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

REPLY BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

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 volume number and page number, e.g., R1/123.

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

ARGUMENT

The Appellant relies on the arguments presented in his Initial Brief. While Truehill may not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

REPLY ARGUMENT I

Trial counsel was deficient for failing to adequately question the prospective jurors as necessary to meet the minimum standards in a death penalty 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 racial bias, no assurance that the jury would fully consider his mitigation, and no assurance that the members of the jury were fully death-qualified. The outcome of his trial is unworthy of confidence. While the postconviction court and the State make much of trial counsel Raymond Warren's ("Warren") trial and jury selection experience, they both completely ignore the uncontroverted testimony of Truehill's postconviction expert witness, who opined that Warren's performance in jury selection fell below an objective standard of reasonableness, as well as Warren's own testimony regarding his failures.

The postconviction court and the State rely on *Caratelli v. State*, 915 So. 2d 1256, 1260 (Fla. 4th DCA 2005) and *Patton v. Yount*, 467 U.S. 1025, 1038-40 (1984) to support the position that evidence of bias must be plain on the face of the record. PC/5110; Answer at 28.

This reliance is misplaced; *Caratelli* and *Patton* were based on counsel's failure to preserve cause challenges after extensive voir dire, and were not decided under the *Strickland* standard.[1] Those 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 bias were never asked. The State's assertion that there is no proof of juror bias because there is no record evidence is actually *further* proof of counsel's ineffectiveness, because trial counsel failed to ask the questions that would reveal any latent bias, whether the jurors would properly consider mitigation, and whether any juror would automatically vote for the death penalty.

At the evidentiary hearing, Terence Lenamon, Esq. ("Lenamon") was qualified as an expert and his report was accepted into evidence without objection. PC/4248. He testified that "the process of questioning jurors is to ferret out not only misunderstandings, but clearly the personal biases that exist with many jurors who are the automatics." PC/4253. By "automatics," Lenamon meant jurors who would automatically sentence a person to death merely based upon

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

a murder conviction and would not consider any mitigation. As Lenamon stated, "[e]ach individual juror needs to be questioned on all of these issues. And it's the responsibility of the lawyer not to guess, not to kind of like surmise what a juror's position is." PC/4262.

Regarding Warren's failure to question the venire regarding racial bias, Lenamon testified, "[t]here are people who are racist, or who have racial biases. They may inherently believe that a black man is more likely to commit a crime than a white man, and when the victim is white, that increases more significantly." PC/4271. "It's the elephant in the room. You got to talk about it. You got to ask questions about it." PC/4272. He further testified, without contradiction, that reasonable defense attorneys would not disagree regarding the necessity of questioning the venire regarding potential racial bias in cases where the defendant is Black and the victim is White. PC/4285-86.

The State repeats the postconviction court's erroneous reliance on Warren's testimony that he did not ask questions about race unless he thought the crime was racially motivated. This reliance is misplaced, because race is an issue in interracial crimes regardless

of the motivation behind the crime. *See Turner v. Murray,* 476 U.S. 28 (1986). 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. Asking questions that were designed to uncover bias or racial animus was the minimum that Warren should have done.

Failure to ask the venire life-qualifying questions, or to ask questions about racial prejudice, fails to adequately protect a defendant's constitutional right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 734 (1992); *Turner*, 476 U.S. at 35. Asking prospective jurors if they can deliberate, be fair, or follow the law is insufficient to detect individuals who would automatically vote for the death penalty or harbor a latent bias, nor can they detect those individuals with views that would prevent or impair their duties in accordance with their instructions and oath. *Morgan*, 504 U.S. at 734. As Lenamon testified, general group questioning is deficient performance under the prevailing norms. PC/9196.

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. *Id.* at 425-26.

The trial team was aware that it was important to ask the venire if anyone had strong opinions about the death penalty. PC/5112. Warren admitted that he missed asking some jurors their opinion of the death penalty, and that failing to do so "would be a foolish strategy." PC/8838-39, 8916-17. *There was no strategy* behind failing to ask the venire members their opinion on the death penalty. PC/8839. The questions Warren asked about whether people agreed with the "eye for an eye" philosophy, or whether they would impose the death penalty in cases where the facts were as far away from the facts of this case as possible were insufficient to determine whether the prospective jurors would prevent or substantially impair the performance of their duties in accordance with their instructions and oath. *Witt*, 469 U.S. at 424. 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. *Id.* 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).

