IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2486

JOE ELTON NIXON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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CITATIONS TO THE RECORD

"R." refers to the twelve volumes of transcript, pleadings and orders, numbered pages 1-2104.
"SR1." refers to the supplemental volume containing, inter alia, a transcript of the November 25, 1987 Circuit Court hearing and orders related thereto, numbered pages 1-33.
"SR2." refers to the supplemental volume containing, inter alia, a transcript of the December 19, 1988 Circuit Court hearing and orders related thereto, numbered pages 1-64.
"SR3." refers to the supplemental volume containing, inter alia, a transcript of the August 30, 1989 Circuit Court hearing and orders related thereto, numbered pages 1-165.
"SR4." refers to the record on this appeal.
"3.850 R." refers to the 23-volume record on this appeal, numbered pages 1-4393.
"A-" refers to the Appendix submitted with this brief. Appendix page numbers appear in the upper right hand corner of each page. In accord with Fla. R. App. P. 9.200(a)(1) and this Court's February 5, 2002 Order, Appellant relies upon all original documents, exhibits and transcripts hitherto filed in all courts including depositions and other discovery, and hereby designates such material as part of the record.

REQUEST FOR ORAL ARGUMENT

Joe Nixon is under sentence of death. Adequate development of the issues raised on this appeal and in the accompanying Amended Petition for a Writ of Habeas Corpus is essential for a determination of his case, which in turn may determine whether he lives or dies. This Court generally grants oral argument in capital cases of this nature. In accord with Rule 9.320 of the Florida Rules of Appellate Procedure, Joe Nixon therefore respectfully moves this Court for oral argument on his appeal and accompanying Amended Petition for a Writ of Habeas Corpus.

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I. INTRODUCTION

How long will it take to get this case right? That's a provocative but fair question.

Two years ago the Court remanded this case for a hearing on the simple issue of whether Joe Nixon explicitly and affirmatively consented to his trial lawyer's concession of guilt in his capital trial. Thereupon the Circuit Court disregarded this Court's mandate, ignored the law of the case, and imposed its own test for assessing consent, one inconsistent with the standard set by this Court. For this reason alone, and for the others set forth here and previously, the decision below must be reversed.1

II. STATEMENT OF THE CASE

A. Procedural History

On August 29, 1984, a Leon County grand jury indicted Joe Elton Nixon for first degree murder, kidnapping, arson and robbery, involving the death of Jeanne Bickner. R. 1-2. Nixon pled not guilty to all charges. At trial in 1985, Nixon's lawyer conceded his guilt. R. 1852. The jury found Nixon guilty. R. 704. The jury recommended death by a vote of 10 to 2. R. 1053. The trial court sentenced Nixon to death. R. 288.

Nixon appealed his conviction and sentence to this Court, which remanded the case to the Circuit Court for an evidentiary hearing on ineffective assistance of counsel. SR1. 1-2; A-345-46. This Court was "concerned with whether Nixon knowingly and voluntarily consented to the trial strategy of which he now complains," viz., the concession of guilt. SR1. 1; A-345.

On November 25, 1987, the Circuit Court held a hearing on the ineffective assistance claim (SR1. 5-32) and then returned the case to this Court for guidance. Another remand followed, with directions that the Circuit Court conduct a further evidentiary hearing. October 4, 1988 Order at 1-2; A-347-48.

The Circuit Court held another hearing on December 19, 1988, at which the defense called Michael Corin, Nixon's trial attorney. SR2. 2-62. The Circuit Court made no findings; it again sent the case back to this Court, which again remanded to allow the State to present witnesses. After another hearing (SR3. 8-164) the Circuit Court concluded:

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.

Order Pursuant to Remand dated October 3, 1989; SR3. 3-7, at 6; A-340-44, at 343.

Nixon appealed the October 3, 1989 Circuit Court order to this Court, which affirmed the conviction and death sentence. Nixon v. State, 572 So. 2d 1336 (Fla. 1990), cert. denied, 502 U.S. 854 (1991) ("Nixon I"). This Court denied without prejudice Nixon's claim that his attorney's concession of guilt deprived him of effective assistance of counsel, inviting Nixon to raise the issue in a Rule 3.850 motion. Id. at 1340. The United States Supreme Court denied Nixon's petition for certiorari.

On October 14, 1993, pursuant to Fla. R. Crim. P. 3.850, Nixon filed a Motion to Vacate Judgment of Conviction and Sentence (the "3.850 Motion") 3.850 R. 405-841. The original trial judge recused himself and the case was assigned to Circuit Judge L. Ralph Smith, Jr (the "original 3.850 Court"). On December 11, 1996, Judge Smith heard oral argument. 3.850 R. 3035-3107. On October 22, 1997, he issued an Order Denying Motion for Post-conviction Relief (the "October 22 Order;" 3.850 R. 3561-3575; A-318-31).

Nixon appealed Judge Smith's denial of his 3.850 motion to this Court, which decided that appeal in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) cert. denied, 2000 U.S. LEXIS 7351 (Nov. 6, 2001) ("Nixon II"). The Court found Nixon's claim that he was denied effective assistance of counsel when his lawyer conceded his guilt without his consent to be dispositive and ordered a hearing on the sole unresolved factual issue pertaining to that claim:

Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough.

Nixon, 758 So. 2d at 624.2

On remand, a hearing was held in the Circuit Court before the Hon. Janet E. Ferris on

May 11, 2001. On September 20, 2001, Judge Ferris entered an Order ("Order of Sept. 20, 2001") (SR 4.), detailed in the argument below, denying relief. Joe Nixon appeals that Order.

B. Facts

An understanding of the facts of this case is crucial to any analysis of the instant appeal. Regrettably, not all of the facts were presented at trial, mainly because trial counsel did not develop them.3

1. The Crime

The facts of the crime are subject to more dispute than previously understood; indeed, only a few can be agreed upon: on Sunday, August 12, 1984, Jeanne Bickner had lunch with friends at the Governor's Square Mall in Tallahassee. Sometime after that, Bickner was taken to a secluded area near Tallahassee where she was set afire and died, either from the fire or from having been strangled beforehand. Joe Nixon confessed to this crime. 3.850 R. 914-65; A-99-131(I).

We concede neither the validity nor the accuracy of Nixon's confession. Record evidence, evidence trial counsel knew of but did not use, and evidence subsequently adduced call it into serious question. Nixon told the following story:

1. Joe Nixon encountered Jeanne Bickner in the parking lot of the Governor's Square Mall on a Saturday afternoon. Confession at 4-5, 6, 39-40; A-101-02, 103, 128-29. Notwithstanding numerous attempts by investigators to get Nixon to change the Saturday date, he insisted that the acts took place on a Saturday. See id.

2. Nixon said that he knew Bickner.4

3. Nixon told Bickner that he had a broken muffler on his uncle's Chevrolet Monte Carlo and that he had hurt his arm. Confession at 5-6; A-101-02. Bickner offered him a ride, and they left the Mall in Bickner's 1973 MG two-seat convertible, with Bickner driving voluntarily and Nixon in the front passenger seat. Confession at 7, 8, 10; A-103, 104, 106.

4. Nixon said that at some point he hit Bickner on the head, overpowered her and, from the passenger side of the car, managed to pull the MG safely over to the side of the road. He then got the still conscious Bickner out of the car and forced her into the trunk. Confession at 10-13; A-106-09.

5. Nixon said he next drove the MG sports car to a logging road, then over a rutted dirt road for what was later determined to be about two miles to the secluded site where Bickner's body was found. Confession at 13-14; A-109-10.

6. Nixon said that, at this wooded scene, he took Bickner out of the trunk of the MG. Singlehandedly and despite Bickner's struggles, he managed to tie her to a tree with two jumper cables from the MG. Nixon first said he tied her feet and left hand, using one cable for the feet, and the other for her hand. He also said there were two separate cables. Confession at 16-17; A-112-13. Later, he said that maybe he did tie her

around the waist, and that if he did, he guessed it was with a cable. Confession at 45; A-131(C). To support that statement, Nixon changed his story, saying he must have loosened her feet, put a bag on her head, put a cable around her waist and then re-tied her feet. Moments later, he changed the story again to say that he never tied Jeanne Bickner's feet. Confession at 45-46; A-131(C)-131(D). The final story, elicited after police coaching, accords with the crime scene photographs.

7. Nixon said he set a fire with some things he found in the car, including the "tonneau" cover, a fabric piece that goes over the retracted convertible top. After some conversation with Bickner, he choked her until she died. Finally, he said he threw the burning tonneau cover onto what he thought was Bickner's dead body and left the scene driving the MG. Confession at 18-23; A-114-20. He returned the MG to the Mall and found his friend, Willy ("Tiny") Harris, who helped him pick up the Monte Carlo at the Mall and return it to his uncle's house. Confession at 24-26; A-120-22.

8. Nixon said that he burned his trousers and shirt at the crime scene because they had blood on them and returned to town in his underwear. Confession at 40-42; A-129-31.

To a thinking person, Joe Nixon's statement should have appeared questionable; but given the statements and other information gleaned in the investigation, this confession was downright incredible. These statements and information disclose:

1. The crime took place on a Sunday, not on a Saturday as Joe Nixon said. Bickner was seen by at least two witnesses on Sunday, August 12, 1984.5

2. The notion that Nixon knew Bickner was flatly rejected by John Nixon and Robinson.6

3. Although Nixon told the police that Bickner voluntarily drove him from the shopping center in the MG (Confession at 7-8; A-103-04), John Nixon and Wanda Robinson both stated that Joe Nixon had said that he put Bickner in the trunk of the Monte Carlo, not the MG, in broad daylight in the parking lot of the Governor's Square Mall.7 John Nixon Deposition at 28; A-41. See also John Nixon-Robinson Statement at 10; A-11; Robinson Deposition at 31-32; A-74-75; Robinson Statement at 6; A-52. Thus, trial counsel knew from discovery that the key vehicle in the crime was open to question.

4. Other accounts corroborate that Joe Nixon drove his uncle's Monte Carlo, not the MG, to the crime scene.8 All this information was available to trial counsel.

5. The crime scene was located in a remote area, at least 1.7 miles from the nearest road (Tram Road) and accessible only by a series of "two-rut" dirt roads.9 The MG is a small idiosyncratic car, likely to be particularly unfamiliar to a mentally retarded man. It has but four and a half inches of ground clearance, new and unloaded.10 Four and a half inches is about the height of a soda can. This information was obvious.

6. Joe Nixon could barely drive the MG. John Nixon said that days after the crime Joe

could not get the car into reverse.11

7. For Jeanne Bickner to fit into the small trunk of the MG, the spare tire had to be removed. This would require Nixon singlehandedly to maintain control over Bickner while opening the trunk, removing the spare tire, and then forcing her into a very small space. As John Nixon testified in a deposition:

A. What I haven't got the right idea on is which car he took the lady out there in. All he said was he put her in the trunk of the car. And I just looked at that little bitty car and I just figured, you know, he couldn't have took nobody in that little thing. The trunk ain't that big on that.

Q Too small to put a person in?

A That's what it seems like. I don't know if you could get somebody in there or not.

John Nixon Deposition at 30; A-43. The deposition was taken by trial counsel.

8. Joe Nixon said that he had burned all his clothing at the crime scene, except for his underwear, which he wore back to Tallahassee. Confession at 40-41; A-129-30. Wanda Robinson and John Nixon said that Joe showed them the clothes he said he wore in committing the crime.12

9. Robinson initially thought John, not Joe, should be the main suspect:

And I was telling him [Detective Paul Phillips] like, "How do you know John didn't have anything to do with killing this woman?" And, "You've got Joe in jail, why don't you put John in jail?"

Robinson Deposition at 68, 68-69; A-97, A-97-98.13

10. Facts that counsel could have obtained but that were not obtained until a subsequent civil action brought by Jeanne Bickner's family against the Governor's Square Mall cast further doubt on the theory that Joe Nixon acted alone or committed the crime at all.14

11. Joe Nixon had a potential alibi of which the State was aware and which it did not disclose. Prior to the trial, Arthur Mickens, Jr., the State Attorney's Office investigator, wrote a memorandum dated October 9, 1984 to Assistant State Attorney James Hankinson, who handled the Nixon prosecution. The Mickens Memorandum (3.850 Motion, Appendix 6; A-212-14) recounts an interview with Lamar Nixon, Joe's uncle, in which Lamar states that he saw Joe in Woodville at between 3:00 and 4:00 p.m. on August 12, and that Joe was driving a brown Buick.15

The facts are thus contradictory and confusing. Admittedly, the State introduced extrinsic evidence linking Nixon to the crime, including palm prints on the victim's car, a pawn ticket for her rings, and statements by Nixon about the circumstances of the crime. These may suggest some level of involvement; they do not, however, prove that he was guilty of capital murder, guilty to the extent the State charged, the lone guilty party, or guilty to the extent that the jury, considering his involvement as

opposed to that of others, would have imposed the death penalty.

We therefore ask the Court to pause at this point and consider what a logical defense strategy would have been and then compare it with what occurred at Joe Nixon's trial.

2. The Trial

a. Defense Counsel's Concession of Guilt

In his opening statement, Joe Nixon's lawyer told the jury:

In this case there will be no question that Jeannie Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.

