

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

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Appendix A

United States Court of Appeals for the Eleventh Circuit
March 31, 2023 Order denying a certificate of appealability.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13693-P

WILLIE SETH CRAIN, JR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

To merit a certificate of appealability, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Willie Seth Crain, Jr. has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.


UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 31, 2023

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Appeal Number: 22-13693-P
Case Style: Willie Seth Crain, Jr. v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 8:12-cv-00322-KKM-AAS

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

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Cases Set for Oral Argument:	404-335-6141		

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

WILLIE SETH CRAIN, JR.

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
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Respondents.

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

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix B

United States District Court for the Middle District of Florida, Tampa Division
September 30, 2022 Order denying Petition for Writ of Habeas Corpus pursuant to
28 U.S.C. Sec. 2254.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE SETH CRAIN, JR.,

Petitioner,

v.

Case No. 8:12-cv-0322-KKM-AAS

SECRETARY, DEPARTMENT OF
CORRECTIONS,

Respondent.

ORDER

Willie Seth Crain, Jr., a Florida prisoner, filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging his conviction for first-degree murder and his death sentence. He seeks habeas relief based on the alleged errors of the trial court, the State, and his trial counsel. (Doc. 117.) Because Crain fails to show that he is entitled to such relief, his Amended Petition is denied. Moreover, a certificate of appealability is not warranted.

I. BACKGROUND

A. Factual Background

On September 9, 1998, Crain met Kathryn Hartman at a bar. After dancing and talking for several hours, they went to Hartman's home, a trailer, where they "remained for approximately thirty minutes." *Crain v. State (Crain I)*, 894 So.2d 59, 63 (Fla. 2004). Hartman had a seven-year-old daughter, Amanda Brown. *Id.* at 62. Although Brown was not at Hartman's home during this visit, her toys and pictures of her were present. *Id.* at 63.

Crain returned to see Hartman again the next afternoon. *Id.* "Hartman testified that Crain smelled of alcohol and carried a cup with a yellow liquid in it." *Id.* During this visit, Amanda was home with her mother and Crain spoke with Amanda about her homework. *Id.* He gave her two dollars for getting her homework right. *Id.* In addition to working on her homework, Amanda also played games with Crain. *Id.* Crain learned that Amanda had a loose tooth and "offered Amanda five dollars to let him pull the tooth out, but she refused. Hartman testified that the tooth was not ready to be pulled out." *Id.*

Crain left Hartman's home in the afternoon but returned, on the invitation of Hartman, for dinner. *Id.* When he returned around 7:00 p.m., Crain "still smelled of alcohol and carried the same or a similar plastic cup with a colored liquid. . . . At some point, Crain mentioned

that he had a large videotape collection and invited Hartman and Amanda to his trailer to watch a movie.” *Id.* Amanda asked Crain if his collection included “Titanic,” and he confirmed that it did. *Id.* She then pleaded with Hartman to “allow them to watch the movie” and although Hartman was “initially reluctant because it was a school night,” she eventually agreed. *Id.* “Crain drove Hartman and Amanda approximately one mile to his trailer in his white pickup truck.” *Id.*

They started the movie in Crain’s living room “but were interrupted by a telephone call from Crain’s sister.” On Crain’s request, Hartman spoke to his sister for him. *See id.* After a twenty- to twenty-five-minute phone call, Hartman returned to find the living room empty. *See id.* “Hartman opened a closed door at the rear of the trailer without knocking, and found Amanda and Crain sitting on the bed in Crain’s bedroom,” continuing the movie. *Id.* They both were dressed and Amanda sat “between Crain’s sprawled legs with her back to Crain’s front.” Crain had his arms wrapped around Amanda and “appeared to Hartman to be showing Amanda how to work the remote control.” *Id.* Hartman sat down on the bed and moved Amanda to sit beside her. *See id.* According to Crain’s testimony, the three of them watched the movie “in his bedroom because it was the only air-conditioned room in the trailer.” *Id.*

During the evening, “Amanda and Hartman used Crain’s bathroom together.” *Id.*

Hartman did not see Amanda bleeding anywhere that she could observe. *Id.* at 63–64. According to Hartman, the toilet seat back had a blue cover. *Id.* at 64. “Amanda did not use the bathroom at any other time that evening.” *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 testified that around midnight, “she saw a white truck parked immediately behind Hartman’s car in Hartman’s driveway.” *Id.* She saw that truck parked on “the side of Hartman’s residence with the lights on and the engine running” later

on, in “the early morning hours.” *Id.* She “heard the truck leave after about five minutes.” *Id.*

At the time of these events, Crain was a 52-year-old fisherman and crabber. *Id.* at 62. According to Albert Darlington, a fisherman who knew Crain, Crain drove his boat to a loading area around 6:15 a.m. that morning. *Id.* at 64. Darlington testified that Crain was 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.” *Id.* According to Darlington, Crain launched his boat “in an overall ‘odd’ manner.” *Id.*

When Hartman awoke that morning at 6:12 a.m., “she discovered that Amanda was missing.” *Id.* at 63. Hartman called Crain, who was “loading his boat,” and he told her “that he did not know where Amanda was.” *Id.* She then “called the police and reported Amanda’s disappearance.” *Id.*

At 8:30 a.m., a police detective found Crain in his boat. *Id.* at 65. Crain was wearing rubber pants, “a blue t-shirt, and loafers.” *Id.* While the two returned to the boat ramp, the detective “noticed a small scratch on Crain’s upper arm.” *Id.* Back at the ramp, Crain took off his rubber pants, “revealing jeans with the zipper down.” *Id.* The detective took Crain to the police station. *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.* (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.*

The police asked Crain about the multiple scratches they observed on his arms. *Id.* “Crain claimed that he received the scratches while crabbing, but became defensive when [a detective] asked him to demonstrate how the scratches were inflicted. Photographs of Crain’s body were taken that morning. *Id.*

Later, the police searched Crain’s home. They “noticed the strong smell of bleach” and found an “empty bleach bottle.” *Id.* According to police testimony, “there were obvious signs of grime and dirt around the edges of the bathroom sink. *Id.* A blue fitted rug that would go around the base of the toilet was found in Crain’s dryer.” *Id.* One of the detectives “applied Luminol, a chemical that reacts both with blood and with bleach, to Crain’s bathroom” and later testified “that the floor, the bathtub, and the walls ‘lit up.’” *Id.* The police also found “two pieces of toilet tissue [on] the inside rim of Crain’s toilet and observed what appeared to be a small blood stain on the seat of the toilet.” *Id.* at 65–66.

The police performed an “extensive, two-week search for Amanda.” *Id.* at 66. They never found Amanda’s body. *Id.* Nor did the police ever find the “maroon shirt and dark pants that Darlington saw Crain wearing” when he departed on his boat the morning of Amanda’s disappearance. *Id.*

The State charged Crain with two counts, one for first-degree murder and another for kidnapping with intent to commit homicide. *Id.* at 62. At trial, the State introduced testimony from Crain’s neighbors and Crain’s daughter about a conversation at Crain’s daughter’s home soon after Amanda’s disappearance. *Id.* Two of those neighbors testified that another neighbor told Crain, “[d]on’t worry, you don’t have anything to worry about” and to “[j]ust remember, you didn’t do anything, you didn’t hurt that little girl.” *Id.* at 66. Those two neighbors also testified that Crain responded, “[y]es, I did do it; yes, you’re right, I didn’t hurt her, I didn’t do anything.” *Id.* Crain’s daughter testified that Crain stuttered, “yes, I did . . . did . . . didn’t do it; yes, you’re right, I didn’t hurt her.” *Id.*

A friend and in-law of Crain testified that around one month before Amanda disappeared, he “helped Crain lay crab traps in a ‘special’ location.” *Id.* Crain had told him at that time that “other crabbers would steal the crab traps if they knew of the spot.” *Id.* Then, after Amanda disappeared, Crain told the friend that if the friend told anyone the location of

those traps, “it could bury [Crain].” *Id.*

Darlington, the fisherman who saw Crain bring his boat to the boat ramp the day Amanda disappeared, also testified that Crain had told him on two occasions that he could “get rid of a body where no one could find it.” *Id.* at 65. Nonetheless, it is undisputed that Crain said this during a conversation about Crain’s “disagreements with other crabbers about Crain’s claims that they had stolen from [his] crab traps.” *Id.* at 65 n.4.

The State also introduced the photographs of the scratches on Crain’s arms and the testimony of a forensic pathologist opining on the photos. That pathologist “could not identify the source of the scratches with certainty, [but] testified that all but two of the scratches were more likely to be caused by the fingernails of a seven-year-old child than by another cause.” *Id.* at 65. He also testified that these scratches were likely inflicted within hours to days before the photographs were taken. *Id.* Finally, he testified that there was a “cluster of small gouges on Crain’s arm” which was more likely caused “by the small grasping hand of a child about seven years of age than by another cause.” *Id.*

Finally, the State introduced the testimony of a forensic scientist who had analyzed the tissue pieces from Crain’s toilet, the toilet seat, and the boxer shorts that Crain wore on the morning of Amanda’s disappearance. The scientist testified that “two blood stains were found

on the toilet seat, one blood stain was found on one of the pieces of toilet tissue, and one blood stain was found on the boxer shorts.” *Id.* at 66 (footnote omitted.) The scientist testified that the blood stain on the boxer shorts and one of the toilet seat’s blood stains “contained DNA consistent with the DNA extracted from personal items belonging to Amanda.” The second toilet seat stain and the stain on the toilet tissue “contained DNA consistent with a mixture of the DNA profiles of Amanda and Crain.” *Id.* “Testimony established that the probability of finding a random match between the DNA profile on the boxer shorts and Amanda’s known DNA profile is approximately 1 in 388 million for the Caucasian population.” *Id.*

In testimony at trial, Crain denied any involvement in Amanda’s death. *Id.* He testified that the last time he saw Amanda was when she was “sleeping in her mother’s bed” the morning of her disappearance. *Id.*

At the close of the case, the trial court instructed the jury on the charges. *See id.* Regarding “the first-degree murder charge in count I,” the court instructed the jury that the State could prove its case for felony murder based on kidnapping by proving “intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim.” *Id.* Regarding “the kidnapping charge in count II, the court instructed the jury that the State had to prove that Crain acted ‘with intent to commit or facilitate the commission of a homicide.’”

Id. at 67.

The jury convicted Crain of first-degree murder and kidnapping with intent to commit homicide. *Id.* “[T]he jury unanimously recommended the death sentence.” *Id.* The court imposed the death sentence after finding three aggravators and eight nonstatutory mitigators. *Id.* The three aggravators were Crain’s prior violent felonies, that he committed the murder during a kidnapping, and that Amanda was less than twelve years old. The court gave each of these factors “great weight.” The first three nonstatutory mitigators were Crain’s mental health, mental problems caused by substances, and his status as an “uncured pedophile.” The court gave these factors “some weight.” The remaining mitigators were Crain’s “history of abuse and [his] unstable home life,” the fact that Crain lacked the benefits of a public education, his history of “hard, productive work,” his “good prison record,” and his “capacity to form loving relationships.” *Id.* at 67 n.9.

B. Procedural Background

In the years following Crain’s conviction and sentence, he directly appealed and twice filed for state postconviction relief. And he appealed the denials of those requests for postconviction relief. Although the Florida Supreme Court modified one of his convictions, his death sentence remains in place.

First, Crain appealed his convictions and sentences. He argued on appeal that there was insufficient evidence to establish either that the murder of Amanda was intentional or that the kidnapping was committed with “intent to commit or facilitate commission of a homicide,” that the trial court erred in its jury instructions on felony murder and kidnapping, that the kidnapping conviction relied on as an aggravating circumstance was unsupported by the evidence, and that Florida’s death penalty statutory scheme was unconstitutional. See *Crain*, 894 So. 2d at 67. The Florida Supreme Court affirmed his murder conviction and death sentence, concluding that the trial court did not commit “fundamental error” in its instructions, that the evidence was sufficient to establish intent to inflict bodily harm, that Florida’s death penalty scheme was constitutional, and that any error in relying on the kidnapping conviction as an aggravating circumstance was “harmless beyond a reasonable doubt.” *Crain*, 894 So. 2d at 71, 75, 77, 78. But it concluded that there was insufficient evidence to support the jury’s conviction of kidnapping with intent to commit homicide and thus reduced his kidnapping conviction to false imprisonment. See *id.* at 76. Crain filed a petition with the United States Supreme Court for a writ of certiorari, which the Court denied on October 3, 2005. *Crain v. Florida*, 546 U.S. 829 (2005) (table).

Crain then moved for postconviction relief on September 7, 2006, under Florida Rule

of Criminal Procedure 3.851. (Ex. C-2 at 229–95.) First, he raised several ineffective assistance of counsel claims premised on the following alleged failures of counsel: (1) to challenge the state’s circumstantial evidence; (2) to seek exclusion of evidence; (3) to retain a medical expert on the scratch marks; (4) to obtain expert psychological evaluation and to present mitigation evidence through testimony and “otherwise challenge the prosecution’s case for the death sentence”; and (5) to cross examine witnesses effectively. (*Id.* at 232–63.) He next claimed that his execution would violate both the Florida and United States Constitutions because the method was cruel and unusual and because he “may be incompetent at time of execution.” (*Id.* at 263, 265.) He claimed that the rules prohibiting his lawyers from interviewing jurors after the trial violated the Florida and United States Constitutions. (*Id.* at 266.) Finally, he claimed that the “combination of procedural and substantive errors deprived [him] of a fundamentally fair trial” as guaranteed by those Constitutions. (*Id.* at 269.) Following multiple evidentiary hearings, the state postconviction court denied relief on all counts. (Ex. C-5 at 903.) The Florida Supreme Court affirmed the denial of postconviction relief on October 13, 2011. *Crain v. State* (*Crain II*), 78 So. 3d 1025 (Fla. 2011).

Several months later, on February 15, 2012, Crain filed his initial petition under § 2254 in this case, raising several grounds for relief. (Doc. 1.) As the case proceeded, the United

States Supreme Court decided *Hurst v. Florida*, holding that the structure Florida courts use to impose the death penalty unconstitutionally deprived defendants of their right to a jury trial. 577 U.S. 92 (2016). This Court stayed the case so that Crain could pursue supplemental postconviction relief in state court premised on that opinion. (Doc. 86.) He filed a motion for supplemental postconviction relief in Florida court on January 5, 2017. (Doc. 123-1.)

The state postconviction court denied the motion because it concluded that “any *Hurst* error was harmless.” (Doc. 117-5 at 14.) The Florida Supreme Court affirmed the order of denial, concluding that Crain’s *Hurst* error was harmless because the jury unanimously recommended a sentence of death. See *Crain v. State (Crain III)*, 246 So. 3d 206, 209 (Fla. 2018). The United States Supreme Court denied his petition for a writ of certiorari. *Crain v. Florida*, 139 S. Ct. 947 (2019).

After the Supreme Court denied Crain’s petition, Crain filed a motion to amend his petition under § 2254, which this Court granted. (Doc. 114; Doc. 115.) Crain then filed his Amended Petition, the State responded, and Crain replied. (Doc. 117; Doc. 122; Doc. 123.) Crain’s Amended Petition is now ripe for review.

II. STANDARD OF REVIEW

“Federal courts may grant habeas corpus relief to prisoners who are being detained ‘in

violation of the Constitution or laws or treaties of the United States.’ ” *Knight v. Fla. Dep’t of Corr.*, 936 F.3d 1322, 1330 (11th Cir. 2019) (quotation omitted). But that authority is limited by “both statute and Supreme Court precedent.” *Id.*

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), writs for habeas corpus may be granted only if the petitioner “is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). If the petitioner seeks review of a state court rejection of his federal claim, AEDPA prohibits the federal court from granting relief outside of two circumstances. *See id.* § 2254(d).

First, AEDPA permits federal courts to grant habeas relief if the state court’s decision was (a) “contrary to,” or (b) “involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” *Id.* § 2254(d)(1); *see Williams v. Taylor*, 529 U.S. 362, 404 (2000) (interpreting this section as providing relief for “two categories of cases”). A decision is “contrary to” clearly established federal law “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at 412–13. A decision involves an “unreasonable application” of clearly established federal law “if the state court identifies the

correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. Moreover, a state court does not unreasonably apply federal law if "'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The phrase "clearly established Federal law" encompasses the holdings, but not dicta, of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412.

When the last state court to decide a federal claim explains its decision in a reasoned opinion, a federal habeas court reviews the specific reasons as stated in the opinion and defers to those reasons if they are reasonable. See *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Nonetheless, federal courts do not "flyspeck the state court order or grade it." *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1349 (11th Cir. 2019).

Second, AEDPA permits federal courts to grant habeas relief if the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). But "deference

does not imply abandonment or abdication of judicial review” and “does not by definition preclude relief.” *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). If “the direction of the evidence, viewed cumulatively, was ‘too powerful to conclude anything but [the petitioner’s factual claim],’” then the state court’s factual findings were “unreasonable.” *Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1294 (11th Cir. 2015) (alterations in original) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005)). In the “rare case in which the petitioner . . . show[s] the state courts made an unreasonable factual determination,” the federal court conducts a “de novo” review “without deference to the [state court’s] decision.” *Jones v. Walker*, 540 F.3d 1277, 1288 (11th Cir. 2008).

Even if AEDPA does not foreclose relief, federal courts are also barred by Supreme Court precedent from granting a writ of habeas corpus to a petitioner seeking “the benefit of a ‘new’ rule of constitutional law announced after [his] conviction became final.” *Knight*, 936 F.3d at 1331 (quotation omitted). Only when a “new” rule applies retroactively may a federal court rely on it to disturb a state conviction that is final. *See id.*

III. ANALYSIS

Crain brings eight claims. In his first three claims, he contends that he received

ineffective assistance of counsel. In his fourth, seventh, and eighth claims, he argues that certain Florida statutes are unconstitutional. In his fifth claim, he argues that the State did not prove its case that the murder of Amanda was premediated. And in his sixth claim, he argues that the trial court gave a deficient jury instruction. None of his claims succeed.

A. Ineffective Assistance of Counsel

Crain brings several claims for ineffective assistance of trial counsel under the Sixth Amendment. Because he brings these claims under AEDPA, he must show that the state court's rejection of his ineffective assistance claims was either contrary to, or an unreasonable application of, clearly established federal law. See § 2254(d). Crain contends that the state court's decision was an unreasonable application of the Supreme Court's decision in *Strickland v. Washington*, which held that a defendant must show that his trial counsel's performance was deficient and that the counsel's errors caused him prejudice to succeed on an ineffective assistance of counsel claim under the Sixth Amendment. 466 U.S. 668, 686–87 (1984).

For the deficiency prong, counsel must make “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. The lynchpin of this analysis is whether counsel's conduct “was reasonable considering all the circumstances.” *Id.* at 688. A petitioner shows that counsel acted unreasonably when he

identifies “acts or omissions [of counsel that] were outside the wide range of professionally competent assistance.” *Id.* at 690. A court “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* When a petitioner’s counsel is experienced, the presumption of competent representation is even higher. See *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000), *cert. denied*, 531 U.S. 1204 (2001).

To show prejudice from deficient counsel, a petitioner must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691.

Finally, the petitioner must show that the state court’s determination of whether the petitioner suffered prejudice from deficient counsel was unreasonable. “The question ‘is not whether a federal court believes the state court’s determination’ under the *Strickland* standard

‘was incorrect but whether that determination was unreasonable—a substantially higher threshold.’” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schiro v. Landrigan*, 550 U.S. 465, 473 (2007)). Consequently, federal petitioners rarely prevail on claims of ineffective assistance of counsel because “[t]he standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.” *Richter*, 562 U.S. at 105 (quotation and citations omitted).

i. Failure to Challenge Circumstantial Case

In his first ineffective assistance of counsel claim, Crain contends that his attorneys were ineffective in failing to challenge the State’s “circumstantial case.” (Doc. 117 at 8.) More specifically, Crain alleges that his attorneys “should have retained an expert to independently test or examine the DNA evidence” and to testify that the State’s DNA testing was not reliable. (*Id.*) He also alleges that his attorneys should not have stipulated that the victim’s DNA that was found on the toilet in Crain’s bathroom and on his boxer shorts was derived from bloodstains. (*Id.* at 8–10.)

The Florida Supreme Court rejected Crain’s claim. *See Crain II*, 78 So. 3d at 1034. First, the Florida Supreme Court concluded that Crain’s counsel made a strategic decision to stipulate that the stains on his boxer shorts were blood, noting two reasons provided by Crain’s

attorneys. The first reason was that contesting that the stains were blood would have been inconsistent with Crain's statements to the media, wherein he explained why Amanda's blood would have been present in his home. See *Crain II*, 78 So. 3d at 1036. The second reason was that they had engaged a confidential expert who "did not raise a concern that the failure" of the State's expert to perform "a substrate control test in this case affected the validity or reliability of the test results," nor did he "advise counsel that a description of the biological substance on the defendant's underwear as blood was scientifically inaccurate or misleading." *Id.* Second, the Florida Supreme Court concluded that, even if the stipulation was an error, it did not prejudice Crain. *Id.* at 1037.

Crain contends that the Florida Supreme Court erred in rejecting his claim, raising both factual attacks and legal attacks against the reasonableness of the court's ruling. None are successful.

1. Factual Attacks Under § 2254(d)(2)

Crain argues that the Florida Supreme Court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2); (Doc. 123 at 36.) He raises three factual findings that were "unreasonable." He argues that the Florida Supreme Court "fail[ed] to consider and respond to the prejudice of

stipulating to all the DNA coming from a blood stain,” that he “did not state [in his testimony] that he saw the victim’s blood placed on his underwear or in the toilet,” and that he did not insist on offering innocent explanations of blood. (Doc. 123 at 20–22.) But his arguments fail to show either that the court made an “unreasonable determination” or based any decision on incorrect facts.

First, Crain fails to explain how the court’s “fail[ure]” to consider the prejudice he would face from the stipulation rendered its factual findings “unreasonable.” (*Id.* at 21.) He cites his appellate brief to the Florida Supreme Court and explains that he offered a “scenario of innocence,” but he offers no specific factual findings that were unreasonable. (*Id.*) To the extent his argument is that the court found there was no innocent explanation for the blood or that his attorneys never offered one, the argument fails because the court never made such a finding.

Second, Crain argues that the Florida Supreme Court made an unreasonable factual determination because he never said he “saw the victim’s blood placed on his underwear or in the toilet.” (*Id.*) As a preliminary matter, Crain does not specify what factual finding the Florida Supreme Court incorrectly made. But it appears that Crain takes issue with the court’s statement that “Crain took the stand in his own defense, [where] he appeared to offer an

innocent explanation for the blood inside his bathroom.” *Crain II*, 78 So. 3d at 1035.

To the extent that Crain takes this line from the court as a factual finding that Crain admitted that he “saw the victim’s blood placed on his underwear or in the toilet,” the surrounding context of the court’s opinion indicates it made no such affirmative finding. (Doc. 123 at 21.) Instead, the court found that he offered explanations for the presence of both his and the victim’s blood. *Crain II*, 78 So. 3d at 1035. The victim’s blood was present because she was “wiggling her tooth around” and the tooth was “bleeding and getting [blood] on her finger.” *Id.* His blood was present because he “suffers from hemorrhoids and bleeds almost all the time when he tries to use the bathroom.” *Id.* Just several paragraphs later, the court relied on “Crain’s continued insistence that *if* blood was found inside his bathroom or on his clothes, it was due to Amanda’s loose tooth.” *Id.* at 1037 (emphasis added). Thus, the court’s finding that Crain offered explanations for the blood does not entail a finding that Crain admitted that blood was present.

And even if the court found as a factual matter that Crain admitted that he saw blood in his bathroom, the Florida Supreme Court did not “base” its decision on this fact. § 2254(d)(2); see *Wiggins*, 539 U.S. at 552 (Scalia, J., dissenting) (explaining that an error was immaterial when the state court’s decision “was not ‘based on’ this mistaken factual

determination”). Instead, the court concluded that Crain’s attorneys made a reasonable decision given “Crain’s continued insistence that *if* the blood was found inside his bathroom or on his clothes,” there was an innocent explanation. *Crain II*, 78 So. 3d at 1037 (emphasis added). The court thus relied on a fact that Crain does not contest: he had innocent explanations if there was blood in his bathroom.

Third, Crain attacks the court’s finding that he risked losing credibility if he did not concede that there was blood. (Doc. 123 at 22.) The court reasoned that Crain’s attorneys made the reasonable decision to stipulate because challenging the existence of blood risked presenting inconsistent statements from Crain to the jury. The court found this based on Crain making “prior statements to the media” about the existence of blood, his “continued insistence that if blood was found inside his bathroom or on his clothes, it was due to Amanda’s loose tooth,” and his “testimony to this effect at trial.” *Crain II*, 78 So. 3d at 1037. Crain argues that these were unreasonable factual findings because he “hardly mentioned anything about the victim bleeding.” (Doc. 123 at 22.)

Although Crain is correct that his statements on the stand about the presence of blood were minimal, that is relevant only to whether the court unreasonably found that he “testi[fied] to this effect”—that is, innocent explanations of blood—“at trial.” *Crain II*, 78 So. 3d at 1037.

And there was not so little evidence of Crain's testimony at trial that the court's finding was unreasonable. As Crain himself admits now, he testified at trial that he "pulled off . . . toilet paper and handed it to [Amanda]" because her tooth was bleeding. (Ex. A-19 at 2817.) He then told her to use it so she wouldn't "get [the blood] on [her] fingers." (*Id.*) He also testified at trial that sometimes when he uses the bathroom, his hemorrhoids cause him to bleed. (*Id.* at 2936.) These statements support a finding that Crain testified "to th[e] effect" that innocent explanations existed.

Crain fails to provide any argument undermining the court's factual finding that he had made statements to the media prior to trial that offered innocent explanations of the blood and that he insisted to his counsel on offering innocent explanations at trial. Moreover, these findings were not unreasonable. Crain had offered an innocent explanation for the presence of the victim's blood inside his residence in pretrial statements to the police and the media. (Ex. C-55 at 7388–89, 7392, 7428.) And Crain insisted on testifying at trial to explain why the victim's blood may have been in his residence. (*Id.* at 7429–30.)

Crain's factual attacks under § 2254(d)(2) in support of his first claim fail.

2. Legal Attacks Under § 2254(d)(1)

In Crain's remaining arguments, he contends that the Florida Supreme Court

unreasonably applied federal law to his claim. Specifically, he contends that the court unreasonably determined that his trial counsel's performance was not deficient and did not prejudice him. But the Florida Supreme Court's decision was not an unreasonable application of *Strickland*, so his arguments fail.

a. Deficiency

The Florida Supreme Court concluded that Crain's attorneys were not deficient in the challenge they mustered against the State's case. The court reasoned that Crain's attorneys' decision to stipulate was reasonable because a confidential expert they retained gave them no reason to think that the evidence was not blood and because of their concern for Crain's credibility at trial. See *Crain II*, 78 So. 3d at 1037. Crain fails to show that this conclusion was unreasonable. See *Williams*, 529 U.S. at 362.

First, Crain's attorneys hired a confidential expert, Dr. William Shields, to challenge the State's DNA evidence. (Ex. C-55 at 7388, 7421–23.) Dr. Shields did not provide any information to refute the lab findings, did not find any evidence of contamination during the testing process, and 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. (*Id.* at 7426–28.) Most importantly here, Shields did not advise counsel that a

description of the biological substance on Crain's boxer shorts as blood was scientifically inaccurate or misleading. (*Id.* at 7426–28.)

Second, Crain had offered a reasonable explanation for the presence of the victim's blood inside his residence in pretrial statements to the police and the media. (*Id.* at 7388–89, 7392, 7428, 7435.) And Crain insisted on testifying at trial to explain why the victim's blood may have been in his residence. (*Id.* at 7429–30.) Counsel did not want to present a position inconsistent to that which Crain had previously stated. (*Id.* at 7388.) It was not unreasonable for the Florida Supreme Court to conclude that it was reasonable for the attorneys to decide that these alternative positions would have presented a less forceful and less credible position to the jury than simply admitting that there was blood present and giving innocent explanations for its presence. Counsel does not give ineffective assistance simply because they could have but chose not to “present[] an alternative . . . theory of the case.” *Dill v. Allen*, 488 F.3d 1344, 1357 (11th Cir. 2007).

Finally, because Crain had the benefit of experienced trial counsel, the Court applies an extra layer of deference to their decisions. *See Chandler*, 218 F.3d at 1316. Crain was represented by Charles Traina and Daniel Hernandez. Traina had practiced law for nearly fifteen years, working his first ten years at the Public Defender's Office where he became chief

of the capital division and the remaining years in private practice where he practiced primarily criminal defense. Traina had been involved in approximately 100 to 150 jury trials, four of which were death penalty cases that were tried to their conclusion. (Ex. C-55 at 7376–77.) At the time of Crain’s 1999 trial, Hernandez had practiced law for nearly twenty-two years, working at the State Attorney’s Office, in private practice as a criminal defense attorney, and had been involved in approximately 200 felony jury trials, fifteen or twenty of which were first-degree murder trials, including death penalty cases. (*Id.* at 7283–84.)

Therefore, the Florida Supreme Court did not unreasonably decide that Crain’s attorneys made a reasonable decision to not contest the State’s DNA evidence, stipulate that the stains in Crain’s bathroom and on his boxer shorts were blood, and have Crain explain why the victim’s blood was present. Crain’s other arguments are unavailing.

In his reply, Crain argues that “[m]ore testing than what was done in this case was necessary before the defense could conclude that the DNA came from blood rather than another source.” (Doc. 123 at 24.) But Dr. Shields did not advise counsel that it was inaccurate or misleading to describe the stain on Crain’s boxer shorts as blood, and he “didn’t give [counsel] any reason for [independent testing].” (Ex. C-55 at 7391.) Crain’s attorneys’ decision to rely on his expert and not pursue independent testing was not deficient. *See Harvey v.*

Warden, Union Corr. Inst., 629 F.3d 1228, 1262 (11th Cir. 2011) (stating that “*Strickland* allows attorneys to limit investigations if it would be reasonable to do so” and holding that trial counsel’s performance in choosing to rely on his expert, rather than obtain a second opinion, did not constitute ineffective assistance).

Crain disagrees, contending that norms of professional conduct required his attorneys to “reasonably investigate” before deciding to stipulate. Crain argues that a reasonable investigation required independent testing of the evidence. As support, he cites the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, which states that counsel in death penalty cases should “request [from the government] any physical evidence . . . relevant to the offense or sentencing, as well as the underlying materials,” and then, “[w]ith the assistance of appropriate experts . . . aggressively re-examine all of the government’s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.” 31 HOFSTRA L. REV. 913, 1020 (2003). Crain is right that the ABA Guidelines are “guides to determining what is reasonable” attorney performance. *Strickland*, 466 U.S. at 688. “[B]ut they are only guides.” *Id.* It is easy to conclude in the abstract that counsel should always examine the forensic evidence, but the abstract “can[not] satisfactorily take account of the variety of circumstances faced by defense counsel or the range

of legitimate decisions regarding how best to represent a criminal defendant.” *Id.* at 688–89. Here, counsel had engaged an expert, provided that expert with all of the reports—if not the forensic evidence itself—and that expert told Crain’s attorneys that he could not find anything “inconsistent . . . about the findings” from the State’s experts and did not give his attorneys “any reason to think that [h]is findings would be significantly different or in any way, shape[,] or form measurably different than what the State was” going to tell the jury. (Ex. C-55 at 7392.) “[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.” *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). Crain fails to show that his counsel unreasonably decided to draw their line after consulting with an expert.

Crain also contends that his lawyers should have objected to the State arguing that the underwear lacked blood anywhere “except where the victim’s DNA was found” when it failed to test a “dark stain in the rear area of the boxers” that “possibly contain[ed] a mixture of blood and feces.” (Doc. 123 at 26.) But he does not indicate when the State said this. If the State said this after the stipulation, then it is unclear how the statement could prejudice him in the light of the fact that the jury already heard a stipulation that the boxers contained a bloodstain with the victim’s DNA. The presence or nonpresence of other bloodstains would be

immaterial. This argument also fails.

b. Prejudice

Even assuming deficient performance, Crain has not shown that the Florida Supreme Court unreasonably rejected Crain's contention that he suffered prejudice from the errors he identified. Crain argued to that court—and now argues to this Court—that if his attorneys did not make the alleged errors, “the jury would have heard testimony to the effect that the DNA could have been derived from a variety of sources, not just blood,” and that there were potential problems with the way the DNA evidence had been handled during testing. *Crain II*, 78 So. 3d at 1037; (Doc. 123 at 29–30). The court rejected this argument, reasoning that the State's expert had testified at the postconviction evidentiary hearing that he had never found “anything other than blood” that reacts to the test he used to conclude that the evidence in this case was blood and that “the proper safety protocols were in place” and “there was no indication that contamination occurred in this case.” *Crain II*, 78 So. 3d at 1038. The court also observed that, although Crain's expert provided reasons to doubt the reliability of the State's tests, he “was unable to testify that [the state's expert's] failure to use conclusive blood testing, the source of the DNA evidence in this case was derived from anything other than blood or that cross-contamination actually occurred.” *Id.*

Crain disagrees. He cites his expert's testimony at the postconviction evidentiary hearing to argue that a jury would have heard about sources other than blood that could have been the source of the victim's DNA in his boxer shorts and that the jury would have heard his expert's testimony about the problems that may have contaminated the test results. (Doc. 123 at 20.) Crain is of course correct that there is a possibility that the testimony would have created some doubt in jurors' minds about the reliability of the evidence, but the evidence he presents would create only that: a possibility of doubt. As the Florida Supreme Court noted, the jury would have also undoubtedly heard from Florida's expert about his thirty-five years of using his testing method and that the method always correctly identified blood. See *Crain II*, 78 So. 3d at 1038; see also *Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 927 F.3d 1150, 1176 (11th Cir. 2019) (requiring courts to "anticipate what a retrial of the penalty phase would look like" by considering, among other evidence, the "evidence the state presented to the state habeas court"). They would have also heard from that expert that "proper safety protocols were in place to detect and avoid cross-contamination." *Crain II*, 78 So. 3d at 1038. In the face of this counterevidence, Crain fails to provide anything more than a possibility that his trial would have gone differently had his counsel taken the actions he identifies. See *Bennett v. Fortner*, 863 F.2d 804, 809 (11th Cir. 1989) (concluding that the lack of test results

renders any prejudice “merely speculative”). And the possibility of his trial going differently is not enough; Crain bears the burden of showing both a “reasonable probability” of a different outcome and that the Florida Supreme Court unreasonably concluded that he failed to carry that burden. *Strickland*, 466 U.S. at 694; see § 2254(d)(1).

