IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,006

JOE ELTON NIXON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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CITATIONS TO THE RECORD

References to the record will be as follows:

"R." refers to the twelve volumes of transcript, pleadings and orders, numbered pages 1-2104.

"SR1." refers to the supplemental volume containing, inter alia, a transcript of the November 25, 1987 Circuit Court hearing and orders related thereto, numbered pages 1-33.

"SR2." refers to the supplemental volume containing, inter alia, a transcript of the December 19, 1988 Circuit Court hearing and orders related thereto, numbered pages 1-64. "SR3." refers to the supplemental volume containing, inter alia, a transcript of the August 30, 1989 Circuit Court hearing and orders related thereto, numbered pages 1-165.

"3.850R." refers to the 23-volume record on this appeal, numbered pages 1-4393.

"A-" refers to the Appendix submitted with this brief. Appendix page numbers appear in the upper right hand corner of each page. In accord with Fla.R.App.P. 9.200(a)(1), Appellant relies upon all original documents, exhibits and transcripts of proceedings filed in the lower tribunal, including depositions and other discovery, and hereby designates such depositions and other discovery as part of the record.

REQUEST FOR ORAL ARGUMENT

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

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I. INTRODUCTION

Hard facts make bad law; and when a mentally disturbed and deficient man confesses to a notorious crime in a small community, this Court must be vigilant to see that it does not affirm bad law made below. Joe Elton Nixon, the defendant in this capital case, spent most of his trial not in the courtroom, but instead barely dressed, huddling in the Leon County Jail, while his lawyer conceded guilt, then presented mostly damaging evidence at the penalty phase of trial. A deranged and incompetent man stood in jeopardy of his life represented by a lawyer with whom he could not communicate and who embarked upon a trial strategy he neither approved nor understood.

Nixon appeals the extraordinary decision of the circuit court below, dismissing without a hearing all claims for post-conviction relief notwithstanding fact-intensive issues of ineffective assistance of counsel at both the guilt and penalty phases of trial, mental incompetency, and violations of Brady v. Maryland and Giglio v. United States. The dismissal violates Fla.R.Crim.P. 3.850 and precedents of this Court, and contravenes this Court's decision in this case on direct appeal, in which the Court declined to rule on Nixon's ineffective assistance claims under United States v. Cronic and instead directed that the issues be developed in a Rule 3.850 proceeding like the one dismissed by the Circuit Court without any factual development at all.

II. STATEMENT OF THE CASE

A. Procedural History

On August 29, 1984, a Leon County grand jury indicted Joe Elton Nixon for first degree murder, kidnapping, arson and robbery, involving the death of Jeanne Bickner. R. 1-2. Nixon pled not guilty to all charges. Jury selection and the guilt phase of the trial took place from July 15 to July 22, 1985. At trial, Nixon's lawyer conceded his guilt. R. 1852. The jury found Nixon guilty. R. 704. The penalty phase followed on July 24 and 25, 1985, after which the jury recommended death by a vote of 10 to 2. R. 1053. The trial court sentenced Nixon to death. R. 288.

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

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

The circuit court held another hearing on December 19, 1988, at which the defense called Michael Corin, Nixon's trial attorney. SR2. 2-

62. The circuit court made no findings; instead it again sent the case back to this Court, which again remanded it to allow the State to present witnesses. After another hearing (SR3. 8-164), the circuit court concluded:

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

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

Nixon appealed the October 3, 1989 circuit court Order to this Court, which affirmed the conviction and death sentence. Nixon v. State, 572 So.2d 1336 (Fla. 1990), cert. denied, 502 U.S. 854 (1991). However, this Court denied without prejudice Nixon's claim under United States v. Cronic, 466 U.S. 648 (1984)("Cronic"), that his attorney's concession of guilt deprived him of effective assistance of counsel, inviting Nixon to raise the issue in a Rule 3.850 motion. Id. at 1340.[1]

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[1] The State did not oppose the idea that the Cronic claim should be litigated in 3.850 proceedings; indeed, it urged that result: "[T]he state urges this Court to...refuse to engage in speculation as to what occurred off-the-record below and require appellant to "ripen" his claim by alleging nonconsent to his defense counsel's strategy pursuant to a motion for post-conviction relief whereupon an on-the-record

Rehearing was denied on January 24, 1991. Id. at 1336. On October 7, 1991, the United States Supreme Court denied Nixon's Petition for Writ of Certiorari.

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

B. Facts

We present here three subsets of facts within the larger set of all applicable facts: (1) the facts apparent on the record, (2) additional facts available to trial counsel (for example, through depositions, other discovery and witness statements, and reasonable investigation) but not acted upon by him and therefore not in the trial record, and (3) facts adduced in the course of the 3.850 proceedings. Regrettably, not all of these facts were presented at trial, mainly because trial counsel did not develop them. All are properly before this Court because sets (1) and (2) are apparent from the record, and

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inquiry could then be conducted." State's Answer Brief on Direct Appeal at 19; 3.850R. 2891 (emphasis added).

set (3) has been pleaded in the 3.850 Motion and must be taken as true for the purposes of this appeal. See Montgomery v. State, 615 So.2d 226, 228 (5th Dist. Ct. App. 1993). Cf. McNeal v. Culver, 365 U.S. 109, 117 (1961) ("[T]he allegations [in a Florida state habeas petition] themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are.").[2]

1. The Crime

The facts of the crime are subject to dispute more than previous court decisions have understood; indeed, only a few can be agreed upon: On Sunday, August 12, 1984, Jeanne Bickner had lunch with friends at the Governor's Square Mall, in Tallahassee. Sometime after that, Bickner was taken to a secluded area near Tallahassee where she was tied to a tree with jumper cables. She was set afire and died, either

[2] Under Rule 3.850 an evidentiary hearing is required unless the motion and record conclusively show that the movant is not entitled to relief. See Harich v. State, 484 So.2d 1239, 1241 (Fla. 1986) ("Because an evidentiary hearing has not been held...we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record."). See also Mills v. State, 559 So.2d 578, 578-579 (Fla. 1990). "The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984). Particularly critical here, the original trial judge recused himself from the Rule 3.850 proceedings, so the 3.850 Judge below never observed a single witness in the case.

from the fire or from having been strangled beforehand. Joe Nixon confessed to this crime. 3.850R. 914-65; A-99-131(I).

We concede neither the validity nor the accuracy of Nixon's confession. As will be shown below, record evidence, evidence trial counsel knew of but did not use, and evidence subsequently adduced call it into serious question. To begin with, though, Nixon told the following story:

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

2. Nixon said that he knew Bickner: "She knows me. She knows my name and everything....Well, she just, or something, up on campus, you know, I be up on Florida State or something. I think she was a teacher or something." Confession at 7; A-103.

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

4. Nixon said that at some point he hit Bickner on the head, overpowered her and, from the passenger side of the car, managed to pull the MG safely over to the side of the road. He then got the still

conscious Bickner out of the car and forced her into the trunk. Confession at 10-13; A-106-09.

