CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

WILLIE SETH CRAIN, JR.

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND

ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

On direct appeal, Fla.R.App.P. 9.142(a)(5) requires the Florida Supreme Court in death penalty cases, "whether or not insufficiency of the evidence is an issue presented for review," to review the issue and determine if relief is warranted.

1. Is it a violation of the Fourteenth Amendment right to Due Process to allow a conviction to stand where some of the elements of the crime were not established by competent, substantial evidence, despite the specific issue not being captured for review in the Defendant's original pleadings?

2. Is it ineffective assistance of counsel and a violation of the Sixth Amendment for trial counsel to stipulate to a material fact when the State of Florida has only proven the fact by a preponderance of the evidence?

LIST OF PARTIES

All parties appear in the caption on the cover page.

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), these are the related cases:

Underlying Jury Trial
Circuit Court of the Thirteenth Judicial Circuit of Florida, Hillsborough County
State of Florida v. Willie Seth Crane, Case No.: 98-17084
Judgment entered: November 19, 1999

Direct Appeal
Florida Supreme Court - SC00-661
Crain v. State, 894 So.2d 59 (Fla. 2004).
Judgment entered: October 28, 2004

Supreme Court of the United States - No. 04-9880
Crain v. Florida, 126 S.Ct. 47 (2005).
Certiorari denied: October 3, 2005

Postconviction Proceedings
Proceedings Pursuant to Fla.R.Crim.P. 3.851
Circuit Court of the Thirteenth Judicial Circuit of Florida, Hillsborough County
State of Florida v. Willie Seth Crane, Case No.: 98-17084CFAWS
Judgment entered: September 10, 2009

Florida Supreme Court - SC09-1920
Crain v. State, 78 So.2d 1025 (Fla. 2011).
Judgment entered: October 13, 2011

United States District Court for the Middle District of Florida
Crain v. Secretary, Department of Corrections
Case No.: 8:12-cv-0322-KKM-AAS
Judgment entered: September 30, 2022
Motion to Alter or Amend Judgment, Fed.R.Civ.P. 59(e) denied: November 25, 2022

United States Court of Appeals for the Eleventh Circuit
Crain v. Sec'y, Dep't of Corr., USCA No. 22-13693-P
Certificate of Appealability denied: Doc. 19-1, March 31, 2023
Motion for Reconsideration denied: Doc. 21-2, May 11, 2023

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PETITION FOR WRIT OF CERTIORARI

Willie Seth Crain, Jr. respectfully petitions for a writ of certiorari to review a judgment of the United States District Court for the Middle District of Florida and the Eleventh Circuit Court of Appeal's denial of a certificate of appealability.

DECISIONS AND ORDERS BELOW

This proceeding is instituted as an appeal from Mr. Crain's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 2254 filed in the United States District Court for the Middle District of Florida, Tampa Division, Case No. 8:12-cv-322-KKM-AAS which was denied in an unpublished opinion on September 30, 2022. (Appendix B) The district court denied a certificate of appealability. Mr. Crain filed a Motion to Alter or Amend Judgment on October 26, 2022 (Appendix H), which was denied on November 25, 2022. (Appendix C) The district court once again declined to issue a certificate of appealability.

The appellant filed an amended notice of appeal on December 22, 2022. He filed a petition seeking a certificate of appealability with the Eleventh Circuit Court of Appeals on the same day. (Appendix J) A single circuit judge summarily denied the petition on March 31, 2023. (Appendix A) Mr. Crain sought reconsideration of the denial which was once again denied on May 11, 2023. (Appendix D)

JURISDICTION

The order of the Eleventh Circuit denying Petitioner's Motion to Reconsider, Vacate or Modify Order Denying Certificate of Appealability was entered on May 11, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the record are numbered according to the filing of the record found in the United States District Court for the Middle District of Florida, Case No. 8:12-cv-322-WFJ-AAS. Volumes pertaining to the direct appeal are designated "A" followed by the volume number/page number. Volumes referencing the postconviction record are designated "C" followed by the volume number/page number.

