after discussing it with the team and after staying up half the night thinking about it. Yeah.

Could I have—could I have benefited Quentin Truehill had I engaged in cross-examination? Yes. Could I have hurt—harmed him? Yes. Which one would you be complaining about now if I had done the cross-examination of Dr. Prichard and got hammered?

(R, 8892-8914).

This detailed analysis shows that an immense amount of thought and consideration went into the reasonable strategic decision to limit the cross-examination of Dr. Prichard. This was not the act of a negligent and ineffective lawyer, but a very well thought out decision. Truehill's argument on what trial counsel should have asked is a hindsight analysis that fails to show deficient performance or prejudice to Truehill. This was a strategic decision, and in evaluating such a strategic decision, "The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result." *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla.1995). The circuit court properly found this was a reasonable strategic decision and was correct to deny relief on this claim. This Court should affirm.

ARGUMENT IV: TRIAL COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL IN ADDRESSING THE STATE'S DNA EVIDENCE

Truehill argues that his trial counsel was ineffective in handling the State's DNA evidence, and had they properly done so the outcome of his case would have been different.

Truehill's attorney, Warren, testified at the evidentiary hearing that he believed the DNA evidence to be significant in this case because much of the evidence was circumstantial and it helped tie the victims to the three codefendants. (R, 8764; 8835; 8932). The trial attorneys retained Dr. Gary Litman as a defense DNA consultant, who prepared numerous memoranda and provided lengthy emails with his findings and advice. (R, 8762; 8765; 8851). Warren testified that the goal of his cross-examination of the State DNA analyst was to get her to admit that her analysis did not prove who left what DNA where, but instead that it was merely possible it was the codefendants, and he was successful in doing so. (R, 8929-30). Truehill also presented the testimony of Tiffany Roy, a forensic DNA consultant who reviewed the DNA evidence presented at trial. (R, 9462). The State presented the testimony of Leigh Clark, an FDLE crime laboratory analyst and DNA technical leader.

Roy explained that the 2010 SWGDAM guidelines updated how laboratories should interpret complex DNA mixtures of two or more people by implementing a "stochastic threshold". (R, 9480). This threshold is used to determine whether DNA data is present and of succifient quality to be used in DNA matching without first

comparing it to known DNA sample and will differ from laboratory to laboratory and even differ between different machines in the same laboratory. (R, 9478-80). While Roy did testify that applying a stochastic threshold to the evidence in Truehill's case would have excluded some of the DNA results for comparison purposes, she did so using an arbitrarily chosen hypothetical threshold of 250 relative fluorescence units (RFU). (R, 9541). Further undercutting Roy's conclusion is the fact that FDLE's new equipment is more sensitive than that used in 2010, so it's able to get better data from less DNA than old testing kits; additionally, a stochastic threshold cannot just be applied to tests run with old testing kits that got different data, they can only applied with a new test with a new kit. (R, 9688-9; 9715). When it came to how the 2010 SWGDAM guidelines and the new 2012 FDLE SOP's that implemented those guidelines, Roy acknowledged that there was no requirement that analysts go back and reinterpret or reanalyze old data and that different laboratories addressed the changes in different ways. (R, 9494-6). She also never testified that there was even enough genetic material to do such testing. Clark also testified that FDLE did not reinterpret old cases, and that when the evidence in Truehill's cases was tested in 2010,

the SWGDAM guidelines had not been implemented yet as FDLE had to conduct validation studies on their equipment. (R, 9674-6). Clark also testified that testing with a new kit could have two possible outcomes for Truehill: DNA results where he was included as a possible contributor could change to "no determination could be made" as to inclusion, which Roy urges is the case; but the opposite is true as well, that areas where no determination was made could become possible inclusions due to the sensitivity of the new instrument. (R, 9716-7).

Truehill first argues that his counsel was ineffective for failing to obtain the 2010 SWGDAM guidelines, the 2012 FDLE SOP's, and using them to exclude Livingston's testimony or discredit it in front of the jury. The circuit court found that the testimony from Roy and Clark showed there is disagreement among experts about how exactly to handle DNA analyzed before the 2012 FDLE SOP's implemented the SWGDAM guidelines, and that there is no reasonable probability that FDLE would, or even could, retroactively apply the guidelines to the DNA testing in this case. The court also found that idea that the application of any stochastic threshold, including the one Roy admitted was chosen as a hypothetical, could

have excluded any of the DNA evidence in this case is wholly speculative as the testing would be done with new, more sensitive instruments.

The circuit court also found, and this Court should affirm, that even if the State had presented no DNA evidence of Truehill's possible inclusion to the mixed samples, there was overwhelming evidence of his guilt in this crime spree. It is undisputed that on March 30, 2010, Truehill was a prisoner in Marksville, LA; and that on April 12, 2010, Truehill was apprehended in Miami, FL along with his co-defendants, Kentrell Johnson and Peter Hughes. Each individual victim of the crime spree preceding the murder of Vincent Binder testified consistent with a finding that Truehill not only participated in those armed robberies, but largely was the individual who brandished a large knife and accosted the victims. The defendant was matched as a contributor to DNA found on Mario Rios's shirt while both codefendants were completely excluded. When the defendants were apprehended, the stolen black truck that was reported missing from Louisiana was searched, and the search results yielded a bloody knife, Ms. Williams' Louisiana identification card, ATM receipts, Ms. Pavlish's documents, and a green washcloth with blood stains.

