

No. 23-5289

**In The
Supreme Court of the United States**

WILLIE SETH CRAIN, JR.,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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Capital Case

QUESTIONS PRESENTED

1. Whether the United States District Court correctly concluded that the Florida Supreme Court did not unreasonably determine that Crain failed to demonstrate his conviction for felony murder violated due process because there was sufficient evidence to prove intent, and Crain failed to raise the argument that there was insufficient evidence that the victim was still alive at the time of her abduction until he filed a motion to alter or amend the district court's judgment after it was entered?

2. Whether the United States District Court correctly concluded that the Florida Supreme Court did not unreasonably determine that Crain failed to demonstrate his trial counsel were ineffective for stipulating that the red-brown stains that were the source of the DNA were blood?

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The opinion of the Eleventh Circuit Court of Appeals is reported as *Crain v. Sec’y Dept. of Corr.*, 2023 WL 5005656 (Fla. Mar. 31, 2023)

STATEMENT OF JURISDICTION

Petitioner asserts that this Court’s jurisdiction is based upon 28 U.S.C. § 1254(1). Respondent agrees that that statutory provision sets out the scope of this Court’s certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court’s discretionary jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel.” U.S. Const. amend. VI, § 1.

The Fourteenth Amendment to the United States Constitution states in pertinent part, “[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE AND FACTS

A. Factual Background

On September 9, 1998, Crain, a 52-year-old fisherman and crabber, 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. Although Amanda was not at Hartman's home during this visit, pictures of her were present, as were her toys. *Crain v. State*, 894 So. 2d at 62-63.

Crain returned to see Hartman again the next afternoon. During this visit, Amanda was home with her mother and Crain paid her a great deal of attention. He spoke with Amanda about her homework and paid her for getting her homework right. He also played games with Amanda. 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." *Crain v. State*, 894 So. 2d at 63.

Crain left Hartman's home but returned around 7:00 p.m., for dinner, at the invitation of Hartman. Crain mentioned that he had a large videotape collection and invited Hartman and Amanda to his trailer to watch a movie. They started the movie in Crain's living room when interrupted by a telephone call from Crain's sister. At Crain's request, Hartman spoke to his sister for him, and after a twenty to twenty-five-minute phone call, Hartman returned

to find the living room empty.

When Hartman opened a closed door at the rear of the trailer without knocking, she found Amanda and Crain sitting on the bed in Crain's bedroom watching the movie. Amanda sat between Crain's legs with her back to Crain who had his arms wrapped around Amanda and appeared to be showing Amanda how to work the remote control. Hartman sat down on the bed and moved Amanda to sit beside her.

During the evening, Amanda and Hartman used Crain's bathroom together, and significantly, Hartman did not see Amanda bleeding anywhere that Hartman could observe. Nor did Amanda use the bathroom at any other time that evening. According to Hartman, the toilet seat back had a blue cover. *Crain v. State*, 894 So. 2d at 63-64.

Later that evening, the three returned to Hartman's home. While Amanda was taking a shower, Hartman checked on her and helped her get ready for bed. At that time, Hartman did not notice any sores or cuts on Amanda. Crain then dried Amanda's hair in the bathroom without Hartman present. According to Hartman, when Amanda went to sleep, her loose tooth was still in place and was not bleeding.

Around 2:30 a.m., Hartman told Crain that she was going to bed, but that he could lie down and sober up. Five minutes later, Crain went to Hartman's bedroom and lay down on the bed with Hartman and Amanda. Hartman neither invited Crain to lie in her bed nor asked him to leave.

Amanda was lying between Hartman and Crain, although Crain was fully clothed, and Amanda was wearing a nightgown.

One of Hartman's neighbors testified that around midnight, she saw a white truck parked immediately behind Hartman's car in Hartman's driveway but saw the truck parked on the side of Hartman's home with the lights on and the engine running later in the early morning hours. She heard the truck leave after about five minutes. When Hartman awoke the next morning at 6:12 a.m., she discovered that Amanda was missing. *Crain v. State*, 894 So. 2d at 64.