CLAIM 1 – SUFFICIENCY OF THE EVIDENCE

STATEMENT OF THE CASE

The state court procedural history of this case concerning the issue of sufficiency raised in this Petition began on October 14, 1998 when Mr. Crain was

charged by Indictment with one count of first-degree murder and one count of kidnapping with intent to commit homicide. (A1/31-33)

At the conclusion of the State's case, Mr. Crain moved for judgments of acquittal for both first-degree murder and kidnapping based on the insufficiency of the evidence. Trial counsel argued:

> What evidence do we have that there was premeditation in this case, assuming for the sake of argument that the State has proven that [Amanda] was dead and that she died as a result of a criminal act of another human being, what evidence do we have of premeditation?
>
> I submit, your Honor, that we don't have it. What other evidence do we have that any underlying felony has been committed that would justify First Degree Murder charges?
>
> ---
>
> Judge, the –the State has not proven any of the elements that are necessary, have – has not presented sufficient evidence; even looking at the evidence most favorable to the State, the State has not presented sufficient evidence to present this case to the jury.
>
> Um, and I would ask the Court, um, based on – on – on all of these problems and holes in the State's case, that, um, the Court grant a motion for judgment of acquittal as to both counts.

(A17/2605-2606, 2608) The trial court denied Crain's motion. *Id.* at 66. A Motion for New Trial was filed on September 23, 1999 which once again pled that the jury verdict was contrary to the law and/or weight of the evidence and that the Court erred in denying the Motion for Judgment of Acquittal. (A2/269-270) This motion was denied on October 11, 1999. A jury found Crain guilty on both counts, first-degree murder and kidnapping, and unanimously recommended a death sentence. Crain was sentenced to death on November 19, 1999.

Crain appealed his death sentence to the Florida Supreme Court, which affirmed a felony murder conviction for kidnapping with intent to commit bodily harm and reduced count 2, kidnapping with intent to commit homicide to false imprisonment. The Florida Supreme Court remanded the case back to the circuit court for resentencing in accordance with its ruling. *Crain v. State*, 894 So.2d 59, 76 (Fla. 2004). (Appendix E)

On direct appeal, Fla.R.App.P. 9.142(a)(5) requires the Florida Supreme Court in death penalty cases, "whether or not insufficiency of the evidence is an issue presented for review," to review the issue and determine if relief is warranted. Additionally, on direct appeal (Claim 1) and in his Petition for Writ of Habeas Corpus (Ground Five), Crain challenged the sufficiency of the evidence to sustain a first-degree murder conviction <u>as it related to intent</u>. Petitioner's Motion to Alter or Amend Judgment asked the District Court to reconsider their ruling as to Ground Five of the Petition as it relates to <u>sufficiency in general</u>, because not all the elements of Felony Murder were established by competent, substantial evidence. (Appendix H)

The Florida Supreme Court found that the trial court instructed the jury on first-degree felony murder in Count I as follows:

> Before you can find the defendant guilty of First-Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:
>
> One, that [Amanda] is dead; two, that the death occurred as a consequence of and while Willie Seth Crain was engaged in the commission of Kidnapping; three, that Willie Seth Crain was the person

> who actually killed [Amanda].
>
> **"Kidnapping"** is the forcible or secret confinement, abduction or imprisonment of another, against that person's will and without lawful authority.
>
> *The Kidnapping must be done with the intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim.*

(Emphasis added.) *Crain v. State*, 894 So.2d 59, 68 (Fla. 2004). (Appendix E)

Citing to *Coleman v. Johnson*, 566 U.S. 650, 651 (2012), the federal District Court recognized, "…a federal court may only 'overturn a state decision rejecting a sufficiency of the evidence challenge' if the 'state court decision was objectively unreasonable.'" (Doc. 135 at 57) In analyzing Petitioner's Ground Five, the federal District Court reviewed the Florida Supreme Court's ruling, which held that there was insufficient evidence to support a finding that Crain *intended* to commit homicide. The District Court went on to review the Florida Supreme Court's holding that found Crain guilty of felony murder by kidnapping with intent to commit bodily harm. The facts presented at trial were reviewed to determine if they could support a finding that Crain *intended* to inflict bodily harm. The District Court found, "Such a finding would not be 'so insupportable as to fall below the threshold of bare rationality.' *Coleman*, 566 U.S. at 656." (Doc. 135 at 60). Therefore, the District Court held, "Crain fails to show that the Florida Supreme Court unreasonably applied federal law to his case or that it based its decision on an unreasonable determination of the facts." (Appendix B, at 61) Both the Florida Supreme Court and the District Court focused their analysis on whether there was sufficient "intent" to sustain a conviction for first degree murder or felony murder

based on kidnapping, while failing to consider whether all the elements of kidnapping had been satisfied to uphold a conviction. The element being challenged here is whether the victim was alive when she was allegedly kidnapped. One cannot "kidnap" a corpse or take a person "against their will" if they are not alive.

FACTUAL BACKGROUND
(According to the Testimony of Witnesses at Trial)

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 v. State*, 894 So.2d 59, 63 (Fla. 2004). Amanda was seven years old at the time. *Id.* At 62.