Crain has not shown that the Florida Supreme Court unreasonably applied *Strickland* or unreasonably determined the facts in denying his claim. He is not entitled to relief on his first claim.

ii. Failure to Retain Medical Expert Challenging Scratch Mark Evidence

In Crain’s second ineffective assistance of counsel claim, he claims that his trial attorneys were ineffective in failing to retain a medical expert to challenge the opinion of Dr. Vega, the State’s medical examiner. (Doc. 123 at 36.) He contends that an expert could have challenged Dr. Vega’s conclusions on the cause of the scratch marks on Crain. He alleges that an expert would have testified (1) the scratches were not likely caused by fingernails because “fingernail marks are curvilinear” and none of the scratches were curvilinear, (2) Dr. Vega’s testimony that fingernails can produce linear marks was questionable because that rarely occurs, (3) most of the scratches on Crain were not caused by fingernails, (4) although two scratches could have been caused by fingernails, it was unlikely, and (5) that Crain’s “severely

sun-damaged” skin would have enabled an expert to undermine Dr. Vega’s opinion. (Doc. 117 at 12.) But because the Florida Supreme Court did not unreasonably reject his claim, Crain’s second ineffective assistance of counsel claim fails.

The Florida Supreme Court concluded that Crain’s attorneys did not perform deficiently by deposing Dr. Vega, obtaining significant concessions regarding the scratch marks, and making the strategic decision to confront him through cross-examination instead of retaining an expert to challenge Dr. Vega’s findings. *Crain II*, 78 So. 3d at 1040–41. The court specifically noted Dr. Vega’s concession “that he was unable to reach any conclusions as to the precise origin of the scratch marks.” *Crain II*, 78 So. 3d at 1039–40. The court concluded that Crain’s attorneys’ decision to use such “significant concessions regarding the nature of the scratch-marks testimony” to challenge Dr. Vega’s testimony instead of retaining an expert was reasonable because “[i]n many instances cross-examination will be sufficient to expose defects in an expert’s presentation.” *Id.* at 1040 (quoting *Richter*, 562 U.S. at 111 (2011)).

Crain fails to show that the Florida Supreme Court unreasonably determined that his attorneys acted reasonably. “*Strickland* does not enact Newton’s third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.” *Richter*, 562 U.S. at 111. In many cases, “cross-examination will be sufficient to

expose defects in an expert's presentation." *Id.* Crain's attorneys "elicited concessions" from Dr. Vega in his deposition and made a strategic decision to highlight those concessions in cross-examination instead of retaining a separate expert. *Id.*; *Crain II*, 78 So. 3d at 1040. The Florida Supreme Court did not unreasonably apply *Strickland* in concluding that Crain received adequate counsel. See *Richter*, 562 U.S. at 111 (concluding that "it would have been reasonable to find that [the petitioner] had not shown his attorney was deficient" when the attorney engaged in vigorous cross-examination).

Crain disagrees, citing a litany of secondary sources arguing that cross-examination of an opposing expert witness is less persuasive than the testimony of a favorable expert witness. (Doc. 123 at 44–50.) Even assuming that cross examination is ordinarily inferior, that does not render the Florida Supreme Court's determination that Crain's attorneys were not deficient unreasonable. In preparing his defense, Crain's attorneys necessarily balanced competing strategies and were entitled to "balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107; see also *Adams v. Wainwright*, 804 F.2d 1526, 1536 (11th Cir. 1986) (holding that defense counsel was not ineffective for failing to obtain expert pathologist, where defense counsel cross-examined state expert and argued weaknesses in testimony to jury in closing argument), *rev'd on other grounds sub nom. Dugger*

v. Adams, 489 U.S. 401 (1989).

In affirming the denial of the claim, the Florida Supreme Court also concluded that Crain failed to demonstrate prejudice. Although Dr. Wright, a forensic pathologist called by Crain’s postconviction counsel, testified that some of the scratch marks were “quite old” and concluded that some were inconsistent with fingernails, he could not rule out fingernails as the cause of the scratches and admitted that “it was not unprofessional or outside the normal permissible mode of expression within forensic pathology for Dr. Vega to indicate that Crain’s scratch marks were consistent with being caused by human fingernails.” *Crain II*, 78 So. 3d at 1041–42. Because Dr. Wright’s testimony fails to establish a reasonable probability that the outcome would have been different had the jury heard it, Crain also fails to prove that the Florida Supreme Court unreasonably determined that he failed to establish prejudice regarding his counsel’s choice not to retain an expert to challenge the State’s scratch mark evidence.

Crain fails to show that the Florida Supreme Court unreasonably rejected his claim that he received ineffective assistance of counsel when his trial attorneys failed to retain a medical expert to opine on the scratch marks. Accordingly, Crain’s second claim fails.

iii. Failure to Obtain Expert Psychological Evaluation, Adequately Present Mitigation Evidence, and Otherwise Challenge the State's Case for the Death Sentence

In Crain's third ineffective assistance of counsel claim, he argues that his trial attorneys failed to both "supervise the administration of available mental health tests" and to "present all available mitigation [evidence] to the jury." (Doc. 117 at 14.) The Florida Supreme Court rejected both arguments. It observed that the first argument essentially challenged the lower court's credibility finding and concluded that the lower court's findings were "sufficiently supported by the record." *Crain II*, 78 So. 3d at 1044. And the court concluded that Crain waived his second argument by failing to identify or argue for any evidence that his counsel should have presented to the jury. *Id.* at 1044 n.13. Both of Crain's arguments fail to show he is entitled to habeas relief.

1. Failure to supervise the administration of available mental health tests and present competent expert psychological evaluation and testimony

First, Crain alleges that his attorneys performed deficiently by relying on an incompetent expert who used outdated tests without good reason and failed to obtain data regarding Crain's mental state at the time of the offense. (Doc. 123 at 56.) According to Crain, if not for these failures, the jury would likely not have recommended the death sentence. Crain

contends that the Florida Supreme Court improperly denied his claim because it unreasonably determined that Crain's trial expert was credible and unreasonably applied *Strickland*. But Crain shows no unreasonable determination of facts nor any unreasonable application of law.

During the penalty phase of the trial, Crain's attorneys called Dr. Robert Berland, an experienced board-certified expert in forensic psychology, to testify about Crain's mental illnesses. (Ex. A-22 at 3334–3411.) He had evaluated whether Crain suffered any mental illness and whether any such “mental health problem . . . meet[s] any . . . legal criteria that involve mental health issues.” (*Id.* at 3341–42.) In this process, he gave Crain two kinds of tests, a Minnesota Multiphasis Personality Inventory (MMPI) test and a Wechsler Adult Intelligence Scale (WAIS) test. (*Id.* at 3345.) Based on the MMPI, Dr. Berland found that Crain suffered from delusional and paranoid thinking. (*Id.* at 3372.) Based on the WAIS, Dr. Berland found that Crain had an I.Q. of approximately 85, was not mentally “retarded,” and showed evidence of impaired functioning due to a brain injury. (*Id.* at 3386–93.) Dr. Berland also testified he was confident Crain was psychotic. (*Id.* at 3392.)

Dr. Stein, a board certified clinical and forensic psychiatrist, testified for the State during the penalty phase. (Ex. A-24 at 3526–91.) She testified that Crain's history gave no indication of psychosis. (*Id.* at 3540–41.) Dr. Stein also testified that the WAIS test “is an

intelligence test” and not considered “a test that can be used to detect brain injury.” (*Id.* at 3586.)

Crain then sought postconviction relief in state court on the basis that his attorneys failed to provide a better expert, one who would have used the correct tests and obtained history to support a finding of psychosis. During the postconviction hearings, Dr. Stein testified that there was no evidence that Crain was suffering from a psychotic disorder, the WAIS and MMPI were “outdated tests,” the WAIS “is not a test that is used to diagnose brain injury,” and neuropsychological testing should be used when “you suspect that someone has any type of brain disorder.” (Ex. C-60 at 7855–56.) Crain’s postconviction relief expert, Dr. Cunningham, testified that the WAIS test was “obsolete,” and the MMPI test was “antiquated.” (Ex. C-57 at 7597, 7600.) He also testified that Dr. Berland had an “adequate basis” for his diagnosis that Crain was psychotic. (*Id.* at 7600.) Finally, he testified that Crain’s counsel should have obtained a neuropsychological assessment of Crain. (*Id.* at 7626.)

The postconviction court denied Crain’s claim, finding Dr. Berland’s testimony credible and holding that Crain’s attorneys did not unreasonably rely on his testimony. The Florida Supreme Court affirmed, reasoning that Crain “essentially challenge[d] the postconviction court’s credibility determinations.” *Crain II*, 78 So. 3d at 1044. The court

explained that it reviewed credibility findings under a highly deferential standard and then concluded that the postconviction court's determination that Dr. Berland was credible was "sufficiently supported by the record." *Id.* Moreover, the court concluded that Crain's attorneys were not ineffective in relying on Dr. Berland's testimony "even if, in retrospect, [Dr. Berland's] evaluations may not have been [as] complete as others may desire." *Id.* (quoting *Darling v. State*, 966 So. 2d 366, 377 (Fla. 2007)). Crain fails to show that the court unreasonably determined facts or unreasonably applied *Strickland* to his case.

First, Crain fails to show that the Florida Supreme Court unreasonably determined the facts of his case in affirming the lower court's finding that Dr. Berland credibly testified about his testing methods. Crain contends that Dr. Stein and Dr. Cunningham's testimony that Dr. Berland used outdated tests "should have diminished the value of Dr. Berland's penalty phase testimony" and perhaps his "credibility in total." (Doc. 123 at 56.) As an initial matter, Crain and the Florida Supreme Court correctly frame this issue as "essentially [a] challenge[to] the postconviction court's credibility determinations." *Crain II*, 78 So. 3d at 1044. After all, "[w]hen there is conflicting testimony by expert witnesses," determining the value of testimony "constitutes a credibility determination." *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000).

Because Crain challenges the Florida courts' credibility determinations, he carries a heavy burden under § 2254(d)(2). As a general matter, "the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review" and federal courts reviewing a habeas petition "have no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court." *Nejad v. Att'y Gen.*, 830 F.3d 1280, 1292 (11th Cir. 2016) (quotations omitted). To show that the Florida court unreasonably determined Dr. Berland's credibility, Crain must present "clear and convincing evidence" that he was not credible. *Bishop v. Warden, GDCP*, 726 F.3d 1243, 1259 (11th Cir. 2013).

Crain proffers no clear and convincing evidence showing that Dr. Berland was not a credible expert witness regarding the reliability of the tests he used. Although two experts testified that Dr. Berland should not have used the tests he used, Dr. Berland gave several reasons for his decision to use those tests. He explained that he used the original WAIS test because he was primarily concerned with finding brain damage in Crain, and the original WAIS "has been determined by neuropsychological research to be a better measure than the subsequent versions of the test of impairment from brain injury." (Ex. C-59 at 7783–85.) Dr. Berland explained that because the WAIS indicated brain impairment from brain injury, he

recommended a PET scan rather than neuropsychological testing to verify brain injury. (*Id.* at 7786–87.) In his experience, Dr. Berland was always asked at trial whether any medical brain scans were performed to verify brain injury, and jurors believe neuropsychological testing results can be “faked” because the testing requires a voluntary response by the defendant. (*Id.*) Finally, Dr. Berland explained that he used the MMPI rather than the MMPI-2 because the MMPI was “clinically and statistically equivalent to the” MMPI-2, and “a much bigger research history” supported using the MMPI. (*Id.* at 7791.) Crain fails to provide clear and convincing evidence that the Florida Supreme Court was wrong to find substantial evidence supporting the lower state court’s finding that Dr. Berland credibly testified about his testing methods. See *United States v. Stein*, 964 F.3d 1313, 1322 (11th Cir.) (reasoning that a decision to credit one among multiple “dueling experts” is not clear error if the “decision is reasonably based on evidence found in the record”), *cert. denied*, 141 S. Ct. 954 (2020).

Crain also argues, albeit obliquely, that the Florida Supreme Court unreasonably affirmed the postconviction court’s finding that Dr. Berland credibly testified that Crain suffered psychosis. Crain contends that “Dr. Berland failed to obtain data to support his conclusion” that Crain suffered from psychosis. (Doc. 123 at 56.) It is unclear whether the Florida Supreme Court addressed this argument, but it is immaterial. Even assuming that the

Florida Supreme Court unreasonably found Dr. Berland credibly testified that Crain suffered psychosis, Crain must still show that he is entitled to relief under a de novo review of the claim. See *Jones v. Walker*, 540 F.3d at 1288 (stating that federal courts review a claim de novo if the petitioner shows that “the state courts made an unreasonable factual determination”). And he has not done so.

Crain fails to show that his attorneys were unreasonable in relying on an expert’s non-credible testimony that Crain suffered from psychosis. More specifically, he fails because he offers no evidence that he suffered from psychosis. And if no evidence exists of Crain’s psychosis, Crain’s attorneys had no other evidence of psychosis on which to rely, thus they were not ineffective for relying on an expert who testified, even if not persuasively, that he was psychotic. Instead of providing evidence of psychosis, he alleges that Dr. Berland should have obtained “a history from [Crain] of his mental state at the time of the offense” and should not have relied on the “rationale that [Crain] would not have told him about it.” (Doc. 117 at 15.) But Dr. Berland testified that he attempted to obtain this history, but Crain was unwilling to discuss the events that occurred the night the victim disappeared. (Ex. A-23 at 3498–99.) And if Crain refused to discuss these events, Dr. Berland was not inadequate for failing to obtain the data, nor were Crain’s attorneys ineffective for relying on Dr. Berland. See *Knowles v.*

Mirzayance, 556 U.S. 111, 125 (2009) (“Competence does not require an attorney to browbeat a reluctant witness into testifying, especially when the facts suggest that no amount of persuasion would have succeeded.”).

Second, Crain fails to show that the Florida Supreme Court unreasonably applied *Strickland*. Because that court found the postconviction court’s finding that Dr. Berland was credible to be supported by substantial evidence, it concluded that Crain’s attorneys were not deficient in relying on him. Crain disagrees.

He argues that his attorneys were ineffective in failing to order a neuropsychological assessment. (Doc. 123 at 52.) But, in preparing for the penalty phase, his attorneys relied on the evaluation and advice of Dr. Berland, a highly qualified and experienced expert. One of Crain’s attorneys testified that he relied on Dr. Berland when he informed counsel that the WAIS was a legitimate tool to detect possible brain injury, the test revealed Crain may have a brain injury, and obtaining a PET scan to attempt to supplement the test results was better than obtaining a neuropsychological evaluation. (Ex. C-55 at 7411.) Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in hindsight, those evaluations may not have been as complete or successful as others may desire. See *Harvey*, 629 F.3d at 1262 (holding that attorneys may limit investigations if reasonable to

do so after consulting with an expert). Therefore, counsel was not ineffective for failing to order neuropsychological testing.

Nor were Crain's attorneys deficient in allowing Dr. Berland to use the WAIS test and MMPI test to evaluate Crain. Although both Dr. Cunningham and Dr. Stein called those tests "outdated" (considering there were revised versions of those tests) and testified that the WAIS could not be used to evaluate brain injury, Dr. Berland gave reasonable explanations for using those tests. Dr. Berland informed counsel that research revealed the WAIS test was better than the subsequent versions of the test at detecting brain injury, the issue about which he was most concerned. Dr. Berland also explained that a larger research history supported using the MMPI test rather than the MMPI-2 test. Therefore, Crain's attorneys were not ineffective in relying on Dr. Berland's expertise in deciding which tests to use. *See Harvey*, 629 F.3d at 1262 (holding that trial counsel's performance in choosing to rely on his expert, rather than obtain a second opinion, did not constitute ineffective assistance).

Crain fails to show that he is entitled to a writ of habeas corpus because of his attorneys' reliance on Dr. Berland.

2. Failure to present all available mitigation

Crain also claims that his attorneys were ineffective in failing to present all available

mitigating evidence. Crain's claim fails because it is procedurally barred, because he fails to offer more than a conclusory allegation of evidence his trial attorneys could have obtained, and because he fails to show prejudice.

The Florida Supreme Court denied this claim on an independent and adequate state law ground, procedurally barring Crain's claim from federal habeas review. Specifically, the Florida Supreme Court concluded that Crain failed to identify or argue "for any mitigating evidence that should have been, but was not, presented at trial" and thus waived the claim for "purposes of appeal." *Crain II*, 78 So. 3d at 1044 n.13. "[A] federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). If the state court's procedural rule "is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed," the rule precludes federal review unless the petitioner establishes an exception. *Id.* at 9–10; see *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732 (2022) ("[F]ederal courts generally decline to hear any federal claim that was not presented to the state courts 'consistent with [the State's] own procedural rules.'" (quotation omitted) (second alteration in original)).

Here, the Florida Supreme Court rejected Crain's claim on a "nonfederal ground

adequate to support the judgment and the rule is firmly established and consistently followed.” *Martinez*, 566 U.S. at 9. First, the Florida Supreme Court clearly rested its decision on waiver, which is a nonfederal ground. See *Crain II*, 78 So. 3d at 1044 n.13; see also *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2011) (requiring that the state court judgment “clearly and expressly state that it is relying on state procedural rules” and must not be “intertwined with an interpretation of federal law” (quotation omitted)). Second, appellate waiver is a “firmly established and regularly followed” requirement under Florida law. See *Doorbal v. Dep’t of Corr.*, 572 F.3d 1222, 1228 (11th Cir. 2009) (quotations omitted). Finally, the state grounds are adequate because they are “faithfully and regularly applied,” *Card v. Dugger*, 911 F.2d 1494, 1517 (11th Cir. 1990); see *Doorbal*, 572 F.3d at 1228 (citing many examples of Florida courts enforcing its appellate waiver rule), and because Crain has pointed to nothing in the record showing that the postconviction court’s application of the procedural waiver rules was applied “in an arbitrary or unprecedented fashion,” nor was it “manifestly unfair.” *Judd*, 250 F.3d at 1313 (quotation omitted).

Moreover, even if Crain’s claim was not procedurally barred, Crain fails to offer more than a conclusory allegation that his attorneys could have presented additional mitigating evidence at his sentencing. Specifically, Crain alleges that “[a]t the [postconviction] evidentiary

hearing, collateral counsel showed that there was substantial mitigating evidence available at the time of trial which was not presented.” (Doc. 123 at 56.) But Crain fails to cite any specific “substantial mitigating evidence” that his trial attorneys should have obtained and presented during sentencing. This will not do. Ineffective assistance of counsel claims cannot be proven through conclusory assertions. *See Boyd v. Comm’r, Ala. Dep’t of Corr.*, 697 F.3d 1320, 1333 (11th Cir. 2012) (affirming dismissal because the habeas petitioner “fail[ed] to detail” what mitigating evidence his trial attorneys should have presented or “how [that evidence] would have affected the outcome”). Thus, even if the claim was not procedurally barred, Crain’s claim would fail because his allegation is entirely conclusory. *See Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992) (“Conclusory allegations of ineffective assistance are insufficient.” (quotation omitted)).

Finally, Crain does not show entitlement to relief because he cannot establish that the state postconviction court’s conclusion of no prejudice was an unreasonable application of *Strickland*. When a petitioner challenges a death sentence, “the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. Crain cannot make this showing.

The trial court found three statutory aggravators: the victim was under the age of twelve at the time of the offense; the murder was committed while Crain was committing a kidnapping; and Crain was previously convicted of felonies (multiple sexual batteries of young children) involving the use or threat of violence to the person. The court gave great weight to each of these aggravators. (Ex. A-2 at 310–12.) Although Dr. Berland found that Crain qualified for two statutory mitigators—that Crain was under the influence of extreme mental or emotional disturbance at the time of the crime and he was substantially impaired in his capacity to conform his conduct to the requirements of law, (Ex. A-23 at 3427–28)—the trial court rejected those findings, (Ex. A-23 at 315–16). The trial court nonetheless found that Dr. Berland provided evidence of numerous nonstatutory mitigators to which the court gave some or modest weight, including that Crain: (1) had a mental health impairment (some weight); (2) had mental problems exacerbated by the use of alcohol and drugs, both legal and illegal (some weight); (3) was an uncured pedophile (some weight); (4) had a history of abuse and an unstable home life (modest weight); (5) was deprived of the educational benefits and social learning that one would normally obtain from public education (modest weight); (6) had a history of hard, productive work (some weight); (7) had a good prison record (modest weight); and (8) Crain had the capacity to form loving relationships (modest weight). (Ex.

A-2 at 315–18). But the court determined that the aggravating circumstances “far outweigh[ed]” the mitigating circumstances; indeed, the court ruled that each aggravating circumstance “standing alone” was sufficient to outweigh the mitigation. (*Id.* at 318).

During the postconviction proceedings, Crain presented additional mitigation evidence from another forensic psychologist, Dr. Cunningham, and a neuropsychologist, Dr. Sestra. Dr. Sestra testified during a deposition that Crain probably had mild brain impairment and an antisocial personality disorder. (Ex. C-35 at 6877–78, 6895.) Dr. Sestra had no criticism of Dr. Berland’s testimony or methodology and believed Dr. Berland’s findings were “consistent” with his own findings and “reasonable.” (*Id.* at 6904, 6906.) Dr. Cunningham testified during the postconviction evidentiary hearing and prepared an extensive report that identified and discussed developmental risk factors that may have minimized Crain’s “moral culpability,” Crain’s possible fetal alcohol exposure, Crain’s micropenis disorder or penile dysmorphism, and Crain’s likely positive adjustment to prison. (Ex. C-57 at 7547–7646; Ex. C-20 at 3792–3851.)

Dr. Stein, the State’s expert, testified during the postconviction evidentiary hearing that nothing Dr. Sestra or Dr. Cunningham presented changed the opinions she gave at trial. (Ex. C-60 at 7822–23.) She testified that there was no evidence that Crain suffered from fetal

alcohol syndrome, there was no way to determine whether the developmental risk factors Dr. Cunningham identified caused Crain's criminal conduct at the time of the victim's kidnapping and murder, there was no evidence of brain damage, and micropenis disorder is not even a condition recognized in the guidebook used by all mental health professionals when applying clinical information to diagnostic categories. (*Id.* at 7823–41.)

Crain has not demonstrated prejudice because he has not shown that, if trial counsel had introduced at the penalty phase all of the mental health evidence presented during the postconviction proceedings, the outcome of the penalty phase would have been different. Dr. Sestra's findings were consistent with Dr. Berland's findings. And much like Dr. Cunningham, Dr. Berland testified to Crain's long history of mental health and substance abuse issues, his pedophilia, and the extensive physical and sexual abuse Crain suffered at the hands of his own family, including beatings and perverse sex acts such as being forced to have sex with his own mother and witnessing her having sex with numerous men and a dog. (See Ex. A-22, pp. 3334–3411; Ex. A-23, pp. 3416–3474.) In sum, there is no reasonable probability that the jury would have recommended, or the judge would have imposed, a life sentence if they had been presented with the new and cumulative mitigation evidence presented during the postconviction proceedings. See *Robinson v. Moore*, 300 F.3d 1320,

1347 (11th Cir. 2002) (“While the additional mitigation witnesses procured by [postconviction] counsel could have presented the resentencing jury and trial judge with more details, or different examples, of these aspects of [petitioner’s] life, these aspects of his life were nonetheless known to the resentencing jury and trial judge.”). Accordingly, Crain is entitled to no relief on his claim that counsel failed to present adequate mitigating evidence.

B. Constitutionality of Statute Prohibiting Juror Interviews

In Crain’s fourth claim, he alleges that Florida’s regulations proscribing criminal defense trial counsel and postconviction counsel from interviewing jurors on behalf of their clients after trial violate a litany of federal and state constitutional provisions. Crain argues that “criminal defense counsel in Florida are treated . . . unequally compared [with] academics, journalists, and those lawyers not connected with a particular case.” (Doc. 117 at 16–17.) He alleges that these rules violate his right to equal protection and his rights under the “First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.” (Doc. 117 at 16) (capitalization omitted); see Fla. R. Crim. P. 3.575; RULES REGULATING THE FLA. BAR 4–3.5(d)(4). Crain finally alleges that these rules violate his right to “adequate assistance of counsel in pursuing his postconviction remedies.” (Doc. 117 at 16 (capitalization omitted).)

Although he lists more than “equal protection” in his petition and reply, he offers argument only for his equal protection claim, thereby abandoning claims under the other constitutional provisions. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (noting that, on appeal, a party “abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority”); *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1325–26 (11th Cir. 2000) (holding that “[t]he appellants’ failure to brief and argue this issue during the proceedings before the district court is grounds for finding that the issue has been abandoned” and therefore the district court did not err by failing to consider it). To the extent that Crain attempted to allege constitutional violations beyond the Equal Protection Clause in this claim, he has abandoned them.

The Florida Supreme Court rejected Crain’s jury interview claim, citing multiple cases where it had previously rejected “similar constitutional challenges to these rules.” *Crain II*, 78 So. 3d at 1045. Because the Florida Supreme Court did not discuss Crain’s equal protection claim directly, the Court “employs a ‘look through’ presumption.” *See Wilson v. Sellers*, 138 S. Ct. 1188, 1193 (2018). Under this approach, the Court “look[s] through a silent higher state court decision to an explicitly reasoned lower court one in determining the reasons for

the decision” and “give[s] appropriate deference to that decision.” *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1349–50 (11th Cir. 2019).

Crain’s claim fails because he identifies no “clearly established law” that the Florida courts “unreasonably appli[ed]” or contravened, nor does he even contend that the Florida Supreme Court unreasonably determined the facts for this claim. § 2254(d). Crain cites two Supreme Court opinions. Neither the Florida Supreme Court’s decision nor the postconviction court’s decision under the “look through” approach was contrary to those opinions, nor did they “involve[] an unreasonable application” of either. § 2254(d)(1).

The postconviction court rejected Crain’s jury interview claim because it was “both legally insufficient and procedurally barred” because it was not raised on direct appeal and he failed to make a showing of any juror misconduct. (Doc. 117-3 at 48.) Like his mitigation argument, the lower court’s finding that this claim was procedurally barred was a “nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed.” *Martinez*, 566 U.S. at 9; *see also Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2002) (declining to provide relief for a similar claim because they were “not raised on direct appeal”).

First, Crain argues that the Florida Supreme Court’s decision was contrary to or involved an unreasonable application of *Wellons v. Hall*, 558 U.S. 220 (2010). There, the

Court held that a claim is not procedurally barred when the “state court declines to review the merits of [the claim] on the ground that it ha[d] done so already.” *Wellons v. Hall*, 558 U.S. 220, 222 (2010) (quoting *Cone v. Bell*, 556 U.S. 449, 466 (2009)). The petitioner in *Wellons* alleged “unreported *ex parte* contacts between the jury and the judge” and other “unusual events going on behind the scenes,” but those facts were irrelevant to the Court’s decision. See *id.* at 220–21 (vacating the decision below because it improperly concluded the claim was procedurally barred and because it gave only “perfunctory consideration,” in the alternative, to the claim). The dispositive facts in *Wellons* were that the state court had declined to review the claim because “it ha[d] done so already,” that the Eleventh Circuit concluded that the state court’s decision procedurally barred review in federal court, and that the Eleventh Circuit gave only a perfunctory consideration to whether the petitioner was entitled to an evidentiary hearing. 558 U.S. at 222.

The postconviction court’s rejection of Crain’s jury interview claim was not “contrary to” *Wellons*’s requirement that federal courts give more than perfunctory consideration to whether a claim is entitled to an evidentiary hearing even if a state court had declined to review the merits of a claim because it “ha[d] done so already.” *Wellons*, 558 U.S. at 222. Nor was it

an unreasonable application of *Wellons*. After all, a fairminded jurist would not think *Wellons* even relevant. See *Whatley*, 927 F.3d at 1188 (“[W]e must respect the state court’s decision ‘so long as “fairminded jurists could disagree” on the correctness of it.” (quotations omitted)).

Second, Crain argues that the court’s decision was an unreasonable application of *Bush v. Gore*, 531 U.S. 98 (2000). The Court in *Bush v. Gore* held that the Equal Protection Clause prohibits the States from “valu[ing] one person’s vote over that of another” through “arbitrary and disparate treatment.” 531 U.S. at 104–05. And it held that certain measures “implemented in response to the decisions of the Florida Supreme Court do not satisfy” that “minimum requirement.” *Id.*

After citing *Bush v. Gore* for the first time in his Amended Petition for Habeas Corpus before this Court (Doc. 123 at 63), Crain does not appear to argue that the postconviction court’s decision was contrary to *Bush v. Gore*—nor could he successfully do so, given the immense factual differences between that case and his—and thus abandons any argument under that clause. See *Sapuppo*, 739 F.3d at 681. Moreover, Crain fails to argue how the postconviction court failed to reasonably apply *Bush v. Gore* to his case. But presumably he likens the right to interview jurors to the right to vote—state legislatures are required to give neither but, once one is given, it must not be withheld from anyone through “arbitrary and

disparate treatment.” *Bush v. Gore*, 531 U.S. at 104. Although the lower court did not directly address Crain’s claim under *Bush v. Gore* (because Crain did not raise it), it held that Crain’s failure to make a prima facie case of jury misconduct prohibited further investigation or interviewing of jurors after the guilty verdict. (Doc. 117-3 at 48.) Crain’s argument fails.

“[T]rial and postconviction counsel” differ from “academics, journalists[,] and lawyers not associated with a case” in their relationship with the jurors who decided a case. (Doc. 123 at 62.) The first have a duty as an advocate for their client that inhibits them from being impartial in discussions with the jurors, while the second can interview jurors without concern for assisting a specific party. A fairminded jurist could not conclude that Florida’s prohibition limits juror interviews in an arbitrary fashion. As such, the Florida courts did not unreasonably apply *Bush v. Gore* in deciding Crain’s case.

Crain’s fourth claim fails because he does not show that the Florida courts’ decisions were contrary to, or an unreasonable application of, clearly established federal law. See § 2254(d)(1).

C. Sufficiency of the Evidence

In Crain’s fifth claim, he alleges that the evidence that Florida presented at his trial was insufficient for the jury to find beyond a reasonable doubt that Amanda’s murder was

premediated. He argues that the Florida Supreme Court's rejection of this argument involved an "unreasonable determination of the facts" and that it unreasonably applied clearly established federal law. (Doc. 123 at 66.)

When a habeas petitioner challenges the sufficiency of the evidence used to convict him, he "face[s] a high bar" because his claim is "subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012). "First, on direct appeal," a court "may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Id.* (quotation omitted). "And second, on habeas review," a federal court may only "overturn a state decision rejecting a sufficiency of the evidence challenge" if the "state court decision was 'objectively unreasonable.'" *Id.* (quotations omitted). A federal court may grant relief only if the jury's "finding was so insupportable as to fall below the threshold of bare rationality." *Id.* at 656.

On direct appeal from his conviction, the Florida Supreme Court rejected Crain's argument that the evidence was insufficient to support his conviction for first-degree murder but reduced his conviction of kidnapping with intent to commit homicide to false imprisonment. *Crain I*, 894 So. 2d at 73, 75–76. The court noted that the jury had convicted Crain of first-degree murder using a general verdict form "that did not specify whether the

verdict was based on premediated or felony murder.” *Id.* at 73. But the court explained that Florida law permits a conviction of first-degree murder to be upheld “where the evidence is sufficient to establish either felony murder or premeditation.” *Id.* The court concluded the evidence sufficiently “establish[ed] first-degree felony murder based on kidnapping with the intent to *inflict bodily harm*” and affirmed the conviction. *Id.* at 73, 75 (emphasis added). Because the court affirmed the conviction on felony-murder grounds, the court “decline[d] to directly address Crain’s argument that the evidence [was] insufficient to establish first-degree premediated murder.” *Id.* at 75 n.16.

The court proceeded to reduce Crain’s conviction for kidnapping to false imprisonment. *Id.* at 75–76. In Count I, the State charged Crain with first-degree murder, “subsum[ing] all valid felony murder theories.” *Id.* at 75. In contrast, the State charged Crain with “kidnapping with intent to commit a homicide” in Count II. *Id.* The State could not “rely on the unpled alternative of [kidnapping with] intent to inflict bodily harm,” the theory which the Florida Supreme Court used to affirm Crain’s first-degree murder conviction. *Id.* And the court concluded that there was insufficient evidence that Crain intended to commit a homicide, reducing his conviction on Count II to false imprisonment. *See id.* at 76.

In his petition, Crain claims that the State’s evidence was insufficient to establish

premeditation. (Doc. 117 at 19.) Crain’s argument fails because the Florida Supreme Court never concluded that there was sufficient evidence of premeditation. Instead, it declined to address whether sufficient evidence supported such a finding and concluded that sufficient evidence supported a conviction for felony-murder premised on kidnapping with intent to inflict bodily harm.

Crain appears to reframe his claim as instead contending that the Florida Supreme Court’s conclusion that sufficient evidence supported a felony-murder conviction was unreasonable because it later concluded that insufficient evidence supported a conviction for kidnapping with intent to commit homicide. (Doc. 123 at 64.) But even under this reframing, Crain’s argument still fails. The court reduced Crain’s kidnapping conviction because it concluded insufficient evidence supported finding that he intended to commit *homicide*. The court affirmed the felony-murder conviction because it concluded sufficient evidence supported finding that he intended to commit *bodily harm*. See *Crain I*, 894 So. 2d at 74, 76. Despite Crain’s arguments, the court’s holdings were not “incongruent.” (Doc. 123 at 64.)

Crain also argues that there was “no evidence of the use of a weapon to kill Amanda, of previous difficulties between the parties, of the presence or absence of provocation at the time of Amanda’s death, of the manner in which the homicide was committed, nor of the nature

and manner of the wounds inflicted.” (Doc. 123 at 66.) But the absence of this evidence does not render the Florida Supreme Court’s finding “so insupportable as to fall below the threshold of bare rationality.” *Coleman*, 566 U.S. at 656. In finding the evidence sufficient for a jury to convict Crain for felony-murder “based on kidnapping with the intent to inflict bodily harm,” the court relied on several pieces of evidence. *Crain I*, 894 So. 2d at 73. First, Crain had “several instances of close[] contact” with Amanda and the last time that Hartman saw Amanda was when Amanda “was sleeping next to Crain.” *Id.* Second, a witness living near Amanda’s home saw a vehicle “that matched the description of Crain’s truck” running with “its lights on” for nearly five minutes before it drove away. *Id.* Third, “blood consistent with Amanda’s DNA was found on Crain’s boxer shorts and taken from the toilet tissue found in Crain’s toilet bowl.” *Id.* Fourth, “multiple scratches and one cluster of gouges were observed and photographed on Crain’s arms” and the cluster of gouges and “all but two of the scratches” were consistent with the fingernails and hands of a seven-year-old child. *Id.* at 73–74; see *Crain II*, 78 So. 3d at 1031 n.2, 1041–42 (explaining that “any statement in [*Crain I*] to the effect that the marks on Crain’s body were ‘more likely’ caused by the hand or fingernails of a seven-year-old child” mischaracterized evidence that showed only that the marks were consistent with having been caused by such fingernails or hands but holding that its confidence in Crain’s “guilt-phase

proceeding” was not undermined).

A jury might draw from this evidence that Crain “ingratiate[d] himself [with] Amanda,” took her to his truck while her mother slept, and received scratch and gouge marks while inflicting her with bodily harm. *Crain I*, 894 So. 2d at 73. Such a finding would not be “so insupportable as to fall below the threshold of bare rationality.” *Coleman*, 566 U.S. at 656. 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.

