IN THE SUPREME COURT OF FLORIDA

WILLIE SETH CRAIN, JR.,

Appellant,

v. **CASE NO. SC09-1920**
L.T. No. 98-17084 CFAWS

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

I. Direct Appeal

This Court's direct appeal opinion in Crain v. State, 894 So. 2d 59 (Fla. 2004), cert. denied, 546 U.S. 829 (2005), recites the following facts

> **Willie Seth Crain**, a then fifty-two-year-old Hillsborough County fisherman and crabber, was charged with the September 1998 kidnapping and first-degree murder of seven-year-old Amanda Brown. At the time, Amanda was three feet, ten inches tall and weighed approximately forty-five pounds.
>
> The evidence introduced at trial establishes that on September 9, 1998, Crain's daughter, Cynthia Gay, introduced Crain to Amanda's mother, Kathryn Hartman, at a bar in Hillsborough County. Crain and Hartman danced and talked for four hours, until 1:30 or 2:00 in the morning, then went to Hartman's residence, a trailer located in Hillsborough County, where they remained for approximately thirty minutes. Amanda was spending the night with her father and was not present. However, two photographs of Amanda and some of her toys were visible in the trailer. Before Crain left, Hartman made it clear to Crain that she wanted to see him again.
>
> The next afternoon, September 10, 1998, Crain returned to Hartman's trailer. Hartman testified that Crain smelled of alcohol and carried a cup with a yellow liquid in it. Amanda was present. Crain began talking to Amanda about her homework. He pulled some money out and told Amanda that if she got her homework right, he would give her a dollar. He eventually gave her two dollars. Crain and Amanda sat at the kitchen table playing games and working on her homework. At some point during the afternoon, Crain became aware that Amanda had a loose tooth. After wiggling the tooth, Crain offered Amanda five dollars to let him pull the tooth out, but she refused. Hartman testified that the tooth was not ready to be pulled out. Crain remained at Hartman's residence for approximately one

hour. Before he left early in the afternoon, Crain accepted Hartman's invitation to return for dinner that evening.

Crain returned to Hartman's trailer shortly after 7 p.m. Crain still smelled of alcohol and carried the same or a similar plastic cup with a colored liquid. After dinner, Hartman and Crain played more games with Amanda. At some point, Crain mentioned that he had a large videotape collection and invited Hartman and Amanda to his trailer to watch a movie. Amanda asked if he had "Titanic," which she stated was her favorite movie. Crain stated that he did have "Titanic" and Amanda pleaded with her mother to allow them to watch the movie. Hartman was initially reluctant because it was a school night, but she finally agreed. Crain drove Hartman and Amanda approximately one mile to his trailer in his white pickup truck.

They began watching the movie in Crain's living room but were interrupted by a telephone call from Crain's sister. Crain said he did not get along with his sister and asked Hartman to speak to her. At the conclusion of a twenty-to twenty-five-minute phone conversation with Crain's sister, Hartman found the living room unoccupied. Hartman opened a closed door at the rear of the trailer without knocking, and found Amanda and Crain sitting on the bed in Crain's bedroom, watching the movie "Titanic." Both were dressed and Amanda was sitting between Crain's sprawled legs with her back to Crain's front. Crain's arms were around Amanda and he appeared to Hartman to be showing Amanda how to work the remote control. Hartman testified that although she was not overly concerned about what she observed at that time, she nevertheless picked Amanda up and sat Amanda beside her on the bed. Crain, Hartman, and Amanda then watched the movie together in Crain's bedroom. Crain testified at trial that they watched the movie in his bedroom because it was the only air-conditioned room in the trailer.

At some point in the evening, Amanda and Hartman used Crain's bathroom together. While they were in the bathroom, Hartman did not notice Amanda bleeding from any location that Hartman could observe. Hartman did

notice a blue cover on the back of the toilet seat. Amanda did not use the bathroom at any other time that evening.

At another point in the evening, Hartman asked Crain if he had any medication for pain. Crain offered her Elavil and Valium. He also offered her some marijuana, which she declined. Crain told Hartman that the Elavil would "really knock the pain out" and would make her sleep for a long time. Hartman elected to take five, five-milligram Valium tablets. [FN2] Crain took one Valium tablet.

> [FN2] At the time she took the Valium, Hartman had a twelve-year addiction to pain pills. Crain testified at trial that he was unaware of the addiction.

Eventually, Hartman decided that it was time to leave. Crain drove Hartman and Amanda back to their residence and accompanied them inside. Amanda took a shower. While checking on Amanda during the shower and helping her dry off and get ready for bed, Hartman did not notice any sores or cuts on Amanda's body. According to Hartman, Crain suggested that Amanda should not go to sleep with wet hair, so Crain blow-dried Amanda's hair in Hartman's bathroom without Hartman present. According to Hartman, when Amanda went to sleep in Hartman's bed around 2:15 a.m., the loose tooth was still in place and it was not bleeding.

According to Hartman, she told Crain, who appeared to be intoxicated at that time, that he could lie down to sober up but she was going to bed. The time was approximately 2:30 a.m. Within five minutes of Hartman going to bed, Crain entered Hartman's bedroom and lay down on the bed with Hartman and Amanda. Hartman testified that she neither invited Crain to lie in her bed nor asked him to leave. Crain was fully clothed and Amanda was wearing a nightgown. Amanda was lying between Hartman and Crain.

Penny Probst, a neighbor of Hartman, testified that at approximately 12 midnight on September 10-11, 1998, she saw a white truck parked immediately behind

Hartman's car in Hartman's driveway. In the early morning hours of September 11, Probst observed the truck parked at the side of Hartman's residence with the lights on and the engine running. [FN3] Probst heard the truck leave after about five minutes.

> [FN3] Michelle Rogers, another neighbor of Hartman, testified that she saw a light blue truck parked behind Hartman's car at approximately 10:30 p.m. on September 10, 1998. Rogers further testified that she saw a light blue truck positioned beside the residence at 10:45 p.m. on September 10, 1998. Rogers stated that she left her residence around 11 p.m. and when she returned at 2:30 a.m., she observed the truck parked on the side of the residence with the lights on.

Hartman slept soundly through the night. When she awoke in her bed alone the next morning, she discovered that Amanda was missing. Hartman testified her alarm clock read 6:12 a.m. when she awoke. Hartman immediately called Crain on his cell phone. At that time, he was at the Courtney Campbell boat ramp in Hillsborough County loading his boat. He told Hartman that he did not know where Amanda was. Hartman then called the police and reported Amanda's disappearance.

At trial, the State presented the testimony of fisherman Albert Darlington, who witnessed Crain towing his boat into the Courtney Campbell loading area at approximately 6:15 a.m. on September 11, 1998. Darlington testified that Crain pulled up to the boat ramp and backed his boat trailer and truck into the water until the truck's front tires were halfway submerged. Crain then got out of his truck and boarded his boat wearing what appeared to be a two-tone maroon shirt and dark slacks, and carrying what appeared to be a rolled-up item of clothing. Crain unhooked his boat and launched it in an overall "odd" manner. Darlington further testified that in the eighteen months prior to Amanda's disappearance, on two occasions Crain told Darlington that Crain had the ability to get rid of a body where no one could find it. [FN4]

[FN4] It is undisputed that these comments occurred during a discussion between Crain and Darlington regarding Crain's disagreements with other crabbers about Crain's claims that they had stolen from Crain's crab traps.

At around 8:30 a.m. on September 11, Detective Mike Hurley located Crain in his boat in Upper Tampa Bay. Crain was dressed in "slickers" (rubber pants fisherman wear over their clothes), a blue t-shirt, and loafers. Crain and Hurley returned to the boat ramp in Crain's boat. On the ride back, Hurley noticed a small scratch on Crain's upper arm. At the boat ramp, Crain removed his slickers, revealing jeans with the zipper down. Hurley took Crain to the police station for questioning. Crain was cooperative but denied having anything to do with Amanda's disappearance.

At the police station, Detective Al Bracket interviewed Crain. Crain told Bracket that he left Hartman's house alone at about 1:30 in the morning, [FN5] went home and accidentally spilled bleach in his own bathroom. Crain claimed that he did not like the smell of bleach, so he spent four hours cleaning his bathroom from about 1:30 to 5:30 in the morning. Later in the same interview, Crain said he cleaned his bathroom with bleach, as was his custom, then cleaned the rest of the house until 5:30 a.m., at which time he left to go crabbing. [FN6]

[FN5] Crain testified at trial that he left Hartman's residence between 2:30 and 3:30 in the morning.

[FN6] Crain testified at trial that he cleaned his bathroom with bleach at around 3 a.m. and left to go crabbing between 5 a.m. and 6 a.m.

During the questioning, Bracket noticed multiple scratches on Crain's arms and asked Crain how he got them. Crain claimed that he received the scratches while crabbing, but became defensive when Bracket asked him to demonstrate how the scratches were inflicted. Photographs of Crain's body were taken on the morning of September 11, 1998. A forensic

pathologist testified at trial that the scratches on Crain's arms probably occurred within a few hours to a day before the photos were taken. Although the pathologist could not identify the source of the scratches with certainty, he testified that all but two of the scratches were more likely to be caused by the fingernails of a seven-year-old child than by another cause. The pathologist also testified that there was one cluster of small gouges on Crain's arm, and it was more likely that these gouges were caused by the small grasping hand of a child of about seven years of age than by another cause.

During a search of Crain's residence, Bracket noticed the strong smell of bleach and recovered an empty bleach bottle. Bracket testified that there were obvious signs of grime and dirt around the edges of the bathroom sink. A blue fitted rug that would go around the base of the toilet was found in Crain's dryer. Another detective applied Luminol, a chemical that reacts both with blood and with bleach, to Crain's bathroom. The detective testified that the floor, the bathtub, and the walls "lit up."

Bracket also recovered two pieces of toilet tissue from the inside rim of Crain's toilet and observed what appeared to be a small blood stain on the seat of the toilet. The tissue pieces, the toilet seat, and the boxer shorts that Crain was wearing on the morning of September 11, 1998 were collected and analyzed for DNA evidence. A forensic scientist for the Florida Department of Law Enforcement (FDLE) testified at trial that two blood stains were found on the toilet seat, one blood stain was found on one of the pieces of toilet tissue, [FN7] and one blood stain was found on the boxer shorts. The FDLE forensic scientist testified that the blood stain on the boxer shorts and one of the stains from the toilet seat contained DNA consistent with the DNA extracted from personal items belonging to Amanda Brown. The second stain on the toilet seat and the stain on the tissue contained DNA consistent with a mixture of the DNA profiles of Amanda and Crain. Testimony established that the probability of finding a random match between the DNA profile on the boxer shorts and Amanda's known DNA profile is approximately 1 in 388 million for the

Caucasian population.

> [FN7] The blood stains were very small. The blood stain on the tissue was not visible to the human eye. When a North Carolina laboratory performed an independent analysis on the blood evidence, its expert could not find enough DNA on the tissue stain to corroborate the testimony of the FDLE forensic scientist identifying Crain and Amanda as the sources of the tissue stain.

Detective Hurley supervised an extensive, two-week search for Amanda in Upper Tampa Bay, the land surrounding Upper Tampa Bay (including the Courtney Campbell Causeway), and the land area surrounding the Crain and Hartman residences. Amanda's body was never found. The maroon shirt and dark pants that Darlington saw Crain wearing on the morning of September 11, 1998, also were never recovered.

At trial, the State introduced the testimony of Linda Miller, Maryann Lee, and Frank Stem. Miller and Lee, who were neighbors of Crain's daughter, Gay, testified about a conversation with Crain that occurred at Gay's home on the first Saturday after Amanda's disappearance. Miller and Lee both testified that Miller said to Crain, "Don't worry, you don't have anything to worry about," and "Just remember, you didn't do anything, you didn't hurt that little girl." According to the testimony of Miller and Lee, Crain responded, "Yes, I did do it; yes, you're right, I didn't hurt her, I didn't do anything." Gay testified that Crain said, stuttering, "yes, I did ... did ... didn't do it; yes, you're right, I didn't hurt her."

Frank Stem, Crain's friend and in-law, [FN8] testified that about one month prior to Amanda's disappearance, Stem helped Crain lay crab traps in a "special" location. At that time, Crain told Stem that other crabbers would steal the crab traps if they knew of the spot. After Amanda disappeared and during a conversation regarding competing crabbers finding his crab traps, Crain told Stem that if Stem revealed the location of the traps "that it could bury him," meaning Crain, or that Stem had enough "evidence to bury him."

[FN8] Stem's daughter was married to Crain's son.

At the conclusion of the State's case, Crain moved for judgments of acquittal of first-degree murder and kidnapping based on the insufficiency of the evidence. The trial court denied Crain's motion. Crain then testified in his defense and denied that he was involved in Amanda's death. He stated that he last saw Amanda while she lay sleeping in her mother's bed in the early morning hours of September 11, 1998.

On the first-degree murder charge in count I, the trial court instructed the jury on the dual theories of premeditated murder and felony murder based on kidnapping "with intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim." On the kidnapping charge in count II, the court instructed the jury that the State had to prove that Crain acted "with intent to commit or facilitate the commission of a homicide." The jury found Crain guilty of first-degree murder on a general verdict form. The jury also found Crain guilty of kidnapping as charged. In the penalty phase, the jury unanimously recommended the death sentence. The trial court found three aggravators: (1) prior violent felonies (great weight), (2) the murder was committed during the course of a kidnapping (great weight), and (3) the victim was under the age of twelve (great weight). The court found no statutory mitigators and eight nonstatutory mitigators, [FN9] and imposed the death sentence.

[FN9] The nonstatutory mitigators the trial court found were: (1) nonstatutory mental health impairment (some weight); (2) mental problems exacerbated by the use of alcohol and drugs, both legal and illegal (some weight); (3) Crain was an uncured pedophile (some weight); (4) Crain had a history of abuse and an unstable home life (modest weight); (5) Crain was deprived of the educational benefits and social learning that one would normally obtain from public education (modest weight); (6) Crain had a history of hard, productive work (some weight); (7) Crain had a good prison record (modest weight); and (8) Crain

had the capacity to form loving relationships (modest weight).