The next day, Crain returned to Hartman's trailer for a dinner invitation. After dinner, Crain drove Hartman and Amanda to his trailer to watch the movie, *Titanic*. *Id.* at 63. Amanda and Hartman used Crain's restroom during this visit. *Id.*

At another point in the evening, Hartman asked Crain if he had any medication for pain. Crain offered her Elavil and Valium. Crain allegedly 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, 5-milligram Valium tablets. At the time she took the Valium, Hartman had a twelve-year addiction to pain pills. *Id.* at 64, FN 2. Crain testified at trial that he was unaware of the addiction. Crain allegedly took one Valium tablet. *Id.*

When Hartman decided to leave, Crain drove both her and Amanda to their trailer and went inside with them. *See Id.* While Amanda was taking a shower,

Hartman checked on her and helped her get ready for bed. During that time, "Hartman did not notice any sores or cuts on Amanda's body." *Id.* Crain then "blow-dried Amanda's hair in Hartman's bathroom without Hartman present." *Id.* Hartman testified that around 2:15 a.m., when Amanda went to sleep, her "loose tooth was still in place and ... not bleeding." *Id.*

Around 2:30 a.m., Hartman told Crain "that he could lie down to sober up but that she was going to bed." *Id.* Only five minutes later, Crain went to 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." *Id.*

One of Hartman's neighbors, Probst, testified that around midnight, "she saw a white truck parked immediately behind Hartman's car in Hartman's driveway." *Id.* In the early morning hours of September 11th, Probst observed the truck parked at the side of Hartman's residence with the lights on and the engine running. Probst heard the truck leave after about five minutes. *Id.* at 64. 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 10th, 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. *Id.* at 64, FN 3.

When Hartman awoke the morning of September 11th at 6:12 a.m., "she discovered that Amanda was missing." *Id.*

During questioning at the police station, Crain explained "that he left Hartman's house alone at about 1:30 in the morning, went home[,] and accidentally spilled bleach in his own bathroom." *Id.* at 65. (footnote omitted). According to Crain, he spent the next four hours cleaning his bathroom because "he did not like the smell of bleach." *Id.* "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." *Id.*

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. *Id.* at 64-65. (footnote omitted).

At around 8:30 a.m. on September 11th, 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. At the boat ramp, Crain removed his slickers, revealing jeans with the zipper down. *Id.* at 65. The maroon shirt and dark pants that Darlington saw Crain wearing on the morning of September 11, 1998, were never recovered. *Id.* at 66.

REASON FOR GRANTING THE WRIT

To summarize the facts presented at trial, Amanda's mother took a large dose of painkillers and went to sleep while Mr. Crain was in her bed with Amanda. When she awoke, the child was gone. Late that night, the neighbors heard a truck running outside, but there was no testimony about voices. The State presented no facts to support a finding that Amanda left her home alive.

Mr. Crain has denied knowledge of what happened to Amanda and has never admitted to harming her in any way. He testified that the small amount of blood allegedly found on his toilet seat may have been from helping her pull out a baby tooth earlier in the day. Pointing out that the charge of kidnapping was not proven by the State is not in any way an argument or admission that Mr. Crain had anything to do with her disappearance. It is simply a legal observation that the State failed to meet their burden of proof as to kidnapping. Mr. Crain maintains his innocence.

The argument that a kidnapping was not sufficiently established by the evidence to sustain a conviction looks at the case in the light most favorable to the State to determine the presence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. *Crain* at 71. Amanda was last seen in

her mother's bed with her mother and Crain. Around the time of Amanda's disappearance two neighbors testified that they saw a truck outside of Hartman's trailer, with one noticing that the truck had the engine running. The State presented evidence that a small amount of Amanda's blood may have been found in Crain's bathroom after her disappearance.

