23-6843

ORIGINAL

Application No.: 24-_____

FILED
FEB 16 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH A. CRENSHAW II – PETITIONER

v.

STATE OF FLORIDA

On Petition for Writ of Certiorari to
The Fifth District Court of Appeals for the State of Florida

PETITION FOR WRIT OF CERTIORARI

Submitted by:

Joseph Crenshaw, Pro Se
D/C # V43177
Marion Correctional Institution
P.O. Box 158
Lowell, FL 32663-0158

QUESTION PRESENTED

1. **Does a trial court's "tender and accept" procedure of an expert witness in front of a jury violative of a Defendant's Sixth Amendment right to a fair trial and Fourteenth Amendment right to Due Process of law.**

LIST OF PARTIES

____ All parties appear in the caption of the case on the cover page.

X All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Wolgst, Susan	**Victim**
Lucky Panda	**Victim**
Camaccio, Nicholas	**Trial Prosecutor (Asst. State Attorney)**
Meyers-Shannon, Marissa	**Trial Prosecutor (Asst. State Attorney)**
Ward, Jacques	**Trial Attorney**
Hawthorne, Candace	**Trial Attorney**
Pope, Willard	**Trial Judge**
Herndon, Lisa	**Trial Judge**
Metz, J. Mathew	**Public Defender**
Lawshe, P. Darnelle	**Appellate Public Defender**
Cohen, Hon.	**5th District Court of Appeal Judge (Direct Appeal)**
Traver, Hon.	**5th District Court of Appeal Judge (Direct Appeal)**
Nardella, Hon.	**5th District Court of Appeal Judge (Direct Appeal)**
Herndon, Hon. Lisa	**3.850 Postconviction Judge**
Caldwell, P. Daniel	**3.850 Assistant Attorney General**
Wallis, Hon.	**5th District Court of Appeal Judge (3.850)**
Stoud, Hon.	**5th District Court of Appeal Judge (3.850)**
Maciver, Hon.	**5th District Court of Appeal Judge (3.850)**

RELATED CASES

- *Crenshaw v. State of Florida*, 338 So.3d 425 (Fla. 5th DCA 2022), Case No. 5D21-1637, Fifth District Court of Appeal, West Palm Beach, Florida (Direct Appeal). Opinion entered April 29th, 2022. Mandate issued May 27th, 2022.

- *Crenshaw v. State of Florida*, 373 So.3d 876 (Fla. 5th DCA 2023), Case No. 5D23-1559 Fifth District Court of Appeal, West Palm Beach, Florida (Postconviction Appeal). Opinion entered November 21st, 2023. Mandate issued December 15th, 2023.

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APPENDIX E	April 6th, 2023, Hon. Lisa Herndon, Case No. 2018-CF-2054-A, 5th Judicial Circuit Court, in and for Marion County, Florida Order Denying Defendant's Motion for Postconviction Relief. This is the last reasoned opinion from the State courts on the issue raised in this Petition for Writ of Certiorari
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OPINIONS BELOW

- *Crenshaw v. State*, April 6th, 2023 (5th Jud. Cir. Fla. 2023), Hon. Lisa Herndon, Case No. 2018-CF-2054-A, 5th Judicial Circuit Court, in and for Marion County, Florida Order Denying Defendant's Motion for Postconviction Relief. This is the last reasoned opinion from the State courts on the issue raised in this Petition for Writ of Certiorari

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[ ] For cases from **Federal** courts:

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

[**X**] For cases from **State** courts:

The opinion of the highest State Court to review the merits appears at **Appendix A** to the petition and is:

[**X**] reported *Crenshaw v. State*, 373 So.3d 876 (Fla. 5th DCA 2023) or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

The opinion of the lower tribunal (Circuit Court) appears at **Appendix B** to the petition and is:

[**X**] reported at *Crenshaw v. State*, April 6th, 2023 (5th Jud. Cir. Fla. 2023), Hon. Lisa Herndon, Case No. 2018-CF-2054-A, 5th Judicial Circuit Court, in and for Marion County, Florida Order Denying Defendant's Motion for Postconviction Relief; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

JURISDICTION

[**N/A**] For cases from **Federal** courts:

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely Petition for Rehearing was denied by the U.S. Circuit Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

[ ] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[**X**] For cases from **State** courts:

The date on which the highest State Court decided my case was November 21st, 2023. A copy of that decision appears at **Appendix B**. See *Crenshaw v. State*, 373 So.3d 876 (Fla. 5th DCA 2023.