D. Propriety of the Felony Murder Jury Instruction

In Crain’s sixth claim, he alleges that the trial court erred in instructing the jury that it could convict Crain of first-degree murder if it found that he kidnapped Amanda with intent to inflict bodily harm. (Doc. 117 at 20.) Count I of the Indictment charged Crain with premeditated murder. (Ex. A-1 at 31.) And Count II of the Indictment charged him with kidnapping the victim “with the intent to commit or facilitate the commission of a felony, to-wit: homicide.” (*Id.*) When the judge instructed the jury on kidnapping as the underlying felony to first-degree felony murder, he explained that “[t]he kidnapping must be done with the intent to commit or facilitate the commission of homicide or *to inflict bodily harm upon the victim.*” (Ex. A-21 at 3153 (emphasis added).)

When the trial court judge instructed the jury on the separate kidnapping charge in Count II, he explained that “the State must prove . . . Crain acted with the intent to commit or facilitate the commission of homicide.” (*Id.* at 3157–8.) Crain contends that this instruction was a violation of due process because the instructions permitted the jury to base a felony-murder conviction on kidnapping with intent to *inflict bodily harm* when the indictment’s kidnapping count charged Crain only with intent to *commit homicide*. (Doc. 117 at 21.) Such an error would violate due process, according to Crain, because “[i]t is a violation of due process of law to convict the accused of a crime not charged.” (Doc. 123 at 67 (citing *Jackson v. Virginia*, 443 U.S. 307, 314 (1979))).

The Florida Supreme Court rejected Crain’s claim, reasoning that it was waived under state law because his trial counsel failed to object to the jury instructions and because any error was not “fundamental error.” *Crain I*, 894 So. 2d at 68, 70. Respondent contends that this rejection was based on a nonfederal ground that was independent and adequate to support the judgment. But even assuming that the ground was not independent and adequate, Crain’s claim still fails on de novo review because the jury instructions did not deprive him of due process.

Of course, Crain is correct that “a conviction upon a charge not made or upon a charge

not tried constitutes a denial of due process.” *Jackson*, 443 U.S. at 314. But he was not convicted of a “charge not made” in the Indictment. *Id.* The Indictment charged Crain with first-degree premeditated murder. (Ex. A-1 at 31.) Although the State used the term “premeditated murder,” Florida law permits a “premeditated murder” charge to be used interchangeably with a felony-murder charge. See *Weatherspoon v. Florida*, 214 So. 3d 578, 584 (Fla. 2017) (stating that the commission of a felony in the first-degree murder statute “stands in lieu of and is the legal equivalent of” premeditation (quoting *Sloan v. Florida*, 69 So. 871, 872 (Fla. 1915))). And “[i]f a State’s courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, [this Court] simply [is] not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.” *Schad v. Arizona*, 501 U.S. 624, 636 (1991). Thus, even though the Indictment nominally charged Crain with premeditated murder, felony-murder alternatives “are mere means of committing” the single offense of murder. *Id.*

Assuming that Crain’s claim is not procedurally barred and that the claim should receive de novo consideration, Crain nonetheless fails to show that the jury instructions deprived him of due process. As such, his sixth claim fails.

E. Constitutionality of Florida's Capital Sentencing Statute

In Crain's seventh claim, he alleges that Florida's capital sentencing statute unconstitutionally deprived him of due process under the Fifth and Fourteenth Amendments and to a jury trial under the Sixth Amendment to the United States Constitution. (Doc. 117 at 22.) He appears to raise three arguments in support of his claim. First, he argues that the statute deprived him of due process because it did not require the aggravating circumstances relied on for his death sentence to be alleged in the Indictment. Second, he argues that the statute deprived him of a jury trial because it did not require the aggravating circumstances to be proven beyond a reasonable doubt by a jury. And third, he argues that this latter jury trial deprivation also deprived him of due process.

Crain raised all these arguments to Florida courts at different junctures and those courts rejected each one. Crain raised the first two arguments in his direct appeal and the Florida Supreme Court rejected them on the merits. *Crain I*, 894 So. 2d at 78; (Ex. A-32 at 1). He raised the third argument in his successive postconviction relief motion and the successive postconviction court held they were procedurally barred because he should have brought them on direct appeal. (Doc. 117-5 at 16–17.) Crain raised this argument again in his successive postconviction appeal and the Florida Supreme Court did not discuss it. (Doc. 123-2 at 20–

21); see *Crain III*, 246 So. 3d at 209–10. All of Crain’s arguments fail. The Florida Supreme Court did not unreasonably apply clearly established federal law when it rejected his first two arguments. And his final argument fails because the Florida postconviction court rejected it on an independent and adequate nonfederal ground.

Crain raised his first two arguments in his direct appeal. (Ex. A-32.) The Florida Supreme Court rejected his claim, concluding that several of its decisions upholding the constitutionality of Florida’s death penalty scheme foreclosed his claim. See *Crain*, 894 So. 2d at 78.

The Florida Supreme Court’s conclusion was neither contrary to, nor an unreasonable application of, Supreme Court precedent that was clearly established at the time the decision was made. See *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (“‘[C]learly established Federal law’ in § 2254(d)(1) ‘refers to the holdings . . . of this Court’s decisions as of the time of the relevant state-court decision.’” (citation omitted)). As to Crain’s first argument—that due process requires the aggravating circumstances be alleged in the Indictment—Crain cites no clearly established federal law as of the time of the Florida Supreme Court’s October 2004 decision holding that death penalty aggravating circumstances must be charged in an indictment. Indeed, as late as 2013, the Eleventh Circuit was “unaware of a Supreme Court holding that

even addresses the issue [of whether aggravating factors must be charged in the indictment], much less decides it.” *Grim v. Secretary, Florida Dep’t of Corrections*, 705 F.3d 1284, 1289 (11th Cir. 2013).

And as to Crain’s second argument, he cites *Ring*, *Apprendi*, and *Hurst* for his contention that Florida’s capital sentencing scheme was unconstitutional because it did not require a jury to find the aggravating circumstances beyond a reasonable doubt. (Doc. 123 at 70–71 nn. 1, 6.) The Florida Supreme Court held that the sentencing statute was not unconstitutional in the light of *Ring* and *Apprendi*, citing two of its former decisions. Those decisions upheld the sentencing statute because the United States Supreme Court had expressly upheld Florida’s capital sentencing statute in the past and did not expressly overrule those decisions when it decided *Ring*. See *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002), *abrogated by Hurst v. Fla.*, 577 U.S. 92 (2016); *King v. Moore*, 831 So. 2d 143, 144 (Fla. 2002). The Eleventh Circuit has affirmed elsewhere that this was not an unreasonable application of *Ring* and *Apprendi* because the Supreme Court has been “perfectly consistent” in holding that if one of its precedents “has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions,” the lower court “should follow the case which directly controls, leaving to [the Supreme] Court[] the prerogative of overruling its own

decisions.” *Evans v. Sec’y, Fla. Dep’t of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012) (quotations omitted) (second alteration added). Accordingly, it was not unreasonable for the Florida Supreme Court to hold that *Ring* and *Apprendi* did not undermine the constitutionality of its capital sentencing statute. And it was not unreasonable, as discussed below in Ground Eight, for the Florida Supreme Court to fail to apply *Hurst* because it is not retroactive to cases on collateral review.

But even if *Hurst* was retroactively applicable, the only rule announced by the Supreme Court in *Hurst v. Florida* is that the Sixth Amendment requires a jury, not a judge, to find the existence of an aggravating circumstance. *Hurst v. Florida*, 577 U.S. at 102-03. Crain’s jury unanimously found the existence of an aggravating circumstance when they found him guilty of felony murder committed during the course of a kidnapping. See *Crain*, 246 So. 3d at 210 (“The kidnapping aggravating factor in Crain’s case remains valid because kidnapping with the intent to inflict bodily harm underlies Crain’s first-degree felony murder conviction. See § 921.141(5)(d), Fla. Stat. (1997) (including “any: . . . kidnapping”). Therefore, the jury properly considered this aggravating factor in making its sentencing recommendation.

Crain raised his final argument in his successive postconviction relief motion. The court denied his claim because he should have “raised [it], if at all, on direct appeal” and concluded

it was “procedurally barred.” (Doc. 117-5.) Although he raised the claim again on appeal, the Florida Supreme Court did not address it. *See Crain*, 246 So. 3d at 206.

Crain’s final argument is procedurally barred because the last Florida court—the lower postconviction court—to address it decided it on an independent and adequate nonfederal ground. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (holding that federal courts “can[not] ordinarily” review claims when a lower state court held they were defaulted under state law and the highest court did not address them). First, the Florida court rested its decision on a procedural bar. (Doc. 117-5 at 16–17.) Although the court also found “the jury was instructed that it must find each aggravating circumstance,” (*id.* at 17), its minor foray into the merits “is of no moment.” *Spencer v. Sec’y, Dep’t of Corr.*, 609 F.3d 1170, 1179 n.1 (11th Cir. 2010). When a state “court makes an alternative merits determination, [the federal court] remains bound by the application of the procedural bar.” *Id.* Second, Florida’s requirement that petitioners raise all available claims on direct review is “firmly established and regularly followed” under Florida law. *Id.* at 1179 (“There is no doubt that, under Florida law, a claim is procedurally barred from being raised on collateral review if it could have been, but was not[,] raised on direct appeal.”); *Deparvine v. State*, 146 So. 3d 1071, 1106 (Fla. 2014), as revised (Aug. 28, 2014) (holding a claim “procedurally barred because it was not raised on

direct appeal”); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983) (citing cases); see also Fla. R. Crim. P. 3.851 (“This rule does not authorize relief based upon claims that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.”). Finally, Crain has pointed to nothing in the record showing that the postconviction court’s application of the procedural waiver rules was applied “in an arbitrary or unprecedented fashion,” nor was it “manifestly unfair. *Judd*, 250 F.3d at 1313. Accordingly, Crain’s seventh claim fails.

F. Applications of *Hurst* and *Caldwell*

In his final claim, Crain alleges that the Florida capital sentencing statute unconstitutionally deprived him of his jury trial right because the statute did not require the jury to find the facts that permitted the judge to sentence him to death. The Florida Supreme Court concluded that any such errors were harmless. *Crain III*, 246 So. 3d at 209–10. Crain alleges that the court unreasonably applied *Hurst v. Florida* in holding the errors harmless. (Doc. 123 at 79.) Crain’s argument fails because the United States Supreme Court decided *Hurst* after his conviction became final and *Hurst* does not apply retroactively on collateral review. Thus, “the secondary question of whether any such [*Hurst*] error was harmless would be a prohibited and pointless exercise for the petitioner and this Court.” *Knight*, 936 F.3d at

1338.

First, Crain’s conviction became final on direct review when the Supreme Court denied his petition for writ of certiorari on October 3, 2005. *Crain v. Florida*, 546 U.S. 829 (2005) (table). That date well preceded the United States Supreme Court’s decision in *Hurst* on January 12, 2016. Thus, *Hurst* is eleven years too late to help Crain. *Hurst*, 577 U.S. at 92.

Second, *Hurst* does not apply retroactively. See *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) (“*Ring* and *Hurst* do not apply retroactively on collateral review.”).

Accordingly, any error the Florida Supreme Court may have made in applying *Hurst* can provide no grounds for relief to Crain. He cannot receive a writ of habeas corpus premised on the Florida Supreme Court’s failure to correctly apply a case that was not retroactive on collateral review. See *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (“[A] new rule of criminal procedure ordinarily does not apply retroactively to overturn final convictions on federal collateral review.” (emphasis omitted)). “[A federal court’s] ability to consider whether Florida applied *Hurst* correctly depends entirely on whether [the court] can apply *Hurst* [itself].” *Knight*, 936 F.3d at 1332. Because *Hurst* was not retroactive and Crain’s conviction was final before the Supreme Court decided *Hurst*, “consideration of . . . whether any such [*Hurst*] error was harmless would be a prohibited and pointless exercise for both the petitioner

and this Court. [This Court] therefore cannot grant [Crain] relief on his *Hurst* claim, whether or not it is cloaked in the garb of harmless error.” *Id.* at 1338.

As part of Crain’s argument that the Florida Supreme Court erred in its harmless error analysis, Crain contends the court “contravened the Eighth Amendment under *Caldwell v. Mississippi*.” (Doc. 123 at 79.) As concluded above, this argument fails because Crain contends the *Caldwell* error rendered the *Hurst* error harmful. But even if Crain had raised the *Caldwell* error independently, it would still fail. *Caldwell* held that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985). But the Supreme Court later clarified that a trial only suffers a *Caldwell* error when “remarks to the jury improperly described the role assigned to the jury by local law.” *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).

Crain identifies no instruction that misled the jury as to its role in the sentencing process under Florida law. Although the trial court instructed the jury that “the final decision as to what punishment shall be imposed, is my responsibility[,]” the court immediately thereafter instructed “[h]owever, your advisory sentence as to what sentence should be imposed

on the defendant, is entitled by law and will be given *great weight* by this Court in determining what sentence to impose in this case It is only under rare circumstances that this Court could impose a sentence other than what you recommend.” (Ex. A-24 at 3660–61.) This instruction properly described the role assigned to the jury under Florida law at the time. A Florida judge who describes “the jury’s sentencing verdict as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority . . . accurately characterizes the jury’s and judge’s sentencing roles under Florida law” and accordingly does not commit “error under *Caldwell*.” *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). Therefore, even if the Court construed Crain’s reply as raising an independent claim under *Caldwell*, it would merit no relief.

In sum, Crain cannot obtain federal habeas relief under either *Hurst* or *Caldwell*. Crain’s eighth claim therefore fails.

IV. CERTIFICATE OF APPEALABILITY

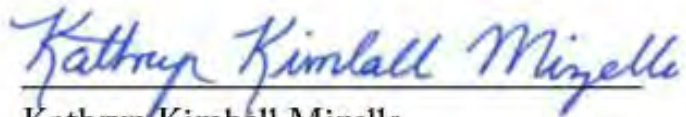
A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of his petition. 28 U.S.C. § 2253(c)(1). Instead, a district court or court of appeals must first issue a certificate of appealability (COA). *Id.* “A [COA] may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.” 28

U.S.C. § 2253(c)(2). To obtain a COA, Crain must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues he seeks to raise. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Crain has not made the requisite showing. Finally, because Crain is not entitled to a COA, he is not entitled to appeal in forma pauperis.

V. CONCLUSION

In his Amended Petition, Crain raises eight claims seeking habeas relief from his conviction and sentence. He succeeds on none. Accordingly, Crain's Amended Petition for Writ of Habeas Corpus is **DENIED**. (Doc. 117.) The Clerk is directed to **ENTER JUDGMENT** against Crain and in the Respondent's favor and to **CLOSE** this case.

ORDERED in Tampa, Florida, on September 30, 2022.


Kathryn Kimball Mizelle
United States District Judge

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix C

United States District Court for the Middle District of Florida, Tampa Division
November 25, 2022 Order denying Motion to Alter or Amend Judgment.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE SETH CRAIN, JR.,

Petitioner,

v.

CASE NO. 8:12-cv-322-KKM-AAS

SECRETARY, DEPARTMENT OF
CORRECTIONS,

Respondent.

ORDER

The Court denied Crain's amended petition for a writ of habeas corpus. Crain now moves for this Court to reconsider its denial under Rule 59(e). Because Crain presses only an argument that could have been, but was not, raised before the entry of judgment, the Court denies the motion. In the alternative, even if Crain had presented this argument in his amended petition, he failed to exhaust it in state court and it is therefore procedurally defaulted.

I. BACKGROUND

In Claim 5 of his amended petition, Crain challenged the sufficiency of the evidence to support his first-degree murder conviction. Specifically, he contended that the evidence the State presented at trial was insufficient for the jury to find beyond a reasonable doubt that the victim's

murder was premeditated. (Doc. 117 at 18–19.) In his reply, Crain reframed his claim, contending that the Florida Supreme Court’s conclusion that sufficient evidence supported a felony-murder conviction was unreasonable because it later concluded that insufficient evidence supported a conviction for kidnapping with intent to commit homicide. (Doc. 123 at 63–66.) This Court concluded that neither contention warranted relief. (Doc. 135 at 56–61.) Crain now asks the Court to reconsider its denial of Claim 5. (Doc. 137.) Respondent opposes the motion. (Doc. 143.)

II. LEGAL STANDARD

Rule 59(e) permits a court to alter or amend a judgment within 28 days after judgment. See Fed. R. Civ. P. 59(e). “The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact.” *Shackleford v. Sailor’s Wharf, Inc.*, 770 F. App’x 447, 451 (11th Cir. 2019) (per curiam) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). Rule 59(e) may not be used to “relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.” *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005).

III. ANALYSIS

Crain asks the Court to reconsider its denial of Claim 5 under Rule 59(e) based on a manifest error of law. Before turning to the merits of his motion, the Court explains why it retains

jurisdiction to decide it. Crain filed his notice of appeal on October 17, 2022. Nine days later, on October 26, 2022, he filed this Motion to Alter Judgment. Ordinarily, Crain's first action would divest this Court of jurisdiction, see *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal"), but not here. Federal Rule of Appellate Procedure 4(a)(4) provides an exception for certain motions, including Rule 59 ones. The Rule provides that "[i]f a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B). The Supreme Court has applied this rule to motions filed both before and after the notice of appeal. See *Stone v. INS*, 514 U.S. 386, 402–03 (1995) ("The majority of post-trial motions, such as Rule 59, render the underlying judgment nonfinal both when filed before an appeal is taken (thus tolling the time for taking an appeal), and when filed after the notice of appeal (thus divesting the appellate court of jurisdiction)."). As such, the notice of appeal will become "effective"—and jurisdiction transferred to the Eleventh Circuit—when this Court disposes of the pending Rule 59(e) motion.

Alternatively, even if this Court no longer has jurisdiction, Eleventh Circuit Rule 12.1-1 provides that a district court may rule on motions in some circumstances even when jurisdiction

remains with the Eleventh Circuit. Under that Rule, when a motion requesting substantive relief is filed while an appeal is pending, “the district court may consider whether to grant or deny the motion without obtaining a remand from [the Eleventh Circuit].” And “[i]f the district court determines that the motion should be denied, the district court may deny the motion without a remand by [the Eleventh Circuit].” 11th Cir. R. 12.1-1(c)(1).

Because Crain fails to satisfy the demanding standards under Rule 59(e) and because Crain procedurally defaulted this newly articulated claim, the Court denies his motion. And because the Court denies his motion, even if jurisdiction remains at the Eleventh Circuit, the Court does not need a remand to resolve it. See 11th Cir. R. 12.1-1(c)(1).

Crain contends that this Court committed a manifest error of law in “failing to consider whether all the elements of kidnapping had been satisfied to uphold a conviction [for felony murder based on kidnapping].” (Doc. 137 at 12.) Specifically, Crain contends “an element of kidnapping is that the abduction be against the ‘will’ of a person,” and this Court (and the Florida Supreme Court) failed to consider that the State did not prove Crain abducted the victim against her will because the State presented no evidence that the victim was alive when she was abducted. (*Id.*, at 8, 12–19.) This claim was raised in neither Crain’s amended petition nor his reply. (Doc 117; Doc. 123.) Therefore, Crain cannot obtain relief under Rule 59(e) because he attempts to raise a claim that he never raised before the entry of judgment although he could have done so.

See *Michael Linet*, 408 F.3d at 763.

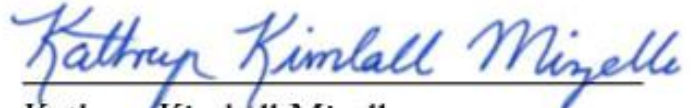
Even if Crain's new claim could be considered under Rule 59(e), it would warrant no relief. As Respondent correctly argues, Crain's claim that the State failed to prove kidnapping because there was no evidence Crain abducted the victim against her will is procedurally defaulted because it was never raised in state court. (Doc. 143 at 6–10.) Crain fails to allege, much less show, that he can overcome the procedural default by demonstrating either cause and prejudice or a fundamental miscarriage of justice. See *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) (The doctrine of procedural default provides that "[i]f the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is established."). As a result, Crain's new claim is barred from federal habeas review.

IV. CONCLUSION

For the reasons stated, Crain fails to justify reconsideration under Rule 59(e). Accordingly, the following is ORDERED:

1. Crain's motion to alter or amend the judgment is **DENIED**. (Doc. 137.)
2. The Court declines to issue a certificate of appealability because Crain has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2). And Crain is not entitled to appeal in forma pauperis.

ORDERED in Tampa, Florida on November 25, 2022.


Kathryn Kimball Mizelle
United States District Judge

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix D

Eleventh Circuit Court of Appeals May 11, 2023
Order denying Motion for Reconsideration.

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13693

WILLIE SETH CRAIN, JR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:12-cv-00322-KKM-AAS

Before WILLIAM PRYOR, Chief Judge, and BRANCH, AND LUCK,
Circuit Judges.

BY THE COURT:

Willie Seth Crain, Jr., a Florida prisoner serving a death sentence, previously sought a certificate of appealability (“COA”) in this Court on all eight grounds raised in his 28 U.S.C. § 2254 petition, which the district court denied.¹ A single judge of this Court denied Crain a COA on all eight claims because Crain did

¹ Crain raised the following claims: (1) his trial counsel was ineffective for failing to challenge the state’s circumstantial case; (2) his trial counsel was ineffective for failing to retain a defense medical expert to challenge the state medical examiner’s testimony regarding scratch mark evidence presented at trial; (3) his trial counsel was ineffective for failing to provide a competent expert psychological evaluation and testimony, failing to adequately investigate, prepare, and present available mitigation evidence through expert or other testimony, and for failing to otherwise challenge the prosecution’s case for the death sentence; (4) the Florida rules prohibiting Crain’s lawyers from interviewing jurors to determine if constitutional error was present violated (a) equal protection principles, (b) the First, Sixth, Eighth, and Fourteenth Amendments, (c) the corresponding provisions of the Florida Constitution, and (d) denied him adequate assistance of counsel in pursuing his postconviction remedies; (5) the state did not prove that the killing of the victim was premeditated; (6) the felony murder jury instruction defining kidnapping violated Crain’s right to due process because it permitted conviction upon proof of an intent not alleged in the indictment; (7) Fla. Stat. Ann. § 921.141 (1997) was unconstitutional because it violated Crain’s right to due process under the Fifth and Fourteenth Amendments and his Sixth Amendment right to a jury trial, which require that aggravating circumstances be alleged in the indictment and found by the jury to have been proven beyond a reasonable doubt; and (8) sentencing Crain under Fla. Stat. Ann. § 921.141 (2010) was unconstitutional and therefore not harmless error.

22-13693

Order of the Court

3

not show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues that he sought to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In other words, Crain failed to show that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or . . . could conclude the issues presented [were] adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quotation omitted).

Crain has now filed a motion for reconsideration of the order denying his motion for a COA. Upon review, Crain merely quarrels with the outcome and reiterates the reasons why he believes a COA is warranted on his claims. These arguments do not warrant reconsideration of this Court’s prior order. *See Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010) (“A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.” (quotation omitted)). Accordingly, his motion for reconsideration is DENIED because he has offered no meritorious arguments that warrant relief.

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix E

Crain v. State, 894 So.2d 59, 76 (Fla. 2004).

894 So.2d 59
Supreme Court of Florida.

Willie Seth CRAIN, Appellant,
v.
STATE of Florida, Appellee.

No. SC00-661.
|
Oct. 28, 2004.
|
Rehearing Denied Jan. 25, 2005.

Synopsis

Background: Defendant was convicted in the trial court of capital murder and kidnapping, and was sentenced to death by unanimous jury. Defendant appealed.

Holdings: The Supreme Court held that:

[1] instruction for felony murder based on kidnapping that was inconsistent with separate kidnapping offense as charged was not fundamental error;

[2] evidence was sufficient to establish corpus delicti for murder;

[3] evidence was sufficient to support conviction for first-degree felony murder based on kidnapping;

[4] evidence did not support conviction for kidnapping with intent to facilitate homicide;

[5] death sentence was proportional to offense;

[6] any error in finding that murder was committed in course of kidnapping was harmless; and

[7] defendant was not entitled to relief based on claim that capital sentencing scheme violate *Ring/Apprendi*.

Affirmed.

Quince, J., specially concurred, with opinion in which Pariente, C.J., and Cantero, J., concurred.

Lewis, J., concurred in result only, with opinion.

Wells, J., filed opinion concurring in part and dissenting in part.

West Headnotes (23)

- [1] **Criminal Law**
🔑Custody and conduct of jury
Homicide
🔑Killing in Commission of or with Intent to Commit Other Unlawful Act

Instruction for felony murder based on kidnapping that allowed jury to find defendant guilty if it found that he kidnapped victim with intent to facilitate homicide or, in alternative, to inflict bodily harm upon victim, was not fundamental error based on claim that separate kidnapping count alleged only that he acted with the intent to facilitate homicide; defendant was indicted for first degree premeditated murder, and thus, State was not required to charge felony murder to be entitled to felony murder instruction, jury was presumed to have applied instructions and independently assessed guilt as to each count, and there was no indication that defendant was surprised by instruction. *West's F.S.A. § 787.01(1)(a)* 2, 3.

21 Cases that cite this headnote

- [2] **Criminal Law**
🔑Constitutional questions

When constitutional rights are implicated, the Supreme Court considers issues for the first time on appeal as fundamental error where the error goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process. *U.S.C.A. Const.Amend.* 14.

1 Cases that cite this headnote

- [3] **Constitutional Law**
🔑 Relation between allegations and proof;
variance

Due process prohibits a defendant from being convicted of a crime not charged in the information or indictment. U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote

- [4] **Kidnapping**
🔑 Intent

Modern, statutory kidnapping differs from its lesser included offense of false imprisonment in its requirement of proof by the State of one of the four intent elements set out in the statute. West's F.S.A. § 787.01.

1 Cases that cite this headnote

- [5] **Kidnapping**
🔑 Intent
Kidnapping
🔑 Confinement, restraint, or detention

The gist of the offense of kidnapping is the felonious act of a confinement or abduction with a specific intent. West's F.S.A. § 787.01.

2 Cases that cite this headnote

- [6] **Homicide**
🔑 Killing in Commission of or with Intent to Commit Other Unlawful Act

If an indictment charges premeditated murder, the State need not charge felony murder or the particular underlying felony to receive a felony murder instruction.

14 Cases that cite this headnote

- [7] **Homicide**
🔑 Killing in Commission of or with Intent to Commit Other Unlawful Act

As long as the definition of the underlying felony provided to the jury in the context of a felony murder instruction is sufficiently definite to assure the defendant a fair trial, it is not necessary to instruct on the elements of the underlying felony with the same particularity as would be required if the defendant were charged with the underlying felony.

3 Cases that cite this headnote

- [8] **Criminal Law**
🔑 Hearing and determination

In cases in which the evidence of guilt is wholly circumstantial, it is the trial judge's task to review the evidence 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.

7 Cases that cite this headnote

- [9] **Criminal Law**
🔑 Weight of Evidence in General

In reviewing a challenge to the sufficiency of the evidence, the reviewing court must assess the record evidence for its sufficiency only, not its weight.

2 Cases that cite this headnote

[10] **Criminal Law**

🔑 **Substantial evidence**

Although the jury is the trier of fact, a conviction of guilt must be reversed on appeal if it is not supported by competent, substantial evidence.

6 Cases that cite this headnote

[11] **Homicide**

🔑 **Infanticide cases**

Circumstantial evidence was sufficient to show that child victim was dead and that defendant killed her, as required to establish corpus delicti for murder, despite evidence that child's body was never found; child was last seen alive in defendant's presence at mother's home, child's blood was found on defendant's boxer shorts and on toilet tissue and toilet seat in defendant's bathroom, scratch marks consistent with child's fingernails were found on defendant, and defendant bleached and scrubbed bathroom for several hours on night child disappeared.

3 Cases that cite this headnote

[12] **Sentencing and Punishment**

🔑 **Scope of review**

In capital cases, the Supreme Court independently assesses the sufficiency of the evidence to determine if it is legally sufficient.

1 Cases that cite this headnote

[13] **Homicide**

🔑 **Corpus delicti**

The corpus delicti for murder consists of the victim's death via the criminal agency of another.

Cases that cite this headnote

[14] **Homicide**

🔑 **Sufficiency of circumstantial evidence**

The corpus delicti of murder can be proven circumstantially, even without any evidence of the discovery of the victim's body.

1 Cases that cite this headnote

[15] **Homicide**

🔑 **Intent or mens rea**

Evidence was sufficient to show that defendant kidnapped seven-year-old child with intent to inflict great bodily harm, as required to support conviction for first degree felony murder based on kidnapping; child's mother last saw child asleep in mother's bed next to defendant, mother never gave defendant permission to take child, child's blood was discovered on defendant's boxer shorts, mixture of defendant's and child's blood was found in defendant's bathroom, and scratches on defendant's arm were consistent with child's fingernails.

Cases that cite this headnote

[16] **Homicide**

🔑 **Form and requisites in general**

A general guilty verdict rendered by a jury instructed on both first-degree murder with premeditation or felony murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation.

25 Cases that cite this headnote

[17]

Kidnapping **Weight and sufficiency**

Evidence that traces of child victim's blood was found on toilet tissue and on toilet seat of defendant's bathroom, that her blood was found on defendant's shorts, that luminol test indicated that defendant had cleaned bathroom with bleach around time child disappeared, and that defendant's truck was left running outside mother's trailer and that he exhibited unusual behavior morning after child disappeared, without more, was insufficient to show that defendant kidnapped child from mother's home with intent to facilitate homicide; blood evidence did not establish what caused child to bleed, how much she bled, or where she was killed, it was impossible to tell from luminol test how much "glow" was attributable to blood and how much was attributable to bleach, and evidence regarding defendant's behavior evinced only plan to remove child from mother's presence and did not support inference of intent to kill child. *West's F.S.A. § 787.01(1)(a) 2.*

1 Cases that cite this headnote

[18]

False Imprisonment **Offenses**

False imprisonment does not require specific intent. *West's F.S.A. § 787.02.*

Cases that cite this headnote

[19]

Sentencing and Punishment **Proportionality in general****Sentencing and Punishment** **Nature, degree, or seriousness of other offense**

Death sentence was proportional to murder of seven-year-old child; death sentences were imposed in other similar cases involving murder of children under age twelve, defendant had

prior felony convictions for sexual battery and aggravated child abuse involving children between ages of seven and nine, assaults were repetitive and occurred over extended period of time, and defendant had threatened children with bodily harm or death if they revealed abuse to anyone.

Cases that cite this headnote

[20]

Sentencing and Punishment **Proportionality**

The Supreme Court has an independent duty to perform a proportionality review of all death sentences.

Cases that cite this headnote

[21]

Sentencing and Punishment **Proportionality**

Proportionality review of a death sentence is not a comparison between the number of aggravating and mitigating circumstances; rather, it requires the Supreme Court to consider the totality of the circumstances in each case, and to compare these circumstances with other capital cases to determine whether death is warranted.

1 Cases that cite this headnote

[22]

Sentencing and Punishment **Harmless and reversible error**

Any error in finding of aggravating factor that child's murder was committed in course of kidnapping, in light of reduction of conviction for kidnapping to lesser offense of false imprisonment, was harmless, in sentencing for capital murder, in view of finding of other aggravating factors that defendant had prior convictions for violent felony offenses, and that

victim was under age of twelve.

[Cases that cite this headnote](#)

[23]

Jury

🔑 [Death penalty](#)

Defendant was not entitled to relief from death sentence imposed for capital murder of seven-year-old child based on claim that capital sentencing scheme violated [Ring/Apprendi](#); defendant had prior convictions for violent felonies, and jury's vote for death sentence was unanimous.

[7 Cases that cite this headnote](#)

Attorneys and Law Firms

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Opinion

PER CURIAM.

This is a direct appeal of convictions of first-degree murder and kidnapping and a sentence of death. We have jurisdiction.¹ For the reasons that follow, we conclude that the State presented legally sufficient evidence of first-degree felony murder based on kidnapping with intent to inflict bodily harm, and therefore affirm the murder conviction and the sentence of death.

Willie Seth Crain, a then fifty-two-year-old Hillsborough County fisherman and crabber, was charged with the September 1998 kidnapping and first-degree murder of seven-year-old Amanda Brown. At the time, Amanda was three feet, ten inches tall and weighed approximately forty-five pounds.

*63 The evidence introduced at trial establishes that on September 9, 1998, Crain's daughter, Cynthia Gay, introduced Crain to Amanda's mother, Kathryn Hartman, at a bar in Hillsborough County. Crain and Hartman danced and talked for four hours, until 1:30 or 2:00 in the morning, then went to Hartman's residence, a trailer located in Hillsborough County, where they remained for approximately thirty minutes. Amanda was spending the night with her father and was not present. However, two photographs of Amanda and some of her toys were visible in the trailer. Before Crain left, Hartman made it clear to Crain that she wanted to see him again.

The next afternoon, September 10, 1998, Crain returned to Hartman's trailer. Hartman testified that Crain smelled of alcohol and carried a cup with a yellow liquid in it. Amanda was present. Crain began talking to Amanda about her homework. He pulled some money out and told Amanda that if she got her homework right, he would give her a dollar. He eventually gave her two dollars. Crain and Amanda sat at the kitchen table playing games and working on her homework. At some point during the afternoon, Crain became aware that Amanda had a loose tooth. After wiggling the tooth, Crain offered Amanda five dollars to let him pull the tooth out, but she refused. Hartman testified that the tooth was not ready to be pulled out. Crain remained at Hartman's residence for approximately one hour. Before he left early in the afternoon, Crain accepted Hartman's invitation to return for dinner that evening.

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

They began watching the movie in Crain's living room

I. FACTS AND PROCEDURAL HISTORY

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

At some point in the evening, Amanda and Hartman used Crain's bathroom together. While they were in the bathroom, Hartman did not notice Amanda bleeding from any location that Hartman could observe. *64 Hartman did notice a blue cover on the back of the toilet seat. Amanda did not use the bathroom at any other time that evening.

At another point in the evening, Hartman asked Crain if he had any medication for pain. Crain offered her [Elavil](#) and [Valium](#). He also offered her some marijuana, which she declined. Crain told Hartman that the [Elavil](#) would "really knock the pain out" and would make her sleep for a long time. Hartman elected to take five, five-milligram [Valium](#) tablets.² Crain took one [Valium](#) tablet.

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

According to Hartman, she told Crain, who appeared to be intoxicated at that time, that he could lie down to sober up but she was going to bed. The time was approximately 2:30 a.m. Within five minutes of Hartman going to bed,

Crain entered Hartman's bedroom and lay down on the bed with Hartman and Amanda. Hartman testified that she neither invited Crain to lie in her bed nor asked him to leave. Crain was fully clothed and Amanda was wearing a nightgown. Amanda was lying between Hartman and Crain.