The postconviction court again ruled that Truehill did not demonstrate that any juror would have provided a response evidencing bias or prejudice. PC/5105 (citing *Green v. State*, 975 So. 2d 1090, 1105 (Fla. 2008)). The postconviction court's reliance on this case was misplaced. In *Green*, there was at least some evidence in the record regarding potential bias based on a juror's answers, but the juror passed the legal test for juror competency. Here, the jurors were never tested for competency because of Warren's deficient performance in jury selection.

Trial counsel performed deficiently by not questioning the potential 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 penalty case and no assurances they could be fair and

impartial because they were never asked to give those assurances. As a result of this deficiency, Mr. Truehill was prejudiced because he was denied a fair and impartial jury. There can be no confidence in the results of his guilt or penalty phases.

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 was an unreasonable strategy. 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.

REPLY ARGUMENT II

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

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. Accordingly, there is a reasonable probability that the result of Truehill's trial would have been different and Truehill is entitled to relief.

B. Failure To Object To Prosecutorial Misconduct

The prosecution used inflammatory language and misstated facts during opening statements and closing arguments, but trial counsel failed to make the necessary objections. Having failed to object, trial counsel also failed to move for a mistrial due to the prosecutorial misconduct. This is deficient performance that further prejudiced Truehill.

It is improper for a prosecutor to misstate facts or the testimony of a witness, even in opening statements. *United States v. Williams*, 504 U.S. 36, 60 (1992). Warren recognized that he should have objected to the State's opening statement that Truehill attacked a witness who was going to testify to the events of an uncharged crime.

PC/8881-82. Notably, he testified that there was no strategic reason for failing to do so. *Id*.

Warren was also exceptionally deficient because he testified that he was not even paying attention to the State's closing argument and that objectionable 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. Truehill was prejudiced by all of counsel's deficiencies and this Court should find that Truehill received ineffective assistance of counsel.

REPLY ARGUMENT III

The State argued that the evidence presented in postconviction is merely cumulative of the evidence presented by trial counsel during the penalty phase. Answer at 53-54, 59. However, collateral counsel did present new, non-cumulative mitigation which trial counsel failed to present during penalty phase. By failing to present all available mitigation, trial counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This new mitigation not only addresses topics which were never presented to the jury, but also paints a complete picture of topics which were merely glossed over during the penalty phase.

Specifically, the mitigation presented in postconviction served to further illuminate Truehill's childhood and abusive home. This new mitigation includes:

- Truehill's father, Marshall Jr., was controlling and manipulative but did not acknowledge at trial that he was guilty of those things. PC/4124.
- He met the needs of strangers but did not do the same with his family. PC/4125. He supported another man's family at the expense of his own. PC/4209.
- He was abusive, was very good at belittling, humiliating, shaming, and demeaning his family from a position of authority based on his status as a preacher. PC/4125.
- He prevented his third wife from taking antidepressants, despite her diagnosis of depression, because he didn't want her to have a diminished sex drive. PC/4126.
- He would become physically violent when he was triggered, including kicking down a bathroom door because he would not let his third wife be alone. PC/4127. He would also physically prevent her from leaving their home, including hiding her keys and jumping on her car. PC/4128-29.

- The Truehill home was happier when the children were younger. PC/4149. The children were relieved after their parents divorced. PC/4151. The three older Truehill children essentially had a different set of parents from the younger two. PC/4169.
- Truehill's father withheld food from his children for three days as punishment when Truehill was a toddler. PC/4152-53.
- Truehill's eldest sister has been diagnosed with obsessive compulsive disorder ("OCD"). PC/4161.
- Traci Vaughan, another sister of Truehill's, has been diagnosed with OCD and anxiety. PC/4161-62. She experiences panic attacks and has considered suicide. PC/4161.
- Jessica Gresko, the youngest of the Truehill sisters, and the closest to Truehill in age, also exhibits OCD symptoms and is emotionally unstable. PC/4164.
- Truehill's father beat his children with a belt on their bare behinds, leaving welts. PC/4177, 4207.
- Truehill had no one to turn to when he needed help and he had no outlet for when things were bad at home. PC/4188, 4193.

