**IN THE SUPREME COURT OF FLORIDA**

JOE ELTON NIXON,

Appellant,

v. CASE NO. SCO1-2486

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CURTIS M. FRENCH
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 291692

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**FEDERAL CASES**

**STATE CASES**

**DOCKETED CASES**



**MISCELLANEOUS**

## PRELIMINARY STATEMENT

This appeal is a continuation of Nixon's previous appeal from the summary denial of his Rule 3.850 motion for postconviction relief. In that appeal, Nixon raised seven issues. Nixon v. Singletary, 758 So.2d 618, 619 (fn. 1) (Fla. 2000).[1] This Court addressed only one of these seven issues, finding "dispositive" the issue of whether or not there was "affirmative, explicit acceptance by Nixon" of trial counsel's strategy at the guilt phase of Nixon's trial, which this Court described as the "functional equivalent of a guilty plea." Id. at 620, 624. This Court remanded the case to the circuit court "to hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt." Id. at 625.[2] The evidentiary hearing mandated by this Court was conducted on May 11, 2002, before circuit court judge Janet E. Ferris. On September 20, 2001, Judge Ferris entered an order denying relief. Nixon appeals from that order, and, in

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[1] In addition, he raised several claims in a petition for writ of habeas corpus. The 3.850 appeal and the habeas petition were orally argued contemporaneously.

[2] This Court found it unnecessary to address Nixon's remaining claims on the 3.850 appeal, or any of his habeas claims.

addition, renews the claims he presented to this Court in his prior appeal.[3]

In these proceedings, the State (as has Nixon) will rely on the transcript and record of Nixon's original trial (including the supplemental volumes of transcript generated by this Court's remands to the circuit court during the direct appeal proceedings), the record from the previous 3.850 appeal, and the transcript and record from the proceedings on remand. The State will cite to the original trial record as "TR," to the supplemental records on appeal from the original trial as "STR," to the previous record on appeal from the original summary denial of postconviction relief as "PCR," and to the record of the latest proceedings on remand as "SPCR."[4]

References to "Nixon" throughout this brief are to the appellant, Joe Elton Nixon. His relatives having the same last name will be referred to by first and last name. All other persons generally will be referred to by their last names.

## STATEMENT OF THE CASE AND THE FACTS

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[3] He also has filed an amended habeas petition. The State will file an updated response to the amended petition contemporaneously with this brief.

[4] There were four un-numbered supplemental volumes in the original record on appeal (case no. 67583). The State will refer to the one certified by the trial clerk on January 18, 1988 as "1," to the one certified on February 5, 1988 as "2," to the one certified on January 18, 1989 as "3," and to the final supplemental record, certified on November 22, 1989 as "4."

*The Original Trial Proceedings And Evidence*

Nixon was arrested August 14, 1984 for the murder of Jeanne Bickner. Michael Corin, an assistant public defender, was appointed to represent him in this capital prosecution. Corin filed a demand for discovery on September 11, 1984 (1TR 25), and thereafter deposed 52 state's witnesses, including Nixon's brother and girlfriend, two uncles, numerous police officers and various eyewitnesses to Nixon's possession of the victim's car and other property (1TR 45-47, 74-75, 94-95).[5] In the defense discovery responses, trial counsel gave the state the names of 60 potential defense witnesses (1TR 55-57, 60-63, 76-77, 114).[6]

At a pre-trial hearing on February 27, 1985, trial counsel stated that, although he had raised the issue of Nixon's competency in another case which had gone to trial several weeks previously, he did not intend to raise the issue in this case

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[5] The State attached 42 of these depositions to its response to Nixon's 3.850 motion (6PCR 1029-65, 1089-1169; 7PCR 1343-1881).

[6] It should be noted that the volumes in the original trial transcript are not numbered in chronological order. For example, volume 6 contains transcripts of pre-trial hearings on February 27, July 9, July 8 and June 14, 1985 (in that order); the jury selection proceedings of July 15, 1985 are in volumes 7 and 8; the jury selection proceedings of July 16 are in volume 3; and the jury selection proceedings of July 17 are in volumes 9 and 10. The presentation of the evidence commences in volumes 11 and 12, and concludes in volumes 4 and 5.

(6TR 899-900).[7] Judge Hall, who had presided over the other case, noted that Nixon had been evaluated in that case by Dr. Stimel, who had given "assurances that we could proceed with confidence" (6TR 909-10).

Trial counsel stated that, although he did not consider competency to be a potential issue, he would move for the appointment of mental health experts for use in mitigation (6TR 900), and he later filed a written motion for such (1TR 90-91). On March 12, 1985, Judge Hall appointed Dr. Ekwall (a psychiatrist) and Dr. Doerman (a psychologist) to assist the defense (1TR 92-93).

Jury selection began on July 15, 1986. Nixon was present during the first day of voir dire (7TR 1185 et seq). On the second day of the jury voir dire, however, Nixon refused to leave his holding cell. Trial counsel reported that Nixon had stripped to his underwear, and was demanding a black judge and a black attorney (3TR 304). Judge Hall noted that Nixon's "behavior in the past has been somewhat on the volatile side;" one day he would behave himself, the next he would act up (3TR 306-07). Judge Hall, accompanied by counsel and the court reporter, went to the holding cell to talk to Nixon (3TR 333).

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[7] As will be seen, Corin had represented Nixon previously; in fact, he was representing Nixon on another charge when Nixon was arrested for the instant murder.

Nixon told the judge he was “tired of being Mr. Nice Guy,” and threatened to misbehave if forced to attend the proceedings (3TR 334-37). After further inquiry, and after hearing testimony from various law officers, Judge Hall determined (more than once) that Nixon was freely and voluntarily absenting himself from the trial (3TR 355-56; 9TR 1411-17; 11TR 1825-27, 1990-1997). Although free to return at any time, Nixon chose to absent himself from most of the rest of the proceedings.[8]

In his opening statement, defense counsel acknowledged that the State would be able to prove to the jury’s satisfaction that Jeanne Bickner had died a horrible death and that Joe Nixon had caused that death (11TR 1852). Defense counsel told the jury the case was about Nixon’s death - whether or not Nixon would suffer death by electrocution, or would die of natural causes after a lifetime of confinement (11TR 1852). He reminded the jurors they had “taken an oath to decide this case” as “best” they could and had promised to give each side “a fair trial”

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[8] Nixon came to the courthouse on July 19, but, after talking to his attorney, decided to return to jail (11TR 1990). Nixon also was present, in the courtroom, when proceedings began on July 22, 1985, and was identified by James Turvaville as the person who had tried to sell him the victim’s MG automobile (4TT 562). During a recess shortly thereafter, Nixon decided not to return (4TR 574). The parties examined the bailiff about that decision (4TR 574-80), and trial counsel was given an opportunity to discuss the matter with Nixon (4TR 580-81). Judge Hall once again determined that Nixon was knowingly, intelligently and voluntarily absenting himself from the trial (4TR 580-81).

(11TR 1852). He told them they would get to a penalty phase, when they would "learn many facts about this case, many facts about Joe Elton Nixon" (11TR 1853). Some of those facts would be good and, "sadly," many things would not be good; but after they had heard all the testimony, there would "be reasons why you should recommend that his life should be spared" (11TR 1853).

The State presented 35 witnesses in its case in chief at the guilt phase of Nixon's trial.

Mary Todd testified that, after church on Sunday, August 12, 1984, she rode with the victim in her MG roadster (with the top up) to Governor's Square Mall in Tallahassee, where they met and ate lunch with several friends at Morrison's Cafeteria (11TR 1854-57). The victim had parked near the Sears Garden Center (11TR 1856). Around 1:30 p.m., Todd left with someone else; the victim stayed at the mall to shop (11TR 1857).

Linda Gallagher, who knew the victim through work and was familiar with her MG, was at the mall that day (11TR 1870-71). Sometime between 3 and 4 p.m., as Gallagher was driving through the parking lot near the Sears Garden Center, she saw the victim standing next to her car talking to a black man (11TR 1871-73).

About the same time, Jeff and Mary Atteberry were leaving the Mall and walking to their car parked near the Sears Garden Center when Jeff saw a man wearing a red and white baseball

shirt (who he later identified as Nixon) walk up to a mustard-colored MG just as a woman walked up to it from another direction (11TR 1860-63, 1865, 1868-69). The Atteberrys saw the woman open her trunk and handed Nixon some jumper cables (11TR 1861). When the Atteberrys last saw them, Nixon had the jumper cables in his right hand and was conversing with the woman and pointing to the southeast (11TR 1866).

Susan and Greg Cleary live near the south end of Williams Road, a short distance from Tram road (11TR 1876). They testified that, just before 5 p.m. Sunday afternoon, they were in their convertible driving north on Williams road (11TR 1877, 1883). An orange MG passed them going south; its top was down and the driver was a black man (11TR 1877-78). There were no visible passengers in the MG (11TR 1878). They saw what appeared to be the same car later that evening, between 7 and 7:30 p.m. being driven by Nixon (11TR 1879, 1881, 1883-84, 12TR 2088-89). Susan Cleary testified that this car was the same shade of orange as the one she had seen previously, and she noticed that the paint was gone from an area on the hood (11TR 1880).[9]

[9] The victim's former husband testified that due to a poor collision repair, an area of paint lifted off the MG's hood and that area had begun to rust (12TR 2084).

Willie James Harris testified that Nixon came by his house Sunday after Harris got off work, driving an orange-colored MG (11TR 1957-58). Nixon claimed the MG belonged to his girlfriend (11TR 1959). They rode in the MG to Nixon's sister's house in Havana (11TR 1959). While there, Nixon showed two rings to his sister and uncle (11TR 1960). From there, they went to Governor's Square Mall in Tallahassee so Nixon could pick up his uncle's Monte Carlo automobile and return it to him (11TR 1960-61). Nixon had no trouble starting the Monte Carlo; he drove it, while Harris drove the MG, to the uncle's house (11TR 1961-62). Nixon then drove Harris home in the MG (11TR 1962). Later that evening, Nixon called Harris; he had a flat tire and needed a ride (11TR 1962). Harris met him at a Sing convenience store on Orange Avenue; Nixon directed him to a wooded area, where he retrieved a tire which he put on the MG when they got back to the convenience store (11TR 1963-64).[10] Harris testified that Nixon spent Monday night with him and still had the car then,

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[10] Harris showed police where the Monte Carlo had been parked, on the southeast side of the mall (11TR 2011). He also took them to where Nixon had picked up his spare tire: from the mall, they drove east on the Parkway, turned on Richview and then on Camellia, ending up on the north side of the Highway Safety Building; at the time, the road was dirt and the area undeveloped and wooded (11TR 2013).

Harris' testimony about the flat was corroborated by testimony that a piece of tire tread found at the Sing store fracture-matched the damaged tire found in the trunk of the MG after Nixon abandoned it (12TR 2033-35).

but called him Tuesday morning from the same convenience store, needing a ride (11TR 1965).

Nixon's uncle James Nixon testified that he saw Nixon at 5:30 p.m. Sunday in the company of Harris (11TR 1967). Nixon showed him two rings that looked similar to State's exhibit 16 (11TR 1968). Nixon claimed he had bought them for his girlfriend, but had taken them away from her and was going to give them to someone else (11TR 1968). Nixon told his uncle he had just bought a new car; James Nixon did not know what kind of car it was other than it was a little sports car (11TR 1969). Nixon left around 7:00 p.m., claiming they had to go the mall to pick up another uncle's car that he had left there (11TR 1970).

Mary Louise Steele, who has known Nixon since he was a child, testified that Nixon came by her place late Sunday evening, driving a small sports car; Monday morning at 7 a.m., she saw Nixon driving the same car (11TR 1977-80).

Evelyn Harris, Willie James Harris' sister, testified that she saw Nixon driving an orange and black MG Sunday evening when he came over to pick up her brother (11TR 1982-83). She saw Nixon at a Laundromat on Orange Avenue the next morning; he was still driving the same car, which he said belonged to his girlfriend (11TR 1983-84). Nixon spent Monday night with her and her brother; he still had the MG then and at 6:30 a.m. Tuesday morning, when she left for work (11TR 1984).

Dennis Council, a pawn-shop owner, testified that on Monday, August 13, 1984, Joe Nixon pawned two rings (State's exhibit 16) for $40.00 (12TR 2071-72).[11] The victim's former husband identified the two rings as having belonged to the victim (12TR 2083, 2085).

James Turvaville testified that Nixon (who he identified in court) came by his used auto parts business and tried to sell him an MG; Nixon initially tried to get $200 for it, but came down to less than $50 (4TR 561-62). Turvaville declined to buy it because Nixon had no title (4TR 562-63).

Ernest Gene Kilpatrick testified that at lunchtime on Monday, August 13, 1984, he was flagged down by Nixon's brother John Nixon, who was with a woman who Kilpatrick took to be John Nixon's fiancé (12TR 2076-77). They were having car trouble (12TT 2077). While Kilpatrick was present, Nixon drove up in a mustard-colored MG convertible (12TR 2077-78). Nixon told Kilpatrick the car wasn't his, but he was thinking about buying it for $350 (12TR 2078). The next morning (Tuesday), Kilpatrick saw what appeared to be the same car burning in an area just off Orange Avenue (12TR 2079).

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[11] The witness identified Nixon from his driver's license (12TR 2071). In addition, a handwriting expert identified the signature on the pawn ticket as Nixon's (4TR 553-54).

The victim was discovered Monday afternoon in a wooded area off Tram road, not far from Williams Road (11TR 1885-87, 1895). She had been set on fire and left tied to two trees with jumper cables; one jumper cable was wrapped around her chest and waist, while the other held her left arm above her head (11TR 1891, 1910-11, 1931, 940). Most of her left leg and left arm, and almost all of her hair and skin, had completely burned away (11TR 1940, 1943-44). The medical examiner observed no pre-mortem injuries during the autopsy, except for two discrete areas under the scalp indicative of contusions and one small hairline crack in the right temple area that was consistent with a blow from a fist (11TR 19479-49). Based on the elevated carbon monoxide level in the victim's blood and the lack of major injuries other than those due obviously to the fire itself, the medical examiner concluded that the victim had been alive when she was set on fire and the fire had been the cause of her death (11TR 1952).