In this case there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death. Likewise that fact will be proved to your satisfaction beyond any reasonable doubt.

R. 1852.

The prosecution's case went uncontested. Defense counsel did not ask a single question of most of the State's 33 witnesses; as to the rest, cross-examination was perfunctory. After the State rested, the defense rested without calling a witness or making any motions. R. 609. In closing argument, 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 obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case.

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.

R. 641 (emphasis added). The jury returned a guilty verdict on all counts. R. 704.

b. Nixon's Lack of Consent to the Guilt Concession

In Nixon II this Court remanded for a further evidentiary hearing to determine whether Nixon had consented to Mr. Corin's decision to concede guilt. We discuss the evidence adduced at the evidentiary hearing in Point I below. Simply stated, at the 2001 hearing on consent Mr. Corin reiterated his prior testimony in 1987 and 1988 that Nixon had not consented to the concession. Also as discussed below, Judge Ferris found that Nixon never gave his explicit consent to the concession. Argument, Point I, infra.

c. Joe Nixon's Incompetency

Joe Nixon was incompetent to stand trial, but the trial court did not follow applicable Florida procedures for determining his competency. We refer the Court to all of the evidence we have adduced, which appears in the 3.850 Motion at 12-38; 3.850 R. 417-43. We can only summarize that evidence here.

Joe Nixon is mentally retarded and suffers from organic personality disorder. See Resume of Neurological Evaluation Re: Joe Elton Nixon, prepared by Henry L. Dee, Ph.D., October 6, 1993 (3.850 R. 719-26; A-133-40) (the "Dee Report"); Summary of Standard Test Results, prepared by Denis William Keyes, Ph.D., September 25, 1993 (3.850 R. 731-40; A-144-53) (the "Keyes Report"); Report of Alec J. Whyte, M.D., October 6, 1993 (3.850 R. 747-63; A-159-75) (the "Whyte Report").

Nixon's mental instability became apparent at least five months before the Bickner murder trial when, on February 12, 1985, he stood trial on an unrelated assault charge before Judge Hall, the same Judge who would try the murder case, and with the same counsel on each side. See R. 899. At that trial, Nixon's actions prompted questions about his competency. Mr. Corin raised the competency of his client. See Transcript of Proceedings held February 12, 1985, A-361-70;16 see also R. 908-10. The Court asked Dr. Carolyn Stimel, a psychologist, to examine Nixon. See A-361(C), 362-65; see also, R. 908-09. Dr. Stimel examined Nixon "during the lunch hour" (R. 910) for about 45 minutes (A-363). She later stated that she had neither performed psychological testing nor made a formal competency evaluation. See Affidavit of Carolyn Stimel, Ph.D.; 3.850 R.716-17; A-315-16. The assault trial proceeded. Assault Tr. 75-76; A-364-65.

About two weeks later, at a February 28, 1985 pre-trial conference in this case, the State Attorney was sufficiently concerned about Nixon's competency that he himself requested a competency determination and volunteered that "the real issue" in the case would "revolve around" Nixon's competency. R. 899. Nixon's defense counsel demurred, saying, "I am not going to waste the time and energy to have a client examined as to competency or insanity when I am not of the professional opinion that that is relevant." R. 900. Later in the same hearing, the State Attorney continued to press for an examination, questioning Nixon's prior behavior in the earlier assault proceedings, to which Judge Hall responded, "Yes. I was seeing enough that made me wonder, too." R. 910.

In May 1985, defense counsel received the following letter from Nixon:

Dear Mr. Corin

About yesterday when we talk about going back to prison I wont to go but don't need to because am my own man and do not run from no one or what I believe in and not going to start at this point in life try to understand what I am saying. you can send me back to prison because you have the law behind you, yes I know this but the bottom line is that I wont to stay right hear and what to left Alone in my cell Alone if not please get off my case if not go to trial by your self with the lies I told about killing Ms. Ann let me tell you what am say.

The bottom line

I hate white people

I am a black African
but you (white dog) or going to kill
me because Am black and kill a white
so call [partly illegible] women but you white people
or killing my people in South African
I don't know them but thay or black
that while I wish you dog would try
to kill me for not going to trial

[illegible]

Mr. Joe African

Send me home back to African - bottom line
3.850 R. 363; A-317 (transcribed verbatim)(emphasis added).

Nixon refused to leave his cell or attend the next hearing on July 8, 1985. R. 916. Defense counsel waived his presence. Nixon declined to attend the July 9, 1985 continuation of the pre-trial hearing, and counsel again waived his presence. R. 943-44.

Nixon attended the first day of jury selection on July 15, 1985. R. 1406. By the next day he was acting out again. He removed his clothes, refused to come to trial, and demanded a black lawyer and a black judge. R. 304-05; A-283-84.

Judge Hall decided to conduct a "hearing" to determine whether Nixon intended to knowingly waive his right to attend trial. The judge and counsel discussed whether to do that with Nixon in the courtroom or at the jail. The judge wanted to hold the hearing in court (R. 322, 330-31), but defense counsel feared that Nixon would act out, thereby aggravating his situation further (R. 331). Even though the judge himself observed that Nixon was "in the holding cell in a considerable state of self-inflicted disarray; clothing, nudity and the like" (R. 328; A-286), at no point was there discussion about assessing Nixon's competency in accord with Pate v. Robinson, 383 U.S. 375 (1966) ("Pate") and applicable Florida rules.

At 10:30 a.m. on July 16, 1985, the trial court, the lawyers, other court personnel, and the court reporter assembled in Nixon's holding cell at the courthouse. R. 333-41; A-288-96. That proceeding is significant and we refer the Court to it. R. 333-41; A. 288-96. Nixon was barely dressed, sat on the toilet, kept his back to the Judge, said he did not want to attend the trial, said he wanted another lawyer, said he did not care about the case, laughed, whistled, and continued to act irrationally. Id. In the face of this bizarre behavior neither the Court, the State nor defense counsel inquired about Nixon's competency to stand trial, nor ordered a medical examination.

Directly after the holding cell proceeding, the Circuit Court took testimony from Deputy George Granger, the transport driver in charge of moving Nixon from the jail to the courthouse. R. 341-46; A-296-301. Granger testified that Nixon had torn off his clothes and had been given jail-issued clothing to wear. R. 342; A-297. Nixon threatened to take off those clothes as well, "so that the newsmen could get a real good picture of him." R. 343; A-298. Granger also reported that Nixon had said that he had no attorney, that he wanted a black attorney, and that he wanted to go back to the jail. R. 344; A-299. Then Nixon ripped off his new clothes. Id. Although Granger had successfully dealt with Nixon before, this time he could not get him to put his clothes back on (R. 344-45; A-299-300); and though Nixon had suggested that he would return to court after lunch on July 16, he did not do so (R. 352). That afternoon, Granger testified that, when he had gone to take Nixon to court, Nixon hid under his blanket and refused to leave the cell. R. 354-55; A-303-04. The judge ruled that Nixon had voluntarily waived his right to attend his trial. R. 356-57.

On July 17, Nixon again stayed in his cell. Deputy Granger testified that, as before, Nixon hid under his blanket and would not move. R. 1412-13. The same thing occurred the next day. R. 1826. On July 19, the second day of trial, Nixon was brought to the courthouse and became agitated, refusing to leave the holding cell and shouting so loudly that he was heard in the courtroom. R. 1990, 1993. The trial judge questioned Captain Howard Schleich, of the Leon County Sheriff's Department, who confirmed Nixon's bizarre actions and adamant refusal to leave the holding cell. R. 1994-95. By this point, Judge Hall had become sufficiently concerned about Nixon's behavior that he did not want the jury to see or hear it; he said, "I don't intend to bring the jury in until after the Bailiff's Unit advises that Mr. Nixon is in the elevator and on his way out. I don't want them to be influenced in any way by what they see or hear. I will keep the jury isolated until Mr. Nixon is removed." R. 1997.

Nixon did not come to court on July 22, the last day of the guilt phase of the trial, but by then there was no longer any testimony about his absence. The next and final reference to the subject occurred on the second day of the penalty phase, when the State asked Sergeant Burl Peacock, the Bailiff, if he had brought Nixon to the Court holding area. Peacock testified that, when Nixon learned that the sentencing phase was still taking place, he said "Well, what in the hell am I doing here then? . . . I don't want to be up there." So Peacock returned Nixon to the jail. R. 976-77.

In sum, the entire guilt and penalty phase of Joe Nixon's trial took place in his absence. At no point did the court or defense counsel question Nixon's competency or invoke the requisite Florida procedures.

III. SUMMARY OF ARGUMENT

This Court has already declared the law of this case: Nixon is entitled to a new trial unless he affirmatively consented to his lawyer's concession of guilt. Three evidentiary

hearings have shown that he did not, and Judge Ferris made that finding. She refused, however, to apply this Court's legal ruling. Her denial of a new trial must accordingly be reversed.

If this Court goes on to consider the issues it previously held in abeyance, it should reject the major premise of the 3.850 court -- that any legal errors in this trial made no difference because the prosecution's case was "overwhelming." The errors here -- ineffective counsel, trial of an incompetent defendant, an inherently unreliable confession, and non-disclosure by the government of exculpatory evidence -- had serious consequences. The State's case had a facade of strength only because of those errors.

Michael Corin, Joe Nixon's trial lawyer, conceded the case to the State. We concede some, but not all, of the circumstances of that case; but we will show that Joe Nixon lacked the intellectual and emotional ability to participate in his trial or to authorize his lawyer to choose any strategy, much less a strategy of concession. We will show that Joe Nixon lacked the intellectual and emotional resources to understand his Miranda rights or to make a coherent confession. We will show, based upon evidence available at the time of the trial but not produced by the State or identified or used by trial counsel, and based upon new evidence, that Nixon acted under extreme emotional disturbance or was insane, that counsel could have raised a reasonable doubt that he may not have acted alone, and, perhaps, did not commit the crime. Finally, we will show that there was considerable evidence in mitigation of a death sentence that counsel could have put forward, but did not, and that the evidence he did adduce at the penalty phase gravely hurt, not helped, his client. Nor did the state comply with its obligations under Ake v. Oklahoma, 470 U.S. 68 (1985) to provide the defense with competent psychiatric assistance.

Except with respect to the concession of guilt, Nixon's claims of ineffective assistance of counsel and governmental misconduct require a hearing on the merits. By denying relief without even holding that hearing, which this Court's 1990 decision required, the 3.850 court failed to develop a record sufficient for this Court to determine whether Joe Nixon's constitutional rights were violated when his lawyer failed to pursue various defenses available to him, and when the State wrongfully withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1967) ("Brady"), and Giglio v. United States, 405 U.S. 150 (1972) ("Giglio"). It also wrongly cut off an inquiry into Nixon's claims that his trial was tainted by racial discrimination and the use or invalid prior convictions in aggravation.

The 3.850 court essentially concluded that Nixon suffered no prejudice, mainly because of his confession and other evidence presented against him. The conclusion is wrong because there is a reasonable probability that the outcome would have been different - at either the guilt or penalty phase, or both - but for the constitutional

violations.

The 3.850 court held the competency claims procedurally barred. This ruling was wrong because the claim is fundamental, jurisdictional and can be raised at any time, and because this Court has in fact heard such claims in many post-conviction proceedings.17 On the merits, the record plainly shows that Joe Nixon, a mentally retarded man with organic personality disorder, patently acting out throughout the proceedings and refusing to attend the trial on most days, was tried without any determination of his competency, in violation of Pate and Florida law, and tried while he was incompetent, in violation of Drope v. Missouri, 420 U.S. 162 (1975) ("Drope").

IV. ARGUMENT

POINT I

Joe Nixon Is Entitled To A New Trial Under This Court's Controlling Decision In Nixon v. Singletary

Two years ago, this Court held in Joe Nixon's case that:

Because [his] counsel's comments [to the jury] were the functional equivalent of a guilty plea, . . . Nixon's claim must prevail at the evidentiary hearing [ordered to be held] below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough.

Nixon II, at 624. This was no lightly considered decision. It was rendered over two dissents and rested on the finding that several basic state and federal constitutional rights would be flouted18 if, without Nixon's express assent, his lawyer were permitted to concede his guilt at the very outset of the trial, before the prosecution had even begun to shoulder its burden of proof.19 As then Chief Justice Harding explained in his concurring opinion for three members of the Court:

If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.20

The holding in Nixon II that "[s]ilent acquiescence is not enough" (758 So. 2d at 624) to waive these constitutional rights constitutes the law of the case, regularly due to be "followed in subsequent proceedings, both in the lower and the appellate courts." Brunner Enters., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984). It was entitled to respect by the Circuit Court below, to which Nixon's case was remanded with the direction to "hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt," 758 So. 2d at 625.

