IN THE SUPREME COURT OF FLORIDA

JOE ELTON NIXON,

Appellant,

v. CASE NO. 92,006

STATE OF FLORIDA,

Appellee.

__________________________/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee does not accept Appellant's Statement of the Facts (Initial Brief at 4-28), which largely consists of argument. The State would set forth its recitation of relevant facts in Section IA of the Argument portion of the Answer Brief and would rely upon such. Appellee also specifically objects to Nixon's reliance upon the contents of certain civil depositions contained in the Appendix to the Initial Brief (Initial Brief at 15-16, et seq.; Appendix at Tabs 31, 34), as such depositions were never provided to the circuit court below, and are improperly presented on appeal. See Doyle v. State, 526 So.2d 909, 911 (Fla.1988); State v. Barber, 301 So.2d 7, 9 (Fla. 1974).

SUMMARY OF ARGUMENT

Appellant presents seven (7) primary points on appeal in regard to the trial court's summary denial of his motion for postconviction relief. No error has been demonstrated in regard to the circuit court's finding of procedural bar as to Nixon's claims concerning his prior convictions and the constitutionality of the jury instructions on certain aggravating factors; likewise, the trial court's finding that Nixon's claim regarding racial prejudice was legally

insufficient was not error. As to Nixon's postconviction claims concerning his mental competency at the time of trial, as well as the claims involving the mental health experts, precedents of this Court support the trial court's finding of procedural bar; to the extent that such ruling was error, however, Nixon would, at most, be entitled to an evidentiary hearing, as it is clear that a meaningful hearing could be conducted at this juncture on these matters. The circuit court did not err in summarily denying Nixon's claims under Brady v. Maryland, 373 U.S. 83 (1963), as it clear that, at minimum, materiality has not been demonstrated, given the overwhelming evidence of Nixon's guilt. This overwhelming evidence of guilt, as well as the overwhelming aggravation supporting the death sentence, likewise supports the trial court's summary denial of Nixon's claims of ineffective assistance of counsel at the guilt and penalty phases, however alleged; the circuit court's conclusion that United States v. Cronic, 466 U.S. 648 (1984), did not provided a basis for relief was likewise correct and should be affirmed.

ARGUMENT

Issue I

THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DENYING NIXON'S CLAIMS OF ERROR BASED UPON UNITED STATES v. CRONIC, 466 U.S. 648 (1984), STRICKLAND v. WASHINGTON, 466 U.S.

668 (1984), AND BRADY v. MARYLAND, 373 U.S. 83 (1967).

As his first, and primary, point on appeal, Nixon contends that the circuit court erred in summarily denying his claims of ineffective assistance of counsel at the guilt phase, both under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as well as alleged state suppression of exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1967). In his order of October 22, 1997, Judge Smith set forth in detail his rationale for summarily denying relief as to these claims (PCR XIX 3561-3576), and additionally attached substantial portions of the record (PCR XIX 3577 - XXIII 4390). Appellee would contend that Judge Smith did not err in his disposition of these claims, and that the order on appeal should be affirmed in all respects. Before proceeding to Nixon's legal arguments, the State will briefly set forth the facts relevant to disposition of these claims.

A. *Relevant Facts of Record*

Joe Elton Nixon was arrested August 14, 1984, and Michael Corin, an Assistant Public Defender who had previously represented him in other cases, was appointed to represent him

in this capital prosecution. Corin filed a demand for discovery on September 11, 1984, and the State subsequently responded with its witness list, amending such several times (OR I 25, 28-33, 35, 38, 39, 41-44, 54, 100, 113).[1] Defense counsel deposed fifty-two (52) of the State's witnesses, including Nixon's brother, John, his girlfriend, Wanda Robinson, two of his uncles, and many of the police investigative officers and eyewitnesses to Nixon's possession of the victim's car and other property (OR I 45-47, 74-75, 94-95); the State appended forty-two (42) of these depositions to its response below (PCR VI 1029-1065, 1089-1169, 1185-1219; VII 1343 - X 1881). The case was continued at one point to allow defense counsel to continue his investigation and deposition of the State witnesses (OR I 80-82). Defense counsel filed a discovery response on January 29, 1985, subsequently amending such on January 31, 1985, February 5, 1985, February 18, 1985, and June 24, 1985, listing a total of sixty (60) potential defense witnesses, including Nixon's family and various mental health experts, as well as the custodian of records for twenty institutions or facilities in

[1] (OR ___) & (SR ___) represent citations to the original and supplemental record on appeal in Nixon v. State, Florida Supreme Court Case No. 67,583, whereas (PCR ____) represents a citation to the instant postconviction record in this appeal, and (PCR-S ___) represents a citation to the supplemental record filed in this case on August 13, 1998.

which Nixon had previously been educated, incarcerated or evaluated (OR I 55-57, 60-63, 76-77, 114). Defense counsel Corin also filed a motion for individual sequestered voir dire, a motion for additional peremptory challenges, and a motion to declare §921.141 to be unconstitutional (OR I 50-51, 58-59, 101-102).

At a pretrial hearing on February 27, 1985, defense counsel stated that he did not intend to present an insanity defense at that time (OR V 897). Defense counsel also said that although he had raised the issue of Nixon's competency in another criminal proceeding which had gone to trial several weeks before, he was not going to do so again unless Nixon's condition or behavior deteriorated (OR V 899-900). Judge Hall (who had likewise presided over the other case) stated for the record that, based on his observations in the prior proceeding, he had had Nixon evaluated by Dr. Stimel and had gotten "assurances that we could proceed with confidence" (OR V 909-910); contrary to any assertion in the Initial Brief, the prosecutor never affirmatively requested that Nixon's competency again be evaluated due to any doubt he harbored as to Nixon's competence, but merely stated the expectation that defense counsel would again be making such motion as he had previously and stated that such should be done expeditiously (OR V 897-900, 908-910).

Defense counsel Corin also stated that he would be moving for the appointment of mental health experts for use in the penalty phase (OR V 900), and, following this proceeding, did so (OR I 90-91). On March 12, 1985, Judge Hall appointed a psychiatrist, Dr. Ekwall, and a psychologist, Dr. Doerman, to assist the defense (OR I 92-93). Counsel filed their reports in the record prior to trial; in Dr. Ekwall's report, he expressly found Nixon competent to stand trial (OR I 111-112). Defense counsel also requested, and received, the court's assistance in securing prior institutional records of Nixon to supply to these experts (OR I 84-89).

At another pretrial hearing on July 8, 1985, defense counsel stated that Nixon had refused to leave his cell to be present at the proceeding (OR VI 916). When the proceedings reconvened the next day, Nixon was still not present (OR VI 941). Attorney Corin stated that he had met with Nixon at the jail the previous evening, and that Nixon had stated the intention to attend (OR VI 943-944). Trial formally commenced on July 15, 1985, and Judge Hall announced that the prospective jurors would be voir dired individually as to their views on the death penalty and any prior knowledge of the case; Nixon was present during the entire first day of voir dire (OR VII 1185). When proceedings reconvened the next day, however, the defendant was not present

(OR III 304). According to defense counsel Corin, Nixon had stripped to his underwear and flip-flops in the holding cell and demanded a black judge and black attorney; Nixon stated that he wanted to represent himself, but also that he intended to go back to the jail and "just be by himself" (OR III 304). Judge Hall observed, based upon his prior dealings with Nixon, that Appellant's "behavior in the past has been somewhat on the volatile side," noting that some days he was a "routine presence," whereas on other days "he takes his clothes off and jumps up and down in the holding cell and makes a racket and the like." (OR III 306-307). Defense counsel was of the view that Nixon could voluntarily waive his presence, and Judge Hall adjourned to the holding cell, accompanied by counsel and the court reporter, for a colloquy with Nixon (OR III 333).

During this colloquy, Nixon stated that he was "tired of being Mr. Nice Guy," and that he wanted to go back to jail; asked why he did not wish to attend the proceedings, Nixon stated that he "ain't got no business in there" (OR III 334-335). Nixon further stated that, if brought back into the courtroom against his will, he would "run [his] mouth and speak when [he] got ready unless you tape it up" (OR III 336). Asked whether he realized that he would be giving up his right to be present while the case was taking place, Appellant answered, "I

don’t care nothing about that case. Never did care nothing about it.” (OR III 337). When the court advised Nixon that he could help his attorney do the best he can to protect himself by being present, Appellant responded, “I refuse to answer any more questions.” (OR III 338-339). When reminded he was on trial for his life, Nixon said that he would come back from the jail in the afternoon (OR III 339-340). However, when proceedings reconvened, a police officer testified that Nixon would not leave his cell (OR III 353-356), and trial proceeded in Nixon’s absence. Nixon did not attend proceedings on July 17, 18 or 19, 1985, and the court received testimony from various police officers to the effect that Nixon was aware that he could attend, prior to finding any knowing voluntary waiver on his part (OR IX 1411-1417; XI 1825-1827, 1990-1997). Nixon did attend part of the proceedings on July 22, 1985, before absenting himself for the remainder (OR IV 561-563, 574-582; V 746-752; VI 975-978).

The State presented thirty-five (35) witnesses in its case in chief at Nixon’s trial. The testimony of the State witnesses established that the victim, Jeanne Bickner, had attended church on the morning of Sunday, August 12, 1984, and then proceeded to the Morrison’s Restaurant at Governor’s Square Mall in Tallahassee for lunch with some friends; at this time, Ms.

Bickner had been driving her 1973 orange MGB convertible (OR XI 1853-1858). Ms. Bickner parked her car behind Sears, and was last seen by her friend Mary Todd at 1:30 p.m. (OR XI 1853-1858). Linda Gallagher, another friend of the victim, saw her between 3:00 and 4:00 p.m. that day in the parking lot of the mall talking with a black male (OR IX 1873). Jeff and Mary Atteberry were returning to their car at the mall parking lot at around this time, and testified that they saw a white female in conversation with a black male by an MGB convertible (OR XI 1860-1861, 1868). Both witnesses stated that the victim gave the black male some jumper cables, and Jeff Atteberry testified that he had previously identified a photograph of Nixon as the man whom he had seen in the parking lot (OR XI 1861-1863, 1868-1869); Mary Atteberry testified that the man had been wearing blue jeans and a red and white baseball shirt at this time (OR XI 1869).

Susan and Greg Cleary were driving into town on Williams Road right before 5:00 p.m. on Sunday afternoon, when they were passed by a black male driving an orange MG in the opposite direction (OR XI 1877, 1883). Both witnesses were shown a photo lineup, and picked out Nixon's photo as the driver (OR XI 1881, 1884; XII 2088-2089); additionally, they testified that they later saw Nixon driving the same vehicle on Orange Avenue

several hours later (OR XI 1879-1880, 1883-1884). Willie "Tiny" Harris, a friend of Nixon, testified that Appellant drove over to his home Sunday evening in an orange MG (OR XI 1958). Nixon stated that the car belonged to his "girlfriend," and the two proceeded to Nixon's uncle's home in Havana, where Appellant showed his sister some rings (OR XI 1959-1960). Nixon's uncle testified that the two arrived at around 5:30, and that Nixon had displayed two rings at that time, which he claimed to have bought for his girlfriend (OR XI 1968). James Nixon stated that one ring was a wedding band with a clear stone in it, while the other had a little diamond or pearl in it (OR 1968). James Nixon stated that the pair remained until approximately 7:00 p.m., when Appellant said that he needed to go back to Tallahassee to pick up another uncle's car from the mall parking lot; Appellant stated that he had previously borrowed Thomas Igles' car (OR XI 1969-1970).

Willie Harris confirmed that he and Appellant had returned to Tallahassee on Sunday night and retrieved a Monte Carlo belonging to Nixon's uncle from the parking lot at the mall (OR XI 1960-1961). Harris drove the MG, while Appellant dropped off the other vehicle at the home belonging to Igles' girlfriend (OR XI 1961-1962). Nixon then dropped Harris off at his home, and left in the MG (OR XI 1962). Harris testified, however, that

Nixon called him later that night, claiming that he had a flat tire on the MG, and enlisting Harris' assistance in obtaining a spare (OR XI 1962). Harris picked Nixon up at a convenience store off of Orange Avenue and drove him to a wooded area where Nixon claimed that he had left the spare; Nixon left the car and later returned with a tire which he claimed he had retrieved from "his girlfriend's house." (OR XI 1963-1964). They then went back and changed the tire (OR XI 1964). Mary Steele testified that Appellant drove by her home in the MG at around 11:00 p.m. on Sunday night, looking for her daughter (OR XI 1978-1979); she also claimed to have seen him driving the MG on Woodville Highway the next morning (OR XI 1979-1980).

Appellant returned to Wanda Robinson's house on Monday morning, where he had been living, and encountered both Miss Robinson and John Nixon, his brother (OR XII 2055, 2065). Appellant told his brother that he had killed a woman, and showed him the MG, as well as two rings, which he said he had obtained from the victim (OR XII 2056). When John Nixon stated that he did not believe Appellant, Appellant offered "to show him where the lady was and everything"; John Nixon described the two rings as "a diamond ring" and a ring "with a pearl-like earbob in it," and also stated that Appellant showed him a gas receipt with the victim's name on it (OR XII 2058). Appellant

told his brother that he had encountered the victim in the mall parking lot and had asked her for a "boost"; after she went to help him, he had put her into the trunk of the car and driven her out to the woods (OR XII 2059). Appellant then stated that he had tied the victim to a tree with the jumper cables, and that when she offered to write him a check and to tell no one of the incident, he stated that if he wrote his name on the check, it would be "like turning him[self] over to the law." (OR XII 2059-2060). Nixon told his brother that he got the floor mats out of the car, set them afire and then threw them on top of the victim, setting her on fire as well; he likewise burned her personal possessions at the scene (OR XII 2060).

Similarly, Appellant told Wanda Robinson that he had killed someone and that he knew he was going to get the electric chair (OR XII 2065). Miss Robinson also heard Appellant state that he had transported the victim to the woods, beaten her, tied her up, choked her and then set her afire; according to the witness, Nixon said that the victim had begged for her life, but that Appellant had stated that he could not leave her out there because she could identify him (OR XII 2066). Appellant likewise told Miss Robinson that he had encountered the victim at the mall parking lot, telling her that he needed a "jump", and had then knocked her on the head and placed her in the trunk

of the car (OR XII 2067); he also showed Miss Robinson the rings (OR XII 2068). Nixon told Miss Robinson that he had tried to sell the MG that morning, and told his brother and Miss Robinson that he intended to pawn the rings (OR XII 2067-2068, 2059).