About 20-25 feet from the victim's body was a large area of burned ground where police recovered matches, an earring that was the mate to the one still in the victim's right ear, an animal registration tag, two key rings, and "part of a black vinyl-type cover which didn't burn completely" (TR 1904, 1910, 1921, 1928-29). News of the discovery of the victim's body aired on television Monday night, but no details of the

condition of the victim's body or of the crime scene were broadcast (4TR 590).

John Nixon testified that he saw his brother several times on Monday (12TR 2055). He was present when Nixon came to Wanda Robinson's house and told them he had killed a woman (12TR 2055, 2059). John Nixon did not believe him at first (12TR 2055). Nixon showed him two rings and an MG sports car (12TR 2056). When John Nixon still did not believe him, Nixon told him he could take them to the body; he also showed him a red and white shirt and a gas ticket with the victim's name on it (12TR 2057-58). John Nixon threw the shirt away (12TR 2058). Later that day, Nixon told his brother he had pawned the two rings (12TR 2059). Nixon told his brother he had gone to the mall, parked in front of the victim's car, and asked if he could get a boost; they left the mall together, he put her in the trunk, took her "on down the pipeline," into the woods, used jumper cables to tie her up, and set her on fire (12TR 2059-60). Nixon stated that the victim had offered to write him a check, but he told her that if he signed it he would be caught (12TR 2060).

John Nixon testified that, early Tuesday morning, his brother told him he was going to burn the victim's car and get rid of it (12 TR 2061)

Wanda Robinson testified she saw Nixon (her former boyfriend) several times on the Monday before he was arrested

(12TR 2065). Nixon told her he had killed a person and knew he "was going to get the electric chair" (12TR 2065). He said he had encountered the victim at Governor's Square Mall; he had asked her to jump him off, and when she acted reluctant, "he knocked her up side the head and put her in the trunk of the car" (12TR 2067). He had taken her out in the woods, where he beat her, tied her with jumper cables, and set her on fire (12TR 2066-67). She begged him not to kill her, offering to write him a check; he declined because she could identify him (12TR 2066).

Robinson testified that Nixon told her he had taken the car to several junk yards, trying to sell it (12TR 2067). Early Tuesday morning, Nixon came by to change his clothes and shoes and left, telling Robinson he was going to burn the MG (12TR 2062, 2067-68). Soon afterwards, Robinson saw smoke and saw the car burning (12TR 2068).

At 7:35 a.m. on Tuesday, August 14, state trooper Walter Glass received a report of a car being on fire. He went to the scene, just off Orange Avenue, where he observed that an orange MG convertible was burning (11TR 2002-03).[12] Vehicle records showed that the MG belonged to the victim (11TR 2004-05).

[12] The MG was 250 feet off Orange Avenue, "slanted down into the drainage ditch" (11TT 2008).

Soon afterwards, John Nixon and Wanda Robinson contacted the police (4TR 591), and Nixon was arrested later that morning at Wanda Robinson's residence (4TR 592).

After being advised of his rights, Nixon gave a lengthy statement to police (5PCR 915-65).[13] Nixon told police he had met the victim on Saturday in the Sears store at Governor's Square Mall (5PCR 919). Nixon claimed she knew him and they talked (5PCR 921). He said he had skinned his arm on a hot exhaust system component while working on his uncle James Igles' Monte Carlo, which he had in his possession (5PCR 920, 922). Nixon said he told the victim he did not want to drive his uncle's car any more with the muffler like it was (5PCR 921), so she offered him a ride home (5PCR 919, 921). They got into her orange MG sports car, with a black top, which was parked by Sears, and headed out of the parking lot towards Tram road, where he told her he lived (5PCR 922, 924). When they got to the truck route, Nixon hit her on the head, made her get out of the car, and put her into the trunk (5PCR 926-27). He put the top down after putting her in the trunk, went to Tram Road, turned down a "pipeline," took another left, and found a wooded area (5PCR 928, 958). He let the victim out of the trunk; she

[13] A full transcription of Nixon's statement is attached to the State's response to Nixon's 3.850 motion for postconviction relief; thus, the citation to that record here.

begged him not to kill her and offered to get money, but he told her he had already given three years to society for something he had not done (5PCR 928). He put a cloth bag over her head, and tied her to a tree in a sitting position with one jumper cable around her waist and another around her left arm (5PCR 930-31, 958-59). Then he set fire to the stuff she had in the trunk and glove compartment, along with her pocket book and all its contents except for $5 cash, which he kept (5PCR 932-35). While this burned, the victim talked to him; he told her about his life and she told him about hers (5PCR 935). She continued to beg for her life as she sat tied to a tree with a bag over her head, offering to sign the title to her car over to him (5PCR 935). Nixon choked her with some rope, and then got something out of the fire (the car's top or a tonneau cover) and threw it on her head (5PCR 935-36). Nixon stated that he had returned to the mall, repaired his uncle's Monte Carlo, and then left to pick up his friend Tiny Harris (5PCR 938-39). They returned to the mall to retrieve the uncle's car and deliver it to him (5PCR 940). Nixon said he burned the victim's car Tuesday morning after reading in the paper that the victim's body had been found (5PCR 949-50). Nixon told police where he had thrown the keys and the gas cap to the MG (5PCR 946, 957, 967).

The keys to the MG and its gas cap were found in the locations described by Nixon (11TR 1926, 2015-16, 2043-44). His

finger and palm prints were found in various locations on the vehicle, including the trunk lid (12TR 2041, 2043-44).

Nixon called his uncle James Nixon from jail, telling him, "I've done something real terrible. . . . I've done murdered somebody. . . . a lady" (11TR 1970-71).

Tom Igles, Nixon's uncle who owned the Monte Carlo, testified that he had loaned Nixon his car Saturday night (11TR 1972-73). It was in good mechanical condition (11TR 1974).

In concluding arguments, defense counsel stated:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case.
>
> In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elect your foreporson and you've done what you must do, you will sign those forms. I know your are not going to take this duty lightly, and I know what you will decide will be unanimous.
>
> I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged: first-degree premeditated murder, kidnapping, robbery, and arson.
>
> Once you have arrived at those verdicts, there will by decision be caused a second part of this trial. That's something that we had discussed with you earlier prior to taking your oaths as jurors.

> At that time, you indicated that regardless of your own personal beliefs in the death penalty, you would listen to the evidence. You would listen to the Judge's instructions. You would weight that evidence in arriving at an advisory recommendation of [sic] Judge Hall.
>
> After today is over, we start the second part of this trial. The evidence and testimony that you've seen and heard will also become part of your deliberations at that point as well as other evidence that the State may introduce or I may introduce in Mr. Nixon's behalf.
>
> After you have heard all that evidence, the testimony, Mr. Hankinson or Mr. Guarisco and myself will be able to present additional arguments to you, and Judge Hall will give you instructions to guide your deliberations.
>
> It will be at that point as difficult as it may seem at this point. I will hope to be able to argue to you and give you reasons not that Mr. Nixon's life be spared one final and terminal confinement forever, but that he not be sentenced to die. Thank you.

(4TR 641-43).

The State began its closing by acknowledging to the jury that, notwithstanding any concessions by defense counsel, the burden remained on the State to prove its case to the satisfaction of the jury and beyond any reasonable doubt; what a lawyer says, the State reminded the jury, is not evidence and has no "legal affect" at all (4TR 646-47). The State's burden was "high," and the jury would have to determine whether the facts alleged by the State had "been proven" (4TR 648, 650). The State then proceeded to outline the evidence and the facts shown by that evidence, and to argue to the jury that, based on

that evidence, Nixon's guilt had been established beyond a reasonable doubt (4TR 643-70).

In rebuttal, defense counsel again reminded the jurors that he planned to give them reasons why Nixon should not be sentenced to death, and emphasized that the trial was "not over until it's over, and it's not near over yet" (4TR 673-74).

Following Nixon's conviction, the penalty proceedings were held on July 24 and 25, 1985.

In his opening statement, defense counsel told the jurors they would find out that Nixon was twenty-three years old and had been in trouble with the law since he was ten; sadly, Nixon had fallen "through some cracks in our system" (5TR 753-755). Nixon had called the Sheriff's Department four days before the murder, seeking help "before he hurt someone;" although law officers came to Nixon's home, they did not arrest him (5TR 756). Then, on the day before the murder, Nixon had attacked the woman he loved in front of police officers; this time, he was arrested, but was almost immediately released. When Wanda Robinson and Nixon's brother next saw Nixon, he acted "crazy" (5TR 756). Defense counsel told the jurors it would be obvious that Nixon was "not normal organically, intellectually, emotionally or educationally or in any other way;" based upon the testimony and documents the defense would present, it would

be apparent that Nixon had "never been normal or right," and that the jury should recommend a life sentence (5TR 756-757).

The State's evidence consisted of judgments of conviction for armed robbery (in Georgia) and battery on a law enforcement officer (in Leon County), as well as, over defense counsel's objections, testimony concerning Nixon's statement that he had removed the victim's underwear in order to terrorize her (5TR 758-761).

Defense counsel presented the testimony of eight witnesses.

Nixon's mother, Betty Nixon, testified that Nixon was the middle child in a family of eight children, and that he had had problems in school (5TR 764-766). She loved her son, but he had mental and emotional problems, and she thought that he needed help because he didn't seem to be normal (5TR 766). Wanda Robinson testified that Nixon had been living with her at the time of the murder and had been acting strangely (5TR 770). He had "looked wild" Saturday night, and, as a result, she had been afraid to spend the night at home; when she returned to her home at 3:00 p.m. Sunday afternoon with Nixon's uncle Lamar, she found "strange" notes from Nixon scattered around (5TR 770-773). Robinson testified that Nixon had been fond of her children, and that he had treated them well (5TR 775).

Defense counsel called police officers who verified that Nixon had called the sheriff's office and asked to talk with

someone before “he hurt somebody”; by the time officers arrived, however, Nixon was relatively calm and agreed to leave the premises (5TR 776-785). Nixon was arrested on August 11, 1985, for battery on Wanda Robinson; after he calmed down, he was released (5TR 786-793).

Defense counsel then called two mental health experts: Dr. Merton Ekwall, a medical doctor whose practice was neurology and psychiatry; and Dr. Allen Doerman, a Ph.D. psychologist (5TR 796-834). Dr. Ekwall testified that he had examined Nixon twice and had reviewed family background documents, including Nixon’s prior incarceration and treatment records (5TR 806, 820, 795).[14] Dr. Ekwall testified that psychiatric records “from way back” had said that “there is something about this boy nobody could quite understand” and that there was “something wrong someplace because he was different from others” (5TR 799). The documentary history indicated that Nixon did not learn from experience; every time he went to Marianna, he “came out just the same as when he went in” (5TR 799-800). Dr. Ekwall administered an EEG and conducted a neurological exam, but failed to find “any definite reason why he is the way he is” (5TR 800). Although Nixon was not psychotic, he did have “brief psychotic episodes,” especially when he was intoxicated (5TR

[14] These documents, which were likewise relied upon by Dr. Doerman, were introduced into evidence by defense counsel.

800-801). Dr. Ekwall noted that Nixon's formal schooling was "interrupted by all the incarcerations," but, while Nixon's intelligence was "on the low side of normal," it was "adequate" (5TR 802). He testified that Nixon was anti-social, and noted that Nixon told the truth as he saw it "which is not necessarily the truth to anybody else" (5TR 801-802, 810); moreover, Nixon knew what he did was wrong, but "didn't feel it was wrong as others seem to feel it" (5TR 811-812). Dr. Ekwall testified that, while Nixon, in his opinion, was competent to stand trial, both of the two statutory mental mitigating factors applied in this case (5TR 802-803). On cross-examination, Dr. Ekwall acknowledged that Nixon was not "a very good risk for society" (5TR 812).

Dr. Doerman testified that he had considered witness statements and depositions from this case, family background documents, incarceration records and prior psychiatric reports (5TR 819-820); in addition, he had administered a battery of neuropsychological and personality tests (5TR 817-18). According to Dr. Doerman's testing, Nixon's IQ was 74, which Dr. Doerman described as being in the "borderline range" (5TR 817-818). The focus of Dr. Doerman's neurological testing was the Halstead-Reitan battery, which gave scores in the brain damage range - they were "barely" in that range, but they did indicate that Nixon had "some" brain damage, which Dr. Doerman described

as “spotty” and “diffuse” (5TR 818-819, 822). As for Nixon’s personality functioning, Dr. Doerman’s diagnosis was that Nixon suffered from mixed personality disorder with elements of anti-social personality, borderline personality and narcissistic personality (5TR 821). Nixon was not psychotic, but “when he’s put under a lot of stress, he has the capacity to break down and not perceive reality as the rest of us do” (5TR 821). Dr. Doerman admitted that he had little hope for “remediation” and that Nixon was, in fact, dangerous (5TR 822-23). He did feel that the two statutory mental mitigators applied because Nixon had been under stress from the breakup of his relationship with Wanda Robinson and, by his own account, had been drinking and not sleeping at the time of the murder (5TR 823-824). Dr. Doerman testified that, because of Nixon’s low IQ, his brain damage, and his history of incarceration, Nixon does not have “the cognitive wherewithal that the rest of us do;” when Nixon “runs into a situation that’s stressful” and there are no “obvious solutions,” Nixon “doesn’t come up with the right answers” (5TR 823-24). In this case, Nixon had acted out of “misdirected rage” at his personal situation at the time of the murder (5TR 824-825). Dr. Doerman testified that Nixon would do better in a structured environment such as prison, rather than in free society; he did not think death was the appropriate

penalty for Nixon, because he was not “an intact human being” (5TR 831-834).

The defense exhibits included school and institutional records and psychological reports covering Nixon’s life from 1972 to 1985. Thus, the exhibits begin with Nixon’s commitment to the Dozier School for Boys in 1972 at age 10, for arson; at that time, no psychiatric cause for his behavior could be determined (Defense Exhibits 3 & 4). An evaluation in February of 1974, when Nixon faced charges of breaking and entering and vandalism to a school, noted that Appellant had an extensive history of anti-social behavior, as well as an IQ of 88 or low average intelligence (Defense Exhibit 7). As a result of these charges, Nixon was sent to a group treatment home (Defense Exhibits 11-15). According to a psychological evaluation on April 29, 1975, Nixon’s test results were typical for his age, but the evaluator expressed pessimism for Appellant’s subsequent adjustment or performance; later testing on May 1, 1975, indicated that Nixon operated intellectually at a dull-normal level, but had a “seriously disturbed” perception of reality (Defense Exhibits 19, 20). When Nixon was finally furloughed from the program, it was observed that he still had many problems (Defense Exhibit 24).