Crain, 894 So. 2d at 62-67.

On direct appeal, Crain raised the following issues: (1) the evidence was insufficient to establish that the murder of Amanda was premeditated; (2) the evidence was insufficient to establish an essential element of kidnapping, that Amanda was abducted with the intent to commit or facilitate commission of a homicide; (3) the trial court committed fundamental error by giving different jury instructions in the felony murder and kidnapping counts as to the elements of kidnapping; (4) the kidnapping conviction relied on by the State for an aggravating circumstance was not supported by the evidence; and (5) Florida's death penalty scheme is unconstitutional. Crain, at 67. The Court affirmed a conviction for first degree murder but reduced the kidnapping with the intent to commit murder charge to false imprisonment. The Court found the sentence proportionate and affirmed the sentence of death. Crain v. State, 894 So. 2d 59, 78 (Fla. 2004), cert. denied, 546 U.S. 829 (2005). Crain filed a petition for writ of certiorari in the United States Supreme Court on April 25, 2005, which was denied October 3, 2005. Crain v. Florida, 546 U.S. 829 (2005).

II. Post-conviction Proceedings

A. Course of Proceedings

On or about September 8, 2006, Crain filed a Motion to Vacate Judgment of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851, raising nine claims for relief.[1] (V2, 229-95). The State filed a response on November 22, 2006. (V2, 300-34). Evidentiary hearings were held on December 15-18, 2008 (V55, 7270-V58, 7734) and February 25-26, 2009 (V59 7735 - V60, 7863). The Honorable Anthony K. Black issued an Order on September 10, 2009 denying Crain's post-conviction motion. (V5, 903-51).

B. Relevant Evidentiary Hearing Facts

i) The Trial Attorneys

Trial defense counsel, Daniel Hernandez had tried some 200 felony jury trials in 1998 when he was appointed to defend Crain. He also estimated that he had tried approximately "15 to 20 first degree murders, some of which were death penalty cases." (V55, 7283-84). Hernandez attends seminars about every other year on capital sentencing and litigation in Florida. (V55, 7327). Hernandez successfully sought to have a second

[1] The Honorable Barbara Fleischer issued an Order on August 24, 2007, granting, in part, Crain's motion for post-conviction DNA testing, which authorized testing of specific items that had been designated in an earlier report but stated that the court recognized "that neither party is conceding to any materiality of the testing results by reason of the entry of this Order." (V3, 425-26).

attorney, Mr. Traina, appointed, to assist him in defending Crain. (V55, 7289). Hernandez had worked with Traina on prior cases. (V55, 7331). While Hernandez had primary responsibility for the first phase, Traina was familiar with the entire case. (V5, 7290). Hernandez was not personally responsible for preparing the second phase, but he was certain they consulted and discussed the penalty phase. (V55, 7319-20).

Hernandez hired an investigator with F and F investigations to assist in preparation for the case. (V55, 7331). The billing records reflect some 40 or so client meetings or consultations with Crain. (V55, 7335-36). Crain was not a passive client and "certainly had a lot of opinions and wanted to be a part of his defense." (V55, 7292).

Traina was given primary responsibility for the DNA aspects of the case. Hernandez explained: "We consulted and I'm sure I had my input but I didn't – I don't remember having any special instructions for him regarding the DNA analysis." (V55, 7293). Hernandez could not recall consulting or hiring a DNA expert in this case but had in the past, hired an expert on DNA. (V55, 7294-95). On questioning regarding Dr. Yeshion [the FDLE expert] and his deposition regarding whether the victim's DNA was obtained from blood or another source, Hernandez testified: "But my recollection was that there really was no dispute that

the victim's DNA, whether it was blood or not, was found on the defendant's underwear as well as the toilet seat in his trailer. So I don't know if that is relevant to what you're asking me, but I remember that as being a pretty foregoing [sic] conclusion that the victim's DNA was in those two locations." (V55, 7296-97). The defense entered into a stipulation regarding the DNA results, and Hernandez explained: "But I'm confident that we conferred and decided that it was not going to be prejudicial in any way to stipulate to that because that would be ultimately proved whether we stipulated or not." (V55, 7299).

Hernandez testified that it was the informed strategy of the defense not to contest the DNA results finding miniscule amounts of blood on Crain's underwear and toilet seat, but to present plausible innocent explanations of how that blood got there. (V55, 7357-58). Crain's trial testimony attempted to provide the explanation that the blood came from a loose tooth that was bleeding, and, that Amanda had used the bathroom on two occasions. (V55, 7358). Further, Crain, in a national news show, told producers that Amanda was bleeding from a loose tooth in his trailer. (V55, 7359). Crain insisted on testifying and getting his story of the loose tooth to the jury. (V55, 7359). Also, Crain said that Amanda had gone on his boat and said that she had fallen, perhaps on one of his crab traps. (V55, 7359).

To some extent, therefore, the defense was locked in by Crain's statements to the media attempting to explain the blood. (V55, 7360). In his closing argument, Hernandez reminded the jury that the DNA experts could not tell the jury how or when the victim's blood DNA got on Crain's underwear or toilet bowl. (V55, 7361). He also argued that the amount of blood found was so miniscule that it was inconsistent with Amanda's murder. (V55, 7362). Since they had offered evidence of an innocent explanation for the blood, Hernandez was sure part of the "thought process" was that if they had argued to the jury it was not blood, they would have lost all credibility. (V55, 7362).

Hernandez testified that he did not hire an expert to counter the medical examiner, Dr. Vega, on the scratch mark evidence. Hernandez thought that they could effectively deal with that issue on cross-examination. (V55, 7318). Although Dr. Vega said some scratches were consistent with human fingernails, "they were also consistent with just about anything else that could have caused the scratches. And as I said, it dealt with this particular case, Mr. Crain had an occupation that you could easily be scratched by other innocent explanations such as the crab traps and the mangroves and bushes that he would find out in the open water where he was doing his crabbing." (V55, 7318). At trial, Crain testified he did not

recall how he got the scratches but that he frequently gets scratched when he retrieves traps from mangrove bushes. (V55, 7354). On cross-examination, Dr. Vega admitted that the scratches were consistent with human fingernails but also such items as wire from crab traps, tree limbs, or branches from mangrove bushes. (V55, 7354-55). Hernandez did not contemplate retaining an expert to essentially parrot Dr. Vega's findings that the scratches could have been caused by fingernails or any number of other things. (V55, 7355).

While Traina had primary responsibility for the penalty phase, Hernandez had personal experience using Dr. Berland as an expert prior to the Crain case. It was his opinion that Dr. Berland gave competent, comprehensive psychological and strategic advice. (V55, 7369).

Charles Traina testified that he spent ten years with the Public Defender's Office after being licensed to practice law, eventually rising to chief of the capital division. (V55, 7375-76). Traina left for private practice in 1994 and primarily handled criminal cases ranging from traffic to homicide and capital cases. (V55, 7376). While he did not have an exact number of jury trials he had tried in 1998, he thought it was some 100 to 150 cases. (V55, 7376-77). Traina had tried four capital cases through the penalty phase but handled more capital

cases, including cases in which the state indicated it was seeking the death penalty, but, for whatever reason, that penalty was not imposed. (V55, 7377). Traina attends the Life Over Death Seminar which is conducted every year by the Florida Public Defender's Association. Id. Although Traina was responsible for preparing the penalty phase, he frequently consulted with Hernandez and testified that they had an "integrated defensive approach to this case." (V55, 7383).

On DNA, Traina testified that they scrutinized the collection and testing of the forensic evidence and "we were gonna at every step of the way consult with an expert that would be able to give us guidance." (V55, 7386-87). Traina retained a Doctor from New York, William Shields, and consulted with him prior to and after depositions were taken in North Carolina. (V55, 7388). Traina testified that they planned to challenge the evidence if they could and show it was faulty. Or, if it turned out that with guidance from their own expert they could not, then the fall back was to explain the presence of the DNA. (V55, 7387). To some extent, Crain had already attempted to explain the presence of Amanda's DNA to police and media, and Traina did not want to take a position that "would then be inconsistent with what our client was saying." (V55, 7388).

Dr. Shields was used as a consultant but if he found something useful they could have used, the defense would have called him to testify. (V55, 7390). Traina testified that he would have sent his expert everything the State had provided him in discovery relating to the serological findings. (V55, 7388). Traina did not file a motion for independent testing for two reasons:

> ...Number one, Dr. Shields didn't give me any reason for that. There wasn't anything inconsistent that he could –- he could suggest to me about the findings that were rendered by the experts in North Carolina. He further didn't give me any reason to think that is (sic) findings would be significantly different or in any way, shape or form measurably different than what the State was in all likelihood going to offer to the jury as far as testimony in the case.
>
> The second reason was simply because our client had taken the position from the very beginning that there was a reason that the blood was there and we knew that and it was consistent with what he was going to say at the trial, also. And I would just point out that he had said that [sic] those same things to people before I even met him.

(V55, 7391-92).

With regard to his penalty phase preparation, Traina testified that he begins by learning as much as he can about his client. Traina explained he sought to obtain information from Crain's birth, family, education, and "would have attempted to gather every single piece of paper I could to find related to Mr. Crain." (V55, 7400-01). "Specifically I would be interested in finding out if there was any history of injury or

illness that might have an effect or have an impact on current mental health considerations." (V55, 7401). "I would be interested in finding out if the family had history that might somehow be passed along to my client. All that starts with initial interviews conducted by me as well as by the investigator and as well as the doctor or doctors that are on board as part of the defense team." (V55, 7401). Traina was also interested in possible indications or history of brain injury and substance abuse, alcohol, pills, and tried to determine what, if any, impact such substances have on his client. (V55, 7402-03).

Crain's initial position was that he did not want a penalty phase and instructed Traina not to prepare for it. Traina ignored Crain's request. (V55, 7404). Much of the time Traina represented Crain he was not "that cooperative" but through the help of family and others along with records they "did learn quite a lot about Mr. Crain." (V55, 7405).

Traina testified that the penalty phase in this case was complicated due to Crain's convictions for sexual battery and his sexual abuse of his own family members. (V55, 7439). The defense wanted to soften the blow of hearing from three of Crain's three previous sexual abuse victims as well as the anger the jury would naturally feel after the guilt phase concluded.

(V55, 7439). The kidnapping and murder of a child is certainly among the most horrific crimes. Traina's task was made more difficult by live testimony from the three surviving sexual assault victims, whom Crain assaulted when they were children. (V55, 7439-40). It certainly did not help that one child victim testified to threats Crain made to cut her up and throw her in a crab trap if she told anyone about the sexual abuse. (V55, 7441).

Among the records they acquired for the penalty phase was Crain's SHARE program treatment which was administered while he was on probation following his incarceration. (V55, 7443). Crain was reluctant to talk about the penalty phase and attempted to justify some of his prior conduct. For example, with regard to molesting his own family members and other child victims, Crain would suggest they wanted to take part in it. In reality, however, given the ages involved, consent was irrelevant by law. (V55, 7445).

Traina was familiar with Dr. Berland, had seen him testify in Hillsborough County, and "felt comfortable that he would be a good person to have on the defense team in Mr. Crain's case." (V55, 7447-48). Dr. Berland administered tests, interviewed family members, and reviewed the defendant's medical, psychiatric, educational and prison records. (V55, 7448). Part

of the ongoing dialogue with Dr. Berland was his request for any HRS records, juvenile justice records, public welfare records, abuse or neglect records. (V55, 7449). Traina's billing records reflect a two hour conference with Dr. Berland, investigator Fernandez, and a "group of potential penalty phase witnesses." (V55, 7450). Traina's records reflect a similar conference on August 4th of 1999, and indicate a team effort to investigate and develop mitigation evidence. (V55, 7451).

Traina was aware of criticism leveled at Dr. Berland for using outdated tests. But, Traina was also aware that Dr. Berland "painstakingly" went through a battery of tests involved and considered them valid tools in this case. "In addition -- and the only thing I would tell you is that Dr. Berland has been at his profession for a long, long time and he was recognized as being good at what he did and he was –- he defended the test that you're asking about." (V55, 7411). They did not hire a neuropsychologist to determine whether Crain suffered from brain injury, they chose the PET scan and Dr. Wood to look into that. (V55, 7411-12).

The defense penalty theme was to show the jury how Crain got to this point, his social history, education, family life, abuse he had suffered and mental health issues they could present to the jury. Traina also testified that they wanted to

show Crain had done well in a structured environment [prison] in the past, and had spent "13 years with a psychiatrist unabated." (V55, 7452). The goal was to get the jury to determine it was not necessary to take Crain's life, but to let him live in Florida State prison. (V55, 7452).

The defense investigated potential brain injury as mitigation for Crain. (V55, 7452-53). Crain related an incident of a mugging where he was beaten and choked. While Crain did not seek medical attention, Dr. Berland thought that this was consistent with testing which suggested brain damage or injury. (V55, 7454). They ordered a PET scan in an attempt to develop this potential mitigation. (V55, 7453). Traina thought the PET scan would be the most persuasive indicator of brain injury in this case. (V55, 7454-55). Traina conferred with Dr. Berland about the results and had telephone conferences with Dr. Frank Wood, who was an expert in interpreting PET scans. However, the defense did not call Dr. Wood to testify because the PET scan results did not corroborate the existence of brain injury. (V55, 7456-57). Ultimately, the defense presented evidence that Crain suffered from brain damage or injury through Dr. Berland. (V55, 7470).