- Truehill and the other children saw Marshall Jr. beat their mother, saw him drag her by the hair, and saw her black eyes and split lips. PC/4206.

In addition, Kalonji Freeman was not contacted or called by the trial team, despite the fact that he was available and willing to testify. PC/4093. He testified about an incident when Truehill's father threw Truehill across a room, and another incident where all of the children's belongings were thrown into the front yard of the house because the children had not cleaned up after themselves. PC/4097. None of this information was cumulative to the penalty phase testimony because Mr. Freeman was not called to testify.

Cheryl Noble ("Noble") also did not testify at the penalty phase. She stated at the evidentiary hearing that she might not have testified had she been asked; however, she did not give a definitive "no" when asked; and did state that she would have been willing to talk to a psychologist involved in the case. PC/4106, 4117. Noble was further able to illuminate the Truehill father's, (Marshall Jr.) abusive nature because she was one of the few family members who knew his first wife. Noble was able to describe instances where family members had to intervene in a physical battle where Marshall Jr. was screaming

and yelling at his wife who was cowering in a corner, trying to protect herself. PC/4113. She also testified to having been molested on more than on occasion by Marshall Jr., who was her uncle. PC/4114-15.

The postconviction court and the State's assertions misapprehend the point of *Wiggins v. Smith,* 539 U.S. 510 (2003). A reasonable strategic decision is based on informed judgment. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable." *Id.* at 523. The postconviction court's findings and the State's argument in its answer brief were not fairly supported by the record, and thus the analysis based on them was flawed.

While trial counsel did attempt to present mental health mitigation at the penalty phase, the mental health expert was not able to present a full assessment of Truehill; as stated in the initial brief, Dr. Sautter's testimony was interrupted and he felt that he was not able to testify fully regarding Truehill's depression and abandonment by his family. Collateral counsel presented a mental health expert, Dr. Mark Cunningham, in postconviction who had the

benefit of learning all of the relevant mitigation regarding Truehill's life when forming opinions. Dr. Cunningham testified at the evidentiary hearing 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 and adverse community factors that affected Truehill and led to him having a diminished capacity to make reasonable choices. 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. Trial counsel failed to present sufficient testimony which showed the tremendous adverse psychological, developmental, and emotional effects of Truehill's traumatic experiences. This type of testimony can only be presented through a mental health expert.

In *Williams v. Taylor*, the United States Supreme Court noted that the lower court's prejudice determination, when reweighing it

against the evidence in aggravation, was unreasonable because it failed to evaluate the totality of the available mitigation evidence, both that adduced at trial and during the habeas proceedings. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990)). Here, the Court must consider the totality of mitigation evidence presented during the penalty phase as well as the postconviction evidentiary hearing. Had Truehill's trial attorneys presented a thorough and comprehensive picture of Truehill's background, the balance of mitigating circumstances would be different and there exists a reasonable probability that Truehill would have received a life sentence.

Trial counsel's failure to investigate and present all available mitigation violated Truehill's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. This mitigation is new, relevant, and non-cumulative, therefore trial counsel's performance was prejudicially deficient. If the newly discovered mitigation evidence coupled with Dr. Cunningham's opinions were presented at penalty phase, there was also a reasonable probability that the fact finders would have assigned greater weight to the previously found mitigators. Consequently, this Court should vacate Truehill's sentence of death.

REPLY ARGUMENT IV

Contrary to the State's assertions, Truehill's counsel rendered ineffective assistance by failing to properly challenge the DNA evidence presented at trial. Truehill was prejudiced by counsel's deficiencies in both phases of his trial.

The State points out that it was Warren's goal to get Suzanne Livingston ("Livingston") to admit that it was possible for the codefendants to have left the DNA instead of Truehill. Answer at 71. Therefore, Warren was even more deficient by failing to show that the DNA evidence was so weak that not only could the codefendants' DNA be present, but so could a multitude of other peoples' DNA. This goal could have been accomplished by obtaining the Scientific Working Group on DNA Analysis Methods ("SWGDAM") guidelines, FDLE Standard Operating Procedures ("SOPs"), and FDLE audits, and using them to cross-examine Livingston or by eliciting the testimony through a defense expert who, unlike the expert retained by trial counsel, was actually willing to testify at trial. Based on Warren's goal of attempting to prove it was possible for others to have left the DNA, it would have clearly satisfied his goal to discredit the DNA evidence by showing that the new guidelines and SOPs would cause Truehill