Additionally, after the defendant, co-defendant Peter Hughes, and Shirley Marcus were arrested at a Budget Inn Motel in Miami, police examined the hotel room at which the defendant and co-defendant Peter Hughes had been residing. This examination yielded the trash bag containing clothing, a metal handsaw, a machete, and a pair of Levi's brand jeans. Finally, a search of the motel room at which Ms. Marcus had been residing yielded a black sheath for a knife and a pair of Giovanni blue jeans with DNA profiles matching both Vincent Binder and Ms. Brown. There was ample evidence even without presenting his possible inclusion in the DNA from mixed profiles that Truehill was a major participant in the crime spree preceding the murder of Vincent Binder. The jury's verdicts would not have been materially affected even if Livingston's testimony opining that Truehill was potentially a low-level contributor to the DNA profiles retrieved from this evidence had been wholly excluded.

Next Truehill argues that had his trial counsel was ineffective for failing to obtain a 2012 audit of the FDLE lab which he claims shows the lab was still improperly interpreting mixed DNA samples even after implementation of the 2012 SOP's. This audit does not show what Truehill claims it does. Clark testified that the timing of

the audit meant it was unable to properly evaluate how FDLE was complying with the 2012 SOP's. (R, 9669). The SOP's were released in April, 2012, and the audit was in May, 2012. *Id*. The audit would have been evaluating the lab's case files from the year prior, and as the SOP's had just been released they did not have cases to be reviewed under the new SOP's; the turnaround time for a case is about 90 days. *Id*. The case files the auditors reviewed would have been using SOP's from 2010 and 2011, which had not yet incorporated the 2010 SWGDAM guidelines. (R, 9669-70). Truehill contends this testimony is unfounded, but as a DNA analyst supervisor Clark is uniquely situated to know when the SOP's had been released, what case files the auditors would have reviewed, and that the laboratory hadn't had time to complete cases under the new SOP's. With this testimony the State would have been able to completely rebut any insinuation that the audit showed an ongoing problem at FDLE. Even if the jury did give the audit credence, the evidence of guilt outlined *supra* would make their rejection of the DNA evidence irrelevant to the outcome of Truehill's case as there is no question he and his codefendants were involved in all the attacks of each victim.

Truehill also argues his counsel was ineffective for failing to object when Livingston did not provide statistical weight every time she linked someone as a possible contributor to the DNA on a piece of evidence. He says had his counsel done so the jury could have given the evidence less credence or discounted it entirely. However, trial counsel did voir dire Livingston on the issue of partial matches and argued to the judge that such testimony was misleading. DAR, XXXIX, 853-54. They renewed this objection and asked for a mistrial at the end of her testimony, which was denied. DAR, XL, 927. In his motion for mistrial, Attorney Warren appeared to address both the low level of statistical value as well as the terminology of possible matches, so the circuit court found that the objections Truehill now requests were made. However, even if this Court agrees with Truehill that trial counsels objections were unrelated to missing statistical weight, again Truehill cannot demonstrate any prejudice as he is unable to do in his other claims. As explained *supra*, had trial counsel been successful in excluding or completely discrediting Livingston's inclusion of Truehill in the mixed DNA samples the jury still would have convicted him with ample non-DNA evidence

available incontrovertibly tying him to the crime spree ranging from Lousianna to Miami.

Truehill argues his trial counsel was ineffective for cross-examining Livingston on the issue of secondary transfer, the idea that DNA can be transferred from one item a person touched to another they had no personal contact with. He says this could have explained how his DNA got on one of the murder weapons, and had the jury heard about it, they could have ignored the evidence and the outcome of his trial would be different. First, the DNA evidence was not the linchpin that got Truehill convicted; it was the evidence of each victim's testimony, the fact that their personal items were found in the truck stolen by the three men, and even full DNA profiles in blood found on a pair of pants belonging to the codefendants that tied Truehill to these many crimes. Therefore, convincing the jury that secondary transfer was responsible for his DNA appearing on the machete would not have affected their verdicts; especially since they already had a very good reason to give that evidence little credence: although Truehill was a possible source for the DNA profile, so were one in 190 Whites, one in 180 African Americans, and one in 140 Hispanics. Those are incredibly less compelling numbers that the one

in trillions or quintillions the jury heard for other DNA evidence. DAR, XL, 915.

Additionally, counsel did explore the issue of secondary transfer. While questioning Livingston outside the presence of the jury, trial counsel asked her about secondary transfer, and her response was, "There is not a good amount of evidence in the literature that secondary transfer takes place on a regular basis." DAR, XXXIX, 851. If trial counsel wanted to attack the DNA evidence on the machete, this is the exact kind of statement he would not want the jury to hear. The circuit court found that trial counsel made a reasonable strategic choice not to cross-examine Livingston on this issue, as the response would have been unhelpful to Truehill, and that regardless there is no prejudice due to the overwhelming evidence of guilt. This Court should affirm.