The defense used Dr. Berland to relate Crain's family background because the family members would be exposed to having

to reveal sexual abuse and other embarrassing or traumatic experiences with Crain. (V55, 7460-61). Traina and Dr. Berland extensively discussed the penalty phase presentation and how best to present the mitigation case. (7463-64). Dr. Berland ultimately testified that in his opinion both of Florida's statutory mental mitigators applied in this case. (V55, 7465). Dr. Berland thought that Crain suffered from a paranoid delusional disorder and suffered from psychosis. (V55, 7465). While Judge Fleisher did not assign Crain's mental problems the weight they had hoped, she did find that Crain's mental health was impaired and that his mental problems were exacerbated by the use of alcohol and drugs. (V55, 7465). The defense also established that Crain had a recognized disorder, Pedophilia, (V55, 7466), and that he was classified a mentally disordered sex offender. (V55, 7467). Crain underwent treatment for that disorder and Dr. Berland reviewed the treatment records from Dr. Lefkowitz. (V55, 7467-68). The defense also presented Crain's history of substance abuse which escalated in the six or eight months prior to the offense. (V55, 7470). Moreover, they presented as non-statutory mitigating evidence Crain's early, unstable life, including sexual and physical abuse. (V55, 7470). This evidence included that the defendant had been placed in foster homes, been kidnapped by his mother, that he

had been a runaway, that he had a terrible home life, and, that his mother was a promiscuous alcoholic. (V55, 7470-71).

The defense also argued in mitigation that the defendant lacked education, had been placed in special education classes and didn't go far in school. (V55, 7471). Traina noted that he was representing a client who did not read or write well at the time and "the fact he didn't get the socialization skills that would normally be available to children if they were able to go to school and successfully move forward in the school process." (V55, 7471). The defense also brought out that Crain had attempted suicide or had suicidal ideations. (V55, 7472).

Finally, Traina testified that the defense attempted to bring out some positive characteristics of Crain during the penalty phase. They presented evidence that Crain was a hard worker, started his crab business from the ground up, and tried to conform and succeed in society. (V55, 7472).

ii) Forensic DNA Experts

Crain presented the testimony of Dr. Elizabeth Johnson, who was self-employed as a forensic DNA expert. (V56, 7488). Dr. Johnson examined items of evidence submitted in this case at trial, the single source DNA profile on the boxer shorts, the toilet seat stain, primarily with Amanda's profile, and stain 2 on the toilet seat, which yielded a mixture of DNA, which could

not exclude or was consistent with the profiles of Amanda and Mr. Crain. (V56, 7491). Dr. Johnson described a substrate control as a sample taken as close as possible to the visual or presumed blood stain, which is tested to determine whether or not there is an overlay or superimposition of some "invisible biological material in that area that would be giving a DNA profile that is not –- would not be mistaken as blood or not from blood." (V56, 7491-92). Dr. Johnson stated that "generally anything that has the appearance of blood and tests with these presumptive chemical tests is likely to be blood." (V56, 7493). However, it is possible that in cases where the stain has been washed or otherwise degraded, some other source DNA from biological material or fluid has overlaid the stain and you can get a DNA "result from that other fluid, from those cells." (V56, 7493). If, after cutting near the stain and testing it, it yields the same DNA profile as from the stain, "then you can't make [sic] conclusion that the DNA came from a blood source as opposed to some other source of cellular material." (V56, 7494). "If you get no result from a substrate control, if it's taken at that time, then you can be more confident that the DNA result is coming from the blood source." (V56, 7495).

Dr. Johnson testified that the FDLE only conducted presumptive tests for blood, "[t]here was no confirmatory tests for blood run." (V56, 7495). From the written materials Dr. Johnson reviewed reflecting the DNA testing and results, she "would not be able to conclude or testify that was absolutely blood." (V56, 7498). To satisfy her desire for a reasonable degree of medical or scientific certainty that those stains were indeed blood, she would have liked reexamination of the stains, if possible, "and do some additional test." (V56, 7498-99). However, "I believe some of these stains were consumed, though, in that initial testing by FDLE." (V56, 7499). Dr. Johnson thought that stipulations, of the type entered into evidence in this case, are not "part of the scientific investigation" but thought that insufficient scientific testing was conducted to conclude that these stains were in fact, blood, to a reasonable degree of scientific certainty. (V56, 7500).

Dr. Johnson thought the State sent their DNA samples to LabCorp in 1998 to "increase the power discrimination of the DNA testing." (V56, 7501). They tested the samples and obtained an additional six loci, increasing the power of DNA testing to something in the area of one in four million. (V56, 7502-03). LabCorp did not have the original samples so they did not conduct testing for blood, "just DNA typing." (V56, 7505). In

connection with some litigation in 2001, after LabCorp had conducted its testing in this case in 1998, Dr. Johnson had occasion to evaluate the proficiency tests and found some validity issues relating to the "in-house Short Tandem Repeat kits." (V56, 7508). The proficiency testing error occurred in 2000, after the testing in this case, but, Dr. Johnson thought that if the validation material had been available to her at the time this case was tried, "I would have found those same problems." (V56, 7509). Had she been advising the defense at the time of trial, she would have advised them to send out the DNA extract to another lab using different test kits. (V56, 7510). However, some of the samples from which DNA extracts and testing had been conducted were empty; the samples had been "used up or dried up." (V56, 7511).

For post-conviction testing in 2007, samples were taken from adjacent areas on the shorts and toilet seat from which the original stains had been obtained for testing. The samples were taken and collected as substrate controls. (V56, 7512). "There were no results obtained on either the toilet seat stain one or two or the boxer short substrate controls." (V56, 7512). According to Dr. Johnson, since many years had passed between the time of the original testing in 1998 and 2007, that did not necessarily eliminate her complaint about the lack of substrate

controls, because “that material could have easily degraded over time.” (V56, 7512). There were no results because the stained areas had been completely removed and consumed by previous testing or if something was left, it had completely degraded and could not yield a result. (V56, 7514). Dr. Johnson also requested that an area around the fly on the boxer shorts be tested which looked like a semen stain.

Dr. Johnson testified that she had some concerns about the possibility of cross-contamination in the testing conducted by the FDLE. (V56, 7516). She thought that since the panties and the stain on the boxer shorts were processed at numerous steps together and there was hands on manipulation required of the samples, it was possible for cross-contamination to occur from one tube to another. (V56, 7516). From the review of the FDLE work in this case, Dr. Johnson could not evaluate whether “there was or wasn’t contamination from the paperwork.” (V56, 7517). If the samples were handled carelessly, Dr. Johnson thought that the conditions were present for contamination. (V56, 7517). Since LabCorp simply obtained DNA extract, if a mistake had been made by the FDLE, that mistake would “perpetuate at Labcore.” (V56, 7519).

On cross-examination, Dr. Johnson acknowledged that she had no evidence that the samples taken by the FDLE in this case were

contaminated at the lab. "I cannot evaluate whether there was or wasn't contamination from paperwork. I can tell you, though, that they -- conditions were present for -- to be contamination if someone was careless in the way they handled these tubes and for that particular sample." (V56, 7517). As an expert reviewing the paperwork from the labs, Dr. Johnson admitted that "I did not find evidence that they were contaminated. I didn't find evidence that they weren't contaminated either. I can't make that evaluation one way or the other." (V56, 7520-21). Dr. Johnson did not know if there was careless handling of the samples from FDLE: "I don't know for sure. I wasn't watching them." (V56, 7523). Dr. Johnson also did not know if there was any extract remaining from the LabCorp sample back in 1999. (V56, 7523). Dr. Johnson had no evidence that the samples from the boxer shorts or toilet bowl were degraded in any fashion at the time they were tested in 1999. (V56, 7523-24). Dr. Johnson acknowledged that LabCorp obtained essentially the same results as FDLE, finding additional loci. (V56, 7504-05).

On substrate controls, Dr. Johnson admitted that no industry standard or accrediting agency requires the use of such controls for DNA testing. (V56, 7524-25). And, Dr. Johnson admitted that substrate control testing in this case on areas adjacent to the boxer short stain and toilet seat yielded no

results when sent to ReliaGene for testing in 2007. (V56, 7529). That finding could be the result of degradation or the fact that no DNA was ever present on those items. (V56, 7529-31). ReliaGene, however, did find a DNA profile from an epithelial sample taken from those same boxer shorts in 2007. (V56, 7531).

The State called Dr. Ted Yeshion who testified that for twenty years he had been employed by the FDLE in the Tampa Regional Crime Laboratory. (V58, 7651). Dr. Yeshion was an associate professor of forensic science at Edinboro University of Pennsylvania and a full time forensic consultant at the time he testified during the evidentiary hearing. (V58, 7651). Dr. Yeshion was also involved in the manufacture of field testing kits for the "detection of blood which is marketed to law enforcement agencies to include phenolphthalein and Luminol." (V58, 7655). Dr. Yeshion had been processing items of blood and using presumptive tests since 1974. He has probably examined or processed "near or in excess of 100,000 samples." (V58, 7660). Dr. Yeshion not only has personal experience in detecting blood visually and using chemical reactions, but he has "taught investigators" and conducted "workshops" on "detecting blood at the crime scenes for investigators throughout the country." (V58, 7662).

Based upon his extensive experience observing blood and analyzing samples, Dr. Yeshion testified that his visual inspection confirmed a blood stain on the fabric [shorts]. (V58, 7660-61). Dr. Yeshion's experience with presumptive testing led him to trust the chemical reactions. "But, yes, in looking at the particular stain on the boxer shorts, I do certainly recall that the stain appeared to be blood. When tested, it gave chemical indications for the presence of blood." (V58, 7662). The phenolphthalein test he used is highly accurate and from his experience in over 35 years using the proper sequence of solutions, he has yet to find "anything other than blood that reacts" to that test. (V58, 7701-02).

The phenolphthalein test has a high level of specificity and Dr. Yeshion's opinion, shared by many throughout the country, is that he can go right from that test and obtain a DNA result. (V58, 7702). With a positive indication of blood, and, through DNA analysis, that stain is linked to Amanda Brown, not Mr. Crain, "where else is the DNA coming from?" Dr. Yeshion testified: "If it's anything from Mr. Crain, that would show up as well so there would be a mixture of something from Mr. Crain and from Amanda Brown." (V58, 7703). In all his years of experience with the phenolphthalein test, where Dr. Yeshion has taken the additional step of confirming the presumptive result

with an additional test, he has never seen a false positive. (V58, 7711).

Dr. Yeshion went on to discount the possibility of a false positive for the presence of blood on any of the items he examined in this case. The chemical reactions that might create a false positive from plant or vegetable material on the sample would be "quite obvious." (V58, 7663-64). He found no such discoloration from plant or vegetable material on the boxer shorts or the toilet bowl stains in this case.[2] (V58, 7664). In addition, the presumptive test he used, phenolphthalein, is not affected by plants or vegetable peroxsidases. (V58, 7665). The other possible reason for a false positive would be a chemical reaction to copper or other metal but there was no such "copper metal involved at all on the boxer shorts or on the rim of the seat where the stains were located." Id. The third false positive possibility is from a reaction to certain chemical oxidants. However, Dr. Yeshion explained that this was not a possibility in this case, because he ran the phenolphthalein test which is a series of three different solutions. (V58,

[2] Dr. Yeshion explained that mold and fungi are typically visible. Mold has a blackening effect and fungi can be quite colorful and hairy as well. "None of that was observed on any of these items whatsoever." (V58, 7672). Moreover, in his experience using the phenolphthalein test, mold and mildew, even when present, do not yield a false positive result. (V58, 7672-73).

7666). "Had the Tidy Bowl blue or stain on the boxer shorts or the stain on the surface of the seats been contaminated with bleach and was significant enough that it would have interfered with my testing, then I certainly would have fully expected to have observed a color reaction occurring out of sequence before the addition of the hydrogen peroxide immediately after the phenolphthalein and before the hydrogen peroxide. That was not observed or I would have noted that strictly as a false positive..." (V58, 7667).

Dr. Yeshion conducted a microscopic analysis of the boxer short stain and determined it originated from the outside of the shorts [assuming proper orientation, i.e., the shorts are not worn inside out]. (V58, 7673-74). Dr. Yeshion's microscopic examination would also let him know if there was plant, vegetable or some other matter on the shorts at that location. "And I did not observe anything of that nature." (V58, 7674).

Dr. Yeshion testified that FDLE does not perform substrate control testing. Dr. Yeshion explained: "No, we had significant discussions about that in years past. And there was a decision, I believe, statewide throughout all of the FDLE crime laboratories and many other crime laboratories as well that substrate controls would not be performed." (V58, 7657). Dr. Yeshion took part in the discussion process and they

ultimately decided that substrate control testing was "essentially a waste of resources." (V58, 7658). It would also potentially complicate the interpretation of DNA findings. Consequently, it was the position of the FDLE in 1998 not to conduct substrate control testing and it is still the position of the FDLE today. (V58, 7658-59).

In Dr. Yeshion's opinion, there was no superimposition of DNA profiles on the items he tested in this case. [3] (V58, 7659-10). The profile from the boxer shorts was a "sole source contribution of DNA from one individual." [Amanda]. "So therefore I would say, no, that it's not a superimposition of layering of various different types of DNA, one over the other." (V58, 7659-60).

Dr. Yeshion was familiar with the ReliaGene test results and the fact that the substrate control test on a location adjacent to the stain on the boxer shorts did not produce any result. (V58, 7674). The lack of results could be explained by degradation of any genetic material or that there was no DNA in that location to begin with. (V58, 7674-75). Dr. Yeshion's

[3] The possibility of a stain on Crain's boxer shorts surviving a washing and then some other type of non-blood DNA being superimposed upon that stain is very unlikely. Dr. Yeshion testified: "I feel certain that the dilution affect would have been far too high given a laundering within a washing machine in a tub of water with a small drop of blood that was on there to begin with." (V58, 7669).

opinion was that there was no DNA on that area to begin with as opposed to degradation of the sample. (V58, 7675). While Dr. Yeshion did not know how the items were stored, he thought that laboratories are "pretty good about maintaining those in acceptable conditions," particularly accredited laboratories. (7675-76). Moreover, even a degraded sample will usually reveal some DNA activity, albeit, with weak markers. (V58, 7676). "One hundred percent degradation under regular environmental conditions is not realistic." (V58, 7676). In 2007, ReliaGene obtained DNA results from Crain's boxer shorts [consistent with Crain's DNA]. This supported Dr. Yeshion's opinion that any lack of DNA results from the substrate control testing in 2007 was not the result of degradation, but, the fact no genetic material was present to begin with. (V58, 7677). Dr. Yeshion testified that the fact DNA results were obtained from another area of the shorts "strongly supports my opinion on that and rebuts the opinion of Dr. Johnson." (V58, 7677).