Indeed, shortly after his furlough, Nixon was again arrested, for burglary and arson, and committed to the Division

of Youth Services until his majority (Defense Exhibit 25). It was noted that Nixon had been tested psychologically and psychiatrically in the preceding three years and that "no organic complications can substantiate his behavior" (Defense Exhibit 6). Nixon returned to the Dozier School for Boys until he was again furloughed in October of 1976 (Defense Exhibits 27-35). In 1980, Nixon was arrested for armed robbery in Georgia; he pled guilty and was placed on probation (Defense Exhibit 36). Nixon was next convicted of burglary in Florida and sentenced to the Department of Corrections for four years in September of 1981; at the time of his admission to the facility, testing indicated an IQ of 83 or a low-average/borderline intelligence, as well as a lack of psychosis (Defense Exhibit 39). Nixon received good disciplinary reports while incarcerated (Defense Exhibits 41-43).

In rebuttal, Roy McKay, assistant superintendent for the Dozier School for Boys in Marianna, testified that he knew Nixon well from 1972 through 1976, when Nixon was at the school, and that Nixon's IQ was 88, which was a bit higher than the average IQ of 84 for children in that institution (5TR 836-37). He described Nixon as very manipulative (5TR 837-38). Sheriff's deputy Larry Campbell testified that, when he was with Nixon on August 14, Nixon showed no signs of being high on drugs or alcohol (5TR 841).

At the penalty phase charge conference, defense counsel requested certain instructions and objected to others (5TR 843-888). In his closing argument to the jury, defense counsel emphasized that mitigating circumstances were unlimited and need not be proved beyond a reasonable doubt (6TR 1022). Drawing the jury's attention to the testimony of the experts and the documentary exhibits, defense counsel identified for the jury mitigating circumstances which he deemed established - Nixon's low intelligence, his brain damage, his troubles in school, his age and his emotional disturbance and impaired capacity at the time of the murder (6TR 1022-1025). Defense counsel noted that Nixon had previously called the police to keep him from hurting someone and that he had cooperated with the police after his arrest and given a detailed confession in this case which included matters prejudicial to him (6TR 1025-1028). He reminded the jury of Wanda Robinson's testimony that Nixon had been a "wild man," and suggested that Nixon had fallen through cracks in the system (6TR 1028-1030). Defense counsel repeatedly emphasized that Nixon was "not normal," reminding the jury of Nixon's mother's testimony, the testimony of the two mental health experts and all of the circumstances of the case (6TR 1031-1037). Defense counsel reminded the jury that, by virtue of their conviction of Nixon on the other felonies, he would serve the rest of his life in prison; noting that prison

records indicated that Nixon did well while incarcerated, counsel argued that the death sentence was not necessary to protect society (6TR 1036-1038). In conclusion, defense counsel reminded the jury that he had promised not to mislead them or misrepresent anything to them; he had shown them "the good and the bad and the ugly, something that probably no juries had ever seen in a case such as this, about a lawyer's client" (6TR 1038-1039). He urged the jury not to "be hasty," but to give full consideration to the evidence and to all the documentary exhibits, and he reminded them of Dr. Doerman's testimony that he believed in the death penalty, but only for "an intact human being" (6TR 1039-40). Nixon - counsel argued - was not, never had been, and never would be an intact human being (6TR 1040). Defense counsel ended by saying:

> You know, we're not around here all that long. And it's rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I'm going to ask you to do that. Thank you.

(6TR 1040).

The jury recommended a death sentence by a vote of 10-2 (6TR 1053).

*The Remand Proceedings During The Direct Appeal*

On direct appeal, Nixon was represented by new counsel, T. Whitney Strickland. His first issue on appeal was styled: "WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

Initial Brief of Appellant, case no. 67, 583, filed December 5, 1986 (Table of Contents page). In his argument on this issue, Nixon's appellate counsel stated:

> The point now before the court is brought pursuant to the dictates of U.S. V. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Specifically, Appellant's claim for relief is base on a complete breakdown in the adversarial process, in that defense trial counsel "entirely failed to subject prosecution's case to meaningful adversarial testing." . . . Appellant's contention, then, is that here there was a complete breakdown of the adversarial process which resulted in a complete denial of the right to counsel.

Id. at 15-16. Appellate counsel also argued that counsel's choice of strategy was in essence a plea of guilty and that the standards of Boykin v. Alabama, 395 U.S. 238 (1969) applied. Initial Brief, case no. 67,583 at 16-17. Nixon's appellate counsel argued that, since there was no on-record inquiry by the trial court and no on-record consent by Nixon to trial counsel's guilt-phase strategy, Nixon's conviction must be reversed. The State responded, inter alia, that the record was insufficient to demonstrate that trial counsel acted against his clients wishes at the guilt phase. Answer Brief of Appellee, case no. 67,583, filed March 13, 1987.

Following oral arguments on appeal, this Court relinquished jurisdiction and remanded the case to the circuit court. By order dated October 20, 1987, this Court directed the circuit court to conduct an "evidentiary hearing" in connection with

Nixon's claim of ineffective assistance of trial counsel, noting that the Florida bar rules allowed an attorney to disclose otherwise privileged information in response to allegations concerning the attorney's representation of his client.

The circuit court convened on this matter on November 25, 1987 (1STR 7-31). The court announced its confusion about the order of relinquishment, wondering whether or not this Court wanted it to conduct an evidentiary hearing (as opposed to mere judicial inquiry of Nixon and his trial counsel), and, if so, who was supposed to have the burden of persuasion (1STR 8). The Court also noted that Nixon's counsel (still T. Whitney Strickland - Nixon's appellate counsel) had filed a motion for protective order (1STR 9). Nixon's appellate counsel argued that only a colloquy between the trial court and the defendant was necessary under Boykin v. Alabama, supra. In response, the State suggested that mere judicial inquiry would not be a "full and fair" hearing on Nixon's ineffective assistance of counsel issue (1STR 19). The State argued, too, that if this Court had found Boykin applicable to this case, it "would have already been reversed," stating that it was "our belief" that this Court had "essentially" ruled against Nixon on the Boykin argument (1STR 25). The court declined to attempt to resolve the issue without further guidance from this Court (1STR 27-31). By

written order, such clarification was sought, and the case returned to this Court (2STR 4-5).

On October 4, 1988, this Court issued it second remand order, explaining that it had "intended that a full evidentiary hearing be conducted." Order of this Court, case no. 67,583, dated October 4, 1988. This Court explained that, on remand, "the trial court should conduct an evidentiary hearing with the rights of examination and cross-examination by the appellant and the State." Ibid. This Court further noted that, "[s]ince it is the appellant who has the burden of establishing his claim of ineffective assistance of counsel, it is he who should be the proponent of the witnesses, with the state having the right to cross-examine." With these directions, this Court again remanded the case to the circuit court for evidentiary hearing.

On December 19, 1988, the circuit court re-convened for hearing on Nixon's Cronic claim. Immediately, Nixon's appellate counsel again objected to having an evidentiary hearing, claiming that such hearing was an "expansion" of the limited issue brought by Nixon on appeal; appellate counsel asserted that his appellate issue concerned "the issue of record consent pursuant to U.S. v. Cronic;" it was not a claim of "ineffective assistance of counsel" (3STR 5). In addition, he contended, and the circuit court explicitly agreed, that this Court's order did

not contemplate that the State would be allowed to call witnesses at this hearing (3STR 12-14).

Nixon called as his first witness trial counsel Michael Corin (3STR 15). Nixon's appellate counsel announced that by doing so, "we" were not waiving the attorney-client privilege (3STR 15). However, when Corin declined to answer appellate counsel's questions in the absence of a waiver of the privilege (3STR21-22), Nixon's appellate counsel indicated that under "protest," the "Defendant" would waive the attorney/client privilege "to the limited extent of the questions which I will ask" (3STR 23).

Appellate counsel then asked Corin whether or not he had told Nixon he was going to concede guilt and seek leniency, Corin answered that he had discussed with Nixon "how he was going to approach the case" (3STR 28), and had told him what he was going to do in his opening and closing statements at the trial (3STR 29). Corin acknowledged that Nixon probably did not "affirmatively agree" to the strategy (3STR 30, 31); however, when Nixon was advised about Corin's plans, and "was given the opportunity to express his displeasure" with the proposed strategy, he "said nothing, he did nothing, and he wrote nothing" (3STR 32).

On cross-examination, Corin explained that he had told Nixon "that if the State didn't accept a plea that my goal was to try

to save his life" in a case in which "the evidence was very, very strong" (3STR 47). Corin testified that his "assessment of the State's case was that the State was going to be able to fulfill [its] burden as to his guilt and if we had to go to trial, if there was not going to be a plea for life, that the defense would be to try to save his life in the penalty phase" (3STR 54). Corin "discussed with [Nixon] all of these avenues," over a "period of months" (3STR 48, 54). Nixon had the opportunity to object to Corin's planned strategy, but did not (3STR 48). Corin noted that "Nixon and I had a relationship that went back prior to his arrest in this case" (SR 47-48). In fact, he had been representing Nixon since the fall of 1983 (3STR 56). Although Nixon did not verbally assent, "[y]ou get a feel for what your client understands and you have a knowledge of their situation" (3STR 48).

The circuit court declined to make any findings, noting that although the first remand order from this Court explicitly directed the circuit court to make findings, the second one did not (3STR 58).

Once again, the case returned to this Court. By order dated February 1, 1989, this Court remanded the case for the third time, directing the circuit court to allow the State to present relevant testimony at the hearing and to make findings as to "1) whether Appellant was informed of the strategy to concede guilt

and seek leniency; 2) whether he knowingly an voluntarily consented to the use of that strategy; and 3) whether, if he did not affirmatively consent, he acquiesced to its use."

On August 30, 1989, the circuit court again conducted an evidentiary hearing. Once again, Nixon's appellate counsel objected at the outset to having a hearing, arguing once again that his Cronic claim was not a claim of ineffective assistance of counsel (4STR 14-15). Appellate counsel announced that he would present no further evidence, but would stand on what he had presented in the December 19, 1988 hearing (4STR 16).

Appellate counsel objected again when the State called trial counsel Michael Corin as its first witness, on the ground that the State had "a full and ample opportunity to cross-examine Corin at the previous hearing" and that any further examination would violate Nixon's attorney-client privilege (4STR 18-19). Corin spoke up at this point to state that he felt "very uncomfortable with the fact that Mr. Nixon is not releasing me from the privilege," and announced that, although he was willing to answer any matters that "are essentially public record," he would not answer "any questions which relate to any discussions that I might have had with Mr. Nixon" (4STR 21-22, 30). Thus, the State's examination of Corin on the Cronic issue essentially was thwarted (4STR 28-75).

The State next called assistant state attorney Anthony Guarisco, one of the trial prosecutors in this case (4PCR 78, 81). Prior to trial, Corin had informed Guarisco that Nixon was willing to plead to all charges in exchange for a life sentence, but Guarisco declined due to the overwhelming evidence and the severity of the case (4STR 82-84). Guarisco testified that when Corin adopted a strategy of not contesting the State's case on guilt, "we had to be very cautious" (4STR 85). The State still had to prove the case and so had to present evidence, but also had to avoid "engaging in overkill" (4STR 85). With this in mind, the State presented its evidence, but withheld evidence it could have presented, including but not limited to: testimony from Evelyn Harris that Nixon had admitted to killing "a white woman;" testimony from Virginia Meeks that she had seen Nixon in the victim's car and that Nixon had showed her some rings that he claimed to have taken from his girlfriend; and testimony from Judith Hill that she too had seen Nixon driving the victim's car (4STR 87).

The State's final witness was board-certified criminal trial lawyer Larry Simpson (4STR 91-92, 95). Simpson was a prosecutor from February of 1974 until May of 1980, handling "every conceivable [type of] case," including many murder cases (4STR 92). He was lead prosecutor in the Ted Bundy Chi Omega case that was transferred to Miami for trial (4STR 93). Since 1980,

he has been in private practice; his practice includes primarily criminal trial and appellate work (4STR 93). Simpson had reviewed the entire record on appeal in this case, including Nixon's transcribed statement to police and the reports generated by the two mental health experts involved in this case (4STR 100). In Simpson's opinion, Michael Corin rendered effective assistance of counsel to Nixon (4STR 101). Simpson testified:

> This case involves a situation where, as best I can count, this Defendant confessed to having committed this crime to at least seven different people that I can count from the transcript. At least four of those people that he confessed to, he gave extensive confessions, detailing facts and circumstances of the crime. And as part of one of those confessions, the tape recorded confession that he gave to Larry Campbell of the Sheriff's Department, that confession, in my view, goes into excruciating detail to the point where there was absolutely no doubt whatsoever that the Defendant Joe Nixon killed Jeanne Bickner.
>
> As a matter of fact, I think Judge Hall probably said it as well as anybody. He commented at one point record that "This case was proven not only beyond a reasonable doubt, this case was proven beyond all doubt." And I think that is essentially what we have here.
>
> What Mike Corin did was to recognize that this case was essentially one trial that may have had two phases that are involved in it. And what Mr. Corin did was to select the issue that really had to be tried in this case and try that issue. And, quite frankly, I don't think that there was a better strategy that could have been employed in the defense of this case than the one that Mr. Corin employed.

(4STR 102-03).

Before hearing arguments, the circuit court told counsel that, as he understood it:

> your burden . . . [is] to show by evidence that Mr. Nixon was not informed of the tactic of conceding the commission of the act or proving that if Mr. Nixon was aware of that tactic, he did not consent to it, or showing that he was neither aware of it nor did he acquiesce in any way to it.

(4STR 106). Appellate counsel acknowledged that those were the issues before the court (4STR 110).

In its order, the circuit court noted that Nixon had been present at the hearings on remand but had not testified and had not waived his attorney client privilege or released trial counsel from the obligations of confidentiality of the attorney-client relationship (4STR 5). Based on the evidence that *was* presented, the court found that:

> 1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.
>
> 2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.
>
> 3. Nixon made no objection and did not protest the strategy and tactic employed at trial.