According to Albert Darlington, a fisherman who knew Crain, Crain drove his boat to a loading area around 6:15 a.m. that morning. Darlington testified that Crain was wearing a shirt with slacks and carrying what appeared to be a rolled-up item of clothing. According to Darlington, Crain launched his boat in an "odd manner." At trial he would testify that Crain had told him on two occasions that he could "get rid of a body where no one could find it." *Crain v. State*, 894 So. 2d at 64-65.

Hartman called Crain, who told her that he was loading his boat and did not know where Amanda was. Hartman then called the police and reported Amanda missing. At 8:30 a.m., a police detective found Crain in his boat. Crain was wearing rubber pants, a blue t-shirt, and loafers. While the two returned to the boat ramp, the detective noticed a small scratch on Crain's upper arm.

When questioned 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. He then spent the next four hours cleaning his bathroom because he did not like the smell of bleach, but later in the interview said he cleaned his bathroom with bleach, as was his custom.

The police asked Crain about the multiple scratches they observed on his arms, and Crain stated that he received the scratches while crabbing. However, he became defensive when the police asked him to demonstrate how he received the scratches.

Later, the police searched Crain's home. They noticed the strong smell of bleach and found an empty bleach bottle even though "there were obvious signs of grime and dirt around the edges of the bathroom sink." When Luminol, a chemical that reacts both with blood and with bleach, was applied to Crain's bathroom the floor, the bathtub, and the walls "lit up." *Crain v. State*, 894 So. 2d at 65. 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. *Crain v. State*, 894 So. 2d at 65-66.

The police performed an extensive search for two-weeks for Amanda, but they never found her body. Nor did the police ever find the shirt and slacks that Darlington saw Crain wearing the morning of Amanda's disappearance.

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. 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." Those two neighbors also testified that Crain initially stated that he did do it before adding that he did not hurt her and adding, "I didn't do anything." Crain's daughter testified that Crain stuttered, "yes, I did . . . did . . . didn't do it; yes, you're right, I didn't hurt her." *Crain v. State*, 894 So. 2d at 66.

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.'" Crain told him at that time that "other crabbers would steal the crab traps if they knew of the spot." Then, after Amanda disappeared, Crain told him that if the friend told anyone the location of those traps, "it could bury [Crain]." *Crain v. State*, 894 So. 2d at 66.

A pathologist was unable to 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." *Crain v. State*, 894 So. 2d at 65. He also testified that these scratches were likely inflicted within hours to days before the photographs were taken. *Crain v. State*, 894 So. 2d at 65. 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." *Crain v. State*, 894 So. 2d at 65.

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. He further 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. As to the second toilet seat stain and the stain on the toilet tissue, they contained DNA consistent with a mixture of the DNA profiles of Amanda and Crain. Moreover, the 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. *Crain v. State*, 894 So. 2d at 66.

The jury convicted Crain of first-degree murder and kidnapping with intent to commit homicide and unanimously recommended Crain be sentenced to death. The court imposed the death sentence after finding three aggravators and eight nonstatutory mitigators. *Crain v. State*, 894 So. 2d at 67.

The three aggravators were Crain's prior violent felonies, that he

committed the murder during a kidnapping, and that his victim was less than twelve years old. Of particularly strong weight in aggravation were Crain's prior violent felony convictions--five counts of sexual battery and one count of aggravated child abuse. The defendant was a violent chronic abuser of young girls, an "uncured pedophile." Crain repeatedly threatened, intimidated, and sexually abused young girls. During the sentencing phase, the State submitted certified copies of judgments and sentences for five sexual batteries and one count of aggravated child abuse. The State also offered the testimony of three child victims of Crain's previous sexual offenses. 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." *Crain v. State*, 894 So.2d at 67.

B. Procedural Background

Crain's conviction and sentence for first degree murder was affirmed on direct appeal to the Florida Supreme Court, with his conviction for kidnapping being reduced to false imprisonment on October 28, 2004. *Crain v. State*, 894 So. 2d 59 (Fla.2004), Crain sought certiorari review before this Court, which was denied on October 3, 2005. *Crain v. Florida*, 546 U.S. 829 (2005).