to no longer be considered a possible contributor but rather that it could not be determined whether he was a contributor at all. As a result, Warren had no reasonable strategy because challenging the DNA evidence would have helped him accomplish his goal by weakening the State's purely circumstantial case. Unfortunately, instead of Warren properly challenging the low probative value of the DNA evidence, his deficient attempt at cross-examination only served to confuse Livingston, the jury, and the trial judge. R40/942-43, 945-46. The State even noted in its closing argument how confused all parties were with Warren's questioning. R43/1355.

The State improperly argues multiple times that Tiffany Roy ("Roy") used an arbitrarily chosen threshold of 250 RFU (Relative Fluorescence Unit). Answer at 72, 80. The postconviction judge asked Roy if her threshold was arbitrary and Roy confirmed that it was not. PC/9543. Roy testified that the threshold was empirically derived, and she was showing "the impact of applying a stochastic threshold instead of being influenced by the known profile." PC/9542-43. However, Roy did testify that what was completely arbitrary was Livingston's use of Truehill's known profile to indicate completeness of the profile on an item that Livingston did not know if Truehill

touched. PC/9542.

The State's contention that FDLE's new equipment was more sensitive and able to obtain better data from less DNA than the older kits is misleading. Answer at 72. The testimony cited by the State refers to Leigh Clark's discussion of a brand-new kit that began to be employed in 2019 as being more sensitive. PC/9688-89. The "more sensitive" kit that she refers to is irrelevant because it was not in place either at the time of Truehill's trial or at the time that his postconviction motion was filed.

Furthermore, this Court has previously stated:

> There are two components of DNA analysis and both must be provided to the trier of fact in order for DNA evidence to have probative value: (1) an examination of the biological material in evidence in comparison with a known DNA sample; and (2) statistical analysis to determine the probability of matching the tested material to random individuals in the general population or specified subgroups. "The first step uses principles of molecular biology and chemistry to determine that two DNA samples look alike. The second step uses statistics to estimate the frequency of the profile in the population." *Butler v. State*, 842 So. 2d 817, 827 (Fla. 2003)[.]

Hodges v. State, 213 So. 3d 863, 870 (Fla. 2017). In response to Truehill's argument that counsel was ineffective in failing to object to Livingston's omission of statistical weights and frequencies and in

failing to elicit that information either on cross-examination or through a testifying defense expert, the State points out that counsel did voir dire Livingston regarding partial matches at trial and argued that such testimony was misleading. Answer at 77. However, that statement highlights that, like the postconviction court, the State has also missed the crux of this argument. PC/5137. Not only was the aforementioned voir dire and argument conducted outside of the presence of the jury, but the argument did not address Livingston's failure to provide statistical weights and frequencies because she had not yet testified. R39/848-55. The State also claims that Warren addressed the issue of statistical weights when he moved for a mistrial due to the phrases "partial match" and "possible contributor" being misleading. Answer at 77 (citing R40/927). Both the State and the postconviction court are incorrect in that sentiment too. PC/5137. The issue that Warren attempted to bring to the trial court's attention was not the same issue that Truehill has argued in postconviction, which is that Livingston inappropriately failed to testify to a statistical weight to multiple items of evidence that she associated with Truehill's DNA profile. PC/9605-09. Therefore, the fact remains that if counsel had objected to Livingston failing to

provide statistical weights and frequencies to the DNA evidence or had elicited the weights either on cross-examination or through its own testifying expert, the jury would have heard the low probability of the DNA's statistical values and discredited the evidence entirely. As addressed in the Initial Brief at 81-86, the jury was falsely led to believe that this was strong DNA evidence, when in reality it was largely meaningless.