(4STR 6). Based on the foregoing, the circuit court found that Nixon had not sustained his burden of proof that he "(a) was neither informed nor knew of the trial strategy and tactic

employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein" (4STR 7).

The case went back to this Court. On January 24, 1991, this Court affirmed Nixon's conviction and death sentence. Nixon v. State, 572 So.2d 1336 (Fla. 1990) (hereafter Nixon I). However, noting that the State's examination of trial counsel had been curtailed by Nixon's refusal to waive his attorney-client privilege, this Court declined to "dispose" of Nixon's claim of ineffective assistance of counsel "on the present state of the record which we view as less than complete." This Court stated that "we do so without prejudice to raise the issue" later in a Rule 3.850 motion. Id. at 1340.

*The Postconviction Proceedings*

On October 7, 1993, Nixon, now represented by Jonathan Lang of New York, filed a rule 3.850 motion raising a number of grounds, including a claim that trial counsel was ineffective under Cronic for conceding guilt without Nixon's consent. On October 22, 1997, postconviction relief was denied summarily by Judge L. Ralph Smith, Jr., in a fourteen page order with almost 150 pages of attachments (19 PCR 3561-3708). Nixon appealed, raising seven issues. Nixon v. Singletary, 758 So.2d 618, 619 (fn. 1) (Fla. 2000) (hereafter Nixon II). This Court addressed only one of these seven issues, finding "dispositive" the issue of whether or not there was "affirmative, explicit acceptance by

Nixon" of trial counsel's strategy at the guilt phase of Nixon's trial, which this Court described as the "functional equivalent of a guilty plea." Id. at 620, 624. This Court remanded the case to the circuit court "to hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt." Id. at 625. The evidentiary hearing mandated by this Court was conducted on May 11, 2002, before circuit court judge Janet E. Ferris.

Corin once again testified that his strategy in representing Nixon was "to attempt to save his life" by "trying to show that even though the State may have been able to prove the acts for which he was accused, there were good reasons he shouldn't be sentenced to death" (3SPCR 425). Corin explained that strategy to Nixon (3SPCR 426). Corin testified that his testimony of December 19, 1988 was true and correct, and he stood by it (3SPCR 427).

On cross-examination by the State, Corin outlined his experience as a defense attorney since 1976 (and a prosecutor before that), working as a federal and a state assistant public defender, representing, on average, probably a thousand clients a year (3SPCR 428-31). This case did not represent the first time Corin had represented Nixon; he had successfully defended Nixon on a robbery charge, and was representing him on burglary charges at the time Nixon murdered Jeanne Bickner (3SPCR 434-

35). Corin's perception was that he and Nixon "got along fine" and that Nixon comprehended the court proceedings (3SPCR 436).

Corin talked to and deposed numerous witnesses, as reflected by the copious notes he took (3SPCR 438-440). Corin discussed "the state of the evidence" with Nixon (3SPCR 440). At some point, Corin explained to Nixon that his strategy would be to try to avoid the death penalty and not contest guilt (3SPCR 440).[15] Corin's strategic decision was not one he would have made "lightly" or without first discussing it with Nixon (3SPCR 440-41). He "owed it to my client to tell him what's going on" (3SPCR 449). In Corin's "professional opinion," based on the state of the evidence in this case, such strategy was the "best way to proceed" and possibly the only way to save Nixon's life (3SPCR 441). In Corin's opinion, if the question of guilt was not going to be a matter that could be the subject of "any reasonable dispute," then it would be much more effective to try to save Nixon's life through mitigating circumstances at the penalty phase than "going through a trial and arguing things that were not going to make a whole lot of sense" (3SPCR 460). Corin did not get "a whole heck of a lot" of assistance or direction from Nixon; "most of it I had to do on my own,"

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[15] Corin testified that he saw "no benefit" to pleading Nixon guilty "straight up to the court." He did not consider what he did to be the same as a guilty plea (3SPCR 476-77).

probably after discussing strategy with other lawyers (3SPCR 447, 468). However, he would not have pursued the strategy he did against Nixon's wishes (3SPCR 446).

Corin had Nixon evaluated by mental health experts; Nixon had a history of mental health problems that Corin thought were mitigating, but Corin did not see any support for an insanity defense and so did not attempt to pursue one (3SPCR 441-42). In addition, while Corin was aware that "sometimes juries will find people guilty of lesser offenses," he did not think there was any realistic possibility of that occurring in this case (3SPCR 444-45).

Corin testified that each case is different and each client is different; "you hope that you have clients that are cooperative," but if you do not, "[y]ou do the best you can" with "what you have," and you "represent them to the best of your ability" (3SPCR 452-53). Corin testified that "many times lawyers make decisions because they have to make them because the client does nothing" (3SPCR 455). Such was the case in Nixon's trial (3SPCR 455, 473).

Judge Ferris denied relief by written order dated September 20, 2001. After discussing the procedural history of the case and this Court's most recent decision in this case, Judge Ferris addressed the issue to be decided on remand: "did Joe Elton Nixon give his attorney, Mike Corin, consent to concede guilt at

trial, and was that consent supported or evidenced by an 'affirmative, explicit acceptance by Nixon' of this specific aspect of the trial strategy?" (2SPCR 370). Judge Ferris noted that the State had argued that this Court's interpretation of Cronic was "overly expansive" and contrary to the holding of Strickland v. Washington, 466 U.S. 447 (1984), and that recent federal decisions interpreting Cronic had explicitly rejected the analysis relied on by this Court (2SPCR 370-71). Judge Ferris described the State's argument as "compelling," but she did not feel "at liberty" to revisit this Court's ruling herself (2SPCR 371). However, this Court's opinion presented Judge Ferris with a "dilemma" (2SPCR 371). Her concern was how to balance this Court's direction to determine whether Nixon consented to Corin's strategy, but only in the context of an "affirmative, explicit acceptance by Nixon" of that strategy, with the general rules that 1) the trial court ordinarily considers many factors in resolving issues of waiver and 2) the burden of proving Nixon's claim lay on Nixon while this Court's opinion suggested a shifting of that burden to the State (2SPCR 371-72). As to the second general rule, Judge Ferris concluded that "such a shift was not intended, and that the burden of proof still rests with Mr. Nixon to show that he *did not* consent to the strategy affirmatively and explicitly" (2SPCR 372)(emphasis in original). As to the first general rule, Judge

Ferris noted that while this Court had earlier affirmed Judge Hall's conclusion that Nixon had knowingly, intelligently and voluntarily absented himself from most of his trial,[16] the trial record "does not reflect what would ordinarily be considered an affirmative, explicit waiver by Mr. Nixon of his right to be present at trial; instead, Judge Hall made his decision based on the circumstances as they existed at the time," including Nixon's behavior and the court's "exasperating conversation with Mr. Nixon" (2SPCR 373-74). Judge Ferris concluded that it was "obvious" that the decision whether Nixon had consented to Corin's trial strategy could "be made only after careful consideration of similar factors (2SPCR 374). Analyzing the evidence presented, Judge Ferris noted: Corin had represented Nixon previously; his relationship with Nixon was generally positive; Nixon nevertheless was not "especially communicative;" while Corin would have preferred a client who actively participated in his defense, Nixon declined to do so; Corin was put in the position of having to make decisions because his client did nothing; Corin did the best he could with a difficult case and a difficult client (2SPCR 374-77).[17] Judge Ferris

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[16] See 572 So,2d at 1341-42.

[17] Judge Ferris stated: "It is hard to imagine a more onerous situation than a client charged with first degree murder absenting himself from the trial; here, in addition to a confession and overwhelming evidence, Mr. Corin had to contend

concluded that Nixon made his position known by his conduct, and had consented to Corin's trial strategy, albeit, not "*in words*" (2SPCR 378)(emphasis in original). In her view, Nixon's actions spoke clearly, and we "cannot not search for words that he was clearly disinclined to provide" (2SPCR 379).[18]

## SUMMARY OF THE ARGUMENT

Nixon presents seven claims for review. In the first he complains that Judge Ferris erred in her interpretation and application of this Court's decision in Nixon II. The remaining six issues are the ones presented previously and ruling deferred in Nixon II.

1. *Nixon's Cronic claim:* This claim is procedurally barred as one that could and should have been, and was, raised on direct appeal. During the direct appeal proceedings, this Court remanded the case to the circuit court for a full, fair and complete evidentiary hearing on the claim, which never occurred due to Nixon's refusal to allow such. Having declined the opportunity given to him at that time to litigate that claim

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with the prejudice Mr. Nixon would surely create by not being present in the courtroom during the trial." (2SPCR 377).

[18] As Judge Ferris noted earlier (2SPCR 372), Nixon himself declined to testify at this hearing or any of the previous ones. Thus, Nixon personally has never said how he felt about Corin's strategy.

fairly, Nixon should be precluded from attempting to litigate his Cronic claim on postconviction.

Should Nixon's claim be addressable on the merits, recent federal and state cases, decided since this Court issued its decision in Nixon II, compel reconsideration of this Court's interpretation of Cronic and Boykin. Regardless of any concession by trial counsel, Nixon had a jury trial at which the State was held to its burden of proof beyond a reasonable doubt. The concessions by counsel, which were not even evidence, much less a basis on which to impose judgment and sentence, were not the functional equivalent of a guilty plea, as is implicit in this Court's opinion in Atwater v. State, 788 So.2d 223 (Fla. 2001), in which this Court declined to find ineffective *per se* an attorney who conceded that his client was guilty of second degree murder. Furthermore, one of the fundamental decisions for a defendant is whether or not to appeal, but in Roe v. Flores-Ortega, 528 U.S. 470 (2000), the United States Supreme Court rejected the application of any *per se* rule of ineffectiveness to a case in which an attorney had chosen not to file an appeal without first obtaining his client's specific consent to that course of conduct. The Court concluded that a *per se* rule should be applicable only if the client explicitly instructs his attorney to file an appeal. If the client fails

to convey his wishes one way or the other, the case-specific deficient-performance/prejudice analysis of Strickland v. Washington applies. Nixon did not object to his trial counsel's choice of strategy, and, as in Roe v. Flores-Ortega, the Strickland test should apply to Nixon's claim of ineffectiveness of counsel.

Should this Court decline to revisit its interpretation of Cronic/Boykin, this Court should nevertheless affirm Judge Ferris' order denying relief. Judge Ferris correctly determined that the burden to prove lack of consent was on Nixon and that he had failed to carry that burden. Further, Judge Ferris was authorized to conclude from all the circumstances that Nixon accepted his trial counsel's strategy, even if he did not do so in words. A defendant's silence, coupled with an understanding of his rights and a course of conduct indicating acceptance, can support a conclusion that a defendant has consented to counsel's strategy.

In addition, because the record clearly establishes that trial counsel's choice of strategy was reasonable under the circumstances and was not prejudicial to the defendant, Nixon's claim of guilt-phase ineffectiveness of counsel fails to meet the Strickland standard.

2. Because the trial court had contemporaneously determined, after evaluation, that Nixon was competent to stand trial in

another case pending at the time Nixon committed this murder, the trial court had no reasonable basis in the instant case for ordering a new competency evaluation *sua sponte*.

3. The record establishes that trial counsel performed effectively at the penalty phase. He extensively investigated Nixon's background, and had him evaluated by two mental health experts who testified that Nixon was mildly brain damaged and that the two statutory mental mitigators applied. That Nixon has now located new mental health experts who say essentially the same thing cannot establish that trial counsel was ineffective. Further, there is not reasonable probability that the evidence that Nixon now proffers, which is largely cumulative to that introduced by trial counsel, would have made a difference, given the strong aggravation in this case.

4. The mental health experts who testified at trial were not incompetent by any stretch of the imagination.

5. Nixon's claim of inadequate jury instructions as to the HAC and CCP aggravators was correctly found to be procedurally barred.

6. Nixon's claim that racial prejudice infected his prosecution was correctly denied under Foster v. State, 614 So.2d 455 (Fla. 1992).

7. Because Nixon's prior conviction's remain valid, his Johnson v. Missippi claim was properly denied summarily.

## ARGUMENT

### ISSUE I

### NIXON IS ENTITLED TO NO RELIEF ON HIS CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE

Nixon begins his brief with what he calls "a provocative but fair question," asking: "How long will it take to get this case right?" Initial Brief of Appellant at 1. The State agrees that it has taken much too long to resolve an issue that Nixon first raised in his direct appeal brief almost 16 years ago. The State would note, however, that much of the delay was caused by Nixon's own intransigent unwillingness to fairly litigate an issue that he had raised. In the State's view, Nixon's Cronic claim should have been denied with prejudice a long time ago on the ground either that Nixon had waived his claim by declining to allow it to be fairly litigated when it was remanded for an evidentiary hearing, or at the very least that he had failed to carry his burden of proof at the evidentiary hearing(s). Furthermore, it is the State's position that, in light of recent cases, Nixon II should be reconsidered and its interpretation of Cronic overruled. Should this Court decline to do so, however, Judge Ferris' denial of relief should nevertheless be affirmed. The State shows as follows:

#### A. *Nixon's Cronic claim should be denied as successive*.

The claim that trial counsel was ineffective per se under Cronic was raised on direct appeal. This Court remanded the case to the trial court for an evidentiary hearing and a determination whether Nixon had consented to his trial counsel's guilt-phase strategy. However, a full and fair evidentiary hearing never occurred, because Nixon refused to waive his attorney-client privilege, and the State was denied a fair opportunity to rebut Nixon's assertions.

It is of course true that ineffective assistance of counsel claims generally are litigated during Rule 3.850 proceedings, not on direct appeal. Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). However, there are exceptions to this general rule. Ibid. In this case, Nixon claimed on appeal that his trial counsel was ineffective per se under Cronic because there was "a complete breakdown in the adversarial process" at the guilt phase of the trial, in that trial counsel had conceded guilt without Nixon's permission. Initial Brief of Appellant, case no. 67,583. The State responded that the trial record alone was insufficient to resolve that issue. Quite reasonably, this Court concluded that Nixon's Cronic claim should be heard during the pendency of the direct appeal proceedings, and remanded the case to the trial court for evidentiary development of the question of whether Nixon had consented to or at least acquiesced in trial counsel's guilt-phase strategy, no doubt

thinking that this relatively simple inquiry could be handled expeditiously. The evidentiary development this Court contemplated, however, never occurred, because Nixon refused to allow it to.

