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 THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The Appellant relies on his Initial Brief for all purposes and offers the following replies to the State's Answer Brief regarding Issues 1 and 2.

REPLY

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.

The State's Answer presents a number of extrapolations and mis-characterizations that repeat the proclivities used by the trial prosecutor in this case. The State could have, and should have, relied on the accurate recitation of Crain's post conviction claims as presented by the post convictions court's order denying relief:

> 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.
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> PCROA V5 905-906.

Instead, and in sequence, the State argues (at p. 47) that Crain "faults counsel for failing to retain and, apparently, present the testimony of an expert in this case to challenge the state's blood evidence. However, Crain conveniently ignores that fact that the defense did retain a confidential expert to consult with on forensic DNA issues."

These statements are not completely accurate. Crain never faulted trial counsel for "failing to retain" a DNA expert because Crain knew of the retention of and consultation done by Dr. Shields for the defense. A "failure to retain" a DNA expert was never pled nor argued in the proceedings below.

The State also claims (at page 47) that "Crain almost entirely ignores the testimony of trial counsel Traina and Hernandez on the issue of the stipulation and DNA testing. Apparently, it is the State that ignores the following passage in the Appellant's initial brief:

> 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).
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> Initial Brief, pp. 35-41.

With all due respect, this excerpt of the brief disputes the notion that the Appellant "almost entirely ignores the testimony of trial counsel Traina and Hernandez on the issue of the stipulation."

Again, if the State had utilized the post conviction court's accurate presentation of the claim that "[s]pecifically, 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," the State would not have wrongly characterized the claim as one pursuing an "alternate theory":

> "While Crain asserts the defense would lose nothing in arguing an *alternative theory* to the jury, he ignores the fact that the defense attorneys concluded that they had no evidence to mount a legitimate challenge to the blood evidence." (at page 51)(emphasis added).
>
> "Indeed, Crain failed to show that a viable *alternate theory* existed in that his post conviction challenge to the DNA evidence was extremely weal and entirely based upon speculation." (at page 51)(emphasis added).

The post conviction court understood that there was no argument involving an "alternate theory." The Appellant cannot explain why the State has yet to understand that there was no argument involving an "alternate theory."

The State's perception of this issue further ignores the record when it argues, with unnecessary sarcasm, the following:

> "Assuming for a moment that counsel even had a duty to scour the country in order to find the out-of-state Dr. Johnson, rather than mount a such a weak and speculative attack on the blood evidence, counsel reasonably pursued an alternate theory first offered by Crain prior to trial." (at page 55).

Undoubtedly, Crain's trial counsel and appellate counsel understood that the State went beyond large and local state universities located in Tampa, Orlando and

Gainesville when the State went to Miami-Dade County to retain DNA expert Martin Tracey. But neither Crain's trial counsel nor appellate counsel complained of the State "scouring" other geographical areas to find that expert. Neither has post conviction counsel.

The State is also aware that the postconviction case presented by Appellant never suggested a duty of trial counsel to retain and use only Doctor Johnson, no matter what her current or past residence may be. Similarly, the State knows that the record, as well as the Initial Brief, clearly explains the reason for any of Doctor Johnson's speculations: the postconviction DNA testing under Rule 3.853 - which the State opposed - failed to produce results due to insufficient quantities of DNA or excessively degraded DNA. PCROA V3 427-433. See Initial Brief, page 20.

Thus, the State continues to ignore the confusion between the definitive nature of DNA testing and the mere presumptive likelihood the subject stains were blood. The State and the court below erred by failing to address the numerous references to "blood" by the State in its closing argument. The court below, and now the State, similarly fail to address this Court's heavy reliance on and usage of the "blood" evidence in its direct appeal opinion, Crain v. State, 894 So.2d 59 (Fla. 2004), when the minuscule stains were never conclusively shown to be blood.

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.

In reply, the Appellant agrees with the State, and always has, that trial counsel was not required to retain an expert in pathology to rebut the State's "scratch marks" testimony by the medical examiner. However, the Appellant rejects the State's assertion (at p. 66) that his "reliance" upon law review and other legal articles for citation in his briefing "is misplaced and inappropriate." Ignored by the State, consequently and for example, was the case citation to De Freece v. State, 848 S.W.2d 150, 160 (Tex.Crim.App.,1993) in Professor Gianelli's article. The Texas court, ruling in a sanity case, stated:

> The court of appeals believed counsel was able to conduct an "admirable" cross-examination of Heynen without the benefit of psychiatric assistance. As appellant notes, this smacks of a harmless error analysis. But in Ake itself the Supreme Court reversed the conviction and remanded the cause for new trial without conducting a harm analysis. See Vickers v. Arizona, 497 U.S. 1033, at 1036, 110 S.Ct. 3298, at 3300, 111 L.Ed.2d 806, at 809 (1990) (Marshall, J., dissenting to denial of petition for writ of certiorari). In any event, we would not conclude that the error in failing to appoint a psychiatrist to consult with counsel was harmless error in this cause. First, help in preparing to cross-examine State's witnesses is not the only function of an appointed psychiatrist contemplated by Ake. Even if it were,

> that counsel did an "admirable" job in cross-examining Heynen does not mean he could not have done an even more effective job with the aid of an expert to interpret the voluminous data from Vernon State Hospital from which her opinion was derived. Especially considering that, although the only contested issue at trial was sanity, the jury nevertheless deliberated for five hours before convicting appellant, we could not say beyond a reasonable doubt that the failure to appoint the requested expert did not contribute to the verdict in this cause.
>
> De Freece v. State, 848 S.W.2d 150, 160 (Tex.Crim.App.,1993).

The fact also remains that the denial of a request for appointment of an expert can be considered an abuse of discretion leading to a reversal and new trial. Robbins v. State, 891 so.2d 1102 (Fla. 5th DCA 2004).

Further, the State seems to be presenting a demarcation line between the use of experts in civil jury trials compared to criminal prosecutions. It is unclear if the State really believes that experts only help to win civil jury trials. The Appellant also notes that the State did not remotely address the guidance regarding the use of experts as provided in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. See Initial Brief, pp. 43-45. The point remains that defense counsel received a medical examiner's name early in discovery and on the State's witness list. It is hard to comprehend a larger red flag, no matter how "admirable" their planned cross-examination would be, that called for the use of their own defense expert in such a circumstantial, no body case.

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 Appellant'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 Reply Brief of the Appellant 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 _____ day of October, 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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