IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-1920
Lower Tribunal No.: 98-17084 CFAWS

WILLIE SETH CRAIN, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Willie Seth Crain's motion for postconviction relief which was brought pursuant to Fla.R.Crim.P. 3.851.

Citations shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as "ROA ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as "PCROA ____" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this appeal will determine whether Mr. Crain lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Mr. Crain accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, entered the judgment of convictions and sentences which formed the basis for this postconviction proceeding. On October 14, 1998, the

Hillsborough County, Florida, Grand Jury indicted the Defendant, Willie Seth Crain, Jr., for the September 10 or 11, 1998, premeditated first-degree murder and kidnapping with intent to commit homicide of Amanda Victoria Brown. (ROA V3, p. 1; ROA V22, p. 3098). Trial commenced on August 30, 1999, (ROA V3, p. 1 et seq.), and the jury found Crain guilty as charged. (ROA V2, p.259; ROA V21 p. 3199). Following the penalty phase, conducted on September 16 and 17, 1999, (ROA V22, p.3213; ROA V24, p. 3512), the jury unanimously recommended the death penalty. (ROA V2, p. 267; ROA V24 pp. 3674-3675). The State and defense filed sentencing memoranda. (ROA V2, p. 280-295). A Spencer hearing, held pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993), was conducted on October 11, 1999. (ROA V26, p. 3859). The court sentenced Mr. Crain to death for first-degree murder and a consecutive term of life imprisonment for kidnapping on November 19, 1999. (ROA V2, p. 310-330; ROA V25, p. 3635-3723).

The following factual history is taken from this Court's opinion affirming Mr. Crain's conviction and sentences on direct appeal:

> 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 v. State, 894 So.2d 59, 62-67 (Fla. 2004).

This Court held that the evidence at trial did not support the appellant's conviction for kidnapping with intent to facilitate murder and that any error in finding that the murder was committed in the course of a kidnapping was harmless. It reduced the conviction of kidnapping to false imprisonment.. Crain, 894 So.2d at 78.

As outlined and considered by the postconviction court in its Final Order Denying Motion to Vacate Judgment of Conviction and Sentence:

> [T]he appellant's Motion to Vacate Judgment of Conviction and Sentence was filed on September 8, 2006, pursuant to Florida Rule of Criminal Procedure 3.851. On November 22,2006, the State filed State's Response to Rule 3.851 Motion for Post Conviction Relief. On November 26,2007, the Court held a case management conference and, on November 30,2007, the Court rendered an Order Granting, in

Part, Evidentiary Hearing on Motion to Vacate Judgment of Conviction and Sentence and Reserving Ruling, wherein the Court found Defendant was entitled to an evidentiary hearing on claims 1, 2, 3, 4, and 5, and reserved ruling on grounds 6,7, 8, and 9. The Court subsequently held evidentiary hearings on the following dates: December 15, 2008; December 16, 2008; December 17, 2008; December 18, 2008; February 25, 2009; and February 26,2009. Defendant filed Defendant's Closing Argument to Rule 3.851 Motion to Vacate Judgment of Conviction and Sentence on May 19, 2009, and the State filed State's Closing Argument to Rule 3.851 Motion for Postconviction Relief on June 19, 2009. PCROA V 5 903.

...

During the December 15, 2008 evidentiary hearing, trial counsel, Daniel M. Hernandez, Esquire, and Charles Traina, Esquire, each testified. Mr. Hernandez testified that he has been an attorney for 30 years, and at the time of Defendant's trial, he had conducted at least 200 felony jury trials and 7 death penalty trials. Mr. Traina testified that he has been a practicing attorney since 1984, primarily in the area of criminal defense, and at one point became the chief of the capital crimes division at the Office of the Public Defender; although he could not recall exact numbers, Mr. Traina testified that he has tried approximately 100 or 150 jury trials, several of those were capital cases that were not death penalty trials, and 4 were death penalty trials. In the instant case, Mr. Hernandez was primarily responsible for the guilt phase of the trial, while Mr. Traina handled the DNA evidence and testimony as well as the penalty phase.

...

Mr. Hernandez testified that defense counsel and Defendant stipulated to the DNA evidence as blood because doing so was not prejudicial to their defense, Defendant had offered a reasonable explanation for the presence of that blood in pretrial statements to the media, and Defendant insisted on testifying to the same during trial. PCROA V 5 906. Mr. Traina testified that they retained the services of Dr. William Shield as a private confidential expert to assist the defense with the DNA evidence in this case. ... According to Mr. Traina, their strategy regarding the DNA evidence was to challenge the validity of the DNA results or, in the alternative, to provide a

reasonable explanation for the presence of the DNA evidence which would be consistent with statements Defendant had already made to the media. ... Finally, Mr. Traina testified that the stipulations were each entered into only after he finished consulting with Dr. Shields, and only after conferring with Defendant and with his full knowledge and consent.

...

During the December 16, 2008, evidentiary hearing, Defendant presented the testimony of Elizabeth Ann Johnson, PhD. Dr. Johnson cited to the lack of substrate controls as a deficiency in the DNA testing in this case and described the significance of substrate controls. ... Dr. Johnson further testified that the substrate controls were tested in 2007 by Reliagene, but the lab was unable to get any DNA results from the substrate controls from the boxers, either because the material had degraded or because there was never any biological material there. She was unable to determine whether there was ever biological material there that had degraded because she did not examine the original samples. Additionally, Dr. Johnson testified there was a problem with the validation of the testing kits used by Labcore, the same test kit that Labcore used in the instant case and, therefore, she questioned the validity of Labcore's results in this case. Dr. Johnson was also concerned about possible cross contamination. ... However, Dr. Johnson further testified that she could not "evaluate whether there was or wasn't contamination/' and did not find any evidence that there was or wasn't contamination, but could only state that conditions were present for contamination "if someone was careless in the way they handled these tubes and for this particular sample." Dr. Johnson further noted that if any mistakes had occurred at FDUE, then those mistakes would have been perpetuated by LabCorp.

...

During the December 18, 2008, evidentiary hearing, the State presented the testimony of Theodore Yeshion, PhD, a forensic serologist, who also testified during the trial in this case. Dr. Yeshion was employed by FDLE and conducted DNA testing on the items submitted to FDLE in this that reacts to the phenolphthalein test when used in the proper sequence." Therefore, Dr. Yeshion further stated,

he had no problem "going right to DNA and saying that the DNA I'm obtaining is a DNA result because of the biological evidence which is identified through phenolphthalein and believed to be blood."

...

Dr. Yeshion agreed that careless handling of the samples could result in cross-contamination, but testified that FDLE had proper safety protocols in place to avoid cross-contamination as well as procedures to detect contamination. He further noted that there was no indication there had been contamination in this case, and there were no "red flags" raised during the technical and administrative reviews of his work.

...

During the February 25,2009 evidentiary hearing, the State presented the testimony of Martin Lewis Tracey, PhD, who was recognized as an expert in the fields of population genetics and forensic DNA analysis. Dr. Tracey testified that he was familiar with the "evolution" of DNA analysis, and acknowledged that there was a time when substrate controls were implemented, but in his experience, very few labs were implementing the use of substrate controls in the late 1990's.

...

Dr. Tracey further testified that by the late 1990' s, the Technical Working Group on DNA Analysis Methods had basically recommended that substrate controls were not necessary and did not provide any useful information, and he was not aware of any recommendations by governing bodies regarding the necessity of substrate controls for a reliable DNA analysis. Finally, Dr. Tracey testified that the lack of substrate controls in this case did not affect the results of the tests conducted.

...

On February 25, 2009, Defendant presented the testimony of Ronald K. Wright, M.D., an expert in the field of pathology. Dr. Wright reviewed 19 photographs of Defendant's scratch marks as well as the report, deposition and trial testimony of Dr. Vega, the forensic pathologist who evaluated the evidence and testified at trial in this case, and the closing arguments during the guilt and penalty phases; Dr. Wright prepared a report regarding his findings and

recommendations. Dr. Wright essentially agreed with Dr. Vega's written report, but concludes that, with exception of two possible marks, the scratches were likely not caused by fingernails.

...

During the December 17, 2008 evidentiary hearing, Defendant presented the testimony of Mark D. Cunningham, PhD, a board certified clinical and forensic psychologist. The defense also entered into evidence Dr. Curiningham's written report, dated February 27, 2008. Dr. Cunningham reviewed voluminous background materials on Defendant and researched and evaluated additional potential mitigation information which could or should have been presented durng the sentencing phase. ... During the December 17, 2008 evidentiary hearing, the State introduced a transcript of the January 15, 2008, deposition testimony of Joseph Sesta, PhD, ABPN, a forensic neuropsychologist board-certified in neuropsychology. Dr. Sesta was retained by CCRC and reviewed mental health and other records regarding Defendant, and conducted a forensic neuropsychological examination of Defendant.

...

During the February 25,2009 evidentiary hearing, the State presented the testimony of Robert M. Berland, PhD, an expert in the field of forensic psychology. Dr. Berland previously testified as a defense expert in the penalty phase of this case. In preparation for the penalty phase, Dr. Berland spent approximately 123 hours working on this case, including 10.6 hours evaluating Defendant. Dr. Berland recalled that Defendant was uncooperative during the penalty phase investigation, and "very difficult and argumentative." Dr. Berland also prepared a report rebutting Dr. Cunningham's report. During the February 26, 2009 evidentiary hearing, the State presented the testimony of Barbara Anne Stein, M.D., an expert in the field of forensic psychiatry. Dr. Stein, who also testified for the State during the penalty phase, testified that none of the additional information or materials which she reviewed in preparation for the instant matter affected her penalty phase findings. Dr. Stein further testified that there is insufficient evidence to conclude that Defendant suffers from fetal alcohol syndrome, and to do so would be "purely speculative." She also noted that Defendant had a history of sexual deviance before

> he was raped in prison. ... As to Dr. Cunningham's assessment of the risk factors associated with Defendant and the relation to his offenses, Dr. Stein testified that there is no evidence of any nexus or correlation between those factors and committing offenses.

PCROA V 5 903-942 passim.

SUMMARY OF THE ARGUMENT

Issue 1: Trial counsel were ineffective for failing to challenge the State's circumstantial case. Specifically, no scientific test conclusively established that the stains found were blood stains although they were repeatedly referred to as blood stains during trial - all due to counsels' stipulation with the State. Additionally, there was no independent DNA testing and no expert testimony offered to challenge the DNA evidence presented against appellant. Counsel should have retained an expert to independently test or examine the DNA evidence and educate the jury about the lack of conclusive testing to establish that the evidence was blood, alternate sources of DNA, possible cross-contamination of the evidence collected, and the lack of substrate control testing.

Issue 2 - At trial, defense counsel relied solely on its cross-examination to challenge the testimony and evidence. the State presented through a medical examiner who examined certain photographs and rendered an opinion regarding what might have caused certain scratches on the appellant. Counsel's failure to retain any expert to challenge the State regarding these scratch marks was deficient performance and prejudiced the defendant's case. The use of this unrebutted evidence permitted the State to establish a murder theory to Mr. Crain's prejudice.

Issue 3 - Counsel was ineffective for failing to supervise the administration of available mental health tests, allowing the improper use of outdated tests to evaluate his client and for failing to present all available mitigation to the jury in this case. Counsel also allowed his expert to improperly claim that the WAIS is a test that is used to diagnose brain injury. Trial counsels' performance at the penalty phase of the trial was therefore prejudicially deficient.

Issue 4- Florida lawyers, including criminal defense trial and postconviction counsel, cannot interview jurors on behalf of their clients. To the extent defendants' counsel are treated differently from academics, journalists, other non-lawyers and lawyers not associated with a case who are not subject to the Rules Regulating the Florida Bar, there is a violation of defendants' rights to equal protection.