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

6. Nixon said that, at this wooded scene, he took Bickner out of the trunk of the MG. Singlehandedly and despite Bickner's struggles, he managed to tie her to a tree with two jumper cables from the MG. Nixon first said he tied her feet and left hand, using one cable for the feet, and the other for her hand. He also said there were two separate cables. Confession at 16-17; A-112-13. Later, he said that maybe he did tie her around the waist, and that if he did, he guessed it was with a cable. Confession at 45; A-131(C). To support that statement, Nixon changed his story, saying he must have loosened her feet, put a bag on her head, put a cable around her waist and then re-tied her feet. Moments later, he changed the story again to say that he never tied Jeanne Bickner's feet. Confession at 45-46; A-131(C)-131(D). The final story -- elicited after police coaching -- accords with the crime scene photographs.

7. Nixon said he set a fire with some things he found in the car, including the "tonneau" cover, a fabric piece that goes over the retracted convertible top. After some conversation with Bickner, he choked her until she died. Finally, he said he threw the burning

tonneau cover onto what he thought was Bickner's dead body and left the scene driving the MG. Confession at 18-23; A-114-20. He returned the MG to the Mall and found his friend, Willy ("Tiny") Harris, who helped him pick up the Monte Carlo at the Mall and return it to his uncle's house. Confession at 24-26; A-120-22.

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

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

1. The crime took place on a Sunday, not on a Saturday as Joe Nixon said. Bickner was seen by at least two witnesses on Sunday, August 12, 1984. See trial testimony of Mary Atteberry, R.1867-68, and Linda Gallagher, R.1871; A-184-85, 188. Still, not only did Nixon steadfastly state that it was a Saturday, John Nixon and Wanda Robinson -- Joe's brother and former girlfriend -- initially corroborated this statement. See Statement of John D. Nixon and Wanda Robinson, given August 14, 1984 ("John Nixon-Robinson Statement") at 3-5, 8; A-4-6, 9. Later, John placed the crime on a Sunday. See, e.g., Statement of John D. Nixon, given August 16, 1984 ("John Nixon Statement") at 26-27; A-23-24. Over time he still could not get the story quite straight. In his deposition he again stated that Joe never said what day the crime

had taken place. Deposition of John Nixon, taken February 14, 1985 ("John Nixon Deposition") at 25; A-38. This discrepancy was apparent both from the record and from discovery materials.

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

3. Although Nixon told the police that Bickner voluntarily drove him from the shopping center in the MG (Confession at 7-8; A-103-04), John Nixon and Wanda Robinson both stated that Joe Nixon had said that he put Bickner in the trunk of the Monte Carlo, not the MG, in broad daylight in the parking lot of the Governor's Square Mall. See, e.g., John Nixon Statement at 17, 19, 28, John Nixon Deposition at 28, Robinson Statement at 7; A-17, 19, 25, 41, 53. In distinct contrast to Joe's confession specifying the MG, John Nixon adamantly said that Joe had specified the Monte Carlo:

> Q: [T]ell us what he told you [of how the crime happened].
>
> A: I will tell you exactly what he told me. He told me that...out to Governor's Square Mall [he] parked my uncle's green and white Monte Carlo...The lady gave him

a boost off and everything and he abducted her and threw her in the trunk of his car.

Q: The trunk of his car?

A: Uh huh.

John Nixon Statement at 17; A-17. John said virtually the same thing in his deposition:

Q: Put her in the trunk of what car?

A: In the green and white car.

Q: Your Uncle Tom's Monte Carlo?

A: Uh huh.

John Nixon Deposition at 28; A-41. See also John Nixon-Robinson Statement at 10; A-11; Robinson Deposition at 31-32; A-74-75; Robinson Statement at 6; A-52. Thus, trial counsel knew from discovery that the key vehicle in the crime was open to question.

4. Other accounts reported that Joe Nixon drove his uncle's Monte Carlo, not the MG, to the crime scene. For example, John Nixon told the police that Joe said he used the Monte Carlo. John Nixon Statement at 17, 19, 28, 37 (implied); John Nixon Deposition at 28; A-17, 19, 25, 28, 41. Wanda Robinson gave identical information. Robinson Statement at 7, Robinson Deposition at 32; A-53, 75. And Wanda Robinson said that her mother had seen Joe, quite definitely driving the Monte Carlo, not the MG, past her house, as Wanda's children played out in front. Robinson Statement at 7-8; A-53-54. Wanda said that Joe had told her that Bickner was in the trunk of the car at this time. Robinson

Statement at 7; A-53.[3] All this information was available to trial counsel.[4]

5. The crime scene was located in a remote area, at least 1.7 miles from the nearest road (Tram Road) and accessible only by a series of "two-rut" dirt roads.[5] The MG is a small idiosyncratic car, likely to be particularly unfamiliar to a mentally retarded man. It has but

[3] At least one account reported that Joe Nixon drove his uncle's Monte Carlo, not the MG, to the crime scene, and that he then returned to the Governor's Square Mall, picked up the MG and took some of the things from the MG out to the crime scene, where he set them on fire. See, e.g., John Nixon Statement at 18-19; A-18-19.

[4] The "Monte Carlo account" is by far more plausible. Joe Nixon knew how to drive the Monte Carlo and an adult would readily fit into its trunk. This account makes more sense than one that assumes that Joe Nixon alone could have both abducted a presumably unwilling victim and coaxed the MG to the crime scene. But any account of Joe acting alone using the Monte Carlo requires a belief that Joe, a lone black man, overpowered Bickner, a white woman, and forced her into the Monte Carlo, in full view of Sunday afternoon shoppers at the Mall. See John Nixon Statement at 28, Robinson Statement at 6, Robinson Deposition at 31-32; A-25, 52, 74-75. It defies logic, if not experience. However, one or more accomplices could overpower Bickner and put her somewhere in the much larger Monte Carlo. The facts to test this questionable element of Nixon's confession were available to trial counsel.

[5] See Directions in Leon County Sheriff's Office Death Investigation Report (August 24, 1984); A-210-11.

four and a half inches of ground clearance, new and unloaded.[6] Four and a half inches is about the height of a 12-ounce soda can.

6. Joe Nixon could barely drive the MG. John Nixon said that days after the crime Joe could not get the car into reverse.[7] Joe Nixon was not familiar with the area where body was found.[8] This information was available to trial counsel.

7. For Jeanne Bickner to fit into the small trunk of the MG, the spare tire had to be removed. This would require Joe Nixon singlehandedly to maintain control over Bickner while opening the

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[6] See "MG Series MGB Specifications," MGB Web Page, http://www.mgcars.org.uk/MGB/mgbspec.html; A-208. Bickner's car was an "M.G.B." See R. 1871; A-188. Photos of the interior of the car show that it had a manual transmission and cramped quarters. See A-201. Bickner's MG probably had even less than four and a half inches of ground clearance. It was over ten years old at the time of the crime and probably had wear on the springs and suspension. Nixon's weight in the car and Bickner's in the trunk, directly over the rear differential and exhaust system, would have brought the car even lower to the ground. Finally, the wheels would have likely slipped into the ruts of the road, bringing the bottom closer to the intervening crown.