The Florida Rules of Appellate Procedure and precedent create "a mandatory obligation [for the Florida Supreme Court] to determine the sufficiency of the evidence to sustain [a] homicide conviction." *Truehill v. State*, 211 So.3d 930, 951 (Fla. 2017) (quoting *Jones V. State*, 963 So.2d 180, 184 (Fla. 2007.) Unfortunately, their analysis concerning sufficiency of the evidence focused solely on "intent." As part of their findings of fact, the Florida Supreme Court noted, the State argued that "luminol evidence demonstrates that a large amount of blood was spilled in the bathroom and therefore establishes that the kidnapping was committed with an intent to kill." *Id.*, at 75. In other words, the State's argument assumes that Amanda was brought to Willie Crain's bathroom, alive and against her will, and was killed there. The Florida Supreme Court found, "Although the DNA blood evidence found on the tissue and the toilet seat in Crain's bathroom independently establishes that Amanda's blood was deposited in Crain's bathroom, it does not establish how much she bled, what caused her to bleed, ***or where she was killed***. Because of the presence of bleach, ***it is impossible to tell how much of the luminol "glow"—if any—was attributable to blood and how much was attributable to bleach***." (Emphasis added.) *Id.* Furthermore, the trial court found, and Justice Wells confirmed, "There

is no way to know exactly what happened to [the victim,] [Amanda]." (*See*, Appendix F - *State v. Crain*, No. 98-17084, Sentencing Order at 2 (Fla. 13th Cir. Ct. order filed Nov. 19, 1999), also cited in J. Wells dissenting opinion in *Crain v. State*, at 88.

The State argued in Closing that Crain brought the child to his truck while she was asleep. (A22/3115) The State told the jury, "Her departure, her snatching from the bed of her mother by this defendant, was kidnapping." (A-20/3001) However, no one testified as to whether Amanda's body left her home alive. No one saw her or heard her leaving her mother's home. The State's argument that the substance found in Crain's bathroom was Amanda's blood and that this substance was found in Mr. Crain's bathroom was used to support kidnapping. However, there was no finding or evidence presented that she was alive when the alleged blood was spilled. The blood could equally have been from a corpse as from a living body. While it is a difficult thing to talk about, the State implied through the testimony of fisherman, Darlington, that Mr. Crain took the body out to sea the next morning. Then in closing, the State actually told the jury that he "laid her body to rest in the turning waters of Upper Tampa Bay." (A-20/3009) Under the State's theory, the bathroom could have just as reasonably been used to reduce the size of the body into smaller components for transport, which would result in blood being released from the body.

There is no crime of kidnapping under Fla. Stat. 787.01(1)(a)(b) for stealing a corpse or inflicting harm on a corpse. The body must still be alive, and the act must be against the "will" of a person. The Florida Supreme Court specifically found the State did not present any facts to establish where Amanda died. *Id.* at 75. Therefore,

while any amount of blood spilled was enough for the Florida Supreme Court to find there was an intent to harm the body and the length of time after a kidnapping that the blood was spilled would not negate a kidnapping conviction, the State must still establish that a live body was kidnapped. Otherwise, the State has only established that a corpse was stolen and mutilated. Furthermore, while any amount of blood spilled may be used to support kidnapping with an intent to harm the body, that body needs to be alive when the blood left it. Where Amanda died, was never established by the State. Two important elements of kidnapping are dependent on that fact. Blood located in a different location than where she died is irrelevant and nothing more than a red herring.

In Petitioner's Motion to Alter or Amend Judgment, for the sake of argument, Petitioner did not challenge the facts found by the Florida Supreme Court. Rather, the motion challenged the sufficiency of those facts to establish the crime of kidnapping, which was the underlying crime used to support a conviction for felony murder. The Florida Supreme Court concluded that any alleged blood found in Mr. Crain's bathroom does not establish where she was killed. In fact, if Amanda was alive when she was allegedly abducted from her mother's house by Crain, it is likely there would have been voices heard by the neighbors who did hear a truck running with the lights on. (The State reminded the jury in Closing that Amanda was afraid of the dark and would not have gone into the dark willingly.) (A20/3011-3012) Since an element of kidnapping is that the abduction be against the "will" of a person, the State is tasked with providing the trier of fact with some proof or inference the body

was alive when it was abducted. The mother taking five Valium and passing out would negate any inference that the mother would necessarily have heard a struggle. Again, the Florida Supreme Court clearly states that where Amanda died is unknown.

In Respondent's Response to Motion to Alter or Amend Judgment (Appendix I, at 15) an assumption is made that if Amanda died at her home, she necessarily died "during the course of her abduction". However, no fact was cited to support the sequence of events that night, and no finding of fact was recognized by any court that a killing occurred *while* Amanda was abducted. Exactly what happened is "unknown." The assumption claimed by the State distorts the analysis of this issue.