[ ] A timely Petition for Rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____..

[**X**] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Issues Involved

The Fourteenth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment of the U.S. Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to ... to have the effective assistance of Counsel for his defense."

STATEMENT OF THE CASE

Joseph Crenshaw II, presently an incarcerated individual in the State of Florida, was originally charged by Amended Information with (Count 1) Robbery with a Firearm while wearing a mask; and (Count 2) Possession of a Firearm by Felon while wearing a mask. .

Susan Wolgast testified she was working at the Lucky Panda in June of 2018, when someone rang the front door buzzer at approximately 3:30a.m. (T 199-200) Wolgast identified the person who rang the bell as someone she knew named "D.J." (T 200-201)

According to Wolgast, when she turned around there was a gentleman standing in the lobby wearing a wolf mask. (T 201) The masked man told Wolgast he was there to rob her. (T 201) Wolgast testified she could not see the man's face. (T 201)

When Wolgast was asked if she saw the man holding anything in his hands, Wolgast said when she looked down she saw that the man was holding a gun by his side. (T 201-202) Wolgast testified she could not remember what type of gun the man was holding but thought it might be a .38 or a nine millimeter. (T 202)

According to Wolgast, she took all of the money and the GPS tracker out of the register and gave it to the masked man. (T 202-203) When Wolgast was asked how much money she gave the man, she testified there was about $2500 in the register. (T 203) After the masked man exited the building, Wolgast testified she called 911. (T 204-205) Wolgast also stated he gave the man the money because she was scared. (T 205) Video surveillance from The Lucky Panda was played for the jury. While the video was playing Wolgast points out that the masked man is wearing a glove and holding a firearm. (T 221-222) Wolgast also identified the man seen walking up to The Lucky Panda and then later running away on the video as D.J. coming through

the door with the man who is wearing the wolf mask following behind him. (T 224-226). Wolgast testified that she knew D.J. as Dennis Waters and that D.J. played at The Lucky Panda every night. On the night in question, D.J. just came in and then left immediately. (T 229)

Wolgast also testified she was instructed to grab the packet of money with the GPS tracker in the event of a robbery, but she did not know how it operated. (T 229-230) Wolgast testified that her friend Daniel Campbell was with her in The Lucky Panda on the night in question, to be her security. (T 236-237)

Deputy Sidney Porter testified he responded to a robbery at The Lucky Panda Internet Café on June 4th, 2018. Based on his review of the surveillance video, Porter testified he observed a thin white male come up to the door wearing a long sleeve flannel shirt, dark jeans, dark sneakers, and a red and black baseball cap with a bandanna in his pocket. (T 251)

The next thing Porter observed on the video surveillance was Mr. Campbell opening the door and another suspect approaching who was wearing a wolf mask with a blue, long-sleeved shirt and dark jeans. (T 251) According to Deputy Porter, the first suspect never entered and ran away behind the building while the masked suspect went inside. (T 251)

Deputy Esquivel testified he was dispatched to the Little Lake Weir subdivision regarding the robbery based on information he received from dispatch regarding a vehicle he was following that had a GPS tracker in it. (T 254-255) He explained that he went to the intersection of Southeast 87th Terrace and Southeast 90th Ave where he observed only one other vehicle.

(T 265) After stopping the vehicle, Esquivel testified he pulled the driver out of the vehicle and detained him. A female named Donna Moya was in the front passenger seat and Dennis Waters and Defendant were in the backseat (T 258) Esquivel also agreed that Defendant

was shirtless, barefoot, and wearing cargo pants. (T 262) According to Deputy Casimiro, when he opened the rear passenger door a firearm fell out. (T 270)

Canine Officer Burgos testified when he arrived at The Lucky Panda Internet Café he deployed his canine partner Babo on a 15-foot lead and tracking harness to begin tracking in that area. (T 284-286) Burgos stated he and his canine partner located a wolf mask, hat, and boots in a wooded area behind the establishment. (T 286) Babo continued tracking east into a residential area where he lost the track. (T 286-288)