Dr. Yeshion agreed with Dr. Johnson's non-controversial position that contamination was possible if the samples were carelessly handled in this case. (V58, 7678). However, Dr. Yeshion testified: "I can assure you that I followed the proper protocol here." (V58, 7679). He always used a decapping device which would prevent the cap or top of the tube from coming into

contact with his hands. (V58, 7679). The fact various samples were run together was not a concern because proper safety procedures were in place to avoid cross-contamination. (V58, 7680). The FDLE Lab employs positive and negative controls. Further, the testing process itself actually looks for the possibility of contamination. (V58, 7680-81). Dr. Yeshion explained: "So there were all kinds of safety set ups here to avoid the cross-contamination. And, of course, the controls are in place to show if there's some kind of contamination that may have occurred." (V58, 7684). All sample items, the toilet seat, the boxer shorts, and Amanda Brown's toothbrush, were handled separately and distinctly during processing. (V58, 7732).

As an accredited laboratory, the FDLE had in place a very strict technical review. After Dr. Yeshion made his interpretation it was passed along to another analyst and then his supervisor for review. (V58, 7681-82). No red flags were raised during the review process in this case. (V58, 7682).

Dr. Martin Tracey, Professor of Biological Sciences at Florida International University, testified that he began working with DNA in 1979 and became a forensic DNA consultant in 1989. (V59, 7807-08). He has testified as an expert in state and federal courts between five and six hundred times. (V59,

7808). Dr. Tracey reviewed all the materials, bench notes, and other material prepared by the FDLE and the private laboratory, LabCorp, as a consultant retained by the State in this case. (V59, 7809). He was familiar with the concept of substrate controls and testified that in the early days of testing there were discussions among professionals about whether or not such controls were "worth doing." (V59, 7811). However, the prevailing standards in 1998 throughout the United States did not require it. In fact, Dr. Tracey testified that such testing was almost never conducted. (V59, 7811-12). The Technical Working Group on DNA Analysis Methods indicated that they did not need to be conducted and "did not provide any useful information." (V59, 7812). Despite much standardization among private and public DNA labs, there were no guidelines or recommendations in favor of using substrate controls. (V59, 7812). Having reviewed all of the case work and bench notes from both the FDLE and the private lab in North Carolina, Dr. Tracey testified that the absence of a substrate control had no affect on the conclusions or the "results" in this case "at all." (V59, 7813).

(iii) Former Medical Examiner, Dr. Wright

Dr. Ronald Wright, MD., was called by Crain and testified that he was now primarily engaged in providing advice to

attorneys in criminal and civil cases. Dr. Wright had previously been a medical examiner Vermont and Florida. He was qualified as an expert in pathology without objection from the State. (V59, 7742-44). In the course of his career as a medical examiner or affiliated with medical examiners' offices, he has performed a little over 12,000 autopsies. (V59, 7744). However, the last time he has conducted or been associated with an autopsy was 1994. (V59, 7757). Dr. Wright now consults or testifies in civil and criminal cases, with most of "his criminal work" being on behalf of the "defense." (V59, 7745).

Dr. Wright reviewed 19 photographs of Mr. Crain and reviewed the report of Dr. Vega [the medical examiner who testified at trial] and stated that he had no disagreement with the report: "No, not that I can see at all." (V59, 7748). He agreed with Dr. Vega's written report that the scratches were non-specific, general, and that number 20 and 7 are "mildly suggestive of fingernail marks." (V59, 7749). While he agreed that those two in particular are suggestive of fingernail marks, Dr Wright thought that they are "not the usual kinds" of fingernail marks that "you see in individuals who are being strangled or otherwise harmed by someone." (V59, 7749). Dr. Wright testified that had he been retained at the time of trial he would have advised the defense that some of the injuries to

Crain's arms appear to be old, or, a few days, and that some of the injuries were "basically inconsistent with fingernail scratches, unless somebody had their fingernails cut into a V so that you would have a very narrow fingernail mark." (V59, 7751). Dr. Wright testified that to a reasonable degree of medical or scientific probability or degree of certainty, those injuries were not caused by fingernails. (V59, 7752). However, Dr. Wright testified that having reviewed Dr. Vega's trial testimony, he did not "think" that Dr. Vega misled the jury as to the nature or limitations of his opinion. (V59, 7758).

Dr. Wright agreed that on cross-examination by the defense at trial, Dr. Vega admitted he could draw no conclusions as to the origin of the scratch marks. (V59, 7758). Dr. Vega also admitted he could not draw conclusions to a reasonable degree of medical certainty that any one scratch mark was caused by a human fingernail. (V59, 7759). In summarizing his own post-conviction conclusions in this case, Dr. Wright testified:

> ...His [Dr. Vega's] testimony -- I don't, in general, have any real problems with either his -- with his direct, Dr. Vega's that is. These – at least a couple of these could be possibly caused by fingernails. But on cross you need to point out that that's not the most likely possibility, but I think that's what was necessary.

(V59, 7760).

Dr. Wright agreed that Hernandez elicited before the jury the limitations of Dr. Vega's opinions: "I believe so." (V59, 7761). Dr. Wright also affirmed that since at least 1983 medical examiners were able to state opinions as to the cause and nature of injury to a standard less than to or within a reasonable degree of medical certainty. (V59, 7762). And, therefore, Dr. Wright agreed that there was not anything "unprofessional" or "outside" the normal or permissible "mode of expression" in forensic pathology for Dr. Vega to have indicated his opinion that these scratch marks were consistent with human fingernails. Id. Dr. Wright also agreed that he could not rule out that fingernails caused the scratches depicted on the defendant in the photographs shown at trial.[4] (V59, 7762-63). Dr. Wright agreed that Dr. Vega's use of the term consistent with or mildly suggestive is compatible with his own phrase "unlikely but possible." (V59, 7763). Dr. Wright also took no issue with Dr. Vega's opinion that most of the injuries on Crain's arms were inflicted very recently, a few hours to one or

[4] Dr. Wright thought the location of the scratches was different than what he would expect based upon his assumption that Amanda was murdered by strangulation involving a sexual assault. (V59-7764-65). However, Dr. Wright admitted his data was limited as Amanda's body was not recovered and the State could not therefore produce evidence of a sexual assault. (V59, 7764). And, Dr. Wright did not know the relative positions of Amanda and Crain at the time these scratches were inflicted. (V59, 7765).

possibly two days from the date of the photographs. (V59, 7769).

(iv) Mental Health Experts

During the post-conviction hearing, Crain presented the testimony of Dr. Mark Cunningham in support of his penalty phase ineffective assistance of counsel claim. In rebuttal, the State presented the testimony of Dr. Robert Berland and Dr. Barbara Stein, both of whom had also testified at trial in this case. The post-conviction court below, in denying relief on the ineffective assistance of counsel claim, provided a comprehensive summary of their testimony. (V5, 928-941). The State will not repeat or recite those facts here.

Any additional facts necessary for disposition of the assigned error will be discussed in the argument, infra.

SUMMARY OF THE ARGUMENT

ISSUE 1: Trial counsel was not ineffective in entering into a stipulation regarding the blood and DNA evidence. Defense counsel hired an independent forensic DNA expert, who advised them that the State's blood evidence was not subject to legitimate challenge. Instead, counsel argued an alternative theory, already advanced by their client that attempted to provide an innocent explanation for the blood evidence. Moreover, during the post-conviction hearing, Crain failed to establish that a legitimate or serious challenge to the State's DNA evidence was available to the defense.

ISSUE 2: Crain's experienced trial counsel vigorously challenged the medical examiner's opinion on scratch mark evidence on cross-examination. Ultimately, defense counsel was able to elicit most, if not all of the favorable points which could have been elicited through retaining a defense medical expert. Counsel's tactical decision was reasonable and therefore, is not subject to the type of second guessing that Crain engages in here.

ISSUE 3: Crain's attorneys provided effective assistance during the penalty phase. The attorneys conducted a thorough background investigation and presented the testimony of an experienced forensic psychologist, Dr. Robert Berland. Dr.

Berland's testimony and opinions were favorable to Crain and included his opinion that both of Florida's statutory mental mitigators applied in this case. The sole witness presented on this claim by Crain, Dr. Mark Cunningham, did nothing more than present and repackage much of the same information provided by Dr. Berland. Dr. Cunningham did not present any significant new mitigation evidence that was not uncovered or presented at trial. Accordingly, this claim was properly denied below.

ISSUE 4: This claim is procedurally barred by Crain's failure to raise this issue at trial and on direct appeal. In any case, under well established state law it is improper for the defense to conduct post-trial interviews of the jury as Crain proposes here in the absence of an allegation the jury was exposed to extra record information or external influence. The jury was not exposed to, nor, has Crain even alleged the jury was exposed to such external influence in this case.

ISSUE 5: Crain has not established any individual errors in this case. Consequently, there is no cumulative error for this Court to assess.

ARGUMENT

ISSUE I

WHETHER THE POST-CONVICTION COURT ERRED WHEN IT REJECTED APPELLANT'S CLAIM THAT COUNSEL WERE INEFFECTIVE FOR FAILING TO CHALLENGE THE STATE'S BLOOD AND DNA EVIDENCE?

Crain first asserts that his defense attorneys failed to adequately challenge the State's circumstantial evidence. After having been granted an evidentiary hearing on this issue, Crain failed to establish any deficiency on the part of his experienced trial counsel, much less the type of serious deficiency required to meet either prong of Strickland v. Washington, 466 U.S. 668 (1984).

Applicable Legal Standards For Review Of Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at

694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir.)(*en banc*), cert. denied, 516 U.S. 982 (1995)(citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate

conclusions on the deficiency and prejudice prongs *de novo*.[5] Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). This Court "recognize[s] and honor[s] the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). Consequently, this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 2d 504, 506 (Fla. 1955)).

Counsel's Failure To Challenge The State's Blood Evidence

Crain first asserts that his trial attorneys were ineffective in failing to challenge the State's blood evidence and in entering into a stipulation to the test results. The State disagrees.

In denying this claim, the Honorable Anthony Black, Circuit Judge, extensively discussed the evidence presented during the hearing below, and found that Crain had neither established deficient performance, nor prejudice, based upon counsel's handling of the DNA and blood evidence issues in this case. The court held, in part:

[5] This standard of review applies to all issues of ineffectiveness addressed in this brief.

First, the Court finds the testimony of Mr. Hernandez and Mr. Traina to be very credible. Consequently, the Court finds both Mr. Hernandez and Mr. Traina considered alternative courses and then made a reasonable strategic decision to stipulate to the DNA evidence as blood where their trial strategy included providing an innocent, plausible explanation for the presence of that blood evidence. The Court further finds that defense counsel were not deficient in failing to challenge or request an independent analysis of the DNA evidence. Mr. Traina initially considered attacking the validity of the DNA evidence, and after consulting with a confidential DNA expert who could not provide him with a basis for challenging the DNA evidence, ultimately decided instead to provide an innocent, plausible explanation for the presence of such evidence. Moreover, counsel's decision was partially based on the conduct of Defendant, who had already provided to police and media his explanations for the presence of such blood evidence, and Defendant himself testified and explained the presence of the blood. Finally, the Court finds the stipulations were entered into with Defendant's full knowledge and consent. (*See* September 1, 1999 transcript, pp. 1464-71, attached). Consequently, the Court finds Defendant has failed to show that counsel performed deficiently in stipulating to the DNA evidence as blood or in failing to challenge the DNA evidence or request independent testing in this case. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

Additionally, the Court further finds the testimony of Dr. Tracey and Dr. Yeshion to be credible as well. While the Court finds Dr. Johnson's testimony was essentially credible, much of it was based on mere speculation. There is no evidence of invalid or even questionable test results, and no evidence of cross contamination. Even if the jury heard testimony regarding presumptive versus conclusive testing, possible degradation and cross-contamination, lack of substrate controls, or invalid test kits, the Court

> finds the outcome of the proceedings would not have been different.
>
> Consequently, the Court finds Defendant has failed to show counsel performed ineffectively for failing to challenge the DNA evidence in this case, and failed to show that the outcome of the proceedings would have been different had counsel challenged or sought independent testing of the DNA evidence. As such, Defendant has failed to meet either *Strickland* prong, and no relief is warranted on claim 1.

(V5, 917-18).

Crain's burden of establishing ineffective assistance in this case is an especially difficult one as he was represented by two very experienced defense attorneys. See Chandler v. United States, 218 F. 3d 1305, 1316 (11th Cir. 2000)(*en banc)* ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger."). Lead counsel, Daniel Hernandez, testified that he had tried some 200 felony jury trials in 1998 when he was appointed to represent Crain. He also estimated that he had tried approximately "15 to 20 first degree murders, some of which were death penalty cases." (V55, 7283-84). Co-counsel Traina spent ten years with the Public Defender's Office after being licensed to practice law eventually rising to Chief of the Capital Division. (V55, 7375-76). By 1998, Traina had tried 100 to 150 cases, including four capital cases through the penalty phase. (V55, 7376-77).

Crain almost entirely ignores the testimony of trial counsel Traina and Hernandez on the issue of the stipulation and DNA testing, which the post-conviction court, as recited above, found credible. Traina provided a rational and reasonable explanation for the defense tactics in this case. Traina had experience defending cases wherein DNA was used against his client prior to Crain and also attended seminars which discussed DNA issues in death penalty litigation. (V55, 7420).

Crain faults counsel for failing to retain and, apparently, present the testimony of an expert in this case to challenge the state's blood evidence. However, Crain conveniently overlooks the fact that the defense did retain a confidential expert to consult with on forensic DNA issues. Dr. William Shields was retained as a confidential expert and possessed specific experience and expertise in the use of forensic DNA in criminal litigation. (V55, 7388). Traina submitted lab reports and depositions relating to the testing and analysis of the DNA by the FDLE and LabCorp to Dr. Shields. (V55, 7389-90). Ultimately, after Dr. Shields reviewed all of the discovery, he was not able to contradict or dispute the findings of FDLE or LabCorp that Amanda's DNA was found in the toilet bowl and on Crain's boxer shorts. (V55, 7391-92).