Issue 5 - Repeated instances of ineffective assistance of counsel and the presently discredited circumstantial factors of "blood" and "scratches" produced an unconstitutional process that significantly tainted and prejudiced appellant's capital proceedings. The cumulative effect of these errors denied appellate his fundamental rights under the Constitution of the United States and the Florida Constitution.

ARGUMENT

ISSUE 1

THE POSTCONVICTION COURT ERRED WHEN IT DENIED APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO CHALLENGE THE STATE'S CIRCUMSTANTIAL CASE - RESULTING IN VIOLATION OF MR. CRAIN'S 6TH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION.

This Court applies a mixed standard of review to ineffective assistance of counsel claims, deferring to the trial court for findings of fact, but reviewing questions of law *de novo*. Occhicone v. State, 768 So.2d 1037, 1045 (Fla. 2000). The Court will not substitute its judgment for that of the postconviction trial court on questions of fact if that court's findings are supported by competent, substantial evidence. Walls v. State, 926 So.2d 1156, 1165 (Fla. 2006).

The postconviction court succinctly described the claim in its order denying relief as follows:

> In Claim 1, Defendant alleges trial counsel was ineffective for failing to challenge the State's circumstantial case. Specifically, Defendant alleges that no scientific test conclusively established that the stains found were blood stains although they were repeatedly referred to as blood stains during trial. Defendant further claims there was no independent DNA testing and no expert testimony offered to challenge the DNA evidence presented against Defendant. Specifically, Defendant alleges counsel should have retained an expert to independently test or examine the DNA evidence and educate the jury about the lack of conclusive testing to establish that

> the evidence was blood, alternate sources of DNA, possible cross-contamination of the evidence collected, and the lack of substrate control testing.
>
> PCROA V5 905-906.

After outlining portions of the evidentiary hearing testimony, the postconviction court made its findings of fact and conclusive ruling as follows:

> 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.
>
> PCROA V5 917-918.

In so ruling, the postconviction court erred when it denied appellant's claim that he received ineffective assistance of counsel due to counsel's failure to challenge the state's circumstantial case - resulting in violation of his 6th Amendment rights under the U.S. Constitution. The court below erred by failing to address that a critical element of the State's case against Mr. Crain was the nature of the source of the DNA which linked the victim to Mr. Crain. The court below erred by failing to address the fact that the defense knew that the testing to determine the nature of the stains at issue was not conclusive - that the state testing yielded only a presumptive result due to shortcuts taken that bypassed the

confirmation that any sample was blood. The court below critiqued the postconviction defense DNA expert as “essentially” credible, presumably because much of her testimony was based on “mere speculation.” PCROA V5 918. The court thus erred by failing to address the reason for any such speculation: the postconviction DNA testing - which the State opposed - failed to produce results due to insufficient quantities of DNA or excessively degraded DNA. PCROA V3 427-433. By ignoring the confusion between the definitive nature of DNA testing and the mere presumptive likelihood the subject stains were blood, the court below erred by failing to address the numerous references to “blood” by the State in its closing argument. Additionally, the court below similarly failed to address this Court’s heavy reliance on and usage of the “blood” evidence in its direct appeal opinion. See, e.g., Crain 894 So.2d at 66; 73-74.

As stated, argued and pled below, a critical element of the State's case against Mr. Crain was the nature of the source of the DNA which linked the victim to Mr. Crain by a spot on his boxer shorts (DNA consistent with the victim), two areas of the toilet seat at his home ("Stain 1" contained DNA consistent with the victim, "Stain 2" contained a mixture of DNA consistent with the victim and Mr. Crain), and in a wad of toilet paper found under the rim of the toilet (mixture of DNA consistent with the victim and Mr. Crain). Testimony of Dr. Elizabeth

Johnson, PCROA V 56 7491.

The problem arises from the failure of the defense to recognize the distinction between the DNA testing with its apparent reliability, and the identification of the areas where the DNA was obtained, which can only be presumed to be blood and were never established as blood to a reasonable degree of medical or scientific certainty.

The defense knew that the testing the State did to determine the nature of the stains at issue was not conclusive. State expert Ted Yeshion explained to the defense in his pretrial deposition that the testing yielded only a presumptive result. PCROA V 9 et seq. (Defense Composite Exhibit 1, Vol. 4(X)(A)(1), Deposition of Theodore Yeshion, 8/13/99, p. 26-27). At the evidentiary hearing in the current proceeding for this appeal, he testified that "some shortcuts that [sic] have been taken along the way." PCROA V 58 7697. Laboratories "go right from a presumptive blood test to DNA. They bypass the confirmation that it is blood . . ." Id. at 7698. He confirmed that was his practice when he worked on the Crain case in 1998. Id. at 7711. The best Mr. Yeshion could say was that if he obtained DNA from an area that tested presumptively as blood, he could say he obtained DNA from an area that tested positive for blood, and believed to be blood. Id.

Mr. Yeshion never testified that the material which produced the DNA in

the case was, in fact, to a reasonable degree of medical or scientific certainty, blood. Dr. Johnson testified that testing that would have definitively determined to a reasonable a degree of scientific certainty that the stains were indeed blood were never done – "No, it was presumptive testing only. There was no confirmatory tests for blood run." PCROA V 56 7495.

The State actually makes the case that the stipulation to the fact that the DNA came from the victim's and Mr. Crain's blood stains damningly damaged the defense case. At the evidentiary hearing, Dr. Johnson was asked:

> Q If you were the witness testifying in 1999 as to the result from the testing, DNA testing in 1998, both FDLE and LabCorp, would you be able to testify that to a reasonable degree of scientific certainty that the stains in this case from the evidence we've talked about, that those stains were blood?

Id. at 7496. The state interrupted and objected that:

> I think that question need incorporate if she were to testify after a stipulation was entered that these were, in fact, blood stains, would she have answered it in the same manner that Dr. Yeshion did because the testimony wasn't -- of Dr. Yeshion in trial wasn't couched in these terms within a reasonable degree of scientific certainty but after stipulations were entered were, did you find blood and what was the DNA profile in that blood? So we're talking about apples and oranges in terms of the manner in which the questions were asked and the context. I suggest should not be lost upon the Court or upon expert testimony. These were following written stipulations –

Id. at 7497. As the State argued in the objection, the defense and Mr. Yeshion

were constrained by the erroneous stipulation. The jury could never be informed that the State could never say, to a reasonable degree of scientific certainty, that the DNA in the case came from blood stains of the victim's and Mr. Crain's blood. Mr. Yeshion never qualified his testimony at trial to make it crystal clear, as he did in his pre-stipulation deposition, PCROA V 9 et seq. (Defense Composite Exhibit 1, Vol. 4(X)(A)(1), Deposition of Theodore Yeshion, 8/13/99, p. 26-27), "that scientifically, conclusively, that [the DNA source] is blood without doing additional tests." Instead, while he did mention that his test for blood was presumptive, he did not clarify the State's next question whether he was able to detect blood – he jumped immediately into referring to the source material as blood, and that all the DNA was derived from blood stains. ROA Vol. 16 at 2384. Subsequent testimony referred conclusively to the bloodstains, omitting the limitation on the conclusions of the testing.

Dr. Johnson explained why a presumptive test for blood could not support a scientific conclusion that DNA obtained from the area of an apparent blood stain was DNA actually derived from blood (and why substrate controls should have been tested, relevant to the second part of this Claim):

> If what you see on an item of clothing for example is a red, round stain and it tests positive for the presumptive chemical test for blood, then that stain -- that may or may not be blood. But generally

> anything that has the appearance of blood and tests with these presumptive chemical tests is likely to be blood. However, if that item of clothing has been washed, the red-brown stain is likely to remain as a visible stain but there's not likely to be any genetic material within it so that that if you just cut it and tested itself, it would likely not give you a DNA result under those circumstances. If that was animal blood, you would not get a DNA result using these tests so -- or if that stain has been sitting in hot, humid environment for even 24 hours not, you know, not having that opportunity to dry out, that could cause the inherent genetic material in the DNA to degrade.
>
> So if you had that situation as a base line and another type of biological fluid has been overlaid or superimposed on it, say, for example, or in that area, say, for example, saliva or tears or some other cellular material has been overlaid in that area, you can get a DNA result from that other fluid, from those cells.
>
> So if an analyst comes along and only cuts the blood stain and tests it, they would mistakenly conclude that the DNA profile that they had obtained originated from the blood stain. In order to distinguish whether or not that's the case, you really need to take a substrate control. In doing that, you're taking an area of the material very close to the stain but not stained itself with blood or apparent blood and you're testing that as well.

PCROA V56 7492-7494. More testing than what was done in this case was necessary before the defense could conclude that the DNA came from blood rather than another source, either because the stain was not blood or because the DNA component of the stain had deteriorated, but the component which produced a presumptive positive result for blood remained. In this case, the stains on the toilet were in a "hot humid environment," the non-airconditioned bathroom in Mr.

Crain's home.

With the facts and the knowledge which trial counsel had available before trial, no reasonable argument can be made that they had to stipulate that the DNA came from blood to achieve any strategic or tactical objective. Nor can it be reasonably maintained that they could not anticipate how such a stipulation would be used by the State. Regardless, before trial, the defense conceded the DNA testing results, but in so doing conceded also that the DNA was found in the victim's blood on the above-mentioned items.

During the trial, the state's experts consistently referred to the area where they found DNA as being bloodstains. The jury was well conditioned to accept without question that the victim's blood was found on the boxers and in the toilet area by the time of the closing arguments. So, the State's closing had a tremendous impact on the jury. The State hammered away at the blood theme in its closing arguments. Even the defense fell into the trap:

Closing Argument by the State

> MR. PRUNER: "I know how rid of a body so no one can find it." That was the tragic prediction made person who was last to lay down next Amanda Brown.
>
> Those were the words uttered Willie Seth Crain on a couple of occasions before Amanda Brown came up missing, before her blood was found on his underwear and on his toilet seat, and mixed with his

blood.

ROA V 20 3008 (any emphasis is added in this and all other excerpts from the close).

> Amanda Brown has not been seen in the one year and two days since this defendant laid down next to her. She has not been seen in the one year and two days since her under -- her blood was found on the toilet seat of the defendant and on his underwear.

ROA V 20 3011.

> That circumstance, when you view it in light of where her blood is, and the mixture of the blood, leads you to one conclusion: Amanda is dead and her blood was shed at the same time these scratches were inflicted.

ROA V 20 3022.

> Tragically, unfortunately, I must argue to you that Amanda Brown is dead. Despite this defendant's best efforts to cover his tracks, he had unwittingly kept a piece of Amanda close to him, his blood on her underwear after he had changed his dress clothes on his boat in the bay, dress clothes that have never been seen to this day.
>
> There is much more to this case than I've discussed at this time. Many more circumstances; the DNA evidence; the events of Wednesday and Thursday and Friday morning in that month of September, 1998.

ROA V 20 3023. As will be seen infra, the claim that Mr. Crain's blood was found on the victim's underwear was completely false, an error defense counsel failed to adequately address with effective argument or the more appropriate objection, motion to strike, motion for mistrial, and motion for curative instruction.

Hernandez Defense Close

> Let's talk about the blood. First of all, I -- and -- and I don't believe I mis -- mis, um, misheard Mr. Pruner, I believe at one point in his closing arguments, he said that, um -- something about, um, Mr. Crain's blood on Amanda's underwear.
>
> And -- and, um, I don't believe Mr. -- if Mr. Crai -- um, Pruner said that, that's -- that's not evidence in this case.
>
> Um, what we have here is a small amount of blood, but the spot on the toilet seat, um, clearly, um, visible to the naked eye, as was brought out during the course of -- of, um, of the testimony of the experts.
>
> Now despite the impressive credentials by the State's experts that testified in this case, by all of the, um, procedures that -- that they have available to them, they were not able to render any opinion as to say or they cannot say as to how the blood got there and cannot say when it got there.

