

**IN THE SUPREME COURT OF FLORIDA**

**CASE NUMBER:** SC20-1589

**Lower Tribunal Case:**552010CF000763XXAXMX

**QUENTIN MARCUS TRUEHILL,**  
APPELLANT,

v.

**STATE OF FLORIDA,**  
APPELLEE.

\_\_\_\_\_ /

\_\_\_\_\_  
**ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT,  
IN AND FOR ST. JOHNS COUNTY, STATE OF FLORIDA**

\_\_\_\_\_  
**INITIAL BRIEF OF THE APPELLANT**

\_\_\_\_\_  
Tracy M. Henry  
Florida Bar#  
0073865

Julie M. Morley  
Florida Bar#  
0085158

James L. Driscoll  
Florida Bar#  
0078840

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE  
12973 N. Telecom Parkway Temple Terrace, Florida 33637  
(813) 558-1600  
COUNSEL FOR APPELLANT

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## **REQUEST FOR ORAL ARGUMENT**

The resolution of the issues involved in this action may determine whether Truehill lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Truehill.

## **PRELIMINARY STATEMENT REGARDING REFERENCES**

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. Citations to the postconviction record will be designated "pc" followed by the page citation, e.g., PC/123. Citations to the record on appeal from Truehill's direct appeal to this Court will be designated "R." followed by a page number, e.g., R/123.

All other record citations are self-explanatory or explained herein.

## **STATEMENT OF THE CASE AND FACTS**

On May 10, 2010, Quentin Truehill, Peter Hughes, and Kentrell Johnson were indicted for one count of first-degree murder and one count of kidnapping to facilitate a felony. R1/5. Truehill was represented by Assistant Public Defenders Raymond W. Warren, James R. Valerino, and Rosemary E. Peoples. Truehill was tried separately from his co-defendants in front of the Honorable Raul Zambrano in the Seventh Judicial Circuit in St. Johns County. Truehill was found guilty on both counts. R43/1418-19. After a penalty phase and *Spencer* hearing, the court imposed a death sentence. 2014. R55/1-9.

The trial court found six statutory aggravating circumstances and gave each great weight: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) the defendant was previously convicted of a felony involving the use of or threat of violence to the person; (3) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of a kidnapping and/or robbery; (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (5) the capital felony was especially

heinous, atrocious or cruel; and (6) the capital felony was committed in a cold, calculated and premeditated manner.

The trial court found four statutory mitigating factors and gave each slight weight: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (3) the crime was committed by another and the defendant had a minor role; and (4) the defendant acted under extreme duress or under the substantial domination of another person. The trial court considered forty nonstatutory mitigators and assigned them slight to no weight. The court found four nonstatutory mitigating factors to have moderate weight: (1) Truehill experienced the trauma of witnessing the unfolding of a retaliatory murder; (2) Truehill assumed the role of family protector for the lives of his girlfriend, Sherell Smith, and her mother; (3) Truehill jumped into the water to rescue his girlfriend when she fell out of the boat; and (4) Truehill was capable of procuring a car after reaching dry land.

Truehill appealed, and this Court affirmed the trial court on

each of his issues. *Truehill v. State*, 211 So.3d 930 (Fla. 2017). A writ of certiorari was filed with the U.S. Supreme Court and denied. *Truehill v. Florida*, 138 S. Ct. 3 (2017).

Truehill filed a motion under Florida Rule of Criminal Procedure 3.851. The postconviction court granted an evidentiary hearing on some of the claims and denied an evidentiary hearing on several claims. Truehill maintains that he was entitled to relief on the claims on which he was denied a hearing and on the claims which the postconviction court heard. The court denied relief on each claim in a written order.

Further facts are discussed below in relation to the claims to which they are relevant. This appeal follows.

## **SUMMARY OF THE ARGUMENTS**

Truehill was convicted and sentenced to death without the courts and the jury knowing the truth. In jury selection, counsel failed to adequately question the venire on vital issues concerning race and mitigation. Two jurors were seated without being asked about their views on the death penalty. Counsel's deficiency in jury selection denied any assurance that Truehill would receive a fair trial in guilt and penalty phase.

The deficiency continued to spread during the guilt phase. Counsel failed to cross-examine and impeach collateral crime witnesses, object to all the prosecutorial misconduct, and to adequately challenge the State's questionable DNA evidence.

The DNA evidence proved little or nothing because it was not scientifically sound. It needed to be challenged with documents and a proper testifying expert to avoid the jury overestimating its value. Counsel failed to adequately confront this evidence which prejudiced Truehill because, in this circumstantial evidence case, a jury would have given far too much weight to the State's questionable evidence.

The State's DNA evidence was also at the center of Truehill's *Giglio* and newly-discovered evidence claims. While providing an

independent legal theory for relief, these claims point to the ultimate conclusion that Truehill did not receive a fair trial.

The ineffectiveness continued in penalty phase. Counsel failed to develop and present important information from Truehill's loving family, who was more than willing to testify. Trial counsel failed them, and Truehill, when they were thrust onto the witness stand with little preparation.

Counsel prepared and utilized its expert in a similarly ineffective manner. Dr. Frederic Sautter was well-qualified to help the jury understand more than just the effects Hurricane Katrina had on Truehill, but counsel failed to adequately prepare him. There was much truth about Truehill that the jury and courts were denied.

There were additional instances of Truehill's rights being denied showing that he did not receive a constitutionally fair trial. The lower court denied these claims without a hearing, which would have shown that there were more constitutional failings in Truehill's case than the postconviction court considered.

Truehill's conviction and death sentences violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He asks this Court as the primary decider of such

claims to grant relief so that he can have what the Constitution requires - a fair and reliable trial.

### **STANDARD OF REVIEW**

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), the ineffective assistance of counsel arguments in Arguments I-III are mixed questions of law and fact requiring *de novo* review. The standard of review is elaborated upon in the other arguments as needed.

## ARGUMENT I

### **TRIAL COUNSEL WAS INEFFECTIVE DURING JURY SELECTION DENYING TRUEHILL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION**

Trial counsel was deficient for failing to adequately question the prospective jurors as necessary to meet the minimum standards in a death case. As a result of trial counsel's deficiency, Truehill was denied a fair and impartial jury and trial and was prejudiced because there was no assurance that the jury was free of bias, fully considered his mitigation, and abstained from improper consideration. This rendered the outcome of his trial unworthy of confidence. This Court should reverse.

The defense must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A defendant

need not show that counsel's deficient conduct more likely than not altered the outcome in the case. . . . An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if

the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

*Strickland*, at 693-94.

### **A. The Essential Nature Of Jury Selection**

Jury selection is one of the most important tasks capital counsel performs. A capital defendant is entitled to an impartial jury, and part of that guarantee is an “adequate voir dire to identify unqualified jurors.” *Morgan v. Illinois*, 504 U.S. 719, 734 (1992). Capital juries have an “awesome responsibility” and must make a “reasoned moral decision” after hearing all the evidence (aggravating and mitigating). *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring); *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985).

The purpose of voir dire is to secure an impartial jury. Counsel must obtain information during voir dire in order to employ challenges to find an impartial jury. *Durousseau v. State*, 218 So.3d 405, 411 (Fla. 2017), quoting *Nelson v. State*, 73 So.3d 77, 85 (Fla. 2011). It is trial counsel’s duty to “ferret out” the jurors who do not possess an impartial state of mind. *Nelson*, at 85, citing *Dufour v. State*, 905 So.2d 42, 54-55 (Fla. 2005). PC/4252.

Inadequate voir dire makes it difficult to determine where peremptory strikes would be necessary, and near impossible for capital counsel to determine which jurors should be stricken for cause, much less construct a coherent argument to strike those jurors. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

Postconviction counsel retained Terence Lenamon as an expert witness. He reviewed the trial transcripts with a particular focus on jury selection, and prepared a report detailing his findings. PC/3044-53, 9183. After his review, Lenamon opined that trial counsel's performance fell below an objective standard of reasonableness. PC/3053. Lenamon was accepted as an expert by the postconviction court with no objection from the State.

Lenamon testified that under prevailing norms, it is critical that a lawyer use jury selection that exposes both clear and latent prejudices, as well as other issues that are unique to capital cases. PC/9180, 9183, 9187. A capital attorney deals with the bad facts that are necessarily a part of a murder trial and must "address those issues directly in the jury selection process." PC/9184.

## **B. Deficient Performance In Jury Selection**

Raymond Warren conducted voir dire at trial. PC/8838. Warren's jury selection method was disjointed and woefully inadequate. He testified, "if I focused on 45 different subjects where I asked group questions and a few of them, those that might have been my personal ones that I ask all the time." PC/8917. "That approach of letting a jury explain how they think they should deliberate is unique to me." PC/8917.

The postconviction court noted Warren testified that looking for jurors who liked to deliberate had led to "three desired verdicts in first degree murder trials." PC/5103, 8927. However, merely relying on what may have worked before, or coasting on general concepts is not enough to find a fair and impartial jury. People are different, cases are different, juries are different. What works in one case does not necessarily work in all cases.

Warren's testimony about his jury selection method showed that he has a deep misunderstanding about selecting a jury in a capital case. It is not enough to find people who are willing to deliberate. General fairness and "follow the law questions" are insufficient to detect jurors who would automatically vote for the

death penalty or harbor a latent bias, nor can they detect those jurors with views that would prevent or impair their duties in accordance with their instructions and oath. *Morgan*, at 734. General group questioning is deficient performance under the prevailing norms. PC/9196.

Truehill's trial counsel failed in every aspect of jury selection. Counsel asked no questions that could expose juror bias, asked no questions regarding this case's particular aggravation or mitigation, and two jurors were seated without ever being questioned about their views on the death penalty.

### **C. Failure To Uncover Racial Bias**

Truehill and his co-defendants are Black men accused of kidnapping and murdering a White man after escaping from a Louisiana jail. Between Louisiana and St. Johns County, the trio were accused of, but not indicted for, a series of crimes. The majority of the victims in these crimes were White, and most of the victims of the uncharged crimes testified at Truehill's trial over defense objection.

Racial bias plays a part in a jury's decision-making in interracial crimes, although it should not, even if race is not necessarily a

motivating factor in the crime itself. “[T]here is a unique opportunity for racial prejudice to operate but remain undetected.” *Turner v. Murray*, 476 U.S. 28, 35 (1986). It is imperative for counsel to determine if there are people in the venire who might believe that Blacks are more “violence prone or morally inferior,” to not only determine whether the juror is biased, but whether that juror will properly consider mitigation. *Id.* “The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.” *Id.* Counsel’s failure to question prospective jurors on racial prejudice was a failure to protect Truehill’s constitutional right to an impartial jury. *Id.*, at 36.

Warren testified that he did not ask questions about race unless he thought the crime was racially motivated; and the trial court found this to be reasonable and did not amount to deficient performance. PC/5109. However, race is at play in interracial crimes regardless of the motivation behind the crime. *See Turner, supra*. Truehill was a Black man on trial for murdering a white man in a county where only 5% of the population is Black. PC/3045.

The trial court made much of defense counsel’s attempts to seat Black jurors, given the fact that there were so few in the venire to

begin with. PC/5106, 8757. However, merely stating a desire to seat Black jurors is as racially misguided as excluding them. Defense counsel stated that most people don't want to admit that they might be racist but failed to consider the myriad of ways to uncover unconscious bias rather than flatly asking people if they were racist. PC/8757-58. In cases with a white victim and a Black defendant it is important to learn whether there are any biased members of the venire. PC/8958. While it is important that minorities not be excluded from the jury, it also essential that the inevitable white jurors do not hold any prejudices, and it is counsel's job to discover those prejudices and make informed decisions regarding cause and peremptory challenges.

The postconviction court itself noted at the evidentiary hearing that it was "more common . . . in the northern counties than the southern counties [of Florida], but if . . . a lawyer does a good job, you make them feel at ease in admitting that there might be some prejudice even if they don't openly say I don't like Black people." PC/9208-09. As such, it was necessary to address race in jury selection. PC/9206.

Warren was solely responsible for jury selection; he was the only attorney who addressed the venire. PC/8837. He believed the team discussed asking the venire about racial bias and stated that he knew they wanted African Americans on the jury panel, and that there weren't enough. PC/8839. Warren admitted that he utterly failed to ask any questions designed to expose racial bias, stating, "I can't tell you why we didn't ask those – I did not. Not 'we.' Let me rephrase that. I didn't ask those questions." PC/8840. Warren admitted in his testimony that he did not have a strategy for failing to ask questions of the venire to determine whether any member of the panel harbored any bias. You cannot have a trial that comports with the Constitution if there is racism on the jury. PC/9209. *See Ham v. South Carolina*, 409 U.S. 524 (1973); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

The postconviction court stated that allegations of prejudice are based on speculative assertions that a juror would have answered a question and revealed a racial bias, stating that "the defendant is required to demonstrate that a particular juror was biased against the defendant, and that this bias is apparent from the face of the

record,” citing *Caratelli v. State*, 915 So.2d 1256, 1260 (Fla. 4th DCA 2005) and *Patton v. Yount*, 467 U.S. 1025, 1038-40 (1984). PC/5110.

*Caratelli* and *Patton* were based on failure to preserve cause challenges, after extensive voir dire, and were not decided under the *Strickland* standard. The cases are premised on the existence of actual record evidence of a juror’s bias, which does not exist in this case because the questions that could have revealed that bias were never asked. To say that there is no proof of juror bias because there is no record evidence is further proof of counsel’s ineffectiveness, because trial counsel failed to make a record.

#### **D. Failure To Discover Jurors Who Would Automatically Vote For The Death Penalty**

Two jurors were seated without directly being asked about their opinions on the death penalty: Krystin Sheridan and Ben Smith. Each were asked only whether they knew of any reason why they could or should not be a juror in this case in the preliminary questioning by the judge. Each answered in the negative. R25/169, 173. The defense did not prepare or provide questionnaires to the venire beyond basic information, and there were no written questions regarding each potential juror’s opinion about the death penalty.

Prospective jurors are disqualified from serving on a capital jury when their views about capital punishment would prevent or substantially impair the performance of their duties in accordance with their instructions and oath. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). The standard does not require bias to be “unmistakably clear” and is met when it is clear that a prospective juror would be unable to faithfully and impartially apply the law. *Witt*, at 425-26.

It is important to consider not only whether a prospective juror’s views on capital punishment would “generally lead to an automatic vote, one way or the other,” but also “the possibility that such a juror might be able to set aside those views and fairly consider both sentencing alternatives, as the law requires.” *Lockhart v. McCree*, 476 U.S. 162, 176 (1986).

To protect the accused’s right to trial before a fair and impartial jury, a capital attorney must ensure that prospective jurors do not hold any concrete views on the death penalty that would automatically lead to a death sentence regardless of the balance of the mitigating and aggravating factors. Death qualification voir dire cannot skirt around the issues so broadly that it is impossible to identify jurors whose views would prevent or substantially impair the

performance of their duties, while managing to avoid pre-trying the case. In this case, the questions asked were not sufficient to allow anyone to determine whether the jurors had feelings either way about the death penalty. Warren's questions to the panel about most topics were confusing and filled with legalese. Lenamon stated in his report that Warren spent more time talking about the Boston Red Sox than he did about the death penalty, and that "the remaining jurors were asked basic questions regarding the death penalty which resulted in answers of little value to the screening process of eliminating automatic death penalty votes." PC/3046.