According to Deputy Burgos, at the point in the road where Babo lost track Burgos could see where the actual traffic stop was o the vehicle which was 200 to 300 yards away. (T 288) Burgos testified he and Deputy Batts were just walking along the road at that point when they located a glove, shirt olive-colored hat and a black bandana. (T 288-289, 296-297)

Corporal Calvin Batts testified a latex glove and a blue shirt were found when he and Deputy Burgos were walking back from the traffic stop to The Lucky Panda. (T 308-309) Batts stated he collected the items, put them in evidence bags, and then gave the items to the evidence technicians who were on scene. (T 311) Sergeant Bradley Bartlett testified he reviewed the surveillance video from The Lucky Panda on the day of the incident and observed a suspect wearing a wolf mask. (T 328) According to Bartlett's testimony, the suspect was described as being approximately five-foot six inches tall and about 120 pounds (T. 329)

When asked to describe his familiarity with bait money, Sergeant Bartlett explained the bait money used by The Lucky Panda employs the same system as that used by the Marion County Sheriff's Office. (T 330) Bartlett testified the bait money sits in a dormant state inside of the drawer until it's picked up and moved from its particular base. (T 330-331) According to Bartlett, it's a magnetic device that when picked up is activated and begins providing GPS

locations. (T 331) Sergeant Bartlett testified he received updates through the sheriff's office communications center after the company that owned the tracking device contacted dispatch to le them know the device was activated. (T 333) After receiving access to the tracking device from the primary company, Bartlett testified he was able to go in and historically look at the date and time when the device was activated. (T 334-338) A CD containing the download of the GPS data was admitted into evidence and published to the jury. (T 338-345) According to Sergeant Bartlett, based on the interviews he conducted with the driver of the vehicle Timothy Stain and the front passenger Ms. Moya, he determined they were not involved in the robbery. (T 346-347)

Additionally, based on a search of the vehicle conducted by himself and Jordan Holzer, Sergeant Bartlett testified a black bag was found in the back seat where Appellant and Dennis Waters were sitting that contained the bait money as well as clothing items worn by Mr. Waters that was observed on the video surveillance. (T 347-349)

After his investigation at the traffic stop was concluded, Sergeant Bartlett testified he went to Donna Moya's residence and collected a pair of black jeans and black and white Adidas shoes. (T 350-351) Based on his investigation and the descriptions given by the witnesses, Bartlett testified the Defendant appeared to be of a similar height and stature as the person seen inthe video surveillance footage. (T 351-352)

Forensic crime scene technician Jordan Holzer testified she processed the crime scene at The Lucky Panda. She testified she was unable to find fingerprints but that if a person was wearing a glove she would not be able to. (T 369-370) According to Holzer, she swabbed the mask and hat for wear DNA. (T 372) The wolf mask, hat, black bandana, black boots and DNA swabs DNA swabs were published to the jury. A blue shirt and glove were also published to the jury. Holzer testified the duffel bag collected from the rear seat of the vehicle contained a pair of

jeans, a bundle of $15 in which a GPS tracker, a hat, a plaid shirt and money in the amount of $2400. (T 396) A debit card belonging to Dennis Waters was found inside a pocket of the jeans. (T 405)

The Defense suggested Holzer contaminated the swab she used on the hat and mask when she used the same swab for both items. (T 439) In response, Holzer testified items that are in close proximity or on top of each other are swabbed together in an effort to get the most amount of DNA so a profile can be created. (T 439) Holzer also testified she was not aware that collecting the swabs in such a way could risk creating a situation where there are multiple donors to a swab. (T. 439-440) Holzer also admitted it was possible that DNA from one person could be on the hat, but not on the mask, and by using one swab for both items there could be cross-contamination. (T 441) Buccal swabs were collected from Defendant and co-defendant (Dennis Waters). (T464-468)

