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

REPLY BRIEF OF APPELLANT

JONATHAN LANG	ERIC M. FREEDMAN
JOHN J. LAVIA III	

CITATIONS TO THE RECORD

"R." refers to the twelve volumes of transcripts, 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 accordance with Fla. R. at 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.

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I. INTRODUCTION

This Reply Brief of Appellant is in response to the Answer Brief of Appellee filed by the State of Florida in this case on August 20, 2002. To save this court time and effort, we refer to the facts of the case as stated in our Initial Brief of Appellant dated May 3, 2002 and restate by reference all of the facts and arguments therein.

II. ARGUMENT

POINT I. UNDER THE LAW OF THE CASE DOCTRINE IN FLORIDA, THE STATE IS PRECLUDED FROM ARGUING THAT NIXON II WAS DECIDED INCORRECTLY

The State attempts to avoid the binding ruling of this court in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), cert. denied, 2000 U.S. LEXIS 7351 (Nov. 6, 2001) ("Nixon II"), by arguing that subsequent Florida case law suggests Nixon II was wrongly decided. This approach fails because, in Florida, the doctrine of the law of the case mandates that "the law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." Fla. Dep't of Trans. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) (citing) Greene v. Massey, 384 So. 2d 24 (Fla. 1980). This court ordered in Nixon II that Nixon should be afforded a new trial "if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy" of conceding guilt on all counts charged. Nixon II, 758 So. 2d at 624.

That ruling thus became established law and immune from further debate by the

State in this Court. See Fla. Dep't of Trans. v. Juliano, 801 So. 2d 106 ("Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case.") (citing) McGregor v. Provident Trust Co., 162 So. 323, 327 (Fla. 1935). And here the facts have not changed one iota. See Initial Brief of Appellant at pp. 28-33.

Although it is true that appellate courts may revisit the law of the case in exceptional circumstances, these arise only when a prior decision is erroneous and would result in "manifest injustice." See Strazzulla v. Hendrick, 177 So. 2d 1, 8 (Fla. 1965) ("[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.") Neither condition is present in this case.

First, no manifest injustice would result from adhering to the ruling in Nixon II. That ruling followed well-established Florida precedent in prescribing standards for the lower court to use when evaluating whether Nixon consented to a literally fatal defense strategy. It did not determine Nixon's guilt, innocence, or sentence.[1] The only manifest injustice in this case was suffered by Nixon as a result of his trial counsel's unauthorized concession of guilt. The State of Florida will not be wronged in any way by a new trial conducted so as to reveal all of the pertinent facts that were available at the time of Nixon's original trial but were not presented to the jury. By definition, the accurate development of the facts

[1] Several cases have held that "manifest injustice" exists when applying the law of the case would result in a harsher sentence for a defendant. Carlos Green v. State of Fla., 813 So. 2d 184 (DCA 2002) (citing) Line v. State, 722 So. 2d 853 (Fla. 4th DCA 1998); Xolache v. State, 687 So. 2d 298 (Fla. 4th DCA 1997). In fact, the reverse is true in this case: relitigating matters already decided in Nixon II would further delay justice for Nixon, who is already facing the harshest possible sentence.

of a case cannot itself be unjust.

Second, the cases cited by the State do not reveal any hint of error by this court. In Atwater v. State, 788 So. 2d 223 (Fla. 2001), defense counsel had conceded guilt of a lesser offense of second degree murder in an attempt to convince the jury that a first degree murder conviction was inappropriate. This Court specifically held that such a concession of guilt of a lesser charge may be a proper strategic decision within counsel's discretion although it reiterated – citing Nixon II for the point – that defense counsel's concession of guilt to the highest offence charged requires the client's consent. Atwater, 788 So. 2d at 230.

The State's claim to discern an implicit lesson in Atwater that concession of guilt cannot constitute a per se denial of the assistance of counsel and deprivation of the right to trial is thus entirely without merit. It is especially inaccurate given the Atwater court's clear distinction between the decision by Nixon's counsel to concede total guilt and Atwater's lawyer's nuanced strategy of conceding guilt to a lesser charge. See Atwater, 788 So. 2d at 231 (saying that in Nixon, "defense counsel entirely failed to subject the prosecution's case to meaningful adversarial testing; therefore, the State's case was never challenged.").

The very purpose of the law of the case doctrine is to save the judicial system from the inefficient relitigation of already-decided controversies, notwithstanding the fact that a party now wishes to assert some further arguments. See Dicks v. Jenne, 740 So. 2d 576, 578 (Fla. 4th DCA, 1999) (noting that the law of the case doctrine promotes finality, assures trial courts' adherence to appellate decisions, and avoids a

waste of judicial resources.) Unless exceptions are reserved for truly extraordinary cases, the courts' work will become a Sisyphean pursuit. As demonstrated in our main brief, Nixon II rested on a solid foundation of state and federal law. Brief of Appellant at 26-41. The State's brief presents no reason why this court should reproduce its judicial labors.