The State asked a question to the entire group whether there was anyone opposed to the death penalty, and whether there was anyone on the venire who would not consider a life sentence following a conviction for first-degree murder. R25/234-36. These questions were to the entire group, asking for a show of hands, trusting that the people in the venire would respond, and trusting that the attorneys or the judge would notice everyone's response. The court reporter did not record raised hands or any other body language that might indicate a response to such a question. The State only followed

up with those whose hands he noticed. This cannot provide assurance that Truehill was tried by a fair and impartial jury.

Warren asked the venire about whether anyone was claustrophobic, about whether anyone who worked in management had hired or fired someone, and about following rules. None of these questions were directed to Jurors Smith or Sheridan.

One juror professed to be a “big fan” of the death penalty, and another nodded her head when the concept of an “eye for an eye” came up. R25/261-65. Neither Sheridan nor Smith participated in this discussion, and there is no indication in the record as to whether either exhibited body language that would give attorneys a clue about their feelings.

Warren continued with this convoluted question:

I want to ask all of the – well, let me go ahead and ask a blanket statement. . . . I’ve asked it already, but I guess I just want to ask this one last question on it. Do any of you feel that you have some belief about the death penalty that I would need to know, whether it was an eye for an eye, or whether there was some tipping point that had happened in your life that caused you to believe the way that you believe one way or another?

R25/268-69. This was typical of Warren’s disjointed jury selection.

He asked a general question and expected jurors to raise their hands

to discuss something as amorphous as a “tipping point” or something else he “would need to know.” Jurors did not have any idea what Warren “needed to know.” Neither Sheridan nor Smith raised their hands or participated in the discussion. Such a manner of questioning did little to ensure that Jurors Sheridan and Smith, or any other juror, could fairly consider a life sentence.

It was incumbent on the defense to determine whether any member of the venire was an automatic death vote, and they failed in this by not questioning the venire members directly and individually. Prevailing norms require capital counsel to learn whether anyone in the venire is an automatic death vote, this is not something that can be guessed or surmised. PC/9187-88. Counsel must ask questions that are reasonably case-specific and must follow up with each of the venire members to determine “where their position is on the death penalty.” PC/9189.

Warren admitted that he missed asking some jurors their opinion of the death penalty. PC/8838-39. Warren further admitted that failing to ask potential jurors about their opinion on the death penalty “would be a foolish strategy,” and that if he had realized at the time that he had failed to ask those questions, he would have

asked them. PC/8916-17. *There was no strategy* behind failing to ask the venire members their opinion on the death penalty. PC/8839.

The postconviction court noted Valerino testified that as a trial team, they normally asked a venire if anyone had any strong opinions about the death penalty and believed they did it this time; he did not remember missing these jurors. PC/5112. The trial record shows that this was wrong. The postconviction court found that the record supported that each panel was sufficiently examined because Warren asked each panel if they agreed with “eye for an eye,” whether they would automatically impose the death penalty in cases where a child or animal was killed, and whether they might be affected by violent images. PC/5113.

The postconviction court noted that Warren asked Sheridan about mitigation and that she provided a highly favorable response for the defense saying she was not partial to the death penalty. In fact, the exchange went as follows:

Warren: How about Ms. Sheridan? I don't think anybody's picked on you yet, so I'm going to. We're on that theme of deliberation.

Sheridan: Yes, sir.

Warren: If I were to throw out a term, could you answer whether you think that's a good way to deliberate or a bad way to deliberate? Ponder.

Sheridan: It 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.

Warren: Well, that's good; as long as it pertains to this case.

R23/252-53.

This exchange was not favorable to the defense. This response was generic at best, and certainly would not assist counsel in determining whether Sheridan would consider a life sentence. It also makes clear that Sheridan had not been asked any questions prior to this. She was also not asked any questions after this.

The trial court indicated in its order that Truehill did not introduce any facts supporting the contention that either Sheridan or Smith favored the death penalty. PC/5113, 5115. This is simply because he did not have the opportunity to. It is impossible to introduce evidence that does not exist due to the ineffectiveness of trial counsel. Moreover, collateral counsel was not able to interview the jurors, leaving a vacuum where information should be. As cited above, the trial court's reliance on *Caratelli* is misplaced, because the issues in those cases arose after extensive voir dire; in this case, the

jurors of concern were barely asked for any information beyond their names. Postconviction counsel attempted to remedy this lack of information and filed a Motion to Interview Jurors. PC/926-953. This motion was denied. PC/1076.

Expert witness Lenamon testified that under prevailing norms, it is *never* appropriate for a juror to be sworn without being asked about their opinion on imposing the death penalty. PC/9210. The risk that death-unqualified jurors might be sworn is “unacceptable in light of the ease with which that risk could have been minimized.” *Morgan*, at 736, quoting *Turner v. Murray*, 476 U.S. at 36. There is no legitimate strategy for failing to ask a juror for his or her thoughts on the death penalty, there is no prohibition on counsel asking questions to determine whether a juror has a bias in favor of the death penalty. There was no legitimate or strategic reason for defense counsel’s failure to do so in this case.

#### **E. Failure To Determine Whether Jurors Would Consider Mental Mitigation And Defense Theories**

Mitigation is “largely a judgment call (or perhaps a value call); what one juror might consider mitigating, another might not. . . . In the last analysis, jurors will accord mercy if they deem it appropriate,

and withhold mercy if they do not, which is what our caselaw is designed to achieve.” *Kansas v. Carr*, 577 U.S. 108, 119 (2016).

Expert witness Lenamon testified that it is necessary for defense counsel in capital cases to uncover jurors who would be unable to meaningfully consider mitigation evidence because “there are many jurors who cannot accept certain types of mitigation” like abuse, thinking they were abused themselves and turned out all right, so they will not consider that as mitigation. PC/9190-91. If a juror says that they cannot consider child abuse as a mitigator because they were struck as a child, “they’re saying they can’t consider a lawful mitigating circumstance.” PC/9192. It is necessary in jury selection to discuss aggravating and mitigating factors, because there are some aggravators that may lead a juror to completely discount *all* mitigation. PC/9195. Failure to discover such jurors is a violation of a client’s rights to a fair and impartial jury under the Federal and Florida Constitutions.

While Warren questioned the venire about whether they would listen to the evidence, asked about aggravators that were not present in this case (whether someone would automatically vote for death if a child or an animal were the victim), and briefly inquired about

whether jurors would consider mental health a disease (R25/295-98), he did not ask the jury any questions that would have given the defense any idea about whether this particular venire would fully consider the defenses raised during guilt phase or the mitigation raised at penalty phase.

Valerino agreed it is important to determine if jury members would consider mitigation. PC/8762. As Lenamon testified, each juror must be questioned about all the issues raised in the case, and the lawyer should not guess about a juror's position. Open-ended questions are necessary regarding both aggravation and mitigation, as well as race issues and anything else that could lead to bias and an unfair jury. PC/9196.

The postconviction court mistakenly found that Warren questioned the venire extensively. There is a difference between asking a lot of questions and asking the right kinds of questions that will help a defense choose a fair and impartial jury. "The record reflects 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." PC/5104. The postconviction court found that counsel was not ineffective for failing to question the

jury about guilt and mitigation themes; that the strategy of looking for jurors receptive to the deliberative process constituted sound trial strategy, and that any prejudice is wholly speculative. PC/5105.

The postconviction court again held that Truehill did not demonstrate that any juror would have provided a response evidencing bias or prejudice, citing *Green v. State*, 975 So.2d 1090, 1105 (Fla. 2008). The postconviction court's reliance on this case is misplaced. In *Green*, there was at least some evidence in the record regarding potential bias based on a juror's answers, but the juror also said he could be fair, and passed the test for juror competency. Here, the jurors were never tested for competency because counsel's performance in jury selection was deficient to the point that any claims that could be raised are absent from the record based solely on the failure of counsel to fully question the venire.

#### **F. Truehill Was Prejudiced By Counsel's Deficient Voir Dire**

The jury's role in death penalty cases is more important than in any other type of case. See *Turner v. Murray*, 476 U.S. at 37. A biased jury requires automatic reversal. *McKlesky v. Kemp*, 481 U.S. 279, 292-93 (1987).

Not only was counsel's performance deficient, it prejudiced Truehill's defense. As defense expert Lenamon testified at the evidentiary hearing:

Jury selection is the most important process in any trial, bar none, but in capital cases, it's even more so because if you do not follow the prevailing norms and address the issues that are both case specific and specific to . . . the actual capital regime, you're failing on so many levels. And you're allowing jurors who would normally be struck for cause or peremptory . . . on the jury . . . it becomes devastating to the case.

PC/9184-85. Such was the case here. Trial counsel performed deficiently by not questioning the jurors in a manner that met the constitutionally required bare minimum in a capital case. Without the assurance of minimally competent jury selection, Truehill was prejudiced because he was tried by a jury that gave no assurances they could follow the law in a death case and no assurances they could be fair and impartial because they were never asked to give those assurances.

## **G. Conclusion**

Trial counsel's failure to question the potential jurors on important issues concerning race and mitigation and failure to discover whether any of the potential jurors were a guaranteed vote

for death was deficient performance. Any strategy imputed to these failures is unreasonable. This deficiency in jury selection denied any assurance that Truehill would receive a fair trial in guilt and penalty phase and prejudiced the outcome of the entire trial. This Court should reverse.

## **ARGUMENT II**

### **TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT DURING THE GUILT PHASE RESULTING IN PREJUDICE TO TRUEHILL AND DENYING TRUEHILL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION**

Defense counsel's performance in guilt phase was ineffective due to counsel's failure to properly cross-examine and impeach several of the State's witnesses, and due to counsel's failure to object to prosecutorial misconduct. To the extent that the trial court allowed the State to present the unfairly prejudicial evidence of unrelated crimes, reasonable counsel should have confronted this evidence with impeaching evidence on cross-examination. Moreover, trial counsel should have objected to the prosecutorial misconduct to prevent further prejudice. As a result of trial counsel's deficiencies Truehill was prejudiced because there was a reasonable probability

that but for counsel's failures, Truehill's jury would have heard the truth and the outcome would have been different.

### **A. Failure To Cross-Examine And Impeach Collateral Crime Witnesses**

The witnesses in question all testified in relation to uncharged collateral crimes. Counsel was forced to object to each of these witnesses' testimony based on impermissible Williams-Rule and inextricably intertwined evidence because the judge had not yet ruled on the evidence. However, counsel failed to impeach the witnesses with crucial facts and prior inconsistent statements. In failing to do so, counsel failed to zealously advocate for Truehill with no valid strategic reason.

#### **1. Leann Williams**

Williams was robbed in a parking lot in Pensacola; she was never able to identify the men who robbed her – either prior to or during trial. R34/218. She described the man who attacked her as larger and taller than herself, a description which did not fit Truehill, but did fit his codefendant Johnson. R34/226, PC/8962. Defense counsel did not cross-examine Williams regarding her prior identification of her attackers as Hispanic, and the fact that when

she saw pictures of the three defendants, she only recognized Johnson. PC/2975-3017. Counsel did not recall this failure and did not recall if there was a strategic reason for this failure. This was particularly prejudicial, because this would have underlined the guilt phase strategy of pointing to Johnson as the leader of the three codefendants. PC/8962.

The postconviction court found that Williams' trial testimony necessarily excluded Truehill as her attacker, therefore the failure to cross-examine on this issue was not deficient performance. The court further found that there is no prejudice because her testimony excluded Truehill as the person who attacked her, but sufficient evidence existed that corroborated that he was present at the crime. PC/5145.

## **2. Brenda Jo Brown**

Brown suffered serious injuries in an attack in Pensacola; she identified Truehill as one of the three men who entered the apartment where she was attacked. R35/316. She did not know which of the men caused her injuries. R35/313. Brown was never able to identify Truehill before the trial, yet Warren did not cross-examine her about this fact. PC/8877-78. Warren's post-hoc rationalization of this

failure was that he feared Brown would identify Truehill from the stand. PC/8879.

The postconviction court held that this failure to impeach was reasonable strategy, and that there was no prejudice because the DNA evidence corroborated her testimony; there was no real question that Truehill was involved in the attack. PC/5149. However, Brown had already identified Truehill during her direct examination. It was incumbent upon Warren to point out this inconsistency, especially because trial counsel objected to all the collateral evidence.

### **3. Chris Pavlish**

Pavlish was attacked by three men in Tallahassee as she was walking home. R35/361. Pavlish had never identified Truehill prior to trial. R21/137-38, PC/2927-66. Yet at trial she was able to identify Truehill from the stand. R35/367-68. Warren failed to cross-examine her about this, again attempting to justify this failure that he feared her identifying Truehill from the stand. PC/8881.

The postconviction court found no deficient performance and no prejudice. PC/5153-54. However, as with Brown, Pavlish had already identified Truehill, thus negating Warren's excuse for failing to fully cross-examine Pavlish and Brown.

As a result of this failure, all the jury heard was unquestioned and uncontroverted identification of Truehill from two people who had never identified him prior to taking the stand, based on uncharged crimes that were introduced solely to inflame the passions of the jury.

#### **4. The Complete Lack Of Cross-Examination Of Mario Rios**

The most egregious failure on the part of defense counsel came from the complete lack of cross-examination of Rios. R35/354. At trial, Rios identified Truehill as the man who grabbed him by the shirt in what appeared to be an attempted robbery. R35/342. Between speaking with the police and his testimony at trial, Rios changed his story and mixed up the codefendants. In one interview he said he could not see what his attacker was holding, yet at trial he testified that Truehill was holding a knife. R35/344. Prior to trial, Rios searched online and read articles about the three defendants. R21/119-22.

Valerino testified that he did not cross-examine Rios due to the DNA evidence on his shirt, which pointed to Truehill as the person who grabbed him. PC/8784. However, as stated below, if counsel obtained the necessary documents prior to trial and if counsel

understood the DNA evidence better, they would have known that the DNA evidence was suspect and may not have tied Truehill to the shirt at all. Between the questionable DNA evidence and Rios' inconsistencies, this information should have been presented to the jury to determine Rios' overall credibility and the weight his testimony should be given. Rios had already identified Truehill from the stand, cross-examination would have done no additional harm, and would have given the jury more information to use in their deliberations.

The postconviction court held that any attempt to impeach the in-court identification would have been futile and would have reinforced the identification, thus the failure to cross-examine was sound trial strategy. The postconviction court based its opinion at least in part on the DNA was found on Rios' shirt, and that there was no prejudice "because the DNA on Rios' shirt independently and irrefutably established that the defendant had physically contacted him. . . ." PC/5158. However, as stated below, counsel's deficient performance regarding the DNA muddies these waters.

The introduction of dissimilar fact collateral crime evidence featured heavily in Truehill's trial and was permitted over defense

objections. Each of these witnesses testified to Truehill's alleged involvement in crimes for which he was not charged and served only to inflame the jury's passions. Three of these witnesses identified Truehill from the stand despite never having identified him prior to trial; the fourth never identified Truehill at all and testified that her attacker in no way physically resembled Truehill. Had defense counsel cross-examined and impeached these witnesses regarding the discrepancies in their statements, their credibility would have been called into question to the jury.