Crime DNA laboratory analyst Brook Hoover testified she performed a STR DNA analysis and a complete DNA profile on the buccal swabs obtained from Defendant and Dennis Waters. (T 491-492) Hoover testified the DNA swab taken from the mask and hat showed the presence of three donors, with at least one of those donors being a male. (T 493-494) According to Hoover, Defendant's DNA was included as a possible contributor to the mixed DNA profile obtained from the swab taken from the mask and hat. (T 494-495) Hoover also testified the software identified Defendant as a major contributor due to Defendant contributing 76 percent to the mixture. (T 495-496) The remaining unidentified mixture was compared by Hoover to the DNA profiles of Timothy Stains, Donna Moya, and Dennis Waters. (T 496-497) According to Hoover's testimony, the profiles of Stains, Moya, and Waters, failed to demonstrate sufficient statistical support for inclusion or exclusion. (T 497) Hoover testified the swab taken from the

handgun was not suitable for her to compare to anyone. (T 498) The wear swab from the clothing found inside the backpack showed a mixture consistent with three donors, including at least one male contributor. (T 499) When Hoover compared it to the DNA profiles of Defendant, Dennis Waters, Timothy Stains, and Donna Moya, she determined Dennis Waters DNA profile was 700 billion times more likely to occur of the same sample originated from Waters and two unrelated individuals, than from three unrelated individuals. (T 500) Hoover was unable to determine who the major contributor was but she was able to exclude Donna Moya. (T 500)

Dennis Waters was determined to be one of the lesser contributors by Hoover, with a contribution of 10 percent. (T 500-501) The buccal swabs taken from the black bandana showed a DNA mixture consistent with three donors, including at least one male contributor. (T 501-502) After comparing the mixture with the DNA profiles of Defendant, Waters, Stain, and Moya, Hoover determined Waters was included as a possible contributor to the mixed DNA profile. (T 502)

Defendant and Timothy stains were excluded as contributors to the mixture and there was no major contributor. (T 502) According to Hoover, twenty-one percent of the mixture belonged to Dennis Waters. (T 503) Hoover testified glove produced no DNA results, with the exception of gender markers, which showed male. (T 505)

Hoover's analysis of the wearer swab taken from a blue shirt showed the mixture was consistent with two donors, at least one of which was male. (T 506) Defendant was included a s a possible contributor. (T 506) According to Hoover, the observed mix DNA profile was approximately 580 million times more likely to occur of the sample originated from Defendant and one unrelated individual than from two unrelated individuals. (T 506-507)

Hoover also testified Defendant was a major contributor at 76 percent of the mixture. (T 507) Comparison of the DNA profile from Dennis Waters to the mixture failed to demonstrate sufficient statistical support for inclusion or exclusion. (T 507) Therefore, no determination could be made regarding the contribution of Waters to the blue short. (T 507)

On cross-examination, Hoover agreed different contributors being found on the same shirt could happen if more than one person wears the same short. (T 508-509) Although Hoover testified the software used is state of the art, she did admit it is not possible to tell when someone wore an item or who was the last person to wear it. (T 509)

Hoover also agreed on cross that she does not know how the swabs are collected, or if they are contaminated when she receives them for testing, because she is not the person that collects them. (T 510)

Although Hoover agreed she could not exclude the other three people as contributors to the mask and hat, Hoover testified she reports people as inconclusive because she knows there is a range where they could be falsely included or falsely excluded. (T 517) With respect to the DNA found on the mask and the hat, Hoover testified she did not know if it came from the mask or hat because both items were sampled with one swab. (T 517-518)

On redirect, Hoover testified that the 700 billion statistic she testified to earlier on direct went to the weight of the possible identification. (T 522) Hoover also agreed that the higher the number, the stronger the association of that person's DNA profile in the mixture. (T 522-523)

On day two of trial, co-defendant Dennis Waters testified he received a seven year prison sentence in exchange for truthful testimony. (T 535-536) Waters testified he went to The Lucky Panda every day up until June 4, 2018. (T 536) He also testified he knew Susan Wolgast and that his nickname was D.J. (T 536) On June 3, 2018, Waters testified he was living with Freddie