ROA V 20 3078-79. This was an wholly ineffective response to the State's blatant error about the blood on the victim's panties, weak, unclear, and unfocused. Also, the State's expert may have had impressive credentials, but expert Ted Yeshion missed the semen stain on the "bloody underwear," addressed infra, an oversight that the defense could have used to attack the impact and reliability of the State's forensic evidence.

> Now as Mr. Crain has told you, he didn't see blood. He saw blood, he saw some blood when he gave her -- when -- in the house when -- when she was complaining about the tooth and got some tissue paper and gave it to, um, gave it to Amanda to, um, to put on the tooth; but

when -- when they went outside in the boat area and she fell, he did not see any blood.

It was dark, he could've -- he could've testified, Yeah, I saw her, um, bleeding from the knee; but he -- he did not see any blood.

But, again, it's another possibility of where she might've bled; but without question, as Mr. Crain said, she was bleeding from the tooth and he gave her tissue paper to -- to apply to the tooth inside the residence.

Mr. Crain is -- is not saying that his blood, um, got anywhere, but that he does know that, um, he suffers from hemorrhoids.

That's been uncontradicted, there -- there has not been any -- any evidence contradicting the fact that Mr. Crain, um, um, suffers from hemorrhoids.

Now I sug – suggest to you, ladies and gentlemen, that it would be illogical that if Mr. Crain was so thoroughly trying to cover up some crime he had committed regarding Amanda Brown, that he would so thoroughly clean the bathroom area and leave a drop of blood on the toilet seat.

ROA V 20 3081-82.

But the time line that we're dealing with Mr. Crain is, at best, from 2:30 to 6:30 when he goes into the water. And then -- so from 2:30 to 6:30, those are only four hours, and the only evidence that the State can suggest that links him or proves the fact that they're trying to prove that Amanda Brown was killed by Willie Crain, is this one drop of blood in the -- in -- or the -- the small amount of blood in the bathroom area.

ROA V 20 3084-85.

What do we have as proof that Amanda Brown is dead? We have the

fact that Amanda's missing and we have the fact that there's a small amount of blood that has been recovered in this case.

ROA V 20 3090.

State Rebuttal

The blood, that you'll be able to see on State's Exhibit No. 17 when you take the exhibit back. It's a little -- it's a smear right in front, there's a smear in the back; that's what's left of Amanda Brown, this blood smear.

We've been talking about this is Amanda Brown's blood, and the DNA people have told you, DN -- DNA is not like a fingerprint, more than one person can have the DNA pattern that another one does; but what are the odds of it in this case?

. . . .

What all that means is the odds are astronomical that there's not another person in this United States with that blood pattern.

The defendant would want you to believe, even though he's not gonna come out and tell you, that the blood is from Amanda's tooth. The blood is from Amanda's tooth.

Why doesn't that make sense? Well, for one thing, because -- and this goes back to Dorothy Flair, Dorothy Martinez when she testified, she indicated to you she saw there was no blood evidence at Kathryn Hartman's trailer.

So what you may say? This little girl's bleeding from a tooth, where is it gonna fall? What's common sense tell you?

Ever seen a little -- a little kid wake up in the middle of the night with a loose tooth? Where's the blood? It's on the pillow case, it's on the linen, it's on the nightgown.

There's no evidence of that. None. That tooth wasn't bleeding that

night. Monique Smith tells you that blood wasn't -- that tooth wasn't bleeding, Kathryn Hartman told you that it wasn't bleeding.

Monique says she wasn't complaining about -- about the tooth, she wasn't talking about the tooth, she wasn't wiggling the tooth.

Defendant indicates to you that he -- he sees her bleed while she's wiggling the tooth at the kitchen table sometime that night.

You know, assign the credibility to that that you think it's worth, because he never told Brackett anything about that, he never told Leeza Gibbons about that.

He testifies about that here today after having read all of the police reports and all of the depositions. He asks you to speculate that that's where the blood came from.

That he gave her -- and that's where the blood came from on the tissue, he will ask you to speculate, because he says he gave her a tissue for the tooth.

. . . .

And you've gotta look at this evidence, including the blood evidence, together. There was a mix of DNA consistent with the defendant and Amanda on two locations in that bathroom: On the toilet seat, and on the tissue.

. . . .

His DNA is only there as a mixture, only there as a mixture. There's no bloodstain that is just Willie Crain's. What does that tell you, ladies and gentlemen?

It tells you that those different blood samples got mixed there because the bloodletting was done at the same time.

The bloodletting that was left that resulted in the stains on the toilet seat and the stain on that tissue, occurred at the same time; when the life blood of Amanda is being taken from her body by this defendant, and when she is fighting for her life with her last line of defenses, her

fingernails.

And that's what that tells you. Not only the fact that there's a mixture, but there is no blood just from this defendant. It happened at the same time, ladies and gentlemen.

[Pause for court reporter to change paper.]

MR. PRUNER: Thank you. This is where I have to tread kind of gently, so that I don't cross the -- the bounds of taste, I guess.

But the Defense has suggested that the blood mixture came from hemorrhoids and that he had -- his hemorrhoids would bleed under the stress of going to the bathroom.

And he concedes that he went out that next morning fishing, which is stressful work, a lot of lifting, a lot of stress.

You bend over, you lift crab traps; common sense tells you when you bend over, where is the stress? In the same portion of your body that's gonna cause your hemorrhoids to bleed.

The only bloodstain on this defendant's underwear, was Amanda Brown's. He had been out there crabbing for two hours, but the stress of crabbing doesn't cause any bloodstains.

What does that tell you? That tells you that the mixture of blood that is comprised in -- comprised in part of his blood, didn't come from hemorrhoids, it came from his arms; it came from the scratches.

ROA V 21 3117-24.

This portion of the argument clearly shows the prejudice that arose because of counsels' stipulation that all the DNA came from blood stains. A scenario of innocence would have the mixture of DNA on the toilet seat come from a

combination of Mr. Crain's blood from his hemorrhoids, over which was imposed the epithelial cells of the victim from her urine, saliva, nasal secretions, or vaginal secretions (all sources of DNA, Testimony of Dr. Elizabeth Johnson, PCROA V 56 7492), or a transfer from her hand as she used the toilet. For that matter, Mr. Crain's DNA could have originated from the same type of non-blood sources, all interposed over an old bloodstain from which the DNA had deteriorated in the hot and humid bathroom, but which still bore hemoglobin from the non-DNA bearing red cells which would react to a presumptive test for blood. Or the test could have been a false positive.

Also, despite the lab technician's initial intake form, PCROA V 9 et seq. (Defense Composite Exhibit 1, Volume 2, page 49), which noted the presence of a dark stain in the rear area of the boxers (possibly containing a mixture of blood and feces), the State's expert failed to test the obvious stain for blood. A competent defense would have objected and moved for mistrial, not only because of the reference to Mr. Crain's blood being on the victim's underwear, but because the State argued the absence of blood anywhere on the underwear except where the victim's DNA was found, when the expert had failed to test the other stains noted by his lab. The absence of blood cannot be argued when obvious locations were ignored.

Let's talk about his nighttime cleaning, his habit, so to speak. He had been drinking for hours, been up since way early the pre -- previous morning. What this is, it was his attempt to cover the tracks, to get the blood out of there.

. . . .

What he did was he cleaned everywhere he thought blood had been spent. And the fact that this sink hasn't been cleaned, tells you that he wasn't concerned about the sink.

What does that tell you? Well, use your common sense again. A little girl, assuming for the sake of argument that she had a loose tooth that was bleeding, if you wanna buy that, if she's in the bathroom, is she gonna reach over, as he suggests the possibility exists, and reach over and grab some men's underwear to -- to wipe off? No.

Do you know a little girl in the world that likes the taste of blood or dried blood in her mouth? No. A little girl rinses the mouth and spits in the sink.

There's no stain in there, it's not even been cleaned, as he knew -- he knows there was no loose tooth bleeding. And the urgency to launder those rugs in there that night, and they're in evidence here, he says because there's spilled bleach. If you wanna -- because he spilled bleach on it.

If you wanna look at those rugs, when -- when blood -- excuse me, when bleach hits a blue rug, what does it do? It robs that portion of the rug that it's coming in contact, of all color. Take a look at the rugs here.

There's no white spot there that, you know, shows you the bleach has come. That's not what he wanted to remove; that's not why he laundered it, he wanted to get the blood out of it.

ROA V 21 3127-29.

Those dress pants and shirts have never been found. Why? I suggest

> to you because they also bore Amanda's blood. Well, you know, he had the same underwear on, and that -- and I -- Counsel is right, I misspoke the first time around here.
>
> If I said -- and I've been told I did say that his blood was on Amanda's panties, that's wrong, that's just plain wrong; I misspoke, there's no evidence of that, and I didn't mean to suggest that if I did -- well, I did say that, because I've been told a couple times about it; but her blood is on his underwear.

ROA V 21 3134-35. This excerpt raises a fundamental error never challenged, the State's claim of knowledge of facts outside the trial. It is undeniable the State argued the false fact that: "Despite this defendant's best efforts to cover his tracks, he had unwittingly kept a piece of Amanda close to him, his blood on her underwear after he had changed his dress clothes on his boat in the bay, dress clothes that have never been seen to this day." ROA V 20 3023. The State's attempt to correct the error in fact only compounded the prejudice and error when the prosecutor admitted he misspoke. He said there was no evidence to support the assertion which might have been sufficient but for the fact that he then said he had been told a couple of times about it. This suggests that the State had evidence outside that presented at trial "I did say [Crain's blood was found on Amanda's panties] because I've been told a couple of times about it."

> Gotta be fresh and clean for those crabs out there. Come on, ladies and gentlemen. And why does it matter? Because he's gotta put his underwear in a position in that bathroom so that the blood transfer of

> Amanda, can be innocent; that's what that's all about. That's why he's trying to convince you of that.
>
> But that doesn't make any sense, you clean up your bathroom and then you take a bath; and you take a bath before your date. It just doesn't make sense.
>
> He's trying to give you an innocent explanation for how that blood got on his underwear, because that is compelling evidence. Because that blood on his underwear does not have an innocent explanation.

ROA V 21 3137.

> He tried to cover his tracks with bleach, but due to the booze and the pills that night, he was inattentive to details and he didn't know that there was a drop of her blood on his underwear.
>
> It is the life blood of Amanda, its placement, its placement in proximity, the mixtures of his blood and her blood his place, it's placement on his underwear; under these circumstances, within the context of his behavior that night and the following morning, which points unerringly to Willie Seth Crain, Jr. as the murderer of Amanda Brown and the kidnapper of Amanda Brown.

ROA V 21 3145-46. This was the penultimate element of the closing, the last argument of the facts, with only a thank you and a request for a verdict to end. ROA V 21 3146. The last facts the jurors heard was that Amanda's lifeblood was on Mr. Crain's underwear.

Defense counsel Hernandez testified at the evidentiary hearing that he conceded the stains were blood because "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." PCROA V 55 7299. Mr. Hernandez had no recollection of ever consulting with a DNA expert to develop defense issues. Id. at 7294. Mr. Hernandez' testimony reflects his continuing failure to distinguish between a test allowing a presumption that a stain is of blood, and the definitiveness of a DNA result taken from that area. Even the State's own expert, at trial and the evidentiary hearing, Ted Yeshion, agreed that he could not say, to a reasonable degree of medical or scientific certainty, that the areas which tested presumptively for blood were, in fact, blood.