#### **B. Failure To Object To Prosecutorial Misconduct**

The prosecution used inflammatory language and misstated facts during opening statements and closing arguments, and defense counsel missed several necessary objections. This is deficient performance that further prejudiced Truehill's defense.

During opening statements, the State argued facts not in evidence; facts that would *never* be in evidence. Defense counsel failed to object when the State claimed that "Truehill and Hughes attacked [Williams] and took her purse." R33/28. This is especially egregious because all parties understood Williams never identified her attackers, and because defense counsel failed to cross-examine

Williams with her prior description of her attacker, which more closely matched codefendant Johnson. Given the fact that defense counsel stated their goal to present Johnson as the ringleader, this was particularly prejudicial. It is improper for a prosecutor to misstate facts or the testimony of a witness. *United States v. Williams*, 504 U.S. 36, 60 (1992). Warren recognized that he should have objected, and that there was no strategic reason for failing to do so. PC/8881-82. The postconviction court held that this was not deficient performance because the statement was not objectionable and because not all statements made in opening are not always elicited during trial. PC/5159-60.

During closing arguments, the prosecutor described Truehill as the “hatchet man” during the attack on Brown, even though she neither saw nor identified who caused her injuries. R35/313. This piled on the error that had already occurred: the trial court allowed evidence of uncharged collateral crimes to be presented to the jury over defense objection; defense counsel failed to cross-examine any of the collateral witnesses regarding their inconsistent statements. The jury heard a great deal about uncharged dissimilar fact crimes, which would affect how the jury viewed Truehill, for actions that he

may not have taken. The State's closing argument that Truehill was the person that brutally attacked Brown was not evidence adduced at trial, it was instead yet another highly prejudicial attempt to inflame the jury based on crimes Truehill was not charged with and was not proven to have committed.

Trial counsel failed to object to these highly objectionable and inflammatory statements. The postconviction court held that Warren's failure to object was not deficient performance, that the reference to a "hatchet man" was not a specific accusation that Truehill injured Brown, but was a reasonable conclusion from the evidence presented that Truehill was always the one seen wielding a knife. PC/5161-62. The postconviction court mistakenly believed that referring to Truehill as the "hatchet man" was not a mischaracterization of the evidence, even though the only testimony was that he was seen holding a knife.

The postconviction court noted that any objection to the term would only have served to repeat it before the jury; therefore, not objecting to inflammatory comments to avoid drawing attention to them was a reasonable strategy. PC/5162. However, Warren testified that he was not giving the State's closing his full attention and that

the remarks may have “slipped past” him. PC/8882. He admitted that there was no strategy for failing to object because he was focused elsewhere. PC/8883.

The postconviction court ruled that there was no prejudice, because “once the comment has been made, the jury could not unhear it.” PC/5163. This puts Truehill in a Catch-22. The jury has already heard something prejudicial, which they cannot unhear. Yet objecting and calling attention to the prejudicial statements would be poor strategy, according to the trial court. What the postconviction court missed was that with the objection, counsel was required to move for a mistrial. Had counsel done so the court would have been required to grant it and Truehill would have received a trial free from the State’s egregious misconduct. Moreover, the court ignores this Court’s appellate review and the critical role of such review in assuring that the death penalty is not imposed unconstitutionally and that it follows a fair trial. This Court was denied the full spectrum of the State’s misconduct in this case. While this Court found that the other misconduct that was objected to and raised in the direct appeal did not require reversal, such would not have been the case if this Court was confronted with entirety of the State’s misconduct.

While there is fundamental error, it is a poor substitute for an argument based on a fully preserved argument in the trial court. Truehill did not receive this because his counsel was deficient. The prejudice was indeed overwhelming, because whether the trial court granted the mistrial or this Court reversed on appeal, the result in this case would have been different because the law does not allow such egregious conduct to convict or support a death sentence.

### **C. Prejudice**

Counsel's deficiency prejudiced Truehill because the jury was denied the full truth, thus denying him a fair trial worthy of confidence. At trial, the court noted that defense cross-examination was unnaturally limited: "I was concerned about the number of witnesses that have testified and no cross-examination has taken place of those witnesses." R39/785. This rendered the guilt phase unreliable. There is a reasonable probability that if the jury heard the available (but unused) impeachment evidence regarding the collateral crime witnesses, it would have served to diminish Truehill's culpability as compared to his codefendants, which was (according to counsel) the plan for guilt phase. PC/8754-55, 8836.

In their failure to object to the State's misconduct and improper statements, defense counsel's deficient performance prejudiced Truehill and denied him a fair trial. While these errors alone are enough to warrant a new trial, they must also be considered in the context of the multitude of counsel's failures. Truehill was prejudiced by this deficient performance and should receive a new guilt and penalty phase trial.

#### **D. Conclusion**

Defense counsel's failure to fully and vigorously cross-examine and impeach several of the witnesses to a series of uncharged collateral crimes, and failure to object to prosecutorial misconduct was clearly deficient performance. These deficiencies prejudiced Truehill because there is a reasonable probability that had counsel not failed in these regards, Truehill's jury would have heard the truth and the outcome would have been different. This Court should reverse.

### **ARGUMENT III**

#### **TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE WHICH VIOLATED TRUEHILL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

Truehill was denied the effective assistance of trial counsel during the penalty phase. Counsel performed deficiently in several regards. As a result of trial counsel's deficiency, Truehill was denied the presentation of evidence that would have convinced at least one juror to spare his life. There is no confidence that his case is one of the most aggravated and least mitigated.

The jury that recommended death had an incomplete understanding of who Truehill was and what influenced the choices he made in life that led to his standing trial for capital murder. Truehill proved counsel's ineffectiveness in three areas. First, trial counsel failed to fully investigate and present mitigation. Counsel failed to develop and present all the compelling mitigation that was available and was known, or should have been known, by counsel. Truehill's family had great love and concern for him but trial counsel failed to prepare his loving family to present his full history and

experiences that the jury would have found compelling.

Second, counsel had a strong expert, Dr. Fredrick Sautter, more than capable of testifying in a complete manner about the effects of various lifelong trauma that Truehill suffered. The evidentiary hearing showed that Dr. Sautter could have provided a complete picture of Truehill's mental state, its origins and its implications, had counsel taken the time to properly prepare the presentation.

Lastly, after defaulting the full mitigation that Truehill had a right to have the jury consider, trial counsel sat idly by as the State's expert offered spurious testimony that negated the mitigation trial counsel developed. Unlike Dr. Sautter's well supported opinion, Dr. Prichard essentially offered his opinion on Truehill's character, based not on scientifically valid methods but Dr. Prichard's own conjecture. This should have been exposed by cross-examination.

Truehill clearly proved that trial counsel was deficient. The postconviction court erred in denying relief because the prejudice that Truehill suffered was overwhelming. Truehill was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This Court should grant relief.

## **A. THE LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL**

The right to counsel means nothing if counsel was ineffective. “Counsel [ ] has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland*, 466 U.S. at 688 (1984). As part of this duty, counsel has an “obligation to conduct a thorough investigation of the defendant’s background” for the purpose of uncovering mitigation evidence for the sentencing phase. *Andrus v. Texas*, 140 S.Ct. 1875, 1881 (quoting *Porter v. McCollum*, 558 U.S. 30, 39 (2009)). See also *State v. Reichmann*, 777 So.2d 342, 350-51 (Fla. 2000). “[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated – this is an integral part of a capital case.” *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002).

In a case where the ultimate punishment may be imposed, counsel’s investigation must be thorough. *Andrus*, at 1881. “If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, ‘evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and

mental problems, may be less culpable than defendants who have no such excuse.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002). Counsel has a duty to “discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

The ABA Guidelines has articulated “well-defined norms” for the performance of capital defense teams at sentencing. *Wiggins*, 539 U.S. at 524; *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000). “The ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’” *Parker v. State*, 3 So.3d 974, 984-85 (Fla. 2009) (quoting ABA Guideline 11.4.1(c), at 93 (1989 ed.)).

It is deficient performance for counsel to present a laundry list of mitigation factors; those facts must be explained and the ramifications of those experiences on defendant’s behavior must be

explained. ABA Guideline §10.11 (commentary). A jury needs a more detailed and nuanced picture of the defendant's formative years, rather than just ticking the boxes of "bad childhood."

The prevailing norms of capital defense require the case in mitigation to include any evidence that would tend "to lessen the defendant's moral culpability for the offense or otherwise support a sentence less than death." ABA Guidelines, §10.10.1 (commentary). Trial counsel should present the combination of all the factors that led the client to that moment to the jury, and it is "critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors." *Id.*

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court held that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* at 527.

[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

*Id.* at 521-522;(quoting *Strickland*, 466 U.S. at 690-91).

In *Sears v. Upton*, 561 U.S. 945 (2010), the Court granted relief based on ineffective assistance of counsel even though counsel had presented some mitigation. The Court stated:

We certainly have never held that counsel’s effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below. In the *Williams* decision, for instance, we categorically rejected the type of truncated prejudice inquiry undertaken by the state court in this case. 529 U.S., at 397-398, 120 S.Ct. 1495. And, in *Porter*, we recently explained:

To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation.” 558 U.S., at ----[, 130 S.Ct., at 453-54]. (internal and external emphasis removed).

A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears’ “significant” mental and psychological impairments, along

with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation.

*Id.* at 955-56. In *Rompilla v. Beard*, 545 U.S. 374 (2005), the United States Supreme Court concluded:

This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, . . . It goes without saying that the undiscovered “mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of [Rompilla’s] culpability,” *Wiggins v. Smith*, 539 U.S., at 538, 123 S.Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S., at 398, 120 S.Ct. 1495), and the likelihood of a different result if the evidence had gone in is “sufficient to undermine confidence in the outcome” actually reached at sentencing, *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052.

*Id.* at 393; citing *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

## **B. TRUEHILL PROVED THAT TRIAL COUNSEL WAS INEFFECTIVE**

Truehill proved at the evidentiary hearing that counsel was deficient and that he was prejudiced. The lower court erred in denying relief. This Court should find that trial counsel was ineffective at the penalty phase based on the arguments that follow

and reverse.

## **1. Trial Counsel Failed To Fully Investigate And Present Mitigation**

### **a. Family**

Trial counsel failed to conduct a full investigation into Truehill's mitigation. Truehill was fortunate that he had a loving family that were willing to help develop his life history. In many cases, individuals find themselves with no family support and are all but abandoned at penalty phase. This was not the case with Truehill's family despite his bad decisions and familial strife which affected them all. Trial counsel had a rich source for developing mitigation because of the family's willingness to help, yet trial counsel failed to fully develop and present this mitigation. This was unfair to Truehill, his family, and the jury that recommended death without a full understanding of how Truehill came to be on trial for his life.

Testifying at a penalty phase in a death case is not within the normal experience of most people. Additionally, even the most well-meaning family member will not have knowledge or experience that counsel is supposed to bring to bear in a capital case. It is therefore necessary for counsel to spend time with potential witnesses to first

obtain the necessary information and then present it as part of a coherent mitigation presentation. Trial counsel must strive to make it as comfortable as possible for lay witnesses faced with this stressful experience.

Testimony at the evidentiary hearing showed that counsel did not meet these important standards. Valerino, who was ostensibly lead counsel for penalty phase, testified that there had been “some conversation” at the depositions, and that the attorneys met with the lay witnesses to go over their testimony, but “I do not recall . . . if we spoke to them personally prior to that. . . .” PC/8789-90. This was not enough. Valerino testified that there were no restraints placed on the mitigation investigation; if Susan Herrero, the mitigation specialist retained by the defense, had requested to travel out of state to interview witnesses it would have been approved. PC/8787.

Herrero testified otherwise. PC/9573. She testified that she had requested to attend trial because she was the lay witnesses’ main point of contact (PC/8970-71); Valerino testified that he did not believe Herrero had made this offer based on some information that he received that Herrero was having surgery around that time. PC/8791-93. Neither Valerino nor any other member of the trial team

remembered following up with Herrero to confirm whether she could attend. PC/8796. These misunderstandings underline the communication problems within the defense team, which led to things being missed in mitigation. If Herrero could not attend trial, it is highly likely that there would have been a motion to continue. Regardless of Herrero's attendance at trial, it became incumbent on trial counsel to spend the time with these witnesses because witness preparation is a necessary function of *counsel*.

The family witnesses at the evidentiary hearing testified to counsel's deficiency in dealing with them. For instance, Truehill's stepmother Miranda testified that she had not spoken to the defense team prior to her deposition and had a brief meeting with them in a conference room the night before she was to testify. PC/9056-58. She testified at the evidentiary hearing that she was unable to convey the depth of the abuse and strife that affected Truehill because she was not properly prepared. PC/9057.

At trial, Truehill's stepmother was unable to testify fully about the abuse she endured at the hands of Marshall Truehill, Jr. PC/9068. After proper preparation, at the evidentiary hearing, she provided a wealth of information regarding the Truehill home life that

she did not at trial. She testified about the public versus the private Marshall Truehill, and the near constant physical and emotional abuse. PC/9050, 9058-59.

The postconviction court found that some of Miranda's testimony at trial established several mitigators and noted that some of her evidentiary hearing testimony contradicted her trial testimony. This stands to reason, based on her testimony that she felt unprepared. The postconviction court seems to imply that there is no difference between working with a witness to prepare them for a very intimidating experience and "coaching" that witness. Contrary to the postconviction court's mischaracterization, there is nothing improper about knowing how a witness will answer a question. Indeed, it is deficient to not prepare and provide a coherent presentation. The postconviction court also fails to understand that a truthful answer has more impact than just the question because the answers need to be considered by the experts to form a coherent mitigation presentation.

Truehill's sister Jessica also testified that she did not speak to the defense team prior to her deposition and only spoke to the attorneys briefly and shortly before her trial testimony. PC/9107-08.

During that brief meeting, they did not review her testimony, “it was more or less them asking questions and writing things down.” PC/9108. She testified at the evidentiary hearing that the beatings inflicted by Truehill’s father were sporadic and spontaneous, “if he was really angry, he would just start hitting and it didn’t matter where. Other times, when he was a little more levelheaded, he would say . . . now you’re going to get a whipping. So we were prepared for it and he would tell us why, and the whipping continued.” PC/9110. At trial, Jessica testified about *some* of the abuse the Truehill family suffered at the hands of their father, but because of the lack of preparation her testimony was more a series of disconnected anecdotes rather than a comprehensive, cohesive narrative that would enable the jury to see her brother as a damaged human being.

The situation was the same with Valli, Truehill’s mother. At the evidentiary hearing Valli was finally able to provide a fuller picture of the abuse she and her children suffered. She was able to expand upon the testimony she gave at penalty phase and tell of further incidents of abuse, including psychological abuse and multiple rapes, that would have given the jury a better understanding of the toxic environment in which Truehill was raised. PC/9139-67.

Counsel's failure to fully interact with the mitigation witnesses, to prepare them in any way for their testimony, falls far below minimum professional standards and prevailing norms, and as such, prejudiced Truehill's defense under *Strickland*. Truehill was prejudiced because the jury never heard all the testimony from his family that was presented at the evidentiary hearing.