Arredondo. (T 537) Waters testified he met Defendant at Arredondo's and spoke with Defendant about committing a robbery at The Lucky Panda. (T 537) According to Waters, he and Defendant talked about a gun and a mask. (T 538) Waters also said that because he worked at The Lucky Panda they would buzz the door and let him inside. (T 538) Waters testified he could not recall who brought the gun. (T 538-539) Waters also said that when he went inside The Lucky Panda Defendant went in behind him. (T 5390 According to Waters, he left immediately after Defendant went inside. (T 540) Waters testified the next time he saw Defendant was outside the back of the building after the robbery occurred. (T 539)

At that time, according to Waters, he got the money from Defendant and put it in a bag. (T 540) The two men then rode off on bicycles to Donna Moya's House. (T 540-541) According to Waters, he did not recall Defendant wearing a mask. (T 541)

He also testified he left his shoes behind The Lucky Panda. (T 541) When Waters was asked if he was wearing a bandana that night, he testified he had a bandana that night but was not wearing it. (T 541) Waters testified he was wearing black jeans, a red shirt, and a black and red hat. (T 541)

After Waters and Defendant arrived at Donna Moya's house, Waters stated they asked for a ride home. (T 541-542) According to Waters, after he and Defendant got in the white truck he realized he left his gun inside, and Moya got out to retrieve it for him. (T 542-543) Although Waters testified he could not recall who brought the gun back to Moya's residence, he did admit the gun belonged to him. (T 543)

When Dennis Waters was asked if he saw Defendant in the courtroom, he replied, "no." (T 544) Although Waters could not identify Defendant in open court, he did testify that he committed the robbery with Defendant. (T 544) Waters admitted he was the person on the

surveillance video being buzzed into The Lucky Panda and that the other person seen on the video wearing a mask was Defendant. (t 544-545)

On cross-examination, Waters admitted he had the mask, the hat, and the gun that were used in the robbery. (T 547) Although Waters agreed he worked at The Lucky Panda prior to the robbery, Waters testified he did not know about the tracker and bait money. On re-cross, Waters testified that although the mask, the hat, and the gun belonged to him, Waters did not use them during the robbery. (T 558) When Waters was asked who the other person on the video was using those items, he replied,"[i]m assuming Crenshaw." (T 558) Waters also testified he left the items in the woods behind The Lucky Panda after Defendant gave him the items. (T 558)

In reply to Defendant's Motion For Judgment of Acquittal, the state argued that through direct testimony of Susan Wolgast, a person came in with a mask on and a gun in his hand and demanded money. (T 565) The state also asserted that the video clearly shows a robbery taking place, with one of the two people involved wearing a mask and carrying a gun. (T 565) The only issue remaining was the identity of the masked man.

The state argued it presented direct testimony from Dennis Waters that Defendant committed the robbery and that DNA evidence corroborated Defendant did it. (T 566) It referred specifically to the presence of Defendant's DNA on the blue shirt, wolf mask, and hat. (T 566) Additionally, the state pointed to the traffic stop that occurred within ten to fifteen minutes of the robbery in which Defendant and Dennis Waters were found in possession of the money. (T 566)

The trial court held the state established a prima facie case. (T 566)

Defense Witness Jackie Headon testified Defendant is her cousin. (T 571) According to Headon, her son Alfredo Arrendondo, Dennis Waters, (D.J.) and Defendant were all living with her in 2018.

On June 3rd, 2021, the jury found Defendant guilty of Count 1, robbery with a firearm. (T 701) The jury also made special findings that Defendant actually possessed a firearm and wore a hood, mask or other device that concealed Defendant's identity during the commission of the robbery. (T 701) After deliberating on a bifurcated Count 2, possession of a firearm by a felon, the jury returned a verdict of guilty for possession of a firearm by felon while wearing a mask.

The Petitioner was issued a Life sentence as to Count 1, and a 15-year prison sentence in Count 2, to run concurrently with each other. A timely notice of appeal was filed.

Appellate Counsel filed an *Ander's*[1] brief on direct appeal that raised the following issue: (1) Whether the trial court erred in denial of Appellant's motion for judgment of acquittal, entry of judgment, or imposition of sentence? **(Appendix D)**.

On April 29th, 2022, the Fifth District Court of Appeal ("5th DCA affirmed the judgment and sentence and remanded to correct a scrivener's error. *Crenshaw v. State*, 338 So.3d 425 (Fla. 5th DCA 2022)) **(Appendix A)**.