Dr. Shields raised no concerns relating to the failure to use substrate controls in this case. (V55, 7427-28). Nor, was Traina advised that describing the biological substance on Crain's underwear as blood was scientifically inaccurate or misleading. (V55, 7428). Traina's reliance upon this expert was not shown to be deficient, particularly in the absence of any attack upon Dr. Shields' experience or qualifications to render such an opinion.

After conducting a reasonable investigation, the defense simply had no reason to question or challenge the State's blood evidence.[6] Rather than mount an unsupported attack upon the State's blood evidence, they pursued an alternate theory provided by Crain to explain the State's evidence. This was certainly a reasonable strategic decision made by two experienced defense attorneys under the facts of this case. Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.")(citations omitted);

[6] As Crain points out, Hernandez did not recall talking with or consulting with Dr. Shields, however, Traina was in charge of this aspect of the case and did recall retaining and consulting with Dr. Shields, a fact supported by billing records submitted in this case. (V55, 7425-26).

Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000) ("Counsel's strategic decisions will not be second guessed on collateral attack.").

Traina also had to consider what Crain had told him and others in the past and what he anticipated Crain's trial testimony to be. (V55, 7428). See Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000) (noting that as stated in Strickland, "'the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" (quoting Strickland, 466 U.S. at 691). Crain told a local reporter and producers from a nationwide talk show that Amanda's tooth was loose when she visited his home and that is where the blood may have come from. It was Crain's intention to take the stand in his own defense and tell his side of the story. (V55, 7429-30). And, when he did take the stand, Crain reiterated his previous statements that any DNA from blood came, not from Amanda's murder, but, from her loose tooth. (V55, 7430).

The two DNA stipulations entered into by the defense were only done with the consent of Crain and with his full understanding. (V55, 7433-34). Since the defense could not refute the DNA findings, they attempted to explain the findings consistent with what Crain had already told his defense

attorneys and others. Indeed, part of the thought process in defending Crain was the desire to maintain credibility with the jury, credibility which might be damaged by putting forth two different explanations for the DNA evidence, i.e., the bleeding loose tooth theory vs. not blood or unreliable DNA results. See Heath v. State, 3 So. 3d 1017, 1028 (Fla. 2009) ("the decision to not present inconsistent defenses for fear of harming credibility with the jury was a matter of trial strategy."); Jennings v. State, 583 So. 2d 316, 320 (Fla. 1991) ("...the existence of another theory of defense, which may be inconsistent with the chosen theory of defense, does not mean that counsel was ineffective.")(citing Engle v. Dugger, 576 So. 2d 696 (Fla. 1991) and Combs v. State, 525 So. 2d 853 (Fla. 1988)).

In his closing argument, Hernandez reminded the jury that the DNA experts could not tell the jury how or when the victim's blood DNA got on Crain's underwear or toilet bowl. He attempted to provide the jury a plausible, innocent explanation for the presence of Amanda's blood. (V55, 7361). Hernandez also argued that the amount of blood found was so miniscule that it was inconsistent with the murder. Since they had offered evidence of an innocent explanation for the blood, Hernandez thought that

if they had argued to the jury it was not blood, they would have lost credibility with the jury. (V55, 7362).

The defense strategy was not shown to be deficient in this case. While Crain asserts the defense would lose nothing in arguing an alternative theory to the jury, he ignores the fact that the defense attorneys concluded that they had no evidence to mount a legitimate challenge to the blood evidence. Further, the attorneys would not want to lose credibility with the jury or dilute the theory they presented of an innocent explanation for the blood evidence. Indeed, Crain failed to show that a viable alternate theory existed in that his post conviction challenge to the DNA evidence was extremely weak and entirely based upon speculation. As Judge Black found below, the defense presented no credible evidence to suggest, much less establish a viable challenge to the blood evidence existed. Thus, Crain failed to establish any prejudice from counsel's stipulation to the blood and DNA evidence in this case.

The court credited the testimony of doctors Yeshion and Tracey over the testimony of Dr. Johnson. It was certainly within the province of the court below to assess witness credibility. Nothing offered by Crain on appeal suggests this credibility assessment was erroneous. Dr. Yeshion's testimony was that the items he processed for DNA testing were in fact

blood and he persuasively discounted the common factors that might lead to a false positive identification from the test he employed in this case. (V58, 7663-66).

Crain's entire argument is premised upon a "fact" not established during the evidentiary hearing below: That the reddish brown stains on Crain's shorts and toilet bowl were not blood. While the defense DNA expert, Dr. Johnson, testified that the stains could not be conclusively established as blood, Dr. Johnson failed to provide a reasonable, alternative explanation for the reddish brown material, which reacted like blood, looked like blood, and, which rendered DNA results [also, like blood]. As Judge Black found below, much of her testimony was based upon mere speculation.

Dr. Johnson could not state that Amanda's DNA profile came from a blood source as opposed to some other biological material over-laying the red-brown stain. (V56, 7533). In fact, Dr. Johnson appeared to agree that it was likely those stains were, in fact, blood. "I think I said earlier if something truly has the appearance of blood and isn't like a ketchup stain red-brown, but truly has the appearance of blood and it tests positive with the presumptive tests, **I did say it's likely to be blood**. But the only way you can confirm is to run additional tests." (V56, 7535). And, Dr. Johnson admitted that she was

not testifying that this red brown stain was not blood: "No, I didn't see it in it's (sic) native form or do any testing." Id. Further, Dr. Johnson had no opinion on whether analyst Ted Yeshion was correct or not in rendering an opinion that, based upon his microscopic analysis, the stain on Crain's boxers originated on the outside of the shorts. (V56, 7537).

Based upon Dr. Yeshion's extensive experience observing blood and analyzing samples, he testified that the visual appearance confirmed a blood stain on the fabric [shorts]. (V58, 7660-61). Dr. Yeshion knows the science of presumptive testing very well, so he learned to trust the chemical reactions. "But, yes, in looking at the particular stain on the boxer shorts, I do certainly recall that the stain appeared to be blood. When tested, it gave chemical indications for the presence of blood." (V58, 7662). The phenolphthalein test he used is highly accurate and from his experience in over 35 years using the proper sequence of solutions, he has yet to find "anything other than blood that reacts" to that test. (V58, 7701-02). The test has a high level of specificity and Dr. Yeshion's opinion, shared by many throughout the country, is that he can go right from that test and obtain a DNA result. (V58, 7702). With a positive indication of blood, and, through DNA analysis, that stain is linked to Amanda Brown, not Mr.

Crain, Dr. Yeshion testified: "where else is the DNA coming from?" If it's anything from Mr. Crain, that would show up as well so there would be a mixture of something from Mr. Crain and from Amanda Brown." (V58, 7703).

While Crain attacks the credibility of Dr. Yeshion for apparently not noting stains on, or testing other areas of Crain's boxer shorts, he ignores the fact that Dr. Yeshion provided a reasonable and credible explanation during the hearing for this alleged oversight. Dr. Yeshion believed the reddish brown stain would be the most probative or relevant stain. Anything that appeared to be urine or possibly semen on the shorts he did not test, assuming, [as it turns out in this case, correctly], that it would be linked to Crain. (V58, 7727).

In sum, Dr. Elizabeth Johnson simply testified that she was not "able to conclude or testify that that was absolutely blood." (V56, 7498). However, she did not testify that those reddish brown stains, which looked like and reacted like blood to presumptive tests, and, which yielded DNA profiles like blood, were not, in fact, blood. Crain has neither established deficient performance nor prejudice for failing to mount such a weak and speculative challenge on the State's DNA/blood evidence in this case. Assuming for a moment that counsel even had a

duty to scour the country in order to find the out-of-state Dr. Johnson, rather than mount such a weak and speculative attack on the blood evidence, counsel reasonably pursued an alternate theory first offered by Crain prior to trial. The loose bleeding tooth theory, if believed by the jury, would have largely negated the State's DNA evidence. Counsel cannot be considered ineffective for pursuing this reasonable strategy. Occhicone, 768 So. 2d at 1048 ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions.").

Counsel's Failure To Retain An Independent Lab Or Expert To Challenge The DNA Results

Crain only briefly mentions his claim that an expert should have been retained by the defense to explain that problems with the lab and that the lack of substrate controls rendered the DNA evidence unworthy of reliance. Indeed, his lack of argument is probably due to his recognition that he presented no credible evidence in the post-conviction hearing to suggest, much less establish that the DNA test results in this case were incorrect or unreliable.

While citing ABA standards which recommend the defense hire its own forensic experts to challenge the State's evidence, Crain ignores the fact that defense counsel did retain an independent expert to review the DNA results in this case, Dr.

Shields. Traina planned to challenge the evidence if they could and show it was faulty. Or if, as it turned out, that with guidance from their own expert, it appeared they could not, then the fall back was to explain the presence of the DNA. Dr. Shields was a confidential consultant but if he found something useful they could have used, the defense would have called him to testify. (V55, 7390). Traina did not file a motion for independent testing:

> ...Number one, Dr. Shields didn't give me any reason for that. There wasn't anything inconsistent that he could –- he could suggest to me about the findings that were rendered by the experts in North Carolina. He further didn't give me any reason to think that is (sic) findings would be significantly different or in any way, shape or form measurably different than what the State was in all likelihood going to offer to the jury as far as testimony in the case.

(V55, 7391-92).

Crain presented no evidence challenging the qualifications of, or, for the matter, the opinion of Dr. Shields during the hearing below. The fact that he now, apparently, has found a different expert, Dr. Johnson, who can offer a different, albeit unpersuasive opinion, does not establish trial counsel was ineffective. See generally Cherry v. State, 781 So. 2d 1040, 1052 (Fla. 2001) (the fact the defendant "found a new expert who reached conclusions different from those of the expert appointed during trial" is not sufficient to establish deficient

performance). Defense counsel reasonably relied upon the opinion of Dr. Shields and post-conviction counsel has not shown that the DNA results in this case were incorrect or unreliable. See generally Darling v. State, 966 So. 2d 366, 377 (Fla. 2007) (counsel is entitled to rely upon qualified experts).

Crain's argument on substrate controls and independent testing is unsupported by any credible evidence. Dr. Johnson did nothing more than speculate on the possibility of contamination if samples were handled incorrectly by FDLE or LabCorp. On cross-examination, Dr. Johnson acknowledged that "if" these things happened [careless handling] then the test results "could" have been invalid. However, Dr. Johnson was forced to admit that she had no evidence of careless handling or cross-contamination of the samples in this case. (V56, 7520-21). Such speculation as offered by Dr. Johnson cannot support a finding of reversible error, much less meet Crain's burden of establishing ineffective assistance of counsel in this case.

To counter Dr. Johnson's speculation on the possibility of careless handling or contamination of the samples, the State presented Dr. Yeshion, who was present when the samples were handled and tested. He followed all protocols and refuted Dr. Johnson's speculation regarding careless handling. As noted, the trial court specifically found Dr. Yeshion's testimony to be

credible. Crain offers nothing to suggest, much less establish the trial court's credibility finding was erroneous.

Dr. Johnson only offered facile criticism of the FDLE and LabCorp for failing to include substrate controls. Despite Crain's reliance upon a single textbook whose author recommended substrate controls in every case (Appellant's Brief at 52), Dr. Johnson admitted that no industry standard or accrediting agency requires the use of substrate controls for DNA testing. (V56, 7524-25). And, Dr. Johnson admitted that substrate control testing in this case on the areas adjacent to the boxer short stain and toilet seat yielded no results when sent to ReliaGene for testing in 2007. (V56, 7529). That finding could be the result of degradation or the fact that no DNA was ever present on those items. (V56, 7529-31). ReliaGene, however, did find a DNA profile from epithelial sample taken from those same boxer shorts in 2007. (V56, 7531). Dr. Johnson appeared to ignore the clear implication of finding identifiable DNA on Crain's boxer shorts in 2007 from sperm cells, i.e., the lack of DNA results in 2007 from substrate testing was not the result of degradation, but, rather, the fact that no genetic material was present. A point made by Dr. Yeshion when called by the State in rebuttal. (V58, 7677). Consequently, the lack of substrate controls in this case casts no doubt upon the DNA results.

Finally, Dr. Johnson's testimony on the need for substrate controls in this case was countered by the testimony of Dr. Martin Tracey and Dr. Ted Yeshion. Dr. Yeshion took part in professional discussions at the FDLE on whether or not state laboratories should conduct substrate control testing. They determined that it was "essentially a waste of resources." It would also potentially complicate the interpretation of DNA findings and that was the position of the FDLE in 1998 and it is still the position of the FDLE today.[7] (V58, 7658-59).

Dr. Martin Tracey, Professor of Biological Sciences at Florida International University, testified that he began working with DNA in 1979 and became a forensic DNA consultant in 1989. Dr. Tracey was familiar with the concept of substrate controls and testified that in the early days of testing there was talk or discussions among professionals about whether or not such controls were "worth doing." (V59, 7811). However, the prevailing standard of practice in 1998 throughout the United States did not require substrate control testing and such testing was almost never conducted. (V59, 7811-12). The Technical Working Group on DNA Analysis Methods, indicated that

[7] In Dr. Yeshion's opinion, there was no superimposition of DNA profiles on the items he tested in this case. (V58, 7659). The profile from the boxer shorts was a "sole source contribution of DNA from one individual." [Amanda]. "So therefore I would say, no, that it's not a superimposition of layering of various different types of DNA, one over the other." (V58, 7659-60).

they did not need to be conducted and "did not provide any useful information." (V59, 7812). Having reviewed all of the case work and bench notes from both the FDLE and private lab in North Carolina, Dr. Tracey testified that the absence of a substrate control had no affect on the conclusions or the "results at all." (V59, 7813).