James Turraville testified that Appellant (whom he identified in open court) had tried to sell him the victim's MG for two hundred dollars, but that he declined to buy it, as Nixon could not produce a valid title to the vehicle; Appellant unsuccessfully dropped his asking price to thirty-five dollars (OR IV 561-563). Dennis Council testified that on Monday, August 13, 1984, Appellant had pawned two rings at his pawn shop on Lake Bradford Road (OR XII 2071). Appellant used his driver's license for identification, and received forty dollars for the jewelry (OR XII 2071-2073). He later showed Wanda Robinson the pawn ticket (OR XII 2068). Appellant was seen by a number of witnesses driving the victim's MG on Monday, and, at such time, he claimed that the car belonged to his girlfriend and/or he was buying it (OR XI 1983-1984; XII 2077-1079). Appellant spent the night at the Harris home (OR XI 1965, 1984), and proceeded back to Wanda Robinson's home early Tuesday morning (OR XII 2061, 2067-2068). Appellant told Miss Robinson and his brother that he intended to burn the MG (OR XII 2061, 2067-2068). A short time later, John Nixon saw a small vehicle

on fire nearby on Orange Avenue (OR XII 2061); Miss Robinson also saw the vehicle on fire (OR XII 2068). Appellant called Willie Harris on Tuesday morning and asked him to pick him up; Harris could hear sirens in the background (OR XI 1965).

Meanwhile, the victim's body had been discovered late Monday afternoon, and the authorities called (OR XI 1885-1890). Deputy Sturmer testified that he found the burned body of a woman against a tree "with her legs out at approximately a forty-five degree angle"; her left arm was "stretched up in the air with what appeared to be a battery jumper cable" (OR XI 1891). Another officer testified that a large pile of burned debris was twenty to twenty-five feet away from the body, such pile contained matchbook covers, an earring, a veterinarian animal registration tag, two keyrings and a vinyl type car cover (OR XI 1902, 1910, 1921). News of the finding of the victim's body was broadcast on the local news at 10:00 p.m. on Monday night, although such broadcast did not go into detail as to the condition of the body or the crime scene (OR IV 590). John Nixon and Wanda Robinson saw this broadcast (OR XII 2062, 2069). After Nixon left Robinson's home on Tuesday morning, she and John Nixon called the Sheriff's Department (OR XII 2062, 2069). The pair then met with two officers at a Texaco station on Orange Avenue at around 9:00 that morning (OR IV 591). The

officers testified that Miss Robinson and Appellant's brother were extremely excited and scared at this time, clinging to each other for support (OR IV 584, 592). The two provided the officers with information concerning Appellant's statements regarding the murder, and Captain Wise and Major Campbell proceeded to Robinson's residence to look for Appellant (OR IV 584, 591-592). When the officers entered the home with a key provided by Miss Robinson, they found Appellant inside; he was advised of his rights, arrested and handcuffed (OR IV 594-597). When they arrived at the station, Nixon was again advised of his rights, and agreed to give a statement (OR IV 600-601); the tape-recorded statement was played for the jury at Nixon's trial, and a copy of the transcript was attached to the State's response to the 3.850 (OR IV 608; PCR V 915-965).

In his statement, Nixon said that he had approached the victim in the mall parking lot at Governor's Square and had told her that he had hurt his arm and asked her for a ride home (PCR V 915-922). The victim agreed, and they got into the MG (PCR V 922). Appellant told the victim that he lived off of Tram Road, away from town, and when they turned off of the truck route, Nixon said that he had hit the victim in the head and grabbed the steering wheel (PCR V 925-926). Nixon made her pull the car over and then put her into the trunk (PCR V 927). Nixon

continued driving, pulling off onto a dirt road into the woods, where he stopped and released the victim (PCR V 927-928). According to Appellant, the victim begged him not to kill her, offering him money, but he responded that he had already given "three years to society for [something] that he had not done" (PCR V 978). Nixon said that he had put a cloth bag over the victim's head and tied her to a tree with the jumper cables (PCR V 929-931). Nixon then set fire to the items which he had taken out of the trunk of the car and dumped the contents of the victim's pocketbook into the fire (PCR V 933). Nixon talked to the victim again, and she begged him just to leave her there, offering to sign the title of the car over to him; Nixon then pulled the burning car cover out of the fire and threw it on the victim's head, setting her afire (PCR V 935-936). He then drove back to Governor's Square Mall and picked up Tiny Harris (PCR V 938). Nixon stated that he had burned the victim's car on Tuesday morning because he had bought a newspaper and seen that the victim's body had been discovered; he also stated that he had left his handprints on the car (PCR V 943, 959). Nixon stated that he threw the keys away in a garbage can close to where he had burned the car, and that he had likewise tossed the gas cap away by a white church (PCR V 946, 957, 967).

In addition to this statement, Nixon called a number of his relatives and friends from the jail and admitted to the murder (OR XI 1970-1971, 1984-1985). Similarly, Nixon's fingerprints and/or palmprints were found on the trunk of the victim's burned vehicle (OR XII 2041, 2043-2044); the keys to the vehicle, as well as the gas cap, were found at the locations identified by Nixon (OR XI 1926, 2015-2016, 2023). Additionally, the victim's husband identified the jewelry which Appellant had pawned as belonging to his wife (OR VII 2084-2085), and a handwriting expert confirmed that it was Nixon's signature on the pawn ticket (OR IV 554). As to the cause of the victim's death, the pathologist testified that he had gone to the scene, and had observed the severely burned body of a young to middle aged white female tied to two trees (OR XI 1940). Dr. Turner stated that the left leg and arm were almost completely burned off, and that the skin was severely charred to such an extent that the facial features could not be determined (OR XI 1940). The witness stated that the left side of the body was burned more severely than the right, and identified remnants of fabric near the victim's temple (OR XI 1944). Dr. Turner also identified premortem injuries to the victim's forehead, as well as a hairline crack in her skull, which were consistent with a blow to the head of moderate force with a fist (OR XI 1947-1949).

There was no injury to the victim's larynx or hyoid bone, consistent with strangling, and the pathologist testified that the fire had been the cause of death (OR XI 1950, 1953); although the victim had been alive at the time of the fire, the doctor could not say whether she had been conscious (OR XI 1953).

The record further reflects that, even during Nixon's absence, Attorney Corin conducted an extensive voir dire of the prospective jurors, and, indeed, specifically questioned them as to what effect, if any, Nixon's actions would have upon their verdict (OR III 360, 380, 436; passim). Attorney Corin delivered a brief opening statement, in which he stated that it would be proven that Appellant caused Ms. Bickner's death (OR XI 1851-1852). Counsel stated, however, that "this case is about the death of Joe Elton Nixon," specifically as to whether such would occur in the electric chair (OR XI 1852). Counsel likewise advised the jurors that, in arriving at their penalty recommendation, they were going to hear many facts about Nixon; although many of the facts were not going to be good, they still should recommend a sentence of life imprisonment (OR XI 1852-1853). While defense counsel did not call any witnesses *per se* or cross-examine the State witnesses, he did object to the introduction of certain photographs as unduly gruesome (OR XI

1906-1907), and likewise objected and moved for a mistrial in regard to a portion of the State's closing argument (OR IV 670-671); although counsel did not formally oppose the admission of Nixon's statement, he did not stipulate to its voluntariness, leaving that matter for the court to determine (OR IV 563-564). In his closing argument, counsel told the jury that he thought that they would decide that the State had proved its case against his client, but reminded them that there would be a further proceeding in regard to the penalty (OR IV 641-642); counsel stated that at that point, he would argue for Nixon's life (OR IV 642). In his rebuttal argument, defense counsel commented upon the State's characterization of his tactics in the trial, and urged them to disregard such (OR IV 673). Attorney Corin told them that he would provide reasons to spare Nixon's life (OR IV 673-674).

Following Nixon's conviction, the penalty proceedings were held on July 24 and 25, 1985. At this time, the State introduced into evidence judgment forms documenting Nixon's prior convictions for robbery and battery on a law enforcement officer, as well as, over defense counsel's objections, testimony concerning Nixon's statement to the effect that he had removed the victim's undergarments in this case in order to terrorize her (OR V 758-761). In his opening statement to the

jury, Attorney Corin advised them that Appellant was twenty-three years old and that he had been in trouble with the law since he was ten (OR V 753-755). Counsel told the jury that Nixon had fallen "through some cracks in our system" (OR V 755). Counsel told the jury that they would hear testimony to the effect that Nixon had called the Sheriff's Department four days before the murder, stating that he needed to talk to the authorities "before he hurt someone;" although the authorities did come to Appellant's home, they did not arrest him (OR V 756). Counsel then told the jury that they would hear testimony that Nixon had attacked Wanda Robinson in front of the police officers on the day before the murder and had been arrested, but released; when Robinson and Appellant's brother had next seen Nixon, he had been "acting kind of crazy" (OR V 756). Attorney Corin advised the jury that based upon the testimony and documents they would receive, it would be apparent that Nixon had "never been normal or right," and that they should recommend a life sentence (OR V 756-757).

Attorney Corin then presented the testimony of eight (8) witnesses. He first called Appellant's mother, Betty Nixon, who testified that Appellant was the middle child in a family of eight children, and that he had had problems in school (OR V 764-766). She stated that she loved Appellant but that he had

mental and emotional problems, and that she thought that he needed help because he didn't seem to be normal (OR V 766). Wanda Robinson testified that Appellant had been living with her at the time of the murder, and that, shortly before it, he had been acting strangely (OR V 770). She stated that he had "looked wild" on Saturday night, and that, as a result, she had been afraid to spend the night at home; when she returned to her home at 3:00 p.m. on Sunday afternoon with Appellant's uncle Lamar, she found "strange" notes from Appellant scattered around (OR V 770-773). She stated that Nixon had been fond of her children, and that he had treated them well (OR V 775). Defense counsel also called a number of police officers who verified that Appellant had called the sheriff's office and asked to talk with someone before "he hurt somebody"; when the officers arrived, however, Nixon was relatively calm and agreed to leave the premises (OR V 776-785). Appellant was arrested on August 11, 1985, for battery on Wanda Robinson; after he calmed down, he was released and described as rational (OR V 786-793).

Attorney Corin also called two mental health experts, a psychiatrist, Dr. Ekwall, and a psychologist, Dr. Doerman (OR V 796-834). Dr. Ekwall, who was also qualified as an expert in neurology, testified that he had examined Nixon twice and had reviewed family background documents, including Nixon's prior

incarceration and treatment records; these documents, which were likewise relied upon by Dr. Doerman, were introduced into evidence at this proceeding (OR V 806, 820, 795). Dr. Ekwall stated that earlier psychiatric records "from way back" had said that "there is something about this boy nobody could quite understand" and that it was felt that there was "something wrong someplace because he was different from others." (OR V 799). Dr. Ekwall stated that the documentary history indicated that Appellant did not seem to learn from experience, in that he continued to repeat the same type of behavior (OR V 799-800). The doctor performed an EEG and a neurological exam to search for the cause of Nixon's problem, but failed to find "any definite reason why he is the way he is;" he stated that although Appellant was not psychotic, he did have brief psychotic episodes, especially when he was intoxicated (OR V 800-801). Likewise, he stated that Appellant's intelligence was "on the low side of normal," but "adequate" (OR V 802). Dr. Ekwall affirmatively stated that both statutory mental mitigating factors, under Sections 921.141(6)(b) & (f), applied in this case (OR V 802-803). The witness testified that part of his diagnosis was anti-social personality, and noted that Appellant told the truth as he saw it "which is not necessarily the truth to anybody else" (OR V 801-802, 810); likewise, he

stated that Nixon knew what he did was wrong, but "didn't feel it was wrong as others seem to feel it" (OR V 811-812). In any to a question by the prosecutor, Dr. Ekwall stated that he did not feel that Nixon was "a very good risk for society" (OR V 812). Dr. Ekwall also reiterated his finding that Nixon was competent to stand trial and advised the jury that Appellant had told him that he had been using drugs and alcohol, and had been without sleep, at the time of the incident (OR V 802-806).

Dr. Doerman testified that he administered a battery of neuropsychological and personality tests; among his results was a finding that Nixon's IQ was 74, which was in the "borderline range" (OR V 817-818). Doerman concluded, based upon the results of the Halstead Reitan Test, that Nixon had brain damage (OR V 818-819). The expert testified that he had considered the family background documents provided by defense counsel, as well as those relating to incarceration and prior psychiatric reports, in addition to witness statements and depositions from this prosecution (OR V 819-820). Dr. Doerman stated that his diagnosis was that Nixon suffered from mixed personality disorder with elements of anti-social personality, borderline personality and narcissistic personality (OR V 821); the witness stated that while Nixon was not psychotic, he had the capacity to break down and misperceive reality when under a lot of stress

(OR V 821). Dr. Doerman testified that Nixon was "not normal" and was, in fact, dangerous (OR V 823). The doctor felt that the statutory mitigators applied because Nixon had been under stress from the breakup of his relationship with Wanda Robinson and, by his own account, he had been drinking and not sleeping at the time of the murder (OR V 823-824). Doerman's hypothesis was that the victim had died as a result of "misdirected rage" (OR V 824-825). The court also stated that Nixon would do better in a structured environment such as prison, rather than in free society, and further told the jury that he did not think that death was the appropriate penalty for Nixon, as he was not "an intact human being" (OR V 831-834).

The documentary exhibits which Attorney Corin introduced included school, institution and psychological reports covering Nixon's life from the year 1972 to 1985 (see PCR-S). Thus, the exhibits begin with Nixon's commitment to the Dozier School for Boys in 1972 at age 10, for arson; at that time, no psychiatric cause for his behavior could be determined, and when he was released, it was stated that there was no need for a psychiatric follow-up (PCR-S Defense Exhibits #3 & #4). A subsequent examination in February of 1974, when Nixon faced charges of breaking and entering and vandalism to a school, noted that Appellant had an extensive history of anti-social behavior, as

well as an IQ of 88 or average intelligence (PCR-S Defense Exhibit #7). As a result of these charges, Nixon was sent to a group treatment home, which was subsequently found to produce poor results (PCR-S Defense Exhibits #11 - #15). A psychological evaluation on April 29, 1975 stated that test results were typical for one Nixon's age, but also expressed pessimism for Appellant's subsequent adjustment or performance, and later testing on May 1, 1975, revealed borderline intelligence at a dull-normal level, as well as a "seriously disturbed" perception of reality (PCR-S Defense Exhibits #19, #20). When Nixon was finally furloughed from the program, it was observed that he still had a tremendous amount of problems (PCR-S Defense Exhibit #24).

Indeed, shortly after his furlough, Appellant was again arrested, for burglary and arson, and committed to the Division of Youth Services until his majority (PCR-S Defense Exhibit #25); it was noted that Appellant had been tested psychologically and psychiatrically in the preceding three years and that "no organic complications can substantiate his behavior." (PCR-S Defense Exhibit #26). Appellant returned to the Dozier School for Boys until he was again furloughed in October of 1976 (PCR-S Defense Exhibits #27 - #35). Appellant was arrested for armed robbery, pled guilty and was placed on

probation in Georgia in 1980 (PCR-S Defense Exhibit #36). Nixon was next convicted of burglary and sentenced to the Department of Corrections for four years in September of 1981; at the time of his admission to the facility, testing indicated an IQ of 83 or a low-average/borderline intelligence, as well as an observation of lack of psychosis (PCR-S Defense Exhibit #39). Nixon received good disciplinary reports while incarcerated (PCR-S Defense Exhibits #41 - #43).