The postconviction court found that this testimony was "largely cumulative" to what was presented at penalty phase and questioned whether this evidence would have "been deemed relevant" at that time. A jury is entitled to, and indeed *must*, hear all relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 US. 586, 604 (1978).

Important mitigation was neither discovered nor used because defense counsel spent almost no time with the Truehill family and clearly did not establish the trusting relationship necessary to enable them to share difficult truths about their family and Truehill's

upbringing. As Dr. Cunningham explained, “if individuals are going to disclose information that is sensitive and might otherwise be considered private in our society, then sufficient time has to be spent that a quality of trust and rapport has been established.” PC/9254. Trial counsel failed to do this.

**b. Trial Counsel Was Ineffective For Not Presenting The Full Scope Of The Mitigation Through Expert Witnesses**

Trial counsel had the mistaken idea that Truehill’s PTSD diagnosis was solely related to his experiences during Hurricane Katrina. PC/8786. Mitigation Specialist Herrero testified that the trial team seemed to be focused on Katrina, and that when she brought other mental mitigation to the trial team, she was told that it was too much. PC/9566. She wanted to bring out Truehill’s abandonment and parental alienation, but the attorneys wanted to focus on Katrina PTSD. PC/9567. There was much more to Truehill’s trauma than counsel presented.

Prior to trial, it was determined that Valerino was lead counsel for penalty phase. PC/8833, 8894, 8957. Valerino was to conduct the direct examination of the defense mental health expert, Dr. Frederic Sautter, and cross-examine the State’s expert, Dr. Prichard. Warren

was present for some conversations regarding penalty phase and mitigation, but it had been decided that he would not present any witnesses during penalty phase. PC/8895, 8898.

This arrangement changed during the penalty phase. The attorneys believed that penalty phase closing arguments would follow close on the heels of the experts' testimony, and Valerino felt he could not prepare for Dr. Sautter's direct examination as well as closing argument. PC/8802. No more than a day or two before the experts' testimony, Valerino asked Warren to assume responsibility for Drs. Sautter and Prichard. Warren initially refused, because he felt he was not ready, and not well enough versed in PTSD to present that testimony; he eventually agreed to handle the witnesses so Valerino could focus on the closing. PC/8896-97.

Dr. Sautter was initially contacted by the defense in September 2012 to evaluate Truehill for PTSD; Valerino was Dr. Sautter's primary contact because he was ostensibly primary for the penalty phase. PC/9004. Dr. Sautter was not given any parameters for his evaluation nor was he given any specific information regarding the charged crimes. PC/9005. It would have been important for Dr. Sautter to have information regarding the crimes, because with

PTSD, as Dr. Sautter explained, “everything becomes relevant that has stress involved, and even things that don’t involve stress.” PC/9005-06.

Trial counsel must work closely with mental health experts to prepare for trial. Prior to Truehill’s case, Dr. Sautter had never been deposed before and trial counsel made no effort to learn that or to prepare him for the deposition. PC/8799-8800, 9010. Dr. Sautter had no idea what to expect during the deposition; he was merely told that it would be about PTSD. He was very nervous, because he did not know what would happen, and the deposition was very different from what he was told. PC/9011.

There was no additional preparation between the time Dr. Sautter was deposed and the trial. PC/9012. In all of Dr. Sautter’s prior forensic cases he prepared for his direct and cross-examinations with the attorneys. PC/9012. Such preparation is necessary because trial counsel should know what an expert is going to testify to in order to prepare proper questions and best present the evidence.

Dr. Sautter believed that Valerino would be questioning him at trial; the night before his trial testimony Dr. Sautter learned that he

might not be questioned by Valerino, and then discovered the morning of his testimony that he would be questioned by Warren. PC/9013-14. Warren spoke with Dr. Sautter for two to three minutes prior to his testimony and did not work with Dr. Sautter to prepare for trial or for his testimony in any way. PC/9014, 9022. Warren testified that he was able to communicate with Dr. Sautter and felt that the doctor was prepared to testify. PC/8895-98. Dr. Sautter testified that his sole preparation was reviewing material that he was given. PC/9014.

During his testimony, Dr. Sautter felt unprepared and unclear as to the direction of questioning. PC/9017, 9021. There was a break during his testimony, which came at the time that Dr. Sautter was discussing Truehill's abandonment by his family, which Dr. Sautter believed was very important. PC/9017-18. When court reconvened, Dr. Sautter was not able to return to the topic and provide the jury with the information that he believed it needed regarding PTSD including support variables and social context in order for the jury to understand Truehill's behavior. PC/9017-20. Dr. Sautter was not able to develop Truehill's depression diagnosis and believed that it

was not addressed at all. PC/9019. Accordingly, the jury was denied important mitigation to consider.

Dr. Sautter testified that he was not able to provide a comprehensive expert opinion concerning Truehill's mental status and was not able to clarify questions about his report on redirect. PC/9019-20. The defense team lacked the understanding necessary to enable Dr. Sautter to explain to the jury all the trauma and stress in Truehill's life both before and after Hurricane Katrina; this affected the way the PTSD expressed itself. PC/9016-17. This would have made Truehill's mitigation more compelling and would have helped the jury decide to vote for life instead of death.

Based on his cross-examination at trial, Dr. Sautter believed that the State did not understand the PTSD testing instrument how the testing is administered, or truly about PTSD itself. Dr. Sautter believed that there was a lot to explain that he was unable to, and Warren did not enable him to clarify his points on redirect. PC/9020-21. Dr. Sautter felt as if he had been whisked off the stand. PC/9021-22. This was hardly the presentation of mitigation required in a death case.

While counsel referred to some abuse in Truehill's childhood home, they merely presented disjointed anecdotes, rather than presenting a full picture. Counsel made much of Truehill's diagnosed PTSD as a result of his experiences during Hurricane Katrina, but they did not make the connection for the jury – from the childhood abuse, shuttling between homes, being the youngest of a large family, being gradually abandoned by his siblings, and eventually being abandoned by his parents as a result of the separation brought about by Hurricane Katrina.

Collateral counsel retained Dr. Mark Cunningham to identify adverse developmental factors that could have been considered in mitigation at the time of trial but were not. Dr. Cunningham uncovered and presented new and substantial mitigation that was available at the time of trial and was not cumulative to what little had been presented. Dr. Cunningham testified at length, as Dr. Sautter could have, that there was a nexus between the adverse developmental factors in Truehill's childhood and the outcomes in his life. PC/9234-9446. Dr. Cunningham identified a vast number of risk factors, adverse community factors that affected Truehill and led to his having a diminished capacity to make reasonable choices.

Contrary to the trial court's discounting Truehill's mitigation based on the relative success of his siblings, a qualified expert such as Dr. Cunningham or Dr. Sautter could have explained *why* this was the case. Every person experiences his family differently, and it is up to defense counsel to ensure that the jury understands that. Dr. Cunningham pointed out the difference between Truehill and his siblings, and how each of his siblings had other protective factors that shielded them from some of the more traumatic experiences of their childhood and the differences in the experiences of Truehill's siblings as compared to him. PC/9264. Dr. Cunningham detailed the multigenerational trauma that affected Truehill's ability to regulate his emotions and make decisions. PC/9321-9433.

Dr. Cunningham testified that the way a defense counters the State's presentation of the defendant as an evil person who made an evil choice is to show the jury that the defendant is "a damaged person who made a tragic choice." PC/9252. Dr. Cunningham identified a multitude of adverse developmental factors that tipped the slope of Truehill's moral culpability and made it increasingly difficult for him to make the right choices. "So it has less to do with what did he do as opposed to how did we get here? What resources

were brought to this decision-making? How was he damaged?”

PC/9249.

[A]nother important understanding of child – of adversity is that an adverse factor does not have a 100 percent penetration effect. In other words, every child that’s physically abused doesn’t grow up to show obvious psychological impairments or disorders or criminality. You don’t see a 100 percent relationship. And sometimes I’ll even be asked on the stand, Dr. Cunningham, his brothers and sisters grew up in the same household, and they didn’t kill anybody. Well, that’s calling for a 100 percent penetration model, only that’s not the way we understand the connection between toxins and outcomes in psychology or medicine.

PC/9262.

These important points could have been made at trial if trial counsel was not ineffective in Dr. Sautter’s preparation and presentation. Trial counsel failed here too.

Defense counsel’s failure to prepare, integrate, and utilize Dr. Sautter fell below the objective standards of effective assistance of counsel. *Sochor v. State*, 883 So.2d 766, 771-85 (Fla. 2004). His testimony would have tied together Truehill’s mitigation – trauma, stress, abuse, abandonment, and PTSD, as seen through the lay mitigation witnesses. Instead, the defense team utterly failed to provide any parameters for evaluations and adequately prepare Dr.

Sautter to testify. The defense team wasted the resource of their most critical penalty phase witness.

Warren was given the responsibility of tying the mitigation together with almost no preparation, after having the responsibility of the guilt phase. He testified that he felt unprepared to handle Dr. Sautter. PC/8896-97. Warren testified, “my initial reflex was, I can’t do it, I’m not versed in PTSD enough . . . to present that testimony.” PC/166. Despite being fully unprepared to handle what was the most important part of penalty phase, Warren decided to proceed. Warren’s initial reaction to handling this witness was correct, and his complete lack of understanding of the subject matter and lack of preparation was apparent throughout his direct examination and felt by Dr. Sautter who believed there was no understanding of the mental mitigation on either side.

The postconviction court found that the mitigation presented at penalty phase was holistic and comprehensive. As was evidenced through the testimony at the evidentiary hearing, it surely was not. As a result, Truehill suffered prejudice because the jury that recommended his death did so without understanding his mitigation and there is a reasonable probability of a different outcome.

**c. Trial Counsel Was Ineffective For Failing To Confront Dr. Prichard**

At trial, the State presented the testimony of Dr. Gregory Prichard to rebut Dr. Sautter's PTSD diagnosis. R52/796-800. Dr. Prichard did incredible damage to the truth finding at Truehill's penalty phase and trial counsel did nothing to counter this. Dr. Sautter had attempted to help the defense team prepare for Dr. Prichard's cross-examination, but defense counsel failed to accept his assistance. PC/8801.

At the evidentiary hearing, Valerino testified that he believed that Warren cross-examining Dr. Prichard was the original plan. PC/8803. Warren testified to the opposite: "it was always known that . . . I would not be presenting any witnesses during the penalty phase." PC/8895. At the last minute, Valerino asked Warren to handle all the mental mitigation during the penalty phase, despite the fact Warren was unprepared. PC/8895. Warren believed that he was not going to be part of the process of the penalty phase. PC/8904. Warren testified, "I initially told him no, I couldn't do that because I didn't feel ready to. . . . I had not made any decisions on how it should proceed. I had not read any of the literature. I had not

– it was decided that I should not be a part of this process.” PC/8904.

Dr. Prichard was allowed to give his opinion on Truehill’s PTSD diagnosis despite not administering any standard scaled tests for diagnosing PTSD; he was allowed to make blanket, unsupported statements like “one quarter of criminal defendants feign mental illness.” R52/807. Dr. Pritchard was allowed to testify to his disagreement that Truehill’s childhood trauma was indeed traumatic; he completely discounted Truehill’s family’s testimony about the abuse they all experienced and stated, “I wouldn’t qualify those things as a trauma.” R52/819-21. Dr. Prichard claimed that Truehill was a leader rather than a follower based on nothing. R52/856-57. There were no defense objections to any of these statements.

After the prejudicial direct examination filled with unsupported opinions, the defense did not cross-examine Dr. Prichard to rebut his unfairly prejudicial testimony. Counsel decided to ask only three questions based on Dr. Prichard’s misstatement that he was court-appointed rather than hired by the State. PC/8911. This led to all of his testimony, which completely undermined all of the mitigation that had been presented, to remain unquestioned; this was further compounded by the fact that the day’s testimony ended on Dr.

Prichard's statement that Truehill did not suffer from PTSD, and that whatever Truehill's symptoms were, they did not relate to the charged crime. R52/857. The jury had no choice but to give Dr. Prichard's testimony credence.

The postconviction court found that Warren wrestled with the decision of whether to cross-examine Dr. Prichard and decided the risk was greater than the reward, and that his decision to harshly criticize the doctor's erroneous insinuation of neutrality was carefully calculated. This was based solely on Warren's testimony that he stayed up late the night between Prichard's direct and cross-examinations. PC/8909.

However, Warren was admittedly unprepared to cross-examine Dr. Prichard, and his post hoc rationalization regarding his reason for failing to perform a full and vigorous cross-examination is specious at best. His performance fell well below the prevailing norms established standards, and constitutional minimums for capital defense counsel. Clearly Dr. Prichard's wholly unquestioned and uncontradicted testimony was successful, especially considering the vigorous cross-examination of Dr. Sautter and considering that the trial court noted in the sentencing order that there was a concern

regarding the credibility of the PTSD diagnosis. PC/8913. A full, vigorous cross-examination of Dr. Prichard would have affected the credibility and weight of the PTSD mitigator.

### **C. Conclusion**

Counsel's performance was deficient and prejudiced Truehill. It is reasonably probable that the outcome of Truehill's sentencing proceedings would have been different had counsel performed adequately. Each of the instances of ineffectiveness presented to the postconviction court required relief. When considered in their entirety, that conclusion is even more certain. This Court should reverse.

## **ARGUMENT IV**

### **TRIAL COUNSEL WAS INEFFECTIVE HANDLING THE DNA, THUS DENYING TRUEHILL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION**

Trial counsel was deficient for failing to properly rebut the DNA evidence presented by the State. As a result of trial counsel's deficiency, Truehill was prejudiced because the jury based its verdict on unreliable and misleading evidence, falsely presented as "science."

There is a reasonable probability that had counsel properly rebutted the State's DNA evidence, the outcome of this case would have been different. This Court should reverse.

## **A. Background**

### **1. Forensic DNA**

There are three different types of DNA profiles: single source, mixed profile, or partial profile. Single source DNA is the simplest to interpret, because the DNA comes from one person. PC/9470-71. When comparing a single source known profile to a known contributor, all the DNA information is going to match completely. PC/9474.

Mixed profile DNA is from more than one person, and it is not always possible to determine how many individuals contributed to a sample. PC/9472. Interpreting mixed profile DNA, analysts attempt to distinguish between major and minor contributors to the profile. PC/9473. When comparing a known source to a mixed profile, there is too much information in the sample for a complete match; when describing mixture comparisons, analysts "say that person can be included or they can be excluded or they cannot be excluded." PC/9474. Within mixed DNA there can be simple mixtures (two

contributors) and complex mixtures (more than two contributors). PC/9475-76. Complex mixtures often contain low levels of information causing an analyst to be uncertain about whether all the DNA information is present. PC/9476.

A partial DNA profile occurs when an analyst cannot develop results or is not confident that results have been developed at every location. PC/9473.

DNA analysts operate with a threshold, which is a minimum amount of DNA present; if the DNA is over that threshold, the analyst can be confident that DNA is present. PC/9478. Thresholds in DNA analysis are important “because these are the minimum detections levels when we are testing where we can confidently say we have DNA present. Where a peak, a piece of DNA, is truly DNA, instead of some artifact or some noise.” PC/9478. The purpose of thresholds “is to provide an idea and a range” to determine dropout. PC/9687. Thus, a threshold is used to indicate whether all the information in a sample is fully represented. PC/9479. Each DNA laboratory has different thresholds because equipment varies and requires validation to determine what that threshold is. PC/9543. A threshold serves as a benchmark to ensure information is complete, which

allows the analyst to make exclusions during comparisons. PC/9549-50.