This Court told the Circuit Court specifically that consent could not be found without "an affirmative, explicit acceptance by Nixon of counsel's strategy." Id. at 624.
On remand, the Circuit Court declared that these requirements for a finding of consent were unrealistic and refused to follow them.21 Nonetheless, the Circuit Court's subsidiary findings confirm that it was forced to conclude from the evidence that Nixon never gave his affirmative, explicit consent to his lawyer conceding guilt.22
On this record, that conclusion is inescapable. At the hearing below, Nixon's trial lawyer, Michael Corin, stated repeatedly that Nixon did not affirmatively or explicitly assent to the concession of guilt. On direct examination, Corin testified:

Q. Now, did you explain that strategy [to concede guilt] to Mr. Nixon?

A. Yes, sir.

Q. And did he affirmatively consent to that strategy?

A. My best recollection would be consistent with, I think, the testimony I gave in a hearing in 1988. And there is a transcript of that hearing. And if he - he didn't sign a waiver. He didn't sign an acknowledgment, and my best recollection is he did nothing.

Q. Did he affirmatively consent?

A. Did he say, yes, sir, go for it, that's the way I want you to do the case? No, sir, he did not.

THE COURT: I'm sorry. Mr. Corin, what was your answer?

THE WITNESS: Did he affirmatively say, yes, that's what I want you to do, go for it? He did not do that.

May 11, 2001 Hearing Transcript at 40 (emphasis added) SR4. 426.23 Throughout an extensive cross-examination Mr. Corin reiterated exactly the same thing. For example:

Q. Did you discuss the strategy of not contesting guilt with the defendant?

A. I thought I answered it. But if I didn't answer it, then, yes, he was advised as to that, yes.

Q. And how did he respond?

A. To the best of my knowledge, again, he did nothing, except after it occurred then he was not real pleased. And I think I answered that before also.

Q. Now, what do you mean by he did nothing?

A. He did nothing. I don't know. I don't know what else I can say, Mr. Evans. I have said it before.

Q. Did you talk to him about the strategy more than one time?

A. I believe I did.

Q. And what was his response the other times?

A. I believe, again, he did nothing.

May 11, 2001 Hearing Transcript at 62-63 (emphasis added); SR4. 448-49.

So clear was the evidence on this point that the State made no attempt to argue in the Circuit Court that there was any basis for finding an affirmative, explicit assent by Nixon to Mr. Corin's concessions. Instead, the State urged the Circuit Court to disregard this Court's "affirmative, explicit" waiver standard as legally incorrect. And the Circuit Court did so, albeit in a more indirect way than the State suggested.

We will discuss shortly both the ground on which the Circuit Court departed from Nixon II and the ground on which the State urged it to do so. But, before taking up each of those separate efforts to circumvent Nixon II, we note a more basic point that puts both of them beyond the pale of propriety. Nixon II constitutes the law of the case, and there is no justification for upsetting it.

Under the "law of the case" doctrine "all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice." Henry v. State, 649 So. 2d 1361, 1364-65 (Fla. 1995). As this Court held in its leading modern case on the subject:

[A]n exception to the general rule binding the parties to "the law of the case" at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons - and always, of course, only where "manifest injustice" will result from a strict and rigid adherence to the rule.

Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965). Here, there are no "changes in the evidence,"24 no "exceptional circumstances," and no conceivable "manifest injustice."

The Circuit Court faulted this Court's Nixon II requirement of an "affirmative, explicit acceptance by Nixon of counsel's strategy" (758 So. 2d at 624) as based upon an "unrealistic construct," at odds with "a . . . true understanding of the realities of representing criminal defendants." To be realistic, it concluded, "the fact that Mr. Nixon did not provide counsel with an affirmative, explicit consent in words . . . does not mean that it was not given."25 But the Nixon II standard for a criminal defendant's waiver of the right to contest guilt does not rest upon factual speculation about the way in which defendants customarily express themselves. It rests, instead, upon legal analysis of the way in which a decision to forgo trial on the issue of guilt must be expressed in order to be constitutionally effective. And that analysis was not a novelty of Nixon II, as the Circuit Court thought. It was drawn directly from Koenig v. State, 597 So. 2d 256, 258 (Fla. 1992), which laid down the basic rule that explicit inquiry and an "affirmative showing" of intelligent consent must appear in the record to support a defendant's waiver of the right to put the prosecution to its proof of guilt.

The facts of Koenig explain why Nixon II found it controlling. After conferring with his lawyer, Koenig "signed a form which described in detail the rights he was waiving"

by pleading nolo contendere. 597 So. 2d at 258. Before accepting Koenig's plea, the trial judge asked whether "he had discussed this with his attorney," and Koenig replied that he had. Id. The trial judge also asked him "if he understood that he was waiving "certain rights" but gave him no further explanation of those rights. Id. This Court held such proceedings insufficient to satisfy "[d]ue process [which] requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." Id. Koenig thus decided that all the elements of a constitutionally valid waiver of the right to trial must affirmatively appear in the record and that the defendant - not the attorney - must be the one to make them explicit.

The Florida cases in keeping with Koenig are legion.26 And the same twin teachings - that, to be effective, a waiver must be explicit and must be made by the defendant personally - are also the gist of the several cases from other jurisdictions that Nixon II cited in holding that the Koenig rule applies as much to a defense attorney's concession of the defendant's guilt in jury argument as to a formal plea of guilty or no contest.27 In short, the Circuit Court's bald rejection of the constitutional underpinnings and the plain holding of Nixon II on the ground of its own superior "understanding of the realities of representing criminal defendants" is unjustifiable.

For its part, the State argued in the Circuit Court that the correctness of this Court's decision in Nixon II is "still subject to re-adjudication" and that "[t]his is particularly the case because subsequent to the decision of the Florida Supreme Court, the Supreme Court of Washington . . . reached a conclusion contrary to the Florida Supreme Court," and the Eleventh Circuit affirmed a decision of a federal district court (reported before Nixon II) refusing to find ineffective assistance of counsel in a similar case.28 The cases cited by the State fall short of its description of them;29 but even if they matched that description, they would not justify "re-adjudicating" Nixon II.

Before as well as after Nixon II, other courts have divided on the issues that this Court debated and decided in its Nixon II opinion.30 The division reflects a conceptual disagreement about what is centrally at stake in these cases - whether it is simply a matter of attorney's trial tactics or whether it implicates, far more basically, the right of a criminal defendant to insist upon putting the prosecution to its proof in a jury trial of the question of guilt.31 This Court advisedly chose to take the latter view in Nixon II, and nothing has occurred since then which calls that choice into doubt, let alone constitutes the kind of "exceptional circumstance," demonstrating "manifest injustice," that will warrant upsetting the law of the case established in Nixon II.

We can assume it would be otherwise if the Nixon II decision rested exclusively on federal constitutional law and if the federal caselaw addressing the specific question decided in Nixon II later changed markedly. But Nixon II rested as much upon the basic Florida due process right to contest guilt in an adversarial trial on a plea of not

guilty as upon any federal constitutional basis.32 So, unless the constitutional law of Florida pertaining to these fundamental rights has changed during the past two years - as, of course, it has not - a decent respect for the primacy of Florida's Constitution compels adherence to the rules set down in Nixon II.33 This is all the more appropriate in light of the manifest relationship between the vision of the Florida Declaration of Rights that informed the announcement of the primacy principle itself in Traylor v. State, 596 So. 2d 957 (Fla. 1992), and the core of rights at risk in Nixon's case, which, as Justice Harding noted, comprise "the very fabric from which our justice system was woven:" the right to "have a fair trial," the right to "have effective representation," the right to be "seen as innocent until proven guilty," and the right to hold the government "to its burden of establishing its case beyond a reasonable doubt."34 In Traylor, this Court recognized that:

No other broad formulation of legal principles, whether state or federal, provides more protection from government overreaching or a richer environment for self-reliance and individualism than does this "stalwart set of basic principles."

* * *

Special vigilance is required where the fundamental rights of Florida citizens suspected of wrongdoing are concerned, for here society has a strong natural inclination to relinquish incrementally the hard-won and stoutly defended freedoms enumerated in our Declaration in its effort to preserve public order. Each law-abiding member of society is inclined to strike out at crime reflexively by constricting the constitutional rights of all citizens in order to limit those of the suspect - each is inclined to give up a degree of his or her own protection from government intrusion in order to permit greater intrusion into the life of the suspect. The framers of our Constitution, however, deliberately rejected the short-term solution in favor of a fairer, more structured system of criminal justice:

" . . . Under our system of constitutional government, the State should not set the example of violating fundamental rights guaranteed by the Constitution to all citizens in order to obtain a conviction."

Traylor, 596 So. 2d at 963-64.

In Nixon's case the Circuit Court below was unfortunately swayed by the powerful temptation to "strike out at crime reflexively" and was thereby led to set aside the legal rules which this Court announced in Nixon II to protect the fundamental rights of every accused person to insist upon a trial at which the prosecution must prove his or her guilt to a jury beyond a reasonable doubt. The Nixon II decision held unequivocally that Nixon could not be stripped of these rights unless he personally waived them by affirmatively and explicitly assenting to his lawyer's concession of his guilt as the starting point for his trial. This Court should now enforce that legal rule and give Nixon the new trial to which he is entitled to on the undisputed facts in this record.35

POINT II

Joe Nixon Was Denied His Rights Not To Be Tried
While Mentally Incompetent

We refer the Court to the substantive discussion of this claim in the 3.850 Motion (3.850 Motion at 6-38; 3.850 R. 411-43) and to the fact statement above for the details demonstrating the profound extent to which Joe Nixon's mental problems rendered him unable to participate meaningfully in his trial. To summarize:

* Joe Nixon is mentally retarded, he is not "borderline."36 See Dee Report, 3.850 R. 719-26; A-133-40; Keyes Report, 3.850 R. 731-40; A-144-53; Whyte Report, 3.850 R. 747-63; A-159-75.
* Nixon has organic personality disorder (brain tissue damage). See Dee Report at 6, A-138; Keyes Report at 7, A-150; Whyte Report at 2,4-6; A-160, 162-64.
* Counsel on both sides had concerns about Nixon's competency as early as February 1985, five months before the Bickner murder trial. See 3.850 Motion at 12-13; 3.850 R. 417-18. The State Attorney volunteered that "the real issue" in the case would "revolve around" Nixon's competency. R. 899. Even Nixon's trial counsel said that his client didn't "fit the usual criteria of somebody who is fully competent." R. 813.
* In February 1985, the Assistant State Attorney questioned Nixon's competency and requested a mental examination, which the Circuit Court erroneously refused to order.
* In May 1985, two months before the trial, Nixon wrote an incoherent letter to his lawyer demonstrating a severe mental imbalance. See 3.850 R. 363; A-317.
* As trial approached, Nixon's mental condition worsened. He removed his clothing, refused to leave his cell, and refused to attend the trial. See e.g. R. 328, 342-46.
* At a hearing held by the Court in Nixon's jail cell, Nixon was barely dressed, sat on the toilet, kept his back to the Judge, said he did not want to attend the trial, said he wanted another lawyer, laughed, whistled, and continued to act strangely and irrationally. See R. 333-41; A-288-96.
* Thereafter, Nixon continued to refuse to attend his trial. The deputy sheriff would usually find him hiding in his bed under his sheet. See R. 354-55; A-303-04.

As clear as the record is about Joe Nixon's incompetency, the relevant law is equally clear: "The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1974) (citing Pate v. Robinson, 383 U.S. 375 (1966)). Accord Dusky v. United States, 362 U.S. 402 (1960); Bishop v. United States, 350 U.S. 961 (1956). See also Riggins v. Nevada, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring).

The constitutional protection against trial while incompetent is as old as English common law and derives from the fact that a mental incompetent cannot cooperate

with counsel in such crucial elements of a criminal trial as preparing and presenting the case, confronting and cross-examining witnesses, and testifying on his own behalf or making an informed decision not to testify. Drope, 420 U.S. at 171. Art. I, º16, Fla. Const. provides similar due process protection. Even if the State has procedures sufficient on their face to protect the defendant's right not to be tried while incompetent, it violates the defendant's constitutional rights if it fails to follow those procedures. Drope, 420 U.S. at 172-73; Pate, 383 U.S. at 385-86.

Because the requirement of competency is basic and fundamental to due process, a duty of inquiry rests with the trial court. See e.g. Pate, 383 U.S. at 385; Watts v. Singletary, 87 F.3d 1282, 1286-87 (11th Cir. 1996) ("Pate established that a criminal defendant's due process rights are presumptively violated when a state trial court fails to conduct, on its own initiative, a competency hearing in the face of sufficient doubt about the defendant's competency."). Accord Robertson v. State, 699 So. 2d 1343, 1346 (Fla. 1997) ("Florida Rule of Criminal Procedure 3.210(b) requires the trial court to order a competency hearing on its own motion whenever it has reasonable ground to believe that the defendant is not mentally competent to proceed"); Hill v. State, 473 So. 2d 1253, 1259 (Fla. 1985) ; Lane v. State, 388 So. 2d 1022 (Fla. 1980) (the trial court has the responsibility to conduct a hearing to determine competency to stand trial whenever it reasonably appears necessary); Calloway v. State, 651 So. 2d 752 (Fla. 1st DCA 1995) (on the initiative of the court, defendant was entitled to a competency hearing because of history of seizures and brain damage).37

The proper standard for determining if a competency hearing is needed is whether there are reasonable grounds to believe that a defendant may be incompetent, not whether he actually is incompetent. Tingle v. State, 536 So. 2d 202 (Fla. 1988); Scott v. State, 420 So. 2d 595 (Fla. 1982); Finkelstein v. State, 574 So. 2d 1164, 1168-69 (Fla. 4th DCA 1991); Unruh v. State, 560 So. 2d 266 (Fla. 1st DCA 1990); Walker v. State, 384 So. 2d 730 (Fla. 4th DCA 1980). See also Hill v. State, supra.