[7] John Nixon said, "He tried to get the car in reverse. He couldn't hardly get it in reverse or whatever. He asked me would I show him, help him get it in reverse. I told him just pull it over there and he tried to get it in reverse and the car kept rolling down the hill and he couldn't never get it in reverse." John Nixon Statement at 27-28; A-24-25 (emphasis added). See also John Nixon-Robinson Statement at 21; A-11(A).

[8] "Q: Are you familiar with Tram Road...Joe? A: Uh, no. Q: Okay. You ever been down in there before? A: I been down there when I was younger but you know, I know it's a long ways you know from town and places like that." Confession at 13; A-109. In contrast, the crime scene was in an area where Wanda Robinson's mother had often gone fishing. See John Nixon-Robinson Statement at 10; A-11.

trunk, removing the spare tire, and then forcing her into a very small space. As John Nixon testified in a deposition:

> A. What I haven't got the right idea on is which car he took the lady out there in. All he said was he put her in the trunk of the car. And I just looked at that little bitty car and I just figured, you know, he couldn't have took nobody in that little thing. The trunk ain't that big on that.
>
> Q Too small to put a person in?
>
> A That's what it seems like. I don't know if you could get somebody in there or not.

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

8. Joe Nixon said that he had burned all his clothing at the crime scene, except for his underwear, which he wore back to Tallahassee. Confession at 40-41; A-129-30. Joe categorically said that he never brought any bloody clothes back to Tallahassee. Confession at 41; A-130. But Wanda Robinson and John Nixon said that Joe showed them the clothes he said he wore in committing the crime. John Nixon-Robinson Statement at 4-5; John Nixon Statement at 11-12, 27; John Nixon Deposition at 24, 32; Robinson Statement at 10-12; Robinson Deposition at 26; A-5-6, 15-16, 24, 37, 45, 56-58, 71. The discrepancy was apparent from the discovery.

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

> And I was telling him [Detective Paul Phillips] like, "How do you know John didn't have anything to do with killing

> this woman?" And, "You've got Joe in jail, why don't you put John in jail?"

Robinson Deposition at 68; A-97. Detective Phillips tried to lead Robinson, by suggesting to her that she had been with John that Saturday and Sunday,[9] but her suspicion about John suggests alternative theories that could have either exonerated Joe Nixon or diminished his legal responsibility or his eligibility for the death penalty. Robinson also testified that, when she visited Joe in jail before trial, Joe said that John and his friends killed Bickner, and they made him watch. Robinson Deposition at 62-64; A-91-93. Trial counsel thus knew of the possibility that others were involved in the crime and that, possibly, Joe Nixon had not committed it at all.

10. Facts that counsel could have obtained but that were not obtained until a subsequent civil action brought by Jeanne Bickner's family against the Governor's Square Mall cast further doubt on the theory that Joe Nixon acted alone or committed the crime at all. See Roberts v. Governor's Square Mall, Case No. 86-2746, Fla. 2d Cir. Ct. In a deposition in that civil action, Wanda Robinson testified that, a

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[9]

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

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

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

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

3:00 and 4:00 p.m. on August 12, and that Joe was driving a brown Buick.[10] It is about 12 miles from Woodville to the Mall and about 15 miles from Woodville to Tram Road at the turn-off to the murder scene, plus another 5-10 minutes of driving over rough dirt to get to the actual place of the murder. See Rand McNally Street Finder (1996 Ed. CD-ROM); A-216. One witness, Mary Atteberry, saw a black man speaking with a white woman near a yellow sports car at the Mall at "about a quarter until 3:00." R.1868; A-185. Atteberry could not identify the people she saw other than by race and sex. R.1868-69; A-185-86. Another witness, Linda Gallagher, a friend of Bickner, saw a black male speaking with Bickner "between, I would say, 3:00 and 4:00 p.m." R.1873; A-190. She also could not identify the man, other than by race. Using Atteberry's time frame, Nixon could not have been in Woodville between 3:00 and 4:00 while kidnapping Bickner starting at 2:45. Even using Linda Gallagher's estimate of 3:00-4:00, it would be hard to imagine how Joe Nixon could have been in Woodville in that time range and at the Mall committing the crime at the same time, as the State contended. Because of the Brady violation, the potential alibi was not available to trial counsel.

[10] Lamar Nixon said that he and Mary Hayes had met Joe while Lamar was on a pass from the Tallahassee Correctional Center. Mary Hayes could have verified this account. Additional verification could have been obtained from others with whom Lamar Nixon told Mr. Mickens he met that afternoon after encountering Joe Nixon. See 3.850 Motion at 235-36; 3.850R. 640-41.

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

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

2. The Trial

a. Defense Counsel's Concession of Guilt

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

> In this case there will be no question that Jeannie Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> In this case there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie Bickner's death. Likewise that fact will be proved to your satisfaction beyond any reasonable doubt.

R. 1852.

The prosecution's case went uncontested. Defense counsel did not ask a single question of most of the State's 33 witnesses; as to the rest, cross-examination was perfunctory. After the State rested, the

defense rested without calling a witness or making any motions. R. 609. In closing argument, defense counsel stated:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case.
>
> In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous.
>
> I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. <u>I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged; first-degree premeditated murder, kidnapping, robbery, and arson.</u>

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

In the proceedings on remand from direct appeal, defense counsel testified:

> Q. Mr. Corin, did you tell Mr. Nixon what you were going to say in your opening and closing statements?
>
> A. Not specifically. If you are asking me did I read him an outline of my opening statement, the answer is no.
>
> Q. Did you tell him what you were going to say?
>
> A. Not in exact words. I told him what I was going to do.
>
> Q. Did you tell Mr. Nixon that you were going to say to the jury in court at trial, "I think you will find the State has proved beyond a reasonable doubt each and every element of the crimes charged in first degree premeditated murder, kidnapping, robbery and arson"?

A. If you are asking me if I told him those exact words, my answer is no, I did not.

* * *

Q. [D]id you tell Mr. Nixon that you were going to concede guilt and seek leniency?

* * *

A. Did I tell him how I was going to approach the case? Yes, I did.

If you are asking me did I tell him that I was going to go into court and say you're guilty and try to save your life, then probably not in those exact words.

Q. When you told him how you were going to approach his case, did he affirmatively agree for you to do it that way?

A. I have to phrase my answer as close to the truth as possible, so probably the best answer is, he did not.

* * *

Q. Did you tell Mr. Nixon that on opening argument you would say, "In this case there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeanne Bickner's death"?

A. Did I tell him those exact words, no, I did not.

* * *

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

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

* * *

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

A. Again, he did nothing.

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

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

* * *

Q. Mr. Corin did you tell him that he was giving up his right to an adversarial testing of the State's case?

A. The answer is -- if I have to answer yes or no, I would have to say no because I don't think I gave -

* * *

Q. Did you ask him the questions that a judge would normally ask him if he were entering a guilty plea before the court?

A. I think I answered that. I didn't go through that type of inquiry with Mr. Nixon with regards to his case.

* * *

Q. Did you tell Mr. Nixon what rights he waived by you making these statements?

A. I did not sit down with him and say you are giving up your right to cross-examine witnesses or call witnesses in your behalf, those type of things. No, I did not go through a litany of those.