There can be no question but that Nixon could not simultaneously pursue a claim that his trial counsel was ineffective but insist on retaining his attorney-client privilege to preclude inquiry into trial counsel's discussions with his client relevant to the ineffectiveness claim. Owen v. State, 773 So.2d 510 (Fla. 2001). It has been and remains the State's position that because Nixon declined the opportunity given to him during the pendency of his direct appeal to allow his Cronic claim (a claim that, it must be emphasized, *he raised*) to be fully litigated, he is foreclosed from re-raising the same claim on 3.850. By refusing to waive his attorney-client privilege despite being informed that he could not simultaneously decline to waive the privilege and pursue a claim of per-se ineffective assistance of counsel, Nixon waived his Cronic claim. Moreover, the burden of proof was on Nixon and he failed to carry it; he is not entitled to successive opportunity to raise and litigate this claim.

In a similar Georgia case, a defendant claimed on direct appeal that he was denied the effective assistance of counsel because the trial court had denied funds for investigative and

forensic assistance to defense counsel representing an indigent defendant pro bono. The Georgia Supreme Court remanded the case to the trial court "for a hearing to determine whether, for any reason, including the lack of funds, the defendant was denied effective assistance of counsel." Gary v. State, 260 Ga. 38, 389 S.E.2d 218 (Ga. 1990). However, Gary, like Nixon, refused to waive his attorney client privilege, and his trial counsel refused to answer the state's questions about his representation of Mr. Gary. The case returned to the Georgia Supreme Court, which held:

> A defendant cannot be forced to litigate an issue. Cf. Morrison v. State, 258 Ga. 683 (3), 373 S.E.2d 506 (1988).[19] . . .
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> The defendant was given the opportunity to prove that the denial of funds for legal, investigative, and forensic assistance prejudiced his defense; i.e., that because of the trial court's denial of funds, attorney Siemon could not effectively represent his client. The defendant has waived that opportunity, and we need not further address his contentions in this regard.

Id. at 389 S.E.2d at 220-21.

Similarly, when a Florida defendant refused to "proceed in good faith" on his claim of ineffectiveness first presented on 3.850, by unjustifiably invoking the attorney-client privilege, this Court affirmed the trial court's denial of relief. Owen v. State, supra, 773 So.2d at 513-16. Nixon's present counsel ask

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[19] This Court recently cited Morrison with approval in Muhammad v. State, 782 So.2d 343, 364 (Fla. 2001).

when his Cronic claim will be resolved correctly. But Nixon himself is the reason this issue was not resolved long ago.[20] Having spurned the opportunity this Court gave him to prove his claim at that time, he should be deemed foreclosed now. Nixon's Cronic issue having been raised and litigated on direct appeal (albeit not fully litigated as a consequence of Nixon's intransigence), his present claim is successive and therefore procedurally barred in these 3.850 proceedings.[21]

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[20] As this Court noted in Nixon II, it was unable to "get an answer to [the] question" that Nixon had raised on direct appeal because Nixon had "invoked the attorney-client privilege." 758 So.2d at 624.

[21] The State acknowledges that in its opinion on direct appeal, this Court said that it declined to dispose of this claim on the incomplete state of the record before the Court at that time, "without prejudice" to raise the issue on 3.850. 572 So.2d at 1340. The State does not interpret this statement as an express ruling on the procedural bar issue now before the Court. Any such ruling would have been premature at that time. Moreover, the opinion does not restrict the operation of "without prejudice" to the defendant; the State would argue that this Court's decision was also "without prejudice" to the State to raise the issue of procedural bar on 3.850. Further, to the extent that this one sentence might arguably establish the law of the case on the question of whether Nixon may be allowed to litigate an issue he declined to litigate more than 10 years ago, the State would urge exception to the general rule on the grounds that a strict and rigid adherence to the law-of-the-case rule will potentially expose the State to the manifest injustice of having to retry this case almost 20 years after the crime was committed on the basis of an issue that could and should have been resolved long ago. See Henry v. State, 649 So.2d 1361, 1364-65 (Fla. 1995) (explaining "manifest injustice" exception to "law of the case" rule). Whether or not this Court agrees with anything else the State may say about the application of Cronic to this case, one thing is absolutely clear: there has *never* been any serious question about Nixon's guilt. The

**B. *Nixon II is inconsistent with Strickland v. Washington and should be overruled.***

In Nixon II, this Court in essence held that, unless trial counsel is able to obtain a disruptive and uncooperative defendant's explicit consent to a strategy of conceding guilt in the face of overwhelming evidence to focus on saving his client's life at the penalty phase, trial counsel must contest guilt even when doing so would not only be useless at the guilt phase, but would work to his client's detriment at the penalty phase. This was so, this Court held, because a concession of guilt is the functional equivalent of a guilty plea, and must be governed by the standards of Boykin v. Alabama, 395 U.S. 238 (1969). This Court acknowledged that "a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase" might be a "sound defense strategy," 758 So.2d at 623, but concluded that "the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy." Ibid. Absent "affirmative, explicit acceptance by Nixon of

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evidence is not merely sufficient, it is overwhelming. Thus, there can be no concern here "that unfair procedures may have resulted in the conviction of an innocent defendant." U.S. v. Timmreck, 441 U.S. 780, 784 (1979)(quoting from U.S. v. Smith, 440 F.2d 521, 528-29 (7th Cir. (1971)(Stevens, J., dissenting)). Rewarding Nixon for his intransigence can make no contribution to justice or fairness or truth.

counsel's strategy," trial counsel was per se ineffective, as set out in U.S. v. Cronic, 466 U.S. 648 (1984), even if trial counsel's strategy was reasonable and effective and designed to maximize Nixon's chances of avoiding a death sentence.

The State would contend that this Court's decision improperly establishes "mechanistic rules governing what counsel must do," and is contrary to the "circumstance-specific reasonableness inquiry required by Strickland [v. Washington, 466 U.S. 668 (1984)]". Roe v. Flores-Ortega, 120 S.Ct. 1029, 1034 (2000). Furthermore, the State would urge this Court to reject the characterization of trial counsel's comments as the functional equivalent of a guilty plea, and to reject any application of Boykin to the circumstances of this case.

Nixon argues that Nixon II establishes the law of this case and should not be reconsidered. The State's response is threefold. First, the doctrine of "law of the case" is not an mandate, but a self-impose restraint to promote finality and efficiency in the legal process and to prevent unnecessary and unproductive relitigation of an issue which has already been decided. State v. Owen, 696 So.2d 715, 720 (Fla. 1997). This Court has the power to reconsider and correct erroneous rulings where reliance on the previous decision would result in a manifest injustice or perpetuate a rule now shown to be wrong.

Ibid.[22] A number of cases bearing on Nixon's Cronic claim have been decided since Nixon II was decided, including cases decided by the United States Supreme Court and by this Court, that, in the State's view, call into question this Court's analysis in Nixon II, and compel reconsideration of the Cronic issue. Furthermore, when the State petitioned the United States Supreme Court for writ of certiorari in this case, Nixon offered no response whatever on the merits; his sole argument was that the decision was not final (2SPCR 227-32). If Nixon II is not a final decision, then surely it is not inappropriate to reconsider the issue in light recent case law that was unavailable to the Court and to the parties when this case was here previously. If the State's position on the applicability of Cronic to this case is correct, reconsideration of the issue would more expeditiously bring this litigation to a close than would a strict and rigid adherence to the "law of the case," which would generate further litigation, including, possibly, an unwarranted, unjustified, and unnecessary retrial. In any event, the State feels obliged to preserve the issue for further review.

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[22] Additionally, the United States Supreme Court has recognized that *stare decisis* is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." Agostini v. Felton, 521 U.S. 203, 235 (1997).

1. *Boykin has no application to concessions of fact by counsel during argument, where, as here, guilt was not stipulated and the burden remained on the State to prove guilt beyond a reasonable doubt.*

In Nixon II, this Court stated that trial counsel's comments in this case "were the functional equivalent of a guilty plea," to which the standards set out in Boykin applied. 758 So.2d at 624. However, Boykin itself states: "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." 395 U.S. at 242-43. As the Supreme Court later elaborated, a guilty plea "is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or a judge." Brady v. U.S., 397 U.S. 742, 748 (1970). See also, North Carolina v. Alford, 400 U.S. 25, 32 (1970) (a guilty plea expresses the defendant's consent "that judgment be entered *without a trial of any kind*")(emphasis supplied). In this case, trial counsel did no more than admit past conduct; nothing trial counsel said was by itself a conviction or a waiver of trial, and no judgment could have been entered on the basis of trial counsel's comments. Nixon had a jury trial and, regardless of any concessions by trial counsel, the burden remained on the State at his trial to prove to the satisfaction of the jury beyond a reasonable doubt

that Nixon was guilty, as the State itself acknowledged in its concluding argument, and as the trial court clearly and explicitly instructed the jury.[23] Furthermore, many issues were preserved for appeal notwithstanding counsel's concessions that would not have been preserved if Nixon had pled guilty, including appellate review for sufficiency of the evidence and appellate review of objections that trial counsel preserved for appeal, such as objections to the introduction of allegedly inflammatory photographs and to portions of the prosecutor's closing argument. U.S. Gomes, 177 F.3d 76, 84 (1st Circ. 1999) (rejecting defendant's attempt to analogize concession of guilt by counsel to a guilty plea).[24]

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[23] It should be noted that a court may accept a defendant's plea of guilty and waiver of trial without an admission of guilt or proof beyond a reasonable doubt that the defendant is guilty. North Carolina v. Alvord, supra. Nixon, on the other hand, did not plead guilty and could not lawfully have been convicted by the jury without such proof.

[24] Gomes states: "[Appellant's] cursory analogy to a guilty plea without safeguards (including the explicit consent and participation of the defendant and a good many formalities as well, Fed.R.Crim.P. 11) is a false one. Counsel's concession was not a guilty plea, which involves conviction *without proof*, and is therefore properly hedged with protections. Here, the government had to provide a jury with admissible evidence of guilt and did so in abundance. [Appellant's] claim that Rule 11 was short-circuited is virtually identical to a claim squarely and properly rejected by the Seventh Circuit in Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991) (Posner, J.)." (Emphasis in original.)

Since deciding Nixon II, this Court has declined to apply the per-se test of Cronic to a case in which a trial counsel faced with overwhelming evidence conceded that his client was guilty of second degree murder in an attempt to save his client's life. Atwater v. State, 788 So.2d 223, 229-31 (Fla. 2001). This Court distinguished its decision in Nixon II on the ground that Atwater's counsel had conceded his client's guilt to a lesser crime than charged, while Nixon's counsel had conceded his client's guilt of the greatest crime charged. Ibid. Atwater does not mention Boykin. However, it would seem that if, as this Court held in Nixon II, a defense counsel's concession of guilt is the functional equivalent of a guilty plea, then it is the functional equivalent of a guilty plea whether or not that concession is to the greatest crime charged or "only" to a lesser crime. But in Atwater this Court did not require a demonstration that the defendant had given his explicit consent to his counsel's strategy; on the contrary, Atwater indicates that counsel could have conceded guilt to a lesser offense without even consulting his client, let alone obtaining his explicit consent.[25] However, neither Boykin nor

[25] This Court stated that counsel's adoption of such a strategy "may bind a client even when made without consultation." 788 So.2d at 230. The United States Supreme Court has held that the defendant has the ultimate authority to make four decisions: whether to plead guilty, waive a jury, testify in his or her own behalf, or to take an appeal. Jones

its progeny relaxes the standards of waiver when a defendant pleads guilty to something less than all the crimes charged in the indictment; a guilty plea to something less than all the crimes charged (a common event) is nevertheless a guilty plea and must be shown to be voluntary and intelligent. To the extent that this Court in Nixon II adopted the test for evaluating concessions of guilt by counsel based on Boykin, then that same test should be applicable to all concessions of guilt. If, on the other hand, Boykin has no application to Atwater, it should have no application to Nixon either, which is the State's view of the matter.[26]

Furthermore, although Nixon's argument assumes that his trial counsel conceded that Nixon was guilty of first degree murder, in fact he did not. What he did concede at the outset was that Jeanne Bickner had died and that Nixon had caused that death. That is *not* a concession that Nixon was guilty of *first degree* murder. Counsel also acknowledged in concluding that he

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v. Barnes, 463 U.S. 745 (1983). This list has been deemed exhaustive, and all other decisions are for counsel to make, with or without the client's consent. Sistrunk v. Vaughn, 96 F.3d 666, 670 (3rd Cir. 1006); U.S. v. Boyd, 86 F.3d 719, 723 (7th Cir. 1996); Watkins v. Kassulke, 90 F.3d 138 (6th Cir. 1996).

[26] That is not to say that Atwater and Nixon II might not be distinguishable under Cronic; the State will address that question infra. But they cannot be distinguished under Boykin. It is the State's argument that Boykin has no application to either case.

thought the jury would "probably" find Nixon guilty beyond a reasonable doubt on all charges. Counsel did not, however, explicitly admit that Nixon was in fact guilty on all counts, or even so much as hint that the jury was not required to evaluate the evidence to determine if the State had proved Nixon's guilt beyond all reasonable doubt. In short, counsel did not concede that Nixon was guilty of first degree murder, nor fail to put the State to its burden of proof.[27] Thus, the comments by Nixon's counsel were not the functional equivalent of a guilty plea, and this Court should so find.

2. *Nixon's ineffectiveness claim should be evaluated under Strickland, not Cronic.*

In Nixon II, this Court agreed that, in a death penalty case, it may be sound strategy for defense counsel to acknowledge the sufficiency of the state's proof at the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. 758 So.2d at 623. As noted in Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299 (1983) (cited in Strickland v. Washington, supra, 466 U.S. at 662, fn. 32):

> In a death penalty case, . . . the possible punishment is so extraordinary that the defense attorney must consider from the outset the impact that the guilt phase defense may have on sentencing. Since

[27] Thus, counsel actually did what this Court said that, as a minimum, he must do. 758 So.2d at 325.