At the penalty phase charge conference, Attorney Corin argued for the inclusion of certain defense-requested instructions and objected to others (OR V 843-888). In his closing argument to the jury, defense counsel advised them that mitigating circumstances were unlimited and need not be proven beyond a reasonable doubt (OR VI 1022). Attorney Corin then identified certain of the mitigating circumstances which he deemed established - Nixon’s low intelligence, his brain damage, his troubles in school, his age and his emotional disturbance and impaired capacity at the time of the murder, drawing the jury’s attention to the testimony of the experts and the documentary exhibits (OR VI 1022-1025). Defense counsel noted that Nixon had previously called the police to keep him from hurting someone and that he had cooperated with the police after his arrest and given a detailed confession in this case which

included matters prejudicial to him (OR VI 1025-1028). He likewise noted the testimony from Wanda Robinson to the effect that Appellant had been a "wild man," and suggested that Nixon had fallen through the cracks of the system, given the fact that the police had released him from custody less than twenty-four hours before this murder (OR VI 1028-1030). Attorney Corin repeatedly contended that Nixon was "not normal," noting his mother's testimony, that of the mental health experts and all of the circumstances of the case (OR VI 1031-1037). Likewise, defense counsel reminded the jury that, by virtue of their conviction of Nixon on the other felonies, he would serve the rest of his life in prison, such that the death sentence was not necessary; counsel drew the jury's attention to the prison records which indicated that Nixon did well while incarcerated (OR VI 1036-1038). In concluding, Attorney Corin reminded the jury that he had promised not to mislead them or misrepresent anything to them, and stated that he had shown them "the good and the bad and the ugly, something that probably no juries had ever seen in a case such as this, about a lawyer's client." (OR VI 1038-1039). He urged the jury to fully consider the documentary exhibits, and reminded them of Dr. Doerman's testimony that the death penalty was not appropriate for Nixon as he was not "an intact human being" (OR VI 1039-1040).

Following rendition of a death sentence, and appeal to this Court, proceedings were remanded to the circuit court in regard to Nixon's claim of ineffective assistance of counsel. At the hearing of December 19, 1988, Attorney Corin testified that he had discussed with Nixon "how he was going to approach the case" (SR 28), and had told him what he was going to do in his opening and closing statements at the trial (SR 29). Counsel stated that he had advised Nixon that if the State did not accept the plea, his goal would be to save Appellant's life (SR 47). Counsel stated that the evidence against Appellant was "very, very strong," and further said that he had discussed this matter with Appellant at least three times (SR 47-48). Corin said that he had a relationship with Appellant which "went back prior to his arrest in this case," and that Appellant never specifically agreed or disagreed with this strategy; he said Nixon never told him "not to do that" (SR 47-48). Attorney Corin testified that his approach at trial had been "to minimize the State's guilt phase," and stated that he had discussed the fact that the State had proved its case against Appellant (SR 50, 54).

At the subsequent post-remand hearing of August 30, 1989, one of the prosecutors, Anthony Guarisco, affirmed that Nixon's offer to enter a plea had been rejected (2SR 82-84). The prosecutor also testified that Attorney Corin's strategy at the

guilt phase had affected the prosecution's strategy as well, and that the State had not introduced all of its available evidence, so as to avoid the appearance of "overkill" (2SR 84-86); Mr. Guarisco specifically identified three potential witnesses who had not been called at trial, who would have testified as to Nixon's possession of the victim's automobile and jewelry, as well as certain statements made by him (2SR 87-88). The State likewise called attorney Larry Simpson, who testified that, under all of the circumstances of the case, Attorney Corin's strategy at the guilt phase had not been unreasonable (2SR 101-103).

B. *The Circuit Court's Denial of Appellant's Claim for Relief Under **United States v.Cronic**, 466 U.S. 648 (1984), was not Error*.

Appellant first maintains that Judge Smith's summary denial of relief as to his claim under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), was error, and violative of this Court's holding in Nixon's direct appeal, Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990). Nixon specifically argues that he is entitled to an evidentiary hearing on his assertion that Attorney Corin "conceded" his guilt without his authorization, and further maintains that counsel failed to subject the State's case to "meaningful

adversarial testing." Judge Smith found Cronic inapplicable to this case, for the following reasons:

> Defendant argues that counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Defendant claims that Cronic obviates the necessity of demonstrating prejudice, which is normally required for an ineffective assistance of counsel claim.
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> In Cronic, the United States Supreme Court held that when surrounding circumstances justify a presumption of ineffectiveness, a Sixth Amendment claim can be sufficient without inquiring into counsel's performance. Such circumstances arise when a defendant is denied presence of counsel at a critical stage in the prosecution, or when there is a breakdown in the adversarial process that would justify a presumption that a defendant's conviction was not reliable. Id. at 2046-2049. Cronic applies to a narrow spectrum of cases where counsel's ineffectiveness was so egregious that the defendant was in effect denied any meaningful assistance at all. See also Chadwick v. Green, 740 F.2d 897 (11th Cir. 1984). Apart from circumstances of that magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. Cronic, supra, at 2047 (citing Strickland v. Washington, 466 U.S., at 693-696, 104 S.Ct., at 2067-2069).
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> As evidenced by the court record cited in the above paragraphs, this case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. There is no allegation that Defendant was

> denied assistance of counsel in his defense. Cronic, supra, at 2044. Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution. Cronic, supra, at 2049. Because defense counsel's concession of guilt, to try to retain sympathy during the penalty phase, is an acceptable defense strategy, Defendant is required to show prejudice. This reasoning is consistent with other courts that have applied the Strickland standard for ineffective assistance of counsel claims, which requires prejudice, to similar defense strategies. See Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). Defense counsel's concession of guilt did not, and could not possibly have prejudiced Defendant in any way. The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without such concession. For the same reasons discussed under the Strickland claims, Defendant fails to show that but for counsel's errors the result of the proceeding would have been different.

(PCR XIX 3571-3573).

Appellant has failed to demonstrate the existence of reversible error.

Appellant is correct in noting that he presented a claim based upon Cronic in his direct appeal to this Court, and this Court found the record insufficient to resolve such, stating that it affirmed without prejudice to the raising of this issue in a later motion under Rule 3.850, Nixon, 572 So.2d at 1340; of course, the reason that the record was "confused" during the

appellate remand was that Nixon's counsel, both trial and appellate, precluded the adequate development of this issue, *i.e.*, Nixon's consent to Attorney Corin's strategy. Nixon, Id., (" . . . The state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.").[2] Nevertheless, the court below was also correct in finding Cronic inapplicable to this case, and in rejecting Nixon's claims of ineffective assistance of counsel under Strickland v. Washington. See Points IC and III, infra. Nixon, of course, prefers the Cronic standard over that set forth in Washington, as the former does not require a showing of prejudice, and, indeed, the primary rationale for application of Cronic and its presumption of prejudice is that some circumstances are so likely to prejudice the accused "that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658. Here, of course, Nixon

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[2] Under comparable circumstances, courts have found waiver, see Gary v. State, 389 S.E.2d 218, 220-221 (Ga. 1990), and such finding would not be unwarranted *sub judice*. Parenthetically, the most that Nixon would be entitled to, even if correct in his arguments as to this claim, would be the evidentiary hearing which he thwarted in 1987-1989.

has already alleged the existence of prejudice (PCR III 465-620; Initial Brief at 37-48, 67-91), and no reason exists not to apply the Strickland v. Washington standard to this case.

Many courts have recognized that the Cronic presumption of prejudice should be applied "very sparingly" and only to a "very narrow spectrum of cases," in which the defendant was "in fact denied any meaningful assistance of counsel at all." See, e.g., Childress v. Johnson, 103 F.3d 1221, 1228-1231 (5th Cir. 1997); Toomey v. Bunnell, 898 F.2d 741, 744, n.2 (9th Cir.), cert. denied, 498 U.S. 960, 111 S.Ct. 390, 112 L.Ed.2d 400 (1990); Davis v. Executive Director of Department of Corrections, 100 F.3d 750, 778, n.3 (10th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1703, 137 L.Ed.2d 828 (1997); Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984); Scarpa v. Dubois, 38 F.3d 1, 11-16 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995) (criticizing some courts' "over expansion" of Cronic, and stating that the presumption of prejudice should not apply in cases in which it is necessary to examine the trial record, in that once such examination has taken place, "resort to a *per se* presumption is no longer justified by the wish to avoid the cost of case-by-case litigation," and further stating that an overly generous reading of Cronic "would do little more than replace case-by-case

litigation over prejudice with case-by-case litigation over prejudice *per se*."). No Florida court has ever granted relief under Cronic in circumstances even arguably comparable to those *sub judice*, and nationwide those cases granting relief on Cronic are minimal in the extreme, comprising for the most part the decision of People v. Hattery, 488 N.E.2d 513 (Ill. 1985), cert. denied, 478 U.S. 113, 106 S.Ct. 3314, 92 L.Ed.2d 727 (1986) (cited by this Court in Nixon's direct appeal, Nixon, 572 So.2d at 1340) and Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1827, 140 L.Ed.2d 962

(1998), relied upon by Appellant (Initial Brief at 34-35).[3] For the reasons set forth below, neither case is controlling.

As to Rickman, such rather aberrant case does not represent one in which defense counsel affirmatively conceded his client's guilt or stood silent during the guilt phase, but rather represented one which the federal courts concluded, after evidentiary hearing, displayed the shocking instance of a defense counsel affirmatively sabotaging his client's case at

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[3] The State finds the following cases distinguishable, in that such cases were not capital prosecutions, and, in the absence of any ensuing penalty proceeding, counsel would have no strategic reason for failing to contest his client's guilt: United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) (robbery prosecution); Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981) (burglary prosecution); State v. Harbison, 337 S.E.2d 504 (N.C. 1985), cert. denied, 476 U.S. 1123, 106 S.Ct. 1992, 90 L.Ed.2d 672 (1986) (second degree murder prosecution). Although Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835 (1985), was a capital case, the case predated Cronic, and defense counsel's concession therein conflicted not only with his client's plea, but also with the defendant's testimony before the jury to the effect that he was innocent; Nixon, obviously, offered no such testimony *sub judice*. In the absence of this latter event, *i.e.*, contrary testimony from the defendant, courts have declined to apply Spraggins. See People v. Johnson, 538 N.E.2d 1118, 1124 (Ill. 1989); Lobosco v. Thomas, 928 F.2d 1054, 1057 (11th Cir. 1991); Harbison likewise took the stand in his trial and denied his guilt. Additionally, the rationale of Swanson, and its presumption of prejudice, has been criticized by other courts, the federal court in Scarpa specifically stating that counsel's concession of guilt should have been treated as a "trial" error which would have been subject to a harmless error analysis, or one requiring a showing of prejudice. Scarpa, 38 F.3d at 12-13; Childress, 103 F.3d at 1232, n.12.

both trial and penalty by eliciting unnecessarily damaging testimony. The federal courts in effect concluded that because defense counsel was so hostile to his own client that he had become a second prosecutor; Attorney Corin's actions and alleged inactions *sub judice* obviously are nothing on par with this. As to Hattery, such case is in fact comparable to that *sub judice*, in that it involved one in which defense counsel conceded his client's guilt during the trial in order to increase the chances for mercy in a capital penalty proceeding. Perhaps due to the proliferation of ensuing claims of this type, however, the Illinois courts have subsequently severely limited Hattery, and have offered language extremely pertinent to the case *sub judice*. Thus, in People v. Johnson, 538 N.E.2d 1118, 1124-1125 (Ill. 1989), the Supreme Court of Illinois expressly held:

> Though Hattery condemned the practice, we did not in that case hold that it is *per se* ineffectiveness whenever the defense attorney concedes his client's guilt to offenses in which there is overwhelming evidence of that guilt but fails to show on the record consent by defendant. . . . .
>
> * * * * *
>
> We decline to read Hattery as broadly as the defendant urges. The error caused by counsel's concession stems from no fault of the State. Nor can the error be usually cured by the prosecutor or the trial court. If we were to accept an automatic ineffectiveness rule, there would be the

> danger that an unscrupulous defense attorney, especially in a death penalty case, would deliberately concede a client's guilt in order to lay the groundwork for a later reversal. It is even possible that client and counsel would conspire to this end. For these reasons the rule in Hattery must be narrowly construed.[] (citation omitted). Thus, if a concession of guilt is made, ineffectiveness may be established; however, the defendant faces a high burden before he can forsake the two-part Strickland test.

Appellee respectfully endorses the rationale of Johnson to this Court, and would maintain that Nixon has failed to demonstrate why he should be excused from satisfying the Strickland v. Washington test. Johnson's analysis of this claim is comparable to that employed by other courts in circumstances comparable to this case. See, e.g., Thompson v. State, 915 S.W.2d 897, 902-905 (Tex. App.- Houston 1996) (claim that defense counsel inappropriately admitted his client's guilt in voir dire and closing argument at the guilt phase analyzed and rejected under Strickland; no basis for relief in attorney's statements in the guilt phase that "only thing we are going to resolve here is the question of punishment," given overwhelming evidence of guilt, client's consent, and fact that attempt to mitigate punishment "may have been the only realistic strategy."); Lobosco v. Thomas, 928 F.2d 1054, 1056-1058 (11th Cir. 1991) (claim of ineffective assistance of counsel in regard

to counsel's concession of guilt in closing statement analyzed and rejected under Strickland v. Washington, where defendant had confessed crime and defendant consented to strategy); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (claim of ineffective assistance of counsel analyzed and rejected under Strickland, where defense counsel placed defendant on stand and allowed state to elicit confession from him on cross-examination; no prejudice in light of overwhelming evidence of guilt); United States v. Sanchez, 790 F.2d 245, 253-254 (2nd Cir.), cert. denied, 479 U.S. 989, 107 S.Ct. 584, 93 L.Ed.2d 587 (1986) (claim of ineffective assistance of counsel analyzed and rejected under Strickland, where defense counsel largely adopted strategy of "silence" and where defendant absented himself from proceedings and failed to consult with attorney; Cronic not applicable, as such might "permit a defendant to forestall adjudication indefinitely by intentionally sabotaging his own defense").