Competency may be raised at any time -- before, during or after trial. Lane, 388 So.2d at 1025; State ex rel. Deeb v. Fabisinski, 152 So. 207, 211 (Fla. 1933). See also Sochor v. State, 580 So. 2d 595, 601 (Fla. 1991) ("Fundamental error occurs in cases 'where a jurisdictional error appears or where the interests of justice present a compelling demand for its application'" [sic]) (quoting Ray v. State, 403 So. 2d 956, 960 (Fla. 1981)); Hipp v. State, 650 So. 2d 91, 92 (Fla. 4th DCA 1995) (errors amounting to a due process violation can be raised for the first time in a post-conviction proceeding). For this reason, the 3.850 court erred in finding the competency claim procedurally barred. See note 57 above and discussion in the 1998 Petition for a Writ of Habeas Corpus, at 4. Nor may an incompetent defendant "waive" his right to a competency hearing. Pate, 383 U.S. at 384 ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently

'waive' his right to have the court determine his capacity to stand trial"); Cooper v. Oklahoma, 517 U.S. 348, 354 n.4 (1996) ("Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination") (emphasis added). Accord Bundy v. Dugger, 816 F.2d 564, 567-68 (11th Cir. 1987), cert. denied, 484 U.S. 870 (1987); Bruce v. Estelle, 483 F.2d 1031, 1037 (5th Cir. 1973); Kiebert v. Peyton, 383 F.2d 566, 569 (4th Cir. 1967).

Once a court finds a violation of Pate and Drope, a new trial is presumptively in order, in light of the obstacles to engaging in a retrospective review of the defendant's competency at the time of the original trial. Drope, 420 U.S. at 183; Pate, 383 U.S. at 387:

[T]his type of competency hearing to determine whether Hill was competent at the time he was tried cannot be held retroactively, because, as was stated in Drope, "a defendant's due process rights would not be adequately protected" under this type of procedure. Such a hearing should be conducted contemporaneously with the trial.

Hill v. State, 473 So. 2d at 1259 (citations omitted). Thus, for example, in Jones v. State, 740 So. 2d 520, 523 (Fla. 1999), this Court found that a twelve year delay between a potential retrospective competency hearing and the initial trial prevented any retrospective determination of the defendant's competency at his initial trial. "[T]he chances of conducting a meaningful retrospective competency hearing decrease when experts must rely on a cold record. . . . [The] appellant's due process rights were impacted by the twelve year delay in holding the competency hearing."38

At minimum, even if Nixon was not entitled to a competency hearing in 1985, his present proffer of evidence that he was incompetent requires a hearing to determine (a) whether a reliable evaluation of his 1985 mental status can now be made, and (b) if not, whether he was competent at the time of trial. Drope; Cooper; Mason v. State, 489 So. 2d 734 (Fla. 1986).

Joe Nixon's rights were thus violated in two ways. First, as a matter of procedural due process, he was tried contrary to Florida's own rules. Fla. R. Crim. P. 3.210(a) provides:

A person accused of an offense or a violation of probation or community control who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while he is incompetent.

Fla. R. Crim. P. 3.210(b) requires that, if the court, counsel for the defendant, or the State has reasonable grounds to believe a defendant is incompetent at any material stage, the court shall immediately appoint no more than three and no less than two experts to examine the defendant. Fla. R. Crim. P. 3.211 sets out the scope of the experts' examination and report.39 As first set forth in Dusky v. U.S., 362 U.S. at 402, and later codified by Florida statute, they must consider "whether [the defendant]

has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him."40 Accord Mora v. State, 2002 Fla. Lexis 66, 27 Fla. Weekly 591 (Jan. 24, 2002); Hertz v. State, 803 So. 2d 629 (Fla. 2001); Medina v. State, 690 So. 2d 1241, 1254 (Fla. 1997). Fla. R. Crim. P. 3.212 sets the procedure in the competency proceeding and provides for treatment of an incompetent defendant so that he may become competent to stand trial.41

Joe Nixon's behavior, summarized above, detailed in the 3.850 Motion (at 12-38; 3.850 R. 417-43), and manifestly spread upon the trial record in this case (passim), should have brought the Pate-mandated Florida procedures into play; indeed, even the State suggested an examination. See R. 899. Yet not a single element of applicable Florida procedure was utilized to determine whether this defendant met the requirements for competency.

Second, independent of the procedural claim under Pate, Nixon's substantive due process rights were violated when he was tried while incompetent. As the United States Supreme Court observed in Cooper v. Oklahoma, "We have repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.' Nor is the significance of this right open to dispute." 517 U.S. at 354 (citations omitted). Cooper holds that a state may not proceed with a criminal trial after a defendant has demonstrated that he is more likely than not incompetent, and thus reaffirms Pate, Drope, and Riggins -- an unbroken chain of holdings that competency is fundamental to the criminal fact-finding process. For example:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Riggins v. Nevada, 504 U.S. at 139-40 (Kennedy, J. concurring).

In Drope the Supreme Court considered the elements of human behavior that bear upon incompetency:

The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient.

420 U.S. at 180-81 (emphasis added).

Drope and Pate, taken together, provide a striking composite of the instant case. In Drope:

[P]etitioner was absent for a crucial portion of his trial. Petitioner's absence bears on the analysis in two ways: first, it was due to an act which suggests a rather substantial

degree of mental instability contemporaneous with the trial; second, as a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him.

420 U.S. at 180-81 (citations omitted).

In Nixon's case, two of the three elements of incompetency identified in Drope appear plainly on the record: irrational behavior and impaired demeanor. Only prior medical opinion was absent, because the trial court erroneously failed to call for the appropriate examinations. Those overdue examinations uniformly confirm that Nixon was incompetent:

* "[T]he rationally complex and emotionally stressful process of a criminal trial was beyond Joe Nixon's competence to comprehend or to effectively cooperate in. His primitive avoidance and other bizarre behaviors and attitudes were simple testimony to his incompetence. To construe them as representing a well thought out and carefully implemented strategy is a pathetic misperception." Whyte Report, at 14-15; A-172-73.

* "Given the fact that Joe Nixon has defective intellect, clear maladaptive behavior, and a history of 'creating fantasy situations,' one must wonder as to how the diagnosis of 'competent' was determined." Keyes Report, at 8; A-151.

* "Although a retroactive determination of competency is difficult for mental health practitioners, the case of Mr. Nixon provides a relatively uncomplicated picture of a profoundly disturbed and incompetent individual." Dee Report, at 7; A-139.

With these reports, all three elements of incompetency set out in Drope fall into place: irrational behavior, impaired demeanor, and expert opinion. It would be hard to envision a record more probative of mental incompetency than this one, yet despite concerns expressed even by the prosecutor five months before trial, the trial court did not order the mental examinations and reports required by Pate and the applicable Florida Rules. Now, to redress this error this Court should order both a new trial and the necessary competency hearing that would precede such a trial. See Jones v. State, 740 So. 2d 520 (Fla. 1999); Hill v. State, 473 So. 2d at 1259.

POINT III

The Sentencing Phase: Instead of Building The Available Case For Life, Counsel Destroyed It.

Nixon's counsel failed in three ways at the penalty phase: (1) he did not introduce available mitigation evidence; (2) the evidence he introduced and his own words devastated his client's case for mercy; and (3) he permitted the State to introduce and argue improper aggravating circumstances. This deficient performance prejudiced

Nixon because available evidence would have guided the jury towards leniency.

A. Counsel's Deficiencies

At the penalty phase, Nixon's lawyer laid the groundwork for a death sentence by adding to his concession of guilt the characterization that Jeanne Bickner "died a horrible, horrible death. Surely she did . . . ." R. 1852. The prosecutor quoted defense counsel's description of Bickner's death and used Nixon's lawyer's own statements to show that there was no doubt about guilt. R. 646-47, 649. By emphasizing the atrociousness of the killing, counsel assisted the State on two statutory aggravating factors, "premeditation" and "especially heinous."

Nixon's counsel did nothing in the guilt phase to prepare the jury to consider a case for life. He then presented no meaningful case for life at the penalty phase; in fact, he did the opposite. Counsel did not emphasize to the jury the importance of its role in sentencing; instead, he accentuated the advisory nature of its duty and failed to object when the prosecutor told the jurors: "[y]ou are not responsible for the penalty in any way because of your verdict." R. 692-93 (emphasis added). But see Caldwell v. Mississippi, 472 U.S. 320, 336 (1985) (Holding that federal due process precludes prosecutor from diminishing jury's sense of responsibility for the sentence); Pait v. State, 112 So. 2d 380 (Fla. 1959) (Holding this argument improper under Florida law).

Just before the penalty phase, defense counsel conceded, in statutory language, that "I will not now nor have I ever argued that this offense is not especially heinous, atrocious and cruel... manifestly spread upon the record before this jury . . . . This is a totally uncontested aggravated circumstance." R. 743.

At the penalty hearing, counsel submitted, en masse and without explanation, 51 exhibits thoroughly documenting Nixon's criminal record. The exhibits included convictions that the State could not use as aggravating factors, e.g. Defendant's Exhibit 31, a February 20, 1976 Memorandum from the Dozier School for Boys, which remarked, "Two of the commitments to Dozier have been for Capital crimes (Arson)." This evidence, submitted by the defense, gave the completely false impression that Nixon had already committed a capital crime.

Consider also the following comments by Nixon's own lawyer:

* "Each one of us has a job that we have to perform. The fact that I represent Joe Elton Nixon does not mean that I don't have normal human feelings." R. 1019.
* "He [Nixon] would certainly have done something to lead them [the mental health experts] to believe that he was a worthwhile human being. Which they pretty much conclude he's not." R. 1025.
* Defendant is perhaps a "devious person, with no responsibility," who did a "horrible deal." R. 1027.
* "[P]erhaps he is totally unremorseful . . . . I can't explain it." R. 1031.
* "Why should we recommend life, because all he's ever done is harm other people?

He's obviously liable to harm somebody in the prison system . . . . 'If we give him his life, he might hurt someone else.' Well, I can't say that he will, and I can't say that he won't." R. 1037-38.

* [T]his case is "something that probably no jurors have ever seen in a case such as this, about a lawyer's client." R. 1038-39.

After demonizing his client, counsel next adduced evidence that destroyed any remaining chance for life. Both defense mental health witnesses were a disaster that counsel's examination only amplified. The first witness, Dr. Ekwall, opined that defendant was not psychotic or suffering from any serious mental illness, but simply "different," that his principal motivation was revenge, that he lacked remorsefulness and was untreatable and dangerous. Dr. Ekwall found no psychotic or neurotic illness and stated that Nixon was competent. R. 804, 811. He believed that Nixon's intelligence is "on the low side of normal, but it's adequate." R. 802. When Dr. Ekwall observed that Nixon told different stories, counsel followed with the question, "life-long history of lying?" Dr. Ekwall replied, "Yes." R. 801. Dr. Ekwall testified that Nixon had an antisocial personality disorder and was not a "very good risk for society." R. 810, 812. At the same time, Dr. Ekwall admitted that "I'm still at a loss to really fully understand his behavior . . . ." R. 811. "It's been a very confusing case psychologically and neurologically." R. 814.

Dr. Doerman testified, also for the defense, that Nixon had a "personality disturbance." R. 824. "I think revenge is a primary factor in the way he operates." R. 825. This witness found Nixon to have brain damage, though just "barely." R. 818-19.

Q. You find him to be an unremorseful person.

A. Precisely

Q. Is any of this treatable?

A. I don't have much hope for remediation . . . . [M]any people have tried to work with him . . . . without much success.

Q. You would conclude he is a dangerous person?

A. Yes.

All of this was on the defense's direct examination. R. 822-23.

Future dangerousness is not an aggravating factor. Remorse is a non-statutory mitigating factor, but lack of remorse is not a statutory aggravator; the prosecution may not argue that a defendant is unremorseful. Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983). Thus, Nixon's lawyer introduced two more impermissible aggravating factors.

Defense penalty phase witnesses failed to encourage understanding or mercy. R. 764-792. In three pages of testimony, Nixon's mother said that she reluctantly appeared in court and that her son had "problems in school" and "didn't seem

normal." R. 765-66. Wanda Robinson's testimony offered little more than that Nixon may have had a fight with his girlfriend. R. 768-76. Law enforcement testimony confirmed only that Nixon was calm.42

The numerous defense exhibits helped only the State, not Nixon:

* Nixon "feels little genuine remorse, is not completely convinced that what he did was wrong [breaking and entering an elementary school]." Exhibit 7, p. 2.
* Nixon is a habitual offender who does not learn from his mistakes. Exhibits 7, 26 and 45.
* Nixon has no serious psychological problem, he is just delinquent. Exhibits 3, 4, 7 and 8.
* No "organic maladjustments" have been found; "he was just a young boy who seemed to have a lot of anger and resentment in his past and he did not appear to be psychotic;" he "knows right from wrong." Exhibit 8, pp. 2-3.
* Exhibits 37, 40, 42, 44, 45, and 46 detail Nixon's extensive delinquency and criminal history and propensity, including that "during the defendant's juvenile commitments, he was a problem." See e.g. Exhibit 44, p. 3.