The combined probability of exclusion (“CPE”) or combined probability of inclusion (“CPI”) are binary calculations used as statistical tools for mixed DNA profiles in order to determine whether a person can be linked to a given profile. PC/9509.

## **2. Governing Bodies And Guidelines For DNA Analysis**

The Scientific Working Group on DNA Analysis Methods (“SWGDM”) is a consensus body that publishes best practice guidelines for the DNA community and recommends updates to the quality assurance standards that govern forensic DNA to the FBI. PC/9486. These quality assurance standards make up the criteria against which laboratories are audited. PC/9671. FDLE tries to be compliant with SWGDM guidelines. PC/9698. If a laboratory deviates from the guidelines, there must be a significant reason that is scientifically supported with empirical data. PC/9486.

Prior to 2010, there was no national consensus regarding the interpretation of low-level, complex mixtures of DNA. PC/9683. The methods for interpretation and statistical calculations were entirely subjective, relying on “comparisons between the questioned DNA

profile from the evidence and the known DNA profile from people being compared and whether or not this known DNA profile information was fully represented in the questioned DNA profile.” PC/9488, 9538.

This was a “suspect-centric” method of interpretation, and was basic number matching, locus by locus, because the analysts were “using the profile that you’re looking for as a means of assessing whether or not all your data is fully represented.” PC/9538. Analysts then would apply a different CPI calculation to each suspect being compared. Thus, multiple CPI calculations are a red flag for suspect-centric analysis. PC/9545. “When the interpretation changes based on who’s being compared, especially the statistical weight, it’s an indication of suspect-centric analysis.” PC/9545.

The suspect-centric analysis was problematic because anyone could be potentially included in the profile. PC/9550. Under suspect-centric analysis, exclusions were highly subjective. PC/9554. Mixtures were even more problematic because “there’s a lot more potential combinations, and the assessment about what numbers could potentially go together is a lot more complicated.” PC/9556.

Based on pure random chance, individuals share 30% of their

alleles in common; some alleles are more common than others. PC/9557. When an analyst uses partial information, the potential that evidence could be linked to the wrong person is much greater; there are many other people who could match randomly. PC/9557. Certain alleles are more common in different subpopulations, which is why frequencies are necessary within those populations. PC/9557-58. Thus, it is possible that three African-American males, like the three codefendants in this case, have more traits in common than in the general population. PC/9557-58.

SWGDM published guidelines in 2010 to standardize how labs interpreted complex DNA mixtures. PC/9484, 9487. These guidelines adopted a stochastic threshold that laboratories should use when doing calculations like the CPI/CPE. PC/9488. The empirically derived stochastic threshold would be applied to the evidence in question. A DNA amount under the threshold would be disqualified for interpretation. PC/9540. Thus, the “assessment of where statistics could be performed was based on the assessments of the evidence data . . . not influenced by the information from the suspect.” PC/9545. Instead of multiple CPI/CPE calculations, only one statistical calculation would be applied. PC/9545. The threshold

allowed analysts to know “whether or not everything is fully represented without making assumptions about . . . who may have contributed.” PC/9539. Analysts were to be objective and not influenced by outside factors; they were to draw all interpretations from the data rather than from a suspect profile. PC/9488.

While FDLE had thresholds in place at the time Truehill’s DNA was analyzed, those thresholds were different and considerably lower than the SWGDAM recommended stochastic threshold.<sup>1</sup> FDLE did not use a stochastic threshold when analyzing Truehill’s evidence and the thresholds that were in place did not have the same effect, nor did they lead to the same confidence in the evidence. PC/9592-93.

FDLE issued BIO SOP 12, adopting the 2010 SWGDAM guideline changes, two years after the guidelines changed. PC/9516-

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<sup>1</sup> The SOP used by the FDLE analyst to analyze Truehill’s evidence was BIO SOP 10r1 which contained two relevant thresholds for mixture interpretations. The minimum analysis/star (\*) threshold was 50 RFU and used to indicate if information was dropping out. This data would not get an allelic number. Anything below this number was considered non-DNA. PC/9588-91. Above this was the analytical/minimum peak height threshold which was 100 RFU. At this threshold, the DNA moves from a peak to an allele and would get a designated number. PC/9589-90, 9642.

17. This was the first time FDLE implemented a stochastic threshold when interpreting mixed DNA profiles. PC/9518, 9582. This was after DNA analysis was done in this case, but prior to any testimony regarding this analysis.

## **B. Evidentiary Hearing Testimony Regarding DNA**

### **1. Trial Attorneys**

Valerino deposed FDLE analyst Susan Livingston<sup>2</sup>. PC/8775. Not long before trial, it was decided that Warren would handle the guilt phase. PC/8833. Warren was primarily responsible for attacking the DNA evidence at trial. PC/8762, 8846, 8937.

Warren testified that DNA evidence was significant for the State because “juries like DNA because of the so-called CSI effect.” PC/8848. DNA was even more significant here because of “the circumstantial evidence aspect of this case.” PC/8835, 8932. Valerino believed the DNA was vital to the State’s case because “we had several victims of different alleged crimes, and items that were found either in a vehicle that had been stolen out of Louisiana had DNA on them, and Truehill and the other two were identified as

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<sup>2</sup> Livingston conducted all DNA testing and analysis in this case. PC/9515. All evidence was submitted prior to April 2010. PC/9515.

people that stole it. So it placed these three individuals along the path to St. Augustine.” PC/8764.

The trial team retained Dr. Gary Litman as a defense DNA expert. PC/8762. Warren and third-chair Rosemarie Peoples had used Litman on previous cases. PC/8848-49, 8969. Litman prepared numerous memoranda and “lengthy email[s] detailing his findings and what he feels that he needs” which the attorneys reviewed to prepare for trial. PC/8765, 8851. Unfortunately, retaining Litman was equivalent to having no expert; he did not testify at trial because he refused to enter the courthouse at all, leaving Truehill with no expert to confront the State’s misleading DNA evidence. PC/8849-50. Any advice that he gave was without knowledge of the actual testimony Livingston presented. PC/8777, 8855-56. This left Warren at a further disadvantage when confronting the testimony of Livingston against Truehill.

Warren believed “the State would not be able to show who actually deposited what DNA on a particular item,” and that they could not tell when the DNA was deposited. PC/8847-48. Warren’s focus during his cross-examination “was to get [Livingston] to say that she didn’t know who had left the DNA. All she could say is it was

possible.” PC/8930. However, Warren unsuccessfully attempted to get Livingston to say that the DNA “had no probative value.” PC/8929.

Peoples conducted the *voir dire* of Livingston at trial where she tried to attack her “testimony to the statistics, her testimony regarding partial match or contributor to a mixed DNA profile.” PC/8970. Peoples believed Livingston’s testimony went “beyond what was permissible” particularly when Livingston discussed possible contributions based on one or two loci. PC/8970-71. Peoples’ *voir dire* was to prevent Livingston’s misleading testimony. PC/8971. Peoples typically would file a pretrial motion to prevent such improper and inaccurate testimony yet failed to file such a motion in this case. PC/8971-72.

## **2. Expert Witnesses**

The postconviction court heard testimony from well-qualified experts at the evidentiary hearing. Tiffany Roy is a forensic DNA consultant with ForsensicAid, LLC, and has been qualified as an expert more than 100 times in the areas of serology and DNA. PC/9460-61. Roy reviewed all the work performed by FDLE and the testimony presented at trial pertaining to DNA. PC/9462.

Leigh Clark is a FDLE crime laboratory analyst supervisor and a DNA technical leader. Clark was presented by the State and was asked to review Claim 4 of the Defendant's Motion to Vacate Judgment and Sentence, Livingston's deposition and trial transcripts, and the original case files as pertaining only to the exhibits mentioned in the original document she received. PC/9693.

### **C. Trial Counsel Was Ineffective In Handling The DNA Evidence**

The State presented the testimony of Susan Livingston, who analyzed all the DNA evidence for FDLE. Trial counsel's attempts to rebut the DNA evidence at trial were unstructured and unclear. During Warren's cross-examination of Livingston, the trial judge requested a bench conference to express his concerns:

You know, I think I know what you're trying to do, but I think the jury's very confused. . . . Is there a way you can simplify it so that at least the jury can follow? Because I know they're confused – they're all completely lost . . . [n]ow I think some of the questions you ask are confusing even for the witness because they confuse me, too . . . I just want to let you know that the jurors have got that puzzled look on their face.

R40/945-46.

Trial counsel failed to bring the serious issues with Livingston's opinion and the DNA evidence to the trial court's attention,

particularly with respect to linking Truehill to several items in evidence. Trial counsel's deficiency allowed the jury to hear misleading and inaccurate evidence to the prejudice of Truehill.

**1. Trial Counsel Failed To Procure All Necessary Documents In Order To Prepare Defense Case Against DNA**

Trial counsel were deficient for failing to obtain and/or present at trial: the 2010 SWGDAM guidelines, FDLE Standard Operating Procedures (SOPs), and FDLE laboratory audits. These documents were readily available had counsel conducted the level of investigation needed to adequately confront the critical DNA evidence that the State used against Truehill. Had counsel conducted this investigation, they would have had the information to challenge the evidence against him through a proper testifying expert. See *Rompilla*, 545 U.S. at 384-93 (2005)(holding that the failure to obtain "readily available" evidence to confront the State's evidence amounted to ineffective assistance of counsel).

**a. SWGDAM Guidelines and FDLE Standard Operating Procedures**

The 2010 SWGDAM guidelines, prior to the analysis of the evidence in this case, were meant to standardize how labs interpreted DNA mixtures by adopting a stochastic threshold for use with binary

calculations like the CPI/CPE. PC/9488. This made mixture interpretation more objective. PC/487-88. Thus, the “assessment of where statistics could be performed was based on the assessments of the evidence data . . . not influenced by the information from the suspect.” PC/9545. Instead of multiple CPI/CPE calculations, only one statistical calculation would be applied. PC/9545. T/815.

The trial attorneys did not request a copy of the guidelines, nor any of FDLE SOPs based on those guidelines until *after* the jury rendered its verdict. R13/2398. Warren had requested these types of records in other cases before and did not recall why the subpoena duces tecum was filed after the guilt phase. PC/8864. Warren believed it was possible that Litman discussed getting the records with him. PC/8867.

Similarly, Peoples did not recall why a subpoena duces tecum to obtain those documents was sought after the guilt phase. PC/8978. Peoples had requested these records in other cases and finds them helpful “in developing cross-examination, challenging the expert, challenging the lab, the work, or the basis of the expert’s opinion.” PC/8988-89. Peoples received these records and shared them with Litman to help her develop a motion for new trial; she felt

that something had gone wrong with the DNA evidence at trial and wanted to determine what it was. PC/8983-84.

The trial attorneys were deficient under *Strickland* by failing to obtain these documents prior to trial to challenge Livingston's DNA testimony. It is necessary for counsel to review guidelines and agency procedures because they instruct the analysts how to perform tests and interpretations. The analysts are bound to the guidelines and standard operating procedures; if they deviate, it needs to be documented and justified. PC/9463-64. By failing to obtain the SOPs before trial, counsel was ignorant to the fact that Livingston's report contained numerous violations of FDLE procedures. The undue delay in obtaining the documents was deficient performance; the jury was denied this critical information in rendering a verdict, which prejudiced Truehill.

#### **b. Audits**

Counsel again failed to obtain the necessary information in the form of Audit Reports to provide Truehill the level of representation the Constitution requires. An External DNA Audit Report on Compliance with the FBI Director's Quality Assurance Standards for Forensic DNA Testing Laboratories was conducted on this FDLE

laboratory on May 14-15, 2012. PC/3405-64. This audit occurred after the publication of FDLE's new procedures and revealed a continuation of the problems that the changes had sought to correct. PC/9521, 9523. Specifically, there were concerns about the way the CPE/CPI statistic was being applied. PC/9524. The auditor found that "one is being applied to data that is fully represented, and one is being applied to data which may not be fully represented." PC/9524. The auditor expressed concern that the CPE calculation was being used on locations where there was potentially allelic dropout and by using the known standard to decide which loci to include in the CPE calculation. PC/9524-26. Both actions were no longer allowed under BIO SOP 12 for the CPI calculation.

Livingston's statistical calculations in this case had the same problems as revealed in this audit in that she improperly applied the CPI/CPE calculation to mixed profiles. PC/9552. Clark's contention that this audit would be based on FDLE's 2010 and 2011 SOPs is unfounded. PC/9669-70. The auditor's objective proof for findings specifically cites "Laboratory Biology SOP 41212 under 3.16.4" which is a reference to BIO SOP 12. PC/3162. Thus, the SOP being critiqued is BIO SOP 12.

Trial counsel was deficient under *Strickland* and *Rompilla* for failing to request and obtain this audit prior to trial. This audit would have assisted counsel in effectively cross-examining Livingston and discrediting the DNA evidence as it is more one piece of evidence to show that Livingston and her laboratory were improperly interpreting DNA mixtures pre and post BIO SOP 12. This audit would have given counsel another tool to help the jury discredit or give less credibility to the DNA evidence.

The State's DNA evidence was unreliable and misleading. If the jury was presented with the truth concerning the audits the jury would have discounted the State's DNA evidence. Because of counsel's deficient performance in failing to obtain the audits and confront the State's evidence with them, there was a reasonable probability of a different outcome if trial counsel had met the minimum standards and obtained these records.

**2. Counsel Rendered Ineffective Assistance By Failing To Object When Livingston Did Not Provide Statistical Weight To Inclusionary Statements And By Failing To Elicit These Weights On Cross-Examination**

DNA analysts must provide a statistical weight when they link a DNA profile to an item of evidence. PC/9605. Any time an analyst

testifies that a person is associated with evidence, a person cannot be excluded, or a person matches the DNA profile, the analyst must give a corresponding statistical weight with that association to give context. PC/9506, 9720. This is a requirement of SWGDAM. PC/9506, 9606-07. Clark testified that without a statistical weight, information can be misleading because “it doesn’t give you a full complement of the information.” PC/9719-20.

In *Brim v. State*, 695 So.2d 268, 269-70 (Fla. 1997), this Court stated DNA testing consists of two distinct steps:

This first step of the DNA testing process relies upon principles of molecular biology and chemistry. In oversimplified terms, the results obtained through this first step in the DNA testing process simply indicate that two DNA samples look the same. A second statistical step is needed to give significance to a match.” This is significant and necessary because it gives probative value and context to the actual DNA analyzed to determine how frequent or rare it is.

Statistical weight is most important with low-level data because “[p]eople can misinterpret a weak association and think that’s very strong evidence.” PC/9607. “When the numbers are low, it’s important to explain how the number is calculated and what the number is because the trier of fact needs to take that into account.”

PC/9721. Statistical weight is “extremely significant when we’re talking about these very low weighted samples” because the numbers can go up or down ten-fold (i.e. a statistic of 1 in 16 would become 1 in 1.6). PC/9621. This “10-fold adjustment” is also addressed in FDLE’s written laboratory reports. PC/3093-3111. This is especially true with mixed DNA samples because “the kinds of association that you might get to a mixed profile could be a lot weaker than the kinds of association you would see to a single source match that could be very strong.” PC/9506.