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

At the penalty phase, Nixon's lawyer conceded most of the aggravating circumstances, added a few of his own, and introduced evidence that generally hurt his client's prospects for life. We detail these inadequacies at Point IV in the Argument below.

b. Joe Nixon's Incompetency

Space constraints make it impossible to set forth in detail here the extensive record demonstrating that Joe Nixon was incompetent to stand trial, and that the trial court should have followed applicable Florida procedures for determining his competency. We refer the Court to all of the evidence we have adduced, which appears in the 3.850 Motion at 12-38; 3.850 R. 417-43. We can only summarize that evidence here.

Joe Nixon is mentally retarded and suffers from organic personality disorder. See Resume of Neurological Evaluation Re: Joe

Elton Nixon, prepared by Henry L. Dee, Ph.D., October 6, 1993 (3.850R. 719-26; A-133-40) (the "Dee Report"); Summary of Standard Test Results, prepared by Denis William Keyes, Ph.D., September 25, 1993 (3.850R. 731-40; A-144-53) (the "Keyes Report"); Report of Alec J. Whyte, M.D., October 6, 1993 (3.850R. 747-63; A-159-75) (the "Whyte Report").

Nixon's mental instability became apparent at least five months before the Bickner murder trial when, on February 12, 1985, he stood trial on an unrelated assault charge before Judge Hall, the same Judge who tried the murder case, and with the same counsel on each side. See R. 899. At that trial, Nixon's actions prompted questions about his competency. Defense counsel -- Michael Corin, the same lawyer who represented him in the trial of this case -- raised the competency of his client. See Transcript of Proceedings held February 12, 1985, A-361-70;[11] see also R. 908-10. The Court asked Dr. Carolyn Stimel, a psychologist, to examine Nixon. See A-361(C), 362-65; see also, R. 908-09. Dr. Stimel examined Nixon "during the lunch hour" (R. 910) for about 45 minutes (A-363). She later stated that she had neither performed psychological testing nor made a formal competency evaluation. See Affidavit of Carolyn Stimel, Ph.D.; 3.850 R.716-17; A-315-16. The assault trial proceeded. Assault Tr. 75-76.

About two weeks later, at a February 28, 1985 pre-trial conference in this case, the State Attorney was sufficiently concerned about Nixon's competency that he himself requested a competency

[11] State v. Joe Elton Nixon (Cir. Ct. 2d Cir., Case No. 84-3708). The transcripts in the assault proceedings bear two page numbers, plus the Appendix numbers. We refer only to the Appendix numbers.

determination and volunteered that "the real issue" in the case would "revolve around" Nixon's competency. R. 899. Defense counsel demurred, saying, "I am not going to waste the time and energy to have a client examined as to competency or insanity when I am not of the professional opinion that that is relevant." R. 900. Later in the same hearing, the State Attorney continued to press for an examination, questioning Nixon's prior behavior in the earlier assault proceedings, to which Judge Hall responded, "Yes. I was seeing enough that made me wonder, too." R. 910.

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

> Dear Mr. Corin
>
> About yesterday when we talk about going back to prison I wont to go but don't need to because am my own man and do not run from no one or what I believe in and not going to start at this point in life try to understand what I am saying. you can send me back to prison because you have the law behind you, yes I know this but the bottom line is that I wont to stay right hear and what to left Alone in my cell Alone if not please get off my case if not go to trial by your self <u>with the lies I told about killing Ms. Ann</u> let me tell you what am say.
>
> The bottom line
> I hate white people
> I am a black African
> but you (white dog) or going to kill
> me because Am black and kill a white
> so call [partly illegible] women but you white people
> or killing my people in South African
> I don't know them but thay or black
> that while I wish you dog would try
> to kill me for not going to trial
>
> [illegible]
>
> Mr. Joe African

Send me home back to African - bottom line

3.850R. 363; A-317 (transcribed verbatim)(emphasis added).

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

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

Judge Hall decided to conduct a "hearing" to determine whether Nixon intended to knowingly waive his right to attend trial and discussed whether to do that with Nixon in the courtroom or at the jail. The judge wanted to hold the hearing in court (R. 322, 330-31), but defense counsel feared that Nixon would act out, thereby aggravating his situation further (R. 331). Even though the trial judge himself observed that Nixon was "in the holding cell in a considerable state of self-inflicted disarray; clothing, nudity and the like" (R. 328; A-286), at no point was there discussion about assessing Nixon's competency in accord with Pate and applicable Florida rules; instead, based upon defense counsel's concerns about Nixon's potentially disruptive behavior in the courtroom, the trial judge decided to assess him in the holding cell. R. 332-33.

At 10:30 a.m. on July 16, 1985, the trial court, the lawyers, other court personnel, and the court reporter assembled in Nixon's holding cell at the courthouse. R. 333-41; A-288-96. That proceeding

is significant and we refer the Court to it. R. 333-41; A. 288-96. Nixon was barely dressed, sat on the toilet, kept his back to the Judge, said he did not want to attend the trial, said he wanted another lawyer, said he did not care about the case, laughed, whistled, and continued to act irrationally. Id. In the face of this bizarre behavior neither the Court, the State nor defense counsel inquired about Nixon's competency to stand trial. Nixon was never seen by a doctor.

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

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

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

Florida procedures. (The State had raised the issue earlier but dropped it. See R. 899.) The only inquiry made was the jail cell interview between Judge Hall and Joe Nixon, with no mental health experts involved.

III. SUMMARY OF ARGUMENT

The major premise of the court below -- that any legal errors in this trial made no difference because the prosecution's case was "overwhelming" -- is false. The errors here -- ineffective counsel, trial of an incompetent defendant, an inherently unreliable confession, and non-disclosure by the government of exculpatory evidence -- had serious consequences. The State's case had a facade of strength only because of those errors.

Michael Corin, Joe Nixon's trial lawyer, conceded the State its case. We concede some, but not all, of the circumstances of that case; but we will show that Joe Nixon lacked the intellectual and emotional ability to participate in his trial or to authorize his lawyer to choose any strategy, much less a strategy of concession. We will show that Joe Nixon lacked the intellectual and emotional resources to understand his Miranda rights or to make a coherent confession. We will show, based upon evidence available at the time of the trial but not produced by the State or identified or used by trial counsel, and based upon new evidence, that Nixon acted under extreme emotional disturbance or was insane, that counsel could have raised a reasonable doubt that he may not have acted alone, and, perhaps, did not commit the crime. Finally, we will show that there was considerable evidence

in mitigation of a death sentence that counsel could have put forward, but did not, and that the evidence he did adduce at the penalty phase gravely hurt, not helped, his client.