Other than the concerns raised in this proceeding about the possibility of cross-contamination in the DNA testing, the portion of the stipulations asserting the DNA results could have been agreed upon without conceding they were from blood rather than the universe of other sources for DNA. The portions conceding blood can easily be excised from the stipulations.

> THE COURT:
> . . . .
> The first stipulation reads as follows: "The State of Florida and the defendant, Willie Crain, and his undersigned attorneys, hereby stipulate and agree that the bloodstain DNA found on the toilet seat in Willie Crain's home, State's Exhibit 17(A), stain one, has the same DNA profile as the DNA profile found on two items represented as belonging to Amanda Brown: The toothbrush, State's Exhibit 42, and the panties, State's Exhibit 43 (B) ."
>
> "The State and the defense further stipulate that the bloodstain DNA

> found on the boxer shorts, State's Exhibit 46, taken from Willie Crain on September 11, 1998, has the same DNA profile as the DNA profile found on two items represented as belonging to Amanda Brown: The toothbrush, State's Exhibit 42 and the panties, State's Exhibit 43 (B) ."
>
> "The State and the defense further stipulate that the DNA profile found on two items represented as being from Amanda Brown: The toothbrush, State's Exhibit 42 and the panties, State's Exhibit 43, is consistent with the DNA profile of an offspring of Kathryn Hartman and Roy Brown, as determined by the DNA profiles of Kathryn Hartman's blood, State's Exhibit 53, and Roy Brown's blood, State's Exhibit 52." That is the first stipulation.
>
> The second stipulation reads as follows: "The State of Florida and the defendant, Willie Crain, and his undersigned attorneys hereby stipulate and agree that, one: The blood sample contained in State's Exhibit 52, is the blood of Roy Brown; two, the blood sample contained in State's Exhibit 53, is the blood of Kathryn Hartman; and, three, the blood sample contained in State's Exhibit 47, is the blood of Willie Seth Crain."

ROA V 15 2348-50 (emphasis added, struck-out words in original, underlined words added for argument). The tactic or strategy Mr. Hernandez gave for stipulating would have been accomplished without conceding blood, since even now there is no proof possible, to a reasonable scientific certainty, that the stains in question were blood, let alone the sources of the DNA.

The State even now, in the evidentiary hearing, encourages this confusion between the definitive nature of the DNA testing and the mere presumptive likelihood the stains were blood. In cross-examining Mr. Hernandez, the State

argued: "Q . . . . [T]he defense did not contest the validity of the DNA results which found the victim's blood on Mr. Crain's underwear and a spot on the – his toilet bowl on a spot? A Yes." PCROA V 55 7357. "Q . . . [W]as it the informed strategy of the defense to choose not to contest the DNA results finding minuscule amounts of blood . . . .. A Yes." Id. at 7357-7358. The State then obtained Mr. Hernandez's agreement that the stipulation arose from a strategy to deal with Mr. Crain's explanations for why the victim's blood would be found. Id. at 7358-7362.

However, Mr. Crain's testimony did not state that he saw the victim's blood placed on his underwear or in the toilet – his testimony did not rule out equally plausible innocent sources for the victim's DNA such as Dr. Johnson testified to in the evidentiary hearing. Those innocent sources, saliva etc., would not carry the emotional impact of "a drop of her blood on his underwear." It is the life blood of Amanda, its placement, its placement in proximity, the mixtures of his blood and her blood his place, it's placement on his underwear . . . ." ROA V 21 3145-46.

Mr. Crain did not poison the well, so to speak, with his testimony such that the defense had to concede blood to avoid losing credibility as suggested by the prosecution in cross examining Mr. Hernandez. PCROA V 55 7362. In fact, Mr. Crain hardly mentioned anything about the victim bleeding – it was the State who brought it up repeatedly in cross-examination. In direct, Mr. Crain said the girl

had a loose tooth. No mention she was bleeding. ROA V 19 2805-06. He mentioned the tooth a second time, and did note then that "it was bleeding a little" and he gave her a piece of toilet paper when the blood got on her finger, telling her to not get the blood on her fingers. Id. at 2817. He said the girl fell on his crab traps on his boat, but he saw no blood. Id. at 2824. He mentioned his hemorrhoids bleed when he goes to the bathroom. Id. at 2836. Those were the only mentions of blood sources offered by Mr. Crain, in 63 pages of direct examination.

Mr. Crain also offered testimony on direct that permitted the argument or inference that the DNA was from innocent non-blood sources – the girl used his bathroom twice, staying in the bathroom six or eight minutes the second time, Id. at 2821-22, and the boxer shorts in evidence had been on the back of his toilet on the tank until he dressed to go crabbing the morning after the girl disappeared, Id. at 2851-52.

Contrast that with the multiple times the State put blood into Mr. Crain's mouth in cross-examination: "Well, when you cleaned the bathroom, isn't it a fact you missed Amanda's blood on the toilet seat?" ROA V 19 2893; "Q Are you trying to suggest to this jury that your blood got on that, um, toilet seat mixed with Amanda Brown's blood, because you had hemorrhoids? A I'm not suggesting

nothing." ROA V 19 2935; "Q And you never saw blood? A Yes, sir. On the girl's finger and her tooth sitting there in my house." ROA V19 2966 – the State went on to suggest Mr. Crain told TV personality Leeza Gibbons about the blood from the loose tooth, implying he fabricated the story after reading police reports that blood had been found ROA V 19 2966-71.

The State used the word "blood" far more than Mr. Crain. A word count on his testimony shows Mr. Crain used the word "blood" only twice in cross-examination, ROA V 19 2936, in explaining that his hemorrhoids only bled when he strained on the toilet, explaining why there was no blood was found on his boxer shorts, and ROA V 19 2971, in explaining he didn't know anything about blood from police reports late in the case. He didn't say the word "blood" once on direct. Defense counsel used the word once, ROA V 19 2824; it was defense counsel who asked if Mr. Crain saw blood after the girl fell in his boat. Compare that with the dozen times the State used the word during cross, ROA V 19 2893, 2935 (2x), 2936, 2966 (3x), 2967, 2968, 2970 (2x), and 2971.

Not one iota of Mr. Crain's testimony about blood sources, even on cross-examination, would conflict with the alternate explanations for how his and the victim's DNA came to be where it was found. Counsel Hernandez's handling of the stipulation was ineffective, deficient, unreasonable and prejudicial under

prevailing professional norms. He could give no rational or reasonable explanation to show that his participation in the stipulation was a "strategic choice[] made after thorough investigation of law and facts relevant to counsel's ... options." Strickland v. Washington, 466 U.S. 668, 690-91 (1984); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2536-37 (2003).

Counsel Charles Traina also demonstrated trial counsels' failure to distinguish between their perceived inability to challenge the DNA results which would have justified a stipulation to the DNA results (easily done as demonstrated by the above-amended stipulations substituting "DNA" for "blood"), and their unreasonable concern about in some way harming the case by refuting Mr. Crain's statements about the loose tooth, the fall on the crab traps, and the hemorrhoids with "inconsistent" evidence or positions. PCROA V 55 7388, 7392 and 7398.

To the contrary, every explanation Mr. Crain provided was an innocent explanation, which did not have a logical opposite which would incriminate Mr. Crain. Mr. Crain only mentioned the bloody loose tooth, the girl's use of the bathroom, the fall on the crab traps, and his hemorrhoids. He never said he saw any of the stains being created by the innocent actions. Thus, establishing alternative hypotheses of how the DNA came to be where it was in no way refuted Mr. Crain's suggested innocent hypotheses, nor could alternative hypotheses make

Mr. Crain out to be a liar. Mr. Crain was not a forensic DNA expert and was, therefore, incapable of interpreting the circumstances he recollected to develop reasonable hypotheses of innocence. Mr. Hernandez and Mr. Traina were experts in the law, and they knew or should have known that they needed expert advice to develop reasonable hypotheses of innocence, all of which would be consistent with Mr. Crain's position – e.g., proving or raising a possibility that the toilet seat DNA from the victim came from nonblood sources did not refute her loose tooth, and would be, in fact, consistent with Mr. Crain's testmony that the girl used the toilet twice.

Mr. Traina testified that the course of his development of the DNA defense led him to conclude that he could not refute the blood evidence. PCROA V 7385-7389. However, his entire discussion of the DNA issue demonstrates his continuing failure to recognize that the State never conclusively proved the stains were blood, or that the DNA came from blood rather than some other source. Mr. Traina agreed with Mr. Hernandez's reason for stipulating to the blood issue – the focus was on dealing with Mr. Crain's prior statements and expected testimony. As already argued, blood did not have to be agreed to to achieve that objective.

Mr. Traina testified that he retained and consulted with a DNA expert, Dr. William Shields. He said Dr. Shields got all the discovery provided the defense

and advised before and after depositions. He said Dr. Shields gave no reason to seek independent testing of the DNA evidence. There was little more offered by Mr. Traina as to what the expert advised. The expert did not make much of an impression on Mr. Hernandez, who didn't even recall consulting a DNA expert. PCROA V 55 7294. Mr. Hernandez was, therefore, untutored on the critical distinction of a presumptive but unconfirmed test for blood. Mr. Traina offered no insight as to receiving such advice from the expert he recalled consulting, and his continued references to the "blood" evidence indicates he remains deaf to the distinction testified to by both Mr. Yeshion and Dr. Johnson.

Defense counsel has a duty to reasonably investigate before making a tactical or strategic decision. Strickland. Both versions of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require a full investigation into guilt phase issues. The 1989 version states:

> GUIDELINE 11.4.1 INVESTIGATION
>
> A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.
>
> B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution’s case at the guilt/innocence phase or the sentencing phase of the trial...

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 1989, available at http:/ / new.abanet.org/DeathPenalty/RepresentationProject.

The 2003 version states:

With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime and all evidence—whether testimonial, forensic, or otherwise—purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. As more fully described infra in the text accompanying notes 195-204, the defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny. Further, notwithstanding the prosecution's burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses—ranging from absolute defenses to liability (e.g., self-defense or insanity) to partial defenses that might bar a death sentence (e.g., guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly

if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (e.g., inculpatory statements or items recovered in searches of the accused's home).

ABA Guidelines, 31 Hofstra L. Rev. 913, 926 (Summer 2003).

GUIDELINE 10.7—INVESTIGATION

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

ABA Guidelines, 31 Hofstra L. Rev. at 1015.

4. Physical Evidence:

Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

Id. at 1020 (Commentary to Guideline 10.7).

The Guidelines are accepted by the United States Supreme Court as the guides for competent counsel: "Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what

is reasonable." Strickland v. Washington, 466 U.S. 668, 688-89 (1984). Had defense counsel in this case conducted the aggressive investigation required for effective representation, they would have been acutely aware of the danger and error in stipulating to the conclusion that the DNA came from blood stains.

The prejudice is clear. One needs only look to the State's cross-examination of Dr. Johnson on her conclusory reference to a semen stain on Mr. Crain's boxer shorts to see what could be done with such a distinction:

> Q [A]cid phosphatase is that presumptive or conclusive test?
>
> A It's presumptive test for semen.
>
> Q Yet in your cross-examination when you referred to ReliaGene testing of a certain area of Mr. Crain's boxers, you repeatedly referred to the biological fluid as a semen stain, even though all they had done was a presumptive test? [Incorrect – the presumptive test had been confirmed by a microscopic examination which showed sperm.]
>
> A I believe they made slides for microscopic determination of sperm. I'll have to check my notes or their report to see if they determined that. Let me just see. Okay. It had a high level of acid phosphatase. [Dr. Johnson overlooked the paragraph immediately following the finding of acid phosphatase which confirmed the semen stain with the identification of sperm.] I should have said apparent semen stain. It was very -- I was present when the acid phosphatase test was done, and it was a yellowish stain. So presumed semen stain.
>
> Q So you did in your direct testimony today what Ted Yeshion did in his testimony at trial, which was describe a biological substance and identify it based upon a presumptive test; isn't that correct? You said it was -- the item was semen based upon a presumptive acid

phosphatase test. Ted Yeshion testified that a red-brown blood stain -- red-brown stain was blood based upon a presumptive field -- phenolphthalein test. Did you make the same error?