Disclosing the level of uncertainty in population frequency calculations is not a new concept, and since at least 2002, best practices have suggested that the matter should be addressed through the presentation of experts and the cross-examination of those experts. *Brim v. State*, 827 So. 2d 259, 260 (Fla. 2d DCA 2002). Further, the "factor of 10" "used to describe a scientist's level of confidence in the statistical estimate" has been suggested since at least 1996 based upon the report of the National Research Council and has been discussed by courts in Florida since at least 2000. *Brim v. State*, 779 So. 2d 427, 435, 446 (Fla. 2d DCA 2000). Although counsel was given similar information by Gary W. Litman, Ph.D. that "these numbers were low, and that if you scaled down tenfold, that they are basically weightless," Warren still did not use the

information in his cross-examination. PC/9621-22. As such, it is clear that counsel was ineffective in failing to object to Livingston's omission of these values, failing to present their own testifying expert, and failing to effectively cross-examine Livingston regarding these statistical values. Truehill's jury was unable to properly weigh the DNA evidence or Livingston's credibility without this information. If the jury was properly informed, there is a reasonable probability that Truehill would not have been found as culpable and at the very least would have received a less severe sentence like his codefendants.

In addition, the State repeatedly argues that no prejudice occurred and even if no evidence related to Truehill's possible inclusion in mixed DNA samples was presented at trial, there was still overwhelming evidence of guilt tying him to the crime spree. Answer at 74-75, 76, 77-78, 81-82. However, even assuming *arguendo* that ample evidence existed that Truehill was present for other events, that does not prove that he was involved in the murder, that he was present or participated in it, or that he was as culpable as any of his codefendants (who each received a life sentence). Accordingly, if counsel had not been deficient in a multitude of ways in failing to properly challenge the DNA evidence at trial and/or had

a defense expert such as Roy testify at trial, there is a reasonable probability that the jury would not have found Truehill guilty of first-degree murder, and at the very least, would not have found Truehill worthy of the death penalty.

As part of the "overwhelming evidence" that the State cites, the State alleges that Truehill "was matched as a contributor to DNA found on Mario Rios's [("Rios")] shirt while both codefendants were completely excluded." Answer at 74. However, being unaware of the issues and weakness of the DNA evidence and the inappropriate way it was presented by Livingston (whether it was due to the deficiencies of the trial team or a *Giglio*[2] violation), also negatively affected trial strategy. PC/8783-84. "[R]easonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options." *Strickland*, 466 U.S. at 680. This "strategy" not to cross-examine Rios was unreasonable because Valerino was unable to make an informed decision as to whether to cross-examine Rios. *See id.* at 681 ("the adversary system requires deference to counsel's *informed decisions*") (emphasis added).

[2] *Giglio v. United States*, 405 U.S. 150 (1972).

Valerino specifically testified that he was going to cross-examine Rios, but he did not because he thought Truehill's DNA on the shirt corroborated Rios' identification of Truehill. PC/8783-84. "If there had not been DNA on the shirt, then obviously the strategy would have been totally different because then there definitely would have been a question about identification." PC/8784. After the implementation of BIO SOP 12, the DNA on Rios' polo shirt that had previously been analyzed under the improper "suspect-centric" analysis would not have been interpretable, and the results would have changed from including Truehill as a possible contributor to *inconclusive*. PC/3084-85, 3090-91, 9526-34, 9545-46, 9550, 9580-81, 9601. Therefore, Truehill was prejudiced by Valerino's uninformed decision in failing to cross-examine Rios and failing to challenge Rios' credibility regarding the identification.

The fact that the State mentioned the DNA evidence numerous times in its closing arguments also illustrates the importance of the DNA evidence and that the State wanted to ensure that the jury focused on it. R43/1276, 1278-79, 1282, 1338-39, 1354, 1355-56. Part of the State's argument was that Truehill grabbed Rios' shirt, which as discussed above, was allowed to go unchallenged due to

counsel's ineffectiveness. R43/1282. The State also made it a feature of the closing arguments to assert that Truehill was wearing gray-colored jeans later found to have the victim's blood on them and to argue that Truehill's DNA was included as a match on a machete and included as a contributor on a knife. R43/1276, 1278-79, 1338-39, 1354, 1356. Properly challenging the DNA evidence and all of its flaws would have been crucial to Truehill's case. These references highlight the prejudicial nature of counsel's failure to effectively challenge the DNA evidence. If counsel had brought out the issues with Livingston's testimony and properly discredited the DNA evidence, the State would not have had a reason to highlight the DNA evidence in its closing arguments. As a result, there is a reasonable probability that the jury's verdicts would have been different.