> the capital case defense attorney may have to be an advocate both for acquittal and for life, she should not frame a defense case for acquittal which will preclude or handicap effective advocacy for life. Indeed, in case where a severe conflict or inconsistency between advocacy for acquittal and advocacy for life exists, the defense attorney will be forced to make the difficult decision of preferring one over the other. *The relationship between this advocacy choice and the assessment of an attorney's competence in such cases cannot be overlooked in formulating standards of effective assistance in capital cases.*
>
> In many capital cases, the evidence of guilt is overwhelming. Such cases go to trial either because the prosecutor will not bargain for a sentence less than death or because the defendant will not accept a sentence of life imprisonment without the possibility of parole. In these cases, although the defendant will almost certainly be convicted, the defendant has nothing to lose by proceeding with a trial on the capital charges. However, *if the guilt phase is virtually indefensible, inappropriate guilt phase advocacy could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase.*

Id. at 329 (emphasis supplied). It has never been contested that Nixon's trial counsel made a strategic decision, and a majority of this Court concluded not only that counsel made a strategic decision, but that counsel's strategic decision was effective and reasonably calculated to help Nixon avoid a death sentence.[28] Nevertheless, this Court found that, absent explicit

[28] Three justices voting with the majority and one dissenter *explicitly* drew this conclusion. See 758 So.2d at 626 (Harding, C.J., concurring, joined by Anstead, J., and Pariente, J.) (no "question that the strategy taken by defense counsel was

consent by Nixon to counsel's strategy, counsel was ineffective per se. This Court reached this conclusion without finding *either* deficient attorney performance *or* prejudice. Instead, this Court concluded that conceding guilt without the client's explicit consent is ineffective per se under Cronic no matter how effective counsel's strategy may have been and no matter what Nixon's best interests may have been.

It is the State's contention that trial counsel's strategic decision in this case is properly reviewed under the two part test of Strickland v. Washington, supra, rather than under dicta in Cronic suggesting that, when trial counsel's performance is so lacking that it amounts to no meaningful assistance at all, a breakdown in the adversarial process has occurred which will be deemed prejudicial per se. Cronic applies only where the attorney's failure to "test the prosecutor's case" is "complete." Bell v. Cone, No. 01-400 (U.S. May 28, 2002).[29] That counsel failed to test the State's case at "specific

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an effective one reasonably calculated to help the defendant avoid the death penalty") and 758 So.2d at 634 (Wells, J., dissenting) ("counsel made a rational choice, one that a competent, experience lawyer would be expected to make given the evidence" and the nature of the proceedings). Thus, a majority of this Court explicitly found that trial counsel's strategy was reasonable and effective considering the circumstances of this death penalty trial.

[29] In Bell v. Cone, the United States Supreme Court reversed Cone v. Bell, 243 F.3d 961 (6th Cir. 2001), cited by Nixon in his brief. Initial Brief of Appellant at 38 (fn. 30).

points" is insufficient to relieve the defendant of proving both deficient attorney performance *and* prejudice under Strickland. Ibid. In a case like this one, in which the State has overwhelming evidence and is seeking a death sentence, defense counsel should not be expected to develop strategy in the guilt and penalty phases independently, without regard for the potential impact of the one on the other. As Goodpaster notes, "if the guilt phase is virtually indefensible, inappropriate guilt phase advocacy could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase." The Trial for Life, supra. It simply cannot be said that a defense attorney's failure to test the state's case is "complete," or that counsel has abandoned his representation of his client, when he decides after reasonable investigation not to contest overwhelming evidence of guilt in order to maintain defense credibility at the penalty phase and maximize his client's chances of avoiding a death sentence. Nixon's trial counsel recognized that in such a case, the most important issue was not guilt, but sentence; by focusing on the penalty phase, he acted in pursuit of what he deemed to be his client's best interests, and "made all significant decisions in

the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.[30]

It should be noted that two of the federal cases relied on by this Court in Nixon II - United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) and Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981) - were not capital prosecutions and trial counsel in those cases had no reasonable justification for conceding guilt.[31] These cases do not support the application of Cronic to this capital prosecution. Clearly, Nixon's trial counsel,

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[30] See The Trial for Life, supra at 338: "The major action in capital cases no longer necessarily takes place at the guilt trial. Penalty trials are not ordinary sentencing hearings; they are complete trials on a crucial issue - life - and counsel and courts must so view them."

[31] The Swanson court noted that the government had failed to identify any strategy that could have justified trial counsel's concession of guilt. In Wiley, the state did argue that counsel's goal was to obtain leniency in sentencing; however, the circuit court did not find this to have been reasonable strategy absent any evidence that counsel's guilt-phase strategy contributed to his sentencing strategy. It should be noted that Wiley pre-dated Strickland and Cronic and that it was still an open question at the time whether a defendant had any burden to prove prejudice on any kind of ineffectiveness claim; further, the court found that in light of the weakness of the state's case of guilt, counsel's concession of guilt *was* prejudicial.

A third federal case relied on by this Court, Osborne v. Shillinger, 861 F.2d 612 (10th Cir. 1988), was a death penalty case, but the court found that counsel had abandoned his duty of loyalty to his client, had failed to investigate, and had no strategic reason for essentially conceding the propriety of a death sentence for his client. In fact, the court analyzed the case under Strickland, not Cronic, although the court suggested that counsel had so abandoned his duty to his client that Cronic probably applied.

unlike counsel in Wiley and Swanson, could have and did have a reasonable justification for pursuing the strategy he did, as this Court acknowledged in its opinion.

Furthermore, in light of this Court's Atwater decision, cases from other states cited by this Court in Nixon II are now patently inapposite.[32] 758 So.2d at 623. In each of these three cases, trial counsel, like trial counsel in Atwater, had conceded only that the defendant was guilty of a *lesser offense*. Thus, the reasoning of these opinions has been rejected by this Court in Atwater, supra, in which this Court expressly declined to find that trial counsel was ineffective per se for conceding that the defendant was guilty of a lesser offense as a matter of strategy chosen to benefit the defendant. Moreover, these cases are inapposite for additional reasons. In two of them, the defendant had expressly objected to counsel's concession of guilt - a concession which, significantly, was directly contrary to the defendant's own trial testimony.[33] In the third, counsel

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[32] These are: State v. Harbison, 337 S.E,2d 504 (NC 1985) (in murder case, counsel argued to the jury that his client was guilty of manslaughter); State v. Anaya, 592 So.2d 1142 (NH 1991) (defendant charged with first degree murder; counsel argued that defendant was guilty of second degree murder); Jones v. State, 877 P.2d 1052 (Nev. 1994) (same).

[33] Anaya and Jones did not merely fail to consent to trial counsel's strategy, they vigorously and explicitly objected; furthermore, as in Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983) (another case cited by this Court in its Nixon opinion), counsels' concessions directly contradicted the defendants' own

conceded guilt without discussing the matter beforehand with either his client or his co-counsel, who had given a closing argument expressly denying guilt.[34] Nixon's counsel, on the other hand, discussed his strategy with Nixon, and Nixon neither objected to the pursuit of that strategy, nor testified contrary to any concession. Especially in light of Atwater, these cases do not support Nixon's contention his trial counsel was ineffective per se under Cronic for conceding guilt for strategic reasons in this death penalty case after discussing that strategy with Nixon, or for choosing what counsel deemed the best possible strategy when Nixon declined to make a choice.

Recent federal capital cases have rejected claims that a concession of guilt in a death penalty case was ineffective per se. In fact, besides Cone v. Bell (supra, fn. 27 of this brief), another case Nixon relied upon has been overturned since he wrote his brief: Haynes v. Cain, 272 F.3d 757 (5th Cir. 2001), vacated by Haynes v. Cain, case no 00-31012 (5th Cir. July 12 2002)(en banc).

In the original panel opinion in Haynes, the 5th Circuit Court of Appeals, relying on the per se ineffectiveness standard set forth in Cronic (and citing Nixon II), found a constructive

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testimony at trial. State v. Anaya, supra; Jones v. State, supra.

[34] State v. Harbison, supra.

denial of counsel where trial counsel conceded that Haynes was guilty of second degree murder, over Haynes' express objection. In dissent, Judge Garza accused the majority of confusing "the denial of counsel, which falls within the province of the Cronic exception, with ineffective assistance of counsel, which we evaluate under Strickland." What Judge Garza deemed "crucial is that in making this strategic choice [to concede guilt], [Haynes' attorneys] never ceased to represent Haynes." In his view, they "pursued a strategy that was the most advantageous for their client given the circumstances." If in fact that approach was unwarranted, the "two-part Strickland analysis provides Haynes with a remedy for such ineffective assistance."

Judge Garza authored the *en banc* opinion reversing the panel's grant of relief. The *en banc* opinion distinguished between failing to oppose the prosecution entirely and the failure to do so at specific points during the trial. When counsel "concedes certain elements of a case to focus on others, he has made a tactical decision," and has "not abandoned his or her client by entirely failing to challenge the prosecution's case." Thus, such a case is to be evaluated under Strickland, not Cronic.

Although informative on the Cronic issue, Haynes does not present the precise situation before us now, as Haynes' counsel (like counsel in Atwater) contested the State's case for first

degree murder while conceding that Haynes was guilty of second degree murder. Nevertheless, the *en banc* reversal of the panel opinion relied on by Nixon undercuts his argument for an application of the per se Cronic standard to this case, and supports the State's argument to the contrary. Nixon's counsel most emphatically did not abandon his client or *completely* fail to test the State's case. Although guilt and penalty phase effectiveness are often analyzed separately, the guilt and penalty phases are component parts of the whole, and must be so viewed. When counsel opts in a capital case with overwhelming evidence of guilt not to contest guilt in a order to preserve credibility on the issue of sentence, he has *not* abandoned his client nor failed to act as his client's advocate; therefore, Cronic should not apply. At least where, as here, the defendant does not expressly object to any concession of guilt, counsel's actions should be reviewed for reasonableness under the circumstances and for prejudice, pursuant to the Strickland standard.

And the 11th Circuit Court of Appeals has done just that, in Parker v. Head, 244 F.3d 831 (11th Cir. 2001), a case decided since this Court issued its decision in Nixon II. Parker's counsel had "admitted to the jury during opening and closing arguments that [Parker] was in fact guilty of murder as charged

in the indictment." Parker v. Turpin, 60 F. Supp. 1332, 1341 (N.D. Ga. 1999). Parker argued on postconviction that his trial counsel was ineffective *per se* under Cronic for conceding that his client was guilty of murder.[35] The District Court analyzed Cronic as follows:

> In Cronic, the United States Supreme Court stated in a footnote, "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of prrof beyond reasonable doubt." 466 U.S. at 656, n. 19, 104 S.Ct. At 2045. This statement does not prohibit counsel from admitting on behalf of the defendant to any facts charged in the indictment. The statement which immediately precedes the aforementioned comment is equally as important. As in the case at bar, the Supreme Court stated, "If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." Id. . . .
>
> [T]here is no per se rule prohibiting counsel from admitting to facts related to one or all of the crimes charged in spite of entering a plea of not guilty. Counsel's statements made in argument do not amount to a stipulation of guilt or the entry of a guilty plea. . . .
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> Since the decision in Cronic, the Eleventh Circuit has limited its applicability to cases in which "circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Vines v. U.S., 28 F.3d 1123, 1128 n. 8 (11th Cir. 1994) (quoting Chadwick v. Green, 740 F.2d 897, 901 (11th Cri. 1984).). . . .

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[35] There are no degrees of murder in Georgia. Instead, one who unlawfully and without justification causes the death of another human being is guilty of murder, voluntary manslaughter or one of two degrees of involuntary manslaughter. Georgia Code Annoted, Section 16-5-1.

> The record clearly establishes that counsel admitted to causing the death of the victim in order to maintain credibility with the jury for the purpose of avoiding the death sentence. Employing such a legal tactic does not constitute representation which falls below an objective standard of reasonableness.

Parker v. Turpin, supra, 60 F. Supp. at 1342-43. The district court went on to distinguish Francis v. Spraggins, supra, on the grounds that, unlike Parker, Francis had not confessed and, on the contrary, had testified that he was not guilty.[36] Parker, on the other hand, like Nixon, had confessed in detail and had not testified at trial. Nor had Parker ever objected to his counsel's strategy. 60 F. Supp at 1343. The Eleventh Circuit affirmed, concluding that the state court's rejection of Parker's Cronic claim was not "contrary to, or an unreasonable application of, the Strickland standard," and that the district court had not erred "in concluding that Parker failed to show the prejudice required under Strickland." 244 F.3d at 840.[37]

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[36] It should be noted, in addition, that Francis v. Spraggins pre-dates the Strickland decision.

[37] Nixon argues that the Eleventh Circuit did not consider the merits of Parker's Cronic claim, but only decided that the rejection of that claim by the Georgia state courts was not "unreasonable." Initial Brief at 37 (fn. 29). It is true that the Eleventh Circuit's review was the deferential one mandated by the Anti-Terrorism and Effective Death Penalty Act, but the Eleventh Circuit was not quite as deferential as Nixon claims. The Eleventh Circuit explicitly held that the rejection of Parker's Cronic claim was not "contrary to" Strickland, and also was not an unreasonable application of Strickland. The Eleventh Circuit could not have so concluded if Nixon's interpretation of Strickland and Cronic were correct.

These recent cases compel reconsideration, and rejection, of the conclusion reached in Nixon II that trial counsel's concession of guilt is ineffective per se. Nixon argues, however, that this Court should adhere to its prior decision even if it concludes that its interpretation of federal law was in error, because Nixon II is grounded as much on Florida law as upon any federal constitutional rights. The State's response is that Nixon II does not offer greater protection to a defendant than does federal constitutional precedent; in fact, if interpreted as Nixon contends it should be, it offers less. What Nixon contends this Court held in Nixon II is that, unless trial counsel is able to obtain a disruptive and uncooperative defendant's explicit consent to concede guilt in the face of overwhelming evidence and to focus on saving his client's life, trial counsel must contest guilt. And this is so even when contesting guilt would not only be useless at the guilt phase, but would work to his client's "detriment" at the penalty phase. This conclusion, the State would submit, is contrary to the admonition in Strickland that counsel "owes the client a duty of loyalty." 466 U.S. at 688. Thus, federal courts have held that, when faced with an uncooperative client, an attorney must represent his client in the best way possible under the circumstances. See, e.g. Harding v. Davis, 878 F.2d 1341, 1344 (11th Cir. 1989) ("even a criminal defendant's complete non-

cooperation does not free his lawyer to abdicate his professional responsibility to represent his client in the best way possible under the circumstances"). As emphasized in Strickland, the "benchmark" for judging a claim of ineffectiveness is whether or not the trial can "be relied on as having produced a just result." 466 U.S. at 686. Ensuring such a just result cannot be accomplished by requiring counsel to adopt a strategy harmful to his client simply because he has an uncooperative client who refuses to choose a strategy. Moreover, such requirement "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 689.