At sentencing, with no defense objection, the State asked the trial court to "consider the Defendant's prior history of criminal misconduct . . . . The Defendant's history shows that he cannot be rehabilitated. The public needs to be protected from further criminal acts by the Defendant." R. 286.43 The prosecutor thus utilized three non-statutory aggravators, which Nixon's lawyer himself developed. Defense counsel made no counter-argument for mercy. Instead, he made the condemning statement that: "[i]n my heart I wish the Court to do what I had requested [give a life sentence] . . . . . In my mind, I don't think it will be possible." R. 286-287.

The evidence that trial counsel submitted, his arguments, and his comments about Nixon were not likely to save defendant's life; instead, they dehumanized him and assisted the State in obtaining a death sentence.

B. Counsel Failed To Collect and Present Compelling Mitigation Evidence That Was Available

Nixon's childhood history is a powerful but missing mitigator. Trial counsel had before him documents and deposition testimony indicating solid mitigating evidence.44 Indeed, counsel mused aloud in his closing that there was likely "some organic problem in the family." R. 1032. Even though counsel knew of Nixon's background of poverty and childhood abuse, he did not investigate. Adequate background investigation is counsel's fundamental duty at the penalty phase of a capital trial.45 The failure to investigate caused double harm. It robbed Nixon of mitigation evidence and denied to the experts background data necessary to evaluate him properly.

The record now shows many witnesses46 who were available to testify:

(1) Nixon was a neglected and severely abused child;

(2) Nixon was likely poisoned by pesticides as an infant;
(3) Nixon, as an infant, was scalded when he fell into a tub of boiled water;
(4) Nixon received little attention at home except for whippings; he was beaten by his father frequently with belts, extension cords, switches, ropes, fan belts, sticks, and "whatever came to hand";
(5) Nixon was often tied up for the beatings;
(6) Nixon was beaten by his mother and beaten by other relatives and at school and in jail;
(7) Nixon was slow and heard voices and saw things that did not exist;
(8) Nixon's family was poor and food was scarce, yet what little they had sometimes was withheld by his mother as punishment;
(9) Nixon, as a child, was put outside at night as punishment despite his terror of the dark; Nixon saw disembodied eyes in the dark;
(10) Nixon was subjected to the most brutal and disgusting sexual abuse not once or several times but frequently over many years, beginning when he was seven years old and continuing until he was a teenager;
(11) Nixon's brother and uncle told others of his being used sexually, taunted him and dressed him as a girl to parade him around the neighborhood; he was tormented and teased constantly by other children in the neighborhood;
(12) Nixon was and is subject to severe mood changes, from quiet and gentle to angry and agitated without any discernible reason;
(13) Nixon's mother drank heavily when pregnant;
(14) Nixon was given alcohol as a child of seven or eight years "to make him act crazy" for other people's entertainment, and he was "always drunk" by age twelve;
(15) With the exception of an older sister, Doris, who left the household as soon as she could because of the sexual abuse practiced upon her, there was no love for Nixon in his home, even from his mother, who knew of the many severe beatings, inflicted some of them herself, knew of the sexual batteries and did nothing about them, and who joined his father and others in heaping verbal abuse on Nixon, calling him "stupid," "no good," "worthless" and "crazy";
(16) Nixon was considered slow by everyone; he could not play and communicate like other children, and he would say he saw things (e.g., a human body with a goat's head) and people who did not exist;
(17) Other children teased him for being "stupid";
(18) Nixon tried to kill himself by hanging in a tree;
(19) Nixon was hospitalized for two weeks after being hit on the head with a lead pipe while he was in jail; he also hit his head and lost consciousness on two other occasions;
(20) Nixon was seen as being drunk and "beside himself" by several witnesses during

a period of two days before the crime and the day afterwards;
(21) While awaiting trial in this case, Nixon would carry on conversations in his cell as if there was someone with him.
3.850 Motion at 138-55; 3.850 R. 543-60.
The evidence proffered also shows that Nixon was regarded as gentle, kind and protective, that he helped his mother with his earnings, and that he had a generally good behavior record in detention settings. 3.850 Motion at 95-96, 153; 3.850 R. 500-01, 558.
With competent experts and a full clinical history of Joe Nixon, compelling mitigating mental health evidence would have helped avoid the death penalty. For example, Dr. Dee found that Nixon could neither appreciate the criminality of his conduct nor have premeditated the murder, and that the statutory aggravators "require intention and cognitive abilities unachievable by Mr. Nixon at the relevant time period." Dee Report at 7; 3.850 R. 725; A-139. He also determined that "[i]n addition to the statutory mitigating factors, Nixon's life history, mental retardation, and organic impairments give rise to myriad nonstatutory mitigation. Physical, sexual, and emotional abuse, poverty, lack of support structures, and many of the other experiences endured by this individual are critical to understanding his psychological make-up." Dee Report at 7-8; 3.850 R. 725-26; A-139-40. Dr. Dee's report shows:
The pretrial mental health assessments of Nixon were fundamentally flawed in several ways. They were performed in the absence of crucial background material and life history information, which is a vital component of any forensics exam but is especially critical when mental retardation, cerebral dysfunction, or episodic psychotic disorder are suspected . . . . Some of the most vital facts were unknown by the prior examiners, among them: Mrs. Nixon's alcohol ingestion during pregnancy, the high level of brutality, neglect, and hunger experienced in the Nixon home; the long-term rape and sexual abuse suffered by Joe Nixon; his lifelong adaptive functioning disabilities; and his numerous and longstanding psychotic symptomology. Dee Report, 8; 3.850 R.726; A-140.
Dr. Keyes found that on the Stanford Binet Fourth Edition test battery Nixon consistently functioned below the intellectual cut-off level of mental retardation.47 Dr. Keyes concluded that Nixon is mentally retarded and lacks the cognitive capacity to premeditate the cold, calculated murder of another person:
* "Joe's involvement in this crime cannot be considered heinous, atrocious, or cruel in that he did not possess the intent to inflict a high degree of pain, nor did he derive any pleasure from the crime. . . [D]ue to his cognitive and adaptive impairments, Nixon did not possess the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law." Keyes Report at 9; 3.850 R. 739; A-152.

Dr. Whyte determined that Nixon suffers from moderate48 mental retardation and organic personality syndrome. Whyte Report at 2; 3.850 R. 748; A-160. Dr. Whyte detailed the reasons why Joe Nixon could not have been death-penalty eligible:*

* "A severely impaired mental state played a determining role that day [of the killing] in two crucial ways. First, [the effects of this disorder] rendered Joe Elton Nixon, before, during and after the time of the offense, incapable of rational premeditation and incapable of conforming his conduct to the requirements of the law."
* "[T]he offense can only be understood as the disjointed, purposeless, increasingly panicked and impulsive products of the paranoid decompensation of a grossly impaired mental and volitional capacity . . . .
* "It is inconsistent with the finding contained throughout this report that Mr. Nixon could have performed a homicide in a cold, calculated, highly premeditated fashion . . . .
* "[I]t is my opinion that Mr. Nixon did not intend to inflict a high degree of pain on the victim, . . .
* "[T]he pre-trial psychiatric examination of Dr. Merton L. Ekwall... is, in my opinion, substandard . . . .
* "[As to Dr. Allen L. Doerman], none of this evidence was given anything close to its appropriate diagnostic significance and was essentially dismissed. This dismissal, combined with [other] critical failures... fell below professional standards."
* "In addition, Dr. Ekwall's reliance on an EEG as a diagnostic tool created the false impression that Mr. Nixon suffers no organic impairment."
Whyte Report at 12-17; 3.850 R. 758-763; A-169-75.

The mitigation evidence proffered by Nixon above is neither cumulative nor hypothetical. It is material, solid, and it bespeaks mercy. It was available to trial counsel in 1985, and it remains available today.

C. The Strickland Test Has Been Met.

1. Substandard Performance

This Court has repeatedly granted relief to condemned prisoners whose lawyers failed to develop mitigating evidence of childhood histories and mental deficiencies substantially similar to those of Joe Nixon.49 Capital sentencing must proceed from an individualized assessment of the defendant, whatever the circumstances of the crime. And "a vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person . . . ." Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983), vacated, 468 U.S. 1206, adhered to on remand, 739 F.2d 531, 533 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

In Osborn v. Shillinger, 861 F.2d 612, 628 (10th Cir. 1988), the court found that "Osborn's attorney so abandoned his 'overarching duty to advocate the defendant's cause' that the state proceedings were almost totally nonadversarial." (Citation omitted.) Defense counsel, though an experienced criminal attorney, "made public statements to the effect that Osborn was not amenable to rehabilitation." Id. As here, counsel's arguments in the sentencing proceeding spoke of the overwhelming nature of the evidence against his client and "'stressed the brutality of the crimes and the difficulty his client had presented to him . . . . [c]ounsel described the crimes as horrendous.'" Id. (quoting Osborn v. Schillinger, 639 F. Supp. 610, 617 (D. Wyo. 1986)). In Osborn, the Court of Appeals concluded:

A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction."

861 F.2d at 629 (quoting Faretta v. California, 422 U.S. 806, 821 (1975))50

In this case, the original 3.850 court found that trial counsel had a "strategic theme." October 22 Decision at 10; A-327. But counsel could not develop a "strategic theme," because he had not conducted an investigation necessary to present evidence that would lead to mercy.51 During the penalty phase Mr. Corin complained, "I have an additional problem that I'm operating without a client." R. 742.52

Mr. Corin portrayed Joe Nixon as a vengeful person, a life-long delinquent, a liar, someone likely to be dangerous in the future, even in prison - untreatable and unrepentant. In Clark v. State, 690 So. 2d 1280, 1282-83 (Fla. 1997), the lower court denied 3.850 relief without an evidentiary hearing. This Court reversed:

[Clark's] counsel failed to function reasonably as an effective counsel when he indicated his own doubts or distaste for the case and when he attacked Clark's character and emphasized the seriousness of the crime . . . .

[W]e find that portions of counsel's argument had the effect of encouraging the jury to impose the death penalty . . . . [citation omitted]. Additionally, counsel's attacks on Clark's character and counsel's attempts to distance himself from his client could only have hurt Clark's cause. We find that counsel's . . . . deficient performance was prejudicial to Clark.

2. Prejudice

Under Strickland, 466 U.S. at 693-94, "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case . . . . [T]he appropriate test for prejudice [is] . . . . that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence

in the outcome."53

Had Nixon's jury seen the mitigation evidence his counsel missed, had they not seen the devastating evidence his counsel offered and conceded, and had they not considered improper aggravating circumstances at the instance of the defense, there is at least a reasonable probability that they would have acted differently. Even with counsel's deficient presentation, two jurors voted for life. R. 1053. Jurors respond to circumstances such as those in this case,54 but the jurors in Joe Nixon's case had no opportunity to do so.

POINT IV

Joe Nixon Was Denied A Competent Mental Health Evaluation In Violation of Ake v. Oklahoma.

In addition to violating Nixon's Sixth Amendment rights under Strickland, the mental health experts' inadequate evaluation and presentation violated Nixon's Eighth Amendment rights under Ake v. Oklahoma, 470 U.S. 68 (1985):

[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83 (emphasis added). The Court in Ake noted the "pivotal role" of psychiatry in criminal proceedings, particularly when insanity is a potential defense: "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense . . . . the risk of an inaccurate resolution of sanity issues is extremely high." Id. at 82. Provision of just any mental health expert does not satisfy Ake; the examination provided must also be adequate. State v. Sireci, 536 So. 2d 231, 233 (Fla. 1988). Specifically, the examination must not be so "insufficient [as to] ignore clear indications of either mental retardation or organic brain damage." State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). This standard has been applied in other post-conviction relief cases. See Gorby v. State, No. 95-153, (Fla. Apr. 11, 2002); Jones v. State, 732 So. 2d 313 (Fla. 1999). It was plainly violated here. See pages 138, 150, and 161 of Appendix to Initial Brief of Appellant and Petition for Writ of Habeas Corpus (Psychological Evaluations by Dr. Dee, Dr. Keyes, and Dr. Whyte, showing that Nixon is mentally retarded and has organic brain damage).

Joe Nixon was an obvious candidate for competent Ake assistance because of his anomalous behavior contemporaneous with the crime and during the pre-trial and trial proceedings, which is detailed at 16-22 above. Mental disorder was a logical consideration. But Nixon was never examined by a capable mental health professional,

as required under Florida law and Ake, during either the guilt or penalty phase of his trial. See Fla. R. Crim. P. 3.216(d); Rose v. State, 506 So. 2d 467 (Fla. 1st DCA 1987) (noting that Florida exceeds the Ake standard).

He was thus denied the basic data needed for his defense. The result was a verdict and sentencing reached through an unfair process by a jury wrongly denied critical information.

POINT V

Joe Nixon's Jury Weighed Invalid And Unconstitutionally Vague Aggravating Circumstances In Violation Of James v. State and Jackson v. State.

The trial court instructed the jury to consider two unconstitutionally vague aggravating circumstances: that the crime was "especially wicked, evil, atrocious or cruel"; and that the crime was committed in a "cold, calculated and premeditated" manner. R. 1041-42.