A Well, I -- he said in his deposition and testimony that that was not a conclusive test. He said that himself.

Q Did you make the same error just a few minutes ago that Ted Yeshion did?

A I may have said that that – referred to semen stain when I should have said a presumptive semen stain. However, based on the quickness of the acid phosphatase test and appearance, I would say it was a semen stain. But I did not run any conclusive test for that or did they -- I m sorry. Did they. They did run a microscopic test for it, not an additional chemical test. It could have been semen without sperm but there was not an additional chemical test performed.

Q So are you saying that based upon the strength of the result of a presumptive test, you feel comfortable as a scientist describing a biological stain as semen because, as you indicated a minute ago, the high level of the result, the acid Phosphatase? Is that what you're saying?

A No. It's likely semen, but as I've said just now, it was just not confirmed by additional chemical testing to be semen.

PCROA V 7527-7529. Cross examination forced a major retreat by the expert once she was attacked on her conclusory references to a presumptive test. Mr. Crain is more than happy to agree with the prosecution that "Did you make the same error just a few minutes ago that Ted Yeshion did?" means it is error to speak conclusively about a test which is only presumptive. However, Dr.

Johnson's error, in the midst of the State's erroneous assertion that "all they had done was a presumptive test," was in overlooking the paragraph in her report which confirmed that the stain was a semen stain because of the presence of sperm. That oversight was quickly corrected on redirect: "[Dr. Johnson] Visualization of sperm cells is a confirmation for the presence of semen and so that was a semen stain. Thank you for pointing that out." Id. at 7537-7539.

The defense in this case was deficient not only for accepting the conclusion that the DNA arose from blood stains, but in failing to properly investigate and present readily available evidence which would have raised a reasonable doubt in the jurors' minds as to the reliability of the forensic testing in this case. No independent testing of DNA evidence was performed and no expert testimony was offered at trial to challenge DNA evidence presented against Mr. Crain.

The jury would have been informed of the fact that blood was never conclusively determined by the State's testing. They would have learned that, as Dr. Johnson testified as noted in the prior portion of this argument, there were many other sources of DNA which would explain the results obtained without the emotionally charged and unduly prejudicial conclusion that the victim's lifeblood was drained from her and left on Mr. Crain's boxer shorts and his toilet.

Defense counsel knew or should have known that Mr. Yeshion's processing

of the boxer short was sloppy, raising doubt about the reliability of his results. An intake inventory sheet was prepared by FDLE lab technician John P. Ryan, for the evidence in "Submission 1," which included the boxer shorts upon which the victim's DNA was reportedly found. It is dated two days before Mr. Yeshion's lab notes, i.e., September 15, 1998. PCROA V 9 et seq. (Defense Composite Exhibit 1, Volume 2, page 49). Mr. Ryan described the shorts as

> One pair of white boxer shorts with red, white and blue, small patterns. Elastic waistband. Yellow stain on "fly" area and left side of left leg (wearing). Brownish stain on back side (wearing) bottom area. Small brown stain on front top of right leg (wearing).

The boxer shorts bore not only the very tiny dot which yielded the victim's DNA, but an observable stain in the fly area indicative of possible semen and urine, and another stain on the back which could have contained a mixture of feces residue and blood from Mr. Crain's hemorrhoids.

Despite this description of a dirty pair of undershorts bearing at least three stains of interest, Theodore Yeshion, only two days later, examined the shorts, drew a diagram of the shorts, and noted only one thing, the small dot on the right front. PCROA V 9 et seq. (Defense Composite Exhibit 1, Volume 2, page 63). In the evidentiary hearing, Mr. Yeshion testified that his notes did not reflect the yellow stain. PCROA V 58 7726-7727.

Mr. Yeshion apparently never was focused on the yellow stain which yielded semen and sperm and epithelial cells when Dr. Johnson directed that the stain be tested during the Reliagene testing in 2006. He appears to have no recollection of such a stain and, in fact, had no such recollection at the time of his pretrial deposition August 13,1999.

> Q. Did you see any other stains that could appear to be blood at that time too or just zeroing in on this one stain that you've described for us?
>
> A. That was the only stain that I observed that potentially looked like it could be a blood stain. I didn't see any other stains on the shorts.
>
> Q. Were these boxer shorts in appearance clean? Did it look like they were clean but for the stain, you know, freshly laundered or folded or anything of that nature?
>
> A. Well, they were -- I do recall that they were just stuffed into a bag by themselves, you know. It wasn't with multiple items. It was just the boxer shorts only. It was not folded. I don't have remarks in my notes here as to the cleanliness of them, but I would tell you that if I come across an exhibit that's dirty, it appears that it needed to be laundered and it's pretty grungy-looking, I would make note of that.
>
> If there is a bad odor, a body odor, a perfume odor, things like that, I have a tendency to make notes of that. I have no notes to that effect on here. My feeling is that they were relatively clean.

Pretrial Deposition of Ted Yeshion, August 13,1999, PCROA V 9 et seq. (Defense Composite Exhibit 1, Volume IV, subdivision X(A)(1), page 21) of the deposition.

Trial counsel knew or should have known about the inventory description of the boxer shorts indicating they were not in a "relatively clean" state, but one which bore at least two additional stains of interest which were unnoted and unexamined by Mr. Yeshion. This should have set off alarm bells in the defense, or, at the very least, this should have alerted the defense expert who had access to all of the discovery. Even if the defense made a tactical or strategic decision to not seek additional testing of the shorts, it would have alerted competent counsel to fundamental flaws in the State's forensic lab requiring "rigorous independent scrutiny." It would appear the only rigor in this case was the defense rigor mortis in responding to obvious forensic flaws. As described in the ABA Guidelines, “to assume the accuracy of whatever information the . . . prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. . . . [T]he defense lawyer's obligation includes . . . subjecting all forensic evidence to rigorous independent scrutiny. ABA Guidelines, 31 Hofstra L. Rev. 913, 926 (Summer 2003).

Failure to adequately investigate ways to challenge the DNA evidence deprived the jury of the readily available information shown at the evidentiary hearing:

1. The DNA could have been cross contaminated when known

samples of the victim's DNA were tested in the same time and place as samples from the crime scene. PCROA V 56 7516.

2. Cross contamination could have occurred when lab technicians opened sample tubes when processing of victim and crime scene DNA at the same time. Id. at 7516-7517. Mr. Yeshion claimed that he always used a mechanical decapper to open such tubes, PCROA V 58 7679, but he conceded that even a decapper, just like a gloved finger, could cross-contaminate, although contamination would be "less likely." Id. at 7683.

3. The State never tested the stains to confirm whether they were blood. The jury would have learned the degree to which it could rely on a presumptive test, as demonstrated by the examination of the experts in the evidentiary hearing.

4. The jury would have learned about the universe of alternate sources for DNA, at the least defusing the emotionally charged "lifeblood" argument and offering additional innocent explanations for the presence of the DNA (e.g. urine, cells from the hand, saliva, mucous, etc.). PCROA V 56 7492-7496.

5. Independent defense testing including substrate controls would have yielded additional evidence that the DNA was of innocent origin. Dr. Johnson testified that substrate testing would have been available and appropriate in 1998 and would have yielded additional information. Id. at 7525-7526. She cited An Introduction to Forensic DNA Analysis as one authority which deemed substrate analysis appropriate in 1998 (the transcript erroneously reports she was referring to the "Fifth" rather than "First" addition of the treatise, but the context makes it clear "First" was what she said, just as the reporter erroneously recorded that she said the "fifth person to test" the DNA samples was the FDLE, Id. 7526-7527, when the FDLE was the first agency to test the DNA). Mr. Yeshion conceded that testing substrate controls was appropriate in 1998: "I'm not going to tell you that it's not good practice. It's certainly good practice to collect those items." PCROA V 58 7721. He also recognized the authority of the

> treatise addressing the basic fundamentals of CSI work by Richard Saferstein, an author known to Mr. Yeshion, which recommended that substrate samples always be collected in forensic DNA work. Id. at 7720-7721. Mr. Yeshion excused his lab's failure to always collect substrate controls as required by Richard Saferstein because there is a difference between how CSI work is done on the east and west coasts of the United States. Competent defense counsel would have been able to further attack the competence of Mr. Yeshion's testing beyond his failure to note or test the additional stains on the boxer shorts by proving that he also failed to perform appropriate testing of the substrates. An expert such as Dr. Johnson would have established that the failure was indicative of the inadequate, unreliable and sloppy work done by the FDLE in this case.
>
> 6. The jury would have learned that the additional LabCorp testing added nothing to the reliability of the protocols and tests performed by the FDLE because LabCorp only received samples collected by the FDLE. Those samples failed to include substrates, and also were subject to the aforementioned potential for cross-contamination.
>
> The reliability of the FDLE testing was severely compromised.

Proper investigation would have discovered and developed the deficiencies, and a competent presentation of the evidence to the jury would have devastated the most critical evidence against Mr. Crain.

The jury relied heavily on the DNA evidence to reach a guilty verdict. This Court relied heavily on the DNA evidence to find the evidence in this purely circumstantial case to be sufficient to support the murder and kidnaping charges. The reliability of the DNA evidence would have been critically diminished if the

jury had only been presented with the evidence presented in this evidentiary hearing.

ISSUE 2

THE POSTCONVICTION COURT ERRED WHEN IT DENIED THE APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE DUE TO COUNSEL'S FAILURE TO RETAIN A DEFENSE MEDICAL EXPERT TO CHALLENGE THE STATE'S MEDICAL EXAMINER'S TESTIMONY REGARDING SCRATCH MARK EVIDENCE PRESENTED AT TRIAL.

As noted previously, this Court applies a mixed standard of review to ineffective assistance of counsel claims, deferring to the trial court for findings of fact, but reviewing questions of law *de novo*. Occhicone v. State, 768 So.2d 1037, 1045 (Fla. 2000). The Court will not substitute its judgment for that of the postconviction trial court on questions of fact if that court's findings are supported by competent, substantial evidence. Walls v. State, 926 So.2d 1156, 1165 (Fla. 2006).

At trial, the State presented Russell Vega, Associate Medical Examiner for Hillsborough County, who examined certain photographs, consisting of six exhibits, and rendered an opinion regarding what might have caused certain scratches on the defendant. ROA V 4 1998. Defense counsel relied solely on its cross-examination to challenge this testimony and evidence. Counsel's failure to

retain any expert to challenge Dr. Vega's testimony regarding these scratch marks was deficient performance and prejudiced the defendant's case. The use of this unrebutted evidence permitted the State to establish a murder theory to Mr. Crain's prejudice.

The postconviction court framed the claim and its components as follows:

> In Claim 3, Defendant alleges counsel was ineffective for failing to retain a medical expert to challenge the State's medical examiner's testimony regarding scratch mark evidence presented at trial. Specifically, Defendant claims a medical expert would have testified to the following:
>
> 1) it was unlikely that Defendant's injuries were from fingernail marks;
>
> 2) fingernail marks are curvilinear, but none of the marks on Defendant was curvilinear;
>
> 3) Dr. Vega's testimony that fingernails also produce linear marks is questionable; it is an extremely and uncommon rare occurrence;
>
> 4) most of the wounds are "clearly not possibly from fingernail marks";
>
> 5) while two of the wounds can not be excluded as fingernail marks the possibility is unlikely.
>
> Defendant further alleges an expert could have challenged Dr. Vega's opinion based upon the appearance and location of the wounds as well as Defendant's severely sun-damaged skin.
>
> PCROA V 5 922-923.