Additionally, if what happened is unknown, then there are no facts to support intent, whether it be intent to commit homicide or intent to inflict bodily harm. If Amanda died in her mother's home, there is no evidence to explain how or why. Therefore, the issue of not knowing where Amanda died also goes to the element of "intent," which was specifically pled and analyzed by the courts. The blood allegedly found in Mr. Crain's bathroom was used to establish "intent to inflict bodily harm," another element of kidnapping. The same analysis applies to this element as to the requirement that the body was removed from the home "against her will." Blood spilled by a corpse does not prove how Amanda died. Concerning the luminol, Justice Lewis pointed out in his separate concurring opinion:

> The majority further concludes that the luminol evidence presented here establishes that Amanda was bleeding while she was confined by Crain. However, Crain testified that he had cleaned his bathroom with bleach, an assertion supported by the State's witness, Detective Bracket, who testified

> that when he conducted a search of Crain's trailer, he noticed a very strong odor of bleach in Crain's bathroom. As the State's expert witness testified, luminol reacts with the presence of bleach in the same manner in which it reacts when blood is present. The State presented no evidence that Crain had used bleach to clean blood from his bathroom because no such direct evidence existed. Therefore, in my view, there is no competent evidence inconsistent with the defendant's theory of events concerning the luminol evidence.

Crain, at 86-87. And as to the "small, almost invisible blood stain found on Crain's toilet seat":

> That blood establishes only that Amanda was present in Crain's bathroom, a bathroom she had used prior to her disappearance, and in no way supports a finding that Crain kidnapped Amanda with the intent to commit bodily harm.

Crain, at 87 and FN27

Finally, as to the State's argument that Crain's behavior surrounding the evening of Amanda's disappearance and the following day supports intent, the Florida Supreme Court found:

> To support its theory that the murder was committed with premeditation, the State also relies on evidence that Crain left his truck running outside Hartman's trailer on the night of Amanda's disappearance, exhibited unusual behavior the next morning, and attempted to conceal his crime. These facts evince a plan to remove Amanda from her mother's residence and to eliminate all evidence of her presence at his residence, but do not support an inference that Crain's intent at any specific point in time was to kill her. *See generally Norton v. State,* 709 So.2d 87, 93 (Fla.1997) ("Efforts to conceal evidence of premeditated murder are as likely to be as consistent with efforts to avoid prosecution for any unlawful killing."); *Hoefert v. State,* 617 So.2d 1046, 1049 (Fla.1993); *see also Smith v. State,* 568 So.2d 965, 968 (Fla. 1st DCA 1990).

Id. at 75-76.

The Supreme Court has stated that federal habeas courts must follow the *Winship*[1] doctrine, which "requires more than simply a trial ritual." *Id.* at 317. The Court held:

> A "reasonable doubt," at a minimum, is one based upon "reason."[9] Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. *Glasser* v. *United States,* 315 U. S. 60, 80; *Bronston* v. *United States,* 409 U. S. 352. See also, *e. g., Curley* v. *United States,* 81 U. S. App. D. C. 389, 392-393, 160 F. 2d 229, 232-233.[10] Under *Winship,* which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

Id. at 317-318, FN omitted. The Court explained that this requirement is satisfied "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana,* 406 U. S., at 362."

Applying the *Winship* standard to the facts of this case, there is insufficient evidence to conclude that a kidnapping of Amanda's live body occurred or to establish any specific intent as to how she died. The Northern District Court of Alabama found in the Rule 59(e) motion they reviewed, "the only [grounds in that case] for granting it would be a manifest error of law or facts." *Marshall v. Dunn*, No. 2:15-cv-1694-AKK, 2021 WL 3603452 (N. D. Ala. August 13, 2021). The District Court next cited to Black's Law Dictionary (10th ed. 2014) in recognizing, "a 'manifest error' is not just

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[1] *In Re Winship*, 397 U.S. 358 (1970).

any error but one that is plain and indisputable, and that amounts to a complete disregard of the controlling law or credible evidence in the records.'" *Id.* at *1. It is a manifest error of law to allow Petitioner's conviction for Felony Murder based on Kidnapping to stand where there was no evidence presented at trial to establish essential elements of the offense of kidnapping. The confining, abducting, or imprisoning of another person must be against their will, ergo while they were alive. Frankly, even false imprisonment fails to hold up under this analysis. Under §787.02(1)(a), Fla. Stat. (1998), false imprisonment is similarly defined as requiring the confining, abducting, imprisoning or restraining of another person to be "against her or his will." It is objectively unreasonable to find either kidnapping or false imprisonment was sufficiently established where the Florida Supreme Court found there was no way to know where or how Amanda died.