Rather than upsetting the law of the case, this Court should correct the error that the lower court made by not following this court's ruling in Nixon II, as it was bound to do by Florida law. See e.g., Brunner Enterprises, Inc. v. Department of Revenue of the State of Florida, 452 So. 2d 550, 552 (Fla. 1984) ("Lower courts cannot change the law of the case as decided by this court or, alternatively, by the highest court hearing a case.") (citing) Beverly Beach Properties v. Nelson, 68 So. 2d 604 (Fla. 1953); Goodman v. Olsen, 365 So. 2d 393 (Fla. 3d DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). Likewise, it should reject the State's claim that "[a] defendant's silence … can support a conclusion that a defendant has consented to counsel's strategy", (Answer Brief of Appellee at 44), as flying in the face of this Court's explicit ruling in Nixon II that

> 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 II, 758 So. 2d at 624.

The State has shown no justification for any of the various ways in which it persuaded the Circuit Court to disregard the law of the case or now invites this Court to disturb that law; its efforts to relitigate Nixon II should not be countenanced.

POINT II.

NIXON'S SILENCE DOES NOT SUPPORT ANY CONCLUSION THAT HE EITHER CONSENTED TO HIS COUNSEL'S EFFECTIVE GUILTY PLEA OR FORFEITED HIS RIGHT TO CONSENT

The State argues that Judge Ferris correctly determined that Nixon had consented to an effective guilty plea because she was authorized to find consent based on the totality of the circumstances. Not only does Judge Ferris's ruling violate the law of the case, but additionally, the totality of circumstances surrounding Nixon's defense offers no evidence of "affirmative, explicit, acceptance" by Nixon of his counsel's complete concession of guilt.[2] See Nixon II at 624. As stated in the Appellant's Initial Brief, attempts to communicate trial strategy with Nixon were met with silence and inaction. See Initial Brief of Appellant at 29-32. Neither type of behavior can be considered 'affirmative' or 'explicit' acts. Inferences made from a pattern of erratic, non-verbal or otherwise non-affirmative behavior should not substitute for a legal analysis of a defendant's Constitutional rights.

The State also confuses Nixon's interest in advocating a new trial in this case

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[2] Nixon's trial counsel, in his opening statement conceded:

> 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.

with the underlying reason for ordering a new trial; namely the preservation of rights fundamental to the fairness of the judicial system. The state construes a new trial as a "[reward] to Nixon for his intransigence," which "can make no contribution to justice or fairness or truth." Answer Brief of Appellee at 51, n. 21.[3] To the contrary, the very reason this court should demand that counsel obtain consent from their clients before failing to contest the prosecution's case, particularly in their opening statements, is to protect defendants from the manifest injustice of unknowingly conceding their guilt. It is fundamental to the constitutionally protected trial process that counsel must contest guilt in order to ensure the government meets its burden of proof. See e.g., Nixon II, 758 So. 2d at 622-23 (discussing the consequences of counsel's failure to subject the prosecution's case to meaningful adversarial testing). The benefit is for the integrity of the system, and not just to Nixon in this case. Thus, it is very much in the interest of justice to ensure that Nixon be afforded an opportunity to choose his plea.

The State's position that Nixon somehow forfeited his right to a constitutionally sound initial trial relies upon an unreasonable assumption that Nixon knew back in 1985 that his silence as to a defense strategy would preserve some right to an appeal almost 20 years later. This was clearly not the case. The failure in this case was Attorney Corin's ineffective assistance rendered by making an effective guilty plea, in his opening statement, without Nixon's consent, and not any

[3] The State's characterization is contradicted by this court's observation in Nixon II that "Despite his difficult behavior, Nixon was still entitled to his constitutional rights." Nixon II, 758 So. 2d at 627.

omission on Nixon's part.

POINT III. THE CONCESSION OF GUILT AND THE CCP AND HAC AGGRAVATOR JURY INSTRUCTIONS WERE TRIAL COURT ERRORS CONSTITUTING "STRUCTURAL DEFECTS" WHICH REQUIRE AUTOMATIC REVERSAL

The State dismisses several of Nixon's claims regarding trial court errors that led to his ultimate conviction. First, the State argues in effect that any error that might have occurred at trial could not have affected the outcome of this case because, even if counsel had not conceded guilt in his opening and closing statements, the jury would have found it anyway. Answer Brief of Appellee at 74-75. Second, the State dismisses Nixon's claim that his death sentence must be vacated because of unconstitutional instructions as to the CCP and HAC aggravators. Answer Brief of Appellee at 92. The State argues that no "complaint of unconstitutional vagueness" was raised at trial or on direct appeal and, therefore, Nixon's claim must be procedurally barred. Id.