Penny Probst, a neighbor of Hartman, testified that at approximately 12 midnight on September 10–11, 1998, she saw a white truck parked immediately behind Hartman's car in Hartman's driveway. In the early morning hours of September 11, Probst observed the truck parked at the side of Hartman's residence with the lights on and the engine running.³ Probst heard the truck leave after about five minutes.

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

At trial, the State presented the testimony of fisherman Albert Darlington, who witnessed Crain towing his boat into the Courtney Campbell loading area at approximately 6:15 a.m. on September 11, 1998. Darlington testified that Crain pulled up to the boat ramp and backed his boat trailer and truck into the water until the truck's front tires were halfway submerged. Crain then got out of his truck *65 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.⁴

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

At the police station, Detective Al Bracket interviewed Crain. Crain told Bracket that he left Hartman's house alone at about 1:30 in the morning,⁵ went home and accidentally spilled bleach in his own bathroom. Crain claimed that he did not like the smell of bleach, so he spent four hours cleaning his bathroom from about 1:30 to 5:30 in the morning. Later in the same interview, Crain said he cleaned his bathroom with bleach, as was his custom, then cleaned the rest of the house until 5:30 a.m., at which time he left to go crabbing.⁶

During the questioning, Bracket noticed multiple scratches on Crain's arms and asked Crain how he got them. Crain claimed that he received the scratches while crabbing, but became defensive when Bracket asked him to demonstrate how the scratches were inflicted. Photographs of Crain's body were taken on the morning of September 11, 1998. A forensic pathologist testified at trial that the scratches on Crain's arms probably occurred within a few hours to a day before the photos were taken. Although the pathologist could not identify the source of the scratches with certainty, he testified that all but two of the scratches were more likely to be caused by the fingernails of a seven-year-old child than by another cause. The pathologist also testified that there was one cluster of small gouges on Crain's arm, and it was more likely that these gouges were caused by the small grasping hand of a child of about seven years of age than by another cause.

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

Bracket also recovered two pieces of toilet tissue from the inside rim of Crain's *66 toilet and observed what appeared to be a small blood stain on the seat of the toilet. The tissue pieces, the toilet seat, and the boxer shorts that Crain was wearing on the morning of September 11, 1998 were collected and analyzed for DNA evidence. A forensic scientist for the Florida Department of Law Enforcement (FDLE) testified at trial that two blood stains were found on the toilet seat, one blood stain was found on one of the pieces of toilet tissue,⁷ and one blood stain was found on the boxer shorts. The FDLE forensic scientist testified that the blood stain on the boxer shorts and one of the stains from the toilet seat contained DNA consistent with the DNA extracted from personal items

belonging to Amanda Brown. The second stain on the toilet seat and the stain on the tissue contained DNA consistent with a mixture of the DNA profiles of Amanda and Crain. Testimony established that the probability of finding a random match between the DNA profile on the boxer shorts and Amanda's known DNA profile is approximately 1 in 388 million for the Caucasian population.

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

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

Frank Stem, Crain's friend and in-law,⁸ testified that about one month prior to Amanda's disappearance, Stem helped Crain lay crab traps in a "special" location. At that time, Crain told Stem that other crabbers would steal the crab traps if they knew of the spot. After Amanda disappeared and during a conversation regarding competing crabbers finding his crab traps, Crain told Stem that if Stem revealed the location of the traps "that it could bury him," meaning Crain, or that Stem had enough "evidence to bury him."

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

*67 On the first-degree murder charge in count I, the trial court instructed the jury on the dual theories of

premeditated murder and felony murder based on kidnapping “with intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim.” On the kidnapping charge in count II, the court instructed the jury that the State had to prove that Crain acted “with intent to commit or facilitate the commission of a homicide.” The jury found Crain guilty of first-degree murder on a general verdict form. The jury also found Crain guilty of kidnapping as charged. In the penalty phase, the jury unanimously recommended the death sentence. The trial court found three aggravators: (1) prior violent felonies (great weight), (2) the murder was committed during the course of a kidnapping (great weight), and (3) the victim was under the age of twelve (great weight). The court found no statutory mitigators and eight nonstatutory mitigators,⁹ and imposed the death sentence.

Crain raises five issues on appeal: (1) the evidence was insufficient to establish that the murder of Amanda was premeditated; (2) the evidence was insufficient to establish an essential element of kidnapping, that Amanda was abducted with the intent to commit or facilitate commission of a homicide; (3) the trial court committed fundamental error by giving different jury instructions in the felony murder and kidnapping counts as to the elements of kidnapping; (4) the kidnapping conviction relied on by the State for an aggravating circumstance was not supported by the evidence; and (5) Florida’s death penalty scheme is unconstitutional.

We address those issues that are necessary to our resolution of this case. Because our analysis regarding the sufficiency of the evidence to sustain Crain’s conviction is dependent upon our determination of whether the felony murder jury instruction constituted fundamental error, we discuss that issue first.

II. FELONY MURDER JURY INSTRUCTION

^[1] The indictment on which Crain was tried and convicted charged him in count I with the premeditated murder of Amanda Brown between September 10 and 11, 1998. Count II of the indictment charged Crain with kidnapping Amanda on the same dates “with the intent to commit or facilitate the commission of a felony, to wit, homicide” in violation of [section 787.01\(1\)\(a\)\(2\), Florida Statutes \(1997\)](#). The kidnapping statute found in [section 787.01, Florida Statutes \(1997\)](#), defines the offense in pertinent part as follows:

(1)(a) The term “kidnapping” means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.
2. Commit or facilitate commission of any felony.
3. Inflict bodily harm upon or to terrorize the victim or another person.

***68** 4. Interfere with the performance of any governmental or political function.

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 Victoria Brown 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 Victoria Brown.

“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.) On the separate kidnapping charge in count II, the court gave the following instruction:

Before you can find the defendant guilty of Kidnapping, the State must prove the following three elements beyond a reasonable doubt:

One, that Willie Seth Crain forcibly, secretly or by threat confined, abducted or imprisoned Amanda Victoria Brown, a child under the age of 13 years, against her will; two, that Willie Seth Crain had no lawful authority; three, that Willie Seth Crain acted with the *intent to commit or facilitate the commission of homicide*.

(Emphasis added.) Thus, while the trial court instructed the jury only on the intent to commit or facilitate the commission of homicide under [section 787.01\(1\)\(a\)\(2\)](#) as to the kidnapping charge in count II, the trial court instructed the jury that it could find Crain guilty of felony

murder based on kidnapping in count I if it found that he abducted Amanda with *either* the intent to commit or facilitate the commission of homicide *or* the intent to inflict bodily harm upon her under [section 787.01\(1\)\(a\)\(3\)](#).

Crain argues that because kidnapping with intent to commit homicide was the kidnapping specifically charged in count II of the indictment, the trial court erred in instructing the jury on kidnapping with intent to inflict bodily harm as an alternate method of establishing felony murder based on kidnapping. The State asserts that the trial court did not commit reversible error in instructing the jury on the latter element under an indictment charging premeditated murder. On the facts of this case, we agree.

^[2] Although Crain asserts on appeal that this instruction was in error, his trial counsel did not object to the instruction when presented with a packet of corrected jury instructions before closing arguments in the guilt phase of the case. With regard to claims of error pertaining to jury instructions, we have held that “[i]ssues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial.” [Overton v. State](#), 801 So.2d 877, 901 (Fla.2001); *see also* [Urbini v. State](#), 714 So.2d 411, 418 n. 8 (Fla.1998). Because this issue was not preserved by an objection, Crain argues that the felony murder instruction constitutes fundamental error. When constitutional rights are implicated, we have considered issues for the first time on appeal as fundamental error where the error “goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.” [J.B. v. State](#), 705 So.2d 1376, 1378 (Fla.1998).

*69 ^[3] To determine whether the felony murder instruction based on kidnapping with intent to inflict bodily harm constitutes fundamental error, we must consider two lines of precedent. First, due process prohibits a defendant from being convicted of a crime not charged in the information or indictment. *See* [Aaron v. State](#), 284 So.2d 673, 677 (Fla.1973) (“The right of persons accused of serious offenses to know, before trial, the specific nature and detail of crimes they are charged with committing is a basic right guaranteed by our Federal and State Constitutions.”); [Long v. State](#), 92 So.2d 259, 260 (Fla.1957) (“[W]here an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment.”); [Lewis v. State](#), 53 So.2d 707, 708 (Fla.1951) (“No principle of criminal law is better settled than that the State must prove the allegations set up in the information or the indictment.”). Consistent with this

principle, the Third District Court of Appeal has held that a kidnapping conviction cannot be sustained on evidence of an intent element not charged in the indictment. *See* [Mills v. State](#), 407 So.2d 218 (Fla. 3d DCA 1981).

^[4] ^[5] The significance of the intent element flows from the status of kidnapping as a specific intent crime. *See* [Sochor v. State](#), 619 So.2d 285, 290 (Fla.1993). Modern, statutory kidnapping as codified in [section 787.01, Florida Statutes](#), differs from its lesser included offense of false imprisonment in its requirement of proof by the State of one of the four intent elements set out in the statute. *See* [Sean v. State](#), 775 So.2d 343, 344 (Fla. 2d DCA 2000). As stated in [Keith v. State](#), 120 Fla. 847, 163 So. 136 (1935), the “gist of the offense” is the felonious act of a confinement or abduction with a specific intent. *Id.* at 138–39.

^[6] ^[7] On the other hand, it is well settled that if an indictment charges premeditated murder, the State need not charge felony murder or the particular underlying felony to receive a felony murder instruction. *See* [Woodel v. State](#), 804 So.2d 316, 322 (Fla.2001); [Gudinas v. State](#), 693 So.2d 953, 964 (Fla.1997); [Kearse v. State](#), 662 So.2d 677, 682 (Fla.1995). We have held that in felony murder situations the notice required by due process of law and supplied by the charging document as to other offenses is provided instead by our State’s reciprocal discovery rules and by the enumeration in [section 782.04\(1\)\(a\)\(2\), Florida Statutes](#) (2003), of the felonies on which the State may rely to establish first-degree felony murder. *See* [Kearse](#), 662 So.2d at 682; *see also* [O’Callaghan v. State](#), 429 So.2d 691, 695 (Fla.1983). As long as the definition of the underlying felony provided to the jury is sufficiently definite to assure the defendant a fair trial, “[i]t is not necessary ... to instruct on the elements of the underlying felony with the same particularity as would be required if the defendant were charged with the underlying felony.” [Brumbley v. State](#), 453 So.2d 381, 386 (Fla.1984); *see also* [Gudinas](#), 693 So.2d at 964 (“We have repeatedly rejected claims that it is error for a trial court to allow the State to pursue a felony murder theory when the indictment gave no notice of the theory.”).

In this case, the State relied on kidnapping to support the felony murder theory of first-degree murder and also charged kidnapping in a separate count of the indictment. However, the instruction on the offense of kidnapping relied upon for felony murder and the instruction on the separate count of kidnapping do not correspond. In the absence of an objection to these divergent instructions, the question becomes whether it was fundamental error for the trial court to give an instruction on *70 the kidnapping underlying felony murder in count I different

from the instruction given on kidnapping as charged in count II. We resolve this issue by examining the rationale behind case law allowing instruction on felony murder based on an indictment charging premeditated murder, by looking to the instruction given to Crain's jury on the relationship between the two counts, and finally by looking for any indications in the record that Crain was surprised or prejudiced by the divergent instructions.

First, as we have previously explained, the State need not charge felony murder in a first-degree murder indictment. Second, separate treatment of felony murder and the underlying felony comports with the standard jury instructions which were given in this case:

A separate crime is charged in each count of the indictment and while they've been tried together, each crime and the evidence applicable to it, must be considered separately and a separate verdict returned as to each.

A verdict of guilty or not guilty as to one crime, must not affect your verdict as to the other crime charged.

The jury did not request clarification of the felony murder or kidnapping instructions. Accordingly, we assume that the jury understood and properly applied the instructions, and independently assessed Crain's guilt on each count. See *Burnette v. State*, 157 So.2d 65, 70 (Fla.1963) (stating that an appellate court must assume that a juror, if properly instructed, will comply with the obligations of the oath and render a true verdict according to the law and the evidence); see also *Sutton v. State*, 718 So.2d 215, 216 & 216 n. 1 (Fla. 1st DCA 1998), and cases cited therein, ("applying the well-established presumption that juries follow trial court instructions").

Third, we note that Crain's argument on appeal that the indictment gave him constitutionally insufficient notice of felony murder resting on kidnapping with intent to inflict bodily harm is not compelling on these facts. The record contains no indication that Crain was surprised or otherwise prejudiced at trial by the felony murder instruction. The proposed jury instructions provided to Crain's attorney included the alternative of intent to inflict bodily harm as an element of felony murder based on kidnapping. Not only did defense counsel fail to object or otherwise claim surprise, but Crain's attorney specifically referred to the wording of the felony murder instruction in his closing argument.¹⁰ Moreover, Crain's defense at trial in this case was that he was in no way responsible for the disappearance and death of Amanda, not that he lacked the requisite intent.

On this record, we cannot conclude that there was any

unfair surprise, failure of notice, or denial of due process as to the felony murder instruction on kidnapping. In light of these considerations, we conclude that the trial court did not commit fundamental error in instructing the jury on "intent to inflict bodily harm" as an alternative to "intent to commit homicide" in defining the underlying felony of kidnapping. *71 ¹¹ In light of this conclusion, we next determine whether the evidence is sufficient to sustain Crain's convictions.

III. SUFFICIENCY OF EVIDENCE

A. Applicable Law

¹⁸¹ ¹⁹¹ In cases in which the evidence of guilt is wholly circumstantial, it is the trial judge's task to review the evidence 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. See *State v. Law*, 559 So.2d 187, 189 (Fla.1989). A reviewing court must assess the record evidence for its sufficiency only, not its weight. We explained in *Tibbs v. State*, 397 So.2d 1120 (Fla.1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982):

The weight and the sufficiency of evidence are, in theory, two distinct concepts most often relevant at the trial court level. Sufficiency is a test of adequacy. Sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." In criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Weight, at least in theory, is a somewhat more subjective concept. The "weight of the evidence" is the "balance or preponderance of evidence." It is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.

As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is

substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Id. at 1123 (citations and footnotes omitted) (quoting *Black's Law Dictionary* 1285, 1429 (5th ed.1979)).

^[10] Although the jury is the trier of fact, a conviction of guilt must be reversed on appeal if it is not supported by competent, substantial evidence. See *Long v. State*, 689 So.2d 1055, 1058 (Fla.1997). In this regard, we have explained:

A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.

Donaldson v. State, 722 So.2d 177, 182 (Fla.1998) (quotation marks and citations omitted).

The State acknowledges that the evidence of intent in this case is entirely circumstantial. In *Law*, this Court reiterated the standard of review in circumstantial evidence cases: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the *72 evidence is inconsistent with any reasonable hypothesis of innocence." 559 So.2d at 188 (citing *McArthur v. State*, 351 So.2d 972 (Fla.1977), and *Mayo v. State*, 71 So.2d 899 (Fla.1954)).

B. Corpus Delicti

^[11] ^[12] Crain assumes for the purposes of argument that there is sufficient evidence to support the jury conclusion that Amanda is dead and that he killed her.¹² However, in capital cases, this Court independently assesses the sufficiency of the evidence to determine if it is legally sufficient. See *Mansfield v. State*, 758 So.2d 636, 649 (Fla.2000). Thus, we must determine whether there was sufficient evidence to establish that the alleged victim is dead and that the defendant killed her.

^[13] ^[14] Despite the inability of authorities to find the victim's body, there is competent, substantial evidence, inconsistent with any reasonable hypothesis of innocence, to establish that Amanda is dead and that Crain killed her, establishing two of the three essential elements of first-degree murder. See Fla. Std. Jury Instr. (Crim.) 7.2. These elements subsume the corpus delicti for murder, which consists of the victim's death via the criminal agency of another. See *Meyers v. State*, 704 So.2d 1368, 1369 (Fla.1997). The corpus delicti of murder can be proven circumstantially, even without any evidence of the discovery of the victim's body. See *id.*; see also *Bassett v. State*, 449 So.2d 803, 807 (Fla.1984). In this case, the extraordinary unlikelihood that a seven-year-old child would voluntarily disappear from her sleeping mother's side in the middle of the night and remain alive but never be seen or heard from again is strong circumstantial evidence of her death. See *Epperly v. Commonwealth*, 224 Va. 214, 294 S.E.2d 882 (1982) (establishing corpus delicti based on evidence of eighteen-year-old victim's character, traits, habits, and relationships, which negated theories of suicide, natural death, accidental death, justifiable, or excusable homicide, or continuing life in absentia).

In addition to the abrupt and permanent disappearance of a young child supporting the inference that Amanda is dead, there is also evidence that Amanda was last seen alive in the presence of Crain, that Amanda's blood was found on Crain's boxer shorts, and that scratch marks consistent with a young girl's fingernails were found on Crain's body. Finally, although not independently determinative, we note that Crain's oddly targeted bleaching of his bathroom in the middle of the night along with his unusual behavior the next morning support a conclusion that Crain's actions with Amanda the previous evening were unlawful and resulted in her death. Thus, we conclude that the totality of these circumstances constitutes substantial, competent evidence from which the jury could reasonably have excluded all inferences other than that Amanda is dead and that Crain killed her. Cf. *Meyers*, 704 So.2d at 1370 (concluding that the State presented sufficient circumstantial evidence of corpus delicti in case involving disappearance of

fourteen-year-old victim, and evidence of injuries to defendant including fingernail scratches).¹³

*73 C. First-Degree Murder

[15] [16] The jury found Crain guilty of first-degree murder on a general verdict form that did not specify whether the verdict was based on premeditated or felony murder. A general guilty verdict rendered by a jury instructed on both first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation. See *Jones v. State*, 748 So.2d 1012, 1024 (Fla.1999); *Mungin v. State*, 689 So.2d 1026, 1029–30 (Fla.1995). We conclude that the evidence is sufficient to establish first-degree felony murder based on kidnapping with the intent to inflict bodily harm.

Crain, a fifty-two-year-old man who met Amanda at her mother's house on the day before she disappeared, showed an immediate interest in the child. Crain played games with Amanda and gave her money for her homework, drew with her, and told her about his collection of movies. This initial, apparently benign conduct led to several instances of closer contact, including Crain and Amanda disappearing into his bedroom to watch "Titanic," Hartman subsequently discovering Amanda sitting between Crain's legs, and Crain insisting on blow-drying Amanda's hair. Perhaps most significantly, the last time Hartman saw Amanda, she was sleeping next to Crain in Hartman's bed. Although Hartman did not prevent any of these close contacts, it is reasonable for the jury to have inferred from the evidence of Crain's conduct that Crain had taken steps to ingratiate himself to Amanda.

In addition, the evidence showed that on the night of Amanda's disappearance, a witness living near Amanda's trailer saw a vehicle that matched the description of Crain's truck with its lights on and engine running for approximately five minutes before she heard the truck being driven away. From the evidence of Crain's interest in Amanda, the fact that he was present when Amanda was last seen asleep in her mother's bed, Hartman's testimony that she slept through the night, and the neighbor's observations of Crain's truck, the jury could reasonably have inferred to the exclusion of all other hypotheses that Crain took Amanda from the trailer without the consent of her mother. This conduct establishes an unlawful confinement under the kidnapping statute. See § 787.01(1)(b) ("Confinement of a child under

the age of 13 is against her or his will within the meaning of [kidnapping] if such confinement is without the consent of her or his parent or legal guardian.").

However, as noted above, in order to establish a kidnapping the State must also prove that the unlawful confinement occurred with a specific intent. In this regard we note that the Second District Court of Appeal has affirmed a conviction of attempted kidnapping with intent to inflict bodily harm or terrorize the victim in reliance on evidence similar to that in this case, specifically that the defendant took a young, sleeping child from his bed in the middle of the night. See *Sean*, 775 So.2d at 344. Here, in addition to circumstances similar to *Sean*, the State also presented evidence that blood consistent with Amanda's DNA was found on Crain's boxer shorts and taken from the toilet tissue found in Crain's toilet bowl. Further, multiple scratches and one cluster of gouges were observed and photographed on Crain's arms. All but two of the scratches were more likely to have been caused by the fingernails of a seven-year-old child than by any other cause. The *74 cluster of small gouges was more likely to have been caused by a small grasping hand consistent with that of a seven-year-old child than by another cause.

Based on this evidence, we conclude that the State presented legally sufficient evidence of a kidnapping with the intent to inflict bodily harm. The DNA blood evidence linked to Amanda that was found on Crain's boxer shorts tends to establish that Amanda bled while Crain was wearing his boxer shorts. Moreover, the DNA evidence indicating a mixture of blood from Crain and Amanda found on the toilet seat and tissue in Crain's bathroom establishes that Amanda and Crain both bled at some point during the kidnapping. When considered in light of the DNA evidence, the scratch and gouge marks on Crain's arms are indicative of a struggle between Crain and Amanda.¹⁴ We note that at the time of her death Amanda was three feet ten inches tall and weighed approximately forty-five pounds. Crain was a fifty-two-year-old man of normal height and weight,¹⁵ engaged in a physically demanding profession. Combined with the disparate height and weight, we conclude that the evidence that a struggle occurred between Amanda and Crain which resulted in both parties' blood loss and numerous scratches and gouges to Crain's arms is a compelling indication of Crain's intent to inflict bodily harm on Amanda.

Our conclusion in this case is consistent with a Virginia Supreme Court decision on analogous facts. In *Epperly*, the Supreme Court of Virginia considered whether, in the absence of a body and a confession, the evidence was sufficient to support a jury verdict of first-degree

premeditated murder. In that case, the defendant and the victim met at a bar and went to a lake house that belonged to a friend of the defendant. The victim's sister reported her missing the next evening. The police ultimately arrested the defendant for her murder despite the fact that the victim's body was never found. In affirming the defendant's conviction for first-degree murder the Virginia Supreme Court noted that a "spattering of tiny droplets of blood through two rooms, the bloodstained clothing, the broken ankle bracelet, the large bloodstain on the carpet, and the disparity of size and strength between [the victim] and the defendant are all circumstances from which the jury could properly infer that she was subjected to a savage beating, resulting in her death." *Epperly*, 294 S.E.2d at 892.

In this case, we determine that the circumstantial evidence supports a verdict of first-degree murder based on felony murder with the underlying felony being kidnapping with intent to inflict bodily harm. The evidence of an abduction, the drops of *75 blood, the DNA evidence, the disparity of size and strength, and the evidence of a struggle between Amanda and Crain are all circumstances from which a jury could properly infer, to the exclusion of any reasonable hypothesis of innocence, that Crain abducted and intentionally harmed Amanda before her death. The fact that we cannot pinpoint when the actual bodily harm and subsequent killing occurred in relation to the time Crain first kidnapped Amanda does not undermine this conclusion. See *Van Gotum v. State*, 569 So.2d 773, 776 (Fla. 2d DCA 1990) (holding that the continuing unlawful confinement and the intent to commit grand theft existed simultaneously and involved the same victim and established a confinement with the intent to commit theft). It is sufficient if the State establishes that the unlawful confinement and the specific intent at some point existed simultaneously and involved the same victim. See *id.*

Accordingly, we find sufficient evidence of a killing in the course of a kidnapping with the intent to inflict bodily harm.¹⁶ On this basis, we affirm the first-degree murder conviction.

D. Kidnapping

^[17] We next address whether the evidence is legally sufficient to support the conviction of kidnapping with the intent to commit a homicide *as charged in count II of the indictment*. Unlike the murder charge, which subsumes all

valid felony murder theories, the State cannot rely on the unpled alternative of intent to inflict bodily harm as to this count.

The State argues that the 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. The State's argument on this point invites this Court to stack inferences, which we decline to do. As we stated in *Miller v. State*, 770 So.2d 1144, 1149 (Fla.2000), "the circumstantial evidence test guards against basing a conviction on impermissibly stacked inferences."

The reaction to luminol in Crain's bathroom may support an inference that Crain was attempting to cover something up rather than cleaning his bathroom in the middle of the night. However, there is no evidence from which the jury could have inferred that there was ever a substantial quantity of blood indicative of a prolonged attack and, therefore, a killing with premeditated intent. 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.

To support its theory that the murder was committed with premeditation, the *76 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).

^[18] The impossibility of better reconstructing the circumstances of Amanda's death leaves us unable to conclude that the State presented legally sufficient evidence of a specific intent to kill. Therefore, we conclude that competent, substantial evidence does not exist to support the jury verdict of kidnapping with intent to commit homicide. Accordingly, pursuant to

924.34, Florida Statutes (1997),¹⁷ we reverse the judgment of guilt of kidnapping and direct the trial court on remand to enter judgment for false imprisonment, and to resentence Crain accordingly.¹⁸

IV. PROPORTIONALITY OF DEATH SENTENCE

[19] [20] [21] Although Crain does not raise the proportionality of his death sentence as a separate issue on appeal, this Court has an independent duty to perform a proportionality review of all death sentences. See *Rimmer v. State*, 825 So.2d 304, 331 (Fla.2002). Proportionality review “is not a comparison between the number of aggravating and mitigating circumstances.” *Terry v. State*, 668 So.2d 954, 965 (Fla.1996) (quoting *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990)). Rather, our proportionality review requires us to consider the totality of the circumstances in each case, and to compare these circumstances with other capital cases to determine whether death is warranted. See *Rimmer*, 825 So.2d at 331; *Porter*, 564 So.2d at 1064.

In this case, Crain’s death sentence was supported by three aggravating factors found by the trial court: the murder was committed during the commission of a felony (kidnapping), the defendant was convicted of prior violent felonies (sexual battery and aggravated child abuse), and the victim was under the age of twelve. The trial court rejected statutory mitigating *77 factors, and the nonstatutory mitigation is far from compelling. First, the trial court’s finding of nonstatutory mental health impairment was based on the fact that Crain was a pedophile and substance abuser. Second, as noted by the State, the trial court’s finding that Crain had the capacity to form loving relationships with his children was a “charitable” finding as none of Crain’s children testified during the penalty phase and the defense filed a motion in limine prior to trial to prohibit the State from eliciting testimony concerning Crain’s sexual abuse of his own children. The trial court also found that Crain had an abusive childhood, was deprived of educational benefits, and had a good prison record.

[22] In his fourth issue, Crain asserts that the trial court erred in relying on the aggravator of murder in the course of a felony under section 921.141(5)(d), Florida Statutes (1997), because the evidence of the crime of kidnapping is legally insufficient. Assuming without deciding that Crain is correct in light of this Court’s reduction of the separate kidnapping conviction to false imprisonment, we

conclude that any error in finding the “murder in the course of a felony” aggravator is harmless beyond a reasonable doubt. This case is analogous to *Geralds v. State*, 674 So.2d 96, 104 (Fla.1996), in which this Court concluded that the erroneous finding of the “cold, calculated, or premeditated” aggravator was harmless based on two valid aggravators—that the murder was heinous, atrocious, or cruel, and that the murder was committed during a robbery/burglary—three mitigators that the trial court gave little weight, and a unanimous death recommendation.

Moreover, we conclude that any error in finding the aggravator of murder in the course of a felony does not affect our proportionality review based on the weight of the two remaining valid aggravators under the circumstances of this case. In making this determination, we remain mindful that proportionality review is not a simple comparison of aggravators and mitigators, and we look to other capital cases involving child victims under twelve in which we have found death sentences proportional. In *Lukehart v. State*, 776 So.2d 906 (Fla.2000), this Court affirmed a death sentence for the murder of a five-month-old child. We determined that the murder was “significantly aggravated by the existence of the prior conviction for felony child abuse,” in which Lukehart caused a closed-head injury to his girlfriend’s eight-month-old daughter by shaking her, and concluded that the “prior felony aggravator is an exceptionally weighty aggravating factor under the circumstances of the present case.” *Id.* at 926. In *Stephens v. State*, 787 So.2d 747 (Fla.2001), we found a death sentence proportional for the murder of a child aged three years, four months. We concluded that “like Lukehart, Stephens’ prior violent felony was given great weight and is similar to the events which led to the present murder.” *Id.* at 760. This Court further observed that the record demonstrated that the defendant “was indifferent to the fate of [the] helpless child” and, therefore, concluded that the death penalty was proportional under the circumstances. *Id.* at 760.

During the penalty phase in this case, the State submitted copies of judgments and sentences for five counts of sexual battery and one count of aggravated child abuse. The State also offered the testimony of three child victims of Crain’s previous sexual assaults. The three female victims all testified that Crain began abusing them when they were between the ages of seven and nine years of age. One of the victims endured Crain’s repetitive abuse on a monthly basis for five years. The *78 victims also testified that Crain threatened them with extensive bodily harm or death should they reveal his abuse to anyone. Thus, as we found in *Lukehart*, the prior felony aggravator is an exceptionally weighty aggravating factor

under the circumstances of the present case, and as we concluded in *Stephens*, Crain's history of victimization of children similar in age to the victim in this case increases the magnitude of the prior violent felony aggravator.

In light of the strength of the aggravating factors, the relatively weak mitigation, and our affirmance of death sentences in comparable cases, we conclude that the death penalty is a proportional punishment.

V. CONSTITUTIONALITY OF DEATH PENALTY

[23] In a supplemental brief, Crain raises the issue of the constitutionality of Florida's death penalty scheme in the wake of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court addressed the contention that Florida's capital sentencing scheme violates the United States Constitution under *Apprendi* and *Ring* in postconviction appeals in *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002), and denied relief. We have also denied relief in direct appeals where, as in this case, the trial judge has found the aggravating factor of previous conviction of a violent felony. See *Duest v. State*, 855 So.2d 33, 49 (Fla.2003), *cert. denied*, 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004); see also *Doorbal v. State*, 837 So.2d 940, 963 (Fla.) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), *cert. denied*, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Additionally, the advisory sentence of death in this case was by a unanimous vote. In *Anderson v. State*, 863 So.2d 169, 189 (Fla.2003), *cert. denied*, 541 U.S. 940, 124 S.Ct. 1662, 158 L.Ed.2d 363 (2004), we pointed to the unanimous death recommendation as well as a prior violent felony aggravator in rejecting an *Apprendi/Ring* claim in direct death appeal. We have also rejected *Apprendi/Ring* claims in other direct death appeals involving unanimous death recommendations. See *Conahan v. State*, 844 So.2d 629, 642 n. 9 (Fla.), *cert. denied*, 540 U.S. 895, 124 S.Ct. 240, 157 L.Ed.2d 172 (2003); *Chavez v. State*, 832 So.2d 730, 767 (Fla.2002), *cert. denied*, 539 U.S. 947, 123 S.Ct. 2617, 156 L.Ed.2d 637 (2003). Accordingly, we conclude that Crain is also not entitled to relief.

VI. CONCLUSION

For the foregoing reasons, we affirm the conviction of first-degree murder and sentence of death in this case, and reduce the conviction of kidnapping to false imprisonment.

It is so ordered.

PARIENTE, C.J., and ANSTEAD, QUINCE, and CANTERO, JJ., concur.

QUINCE, J., specially concurs with an opinion, in which PARIENTE, C.J., and CANTERO, J., concur.

LEWIS, J., concurs in result only with an opinion.

WELLS, J., concurs in part and dissents in part with an opinion.

QUINCE, specially concurring.

I concur in the majority's decision to affirm the jury's verdict for first-degree *79 murder because the evidence demonstrates beyond a reasonable doubt that Amanda Brown is dead and that her death occurred during criminal activity, a kidnapping, perpetrated by Willie Seth Crain. My agreement with the majority is based on both the absence of evidence which would suggest some other person is responsible for the disappearance and death of Amanda and the circumstances surrounding Crain's interaction with this seven-year-old victim. Thus, the circumstantial evidence in this case leads to the inescapable conclusion that Crain and no one else abducted and murdered Amanda Brown. See *Cox v. State*, 555 So.2d 352, 353 (Fla.1989) (holding that the circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged").

The time frames involved in this murder indicate there was only a short period of time (at most four hours) between the time that the mother went to sleep and when Crain left her residence, and the discovery that Amanda was not at home. From the testimony of Crain, Kathryn Hartman (Amanda's mother), Penny Probst, a neighbor, and Michelle Rogers, another neighbor, the earliest Crain

could have left Hartman's trailer is 2:30 a.m. The neighbors indicated they observed Crain's vehicle on the side of the trailer with the lights on and the engine running at 2:30 a.m. When Hartman awoke at 6:12 a.m., Amanda was not in the bed or in the house. Both Hartman and Roy Brown, Amanda's father, testified that Amanda was afraid of the dark and never wandered outside alone at night. Moreover, there was no indication that there was any type of forced entry into the trailer. The back door to the trailer was kept locked and was locked on September 9, 10 and 11. There was also no evidence that any of Amanda's clothes or toys were missing. Hartman testified that nothing of value was missing from the trailer.

In addition, the circumstances of this case weave a pattern that leads to the inescapable conclusion that Amanda Brown is dead and that Willie Seth Crain caused that death. After meeting Amanda for the first time on the afternoon of September 10, Crain showed a pointed interest in this seven-year-old child. He talked to her about her homework and offered her money if she got the homework correct.¹⁹ He also sat at the kitchen table and played games with her. At some point in the afternoon Crain noticed that Amanda had a loose tooth, and he offered her money if she would let him pull it.²⁰

On the evening of September 10, Crain returned to the Hartman residence and again played games with Amanda. At some point in the evening he told them he had a large video collection and invited them to his trailer. Once at Crain's trailer, they began watching a movie in the living room. However, while the mother was on the telephone talking to Crain's sister, Crain took the child into his bedroom to watch the movie. When the mother came in, Amanda was sitting between his legs with his arms around her. Even after Amanda and her mother returned home, Crain continued to show a marked interest in the child when he offered to and did blow dry her hair after she took a shower.²¹

After Amanda and her mother were in bed, Crain laid down in his clothing on the *80 same bed occupied by the females. Less than four hours later, when Hartman got up, both Amanda and Crain were no longer in the residence. When Crain was called by Hartman to see if Amanda was with him, he simply said she was not with him, and he continued to take his boat out. There was no offer of assistance.

The circumstantial evidence produced by the State indicates that after removing Amanda from her home, Crain took her to his trailer and committed acts of violence against her. Blood consistent with Amanda Brown's DNA was found on the toilet seat, on a piece of

toilet tissue²² from Crain's bathroom, and on Crain's boxer shorts. Hartman indicated that she and Amanda used Crain's bathroom when they were there on the evening of the 10th; however, the child was not bleeding during that time. Even more telling is the fact that, after coming home after 2:30 a.m., Crain spent the rest of the early morning hours scrubbing down his bathroom with bleach. He then went out to the Courtney Campbell Causeway and took out his boat.

Amanda's death occurred only one day after Crain was introduced into her life. Hartman met Crain on the night of September 9, 1998. Amanda was not at home when Crain came to the trailer that night or early morning of the 10th. However, he met Amanda on the afternoon of September 10, and she was killed on September 11. Both the jury and this Court would have to engage in sheer speculation to conclude that some other person entered the Hartman dwelling and abducted Amanda during this four-hour window of opportunity.