Attorney Corin did not adopt the strategy which he did through apathy or hostility to Nixon, and his strategy did not deny Nixon "any meaningful assistance at all," see Childress, supra, or result in the complete failure of the adversarial process. This case is not one of those on the very narrow spectrum to which Cronic should properly apply, given the fact

that counsel's strategy was just that, *i.e.*, a conscious strategy, and that any errors or omissions committed by him should be analyzed under the Strickland v. Washington standard, which requires, *inter alia*, a showing of prejudice. In conclusion, the observations of Judge Hall, made at the close of proceedings in 1985, remain true and accurate:

> One facet of the case that doubtless will come under examination is the tactics, strategy, analysis employed by defense counsel in this case.
>
> Trial court is uniquely situated in our judicial system. It's the only judicial officer that sees the people that appear, and observes their demeanor, is able to see the impact that the case has upon the jury, observe that impact, and so forth, as the jury hears it. Privy to the evidence and privy to that evidence as it is presented in the courtroom.
>
> Doubtless, there may be those who have reservations about the approach employed by trial counsel for the defense in this case.
>
> It is my view that the tactic employed by trial counsel in this case was an excellent analysis of reality of his case and the preservation of his credibility and the credibility of any mitigating circumstances that could have been placed before the jury and before this Court, as to disposition.
>
> It is my view, in view of the evidence in this case, the jury has found the defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. I think that the evidence, preparation of the case,

> presentation, would have persuaded any jury, not only beyond a reasonable doubt, but beyond all doubt.
>
> For trial counsel to have inferred that Mr. Nixon was not guilty of these offenses would have deprived him of any credibility during the penalty phase, and to some extent, although professionalism would have detracted a little bit from it, under a sentencing hearing before the Court. I think the trial counsel's approach, the maintenance of credibility, his rapport with the jury, were the only realistic steps that could have been taken, in an effort to give some relief to his client.
>
> A less experienced attorney, probably seeking to avoid criticism - either public, private or professional - would have tried the case differently, and probably would have left no hope at all for Mr. Nixon.
>
> Mr. Corin's approach, his analysis, his assessment, I think was right on the mark. I think that his approach has been conscientious and in diligent best interest to defend his client, Mr. Nixon.

(OR VI 1046-1047).

Appellant has failed to demonstrate any basis for reversal.

C. *The Circuit Court's Summary Denial of Appellant's Claim of Ineffective Assistance of Counsel at the Guilt Phase, Under* ***Strickland v. Washington****, 466 U.S. 668 (1984), was not Error*.

Appellant next contends that the circuit court erred in summarily denying his claim for relief, under Strickland v. Washington, in regard to the guilt phase. On appeal, opposing

counsel presents the following allegations of ineffective assistance: (1) counsel's failure to suppress Nixon's confession; (2) counsel's failure to challenge his client's competency, and (3) counsel's failure to "challenge" the State's case; as to his latter assertion, collateral counsel faults attorney Corin for failing to: investigate the possible involvement of others, development impeachment evidence against John Nixon and Wanda Robinson, learn of John Nixon's alleged involvement with the authorities and/or impeach him with his status as an informant, investigate an insanity or intoxication defense, provide the mental health experts with sufficient background information; attack the confession in front of the jury; question the processing of the crime scene and adequately litigate the competency of a juror (Initial Brief at 37-48). Judge Smith found that Nixon failed to demonstrate either deficient performance of counsel or prejudice, under Strickland v. Washington, and such conclusion was correct.

The trial court's order contains the following findings:

> Defendant raises various claims of ineffective assistance of counsel. The Court will first addrses the ineffective assistance of counsel claims pursuant to the standard enunciated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To succeed on a claim of ineffective assistance of counsel under Strickland, Defendant must show that but for counsel's unprofessional errors, the result

of the proceedings would have been different. To be entitled to an evidentiary hearing to make such showing, the Defendant must allege specific facts which are not conclusively rebutted by the record which demonstrate a deficiency in performance that prejudices the defendant. Defendant fails to sustain this burden. The alleged deficiency in performance by Nixon's trial counsel did not prejudice Nixon, and his allegations of deficient performance do not show such required prejudice.

Defendant alleges that counsel was ineffective in failing to recognize that his relationship with Defendant had deteriorated to the point where he could not effectively represent him; counsel was ineffective in failing to investigate Defendant's competency; counsel was ineffective at the guilt-innocence phase of Defendant's trial; and counsel was ineffective at the penalty phase of Defendant's trial.

The record demonstrates that the State presented overwhelming evidence against Defendant at trial. The State introduced Defendant's confession to the police wherein he provided specific details regarding the murder which were corroborated by the evidence introduced at trial. (Exhibit B, pg. 608). In his confession, Defendant stated that he met the victim at the Governors Square Mall and asked her for a ride. He further stated that he hit the victim in the face, put her in the trunk of the car, tied her to two trees with her jumper cables, and threw burning melting material onto her head and face. Defendant also stated that he left the victim burning, took her car, later burned the car, threw the gas cap into a ditch and threw the car keys into a garbage can. (Exhibit C).

Witness Jeff Atteberry testified that he saw the victim speaking with Defendant at the

Governor's Square Mall parking lot and hand him jumper cables. (Exhibit B, pgs. 1858-1866). Dr. Ben Turner, an expert witness in pathology, testified that the victim died by fire. (Exhibit B, pg. 1952). The victim's car was found burned and the gas cap was located where Defendant had specified. (Exhibit B, pgs. 2015-2016). Witness Carol Hurdle retrieved the victim's car keys from a garbage can where Defendant had said that he had thrown them. (Exhibit B, pgs. 2017-2024).

The State also presented evidence that Defendant admitted killing the victim to John Nixon (Exhibit B, pgs. 2054-2063); Wanda Robinson (Exhibit B, pgs. 2064-2070), James Nixon (Exhibit B, pgs. 1966-1971), Thomas Ingles (Exhibit B, pgs. 1972-1975); and Evelyn Harris (Exhibit B, pgs. 1980-1985). These same witnesses saw the Defendant driving the victim's car on the day of her murder, the day after her murder and two days after her murder. Greg and Susan Cleary testified that they saw Defendant driving the victim's car near the murder scene about the time the murder was committed (Exhibit B, pgs. 1876-1884, 2089). Additional witnesses testified that they had seen Defendant driving the victim's car. (Exhibit B, pgs. 561-563, 2075-2079).

Expert witnesses Karen Cooper and Douglas Barrow identified the Defendant's hand prints on the victim's car. (Exhibit B, pgs. 2030-2036, 2039-2051). James Turvaville testified that Defendant attempted to sell the victim's car to him. (Exhibit B, pgs. 561-563). The Defendant pawned the victim's jewelry. The pawn shop owner, Dennis Council, identified the Defendant as being the person who pawned the jewelry (Exhibit B, pgs. 2070-2073).

On August 30, 1989, the trial court conducted a post conviction evidentiary

> hearing wherein the State provided additional evidence that it would have presented at trial but elected not to do so since Defendant had admitted guilt. Specifically, the State choose [sic] not call other another [sic] law enforcement officer whom Defendant had confessed to, another witness named Virginia Meeks who would have testified that she saw Defendant in the victim's car and that Defendant showed her rings belonging to the victim, another witness named Judith Hill who would have also testified that she had seen Defendant in the victim's car. (Exhibit D, pgs. 77-82). At this hearing, expert Larry Simpson also testified that if any deficiency had occurred it had no effect whatsoever on the outcome of this case and that the State's case was proven beyond all doubt. (Exhibit D, pgs. 93-96).
>
> The court record reveals that the trial court itself concluded that the trial tactic employed by trial counsel was an excellent analysis of the reality of the case and the preservation of the credibility of any mitigating circumstances that could have been placed before the jury and before the court as to disposition. It was the trial court's opinion that in view of the evidence presented in the case, the jury found the Defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. The evidence, preparation of the case and presentation, would have persuaded any jury not only beyond a reasonable doubt, but beyond all doubt. (Exhibit B, pgs. 1048-1049). From an examination of the record, it is the opinion and judgment of this Court that the trial court's conclusions were sound and well founded.

(PCR XIX 3567-3570).

These findings are correct, and should be affirmed. Each of Appellant's three main assertions will now be addressed.

(1) The Confession Issue

In this portion of the claim, Appellant contends that Attorney Corin rendered ineffective assistance in failing to have his confession suppressed. The basis for this contention is largely the belief of present collateral counsel that Nixon is mentally incompetent and/or mentally retarded, and that, accordingly, his confession in 1984 could not have been knowing and voluntary; indeed, some of the experts retained by present collateral counsel so opined (Initial Brief at 37-45). The focus of this claim, however, is upon counsel's performance in 1984-85, and the State respectfully suggests that reasonable counsel in the position of Attorney Corin would not have felt constitutionally constrained to move to exclude Nixon's confession on this basis. As the Eleventh Circuit held in White v. Singletary, 972 F.2d 1218, 1220 (11th Cir. 1992), a Florida capital case:

> The [Strickland] test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable attorney at the trial could have acted, in the circumstances, as defense counsel acted at trial.

Under the circumstances known to Attorney Corin, it was not unreasonable for him to have declined to move to suppress the confession.

Although present collateral counsel now contend that testing indicates that Nixon is mentally retarded (Initial Brief at 39), the evidence available to Attorney Corin was to the contrary. Thus, the experts retained by Attorney Corin determined that Nixon's IQ was seventy-four (74), in the borderline range, and the documentary exhibits obtained by defense counsel, and supplied to the experts, similarly indicated prior IQ testing in the low-average or borderline intelligency range (OR V 817-818; PCR-S Defense Exhibits #7, 19, 20, 39). Likewise, the documentary exhibits did not involve a history of specific mental illness on Nixon's part, and the experts retained by defense counsel did not find the presence of psychosis, although they did find personality disorders; Dr. Ekwall affirmatively found Nixon competent to stand trial (OR V 800-801, 821; OR I 111-112). Based on the information at hand, Attorney Corin, as well as reasonable counsel in his position, would have had no cause to suppress Appellant's confession on the basis of mental illness or retardation. Cf. Foster v. Dugger, 823 F.2d 402, 407-408 (11th Cir. 1987) (counsel had no reason to conduct further investigation into client's mental state where he was

familiar with prior records and had consulted experts of his choosing; likewise, counsel had no reason to doubt conclusions of experts).

Likewise, counsel had no reason to believe that the circumstances of the confession provided any basis for its suppression. Given Nixon's lengthy criminal history (of which counsel was well aware, having represented him in the past), Corin knew that Nixon was familiar with his rights, and the record in this case indicates that Appellant was formally advised of his rights no less than four times - at the time of his arrest (OR V 595-596), prior to transport to the station (OR V 576-577), during transport to the station (OR V 597-599), and at the station itself prior to the taped statement (OR V 585-586, 600-601); the taped statement itself includes advisement of rights and Nixon's waiver thereof (PCR V 915-916). Contrary to any assertion in the Initial Brief, there is no support for any assertion that the officers truncated the advisement of rights or deceived or manipulated Nixon in any way (Initial Brief at 38-39); Nixon signed a written waiver of his rights, and, upon his third advisement thereof, stated, "I know what you are talking about. I'll talk to you whenever you want to talk." (OR V 599). Nothing in the statement itself suggests that Nixon's will was overborne or that, in fact, the statement

itself is involuntary, and this claim is premised simply upon "hindsight" originating from expert testimony secured in 1993; the officers present in 1984 testified that Nixon had seemed to understand his rights and had voluntarily waived them (OR V 585-587, 601-602). Further, prejudice has not been demonstrated under Strickland v. Washington, in that, even without Nixon's confession to the authorities, the State had evidence of other inculpatory statements by Nixon, Nixon having been seen with the victim prior to the incident, evidence of Nixon driving the victim's car, evidence of Nixon pawning the victims' rings, as well as physical evidence as to Nixon's handprints on the victim's vehicle. The trial court's summary denial of this claim was not error. See Johnston v. Dugger, 583 So.2d 657, 661 (Fla. 1991) (counsel not ineffective for failing to move to suppress confession based upon client's alleged mental retardation and mental defects).

(2) The Competency Claim

In a related claim, collateral counsel contends that Attorney Corin rendered ineffective assistance for failing to have Nixon's competency to stand trial evaluated. Again, a primary basis for this claim are the later-secured 1993 mental health expert reports (Initial Brief at 45-46). Trial counsel, of course, did not have possession of these reports, and, to the

contrary, had a report filed by one of his own experts, Dr. Ekwall, to the effect that Nixon was in fact competent to stand trial, a view which the expert reiterated when he testified at the penalty phase on July 24, 1985 (OR I 111-112; OR V 804). Likewise, trial counsel had possession of substantial documentary exhibits detailing Nixon's life between 1972 and 1985; these documents included prior mental health evaluations of Nixon, and none included the finding of psychosis or any major mental disorder, which would have caused counsel to question the competency of his client in 1985 (PCR-S Defense Exhibits #3, 4, 7, 19, 20, 39).[4]

During Corin's prior representation of Nixon on the assault and battery charge in February of 1985, Nixon's competency had been evaluated or "screened" by Dr. Stimel, who had found no basis to declare him psychotic or incompetent (OR VI 900, 909-910). Attorney Corin affirmatively stated at a pretrial hearing in this case, on February 27, 1985, that he would not seek further competency evaluation of Nixon unless his condition deteriorated (OR VI 900-901, 910). This Court held in Groover v. State, 574 So.2d 97, 99 (Fla. 1991), that counsel could not

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[4] Accordingly, this case is distinguishable from Williamson v. Ward, 110 F.3d 1508 (10th Cir.1997), relied upon by Appellant, in which counsel failed to obtain pre-existing mental health reports which would have served as a basis to challenge competency.

be deemed ineffective for failing to move for a competency evaluation of his client pursuant to Fla.R.Crim.P. 3.210, when there was no evidence calling a defendant's competency into question. See also Blanco v. Singletary, 943 F.2d 1477, 1506-1507 (11th Cir. 1991) (despite defendant's exhibition of "signs that he might have had some mental health problems during trial," counsel not ineffective for failing to seek competency determination). Here, given Corin's familiarity with Nixon, he did not perceive Nixon's refusal to attend the trial or his comments at the time of such refusal as a basis to assert incompetency, and Appellant has failed to demonstrate that such performance was deficient under Strickland v. Washington. Despite the existence of "new" expert opinion, Attorney Corin had no reason to question the conclusion of his expert to the effect that Nixon was competent, see Foster, supra, and the trial court's summary denial of relief as to this claim should be affirmed.

(3) The "Challenge" Issue

In this omnibus claim, current collateral counsel contend that Attorney Corin rendered ineffective assistance in ten (10) specific instances. The subclaim in regard to counsel's alleged failure to sufficiently litigate the matter of the competency of a juror (Initial Brief at 48), is procedurally barred, in that

this Court addressed such issue on direct appeal, Nixon, 572 So.2d at 1343, and Nixon cannot relitigate it, in the guise of a claim of ineffective assistance of counsel on collateral attack. See Quince v. State, 477 So.2d 535, 536 (Fla. 1985); Medina v. State, 573 So.2d 293, 295 (Fla. 1990). As to the remaining nine claims, that involving counsel's failure to "question the processing of the crime scene" (Initial Brief at 47), is too speculative to state a basis for relief, in that it is never alleged what counsel would have accomplished had he proceeded in such direction. See, e.g., Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989) (conclusory allegations of ineffective assistance of counsel insufficient for evidentiary hearing or relief); Bryan v. Dugger, 641 So.2d 61, 63 (Fla. 1994). The claim that collateral counsel should have "attacked the confession in front of the jury" (Initial Brief at 47), presupposes that there was a basis for such attack, which, as previously demonstrated, there was not.