Finally, as to the issue of the machete being transported in the same bag as other evidence, which could have contaminated the machete by causing secondary DNA transfer, the State asserts that the verdicts would not have been affected because "DNA evidence was not the linchpin that got Truehill convicted," and the other evidence presented, including DNA evidence related to the codefendants, tied Truehill to the crimes. Answer at 78; PC/9616-17. Contrary to the

State's assertions, if the jury learned that it was possible for Truehill's DNA to have been deposited on the machete via secondary transfer, it would have affected the jury's verdicts because Truehill would not have been found to have been as culpable. As the machete was alleged to be one of the murder weapons, it would have been critical for counsel to show that Truehill did not need to touch the machete in order for his DNA to appear on it. Hence, it was not a reasonable strategy to fail to cross-examine on this issue and it was definitely unreasonable to fail to have an expert such as Roy testify in front of the jury to explain secondary transfer and refute Livingston's supposedly "unhelpful" statements that she made outside the jury's presence. Answer at 79; PC/5138. If counsel had been effective and had an expert who was actually willing to step foot inside the courtroom, the expert would have been able to testify that secondary transfer of DNA evidence could have occurred when the machete was transported in a large plastic bag with other evidence. PC/9616-19. Truehill was prejudiced by these deficiencies.

Although Truehill contends that each of these deficiencies alone was prejudicial, without a doubt, the cumulative effect of all of counsel's deficiencies related to DNA evidence prejudiced Truehill. A

reasonable probability exists that the result of both phases of Truehill's trial would have been different if counsel was not deficient. Therefore, this Court should find that counsel rendered ineffective assistance of counsel and grant relief.

REPLY ARGUMENT V

The State repeatedly contends that the stochastic "threshold can vary wildly from laboratory to laboratory and even between different machines in one laboratory, and can only be determined through experimentation." Answer at 83 (citing PC/9679-80), 85. This statement is an exaggeration. There is no testimony that the threshold varies "wildly", and a review of the pages cited, does not indicate any testimony that the threshold varies between different machines in the same laboratory.

The State also claims that "[e]ven if it was error for Livingston to not include statistical weight in her mixed sample testimony, it was not material because there is not a reasonable likelihood it affected the trier of fact." Answer at 89. The State asserts that there was a "mountain of other evidence" tying Truehill to the crimes and that "the DNA evidence in this case was not particularly strong." *Id.* The State's response highlights the exact issue with Livingston failing

to testify to the statistical weights and frequencies. The State and the postconviction court have all now heard testimony that the DNA evidence was not very strong; however, Truehill's jury and the trial court who sentenced him did not hear that same information because Livingston omitted the statistical values and failed to inform them that the results for the mixed DNA evidence would have changed from inclusionary to inconclusive. Therefore, the fact finders were completely unaware that these DNA results were of little to no evidentiary value. As a result, Livingston's false and misleading testimony was material because there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Bagley*, 473 U.S. 667, 678 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Further, failure to disclose the testimony was not harmless beyond a reasonable doubt. *Bagley*, 473 U.S. at 680. If the fact finders heard the accurate DNA testimony heard in postconviction, it would give reasonable doubt as to Truehill's guilt and culpability. Therefore, this Court should find that a *Giglio* violation occurred and grant Truehill relief.

REPLY ARGUMENT VI

The State claims that the postconviction court properly found that the "second prong of the newly discovered evidence analysis" failed "because it would not probably produce an acquittal on retrial" due to overwhelming evidence of guilt. Answer at 91-92. However, the second prong is satisfied if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Hurst v. State*, 18 So. 3d 975, 992 (Fla. 2009) (quoting *Heath v. State*, 3 So. 3d 1017, 1023-24 (Fla. 2009)). Further, this Court has held that "[i]f reasonable doubt exists as to the defendant's culpability, a jury must resolve this factual matter—not this Court." *Hildwin v. State*, 141 So. 3d 1178, 1185 (Fla. 2014).

The newly discovered evidence attacks the weight and credibility of the DNA evidence presented at Truehill's trial and gives rise to a reasonable doubt as to his culpability. This is even more critical considering Truehill was arguably less culpable than his codefendants who received life sentences. *See Marek v. State*, 14 So. 3d 985, 997 (Fla. 2009). Upon retrial, the newly discovered evidence would likely produce an acquittal, or at the very least, a lesser sentence, therefore this Court should grant relief.