Dr. Yeshion was familiar with the ReliaGene test results and the fact that the substrate control test on a location adjacent to the stain on the boxer shorts did not produce any result. (V58, 7674). Dr. Yeshion's opinion was that there was no DNA on that area to begin with as opposed to degradation of the sample. (V58, 7675). Dr. Yeshion explained that even a degraded sample will usually reveal some DNA activity, with weak markers. (V58, 7676). Moreover, in 2007, ReliaGene obtained DNA results from Crain's boxer shorts [consistent with Crain's DNA] which supports Dr. Yeshion's opinion that any lack of DNA results from the substrate control testing in 2007 is not the result of degradation, but, the fact no genetic material was present to begin with. (V58, 7677).

Dr. Yeshion also refuted Dr. Johnson's speculation regarding the possibility of careless handling of samples by the FDLE. Dr. Yeshion testified: "I can assure you that I followed the proper protocol here." (V58, 7679). He always used a

decapping device which would prevent the cap or top of the tube from coming into contact with his hands. Id. The fact various samples were run together was not a concern because proper safety procedures were in place to avoid cross-contamination. (V58, 7680). Dr. Yeshion explained: "So there were all kinds of safety set ups here to avoid the cross-contamination. And, of course, the controls are in place to show if there's some kind of contamination that may have occurred." (V58, 7684).

Crain failed to carry his burden of showing a legitimate or persuasive forensic attack could have been made on the DNA evidence in this case. As found by the trial court, Dr. Johnson's testimony was almost entirely based upon speculation. Such unfounded speculation cannot form the basis for finding reversible error. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) (In rejecting an ineffectiveness claim the court noted that reversible error cannot be predicated on "conjecture.")(citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)).

In conclusion, trial counsel in this case retained a recognized forensic DNA expert, an expert whose qualifications have not been challenged by Crain in this proceeding. The trial attorneys reasonably relied upon this expert in preparing Crain's defense. Since even now, with unlimited time and the

ability to study a made record, his own forensic expert, Dr. Johnson, has come up with nothing significant to refute or challenge the State's DNA evidence, trial counsel cannot be considered deficient under Strickland. Rather than pursuing a weak and speculative attack upon the DNA results in this case, counsel pursued a reasonable strategy based upon Crain's previous statements attempting to offer an innocent explanation [loose tooth] for the State's blood evidence. See Osborne v. Terry, 466 F.3d 1298, 1310-1311 (11th Cir. 2006) ("The fact that present counsel might have chosen to try to undermine the State's experts with defense experts does not render trial counsel ineffective or unreasonable in attempting to support his chosen defenses of self-defense or voluntary manslaughter as trial defenses, based on Osborne's own statements."). And, since the defense presented no credible evidence to refute the blood/DNA findings presented by the State in this case, the record cannot support a finding of prejudice. See generally Overton v. State, 976 So. 2d 536, 553 (Fla. 2007) (noting that it was unlikely a "challenge to the protocols and procedures that were in place at the Bode Lab" would have been successful and therefore counsel's failure to more "fully" participate during the Frye hearing did not result in prejudice). Accordingly, the trial court's ruling must be affirmed.

ISSUE II

WHETHER THE POST-CONVICTION COURT ERRED IN FINDING COUNSEL WERE NOT DEFICIENT IN FAILING TO RETAIN AN EXPERT TO CHALLENGE THE STATE'S MEDICAL EXAMINER'S TESTIMONY REGARDING SCRATCH MARK EVIDENCE?

Crain contends that his defense counsel was deficient for failing to challenge the medical examiner's opinion on the source or cause of scratches on Crain's arms. The court below found that counsel did not render deficient performance in failing to hire an expert to challenge the scratch mark evidence. The court stated, in part:

> First, the Court finds the testimony of Mr. Hernandez to be credible. Consequently, the Court finds trial counsel made a reasonable strategic decision in not obtaining an expert to challenge Dr. Vega's opinions about Defendant's scratch marks. Mr. Hemandez deposed Dr. Vega and determined that his opinion would not be harmful to the defense where Dr. Vega could not conclusively determine the origin of the scratch marks and agreed they could have been caused by other things that were consistent with Defendant's crabbing occupation. *See Occhicone*, 768 So. 2d at 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."). Additionally, during trial, Dr. Vega testified consistently with his pre-trial testimony to Mr. Hernandez, and during the cross-examination, Mr. Hernandez highlighted the weaknesses in his testimony. (*See* September 8, 1999 trial transcript, pp. 2014-22, attached). Mr. Hernandez further argued those weaknesses to the jury. (*See* September 13, 1999 trial transcript, p. 3070, attached). The jury was well-informed that the scratch marks were also consistent with crab traps and mesh wiring. Therefore, after considering Defendant's

> Motion, the State's Response, the court file and record, as well as the testimony and evidence presented during each of the aforementioned evidentiary hearings, and written closing arguments by counsel, the Court finds Defendant has failed to show that counsel performed deficiently pursuant to *Strickland*. As such, no relief is warranted on claim 3.

(V5, 926-27). The post-conviction court's ruling is well supported by the record.

Crain's contention that counsel did not challenge Dr. Vega's testimony is refuted by the record. While counsel did not hire his own expert to challenge Dr. Vega's testimony, testimony elicited by defense counsel during trial effectively limited the impact of this evidence. See Atkins v. Dugger, 541 So. 2d 1165, 1166 (Fla. 1989) (Recognizing that one tactic available to counsel is to present expert testimony but, stating that "it is by no means the only tactic, nor is it required."). Hernandez, whose testimony was found credible by the post-conviction court, testified that he did not hire an expert to counter Dr. Vega on scratches and instead effectively dealt with it on cross-examination. Although Dr. Vega said some scratches were consistent with human fingernails, "they were also consistent with just about anything else that could have caused the scratches. And as I said, it dealt with this particular case, Mr. Crain had an occupation that you could easily be scratched by other innocent explanations such as the crab traps

and the mangroves and bushes that he would find out in the open water where he was doing his crabbing." (V55, 7318).

The record supports the finding that most, if not all the points Crain contends could have been made through Dr. Wright, were in fact, made on cross-examination by trial counsel. Thus, Hernandez and Traina pursued a reasonable strategy to minimize or limit the impact of Dr. Vega's testimony on cross-examination rather than hire their own expert. See Belcher v. State, 961 So.2d 239, 250 (Fla. 2007) (counsel did not render deficient performance in failing to retain an expert where defense counsel "rigorously challenged" the State's witness on cross-examination and established "facts" necessary for the defense)(citing Reed v. State, 875 So. 2d 415 (Fla.2004)); accord Smithers v. State, 18 So. 3d 460, 470 (Fla. 2009) (counsel made reasonable strategic decision to cross-examine state's expert on cause of death rather than hire an independent expert); State v. Mundt, 115 Ohio St. 3d 22, 39, 873 N.E.2d 828, 845 (Ohio 2007) ("[C]ounsel's decision to rely on cross-examination instead of calling an expert witness does not constitute ineffective assistance.").

Since defense counsel deposed the medical examiner prior to trial and concluded that his testimony could be addressed through cross-examination, counsel's decision was clearly a

matter of trial strategy. As a matter of strategy, counsel's decision is virtually immune from post-conviction attack. See Strickland, 466 U.S. at 690-691 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."); Chandler, 218 F.3d at 1314 (a reviewing "court must not second-guess counsel's strategy.").

Crain extensively quotes a law review article on the defense need to hire an expert on forensic issues in an effort to meet his considerable burden of establishing deficient performance. (Appellant's Brief at 63). However, Crain's reliance upon this article is misplaced and inappropriate. The article was not even published at the time this case was tried and does not constitute evidence.[8] It is merely the opinion of that particular law review professor. Crain was represented by two very experienced defense attorneys in this case, attorneys who subjected the State's expert to vigorous and effective cross-examination. Not surprisingly, Crain ignores the trial record reflecting the cross-examination of Dr. Vega.

[8] Also unpersuasive is Crain's reference to a Florida Bar Journal article on expert witness selection in civil cases, noting that "'a medical malpractice case is always necessarily a battle of expert witnesses.'" (Appellant's Brief at 70) (quoting 80 The Florida Bar Journal, 48 October, 1997). This is not a medical malpractice case.

Dr. Russell Vega testified at trial that he viewed the photos of the superficial scratch wounds on Crain's back and arms. (Tl4, 1995-99, 2022). In his opinion the injuries occurred within a few hours, up to one or two days before the photos were taken. (T14, 2000, 2022). The injuries were contemporaneous; they occurred at more or less the same time. (T14, 2000-01, 2022, 2024). He was not able to come to any conclusion to a reasonable degree of medical certainty as to the origin of these wounds. He could not come to any conclusion or opinion as to whether the scratches or wounds were caused by human fingernails. (T14, 2014-15, 2031). The injuries were consistent with several things, including human fingernails. (T14, 2023).

An angled scratch shown in State's Exhibit 34 was consistent with having been made by the fingernail of a seven year old child, but Dr. Vega could not say with any certainty what caused it. (T14, 2001-02, 2020). It was also consistent with crab traps, wire mesh, twigs, branches, or other inanimate object. (T14, 2020). Exhibit 32 showed a scratch on the back of the arm similar to the previous one. It had no significant identifying characteristics to determine what caused it. While it was consistent with a fingernail scratch from a seven year old child, Dr. Vega could not determine that with any certainty.

It could have been caused by something else. (T14, 2002-03, 2017). It was consistent with crab traps, wire mesh, bushes, branches, and twigs. (T14, 2017). Exhibit 33 showed a nondescript single scratch on the forearm. Again, it was consistent with a child's fingernail, but could have been caused by some other implement. (T14, 2003-04, 2019). It was also consistent with crab traps, wire mesh, bushes, branches, twigs, or other inanimate objects. (T14, 2019).[9]

The post conviction testimony of Dr. Wright does not establish that trial counsel's strategy in this case was deficient. Indeed, Dr. Wright testified that he had no particular disagreement with Dr. Vega's written reports about the scratches: "No, not that I can see at all." (V59, 7748). Moreover, Dr. Wright did not disagree that two scratches are mildly consistent with fingernail marks. (V59, 7749). Dr.

[9] Exhibit 32(A) showed several faint scratch marks. One was small and angled. Another was also a bit angled. There was a cluster of three parallel scratch marks suggestive of the pattern that would be caused by multiple fingernails from the same hand. The spacing was consistent with the fingers of a seven year old child. These were more likely to have been made by fingernails than the marks in some of the other exhibits. (T14, 2007-09, 2018). They were also consistent with crab traps, wire mesh, or, less likely, twigs. (T14, 2018-19). Exhibit 31 showed a cluster of "punctate" wounds -- small gouges -- suggestive of being caused by a small grasping hand, "consistent with the spacing of the fingers of a seven year old child." However, Dr. Vega could not be certain that was the cause. (T14, 2009-13, 2015). The wounds were also consistent with crab traps, wire mesh, and possibly bushes. (T14, 2015-16).

Wright also agreed that Dr. Vega did not mislead the jury as to the nature of, or, limitations of his opinion in this case. (V59, 7758).

According to Dr. Wright, defense counsel elicited the proper result or conclusion in getting Dr. Vega to admit that he could not state to, or, within a reasonable degree of medical certainty, that the scratches were from human fingernails. (V59, 7761).

Dr. Wright agreed that since at least 1983 medical examiners were able to state opinions as to the cause and nature of injury to a standard less than to or within a reasonable degree of medical certainty. (V59, 7762). And, therefore, there was not anything "unprofessional" or "outside" the normal or permissible "mode of expression" in forensic pathology for Dr. Vega to indicate that these scratch marks were consistent with human fingernails. Id. In fact, Dr. Wright agreed that he could not rule out that fingernails caused the scratches depicted on the defendant in the photographs shown at trial.[10] (V59, 7762-63). See Branch v. State, 952 So. 2d 470, 479 (Fla.

[10] Dr. Wright thought the location of the scratches was different than what he would expect based upon his assumption that Amanda was murdered by strangulation involving a sexual assault. (V59, 7764). However, Dr. Wright admitted his data was limited as Amanda's body was not recovered and the State could not therefore produce evidence of a sexual assault. And, Dr. Wright did not know the relative positions of Amanda and Crain at the time these scratches were inflicted. (V59, 7765-66).

2006) (counsel made a reasonable tactical decision to rely upon cross-examination of the State's expert rather than hire his own experts because the post-conviction testimony represented nothing more than differences of opinion among experts and both defense experts "conceded the possibility of the correctness of the State's experts' testimony at trial."). Dr. Wright also took no issue with Dr. Vega's opinion that most of the injuries on Crain's arms were inflicted very recently, a few hours to one or possibly two days from the date of the photographs. (V59, 7769).

Crain's reliance upon United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984) is misplaced. (Appellant's Brief at 73). Crain's attempt to avoid the prejudice component of Strickland under the facts of this case, while perhaps understandable, is a frivolous argument. In Chavez v. State, 12 So. 3d 199, 211 (Fla. 2009), this Court observed that Cronic's presumption of prejudice would only apply in very rare circumstances, none of which are present here. This Court stated:

> Generally, a defendant is entitled to relief if he or she demonstrates that counsel violated this guarantee through deficient performance and that he or she was prejudiced by the deficiency. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. However, if the defendant can demonstrate that counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," the law will presume

> prejudice and deem counsel ineffective per se. *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039. For instance, constitutional error is found without a showing of prejudice when counsel was totally absent, was prevented from assisting the accused during a critical stage of the proceeding, or had a conflict of interest that affected the adequacy of representation. *See id*. at 659 n. 25, 104 S.Ct. 2039. Apart from these rare circumstances, the *Cronic* standard is a narrow exception to *Strickland* that is reserved for situations where counsel has entirely failed to function as the client's advocate. *See Florida v. Nixon*, 543 U.S. 175, 189-90, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (holding that this Court erred in determining that counsel's concession of the client's guilt qualified as such a failure).

See also Morris v. State, 931 So. 2d 821, 829 n.10 (Fla. 2006) (noting that outside of the limited circumstances mentioned in Cronic "'there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.'" Id. at 659 n.26. (quoting Cronic); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990) (prejudice prong required even where counsel advised defendant to plead guilty to a charge that counsel had not investigated).