Nixon's claims of ineffective assistance of counsel under Cronic and Strickland v. Washington, 466 U.S. 668 (1984) ("Strickland"), require a hearing on the merits. By denying relief without even holding that hearing, which this Court's 1990 decision requires, the circuit court failed to develop a record sufficient for this Court to determine whether Joe Nixon's constitutional rights were violated (1) when his lawyer conceded his guilt, (2) when his lawyer failed to pursue various defenses available to him, and (3) when the State wrongfully withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1967) ("Brady"), and Giglio v. United States, 405 U.S. 150 (1972) ("Giglio").

The court below essentially concluded that Nixon suffered no prejudice, mainly because of his confession and other evidence presented against him. As to the Cronic claim, that conclusion is wrong as a matter of law, because prejudice is presumed in these circumstances. As to the Strickland, Brady, and Giglio claims, the conclusion is wrong because there is a reasonable probability that the outcome would have been different -- at either the guilt or penalty phase, or both -- but for the constitutional violations.

The circuit court found the competency claims procedurally barred. This finding is wrong because the claim is fundamental, jurisdictional and can be raised at any time, and because this Court has in fact heard

such claims in many post-conviction proceedings.[12] On the merits, the decision below ignores the fact that Joe Nixon, a mentally retarded man with organic personality disorder, patently acting out throughout the proceedings and refusing to attend the trial on most days, was tried without any determination of his competency, in violation of Pate v. Robinson, 383 U.S. 375 (1966) ("Pate"), and tried while he was incompetent, in violation of Drope v. Missouri, 420 U.S. 162 (1975) ("Drope").

[12] See Oats v. Dugger, 638 So.2d 20 (Fla. 1994), cert. denied, 513 U.S. 1087 (1995); Koon v. Dugger, 619 So.2d 246 (Fla. 1993); Jones v. State, 478 So.2d 346 (Fla. 1985); Hill v. State, 473 So.2d 1253 (Fla. 1985); Lane v. State, 388 So.2d 1022, 1025 (Fla. 1980); State ex rel. Deeb v. Fabisinski, 111 Fla. 454, 456, 152 So. 207, 211 (1933). See Petition for a Writ of Habeas Corpus, at p. 5, n. 3.

IV. ARGUMENT

POINT I

The Circuit Court Denied Joe Nixon a Full and Fair Hearing on His Claims That He Was Convicted and Sentenced to Die Without Effective Assistance of Counsel, in Disregard of This Court's Opinion on Direct Appeal and in Violation of His State and Federal Constitutional Rights.

A. As This Court Recognized on Direct Appeal, Nixon is Entitled to an Evidentiary Hearing on His Claims of Ineffective Assistance of Counsel Under United States v. Cronic.

The Cronic claims arise from trial counsel's unauthorized, explicit concessions of guilt and his total failure to contest the State's guilt phase case. These claims assert that Nixon was not informed of trial counsel's decision to concede guilt, or competent to concur in that decision, and that trial counsel's performance, including the concessions of guilt, constituted ineffective assistance "per se." See Nixon v. State, 572 So.2d at 1339-40.

Nixon has pled facts sufficient to make out a prima facie case that he did not consent, nor could he consent, to the concession of guilt. See 3.850R. 444-58. The evidentiary hearing foreclosed by the court below will show that trial counsel's intention to concede guilt was not adequately communicated to Joe Nixon and that Nixon did not authorize, consent to, or acquiesce in the concessions, nor was he competent to do so. Indeed, the limited testimony by trial counsel in earlier proceedings and the mental health evidence now available confirm that Joe Nixon neither understood nor consented to the concession of guilt. See SR. 29-35. Nixon was absent from court at the times trial counsel made the concessions, and evidence from

witnesses and contemporaneous public media proves that Nixon expressed strenuous objections to the concessions of guilt. See 3.850 R. 457; 3.850 Motion at 52, n. 12 (Sheriff's Deputy observed that Defendant vehemently refused to enter the courtroom because he had learned of counsel's concession. Tallahassee Democrat, July 20, 1985, p. 1).

Ineffective assistance of counsel under Cronic violates the Constitution not because of any "micro" assessment of deficiencies in counsel's performance or resulting prejudice to the defendant's case. Instead, Cronic ineffectiveness occurs when failure to "subject the prosecution's case to meaningful adversarial testing" causes the "criminal trial [to] lose [its] character as a confrontation between adversaries," rendering "the adversary process itself presumptively unreliable" and denying the defendant's Sixth Amendment rights. 466 U.S. at 659.

Trial counsel's unauthorized concessions of guilt robbed Nixon's trial of any adversarial character. A concession of guilt mirrors a guilty plea; it results in a waiver of rights. Trial counsel may not concede guilt absent the client's intelligent and understanding waiver of his rights. Cf. Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea must be knowing, intelligent, informed, and on the record). A concession of guilt does not subject the state's case to meaningful adversarial testing and renders the adversarial process presumptively unreliable within the reasoning of Cronic.

In a precursor to Cronic, Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091 (1981), the court of appeals held that the defendant was "deprived of effective assistance of counsel

when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy." 647 F.2d at 650. In a similar case, the Supreme Court of North Carolina recognized that "when counsel admits his client's guilt without first obtaining the client's consent, the client's right to a fair trial and to put the State to the burden of proof are completely swept away." State v. Harbison, 337 S.E.2d 504, 507 (N.C. 1985), cert. denied, 476 U.S. 1123 (1986). Referring to Cronic, the Harbison court found that "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." Harbison, 337 S.E.2d at 507. Accord, Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983) ("[C]ounsel's complete concession of the defendant's guilt [in closing argument] nullifies his right to have the issue of his guilt or innocence presented to the jury as an adversarial issue and therefore constitutes ineffective assistance."), cert. denied, 470 U.S. 1059 (1985).

Unlike a Strickland claim, a Cronic claim requires no showing of prejudice. The circuit court confused the two rules, holding, "The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without [a] concession." October 22 Order at 13; 3.850 R. 3573; A-330. Of course, that is just another way of talking about Strickland. Cronic, decided on the same day as Strickland, provides a free-standing analysis of Sixth Amendment "ineffectiveness," a rule independent of Strickland. When Cronic error occurs, the Court does not -- indeed, may not -- apply the dual-pronged Strickland test of attorney deficiency and prejudice. All the Court

decides under Cronic is whether the trial lost its adversarial character. If that happened without the client's informed consent, any resulting verdict must fall. See Francis v. Spraggins and State v. Harbison.[13]

Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997), cert. denied, 66 U.S.L.W. 3604, 1998 WL 99202 (April 28, 1998; No. 97-1442), presented almost identical facts to the Sixth Circuit Court of Appeals, which ordered a new trial based on a Cronic violation. Like Nixon, Rickman had confessed to a brutal killing. The court of appeals took it for granted that there was little question as to guilt. See 131 F.3d at 1160. Like Mr. Corin in this case, Rickman's lawyer had conceded his client's guilt (id. at 1159), portrayed him as "nuts" (id. at 1158), and relied solely upon this misbegotten "strategy" to paint Rickman as a "sick man" for the penalty phase (id. at 1157) in a "desperate and poorly executed strategy" to save his client's life (id. at 1160). The court of appeals recognized the difficulty in overturning a 20-year old conviction, but it correctly did so in the interest of preserving the integrity of our adversarial system of justice:

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[13] The circuit court incorrectly relies on Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). In Magill, defense counsel conceded second degree murder, and his client participated at trial and testified (unwisely, it turned out; see 824 F.2d at 887). Nixon never attended his trial, barely consulted with his lawyer, and reacted adversely when he learned that his lawyer had conceded guilt to capital murder. Further, we will show, when given the hearing that the circuit court denied, that Nixon never consented to the concession of guilt. Without such consent, the concession was improper and brings this case within the ambit of Cronic.