Crain then moved for postconviction relief on September 7, 2006. The state postconviction court denied relief on all counts on September 11, 2009. *State v. Crain*, 2009 WL 10719775 (Fla. Cir. Ct. Sept. 11, 2009). 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).

On February 15, 2012, Crain filed his initial petition under 28 U.S.C. § 2254. The United States District Court stayed the case so that Crain could pursue successive postconviction relief in state court based on this Court's opinion in *Hurst v. Florida*, 577 U.S. 92 (2016).

Crain filed a motion for postconviction relief in Florida circuit court on January 5, 2017, which was denied on June 15, 2017. The Florida Supreme Court affirmed the order of denial on April 5, 2018. *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 on January 22, 2019. *Crain v. Florida*, 139 S. Ct. 947 (2019).

Crain filed a motion to amend his petition, which was granted. On September 30, 2022, the district court entered its Order denying Crain's amended habeas petition and denying a certificate of appealability. (Doc. 136) On October 26, 2022, Crain filed a Motion to Alter or Amend Judgment, pursuant to Fed. R. Civ. P. 59(e), (Doc. 137) which was denied on November 25, 2022 "[b]ecause Crain presses only an argument that could have been, but was not, raised before the entry of judgment . . . [or] he failed to exhaust [] in state court and it is therefore

procedurally defaulted.” (Doc. 146).

On October 17, 2022, Crain filed a pro se Notice of Appeal, and on December 22, 2022, his attorneys filed a Petitioner’s Amended Notice of Appeal and an Application for Certificate of Appealability and Memorandum of Law, after having moved for and obtaining an Order granting a motion for extension of time to file a motion for certificate of appealability. On March 31, 2023, the United States Court of Appeals for the Eleventh Circuit entered an Order denying Crain’s motion for a certificate of appealability. On April 13, 2023, Crain filed his motion for reconsideration of the Eleventh Circuit’s order denying his motion for a certificate of appealability. On May 11, 2023, in an order issued by Chief Judge William Pryor, Judge Branch and Judge Luck, the court entered an order denying the motion for reconsideration because “Crain merely quarrels with the outcome and reiterates the reasons why he believes a COA is warranted on his claims . . . [and] has offered no meritorious arguments that warrant relief.”

On August 1, 2023, Crain filed his Petition for a Writ of Certiorari before this Court, to which this response issues.

REASONS FOR DENYING THE WRIT

1. Whether the United States District Court correctly concluded that the Florida Supreme Court did not unreasonably determine that Crain failed to demonstrate his conviction for felony murder violated due process because there was sufficient evidence to prove intent, and Crain failed to raise the argument that there was insufficient evidence that the victim was still alive at the time of her abduction until he filed a motion to alter or amend the district court's judgment after it was entered?

Crain contends that the State failed to prove that the seven-year-old victim, Amanda Brown, was kidnapped. (Petition at 9). If true, this would undermine Crain's murder conviction because the Florida Supreme Court found that there was insufficient evidence of premeditated murder but sustained Crain's murder conviction and death sentence based on the court's conclusion that the evidence proved that he committed a felony-murder in which the crime of kidnapping with the intent to commit bodily harm was the underlying felony. He now argues for the first time that the State failed to prove Amanda was alive at the time she was abducted from her home, and under Florida law he "cannot 'kidnap' a corpse or take a person 'against their will' if they are not alive." (Petition at 6).

While Crain's contention that there is insufficient evidence to prove kidnapping is incorrect, as will be explained below, of equal importance is the fact that Crain never raised this argument before in any state court. *Not until after the district court entered its order denying his habeas corpus petition, did Crain, for the first time, make this argument*, doing so in a motion to alter or amend the judgment of the court pursuant to Fed R. Civ. P. 59(e). Notably, the district court concluded that "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.*” (emphasis added). *See Banister v. Davis*, 140 S. Ct. 1698, 1708 (2020) (Rule 59(e) permits a prisoner to request “reconsideration of matters properly encompassed” in the challenged judgment and will not entertain arguments that could have been but were not raised before the just-issued decision.).