Livingston provided a statistical weight for the evidence in her written reports and acknowledged this requirement at trial. PC/9607. This is necessary “to allow the Courts to make a determination how common or how rare that match may be.” R39/865. At trial, Livingston failed to testify to a statistical weight for inclusionary statements regarding five pieces of evidence. PC/9608-09. However, Livingston failed to testify to a statistical weight for inclusionary statements five times. PC/9608-09. Specifically, a baseball hat, the victim’s wallet, a washcloth, a pair of blue jeans, and a silver knife. Of those items, Livingston stated Truehill was a possible contributor to the wallet, washcloth, and silver knife.

The trial attorneys failed to follow their own DNA expert's advice regarding these low statistical values. The team was made aware of the low probative value and the 10-fold adjustment. PC/2733-34, 2739. The team was advised "that these numbers were low, and that if you scaled down tenfold, that they are basically weightless." PC/9621. The defense team was made aware, "that this was weightless evidence, and he made several notes throughout his notes that sort of hit on that topic, but . . . it didn't seem to ever materialize in any of the cross-examination." PC/9621-22. This further highlights the need for the defense team to have a DNA expert who was willing to enter the courthouse, to advise the team that Livingston was leaving the values out of her testimony, thus making them appear weightier; the defense had not witness to put on the stand to explain the essentially weightless evidence.

The trial attorneys were deficient under *Strickland* when they failed to object to Livingston associating Truehill with evidence in front of the jury without providing a statistical weight and by failing to cross-examine Livingston about these weights and the 10-fold adjustment, leading to the jury supposing the evidence was stronger than it actually was. PC/9613. Warren mistakenly "thought

[Livingston] provided a statistical weight for every item that she was asked about,” and recalled the 10-fold adjustment concept but did not recall discussing it with Litman or why it was not addressed at trial. PC/8861, 8873. There was no strategic reason for this failure. The trial court found that the defense did object during Livingston’s voir dire, however, trial counsel did not address this particular issue. PC/5137. The objection raised at trial was regarding the testimony about a “partial match,” which is different from objecting to failure to use statistical weights.

The resulting prejudice from failing to object when Livingston did not provide a statistical weight and failing to elicit these weights during cross-examination was overwhelming. At the evidentiary hearing, both experts testified about the low probative weight of the evidence presented at trial. The State’s own DNA expert testified that the trial attorneys should have asked Livingston to speak to the weight of the evidence. PC/9729. Clark noted this is particularly significant because a “surprising number of statistics that were less than one in ten were reported.” PC/9727. Clark stated, “I would expect on cross to explain my weights to my inclusions that I’ve stated.” PC/9728. A statistical weight is crucial with low-level data

“[b]ecause that’s when the biggest risks of miscarriage of justice can happen. People can misinterpret a weak association and think that’s very strong evidence.” PC/9607. In Truehill’s case this was precisely what happened - the jury was misled into giving far greater weight to unreliable and misleading evidence thus prejudicing Truehill.

If the trial attorneys did not perform deficiently and had elicited such testimony, the jury would have either given the DNA evidence far less consideration or discounted it entirely. For example, Livingston testified that Truehill was a “possible contributor” to DNA found on the victim’s wallet. R40/911-914. However, due to trial counsel’s ineffectiveness, the jury never learned the “chance that a randomly selected, unrelated person also matching the evidence would be 1 in 20 Caucasians, 1 in 31 African-Americans, and 1 in 16 Southeastern Hispanics.” PC/9611. Further, the jury never learned that the 10-fold adjustment could lower those numbers to 1 in 2, 1 in 3.1, and 1 in 1.6. Clark described this as “a relatively meaningless statistic” and “weak support” for the hypothesis that Truehill is included. PC/3782. At these levels, it means that anyone could have touched that wallet and left DNA.

A knife that was entered into evidence (R40/928-931) posed a

similar problem. The jury never learned that “the percentage of unrelated individuals in the following populations that are expected to be excluded as contributors to the mixed DNA profile are 31 percent Caucasians, 15 percent African-Americans, and 28 percent of Southeastern Hispanics.” PC/9611. This means “for every single population that [Livingston] looked at, more than half of the population would be included, in some cases more than 75 percent.” PC/9611-12. For the African-American population, 85% of the population would be potentially included. PC/9612, 9726. These statistics were calculated on one locus, which Clark states “affords no weight to an inclusion” because “one location is not discriminatory.” PC/9725. Therefore, the jury heard that Truehill left DNA on a weapon associated with the murder, even though almost anyone else in the world could have done the same. Counsel was deficient for not bringing these facts to the jury which resulted in Truehill being denied a fair trial. There was a reasonable probability that had counsel presented this evidence, the outcome would have been different because the jury would not have been misled by Livingston’s testimony.

The trial team failed to understand how to properly challenge

this low probative, low weighted evidence. During the *voir dire* of Livingston, Peoples argued that Livingston was not qualified to testify as to statistical values. R39/852. The jury needed to hear these statistical values so that the evidence could be discounted as wholly unreliable in linking evidence to Truehill. Even the State's expert, Leigh Clark, testified at the evidentiary hearing that she "would have expected the defense to just attack the low level and low probability values on cross." PC/3787. Clark continued: "[h]ad the defense understood the math, the line of questioning would not at all needed to be argumentative . . . this all could potentially have been shut down if the witness offered the actual statistical values associated with the evidence." PC/3787-88.

By failing to object and/or elicit these values at trial, the jury only heard that Truehill was a "possible contributor" to this evidence. The trial attorneys failed to give the jury any context for considering those associations, especially considering the low statistical values of the evidence. The lack of statistical weight misled the jury into believing this was strong DNA evidence, when in fact it was largely meaningless. There is a reasonable probability that, but for counsel's errors, the outcome of Truehill's trial would have been different.

### **3. Trial Counsel Failed To Cross-Examine The State's DNA Expert On Transfer DNA**

At trial, it was revealed that a plastic garbage bag containing a pair of Levi 501 jeans, a machete, a handsaw, and other items of clothing was taken into custody. R38/704. Out of the presence of the jury, Livingston accepted the possibility of secondary transfer of DNA, when DNA on one object is transferred to another without anyone touching the second object. R39/851. The jury never heard about transfer and were not made aware of this possibility via questioning from defense counsel. PC/8872.

The defense team was aware that contamination of evidence, particularly regarding the machete, was a possibility. PC/2814, 2816, 2855. Peoples' handwritten notes state: "They realize they have a problem since we can show contamination of items before collected by police for DNA processing." PC/3024. Warren testified at the evidentiary hearing that Livingston "did testify that secondary transfer is possible" and thinks she addressed this point "both on direct and cross-examination;" he was mistaken in this. PC/8867-68. Warren had no independent recollection or strategic reasons why transfer was not discussed in front of the jury. PC/8872.

The knife could have Truehill's DNA from secondary transfer, because it was found and transported in one large plastic bag from along with a number of items that Truehill had indeed touched. PC/9616-17. DNA could very easily have been transferring between items in the bag. PC/9617.

The trial court found that failing to question the state's expert regarding transfer DNA in front of the jury was a strategic decision. PC/5138. There is no record evidence to support this. The court further noted that any testimony regarding transfer DNA from Livingston would have been "unhelpful," and

since the defense team's only expert in the field of forensic DNA evidence, Dr. Litman, refused to testify at trial, defense counsel would have had nothing with which to refute Ms. Livingston's statement.

PC/5138. The trial court itself noted counsel's deficient performance in this matter.

There was no strategic reason for failing to address DNA transfer; counsel merely failed to bring up this line of questioning during cross-examination. PC/8872. This failure prejudiced Truehill because all the jury heard was that the machete, one of the alleged murder weapons, was found to have "matched" Truehill's DNA, and

they did not hear that there was more than one way that his DNA could conceivably been deposited. R40/914-915. Unlike all the other evidence at trial, the machete was the only single sourced profile; meaning only Truehill's DNA was found. It was critical that trial counsel attack this DNA evidence to diminish its weight in front of the jury to show that there was doubt about whether Truehill handled the weapon. There is a reasonable probability that, but for counsel's errors, the jury would have given less weight or discredited the machete evidence and a reasonable likelihood the outcome of Truehill's trial would have been different.

**4. Trial Counsel Was Deficient For Failing To Object, Move To Exclude, Or Cross-Examine Livingston's Testimony In Light Of The 2010 SWGDAM Guidelines And FDLE BIO SOP 12 Resulting In Prejudice**

In forensic DNA "[s]ingle source on major profiles are described in match language, and mixtures are described in exclusion language." PC/9474. All DNA evidence presented at trial was from mixed samples, except the machete, which was single sourced and linked to Truehill in the absence of testimony about transfer DNA.

With single source profiles and a known contributor, the information is going to match one to one. PC/9464, 9473. When

comparing a known profile to a mixture, analysts say that a person can be included, excluded, or they cannot be excluded. PC/9474. In a complex mixture, it is difficult to tell the exact number of contributors. PC/9476. Complex mixtures usually contain “some low-level data where you have some uncertainty about whether or not all of your DNA information’s fully present.” PC/9476. Knowledge that DNA is fully present is necessary for analysis to “get an accurate estimation for the trier of fact . . . of how common or rare those DNA profiles are.” PC/9480. Analysts must “know that everything is truly present, fully present; otherwise, the number that we’re reporting isn’t going to be descriptive if we don’t know what we’re missing.” PC/9480.

Dropout is a concern in DNA analysis, particularly with low level data. This occurs when the DNA that may have been present in the test tube is not reflected in the final results and there are no means of detecting it. PC/9676. Dropout is “related to the amount of DNA and the quality of the DNA.” PC/9628. DNA peaks come in pairs, so if an analyst sees one peak at a low level, they must consider that the other peak dropped out. PC/9687. The CPI/CPE was used in this case for mixture interpretations. PC/9510. CPI/CPE calculations

require “all of your information be fully represented or that you know what your number pool is.” PC/9511-12.

Because this evidence was analyzed *after* the 2010 SWGDAM guidelines, all the data in Truehill’s case was erroneously interpreted by FDLE. “Every profile associated with Quentin Truehill is in the stochastic range, and as such the data is unreliable.” PC/3084. All the data associated with Truehill is partial and low-level and “the vast majority of these samples should never have been interpreted.” PC/9533-34. By failing to follow the new guidelines, FDLE was “using subjective methods to assess the data for dropout.” PC/9521. This resulted in FDLE applying “the CPI calculation to low-level mixed data, where dropout was not just suspected but observed and documented by the analyst.” PC/3084.

Livingston marked all the locations where DNA information was visibly dropping out, a trend seen in almost all the samples. PC/3084. The marks helped FDLE disqualify some loci, but unless the analyst “visibly saw a dropped-out peak, then they would say there’s no dropout happening here.” PC/9632. However, at that time, the DNA community was well aware that dropout could and did occur where the analyst did not physically see it. PC/9632.

In this case, the CPI calculation was also erroneously applied to low level data and multiple CPI calculations were used for the same evidence sample. “The data from samples in this case where Quentin Truehill was included should not have had the binary CPI calculation performed because it does not apply in cases where DNA information could be dropped out. Its use on data of this type is improper.” PC/3084. These DNA profiles were “partial and they were extremely mixed, with a lot of low-level data that caused . . . the vast majority of the profile . . . to be disqualified even at the time when Susan Livingston did her analysis.” PC/9631. This should not have been the basis of testimony.

The trial attorneys did not object, move to exclude as misleading, or cross-examine Livingston on the changes in the guidelines and procedures, and how these changes would have affected the reports she had prepared several years prior. PC/9580. Peoples believed the changes were to be included in Livingston’s cross-examination, but did not recall whether that information came from Litman. PC/8988. She relied on a document referring to the 2010 guidelines when she prepared her voir dire for Livingston, therefore the knowledge of the guideline changes can be imputed to

the entire team. PC/8986. However, Warren did not recall any conversations with Litman about the guidelines, nor did he receive a copy of the 2010 guidelines until after trial. PC/8934.

The trial attorneys were made aware that FDLE updated their procedures *after* Truehill's evidence was analyzed because Livingston testified about the new testing kit at both her deposition in 2012 and again at trial in 2014. PC/9579; R39/880. However, the trial attorneys did not request any of the FDLE SOPs until *after* the guilt phase, when professional norms would dictate them being obtained in discovery for use at trial. R13/2362-63. None of Litman's memoranda to the defense team referenced the guideline or procedure changes, nor did he alert the defense team to the problematic way the CPI calculation was being applied. PC/9623-24.

The trial attorneys performed deficiently by failing to object, move to exclude, or cross-examine Livingston's testimony as misleading due to the 2010 SWGDAM guidelines and BIO SOP 12. Livingston testified in 2014, four years after SWGDAM published its new guidelines on mixture interpretations and two years after FDLE adopted these guidelines, yet the defense team did nothing to ensure that the changes in the guidelines and procedures had not affected

her original findings, which indeed they had.

All the DNA evidence in this case is suspect because “the data is too partial, mixed and limited, and the interpretations were potentially biased by using his profile as the benchmark to determine what data was suitable.” PC/9533. After the guidelines were published, the DNA community knew that this data was unsuitable for these types of calculations. There was a need for an objective measure to assess the data independently of the profiles of the people being compared. That did not happen in this case, and Livingston should not have testified about the data. PC/9533.

The implementation of the new FDLE procedure in 2012 rendered Truehill’s data uninterpretable. All the DNA interpretation results for the evidence at trial would have changed from **inclusionary to inconclusive**, meaning that the State would no longer be able to link Truehill to these pieces of evidence. PC/3085. This is a difference that cannot be overstated; it completely changed the complexion of the DNA evidence. The trial attorneys took no action pre-trial to limit this misleading testimony. The attorneys did not seek to have Livingston amend her report nor did they question Livingston on the effects of this guideline change. But for this

deficient performance, the jury would have given much less weight to, or entirely discredited, the DNA evidence associated with Truehill.

It was imperative for the trial attorneys to address these changes with the court and/or Livingston. The methodology for their interpretation was considered flawed by the community at the time of trial, and defense counsel utterly failed to address this problem in front of the jury. PC/9582-83. In fact, this failure affected trial strategy, because Valerino testified that he did not cross-examine Mario Rios based on the fact that Truehill's DNA was found his shirt; had the defense team understood and attacked the DNA evidence based on their imputed knowledge at the time of trial; this cross-examination could and should have been more rigorous.

The trial attorneys should have requested that Livingston validate the testing kits in place at the time the evidence was analyzed, find the stochastic threshold, and retest this data with the updated testing kit, or at the very least let the court and the jury know that her results would be different as a result of the guideline changes. PC/9629-30. In the absence of retesting, counsel was deficient in failing to bring attention to the trier of fact that Livingston's opinions would have been different under the new

understanding of mixture interpretation. PC/9584-85.

The State's DNA expert testified at the evidentiary hearing that changes in statistical tools and thresholds "may impact . . . the numerical value, based on the number of locations that are utilized for a statistic." PC/9715-16. While thresholds would not be applied to older data, the interpretation of the data could be altered. PC/9716-9717. Specifically, "there can be change from **inclusion to no determination** based on changes in interpretation and the information that can be utilized to generate a statistic." PC/9716. In DNA forensics, referring to someone as a "possible contributor" is quite different from saying that no determination can be made. PC/9713. An analyst testifying that someone was a possible contributor when no determination could be made is misleading and led to a miscarriage of justice with a misidentification.