As to the claim that counsel should have investigated or raised an insanity defense and that he failed to provide the mental health experts with sufficient background information to establish such (Initial Brief at 47), the latter assertion is squarely contradicted by the record. The mental health experts in this case not only conducted extensive testing of Appellant,

but also possessed, through counsel’s efforts, substantial documentary evidence concerning Appellant’s early life, including prior mental health evaluations (OR I 105, 110-111; OR V 798-799, 806, 820, 826). Based upon what they knew, the experts provided counsel with no basis to believe that an insanity defense would have been fruitful, and counsel discharged his responsibilities to Nixon more than competently by asserting Nixon’s mental problems and/or alleged intoxication as a basis for mitigation, as opposed to acquittal. Any suggestion that Nixon was so mentally deranged or “intoxicated” so as to constitute an absolute defense to the offenses charged is simply ludicrous, given the purposeful conduct which Nixon engaged in at the time of the murder, as well as afterwards, including such actions as his pawning of the victim’s jewelry and destruction of the car, given his fear of the existence of fingerprints. Cf. White v . State, 559 So.2d 1097, 1099 (Fla. 1990); Harich v. Dugger, 844 F.2d 1464, 1471 (11th Cir. 1988). Neither deficient performance of counsel nor prejudice have been demonstrated in regard to any of these alleged failings.

The remaining subclaims involve Attorney Corin’s alleged failure to sufficiently investigate John Nixon and/or Wanda Robinson as to their status as alleged suspects or police informants; collateral counsel has also raised comparable claims

under Brady v. Maryland, 373 U.S. 83 (1967), to the effect that the State allegedly suppressed evidence in this regard as well (Initial Brief at 48-55). The State would respectfully contend that these allegations are conclusory and/or legally insufficient, and, thus, were properly denied. See Kennedy, supra; Bryan, supra. Further, some of the matters asserted, i.e., that relating to an incident involving John Nixon in 1986, obviously did not exist at the time of the trial, so as to be utilized by defense counsel; likewise, the source of these allegations, certain civil depositions of Donald Roberts and Wanda Robinson (Initial Brief at 46, n.19), were never presented to the trial court below, despite their presence in the appendix accompanying the Initial Brief (Appendix at Tabs 31, 34), and their presentation on appeal is plainly improper and should be dismissed. See Doyle v. State, 526 So.2d 909, 911 (Fla. 1983); State v. Barber, 301 So.2d 7, 9 (Fla. 1974).

In any event, the most that can be said is that collateral counsel has now demonstrated that some basis might have existed to suggest that John Nixon or Wanda Robinson had an "interest" in their testimony. Such fact does not mean that any of their testimony was untrue or provide any basis for the jury to dismiss it. Further, even if their testimony were somehow nullified, the extensive testimony and evidence cited by the

district court in its order, including, *inter alia*, Nixon's confession to the authorities, his inculpatory statements to others, his possession and pawning of the victim's belongings and his destruction of the victim's vehicle, would preclude the finding of prejudice under Strickland v. Washington in regard to any of these claims. Summary denial of this claim was not error and should be affirmed.

D. *The Circuit Court's Summary Denial of Nixon's Claim Under **Brady v. Maryland**, 373 U.S. 83 (1967), was not Error*

As his last argument on this point, Nixon contends that Judge Smith erred in summarily denying relief as to his claim under Brady v. Maryland, Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Appellant maintains that the State withheld exculpatory evidence in the form of a memorandum which allegedly provided Nixon with an alibi, as well as information that State witnesses John Nixon and Wanda Robinson allegedly had been paid money or been promised favorable treatment in exchange for their testimony and/or that John Nixon may have been involved in the crime. Judge Smith rejected these matters as follows:

> Defendant additionally argues that the State's failure to turn over exculpatory

> information in its possession before trial violated Defendant's rights under Article I, ss. 9, 16, and 17 of the Florida Constitution, Fla. R. Crim. P. 3.220, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defendant argues that the State withheld a memorandum written by an investigator with the States Attorney's Office to an assistant state prosecutor which provided Defendant with an alibi; withheld notes contained in the State Attorney's file of pre-trial interviews which would have lent support to a defense of voluntary intoxication; and that the State failed to disclose that Defendant's brother who turned him in was a paid informant for the Leon County Sheriff's Department.
>
> In order to establish a Brady violation, the Defendant must allege specific facts which, if proven, would establish that had the evidence been disclosed a reasonable probability exists that the outcome of the proceedings would have been different. See, Mills v. State, 684 So.2d 801 (Fla. 1996); Hegwood v. State, 575 So.2d 170 (Fla. 1991). Even if proven at an evidentiary hearing, the facts allegedly constituting Brady material are insufficient to justify the relief sought. This alleged Brady material is simply insufficient to show a reasonable probability that the outcome of the trial court have been different had the evidence been presented to the jury. The evidence of Defendant's guilt was so overwhelming, the outcome of this trial would not likely have been different had the jury been provided this additional information. Confidence in the outcome of the proceedings is not undermined by the failure to disclose such evidence as alleged. See, White v. State, 664 So.2d 242 (Fla. 1995).

(PCR XIX 3573-3574).

Reversible error has not been demonstrated, and the court's ruling should be affirmed.

In Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991), this Court, quoting United States v. Meros, 866 F.2d 1304 (11th Cir. 1989), set forth the four requirements of a Brady violation:

> To establish a Brady violation a defendant must prove the following: (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecutor suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

It is clear as to the matters now asserted by Nixon that the above criteria have not been satisfied, and that, accordingly no relief is warranted. See also Mills v. State, 684 So.2d 801, 805 (Fla. 1996); Buenoano v. State, 708 So.2d 941, 948-949 (Fla. 1998); Jones v. State, 709 So.2d 512, 519 (Fla. 1998).

As to the "Mickens memorandum", in which Appellant's uncle, Lamar Nixon, allegedly stated that he had seen Appellant at 3:00 p.m., on Sunday afternoon at a location other than Governor's Square Mall and/or the murder site, thus allegedly providing Nixon with an "alibi" (PCR IV 784), Appellee would initially contend that this evidence was equally available to the defense. Not only was Lamar Nixon Appellant's uncle, but he was also

listed as a defense witness (OR I 55). Accordingly, it is difficult to see how a Brady violation could be maintained in this regard. See, e.g., James v. State, 453 So.2d 786, 790 (Fla. 1984) (no violation of Brady demonstrated where item equally accessible to both sides, and defendant had greater right to access); Roberts v. State, 568 So.2d 1255, 1260 (Fla. 1990) (same). Further, it is clear that this alleged testimony cannot be material, in that it was contradicted not only by the State's extensive case, including numerous sightings of Appellant at or near the mall and the murder site by any number of witnesses, but also by defense witness Wanda Robinson. Thus, at the penalty phase, Wanda Robinson testified that Lamar Nixon had been with her and John Nixon at 3:00 p.m. on Sunday afternoon at her home when she had discovered the "bizarre" notes left by Appellant; indeed, Lamar Nixon took possession of these notes (OR V 772-773). As Lamar Nixon could not have been in a position to observe what is allegedly attributed to him, it is clear that this information is insufficient to support a valid Brady claim. See Mills, supra.

As to the claims concerning John Nixon and Wanda Robinson, such likewise fail the materiality test, and are legally insufficient. The primary basis for this claim is an affidavit executed by John Nixon in 1993, and attached to Appellant's

post-hearing memorandum, filed February 25, 1997 (PCR XVIII 3459-3468); inasmuch as this document was not filed until 1997, six years after finality of Nixon's conviction and sentence and three and a half years after the filing of his postconviction motion in 1993, the State would also contend that the matters contained therein are procedurally barred. See Mills, supra (defendant has one year from finality to file postconviction motion and/or from discovery of "new matters" to raise legal claim, through due diligence). The most that John Nixon belatedly alleges is that Major Campbell offered Wanda Robinson and himself "money for information on Appellant," and that Miss Robinson "waved some money around;" he also states that the authorities told him that they had a warrant for his arrest for violation of probation, that they thought that he might have been involved and that they were not greatly interested in hearing him state that Appellant had been "acting messed up" at the time of the crime.

The fact that John Nixon faced pending charges, including a possible five years for dealing in stolen property and violation of probation, was well known to the defense, and was brought out by defense counsel at John Nixon's deposition of February 14, 1985, excerpts of which were attached to the response to the postconviction motion (PCR VI 1047-1049, 1063-

1064); likewise, during the February 14, 1985 deposition of Wanda Robinson, defense counsel asked her about John Nixon "working with" the Sheriff's Office (PCR VI 1154-1155). Thus, no claim of state suppression of evidence can exist in regard to these matters. Further, during the joint statement of John Nixon and Wanda Robinson on August 14, 1984, both stated that no threats or promises had been made to them in exchange for their statement (PCR V 990). Assuming that one must give any credence to the latter-day assertions by John Nixon, it is noteworthy that he nowhere alleges that any of the testimony offered by himself or by Wanda Robinson was false or inaccurate in any way, thus clearly precluding any finding of materiality. See Mills, supra; Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992) (summary denial of Brady claim proper, where, even if other individual "more involved in case" that suspected, no allegation that defendant's participation was less). Even if it could be said that these allegations call into question the credibility of the testimony offered by these two witnesses, no reasonable probability of a different result exists at trial under Kyles v. Whitley, given the sheer number of other witnesses who had heard admissions from Appellant or who saw him in possession of the victim's possessions, not to mention Appellant's own confession

to the authorities. See Robinson v. State, 707 So.2d 688, 693 (Fla. 1998); Jones, supra.

In the Initial Brief, opposing counsel also makes reference to other matters, including the fact that the State reduced charges against John Nixon in 1986, that John Nixon had allegedly committed abductions similar to that *sub judice*, that Wanda Robinson stated in a 1988 deposition in a civil case that John Nixon had been a police informant and that a 1986 police report stated that John Nixon had been an informant for FDLE (Initial Brief at 49-50). Obviously, the State cannot be said to have "withheld" evidence which related to events occurring in 1986, two years after the crime in this case, and one year after Nixon's trial and conviction; similarly, there has been no showing that the State was aware of John Nixon's alleged commission of comparable offenses, thus precluding any Brady claim in that regard. Cf. Foster v. State, 614 So.2d 455, 460 (Fla. 1992). Opposing counsel's reliance upon Wanda Robinson's 1988 deposition, included in the appendix to the Initial Brief at Tab 34, is improper, in that such matter was never presented to the trial court below. See Doyle, supra. Appellant's reliance upon State v. Gunsby, 670 So.2d 920 (Fla. 1996), is likewise misplaced, as would be any assertion that the above matters constitute "newly discovered evidence" sufficient to

merit relief under Jones v. State, 591 So.2d 911 (Fla. 1991), and the circuit court's summary denial of relief as to this claim should be affirmed in all respects.

Issue II

THE CIRCUIT COURT'S SUMMARY DENIAL OF RELIEF AS TO APPELLANT'S CLAIM OF MENTAL INCOMPETENCY WAS NOT ERROR.

Appellant next contends that the circuit court erred in summarily denying his claim that he was tried while mentally incompetent. This claim is based upon the conclusions of the experts retained by collateral counsel in 1993, as well as Nixon's refusal to attend his trial in 1985, and the statements and actions by him at that time. In his order Judge Smith found this claim procedurally barred and not cognizable on postconviction motion, on the authority of such cases as Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993), Johnson v. State, 593 So.2d 206 (Fla. 1992), Medina v. State, 573 So.2d 293 (Fla. 1990), and Rosier v. State, 655 So.2d 160 (Fla. 1st DCA 1995) (PCR XIX 3561). In the Initial Brief, opposing counsel contends that this ruling was error, citing to such cases as Oats v. Dugger, 638 So.2d 20 (Fla. 1994), 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 (Fla. 1980), and State ex rel Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207 (1933) (Initial Brief at 30, n.12).

With the exception of Lane (a direct appeal case) and Fabisinski (a pretrial habeas case), the other precedents cited

above - Oats, Koon, Jones and Hill - represent instances in which a defendant's claim relating to alleged mental incompetency at the time of trial was adjudicated on the merits in a postconviction action. On the other hand, the precedents cited by the court below are to the contrary, in holding such claims procedurally barred, as are the following additional precedents from this Court. See, e.g., Adams v. State, 456 So.2d 288, 290 (Fla. 1984) (claim of defendant's alleged incompetency to stand trial matter which "should have been determined on direct appeal."); Bundy v. State, 538 So.2d 445, 446-447 (Fla. 1989) (claim that court should have held a hearing on defendant's competency to stand trial procedurally barred on 3.850 as matter which should have been raised on appeal); Johnston v. Dugger, 583 So.2d 657, 660 (Fla. 1991) (claim that defendant not competent to stand trial procedurally barred on 3.850). It is difficult to fault the trial court for relying on precedents of this Court which have never been overruled, and Appellant has failed to demonstrate that such reliance was error or provides any basis for reversal. Accordingly, the order on appeal should be affirmed.

To the extent that any further argument is necessary, the State would contend that surely that portion of this claim which relies on matters already in the record, *i.e.*, Nixon's refusal

to attend his trial and the attendant actions and statements therein, should be procedurally barred on the basis of the above precedents, as representing a matter which could and/or should have been raised on direct appeal. See also James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992), cert. denied, 510 U.S. 896, 114 S.Ct. 262, 126 L.Ed.2d 214 (1993) ("Pate [v. Robinson, 383 U.S. 375 (1996)] claims could and must be raised on direct appeal"). As to the portion of this claim which relies on the 1993 reports of Nixon's new experts, the most that can be said would be that Nixon could be entitled to an evidentiary hearing. While it is true that this Court held in Hill that a *nunc pro tunc* competency hearing would not adequately protect the defendant's rights, this Court took a different approach in Mason v. State, 489 So.2d 734 (Fla. 1986), in which a postconviction attack upon competency was raised, and remanded for an evidentiary hearing; this Court subsequently affirmed the denial of relief, and finding of competency, following such *nunc pro tunc* evidentiary hearing. See Mason v. State, 597 So.2d 776 (Fla. 1992). Other courts have similarly concluded that *nunc pro tunc* competency hearings or hearings on matters relating to competency are appropriate, as long as there is sufficient expert or lay witness testimony to adequately address the defendant's mental state at the time of trial. See,

e.g., James, supra (federal court remands for evidentiary hearing on competency claim raised in federal habeas corpus petition by Florida death row inmate), and James v. Singletary, 995 F.2d 187 (11th Cir.), cert. denied, 510 U.S. 896, 114 S.Ct. 262, 126 L.Ed.2d 214 (1993) (affirming district court's finding of competency after *nunc pro tunc* hearing); Moran v. Godinez, 57 F.3d 690, 695-699 (9th Cir. 1994), cert. denied, ___ U.S. ___, 116 S.Ct. 479, 133 L.Ed.2d 407 (1995) (state court's *nunc pro tunc* hearing on petitioner's contention that he had been incompetent at time of plea and that court should have held hearing on such matter sufficient to resolve claims, despite passage of several years between time of plea and hearing, where state court able to conduct meaningful hearing on subject); Reynolds v. Norris, 86 F.3d 796, 802-803 (8th Cir. 1996) (district court's granting of writ reversed, where meaningful *nunc pro tunc* hearing could be held on petitioner's claim that he had been entitled to further competency hearing in state court, noting that the "passage of time is not a insurmountable obstacle if sufficient contemporaneous information is available"); Tate v. Oklahoma, 896 P.2d 1182, 1186 (Okl. Cir. 1995) (retrospective proceeding to determine defendant's competency five years after trial, before a jury, did not

violate due process; time lapse did not preclude meaningful determination in light of available evidence).