It is well-recognized that certain constitutional errors, no less than other errors, may have been "harmless" in terms of their effect on the fact finding process at trial. See Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); Wilson v. State of Fla., 764 So. 2d 813, 818 (DCA 2000). These errors are classified as "trial errors" and require a "harmless error" test. However, there are certain 'structural defects' in the trial mechanism that defy analysis by "harmless-error" standards. See Sullivan, 508 U.S. at 281; Wilson, 764 So. 2d at 818. These "structural defects" affect the framework within which the trial proceeds by "infecting the entire

trial process" and, therefore, require automatic reversal. See Sullivan, 508 U.S. at 281 (holding that an unconstitutional "reasonable doubt" instruction given by a trial judge constitutes a "structural" error); Wilson, 764 So. 2d at 818. More specifically, "errors involving a structural defect in the framework of a trial deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence … and no criminal punishment may be regarded as fundamentally fair." Wilson, 764 So. 2d at 818.

In this case, trial counsel's unauthorized concessions of guilt and the unconstitutional instructions as to the CCP and HAC aggravators constituted "structural defects". As stated above, a "structural defect" requires automatic reversal. Therefore, the State's various arguments that the absence of trial error would not have changed the outcome of Nixon's conviction of first-degree murder are legally irrelevant.

POINT IV. THE TRIAL COURT ERRED BY DENYING NIXON A *SUA SPONTE* COMPETENCY HEARING

The State has erroneously concluded that a trial court is not required to hold a *sua sponte* competency hearing even when there are reasonable grounds to believe that the defendant is incompetent. Answer Brief For Appellee at 84. To the contrary, in Robertson v. State, 699 So. 2d 1343, 1346 (Fla. 1997), the court held that Fla. R. Crim. P. 3.210 unambiguously requires the trial court to order a competency examination and conduct a hearing when it has reasonable grounds to believe that defendant is not mentally competent to proceed. Robertson,

699 So. 2d at 1346. See also Nowitzke v. State of Fla. 572 So. 2d 1346, 1349 (Fla. 1990) (explaining that the trial court improperly failed to hold a competency hearing even when witnesses at trial testified that defendant was acting strangely prior to the crimes and that he had a family history of mental disease). Subsequent to the holding in Robertson, numerous Florida decisions have reinforced this proposition. See e.g., Kelly v. State of Fla., 797 So. 2d 1278 (DCA 2001) (explaining that the trial court should have *sua sponte* ordered a competency hearing when the trial judge knew that defendant was a mental health patient for 20 years and that he had held up two large rocks and gestured as if he was going to throw them at an officer's head).

Furthermore, it is well settled that due process prohibits a person accused of a crime from being prosecuted while incompetent. See Drope v. Missouri, 420 U.S. 162, 172 (1974) (citing) Pate v. Robinson, 383 U.S. 375 (1966); Nowitzke, 572 So. 2d at 1349 (citing) Lane v. State, 388 So. 2d 1022, 1024 (Fla. 1980). To this end, the duty of inquiry rests with the trial court to determine the issue of competency.

In this case, the trial judge was fully familiar with Nixon's obstreperous and unpredictable behavior, as well as his refusal to participate in his own trial. Answer Brief of Appellee at 84-85. Therefore, the trial court erred by failing to hold a competency hearing when reasonable grounds existed to believe that defendant was not mentally competent.

POINT V.

APPELLANT IS ENTITLED TO AN EVIDENTIARY HEARING IN WHICH HE MAY PROVE THAT HIS ATTORNEY WAS PREJUDICIALLY DEFICIENT AT THE PENALTY PHASE OF TRIAL

On this appeal, the State contends that Nixon is not entitled to an evidentiary hearing, whereas, on the last appeal, Nixon II, the State virtually conceded the need for an evidentiary hearing.

[4] The State presents generalities which do not entitle it to summary dismissal of Nixon's claims concerning Attorney Corin's conduct during the penalty phase of trial. "'[A]n evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief.'" Floyd v. State, 808 So. 2d 175, 182-83 (Fla. 2002), (quoting) Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). No such showing has been made by the State on this appeal or on the previous appeal.[5] Rather, the State baldly asserts that Nixon's attorney "investigated Nixon's background extensively" (SAB at 90) and that the evidence sought to be introduced is "largely cumulative." Id. at 45. There is nothing redundant about the massive evidence of child abuse suffered by Nixon, which is set forth in the affidavits submitted by nine of the witnesses in this proceeding. See AB at 59-61. Those whose testimony was not heard at trial aver that if they had been asked to give this testimony, they would have done so. 3.850 Motion at 141 and AB 59, n. 46.