Next, Truehill argues trial counsel was ineffective for failing to object, move to exclude, or cross-examine Livingston's testimony in light of the 2010 SWGDAM guidelines and 2012 FDLE SOP's. He contends that since the evidence in this case was analyzed after the SWGDAM guidelines were released, all of the data in his case was erroneously interpreted. He also points out that Roy testified every

DNA profile associated with him was in the stochastic range, and therefore unreliable. (R, 3084). These arguments miss two important points. First, that FDLE did not implement the SWGDAM guidelines until two years after the evidence was analyzed in this case, and the testing was done properly with the FDLE SOP's in place at the time. Second, that Roy was using a hypothetical, arbitrary stochastic threshold when looking at the data in this case, and Clark testified that using any sort of stochastic threshold on old data is improper.

Truehill argues that had trial counsel gotten the testimony excluded or discredited based on the guideline and SOP changes, his trial would have ended differently. The circuit court found that the changes were not a basis for excluding Livingston's testimony. Had those changes even been a proper basis for excluding her testimony or discrediting it to the jury, the overwhelming nature of the evidence against Truehill renders him unable to show any prejudice from the alleged deficiency.

Finally, Truehill argues his trial counsel was ineffective for failing to cross-examine or object to evidence given by Livingston that was allegedly in violation of FDLE's SOP's at the time of analysis. He alleges that had trial counsel cross-examined her on this issue, it

would have affected his possible inclusion to DNA found on a machete, a knife, and a washcloth. Regardless of whether he was tied to these pieces of evidence in violation of the FDLE SOP's, the circuit court found that he experienced no prejudice because, once again, of the other corroborating evidence of his guilt. The circuit court found:

> Notably, the testimony at the evidentiary hearing from trial counsel, as well as the expert counsel hired to investigate possible alibis, indicates that defense counsel was unable to establish a reliable alibi for any of the crimes in this case. Additionally, apart from Ms. Williams, each living victim of the crime spree testified that there were three individuals who participated in those attacks. Post-conviction counsel has failed to proffer any evidence supporting that one of those three individuals was someone other than Defendant.

(R, 5141, footnote 10).

All of Truehill's arguments in this section share a theme: trial counsel should have done something to exclude or discredit Livingston's DNA testimony, and had they done so, the jury would have acquitted Truehill or recommended life. The DNA evidence was used to tie Truehill to the crime spree that ultimately led to the murder of Vincent Binder. Despite trial counsel's testimony at the evidentiary hearing, it was not particularly compelling and involved a lot of mixed samples, many of which that did not even include

Truehill, or low-level samples that were not a very close match to him. Instead, video evidence, testimony from the victims, full DNA profiles of more than one victims' blood on clothing in the defendants' possession, and personal effects of the victims found in the truck in Miami which had been stolen in Louisiana did a very compelling job establishing Truehill's and his codefendants' involvement in these mutltitude of crimes. For every argument Truehill made that trial counsel could have excluded or discredited the DNA testimony, the circuit court found no prejudice. Truehill's convictions were inescapable, and the DNA did very little to further implicate him or increase his culpability than the already available evidence. This Court should affirm and reject relief on these claims.

ARGUMENT V: THE STATE DID NOT USE FALSE AND MISLEADING EVIDENCE IN VIOLATION OF *GIGLIO*

In this claim Truehill alleges that the State DNA expert at trial, Susanne Livingston, provided misleading testimony in violation *Giglio* for failing to disclose that FDLE's new standard operating procedures (SOP's) could have potentially changed her interpretation of DNA results in Truehill's case, and for failing to testify to a statistical weight of some results.

The DNA analysis of the evidence in this case occurred in 2010. That same year, the Scientific Working Group on DNA Analysis Methods ("SWGDAM") issued new guidelines on how laboratories should handle and interpret what are called "mixed" or "complex" samples of DNA, where the DNA of two or more people are present in a sample. Those guidelines were not implemented by the FDLE until 2012, two years after the DNA analysis occurred in this case, when that agency issued new SOP's meant to bring FDLE in line with the SWGDAM guidelines. The SWGDAM guidelines and new FDLE SOP's were designed to have a more objective approach toward DNA analysis, using a stochastic threshold that a DNA sample must meet before it can be used for comparison purposes. This threshold can vary wildly from laboratory to laboratory and even between different machines in one laboratory, and can only be determined through experimentation. (R, 9679-80).