A. This Argument was Not Properly Raised Below

This Court is “a court of final review and not first view.” *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001); *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005). This Court’s traditional rule precludes a grant of certiorari when the question raised in the petition was either not presented to the lower court or was not ruled upon by the lower court. *United States v. Williams*, 504 U.S. 36, 41 (1992) (discussing the concept of “not pressed or passed upon below”); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing the writ of certiorari as improvidently granted where the issue was not raised, preserved, or passed upon in the state courts below); *Adams v. Robertson*, 520 U.S. 83, 88 (1997) (dismissing the writ as improvidently granted where the issue was not raised with “fair precision and in due time”); *Howell v. Mississippi*, 543 U.S. 440, 441 (2005) (dismissing the writ of certiorari as improvidently granted where the issue was not raised as a federal constitutional issue).

The question of whether Crain’s conviction violated his right to due process because there was allegedly insufficient evidence to prove that Amanda Brown *was*

alive when Crain abducted from her home was never raised in any state court. Crain urges the Court to ignore this problem. He asserts that the Florida Supreme Court's rule requiring that it automatically review all capital case convictions for sufficiency of the evidence both replaces any requirement that he specifically make this same argument on appeal to consider it exhausted before the state courts and immunizes him from procedural default for his failure to do so. (Petition at 17-18).¹ However, Crain cites no case supporting this argument.

Although this Court has never addressed this issue directly, in *Bell v. Cone*, 543 U.S. 447 (2005), the Court suggested otherwise. In *Bell*, the Sixth Circuit, in rejecting the state's argument that the defendant procedurally defaulted his void for vagueness argument concerning Tennessee's heinous, atrocious, and cruel aggravator, ruled that the Tennessee Supreme Court's statutorily mandated review of each death sentence "necessarily included the consideration of constitutional deficiencies in the aggravating circumstances found by the jury and therefore that the issue was 'fairly presented' to the state court, even if respondent did not raise it himself." *Bell v. Cone*, 543 U.S. 447, 451 (2005). However, in footnote three, on this

¹ Crain is correct that Florida Rule of Appellate Procedure 9.142(5) currently requires that "on direct appeal in death penalty cases, whether or not insufficiency of the evidence is an issue presented for review, the court must review the issue and, if necessary, remand for the appropriate relief." However, at the time of the Florida Supreme Court's review of Crain's direct appeal, the language of the applicable statute differed slightly and was found in Florida Rule of Appellate Procedure 9.142(6): "In death penalty cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review." *Amendment to the Florida Rules of Appellate Procedure (Rule 9.142)*, 837 So. 2d 911, 922 (Fla. 2002).

point, the Court stated, “[S]ome Courts of Appeals have held that a petitioner must raise his constitutional claim in state court in order to preserve it, notwithstanding the existence of a mandatory-review statute, we find it unnecessary to express a view on this point . . . [w]e do emphasize that, *as a general matter, the burden is on the petitioner to raise his federal claim in the state courts at a time when state procedural law permits its consideration on the merits*, even if the state court could have identified and addressed the federal question without its having been raised.” *Bell v. Cone*, 543 U.S. 447, 451 n. 3. (2005) (emphasis added).

In the second issue in his brief on his direct appeal, Crain raised sufficiency of evidence to prove a felony-murder based on Amanda’s kidnapping, but the argument he raised was far different than the one he now makes. In his brief, Crain focused on whether there was sufficient evidence to prove *intent*:

The State’s evidence, summarized in the Statement of the Facts, *supra*, did not include any direct evidence that Willie Crain abducted Amanda Brown, that Amanda was dead, the manner and cause of her death, that Crain killed her, nor that he intended to kill her. Assuming for purposes of this argument that the circumstantial evidence was sufficient for the jury to conclude that Crain abducted Amanda, that she was dead, and that Crain killed her, it was not sufficient for the jury to conclude that Crain *intended to kill Amanda* during the abduction.

(IB at 63) (emphasis added). The brief then continues with the argument exclusively focused on whether the evidence is sufficient to prove Crain’s intent to kill Amanda Brown. (IB at 63-66). Because sufficiency of the evidence is an issue a defendant in Florida must raise on direct appeal, he is now procedurally barred from raising this issue again. *Chandler v. Dugger*, 634 So. 2d 1066, 1069 (Fla. 1994) (arguments that could be raised on direct appeal, but are not, are procedurally barred from subsequent

review because they could have been raised on direct appeal.). Therefore, this argument has been procedurally defaulted in any habeas proceeding.