Word choice matters in DNA. Testing results that could change from "inclusionary" to "inconclusive" are significant, particularly in a circumstantial case like this one. The methods of interpretation used by Livingston in 2010 were proven to be problematic and flawed by time she testified at trial four years later. The DNA community recognized this error in 2010 with the passage of the new guidelines.

FDLE agreed and adopted this guideline fully in 2012 to correct an on-going systematic issue with mixture interpretation. However, Livingston took the stand in 2014 and testified to results based on the flawed method, without any cross-examination to question her methods or her results. The trial attorneys were ineffective for failing to stop this testimony pretrial and failing to limit its effect during trial (through objections or cross-examination) because the testimony was misleading and improper. The DNA was one of the few pieces of evidence used to connect Truehill to the homicide and the collateral crimes. There is a reasonable probability that but for counsel's errors, the jury would have given less weight to or discredited this evidence entirely and a reasonable likelihood the outcome of Truehill's trial would have been different.

**5. Trial Counsel Was Deficient For Failing To Cross-Examine Or Object To Evidence Given In Violation Of The SOPs Resulting In Prejudice To Truehill**

As stated above, the trial attorneys rendered ineffective assistance of counsel by failing to request FDLE's SOPs before trial and failing to cross-examine Livingston on her failure to follow the SOPs. FDLE BIO SOP 10r1, issued April 6, 2010, was the controlling procedure when the evidence in this case was tested and analyzed.

PC/9585. Once data has been analyzed and profile types were established, then result types were to be determined for purposes of statistical calculations. PC/3665. This procedure states that analysts may make statistical calculations for matches or inclusions if a partial profile (single source) has all alleles above the minimum peak height threshold for at least **one** locus.<sup>3</sup> Complex mixtures may be used for inclusionary purposes if they include a profile at **three** loci.<sup>4</sup> PC/9598.

At trial, Livingston made mixture comparisons using only one or two loci, rather than the required three, in **direct violation** of SOP 10r1. PC/9597. Of these items of evidence, Livingston testified that Truehill was a possible contributor to two: a washcloth and a silver knife. Because these profiles did not meet the minimum criteria, no determinations regarding inclusion should have been made, and certainly should not have been testified to.

Had Livingston followed this procedure, the results for the evidence linked to Truehill at trial should have been reported merely as “limited DNA results.” PC/9600. Failing to meet the minimum

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<sup>3</sup> PC/3665.

<sup>4</sup> PC/3665-66.

criteria demonstrates that these types of profiles are limited; the FDLE SOP states “most complex mixtures are of limited probative value.” PC/9600, 3665. Analysts cannot draw conclusions from the low levels with any degree of scientific certainty. PC/9600-01. All this evidence should have been expressed as “limited value or inconclusive.” PC/9601.

Livingston also failed to follow FDLE procedures regarding the machete, which was designated by her as single-sourced and found to have “matched” Truehill’s DNA. R40/914-915. The procedure required all alleles above the minimum peak height threshold for at least **one** locus before inclusionary statements or statistical calculations could be made. PC/9598, 3665. The procedure further states that low-level and partial profiles should be cautiously interpreted, and states “[l]ow level samples with a high likelihood of allelic dropout at all loci should not be classified as partial profiles and the data should be reported as DNA results.” PC/3665, 9598.

Roy testified that she had doubts about the machete being a single source because there was low-level information that was difficult to see; to Roy, the machete was a partial profile at a very low level. PC/9603. As such, the machete should not have been

interpreted, should have been reported as “limited DNA results,” and not linked to any individual. PC/9604.

Attorney Peoples was aware that the evidence Livingston was testifying about was not scientifically sound. Peoples stated that inclusions were improperly made based on one or two loci and she did not know why Warren asked no questions about this on cross-examination. PC/8980. The prejudice to Truehill was described concisely by Peoples: “The scientific basis for what she was doing wasn’t there. But the jurors aren’t going to get that. They’re just going to hear contributor, match, and then – because it’s DNA, they’re going to kind of discount the rest of it, if they hear any of it.” PC/8991-92. Peoples’ *voir dire* of Livingston was meant to prevent the jury from hearing this prejudicial and misleading testimony, but Warren failed to follow the path she laid. PC/8991-92. Once Peoples’ objections were denied, Warren had no strategy to attack the similar issues on cross-examination. Instead, he confused the jury resulting in even greater prejudice to Truehill.

All the DNA on the evidence used to link Truehill to the murder and collateral crimes had extremely low data. The defense team was aware that Livingston’s testimony was not scientifically sound.

However, all the jury heard was that Truehill was a “match” to one of the murder weapons, and contributed to other items of evidence. If the defense had used the FDLE procedures during trial, the inclusions would have changed to limited results, limited value, or inconclusive, and the word “match” would never have been uttered.

Livingston should not have used the word “match” to describe Truehill’s inclusion with the evidence swab from the machete because the data was so low level. PC/9614. In forensic DNA, the word match conveys that a person matches one hundred percent with that time. PC/9614.

Thus, but for trial counsel’s deficient performance and its prejudicial effect on the jury, there is a reasonable probability the jury would have given less weight or discredited this evidence entirely and the outcome of the guilt phase would have been different.

#### **D. Conclusion**

The DNA evidence was presented by the State as some of the strongest evidence tying Truehill to the collateral crimes committed before and after the homicide, and the homicide itself. This was a circumstantial evidence case. There was nothing tying Truehill to the homicide aside from the DNA evidence. Truehill’s fingerprints were

never found on any items of evidence collected, there were no eyewitnesses to the homicide, and Truehill did not provide any statements against interest. DNA was the main evidence placing Truehill at the homicide scene and was referenced throughout the State's case-in-chief. The evidence presented in post-conviction attacks every piece of DNA evidence presented at trial in a multitude of ways. The newly discovered evidence, *Giglio* violations (as detailed below), and ineffective assistance of counsel all discredits the DNA evidence such that the jury would have either severely limited its weight or disregarded the evidence entirely. This ultimately undermines the guilty verdict. An attack on the DNA evidence weakens the case against Truehill and gives rise to a reasonable doubt as to his culpability compared to his co-defendants. Culpability played a significant role during the penalty phase and the lower court's proportionality analysis; the postconviction evidence would likely yield a less severe sentence because Truehill's role has been diminished.

## ARGUMENT V

### **BASED ON GIGLIO AND NAPUE, THE STATE USED FALSE AND MISLEADING EVIDENCE AT TRIAL WHICH VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION**

Truehill was deprived of his Fifth, Sixth, Eighth and Fourteenth Amendment rights as a result of the State's failure to honor its constitutionally mandated obligations to refrain from the use of false or misleading evidence and thereby misleading the jury, the trial judge, and defense counsel.

#### **A. Standard Of Review**

On a *Giglio* claim this Court applies a mixed standard of review, “defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law.” *Sochor v. State*, 883 So.2d 766, 785 (Fla. 2004), quoting *Lightbourne v. State*, 841 So.2d 431, 437-38 (Fla. 2003).

To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material.

*Guzman v. State*, 941 So.2d 1045, 1050 (Fla. 2006) quoting *Guzman*

*v. State*, 868 So.2d 498, 505 (Fla. 2003). The State bears the burden of proof on the materiality prong. *Id.* The test of materiality under *Giglio* requires the state to prove that the presentation of the false testimony was “harmless beyond a reasonable doubt,” and “that there is no reasonable possibility that the error contributed to the conviction.” *Id.* (citations omitted).

### **B. Livingston’s Testimony Was False, Misleading, And A *Giglio* Violation For Failing To Disclose The Impact Of Bio Sop 12 To Truehill’s Case**

At the time of trial, FDLE was no longer using the procedure used by Livingston to interpret and analyze Truehill’s mixed DNA samples. FDLE moved from a “suspect centric” analysis to a database analysis with the stochastic threshold. PC/9580-81, 9706. The jury never heard about this change in mixture interpretation or statistical calculations; nor did FDLE issue an amended report using the changed procedures to explain how the change could have impacted Truehill’s evidence. PC/9580.

At the evidentiary hearing, both experts testified that it would be impossible for Livingston to be unaware of the 2010 SWGDAM interpretation changes and BIO SOP 12. DNA analysts in 2014 would have known about this change in protocol and the problems that

existed prompting the change. PC/9579. Analysts are required to stay current with the latest publications and advancements in the field. PC/9584. BIO SOP 12 was a substantial change for FDLE because it changed the kits used, the interpretation and utilization of the data, and how statistics were applied. PC/9703-04. Livingston acknowledged the change in kits during both her deposition and trial testimony. PC/9579; R39/880. Livingston must have had knowledge of the entirety of the BIO SOP 12 because she was employed by the FDLE and it was a job requirement. PC/9704.

Even after FDLE adopted the 2010 SWGDAM guidelines, there was no consensus on how to handle mixture data interpreted prior to the procedure change, and it does not appear that FDLE instructs analysts on how to disclose the information. PC/9639, 9732. Laboratories throughout the county handled this issue differently. PC/9496.

Best practices dictate that Livingston should have addressed the change:

It's the way the statistic, the combined probability of inclusion, was being applied, the methodology. The combined probability of inclusion as being applied to data for which it was not suitable, which is low-level stochastic data. And the way that they dealt with that at the time has

since been revealed to be inappropriate. So the whole methodology for their interpretation at that time is now considered to be flawed by the community, and I think that should have been addressed.

PC/9582-83. Since there is no way to go back and rescue legacy data that did not have a validated stochastic threshold, the best practice is to retest all the evidence with the proper methodology, proper thresholds, and proper interpretations in place.<sup>5</sup> PC/9583-84. Livingston could also have addressed the change by issuing a new report. PC/9583. At a minimum, Livingston needed to “let the Court know that things might be different now” and “why my opinions today might differ than the opinions I expressed in that original report.” PC/9584-85.

Clark testified that “[l]aboratory reports themselves can be somewhat confusing, so the onus is also on an analyst to be able to articulate what it means.” PC/9696. Clark testified that although thresholds are not applied retrospectively, “the premise and the understanding of it can alter the interpretation.” PC/9716-17.

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<sup>5</sup> Roy and Clark both stated it is impossible to reinterpret Truehill’s original data and just apply a stochastic threshold because no such threshold existed at the time. FDLE would either have to validate a stochastic threshold with the Profiler/COfiler kit or retest the evidence entirely under their current kit. PC/9639-40, 9715.

“Application of an interpretation procedure simply doesn’t change the resulting data or its qualitative assessment; however, the incorporation of thresholds specific to an update in the chemistry or platform or software or statistical tool utilized **may result in different expression of the conclusions.**” PC/3779. Thus, “there can be change from inclusion to no determination based on changes in interpretation and the information that can be utilized to generate a statistic.”<sup>6</sup> PC/9716.

Livingston’s testimony during the guilt phase violated *Giglio*. As a State agent, Livingston’s knowledge was imputed to the State Attorney. See *Guzman v. Sec’y, Dept. of Corrections*, 663 F.3d 1336, 1349; *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in [the] case, including the police.”). Livingston knew at trial that the interpretations and statistical calculations she used for Truehill’s evidence were obsolete because she discussed the updated SOPs at both her deposition and

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<sup>6</sup> “Changes to available statistical tools and thresholds could conceivably impact whether or not a given individual could be said to be included versus ‘no determination’ or ‘no determination’ versus excluded.” State Ex. B, lines 82-84.

trial testimony. However, Livingston failed to take any action to prevent her misleading testimony. She did not issue a new report or alert either party as to how her conclusions could now be called into question. Rather, Livingston took the stand and testified repeatedly that Truehill was potentially included as a donor in evidence without any qualifying statements. After the implementation of BIO SOP 12, Truehill's data would no longer be interpretable, thus preventing her from testifying about his possible inclusion. All the DNA results for the mixed DNA evidence would have changed from inclusionary to inconclusive, and therefore of little to no evidentiary value.

Words matter, especially to capital juries. A "possible contributor" is not the same as "no determination," but an uninformed jury can see it that way. The State's own DNA expert stated that an analyst testifying that someone was a "possible contributor" when no determination could be made is **misleading** because those are "two different qualifying answers. They mean two different things." PC/9714-15. The DNA evidence was material to the State's case because it helped tie Truehill to the homicide. There is a reasonable likelihood that Livingston's false and misleading testimony could have affected the judgment of the jury as the new

DNA assessments give reasonable doubt as to Truehill's guilt and relative culpability as compared to his co-defendants.

### **C. Livingston's Testimony Was Misleading And A Violation Of *Giglio* For Failing To Testify To A Statistical Weight**

Forensic DNA and Florida case law mandates that if a positive association is made between the DNA profile of a person of interest and the profile from an item of evidence, it must be accompanied by an estimation of the weight of that association. PC/9605. Any time an analyst associates an individual with evidence, testifies that a person cannot be excluded, or testifies that a person matches the DNA profile, the analyst must give a corresponding statistical weight with that association. PC/9506, 9720.

Livingston's failure to provide statistical weight to these items was misleading and a violation of *Giglio*. Her testimony was misleading because she testified several times with inclusionary statements without providing any qualifications or context for those statements. This was done in direct violation of Florida case law and requirements within the forensic DNA community. Obfuscation can qualify as a *Giglio* violation if the prosecutor knows that the jury and/or the defense is being misled and chooses not to reveal the

truth. *Johnson v. State*, 44 So.3d 41 (Fla. 2010). As an agent of the State, Livingston's knowledge is imputed to the State Attorney. *Guzman v. State*, 868 So.2d at 505; citing *Gorham v. State*, 597 So.2d 782, 784 (Fla. 1992).

Here, Livingston misled the jury by stating that Truehill was a possible contributor to pieces of evidence with extremely low statistical values. Livingston's statements gave absolutely no probative value to the evidence which, in this case, was extremely low. The result is a miscarriage of justice where the jury is left to misinterpret a weak association for strong evidence. PC/9607.

Both DNA experts at the evidentiary hearing testified about the overall low probative weight of the evidence presented at trial. The State's own DNA expert testified that the trial attorneys should have asked Livingston to speak to the weight of the evidence. PC/9729. Clark noted that a "surprising number of statistics that were less than one in ten were reported by Ms. Livingston." PC/9727.

By failing to testify to these actual values at trial, the jury only heard that Truehill was found to be a "possible contributor" to this evidence. There was no context for considering those associations, especially because all the evidence testified to had extremely low

statistical values (like in the case of the silver knife, 85% of the population would be included). Thus, there is a reasonable likelihood that Livingston's false and misleading testimony could have affected the judgment of the jury as the new DNA assessments give reasonable doubt as to Truehill's guilt and relative culpability as compared to his co-defendants.

The trial court found that the DNA experts' testimony at the evidentiary hearing conflicted regarding the obligation to disclose the changes. PC/5132. However, both experts testified that the evidence would have been impacted by the change. PC/3779, 9582-83, 9716-17.