It is undisputed that Nixon's trial counsel had talked to Nixon about his planned strategy, including the probability that he would concede the killing of the victim by Nixon. It is also undisputed that Nixon did not object to or protest his trial counsel's strategy. In Nixon II, this Court found Nixon's failure to object insufficient by itself to bring counsel's performance outside the ambit of Cronic. It is the State's contention that Nixon II is inconsistent with, and contrary to, Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) - a case decided by the United States Supreme Court a month after this Court issued Nixon II.

In Roe v. Flores-Ortega, the Supreme Court reviewed and *reversed* a decision of the Ninth Circuit Court of Appeals holding that a an attorney who failed to obtain his client's explicit consent not to file an appeal was ineffective *per se.* The Supreme Court rejected this "bright line" rule in favor of a more case-specific analysis as required by Strickland v. Washington.

In its analysis of this issue, the Supreme Court first noted that it had long held that a lawyer who "disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." 120 S.Ct. At 1034. At the "other end of the spectrum" was a defendant who explicitly instructs his attorney not to file an appeal. Such a defendant, the Court held, may not later complain that, by following his instructions, his attorney performed ineffectively. Ibid. Between "those poles" was the case in which the defendant had not clearly conveyed his wishes one way or the other. In this last kind of case, the Courts of Appeals for the First and Ninth Circuits had applied a "bright line" rule, holding that counsel is *per se* deficient if he fails to file a notice of appeal unless the defendant specifically instructs otherwise. The Supreme Court concluded that this bright-line rule was "inconsistent with Strickland's holding

that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" Ibid. As the lower court had "failed to engage in the circumstance-specific reasonableness inquiry required by Strickland," the Supreme Court reversed. Ibid.

The Supreme Court concluded that if counsel consults with his client about an appeal, counsel performs in a professionally unreasonable manner only if he fails to follow the defendant's express instructions with respect to an appeal. Even if counsel does not consult with his client, his performance cannot be considered deficient per se, but must be evaluated under all the circumstances. Any other course would be inconsistent with Strickland's rejection of "mechanistic rules governing what counsel must do." Roe v. Flores-Ortega, 120 S.Ct. at 1036.

In Nixon II, this Court held that consultation and acquiescence was not enough. Instead, this Court applied a per se rule that, absent Nixon's explicit consent to counsel's guilt-phase concession strategy, counsel was constitutionally precluded from pursuing that strategy, even if it was in his client's best interests.[38] This is the imposition of exactly the

[38] This Court held in Nixon II that if contesting guilt had worked to Nixon's detriment, "Nixon himself must bear the responsibility for that decision." 758 So.2d at 625. It is one thing, however, to hold the defendant personally responsible for a strategy he has chosen; it is an altogether different matter to burden a defendant with the responsibility for a trial

kind of "mechanical rules on counsel" which the United States Supreme Court rejected in Strickland. Roe v. Flores-Ortega, 120 S.Ct. at 1037. This simply is not a case in which counsel abandoned his duty of loyalty to his client or for any reason ceased to act on his client's behalf or in what counsel thought was his client's best interests. Trial counsel acted in pursuit of what he deemed to be his client's best interests, and "made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. In a capital case in which the evidence of guilt is overwhelming, a defendant whose attorney decides after reasonable investigation not to contest guilt in order to maximize defense credibility at the penalty phase and maximize the defendant's chances of being sentenced to life rather than death simply has not been "denied any meaningful assistance of counsel at all," and neither Cronic nor any presumption of deficient performance or prejudice should apply.

This Court should engage in a circumstance-specific reasonableness inquiry pursuant to Strickland, and analyze the performance of Nixon's trial counsel under all the circumstances, instead of concluding that counsel's strategy was

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strategy he did not personally choose. Moreover, it serves the interests of no one to force defense counsel to adopt a strategy that runs counter to his client's best interests just because the client refuses to choose a strategy.

ineffective per se if not expressly consented to by Nixon. It is at the very least analytically puzzling to say, on the one hand, that trial counsel's strategy was reasonable and effective under the circumstances (which this Court did in Nixon II) but then find that counsel was ineffective per se. Counsel cannot have been both effective but (simultaneously) ineffective per se, and Cronic simply cannot be read to require or support such a result.

Moreover, even if counsel's strategy were unreasonable, this was not a case in which the defendant, either actually or constructively, was denied the assistance of counsel altogether. While a trial counsel's sub-standard performance, including inappropriate concessions of fact, may lead "to a judicial proceeding of disputed reliability," there is no "forfeiture of the proceeding itself." 120 S.Ct. at 1038. A trial occurred in this case. Counsel's performance in this case, even if deficient, at most deprived Nixon of a "fair" trial, not of a trial altogether. Ibid. Thus, Nixon should be required to show actual prejudice in order to obtain relief, at least so long as he did not explicitly object to the strategy counsel chose, or explicitly insist on a different strategy.

The issue here is not whether counsel ordinarily should consult with his client, contest guilt, or attempt to obtain his client's agreement to defense strategy. Defense counsel

ordinarily would and should do all these things. The question is whether, in a capital trial in which death is a possible sentence and the evidence of guilt is overwhelming, trial counsel is ineffective *per se* if he concedes guilt after discussing such strategy with a defendant who neither objects nor explicitly consents, even if it is shown that such concession was reasonable and effective strategy designed to maximize the defendant's chances of avoiding a death sentence. The answer should be no. Cronic is meant to apply only to those rare cases in which the defendant was denied any meaningful assistance at all. This simply is not such a case. For all these reasons, the State would ask this Court to reconsider and to overrule its previous decision holding that this case must be evaluated under Cronic, and to hold that counsel's performance must be evaluated pursuant to the Strickland two-part deficient performance and actual prejudice standard.

**C. *Judge Ferris correctly denied relief under the standards set by this Court in Nixon II, requiring affirmative, explicit acceptance by Nixon of his trial counsel's guilt phase strategy.***

Should this Court decline to recede from its interpretation of Cronic/Boykin in light of the recent developments in the law since Nixon II was decided, this Court nevertheless should affirm Judge Ferris' order denying relief. The State disagrees that Judge Ferris "refused to follow" this Court's decision in Nixon II, as Nixon contends in his brief (p. 28). On the

contrary, Judge Ferris acknowledged that she was not "at liberty" to revisit this Court's ruling in Nixon II (2SPCR 371). At issue, however, was what this Court meant by "affirmative, explicit acceptance" by Nixon of his trial counsel's strategy, and on which party the burden lay. Judge Ferris concluded that the burden to show lack of consent lay with Nixon, and that, in accordance with general standards applicable to evaluations of waiver and consent, no formulaic set of words was essential to a finding of acceptance by Nixon of his trial counsel's strategy. Judge Ferris was correct in her legal analysis, and her ultimate determination is entitled to deference.

1. *On postconviction, the burden is on the one who attacks his or her conviction, even if it is based on a guilty plea.*

At the outset, it is useful to note that once a conviction is final and is being attacked on postconviction, even when a defendant is attacking a genuine guilty plea by the defendant, rather than a concession of some degree of guilt by trial counsel at a trial, the burden is on the defendant to show that his plea is invalid, and to show that any invalidity in the plea proceedings was harmful. See U.S. v. Timmreck, 441 U.S. 780 (1979 (Court rejected defendant's collateral attack on his plea based on failure to follow all requirements of Rule 11, noting that "concern for finality" served by limitations on collateral attack "has special force with respect to convictions based on

guilty pleas"); U.S. v. Vonn, 122 S.Ct. 1043 (2002) (defendant's failure to object to violation of Rule 11's plea procedures is a waiver of objection unless he can establish "plain error," citing Timmreck; where defendant fails to speak up "when a mistake can be fixed," it is not unfair to place the burden of proving prejudice on the defendant). See also Robinson v. State, 373 So.2d 898 (Fla. 1979) (On collateral attack of a guilty plea, "the burden is on the defendant to prove that a manifest injustice has occurred.").[39]

2. *A waiver does not require any particular incantation by a defendant; its validity is determined under the totality of the circumstances, as Judge Ferris ruled.*

Even guilty pleas do not require any particular incantation by the court, counsel, or the defendant, outside the strictures of formal rules guiding the plea inquiry (like Fla.R.Crim.P 3.172). Guilty pleas are constitutionally valid if both voluntary and intelligent - matters which are determined "by considering all of the relevant circumstances" surrounding the plea. Brady v. U.S., supra, 397 U.S. at 747-48.

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[39] Nixon cites Koenig v. State, 597 So.2d 256 (Fla. 1992), in support of his argument that Judge Ferris erred in her evaluation of Nixon II. Initial Brief at 33-34. However, Koenig addressed the validity of a guilty plea on direct appeal. Nixon rejected this Court's attempt to resolve his Cronic/Boykin claim on direct appeal. Having done so, and to the extent that Koenig has any application to counsel's trial strategy, rather than solely to a true guilty plea, Nixon now on postconviction faces a higher burden on his claim that trial counsel's strategy was the functional equivalent of a guilty plea.

In this case, of course, there was no formal plea of guilty, but rather a choice of strategy by trial counsel which has been analogized to a guilty plea. The question is whether Nixon gave constitutionally sufficient assent to such strategy.

Initially, the State would note that, generally, "formal waivers are not essential to voluntary decisions." Taylor v. U.S., 202 Westlaw 725430 (7th Cir., decided April 25 2002). The Seventh Circuit held in Taylor that, at least in the context of a defendant's decision to testify or not (which ultimately is his alone to make, see Rock v. Arkansas, 483 U.S. 44 (1987)), "[n]othing in the Constitution or any decision of the Supreme Court) justifies meddling in the attorney-client relationship by requiring advice to be given in a specific form or compelling the lawyer to *obtain a formal waiver*."

Furthermore, in the context of the voluntariness of a custodial confession, the United States Supreme Court has held that, while presuming waiver from a silent record is impermissible, "[t]hat does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights." North Carolina v. Butler, 441 U.S. 369 (1979).

In a case involving the assertion of an insanity defense by counsel, the federal Second Circuit Court of Appeals assumed,

without deciding, that "the Sixth Amendment, as applied through the Fourteenth Amendment here, prohibits counsel from imposing an insanity defense on an unwilling defendant." Dean v. Superintendent, 93 F.3d 58, 61 (2nd Cir. 1996). The Court held that, assuming that a criminal defendant possessed the fundamental right to accept or reject an insanity defense, that right "can be subected to practical constraints." Id. at 62. Thus, where counsel "*advises* a client on a strategic decision as significant as an insanity defense or plea, a petitioner who does not state an objection on the record must show not only that he "disagreed" with counsel, but that his "will was 'overborne' by his counsel." Ibid.

3. *Judge Ferris was authorized to conclude, on the record before her, that Nixon accepted his trial counsel's strategy.*

It is undisputed that Nixon's trial counsel discussed the evidence and potential trial strategy with Nixon, and discussed with him the probability that he would not contest guilt, but would focus on trying to save Nixon's life at the penalty phase. It is also undisputed that trial counsel had represented Nixon previously and had a generally positive relationship with Nixon. Finally, it is undisputed that Nixon did not object to trial counsel's proposed strategy on the record or to his trial counsel off the record, and that *trial counsel would not have pursued his strategy of not contesting guilt if Nixon had*

*objected*. In these circumstances, Judge Ferris was authorized to concluded that Nixon accepted this strategy and that it was unnecessary to search for specific words of assent that Nixon was disinclined to provide. This was a sufficient acceptance of trial counsel's strategy under Nixon II to remove this case from the ambit of Cronic and return it to Strickland.

***D. Because Nixon cannot show deficient attorney performance at the guilt phase, or prejudice, relief was properly denied on his claim that trial counsel was ineffective at the guilt phase.***

In his latest brief, Nixon devotes his entire argument on Issue I to the Cronic/Boykin aspect of his claim that trial counsel was ineffective at the guilt phase. As to all other aspects of his first issue, Nixon relies on his prior argument, which, by this Court's briefing orders, are deemed reiterated on this appeal. Initial Brief of Appellant at 41 (fn. 35). The State will do the same, but will make a very few additional observations.

First, it is well settled that trial counsel's performance cannot be deemed constitutionally deficient if counsel conducts a reasonable investigation and chooses a reasonable strategy. The record conclusively demonstrates that counsel conducted a constitutionally sufficient investigation in this case. Counsel knew what the case was about; the problem was that the evidence against Nixon was overwhelming and, further, that it was a

horrible crime. That being the case, counsel chose not to contest this overwhelming evidence, in an attempt to maintain credibility with the jury at the penalty phase so he could focus on saving Nixon's life. This choice of strategy is constitutionally deficient only if no reasonable attorney would have chosen it under the circumstances. Chandler v. U.S., 218 F.3d 1305 (11th Cir. 2000). That simply cannot be said in this case. As noted in the statement of the case and facts, attorney Larry Simpson, whose reasonableness has never been questioned, testified at the 1989 hearing that trial counsel's strategy was not only reasonable, but "there was no better strategy that could have been employed" in this case (4STR 102-03). Simpson is not alone in this view either. A majority of this Court has expressly indicated that trial counsel's strategy was "effective" and "reasonably calculated to help the defendant avoid the death penalty." Nixon II. That would appear to be the law of the case as to any question of reasonableness, and at the very least is a persuasive manifestation of the reasonableness of trial counsel's choice of strategy in the unique circumstances of this case.