The knowing use of false testimony violates due process. *Giglio v. United States*, 405 U.S. 150, 153 (1972). This rule applies regardless of whether the false testimony is solicited, or merely allowed to stand uncorrected after it appears. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Nondisclosure of evidence affecting credibility

also falls within this rule "when the 'reliability of a given witness may well be determinative of guilt or innocence." *Giglio*, 405 U.S. at 154. In order to establish a *Giglio* violation, a defendant must demonstrate that: 1) a state witness gave false testimony; 2) the prosecutor knew the testimony was false; and 3) the statement was material. *Id.* Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgement of [the finder of fact]." The *Giglio* standard has also been explained as a "materiality standard under which the fact that the testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *U.S. v. Bagley*, 473 U.S. 667, 679-80 (1985). This Court has held, in the context of a *Giglio* analysis, that "[a]mbiguous testimony does not constitute false testimony." *Phillips v. State*, 608 So. 2d 778, 781 (Fla. 1992). "By contrast to an allegation of suppression of evidence under *Brady*, a *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant." *Mordenti v. State*, 894 So. 2d 161, 175 (Fla. 2004).

Truehill first asserts a *Giglio* claim because Livingston's testimony did not include an explanation of the new SWGDAM guidelines and FDLE SOP's, and how new analysis procedures might affect her previous analysis. At the evidentiary hearing both the defense and the State presented testimony from DNA expert witnesses. Truehill presented Tiffany Roy, a forensic DNA expert and consultant, and the State presented Leigh Clark, a crime laboratory anaylyst supervisor and DNA technical leader for FDLE. Both experts referred to the 2010 SWGDAM guidelines, the 2012 FDLE SOP's, and their relevance and applicability to the DNA analysis in Truehill's case.

The Court properly found there was no affirmative obligation for Livingston to disclose the new guidelines or SOP's beyond the disclosure she had already made to defense counsel during deposition. Given that stochastic thresholds can vary wildly from lab to lab and machine to machine, Roy's opinion that the DNA samples in this case definitely would not have led to inclusions under a new analysis is not reliable and purely speculative. Roy's assertion that the evidence should have been retested or reinterpreted in this case is also directly contradicted by Clark, who testified that as SOP's and

technology develop FDLE does not go back and rework or reanalyze thousands of cases. (R, 9674).

There is no evidentiary support that conclusively establishes that re-evaluating the evidence at issue under the 2010 SWGDAM guidelines would have resulted in a markedly different opinion regarding whether the defendant was able to be included or excluded as a possible contributor utilizing the more recent scientific views. Accordingly, it would not have been prudent for Livingston to speculate that re-analyzing these items of evidence under the 2010 SWGDAM guidelines might have produced a different result. Additionally, Clark's testimony confirms that Livingston could not have properly applied the updated guidelines to the results from her 2010 analysis, given that the stochastic threshold utilized would have been based upon new equipment. Although Roy personally opined that Livingston should have volunteered that there existed a new, better procedure for analyzing DNA that may or may not have affected the results in this particular case, the circuit court declined, and this Court should decline, to impose on Livingston the obligation to provide speculative information about the effect of a new interpretation procedure where the operating procedure she used in

analyzing the DNA samples in this case was appropriate at the time of analysis. Finally, the defendant contends that the FDLE SOPs in effect at the time Livingston testified required that if she were to opine that the defendant could be included as a contributor to items of evidence containing low level mixed-DNA samples, she must also attach a statistical weight to the likelihood that the defendant's DNA contributed to those samples. Truehill asserts Livingston's failure to attach statistical weights to her opinions as to the items of evidence where she identified the defendant as a possible contributor constituted a *Giglio* violation. At the evidentiary hearing, Roy confirmed that the best practice for these types of low-level mixed DNA samples is to attach statistical weights when opining as to the probability that a particular individual is included, or excluded, from those samples. However, Roy also acknowledged that analysts are not required to reanalyze old data and never claimed that there was enough genetic material from the items of evidence at issue to even be able to reliably reanalyze the data.

There is no *Giglio* violation because Livingston's testimony was not materially false or misleading. In Truehill's argument he appears to misapprehend Livingston's terminology in relation to mixed DNA

samples. Truehill is correct that when a DNA analyst says there is a match, they need to go further and give statistical weight to what that means. *See Brim v. State*, 695 So. 2d 268 (Fla. 1997). However, Livingston specifically pointed out that when she refers to contributors to mixed DNA samples, she never refers to them as a match, as revealed by a review of her testimony in the record: "I don't call it a match when it's a mixture. I'll say they're included as a possible contributor to the mixed DNA profile." DAR, XXXIX, 887-88. When Livingston testified to samples with a single DNA profile, she was able to give it statistical weight; when she testified to minor contributors to mixed DNA samples, she could exclude someone from the sample completely, or say they were a possible contributor. This difference in terminology also helped underscore for the jury the difference in reliability between single and mixed sources.

Her testimony was consistent with this in the five items challenged by Truehill. She testified that she found a full DNA profile matching Vincent Binder on the baseball hat; that she could determine "possible" minor contributors on the wallet; that she found some full DNA profiles, some major contributors, but mostly could only exclude or include individuals as possible minor contributors on

various stains on the washcloth; that several stains matched two of the victims' full DNA profiles on the jeans, and that other stains mostly had minor possible contributors; and that she found a full DNA profile of Binder on the silver knife, and could exclude or include some individuals as possible minor contributors. DAR, XL, 911; 912-14; 916-19; 923-26; 928-31. She only strayed from this once when she said a major profile "matched" Kentrell Johnson on the washcloth, testimony that would help, not hurt, Truehill. DAR, XL, 916-17.