Florida's "especially wicked, evil, atrocious or cruel" jury instruction (see Fla. Std. Jury Instr. (Crim.) (1981)) is unconstitutionally vague. James v. State, 615 So. 2d 668 (Fla. 1993). Cf. Espinosa v. Florida, 505 U.S. 1079 (1992). Florida's "cold, calculated, and premeditated" aggravating factor is invalid for the same reason. Jackson v. State, 648 So. 2d 85 (Fla. 1994).

In Nixon's case, as in James, the jury received no guidance about the "especially wicked" aggravating factor. The trial court simply instructed the jurors, in the language of the then-standard instruction, that they could weigh the aggravating circumstance if they found that the murder was "especially wicked, evil, atrocious or cruel" (R. 1042), the instruction that James held unconstitutionally vague.

Similarly, without explanation or definition, the trial court instructed Nixon's jury in the language of the then-standard instruction on the "cold, calculated" factor: "Fifth: The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification." R. 1042. This instruction was also unconstitutionally vague. Jackson v. State, 648 So. 2d at 90.

James and Jackson represent fundamental changes in Florida law. As such, they are retroactively applicable in post-conviction proceedings. Certainly the changes under James and Jackson reach the level required for retroactive application by Witt v. State, 387 So. 2d 922 (Fla. 1980) (retroactive treatment accorded a change in law (1) emanating from this Court or the United States Supreme Court, (2) constitutional in nature, and (3) of fundamental significance), cert. denied, 449 U.S. 1067 (1980).56

The appropriate analysis is harmless error. James, 615 So. 2d at 669; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Cf. Chapman v. California, 386 U.S. 18

(1967); Stringer v. Black, 503 U.S. 222, 232 (1992) ("When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.").

The nature of both the "especially heinous" aggravator and the "cold, calculated" aggravator make it nearly impossible for the government to carry its burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt.57 This Court must assume that the jury applied and relied on the invalid aggravating circumstances. James, 615 So. 2d at 669. This Court may not guess that the errors "did not contribute to the verdict [of death] obtained," Chapman, 386 U.S. at 24.

While the trial court in this case did not find any mitigation, the record contains evidence that the jury could have relied on to recommend life and that led two jurors to vote for life. Given the statutory and non-statutory mitigating evidence, it cannot be said "[b]eyond a reasonable doubt that the errors complained of did not contribute to the verdict . . . ." Chapman, 386 U.S. at 24. Although inadequate in comparison to what was available, mitigating evidence was introduced at trial. It related to Nixon's history of psychological and emotional problems, "borderline" intelligence, and his alcohol and drug usage at and around the time of the offense. The non-statutory mitigating evidence presented to the jury was surely sufficient to support a life recommendation under Tedder v. State, 322 So. 2d 908 (Fla. 1975). Had the jury been properly instructed and voted for a life sentence, the trial court could not have overridden that recommendation. Id. at 910.

It is no more possible for this Court to determine here that the jury instruction error was harmless than it was in Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991) ("We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor . . . ."), or Hitchcock v. State, 614 So. 2d 483 (Fla. 1993), where this Court directed the trial court to conduct a new penalty proceeding because "[w]e cannot tell what part the [inadequate] instructions played in the jury's consideration of its recommended sentence." 614 So. 2d at 484.

The error in the jury instructions plainly violated both James and Jackson. It was not harmless beyond a reasonable doubt. Nixon is entitled to a new sentencing proceeding before a properly instructed jury.

POINT VI

Joe Nixon Should Have The Opportunity To Prove That Race Discrimination Tainted His Conviction And Death Sentence.

Joe Nixon, a black man, was tried and convicted for killing a white woman in a notorious crime in a small community. The 3.850 Motion details Nixon's claim that race discrimination played a role in his conviction and death sentence. 3.850 R. 667-83. The 3.850 court denied the claim on the merits, stating that Nixon had failed to show purposeful discrimination. October 22 Order at 5; A-322.

The reliance of the 3.850 court on Foster v. State, 614 So. 2d 455 (Fla. 1992), was misplaced. First, Nixon has pled very stark statistical facts that take the case out of the perhaps more questionable statistical analyses in Foster and McCleskey v. Kemp, 481 U.S. 279 (1987). For example, as of the filing of the 3.850 Motion, in no Leon County black-victim case had a jury recommended a death sentence. 3.850 Motion at 264; 3.850 R. 669. Second, Nixon has alleged systemic racial bias across-the-board in Leon County in the provision of municipal and police services. 3.850 Motion at 267; 3.850 R. 672. Nixon should have the opportunity to prove that these allegations demonstrate discrimination under Foster and McCleskey. Alternatively, we would urge the Court to review its decision in Foster and adopt, as a matter of Florida constitutional law, the reasoning of the dissent in that case. See 614 So. 2d at 467-68 (Barkett, C.J., concurring in part and dissenting in part). See also McCleskey, 481 U.S. at 324-25 (Brennan, J., dissenting), and 481 U.S. at 352-53 (Blackmun, J., dissenting).

Finally, the facts of this case -- a black man charged with kidnapping and murdering a white woman -- provide "fertile soil for the seeds of racial prejudice." Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988). The prosecution injected race as an issue throughout the trial. See 3.850 Motion at 272-76; 3.850 R. 677-81. In these special circumstances, Nixon should have the opportunity at a hearing to prove that impermissible racial discrimination tainted his conviction and death sentence.

POINT VII

Joe Nixon Is Entitled To Prove His Claims Under Johnson v. Mississippi.

The 3.850 court refused to consider Nixon's claims, under Johnson v. Mississippi, 486 U.S. 578 (1988), that the two violent prior convictions used as aggravating circumstances lacked validity. The court denied the claim because the convictions have not yet been overturned. See October 22 Order at 6; A-323.

Nixon should be entitled to pursue or remand whatever course (including possible litigation in the Georgia courts) may be appropriate. To date, Nixon has been represented by volunteer counsel. The Volunteer Lawyers Resource Center of Florida, which investigated the case, has closed, and the Collateral Capital Regional Representative has been unable to provide meaningful support. Since Nixon is entitled at a minimum to a hearing on the merits of his 3.850 claims, he should be permitted to

continue to assert his claim under Johnson v. Mississippi pending an opportunity to challenge the prior convictions.58

V.

CONCLUSION

For all of the foregoing reasons, Appellant Joe Elton Nixon respectfully requests that this Court enter an Order:

1. Vacating Nixon's conviction and sentence and ordering a new trial; or
2. Vacating Nixon's sentence and ordering a new sentencing proceeding; or
3. Remanding this case to the Circuit Court for a full evidentiary hearing on all issues raised on this appeal and the accompanying Petition for a Writ of Habeas Corpus; and
4. Directing such other relief as this Court may deem just and proper.

Dated: May 3, 2002

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Appellant has been mailed by first class mail to Eddie M. Evans, Esq. Deputy State Attorney, c/o the Office of the State Attorney for the Second Judicial Circuit, Leon County Courthouse, 4th Floor, Tallahassee, FL 32301, and to Curtis French, Assistant Attorney General, Office of Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, on May 3, 2002.

_____
Jonathan Lang, Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief of Appellant complies with Florida Rule of Appellate Procedure 9.210(a)(2).

Dated: May 3, 2002.

_____
Jonathan Lang, Attorney for Petitioner

1 This brief contains cumulative briefing of all the issues raised by the 3.850 motion and habeas corpus petition previously filed on Mr. Nixon's behalf (the "1998 Habeas Corpus Petition"). An updated (amended) habeas corpus petition is being filed herewith, which contains in it a description of the additional claims asserted.

2 The Court held Nixon's other claims in abeyance. See Nixon II, 758 So. 2d 618,

619, n.1 and 620.

3 We present here three subsets of facts within the larger set of all applicable facts: (1) facts apparent on the record made to date, (2) additional facts available to trial counsel (for example, through depositions, other discovery and witness statements, and reasonable investigation) but not acted upon by him and therefore not in the trial record, and (3) facts proferred in the course of the 3.850 proceedings. All are properly before this Court because sets (1) and (2) are apparent from the record, and set (3) has been pleaded in the 3.850 Motion and must be taken as true for the purposes of this appeal. See Montgomery v. State, 615 So. 2d 226, 228 (Fla. 5th DCA 1993). Cf. McNeal v. Culver, 365 U.S. 109, 117 (1961) ("[T]he allegations [in a Florida state habeas petition] themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are").

4 "She knows me. She knows my name and everything . . . . Well, she just, or something, up on campus, you know, I be up on Florida State or something. I think she was a teacher or something." Confession at 7; A-103.

5 See trial testimony of Mary Atteberry, R. 1867-68, and Linda Gallagher, R. 1871; A-184-85, 188. Still, not only did Nixon steadfastly state that it was a Saturday, John - Nixon and Wanda Robinson - Joe's brother and former girlfriend - initially corroborated this statement. See Statement of John D. Nixon and Wanda Robinson, given August 14, 1984 ("John Nixon-Robinson Statement") at 3-5, 8; A-4-6, 9. Later, John placed the crime on a Sunday. See e.g. Statement of John D. Nixon, given August 16, 1984 ("John Nixon Statement") at 26-27; A-23-24. Over time he still could not get the story quite straight. In his deposition he again stated that Joe never said what day the crime had taken place. Deposition of John Nixon, taken February 14, 1985 ("John Nixon Deposition") at 25; A-38. This discrepancy was apparent both from the record and from discovery materials.

6 The death certificate listed Bickner's occupation as "Personnel Program Analyst, Florida State Government." See State Exh. 15; A-193. John Nixon told the police that Joe "told me he didn't know the woman at all . . . . She was a complete stranger to him." John Nixon Statement at 30; A-27. Wanda Robinson concurred: "I asked him who was it [sic] and he said he didn't know." Robinson statement at 7; A-53. This discrepancy was also obvious both from the record and available facts.

7 See e.g. John Nixon Statement at 17, 19, 28; John Nixon Deposition at 28, Robinson Statement at 7; A-17, 19, 25, 41, 53. In contrast to Nixon's confession specifying the MG, John said that Joe had specified the Monte Carlo:

Q: [T]ell us what he told you [of how the crime happened].

A: I will tell you exactly what he told me. He told me that . . . . out to Governor's Square Mall [he] parked my uncle's green and white Monte Carlo . . . . The lady gave him a boost off and everything and he abducted her and threw her in the trunk of his

car.
Q: The trunk of his car?
A: Uh huh.
John Nixon Statement at 17; A-17.
John said the same thing in his deposition:
Q: Put her in the trunk of what car?
A: In the green and white car.
Q: Your Uncle Tom's Monte Carlo?
A: Uh huh.
8 John Nixon told the police that Joe said he used the Monte Carlo. John Nixon Statement at 17, 19, 28, 37 (implied); John Nixon Deposition at 28; A-17, 19, 25, 28, 41. Wanda Robinson gave identical information. Robinson Statement at 7; Robinson Deposition at 32; A-53, 75. Wanda Robinson said that her mother had seen Joe driving the Monte Carlo, not the MG, past her house, as her children played out in front. Robinson Statement at 7-8; A-53-54. Wanda said that Joe had told her that Bickner was in the trunk of the car at this time. Id. at 7; A-53. The "Monte Carlo account" is more plausible. Joe Nixon knew how to drive the Monte Carlo and an adult would readily fit into its trunk. This account makes more sense than one that assumes that Joe Nixon alone could have both abducted an unwilling victim and coaxed the MG to the crime scene. But any account of Nixon acting alone using the Monte Carlo requires a belief that he, a lone black man, overpowered Bickner, a white woman, and forced her into the Monte Carlo in full view of Sunday afternoon shoppers at the Mall. See John Nixon Statement at 28, Robinson Statement at 6, Robinson Deposition at 31-32; A-25, 52, 74-75. It defies logic, if not experience. However, one or more accomplices could overpower Bickner and put her somewhere in the much larger Monte Carlo. The facts to test this questionable element of Nixon's confession were available to trial counsel.
9 See Directions in Leon County Sheriff's Office Death Investigation Report (August 24, 1984); A-210-11.
10 See "MG Series MGB Specifications," MGB Web Page, http://www.mgcars.org.uk/MGB/mgbspec.html; A-208. Bickner's car was an "M.G.B." See R. 1871; A-188. Photos of the interior of the car show that it had a manual transmission and cramped quarters. See A-201. Bickner's MG probably had even less than four and a half inches of ground clearance. It was over ten years old at the time of the crime and probably had wear on the springs and suspension. Nixon's weight in the car and Bickner's in the trunk, directly over the rear differential and exhaust system, would have brought the car even lower to the ground. Finally, the wheels would have likely slipped into the ruts of the road, bringing the bottom closer to the intervening crown.
11 John Nixon said, "He tried to get the car in reverse. He couldn't hardly get it in

reverse or whatever. He asked me would I show him, help him get it in reverse. I told him just pull it over there and he tried to get it in reverse and the car kept rolling down the hill and he couldn't never get it in reverse." John Nixon Statement at 27-28; A-24-25 (emphasis added). See also John Nixon-Robinson Statement at 21; A-11(A). Nixon was not familiar with the area where body was found. This information was available to trial counsel.