Crain was represented by two very experienced criminal defense attorneys. As noted, counsel reasonably concluded that they could cross-examine the State's medical expert effectively and the record provides ample support for counsel's strategic

decision. In no way did counsel abandon their client as Crain suggests.

Crain attempts to show deficient performance by citing the prosecutor's use of the scratches in closing argument and this Court's subsequent citation to that evidence on appeal. However, it is entirely permissible for the State to argue in closing and, on appeal, for this Court to accept the most favorable inferences which can be derived from such evidence. The fact that Crain had no other scratches other than his arms [recently inflicted] and that he became evasive when asked by detectives to demonstrate how he was scratched supports the State's theory that Amanda inflicted at least some of those scratches as she attempted to fend off Crain's attack. Moreover, the fact that the only blood of Crain's found in the bathroom contained a mixture of his and Amanda's DNA supports the inference that Crain's injuries were inflicted at the same time and place where Amanda was assaulted, i.e, they were both bleeding at the same time. Nothing offered by Dr. Wright refutes the favorable inferences which **can be argued** and drawn from this physical evidence. Further, as noted by the post-conviction court, the defense counsel argued from their cross-examination of Dr. Vega that these inferences should not be drawn. See State v. Riechmann, 777 So. 2d 342, 354 (Fla. 2000)

(a reviewing court must consider the nature or reasons for counsel's tactical decision as well as "whether cross-examination of the State's expert brings out the expert's weaknesses and whether those weaknesses are argued to the jury..."). Crain's allegations fall short of establishing the kind of serious deficiency required to establish ineffective assistance of counsel under Strickland. Moreover, even assuming some deficiency can be gleaned from the record, Crain has not carried his burden of demonstrating prejudice. As noted above, the points Crain contends could have been made through hiring his own expert were largely, if not entirely, made through defense counsel's cross-examination of Dr. Vega. Consequently, this claim should be denied.

ISSUE III

WHETHER THE POST-CONVICTION COURT ERRED WHEN IT REJECTED APPELLANT'S CLAIM THAT COUNSEL WERE INEFFECTIVE FOR FAILING TO ADEQUATELY PREPARE AND PRESENT MITIGATION EVIDENCE IN THE PENALTY PHASE?

Crain next asserts that his trial attorneys were ineffective for failing to investigate, prepare, and present expert testimony in the penalty phase of his trial. Crain's argument on appeal lacks any merit.

Crain Failed to Establish Deficient Performance Under Strickland

The post-conviction court extensively analyzed the evidence presented on this issue in the post-conviction hearing from Dr. Cunningham and the rebuttal testimony from Dr. Berland and Dr. Barbara Stein. The court concluded that Crain did not meet his burden of establishing either deficient performance or prejudice in this case. In finding counsel was not deficient, the court stated, in part:

> First, the Court finds the testimony of both Dr. Berland and Mr. Traina to be credible. Consequently, the Court finds counsel did not perform deficiently for failing to establish evidence of Defendant's brain damage through neuropsychological testing. Defense counsel made a strategic decision to obtain evidence of brain damage through PET scan testing and when that failed, to present the testimony of Dr. Berland. Mr. Traina also relied on the opinion and recommendation of his expert, Dr. Berland. The Court further finds Defendant has failed to show counsel performed deficiently for presenting the testimony of Dr. Berland during the penalty phase. Dr. Berland explained his reasons for using the older versions of the WAIS and MMPI and adequately expressed his

> opinions and the bases for those opinions; Mr. Traina was not ineffective for relying on Dr. Berland's evaluations and opinions. *See Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007)("This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire."); *Sexton v. State*, 997 So. 2d 1073, 1085 (Fla. 2008)("The fact that Dr. McCraney [postconviction expert], some seven years later, disagreed with the extent or type of testing performed, or the type of mitigation presented, does not mean that trial counsel was deficient at trial."). Additionally, much of the information provided by Dr. Cunningham was cumulative where Dr. Berland informed the jury about Defendant's alcohol and substance abuse, his history of psychiatric care and counseling, good behavior in prison, unstable home life, substantial physical, sexual and emotional abuse during childhood, witnessing of disturbing sex, and lack of education and social training. *See* 966 So. 2d at 377 ("[T]his Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence."). Consequently, the Court further finds trial counsel performed a reasonable investigation into Defendant's mental health and background as required. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). As such, Defendant has failed to show counsel performed deficiently under *Strickland*.

(V5, 941-43). The record provides ample support for the trial court's rejection of this claim below.

In preparing for the penalty phase, Traina testified that he begins by learning as much as he can about his client, from his birth, family, education, and "would have attempted to gather every single piece of paper I could to find related to

Mr. Crain." (V55, 7400-01). Crain instructed counsel not to prepare for the second phase, but, Traina ignored him. (V55, 7404). Much of the time he represented Crain he Appellant was not "that cooperative" but through the help of family and others along with records they "did learn quite a lot about Mr. Crain." (V55, 7405).

Dr. Berland thought that Crain might have suffered from brain injury and the defense was interested in finding support for that position. Consequently, Traina requested a PET scan in an attempt to confirm it. (V55, 7408-09). They had Dr. Wood analyze the PET scan results, but he determined that the scan did not reflect or support a finding of brain injury. (V55, 7409).

Traina was aware of criticism that Dr. Berland used outdated tests in this case. But, Traina was also aware that Dr. Berland "painstakingly" went through a battery of tests involved and considered them valid tools in this case. "In addition — and the only thing I would tell you is that Dr. Berland has been at his profession for a long, long time and he was recognized as being good at what he did and he was – he defended the test that you're asking about." (V55, 7411). They did not hire a neuropsychologist to determine whether Crain

suffered from brain injury, instead, they chose the PET scan and Dr. Wood to look into that. (V55, 7411-12).

Crain presented no evidence below to suggest, much less establish that Dr. Robert Berland lacked the training, knowledge, qualifications, or experience to conduct a forensic evaluation of the defendant. Dr. Berland, a board certified forensic psychologist, conducted diagnostic and clinical/legal evaluations of Willie Crain. At the time of trial, Dr. Berland estimated that he had conducted "somewhere approximately at or in excess of 2500 evaluations" of criminal defendants. (T22, 3338). Dr. Berland had been recognized as an expert "in excess of 300 times." (T22, 3339). He interviewed Crain, conducted psychological tests, reviewed prior tests, talked to lay witnesses, and looked at medical records, treatment program records, and case documents, seeking to guard against any chance of malingering. (T22, 3334-44). Dr. Berland saw Crain five different times for a total of ten hours. (T22, 3395).

The record reflects that Dr. Berland provided extensive and favorable mental health testimony for the defense during the penalty phase. See Gorby v. State, 819 So. 2d 664, 680 (Fla. 2002) ("Dr. Goff's examination itself was competent because it certainly was not so 'grossly insufficient [as to] ignore clear indications of either mental retardation or organic brain

damage.'" (citing State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987)). Amazingly, collateral counsel is faulting trial counsel for hiring Dr. Berland, who provided highly favorable penalty phase testimony, including his opinion that **both statutory mental mitigating circumstances applied** in this case.[11] Indeed, it cannot be said that Crain's postconviction expert, Dr. Cunningham, provided more favorable mental health testimony than Dr. Berland did for Crain at trial. Dr. Cunningham did not testify that any of Florida's statutory mental mitigating circumstances applied to Crain. But, even if some aspect of Dr. Cunningham's testimony can be deemed more favorable to Crain, this fact is of no consequence. It is by now well established that counsel's investigation into a defendant's mental health is not rendered deficient even if collateral counsel is able to obtain the opinions of more favorable experts. See Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002) ("We have held that counsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'")(quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)); Downs v. State,

[11] Any assertion that Crain was denied access to a competent mental health professional pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985), is procedurally barred from this motion for post-conviction relief. Such a claim must be raised on direct appeal. See Whitfield v. State, 923 So. 2d 375, 379 (Fla. 2005).

740 So. 2d 506, 509 (Fla. 1999) ("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted); Jones v. State, 732 So. 2d 313, 317-318 (Fla. 1999) (finding no deficient performance for failing to procure Doctors Crown and Toomer noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case."). Trial counsel reasonably relied upon a recognized, experienced, local board certified forensic psychologist.

Crain vaguely contends that defense counsel failed to "supervise the administration of available mental health tests and for failing to present all available mitigation to the jury in this case." (Appellant's Brief at 77). He conspicuously avoids mentioning what this "available" mitigation evidence was, or, how it could have affected the jury's recommendation in this case. Crain failed to prove his allegation that "substantial mitigating evidence available at the time of trial" but was not presented due to "ineffective assistance of counsel." (Appellant's Brief at 78).

Crain's history was extensively investigated and presented at trial below, including Crain's deprived and abusive childhood, that he had been kidnapped by his mother, and his good behavior or adjustment while in prison. Crain's argument cannot withstand a cursory examination of the record, or, for that matter, the sentencing order. Crain completely ignores the evidence which was presented during his trial.[12]

Evidence of brain damage and Crain's low intelligence were presented to the sentencing jury. Moreover, evidence of Crain's deprived and impoverished childhood was also presented below. The trial court found various non-statutory mitigation relating to his character (good worker, family relationships, abusive childhood, non—statutory mental health mitigation, drug and alcohol abuse, and good prison record. (R2, 315-19). Counsel cannot be considered ineffective for failing to hire an out of state expert, Dr. Cunningham, to present this same evidence. See Atwater v. State, 788 So. 2d 223, 233 (Fla. 2001) (rejecting an ineffectiveness claim for failing to present mitigation because Atwater's personal and family history were, in fact,

[12] Based upon his review of prison records, Dr. Berland testified that Crain did very well in prison. (T23, 3456). Witnesses reported that Crain had a long history of hard, productive work. (T23, 3459-60). Crain also had a history of very unstable home life as a child, including physical, sexual, and emotional abuse. (T23, 3460-67). School records showed that Crain was enrolled for four or five years, failed every year, and dropped out. (T23, 3468-69).

presented during the penalty phase); Downs, 740 So. 2d at 515-16 (rejecting ineffective assistance claim for failing to present mitigating evidence where most, if not all, of the evidence was, in fact, presented.).

Crain curiously ignores the testimony of Dr. Cunningham, the only witness called by the defense in an attempt to prove this claim, and, instead, cites the testimony of Dr. Stein who testified at trial and was called again by the State during the post-conviction hearing. However, trial counsel elicited some favorable information from Dr. Barbara Stein during the penalty phase. While Dr. Stein disagreed with Dr. Berland's testimony regarding the statutory mental mitigators, she testified that prison records showed that Crain made a good adjustment to prison and was well-behaved. (T24, 3588). Prior records from 1985 also showed that Crain reported childhood physical and sexual abuse, neglect, and an unstable home life. (T24, 3589). Crain did not make it through the second grade. He had learning disorders and a low average I.Q. (T24, 3590).

While Crain faults the trial court for failing to discuss the criticism Dr. Stein leveled at Dr. Berland, notably, Dr. Berland's reliance upon outdated testing, he fails to acknowledge that Dr. Berland arrived at conclusions generally favorable to the defense using such tests. Curiously, while

criticizing Dr. Berland for using outdated versions of two tests in this case, Dr. Cunningham admitted he did not administer the current versions of these tests. In fact, Dr. Cunningham failed to administer a single test to Mr. Crain. (V57, 7614-15). Consequently, Dr. Cunningham's testimony cannot possibly form the basis for finding trial counsel was ineffective for relying upon Dr. Berland, because Dr. Cunningham does not know, and, this Court cannot know if the later version of either the MMPI or WAIS would render a different interpretation or profile.[13] Thus, the record is entirely devoid of evidence upon which this Court could find **prejudice** based upon administration of the two out of date tests used by Dr. Berland. Moreover, as the post-conviction court found below, Dr. Berland was a credible witness and competently defended his use of the tests. Crain fails to overcome this credibility finding by the court below.

While criticizing Dr. Berland for administering the out of date WAIS and dismissing its utility in detecting brain damage, Dr. Cunningham ignored the fact that Dr. Berland achieved the correct result [at least according to Dr. Cunningham] and

[13] Dr. Berland administered the Minnesota Multiphasic Personality Inventory (MMPI) and the Wechsler Adult Intelligence Scale (WAIS) to Crain in March 1999. (T22, 3345, 3378-79). Crain's prior MMPI results when tested by Dr. Mark Lefkowitz in December, 1984, produced similar findings, including delusional, paranoid thinking and a concerted effort to appear normal. This suggested that Crain suffered from chronic mental illness. There was no evidence of malingering on either test. (T22, 3379-81).

presented this favorable brain damage mitigation evidence to the jury. According to Dr. Berland, Crain's WAIS results suggested that he suffered from impairment of both the right and left hemispheres of his brain, and his overall IQ was 85, which is the bottom end of the average range 85 to 115. (T22, 3382-87). Dr. Berland used the WAIS instead of the revised versions -- WAIS(R) and WAIS(III) -- because there was extensive research literature going back to 1950 supporting its use as a measure of impairment for brain injury, while there was less research on the WAIS(R) and none on the WAIS (III).[14] (T22, 3388). Dr. Lefkowitz administered the WAIS(R) to Crain in December 1984. According to Dr. Berland, that test also indicated left and right hemisphere impairment from brain injury and an overall IQ of 82. (T22, 3389-91).

Crain briefly mentions Dr. Stein's criticism of Dr. Berland on his reliance on the WAIS and his statement that it was just as good as a neuropsychological test battery (Appellant's Brief at 78), but, he conspicuously avoids mentioning that Crain was in fact, examined by a neuropsychologist chosen by collateral

[14] Based upon 50 years of research that has been done, Dr. Berland considered the WAIS a conservative and reliable indicator of actual brain damage which has a near zero false positive rate. While there are limitations to what an M.R.I. can do, three different radiologists reading a C.T. scan can get three different results, and a C.T. scan can fail to detect actual brain damage. (V23, 3487-92).

counsel. However, collateral counsel chose not to call this witness to testify during the post-conviction hearing below.[15] Although collateral counsel failed to call Dr. Joseph Sesta to testify, Dr. Cunningham apparently relied upon or at least cited Dr. Sesta's testing results in his own report. Dr. Cunningham somewhat misleadingly characterized Dr. Joseph Sesta's findings in his report as depicting a range of mild to moderate impairment or brain damage. In fact, Dr. Sesta only found "mild" impairment based upon his neuropsychological testing of Crain. (V35, 6889). Dr. Sesta summarized his conclusion on brain damage or impairment in a prehearing deposition: "[I would be] hard pressed to say that the impairment was anything more than mild." (V35, 6901). Dr. Cunningham ultimately agreed that Dr. Sesta found any impairment in Crain's brain functioning, "mild." (V57, 7629-30). Thus, Dr. Sesta's testing confirmed, if only to a lesser degree, Dr. Berland's finding of brain damage based upon his administration of WAIS.