Even if it was error for Livingston to not include statistical weight in her mixed sample testimony, it was not material because there is not a reasonable likelihood it affected the trier of fact. As helpful as DNA evidence can be, there was a mountain of other evidence, as mentioned above, tying Truehill to this crime spree and the murder of Vincent Binder. In addition, the DNA evidence in this case was not particularly strong. The State could have had *zero* DNA evidence, or the jury could have rejected all of it as Truehill says they should have, and the jury still had plenty of evidence to find Truehill guilty beyond a reasonable doubt.

ARGUMENT VI: THE CIRCUIT COURT PROPERLY REJECTED TRUEHILL'S CLAIM OF NEWLY DISCOVERED EVIDENCE

Truehill claims that a report, "MIX13", published four years after his trial, entitles him to a new trial. That report was a sample of studies sent to public crime laboraties to evaluate those laboratories' consistency and statistical analysis. The report found a great deal of variation within and between laboratories regarding results obtained when using a stochastic threshold in interpreting mixed DNA samples.

To obtain a new trial based upon newly discovered evidence, a defendant has the burden to establish two things: (1) the evidence was not known by the trial court, the party, or counsel at the time of trial and the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial. *See Hurst v. State*, 18 So.3d 975, 992 (Fla. 2009) (*citing Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998)). Newly discovered evidence satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones*, 709 So. 2d at 526 (quoting *Jones v. State*, 678 So.

2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones*, 591 So. 2d 911, 915 (Fla. 1991).

In determining whether the evidence compels a new trial, the trial court must "consider all newly discovered evidence which would be admissible," and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* at 916; *Jones*, 709 So. 2d at 521. "In determining the impact of newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a total picture of the case and all the circumstances of the case." *Hildwin v. State*, 141 So.3d 1178, 1184 (Fla. 2014).

The circuit court properly found that the MIX13 report fails the second prong of the newly discovered evidence analysis. This evidence fails the second prong because it would not probably produce an acquittal on retrial. Even if we throw out all of the mixed DNA mixtures as Truehill wants, there is overwhelming evidence tying him to the collateral crimes, the murder, as the one consistently wielding a weapon. Each victim testified that Truehill was the one

wielding a knife; multiple personal effects of the robbery victims were found in the truck stolen by the three codefendants; Truehill is on camera using the victim's debit card shortly after the victim left his friends' apartment; and Truehill is the only contributor of DNA to one of the murder weapons. Livingston testified that transfer DNA is uncommon. Truehill's assertions about transfer DNA also don't explain how if his DNA on the weapon was transfer DNA, why his was the only DNA present when the machete was around items and clothing handled by all three men. Given this overwhelming evidence of guilt, the jury could have ignored all of the mixed DNA samples and still found him guilty.

ARGUMENT VII: THE CIRCUIT COURT CORRECTLY SUMMARILY DENIED CLAIMS I, II, AND IX IN TRUEHILL'S MOTION FOR POSTCONVICTION RELIEF

Three of Truehill's claims for postconviction relief were summarily denied before the evidentiary hearing: Claim I) Venue was improper in St. John's County and his trial counsel was ineffective for not considering changing venue; Claim II) The systematic exclusion of African American's by felony disenfranchisement violated Truehill's right to a fair cross-section in the grand and petit juries; Claim III) Evidence of his codefendant's life sentences and

additional evidence presented in postconviction required a new proportionality analysis. Truehill now argues the circuit erred by summarily denying these motions and requests an evidentiary hearing on each claim. As explained below, each claim was properly denied without an evidentiary hearing.

Standard of Review

A postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on the written materials before the court. A court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record. *See Franqui*, 59 So.3d at 101; *Troy*, 57 So.3d at 840 (*citing Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008). A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. *Moore v. State*, 820 So. 2d 199, 203 (Fla. 2002).

Rule 3.851(e)(1)(D) requires a defendant to include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought. The burden is on the defendant to establish a legally sufficient claim. *See Franqui*, 59 So.3d at 96 (*citing Freeman*

v. State, 761 So. 2d 1055, 1061 (Fla. 2000)); *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Conclusory allegations are not sufficient. *Franqui*, 59 So.3d at 96 (*citing Freeman*, 761 So. 2d at 1061).

The rule of sufficiency is equally applicable to claims of ineffective assistance of counsel. *See Thompson*, 796 So. 2d at 515; *Knight v. State*, 923 So. 2d 387 (Fla. 2005). The facial sufficiency of an ineffective assistance of counsel claim is determined by applying the two-pronged test of deficiency and prejudice set forth in *Strickland*. *Troy*, 57 So.3d at 834 (*citing Duest v. State*, 12 So.3d at 747). Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for postconviction relief. *See Owen v. State*, 986 So. 2d at 543; *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992) (holding counsel cannot be deemed ineffective for failing to make meritless argument).