On March 16th, 2023, the Petitioner filed a 1-ground Fla. R. Crim. P. Rule 3.850 motion for post-conviction relief claiming ineffective assistance of counsel ("IAC") as follows: (1) IAC for failing to object when the state tendered and the Court accepted Brooke Hoover, a crime laboratory analyst with the Florida Department of Law Enforcement, as an expert witness. (2) Counsel Hawthorne failed to move for a mistrial based on the tender and acceptance of said expert witness. **(Appendix F)**.

[1] *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)

On April 6th, 2023, Hon. Judge Lisa Herndon issued her final summary "Order Denying Defendant's Motion for Postconviction Relief" (**Appendix E**). A timely notice of appeal was filed.

On November 21st, 2023, the Fifth District Court of Appeal ("5th DCA") per curiam affirmed the post-conviction court's denial order without a written opinion (see *Crenshaw v. State*, 236 So.3d 430 (Fla. 5th DCA 2023)) (**Appendix B**).

On December 15th, 2023, the 5th DCA issued its mandate, making the State postconviction court's Rule 3.850 motion denial order final (**Appendix B**).

REASONS FOR GRANTING THE PETITION

A trial judge's acceptance of a "tender and accept" proffer of an DNA expert witness' testimony in front of a jury unfairly imputes an imprimatur of expert credibility that gives the government an unfair advantage and absent the application of the harmless error rule enunciated in *Chapman v. California*[2], prejudice ensues under Strickland's right to effective assistance of counsel. Prejudice ensues under the Sixth Amendment right to a fair trial and prejudice ensues under the Fourteenth Amendment, applicable to the States.

When denying Ground one and two of Petitioner's Fla. R. Crim. P. 3.850 motion for Post-Conviction relief. The state Postconviction Judge Herndon denied this claim by ruling that "*In this case, the 'tender and acceptance' by the State and the Court, respectively, do not rise to the level of an error by the Court. And that the reading of the expert jury instructions "significantly mitigated the concern that the jury would view the court's declaration of the witness as an expert as a positive comment on the witnesses' credibility or a wholesale*

[2] *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)

endorsement of the witness's testimony. That counsel Hawthorne cannot be deemed ineffective for failing to make a meritless objection or argument. Moreover, Defendant failed to establish that due to Ms. Hawthorne's failure to object when the State tendered, and the Court accepted Ms. Hover as an expert witness in front of the jury the outcome of the trial would have been different." **(Appendix E, pg. 3,4)**

The Florida Fifth District Court of Appeal has taken the position that a "tender and accept" can never be an error let alone a fundamental error. Mitchell v. State, 207 So.3d 369, 371 (Fla. 5th DCA 2016) ("We believe that it is overly formalistic to presume that the mere acceptance of a witness as an expert constitutes a comment on the credibility of the witness. This is particularly true given that the jury instructions specifically address the role of expert witnesses at trial, and juries are presumed to follow their instructions. Thus, we disagree with *Osorio* that a trial court's declaration that a witness is an expert is error.'). Moreover, the Court stated in footnote (3) that they disagree with the *Osorio* court's contrary position. "Despite our disagreement with *Osorio*, we do not certify conflict because our holding is limited to the absence of fundamental error. There is no indication in *Osorio* that the court considered the error fundamental. On this point, our two decisions do not conflict.").

The Fifth District's position is untenably wrong and is in conflict with two sister courts in its own state and contrary to other state appellate and Federal courts.

In Petitioner's case, the state presented the testimony of an expert witness. The expert witness's name was Brook Hoover. Brook Hoover worked for FDLE as a Crime DNA laboratory analyst. Ms. Hoover's testimony played a key role in establishing corroborating DNA evidence to support the state's theory that Defendant was the "Masked Man" holding the firearm in the robbery. When Ms. Hoover was called to testify, the state examined her about her agency's

accreditations and specifically about her credentials and experience in DNA testing and experience in testifying about DNA testing. **(T 477-478)**

After a short colloquy regarding accreditation and credentials, the state then asked in front of the jury if she was an expert. **(T 477)**

> Q: Okay. And have you been qualified as an expert in DNA analysis and testing?
>
> A: Yes, I have.