The District Court denied Petitioner's Amended Petition after analyzing whether the Florida Supreme Court's finding that intent to commit bodily harm was proven was "'so insupportable as to fall below the threshold of bare rationality.' *Coleman*, 566 U.S. at 656." (Doc.135 at pgs. 59-60). The District Court was satisfied that the evidence relied upon by the Florida Supreme Court was sufficient for a jury to convict Crain of felony-murder based on kidnapping with intent to inflict bodily harm. *Id.* at 60-61. The District Court made this finding despite the Florida Supreme Court acknowledging that how Amanda died and where Amanda died was unknown. The District Court even acknowledged that the Florida Supreme Court specifically recognized that the State's expert concerning scratch marks, Dr. Vega, conceded "that

he was unable to reach any conclusion as to the precise origin of the scratch marks. *Crain II*, 78 So.3d at 1039-40." (Doc. 135 at 33). The Florida Supreme Court found that on cross-examination Dr. Vega admitted he was unable to definitively conclude "whether Crain's scratches were caused by human fingernails, that Crain's injuries were also consistent with being caused by objects associated with Crain's profession as a crabber, and that he could not determine if all of Crain's injuries occurred simultaneously. Dr. Vega also acknowledged that his opinion was not within a reasonable degree of medical certainty." *Crain II*, at 1040. Therefore, where there are no facts to support essential elements of kidnapping with intent to inflict bodily harm, the findings of the Florida Supreme Court are insupportable, and objectively unreasonable and do fall below the threshold of bare rationality as described in *Coleman*.

The District Court also denied Petitioner's Motion to Alter or Amend Judgment concerning the issue of the victim being abducted against her will not being proven by any evidence. The District Court found that this issue was not specifically pled in Mr. Crain's amended petition or reply, and agreed with Respondent that this issue was never raised in state court. The District Court ruled that this issue was procedurally defaulted. (Doc. 146 at pgs. 4-5) However, the Florida Supreme Court has recognized it has a duty to analyze the case to be sure *all elements* of the crimes for which Mr. Crain was convicted could be supported by competent, substantial evidence despite any failing of counsel to properly plead that issue. Therefore, since the Florida Supreme Court recognized that obligation before it analyzed Mr. Crain's

convictions for sufficiency of the evidence, the issue of sufficiency should be considered exhausted in state court.

The District Court did not discuss the merits of this issue in its Order (Doc. 146) denying relief, nor demonstrate how it reached the conclusion that missing an essential element of an offense for which a person is sentenced to death would not fall into the category of miscarriage of justice. *Id.* The District Court stood on procedure without commenting on the substance of the claim and merely stated the conclusion that there was no fundamental miscarriage of justice. In only stating a conclusion, the District Court did not make a record which would allow this Court to review their analysis of why there was no miscarriage of justice. This Court stated in *Long v. U.S.*, 626 F.3d 1167, 1170 (11th Cir. 2010):

> Finally, we have long required the district courts and administrative boards to facilitate meaningful appellate review by developing adequate factual records and making sufficiently clear findings as to the key issues. *See, e.g., Thompson v. RelationServe Media, Inc.,* 610 F.3d 628, 637-38 (11th Cir.2010) (securities fraud case); *Shkambi v. U.S. Attorney Gen.,* 584 F.3d 1041, 1048-49 (11th Cir.2009) (immigration case); *United States v. Gupta,* 572 F.3d 878, 889 (11th Cir.2009), *cert. denied,* ___ U.S. ___, 130 S.Ct. 1302, ___ L.Ed.2d ___ (2010) (criminal case). This general policy comports with the *Clisby*[2] rule.
>
> Thus, in a post-conviction case, the district court must develop a record sufficient to facilitate our review of all issues pertinent to an application for a COA and, by extension, the ultimate merit of any issues for which a COA is granted.

Petitioner challenges the District Court's position, as well as the Eleventh Circuit Court of Appeal's summary denial of a certificate of appealability. It is a grave

[2] *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992).

violation of Due Process, and therefore a miscarriage of justice, to execute someone where the elements of the crime underlying his conviction are unsupported by any evidence.

CONCLUSION

The Florida Supreme Court has recognized it has a duty to analyze the case to be sure *all elements* of the crimes for which Mr. Crain was convicted could be supported by competent, substantial evidence despite any failing of counsel to properly plead that issue. Therefore, the issue of sufficiency should be considered exhausted in state court. This Court should find it is a violation of the Fourteenth Amendment right to Due Process to allow a conviction to stand where some of the elements of the crime were not established by competent, substantial evidence, despite the specific issue not being captured for review in the Defendant's original pleadings.