I believe these facts and circumstances lead to the inescapable conclusion that Amanda Brown is dead and Crain murdered her. Therefore, I concur in the majority's decision affirming Crain's conviction for first-degree murder. *See, e.g., Johnston v. State*, 863 So.2d 271 (Fla.2003).²³

PARIENTE, C.J., and CANTERO, J., concur.

LEWIS, J., concurring in result only.

Although I concur in result, it is not without considerable concern and reservations. I have concerns with not only the legal theories and applications, but also with overstatements of facts. We review very tragic circumstances here involving a child, but I cannot agree with characterizations of much of the evidence and inferences upon which others rely for legally sufficient evidence. In my view, the majority and others rely upon strained and improper expanded inferences drawn from the actual evidence presented, which ultimately determine that Crain's intent can be ascertained from far less actual evidence. In my view, it is the actual physical evidence (blood and scratches) along with the actual physical location of such evidence (boxer shorts and arms) that tips the evidentiary balance to support a finding of felony murder based upon kidnapping with the intent to commit bodily harm. Therefore, I cannot fully agree with the majority's decision and discussion of the evidence.

Prior to addressing the ultimate issue in this case,

however, I must also initially voice my concern regarding our determination *81 that Crain's death sentence may rest upon a conviction of felony murder, where the underlying felony is kidnapping with intent to commit bodily harm. Crain was indicted on two counts—premeditated murder and kidnapping with intent to commit a homicide. Pursuant to the majority's holding, however, Crain's conviction and sentences are being affirmed based only upon convictions for felony murder and false imprisonment. In my view, this result presents serious due process concerns that cannot be lightly disregarded. While I recognize this Court's repeated adherence to the rule that the state may pursue a theory of felony murder even when the defendant has only been indicted for premeditated murder, I am concerned with our application of the rule here, as I believe this case presents a very unique scenario, and may be clearly distinguishable from those decisions which have relied upon and discussed this rule.²⁴

Our rules do not require that the state charge a defendant with felony murder, or even inform the defendant of the specific crimes upon which the state intends to rely, when the state elects to pursue a theory of felony murder. See *Kearse v. State*, 662 So.2d 677, 682 (Fla.1995). This rule is based upon the theory that through our reciprocal discovery rules and the felony murder statute, a defendant has notice of the charges, the evidence the state will rely upon, and the possible underlying felonies the state may use to prove felony murder. See *id.* I am not convinced this rationale is always adequate where the state intends to rely upon kidnapping as the underlying felony for felony murder and a separately charged kidnapping count cannot be sustained by the evidence.

Kidnapping is a specific intent crime. Under Florida law, the state is required to prove one of the four enumerated intentional acts to support kidnapping. See *Van Gotum v. State*, 569 So.2d 773, 775 (Fla. 2d DCA 1990); *Mills v. State*, 407 So.2d 218, 221 (Fla. 3d DCA 1981). While a charge of first-degree murder may place a defendant on notice of the possibility that the state intends to pursue a theory of felony murder, and the felony murder statute itself informs the defendant of the possible felonies the state may pursue, these provisions do nothing to notify the defendant of the specific intentional conduct the state will seek to prove to support a finding of kidnapping, which I suggest is foundational in the process of formulating any defensive strategy.

Here, the charge of premeditated murder did not place Crain on notice of the underlying felony upon which the State would ultimately rely to support a conviction for felony murder. Instead, that notice was actually supplied

by the additional charge of kidnapping with intent to commit a homicide. Indeed, while the State maintains that Crain was on notice regarding intent to inflict bodily harm, the State conceded that its theory of prosecution throughout trial in this case was that Crain kidnapped the child with the intent to commit homicide. Clearly, this was the alleged conduct Crain was on notice to defend against.

As noted, the State charged Crain with both premeditated murder and kidnapping with intent to commit a homicide, and proceeded *82 throughout the trial on only those two theories. It was not until the end of trial, during closing arguments and jury instructions, that the theory of kidnapping with intent to inflict bodily harm was first raised and then presented to the jury for the first time. Also, as a result of the use of a general jury verdict form, it is impossible to ascertain whether the jury found Crain guilty of premeditated murder or felony murder. Further, as it is impossible to know if Crain was convicted of felony murder, it is not known whether the jury determined that Crain had committed a kidnapping with intent to commit a homicide or intent to inflict bodily harm.²⁵

We have concluded that the evidence was insufficient to support a finding of premeditated first-degree murder, yet we uphold the conviction based on felony murder with the underlying felony being kidnapping, but then proceed to reduce a second count of kidnapping with intent to commit a homicide to false imprisonment. A review of the numerous decisions of this Court holding that the state may pursue a theory of felony murder even when the defendant has been charged with only premeditated murder, seems to reveal no decision where this Court has applied this rule in a situation similar to that presented here. In all cases where the rule has been followed, either the finding of premeditation has been upheld or the defendant's separate conviction of an underlying felony that would support felony murder could be upheld. Therefore, in those decisions, the defendant was clearly not harmed by the fact that the state charged only premeditated murder.

Here, the evidence does not support a finding of premeditation and we have also reduced the separate charge of kidnapping to false imprisonment, a crime that does not support felony murder. In reviewing Florida law it appears that never before has this Court determined that when premeditation is not supported by the evidence, and the separately charged felony which provided the defendant with notice as to felony murder is also not supported by the evidence, the felony murder theory may be upheld as a basis for conviction. In my view, although

our theories of law appear to permit this result, this presents serious due process concerns.

I would agree that here, had the State proven the intent necessary to support the separate charge of kidnapping with intent to commit a homicide, Crain's first-degree murder conviction should clearly be upheld pursuant to the felony murder doctrine, as Crain unquestionably was on notice of that charge and defended against it. However, because the State elected to charge the separate kidnapping count, but failed to prove that charge by legally sufficient evidence, and because it is very likely that the jury relied upon the underlying kidnapping charge to support the felony murder count, Crain's right to due process is placed in question. While I recognize the principle that an appellate court must assume that jurors follow instructions, here Crain's jury was provided two separate instructions for the same crime. These varying instructions could have easily misled or confused the jury, placing the jury's verdict in question. Notably, the State wrote in its brief to this Court:

Under either of the two intents, the evidence is sufficient to find the appellant guilty of felony murder with kidnapping as the underlying felony. However, *83 should this Court determine it must speculate as to which intent the jury found, the fact the jury returned a verdict of guilty on the kidnapping count indicates the jury necessarily found that the kidnapping was done with the intent to commit or to facilitate the commission of a homicide; the intent charged in the indictment.

Answer Brief of the Appellee at 75.

The State could have very easily avoided the problem in this case by charging Crain with felony murder, thereby placing him on notice by enumerating the exact felony upon which it would be relying, or by using a specific jury verdict form. *See In re Use By Trial Courts of Standard Jury Instructions in Criminal Cases*, 431 So.2d 594, 597 (Fla.1981) (recognizing there could be improvement in the manner in which a case is presented to the jury on alternate theories of felony murder and premeditated murder and suggesting use of special verdict forms as a solution). The State, for unknown reasons, opted not to indict Crain for felony murder, choosing

instead to charge him with only first-degree premeditated murder. Further, although not required by law to do so, the State elected to charge Crain with a separate felony, namely kidnapping with intent to commit a homicide, which, if proven, certainly could have been used to support felony murder. Again, the State was free to charge Crain with kidnapping with intent to commit bodily harm, but did not choose to do so. I suggest that when the state elects to charge only premeditated murder, and further elects to charge a felony which, if proven, would support felony murder, it is that felony or a lesser included felony that provides the defendant with notice of the felony the state intends to rely upon should it pursue a theory of felony murder. It is that felony the defendant prepares to defend against, and therefore if the underlying felony cannot be proven, felony murder cannot be found. In cases involving the ultimate punishment of death, a defendant is entitled to the ultimate level of due process. The result attained here without the aid of complete argument from either party generates concerns as to whether Crain received the due process rights to which he is entitled under these specific facts.

Turning to the next issue, the ultimate conclusion affirming Crain's conviction and sentence, with regard to whether the evidence is legally sufficient to support a finding of kidnapping with intent to inflict bodily harm, in my view, the majority's rendition of the facts skews the evidence presented and draws improper and expanded inferences. From the majority's presentation, it is suggested that Crain was a predator, who ingratiated himself into the victim's life through her mother, only to wait for the perfect opportunity to kidnap and murder the child. The majority highlights that Crain visited Hartman's trailer three times in two days, and suggests, in speculation at best, that after the first visit Crain must have known Hartman had a daughter because "two photographs of Amanda and some of her toys were visible in the trailer." Majority op. at 63. Additionally, by noting that Crain assisted Amanda with her homework, gave her money for correct answers, played games with her, and offered to pull a loose tooth, *see id.* at 63, the majority suggests that Crain took an untoward interest in Amanda during his visits to her mother's trailer. This inference is further developed when the majority notes that Hartman, who had been on the telephone, found Amanda sitting on Crain's bed, between Crain's legs facing the television, with Crain apparently demonstrating to Amanda how to work the remote control, *see id.* at 63-64, and that *84 later in the night Crain dried Amanda's hair after she had showered. *See id.* at 64.

Even recognizing that in consideration of a motion for a judgment of acquittal, the court must examine all the facts

and inferences in a light most favorable to the state, *see McCoy v. State*, 853 So.2d 396, 408 (Fla.2003), it is my view that here, the majority opinion has drawn and relied upon expanded inferences contrary to law. The evidence presented demonstrates that Crain never attempted to separate Amanda from her mother, and in fact it was Amanda's mother who voluntarily and intentionally introduced Crain into these circumstances. It was Hartman who solicited Crain into her home. Further, Amanda's mother neither voiced an objection nor asked Crain to leave when Crain laid down on the bed with Hartman and her daughter.

The majority's characterization of Hartman's testimony is in my view also misleading in its suggestiveness. While it may be true that Crain demonstrated an interest in the child by helping her with her homework and rewarding her for correct answers, such is not uncommon or abnormal behavior for an adult in the normal course of human interaction. Further, the evidence shows that the bedroom in which Amanda and Crain were located while Crain assisted Amanda with the operation of the television electronic equipment, was the only room in the trailer with air conditioning and a television. Therefore, it was logical for Crain and Amanda to be in that room while Hartman was on the telephone. When Hartman entered the room, apparently nothing had occurred or was occurring to cause the mother any particular concern for the child's safety. Hartman knew the two were together and apparently had no reason for fear or concern. Hartman, the mother on the scene, apparently observed no improper or illicit conduct or behavior as she freely participated in the various activities from which the majority now attempts to infer a predatory stalking of the child by Crain. The majority seeks to infer something that the mother, who was physically present with her child, apparently did not observe as being the sinister conduct the majority infers. Hartman solicited Crain's presence within her family circle and apparently she never had a reason to ask that he leave or alter his behavior.

Additionally, it is not uncommon that an adult would be positioned behind a child while demonstrating how to work an electronic device, such as a remote control. Crain's interactions with the child were not unlike interactions that adults have with children every day. Hartman's testimony provides no support for our conclusion that Crain kidnapped Amanda with the intent to cause her bodily harm. It must be remembered that it was Hartman who brought Crain into this context and Hartman was present at all times. While in no way suggesting that Hartman is at fault or blameworthy for the tragic circumstances that occurred, it must be recognized that the majority is drawing inferences that even the

mother, who was present at the time, clearly did not make.

During trial, Crain moved for a judgment of acquittal both after the State presented its evidence and after the close of all evidence, arguing the State had not presented sufficient evidence to support either premeditated or felony murder. The trial judge denied Crain's motion. This Court has repeatedly held that where a conviction is based wholly upon circumstantial evidence, a special standard of review applies. *See Darling v. State*, 808 So.2d 145, 155 (Fla.2002); *Jaramillo v. State*, 417 So.2d 257 (Fla.1982). As stated in *State v. Law*, 559 So.2d 187 (Fla.1989):

***85** Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence....

....

... A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Consistent with the standard set forth in *Lynch [v. State]*, 293 So.2d 44 (Fla.1974)], if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So.2d at 45. The state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla. R.Crim. P. 3.380.

It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the *exclusion of all other inferences*. That view of the evidence must be taken in the light most favorable to the state.

Id. at 188–89 (citations and footnote omitted) (emphasis added).

Crain's hypothesis of innocence at trial was simply that he was not guilty—that he did not kidnap and kill Amanda Brown. Therefore, it was the trial court's obligation to determine whether the State presented substantial, competent evidence to refute Crain's theory of innocence. In my view, the State could meet its threshold burden and provide competent evidence from which the jury could infer guilt to the exclusion of all

other inferences in this case only from the physical blood and scratch injury evidence. Suspicion alone cannot satisfy this burden and the expansive inferences are not, in my view, competent. The majority properly concludes that the evidence was insufficient to support premeditated murder and felony murder based upon kidnapping with intent to commit a homicide. The majority is correct in concluding that the evidence supports that Crain committed felony murder, where the underlying felony is kidnapping with intent to commit bodily harm, but incorrect in seizing upon expansive improper inferences.

Initially, we should not impute upon Crain an admission that he was in fact involved in the murder of Amanda Brown. In his brief to this Court, Crain does assume *only for purposes of argument* that Amanda is dead and that he killed her, but this does not equate to an admission of guilt that should be used against him as established fact. Crain's primary argument to this Court is that the State did not prove the required intent necessary to support either premeditated or felony murder based on kidnapping with intent to commit homicide.²⁶ The majority improperly infers that because Crain does not assert on appeal that the evidence was insufficient to prove the fact that Amanda is dead and that he killed her, he has thereby conceded that the child died at his hands. *See* Majority op. at 72 n. 12. Such a conclusion would necessarily require that this Court infer guilt in every case in which an appellant-defendant does not challenge the sufficiency of the evidence necessary to prove that the victim is dead, *86 and that he or she actually killed the victim. To support the ultimate conclusion that Crain had the requisite intent to commit bodily harm, the majority opinion begins with the presumption that Amanda Brown is dead and that Crain killed her.

In support of the determination that the evidence was sufficient to support felony murder based on the felony of kidnapping with the intent to commit bodily harm, the majority posits that: (1) Crain took a young sleeping child from her mother's bed in the middle of the night; (2) the DNA blood evidence linked to Amanda Brown found on Crain's boxer shorts and the luminol evidence in the bathroom both established that Amanda bled while confined; and (3) the scratch and gouge marks on Crain's arms indicate that a struggle occurred between Crain and Amanda. *See* Majority op. at 64. The support for the majority decision comes from a Second District decision, *Sean v. State*, 775 So.2d 343 (Fla. 2d DCA 2000).

The conclusion that Crain's act of removing Amanda from her mother's bed in the middle of the night supports an inference of guilt has some limited support in the record. As noted, the majority begins with the

presumption that Crain killed Amanda, and it simply expands that presumption by maintaining that Crain must have taken the child from her mother's bed. The State presented absolutely no evidence that demonstrates that Crain took the child from her mother's bed. The presence of a vehicle without more does not justify the inference the majority imposes. The majority's reliance on *Sean* is also misplaced. In *Sean*, the Second District merely noted: "[U]nder the facts in this case, we have no problem affirming Sean's [attempted kidnapping] conviction. The evidence that Sean took a young, sleeping child from his own bed in the middle of the night supports the verdict of guilt." *Sean*, 775 So.2d at 344. The district court did not explain what evidence supported the conclusion that the defendant had taken the child from his own bed. *See id.* While I agree that *when there is evidence* that an adult has taken a child from the child's bed in the middle of the night, that fact may create an inference of fact to support a charge of kidnapping with intent to inflict bodily harm. However, in the instant case, there is no direct evidence to support the allegation that Crain removed the child from her mother's bed, a fact that cannot be merely assumed, which is an assumption drawn by the majority.

The majority also directs attention to evidence of scratch marks on Crain's arms to conclude that a struggle occurred between Amanda and Crain. Crain, who earned his living as a crabber, attributed the scratches and gouges to his work with crab traps. The State did not offer definitive evidence that Crain's version of the facts was not true. In fact, the State's own medical examiner testified that he could not determine with certainty whether the scratches were caused by fingernails. The medical examiner did testify that some of the scratches were more likely caused by fingernails, a factual basis from which inferences may be drawn. Although the expert conceded that all of the scratches were consistent with having been caused by crab traps and wire meshing, such does not negate proper inferences.

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 *87 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.

The final piece of evidence upon which we rely is the blood found on Crain's boxer shorts, which was subsequently linked by DNA to Amanda Brown. While the existence of this blood evidence alone may be enough to support a finding that Crain possessed the intent to commit bodily harm required to affirm the felony murder conviction, this Court has held even when evidence, such as fingerprints, conclusively links a defendant to a crime, the state must still introduce some other evidence to support a conviction. See *Long v. State*, 689 So.2d 1055, 1058 (Fla.1997). Similarly, even when evidence, such as a single drop of blood, conclusively links a victim to a defendant, the state is required to introduce other evidence to support a first-degree murder conviction and sentence of death.²⁷

This Court has held that "[c]ircumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction." *Cox v. State*, 555 So.2d 352, 353 (Fla.1989). Further, "[c]ircumstantial evidence is not sufficient when it requires such pyramiding of inferences in order to arrive at a conclusion of guilt." *Weeks v. State*, 492 So.2d 719, 722 (Fla. 1st DCA 1986). The parties do not dispute that the State's case was based entirely upon circumstantial evidence. The State provided no direct evidence of Amanda's death, that her disappearance was the result of a kidnapping, or that Crain was in any way involved in Amanda's disappearance. The blood and scratch evidence is the only substantive material. The majority begins with the presumption that Amanda is dead and that Crain was involved, and then arrives at a conclusion of guilt based upon a pyramiding of inferences. While the evidence may suggest such suspicions, the majority's ultimate conclusion—that the evidence supports a finding of kidnapping with intent to commit bodily harm—is clearly not without problems. Even if the majority is correct, and we assume Amanda Brown is dead and that Crain killed her, the record is completely void of any direct evidence of his intent to cause Amanda Brown bodily harm. The evidence does not demonstrate how she died, and from the limited evidence presented, it is difficult to determine, to any reasonable degree, Crain's mental state that night. Just as the evidence does not support a finding of premeditation or kidnapping with intent to commit a homicide, it is only circumstantial to prove kidnapping with intent to commit bodily harm when the blood and scratch evidence is considered. While the evidence presented may support a non-intent based homicide, it is not without some good arguments that a conviction for first-degree felony murder and a sentence of death does not have sufficient

supporting evidence. Therefore, I concur in result only.

WELLS, J., concurring in part and dissenting in part.

***88** I concur that there is insufficient evidence to sustain the kidnapping conviction. I dissent to the affirming of the first-degree murder conviction.

Based upon the record presented in this case, there are simply too many assumptions which have to be made to affirm Crain's conviction for first-degree murder, either premeditated or felony. Since the child's body has not been located, the initial inference which has to be made is that she is dead. From that inference, all others have to be stacked. I have to recognize what the trial judge concluded in her sentencing order: "There is no way to know exactly what happened to Amanda Brown." *State v. Crain*, No. 98-17084, order at 2 (Fla. 13th Cir. Ct. order filed Nov. 19, 1999). That is the evidence in the record.

It appears to me that this case is similar to the case this Court had before it in *Meyers v. State*, 704 So.2d 1368 (Fla.1997). However, the clear distinction was that in *Meyers*, there was a confession to cell mates which overcame the wholly circumstantial evidence of a case in which the child's body was never located.

In *Cox v. State*, 555 So.2d 352, 353 (Fla.1990), we said:

This Court has long held that

one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence.

Davis v. State, 90 So.2d 629, 631 (Fla.1956); *McArthur v. State*, 351 So.2d 972 (Fla.1977). Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." *Hall v. State*, 107 So. 246, 247 (Fla.1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. *Williams v. State*, 143 So.2d 484 (Fla.1962); *Davis*; *Mayo v. State*, 71

So.2d 899 (Fla.1954).

One of this Court's functions in reviewing capital cases is to see if there is competent substantial evidence to support the verdict. *Williams v. State*, 437 So.2d 133 (Fla.1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984). After reviewing this record, we find that the state's evidence is not sufficient to support Cox' conviction.

See also *Long v. State*, 689 So.2d 1055, 1057–58 (Fla.1997).

All Citations

894 So.2d 59, 29 Fla. L. Weekly S635

Footnotes

1 See art. V, § 3(b)(1), Fla. Const.

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

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

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

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

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

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

8 Stem's daughter was married to Crain's son.

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

10 In discussing the anticipated instruction on felony murder, counsel stated:
They still have to prove under the felony murder theory, they have to prove that Amanda Victoria Brown is dead and that she died—the death occurred as a consequence of and while Willie Seth Crain was engaged in the commission of kidnapping.

....

The instruction further says that the kidnapping must be done with the intent to commit or facilitate the commission of homicide or to inflict bodily harm upon the victim.

11 We do not address whether the felony murder instruction given in this case would have constituted harmful error had Crain preserved the issue with a proper objection.

12 Crain has not asserted in his appeal that the evidence was insufficient to prove either that Amanda is dead or that he killed her.

- 13 Justice Wells' partially dissenting opinion in this case includes the assertion that this case is distinguishable from *Meyers* only in the absence of a confession, which Justice Wells deems fatal to Crain's conviction. However, unlike *Meyers*, in which the defendant's confession was necessary to establish that the victim's death was caused by the defendant's criminal act, see 704 So.2d at 1370, in this case the circumstantial and physical evidence was such that the jury could lawfully have concluded that it was the defendant and no one else who committed the killing.
- 14 Crain asserted at trial and on appeal that he obtained the scratch marks while crabbing. Relying on testimony from the medical examiner that he could not determine with any degree of certainty whether the scratches were caused by fingernails or crab traps, Justice Lewis states in his separate opinion that "[t]he State did not offer definitive evidence that Crain's version of the facts was not true" regarding the origin of the scratch marks. See *infra* at 86. However, we note that the circumstantial evidence standard requires this Court to take every inference in the light most favorable to the State. See *Law*, 559 So.2d at 189. The State offered evidence that Crain's version of the events was untrue—namely the medical examiner's testimony that the scratches were more likely to have been caused by the fingernails of a seven-year-old girl than by a crab trap. Applying the review standard for circumstantial evidence to this evidence, we conclude that the jury could have properly rejected Crain's version that the scratches came from crabbing.
- 15 The October 1, 1998, arrest report reflects that Crain was six feet tall and weighed 150 pounds.
- 16 Because we determine that the evidence is sufficient to support a first-degree felony murder conviction, we decline to directly address Crain's argument that the evidence is insufficient to establish first-degree premeditated murder. Any error in instructing the jury on premeditated murder based on insufficient evidence of premeditation is necessarily harmless. See *Jones*, 748 So.2d at 1024 ("[E]ven if the evidence does not support premeditated murder, any error in charging the jury on that theory is harmless where the evidence supports a conviction for felony murder, which has also been charged."); *Mungin*, 689 So.2d at 1029–30 (concluding that error in instructing on felony murder was "clearly harmless" where evidence supported conviction for felony murder and the jury properly convicted defendant of first-degree murder on this theory).
- 17 Section 924.34 provides:
When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.
- 18 False imprisonment does not require specific intent. See *State v. Sanborn*, 533 So.2d 1169, 1170 (Fla.1988) (concluding that the general intent of false imprisonment is included in the specific intent of kidnapping). Section 787.02, Florida Statutes (1997), provides in pertinent part:
(1)(a) The term "false imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will.
(b) Confinement of a child under the age of 13 is against her or his will within the meaning of this section if such confinement is without the consent of her or his parent or legal guardian.
- 19 He eventually gave her \$2.
- 20 This time the offer of money was \$5.
- 21 Hartman testified there that were no cuts or sores on Amanda's body when she helped Amanda dry off and get ready for bed.
- 22 The blood on the tissue was consistent with a mixture of the DNA profiles of Amanda Brown and the defendant.
- 23 I also agree with the majority that the jury was properly instructed on felony murder with the underlying felony being kidnapping to facilitate great bodily harm even though the defendant was not charged with this form of kidnapping.
- 24 I must note that it is troubling to me that neither the State nor Crain gave more than passing consideration to the theory, namely felony murder based upon kidnapping with intent to inflict bodily harm, upon which the majority is upholding Crain's first-degree murder conviction and sentence of death. While Crain argued that neither premeditation nor kidnapping with intent to commit a homicide was supported by the evidence, he never addressed whether

kidnapping with intent to commit bodily harm was proven.

25 However, as the State noted in its brief, the jury's erroneous determination of guilt as to the charge of kidnapping with intent to commit a homicide strongly suggests that if the jury found Crain was guilty of felony murder, the underlying felony upon which the jury relied was kidnapping with intent to commit a homicide.

26 Crain also asserted in his brief that the trial court erred in denying his motion for a judgment of acquittal.

27 This same rationale applies 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.

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix F

State v. Crain, No. 98-17084, Sentencing Order
at 2 (Fla. 13th Cir. Ct. order filed Nov. 19, 1999).

IN THE CIRCUIT COURT IN AND FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF HILLSBOROUGH, STATE OF FLORIDA

CRIMINAL DIVISION
CASE NO. 98-17084

STATE OF FLORIDA

vs.

MURDER IN THE FIRST DEGREE
KIDNAPPING

WILLIE SETH CRAIN

SENTENCING ORDER

On September 13, 1999, the Defendant, WILLIE SETH CRAIN, was found guilty by a jury of Murder in the First Degree and Kidnapping.

On September 17, 1999, by a unanimous vote of twelve (12) to zero (0), the jury recommended that the Court sentence the Defendant to death.

On October 11, 1999, the State and the Defense presented additional evidence and argument to the Court. The Defendant was given an opportunity to be heard and he presented his concerns and comments to the Court.

This Court heard the evidence presented in the guilt and penalty phases of the trial, has considered the additional evidence and argument provided at the sentencing hearing on October 11, 1999, has reviewed the sentencing memorandum submitted by the Defense, and has considered the information presented by the Defendant.

The Court finds as follows:

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

On January 14, 1985, the Defendant was convicted of Sexual Battery and Aggravated Child Abuse in case number 84-6359.

On January 14, 1985, the Defendant was convicted of Sexual Battery in case number 84-6510.

On January 14, 1985, the Defendant was convicted of Sexual Battery in case number 84-6511.

On January 14, 1985, the Defendant was convicted of Sexual Battery in case number 85-6360.

On January 14, 1985, the Defendant was convicted of Sexual Battery in case

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number 84-6816.

Judgments and sentences for each of these crimes were introduced.

In addition, three of the victims of these crimes testified about what Mr. Crain had done to them when they were young children. There is no doubt that the Defendant committed these crimes.

This aggravating factor has been proven beyond all reasonable doubt and the Court has given this factor great weight.

2. The capital felony was committed while the Defendant was engaged in the commission of, or attempting to commit, or escape after committing, the crime of kidnapping.

On September 9, 1998, the Defendant met the victim's mother, Mrs. Hartman, at a bar where his daughter worked. After buying Mrs. Hartman drinks and spending time with her at the bar, Mr. Crain invited Mrs. Hartman to go to his daughter's home. She did so. Later, the Defendant went to Mrs. Hartman's home for a short time. The next afternoon, on September 10, 1998, the Defendant returned to Mrs. Hartman's home. Mrs. Hartman's daughter, seven (7) year old Amanda Brown, came home from school at about 2:30 p.m. Amanda Brown is the victim in this case.

Although there is conflict in the testimony of the victim's mother and the Defendant, both agree that the Defendant left some time during the afternoon of September 10, 1998, but returned for dinner. The Defendant spent time with Amanda Brown. The Defendant helped Amanda with her homework, gave her money, and played games with her. After dinner he invited Mrs. Hartman and Amanda to his house to see the movie "Titanic" about which Amanda showed great enthusiasm. The Defendant drove Amanda and her mother to his trailer. He spent some time alone with the victim in his bedroom while Mrs. Hartman was speaking to the Defendant's daughter in another room at his request. Finally, all three began watching the movie in his bedroom. As it was a school night for Amanda, they did not watch all of the movie. All three returned to Mrs. Hartman's trailer. They took the movie back with them so that Amanda could finish watching it at another time. During the course of the evening, the Defendant gave five (5) Valium to Mrs. Hartman. Both Mrs. Hartman and the Defendant were also drinking throughout the evening. The victim, her mother, and the Defendant finally went into Mrs. Hartman's bedroom. The mother remembered that she last saw the Defendant around 2:00 a.m. on September 11th, when Amanda was asleep in bed between the Defendant and herself. Mrs. Hartman testified that when she awoke at approximately 6:15 a.m. Amanda and Willie Crain were gone.

A massive search effort by air, land, and water involving many law enforcement agencies and volunteers was unsuccessful in locating Amanda. Over a year later, when the jury reached its verdict, neither the child nor her body, had been found.

There is no way to know exactly what happened to Amanda Brown.

In addition to the facts above, however, is the DNA evidence. DNA results indicate that blood consistent with that of the victim was found on the underwear the Defendant was wearing on September 11, 1998. Also, blood consistent with the victim's was found on the toilet in the Defendant's trailer.

The Defendant testified that on September 11, 1998, he left the victim sleeping in bed with her mother. He went to his trailer and thoroughly cleaned his bathroom with

bleach before he left to go crabbing that morning.

There is other evidence consistent with the Defendant's testimony that he attempted to clean his trailer. Other credible evidence, however, is not consistent with the Defendant's testimony that he left Amanda Brown sleeping in her mother's bed.

Other crabbers and witnesses testified that the Defendant's behavior, dress, and demeanor the morning of the victim's disappearance were unusual. Statements attributed to the Defendant both before and after the child's disappearance further establish circumstantial evidence of the kidnapping of Amanda Brown by the Defendant.

The jury concluded that the Defendant was guilty of kidnapping.

The Court finds that the Defendant committed the kidnapping.

The Defendant argues, however, in his Memorandum of Law in Support of A Life Sentence that in effect the Court would be doubling the aggravating circumstances if it considers both the victim's age, that the victim was less than twelve (12) at the time of the murder, and also considers this aggravator. The Defendant argues . . . "that the victim's age made it easier for the State to get a conviction on the underlying felony of kidnapping in the guilt phase of the trial, and virtually assured the finding of not one, but two aggravating circumstances arising out of the same factual basis." The Court does not believe that the Defendant's position is legally correct and therefore rejects this argument.

This aggravating factor has been proven beyond a reasonable doubt and the Court has given this factor great weight.

3. The victim of the capital felony was less than twelve (12) years of age.

The facts established and the Defendant concedes, that Amanda Brown was less than twelve (12) years old.

This aggravating factor has been proven beyond a reasonable doubt and the Court has given this factor great weight.

None of the other aggravating factors enumerated by statute applies in this case and none was considered by this Court.

Nothing except as indicated in paragraphs 1 through 3 above was considered in aggravation. Although victim impact evidence was presented to the jury during the penalty phase, this Court did not consider that evidence in aggravation or for any other reason.

B. MITIGATING FACTORS

STATUTORY MITIGATING FACTORS

The Court asked the Defendant to prepare a memorandum suggesting all mitigation he believed had been presented to either the jury or the Court at the separate sentencing hearing. A memorandum was prepared. Each suggestion of mitigation will be addressed in the order addressed in the Defendant's memorandum, using the terminology of the Defendant.

1. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

Dr. Robert Berland, a forensic psychologist, was the only witness called by the defense during the penalty phase of the trial. Dr. Berland testified that he had administered two tests, the Minnesota Mutliphasic Personality Inventory (MMPI) and the Wechsler Adult Intelligence Scale (WAIS). Dr. Berland also telephonically interviewed some of the Defendant's friends and family members. He conducted a clinical examination of the Defendant that stretched over several interviews and lasted approximately ten (10) hours. Dr. Berland also reviewed investigative reports pertaining to the case, the Defendant's prior medical and treatment records related to his past offenses, and the Defendant's prison records.

Dr. Berland concluded that, although the Defendant attempted to mask and deny it, he has been and continues to be psychotic. According to Dr. Berland, the Defendant has had "a chronic mental illness" for many years and still has it. He has suffered and still suffers from "paranoid delusional thinking." Dr. Berland testified that the Defendant's mental condition was exacerbated by the use of alcohol, cocaine, and prescription drugs.

Dr. Berland found the results of both the MMPI and the WAIS tests to be particularly strong indicators that the Defendant's mental health was extremely impaired due in part to brain injury. Dr. Berland testified that the likely cause of the brain injury was an alleged mugging that had occurred around December, 1997. Since then, the Defendant's family members and friends described the Defendant's behavior as including hallucinations, increased paranoid thinking, jumping from one subject to another in mid-thought, and irrationally and for no apparent reason accusing people of being "out to get him." The Defendant had increased memory problems and excessive fatigue, and showed more inclination to withdraw. Friends and family members also reported that during the 6 - 8 months prior to his arrest, the Defendant's mental health deteriorated as he mixed prescription medication with alcohol and cocaine. He spoke of suicidal thoughts and witnesses recounted what they believed to have been suicide attempts by the Defendant.

The Defendant, however, did not report a mugging to Dr. Berland. The State retained a forensic psychiatrist, Dr. Barbara Stein, who interviewed the Defendant on September 13, 1999. Dr. Berland heard the Defendant report to Dr. Stein that he had suffered this alleged mugging. The mugging, with its attendant choking, is the only event that Dr. Berland said might have caused Mr. Crain's supposed brain damage. There is no medical or other evidence confirming such an event. No medical tests such as an MRI or C.T. Scan were done at or near the time of the alleged event. The Defendant did not seek medical treatment. No neuropsychological evaluation was done.

It is significant that Dr. Berland offered no specific information about the Defendant's emotional state or mental condition on or about September 11, 1998, the date of the victim's disappearance. The Defendant maintained that "he had been framed." It was the doctor's position that it did not make sense to try to get Mr. Crain to give him any information about this time period because the doctor had so much trouble getting other information from the Defendant.

Mr. Crain had reluctantly told Dr. Berland about hallucinations he'd had at about age thirty (30). According to the doctor, however, the Defendant reported no symptom, experience, or behavior which would suggest that he was under the influence of extreme mental or emotional disturbance around the time Amanda Brown vanished.

All of the symptoms reported by other witnesses addressed events occurring during the months prior to the victim's disappearance. Some of these events were as far removed

as 6 - 8 months. No witness reported any occurrence immediately before or during the time period at issue.

Dr. Barbara Stein was called by the State. The doctor indicated that she had reviewed the Defendant's prior medical and other treatment records, prison records, case investigative reports, Dr. Berland's deposition, and the Defendant's MMPI and WAIS test results conducted by Dr. Berland. The doctor also attempted to read Dr. Berland's notes but because she had some difficulty deciphering the notes, she relied more heavily on Dr. Berland's deposition. Dr. Stein also interviewed the Defendant once for approximately 4 - 4 ½ hours. She concluded that the Defendant was not under the influence of extreme mental or emotional disturbance at the time of the murder.

There was no evidence in any of the 13 years of records that the Defendant was psychotic. During her interview with the Defendant, he did not endorse any symptoms of psychosis and Dr. Stein found that the Defendant's behavior up to and including the date of his arrest was organized and goal oriented. He worked, lived on his own, maintained his trailer, purchased things and socialized with friends and family.