After outlining portions of the evidentiary hearing testimony, the postconviction court made its findings of fact and conclusive ruling as follows:

> 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. Hernandez 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) ("[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."). 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.
>
> PCROA V 5 926-927.

In so ruling, the postconviction court erred when it denied appellant’s claim that he received ineffective assistance of counsel due to counsel's failure to retain

a defense medical expert to challenge the state's medical examiner's testimony regarding scratch mark evidence presented at trial. The court below erred by failing to address the fact that the unrebutted testimony permitted the State to establish a murder theory to Mr. Crain's prejudice. Not addressed by the court below was the fact that, in closing argument, the prosecuting attorney, without objection, made the medical examiner's distinction between "consistent with" and "caused by" completely disappear:

> MR. PRUNER: The defendant suggests to you – suggests that his DNA could've gotten on his toilet seat because he had hemorrhoids, he may have bled when he went to the bathroom.
>
> This is his bathroom that he uses all the time, there is no DNA of his standing alone from anyone else's; in other words, there's no stain from him apart.
>
> His DNA is only there as a mixture, only there as a mixture. There's no bloodstain that is just Willie Crain's. What does that tell you, ladies and gentlemen?
>
> It tells you that those different blood samples got mixed there because the bloodletting was done at the same time.
>
> The bloodletting that was left that resulted in the stains on the toilet seat and the stain on that tissue, occurred at the same time; when the life blood of Amanda is being taken from her body by this defendant, and when she is fighting for her life with her last line of defenses, her fingernails.
>
> And that's what that tells you. Not only the fact that there's a mixture, but there is no blood just from this defendant. It happened at the

same time, ladies and gentlemen.

. . .

This is where I have to tread kind of gently, so that I don't cross the -- the bounds of taste, I guess.

But the Defense has suggested that the blood mixture came from hemorrhoids and that he had -- his hemorrhoids would bleed under the stress of going to the bathroom.

And he concedes that he went out that next morning fishing, which is stressful work, a lot of lifting, a lot of stress.

You bend over, you lift crab traps; common sense tells you when you bend over, where is the stress? In the same portion of your body that's gonna cause your hemorrhoids to bleed.

The only bloodstain on this defendant's underwear, was Amanda Brown's. He had been out there crabbing for two hours, but the stress of crabbing doesn't cause any bloodstains.

What does that tell you? That tells you that the mixture of blood that is comprised in -- comprised in part of his blood, didn't come from hemorrhoids, it came from his arms; it came from the scratches.

And when you view all of the evidence together, and view it together you must, you cannot avoid the scratches. At 12:00, these photographs were taken of the defendant; and Dr. Vega indicates those are fresh scratches, somewhere within the last 24 hours.

Let me show you State's Exhibit No. 31, which are the gouge marks, they've been described as gouge marks, four of them; three and then a thumb.

And you can see them there, I'm gonna tilt the picture, one, two, three and down here a thumb. Dr. Vega said they are suggestive of a little girl's fingernails; because of the parallel nature and the spacing, it's consistent with the fingernails of a seven year old girl.

And when you look at these injuries and you look at the hand of Amanda Brown, you can vision, you can see her fingernails digging into this man's elbow as she fought for his (sic) life --as he took her life in that bathroom.

You can see it in this picture. You can see the claw that she's scratching with, all of 45 pounds against this man. State's 32(A), three more parallel scratches.

Can Dr. Vega rule these out as coming from any other source? Absolutely not. But look at them in the context, ladies and gentlemen, there's another three coming down the back of the arm occurring roughly the same time, according to Dr. Vega, as the gouge on the elbow.

When did that happen, ladies and gentlemen? When he's going through palm fronds or whatever it was out there on the bay? No.

And why do we know that? Because there's no scratches on his hands, or on his face, or anywhere else; if you o into those deep thickets, you -- you get scratches.

Only on his arms, only on the part of his body that's uncovered, that's within the reach of a little girl fighting for his (sic) life — for her life.

You know, and -- and this defendant knew the significance of those scratches early on. Remember at Detective Brackett's testimony, I asked him — Detective Brackett asked him, Well, Mr. Crain, if you got those scratches there while you're crab fishing, show me how you did it lifting those crab traps?

And Detective Brackett says he just sat there, he wouldn't demonstrate. Instead he became very irate and accused me of a frame-up.

What happened? Al Brackett touched a nerve. This defendant realized that he couldn't do such a demonstration. He realized that he

didn't have a ready answer then for those scratches.

ROA V 21 3122-27.

Similarly ignored and not analyzed by the postconviction court was this Court's repeating of the State's keen emphasis on the scratch marks upon direct appeal:

> On the ride back, Hurley noticed a small scratch on Crain's upper arm.

Crain, 894 So.2d at 65.

> 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.*

Id. at 65 (emphasis added).

> In addition to the abrupt and permanent disappearance of a young child supporting the inference that Amanda is dead, there is also evidence that Amanda was last seen alive in the presence of Crain, that Amanda's blood was found on Crain's boxer shorts, *and that scratch marks consistent with a young girl's fingernails were found*

on Crain's body.

Id. at 72 (emphasis added).

Here, in addition to circumstances similar to Sean, the State also presented evidence that blood consistent with Amanda's DNA was found on Crain's boxer shorts and taken from the toilet tissue found in Crain's toilet bowl. *Further, multiple scratches and one cluster of gouges were observed and photographed on Crain's arms. All but two of the scratches were more likely to have been caused by the fingernails of a seven-year-old child than by any other cause. The cluster of small gouges was more likely to have been caused by a small grasping hand consistent with that of a seven-year-old child than by another cause.*

Based on this evidence, we conclude that the State presented legally sufficient evidence of a kidnapping with the intent to inflict bodily harm. The DNA blood evidence linked to Amanda that was found on Crain's boxer shorts tends to establish that Amanda bled while Crain was wearing his boxer shorts. Moreover, the DNA evidence indicating a mixture of blood from Crain and Amanda found on the toilet seat and tissue in Crain's bathroom establishes that Amanda and Crain both bled at some point during the kidnapping. *When considered in light of the DNA evidence, the scratch and gouge marks on Crain's arms are indicative of a struggle between Crain and Amanda.[FN14] We note that at the time of her death Amanda was three feet ten inches tall and weighed approximately forty-five pounds. Crain was a fifty-two-year-old man of normal height and weight,FN15 engaged in a physically demanding profession. Combined with the disparate height and weight, we conclude that the evidence that a struggle occurred between Amanda and Crain which resulted in both parties' blood loss and numerous scratches and gouges to Crain's arms is a compelling indication of Crain's intent to inflict bodily harm on Amanda.*

> *[FN14]. Crain asserted at trial and on appeal that he obtained the scratch marks while crabbing. Relying on*

> *testimony from the medical examiner that he could not determine with any degree of certainty whether the scratches were caused by fingernails or crab traps, Justice Lewis states in his separate opinion that "[t]he State did not offer definitive evidence that Crain's version of the facts was not true" regarding the origin of the scratch marks. See infra at 86. However, we note that the circumstantial evidence standard requires this Court to take every inference in the light most favorable to the State. See Law, 559 So.2d at 189. The State offered evidence that Crain's version of the events was untrue-namely the medical examiner's testimony that the scratches were more likely to have been caused by the fingernails of a seven-year-old girl than by a crab trap. Applying the review standard for circumstantial evidence to this evidence, we conclude that the jury could have properly rejected Crain's version that the scratches came from crabbing.*

Id. at 74 (emphasis added).

In this case, we determine that the circumstantial evidence supports a verdict of first-degree murder based on felony murder with the underlying felony being kidnapping with intent to inflict bodily harm. The evidence of an abduction, the drops of blood, the DNA evidence, *the disparity of size and strength, and the evidence of a struggle between Amanda and Crain are all circumstances from which a jury could properly infer, to the exclusion of any reasonable hypothesis of innocence, that Crain abducted and intentionally harmed Amanda before her death.* The fact that we cannot pinpoint when the actual bodily harm and subsequent killing occurred in relation to the time Crain first kidnapped Amanda does not undermine this conclusion.

Id. at 74-75 (emphasis added).

The following makes clear that counsel's failure to retain any expert to

challenge Dr. Vega's testimony regarding these scratch marks was deficient performance and prejudiced the defendant's case. First, Professor Paul C. Giannelli discussed, in depth, the underlying myths of the effectiveness of cross-examination, the neutrality, and the competency of prosecution experts in 2004:

> Appellate courts often cite the fact that the cross-examination of the prosecution expert was effective as a reason why a defense expert was not needed. For example, one court wrote that "defense trial counsel exhibited an understanding of the scientific evidence, and effectively and comprehensively cross-examined the prosecution's experts." Another court went further, declaring:
>
> > [W]e disagree with [the] contention that the average attorney is ill-equipped to defend against [DNA] evidence. To the contrary, law libraries—i.e., law journals, practitioners' guides, annotated law reports, CLE materials, etc.—are teeming with information and advice for lawyers preparing to deal with DNA evidence in trial. Even a cursory perusal of the literature in this area reveals copious lists of questions for defense attorneys to use in cross-examinations and other strategies for undermining the weight of DNA evidence.
>
> This statement borders on the incredulous. First, the same reasoning applies when prosecutors seek a psychiatric evaluation of an accused who has raised an insanity defense. There are likewise numerous texts and CLE materials on that subject, and yet virtually every jurisdiction has procedures recognizing the prosecution's right to have the accused examined by a state psychiatrist—a prosecution expert. The rationale for this procedure is obvious: the adversary system would be undermined if the prosecution was deprived of its own expert.

Second, effective cross-examination of a prosecution expert frequently requires the advice of a defense expert. For example, a British DNA study found that "94 per cent of defense lawyers who consulted an expert felt that they had been assisted by that expert, either in their evaluation of the case and the advice they gave to their client or in presenting their case in court."

Third, there is a significant difference between attacking the opinion of an opponent's expert through cross-examination and attacking that opinion through the testimony of your own expert. In Daubert, the Supreme Court noted that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." In 1983, the Court upheld the admissibility of expert testimony concerning future dangerousness in capital cases. In so ruling, the Court noted that "jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors." Similarly, the 1992 report of the National Academy of Sciences observed that "[m] ere cross examination by a defense attorney inexperienced in the science of DNA testing will not be sufficient." A forensic scientist agrees, remarking that " [I] f cross-examination is to be the only way to discover misleading or inadequate testimony by forensic scientists, then too much is being expected from it." Some courts have also recognized this point. For instance, in De Freece v. State, the Texas Court of Criminal Appeals rejected the notion that an "admirable" cross-examination of the prosecution expert justified the failure to appoint an expert for the defense.

Finally, if this factor is relevant at all, it would only be so on appellate review under a harmless error analysis. After all, a trial court cannot wait to review the defense counsel's cross-examination before appointing a defense expert.

[ ] "Neutral" Prosecution Experts

Courts may assume that cross-examination is adequate because

government experts are unbiased scientists. For example, the Indiana Supreme Court upheld a trial judge's denial of funds for a DNA expert because "the neutral ... experts here were testifying to the results of a test 'involving precise, physical measurements and chemical testing." Eighty percent of crime laboratories, however, are controlled by the police, and most examine only evidence submitted by the prosecution. The "pro-prosecution" bias of lab experts has often been criticized, both in this country and abroad. Along a similar vein, the Eighth Circuit rejected the notion that the right to subpoena state experts is an appropriate consideration. According to the court, "the ability to subpoena a state examiner and to question that person on the stand does not amount to the expert assistance required by Ake."