Immediately after tendering, the state asked the trial court to permit the "witness" to testify, to which the court approved.

> Ms. Meyer Shannon (State Attorney): Your Honor, at this time I would ask that the witness be permitted to testify to her opinion regarding the field of forensic DNA analysis.
>
> Court: You may proceed.
>
> Ms. Meyer Shannon (State Attorney): Thank You.

Trial Counsel Candace A. Hawthorne, was present and she did not object. Because counsel failed to object she was deficient in her performance.

This Court's precedent under *Mitchell*, *supra*, that the "tender and accept" procedure is not error is in direct conflict with the First and Fourth District Court of Appeal. This issue is clearly unsettled law in Florida. See *Mitchell v. State*, 207 369, 371 (Fla. 5th DCA 2016) ("We disagree with *Osorio* that a trial court's declaration that a witness is an expert is error. Even if we were to assume that the trial court's declaration was error in this case, any error would not be fundamental."). This position is in direct conflict with *Osorio v. State*, 186 So. 3d 601 (Fla. 4th DCA 2016) ("When a court declares that a witness is an "expert" in his or her field, it confers an imprimatur of authority and credibility, thereby inordinately augmenting the witness's stature

while simultaneously detracting from the court's position of neutrality. *See* 90.106, Fla. Stat. (2011) ("A judge may not sum up the evidence or *comment to the jury upon the weight of the evidence, the credibility of the witnesses*, or the guilt of the accused." (emphasis added)) While this court and others have repeated the recommendation that trial courts ought to refrain from directly declaring the expert status of a witness in front of the jury, we recognize this has been interpreted by some as merely a suggestion of judicial practice, and not a hard-and-fast rule. Today we clarify that such practice is impermissible. Judges must not use their position of authority to establish or bolster the credibility of certain trial witnesses."); see also *Norfleet v. State*, 223 So. 3d 395, 397 (Fla. 1st DCA 2017) (Here, *we conclude that the trial court's error* in declaring the state witnesses to be experts in front of the jury was not fundamental because we have no doubt that a guilty verdict could have been-and would have been-obtained without these declarations.").

Osorio was decided in May of 2016 and *Mitchell* was decided in December of 2016. The Fifth District's holding that it is not error at all and Osorio's holding that it is error. Is a conflict that has yet to be resolved in Florida.

The *Osorio* court adopted the rationale of several other Federal and State courts that hold this issue to be an improper bolstering of witnesses. *See, e.g., United States v. Johnson*, 488 F.3d 690, 697-98 (6th Cir. 2007) (noting its disapproval of the tender/acceptance process); *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988) (stating that "[a]though it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses' expertise by the Court");

Luttrell v. Commonwealth, 952 S.W.2d 216, 218, 44 11 Ky. L. Summary 33 (Ky. 1997) (stating that "[g]reat care should be exercised by a trial judge when the determination has been made that a witness is an expert. If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such rulings should be made outside the hearing of the jury and there should be no declaration that the witness is an expert"); *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214, 1232-33 (Ariz. 1996) (remarking that "[b]y submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert. . . . In our view, the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness. The strategic value of the process is quite apparent but entirely improper."). *Osorio* at 609.

"The problem associated with this "tender and accept" process has been specifically identified in the advisory committee notes to Federal Rule of Evidence 702, which establishes when a qualified expert may testify as such in the federal courts. The committee stated:

The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. *Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts.'"* Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials). Fed. R. Evid. 702 advisory committee's note

to 2000 amendment (emphasis added). *Osorio* at 610. See also *Tampa Bay Water v. HDR Enjg*, Inc, 2012 U.S. Dist. LEXIS 14135 (M.D. Fla. 2012) ("Counsel shall not 'tender' expert witnesses to the court in the presence of the jury. Tendering of an expert invites a comment on the evidence by the court.").

Nevertheless, the Fifth District Court's held that "Even if we were to assume that the trial court's declaration was error in this case, any error would not be fundamental. Mitchell's defense at trial had nothing to do with the qualifications of the State's chemist or the validity of the tests performed." *Mitchell* at 371.