It would appear that Nixon himself is not unalterably opposed to a *nunc pro tunc* hearing of this kind, as, at least in the alternative, he has requested such relief under the authority of Jones v. State, supra (Initial Brief at 66). Further, Appellee does not read Nixon's brief as suggesting that a *nunc pro tunc* hearing would be impossible under the circumstances of this case, and, indeed, his pleadings would seem to demonstrate to the contrary. It would appear that collateral counsel has been in contact with the original experts who examined Nixon at the time of the trial (including Dr. Ekwall, who expressly found Nixon competent, OR I 112, OR V 803-804)), and such experts would presumably be available for a hearing of this kind (PCR III 562, 565-566). As best the undersigned can determine, the presiding judge, prosecutor and defense counsel would likewise be available, even if no longer in their prior positions. Accordingly, a *nunc pro tunc* hearing could be held in this case, if this Court deems such necessary. It is, however, the State's position that no such hearing is necessary.

When a federal habeas corpus petitioner presents a substantive claim of mental incompetence, no hearing is required

in the federal courts unless the petitioner has presented "clear and convincing evidence to create a real, substantial and legitimate doubt as to his mental capacity to meaningfully participate and cooperate with counsel." Card v. Singletary, 981 F.2d 481, 484 (11th Cir. 1992), cert. denied, 510 U.S. 839, 114 S.Ct. 121, 126 L.Ed.2d 86 (1993). Although this is a state collateral action, Appellee suggests that a comparable standard is appropriate for state postconviction proceedings, and that Nixon has not met it. While Nixon has presented the reports of three experts who examined Appellant in 1993 and who opined that he was not competent to stand trial (PCR IV 719-763) (a further fact which demonstrates that *nunc pro tunc* hearings and determations could be made in this case), these latter-day assertions cannot "trump" the prior and contemporaneous finding of competency by Dr. Ekwall; likewise, while collateral counsel now allege that Dr. Ekwall might now augment and/or amend his prior findings (PCR III 562), there is no indication that Dr. Ekwall would formally recant his finding of competency. The mere existence of "mental problems" on the part of a defendant, as well as latter day criticism of prior expert evaluation and/or newly-presented retroactive allegations of incompetency, do not present a sufficient basis for a postconviction hearing on competency. See Card, supra (petitioner's lengthy history of

emotional disturbances, as well as postconviction expert opinion to the effect that defendant was incompetent at time of trial, and partial recantation by prior expert, insufficient to establish legitimate doubt as to petitioner's competency, in that "not every manifestation of mental illness demonstrates incompetency to stand trial.").

Additionally, Attorney Corin, who was familiar not only with Nixon but also with his mental health history, never expressed any doubts as to Nixon's competency at the time of trial, nor is it now alleged that he would; likewise, Judge Hall, who was likewise familiar with Nixon and who held a full colloquy with him at the time he waived his presence at trial, found no basis to question Nixon's competency and, additionally, this Court affirmed the court's findings as to Nixon's waiver of presence. Nixon, 572 So.2d at 1342. None of the background materials concerning Nixon which defense counsel introduced into evidence at the penalty phase, and which had been considered by the contemporaneous defense experts, provided any basis to challenge competency in 1985, and it should be noted that these documents included prior psychiatric evaluations (PCR-S Defense Exhibits #3, 4, 7, 19, 20 & 39). No hearing is required on this matter. Cf. Diaz v. Dugger, 23 Fla.L.Weekly S332 (Fla. June 11, 1998).

Nixon is likewise not entitled to a hearing or any other relief as to any procedural claim under Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), in that he has failed to demonstrate that the trial court ignored facts which raised a "bona fide doubt" regarding his competency. The fact that a contemporaneous finding of competency was made, and has not been recanted, is significant. See Card v. State, 497 So.2d 1169, 1174-1176 (Fla. 1986) (defendant not entitled to relief as to postconviction claim that he should have received pretrial competency hearing, where prior experts had found defendant competent, and later-proffered expert testimony insufficient to raise bona fide doubt). Likewise, the fact that trial counsel never raised a competency concern is relevant. See Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 2440, 138 L.Ed.2d 200 (1997) ("failure of defense counsel to raise the competency issue at trial, while not dispositive, is evidence that the defendant's competency was not really in doubt and there was no need for a Pate hearing").

Here, Attorney Corin, who was familiar with not only Nixon but also his mental health history, expressly stated on the record that, after having Nixon's competency evaluated in a prior proceeding, he had no intention to seek further examination, unless circumstances warranted it (OR VI 900-901);

counsel who, was well aware of Nixon's decision not to attend his trial, and who was likewise present during Nixon's colloquy with the trial court, did not raise the matter further. Contrary to any assertion in the Initial Brief (Initial Brief at 58, 64), the prosecutor never affirmatively "moved for" or "requested" a hearing on Nixon's competency due to any genuine doubt as to Nixon's ability to communicate or cooperate with this attorney. Rather, at the pretrial hearing of February 27, 1985, almost five months prior to trial, the prosecutor expressed his expectation that defense counsel would seek examination of his client under Fla.R.Crim.P. 3.210, as he had done in a prior case, and further expressed his desire that such appointment and examination take place sooner, rather than later (OR VI 899-900, 908-910); it would also seem that the prosecutor wished to expedite any appointment of an expert pursuant to Fla.R.Crim.P. 3.216. Certainly, the prosecutor, who was likewise present at the time that Nixon waived his presence at trial and during the colloquy with the trial court, never made any suggestion that Nixon's competency could be evaluated at that point.

Assuming this claim is cognizable, no relief is warranted. See, e.g., Williams v. State, 396 So.2d 267, 269 (Fla. 3d DCA), cert. denied, 406 So.2d 1107 (Fla. 1981) (in-trial evidentiary

hearing on competency not required, in case where defendant refused to testify despite prior assurance that he would do so, and despite defendant's demand to immediately see a psychiatrist); Kilgore v. State, 688 So.2d 895, 898-899 (Fla. 1996) (trial court not required to hold *sua sponte* competency hearing in case where defense counsel never requested such, despite defendant's absence from portion of proceedings and expression of dissatisfaction therewith); Robertson v. State, 699 So.2d 1343, 1346 (Fla. 1997) (trial court not required to hold *sua sponte* competency hearing, where defense counsel expressly declined determination of client's competency, even though defendant had history of mental problems, had been disruptive at prior hearing and counsel stated that client refused to meet with him); Watts, supra (trial court not required to hold *sua sponte* competency hearing, even though defendant slept through vast majority of trial due to use of crack cocaine). The circuit court's summary denial of relief as to this claim should be affirmed.

Issue III

THE CIRCUIT COURT'S SUMMARY DENIAL OF APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, UNDER STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984), WAS NOT ERROR.

In his next claim, Nixon contends that the trial court erred in summarily denying his claim of ineffective assistance of counsel at the penalty phase, brought under Strickland v. Washington. Appellant contends that Attorney Corin rendered ineffective assistance by failing to introduce available mitigation, by introducing affirmatively harmful evidence and by permitting the State "to introduce and argue improper aggravating circumstances" (Initial Brief at 67). Judge Smith summarily denied relief as to this claim, making the following findings:

> As to the allegations regarding the penalty stage, the Defendant must show that but for counsel's errors he would probably have received a life sentence. See, Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Bertolotti v. State, 534 So.2d 386 (Fla. 1988). The court record indicates that counsel argued for jury instructions favorable to his client. (Exhibit B, pgs. 726-732). Defense counsel also introduced fifty exhibits in support of mitigation, (Exhibit B, pgs. 733-734), and called nine witnesses to provide mitigation testimony regarding the Defendant's background and mental and emotional problems. (Exhibit B, pgs. 764-838). Throughout the penalty phase defense counsel continually emphasized his strategic theme, which focused on Defendant's mental and emotional problems. Counsel was arguing for a life sentence. (Exhibit B, pgs. 757-758).
>
> The record further shows that counsel objected to certain aggravating factors presented by the State. Counsel objected to aggravating circumstances testimony

regarding Defendant terrorizing the victim (Exhibit B, pgs. 738-746); counsel objected that Defendant's conviction for battery on a law enforcement officer did not meet the statutory definition as a felony involving violence (Exhibit B, pgs. 868-872); counsel argued to exclude additional aggravating testimony that Defendant had tried to terrorize the victim by removing her underwear (Exhibit B, pgs. 740-743); counsel attempted to argue that the court would be impermissibly doubling aggravators by instructing the jury that it could find the Defendant's killing both heinous, atrocious and cruel and cold, calculated and premeditated (Exhibit B, pgs. 887-889); and objected against the aggravator that Defendant murdered the victim for pecuniary gain (Exhibit B, pgs. 872-883).

Trial counsel's legitimate, sufficient, and able efforts could not establish mitigating factors sufficient to overcome the aggravating factors proven by the State: (1) Defendant had prior convictions for two violent felonies, armed robbery and battery on a law enforcement officer; (2) the murder occurred in a heinous, atrocious and cruel manner; (3) Defendant murdered in a cold, calculated and premeditated manner; (4) the murder occurred during the course of a kidnapping; and (5) Defendant murdered for pecuniary gain. (Exhibit E). The Court finds that trial counsel did present substantial mitigating evidence at the penalty phase and rendered reasonably effective assistance of counsel. Based upon the overwhelming evidence that Defendant committed an aggravated murder, Defendant cannot demonstrate that but for the alleged errors he would have received a life sentence. See, Hildwin, supra. The factual allegations of Defendant are conclusively

> rebutted by the record, as referenced herein, which shows that Defendant was not prejudiced by any deficiency of trial counsel.

(PCR XIX 3570-3571).

Reversible error has not been demonstrated, and each of Appellant's arguments will now be addressed.

A. *<u>Counsel's Alleged Failure to Present Available Mitigation</u>*

As the first "prong" of his attack upon counsel's performance, Nixon contends that Attorney Corin failed to investigate "available" evidence concerning his childhood and early life, particularly in regard to alleged physical and sexual abuse, poverty and deprivation, alleged signs of mental retardation and mental illness, and alleged drug and alcohol problems both earlier in life and at the time of the murder (Initial Brief at 77-79). These same matters were alleged in the 3.850 motion below, and considered by Nixon's new mental health experts (PCR III 529-595), although the source of these allegations is not always set forth; to the extent that Appellant's mother would now testify that she drank while pregnant with him and that she beat him as a child or witnessed him being abused by others (PCR III 530-536), it is worth noting that she offered no testimony of this kind while testifying at the penalty phase in 1985 (OR V 764-767), stating instead that

she had tried to provide for him as best she could (OR V 767). The issue is not whether Nixon's current counsel have discovered new information through further investigation nor whether members of Nixon's family or Nixon himself have now chosen to come forward with new information to mental health experts retained by successor counsel. Rather, the issue is whether Attorney Corin performed a reasonable investigation in 1984 through 1985, and, further, whether any deficiency in that investigation prejudiced Nixon to such an extent that his death sentence has now been rendered unreliable. Appellee respectfully contends that these questions should be answered, respectively, in the affirmative and in the negative.

It cannot be seriously contended that Attorney Corin did not investigate his client's life. Corin obtained documentary exhibits pertaining to Nixon's life between 1972 and 1985 (PCR-S Defense Exhibits #1-50), and presented such to his mental health experts, so that their diagnoses could be based upon as much information as possible. Attorney Corin had a definite strategy at the penalty phase which focused upon Nixon's mental problems; in short, it was the defense's view that death was not the appropriate sentence because Nixon was not, in Dr. Doerman's words, "an intact human being." Accordingly, Attorney Corin elicited testimony from Appellant's mother to the effect that he

had never been “normal” while growing up, and also elicited testimony from Wanda Robinson concerning Nixon’s mental state at the time of the offense; similarly, counsel elicited testimony from various police officers who had come into contact with Nixon close to the time of the murder when he had asked to be taken into custody before he hurt someone. Likewise, Attorney Corin elicited testimony from the mental health experts to the effect that, in light of Nixon’s history and their own examination and testing, both statutory mental mitigators pertaining to mental state applied, pursuant to §921.141(6)(b) & (f); the doctors diagnosed Nixon as suffering from mixed personality disorder, as well as borderline intelligence, and stated that, under stress, he could become psychotic and have problems perceiving reality. They also testified that Nixon had told them that he had been drinking and using drugs prior to the murder as well as deprived of sleep (OR V 802-803, 805-806, 823, 825-826). Defense counsel argued all of these factors as a basis for the jury to recommend a life sentence. This was not unreasonable conduct.

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. If, in fact,

he did not know of these matters, the State would respectfully contend that he would have had no reason to suspect that such existed. Certainly, Nixon did not tell either Attorney Corin or the mental health experts in 1984-5 of these matters, nor were any of these matters contained in the fifty documentary exhibits obtained by counsel. These documents included not only prior psychological evaluations, but also interviews of Nixon and members of his family. At these times, Nixon's parents had stated that he had been "healthy" and had had no accidents; likewise, visits were made to the Nixon home and/or interviews conducted with his family, which resulted only in observations that Nixon's parents failed to properly supervise their children, as well as the fact that they had a strong sense of moral values and were devoutly religious (PCR-S Defense Exhibits #8, 12, 23, 26). Reasonable counsel in Attorney Corin's position would not have suspected that further investigation would have uncovered the maelstrom of alleged abuse, deprivation, etc., now asserted by collateral counsel. Cf. Foster, supra. Alternatively, counsel could reasonably have concluded that presentation of these matters would simply have diluted the jury's attention from the focus of the penalty proceeding, *i.e.*, Nixon's mental state. Reasonable counsel in Attorney Corin's position could well have decided that such

presented the best chance for success, and that any attempt to portray Joe Elton Nixon as the greater "victim" in this case, as opposed to Jeanne Bickner, would be doomed to failure.