Furthermore, Nixon cannot demonstrate prejudice. Nothing he proffers raises any remotely significant question of Nixon's guilt. Nixon did not just confess to his brother and ex-girlfriend; he gave detailed confessions to any number of

people, including the police. Minor inconsistencies in these statements are insufficient to discredit the depth of detail in them. Moreover, despite the questions raised by postconviction counsel about Nixon's ability to drive an MG with a manual gearbox, the fact remains that many people, whose credibility cannot reasonably be assailed, saw Nixon driving the MG - on the afternoon of the crime not far from the crime scene the afternoon the victim disappeared, all around town the next couple of days, and to a junkyard where he tried to sell it the day before he burned it. Nixon was also positively identified as the person who was with the victim the last afternoon she was seen alive, who pawned the victim's rings, and whose fingerprints were all over the victim's car.

Not only was the evidence overwhelming, but if trial counsel had contested guilt, the State would have presented additional evidence that would have made its case even stronger. Nixon simply cannot demonstrate a reasonable probability of a different verdict if trial counsel had attempted to contest guilt in the manner now urged. Thus, he is entitled to no relief on his claim of ineffective assistance of counsel at the guilt phase, and relief was summarily denied.

**E. *CONCLUSION***

The record admits to no other conclusion than that trial counsel performed reasonably and effectively under all the

circumstances of this case. That being the case, trial counsel should not be deemed ineffective per se just because Nixon failed to give explicit *verbal* assent to trial counsel's planned guilt phase strategy. This was not a case in which trial counsel failed to discuss his planned strategy with his client, or pursued that strategy over his client's explicit objection, or made concessions which were inconsistent with the defendant's trial testimony (or pre-trial statements) or with co-counsel's argument. Nixon was consulted; he understood what his rights were and what was at stake, and he assented to trial counsel's proposed strategy. Because Nixon not only failed to object at trial but also refused to litigate his claim that trial counsel was ineffective *per se* when given the opportunity to do so on direct appeal, he should not be allowed at this late date to litigate this issue. Even so, his claim is meritless, as he has not demonstrated that trial counsel pursued his guilt phase strategy without Nixon's informed assent. The denial of relief on this issue should be affirmed.

## REMAINING ISSUES

The six remaining issues are the same issues Nixon raised in his previous appeal. The State has fully briefed these issues, and its prior argument is deemed reiterated on this appeal. The State will rely on the arguments it made

previously, but will offer brief argument to update and clarify its former argument.

**ISSUE II**

THE CIRCUIT COURT'S SUMMARY DENIAL OF RELIEF AS TO NIXON'S CLAIM OF INCOMPETENCY TO STAND TRIAL WAS NOT ERROR

Basically, Nixon's present counsel contend that the trial court should have had Nixon evaluated to determine whether or not he was mentally competent, even though trial counsel did not seek such an evaluation. As noted in the State's previous brief, Judge Smith summarily denied this postconviction claim on the ground that it was procedurally barred as one that could and should have been raised on direct appeal. Because Nixon's appellate counsel could have but did not raise this issue on appeal, Judge Smith's ruling clearly was correct.

Moreover, despite Nixon's insistence on absenting himself from trial, the trial court was not required to hold a competency hearing *sua sponte*. Robertson v. State, 699 So.2d 1343, 1346 (Fla. 1997) (trial court not required to hold *sua sponte* competency hearing even though defendant had history of mental problems, had been disruptive at prior hearing, and counsel stated that client had refused to meet with him). At the time of *this* trial, Nixon had just been evaluated for competence in a case that was pending at the time he committed

this murder. The trial judge in this case had presided over that case also, and was fully familiar with Nixon's obstreperous and unpredictable behavior *and* the evaluation and the opinion of the examining mental health expert that Nixon was competent to stand trial. Given the recency of this evaluation, the trial court had no reasonable grounds to believe that Nixon was incompetent, and was under no obligation to have yet another evaluation conducted despite the lack of a request for one. The fact that neither trial counsel nor appellate counsel (who dealt with Nixon through three remand proceedings) felt the need for a competency evaluation is ample corroboration of the correctness of the court's decision. See Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996) (trial counsel's failure to raise competency issue is evidence that defendant's competency was not in doubt).[40]

**ISSUE III**

THE CIRCUIT COURT'S SUMMARY DENIAL OF NIXON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE WAS NOT ERROR

[40] Nixon's postconviction counsel once again argue that the State requested a competency hearing. The State addressed this in its prior brief (p. 63-64), but would just reiterate here that the prosecutor's suggestion, five months before trial, that competency might be an issue, is not a request for an evaluation or an expression of concern that Nixon was truly incompetent.

Nixon argues that instead of building a case for life, trial counsel "destroyed it," by introducing evidence and making argument that was harmful to Nixon rather than helpful. His primary complaint in this regard seems to be that counsel acknowledged that this was an aggravated murder and the background evidence counsel introduced "documented" Nixon's criminal history. But the murder in this case was indeed aggravated. Nixon simply has failed to demonstrate what kind of evidence or argument could have been presented to show that this murder was not the heinous and brutal murder that it was. It was reasonable for counsel not to have attempted to pass this murder off as less aggravated than it obviously was, not only to maintain his credibility with the jury, but also to focus attention away from aggravating circumstances of the crime and onto Nixon's mental problems. Counsel retained the services of two mental health experts, both of whom testified that the two statutory mental mitigators applied. From them he elicited testimony that Nixon was brain damaged, that he occasionally had psychotic episodes, that he broke down under stress, and that he did not have the "cognitive wherewithal" to "come up with the right answers" under stress.

The school and institutional records showed that Nixon had a criminal history dating back to age 10. But they also showed that he had a "seriously disturbed" perception of reality and

had many problems. If trial counsel had failed to provide this background material to his experts, Nixon would in all likelihood be contending now that counsel was ineffective for failing to provide this background information. In fact, consideration of this background information was essential to an evaluation of Nixon. Furthermore, while it doubtless was unhelpful to Nixon in some respects, it is a fact of life that mitigation evidence is often a two-edged sword. Cf. Emerson v. Gramley, 91 F.3d 898, 906 (7th Cir. 1996) (narratives that "mitigation specialists" present "often contain material that the jury is likely to consider aggravating rather than mitigating"). And so a defense attorney has to decide whether the positive aspects of potential mitigation evidence outweigh the negative aspects. Trial counsel could hardly have presented the testimony of his expert mental health expert witnesses without also disclosing the background records they had relied upon in formulating their opinions; once he did so, those background records became available to the State to use for cross-examination of those experts. That being the case, counsel not unreasonably chose to present them in the first instance, again, to maintain credibility with the jury. Furthermore, the background evidence did corroborate the assessment of the defense experts that Nixon was not an "intact" human being, and was consistent with the defense theory of

mitigation. The decision to present this evidence cannot be described as constitutionally unreasonable.

Nor does this record support Nixon's argument that his trial counsel "presented no meaningful case for life at the penalty phase," or that he "demonized" his client. On the contrary, counsel presented a perfectly acceptable penalty phase defense of brain damage and mental problems. While these very problems indicate that Nixon's performance in an unstructured setting is so unstable that he probably does not need to be released into society again, the evidence was a basis for trial counsel's argument of diminished moral culpability, and that, coupled with evidence that, despite his problems, Nixon functions well while institutionalized, supported trial counsel's argument that life imprisonment would be a sufficient and just punishment for Nixon. The issue at the penalty phase, of course, was not whether Nixon would be imprisoned or released, but whether or not he would be imprisoned or executed. Relevant to the latter question is the extent of his moral culpability, and the defense evidence and argument was designed to reduce Nixon's moral culpability based on his mental and emotional deficiencies. That simply was not an unreasonable strategy, and Nixon has not offered any other that would in reasonable probability have worked any better.

What Nixon primarily now contends is just more of the same, only with different experts. But it is well settled that a defendant is not entitled to a new trial simply because he has obtained new, even if arguably more favorable, mental health experts years after the trial. Asay v. State, 760 So.2d 974 (Fla. 2000). In fact, Nixon's present mental health experts have arrived at essentially the same conclusions as did his original experts. His present experts primarily criticize the prior experts for failing to find Nixon to be mentally retarded. However, Nixon's IQ scores on tests administered since his arrest are above 70, which is the "cutoff" for mental retardation under the definition of mental retardation in the DSM IV and also in recently enacted Section 921.137, Fla. Stat. (2001). More importantly, the statutory definition (like the DSM IV definition) requires onset before age 18. It is undisputed that Nixon's IQ was 88 when he was a teenager, and was still as high as 83 in 1981, when he was 19 or 20 years old. These IQ scores are only slightly out of the average range (50% of the population has an IQ between 90 and 110). Even assuming that Nixon's IQ truly has diminished since he was 19 (and that the lower scores on tests administered since he was arrested on this murder charge do not merely indicate lack of effort or other matter which would render the tests less than accurate indicators of Nixon's true intellectual functioning), there

simply was no manifestation of mental retardation before age 18, and Nixon therefore cannot be deemed "mentally retarded" as that term is defined by statute.

Nixon also faults trial counsel for failing to discover and present evidence of an abusive childhood, primarily from his family members. But trial counsel investigated Nixon's background extensively, as the record shows. At that time, Nixon's mother said nothing about drinking when she was pregnant with Nixon, or beating him, or witnessing others abusing him. Nor did Nixon himself mention any alleged abuse to the mental health experts who evaluated him before trial. Trial counsel can hardly be faulted in these circumstances for failing to discover evidence of abuse. Moreover, Nixon cannot demonstrate prejudice. This was a highly aggravated murder, in which the victim was abducted from a shopping mall, taken to an isolated area in the trunk of her own car, tied to a tree, tormented, beaten and set on fire. The crime was committed for pecuniary gain, during the course of a kidnapping, by a defendant with prior convictions for violent crimes, in the most coldly calculated and premeditated, as well as heinous, atrocious and cruel manner imaginable. The jury heard considerable evidence of Nixon's troubled childhood and mental and emotional problems. There is no reasonable probability that the jury would have

recommended a life sentence if it had considered additional evidence in this same vein.

Nixon's trial counsel thoroughly investigated this case, presented substantial evidence in mitigation, and made an impassioned plea for mercy in his closing argument. His performance at the penalty phase was not constitutionally deficient, and Nixon cannot demonstrate prejudice. For the reasons stated above, and for all the reasons set forth in the State's original brief on this issue, the summary denial of Nixon's claim of penalty-phase ineffective assistance of counsel should be affirmed.

## ISSUE IV

THE CIRCUIT COURT'S SUMMARY DENIAL OF NIXON'S CLAIM THAT HE WAS DEPRIVED OF COMPETENT MENTAL HEALTH ASSISTANCE WAS NOT ERROR

Nixon has failed to explain why the circuit court erred in finding this claim procedurally barred, and thus is entitled to no relief. Cf. Jones v. Moore, 732 So.2d 313, 321-22 (Fla. 1999). Furthermore, although Nixon now characterizes the evaluations of his original trial experts as constitutionally inadequate, it is clear that they did not ignore clear indications of mental retardation or brain damage. Gorby v. State, 819 So.2d 664 (Fla. 2002). In fact, they found brain damage, and also borderline intelligence. The record conclusively establishes that Nixon's mental health experts at

trial were not incompetent. Sireci v. State, 773 So.2d 34, 45 (Fla. 2000). That Nixon's present experts have characterized him as mentally retarded, despite having an IQ above 70 and despite the lack of manifestion of mental retardation before age 18, does not mean that the original experts were incompetent. Jones, supra at 320 (original evaluation not rendered incompetent by presentation of later evaluation reaching conflicting result on similar evidence).

For the reasons stated above, and for all the reasons set forth in the State's original brief on this issue, the summary denial of Nixon's claim that he was denied a competent mental health evaluation should be affirmed.

**ISSUE V**

THE CIRCUIT COURT CORRECTLY FOUND PROCEDURALLY BARRED NIXON'S CLAIM THAT HIS JURY WAS GIVEN CONSTITUTIONALLY INADEQUATE INSTRUCTIONS ON TWO AGGRAVATORS

This was claim VII in Nixon's original postconviction brief. As the State noted in its answer brief, the circuit court denied as procedurally barred Nixon's claim that his death sentence must be vacated because of unconstitutional instructions as to the CCP and HAC aggravators. Because no complaint of unconstitutional vagueness was raised at trial or on direct appeal, the circuit court's conclusion was correct. E.g. Pope v. State, 702 So.2d 221, 223-24 (Fla. 1997) (claim that CCP instruction is unconstitutionally vague procedurally barred

unless specific objection to instruction itself on that ground is made at trial and pursued on appeal). Further, it should be noted that the instructions given were standard jury instructions at the time of Nixon's trial. Trial counsel cannot be deemed ineffective for failing to object to standard jury instructions that have not been invalidated at the time of trial. Waterhouse v. State, 792 So.2d 1176, 1196 (Fla. 2001).

For the reasons stated above and in the State's original brief on this issue, summary denial of this claim was proper.

**ISSUE VI**

THE CIRCUIT COURT DID NOT ERR IN REJECTING AS LEGALLY INSUFFICIENT NIXON'S CLAIM OF ALLEGED RACIAL DISCRIMINATION

The circuit court denied this claim on the basis of Foster v. State, 614 So.2d 455 (Fla. 1992), in which this Court held that a defendant making a claim that racial discrimination infected his conviction and sentence must show that the State Attorney's Office acted with purposeful discrimination in seeking the death sentence in his case. Nixon has not done that and so is not entitled to hearing or relief. His suggestion that Foster be overruled should be rejected.

For the reasons stated above and in the State's original brief on this issue, summary denial of this claim was proper.

**ISSUE VII**

NIXON'S JOHNSON V. MISSIPPI CLAIM WAS PROPERLY DENIED

Finally, citing Johnson v. Mississippi, 486 U.S. 578 (1988), Nixon contends here, as he did in claim five of his original postconviction brief, that the circuit court erred in summarily denying Nixon's claim that his two prior violent felony convictions were invalid. The problem with Nixon's claim here is that his prior convictions have never been invalidated, and they cannot be invalidated in this proceeding. Thus, Nixon has no claim under Johnson v. Mississippi.

For the reasons stated above and in the State's original brief on this issue, summary denial of this claim was proper.

**CONCLUSION**

WHEREFORE, for all the foregoing reasons, the judgment of the court below should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
CURTIS M. FRENCH
Senior Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 Ext. 4584

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jonathan Lang, 305 West 103rd Street, New York, New York 10025, this 20th day of August, 2002.

_____
CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

_____
CURTIS M. FRENCH
Senior Assistant Attorney General