> We have approached this case with great caution, conscious of the important limitations of our role as the federal court reviewing in habeas the conclusions of the Supreme Court of Tennessee -- limitations we deeply respect. We recognize too the import of a decision that mandates another trial for an individual concerning whom there is little question as to his guilt of a killing committed 20 years ago. But we are constrained to observe that what the Tennessee judiciary permitted to occur here was nothing less than the evisceration of the right-to-counsel that is guaranteed by the Sixth Amendment and as much a travesty for our entire judicial system as it is for Rickman individually. The display of Rickman's trial, if allowed to stand, would simply mock fundamental constitutional guarantees of "vital importance." Strickland, 466 U.S. at 685. The Court's recognition that "'the right to counsel is the right to effective assistance of counsel'"...would be devoid of meaning were counsel like Livingston deemed effective.

131 F.3d at 1160 (some citations shortened and omitted).

The decision below was also at odds with this Court's own ruling on direct appeal, which established Nixon's right to an evidentiary hearing on his Cronic claim. In its decision on direct appeal, this Court noted that the proceedings to which it remanded these claims were "atypical" and that the resulting record is "less than complete." Nixon v State, 572 So.2d at 1339-40. Cf. Boykin v. Alabama, 395 U.S. at 240 ("Trial strategy may of course make a plea of guilty seem the desirable course. But the record is wholly silent on that point and throws no light on it."). Recognizing the "confusion" that resulted from the remanded proceedings, id. at 1340, this Court "decline[d]" to

resolve the Cronic claims based on the record on remand.[14] Instead it suggested Nixon raise these claims in a 3.850 Motion.

Joe Nixon's lawyer conceded his guilt. This Court suggested that Nixon pursue the resulting Cronic claim in this 3.850 motion. See Nixon v. State, 572 So.2d at 1340. The State earlier suggested the same procedure. See note 1 supra. Nixon has done exactly what this Court required and the State suggested; the circuit court's refusal to hold the appropriate hearing cannot be justified.

B. In Remanding for the Evidentiary Hearing That Joe Nixon Deserves But Has Not Received, This Court Should Instruct the Circuit Court To Hear All of Nixon's Claims that He Was Denied Effective Assistance of Counsel at the Guilt Phase of His Trial, Considering Those Claims in Conjunction With His Claims of Brady/Giglio Violations and New Evidence of Innocence.

1. The Strickland Violation at the Trial of Guilt or Innocence

Nixon's Strickland claims bear upon both the guilt and penalty phases of the trial. We address the guilt phase claims here, and the penalty phase claims later.

Counsel's ineffectiveness manifests itself as a series of errors that led to one large one. First, Mr. Corin did not inquire into the competency of his client to stand trial. Then, he unreasonably permitted Nixon's confession to be admitted in evidence without objection. That confession in turn permitted the State to prove

[14] This Court has cited its opinion in this case in holding that the uncertainty of the record requires an evidentiary hearing to determine whether a capital defendant was informed that counsel would concede guilt. Harvey v. Dugger, 656 So.2d 1253, 1256 (1995).

collateral facts that mortared its case. Trial counsel then did not challenge those facts, even though many of them were suspect.

a. Failure to Suppress the Confession

Counsel's threshold error was in not challenging Nixon's competency to confess and to stand trial. We address the latter issue in Point 2, below, in the context of the Pate and Drope claims. We address the competency to confess claim here in connection with ineffective assistance.

There were strong legal grounds for suppressing Joe Nixon's confession because of his mental incompetency. No strategic reason could justify a failure to object to the confession. Trial counsel had ample notice that Joe Nixon was mentally unstable, mentally deficient, semi-literate, and considered even by the State to need a competency evaluation. Failure to move to suppress the confession was deficient under the first prong of Strickland, and it prejudiced Nixon's case under the second.

Police officers read Joe Nixon his rights in a cursory fashion without adequate explanation, given his limited intellect. Officer Campbell, "explained" Nixon's rights to him as follows: "A little more fancy language than what I said this morning but basically we're not going to try and trick you or threaten you or hurt you or promise you good things or bad things, we're just going man to man straight from the shoulder. Is that, you understand what I've said to you?" Confession at 1; A-99(a). Throughout the interview, Officer Campbell used soothing, leading and ultimately deceptive words ("You read real

good, don't you Joe?"). Id. The transcript reads (and sounds) as if Campbell is speaking to a child, which of course Joe Nixon functionally is: "His actual adaptive functioning is estimated to be developed at the level of a child between six and eight years of age." See Keyes Report; 3.850 R. 587; A-736. Nixon did not repeat back the rights, explain in his own words the rights he was waiving, or respond in other than monosyllabic tones to the officers' words. Moreover, under the "totality of the circumstances," including Nixon's mental retardation and the police officers' awareness of some deficiency as evidenced by their simplistic and misleading language, the words "we're not going to trick you...we're just going man to man straight from the shoulder" cynically obscured the significance of Nixon's constitutional rights. This questioning technique was deceptive coercion, as the result of which Joe Nixon's constitutional rights became forfeit.

The decision below does not even address Nixon's claim that he lacked the competence to waive his Miranda rights and confess, ignoring Nixon's mental retardation and the great difficulty he has understanding very simple concepts. As Dr. Keyes observed:

> Joe's waiver of his rights during initial questioning cannot be considered voluntary. Asking him if he understands the waiving of his rights will almost always get an affirmative answer; he wants to appear normal and the logical answer to appear normal is almost always the affirmative one, or the answer suggested by a leading question. As stated above, Det. Larry Campbell asked Joe to read his own Miranda warnings, stating "You read real good, don't you, Joe?" Given such a question, Joe could only have given the affirmative answer, despite his lack of competence for the task.

Keyes Report at 8-9, A-151-52. Dr. Whyte and Dr. Dee each independently reached similar conclusions. See Whyte Report at 14, A-712; Dee Report at 6, A-138.

A recent law journal article documents high profile cases of false confessions with several factors in common: a mentally or emotionally vulnerable suspect (due to brain damage, recent shock, youth, or mental deficiency), intense pressure on the police to solve a very violent crime, lengthy interrogation of the vulnerable suspect without any neutral or supporting persons present, and police misrepresentations about extrinsic evidence. Gail Johnson, False Confessions and Fundamental Fairness: the Need for Electronic Recording of Custodial Interrogations, 6 B.U. Pub. Int. L.J. 719, 721 (1997). All of these factors appear in Nixon's case.