Additionally, prejudice has not been demonstrated under Strickland v. Washington. The crime committed by Joe Elton Nixon is truly one of the most heinous and aggravated in the history of Florida capital litigation. This was no "simple" convenience store robbery, which went "bad", and in the course of which the victim was quickly and painlessly executed with a single gunshot. Rather, the victim was abducted from a public place, taken to a remote location and tormented, beaten, tied to a tree and set afire, after begging for her life. The crime was committed by one with prior convictions for crimes of violence, was committed during the course of a kidnapping and was committed for pecuniary gain, Nixon stealing the victim's car, as well as her jewelry, which, of course, he later pawned. Likewise, the crime was well planned and conducted in a cold, calculated and premeditated manner; contrary to any allegations in the Initial Brief or from the current experts, testimony as to Nixon's alleged mental problems would affect, at most, the weight given to these aggravators, as opposed to their applicability. Michael v. State, 473 So.2d 138, 141-142 (Fla. 1983); Card v. State, 453 So.2d 17, 22-24 (Fla. 1984). The

matters now presented on collateral attack, particularly those relating to Nixon's early life, are remote in time in reference to the incident, and would not provide the reasonable probability of a different sentencing result, had they been presented.[5]

Accordingly, summary denial of his portion of Appellant's claim of ineffective assistance of counsel was not error, and should be affirmed. See, e.g., Grossman v. Dugger, 708 So.2d 249, 251 (Fla. 1997) (no prejudice under Strickland in regard to counsel's failure to present mitigation where "facts of this case show the defendant's conduct to be so egregious that proof of mitigating circumstances was extremely difficult"); Breedlove v. State, 692 So.2d 874, 878 (Fla. 1997) (no prejudice under Strickland in regard to counsel's failure to present evidence concerning childhood beatings where aggravation affirmed on appeal "overwhelmed" mitigation later proffered); King v. State, 597 So.2d 780, 782 (Fla. 1992) (no prejudice from counsel's failure to present newly-acquired mental health evidence where "the aggravating factors in this case are so overwhelming, it is

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[5] Collateral counsel also contend that Wanda Robinson's deposition would have provided additional mitigation (Initial Brief at 76, n.34). It is difficult to see how Miss Robinson's statement that Appellant's history of tying women to trees when he was angry with them would be helpful to the defense, and Attorney Corin could well have concluded that further investigation would not be fruitful (PCR VI 1122).

difficult to imagine a jury or a judge, following the law, would ever recommend or impose a sentence other than death."); Mendyk, supra (unpresented evidence as to abusive childhood, history of drug and alcohol abuse and mental impairment insufficient to demonstrate prejudice, in light of, *inter alia*, "strong aggravating circumstances."); Puiatti v. Dugger, 589 So.2d 231, 233-234 (Fla. 1991) (summary denial of 3.850 proper, where counsel not defective for presenting testimony from defendant's mother of good family background, even though on collateral attack, defendant claimed that, in fact, he had been beaten and abused); Buenoano v. Dugger, 559 So.2d 1116, 1119 (Fla. 1990) (summary denial of claim of ineffective assistance of counsel at penalty phase not error, because evidence of alleged sexual abuse and mental problems would in no way be sufficient to outweigh four strong aggravating circumstances); Correll v. Dugger, 558 So.2d 423, 426 (Fla. 1990) (counsel not ineffective for failing to discover that Appellant had abused childhood, where defendant's mother offered contrary testimony at sentencing; no prejudice from counsel's failure to present evidence of drug use and intoxication in light of heinous nature of murder and abundance of aggravating circumstances); Tompkins v. Dugger, 549 So.2d 1370, 1373 (Fla. 1989) (unpresented evidence of abused childhood and addiction to drugs and alcohol

would not have affected penalty in light of the case and the nature of the aggravating circumstances; no prejudice under Strickland); Francis v. State, 529 So.2d 670, 673 (Fla. 1988) (no prejudice under Strickland in regard to counsel's failure to present evidence of defendant's abused childhood and neglected and deprived upbringing in light of remoteness of evidence, in case involving torture murder); Clisby v. State of Alabama, 26 F.3d 1054, 1057 (11th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1127, 130 L.Ed.2d 1089 (1995) ("some cases almost certainly cannot be won by defendants;" "sometimes the best lawyering, not just reasonable lawyering, cannot convince the sentencer to overlook the facts of a brutal murder -- or, even, a less brutal murder for which there is strong evidence of guilt and fact.").

Additionally, Nixon argues that counsel's failure to supply this "mitigating" background information to the experts precluded them from rendering "competent" diagnoses, and/or likewise rendered counsel ineffective (Initial Brief at 76, 82). The State disagrees. The record reflects that Drs. Doerman and Ekwall had a substantial amount of background information supplied to them by Attorney Corin, *i.e.*, PCR-S Defense Exhibits #1-50, documenting all relevant facets of Nixon's life between 1972 and 1985; these records included prior psychiatric

evaluations (see PCR-S Defense Exhibits #3, 4, 7, 19, 20, 39). Additionally, the experts performed a significant amount of testing on Appellant, both psychological and neurological, and testified at the penalty phase regarding his borderline intelligence (IQ of 74), brain damage, and personality disorder, as well as the fact that he had brief psychotic episodes while under stress, when he would not be able to perceive reality (OR V 800, 818-819, 821-822); Dr. Ekwall expressly testified that both statutory mitigating circumstances existed (OR V 802-803), and Dr. Doerman stated that at the time of the murder, Appellant had been under great stress, given his feelings for Miss Robinson and alleged consumption of alcohol (OR V 822-824). A reasonably competent attorney in Attorney Corin's position would not have concluded that Drs. Ekwall and Doerman lacked sufficient information to make their diagnoses, and the fact that present collateral counsel has obtained "new" experts who offer allegedly "new" diagnoses (premised upon "new" material apparently supplied by Nixon and/or his family for the first time), does not mean that counsel was ineffective in 1984-85. See, e.g., Stano v. State, 520 So.2d 278, 281 (Fla. 1988); Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990); Engle v. Dugger, 576 So.2d 696, 702 (Fla. 1991); Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992) (record refuted contention that

original mental health experts lacked sufficient background information).

The fact that Nixon's present experts differ with his past experts is neither surprising nor a basis for relief. <u>See</u> <u>Engle</u>, <u>supra</u> ("mental health experts often reach differing conclusions."). The fact that Nixon's present experts - Drs. Dee, Keys and Whyte (PCR IV 719-763) - would testify that both statutory mental health mitigators existed is not evidence of prejudice, in that Dr. Ekwall offered this testimony at the penalty phase; the fact that the present experts would opine that neither the HAC nor CCP aggravators should have been found due to Nixon's mental state is not evidence of prejudice, as such is a view contrary to Florida law. <u>See</u> <u>Michael</u>, <u>supra</u>. Present collateral experts obviously agree with the past experts that brain damage existed, as well as with the fact that Nixon could act psychotically while under stress, and present counsel has failed to demonstrate that the new experts' diagnoses of "organic personality syndrome" would be viewed as one more mitigating than that offered by Dr. Doerman, *i.e.*, mixed personality disorder. Nixon told Drs. Ekwall and Doerman of his alleged drug and alcohol use and sleep deprivation, and they so advised the jury; any new evidence in this regard would be

cumulative, as would much of the rest of the matters now cited by collateral counsel.

Although the present experts, from their vantage point in 1993, fault Drs. Doerman and Ekwall for not diagnosing Nixon as mentally retarded (PCR IV 726, 737-738, 761-763), it should be noted that the operative edition of the Diagnostic and Statistical Manual of Mental Disorders sets forth an IQ of 70 as the cutoff for mental retardation, a fact noted by Dr. Doerman in his testimony,[6] and nothing in Nixon's prior IQ testing (which had resulted in scores of 88 and 83, PCR-S Defense Exhibits #7, 39) would have suggested the presence of mental retardation *per se*; it should be noted that Dr. Doerman expressly advised the jury that Nixon's intelligence was borderline at best, stating, "his IQ puts him at the fifth percentile as opposed to the population at large." (OR V 819, 822). Ineffective assistance of counsel has not been demonstrated by virtue of Attorney Corin's reliance upon the experts obtained in 1985, and their diagnoses. See, e.g., Jennings v. State, 583 So.2d 316, 320-321 (Fla. 1991) (rejecting claim under comparable circumstances); Johnston v. Dugger, 583 So.2d 657, 660-661 (Fla. 1991) (same);

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[6] At the time he examined Nixon, Dr. Doerman would have utilized the third edition of Diagnostic and Statistical Manual of Mental Disorders, published in 1980, which does indeed set forth such "cutoff." Id., at 36-37.

Rose v. State, 617 So.2d 291, 295 (Fla. 1993) (reports by original experts were not so grossly insufficient as to merit post conviction relief, where original experts had not ignored "clear indications of mental health problems"). The trial court's summary denial of this portion of Nixon's claim was not error.

B. *Counsel's Alleged "Harmful" Presentation*

Nixon also contends that the manner in which Attorney Corin presented the defense case at the penalty phase was affirmatively harmful. Thus, present collateral counsel maintain that Attorney Corin elicited prejudicial testimony from the defense witnesses, and further presented damaging closing argument to the jury, which harmed Nixon's cause, as opposed to helping it. For support, Appellant relies upon this Court's decision in Clark v. State, 690 So.2d 1280 (Fla. 1997), as well as Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), and Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). Appellee would contend that these cases are distinguishable, and that the circuit court's summary denial of this portion of Nixon's claim was not error and should be affirmed.

Even in the absence of an evidentiary hearing, it is clear that Attorney Corin did in fact have a definitive strategy at

the penalty phase. As he told the jury in closing argument, he had promised them that he "would not try to misrepresent anything" to them, and he kept that promise; he had shown them "the good and the bad" concerning his client, so that they could make an informed recommendation to the court (OR VI 1038-1039). Contrary to the allegations in the Initial Brief, and in contrast to the accusations of the attorneys censured in the above cases, Attorney Corin had only one objective in this proceeding - to save Nixon's life - and nothing he said or did would have misled the jury as to this fact. Attorney Corin used his opening and closing statements during the guilt phase to urge the jury to consider, at the appropriate time, a life recommendation for Nixon (OR XI 1852-1853, IV 642-643, 673-675). In his closing argument at the penalty phase, Corin said nothing to distance himself from his client nor to "demonize" Nixon, as alleged, but rather repeatedly advised the jury that they should recommend a life sentence, owing to such factors as Nixon's low intelligence, his brain damage, his emotional disturbance or impaired capacity at the time of the crime, as well as the fact that Nixon would already be serving a life sentence by virtue of his other convictions and that he adjusted well to incarceration (OR VI 1018-1040). In contrast to the cases relied upon by Appellant, it is clear that Attorney Corin never told the jury:

(1) that his client was worthless, that he hated him or that it was virtually impossible to get up to come up with a reason not to impose the death penalty (Horton); (2) that no mitigating circumstances existed except that his client was a human being (Douglas); (3) that he was very reluctantly representing his client and that his client was "dehumanized" (King), and (4) that counsel was only making his argument because he was required to do so, that his client was a bad person who could not follow the law and that his client needed to be "stopped" (Clark).[7]

The real focus of this claim is upon the fact that Attorney Corin, as promised, elicited not only the "good" about his client, but also "the bad and the ugly." It is apparently collateral counsel's view that one in Attorney Corin's position

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[7] Likewise, Attorney Corin's remarks are nowhere comparable to those condemned in Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988), relied upon by Appellant (Initial Brief at 85), in which counsel referred to the difficulty in presenting mitigating circumstances in behalf of his client, the problems his client's behavior had caused him, and analogized his client to a "shark" and an "animal". The Tenth Circuit declined to follow Osborn in its subsequent decision, Davis v. Executive Director of Dept. of Corrections, 100 F.3d 750, 757-760 (10th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1703, 137 L.Ed.2d 828 (1997), in which it rejected the contention that defense counsel had abandoned his client when, in closing argument, he stated that he hoped never to see a case like Davis' again, that sometimes he hated his client and the things that he did, that there was "no excuse" for them, and that his client had lied to him. Davis indicates that Nixon merits no relief.

was somehow to sanitize Nixon’s life, to make a full presentation in mitigation, and to only present evidence which redounded well to Nixon’s benefit. Unfortunately, Appellant Nixon, who led the type of life which he did, made this impossible, a fact which is not attributable to any action or omission on the part of counsel.

Counsel fully investigated Nixon’s life, obtained voluminous background materials and presented them to the mental health experts, in the hope that they could propound a theory of mitigation, which, in turn they did, and which, in turn, Attorney Corin argued to the jury. While it is true that the background materials supplied to the experts, as well as the experts’ own testimony, contained matters which are not helpful to Nixon, such as delineation of Nixon’s long history of anti-social behavior, collateral counsel make no explanation as to how Attorney Corin was to selectively edit Nixon’s life so that only the “good” could be presented to the jury. If a defendant presents his life story and/or his mental condition as a basis for mitigation, all relevant matters pertaining thereto can be elicited by either party. In consciously eliciting some of these matters less favorable to Nixon, Attorney Corin was simply seeking to blunt their impact, as opposed to allowing the State to elicit such matters on cross-examination, as would be their

prerogative. This is nothing more than application of the doctrine of "anticipatory rehabilitation" in the context of a capital penalty proceeding. See, e.g., Bell v. State, 491 So.2d 537, 538 (Fla. 1986) (prosecutor was entitled to elicit testimony from state witness to the effect that he had initially lied "as anticipatory rehabilitation" so as "to take the wind out of the sails of the defense attack on the witness' credibility"); McCrae v. State, 510 So.2d 874, 877-878 (Fla. 1987) (defense counsel not ineffective for presenting testimony regarding defendant's prior convictions, which led to cross-examination as to the nature of one of such priors, where counsel was utilizing such as anticipatory rehabilitation to "take the wind out of the prosecution's sails."). Ineffective assistance of counsel has not been demonstrated, and collateral counsel's complaints as to Attorney Corin's presentation of evidence through Appellant's mother, as well as Wanda Robinson and the police officers, is completely without merit, in that counsel was clearly trying to lay a basis for the mental health defense, and demonstrating that the police had allowed Nixon to "fall through the cracks" days before this murder, and, inferentially, that they could have prevented such, had they taken him into custody as he requested.

In making a claim for life, Attorney Corin did not have a great deal to work with. His client stood convicted of one of the most heinous crimes imaginable, and it is respectfully submitted that insufficient mitigation exists in the universe which could make a life sentence reasonable under the circumstances of this case. Attorney Corin perceived his best chance, and thus Nixon's best chance, as following a "strategy" of complete candor. Thus, at the guilt phase, Corin did not contest the State's case, so as not to loose credibility with the jury in presenting a "wild goose chase" defense. Having proceeded to the penalty phase, Corin again sought to maximize credibility with the jury by not hiding things from them, a strategy which collateral counsel has entirely failed to demonstrate was unrealistic or unreasonable. Although Corin is faulted for advising the jury that Nixon had prior convictions for burglary and assault (Initial Brief at 69), it cannot seriously be contended that a reasonable probability of a different sentencing result exists, had such action not been taken. Likewise, the fact that counsel introduced documentary exhibits which contained unfavorable information (Initial Brief at 69, 73-74), is explainable by the fact that these matters were considered by the mental health experts, and that the State could have elicited their contents on cross-examination. See

Parker v. State, 476 So.2d 135, 139 (Fla. 1985) (State could cross-examine defense expert as to knowledge of defendant's prior criminal history where such considered by expert in reaching opinion); Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987) (introduction of document detailing defendant's juvenile criminal history not error, where defense expert could be examined as to his knowledge of such). Counsel cannot be faulted for supplying these matters to the experts, and thus opening the door to their disclosure, given the fact that a mental health defense was truly Nixon's only hope at the penalty phase, and, rather perversely, it should be noted that counsel was also faults Corin for not providing the experts with sufficient background information concerning Nixon. The fact that counsel referred to Nixon as "nuts" in his closing argument was perhaps inartful (Initial Brief at 70), but obviously was consistent with his view that Nixon did not deserve the death penalty because he was not "an intact human being."