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[4] "Because there has been no evidentiary hearing in this case, it is not clear from this record whether, in fact, Attorney Corin knew of the matters alleged in the motion pertaining to the abuse and deprivation suffered by Appellant." SAB, Nixon II, at 69.

[5] The State's Brief deems its prior argument, in Nixon II, "reiterated on this appeal." SAB at 83-84, 92. Accordingly, appellant respectfully refers the court to Point III-B of his Reply Brief on the earlier appeal.

In Ragsdale v. State, 798 So. 2d 713, 716-18 (Fla. 2001), evidence was adduced showing abundant mitigating childhood abuse, resulting in a remand for a new penalty phase before a jury. Ragsdale's mitigating evidence is comparable to that which Nixon has offered to prove. As with Nixon's affiants, "Ragsdale's siblings testified that they were never contacted and that they would have testified if they had been contacted at the time of Ragsdale's trial …." Id. at 719. The State suggests that Asay v. State, 769 So. 2d 974 (Fla. 2000) supports its position. SAB at 89.[6] But the Court in Ragsdale, pointed out that "[i]n Asay v. State, [citation omitted] we affirmed the circuit court's rejection of defendant's ineffectiveness claim where the attorney was informed of the defendant's abusive background and, after contacting potential witnesses, made a strategic decision to forego the presentation of nonstatutory mitigation …." Ragsdale 798 So. 2d at 719 (emphasis added). "Furthermore, unlike the situation in Asay [citation omitted], since counsel did not conduct a reasonable investigation, he was not informed as to the extent of the child abuse suffered, and thus he could not have made an informed strategical decision not to present mitigation witnesses …." Id. at 720.

In the absence of an evidentiary hearing, one cannot know whether there were appropriate tactical reasons for what Attorney Corin did and did not do in preparing for trial. What we do know, at this point, is that Attorney Corin admitted that his preparation for trial was "probably shockingly little." SR. at 48. "[T]he conclusion that counsel had legitimate tactical reasons for not calling witnesses is rarely an appropriate basis for summary denial of post-conviction relief … [citation omitted]."

[6] Asay is incorrectly cited as 760 So. 2d 974 (2000).

Jackson v. State, 789 So. 2d 1218, 1220 (Fla. 2001).

The State also asserts that Drs. Keyes, Whyte and Dee "arrived at essentially the same conclusions" (SAB at 89) as did Drs. Ekwall and Doerman – "just more of the same, only with different experts." Id. This is not so. Drs. Ekwall and Doerman said that Nixon is competent, not psychotic (R. at 804, 811), and has an intellect "on the low side of normal, but it's adequate." R. at 802. Drs. Dee, Whyte and Keyes found Nixon at the time of the murder to be insane,[7] incompetent,[8] psychotic, mentally retarded, incapable of rational premeditation and incapable of conforming his conduct to the requirements of the law. See AB at 61-64.

Finally, the State has the audacity to claim that Nixon's trial counsel "made an impassioned plea for mercy in his closing argument." SAB at 91. Far from a passionate plea for mercy, counsel's closing was not reasonably calculated to elicit mercy for his client. The most he did for Nixon was to suggest that the "death penalty is never warranted," and that a "sentence of death is not needed in this case." (R. at 1038, emphasis added) Otherwise, trial counsel's performance consisted of elicitation of his client's lack of remorse and future dangerousness – potent but unauthorized nonstatutory aggravators, which the State itself could not introduce at trial.

[9] In his closing and throughout the trial, counsel excoriated his client with argument

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[7] See Whyte Report at 12, 15, Dee Report at 6, Keyes Report at 9.
[8] See Dee Report at 7, Keyes Report at 6, Whyte Report at 12, 14-15.
[9] Counsel told the jury "[e]ach 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. at 1019. The mental health experts "pretty much" conclude Nixon is not a "worthwhile human being." R. at 1025. "[P]erhaps he is totally unremorseful." R. at 1031. "Why should we recommend life, because all he's ever done is harm other

and documentary evidence that went far beyond any strategy of being honest with the jury.

people? He's obviously liable to harm somebody in the prison system." R. at 1037-38. This case "is something that probably no jurors have ever seen in a case such as this, about a lawyer's client." R. at 1038-39.

III. 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: September 26, 2002

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Dated: September 26, 2002.

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Jonathan Lang, Attorney for Appellant