[ ] Competence of Examiners

If government examiners were always competent, the need for defense experts would arguably decrease. Such an assumption, however, is unwarranted. In 1989, molecular biologist Eric Lander could correctly note: "At present, forensic science is virtually unregulated—with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row." Although important reforms have been undertaken, only a few states require the accreditation of crime laboratories. There are voluntary programs, such as the American Society of Crime Lab Directors/Laboratory Accreditation Board (ASCLD/LAB), but many laboratories remain unaccredited.

Proficiency testing in the forensic sciences dates back to 1978, and later studies demonstrated its feasibility. Nevertheless, some courts have criticized current proficiency testing in fingerprin and handwriting comparisons as not being sufficiently rigorous. In short, we do not know much about competence, and proficiency testing, which is designed to be an indicator of competence, will affirmatively mislead if it is not rigorous enough. Thus, competence cannot be

assumed under current conditions.

Paul C. Giannelli, "*Ake v. Oklahoma*: the Right to Expert Assistance in a Post-Daubert, Post-DNA World," 1305 Cornell Law Review [Vol. 89; 1376-1380; 2004](footnotes omitted).

Secondly, the defendant notes that, at a minimum, the following components of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases apply to this claim. The 1989 version reads:

Guideline 8.1 - Commentary:

In a capital case reaffirming that fundamental fairness entitles indigent defendants to the "basic tools of an adequate defense," the United States Supreme Court stated that:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

The Court reiterates the proposition adopted by other national standards on defense services that quality representation cannot be rendered by assigned counsel unless the lawyers have available for their use adequate supporting services. These services include:

> ...expert witnesses capable of testifying at trial and at other proceedings, personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencings, and trained

> investigators to interview witnesses and to assemble demonstrative evidence.
>
> As set out in the following Guidelines and/or commentary -- 1.1, 11.4.1, 11.5.1, 11.7.2 and 11.8, experts and other supporting services are frequently vital in capital cases.
>
> Guideline 11.4.1
> 7. Expert Assistance:
>
> Counsel should secure the assistance of experts where it is necessary or appropriate for:
>
> > (A) preparation of the defense;
> >
> > (B) adequate understanding of the prosecution's case;
> >
> > (C) rebuttal of any portion of the prosecution's case at the guilt/ innocence phase or the sentencing phase of the trial . . .
>
> ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 1989, available at http://new.abanet.org/DeathPenalty/ RepresentationProject (footnotes omitted).

Relevant portions of the revised 2003 version read as:

> 1. Guideline 4.1 - Commentary:
>
> In a capital case reaffirming that fundamental fairness entitles indigent defendants to the "basic tools of an adequate defense," the United States Supreme Court stated:
>
> > We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal

> trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

It is critically important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence.

National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate "supporting service [including] ... expert witnesses ....

This need is particularly acute in death penalty cases. The prosecution commits vast resources to its effort to prove the defendant guilty of capital murder. The defense must both subject the prosecution's evidence to searching scrutiny and build an affirmative case of its own. Yet investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts ─ whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others.

31 Hofstra Law Review 954-955 (2003)(emphasis added).

2. Guideline 1.1 - Commentary:

With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime and all evidence─whether testimonial, forensic, or otherwise ─ purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel .... the defense lawyer's obligation includes .... subjecting

all forensic evidence to rigorous independent scrutiny.

31 Hofstra Law Review 926 (2003)(emphasis added).

3. Guideline 10.7, commentary:

> Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

31 Hofstra Law Review 1020 (2003)(emphasis added).

The use of defense experts has been discussed in other forums. In answering the question: "why use an expert?," defense attorney Eric A. Vos wrote that it is "[f]or the jury's sake. ... [b]ecause they win cases! Logically, given the rules which dictate attorney presentations to jurors, lawyers will not be allowed to give long-winded explanations or theories outside of opening and closing arguments. Even if an attorney could miraculously take the witness stand, this would be a rather poor substitute for expert testimony. Hence, most of the heavy lifting is best done by someone other than the defense attorney ─ the least liked person in the courtroom. An opening statement, a blistering cross-examination, and summation are the sum total of how most defense attorneys set forth theory. Yet, when an expert is employed aggressively, a theory can be impressively

presented." Eric A. Vos, "Experts: How to Identify Them, Confront Them, and Keep Them Off the Stand," The Champion, June 2007, page 10. In deciding an issue involving the justifiable use of deadly force, a Florida appellate court ruled that "[b]y allowing the State to produce Dr. Kocisko's opinion, but denying Robbins the opportunity to present a contrary expert opinion, Robbins was certainly unduly prejudiced." Robbins v. State, 891 So.2d 1102, 1108 -1109 (Fla. 5th DCA 2004). Florida commentators have also discussed the similar impact and usage of experts in the civil case context:

> Selecting the best possible expert witness is especially important in today's legal climate. A good expert can help build your case, but a great expert witness can also substantially undermine your opponent's case. Each party seeks to assemble its best team of expert witnesses to help educate the jury and then convince the jury of its position, all the time knowing that each individual expert will engage opposing counsel and the opposing party's corresponding expert. Judge Blue stated in Centas vs. Naples Community Hospital, 689 So.2d 302 (Fla. 2d DCA 1997): "Even if expert testimony is cumulative, excluding such testimony is harmful because a medical malpractice case is always necessarily a battle of expert witnesses."
>
> David Theodore Tirella , "Winning Strategies: The Four Ps of Expert Witness Selection," 80 The Florida Bar Journal 11 (December, 2006).

See, also, Hollis F. Russell and Peter A. Bicks, "The Use of Forensic Document Examiners in Florida Will Contests," 71 The Florida Bar Journal 48 (October, 1997): "The practitioner also must consider that it usually is risky when an

opponent retains an expert to rely exclusively on cross-examination of that expert; the more prudent course is to retain an expert to counter the other side's expert."

Thus, before the jury heard at closing that the victim was "fighting for her life with her last line of defenses, her fingernails," the jury had been exposed only to the examination and cross-examination of the State's medical examiner. The jury and trial court never had the opportunity to hear an opposing analysis by a defense expert about the scratches such as that provided at the postconviction hearing:

> Q. Did you, in fact, have any disagreement with Dr. Vega's written reports about the scratches?
>
> A. No, not that I can see at all.
>
> Q. Okay. And if you want to make it a narrative, that may be a better use of time, Dr. Wright, proceeding to whether or not you had any opinions after your review of these materials.
>
> A. Pretty much exactly what Dr. Vega wrote in his report, which is that the scratches are nonspecific and in general and number 20 and number 7 are mildly suggestive of fingernail marks.
>
> I might disagree a little with that by the way. I suppose they are mildly suggestive, but they are not completely inconsistent with fingernail marks but they are not the usual kinds of fingernail marks that you see in individuals who are being sexually assaulted or are being strangled or otherwise being harmed by someone.
>
> . . .
>
> Q. If you had been utilized by the defense counsel at the time of Mr. Crain's trial what would you have advised them and later testify to, if

you will, about the — about your opinion about the usage of these photographs showing scratches on Mr. Crain's body?

A. I — I would have urged the defense to ask Dr. Vega concerning what he thinks the most likely cause of these particular scratches are, and I think that would have elicited at least two different answers. Number one, some of these injuries are quite old, several days at least prior to when the photographs were taken, other of the injuries are basically inconsistent with fingernail scratches, unless somebody had their fingernails cut into a V so that you would have a very narrow fingernail mark. And number 20 and number 7 are the only ones that might possibly be fingernail marks, but they lack the characteristic curvilinear feature. It looks like a half moon. When you put your fingernail into somebody's skin, you end up with a half moon mark. There aren't any here. So, in general I would have suggested to the defense that Dr. Vega most probably would concede all of those points I just made.

. . .

Q. And based on reasonable medical or scientific probability or certainty do you have an opinion that these injuries were caused by fingernails, Dr. Wright?

A. Yes, I do.

Q. And what is that opinion?

A. No, they are not.

PCROA V 59 7748-7752.

Consequently, the ineffective failure to rebut the State medical expert's testimony permitted the State to establish a murder theory to Mr. Crain's prejudice. Mr. Crain has established counsel's ineffective and prejudicial performance as required in Strickland v. Washington. In any event, and

alternatively, prejudice should be presumed under United States v. Cronic, 466 U.S. 648 (1984) because Mr. Crain's attorneys simply abandoned their client at a critical stage and as to a critical component of the State's case in this proceeding. Counsels' failure to challenge the scratch mark evidence resulted in performance so inadequate that, in effect, no assistance of counsel was provided to Mr. Crain.

ISSUE 3

THE POSTCONVICTION COURT ERRED WHEN IT DENIED THE APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROVIDE COMPETENT EXPERT PSYCHOLOGICAL EVALUATION AND TESTIMONY, ADEQUATELY INVESTIGATE, PREPARE AND PRESENT AVAILABLE MITIGATION EVIDENCE THROUGH EXPERT OR OTHER TESTIMONY, AND TO OTHERWISE CHALLENGE THE PROSECUTION'S CASE FOR THE DEATH SENTENCE.

The appellant again notes that a mixed standard of review is applied by this Court to ineffective assistance of counsel claims, deferring to the trial court for findings of fact, but reviewing questions of law *de novo*. Occhicone v. State, 768 So.2d 1037, 1045 (Fla. 2000). The Court will not substitute its judgment for that of the postconviction trial court on questions of fact if that court's findings are supported by competent, substantial evidence. Walls v. State, 926 So.2d 1156, 1165 (Fla. 2006). After outlining the claim and portions of the evidentiary hearing testimony, the postconviction court made its findings of fact and conclusive ruling

as follows:

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 railing 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) ("[CJounsel 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.

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, Defendant5 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.
>
> PCROA V 5 941-944.

Finding Dr. Berland's testimony to be credible and accepting Dr. Berland's explanation for using out-of-date versions of the WAIS and MMPI tests are the key components of the court's ruling. However, the court fails to address and analyze how it treated the testimony of State expert, Dr. Barbara Stein. Before making his findings regarding Dr. Berland's credibility, the court described that "During her testimony, Dr. Stein agreed that Dr. Berland improperly used outdated tests to evaluate Defendant during the penalty phase, and noted that "as a forensic clinician, you should not be using an outdated version of any test." (See February 26, 2009, pp. 40-42, attached). Dr. Stein also disagreed with Dr. Berland and

stated that the WAIS is not a test that is used to diagnose brain injury. (See February 26, 2009, pp. 40-41, attached). Those opinions, elicited from the State's forensic psychiatrist, would seem to diminish the value of Dr. Berland's penalty phase testimony, if not his credibility in total. While the court below largely accepted the additional mitigation testimony and evidence presented in postconviction, the court fails to address how the jury may have been affected by these shortcomings.

In sum, trial counsels' performance at trial was prejudicially deficient under standards set by Stickland, supra, Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and the ABA Guidelines. Counsel was ineffective for failing to supervise the administration of available mental health tests and for failing to present all available mitigation to the jury in this case.

As to Mr. Crain's case, this Court noted:

> In this case, Crain's death sentence was supported by three aggravating factors found by the trial court ... [t]he trial court rejected statutory mitigating factors, and the nonstatutory mitigation is far from compelling. First, the trial court's finding of nonstatutory mental health impairment was based on the fact that Crain was a pedophile and substance abuser. Second, as noted by the State, the trial court's finding that Crain had the capacity to form loving relationships with his children was a 'charitable' finding ... [t] he trial court also found that Crain had an abusive childhood, was deprived of educational benefits and had a good prison record.

Crain, 894 So.2d at 76-77.