The State disagrees with Appellant's contention that the mental health experts presented below were "a disaster" (Initial Brief at 71). The fact that some of their testimony may not have been helpful does not mean that counsel was ineffective for calling them. See Hance v. Zant, 981 F.2d 1180, 1184 (11th Cir. 1993) (counsel not ineffective for presenting testimony of

mental health expert which "included both favorable and unfavorable elements," including testimony that defendant's chance of rehabilitation were poor). Although Dr. Ekwall did not find the existence of gross psychosis, he did state that both statutory mental mitigators applied, and that Appellant suffered from psychotic episodes when under stress (OR V 799-804); when asked on cross-examination by the prosecutor if he could predict what Nixon would do in the future, the witness replied that he could not but that he did not feel that Appellant was "a very good risk for society" (OR V 812). Although Dr. Doerman testified on direct that Nixon's primary method of dealing with conflict was to "start plotting revenge," he also attested to Nixon's borderline intelligence and brain damage (OR V 817-819, 821). Likewise, while counsel did elicit testimony from Doerman to the effect that Nixon was not remorseful, and, in fact, was dangerous, not subject to treatment and should not be in a free society (OR V 821-823), counsel utilized these matters in his closing argument in support of his contention that Nixon was "not normal" and was not deserving of the death penalty (OR VI 1025, 1030-1031); similarly, counsel used Dr. Doerman's testimony that Nixon did well in a structured environment (OR V 830-831), as a basis to argue that life imprisonment was appropriate, given the

defendant’s lack of disciplinary reports while incarcerated (OR VI 1035-1037).

In order to prevail on this claim, Appellant must, of course, demonstrate both deficient performance of counsel and prejudice. The State contends that Appellant has failed to demonstrate either, but that, even if deficient performance were shown, prejudice has still not been demonstrated under Strickland. The proposed strategy now offered by collateral counsel, involving the new experts, would seem to involve a penalty phase defense of “complete insanity” in which it was asserted that Nixon was totally insane at the time of the murder, as well as a full presentation of accounts of alleged abused and deprived childhood. Presentation of these matters, would not have created a reasonable probability of a different sentencing result. The manner in which Nixon committed the crimes, including his theft and pawning of the victim’s jewelry and his destruction of the victim’s vehicle to avoid detection, as well as his presentation of a detailed confession to the authorities, is inconsistent with any claim of complete insanity at the time, and any attempt to portray Nixon as the “greater victim” than Ms. Bickner would have done nothing but insult the jury. This was a case of overwhelming aggravation in which death was the only appropriate or reasonable sentence. As to

the Eleventh Circuit observed in Clisby, supra, sometimes the best lawyering cannot convince the sentencer to overlook the facts of a brutal murder, and some cases almost certainly cannot be won by defendants. Joe Elton Nixon's case was one of these, and the circuit court's finding of lack of prejudice was correct. See also Grossman, supra; Breedlove, supra; King, supra; Mendyk, supra; Buenoano, supra; Correll, supra; Tompkins, supra. Nixon warrants no relief on this portion of his claim.

C. *Counsel's Handling of Aggravating Circumstances*

Collateral counsel also contends that Attorney Corin rendered ineffective assistance in conceding the application of the heinous, atrocious or cruel aggravating factor, and failing to object to jury instructions on four of the aggravators (Initial Brief at 68-69). This claim fails to satisfy either "prong" of Strickland v. Washington. As to the jury instructions, it is difficult to see any deficiency of counsel, in that no court had ever invalidated such instructions at the time of Nixon's trial in 1985, and, indeed, no challenge has been successfully entertained to those instructions relating to prior conviction or commission during a felony. See Harvey v. Dugger, 656 So.2d 1253, 1258 (Fla. 1995) (counsel not ineffective for failing to object to instructions which had

previously been deemed constitutional). As to the HAC factor's application, counsel's "concession" was made to the court and opposing counsel, rather than expressly to the jury (OR V 743), although counsel did, during the course of his argument, refer to the crime as "atrocious" (OR VI 1027). Collateral counsel has failed to demonstrate that any reasonable attorney in Attorney Corin's position would have contested the application of this aggravating factor. Considering the gruesome and torturous manner in which the victim died, as well as the fact that the finding of this aggravating circumstance is in accord with precedent, see, e.g., Henry v. State, 613 So.2d 429 (Fla. 1992) (HAC properly found where victim robbed, bound and then set afire), neither deficient performance nor prejudice has been demonstrated. No relief is warranted as to this claim.

Issue IV

THE CIRCUIT COURT'S SUMMARY DENIAL OF APPELLANT'S CLAIM OF ERROR, UNDER AKE v. OKLAHOMA, 472 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), WAS NOT ERROR.

In a somewhat related claim, Nixon contends that he was deprived of competent mental health assistance, in violation of Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). The circuit court found this claim procedurally barred, but rejected on the merits any assertion that trial counsel had

been ineffective for failing to provide the experts with sufficient background information (PCR XIX 3562, 3567-3571). As this case does not represent one in which defense counsel relied upon "grossly inadequate" mental evaluations, cf. State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987), the trial court's rejection of this claim was proper. As previously demonstrated, the experts retained by defense counsel had a substantial amount of background information supplied by defense counsel himself, and the experts themselves conducted a significant amount of testing on Appellant. Although Appellant has now secured new experts who have offered affidavits in some contravention of the findings of the prior experts (PCR IV 719-763), and although it is alleged, without attestation, that the original experts may modify their testimony in some respects, following the consideration of "new" matters (PCR III, 562, 565-566), it cannot be said that the original experts' evaluations were so deficient as to deprive Nixon of due process. Accordingly, no relief is warranted as to this claim.

Issue V

THE CIRCUIT COURT DID NOT ERR IN FINDING NIXON'S CLAIM CONCERNING HIS PRIOR CONVICTIONS TO BE LEGALLY INSUFFICIENT.

As his next claim, Nixon contends that Judge Smith erred in his disposition of his claim concerning his two prior

convictions. Nixon claimed that because he allegedly was incompetent at the time of this trial, such incompetency should serve as a basis to violate his prior convictions as well (PCR IV 684-692); accordingly, Nixon contended that he was entitled to relief under Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Judge Smith found this claim legally insufficient, under Henderson v. Singletary, 617 So.2d 313, 316 (Fla. 1993) (PCR XIX 3566). Reversible error has not been demonstrated.

Judge Smith's reliance upon Henderson was not misplaced, in that in such case the defendant, as here, contended that his death sentence should be vacated, under Johnson v. Mississippi, because the prior convictions utilized in aggravation were allegedly invalid. Unlike Nixon, however, Henderson actively litigated challenges to his prior convictions, which were still pending at the time of his execution. This Court found Henderson's reliance upon Johnson misplaced, given the fact that the prior convictions had not been vacated, additionally citing to Tafero v. State, 561 So.2d 557 (Fla. 1990), Eutzy v. State, 541 So.2d 1143 (Fla. 1989), and Bundy v. State, 538 So.2d 445 (Fla. 1989). Nixon has demonstrated no reason why Henderson should not apply *sub judice*, and the order on appeal should be affirmed.

Additionally, Nixon notes in a footnote, in regard to his Florida conviction for battery on a law enforcement officer, that his public defender "considered" an appeal of this conviction based on Nixon's alleged incompetency to stand trial (Initial Brief at 93, n.42). That conviction was in fact appealed and affirmed. Nixon v. State, 495 So.2d 1172 (Fla. 1st DCA 1986). Given the fact that this prior conviction has been final for more than a decade, it is clear that any attack upon it at this juncture would be procedurally barred, and this Court has traditionally held that claims of this nature are not cognizable on 3.850. See, e.g., Roberts v. State, 678 So.2d 1232, 1234-1235 (Fla. 1996). Nixon merits no relief on this claim.

Issue VI

THE CIRCUIT COURT DID NOT ERR IN FINDING NIXON'S CLAIM CONCERNING ALLEGED RACIAL DISCRIMINATION TO BE LEGALLY INSUFFICIENT.

In his next claim, Nixon contends that Judge Smith erred in denying relief as to alleged racial discrimination in the prosecution of his case. In his 3.850 motion, Nixon contended that Leon County prosecutors have not traditionally sought the death penalty in cases in which the victim was black, and that, hence, Nixon's prosecution was racially motivated (PCR IV 667-683); Nixon likewise contended that municipal services are less

available to the black community in Leon County and that racial discrimination exists in employment. Appellant similarly argued that the prosecutor introduced racism in his case, in that several witnesses referred to the race of individuals whom they had observed (PCR IV 678). Judge Smith found this claim legally insufficient on the basis of this Court's decision in Foster v. State, 614 So.2d 455 (Fla. 1992) (PCR XIX 3565). Appellant has failed to demonstrate any error in this ruling.

This Court held in Foster that, under such precedents as McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), a defendant seeking to make a claim premised upon racial discrimination must show that the State Attorney's Office acted with purposeful discrimination in seeking the death penalty in his case. Id., at 463. Nixon, like Foster, has failed to make such a showing, and simply relies upon generalized statistics which have nothing to do with his particular case. Appellant apparently recognizes this, as he asks this Court to recede from Foster (Initial Brief at 94). Appellee respectfully contends that Nixon has failed to demonstrate any reason why this Court should do so, and that the circuit court's order should be affirmed. Appellant's claim that the prosecution introduced race because witnesses referred to individuals by their race (PCR IV 678) is frivolous. As Appellant notes elsewhere in his

brief (Initial Brief at 17), the witnesses could not identify either the defendant or the victim by name, and hence chose to describe them as “a black male” or “a white female.” This is not racism, and reversible error has not been demonstrated.

Issue VII

THE CIRCUIT COURT DID NOT ERR IN FINDING NIXON'S CLAIMS UNDER ESPINOSA v. FLORIDA, 505 U.S. 1079 (1992), TO BE PROCEDURALLY BARRED.

As his final claim, Nixon contends that his sentence of death must be vacated because the jury received unconstitutionally vague instructions on the HAC and CCP aggravators; in support of this claim, Nixon relies upon Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994). Appellee would contend that Appellant's reliance upon these precedents is misplaced, and that the court below was correct in finding this claim to be procedurally barred (PCR XIX 3562-3563); in rejecting this claim, Judge Smith found:

> Defendant argues that this issue may be raised in a 3.850 motion because it is a fundamental change in Florida law. Defendant cites James v. State, 615 So.2d 668 (Fla. 1993), wherein the supreme court granted relief based on an Espinosa claim in a 3.850 proceeding. The court in James held that claims arguing that the instruction on the heinous, atrocious, or cruel aggravator is unconstitutionally vague are procedurally barred unless a "specific" objection on that ground is made at trial and pursued on appeal. Because in James the defendant had objected to the standard instruction and had argued the constitutionality of the instruction, the court opined that it would

> be unfair to deprive him of the Espinosa ruling.
>
> Defendant states that counsel moved at the penalty phase charge conference that the especially heinous and cold calculating aggravating circumstances overlap, thereby providing insufficient guidance to the jury. It appears that Defendant is attempting to argue that this issue was properly preserved. Pursuant to James, the objection must be specific and raised on appeal. The record indicates that no specific objection was made nor was the issue raised on appeal. Accordingly, James is distinguishable from the instant case and the issue is procedurally barred. See also Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995).

(PCR XIX 3563).

Appellant has entirely failed to demonstrate any error in the above ruling.

As the circuit court correctly found, these claims are barred under James, because no contemporaneous objection was interposed at the time of trial, on the basis that the jury instructions were unconstitutionally vague, nor were any such claims presented on Nixon's direct appeal. The record reflects that trial counsel interposed no objection on vagueness grounds to the jury instructions at issue in regard to these two aggravators. Indeed, trial counsel specifically stated on the record that he had no argument of any kind as to the applicability of the HAC factor, and as to the CCP factor, simply stated he felt there was a potential for improper

doubling (OR V 887-889). Although trial counsel had filed a motion to declare the statute unconstitutional, this pleading did not attack the constitutionality of any aggravating factor or jury instruction thereupon (OR I 101-102), and, in any event, would be insufficient so as to vest preservation, see, e.g., Beltran-Lopez v. State, 626 So.2d 163 (Fla. 1993); any contention that trial counsel was ineffective for failing to object to the standard instructions utilized in 1985 would be without merit. See Harvey v. Dugger, 656 So.2d 1253, 1258 (Fla. 1995) (counsel not ineffective for failing to object to instructions which had previously been deemed constitutional). In addition to the procedural default at trial, this matter was procedurally defaulted on appeal as well, in that Nixon's appellate counsel made no attack upon the finding of these aggravating circumstances or upon the jury instructions thereon (Initial Brief, Nixon v. State, Florida Supreme Court Case No. 67,583, filed December 8, 1986); at most, appellate counsel attacked alleged doubling between the felony murder and pecuniary gain factors (id., at 64-65). As James and Jackson both require adequate preservation of constitutional challenges both at trial and on appeal, the circuit court's finding of procedural bar was clearly proper.

To the extent that any further argument is necessary, Appellee would contend that any error herein was harmless beyond a reasonable doubt under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), in that the aggravating circumstances were established beyond a reasonable doubt under any definition of the term. It is difficult to conceive of any words to describe the murder of Jeanne Bickner, other than heinous, atrocious and cruel, given the fact that she was beaten, tied up and burned alive, after she had begged for her life; likewise, Nixon clearly planned the enterprise in a cold and calculated manner, as he abducted the victim from a public place, subdued her, transported her to a remote location, bound her, tormented her, stole all of her possessions deemed to be of value, murdered her to avoid detection and took further steps to prevent capture, such as burning her vehicle. Under this Court's precedent, reversible error has not been demonstrated. See, e.g., Henry v. State, 613 So.2d 429, 433-434 (Fla. 1992) (HAC and CCP factors properly found where defendant robbed victims, bound them and set them afire); Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993) (jury instruction error as to HAC and CCP factors harmless where facts established factors under any definition of the term; victims taken to remote location, bound, robbed of valuables, and executed after begging to be spared); Slawson v. State, 619

So.2d 255, 261 (Fla. 1993); Thompson v. State, 619 So.2d 261, 267 (Fla. 1993). The trial court's denial of relief as to this procedurally barred claim should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the circuit court's denial of relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jonathan Lang, 1114 Avenue of the Americas, 44th Floor, New York, New York 10036-7794, this 8th day of September, 1998.

____

RICHARD B. MARTELL
Chief, Capital Appeals