The trial court must summarily deny claims that are procedurally barred. Fla. R. Crim. P. 3.851(e)(1). The Florida Supreme Court has consistently held that a claim that could and should have been raised on direct appeal is procedurally barred. *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006); *Davis v. State*, 915 So. 2d 95, 129 (Fla. 2005); *Duckett v. State*, 918 So. 2d 224, 234 (Fla.

2005); *Robinson v. State*, 913 So. 2d 514, 523 (Fla. 2005). Further, it is inappropriate to use a different argument to relitigate the same issue. *Willacy v. State*, 967 So. 2d 131, 141 (Fla. 2007). A procedurally barred claim cannot be considered under the guise of ineffective assistance of counsel. *Freeman*, 761 So. 2d at 1067 (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel); *see also Rodriguez v. State*, 919 So. 2d 1252, 1262 (Fla. 2005). The trial court must also summarily deny claims that are conclusively refuted by the record. The State has referenced sections of the record which specifically refute Truehill's various claims.

Claim I

Truehill claims that the atmosphere in St. Johns County created a prejudicial effect that made it impossible for him to receive a fair trial there, and that his trial counsel was ineffective in not moving to change venue. He claims pretrial publicity made it impossible to empanel an impartial jury and that trial counsel should have changed venue to another county in the judicial circuit or to Tallahassee where Vincent Binder was kidnapped.

The decision of whether to seek a change of venue is a matter of trial strategy and, therefore, is not generally an issue to be second-guessed in postconviction proceedings. *Rolling v. State*, 825 So. 2d 293, 298 (Fla. 2002); *Buford v. State*, 492 So. 2d 355, 359 (Fla. 1986) ("Counsel's failure to move for a change of venue was a tactical decision and therefore not subject to attack."). Further, a postconviction movant must establish grounds that would require a change of venue or that there was substantial difficulty in seating a fair or impartial jury. *Wike v. State*, 813 So. 2d 12, 18 (Fla. 2002); *Provenzano v. Dugger*, 561 So. 2d 541, 545 (Fla. 1990) (concluding that counsel was not ineffective for failing to renew the motion for change of venue because it was a tactical decision and because "it is most unlikely that a change of venue would have been granted because there were no undue difficulties in selecting an impartial jury"); *See also Meeks v. Moore*, 216 F.3d 951, 961 (11th Cir. 2000)(a defendant must "bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if [defense] counsel had presented such a motion to the court.")

In determining whether a change of venue is necessary or warranted, the test "is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom." *McCaskill v. State*, 344 So. 2d 1276, 1278 (Fla. 1977). On appeal, the court makes a two-pronged analysis, evaluating: 1) the extent and nature of any pretrial publicity; and 2) the difficulty encountered in selecting a jury. *Rolling v. State*, 695 So. 2d 278, 285 (Fla. 1997). In deciding on the first prong, the court can look at the length of time between the crime and the trial, the nature of the news stories published, the size of the community, and whether the defendant exercised all of his peremptory challenges. *Id.* In relation the second prong, the ability to seat an impartial jury can be demonstrated by a lack of extrinsic knowledge about the case or a lack partiality in those with knowledge. *Id.* "[A]bsent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury." *Henyard v. State*, 689 So. 2d 239, 245 (Fla. 1996).

It is correct that about a third of the jury venire reported exposure to pretrial publicity and three members of the sworn jury were among those. However, "jurors need not be totally ignorant of the facts of the facts nor do they need to be free from any preconceived notion at all." *Rolling* at 285. In addiiton, this is apparently not an unduly large number of jurors, because courts in Florida have found in cases with similar percentages that a change of venue was not required. *See Pitts v. State*, 307 So. 2d 473 (Fla. 1st DCA 1975); *Copeland v. State*, 457 So. 2d 1012 (Fla. 1984); *Provenzano v. State*, 497 So. 2d 1177 (Fla. 1986).

Three separate panels between fifty and sixty jurors were called and questioned separately from each other, for a total of 163 jurors. Every juror that said they had previously heard about the case were questioned extensively and individually about what they knew. The vast majority of jurors who reported more than a passing knowledge of the case were summarily excused due to their prior knowledge whether or not they expressed a preconceived notion of Truehill's guilt. None of the three with prior knowledge who were empaneled had more than slight knowledge about the case, and had no knowledge of the more "salacious details," as Truehill puts it. Juror

Gatewood had read about the case when it first occurred nearly four years previous, and happened to be driving a UPS truck in the area and time where the body was found. DAR, XXVI, 438-39. All he remembered was, "People from out of state came and they dropped off the body here in St. Augustine and they were found in Miami." DAR, XXVI, 439. Juror Martinez reported that all he knew was that a body had been found in St. John's and that he never followed the case because he was too busy to follow the news. DAR, XXVI, 458. Juror Hockman, one of the alternate jurors, said that the only thing she had ever seen about the case was a headline and never read an article about it. DAR, XXIX, 932-33.