However, even though the argument has been procedurally defaulted, there are two narrow circumstances in which Crain would be able to raise a procedurally defaulted claim if he can meet the criteria for overcoming a procedural default. First, Crain may obtain federal review of a procedurally defaulted claim if he can show both “cause” for the default and actual “prejudice” resulting from the default. *See Murray v. Carrier*, 477 U.S. 478 (1986). “[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. *Murray v. Carrier*, 477 U.S. at 88.. To establish “prejudice,” a petitioner must demonstrate that “there is a reasonable probability” that the result of the trial would have been different. *See Strickler v. Greene*, 527 U.S. 263, 289 (1999).

Second, a federal court may also grant a habeas petition on a procedurally defaulted claim, without a showing of cause or prejudice, to correct a “fundamental miscarriage of justice.” *Murray v. Carrier*, 477 U.S. at 495-96. However, the fundamental miscarriage of justice exception is available “only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.” *Herrera v. Collins*, 506 U.S. 390, 404 (1993). And then, it must be combined with new evidence as the Court noted in *Schlup v. Delo*, 513 U.S. 298, 324 (1995). (“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.").

However, Crain has failed to demonstrate either cause and prejudice or a fundamental miscarriage of justice. Indeed, he has not even truly attempted to do so. Although he claims to have suffered a miscarriage of justice, nowhere has he claimed there exists new evidence not previously introduced at trial that demonstrates that he is factually innocent of these charges. 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 petition.

Furthermore, even had Crain not procedurally defaulted this argument, the result would be no different. While analyzing the actual arguments raised by Crain, (1) that the evidence was insufficient to prove Crain's premeditated intent to murder Amanda Brown (Direct Appeal Brief at 58-62) and (2) the evidence was insufficient to prove Crain kidnapped Amanda Brown with the intent to commit or facilitate a homicide (Direct Appeal Brief at 62-67), the Florida Supreme Court concluded that a "struggle" occurred between Crain and his victim. The court stated:

Further, multiple scratches and one cluster of gouges were observed and photographed on Crain's arms. All but two of the scratches were more likely to have been caused by the fingernails of a seven-year-old child than by any other cause. The cluster of small gouges was more likely to have been caused by a small grasping hand consistent with that of a seven-year-old child than by another cause . . . *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.* 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, 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.

Crain v. State, 894 So. 2d 59, 73-74 (Fla. 2004) (footnote omitted).

Thus, although Crain never argued that Amanda was alive at the time of her abduction, and the Florida Supreme Court never ruled on this argument, the court's analysis explaining its rejection of different arguments raised by Crain, resulted in the court factually determining that at the time of Amanda's abduction she must have been alive. Otherwise, there could not have been a "struggle." A challenge to evidence sufficiency as Petitioner lodges here is subject to highly deferential review in federal court. As recently stated by the Supreme Court in *Coleman v. Johnson*, 566 U.S. 650, 651 (2012):

We have made clear that *Jackson* [*Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)] claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, "it is the responsibility of the jury-not the court-to decide what conclusions should be drawn from evidence admitted at trial. A reviewing 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." *Cavazos v. Smith*, 565 U.S. 1, —, 132 S. Ct. 2, 4, 181 L.Ed.2d 311 (2011) (per curiam). And second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U.S. —, —, 130 S. Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

Therefore, although Crain failed to exhaust this argument before the state courts, he is incorrect in claiming that there is insufficient evidence admitted at trial that Amanda was alive at the time she was abducted, and the Court should deny his

petition.

2. Whether the United States District Court correctly concluded that the Florida Supreme Court did not unreasonably determine that Crain failed to demonstrate his trial counsel were ineffective for stipulating that the red-brown stains that were the source of the DNA were blood?