As to the question of brain injury, Dr. Stein said that there was none. There were no eyewitnesses to the alleged mugging, no medical evaluations or tests were conducted, and there was no medical impact reported by the Defendant at the time.

Dr. Stein also disputed that the MMPI confirmed brain damage. She stated that the MMPI is not recognized for that purpose.

She also said that the WAIS is "never used to establish brain damage." According to Dr. Stein, it measures IQ. Further, she stated that neuropsychologists generally do not rely on that test to detect brain injury.

In fact, Dr. Stein testified that much of the behavior reported by the Defendant's friends and family could be due to substance abuse as opposed to psychosis.

As to the Defendant's use of alcohol and drugs, the notes of the Defendant's physician, Dr. Milian, reflect that when he last saw the Defendant in June, 1998, the Defendant denied any abuse of alcohol or drugs. In fact, the Defendant indicated to the doctor that he had not had any alcohol in the previous ten (10) months. There is also an entry in Dr. Milian's files that in December, 1997, the Defendant had denied any use of alcohol.

The Defendant, however, indicated to others and others observed that he was drinking regularly and using both prescription and illegal drugs.

The Court concludes as follows as to this proposed mitigator:

The Defendant did not reveal anything to Dr. Berland about his mental status at the time of the victim's disappearance.

There is no other evidence that Mr. Crain was under extreme emotional or mental disturbance at the time of the murder. There is no corroboration in the form of medical records or tests. There has been no diagnosis in any record anywhere, either in his prison records or his other medical records, that he was at any time, let alone at the time of the murder, suffering from psychosis.

Clearly the Defendant has been determined to be a pedophile. Although there is disagreement among mental health experts about how Pedophilia should be dealt with in the legal arena, both Dr. Berland and Dr. Stein agreed that Pedophilia is a mental disorder. Pedophilia, however, even in combination with the Defendant's history of alcohol and drug abuse, does not establish that the Defendant was under extreme mental or emotional disturbance at the time of the murder.

The Court is not reasonably convinced that the Defendant suffered a brain injury. There is only the possibility that this alleged injury occurred. There is no corroboration, no medical exam, and no test which shows any brain damage. The Defendant's behavior and other alleged symptoms are not necessarily attributable to brain damage. Dr. Stein emphatically rejected Dr. Berland's interpretation of the MMPI and the WAIS tests to establish brain damage, and this Court is not persuaded that those tests confirm the Defendant's brain injury.

Most persuasive is Mr. Crain's behavior at the time of the murder as both he and others described it to the jury. His recall of events, although certainly not entirely credible, was precise and detailed, albeit clearly self-serving and evasive at times. He went crabbing the day before Amanda disappeared, drove back and forth between Mrs. Hartman's trailer and his own, and watched a movie. The next day he went crabbing and he spoke to his daughter, Mrs. Hartman, and the police. He appeared to be perfectly rational and functional.

In fact, and unfortunately, this Court is convinced that he was functioning all too well. He worked the mother to get to the child. He gave the mother drugs, lent her money, complimented her, and made sexual advances toward her. Then he worked the child. He helped her with her homework, gave her money, and played games with her. Then he took the child. Finally, he murdered the child.

The Court is therefore not reasonably convinced that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murder.

By his own report to Dr. Stein and anecdotal reports of friends and family, however, the Defendant was drinking alcohol almost daily, taking prescribed drugs, and using cocaine two days before the child disappeared.

The Defendant is obviously a pedophile.

The Court is, therefore, reasonably convinced that the Defendant's mental health was impaired and that his mental problems were further exacerbated by the use of alcohol and drugs, both legal and illegal.

The Court has therefore given some weight to this factor.

2. The capacity of the Defendant to conform his conduct to the requirements of law was substantially impaired.

In its memorandum, the Defense argues that Mr. Crain is an uncured pedophile.

As indicated above, the Court has already considered and given this factor some weight.

3. The Defendant was intoxicated at the time of the crime.

It is significant that Dr. Berland did not conclude that the Defendant was intoxicated at the time of the offense. In answer to Mr. Traina's question "Did you come to any conclusion regarding whether or not Mr. Crain was intoxicated at the time that this crime took place?" Dr. Berland said, "I had some information that bore on that." The Defendant did not discuss his alcohol or drug use at the time of the offense with Dr. Berland. The Defendant did, however, share some information with Dr. Stein, while Dr. Berland was observing that interview.

The Defendant told Dr. Stein that he drank daily during the months preceding the date of the crime but drank less than usual on that particular day. Mrs. Hartman reported that he was "drunk," but Dr. Stein testified that Mr. Crain's behavior was the "bottom line." The Defendant said that he had consumed three (3) drinks, each of which contained three (3) shots. As indicated above, however, the Defendant was functioning, appeared to be thinking rationally, was getting from place to place, was able to account for his whereabouts when asked by the police, and at trial was able to recall in great detail what he had allegedly done and not done.

Dr. Stein also explained that over time, a person builds up a tolerance to alcohol. Based on all of the above, Dr. Stein concluded that the Defendant was not intoxicated.

The Court has no doubt that the Defendant had been drinking, but the Court is not reasonably convinced that the Defendant was intoxicated to the point that he was not aware of what he was doing. There is no credible evidence to suggest otherwise from the Defendant or any other witness.

The Court is reasonably convinced, however, of the Defendant's abuse of alcohol and drugs as discussed above and has given some weight to this factor.

4. The Defendant suffered from brain injury.

As discussed above in the Court's analysis of the Defendant's proposed mitigator¹, there is no credible evidence which suggests that the Defendant suffered any brain injury. The Court, therefore, is not reasonably convinced of this mitigator and has given it no weight. The Court has obviously considered the Defendant's mental health problems and has given those problems some weight. It is not the source, after all, but the existence of the problems that must be and has been considered by this Court.

5. The Defendant has a history of extensive substance abuse.

As discussed above in 1 and 3, the Court is reasonably convinced of the Defendant's history of substance abuse. The Court has given this factor some weight.

6. The Defendant has a history of abuse and unstable home life.

As related by Dr. Berland, the Defendant's childhood was clearly unstable and

devoid of any substantial love or nurturing. The Court believes that the Defendant was both neglected and abandoned by his mother, and was physically, as well as sexually, abused by her.

He did not fare much better in the care of others as he moved between parents and other relatives.

The Court is reasonably convinced that the Defendant has a history of abuse and an unstable home life, and has given this mitigator modest weight.

7. The Defendant was deprived of the educational benefits and social learning that one would normally obtain from public education.

It is clear that the Defendant did not go beyond the second grade for all intents and purposes, and is still unable to read or write with any real proficiency. Clearly the Defendant did not acquire those socialization skills normally available to children in school.

The Court is reasonably convinced that this mitigator has been established and has given it modest weight.

8. The Defendant has participated in at least thirteen (13) years of counseling and psychiatric care for mental illness and panic disorder.

The Defendant was and remains a pedophile. The Defendant did participate in and complete the S.H.A.R.E. program, an outpatient sex offender treatment program. The Defendant, however, was court ordered into this program. If he had not successfully completed the program, it is likely that the Defendant would have been found in violation of his probation and might have been sent back to prison. Importantly, although he was still feeling urges to have sexual contact with children, the Defendant did not continue to seek additional help for his pedophilia. Further, although he may have warned some about his predilections, he certainly did not warn Mrs. Hartman or Amanda Brown. On the contrary, he very deliberately sought to get close to Mrs. Hartman and Amanda Brown, and obviously did.

Although the Defendant did seek continued counseling and treatment for a panic disorder, this panic disorder did not cause him to kidnap and murder Amanda Brown.

The Court has already acknowledged Mr. Crain's mental health problems and given weight to that factor. The Court is not reasonably convinced that this is a new mitigating factor.

9. At the time the Defendant experienced depression and suicidal ideation in the months leading up to his arrest.

Dr. Berland testified that the Defendant spoke about wanting to die frequently in the 6 - 8 months prior to Amanda Brown's disappearance. He reportedly had asked someone to kill him and supposedly had attempted to kill himself on a couple of occasions.

Assuming that this information is true, it would be another indication of Mr. Crain's mental problems. Since the Court has already considered Mr. Crain's mental condition above, little weight is given to this factor.

10. The Defendant was open with strangers about his past charges and expressed self-loathing regarding his past acts of pedophilia.

The Defendant's expressions of self-loathing as reported by others to Dr. Berland may reflect his remorse over his past acts of pedophilia, but remorse over past events is not relevant. The Court is, therefore, not reasonably convinced that this mitigator has been established.

11. The Defendant had a history of hard, productive work, starting and running a successful business.

As reported to Dr. Berland by family, friends and the Defendant, Mr. Crain apparently was hard working, although in the months just prior to Amanda Brown's disappearance, his substance abuse seemed to interfere with his work ethic. The Court is persuaded that at least he attempted to work steadily.

The Court is reasonably convinced of this mitigator and has given it some weight.

12. The Defendant has a good prison record.

The Department of Corrections' records reflect the Defendant's good prison record and the Court is, therefore, reasonably convinced of this mitigating factor. The Court has given modest weight to this factor.

13. The Defendant has the capacity to form loving relationships.

There was no testimony by the Defendant's family members in the penalty phase. Two daughters, however, did testify during the guilt phase and did acknowledge to Dr. Berland that they loved their father. He, in turn, also indicated that he loved them and his grandchildren. The Court is, therefore, reasonably convinced of this mitigator and gave it modest weight.

This Court has now discussed all the aggravating and mitigating circumstances. The aggravating circumstances in this case far outweigh the mitigating circumstances. Each one of the aggravating factors in this case, standing alone, would be sufficient to outweigh the mitigation presented on Mr. Crain's behalf. This Court agrees with the jury's unanimous decision that in weighing the aggravating circumstances against the mitigating circumstances, death is the sentence that must be imposed.

Accordingly, it is hereby

ORDERED AND ADJUDGED, for the murder of AMANDA BROWN, you, WILLIE SETH CRAIN, are hereby sentenced to death.

ORDERED AND ADJUDGED, for the kidnapping of AMANDA BROWN, you, WILLIE SETH CRAIN, are hereby sentenced to life in prison consecutive to the sentence just imposed by this Court on Count I in the indictment.

The two reasons for the upward departure by this Court are as follows:

1. The Defendant was contemporaneously convicted of a capital felony which is not reflected on the guideline scoresheet.
2. The primary offense is scored at level 7 or higher and the Defendant has been convicted of one or more offense that scored, or would have scored, at an offense 8 or higher.

Either reason alone would be a sufficient basis for the upward departure.

ORDERED AND ADJUDGED that you, WILLIE SETH CRAIN, shall be transported to Florida State Prison until this sentence is carried out as provided by law.

The Defendant has thirty (30) days to appeal the judgment and sentence of this Court.

DONE AND ORDERED in Tampa, Hillsborough County, Florida this 19th day of November, 1999.



BARBARA FLEISCHER
Circuit Court Judge

Copies furnished to:

Jay Pruner and Chris Moody
Assistant State Attorneys

Daniel Hernandez and Charles Traina
Counsel for the Defendant

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix G

Crain v. State, 78 So.3d 1025,1035 (Fla. 2011).

78 So.3d 1025
Supreme Court of Florida.

Willie Seth CRAIN, Jr., Appellant,
v.
STATE of Florida, Appellee.

No. SC09–1920.

Oct. 13, 2011.

Rehearing Denied Jan. 20, 2012.

Synopsis

Background: After affirmance of defendant’s conviction for felony murder and death sentence, 894 So.2d 59, defendant brought motion for postconviction relief. After an evidentiary hearing, the Circuit Court, Hillsborough County, Anthony Kerrol Black, J., denied relief. Defendant appealed.

Holdings: The Supreme Court held that:

[1] counsel did not perform deficiently in stipulating that DNA recovered from defendant’s boxer shorts and from defendant’s bathroom was blood, and

[2] counsel did not perform deficiently in failing to retain an expert witness to rebut the trial testimony of State’s expert that scratch marks on defendant’s body were consistent with having come from the young victim’s fingernails.

Affirmed.

West Headnotes (19)

[1] **Criminal Law**
🔑 Deficient representation and prejudice in general

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel’s performance was deficient and that the deficient performance

prejudiced the defendant so as to deprive him of a fair trial. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[2] **Criminal Law**
🔑 Deficient representation in general

To establish the deficiency prong under the *Strickland* test for ineffective assistance of counsel, the defendant must prove that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[3] **Criminal Law**
🔑 Presumptions and burden of proof in general

The defendant alleging ineffective assistance of counsel carries the burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
🔑 Prejudice in general

Under the prejudice prong, the *Strickland* test for ineffective assistance of counsel places the burden on the defendant, not the State, to show a “reasonable probability” that the result would have been different, which is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

- [5] **Criminal Law**
 🔑 Review De Novo
Criminal Law
 🔑 Counsel

Because both the deficient performance prong and the prejudice prong of the *Strickland* test for ineffective assistance of counsel present mixed questions of law and fact, the appellate court employs a mixed standard of review, deferring to the trial court's factual findings that are supported by competent, substantial evidence, but reviewing the trial court's legal conclusions de novo. [U.S.C.A. Const.Amend. 6](#).

[Cases that cite this headnote](#)

- [6] **Criminal Law**
 🔑 Strategy and tactics in general

Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. [U.S.C.A. Const.Amend. 6](#).

[1 Cases that cite this headnote](#)

- [7] **Criminal Law**
 🔑 Stipulations

Counsel did not perform deficiently, as element of ineffective assistance of counsel, in stipulating, for guilt phase of capital murder trial, that DNA recovered from defendant's boxer shorts and from defendant's bathroom was blood; confidential DNA expert retained by counsel had failed to provide counsel with a basis for questioning State's test results, before trial defendant had given the media an innocent explanation for presence of blood, i.e., seven-year-old victim's loose tooth had caused her to bleed, and defendant gave that same

innocent explanation when he testified at trial. [U.S.C.A. Const.Amend. 6](#).

[Cases that cite this headnote](#)

- [8] **Criminal Law**
 🔑 Stipulations
Criminal Law
 🔑 Experts; opinion testimony

Defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's allegedly deficient performance in stipulating, for guilt phase of capital murder trial, that DNA recovered from defendant's boxer shorts and from defendant's bathroom was blood, and in failing to obtain substrate control testing of the DNA and to educate the jury regarding possible cross-contamination of evidence collected; defendant's sole expert at postconviction relief hearing was unable to testify that the source of the DNA evidence in the case was derived from anything other than blood or that cross-contamination actually occurred, and State's expert witnesses at postconviction hearing found no problems with DNA testing in the case. [U.S.C.A. Const.Amend. 6](#).

[Cases that cite this headnote](#)

- [9] **Criminal Law**
 🔑 Preparation for trial

The *Strickland* test for ineffective assistance of counsel permits counsel to make a reasonable decision that makes particular investigations unnecessary. [U.S.C.A. Const.Amend. 6](#).

[Cases that cite this headnote](#)

- [10] **Criminal Law**
 🔑 Experts; opinion testimony

Counsel did not perform deficiently, as element

of ineffective assistance of counsel, by failing to retain an expert witness to rebut the trial testimony of State's expert on forensic pathology, at guilt phase of capital murder trial, that scratch marks on defendant's body shortly after disappearance of seven-year-old victim were consistent with having come from fingernails of a seven-year-old child; during pretrial deposition counsel had obtained significant concessions from State's expert regarding nature of scratch-marks evidence, and counsel made reasonable decision to confront and challenge State's expert witness at trial through cross-examination. [U.S.C.A. Const.Amend. 6.](#)

[5 Cases that cite this headnote](#)

^[11] **Criminal Law**
[Experts; opinion testimony](#)

The *Strickland* test for ineffective assistance of counsel does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense; rather, in many instances cross-examination will be sufficient to expose defects in an expert's presentation.

[2 Cases that cite this headnote](#)

^[12] **Criminal Law**
[Experts; opinion testimony](#)

Defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's allegedly deficient performance in failing to retain an expert witness to rebut the trial testimony of State's expert on forensic pathology, at guilt phase of capital murder trial, that scratch marks on defendant's body shortly after disappearance of seven-year-old victim were consistent with having come from fingernails of a seven-year-old child; defendant's postconviction expert was unable to rule out fingernails as cause of scratch marks and the expert admitted that he had no "real

problems" with trial testimony of State's expert witness, and State's expert witness had acknowledged at trial that he could not narrow down whether any two of the injuries occurred at exactly the same time. [U.S.C.A. Const.Amend. 6.](#)

[3 Cases that cite this headnote](#)

^[13] **Criminal Law**
[Homicide and assault with intent to kill](#)

Prosecutor's closing argument at guilt phase of capital murder trial, that marks found on defendant's body shortly after disappearance of seven-year-old victim were "suggestive of a little girl's fingernails," was fair comment on testimony of State's expert witness that the marks were consistent with having come from fingernails of a seven-year-old child.

[Cases that cite this headnote](#)

^[14] **Criminal Law**
[Exceptions to two-pronged standard](#)

The *Cronic* standard of per se prejudice, as element of ineffective assistance of counsel, is reserved for situations where the assistance of counsel has been denied entirely or withheld during a critical stage of the proceeding such that the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. [U.S.C.A. Const.Amend. 6.](#)

[1 Cases that cite this headnote](#)

^[15] **Criminal Law**
[Questions of Fact and Findings](#)

The appellate court is highly deferential to the trial court's judgment on the issue of credibility of witnesses, and in evaluating a trial court's order, the appellate court will not substitute its

judgment for that of the trial court on the credibility of the witnesses, provided its order is supported by competent, substantial evidence.

[Cases that cite this headnote](#)

[16]

Criminal Law

🔑 Presentation of evidence in sentencing phase

Counsel did not perform deficiently, as element of ineffective assistance of counsel, at penalty phase of capital murder trial in relying, for mitigation evidence, on testimony of an expert witness who used earlier rather than current versions of Wechsler Adult Intelligence Scale (WAIS) and Minnesota Multiphasic Personality Inventory (MMPI) tests for brain injury and psychological disorder; the expert provided postconviction court with adequate reasons for relying on earlier versions of those tests, though two other experts who testified during postconviction proceedings disagreed with the testing conducted by defense expert. [U.S.C.A. Const.Amend. 6](#).

[Cases that cite this headnote](#)

[17]

Criminal Law

🔑 Points and authorities

Defendant waived claim, on appeal from denial of postconviction relief, that trial counsel was ineffective at penalty phase of capital murder trial in failing to secure and present available mitigation, where on appeal defendant neither identified nor argued for any mitigating evidence that should have been, but was not, presented at trial. [U.S.C.A. Const.Amend. 6](#).

[1 Cases that cite this headnote](#)

[18]

Criminal Law

🔑 Particular cases in general

Criminal procedure rule and attorney professional conduct rule restricting post-trial jury interviews by attorneys did not unconstitutionally deny capital murder defendant the right to effective assistance of counsel in pursuing his postconviction remedies. [U.S.C.A. Const.Amend. 6](#); [West's F.S.A. RCrP Rule 3.575](#); [West's F.S.A. Bar Rule 4-3.5\(d\)\(4\)](#).

[Cases that cite this headnote](#)

[19]

Jury

🔑 Term of service; post-trial contacts

Post-trial juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings.

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

***1027** Bill Jennings, Capital Collateral Regional Counsel, [Robert T. Strain](#), Assistant CCR Counsel, Middle Region, Tampa, FL, for Appellant.

[Pamela Jo Bondi](#), Attorney General, Tallahassee, FL, and [Scott Andrew Browne](#), Assistant Attorney General, Tampa, FL, for Appellee.

Opinion

***1028** PER CURIAM.

Willie Seth Crain, Jr., a prisoner under sentence of death, appeals the denial of his motion for postconviction relief filed pursuant to [Florida Rule of Criminal Procedure 3.851](#).¹ Through his postconviction motion, Crain challenges his capital murder conviction and sentence of death arising from the September 1998 murder of seven-year-old Amanda Brown. On direct appeal, this Court evaluated the circumstantial evidence of Crain's

guilt and affirmed his first-degree felony murder conviction, concluding that sufficient evidence existed that Crain killed Amanda in the course of a kidnapping with the intent to inflict bodily harm. In the instant postconviction appeal, Crain primarily criticizes his counsel's performance at trial for failing to adequately challenge the State's circumstantial case. Crain argues that counsel rendered ineffective assistance for stipulating to the fact that DNA matching Amanda's DNA was derived from blood as opposed to some other source. He also contends that counsel were ineffective for failing to retain and call an expert to challenge the State's scratch-marks expert. Crain additionally challenges counsel's presentation of mental health mitigation during the penalty phase. After conducting an evidentiary hearing, the postconviction court denied relief on these claims, as well as summarily denying relief on Crain's challenge to the rules prohibiting juror interviews. We affirm the postconviction court's denial of all claims.

FACTS AND PROCEDURAL HISTORY

Crain, then a fifty-two-year-old fisherman and crabber, was charged with the kidnapping and first-degree murder of Amanda Brown. On direct appeal, this Court detailed the evidence establishing Crain's involvement with Amanda's disappearance. Because this postconviction challenge focuses on the circumstantial evidence, we set forth these facts to place Crain's arguments in the appropriate context:

[O]n September 9, 1998, Crain's daughter, Cynthia Gay, introduced Crain to Amanda's mother, Kathryn Hartman, at a bar in Hillsborough County. Crain and Hartman danced and talked for four hours, until 1:30 or 2:00 in the morning, then went to Hartman's residence, a trailer located in Hillsborough County, where they remained for approximately thirty minutes. Amanda was spending the night with her father and was not present. However, two photographs of Amanda and some of her toys were visible in the trailer. Before Crain left, Hartman made it clear to Crain that she wanted to see him again.

The next afternoon, September 10, 1998, Crain returned to Hartman's trailer. Hartman testified that Crain smelled of alcohol and carried a cup with a yellow liquid in it. Amanda was present. Crain began talking to Amanda about her homework. He pulled some money out and told Amanda that if she got her

homework right, he would give her a dollar. He eventually gave her two dollars. Crain and Amanda sat at the kitchen table playing games and working on her homework. At some point during the afternoon, Crain became aware that Amanda had a loose tooth. After wiggling the tooth, Crain offered Amanda five dollars to let him pull the tooth out, but she refused. Hartman testified that the tooth was not ready to be pulled out. Crain remained at Hartman's residence for approximately one hour. Before he left early in the *1029 afternoon, Crain accepted Hartman's invitation to return for dinner that evening.

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

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

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

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

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

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

According to Hartman, she told Crain, who appeared to be intoxicated at that time, that he could lie down to sober up but she was going to bed. The time was *1030 approximately 2:30 a.m. Within five minutes of Hartman going to bed, Crain entered Hartman’s bedroom and lay down on the bed with Hartman and Amanda. Hartman testified that she neither invited Crain to lie in her bed nor asked him to leave. Crain was fully clothed and Amanda was wearing a nightgown. Amanda was lying between Hartman and Crain.

Penny Probst, a neighbor of Hartman, testified that at approximately 12 midnight on September 10–11, 1998, she saw a white truck parked immediately behind Hartman’s car in Hartman’s driveway. In the early morning hours of September 11, Probst observed the truck parked at the side of Hartman’s residence with the lights on and the engine running. Probst heard the truck leave after about five minutes.

Hartman slept soundly through the night. When she awoke in her bed alone the next morning, she discovered that Amanda was missing. Hartman testified her alarm clock read 6:12 a.m. when she awoke. Hartman immediately called Crain on his cell phone. At that time, he was at the Courtney Campbell boat ramp in Hillsborough County loading his boat. He told

Hartman that he did not know where Amanda was. Hartman then called the police and reported Amanda’s disappearance.

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

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

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

[Crain v. State](#), 894 So.2d 59, 63–65 (Fla.2004) (footnotes omitted).

The record reveals that during the questioning, Bracket noticed multiple scratch marks on Crain’s arms. Thereafter, photographs of Crain’s body were taken. A *1031 forensic pathologist, Dr. Russell Vega, testified at trial that in his opinion, all but two of the scratch marks were “consistent with” having been caused by the fingernails of a seven-year-old child and one cluster of three scratch marks was “somewhat more likely” to have

been caused by fingernails than those depicted in the other photographs. He further testified that one cluster of small gouges on Crain's arm was "somewhat suggestive of ... having been caused by a small grasping hand" with spacing consistent with the hands of a seven-year-old child.²

On direct appeal, we further explained:

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

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

Detective Hurley supervised an extensive, two-week search for Amanda in Upper Tampa Bay, the land surrounding Upper Tampa Bay (including the Courtney Campbell Causeway), and the land *1032 area surrounding the Crain and Hartman residences. Amanda's body was never found. The maroon shirt and dark pants that Darlington saw Crain wearing on the morning of September 11, 1998, also were never recovered.

At trial, the State introduced the testimony of Linda

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

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

Crain then testified in his defense and denied that he was involved in Amanda's death. He stated that he last saw Amanda while she lay sleeping in her mother's bed in the early morning hours of September 11, 1998.

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

Crain, 894 So.2d at 65–67 (footnotes omitted).

This Court affirmed Crain's conviction for first-degree felony murder and sentence of death as to count I in the

indictment. *Id.* at 78. With respect to his sentence and conviction for kidnapping with the intent to commit or facilitate commission of a homicide, count II of the indictment, the Court reversed Crain's conviction because competent, substantial evidence did not exist to support the jury verdict as charged in the indictment. *Id.* at 76.³ As a remedy, the Court remanded *1033 to the trial court to enter judgment for false imprisonment and to resentence Crain accordingly. *Id.*

In September 2006, Crain filed a motion for postconviction relief, raising a total of nine claims.⁴ Following a status conference, the postconviction court conducted an evidentiary hearing on Crain's ineffective assistance of counsel claims. The postconviction court subsequently denied relief on all nine claims.

ANALYSIS

Crain appeals to this Court the denial of his motion for postconviction relief, expressly raising five claims. Crain raises three ineffective assistance of counsel claims, asserting that counsel were ineffective for failing to (1) challenge the State's circumstantial case as it related to DNA evidence introduced at trial and stipulated to as being derived from blood; (2) call an expert to challenge the State's expert witness, who testified as to the origin of scratch marks on Crain's body; and (3) adequately investigate, prepare, and present available mitigation and provide competent expert psychological evaluation and testimony. In his fourth claim, Crain argues that the rules restricting trial counsel's ability to interview jurors are unconstitutional. As to his final claim, he asserts that the cumulative effect of the errors and omissions of trial counsel warrants relief. We address each claim in turn, beginning with Crain's ineffective assistance of counsel claims.⁵

Ineffective Assistance of Counsel Claims

[1] [2] [3] [4] The first three claims raise issues relating to ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *1034

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish the deficiency prong under *Strickland*, the defendant must prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Under the prejudice prong, "*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, — U.S. —, 130 S.Ct. 383, 390–91, 175 L.Ed.2d 328 (2009) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

[5] Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's legal conclusions de novo. *Sochor v. State*, 883 So.2d 766, 771–72 (Fla.2004).

The State's Circumstantial Case

In his first claim, Crain contends that trial counsel were ineffective for failing to challenge the State's circumstantial case as it related to several pieces of DNA evidence introduced at trial. Crain's contention focuses on the effects of counsel's stipulation that DNA stains consistent with Amanda's DNA, which were found on Crain's boxer shorts and inside Crain's bathroom following Amanda's disappearance, came from bloodstains rather than from another source of DNA, such as urine, saliva, or tears. Specifically, Crain argues that no scientific testing conclusively established that the stains collected and tested were blood, yet the stains were repeatedly referred to as bloodstains during trial. Crain further argues that there was no independent DNA testing or expert testimony offered to challenge the DNA evidence presented and that counsel should have retained an expert to test or examine the DNA evidence and educate the jury about the lack of conclusive testing to establish that the evidence was blood, the potential alternative sources of DNA, the possible

cross-contamination of evidence collected, and the lack of substrate control testing.⁶ After conducting an evidentiary hearing on this claim, the postconviction court denied relief under both prongs of the *Strickland* test.

The facts underlying this claim show that at trial, law enforcement officials testified that after Amanda disappeared, they recovered a piece of toilet tissue from the inside rim of Crain's toilet and observed what appeared to be two small bloodstains on the seat of the toilet. Thereafter, the piece of tissue (State's Exhibit 18), the toilet seat (State's Exhibit 17(A)), and the boxer shorts Crain was wearing on the morning of September 11, 1998 (State's Exhibit 46), were collected and analyzed for DNA evidence. The stains were first tested by the Florida Department of Law Enforcement (FDLE) and then sent to LabCorp, an independent testing facility in North Carolina. 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 Brown....

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 Brown....

(Emphasis added.) The stipulation was agreed upon prior to trial, during which defense counsel informed the court that they had consulted with a DNA expert, Dr. William Shields, who had reviewed all the documentation and had given counsel advice. The court asked Crain whether he agreed with this stipulation, and Crain acknowledged his agreement with it and that he was not coerced.

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 very a 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.

***1036** 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.⁷ 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.

Notwithstanding counsel's retention of a confidential DNA expert, who reviewed the State's results prior to the stipulation, Crain contends that counsel was ineffective for failing to challenge the State's circumstantial case, and more specifically, the conclusion that the DNA substance matching Amanda's DNA was blood without independent testing. After finding the testimony of trial counsel to be "very credible" and that Crain's stipulation at trial was entered into with his full knowledge and consent, the postconviction court determined that 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. In making this determination, the postconviction court noted that trial counsel considered alternative courses of action and then made a reasonable strategic decision for the stipulation and for not challenging the evidence or requesting an independent analysis. We accept the postconviction court's findings as supported by competent, substantial evidence. See *Parker v. State*, 3 So.3d 974, 980 (Fla.2009) ("As long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses...." (quoting *Blanco v. State*, 702 So.2d 1250, 1252 (Fla.1997))).

*1037 ^[6] ^[7] As we have routinely stated, "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Patton v. State*, 878 So.2d 368, 373 (Fla.2004) (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000)). Prior to entering into the stipulation, counsel considered attacking the validity of the DNA evidence by retaining a confidential expert. When the expert failed to provide counsel with a basis for questioning the State's test results, the defense sought to establish an innocent, plausible explanation for the presence of blood found on Crain's boxer shorts and

inside his bathroom. Not only was this a reasonable alternative course in light of the retained expert's conclusions, but this decision was also consistent with Crain's prior statements to the media, Crain's continued insistence that if blood was found inside his bathroom or on his clothes, it was due to Amanda's loose tooth, and Crain's testimony to this effect at trial. Cf. *Carroll v. State*, 815 So.2d 601, 613 & n. 14 (Fla.2002) (concluding that trial counsel's decision not to retain a DNA expert was reasonably strategic where counsel spoke with several DNA experts in preparation for dealing with the DNA evidence, the DNA evidence "was pretty solid," the FBI lab was under no scrutiny at the time, and counsel sought to exclude the evidence during trial and testified that the retention of an expert would have done the defendant a disservice). Moreover, when the trial judge questioned Crain about this stipulation at trial, he acknowledged that his agreement with it was not coerced. Under these circumstances, we conclude that counsel's decision to stipulate to the DNA evidence as being derived from blood was not deficient; rather, the record supports the conclusion that it was a well-informed and strategic decision made after consulting an expert and considering alternative courses of action.

^[8] Even if we were to assume that counsel's performance was deficient, Crain cannot establish prejudice under *Strickland*. It has never been contested whether the DNA found on Crain's boxer shorts and inside his bathroom matched Amanda's DNA; rather, Crain's postconviction claim is predicated only upon counsel's decision to stipulate that the DNA was blood. In essence, Crain alleges that if counsel had not entered into the DNA stipulation and had adequately investigated ways in which to challenge the State's DNA evidence, the jury would have heard testimony to the effect that the DNA could have been derived from a variety of sources, not just blood, and that possible problems with the handling of the DNA evidence during testing existed.

During the evidentiary hearing, Crain's sole expert on this issue, Dr. Elizabeth Johnson, testified that presumptive blood testing, like the testing Dr. Yeshion performed on the DNA evidence in this case, does not conclusively establish that the source of DNA is blood. Dr. Johnson explained that substrate control testing, which Dr. Yeshion did not undertake in this case, would have eliminated the possibility that the DNA was derived from a source other than blood, such as saliva, tears, nasal or vaginal secretions, or urine. She also testified as to her concerns regarding possible cross-contamination, but because more recent testing of the items did not yield any favorable results, Dr. Johnson could not say whether the DNA's source was anything other than blood. Based on

the information provided to her, Dr. Johnson finally testified that she was unable to “evaluate whether there was or wasn’t contamination.”

***1038** At the evidentiary hearing, Dr. Yeshion defended his use of the [phenolphthalein](#) presumptive test and noted that in his thirty-five years of using that test, he had not found “anything other than blood that reacts to the phenolphthalein test when used in the proper sequence” and had no real problem “going right to DNA and saying that the DNA [he was] obtaining is a DNA result because of the biological evidence which is identified through phenolphthalein and believed to be blood.” Dr. Yeshion also explained that the proper safety protocols were in place to detect and avoid cross-contamination and that there was no indication that contamination occurred in this case. Dr. Martin Tracey, a DNA analyst and an expert in the field of population genetics presented by the State, testified that in the late 1990s, very few labs implemented substrate control testing, that such controls were not recommended as being necessary at the time, and that he was unaware of any guidelines requiring the use of substrate controls for forensic DNA analysis to be considered reliable. Dr. Tracey further noted that the lack of substrate control testing did not affect the results in this case.

In analyzing prejudice, the postconviction court determined that the State’s experts, Drs. Tracey and Yeshion, were credible and found Dr. Johnson’s testimony to be “essentially credible” but that much of it was “based on mere speculation.” These findings are supported by competent, substantial evidence. Dr. Johnson was unable to testify that despite Dr. Yeshion’s failure to use conclusive blood testing, the source of the DNA evidence in this case was derived from anything other than blood or that cross-contamination actually occurred. On the other hand, Drs. Yeshion and Tracey found no problems with the DNA testing conducted in this case. The postconviction record does not disclose any definitive evidence of invalid or even questionable DNA test results, and therefore Crain has failed to demonstrate prejudice.

Because Crain has established neither deficiency nor prejudice, we deny relief on this claim.⁸

Failure to Retain a Rebuttal Expert

Crain next argues that trial counsel were ineffective for

failing to retain an independent expert to challenge the testimony elicited from the State’s expert, Dr. Russell Vega, a forensic pathologist who rendered an opinion as to the origin of certain scratch and gouge marks appearing on Crain’s body following Amanda’s disappearance.

To place this claim in context, at trial it was revealed that during police questioning of Crain on September 11, 1998, Detective Al Bracket noticed multiple scratch marks on Crain’s arms and asked Crain how he received them. Crain claimed that the scratches occurred while he was lifting crab traps, but Crain became defensive when Bracket asked him to demonstrate how the scratch marks were inflicted. Thereafter, several photographs of Crain’s body were taken. To interpret the origin of these scratch marks as depicted in the photographs, the State presented the testimony of Dr. Vega. On direct examination, Dr. Vega testified that Crain’s scratch marks were probably inflicted within a few hours to a day before the photos were taken, but he could not identify the origin ***1039** of the scratch marks with any certainty. In his opinion, all but two of the scratch marks were “consistent with” having been caused by the fingernails of a seven-year-old child and one cluster of three scratch marks was “somewhat more likely” to have been caused by fingernails than those depicted in the other photographs. He further opined that one cluster of small gouges on Crain’s arm was “somewhat suggestive of ... having been caused by a small grasping hand” with spacing consistent with the hands of a seven-year-old child.