REPLY ARGUMENT VII

The State argued and the postconviction court based its decision on alleged facts. There lies the problem. The State and postconviction court's reliance on "facts" shows that Truehill should have been allowed to show the contrary. That is what fairness required and that is the heart of the argument here.

Truehill has limited procedures under which he may raise his claims. These procedures all have strict time limits and obstacles to filing successive pleadings after initial pleadings are determined. With such rules affecting his ability to overcome constitutional violations, he should have received a full opportunity to prove these violations at an evidentiary hearing. Florida Rule of Criminal Procedure 3.851 required an evidentiary hearing. This Court should reverse.

Claim I.

The postconviction court denied an evidentiary hearing on Claim One but nevertheless decided the claims based on factual determinations. The State's justification for the denial of Truehill's right to a hearing was unavailing. Truehill's Claim I pleaded that, amongst other denials, trial counsel was ineffective which is

fundamentally a fact-based claim.

The State began by arguing that "[t]he decision of whether to seek a change of venue is a matter of trial strategy and, therefore, is not generally an issue to be second-guessed in postconviction proceedings." Answer at 96 (citing *Rolling v. State*, 825 So. 2d 293, 298 (Fla. 2002); *Buford v. State*, 492 So. 2d 355, 359 (Fla. 1986)). The State continued to argue:

> Further, a postconviction movant must establish grounds that would require a change of venue or that there was substantial difficulty in seating a fair or impartial jury. *Wike v. State*, 813 So. 2d 12, 18 (Fla. 2002); *Provenzano v. Dugger*, 561 So. 2d 541, 545 (Fla. 1990) (concluding that counsel was not ineffective for failing to renew the motion for change of venue because it was a tactical decision and because "it is most unlikely that a change of venue would have been granted because there were no undue difficulties in selecting an impartial jury").

Answer at 96. The problem with the State's argument was that Truehill was denied an evidentiary hearing to show a lack of reasonable strategy, or to show that there were sufficient grounds for counsel to move to change venue. As mostly an ineffective assistance of counsel claim, this claim inherently required fact-finding to resolve the claim. It was simply insufficient for any court to find, let alone for the State to argue, that counsel's failure to move and preserve a

change of venue claim was strategic without hearing from trial counsel.

The State's argument failed to acknowledge that an evidentiary hearing would have allowed Truehill to present expert testimony to prove the underlying validity of a motion to change venue. No expert opinions from any evidentiary hearing appear in the record on this matter. Any analysis of the facts would have benefitted from the presentation of expert testimony. Moreover, an expert would have allowed for the courts to consider the effects of both conscious and unconscious bias. Counsel was deficient in failing to account for unconscious bias. Both conscious and unconscious bias denied Truehill the fair trial that he was guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

Florida law provides for a postconviction evidentiary hearing to expose any constitutional violations that were not apparent on the trial record. Claim One was one such claim. This Court should reverse.

Claim II.

The State argued that this claim should have been raised on direct appeal. Answer at 103. The State then proceeded to argue that

felons are not an immutable class. Claim Two could not be raised on direct appeal because it required further factual development. A postconviction hearing would have been an ideal venue for this development and would have aided the courts in considering hidden constitutional violations that diminish the credibility and justness of Florida's death penalty system, and specifically in Truehill's trial.

Truehill had a right to a jury that comprised a "fair cross-section of the community." As far as the State's lack of immutability of felon status argument, this ignores the well documented disparate treatment of minorities in the criminal justice system and the history of treating felony status as a proxy for race. The felony disenfranchisement laws have deprived Florida juries of the experiences of large numbers of people who could have contributed to the truth finding that occurs in a jury verdict. Despite the availability of the restoration of rights, pre-Amendment 4, any restoration was nearly impossible, thus showing the immutability of the felon status.

While these failings are well known, expert testimony and evidence would have provided the insight necessary to show this constitutional violation. This Court should reverse.

Claim IX.

Truehill's case is not one of the most aggravated and least mitigated, especially when the errors that deprived Truehill of a fair and reliable trial and penalty phase are considered. Postconviction has showed that Truehill was less culpable or no more culpable than his codefendants, yet he remains on death row while the codefendants serve life sentences. Disparate sentences between like defendants would have been a critical factor for the jury in determining whether Truehill should have been sentenced to life or to death.