The occurrence of false or unreliable confessions by mentally retarded or other vulnerable persons has not gone unnoticed.[15]

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[15] The unreliability of confessions made by mentally retarded persons is well documented in psychological and social research, which finds that standard interrogation techniques, when applied to particularly vulnerable persons, lead to a high number of false confessions. Richard J. Ofshe and Richard A. Leo, The Social Psychology of Police Interrogation, 16 Studies in Law, Politics and Society 189, 1997 ("Ofshe and Leo"). See also Gisli H. Gudjonsson, The Psychology of Interrogations, Confessions and Testimony (1992) ("Gudjonsson").

Confessions from mentally retarded persons are highly suspect for several reasons. First, according to legal psychologists Ofshe and Leo, "the mentally handicapped are unusually responsive to pressure to submit to and comply with the demands of authorities" and "are especially vulnerable to the pressure of accusatorial interrogation." Because of their mental deficiencies, "they are quite likely to be highly vulnerable to the stress inherent in a modern accusatory interrogation." Ofshe and Leo, at 212; see also James W. Ellis and Ruth A. Luckasson, Symposium of the ABA Criminal Justice Mental Health Standards Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev.

Recently, several highly publicized false confessions prompted a series

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414, 427 (1985) ("Ellis and Luckasson"). One of the mechanisms that mentally retarded persons use to cope with stressful situations is consistently answering questions in the affirmative, regardless of whether the questions demand affirmative answers. In addition, the form of a question can more easily bias the mentally retarded suspect's answer. Id, at 428. The retarded are also "unusually responsive" to authority figures. As a result, ordinary police interrogation techniques often yield false confessions from these suspects. Ofshe and Leo, at 213-214.

"Some mentally retarded suspects are inclined to confess falsely even if the interrogation methods are relatively benign." Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 Harv. C.R.-C.L.L. Rev. 105, 131 ("White") (1997). Mentally retarded suspects also give false or unreliable confessions for other reasons. For example, "mental health experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures will lead him to confess falsely." Id. at 123; see also Ellis & Luckasson, at 446. Studies also demonstrate what is called a "cheating to lose" phenomenon -- a mentally retarded person will accept blame for some event so that the persons in authority who are asking about it will not be angry with him. Id.

The pressure that the police feel from the community to solve a case may lead them to use interrogation tactics inappropriate to the mentally retarded suspect. White, at 133. "[T]he empirical data suggest that standard interrogation methods will lead to untrustworthy confessions when interrogators employ these methods on a particularly vulnerable suspect or employ specific stratagems or tactics on any suspect." Id. at 134.

Two types of false confessions may result when vulnerable suspects, such as a mentally retarded, emotional and mentally stressed Joe Nixon, are subjected to interrogation, even standard techniques: "coerced-compliant" confessions, knowingly false or unreliable confessions given to obtain some goal (to go home or end the interrogation, for fear of higher sentencing, to protect others - one or more of which could have occurred in the instant case), or "coerced-internalized" false confessions, in which the suspect begins to believe in his own guilt. Id. at 109. See also Gudjonsson, at 260-273 (1992); Gail Johnson, False Confessions and Fundamental Fairness: the Need for Electronic Recording of Custodial Interrogations, 6 B.U. Pub. Int. L.J. 719, (1997).

of New York Times articles highlighting the prevalence of false confessions.[16] One article reported that certain personalities are prone to make false confessions, and often the suspects in these cases are mentally retarded or otherwise highly suggestible. Jan Hoffman, "Questioning Miranda: Police Refine Methods So Potent, Even The Innocent Have Confessed," N.Y. Times, March 30, 1998. One study reports that false confessions played a role in approximately 14% of all miscarriages of justice in homicide and capital cases.[17] The combination of factors present at the time of Nixon's confession, most notably his diminished mental capacity, puts his confession in this category.

Joe Nixon had a due process right to a determination of the voluntariness of his confession. Jackson v. Denno, 378 U.S. 368, 393-94 (1964). He also had a right to a determination whether he knowingly and voluntarily had waived Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966); accord, Miller v. Dugger, 838 F.2d 1530, 1537-38 (11th Cir.), cert. denied, 486 U.S. 1061 (1988). Then and now, ample authority supports suppression of confessions made by incompetent,

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[16] See Joseph Berger, "A Suspect's Confession Fits the Crimes, but He's The Wrong Man," N.Y. Times, March 12, 1998; David M. Halbfinger, "Records Detail a False 1992 Murder Confession," N.Y. Times, January 7, 1998; Jan Hoffman, "Questioning Miranda: Police Tactics Chipping Away at Suspect's Rights," N.Y. Times, March 29, 1998; Jan Hoffman, "Questioning Miranda: Police Refine Methods So Potent, Even The Innocent Have Confessed," N.Y. Times, March 30, 1998.

[17] Michael L. Radelet, Hugo Adam Bedau, Constance E. Putnam, In Spite of Innocence: Erroneous Convictions in Capital Cases, (Boston: Northeastern University Press. 1992). See also, Ann Scott Tyson, "Prosecutors Acts Are Put on Trial in Illinois Case," The Christian Science Monitor, Feb. 20, 1997.

retarded defendants like Joe Nixon. Formal compliance with Miranda procedure does not automatically render a custodial statement admissible where the defendant may be mentally incompetent. See, e.g., Miller v. Dugger, 838 F.2d at 1539 ("There is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his Miranda rights. Competency to make such a waiver is, of course, to be determined according to the totality of the circumstances." [citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)]); State v. Caldwell, 611 So.2d 1149, 1152 (Ala. Crim. App. 1992), cert. denied, 510 U.S. 904 (1993); Smith v. Kemp, 664 F. Supp 500 (M.D. Ga. 1987), aff'd sub nom., Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) (evidence of a defendant's mental retardation and low I.Q., though not dispositive, carries great weight in determining competency to confess); Myles v. State, 399 So.2d 481 (Fla. 3d DCA 1981). See generally Charles Marvel, Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession, 8 A.L.R.4th 16 (190.81).

Several courts have invalidated or questioned confessions tainted by a defendant's mental retardation or ill health, even if made after Miranda warnings. See Brown v. State, 657 So.2d 903 (Fla. 4th DCA 1995) (court doubts the voluntariness of a post-Miranda warning confession by a mentally retarded defendant who had a "passive compliant personality" and whose confession would be easily manipulated); Smith v. Kemp, supra; Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972); United States ex rel. Simon v. Maroney, 228 F. Supp. 800 (W.D. Pa. 1964); United States ex rel. Lynch v. Fay, 184 F. Supp. 277 (S.D.N.Y. 1960). See also Note, Constitutional Protection of

Confessions Made by Mentally Retarded Defendants, 14 Am. J. L. Med. 431, 432, 440-44 (1989). And see Sims v. Georgia, 389 U.S. 404, 407 (1967); Miranda v Arizona, 384 U.S. 436, 475 (1966); Moore v. Ballone, 658 F.2d 218, 229 (4th Cir. 1981); Henry v. Dees, 658 F.2d 406, 409 (5th Cir. 1981).