CLAIM 2 – INEFFECTIVE ASSISTANCE OF COUNSEL

STATEMENT OF THE CASE AND FACTS

The Florida Supreme Court found in its opinion concerning the denial of Petitioner's postconviction motion:

> Before the State offered the testimony of Dr. Theodore Yeshion, a forensic scientist for FDLE, to interpret these findings, the trial court read the following stipulation to the jury:
>
> > The State of Florida and the defendant, Willie Crain, and his undersigned attorneys, hereby stipulate and agree that the *bloodstain* 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].
>
> The State and the defense further stipulate that the *bloodstain* 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]. (Emphasis added.)

Crain v. State, 78 So.3d 1025,1035 (Fla. 2011). (Appendix G) The trial court asked Mr. Crain whether he agreed with this stipulation, and Mr. Crain acknowledged his agreement with it and that he was not coerced. *Id.* (However, concerning any stipulation by Mr. Crain, this Court should consider that later in their opinion, the Florida Supreme Court noted Dr. Berland's testimony about Mr. Crain's lack of education. *Id.,* at 1043.) As to the stains in question, the Florida Supreme Court went on to find:

> Subsequently, Dr. Yeshion testified that he conducted a preliminary visual examination of the toilet seat, State's Exhibit 17(A). However, to determine whether reddish-brown stains found on that item were in fact blood, he performed a "presumptive blood test," or "phenolphthalein" test, which is "a chemical presumptive test that simply indicates that blood may be present." Dr. Yeshion stated that after conducting this test, he was able to find two areas on the toilet seat that contained blood. Dr. Yeshion also tested the boxer shorts recovered from Crain's person (State's Exhibit 46) for the presence of blood and noted that he found a very small bloodstain on them. With respect to the toilet tissue recovered, Dr. Yeshion testified that it was very difficult to detect any obvious bloodstains but after examining a smaller, darker area microscopically, he performed the phenolphthalein test on that stain and found a very small amount of blood on the tissue. Dr. Yeshion concluded that the bloodstain 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. 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.

When Crain took the stand in his own defense, he appeared to offer an innocent explanation for the presence of blood inside his bathroom. Crain explained that while he was inside Hartman's trailer on the afternoon of September 10, he observed Amanda wiggling her tooth around because "it was ready to fall out." He testified that later in the evening, when Hartman and Amanda returned to Crain's trailer, Amanda was again wiggling her tooth and noted that the tooth was bleeding and getting on her finger, causing Crain to pull off toilet paper to prevent Amanda from getting blood on her hands. According to Crain, Amanda used his bathroom once with her mother and then once by herself for around six to eight minutes. Crain also stated that he kept his underwear on the back of his toilet and put those clothes on before going crabbing in the morning. Crain finally explained that he suffers from hemorrhoids and bleeds almost all the time when he tries to use the bathroom.

At the evidentiary hearing, Crain's counsel testified that he considered either challenging the validity of the DNA results or providing a reasonable explanation for the presence of the DNA evidence that would be consistent with pretrial statements Crain made to the media and law enforcement officials. According to trial counsel, Crain had offered a reasonable explanation for the presence of Amanda's blood inside his residence in pretrial statements to the media (to a local reporter and to producers of a national talk show), and Crain insisted on testifying to the same during trial.[FN7] Thus, it was counsel's informed strategy to not contest the DNA results because they "were to some extent locked in by [Crain's] previous statements," and counsel did not want to present a position inconsistent to that which Crain had previously stated or would have testified in the future. Counsel further explained that the DNA stipulation was entered into only after consulting with Dr. Shields, the retained confidential DNA expert, and with Crain, who willingly signed the stipulation. In fact, prior to the stipulation, counsel provided Dr. Shields with copies of lab reports, bench notes, and any discovery related to the DNA evidence in an effort to challenge the State's results. However, Dr. Shields did not provide any information to refute the lab findings, did not find any evidence of contamination during the testing process, did not raise a concern that the failure by either the FDLE lab or LabCorp to conduct a substrate control test in this case affected the validity or reliability of the test results, and did not advise counsel that a description of the biological substance on the defendant's underwear as blood was scientifically inaccurate or misleading.

Id., at 1035-1036. After finding the testimony of trial counsel to be "very credible" and that Mr. Crain's stipulation at trial was entered into with his full knowledge and consent, the postconviction court determined that Mr. Crain failed to establish that trial counsel performed deficiently in stipulating to the DNA evidence as blood or in failing to challenge the DNA evidence or to request that independent testing be conducted in this case. *Id.*, at 1037.