Dr. Vega made considerable concessions on cross- and redirect examination. On cross, Dr. Vega conceded his inability to reach any conclusion or opinion as to whether Crain’s scratches or wounds were caused by human fingernails. The doctor admitted that the cause of the scratches would also be consistent with crab traps, mechanisms with wire meshing, and to a lesser extent, bushes, twigs, or things of that nature, as well as other innumerable inanimate objects. Based on cross-examination questions, Dr. Vega emphasized that he was unable to narrow down that any two of the scratches occurred at exactly the same time. Finally, on redirect, Dr. Vega admitted that he could not reach an opinion within a reasonable degree of medical certainty as to the origin of Crain’s injuries.

In support of this claim, postconviction counsel called Dr. Ronald Wright, another forensic pathologist, to show the type of expert opinion that trial counsel could have presented during the guilt phase. In Dr. Wright’s view, some of Crain’s injuries were “quite old” and made at least several days before the photographs were taken; some were “basically inconsistent with fingernail

scratches, unless somebody had [his or her] fingernails cut into a V so that you would have a very narrow fingernail mark”; and the scratch marks depicted in two of the photographs were the only injuries that could not be excluded as fingernail marks even though they lacked “the characteristic curvilinear feature.” However, Dr. Wright also acknowledged the following: he did not disagree with Dr. Vega’s written report⁹ concerning the scratch marks; his own opinion was in accord with the opinions expressed in Dr. Vega’s report; Dr. Vega did not mislead the jury as to the nature or limitations of his opinion; he did not have any “real problems with” Dr. Vega’s testimony because “at least a couple of” the scratch marks could have been caused by fingernails; he could not rule out the possibility that fingernails caused Crain’s scratch marks, only that it was, in his view, unlikely; and he agreed that there was nothing outside the permissible mode of expression within forensic pathology for Dr. Vega to give his opinion that Crain’s scratch marks were consistent with human fingernails. In fact, Dr. Wright’s main criticism of the trial testimony appeared to be that counsel never asked Dr. Vega whether his opinion was based upon a reasonable degree of medical certainty, but the trial record indicates that on redirect, Dr. Vega stated that his opinion was not within a reasonable degree of medical certainty.

At the evidentiary hearing, trial counsel explained the reason for choosing not to retain an expert to challenge Dr. Vega’s conclusions. According to counsel, before trial, the defense deposed Dr. Vega, during which Dr. Vega’s assessment of the cause of the scratch marks was equivocal—they could have been caused by fingernails but could have also been caused by a variety of other objects consistent with Crain’s occupation *1040 as a crabber. In his deposition testimony, Dr. Vega admitted that he was unable to reach any conclusions as to the precise origin of the scratch marks, which he later admitted at trial. Based on the nature of Dr. Vega’s deposition testimony, counsel did not recall contemplating the retention of an expert to rebut Dr. Vega’s findings because the doctor’s testimony was not damaging.

^[9] In denying this claim, the postconviction court found trial counsel’s testimony to be credible and that counsel’s actions in not retaining an expert for the guilt phase were based on a reasonable strategic decision. While Crain contends that his trial counsel should have further challenged Dr. Vega’s testimony through the use of a defense expert, the United States Supreme Court has recognized that “*Strickland* ... permits counsel to ‘make a reasonable decision that makes particular investigations unnecessary.’” *Harrington v. Richter*, — U.S. —, 131

S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052); see *id.* at 789 (acknowledging that “it would be well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts regarding” a challenge to the prosecution’s blood evidence).

^[10] In the present case, Crain cannot establish deficient performance for failure to retain an expert witness when trial counsel made a reasonable decision to confront and challenge the State’s own witness at trial through cross-examination, particularly since counsel deposed the State’s expert in advance of trial and, while doing so, obtained significant concessions regarding the nature of the scratch-marks testimony. See *Smithers v. State*, 18 So.3d 460, 470–71 (Fla.2009) (concluding that trial counsel’s decision to rely solely on cross-examination of State’s expert was reasonable since expert’s testimony was consistent with the defense’s argument); *Belcher v. State*, 961 So.2d 239, 250–51 (Fla.2007) (holding that it was a reasonable strategic decision for trial counsel to decline retaining an expert to rebut the State’s expert when at trial, counsel rigorously challenged the State’s expert and attempted to confront the evidence not through a defense expert, but by vigorously challenging the State’s expert at trial).

Standing alone, Dr. Vega’s testimony on direct examination would have been highly unfavorable to the defense. However, trial counsel vigorously attacked Dr. Vega’s testimony on cross-examination by obtaining a concession that he was unable to reach a definitive conclusion regarding 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. Dr. Vega’s trial testimony was consistent with his deposition testimony that trial counsel obtained prior to trial.

^[11] As the United States Supreme Court has recently recognized, “*Strickland* does not enact Newton’s third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense” because “[i]n many instances cross-examination will be sufficient to expose defects in an expert’s presentation.” *Harrington*, 131 S.Ct. at 791. In accord with that logic, the record is clear that in the present case, trial counsel deposed Dr. Vega before trial, and during that deposition, counsel obtained significant concessions.

Thereafter, trial *1041 counsel made a reasonable strategic decision to attack the scratch-marks evidence not through the use of a rebuttal expert, but rather through a comprehensive challenge of the State's expert. Thus, Crain cannot premise his ineffectiveness claim on trial counsel's reasonable strategic decision made after deposing the State's expert.

^[12] Even if we were to assume deficiency, Crain has not demonstrated prejudice. While it is true that Dr. Wright opined that it was unlikely fingernails caused Crain's scratch marks, he was also unable to rule fingernails out as a cause of the scratch marks. Additionally, Dr. Wright admitted that he had no "real problems" with Dr. Vega's trial testimony because in his view, several of the scratch marks could have been caused by fingernails and it was not unprofessional or outside the normal permissible mode of expression within forensic pathology for Dr. Vega to indicate that Crain's scratch marks were consistent with being caused by human fingernails. Moreover, Dr. Vega even acknowledged at trial that he could not narrow down whether any two of the injuries occurred at exactly the same time.

^[13] In support of prejudice, Crain further alleges that during guilt-phase closing arguments, the prosecutor improperly blurred the distinction between the cause of his scratch marks as being "consistent with" fingernails and actually being "caused by" fingernails with the following statements:

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

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

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

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

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

time, according to Dr. Vega, as the gouge on the elbow.

(Emphasis added.) Contrary to Crain's contention, the prosecutor's statements regarding Crain's scratch marks were fair comments based upon Dr. Vega's testimony, and thus no prejudice resulted. *See Wade v. State*, 41 So.3d 857, 869 (Fla.2010) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." (quoting *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985))), *cert. denied*, — U.S. —, 131 S.Ct. 1004, 178 L.Ed.2d 835 (2011).

Crain also cites to this Court's discussion of Dr. Vega's testimony throughout its direct-appeal decision to support his prejudice claim, *see Crain*, 894 So.2d at 65, 72, 74–75, specifically noting "this Court's repeating of the State's keen emphasis on the scratch marks upon direct appeal." Considering the testimony of Dr. Vega at trial and comparing it with the testimony that Crain now offers through Dr. Wright, the differences are not so substantial so as *1042 to undermine our confidence in the outcome of Crain's guilt-phase proceeding. Moreover, our references to Dr. Vega's testimony on direct appeal cannot be considered in isolation of our analysis of all the circumstantial evidence that points to Crain's culpability for Amanda's murder, which stands as strong evidence of his guilt.¹⁰

^[14] In light of the above, we affirm the postconviction court's denial of relief on this claim.¹¹

Penalty–Phase Investigation and Presentation

In his final ineffectiveness argument, Crain essentially raises two subclaims. He first argues that counsel failed to adequately investigate, prepare, and present available mitigation. Crain also contends that counsel failed to supervise the administration of available mental health tests and provide a competent expert psychological evaluation and testimony. Crain generally alleges that these deficiencies prejudiced his penalty-phase proceeding. For the reasons that follow, we deny relief on all aspects of this claim.

To properly address this claim, we first review the relevant testimony. The trial record discloses that Dr. Robert Berland, a board-certified forensic psychologist and the defense's sole penalty-phase expert, evaluated Crain in preparation for the penalty phase and testified at

trial. During the penalty phase, Dr. Berland acknowledged that he administered to Crain the original versions, as opposed to more recent versions, of the Wechsler Adult Intelligence Scale (WAIS) and Minnesota Multiphasic Personality Inventory (MMPI). Based on his MMPI testing, Dr. Berland found that Crain suffered from delusional paranoid thinking. Dr. Berland used the WAIS to assess impairment for [brain injury](#), and the WAIS indicated that Crain was not mentally retarded and had an overall IQ of 85. In Dr. Berland's view, Crain was psychotic, and he also had some reason to believe that Crain suffered from impaired functioning due to [brain injury](#). Dr. Berland further opined that at the time of his offense, Crain suffered from an extreme mental or emotional disturbance and that Crain's capacity to conform his conduct to the requirements of law was substantially impaired. At trial, the State's clinical and forensic psychiatric expert, Dr. Barbara Stein, disagreed with Dr. Berland's assessment and criticized his use of the original WAIS because it was outdated and could not be used to evaluate [brain injury](#). The jury unanimously recommended a sentence of death.

***1043** During postconviction proceedings, Dr. Berland explained the purpose behind using original versions of the WAIS and MMPI. According to Dr. Berland, Crain's intelligence was not an issue, and he was more concerned with preliminary evidence of [brain injury](#). Consequently, Dr. Berland utilized the original WAIS, which neuropsychological research indicated was a better measure of impairment from [brain injury](#) than the test's subsequent versions. Dr. Berland also explained that the original and second editions of the MMPI were now proven to be clinically and statistically equivalent and a larger research history supported using the original MMPI at the time of Crain's trial. Further, during the penalty phase, Dr. Berland testified consistent with his postconviction testimony regarding his use of the original WAIS. At trial, he stated that the original WAIS was a better measure of impairment for [brain injury](#) and had a multitude of research dating back to 1950 supporting its usage for such an assessment. Dr. Berland also testified that the revised and third editions of the WAIS had considerably less research supporting their use in this regard.

At the evidentiary hearing, trial counsel testified to being aware of Dr. Berland's use of the original versions of the tests and acknowledged that the State's penalty-phase expert disagreed with the validity of Dr. Berland's testing procedures. However, counsel recalled the following: no one definitively established whether the tests used were outdated; Dr. Berland was comfortable using such tests and found them to be legitimate assessment tools; and Dr.

Berland had been a doctor for a long period of time and was regarded as being good at his profession.

In denying this claim, the postconviction court determined that counsel did not render deficient performance, and in doing so, made extensive findings of fact and credibility:

First, the Court finds the testimony of both Dr. Berland and [trial counsel] to be credible. Consequently, the Court finds counsel did not perform deficiently for failing to establish evidence of Defendant's brain damage through neuropsychological testing. Defense counsel made a strategic decision to obtain evidence of brain damage through [PET scan](#) testing and when that failed, to present the testimony of Dr. Berland. [Trial counsel] also relied on the opinion and recommendation of his expert, Dr. Berland. The Court further finds Defendant has failed to show counsel performed deficiently for presenting the testimony of Dr. Berland during the penalty phase. Dr. Berland explained his reasons for using the older versions of the WAIS and MMPI and adequately expressed his opinions and the bases for those opinions; [trial counsel] was not ineffective for relying on Dr. Berland's evaluations and opinions. See [Darling v. State](#), 966 So.2d 366, 377 (Fla.2007) ("This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire."); [Sexton v. State](#), 997 So.2d 1073, 1085 (Fla.2008) ("The fact that Dr. McCraney [postconviction expert], some seven years later, disagreed with the extent or type of testing performed, or the type of mitigation presented, does not mean that trial counsel was deficient at trial."). Additionally, much of the information provided by Dr. [Mark] Cunningham was cumulative where Dr. Berland informed the jury about Defendant's alcohol and substance abuse, his history of psychiatric care and counseling, good behavior in prison, unstable home life, substantial physical, sexual and emotional abuse during childhood, witnessing of disturbing sex, and lack of education and ***1044** social training. See 966 So.2d at 377 ("[T]his Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence."). Consequently, the Court further finds trial counsel performed a reasonable investigation into Defendant's mental health and background as required. See [Strickland v. Washington](#), 466 U.S. 668, 691 [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). As such, Defendant has failed to show counsel performed

deficiently under *Strickland*.

After reviewing the sentencing order, which found three aggravating circumstances and various nonstatutory mitigation circumstances,¹² noting the jury's unanimous recommendation, and considering the additional mitigating testimony presented during the evidentiary hearing, the postconviction court further found that there was no prejudice.

[15] On appeal, Crain essentially challenges the postconviction court's credibility determinations and, more specifically, the weight given to Dr. Berland's testimony. However, this Court is "highly deferential to the trial court's judgment on the issue of credibility," *Archer v. State*, 934 So.2d 1187, 1196 (Fla.2006), and in "evaluating a trial court's order, 'this Court will not substitute its judgment for that of the trial court on ... the credibility of the witnesses ...' provided its order is supported by competent, substantial evidence," *Cherry v. State*, 959 So.2d 702, 709 (Fla.2007) (quoting *Porter v. State*, 788 So.2d 917, 923 (Fla.2001)).

[16] [17] After having reviewed both the trial and evidentiary hearing testimony, we conclude that the postconviction court's findings are sufficiently supported by the record. Although Dr. Stein and Dr. Mark Cunningham, two other experts who testified during postconviction proceedings, disagreed with Dr. Berland's opinions and the type of testing Dr. Berland conducted prior to and in preparation for the penalty phase, the postconviction court found that Dr. Berland adequately explained the basis for his evaluations and opinions and found his testimony to be credible. Therefore, counsel were not ineffective for relying on Dr. Berland's assistance, "even if, in retrospect, [his] evaluations may not have been complete as others may desire." *Darling*, 966 So.2d at 377. Accordingly, we affirm the postconviction court's denial of relief on all aspects of this claim.¹³

Jury Interview Rules

Footnotes

¹ We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

² In our direct appeal decision, Dr. Vega's testimony was characterized in the following manner:
A forensic pathologist testified at trial that the scratches on Crain's arms probably occurred within a few hours to a

[18] [19] Lastly, Crain argues that *1045 rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar and Florida Rule of Criminal Procedure 3.575, which place restrictions on post-trial jury interviews by attorneys, unconstitutionally deny him the right to effective assistance of counsel in pursuing his postconviction remedies. This Court has repeatedly rejected similar constitutional challenges to these rules. See, e.g., *Floyd v. State*, 18 So.3d 432, 459 (Fla.2009) (rejecting claim that rule 4-3.5(d)(4) violated due process rights as well as the First, Sixth, Eighth, and Fourteenth Amendments); *Barnhill v. State*, 971 So.2d 106, 117 (Fla.2007) ("We deny relief on this issue consistent with our prior decisions which have found that rule 4-3.5(d)(4) and rule 3.575, which collectively restrict an attorney's ability to interview jurors after trial, do not violate the defendant's constitutional rights."). We also note that "juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings," *Green v. State*, 975 So.2d 1090, 1108 (Fla.2008) (quoting *Johnson v. State*, 804 So.2d 1218, 1225 (Fla.2001)), and there is no evidence that Crain made such a request in this case. Accordingly, we affirm the postconviction court's denial of this claim.

CONCLUSION

For the reasons set forth above, we affirm the postconviction court's denial of relief.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

All Citations

78 So.3d 1025, 36 Fla. L. Weekly S593

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

[Crain, 894 So.2d at 65](#). We now clarify that any statement in our direct appeal decision to the effect that the marks on Crain's body were "more likely" caused by the hand or fingernails of a seven-year-old child "than by another cause" was a mischaracterization of Dr. Vega's trial testimony. Dr. Vega never drew such a strong correlation between the marks and their apparent cause. Rather, Dr. Vega acknowledged that the marks on Crain's body were "consistent" with having been caused by the fingernails or with the hand spacing of a seven-year-old child, but were also consistent with having been caused by other objects.

- 3 In contrast to the jury instruction on count I, which related to the murder charge and instructed the jury on alternative theories of kidnapping, on count II, the jury was not instructed on the unpled alternative of kidnapping with intent to inflict body harm. [Id. at 75](#). Thus, on appeal, when examining whether the evidence was legally sufficient to support a separate conviction for kidnapping as charged in count II of the indictment, this Court concluded that competent, substantial evidence did not exist to support the jury verdict of kidnapping *with the intent to commit homicide*. [Id. at 76](#). As to count I, however, we held that there was sufficient evidence to support a felony murder conviction under the alternative theory of kidnapping *with the intent to inflict bodily harm*. [Id. at 73–74](#).
- 4 Crain raised the following postconviction claims: (1) counsel rendered ineffective assistance by failing to challenge the State's circumstantial case as to the introduction of DNA evidence; (2) counsel rendered ineffective assistance by failing to seek the exclusion of photos of scratches on Crain's body on the basis that such photos were obtained pursuant to an unconstitutional search; (3) counsel rendered ineffective assistance by failing to retain a defense expert to challenge the testimony of the State's medical expert who testified regarding scratch-mark evidence presented at the guilt phase; (4) counsel rendered ineffective assistance for failing to provide a competent psychological evaluation and testimony, to adequately investigate, prepare, and present available mitigation, and to otherwise challenge the State's case for the death sentence; (5) counsel rendered ineffective assistance by failing to effectively cross-examine several trial witnesses for the purpose of impeachment; (6) execution by lethal injection constitutes cruel and unusual punishment; (7) because Crain may be incompetent at the time of execution, his right against cruel and unusual punishment will be violated; (8) the rules prohibiting Crain's lawyers from interviewing jurors to determine if error occurred are unconstitutional and deny Crain adequate assistance of postconviction counsel; and (9) cumulative error occurred.
- 5 Since we conclude that Crain's individual claims are without merit, we likewise deny his claim that cumulative error occurred in this case. See [Israel v. State, 985 So.2d 510, 520 \(Fla.2008\)](#).
- 6 Dr. Elizabeth Johnson testified at the evidentiary hearing that "substrate control" testing is the testing of an area from a piece of cloth as close as possible to the visible presumed bloodstain, but which is not stained itself, to determine whether there is an overlay or superimposition of invisible biological material in that area that would give a DNA profile from a source other than blood.
- 7 At the evidentiary hearing, trial counsel recalled that in trying to defend against the State's DNA case, they had to confront Crain's prior statements to a local reporter, Warren Eli, and the producers of a national talk show that Amanda's tooth was loose on the night she visited and that this may have been the source of Amanda's blood. Counsel testified that he reviewed the tape of the talk show, and Crain continued to insist that if there was blood in his bathroom or on his clothes, it was a result of Amanda having a loose tooth. According to counsel, Crain reiterated his pretrial insistence that any blood DNA from Amanda was a result of her loose tooth rather than the result of a murder.
- 8 To the extent Crain argues that counsel were ineffective for failing to object to comments made by the prosecutor during closing argument and for ineffectively responding to the prosecutor's misstatement of the evidence, these claims are procedurally barred because they were not raised below. See [Green v. State, 975 So.2d 1090, 1104 \(Fla.2008\)](#). We further conclude that they are without merit.
- 9 The record does not reflect that Dr. Vega's written report was ever entered into evidence during either the trial or postconviction proceedings.
- 10 As recognized in footnote 2 of this opinion, any statement we made to the effect that the marks on Crain's body were "more likely" caused by the hand or fingernails of a seven-year-old child "than by another cause" should have been more accurately stated as being "consistent" with those conclusions.

- 11 Crain asserts in the alternative that counsel's failure to retain a rebuttal expert rendered them ineffective per se under the standard articulated in *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). We reject this claim because the "*Cronin* standard is reserved for situations where the assistance of counsel has been denied entirely or withheld during a critical stage of the proceeding such that the 'likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary.'" *Chavez v. State*, 12 So.3d 199, 212 (Fla.2009) (quoting *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). In this case, because counsel was never denied, Crain cannot rely on the per se rule from *Cronin* to avoid establishing prejudice; the record reflects that counsel was present during Dr. Vega's testimony and conducted a thorough cross-examination of the State's expert witness.
- 12 At sentencing, the trial court found the following nonstatutory mitigating circumstances, assigning to each various weight: (1) although the trial court was not reasonably convinced Crain was psychotic or had a brain injury, the trial court found Crain was an uncured pedophile, that his mental health was impaired, and that his mental health problems were exacerbated by the use of alcohol and drugs (some weight); (2) Crain was intoxicated at the time of the offense (some weight); (3) Crain had a history of extensive abuse (some weight); (4) Crain had a history of abuse and an unstable home life (modest weight); (5) Crain was deprived of educational benefits and social learning that one would normally obtain from public education (modest weight); (6) Crain experienced depression and suicidal ideation in the months leading up to his arrest (little weight); (7) Crain had a history of hard, productive work (some weight); (8) Crain had a good prison record (modest weight); and (9) Crain had the capacity to form loving relationships (modest weight).
- 13 Crain also contends that counsel failed to secure and present available mitigation. However, Crain has neither identified nor argued for any mitigating evidence that should have been, but was not, presented at trial. Because Crain has failed to identify any source of potential mitigation in support of this argument, we conclude that Crain's bare subclaim has been waived for the purposes of appeal. See *Pagan v. State*, 29 So.3d 938, 957 (Fla.2009) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." (quoting *Duest v. Dugger*, 555 So.2d 849, 852 (Fla.1990))); see also *Doorbal v. State*, 983 So.2d 464, 482 (Fla.2008).

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix H

Petitioner's Motion to Alter or Amend Judgment filed October 26, 2022.

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

WILLIE SETH CRAIN, JR,

Petitioner,

DEATH PENALTY CASE

v.

Case No. 8:12-cv-322-KKM-AAS

**SECRETARY, DEPARTMENT
OF CORRECTIONS,**

Respondent.

_____ /

MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Petitioner, WILLIE SETH CRAIN, JR., by and through undersigned counsel, pursuant to Fed.R.Civ.P. 59(e) and submits the following motion for relief from this Court's Order (Doc. 135.) and Judgment (Doc. 136.) filed on September 30, 2022, and as grounds states:

Petitioner filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging his conviction for first-degree murder and his death sentence. (Doc. 117.) He sought habeas relief based on the alleged errors of the trial court, the State, and his trial counsel. This Court found that Petitioner failed to show that he is entitled to such relief, and denied his Amended Petition. (Doc. 135.)

This motion is timely as it has been filed within 28 days after the entry of this Court's Judgment. Furthermore, this motion asks the Court to correct a manifest error of law or fact upon which the judgment rests, namely whether there was sufficient evidence to uphold a conviction for felony murder which occurred during a kidnapping with intent to do bodily harm. Petitioner has challenged sufficiency of the evidence to support his first degree murder conviction during his trial, in his direct appeal, and in Claim 5 of his federal habeas petition. This motion asks the Court to address an important component of kidnapping that appears to have been passed over in prior sufficiency analyses. *See, Banister v. Davis*, 140 S.Ct. 1698, 1708 (2020); *De Jesus v. United States*, 842 Fed.Appx. 492, 494 (11th Cir. 2021). *See also, Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) citing *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir.2007), "[t]he only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact.' *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir.1999)." This motion does not seek a reexamination of an unfavorable ruling or a reweighing of the evidence. This motion is based on a manifest error of law or fact in that the evidence presented by the State and the facts found by the Florida Supreme Court are insufficient to base a judgment and conviction for kidnapping, which was then used to find Petitioner guilty of felony murder. Therefore, this motion

should not be construed as a second or successive habeas petition. *Banister* at 1702.

I. BACKGROUND

A. Factual Background According to 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.

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, five-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.

B. Procedural Background

At the conclusion of the State’s case, Crain moved for judgments of acquittal of first-degree murder and kidnapping based on the insufficiency of the evidence. 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.

(A-17/R2605-2606, 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. (R269-270) This motion was denied on October 11, 1999.

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, Crain challenged the sufficiency of the evidence to sustain a first degree murder conviction. In conducting a sufficiency review, the Florida Supreme Court reviews the evidence “in the light most favorable to the State to determine whether a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.” *Cozzie v. State*, 225 So.3d 717, 733 (Fla. 2017 (quoting *Rodgers v. State*, 948 So.2d 655, 674 (Fla. 2006))). In *Crain v. State*, 894 So.2d 59 (Fla. 2004), the Florida Supreme Court found:

The indictment on which Crain was tried and convicted charged him in count I with the premeditated murder of [Amanda] between September 10 and 11, 1998. Count II of the indictment charged Crain with kidnapping Amanda on the same dates “with the intent to commit or

facilitate the commission of a felony, to wit, homicide” in violation of section 787.01(1)(a)(2), Florida Statutes (1997). The kidnapping statute found in section 787.01, Florida Statutes (1997), defines the offense in pertinent part as follows:

(1)(a) The term “kidnapping” means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.
2. Commit or facilitate commission of any felony.
3. Inflict bodily harm upon or to terrorize the victim or another person.
4. Interfere with the performance of any governmental or political function.

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.) On the separate kidnapping charge in count II, the court gave the following instruction:

Before you can find the defendant guilty of Kidnapping, the State must prove the following three elements beyond a reasonable doubt:

One, that Willie Seth Crain forcibly, secretly or by threat confined, abducted or imprisoned [Amanda], a child under the age of 13 years, against her will; two, that Willie Seth Crain had no lawful authority; three, that Willie Seth Crain acted with the *intent to commit or facilitate the commission of homicide*.

(Emphasis added.) Thus, while the trial court instructed the jury only on the intent to commit or facilitate the commission of homicide under section 787.01(1)(a)(2) as to the kidnapping charge in count II, the trial court instructed the jury that it could find Crain guilty of felony murder based on kidnapping in count I if it found that he abducted Amanda with *either* the intent to commit or facilitate the commission of homicide *or* the intent to inflict bodily harm upon her under section 787.01(1)(a)(3).

Id. at 67 – 68.

The jury convicted Crain of first-degree murder and kidnapping with intent to commit homicide. *Id.* at 67. The jury unanimously recommended death and the trial court imposed the death sentence, and a consecutive life sentence for kidnapping. *Id.*, and R319; (Doc. 117-1, pg. 11).

The Florida Supreme Court found five issues were raised on appeal:

(1) the evidence was insufficient to establish that the murder of Amanda was premeditated; (2) the evidence was insufficient to establish an essential element of kidnapping, that Amanda was abducted with the intent to commit or facilitate commission of a homicide; (3) the trial court committed fundamental error by giving different jury instructions in the felony murder and kidnapping counts as to the elements of kidnapping; (4) the kidnapping conviction relied on by the State for an aggravating circumstance was not supported by the evidence; and (5) Florida's death penalty scheme is unconstitutional. *Id.* at 67.

The Florida Supreme Court began its appellate review by stating:

In cases in which the evidence of guilt is wholly circumstantial, it is the trial judge's task to review the evidence 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. *See State v. Law*, 559 So.2d 187, 189 (Fla.1989). A reviewing court must assess the record evidence for its sufficiency only, not its weight, [citing] *Tibbs v. State*, 397 So.2d 1120 (Fla.1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Id. at 1123 (citations and footnotes omitted) (quoting *Black's Law Dictionary* 1285, 1429 (5th ed.1979)). *Crain* at 71.

In his Amended Petition for Writ of Habeas Corpus (Doc. 117), Crain again challenged the sufficiency of the evidence to support a conviction of first degree murder in Ground Five. He pled in part:

It was assumed for purposes of argument on direct appeal that the state's circumstantial evidence was legally sufficient for the jury to conclude that Amanda was dead and that Petitioner killed her. However, the evidence was not sufficient for the jury to conclude that he intended to do so. The trial court erred by denying defense counsel's motion for judgment of acquittal on premeditated murder because the state's circumstantial evidence was legally insufficient to establish premeditation....As cogently stated by the trial judge in her findings of fact regarding the kidnapping aggravating factor, "There is no way to know exactly what happened to

[Amanda]." In the complete absence of any evidence to establish the manner and cause of her death, any finding of premeditation could only be the product of sheer speculation, imagining what might have happened instead of knowing what happened based upon competent, substantial evidence.

This Court added to the standard of review outlined above for the Florida Supreme Court on direct appeal, the additional layer of judicial deference afforded on federal habeas review. Citing to *Coleman v. Johnson*, 566 U.S. 650, 651 (2012), this 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, this 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. This 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. This 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, this 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." (Doc. 135 at 61). Both the Florida Supreme Court and this 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.

II. ARGUMENT – GROUND FIVE (Sufficiency of the Evidence)

In summary, Amanda’s mother took a large dose of pain killers 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 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 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, *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/R3115) The State told the jury, "Her departure, her snatching from the bed of her mother by this defendant, was kidnapping." (A-20/R3001) 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/R3009) 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. The body must still be alive as 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.

In this motion, for the sake of argument, Petitioner does not challenge the facts found by the Florida Supreme Court. Rather, this motion challenges 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.) (A-20/R301103012) 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 *Jackson v. Virginia*, 443 U.S. 307, 314 (1979), the United States Supreme Court noted:

A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused. Accordingly, we held in the *Thompson* case that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. See also *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666; *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149; *Gregory v. Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134; *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52. The "no evidence" doctrine of *Thompson v. Louisville* thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty.

The Supreme Court went on to find that the “no evidence” doctrine of *Thompson v. Louisville*¹ is not the appropriate guide for a federal habeas corpus court to apply in assessing a state prisoner’s challenge to his conviction as founded upon insufficient evidence. *Id.* at 316. The Court stated that federal habeas courts must follow the *Winship*² 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.” In distinguishing this standard from the “no evidence” rule of *Thompson*, the Court explained:

¹ *Thompson v. City of Louisville, et. al*, 362 U.S. 199 (1960).

² *In Re Winship*, 397 U.S. 358 (1970).

That the *Thompson* "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. "[A] mere modicum of evidence may satisfy a 'no evidence' standard" *Jacobellis v. Ohio*, 378 U. S. 184, 202 (Warren, C. J., dissenting). Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. The *Thompson* doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored.^[14]

Id. at 320.

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. 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 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 an essential element 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. It is a grave violation of Due Process to execute someone where the elements of the crime underlying his conviction are unsupported by any evidence.

WHEREFORE, as to Count 1, First Degree Murder, Petitioner prays this Court set aside its order and judgment and send this case back to the circuit court to sentence Mr. Crain to a lesser degree of murder that is supported by the facts. As to Count 2, False Imprisonment, Petitioner prays this Court set aside any order and judgment convicting him of this offense, as it is also not supported by competent substantial evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 26, 2022, we electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: Rick A. Buchwalter, Assistant Attorney General, rick.buchwalter@myfloridalegal.com, capapp@myfloridalegal.com, heather.davidson@myfloridalegal.com, paula.montlary@myfloridalegal.com and I mailed the forgoing document to Willie Seth Crain, Jr., DOC#096344, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

s/Ann Marie Mirialakis
ANN MARIE MIRIALAKIS
Assistant CCRC
Florida Bar No. 0658308
Email: mirialakis@ccmr.state.fl.us

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix I

Respondent's Response to Motion to Alter or Amend Judgment filed
November 9, 2022.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**WILLIE SETH CRAIN, JR.,
Petitioner,**

v.

**Case No. 8:12-cv-322-T-35AAS
DEATH PENALTY CASE**

**SECRETARY, DEPARTMENT
OF CORRECTIONS, ET AL.,
Respondents.**

_____ /

**RESPONDENTS' RESPONSE TO MOTION
TO ALTER OR AMEND JUDGMENT**

COME NOW the Respondents, by and through the undersigned Assistant Attorney General, and pursuant to this Court's Order entered October 26, 2022 (Doc. 138) and respond to Crain's Motion to Alter or Amend Judgment. (Doc. 137). Respondents request that the Court deny Crain's motion, and in support state the following:

RELEVANT PROCEDURAL HISTORY

Willie Crain was indicted by a Hillsborough County grand jury on October 14, 1998, for the first-degree murder of 7-year-old Amanda Brown, which occurred on or between September 10th and September 11th of 1998. Crain was also charged with one count of Kidnapping Amanda Brown.

Trial commenced on August 30, 1999. After the State rested its case, Crain's counsel moved for judgment of acquittal. The central theme of Crain's trial counsel's argument was that because the State relied on circumstantial evidence to prove much of its case, the circumstantial evidence was insufficient to overcome a reasonable hypothesis of innocence. Specifically, he argued that there was insufficient evidence to prove that Amanda Brown was dead or that her death was due to the criminal agency of another, or that Crain committed any criminal act with respect to Amanda Brown, and that the State had not presented sufficient evidence to proceed on "any theory" of felony murder. Trial counsel, however, never argued what Crain argues in his pending motion. He never argued that the State was required to prove that Amanda Brown was still alive when Crain abducted her from her home and that the State had failed to do so. Crain made no additional argument after the State rested its case or even renewed his motion for judgment of acquittal.

Moreover, trial counsel never objected during the charging conference to the kidnapping instruction given to the jury. At no time did counsel ever raise the argument Crain now makes in his motion – that the State was required to prove Amanda Brown died prior to Crain removing her from her home.

On September 13, 1999, the jury found Crain guilty on both counts.

The penalty phase of Crain's trial commenced on September 16, 1999, and the jury unanimously recommended Crain be sentenced to death. A Spencer¹ hearing was held on October 11, 1999. On November 19, 1999, the trial court followed the jury's recommendation and imposed a death sentence for the first-degree murder of Amanda Brown.

The Florida Supreme Court affirmed Crain's convictions and sentence of death on October 28, 2004. Crain v. State, 894 So. 2d 59 (Fla. 2004). Crain's Motion for Rehearing was filed on November 8, 2004, and denied on January 25, 2005. The Mandate issued on February 10, 2005. Crain did not file a petition for writ of certiorari to the United States Supreme Court.

Crain filed his initial Motion to Vacate pursuant to Florida Rule of Criminal Procedure 3.851 on September 8, 2006. The State filed its response on November 22, 2006. Evidentiary hearings were held December 15-18, 2008, and February 25-26, 2009. The postconviction court denied relief on all claims on September 10, 2009.

Crain appealed the denial of the motion for postconviction relief on October 16, 2009. Crain did not file a state habeas corpus petition. The Florida Supreme Court affirmed the denial of postconviction relief on

¹ Spencer v. State, 615 So. 2d 688 (Fla. 1993).

October 13, 2011. Crain v. State, 78 So. 3d 1025 (Fla. 2011). Crain filed a Motion for Rehearing on October 27, 2011, which was denied on January 20, 2012. The Florida Supreme Court issued its mandate on February 6, 2012.