At the evidentiary hearing, collateral counsel showed that there was substantial mitigating evidence available at the time of trial which was not presented to the Court due to ineffective assistance of counsel. The presentation also reflected, at minimum, the following shortcomings of trial counsel and their penalty phase witness:

> 1) Dr. Berland used an outdated WAIS. The test was normed in 1955 and was 44 years out of standardization when given to Mr. Crain. (see Testimony of Dr. Stein, PCROA V 60 7855).
>
> 2) Dr. Berland asserted that the test was just as good as conducting a neuropsychological test battery. This statement is not accurate or there would be no need to conduct test batteries at all. (see Testimony of Dr. Stein, PCROA V 60 7856).
>
> 3) Dr. Berland failed to obtain data to support conclusion of Psychosis. He failed to get a history from the client of his mental state at the time of the offense and used the rationale that the client would not have told him about it. As a result, statutory mental health mitigators were discredited. (see Testimony of Dr. Stein, PCROA V 60 7854).
>
> 4) Dr. Berland gave an MMP1 instead of an MMPI 2 without a good reason for giving this test. (see Testimony of Dr. Stein, PCROA V 60 7855).

Because of the facts of this case, it was critically important that every avenue of investigation which could have reasonably been pursued prior to trial should have been pursued. "[A]n attorney has a strict duty to conduct a reasonable

investigation of a defendant's background for possible mitigating evidence. (Citations omitted). The failure to investigate and present available mitigating evidence is of critical concern along with the reasons for not doing so." State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000). The prejudice to Mr. Crain resulting from the absence of this and other mitigation to the penalty phase jury is clear. Confidence in the outcome of the trial is undermined and the results of the penalty phase are unreliable. Ragsdale v. State, 798 So.2d 713 (Fla. 2001), Rose v. State, 675 So.2d 567 (Fla. 1998); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Strickland, 466 U.S. at 690-91; Wiggins, 123 S.Ct. 2527 at 2536-37.

ISSUE 4

THE RULES PROHIBITING APPELLANT'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES HIM ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

This claim was denied an evidentiary hearing by the lower court's order dated November 28, 2007. PCROA V 3 579-587. In recognizing the rulings of the cases as cited by the court, the defendant notes that the postconviction court

denied the claim as follows:

> In claim 8, Defendant alleges that Florida's rules, which prohibit counsel from interviewing jurors, violate equal protection and due process rights under the First, Sixth, Eighth and Fourteenth Amendments to the United State Constitutions. Defendant further claims that counsel was ineffective to the extent that he failed to make and preserve this claim, thereby causing prejudice to Defendant's trial and appeal.
>
> However, in the instant Motion, Defendant does not set forth any facts alleging that actual juror misconduct occurred or may have occurred or that trial counsel should have raised this issue in the trial court. In *Arbelaez v. State*, 775 So. 2d 909, 921 (Fla. 2002), the Florida Supreme Court held that this claim was both procedurally barred and legally insufficient where it should have been raised on direct appeal and the defendant failed to "make a prima facie showing of any juror misconduct." The court further noted that defendant "appears to be complaining about a defendant's ability to conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned." Therefore, the *Arbelaez* court held that an evidentiary hearing was not required on that claim and defendant was not entitled to relief on the grounds he asserted. Id.; *see also Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001) (relying on *Arbelaez* and finding trial court properly denied same claim without an evidentiary hearing because it was without merit and procedurally barred); *Griffin v. State*, 866 So. 2d 1,20-21 (Fla. 2003); *Sweet v. Moore*, 822 So. 2d 1269,1273-74 (Fla. 2002). Consequently, the Court finds the issue raised in claim 8 is both legally insufficient and procedurally barred.
>
> As to Defendant's allegation that counsel was ineffective for failing to preserve the issue for appellate review, the Court finds Defendant cannot show the outcome of the trial proceedings would have been different had counsel preserved the issue for appellate review, and therefore, Defendant has failed to meet the prejudice prong of *Strickland*. *See State v. Bouchard*, 922 So. 2d 424 (Fla. 2d DCA 2006) ("[T]he failure to preserve issues for appellate review may

> constitute ineffective assistance of counsel. However, a defendant must demonstrate 'that counsel had no excuse for overlooking the objections and that the outcome of the case would likely have been different had the objections been made.'") (quoting *Rhue v. State*, 603 So.2d 613, 615 (Fla. 2d DCA 1992); *Strobridge v. State*, 1 So. 3d 1240,1242 (Ha. 4th DCA 2009) ("However, failure to preserve issues for appeal does not show the necessary prejudice under Strickland, The prejudice in counsel's deficient performance is assessed based upon its effect on the results at trial, not on its effect on appeal."); *see e.g.*, *Carratelli v. State*, 961 So.2d 312, 323 (Fla.2007) (holding that "a defendant alleging that counsel was ineffective for failing to object or preserve a claim of reversible error in jury selection must demonstrate prejudice at the trial, not on appeal."). As such, no relief is warranted on claim 8.
>
> PCROA V 5 948-950.

Florida lawyers, including criminal defense trial and postconviction counsel, cannot interview jurors on behalf of their clients outside the constraints created by Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4). To the extent defendants' counsel are treated differently from academics, journalists, other non-lawyers and lawyers not associated with a case who are not subject to the Rules Regulating the Florida Bar, there is a violation of defendants' rights to equal protection as the concept is enunciated in, e.g., Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). See William J. Bowers and Wanda D. Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." Criminal Law Bulletin 39:51-86 (2003).

A new procedural rule regarding juror interviews became effective on January 1, 2005. Fla.R.Crim.P. 3.575 provides as follows:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview. COURT COMMENTARY: This rule does not abrogate Rule Regulating the Florida Bar 4-3.5(d)(4), which allows an attorney to interview a juror to determine whether the verdict may be subject to legal challenge after filing a notice of intention to interview.

It is clear that criminal defense counsel in Florida are treated differently, unfairly and unequally compared to academics, journalists and those lawyers not connected with a particular case. Academics are allowed to and, in fact, do interview capital jurors, post-trial, about a wide range of matters, not just those factors which may be "grounds for legal challenge" under the rules. See, e.g., the Capital Jury Project website at http://www.cjp.neu.edu which discusses, in part, the completed 1,198 interviews with jurors from 353 capital trials in 14 states,

including Florida (as of August 15, 2005). The website also lists a number of doctoral dissertations based on Capital Jury Project data including Julie Goetz, "The Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors." Unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida.

Additionally, journalists are permitted without restriction to interview jurors post-trial. For example, a juror in the Jerone Hunter case was interviewed about the their jury deliberations. "Juror Explains Deltona Verdicts," Orlando Sentinel, August 3, 2006 "(http://www.orlandosentinel.com/ archives). See also, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg Times, October 25, 2004 (available at http://www.sptimes.com/ advancedsearch.html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Importantly, Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4) only apply to cases "with which the lawyer is connected." Hence, lawyers not connected with a case are treated differently because the rule does not apply to them. Lastly, by definition, non-lawyers, who are not subject to the criminal procedural and Florida Bar rules, are free to question and interview any juror willing to talk with them. *See* Instruction 4.2, Standard Jury Instruction

Upon Discharge of Jury.

As to the present proceeding, a situation involving a claim of a constitutional dimension that can be developed only after the trial and direct appeal certainly qualifies as a proper postconviction claim under Florida Rule of Criminal Procedure 3.851(e)(1). Postconviction interviewing of trial jurors, after all, is affected by the common knowledge that juror misconduct is "not a recent problem" but is "on the rise." *Reining In Juror Misconduct - Practical Suggestions for Judges and Lawyers*. Ralph Artigliere, Jim Barton and Bill Hahn, Vol. 84, No. 1 Florida Bar Journal 9 (January, 2010). As elaborated by the authors:

> To say that current jurors have enhanced temptation and ability to communicate about the trial with the outside world is the understatement of this still young century. Jurors have the capability instantaneously to tweet, blog, text, e-mail, phone, and look up facts and information during breaks, at home, or even in the jury room if they are allowed to keep their digital "windows to the world." Jury instruction by the judge about communication outside the courtroom has not kept pace with technology.
>
> The problem of outside influence on jurors is no longer confined to high profile cases that are covered in the press or other media. Courtroom misconduct seems to be everywhere.
> ...
> The[se] examples represent recent transgressions that were discovered, and probably represent just the tip of the iceberg of juror behavior. (FN14 See Hoenig, Juror Misconduct on the Internet, New York L. J. (October 9, 2009), in which the author notes that juror

> forays to the Internet are a "growing phenomenon" of unknown magnitude because post-trial interviews are generally forbidden or discouraged).
>
> Improper juror communication and research are only part of the problem. Another insidious type of juror misconduct is misrepresentation or disinformation provided to the judge and lawyers in qualification and voir dire. Deception during voir dire deprives the examining attorneys and the judge of the opportunity to obtain accurate information for challenges for cause and peremptory challenges. The level of deception ranges from jurors who puff their qualifications or hide or gloss over information to avoid embarrassment to "stealth jurors" on a mission and willing to lie to get on the jury in order to carry out an objective for or against one of the parties. Regardless of motive, jurors who betray their oath as jurors subvert the jury system and threaten the fairness of the process.
>
> Id. at 9-10.

Other controlling authority in Florida, from cases such as Barnhill v. State, 971 So.2d 106 (Fla. 2007), and Evans v. State, 995 So.2d 933 (Fla. 2008), still does not address the legal and logical reasons why academics, journalists and lawyers not associated with a case may all - collectively or individually - conduct "fishing expeditions" by interviewing capital jurors without restriction while trial and postconviction counsel may not.

Appellant's morass of not having fish to fry because of restrictions on counsel against fishing is a Catch-22 situation especially for post-trial counsel that was recently considered by the U.S. Supreme Court. See Wellons v. Hall, 130

S.Ct. 727, 22 Fla. L. Weekly Fed. S 51 (January 19, 2010) ("Neither Wellons nor any court has ascertained exactly what went on at this capital trial or what prompted such 'gifts.' Wellons has repeatedly tried, in both state and federal court, to find out what occurred, but he has found himself caught in a procedural morass .

The Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21 of the Florida Constitution, require that appellant receive a fair trial. However, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar[1] prevents his attorneys from determining whether he received a fair trial. They can only discover certain jury misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional. Because the

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[1]The rule expressly prohibits counsel from directly or indirectly commuicating with jurors. The rule states that:

> A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

Rule denies appellant this opportunity to investigate and present a claim of juror misconduct, it infringes his rights to due process, access to the courts, and the equal protection concepts enunciated in cases such as Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).

ISSUE 5

THE POSTCONVICTION COURT ERRED IN DENYING THE CLAIM THAT, CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The ruling on this claim was reserved by the Court's order dated November 28, 2007, pending the evidentiary hearing. PCROA V 3 579-587. The final ruling denied the claim under the authority of Griffin v. State, 866 So.2d 1 (Fla. 2003). PCROA V 5 950. Yet, as argued here, repeated instances of ineffective assistance of counsel and the presently discredited circumstantial factors of "blood" and "scratches" produced an unconstitutional process that significantly tainted and prejudiced Mr. Crain's capital proceedings. Under Florida case law, the cumulative effect of these errors denied Mr. Crain his fundamental rights under the Constitution of the United States and the Florida Constitution. State v.

DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981).

CONCLUSION

Based on the foregoing, the lower court improperly denied potconviction relief. Especially with the postconviction hearing producing evidence that discredited the circumstantial factors of "blood" and "scratches," the case presents too many assumptions which have to be made to deny relief on appellant's challenge to his first degree murder conviction - whether premeditated or felony. From the initial inference that the child victim is dead, other and numerous inferences had to be stacked, even with less support now than at the time of direct appeal. This Court is respectfully urged to order that appellate's conviction of first degree murder and death sentence be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Scott A. Browne, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013, on this 25th day of May, 2010.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

_____

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