This claim differs from the claim in Truehill's state habeas petition because, in addition to the legal arguments that the petition makes, if relief is not immediately granted, Truehill should have been allowed to develop facts concerning the disparate treatment of his codefendants. These facts could not have come from the trial court's familiarity with the codefendants' case. *See Cruz v. State*, 320 So. 3d 695 (Fla. 2021) It is improper for a trial court to consider "evidence from a different trial that was not introduced in the guilt phase of the present trial." *Id.* at 725 (citing *Davis v. State*, 207 So. 3d 177, 192 (Fla. 2016)) (quoting *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1991)).

This Court's decision in *Cruz* showed why an evidentiary hearing was required.

The State's notion that Truehill's codefendants received life sentences because of a legal reason is not accurate. A true legal reason would be that the death penalty could not be applied to the codefendants as a matter of constitutional law. For instance, if one of the codefendants was a minor or intellectually disabled, a death sentence would be clearly prohibited by the United States Constitution. Alternatively, if one of the codefendants went to trial and was only convicted of second-degree murder, or a jury returned a nonunanimous life verdict, death would not be a permissible punishment. Here Truehill's codefendants received life sentences because the Tallahassee Police Department offered Kentrell Johnson life and the State offered Peter Hughes the same. These are not legal reasons; they are arbitrary acts of discretion.

While the codefendants' sentences are now known and this Court could rule on Ground Two of Truehill's habeas petition, this claim raised the failure to consider the disparate sentence by the trial court and jury that sentenced Truehill to death. Especially from the perspective of a jury, the sentencing of two codefendants to life would

raise a serious question of whether Truehill's sentence was unfair. Jurors in a capital case are called upon to make the ultimate decision of whether a death sentence is fair. There can be no greater mitigating factor than the fundamental notion that like defendants should be treated alike. Here they clearly were not, but not because of any uniqueness of Truehill or his culpability. The extent that the State disputes this only solidifies that Truehill was entitled to a hearing.

These are all well-known ideas, but an expert could still have explained the impact that disparate sentencing would have had on a jury. The jury and the trial court did not hear this evidence because Truehill was tried and sentenced first. Such misfortune was not a constitutional distinction that would have allowed for disparate sentencing. Much more was needed to justify such treatment and to pass Eighth Amendment scrutiny.

Here the disparate sentencing clearly meets the requirement of newly discovered evidence. While Truehill acknowledges this Court's decision in *Lawrence v. State*, 308 So. 3d 544, 552 (Fla. 2020), and Truehill contests its application to him, *Lawrence* did not limit relative proportionality or in any way overcome the Eighth Amendment's bar of arbitrary, capricious, and excessive penalty.

This Court's opinion in *Lawrence* could not overcome the requirements of *Furman v. Georgia*, 408 U.S. 238 (1972) in which Justice Stewart explained that "[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." *Id.* at 309-10 (Stewart, J., concurring).

If Truehill remains sentenced to death only because he happened to be tried first and before this Court ruled on Kentrell Johnson's case, this would be the very definition of wanton and freakish imposition of death. Truehill may only receive death if his case was the most aggravated and least mitigated; his case cannot be if his codefendants' cases were not.

The State fails to account for, much less overcome, the duty that the State courts must adjudicate claims of federal constitutional violation under federal and Florida law. This Court is the primary decider of federal claims of constitutional violation. *Harrington v. Richter,* 562 U.S. 86, 102–03 (2011). In order for this Court to fulfill this role, it is necessary for litigants such as Truehill to be allowed to develop the facts necessary to prove these claims. While

postconviction relief continues to be limited based on retroactivity and hostility to successive motions, it is necessary that a condemned individual have one full opportunity to develop issues and obtain a judgment on the merits. Here, the postconviction court could have easily allowed for Truehill to develop these facts but instead decided to deny him this right. This Court should reverse.

CUMULATIVE ERROR

Contrary to the State's argument, there is overwhelming error, individually and cumulatively. Even with the unconstitutional limitations that Truehill was forced to confront, he has proved constitutional error decisively and overwhelmingly.

CONCLUSION

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 Reply Brief on, Patrick Bobek, Assistant Attorney General, on this 20th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

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