Crain filed his petition for a writ of habeas corpus in federal district court on February 15, 2012. On September 30, 2022, the Court entered its Order denying Crain's habeas corpus petition. Crain filed his Motion to Alter or Amend Judgment on October 26, 2022. (Doc. 137). On October 26, 2022, this Court ordered Respondents to file a response to the motion. (Doc. 138).

ARGUMENT

Crain argues in his motion that the Court should alter or amend the judgment it entered in this case because, he contends, there exists “a manifest error of law or fact in that the evidence presented by the State and the facts found by the Florida Supreme Court are insufficient to base a judgment and conviction for kidnapping, which was then used to find Petitioner guilty of felony murder.” (Doc. 137 p. 2). He faults both the Florida Supreme Court and this Court for analyzing “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.” (Doc. 137 p. 12).

Crain is correct that both the state courts and this Court focused their

analysis on whether there was sufficient evidence to prove Crain kidnapped Amanda Brown exclusively on the “intent” element of kidnapping. However, the courts did so for good reason. The reason the courts focused on whether there existed sufficient evidence to prove the intent element of kidnapping, is because this is the only error Crain argued the state courts made concerning sufficiency of the evidence to prove an element of the kidnapping charge². Therefore, neither the State courts nor this Court have previously considered Crain’s new claim that the underlying felony of kidnapping was not proven because an allegedly different element was not proven. As a result, this claim is now procedurally defaulted because it was never raised in state court resulting in a procedural bar in state court and remains unexhausted.

² On direct appeal, Crain argued in Issue 1 that the evidence was insufficient to prove kidnapping but only to the extent that the element of “intent to commit or facilitate commission of a homicide” was not proven and succeeded in obtaining a reversal of his kidnapping conviction on that basis. However, he never argued that the State was required to prove that Amanda Brown was still alive when she was removed from her home. Crain also argued sufficiency of the evidence in Issue 4 on his direct appeal, but that issue was limited to the effect reversing this charge should have on sentencing because it was one of the aggravators upon which the sentencing court relied.

**CRAIN’S NEW ARGUMENT IS PROCEDURALLY
DEFAULTED**

Federal courts are precluded from granting habeas relief unless “the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). LeCroy v. Sec’y, Fla. Dept. of Corr., 421 F.3d 1237, 1260 (11th Cir. 2005). The underlying purpose of exhaustion is to “afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary.” McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005). “[I]f the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is applicable.” Smith v. Jones, 256 F.3d 1135, 1138 (11th Cir. 2001).

Florida law requires that an argument be raised with specificity at trial in order to be preserved for review. See § 924.051(1)(b) & (3), Florida Statutes; Hampton v. State, 103 So. 3d 98, 113-114 (Fla. 2012) (In the absence of fundamental error, an appeal may not be taken unless error is preserved; “Preserved” means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise . . .”) (internal quotation omitted).

In Hampton, the defendant argued that competent substantial evidence did not support a finding that he sexually battered the victim, which was the underlying felony supporting his conviction for felony murder. Hampton argued that the trial court erred in providing an instruction that permitted the jury to find that he committed first-degree murder based on the commission of the underlying felony of sexual battery. Hampton conceded that he did not present this argument to the trial court, and that he raised no objection to the first-degree felony murder instruction at trial. Nevertheless, Hampton argued that this issue did not need to be preserved because the error was fundamental, and similar to Crain, the Florida Supreme Court had an independent obligation to review the sufficiency of the evidence. The Florida Supreme Court rejected Hampton's argument regarding preservation. It ruled that for an argument to be cognizable on appeal, it must be raised with specificity at trial, citing § 924.051(1)(b) & (3). The court noted that an issue, legal argument, or objection to evidence must be timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence must be sufficiently precise. Id.

Like the defendant in Hampton, Crain failed to raise the same specific objection at trial (or subsequently) that he now makes in his motion. Although Crain has repeatedly argued that there is insufficient evidence of

kidnapping to permit its use as the underlying felony supporting his conviction for felony murder, the basis for his argument has always been that the State failed to prove the requisite intent. Specifically, he argued that the underlying kidnapping required proof of intent to kill Amanda Brown because the indictment expressly alleged this intent in the kidnapping charge, an argument the Florida Supreme Court rejected.

In his motion, Crain makes a very different argument than one he has previously made. He now suggests, for the first time, that the State never proved the underlying felony of kidnapping Amanda Brown because the State failed to prove she survived Crain's abduction of her from her home. However, when Crain's trial counsel and the prosecution discussed the jury instructions with the trial court, Crain's counsel never argued that the instructions were missing what Crain now claims are a crucial element of the charge. Rather, when provided the instruction by the trial court for Crain's counsel to review, he replied, "That's fine, Judge. I've read it." (A18: 2778).

Because Crain's new argument has been waived, he never argued to the trial court that this evidence was required to prove a charge of kidnapping, never objected to the instruction on the basis that it failed to include a necessary element of the charge, never raised this on direct appeal, nor alleged in his postconviction motion that his attorney's failure to raise this

issue on direct appeal was an error. As a result, Crain is now procedurally barred from raising it before this Court and has failed to provide any legal basis for its consideration by the Court after judgment has been entered.

However, as previously noted, although the argument has been procedurally defaulted, there are two limited circumstances in which Crain would be able to raise a procedurally defaulted claim if he can meet the criteria for overcoming a procedural default. The first is by demonstrating “cause and prejudice”, and the second is by demonstrating that a conviction in his case would result in a “fundamental miscarriage of justice.”

To show cause for his procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court. Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003); Marek v. Singletary, 62 F.3d 1295, 1302 (11th Cir. 1995). To show prejudice, a petitioner must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his factual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Hollis v. Davis, 941 F.2d 1471, 1480 (11th Cir. 1991) quoting United States v. Frady, 456 U.S. 152, 170 (1982). A petitioner has the burden of showing a reasonable probability that the result of the proceeding would have been different. Henderson, 353 F.3d at 892.

Alternatively, a petitioner may obtain federal habeas review of a procedurally defaulted claim without a showing of cause and prejudice if such review is necessary to correct a fundamental miscarriage of justice. This exception is available only "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001). A claim of actual innocence requires a showing of constitutional error coupled with "new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995); Rozzelle v. Sec'y, Florida Dept. of Corr., 672 F.3d 1000, 1011 (11th Cir. 2012).

However, Crain has failed to demonstrate either cause and prejudice or a fundamental miscarriage of justice. Indeed, he has not even made an attempt to do so. Because Crain's new argument has been procedurally defaulted, and he is unable to overcome the procedural default by demonstrating either cause and prejudice or a fundamental miscarriage of justice, the Court should deny Crain's motion.

**THE FLORIDA SUPREME COURT INTERPRETED STATE LAW IN
DETERMINING WHAT THE STATE WAS REQUIRED TO SHOW
TO PROVE THE UNDERLYING FELONY OF KIDNAPPING**

In addition, this Court should reject Crain's new argument because it suggests he may be released from custody by this Court based on a disagreement with the Florida Supreme Court's interpretation of Florida state law in determining what Florida law requires the State prove to establish the underlying felony of kidnapping to sustain Crain's conviction for the felony murder charge.

Pursuant to 28 U.S.C. § 2254(a), a federal habeas petition by a state inmate is cognizable "only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States." Thus, a "state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." Anderson v. Sec'y for the Dept. of Corr., 462 F.3d 1319, 1330-1331 (11th Cir. 2006) quoting McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992); see also Estelle v. McGuire, 502 U.S. 62, 67 (1991) (reaffirming that federal habeas corpus relief does not lie for errors of state law.) Where a petition that actually involves state law issues is "couched in terms of equal protection and due process," this limitation on federal habeas corpus review is of equal force. Willeford v. Estelle, 538 F.2d 1194, 1196-98 (5th Cir. 1976).

In its discussion regarding the felony murder jury instruction, the Florida Supreme Court stated:

The indictment on which Crain was tried and convicted charged him in count I with the premeditated murder of Amanda Brown between September 10 and 11, 1998. Count II of the indictment charged Crain with kidnapping Amanda on the same dates “with the intent to commit or facilitate the commission of a felony, to wit, homicide” in violation of section 787.01(1)(a)(2), Florida Statutes (1997). The kidnapping statute found in section 787.01, Florida Statutes (1997), defines the offense in pertinent part as follows:

(1)(a) The term “kidnapping” means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.
2. Commit or facilitate commission of any felony.
3. Inflict bodily harm upon or to terrorize the victim or another person.
4. Interfere with the performance of any governmental or political function.

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 Victoria Brown 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 Victoria Brown.

“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.) On the separate kidnapping charge in count II, the court gave the following instruction:

Before you can find the defendant guilty of Kidnapping, the State must prove the following three elements beyond a reasonable doubt:

One, that Willie Seth Crain forcibly, secretly or by threat confined, abducted or imprisoned Amanda Victoria Brown, a child under the age of 13 years, against her will; two, that Willie Seth Crain had no lawful authority; three, that Willie Seth Crain acted with the *intent to commit or facilitate the commission of homicide.*

(Emphasis added).

Crain v. State, 894 So. 2d 59, 67–70 (Fla. 2004).

After concluding that there was sufficient circumstantial evidence that Amanda Brown was dead, the court turned its attention to the sufficiency of the evidence to support a jury finding that Crain murdered her during the course of committing the felony of kidnapping. During the course of this discussion, the court noted:

In addition, the evidence showed that on the night of Amanda's disappearance, a witness living near Amanda's trailer saw a vehicle that matched the description of Crain's truck with its lights on and engine running for approximately five minutes before she heard the truck being driven away. From the evidence of Crain's interest in Amanda, the fact that he was present when Amanda was last seen asleep in her mother's bed, Hartman's testimony that she slept through the night, and the neighbor's observations of Crain's truck, the jury could reasonably have inferred to the exclusion of all other hypotheses that Crain took

Amanda from the trailer without the consent of her mother. This conduct establishes an unlawful confinement under the kidnapping statute. See § 787.01(1)(b) (“Confinement of a child under the age of 13 is against her or his will within the meaning of [kidnapping] if such confinement is without the consent of her or his parent or legal guardian.”).

However, as noted above, in order to establish a kidnapping the State must also prove that the unlawful confinement occurred with a specific intent. In this regard we note that the Second District Court of Appeal has affirmed a conviction of attempted kidnapping with intent to inflict bodily harm or terrorize the victim in reliance on evidence similar to that in this case, specifically that the defendant took a young, sleeping child from his bed in the middle of the night. See Sean, 775 So.2d at 344.

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The evidence of an abduction, the drops of blood, the DNA evidence, the disparity of size and strength, and the evidence of a struggle between Amanda and Crain are all circumstances from which a jury could properly infer, to the exclusion of any reasonable hypothesis of innocence, that Crain abducted and intentionally harmed Amanda before her death. The fact that we cannot pinpoint when the actual bodily harm and subsequent killing occurred in relation to the time Crain first kidnapped Amanda does not undermine this conclusion. See Van Gotum v. State, 569 So.2d 773, 776 (Fla. 2d DCA 1990) (holding that the continuing unlawful confinement and the intent to commit grand theft existed simultaneously and involved the same victim and established a confinement with the intent to commit theft). It is sufficient if the State establishes that the unlawful confinement and the specific intent at some point existed simultaneously and involved the same victim. See id.

Accordingly, we find sufficient evidence of a killing in the course of a kidnapping with the intent to inflict bodily harm. On this basis, we affirm the first-degree murder conviction.

Id. at 73-75 (emphasis added).

Crain now seeks to have the Court issue a ruling finding that the Florida Supreme Court misinterpreted its statute by failing to require that the State prove Amanda Brown died prior to Crain removing her from her home. It is “not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” Estelle v. McGuire, 502 U.S. 62, 67–68 (1991). This argument is contrary to the court’s interpretation of the kidnapping statute. The argument also leads to the absurd result that had Amanda Brown died at her home during the course of her abduction, there would be no kidnapping and Crain did not commit a felony murder.

CONCLUSION

WHEREFORE, Respondents respectfully request this Honorable Court deny the Motion to Alter or Amend Judgment.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND TYPE-STYLE REQUIREMENTS

I HEREBY CERTIFY that this document complies with the typeface requirements of Local Rule 1.08 because this document has been prepared in a proportionally spaced typeface using Microsoft Word 10 in 14-point Georgia.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Ann Marie Mirialakis, Assistant CCRC-M, Law Office of the Capital Collateral Regional Counsel, Middle Region, 12973 North Telecom Parkway, Temple Terrace, FL 33637, **mirialakis@ccmr.state.fl.us** and **support@ccmr.state.fl.us**, and by U.S. mail to: Willie Seth Crain, Jr. DOC# 096344, Union Correctional Institution, Post Office Box 1000, Raiford, FL 32083.

Respectfully submitted,

ASHLEY MOODY
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COUNSEL FOR RESPONDENTS

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*

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE**

Appendix J

Application for a Certificate of Appealability filed in the United States Court of Appeals for the Eleventh Circuit on December 22, 2022.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**WILLIE SETH CRAIN, JR.,
Appellant/Petitioner,**

CASE NO.: 22-13693-P

v.

**DEATH PENALTY CASE
Dist. Ct. No: 8:12-cv-322-T-27AAS**

**SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS, et al.
Appellee/Respondents.**

**APPLICATION FOR CERTIFICATE OF APPEALABILITY
AND MEMORANDUM OF LAW**

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT (CIP)

In compliance with 11th Cir. R. 26.1-1, counsel for Petitioner/Appellant hereby certifies that the following persons, partnerships, or firms may have an interest in the outcome of this case:

B., Amanda V. (deceased victim)

Black, Anthony Kerrol (Circuit Court Judge, Thirteenth Judicial Circuit in and for Hillsborough County)

Bondi, Pam (Former Attorney General, State of Florida)

Browne, Scott Andrew (Assistant Attorney General)

Buchwalter, Rick A. (Assistant Attorney General, Counsel for the Respondents/Appellees)

Butterworth, Robert A. (Former Attorney General)

Canady, Honorable Charles T. (Florida Supreme Court Justice)

Corso, Adriana (Assistant Capital Collateral Regional Counsel, Attorney for Petitioner/Appellant)

Crist, Charles J. (Former Attorney General for Florida)

Deliberato, Maria (Former Acting Capital Collateral Regional Counsel-Middle Region)

Fleischer, Barbara C. (Former Circuit Court Judge, Thirteenth Judicial Circuit in and for Hillsborough County)

Gemmer, David R. (Former Assistant Capital Collateral Counsel – Middle Region)

Helm, Paul C. (Attorney for Petitioner/Appellant at on Direct Appeal)

Hernandez, Daniel M. (Attorney for Petitioner/Appellant at Trial)

Hope, Michael (Assistant Capital Collateral Regional Counsel, Attorney for Petitioner/Appellant)

Inch, Mark S. (Secretary, Florida Department of Corrections)

Jennings, Bill (Former Capital Collateral Regional Counsel-Middle Region)

Jung, Honorable William F. (United States District Court Judge, Middle District of Florida)

Labarga, Honorable Jorge (Florida Supreme Court Justice)

Lewis, Honorable R. Fred (Former Florida Supreme Court Justice)

Martin, Lisa (Former Assistant Attorney General)

Mirialakis, Ann Marie (Assistant Capital Collateral Regional Counsel,
Attorney for Petitioner/Appellant)

Mizelle, Kathryn Kimball (United States District Court Judge, Middle
District of Florida)

Moody, Ashley (Attorney General, State of Florida)

Moody, Chris (Former Assistant State Attorney)

Pariente, Honorable Barbara J. (Former Florida Supreme Court Justice)

Perry, Honorable James E.C. (Former Florida Supreme Court Justice)

Pinkard, Eric (Capital Collateral Regional Counsel-Middle Region)

Polston, Honorable Ricky (Florida Supreme Court Justice)

Pruner, Jay (Former Assistant State Attorney)

Quince, Honorable Peggy A. (Former Florida Supreme Court Justice)

Rodriguez, Carol C. (Former Assistant Capital Collateral Counsel – Middle
Region)

Shakoor, Ali. A. (Assistant Capital Collateral Regional Counsel-Middle
Region)

Sisco, Michelle (Circuit Court Judge, Thirteenth Judicial Circuit in and for Hillsborough County)

Singleton, Vivian (Former Assistant Attorney General)

Strain, Robert T. (Former Assistant Capital Collateral Counsel – Middle Region)

Traina, Charles (Attorney for Petitioner/Appellant at Trial)

Viggiano, Jr., James Vincent (Former Capital Collateral Regional Counsel- Middle Region)

Whittemore, James D. (United States District Court Judge, Middle District of Florida)

There are no corporations involved in this case.

APPLICATION FOR CERTIFICATE OF APPEALABILITY
AND MEMORANDUM OF LAW

COMES NOW, the Petitioner/Appellant, WILLIE SETH CRAIN, JR. (“Crain”), by and through undersigned counsel, and moves this Court to issue a certificate of appealability (hereinafter “COA”) pursuant to 28 U.S.C. §2253 and 11th Cir. R. 22-1, and as grounds states:

PROCEDURAL HISTORY

On October 14, 1998, 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 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). Crain filed a timely petition for writ of certiorari to the U.S. Supreme Court which was denied on October 3, 2005. *Crain v. Florida*, 126 S.Ct. 47, 163 L.Ed.2d 79 (2005).

On September 8, 2006, Crain then sought postconviction relief in the Florida courts by filing a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. This motion was denied on September 10, 2009. An

appeal to the Florida Supreme Court affirmed the denial of the postconviction motion. *Crain v. State*, 78 So. 3d 1025 (Fla. 2011).

On February 15, 2012, Mr. Crain filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 2254 in the United States District Court for the Middle District of Florida, Tampa Division, Case No. 8:12-cv-322-T-27EAJ. In the federal petition, Mr. Crain raised seven Constitutional violations. During the pendency of the federal petition, Crain filed a successive state postconviction motion following the decision in *Hurst v. Florida*, 136 S. Ct 616 (2016). The federal petition was stayed pending the resolution of the successive state postconviction motion. On June 14, 2017, the successive postconviction was denied. The Florida Supreme Court subsequently affirmed the denial of the motion due to Crain's unanimous jury recommendation. *Crain v. State*, 246 So.3d 206 (Fla. 2018).

Upon resolution of the successive state postconviction pleadings, the stay in federal court was lifted. (Doc. 101.) Crain filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging his conviction for first-degree murder and his death sentence, adding to this petition his *Hurst* claim. (Doc. 117.) Respondents ("the State") filed an Answer to the Amended Petition. (Doc. 122) Crain filed a Reply. (Doc. 123) The federal District Court found that Petitioner failed to show that he is entitled to relief, and denied his

Amended Petition on September 30, 2022. (Doc. 135.) Crain filed a Motion to Alter or Amend the Judgment on October 26, 2022. (Doc. 137.) The State filed a Response on November 9, 2022. (Doc. 143.) The Motion to Alter or Amend Judgment was denied on November 25, 2022. (Doc. 146.)

Before the District Court ruled on Crain's Motion to Alter or Amend Judgment, Crain filed a pro se Notice of Appeal on October 27, 2022. (Doc. 139.) Along with this request for a COA, through undersigned counsel, Crain also files an Amended Notice of Appeal to add the denial of his Motion to Alter or Amend Judgment.

LAW APPLICABLE TO THIS COURT'S DECISION ON A CERTIFICATE OF APPEALABILITY

In order to appeal to the Circuit Court of Appeals, a Certificate of Appealability (COA) is required under 28 U.S.C. §2253, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) and FRAP 22(b)(1).

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). The COA "shall indicate which specific issue or issues satisfy the showing required"

A COA determination is a separate proceeding, one distinct from the underlying merits. The question is the debatability of the underlying constitutional claim, not the resolution of that debate. *Miller-El v. Cockrell*,

537 U.S. 322, 336-37 (2003). Because the Certificate of Appealability only serves a gate-keeping function, the standard for granting it differs from and is more lenient than the standard for issuing a Writ of Habeas Corpus. The determination of whether to grant a COA “does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.” *Id.* at 336.

Under this standard “a petitioner must sho[w] that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Id.* at 336; (internal quotes and citations omitted). A petitioner seeking a COA must prove “something more than the absence of frivolity or the existence of mere good faith on his or her part.” *Id.* at 337; *citing Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (internal quotations omitted).

However, before the issuance of a COA, a petitioner need not prove that some jurists would grant relief. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that a petitioner will not prevail. It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole

premise is that the prisoner “has already failed in that endeavor.” *Miller-El, supra*, citing *Barefoot v. Estelle*, 463 U.S. 880, 893(1983), n. 4.

“When the District Court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A petitioner/appellant seeking a COA is not required to show that the state court’s decision was objectively unreasonable under §2254(d)(2). *Miller-El*, 537 U.S. at 341-42. This Court’s grant or denial of habeas relief is reviewed *de novo* and findings of fact are reviewed for clear error. *Pruitt v. Jones*, 348 F.3d 1355, 1356 (11th Cir. 2003).(citations omitted).

The Eleventh Circuit has stated:

Going forward, a certificate of appealability, whether issued by this Court or a district court, must specify what constitutional issue jurists of reason would find debatable. Even when a prisoner seeks to appeal a procedural error, the certificate must specify the underlying constitutional issue. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000) (“When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a [certificate] should issue when the prisoner shows, at least, that

jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."). A failure to specify that issue would violate the text enacted by Congress, *see* 28 U.S.C. § 2253(c)(3), and will result in the vacatur of the certificate.

Spencer v. United States, 2014 U.S. App. LEXIS 21641, 10 (11th Cir. Fla. Nov. 14, 2014)

The Petitioner/Appellant, Crain, seeks a Certificate of Appealability on all grounds raised in his Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus. Petitioner/Appellant incorporates all previously advanced claims and arguments made in these proceedings; none are waived or abandoned because they are not repeated here and offers argument and support for the Certificate as follows:

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, five-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.

ARGUMENT ON PETITIONER'S CLAIMS

GROUND ONE

THE POSTCONVICTION COURT ERRED WHEN IT DENIED PETITIONER'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 PETITIONER'S 6TH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION.

At the circuit level in state court, the postconviction court succinctly described this claim in its order denying relief as follows:

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

C5/905-906.

Rather than challenge the State's use of a presumptive test to establish that DNA found on Petitioner's toilet and boxer shorts hanging on the wall behind the toilet, which matched the victim's DNA, was derived from blood as opposed to some other substance, trial counsel stipulated to this fact. Trial

counsel went on to offer a plausible explanation for why blood could have been found. Though a possible explanation was offered, it was still not certain that the stain was definitively blood. Counsel did not have to choose between crossing the State's expert on the reliability of a presumptive test and offering an innocent explanation if the stain was blood. Therefore, there was no reasonable purpose or strategy for stipulating to a fact that may not be true and was not proven by the State. Even with the high level of deference afforded trial counsel strategies and Florida Supreme Court findings of fact, there is no good reason to stipulate to such a highly prejudicial fact. A competent attorney would have cross examined the State's experts, created doubt as to the true nature of the stain and offered a plausible explanation if perhaps the stain was blood. Spilling the blood of a child is such an egregious concept that it is an unreasonable application of the facts to the precedent in *Strickland v. Washington*, 466 U.S. 668 (1984) to not find trial counsel was incompetent and their actions were prejudicial to the outcome of Petitioner's case.

A. Florida Supreme Court Opinion

The Florida Supreme Court found:

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). 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.

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 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.

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

If what you see on an item of clothing for example is a red, round stain and it tests positive for the presumptive chemical test for blood, then that stain -- that may or may not be blood. But generally anything that has the appearance of blood and tests with these presumptive chemical tests is likely to be blood. However, if that item of clothing has been washed, the red-brown stain is likely to remain as a visible stain but there's not likely to be any genetic material within it so that that if you just cut it and tested itself, it would likely not give you a DNA result under those circumstances. If that was animal blood, you would not get a DNA result using these tests so -- or if that stain has been sitting in hot, humid

environment for even 24 hours not, you know, not having that opportunity to dry out, that could cause the inherent genetic material in the DNA to degrade.

So if you had that situation as a base line and another type of biological fluid has been overlaid or superimposed on it, say, for example, or in that area, say, for example, saliva or tears or some other cellular material has been overlaid in that area, you can get a DNA result from that other fluid, from those cells.

So if an analyst comes along and only cuts the blood stain and tests it, they would mistakenly conclude that the DNA profile that they had obtained originated from the blood stain. In order to distinguish whether or not that's the case, you really need to take a substrate control. In doing that, you're taking an area of the material very close to the stain but not stained itself with blood or apparent blood and you're testing that as well.

C56/7492-7494. More testing than what was done in this case was necessary before the defense could conclude that the DNA came from blood rather than another source, either because the stain was not blood or because the DNA component of the stain had deteriorated, but the component which produced a presumptive positive result for blood remained. In this case, the stains on the toilet were in a "hot humid environment," the non-airconditioned bathroom in Mr. Crain's home.

With the facts and the knowledge which trial counsel had available before trial, no reasonable argument can be made that they had to stipulate that the DNA came from blood to achieve any strategic or tactical objective. Nor can it be reasonably maintained that they could not anticipate how such a stipulation would be used by the State. Regardless, before trial, the defense

conceded the DNA testing results, but in so doing conceded also that the DNA was found in the victim's blood on the above-mentioned items.

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.

Finally, despite the lab technician's initial intake form, C9 et seq. (Defense Composite Exhibit 1, Volume 2, page 49), which noted the presence of a dark stain in the rear area of the boxers (possibly containing a mixture of blood and feces), the State's expert failed to test the obvious stain for blood. A competent defense would have objected and moved for mistrial, not only because of an incorrect reference to Mr. Crain's blood being on the victim's underwear (A20/3078-9), but because the State argued the absence of blood anywhere on the Mr. Crain's underwear except where the victim's DNA was found, when the expert had failed to test the other stains noted by his lab. The absence of blood cannot be argued when obvious locations were ignored.

Defense counsel knew or should have known that Dr. Yeshion's processing of the boxer short was sloppy, raising doubt about the reliability of his results. An intake inventory sheet was prepared by FDLE lab technician John P. Ryan, for the evidence in "Submission 1," which included the boxer

shorts upon which the victim's DNA was reportedly found. It is dated two days before Dr. Yeshion's lab notes, i.e., September 15, 1998. C9 et seq. (Defense Composite Exhibit 1, Volume 2, page 49). Mr. Ryan described the shorts as:

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

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

Despite this description of a dirty pair of undershorts bearing at least three stains of interest, Theodore Yeshion, only two days later, examined the shorts, drew a diagram of the shorts, and noted only one thing, the small dot on the right front. C9 et seq. (Defense Composite Exhibit 1, Volume 2, page 63). In the evidentiary hearing, Dr. Yeshion testified that his notes did not reflect the yellow stain. C58/7726-7727.

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

of his pretrial deposition August 13,1999.

Q. Did you see any other stains that could appear to be blood at that time too or just zeroing in on this one stain that you've described for us?

A. That was the only stain that I observed that potentially looked like it could be a blood stain. I didn't see any other stains on the shorts.

Q. Were these boxer shorts in appearance clean? Did it look like they were clean but for the stain, you know, freshly laundered or folded or anything of that nature?

A. Well, they were -- I do recall that they were just stuffed into a bag by themselves, you know. It wasn't with multiple items. It was just the boxer shorts only. It was not folded. I don't have remarks in my notes here as to the cleanliness of them, but I would tell you that if I come across an exhibit that's dirty, it appears that it needed to be laundered and it's pretty grungy-looking, I would make note of that.

If there is a bad odor, a body odor, a perfume odor, things like that, I have a tendency to make notes of that. I have no notes to that effect on here. My feeling is that they were relatively clean.

Pretrial Deposition of Ted Yeshion, August 13,1999, C9 et seq. (Defense Composite Exhibit 1, Volume IV, subdivision X(A)(1), page 21) of the deposition.

Trial counsel knew or should have known about the inventory description of the boxer shorts indicating they were not in a "relatively clean" state, but one which bore at least two additional stains of interest which were unnoted and unexamined by Dr. Yeshion. This should have set off alarm bells in the defense, or, at the very least, this should have alerted the defense expert

who had access to all of the discovery. Even if the defense made a tactical or strategic decision to not seek additional testing of the shorts, it would have alerted competent counsel to fundamental flaws in the State's forensic lab requiring "rigorous independent scrutiny." At the very least, these issues should have been presented to the jury. As described in the ABA Guidelines, "to assume the accuracy of whatever information the . . . prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. . . . [T]he defense lawyer's obligation includes . . . subjecting all forensic evidence to rigorous independent scrutiny. ABA Guidelines, 31 Hofstra L. Rev. 913, 926 (Summer 2003).

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

1. The DNA could have been cross contaminated when known samples of the victim's DNA were tested in the same time and place as samples from the crime scene. C56/7516.
2. Cross contamination could have occurred when lab technicians opened sample tubes when processing victim and crime scene DNA at the same time. *Id.* at 7516-7517. Dr. Yeshion claimed that he always used a mechanical decapper to open such tubes, C58/7679, but he conceded that even a decapper, just like a gloved finger, could cross-contaminate, although contamination would be "less likely." *Id.* at 7683.
3. The State never tested the stains to confirm whether they were blood. The jury would have learned the degree to which it could rely on a presumptive test, as demonstrated by the

examination of the experts in the evidentiary hearing.

4. The jury would have learned about the universe of alternate sources for DNA, at the least defusing the emotionally charged "lifeblood" argument and offering additional innocent explanations for the presence of the DNA (e.g. urine, cells from the hand, saliva, mucus, etc.). C56/7492-7496.

5. Independent defense testing including substrate controls would have yielded additional evidence that the DNA was of innocent origin. Dr. Johnson testified that substrate testing would have been available and appropriate in 1998 and would have yielded additional information. *Id.* at 7525-7526. She cited An Introduction to Forensic DNA Analysis as one authority which deemed substrate analysis appropriate in 1998 (the transcript erroneously reports she was referring to the "Fifth" rather than "First" edition of the treatise, but the context makes it clear "First" was what she said, just as the reporter erroneously recorded that she said the "fifth person to test" the DNA samples was the FDLE, *Id.* 7526-7527, when the FDLE was the first agency to test the DNA). Dr. Yeshion conceded that testing substrate controls was appropriate in 1998: "I'm not going to tell you that it's not good practice. It's certainly good practice to collect those items." C58/7721.

The reliability of the FDLE testing was severely compromised. Proper investigation would have discovered and developed the deficiencies, and a competent presentation of the evidence to the jury would have devastated the most critical evidence against Mr. Crain.

On direct appeal, the Florida Supreme Court issued its *per curiam* opinion on October 28, 2004. There, a concurring justice forthrightly expressed his serious concerns with this circumstantial evidence case, but found that the presence of blood tipped the scale:

Although I concur in result, it is not without considerable concern and reservations. I have concerns with not only the legal theories and applications, but also with overstatements of facts. We review very tragic circumstances here involving a child, but I cannot agree with characterizations of much of the evidence and inferences upon which others rely for legally sufficient evidence. In my view, the majority and others rely upon strained and improper expanded inferences drawn from the actual evidence presented, which ultimately determine that Crain's intent can be ascertained from far less actual evidence. In my view, it is the actual physical evidence (blood and scratches) along with the actual physical location of such evidence (boxer shorts and arms) that tips the evidentiary balance to support a finding of felony murder based upon kidnapping with the intent to commit bodily harm. Therefore, I cannot fully agree with the majority's decision and discussion of the evidence.

Crain v. State, 894 So.2d 59, 80 -81 (Fla. 2004)(Lewis, J., concurring in result only).

The dissenting justice, J. Wells, on direct appeal wrote the following:

I concur that there is insufficient evidence to sustain the kidnapping conviction. I dissent to the affirming of the first-degree murder conviction.

Based upon the record presented in this case, there are simply too many assumptions which have to be made to affirm Crain's conviction for first-degree murder, either premeditated or felony. Since the child's body has not been located, the initial inference which has to be made is that she is dead. From that inference, all others have to be stacked. I have to recognize what the trial judge concluded in her sentencing order: "There is no way to know exactly what happened to [Amanda]." State v. Crain, No. 98-17084, order at 2 (Fla. 13th Cir. Ct. order filed Nov. 19, 1999). That is the evidence in the record.

Id., at 87 -88 (Fla. 2004)(Wells, J., concurring in part and dissenting in part.)

B. Federal District Court Opinion

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* at 687. While this standard is higher than the standard for a request for certificate of appealability, even 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. The prejudice is clear. The defense in this case was deficient for accepting 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. Therefore, jurists of reason would find it debatable whether the petition states a valid claim of the denial of his Sixth Amendment right to trial and that jurists of reason

would find it debatable whether the District Court was correct in denying Mr. Crain's Petition.

GROUND FIVE

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT PETITIONER OF FELONY MURDER BY KIDNAPPING WITH INTENT TO COMMIT BODILY HARM IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

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 as it related to intent. Petitioner's Motion to Alter or Amend Judgment (Doc. 137) asked the District Court to reconsider their ruling as to Ground Five of the Petition as it relates to sufficiency in general, because not all the elements of Felony Murder were established by competent, substantial evidence.

In Ground Six of his federal petition, Mr. Crain challenged whether it was appropriate for the jury to be instructed on a different intent for kidnapping as part of the felony murder charge in count one versus the intent that was used in the Indictment on count two, kidnapping with intent to

commit homicide. However, as to the claim before this Court, [contrary to the Respondent's Response to Motion to Alter or Amend Judgment (Doc. 143)], Mr. Crain argues that, given the instruction exactly as it was read to the jury, there is insufficient evidence to uphold a conviction. This claim does not argue that trial counsel should have asked for a different instruction. That argument is found and preserved in Ground Six and should not be conflated to apply to this claim in Ground Five. This claim should be understood to argue that the elements of the instruction read to the jury were not proven by competent, substantial evidence. The Florida Supreme Court found:

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).

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.” (Doc. 135 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.

To summarize the facts presented at trial, Amanda's mother took a large dose of pain killers 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 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, 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 (Doc. 143, at page 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,

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

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 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

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

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 and argues it is a grave 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. Therefore, jurists of reason would find it debatable whether the petition states a valid claim that Mr. Crain was denied his Fourteenth Amendment right to Due Process and that jurists of reason would find it debatable whether the District Court was correct in denying Mr. Crain's Petition.

REMAINING GROUNDS

As to the remaining Grounds which were not specifically argued above, Petitioner relies on all previously advanced claims and arguments made in these proceedings, and respectfully requests that the COA should issue.

WHEREFORE, for the foregoing reasons, reasonable jurists could debate whether these Grounds should have been decided differently, based on the arguments contained in Mr. Crain's Petition (Doc. 117), Reply (Doc.123), Motion to Alter or Amend Judgment (Doc. 137) and here. Petitioner/Appellant respectfully requests this Court grant him a certificate of appealability.

Respectfully submitted,

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Dated: December 22, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 22, 2022, we electronically filed the foregoing application with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: Rick A. Buchwalter, Assistant Attorney General, rick.buchwalter@myfloridalegal.com, capapp@myfloridalegal.com, and mailed the foregoing document to Willie Seth Crain, Jr., DOC#096344, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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