### **ARGUMENT VI**

#### **TRUEHILL IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE. THE POSTCONVICTION COURT'S DENIAL OF RELIEF WAS CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION**

To obtain a new trial based on newly discovered evidence, a defendant must establish: (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 Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)). The second prong is satisfied if the evidence weakens the case against the defendant and gives rise to a reasonable doubt as to culpability. *Id. at* 526. 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 (2014).

#### **A. MIX13 Report**

Prior to 2010, each DNA laboratory in the country was interpreting low-level, complex mixtures differently; there were no industry standards. PC/9683. Sample studies were sent to public crime laboratories on a voluntary basis to interpret five different profiles and report their results with statistics. PC/9501. The 2013 studies (“MIX13”) were conducted to determine how well laboratories were progressing with interpreting complex DNA mixtures. This study was published in 2018 and demonstrates that mixture interpretation remains an ongoing problem. Fewer than half the laboratories in the country have moved on to software type of analysis from the manual analysis. PC/9502-03. The MIX13 revealed:

ongoing wide variation from laboratory to laboratory and how the same data was being interpreted as a strong or weak mixture, or sometimes interpreted at all . . . one analyst might feel that the mixture is too complex for interpretation and might not report anything, might report it inconclusive, where another analyst may feel that it's suitable for inclusion, maybe only partial interpretation. So there was still wide variation . . . many of the mixture interpretation protocols or procedures were still subjective.

PC/9501-02. The MIX13 results varied greatly by laboratory and even by analysts within the same laboratory. PC/9483.

This newly discovered evidence was not known to trial counsel because the study was published four years after Truehill's trial. This new evidence is one more piece in an on-going narrative that the way FDLE analyzed, interpreted, and statistically calculated Truehill's DNA evidence was improper, and his trial unreliable.

The postconviction court found that Truehill has failed to satisfy the "prejudice component" regarding this claim. PC/5126. Prejudice is not one of the requirements under the newly discovered evidence standard. Further, the postconviction court found that there was no determination that there was sufficient genetic material to reanalyze the data. PC/5127. Both experts testified that it is impossible to reinterpret the original data, and Clark's report specifically discussed

which items of evidence were unable to be retested. PC/9639-40, 3779-88. Retesting the data is not a requirement in this instance and should not have factored in to the postconviction court's decision.

The postconviction court also found that Truehill failed to identify the items of evidence which would have been excluded if the SWGDAM guidelines had been followed in the testing. PC/5129. This is incorrect. Roy's reports and testimony were clear that *all* of the evidence would have been discredited because it was *all* suspect.

The MIX13 study shows that the problems Livingston had in this case (i.e. improperly interpreting low level, mixed profiles and misusing the CPI calculation) were like problems seen throughout numerous laboratories. This new evidence attacks the weight and credibility of the DNA evidence presented at trial, particularly when coupled with the claims of ineffective assistance of counsel and *Giglio* violations related to the 2010 SWGDAM guideline changes and BIO SOP 12. This weakens the case against Truehill and gives rise to a reasonable doubt as to his culpability.

## ARGUMENT VII

**THE TRIAL COURT'S DENIAL OF EVIDENTIARY HEARING ON CLAIMS I, II, AND IX DENIED TRUEHILL'S RIGHT TO AN EVIDENTIARY HEARING AND HABEAS CORPUS AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THIS COURT SHOULD REVERSE AND REMAND FOR AN EVIDENTIARY HEARING.**

### **A. Standard Of Review For Claims Denied A Hearing**

This Court has stated that the standard of review such claims is as follows:

A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to *de novo* review. *See, e.g., Rose v. State*, 985 So.2d 500, 505 (Fla.2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000).

*Ventura v. State*, 2 So.3d 194, 197–98 (Fla. 2009). Applying this standard of review, this Court should grant relief or remand for an evidentiary hearing.

Florida Rule of 3.851 provides for a hearing on cases in which a factual determination is needed. Truehill had a right to a hearing

on the claims addressed in this argument below.

The three claims addressed here were pleaded as claims one, two and nine of Truehill's postconviction motion. The trial court denied an evidentiary hearing. Truehill had a right to an evidentiary hearing. The revision of Rule 3.851 became effective on October 1, 2001. At issue here and as the commentary stated:

Most significantly, [new subdivision (f)] requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. [This] Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims which will avoid this cause of delay.

In *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), this Court expressed its concerns that a "major cause of delay in postconviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required." *Id.* at 67. Reflecting this Court's concerns expressed in both the commentary to Rule 3.851 and *Allen*, Rule 3.851(5)(A) as effective on October 31, 2001 states in relevant part: **"At the case management conference, the trial court shall schedule an evidentiary hearing, to be held within 90 days, on**

**claims listed by the defendant as requiring a factual determination . . . .” Fla. R. Cr. Pro. 3.851(5)(A)(i)(emphasis added).**

Based on the language of Rule 3.851 and the Rule’s commentary it could not be clearer -- the court should have granted Truehill an evidentiary hearing on all claims listed by Truehill as requiring an evidentiary hearing. This Court should reverse.

**B. Truehill’s Claims And The Trial Court’s Denial Of A Hearing**

**1. Truehill Pleaded In Claim I:**

CLAIM 1: VENUE IN ST. JOHNS COUNTY WAS IMPROPER DUE TO A PREJUDICIAL ATMOSPHERE THAT DEPRIVED TRUEHILL OF DUE PROCESS AND HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO CONSIDER CHANGING VENUE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND SIMILAR PROVISIONS OF THE FLORIDA CONSTITUTION.

The trial court summarily denied this claim without a hearing. In the order following the evidentiary hearing, the trial court delved into the merits and made factual decisions despite the court not allowing Truehill an evidentiary hearing to establish or contest facts. PC/5091-97. This Court should reverse and grant a hearing.

**2. Truehill Pleaded In Claim II:**

CLAIM 2: THE SYSTEMATIC EXCLUSION OF AFRICAN AMERICANS BY FELONY DISENFRANCHISEMENT VIOLATED TRUEHILL’S

RIGHT TO A FAIR CROSS-SECTION IN THE GRAND AND PETIT JURIES, EQUAL PROTECTION AND DUE PROCESS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Here, again, the trial court denied an evidentiary hearing on a fact-based question. This Court should reverse and grant a hearing.

### **3. Truehill Pleaded In Claim IX:**

CLAIM 9: EVIDENCE OF CO-DEFENDANTS JOHNSON'S AND HUGHES' LIFE SENTENCES, AS WELL AS, ALL NEW EVIDENCE PRESENTED DURING POST-CONVICTION REQUIRES THIS COURT TO CONDUCT A NEW PROPORTIONALITY REVIEW AND DICTATES THAT TRUEHILL'S DEATH SENTENCE BE VACATED.

This claim involved the disparate sentencing of Truehill's codefendants, Peter Hughes and Terrell Johnson, both of whom received life sentences. Truehill was indicted with two codefendants. This Court considered the life sentence of Hughes during Truehill's direct appeal but had not yet decided that Johnson was entitled to a life sentence. *See Johnson v. State*, 238 So.3d 726, 739 (Fla. 2018). The jury and the trial court that sentenced Truehill to death had no idea that the other codefendants would receive life.

This Court has consistently held,

that "the sentence of an accomplice may indeed affect the imposition of a death sentence upon a defendant." *Foster*

*v. Florida*, 778 So.2d 906, 922 (Fla.2000); *see also Keen v. State*, 775 So.2d 263, 285–86 (Fla.2000); *Gafford v. State*, 387 So.2d 333, 337 (Fla.1980). Just as steadfastly in this situation, however, we have held that “[d]isparate treatment of a codefendant, however, is justified when the defendant is the more culpable participant in the crime.” *Larzelere v. State*, 676 So.2d 394, 407 (Fla.1996); *see also Foster*, 778 So.2d at 922, *Ray v. State*, 755 So.2d 604, 611–12 (Fla.2000); *Hayes v. State*, 581 So.2d 121, 127 (Fla.1991).

*Fotopoulos v. State*, 838 So.2d 1122, 1133 (Fla. 2002). This Court found that Fotopoulos’ codefendant’s “resentencing qualifies as newly discovered evidence because it occurred after Fotopoulos's trial and sentencing.” *Id.* Fn.11; citing *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991).

In *Fotopoulos*, this Court affirmed the denial of relief based on the trial court’s having been “faced with the evidence presented at the hearing in this cause. . .” *Id.* The decision of whether the new evidence requires a life sentence for Truehill is equally fact-based and should equally be determined after allowing him to present such evidence in the context of the facts of his case.

This Court, the trial court and the jury knew nothing of the problems with DNA or counsel’s ineffectiveness that led to the outcome in this case in addition to the life sentence of Johnson.

Truehill had a right to show that he was truly less or no more culpable than his codefendants and thus should have received life as well. His death sentence violates the Eighth Amendment requirement that the death be limited to the least mitigated and most aggravated case. Here it certainly was not, and Truehill had a right to prove it.

Truehill concluded by arguing that:

Disproportionate application of the death penalty is a violation of Mr. Truehill's Eighth Amendment rights under the U.S. Constitution and corresponding provisions of the Florida Constitution. It has long been held that a co-defendant's life sentence is a highly relevant consideration in determining whether a death sentence should be imposed. In this case, the new evidence presented of co-defendants Johnson and Hughes both receiving life sentences must be considered in a new proportionality analysis to pass constitutional muster. Based on the two co-defendant's sentences, plus the new evidence presented in post-conviction, Mr. Truehill's death sentence is no longer proportional and must be vacated.

PC/1594-95.

Truehill could not raise Johnson's life sentence on appeal to show that his sentence was excessive, arbitrary and capricious because Johnson was still sentenced to death at the time of Truehill's appeal. Truehill had a right to show at any time that his death sentence violated the Eighth Amendment's prohibition on the

excessive, arbitrary and capricious punishment and that relevant to his codefendants, and overall, that his case was not one the most aggravated and least mitigated of cases.

The central inquiry of whether a sentence violates the U.S. Constitution because it arbitrary and capricious is inherently fact based. The Eighth Amendment stands to guarantee that the death penalty is reliably inflicted only upon the most morally culpable subset of those persons who commit the most serious homicides. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 568, (2005); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). This Court has repeatedly held that a death sentence “cannot be predicated on mere ‘caprice’ or on ‘factors that are constitutionally impermissible.’” *Johnson v. Mississippi*, 486 U.S. 578, 584–85 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884–885, 887 n.24 (1983)).

“[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); *see also id.* at 313 (White, J., concurring) (“[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . .

there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not”). The death penalty may not be “inflicted in an arbitrary and capricious manner.” *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also Godfrey*, at 428 .

To adjudicate these claims the postconviction court needed to delve deeply into the facts that were presented at guilt and penalty phase and those which were not and only became apparent through the truth-finding lens of postconviction. This inquiry is of the utmost importance because an unconstitutional death sentence is never acceptable.

New evidence has rendered Truehill’s death sentence unconstitutional based on rights which have no expiration date. What if anything separates Truehill from his codefendants and allows for such disparate treatment is inherently fact-based. The trial court should not shy away from making these important fact-based decisions. Truehill had a right to be free from an arbitrary, capricious and excessive death sentence. Truehill’s codefendant’s life sentences based on no meaningful differences show this to be to be the case in Truehill’s case. This Court should reverse.

### **C. The Denial Of A Hearing On These Claims Was A Denial Of Truehill's Rights Under The United States And Florida Constitutions**

The denial of a hearing on these claims denied Truehill's substantive rights as detailed in the claims, Truehill's Fourteenth Amendment rights to Equal Protection and Due Process and his right to habeas corpus under the United States Constitution, as well as the corresponding provisions of the Florida Constitution. Lastly, the denial of these rights act in concert to render Truehill's sentence of death arbitrary and capricious and excessive under the Eighth Amendment to the United States Constitution.

The primary responsibility for reviewing constitutional claims under the United States Constitution lies with the state courts and ultimately this Court. *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011). If the state courts refuse to hear claims or deny claims in violation of the Constitution, the possibility of receiving relief is severely limited in federal court. For instance, to obtain federal relief, a petitioner must file within short time periods and is only available if the claim was decided in manner contrary to, or based on an unreasonable application of, United States Supreme Court's precedent, or based on an unreasonable finding of fact. *See* 28 U.S.C.

§ 2254. While Truehill will seek relief in federal court if he is not successful in state court, this is no substitute for full review by the state courts in their primary role safeguarding the rights guaranteed by the United States Constitution.

When state courts abdicate this duty and when state appointed counsel fail to fully present the claims in a timely manner, relief from constitutional error is prevented. When this happens repeatedly, it amounts to a denial of due process and a suspension of the writ of habeas corpus. The trial court's denial of a hearing is such a denial.

Individuals under a sentence of death still retain due process rights, including fair hearings in accord with fundamental fairness. *Panetti v. Quarterman*, 551 U.S. 930, 949-50 (2007)(finding that a violation of state's procedural framework in competency to be executed claim was failure to provide minimum requirements of due process).

This Court made explicit:

[T]hat a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. . . . The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are

not sufficient to meet this burden. [ ] However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. [ ]. We must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.

*Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001)(internal cites omitted). Truehill's motion established a prima facie case that he was denied his rights under the United States and Florida Constitution. The lower court erred in denying Truehill an evidentiary hearing. This Court should reverse.

The lower court's summary denials denied Truehill the right to develop facts that existed outside of the record at an evidentiary hearing and receive relief. The lower court based its decisions on incomplete findings of fact and incorrect factual analysis that would have been corrected at an evidentiary hearing. This violated Truehill's rights to right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Additionally, this amounted to a state and federal rights to due process, equal protection, the right to counsel, confrontation, a fair trial, and constitutes cruel and unusual punishment under the Fifth,

Sixth, Eighth and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution.

The lower court's denial of relief also violated Truehill's state and federal rights to due process, equal protection, the right to counsel, confrontation, a fair trial, and constitutes cruel and unusual punishment, under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution. This Court should reverse.

#### **D. Remedy**

This Court has repeatedly held that when facts are at issue, those condemned to death must have the opportunity to show that that their conviction and sentence violate the United States and Florida Constitutions. The lower court made decisions on constitutional questions of magnitude without allowing Truehill to prove his case.

While this Court can certainly grant relief here, if the Court is unwilling, Truehill should be given the hearing he is entitled to under the United States Constitution and Florida law.

## **CUMULATIVE ERROR AND CONCLUSION**

Whether considered cumulatively or individually the error is this case requires relief. This Court should reverse.

**CERTIFICATE OF SERVICE**

We hereby certify that a copy of the above has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Initial Brief on, Patrick Bobek, Assistant Attorney General, on this 2nd day of June 2021.

S/Tracy M. Henry  
Florida Bar#  
0073865

S/Julie M. Morley  
Florida Bar#  
0085158

S/James L.  
Driscoll Jr. Florida  
Bar# 0078840

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE  
12973 N. Telecom Parkway Temple Terrace, Florida 33637  
(813) 558-1600  
COUNSEL FOR APPELLANT

**CERTIFICATE OF COMPLIANCE**

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S/Tracy M. Henry  
Florida Bar#  
0073865

S/Julie M. Morley  
Florida Bar#  
0085158

S/James L.  
Driscoll Jr. Florida  
Bar# 0078840

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE  
12973 N. Telecom Parkway Temple Terrace, Florida 33637  
(813) 558-1600  
COUNSEL FOR APPELLANT