It is clear from the record that both prongs favor that a change of venue was not warranted. As to the pretrial publicity, a review of the articles provided by defense show that they are largely more "straight news"-oriented than inflammatory. Almost four years passed between the crime and the trial, which likely contributed to so many jurors having little to no knowledge of the case. Trial counsel even had a peremptory challenge remaining that they elected not to use. DAR, XXXI, 1326. These facts are very similar to *Hoy v. State*, 353 So. 2d 826 (Fla. 1977), where the Florida Supreme Court found

that there was no significantly inflammatory atmosphere either in the community or the courtroom, and thus no justification for a change of venue, observing:

> The voir dire of the jury selected to hear the cause reveals that eight of them had no prior knowledge whatsoever of the cause prior to being called for jury duty. Of the remaining four, one heard that the murder had happened from a customer, but that was the extent of her exposure, and she knew nothing more about it. Another remarked that she only read something briefly about it in the St. Petersburg Times when the news was first released that the murders had occurred and that she had not heard or read anything about it since that time nor had she discussed it with anyone. Another remembered having seen something in the St. Petersburg Times about the case, but it had made no impression with her. The fourth juror stated that she had read something about the case when it first started but could not recall any facts and had not discussed it with anyone. It is obvious from the record that defense was satisfied with the jury selected, all of whom were completely impartial and had in no way been prejudiced by pre-trial publicity. This is supported by the fact that the defense had by no means exhausted its available peremptory challenges.

353 So. 2d at 829-30.

It was also not unduly difficult to seat an impartial jury. The trial court needed a pool of only 163 jurors to seat the fifteen-person panel, and nearly two-thirds had never heard of the case before being called to serve. Jury selection took about a week. Contrast this with, for example, Danny Rolling's case. There, 1233 jurors were initially

summoned for jury duty, nearly eight times the number in our case. *Rolling* at 286. Of those, 800 were excused based solely on their answers to a screening questionnaire. *Id.* Those who were called in to be questioned were separated into twenty to twenty-four person panels, and every panel was questioned on pretrial publicity. *Id.* at 287. *Every single member* of the more than 400 who were questioned had at least some extrinsic knowledge of the case, and jury selection took three weeks. *Id.* And yet, this Court found that the pain-staking process used by the trial court alleviated the need for a change of venue. *Id.* Here, no such arduous process was required for an impartial jury to be seated as so few jurors had prior knowledge of the case.

The same reasons that allowed for venue to be proper in St. John's County also show that trial counsel was not ineffective in deciding not to move for a change of venue. Because venue was proper in St. John's, any motion for a change of venue would have been denied. Trial counsel is not ineffective when they make the decision to not pursue a meritless argument. *See, e.g.*, *Lynch v. State*, 2 So.3d 47, 67-68 (Fla. 2008) (Trial counsel not ineffective in deciding not to file meritless motion to suppress admissible evidence.). Since

any motion for change of venue would have been denied, Truehill also shows no prejudice, because there would have been no impact on the proceedings. *Id.* Additionally, twelve of the fifteen jurors had no prior knowledge of his case, and the three who did knew so little that they may as well have had no prior exposure. Changing the venue to a less news-saturated county would not have resulted in a jury any more impartial than the one he received.

The circuit court found that this record supported the finding that a change of venue would not have been warranted if requested, so there was no deficient performance or prejudice to Truehill and his rights were not violated by having his trial in St. John's County. This court should affirm and reject relief on this claim.

Claim II

Truehill argues that Florida's law revoking the right to vote from convicted felons denies him a fair cross-section of the community from which to pick a jury, and thus has violated his Sixth Amendment right to a fair and impartial jury.

To prevail on this claim, Truehill must show: "(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are

selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

As an initial matter, this claim is procedurally barred because it could and should have been raised on direct appeal. *See Reaves v. State*, 826 So. 2d 932, 936 n.3 (Fla. 2002).

As to the merits, Truehill correctly points out that previous cases finding a violation of a fair cross-section all involved exclusion of groups of individuals based on *immutable characteristics*. *Duren*, 439 U.S. 357 (women); *Peters v. Kiff*, 407 U.S. 493 (1972) (African-Americans); *Castaneda v. Partida*, 430 U.S. 482 (1977) (Mexican-Americans). It is clear from this line of cases that what is meant by a "distinctive group" is one with a shared, immutable characteristic, which is wholly outside each individual's control. People don't choose to be white, or black, or women, and so the wholesale exclusion of those groups from jury venires violates due process.

Felons, on the other hand, do not have a shared immutable characteristic. Florida's felon population is composed of individuals from all walks of life, every race, gender, and socioeconomic status.

What they do have in common is they all at some point were convicted of a felony. They were not born felons, but became them by making conscious choices that affected their path in life. Felons as a group are more similar to the *Witherspoon*[2]-excludables discussed in *Lockhart v. McCree*, 476 U.S. 162 (1986). The Supreme Court first decided in *Witherspoon* and affirmed again in *Lockhart* that there is no constitutional violation in excluding jurors from death penalty juries who would refuse to impose the death penalty. The Court found that they were a "group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors," as opposed to being defined by an immutable characteristic. Similarly, felons are a group defined by their shared actions that render them ineligible to serve as jurors.