12 John Nixon-Robinson Statement at 4-5; John Nixon Statement at 11-12, 27; John Nixon Deposition at 24, 32; Robinson Statement at 10-12; Robinson Deposition at 26; A-5-6, 15-16, 24, 37, 45, 56-58, 71. The discrepancy was apparent from the discovery.

13 Wanda's suspicion about John suggests alternative theories that could have either exonerated Joe Nixon or diminished his legal responsibility or his eligibility for the death penalty. Robinson also testified that, when she visited Joe in jail before trial, Joe said that John and his friends killed Bickner, and they made him watch. Robinson Deposition at 62-64; A-91-93. Trial counsel thus knew of the possibility that others were involved in the crime and that, possibly, Joe Nixon had not committed it at all. Detective Phillips tried to lead Robinson, by suggesting to her that she had been with John that Saturday and Sunday:

"And he [Detective Phillips] said, 'Wanda, you talking crazy. You need to shut up. You know John couldn't have killed the woman because John was with you,' you know, and all of that. Which John was with me that Saturday and that Sunday. And he just told me, you know, 'You are not supposed to be talking about the case. So, just drop it, you know. Go ahead with your life.'"

Robinson Deposition at 68-69; A-97-98.

14 See Roberts v. Governor's Square, Inc., No. 86-2746 (Fla. 2d Cir. Ct. 2000) In a deposition in that civil action, Wanda Robinson testified that, a year before the Bickner murder, John Nixon had kidnapped her from the Governor's Square Mall by beating her, choking her and throwing her into a car, a modus operandi identical to that alleged in the instant case. See Roberts v. Governor's Square, Inc.; Deposition of Wanda Huggins McKinney at 66-74, 81-103; A-391-421; see also Rule 3.850 Motion at 246-47; 3.850 R. 651-52. Two months before Joe Nixon's trial, Robinson claimed, John Nixon again abducted her in a similar fashion. Id. And, in 1986, after the Joe Nixon trial, John again assaulted and abducted Wanda, and this time the State of Florida charged him for it. Id. Finally, Jeanne Bickner's father said that the police told him that they were greatly confused about which of two Nixon brothers had committed the crime. See Roberts v. Governor's Square, Inc.; Deposition of Donald Roberts, at 20; A-359; Rule 3.850 Motion at 248, 3.850 R. 653. These facts were either available to trial counsel upon a reasonable investigation or constitute new evidence justifying reconsideration of Nixon's conviction and death sentence.

15 It is about 12 miles from Woodville to the Mall and about 15 miles from Woodville to Tram Road at the turn-off to the murder scene, plus another 5-10 minutes of driving over rough dirt to get to the crime scene. See Rand McNally Street Finder (1996 Ed. CD-ROM); A-216. Mary Atteberry, saw a black man speaking with a white woman near a yellow sports car at the Mall at "about a quarter until 3:00." Atteberry could not identify the people she saw other than by race and sex. R. 1868-69; A-185-86. Linda Gallagher saw a black male speaking with Bickner "between, I would say, 3:00 and 4:00 p.m." R. 1873; A-190. She could not identify the man, other than by race. Using Atteberry's time frame, Nixon could not have been in Woodville between 3:00 and 4:00 while kidnapping Bickner starting at 2:45. Even using Linda Gallagher's estimate of 3:00-4:00, Joe Nixon could hardly have been in Woodville in that time range and at the Mall committing the crime at the same time, as the State contended. Because of the violation under Brady v. Maryland, 373 U.S. 83 (1967), the potential alibi was not available to trial counsel. Also, Lamar Nixon said that he and Mary Hayes had met Joe while Lamar was on a pass from the Tallahassee Correctional Center. Mary Hayes could have verified this account. Verification could have been obtained from others with whom Lamar Nixon told Mr. Mickens he met that afternoon after encountering Joe Nixon. See 3.850 Motion at 235-36; 3.850 R. 640-41.

16 State v. Nixon, No. 84-3708 (Fla. 2d Cir. Ct. 2001). The transcripts in the assault proceedings bear two page numbers, plus the Appendix numbers. We refer only to the Appendix numbers.

17 See Oats v. Dugger, 638 So. 2d 20 (Fla. 1994), cert. denied, 513 U.S. 1087 (1995); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993); Jones v. State, 478 So. 2d 346 (Fla. 1985); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Lane v. State, 388 So. 2d 1022, 1025 (Fla. 1980); State ex rel. Deeb v. Fabisinski, 111 Fla. 454, 456, 152 So. 207, 211 (1933). See the 1998 Habeas Corpus Petition, at 6.

18 The Court relied both on the federal Sixth Amendment right to counsel - which "affects [an accused's] ability to assert any other rights he may have," 758 So. 2d at 621, quoting United States v. Cronic, 466 U.S. 648, 654 (1984), quoting Chief Justice Shaefer's Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956) - and the underlying right to due process that, "as this Court has stated ..., 'requires a court accepting a guilty plea to inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary.' Koenig v. State, 597 So. 2d 256, 258 (Fla. 1992)." See Nixon II, 758 So. 2d at 624.

19 The Court has reiterated its holding in Nixon II, while distinguishing the case of a defense lawyer who, in closing argument, after evaluating the prosecution's case, makes the tactical decision to argue that his client is not guilty of the offense charged but of a lesser included offense. Atwater v. State, 788 So. 2d 223, 229-31 (Fla. 2001): In Nixon v. Singletary, . . . counsel conceded the defendant's guilt to the crime

charged in the opening statement of the guilt phase. . . . In closing argument, defense counsel told the jury that he believed the State had proven its case of first-degree premeditated murder against his client. Defense counsel entirely failed to subject the prosecution's case to meaningful adversarial testing; therefore, the State's case was never challenged.

Id. at 231. See also State v. Williams, 797 So. 2d 1235, 1240-41 (Fla. 2001).

20 Nixon II, 758 So. 2d at 627.

21 The Circuit Court's opinion must be read in its entirety to understand the way it treated this Court's decision in Nixon II. To summarize, the Circuit Court began by saying that "the Florida Supreme Court's opinion presents this court with a dilemma." Order of September 20, 2001 at 5. The "concern faced by this court is how to balance the Supreme Court's direction to not only determine whether Mr. Nixon gave his consent to Mr. Corin's strategy of concession of guilt, but to do so in the context of an 'affirmative, explicit acceptance by Nixon.'" Id. The court nowhere says what it needs to "balance" the Supreme Court's direction against, but the counterweight appears to be the Circuit Court's own view that "[o]rdinarily, the trial court may consider many factors in resolving issues of knowing and voluntary waivers of rights, and this case should be no exception." Id. (emphasis added). After noting what it described as a contradiction between the standards used by this Court in determining that Nixon had waived his right to be present at trial and the "affirmative, explicit acceptance" standard which the Court prescribed for the inquiry whether Nixon had consented to Corin's acknowledging that he was guilty of first degree murder (id. at 8-9), the Circuit Court rejected the latter standard in favor of the former. ("The Supreme Court accepted Judge Hall's finding that Mr. Nixon's extraordinary behavior constituted a knowing, intelligent, and voluntary waiver of his attendance at trial. . . . M . . . However, it must be noted that the 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, Mr. Nixon's unusual behavior, and his exasperating conversation with Mr. Nixon. It is obvious, therefore, that the decision whether Mr. Nixon consented to Mr. Corin's trial strategy can be made only after careful consideration of similar factors.", Id. at 8-9 (emphasis added).

A key factor to be considered as to whether Mr. Nixon's consent could be inferred from his silence was that "the pattern of interactions in the attorney-client relationship between Mr. Corin and Mr. Nixon often involved information being provided by Mr. Corin, followed by silence from Mr. Nixon." Id. at 9. This was important because, "[a]s the State noted . . ., everyone involved in the court process must possess a '. . . true understanding of the realities of representing criminal defendants.'" Id. at 10 (quoting plaintiff's memo at 7.) Fortified with the requisite understanding, the Circuit

Court found it evident that "Mr. Nixon made his position known through bizarre and angry statements, and not by an affirmative or explicit discussion of his decision with trial counsel or the court. It is likewise impossible to resolve the Supreme Court's question by reliance on an unrealistic construct." Id. at 11 (emphasis added). So, instead of the "affirmative, explicit acceptance" standard prescribed in Nixon II, the Circuit Court concluded that an "objective standard also must be applied to the facts and circumstances of this case, without resort to unfair presumptions about what should have occurred." Id. at 12. Having liberated itself from this Court's "unrealistic construct" and "unfair presumptions," the Circuit Court readily found that "Mr. Nixon did consent to the trial strategy of conceding guilt. His consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with Mr. Nixon, and Mr. Nixon would refuse to respond. The court further finds that the fact that Mr. Nixon did not provide counsel with an affirmative, explicit consent in words, and in the manner that we ordinarily expect and presume is acceptable, does not mean that it was not given." Id. (emphasis added).

22 The Circuit Court makes this finding expressly at least three times: in the underlined portions of the last sentence quoted in note 21, supra, and of the first and fifth sentences preceding the last sentence.

23 The 1988 testimony to which Mr. Corin refers was given at a hearing before the trial judge on a remand from this Court. In it Mr. Corin reiterated several times that Nixon had not expressed assent to Corin's strategy in any way other than silence:

Q. Did he affirmatively agree for you to do this?

A. Again, the best - the most honest answer I can give you on that question is, he did not.

* * *

Q. Did he say, write or do anything to demonstrate his consent or approval of your doing this?

A. Again, he did nothing.

Q. Did he say, write or do anything to demonstrate his approval?

A. He said nothing, he did nothing and he wrote nothing. He did nothing.

December 19, 1988 Hearing Transcript, at 28-34; SR2. 29-35 (emphasis added).

24 Compare note 23, supra, with the text before and after it.

25 Each of these quotations from the Circuit Court's opinion is set out in context in note 21, supra, with page citations.

26 See e.g. Kelly v. State, 797 So. 2d 1278, 1280 (Fla. 4th DCA 2001) (holding that defendant did not validly waive trial by jury because there was no affirmative showing in the record that he made a knowing, voluntary, intelligent waiver of the right as required by Upton); Babb v. State, 736 So. 2d 35, 36-37 (Fla. 4th DCA 1999) (reversing a conviction on a count on which defendant's lawyer waived a jury trial for

the client because there was no affirmative showing in the record that the client made a knowing, voluntary, intelligent waiver of the right to trial by jury, as required by Upton); Wallace v. State, 722 So. 2d 913 (Fla. 2d DCA 1998) (holding that a conviction following a lawyer's waiver of a six-person jury on behalf of his client could not be sustained under Blair because the record did not affirmatively show that the client was aware of his right to be tried by a jury of six and personally waived it); Blair v. State, 698 So. 2d 1210, 1213-14 (Fla. 1997) (reaffirming Upton in holding that a defendant can waive the right to a six-person jury if but only if the record shows an affirmative, personal, on-the-record waiver after adequate advice of the right); State v. Upton, 658 So. 2d 86, 88 (Fla. 1995) (holding that a lawyer's written waiver of jury trial on behalf of a client cannot validly waive the client's right to trial by jury where there is no affirmative showing in the record that the client agreed to the waiver); Ashley v. State, 614 So. 2d 486, 488 (Fla. 1993) (vacating a habitual-offender sentence on a guilty plea because the record did not affirmatively show that defendant personally knew his sentence could be lengthened due to the habitual-offender statute); LaMadline v. State, 303 So. 2d 17, 20 (Fla. 1974) (reversing a death sentence because the record did not affirmatively show that defendant voluntarily, intelligently waived his right to a jury recommendation).

27 Jones v. State, 110 Nev. 730, 737-38, 877 P.2d 1052, 1056-57 (1994):

The State characterizes this issue primarily as one of ineffective assistance of counsel . . . . Jones responds that his counsel's concessions of guilt without his consent . . . and in contravention of his own testimony, were improper per se. . . . M . . . The gravity of the consequences of a decision to plead guilty or to admit one's guilt demands that the decision remain in the defendant's hand. . . . A lawyer may make a tactical determination of how to run a trial, but the due process clause does not permit the attorney to enter a guilty plea or admit facts that amount to a guilty plea without the client's consent.