Crain claims that because no scientific testing conclusively establishes that the stains on Crain's boxer shorts and inside his bathroom, which were the source of the DNA evidence that matched Amanda's DNA profile, were blood, that his trial counsel provided ineffective assistance. (Petition at 22). Not only has Crain failed to convince any court that has reviewed this case that he has demonstrated that this stipulation establishes deficient representation by his trial counsel or that he was prejudiced as a result of this stipulation, the United States District Court determined that there did not exist a sufficient basis for providing Crain a certificate of appealability.

A. The United States District Court Correctly Held That Crain Failed to Demonstrate That the State Courts' Decisions Were Unreasonable

To demonstrate ineffective assistance of counsel, a defendant must show both that counsel performed deficiently and that the deficient performance prejudiced the defense. *Washington v. Strickland*, 466 U.S. 668 (1984). Courts, in determining whether a defendant has demonstrated counsel's performance is deficient, must be highly deferential and entertain a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 694. In addition, a habeas petitioner can only obtain habeas relief if the state court adjudication of the claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "was

based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d)(1)(2). When a court applies *Strickland* while reviewing a case under AEDPA, the petitioner’s burden of demonstrating error is particularly difficult because the standard created by both AEDPA and *Strickland* is highly deferential, and “the two apply in tandem.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011). “[T]he question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland’s* deferential standard.” *Harrington*, 562 U.S. 86 at 105.

Crain was represented in this case by two highly experienced criminal trial attorneys, Charles Traina and Daniel Hernandez. Traina had practiced law for nearly fifteen years. His first ten years he worked as an assistant public defender and became chief of the capital division in his office. After he left that office, he practiced primarily criminal defense in the private sector. Traina had been involved in approximately 100 to 150 jury trials, four of which were death penalty cases that were tried to their conclusion. At the time of Crain’s 1999 trial, Hernandez had practiced law for nearly twenty-two years, working as a prosecutor and in private practice as a criminal defense attorney. He had been involved in approximately 200 felony jury trials, fifteen or twenty of which were first-degree murder trials, including death penalty cases. *Crain v. Sec’y, Dept. of Corr.*, 2022 WL 20472602 at 10 (M.D. Fla. Sept. 30, 2022).

To assist them in this case, they retained a confidential DNA expert, Dr. William

Shields. Shields was unable to refute the lab findings, find any evidence of contamination during the testing process, or raise a concern about the validity or reliability of the test results. Nor, as the district court noted, did Shields advise counsel that it was inaccurate or misleading to describe the stains as blood. *Crain v. Sec'y, Dept. of Corr.*, 2022 WL 20472602 at 9.

The Florida Supreme Court noted that 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.”

Crain v. State, 78 So. 3d 1025, 1037 (Fla. 2011).

By adopting the story Crain had already provided to both law enforcement and the media, trial counsel avoided presenting a position that was inconsistent to that which Crain had previously provided. “The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.” *Strickland v. Washington*, 466 U.S. at 691. The district court correctly determined that the Florida Supreme Court did not unreasonably 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.” *Crain v. Sec'y, Dept. of Corr.*, 2022 WL 20472602 at 10. Thus, Crain has failed to establish

that the State courts unreasonably determined that he failed to demonstrate that his trial counsels' performance was deficient.

Crain has also failed to establish that the Florida Supreme Court unreasonably determined that he failed to demonstrate that there is a reasonable probability that the result would have been different but for the stipulation. The court noted that the postconviction court's analysis of the *Strickland* prejudice prong resulted in the postconviction court finding "that the State's experts, Dr's. 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." *Crain v. State*, 78 So. 3d at 1038. *See Crain v. State*, 78 So. 3d at 1044. (quoting *Archer v. State*, 934 So. 2d 1187, 1196 (Fla. 2006) (However, this Court is "highly deferential to the trial court's judgment on the issue of credibility.")). Dr. Yeshion testified that with regard to his use of the phenolphthalein presumptive test "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.'" *Crain v. State*, 78 So. 3d at 1038. It further noted that "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." *Crain v. State*, 78 So. 3d at 1038.

Because Crain is unable to demonstrate that the Florida State Supreme Court

unreasonably determined that Crain failed to demonstrate both deficient representation by his trial counsel and prejudice resulting from any deficient representation, this Court should deny the petition.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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