REASON FOR GRANTING THE WRIT

A. State Court

The findings of fact by the trial court and then the Florida Supreme Court fail to consider and respond to the prejudice of stipulating to all the DNA coming from a blood stain. Petitioner argued in the appellate brief (C62/32) that 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, (C56/7492), 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. (C56/7492-7494) Or the test could have been a false positive.

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." The State emphasized the blood in Closing, "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 . . . ." (A21/ 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 trial counsel, Mr. Hernandez. (C55/7362) 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, but did not mention that she was bleeding. (A19/2805-06) 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. (A19/ 2817) He said the girl fell on his crab traps on his boat, but he saw no blood. (A19/2824) He mentioned his hemorrhoids bleed when he goes to the bathroom. (A19/2836) Those were the only mentions of blood sources offered by Mr. Crain, in 63 pages of direct examination.

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's 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?

C56/7496. 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 –

(C56/7497) As the State argued in the objection, the defense and Dr. 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. Dr. Yeshion never qualified his testimony at trial to make it crystal clear, as he did in his pre-stipulation deposition, C9 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. (A16/2384) Subsequent testimony referred conclusively to the bloodstains, omitting the limitation on the conclusions of the testing.

Many comments in the State's closing argument highlight the prejudice caused by the blood stipulation where the fact that Amanda's "blood' was found is emphasized again and again. (A20/3008, 3011, 3022, 3023) The State's closing arguments clearly show the prejudice that arose because of counsels' stipulation that all the DNA came from blood stains.

B. Federal District Court

The District Court used the AEDPA standard for analyzing Petitioner's ineffective assistance of counsel claim concerning trial counsel's stipulation to DNA being blood versus another bodily fluid. They considered whether counsel's error was "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The AEDPA standard cannot be satisfied as to this egregious stipulation. There was no benefit to be gained by stipulating. The State presented their experts just as they would have without the stipulation. No time or state funds were saved in stipulating. However, instead of merely being able to say the stain was presumed to be blood, but not to a scientific degree of certainty, the issue became uncontested. Likewise, as to the question of whether there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would be different," the Florida Supreme Court used the finding of blood to find intent to commit bodily harm, an important element of Felony Murder by Kidnapping. *See, Crain*, 894 So.2d at 74-75.

The District Court seemed to reason that Mr. Crain giving an innocent explanation *if* there was blood in his bathroom in effect made the question of the stipulation moot, because Mr. Crain did not outright deny blood was found. However, this misses the point. He never agreed that Amanda left blood in his bathroom. He merely tried to imagine how that could have occurred *if* it did occur. The stipulation created a situation where the jury had to decide if Mr. Crain's explanation of why blood was found was plausible and reasonable, rather than deciding if the State proved beyond a reasonable doubt that Amanda's blood was in fact found in Mr. Crain's bathroom. Since Mr. Crain never said he actually knew that Amanda's blood was left in his bathroom, it does not affect his credibility to require the State to prove this unusual circumstance.

Mr. Crain presented expert testimony that he alleges should have been heard by the jury. However, the District Court found no fault with the Florida Supreme Court's findings concerning a defense expert. While this point is not conceded, this claim is not dependent on presenting an expert to contest the State's findings. The cornerstone of this claim is that no effort was necessarily needed on the part of the defense beyond arguing that a presumptive test is not conclusive enough to establish the presence of Amanda's blood. The State's circumstantial evidence case would have failed but for the error of trial counsel in stipulating that the substance was in fact blood. The Florida Supreme Court found there was not enough evidence to uphold a conviction for intent to commit homicide. However, the Florida Supreme Court held, "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." *Crain* at 74-75. (Emphasis added.) Therefore, due to the finding of blood, the Florida Supreme Court reasoned there was enough evidence to uphold a conviction for felony murder by kidnapping with intent to commit bodily harm.

In conclusion, there is no reasonable strategy for stipulating to an extremely prejudicial fact that the State cannot prove by merely using a presumptive test, which does not eliminate other more favorable conclusions. The prejudice is clear where the Florida Supreme Court relied upon the *blood* stains in upholding a felony murder conviction based on kidnapping with intent to commit *bodily harm*. 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.

CONCLUSION

The prejudice is clear. The defense in this case was deficient for stipulating to the conclusion that the DNA arose from blood stains. The Florida Supreme Court's finding is an unreasonable determination and/or application of the facts to the *Strickland* precedent. The petition states a valid claim of the denial of his Sixth Amendment right to trial and the District Court's denial of Mr. Crain's Petition should be reversed, as well as the Eleventh Circuit's denial of a certificate of

appealability.

Respectfully, certiorari should be granted for this case.

Respectfully submitted,

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