Even if Truehill's argument holds any weight that felon disenfranchisement disproportionately affects minorities, which can be protected classes, that does not mean he is being denied a fair cross-section of the community. Not all minorities are being targeted and removed from jury service, just a subsection of them: those who

[2] *Witherspoon v. State of Illinois*, 391 U.S. 510 (1968)

have been convicted of a felony. This Court has similarly held that the exemption of mothers with young children from jury service at their request does not violate the Constitution because it only affects *some* women, not all women. *See Hitchcock v. State* 413 So. 2d 741, 745 (Fla. 1982); *Henderson v. State*, 463 So. 2d 196, 201-02 (Fla. 1985).

The circuit court summarily denied this claim because it was procedurally barred, as it should have been raised on direct appeal. This Court should affirm and reject relief on this claim.

Claim IX

In this claim, Truehill argues that his co-defendant's life sentences and evidence he intended to present at the evidentiary hearing render his death sentence disproportionate. Peter Hughes pled guilty to first-degree murder to receive his life sentence. Kentrell Johnson had initially been convicted at trial and sentenced to death, but his sentence was vacated by this Court and he instead received a life sentence. However, that court did not vacate his sentence due to proportionality or relative culpability. Johnson had made a deal with law enforcement and the State Attorney's Office that he would help them find the body in exchange for avoiding the death penalty.

Johnson v. State, 238 So.3d 726, 733 (Fla. 2018). The court found that contract law obligated the State Attorney's Office to not seek the death penalty, and therefore he was entitled to a life sentence. *Id.* at 738-39.

This case is indistinguishable from *Walton v. State*, 246 So.3d 246 (Fla. 2018). Walton was one of three codefendants in a homicide case. One of his codefendants received a life sentence as part of a negotiated plea, and the other received a life sentence on appeal based on a legal error by the trial judge. *Id.* 252. We have nearly identical facts here: Hughes received a life sentence as part of a negotiated plea, and Johnson received a life sentence due to a rather arcane application of contract law. When codefendants receive lesser sentences due to purely legal reasons, relative culpability is not an issue. *Id. See also Jeffries v. State*, 222 So.3d 538, 547 (Fla. 2017) ("[W]e have historically refused to review the relative culpability of codefendants when a codefendant pleads guilty and receives a lesser sentence as a result."); *Farina v. State*, 937 So. 2d 612 (Fla. 2006) (holding that the life sentence of a codefendant was irrelevant because the basis for the codefendant receiving the life sentence was

purely legal and had no connection to the nature or circumstances of the crime or to the defendant's character or record).

Truehill has already received a comparative proportionality review on direct appeal, and this Court found that his sentence was proportional in comparison to other capital cases. *Truehill*, 211 So.3d at 959. Additionally, this Court has since receded from comparative proportionality review in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020) because it ran contrary to the conformity clause of Article I, Section 17 of the Florida Constitution. Under this Court's new precedent Truehill is not entitled to any comparative proportionality review based on what little additional mitigation was presented at the evidentiary hearing. The State also argues that when this Court dispensed comparative proportionality, it also dispensed the relative culpability review Truehill now argues entitles him to a life sentence. Relative culpability analysis is an aspect of the comparative proportionality review. *See, McCloud v. State*, 208 So.3d 668, 693 n.6 (Fla. 2016) (Canady, J., concurring in part and dissenting in part) ("Because relative culpability is an aspect of our comparative proportionality review, I would conclude, for the same reasons detailed in *Yacob*, that it too is precluded by the conformity clause.")

Even if Truehill's codefendants had not received their life sentences for purely legal reasons, this Court's decision in *Lawrence* would still be a bar to relief.

The circuit court summarily denied this claim due to the purely legal nature of Truehill's codefendants' sentences rendering relative culpability a non-issue. This Court should affirm and deny relief.

ARGUMENT VIII: THERE WAS NO ERROR AT THE TRIAL LEVEL OR BY THE POSTCONVICTION COURT, SO THERE IS NO CUMULATIVE ERROR

The circuit court found no error, ineffectiveness, or prejudice in the individual claims, and so found no cumulative error. "Where the alleged errors urged for consideration in a cumulative error analysis are individually either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009). This Court should affirm and deny relief.

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 11th, 2021, a true and correct copy of the foregoing has been furnished by email to Tracy M. Henry, Assistant Capital Collateral Regional Counsel, Middle, 12973 N. Telecom PARKWAY, Temple Terrace, FL 33637-0907 [henry@ccmr.state.fl.us], Julie M. Morley, Assistant Capital Collateral Regional Counsel, Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637-0907 [morley@ccmr.state.fl.us], James L. Driscoll Jr., Assistant Capital Collateral Regional Counsel, Middle, 12973 N. Telecome Parkway, Temple Terrace, FL 33637-0907, [driscoll@ccmr.state.fl.us] and [support@ccmr.state.fl.us], the attorneys for Appellant.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this response is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.120 and 9.210, and Certificate of Compliance Fla. R. App. P. 9.045(e) this response contains 23,971 words.

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