State v. Harbinson, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985):

When a defendant enters a plea of 'not guilty,' he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt. . . . M This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

State v. Anaya, 134 N.H. 346, 353, 592 A.2d 1142, 1146 (1991):
[T]he decision to admit . . . guilt should remain inviolably personal to the defendant. See N.H. Rule of Prof. Conduct 1.2 ("A lawyer shall abide by a client's decisions concerning the objectives of representation").
See also Jones v. Barnes, 463 U.S. 745, 751 (1983)
("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty . . . ."); id. at 753 n.6.
28 Post-Evidentiary Memorandum of Law in Opposition To Defendant's Motion to Vacate, filed June 20, 2001, pages 3-4; SR4. 297-98.
29 The State cited In the Matter of the Personal Restraint of Darold J. Stenson, 142 Wash. 2d 710, 16 P.3d 1 (2001), and Parker v. Turpin, 60 F. Supp. 2d 1332, 1341-45 (N.D. Ga. 1999), affirmed sub nom. Parker v. Head, 244 F.3d 831 (11th Cir. 2001). The Stenson case does not involve an attorney's admission of the client's guilt at the guilt phase of a capital trial but rather an attorney's "admitting guilt during the penalty phase." Stenson, 142 Wash.2d at 735-36, 16 P.3d at 15-16. The Parker case does involve an attorney's admission of a client's guilt at the guilt phase, but because Parker's federal habeas corpus proceeding was governed by 28 U.S.C. º 2254(d) as enacted by the Anti-Terrorism and Effective Death Penalty Act of 1996, the Eleventh Circuit did not consider the merits of Parker's claim of ineffective assistance of counsel; it decided only that the state courts' rejection of the claim was not "unreasonable." See 244 F.3d at 833, 840. Nevertheless, the Eleventh Circuit opinion certainly does reflect that the Superior Court of Butts County, Georgia decided the merits of Parker's case in a way that is probably inconsistent with this Court's Nixon II decision and that the Georgia Supreme Court then denied a certificate of probable cause to appeal and a petition for certiorari review (all several years before Nixon II).
30 For example, compare United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) (in accord with Nixon II), and Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983) (same), and Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981) (same) with Clozza v. Murray, 913 F.2d 1092 (4th Cir. 1990) (contra Nixon II), and Tenner v. Gilmore, 184 F.3d 608 (7th Cir. 1999) (same, subject to the qualification that the issue before the Seventh Circuit was restricted by 28 U.S.C. 2254(d)(1) to the reasonableness of the state-court resolution of the constitutional claim). And compare Haynes v. Cain, 272 F.3d 757 (5th Cir. 2001) (in accord with Nixon II), with Young v. Catoe, 205 F.3d 750 (4th Cir. 2000) (contra Nixon II).
There is also a division among the federal courts on a related but distinct issue: when, if ever, a defense attorney's failure to present a vigorous argument against the prosecution's case amounts to such a breakdown of the adversary process as to implicate the rule of United States v. Cronic, 466 U.S. 648 (1984), rather than that of Strickland v. Washington, 466 U.S. 668 (1984). Compare Cone v. Bell, 243 F.3d 961

(6th Cir. 2001), cert. granted, 122 S. Ct. 663 (2001), with Fox v. Ward, 200 F.3d 1286 (10th Cir. 2000); compare Appel v. Horn, 250 F.3d 203 (3d Cir. 2001), with Houchin v. Zavaras, 107 F.3d 1465 (10th Cir. 1997); compare Patrasso v. Nelson, 121 F.3d 297 (7th Cir. 1997), with United States v. Reiter, 897 F.2d 639, 644-45 (2d Cir. 1990). Since the cases in this category do not involve an attorney's affirmative concession of a client's guilt - and therefore do not raise the question of the constitutional propriety of an attorney's unauthorized waiver of the client's right to put the prosecution to its proof at a trial on a plea of not guilty - the present pendency of the Cone litigation in the U. S. Supreme Court should not affect this Court's consideration of the latter issue.

31 For example, in the several federal cases cited in note 30, supra, that are in accord with Nixon II, the courts characteristically take the position that "[v]iewing [defense counsel's] conduct as part of a trial strategy or tactic is to ignore the obvious . . . . [I]t was the equivalent to entering a plea of guilty" and therefore implicated the defendant's right to a due process trial. Haynes, 272 F.3d at 763 (quoting State v. Carter, 270 Kan. 426, 14 P.3d 1138, 1148 (2000)); see also Wiley, 647 F.2d at 648-50; Swanson, 943 F.2d at 1073. Conversely, the courts that arrive at results contrary to Nixon II uniformly fail to consider this aspect of the issues or to explain why it is being ignored. See the "contra" cases in note 30.

32 See note 8, supra.

33 Applying the primacy doctrine, this Court has held that in some situations where the right to counsel serves to protect the adversary process, that right as guaranteed by Art. I, º16, Fla. Const. is more protective than the parallel federal Sixth Amendment right. Compare Peoples v. State, 612 So. 2d 555 (Fla. 1992), with United States v. Gouveia, 467 U.S. 180 (1984), and Illinois v. Perkins, 496 U.S. 292 (1990).

34 See text at note 20 supra.

35 By this Court's briefing order, all prior arguments have been deemed reiterated on this appeal, and accordingly we refer the Court to our contention that in addition to the claim of ineffectiveness resulting from the unauthorized guilt concession, counsel's other deficiencies constituted ineffectiveness under Strickland v. Washington, 466 U.S. 668 (1984) see also Appellant's Initial Brief dated June 5, 1998 Point I asserting claims under Brady v. Maryland, 373 U.S. 83 (1967), and Gislin v. United States, 405 U.S. 150 (1972).

36 The misnomer "borderline retarded" was discontinued in reference to mental retardation in 1983. See Grossman, H. (Ed.). Terminology and Classification Manual of the American Association of Mental Retardation (8th ed. 1983). The term "moderate" mental retardation is also deceptive. Joe Nixon functions approximately at the level of a six-to-eight year-old child. See Keyes Report at 1, 6; A-144, 149. Consider the ability of such an individual, analogous to a second-grader, to understand

the meaning and import of Miranda v. Arizona, 384 U.S. 436 (1966) and to comprehend and cope with the complex and stressful bifurcated proceedings of a capital murder trial.

37 Because lawyers are not trained to make psychiatric diagnoses, mental health experts, not lawyers, must evaluate competency. Hill v. State, 473 So. 2d at 1253; Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978); Hull v. Freeman, 932 F.2d 159, 168 (3rd Cir. 1991). Thus, a trial judge may not rely on defense counsel's judgment in forgoing a competency inquiry, an error that occurred in this case. See R. 813. Nor may a trial judge rely upon his or her views on competency rather than those of experts, as also happened here.

38 The Court in Jones further stated that "other factors that weigh against the ability to make a meaningful retroactive competency determination are that appellant was not subject to a competency evaluation by a qualified expert contemporaneous with his trial." 740 So. 2d 520, 524 (Fla. 1999).

39 The rule discussed here is the rule in effect in 1985. See The Florida Bar Re Rules of Criminal Procedure, 389 So. 2d 610, 618-19 (Fla. 1980). The rule has since been amended.

40 The experts must consider: (i) Defendant's appreciation of the charges; (ii) Defendant's appreciation of the range and nature of possible penalties; (iii) Defendant's understanding of the adversary nature of the legal process; (iv) Defendant's capacity to disclose to counsel pertinent facts surrounding the alleged offense; (v) Defendant's ability to relate to counsel; (vi) Defendant's ability to assist counsel in planning defense; (vii) Defendant's capacity to realistically challenge prosecution witnesses; (viii) Defendant's ability to manifest appropriate courtroom behavior; (ix) Defendant's capacity to testify relevantly; (x) Defendant's motivation to help himself in the legal process; and (xi) Defendant's capacity to cope with the stress of incarceration prior to trial. Fla. R. Crim. P. 3.211(a)(1).

41 Under Fla. Stat. Ch. 916.11(1)(d): "If a defendant's suspected mental condition is mental retardation, the court shall appoint the diagnosis and evaluation team of the Department of Health and Rehabilitative Services to examine the defendant and determine whether he meets the definition of 'retardation' in s. 393.063 and, if so, whether he is competent to stand trial." Such an evaluation should have been ordered here.

42 Counsel did bring out that Nixon had asked the police to arrest him prior to the murder. R. 783-85. This could have been important had counsel connected it to Joe Nixon's history and mental condition, but he did not.

43 "[A] substantial history of prior criminal activity is not an aggravating circumstance under the statute . . ." Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1979), cert. denied, 456 U.S. 1011 (1982).

44 Defense Exhibits 12 and 14 refer to whippings of the Nixon children and poor parental communication. See Robinson Deposition at 35-36, A-78-79; John Nixon Deposition at 64, A-49.

45 See Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (vacating death sentence on basis of counsel's failure to investigate and present mitigation evidence, including defendant's "nightmarish childhood" and borderline retardation); Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991) (where a defendant was noticeably morose and irrational, "[c]ounsel therefore had a greater obligation to investigate and analyze available mitigation evidence").

46 Affidavits of Virginia Nixon, sister of defendant, 10/6/93, Marvin Carter, correctional officer, 10/6/93; Judith Dougherty, former attorney for defendant, 10/6/93; Willie James Harris, friend of defendant, 10/1/93; John Nixon, Jr., brother, 9/30/93; James Nixon, uncle, 9/3/93; Eddie Ingram, cousin, 9/21/93; Doris Graham, sister, 9/26/93; and Thomas Earl Nixon, cousin, 10/5/93. See 3.850 Motion at 125-150 for a detailed summary of Nixon's childhood background and social history.

47 "In short term memory, he functions in the lowest percentile of the U.S. population. His adaptive skills are within the severe range of retardation in all skill areas. His actual adaptive functioning is estimated to be developed at the level of a child between six and eight years of age. His social development level is similar to that of a 6 year-old child. His mental capacities place him below the lowest 1% of the population. His adaptive behavior is so distorted as to place below the lowest .01 percent of the general population." Keyes Report at 5-7, 3.850 R. 735-37; A-148-51.

48 The euphemism "moderate" is misleading. See note 36 above.

49 Gaskin v. State, 737 So. 2d 509, 513-17 (Fla. 1999) (alleged failure of trial counsel to present mitigation evidence of defendant's poor childhood development and abuse, including incestuous sexual activity at a young age, and of counsel's failure to provide mental health expert with sufficient background information required an evidentiary hearing); Peede v. State, 748 So. 2d 253, 258-59 (Fla. 1999) (evidentiary hearing required due to counsel's alleged ineffectiveness in failing to discover and produce evidence as to defendant's troubled childhood and mental problems); Ragsdale v. State, 720 So. 2d 203, 208 (Fla. 1998) (evidentiary hearing ordered to determine whether counsel was ineffective in failing to investigate and present mitigation evidence showing defendant's childhood deprivation, organic brain damage and retardation); Rose v. State, 675 So. 2d 567, 573 (Fla. 1996); Cherry v. State, 659 So. 2d 1069, 1074 (Fla. 1995); Harvey v. Dugger, 656 So. 2d 1253, 1257 (Fla. 1995); Heiney v. Dugger, 558 So. 2d 398, 400 (Fla. 1990); Hildwin v. Dugger, 654 So. 2d 107, 109-10 (Fla. 1995), cert. denied, 516 U.S. 965 (1995); State v. Lara, 581 So. 2d 1288 (Fla. 1991).

50 Accord Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991), cert. denied, 503

U.S. 952 (1992) ("Horton's counsel's argument to the jury raises the distinct possibility that portions of the closing argument encouraged rather than discouraged the jury to impose the death penalty. [Counsel's] attacks on Horton's character and his attempts to distance himself from his client could only have hurt Horton's cause."); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (Counsel acted unreasonably by emphasizing the reprehensible nature of the crime and his "closing argument served only to dehumanize his client"), cert. denied, 471 U.S. 1016 (1985).

51 Counsel admitted in a post trial proceeding that he had devoted "probably shockingly little" time to the case prior to trial. SR. 48.

52 Nixon had entreated counsel, "Please get off my case" (A-317), and told the Judge, "I want another attorney." R. 335. His request rejected, Nixon refused to attend his trial. When the matter of his non-attendance arose again at the beginning of the penalty phase, a waiver of attendance resulted from colloquy between the court and Mr. Corin. Even when confronted with information that Nixon had been on his way to court that morning, counsel declined the judge's offer of a recess to speak with his client. R. 977. "The defendant will appear human to the sentencer, and his life of value, only if counsel treats the defendant as a valuable human being in the sentencer's presence...." Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.R. 299, 321 (1983) (emphasis added). Counsel's failure to intervene demonstrates prejudicial ineffectiveness. See Deaton v. State, 635 So. 2d 4, 8 (Fla. 1994), cert. denied, 513 U.S. 902 (1994).

53 The original 3.850 court misstated the standard by which a claim of ineffective assistance of counsel must be evaluated. "Defendant cannot demonstrate that but for the alleged errors he would have received a life sentence." October 22 Order, at 11.

54 In a survey done in 1986 in Florida, people opposed use of the death penalty for mentally retarded offenders by 71% (opposed) to 12% (in favor); at the same time, 84% generally favored capital punishment against 13% who opposed it in principle. John Blume and David Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark. L.R. 725, 759-60 (1988).

56 The 3.850 court incorrectly found the Espinosa claim procedurally barred. October 22 Order at 2-3; A-319-20. See Habeas Corpus Petition at 3.

57 This is particularly true with respect to the instruction on the "especially heinous" aggravating factor, because of the uniquely powerful nature of that aggravator. See Maxwell v. State, 603 So. 2d 490, 493 and n.4 (Fla. 1992); Arave v. Creech, 507 U.S. 463, 472 (1993). The jury received no guidance on the "cold, calculated and premeditated" aggravating circumstance. It would be pure speculation to find that the jury did not automatically assume that this aggravating circumstance was established in Nixon's case, given the absence of any further instruction on the words "cold,

calculated" and "premeditated."
58 It is noteworthy that Nixon's public defender in the assault case, one of the two prior convictions, considered an appeal of that conviction based on Nixon's incompetency to stand trial. See Motion to Supplement Record on Appeal in Nixon v. State (Fla. 1st DCA, Case No. BF-33); A-371-75.

72