A defendant has no need to challenge the qualifications or the validity of the test performed unless there is evidence to justify such a challenge. In this case however, there was cause to justify the validity of the test performed by Brook Hoover.

What is well settled in a request for post-conviction relief is that the Defendant must establish prejudice from counsel's alleged deficiencies.

Crenshaw's defense at trial was misidentification. None of the victims identified Defendant, because the perpetrator was wearing a mask. Therefore it was incumbent upon the state to present competent substantial evidence to rebut this defense. The state presented the testimony of co-defendant Dennis Waters who was a convicted felon, who had every motive to lie because he received a grandfather deal of (7) years on a punishable by life crime.

Second, the state presented the testimony of Brook Hoover, the "expert" FDLE Crime DNA laboratory analyst, whose lab operated under the "quality assurance standards of the FBI." **(T 477).** When the trial court accepted the states tender or request for "judicial endorsement" of Ms. Hoover as a DNA expert, it conveyed to the jury that Ms. Hoover's testimony regarding the

DNA evidence that was to follow, carried with it the court's "stamp of authority," such that Ms. Hoover's testimony surely was credible and indisputable. *Osorio* at 610.

When Ms. Brook testified that the mask and hat contained Appellant's DNA and also that the blue shirt, which the state posited that Appellant wore during the crime and discarded, contained a high percentage, (76) percent of Appellant's DNA, undoubtedly impressed upon the jury that it had no reason to question or doubt whether anyone other than Appellant was the robber wearing the mask and shirt.

The physical evidence collection and testing was bungled from the outset. Ms. Holzer, (the crime scene technician) admitted to unintentionally contaminating the buccal swab she used on the hat and mask when she used the *same* swab for both items. **(T 439)**. Her reasoning that because items in close proximity or on top of each other are swabbed together to get the most amount of DNA is untenable. **(T 439)** When a citizen's liberty is at stake, law enforcement has a public service duty to ensure that the DNA is collected without preventable contamination. It belies logic to place collecting the "most amount" as the primary collection procedure.

Holzer conceded she was not aware that collecting the swabs in such a way could risk creating a situation where there are multiple donors to a swab. **(T. 439-440)** Holzer also admitted it was possible that DNA from one person could be on the hat, but not on the mask, and by using one swab for both items there could be cross-contamination. **(T 441)**

Because of the position which a judge holds in the scheme of the trial, in the minds of the jurors, the trial court's accepting in front of the jury that the expert is an expert, conveys to a layperson jury that it should place significant importance to that witness's testimony. It cannot be said that the 'stamp" in this case did not contribute to the jury's decision to convict. Under the harmless error test, the question is whether there is a reasonable probability that the error

affected the verdict. See *State v. Diguilio*, 491 So. 2d 1129, 1136-39 (Fla. 1986); same *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1992).

Again, Petitioner's defense was that he was misidentified. The cross-contamination of the buccal swab along with the trial court's "tender and accept" of the DNA expert, bolstered the testimony and contributed in a significant way to damaging Petitioner's defense. This error is not harmless. The trial court's tendering of the expert in front of the jury evinced an added layer of credibility to the DNA expert's testimony, which deprived the defendant of due process and a fair trial. This kind of error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

As to Issue (2), if trial Counsel had objected to the "tender and accept" under the premise that it violated Defendant's constitutional right to a fair trial and Due Process of law, it follows that there would have been a sufficient basis for a motion for mistrial and counsel is ineffective for not having moved for one.

CONCLUSION

This Court should grant the instant writ of certiorari and establish that a "tender and accept" procedure of an expert in front of a jury violates a Defendant's Sixth Amendment right to a fair trial and that a trial counsels failure to object can establish prejudice absent application of the harmless error rule. Further, that a "tender and accept" violates the Fourteenth Amendment right to Due Process of law.

OATH

Under penalty of perjury, I certify that all of the facts and statements contained in this document are true and correct and that on the 16 day of February 2024, I handed this document and exhibits to a prison official for mailing out to this Court and the appropriate Respondents for mailing out U.S. mail.

/s/ _____

Joseph Crenshaw, Pro Se
D/C # V43177
Marion Correctional Institution
P.O. Box 158
Lowell, FL 32663-0158