[15] Collateral counsel did not object to the State's introduction of Dr. Sesta's deposition into evidence during the hearing below. The court had earlier sustained an objection to the State's attempt to cross-examine Dr. Cunningham with Dr. Sesta's deposition on collateral counsel's representation that Crain would call Dr. Sesta to testify during the evidentiary hearing. Collateral counsel presumably made a subsequent tactical decision not to call Dr. Sesta and the State therefore introduced the deposition into evidence.

In addition, Dr. Sesta's opinion on Crain's intelligence was the same as Dr. Berland's. Dr. Sesta thought from talking to Crain his intelligence would be within normal limits, and in testing him "it was." (V35, 6853). Dr. Sesta administered the WAIS-III and obtained a verbal performance of 80, performance of 79 with a full scale of 78. He also provided a GAMA IQ test and Crain scored an 84, within the normal range. Overall, Dr. Sesta placed Crain in the low average range of intelligence. (V35, 6871). Dr. Sesta's deposition testimony supports, rather than contradicts Dr. Berland's trial testimony. Crain was certainly not retarded and tested in the low average range of intellectual functioning.

The perplexing part of collateral counsel's argument is that he is attempting to demonstrate that defense counsel was deficient for failing to present **less favorable mental health testimony** in the penalty phase. Dr. Cunningham did not testify that he found either statutory mental mitigator in this case, whereas, as noted above, Dr. Berland found both applicable. The State has not found a single case, nor has the defendant cited any, where trial counsel has been found ineffective under these unusual circumstances. Moreover, the thrust of Dr. Cunningham's testimony was that Crain possessed the profile or risk factors of sex offenders who commit murder. However, since Crain

successfully disposed of Amanda's body in this case, the State was unable to argue that Crain sexually assaulted Amanda before her death. Consequently, Dr. Cunningham appeared to concede a point which defense counsel below would not obviously want to admit in front of the jury. In any case, most, if not all of those risk factors in Crain's background, were presented to the jury.[16] See Raleigh v. State, 932 So. 2d 1054, 1061 (Fla. 2006) (affirming denial of relief where trial court found that the postconviction expert was "essentially no more than a better repackaging" of the trial mental health expert's testimony).

Dr. Cunningham's opinions, while generally favorable to the defense, were no more so than Dr. Berland's testimony during the penalty phase. Indeed, while Dr. Cunningham seemed to go out of his way to criticize Dr. Berland, nothing significant was developed below to cast this case in a different light for sentencing purposes. Dr. Cunningham seemed to present much of the same information that Dr. Berland did and his criticisms of

[16] While generally faulting Dr. Berland for failing to put the emphasis he thought was appropriate on Crain's background, Dr. Cunningham acknowledged that Crain's background of family abuse was presented during the penalty phase. (V57, 7621). He also acknowledged that most of the historical records he reviewed in this case were available or compiled at the time of trial. (V57, 7615).

Dr. Berland seemed largely contrived or inconsequential.[17] Jones v. State, 998 So. 2d 573, 586-587 (Fla. 2008) (We have repeatedly held that counsel is not ineffective for failing to present cumulative evidence.)(string cites omitted).

For example, when asked if the jury heard during the penalty phase, that Crain sexually abused a number of young girls, Dr. Cunningham answered that he did not know, but went further to incorrectly suggest Dr. Berland "opened the door" to such testimony. Dr. Cunningham testified: "Dr. Berland had made a comment that opened the door to some extent. I don't recall whether Mr. Pruner then followed up putting on evidence regarding that or not." (V57, 7622). While claiming familiarity with Florida's capital sentencing scheme, Dr. Cunningham was unaware that prior violent felonies and specifically, Crain's prior adjudicated offenses against young girls were admitted into evidence in the penalty phase [prior violent felony aggravator]. "That I can't speak specifically to." (V57, 7622-23). Rather than acknowledging that the State properly presented Crain's prior violent criminal history in

[17] One of the very few new items offered by Dr. Cunningham was that Crain suffers from micropenis disorder. The post-conviction court was suitably unimpressed with this alleged disorder as mitigation. (V5, 943-44). Further, any argument by Crain that this disorder somehow mitigates his conduct could be countered by potentially devastating argument by the State, i.e., that Crain molested young girls in order to feel more substantial.

this case, Dr. Cunningham simply assumed or speculated that Dr. Berland "opened the door" to this evidence; an incorrect assumption on Dr. Cunningham's part, but one which clearly indicates either his bias in favor of the defense or, lack of knowledge regarding Florida's capital sentencing scheme.[18]

In sum, it is clear that Crain's trial counsel thoroughly investigated Crain's background and mental health history. Counsel retained a qualified expert who provided highly favorable testimony during the penalty phase below. The record clearly refutes the instant ineffective assistance of penalty phase counsel claim. See Gorby v. State, 819 So. 2d 664, 676 (Fla. 2002) (finding counsel was not ineffective where each allegation "is either wholly unsupported by evidence, was actually presented as mitigation evidence, or is related to nonstatutory mitigation found to exist by the trial judge.").

[18] Interestingly enough, although the trial judge found Crain had been sexually abused as a child by his mother from information provided by the defense in the penalty phase, Dr. Cunningham acknowledged that Crain was the only source of that information. Dr. Cunningham acknowledged that Crain failed to provide this information to the other post-conviction expert retained by the defense, Dr. Sesta. Moreover, Dr. Cunningham admitted that there was no collateral data supporting Crain's abuse allegation, such as other children complaining of being victimized by Crain's mother. (V57, 7616-20). Of course, Dr. Cunningham agreed that there was ample corroboration of Crain's own pedophilia, i.e., multiple sexual abuse victims.

Crain Has Failed To Establish Prejudice Under Strickland

In addition to its finding that counsel rendered effective assistance in the penalty phase, the post-conviction court also found Crain failed to establish prejudice. The court concluded, in part:

> Finally, the Court notes that in its sentencing order, the trial court found the existence of each of the 3 aggravators argued by the State: the victim was less than 12 years old; the murder occurred during a kidnapping; and Defendant was previously convicted of felonies involving the use or threat of use of violence against another, and gave each aggravator great weight. The trial court further found the following mitigators: although the trial court was not reasonably convinced Defendant was psychotic or had a brain injury, the trial court found Defendant was an uncured pedophile, and therefore, Defendant's mental health was impaired and his mental health problems were exacerbated by the use of alcohol and drugs (some weight); as an uncured pedophile, his capacity to conform his conduct to the requirements of the law was substantially impaired (some weight); Defendant was intoxicated at the time of the crime (some weight); Defendant has an extensive history of substance abuse (some weight); Defendant has a history of abuse and unstable home life (modest weight); the Defendant was deprived of the education benefits and social learning that one would normally obtain from a public education (modest weight); Defendant experienced depression and suicidal ideation in the months leading up to his arrest (little weight); Defendant had a history of hard, productive work, starting and running a successful business (some weight); Defendant has a good prison record (modest weight); Defendant has the capacity to form loving relationships (modest weight). (*See* sentencing order, attached). The Court further notes that the jury unanimously recommended the death sentence. (*See* advisory sentence, attached).
>
> Consequently, in light of the aggravators and mitigators established during the sentencing proceedings, the Court finds that even after

> considering all of the additional mitigation testimony and evidence presented during the instant evidentiary hearings - including but not limited to neuropsychological evidence of mild brain impairment, antisocial personality disorder, evidence of adverse developmental risk factors and a possible nexus between those factors and behavior or moral culpability, possible fetal alcohol exposure, micropenis disorder or penile dysmorphophobia, and Defendant's positive adjustment to prison - Defendant has still failed to show that the outcome of the proceedings would have been different as required under *Strickland*. There is no reasonable probability that such additional mitigation evidence would have outweighed the aggravating circumstances and resulted in the imposition of a life sentence. *See Strickland*, 466 U.S. at 695, 695 ("When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."); *Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008)(finding postconviction court did not err in determining there was no reasonable probability that the outcome would have been different where the aggravating factors were "extremely weighty."). As such, no relief is warranted on claim 4.

(V5, 943-44).

As found by the court below, assuming *arguendo* some deficiency can be discerned from trial counsel's investigation of, and, presentation of mental health issues during the penalty phase, Crain fails to meet his burden of demonstrating resulting prejudice. As for the second prong of the Strickland test, "[a] petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high." Van Poyck v. Fla. Dep't of Corr., 290 F.3d 1318, 1322 (11th Cir. 2002). "It

is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Instead, when a petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. See Gaskin v. State, 737 So. 2d 509, 516 n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.").

Collateral counsel in this case did nothing more than repackage the testimony presented by the defense at trial with the benefit of a different expert witness. This was simply not a close case as evidenced by the jury's unanimous death recommendation. Crain's prior violent felony aggravator alone far outweighs any additional mitigation collateral counsel might have uncovered and presented. Crain repeatedly threatened,

intimidated, and sexually abused young girls.[19] The outcome of the penalty phase is not called into question by the somewhat different presentation collateral counsel now offers through Dr. Cunningham. See Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide a reasonable probability of life sentence if evidence had been presented.)

ISSUE IV

WHETHER APPELLANT'S LAWYERS WERE UNCONSTITUTIONALLY PREVENTED FROM INTERVIEWING THE JURORS?

Crain complains that his lawyers are unfairly prohibited from questioning his jurors after the trial in an effort to establish reversible error. As found by the post-conviction court below, this claim is both procedurally barred and without merit. (V5, 948-49).

Appellee submits that the instant claim was procedurally barred as it was a claim that could have been raised on direct

[19] The trial court found three aggravators; prior violent felonies (great weight), the murder was committed during the course of a kidnapping (great weight), and that the victim was under the age of twelve (great weight). Of particularly strong weight in this case are defendant's prior violent felony convictions--five counts of sexual battery and one count of aggravated child abuse. (V2, 310). The defendant was a violent chronic abuser of young girls, an "uncured pedophile." (V2, 315).

appeal, but was not.[20] See Ragsdale v. State, 720 So. 2d 203, 205 n.1 & 2 (Fla. 1998); Gaskin v. State, 737 So. 2d at 530 n.6; see also Brown v. State, 755 So. 2d 616, 620-21, n.1, 4, 5, 7 (Fla. 2000); Mann v. State, 770 So. 2d 1158, 1161, n.2 (Fla. 2000). In any case, Crain does not even mention any particular allegation of error which necessitates an inquiry of the jurors. Further, even if Crain could point to such an error, inquiry of the jury is clearly improper in the absence of external influence or exposure to extra record communication. No such allegation has been made here. Accordingly, Crain's claim must be rejected.

This Court has repeatedly rejected the claim that the rule prohibiting his counsel from interviewing jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar, is unconstitutional because it violates his constitutional rights of equal protection and due process. Such a fishing expedition is properly prohibited as a matter of state law and offends no

[20] On appeal, Crain does not repeat his allegation that counsel was ineffective for failing to preserve or present this issue to the trial court below. Any such challenge would clearly fail, as found by the trial court below. Since the claim is clearly without merit, trial counsel cannot be considered ineffective in failing to raise the claim in trial court, resulting in the procedural default.

constitutional principles.[21] See Barnhill v. State, 971 So. 2d 106, 116-17 (Fla. 2007)(”We deny relief on this issue consistent with our prior decisions which have found that rule 4-3.5(d)(4) and rule 3.575, which collectively restrict an attorney’s ability to interview jurors after trial, do not violate the defendant’s constitutional rights.”)(string cites omitted); See also Tompkins v. State, 994 So. 2d 1072 (Fla. 2008); Sexton v. State, 997 So. 2d 1073, 1089 (Fla. 2008); Evans v. State, 995 So. 2d 933 (Fla. 2008).

Because Appellant’s claim is procedurally barred and without merit, this Court should affirm the post-conviction court’s summary denial of the instant claim.

[21] Florida’s rules are consistent with those employed by federal courts and offend no constitutional principle. See Federal Rule of Evidence 606(b) (limiting inquiry of jurors to allegations of prejudicial extraneous information or external influence); U.S. v. Powell, 469 U.S. 57, 67 (1984) (“Courts have always resisted inquiring into a jury’s thought processes, see McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 783, 59 L.Ed. 1300 (1915); Fed. Rule Evid. 606(b) (stating that jurors are generally incompetent to testify concerning jury deliberations); through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.”).

ISSUE V

WHETHER CUMULATIVE ERRORS DENIED APPELLANT THE RIGHT TO A FAIR TRIAL?

Appellant claims in his final issue that the arguments contained in his brief, when considered cumulatively by this Court, should cause this Court to vacate his judgment and sentence and order a new trial. The State has shown, however, that none of Crain's claims have merit. The lower court agreed and found that because Crain failed to establish any of his allegations of ineffective assistance of counsel, he was not entitled to relief under a cumulative error analysis. (V5, 950).

Because there is no individual error to consider, Crain is not entitled to combine meritless issues together in an attempt to create a valid "cumulative error" claim. See Brown v. State, 846 So. 2d 1114, 1126 (Fla. 2003) (upholding lower court's denial of cumulative error claim when each of the individual claims of ineffective assistance of counsel had been denied); Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (finding no cumulative effect to consider where all claims were either meritless or procedurally barred); Downs, 740 So. 2d at 509 (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the denial of Crain's motion for post-conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. mail to Robert T. Strain, Assistant Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, on this 30th day of August, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com
COUNSEL FOR APPELLEE