Mental infirmity is relevant to what may be "coercive" under "the totality of the circumstances." See United States ex rel. Rush v. Ziegele, 474 F.2d 1356 (3d Cir. 1973); accord, United States v. D.F., 857 F. Supp. 1311 (E.D. Wisc. 1994), aff'd, 115 F.2d 413, 421 (7th Cir. 1997). Persons of limited mental ability like Joe Nixon are particularly vulnerable to suggestion and overreaching during interrogation, and law enforcement officers have a special duty to assure the validity of the Miranda waivers they obtain from such suspects. See Henry v. Dees, 658 F.2d at 411.

Finally, even if the confession had ultimately been admitted, Nixon was entitled to have the jury know the basis of his claim that it was not voluntary, Crane v. Kentucky, 476 U.S. 683 (1986). That basis, including Nixon's mental retardation, could have affected both the guilt and penalty phase results.

Trial counsel's failure to move to suppress the confession on clear facts and settled law prejudiced Nixon in both phases of his trial. The confession provided damaging evidence to bolster the State's case during the guilt phase, and helped prove kidnapping beyond a reasonable doubt, for which Nixon was convicted and which was also

found as an aggravating circumstance during the penalty phase.[18] Nixon's confession was central to the State's case. Without it, the case would have depended largely on the testimony of John Nixon, an unreliable police informant of questionable character, and John and Joe Nixon's sometime girl friend, Wanda Robinson. As discussed below in Point I(B)(2)(a), both witnesses were impeachable, and there is a reasonable probability that the outcome would have been different without the confession.

b. Failure to Challenge Nixon's Competency

We address Nixon's incompetency to stand trial at Point II below. It suffices to say here that trial counsel's failure to challenge Nixon's competency when he was patently acting out and unable to cooperate in his defense, and even the State was asking for an examination, fell below any reasonable standard. See Williamson v. Ward, 110 F.3d 1508, 1517-18 (10th Cir. 1997). Given the uniform findings of Drs. Keyes, Dee and Whyte of Nixon's incompetency and mental instability, Nixon suffered prejudice, as there is a reasonable probability that he would have been found incompetent had trial counsel raised the issue. Id. at 1519-20.

c. Failure to Challenge the State's Case

Trial counsel also failed to render effective assistance at the guilt phase by conceding guilt. Moreover, counsel (1) did not investigate possible involvement of others -- notably John Nixon, the

[18] This doubling is unconstitutional, as claimed on direct appeal. We continue to press the point in order to preserve it.

State's key witness, (2) did not develop impeachment evidence against John Nixon and Wanda Robinson, (3) did not learn of John Nixon's involvement in similar crimes and status as an initial suspect in the Bickner murder,[19] (4) did not follow up on John Nixon's attempt, at a deposition, to create an alibi for himself as to the date of the Bickner murder,[20] (5) did not impeach John Nixon based on his status as a police informant,[21] (6) did not investigate or raise an insanity

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[19] Roberts v. Governor's Square Mall, Deposition of Donald Roberts at 20; 3.850 Motion at 246-47. Also, Wanda Robinson's deposition provided defense counsel with an account of her colloquies with the police on the subject of John Nixon's possible role in the Bickner homicide. Wanda Robinson Deposition at 68; A-97.

[20] Trial counsel's depositions of John Nixon and James Nixon contain directly contradictory accounts that John and James each accompanied Lamar Nixon on Lamar's return from an August 12, 1984 furlough to the Tallahassee Community Correctional Center ("TCCC") at which he was an inmate. James Nixon testified that he and Virginia Nixon Meeks accompanied Lamar on his return to the TCCC after the three had gotten "out of the church about 1:30." Deposition of James Nixon taken January 21, 1985 at 4-5; A-221-22. John Nixon testified that in the early afternoon on August 12 he and Robinson "was taking my uncle back out" to the TCCC and that "about 3:00" they, together with Lamar, had been at Robinson's house on Millard Street. John Nixon Deposition at 20, 57; A-36, 46. Unless Lamar returned to the TCCC twice on August 12 or unless John and James both took Lamar back to the TCCC (but failed to mention one another in their depositions to defense counsel) or unless John started but did not finish taking Lamar back and James finished, both John and James could not have been the return companions. John Nixon's statement that he and Robinson accompanied Lamar on his return is also contradicted by Lamar's statement to State Investigator Arthur Mickens; Lamar told Mickens that he had returned with James. Mickens Memorandum; A-213.

[21] John Nixon told trial counsel that he had known Detective Paul Phillips only since "about two days after all this happened. That's how I know him. That's how I first came to know him." John Nixon Deposition at 6; A-33. But Wanda Robinson told trial counsel that on the day of Joe Nixon's arrest, John telephoned Detective Phillips and told him that he knew who had killed Jeanne Bickner. Wanda said that John "had told me he had called Paul Phillips because he knew Paul

defense even though Joe Nixon was both mentally deranged and intoxicated at the time of the crime (see, e.g., 3.850 Motion at 135-36; 3.850R. 540-41), (7) did not provide the defense mental health experts information sufficient to establish these crucial defenses, (8) did not attack the confession in front of the jury even though he was entitled to do so as a matter of law regardless of the trial judge's ruling on the admissibility of the confession,[22] (9) did not question the processing of the crime scene, which ignored the possibility of additional footprints, tire tread marks and other evidence that might have implicated others in the crime or diminished Nixon's responsibility for it,[23] and (10) waived the trial court's error in failing to establish the mental incompetency of a juror who went off of her psychotropic medication during the trial and who had to be replaced by an alternate at the penalty phase.[24]

A "reasonably effective" defense lawyer assessing the material contradictions in the prosecution's case and the vulnerability to impeachment of the key State witnesses would not have conceded guilt and would have cross-examined John Nixon and other State witnesses. Trial counsel's failure to do so was deficient and prejudiced Joe

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Phillips." Wanda Robinson Deposition at 55; A-84. Robinson also testified that, whenever John Nixon beat her up, she "always [told] Phillips about it. And he talks to John." Id. at 14; A-68.

[22] See Jackson v. Denno, 378 U.S. 368 (1964); Crane v. Kentucky, 476 U.S. 683 (1986).

[23] Crime scene processing was limited to a ten-foot grid surrounding the victim's body, but the burned pile of debris was located "20 or 25" feet from body. See R. 1904.

[24] See Nixon v. State, 572 So.2d at 1342.

Nixon's case. Cumulatively, had the confession not been admitted and had trial counsel conducted an adversary proceeding, he could have raised reasonable doubt about Nixon's guilt, at least as to the capital crime charged. And even if the jury had convicted Nixon of first degree murder, the facts trial counsel could have adduced at the guilt phase could have raised enough doubt that the penalty phase result would have differed.

2. The Brady/Giglio Violations

The Brady/Giglio claims involve two types of evidence: (1) two State witnesses -- John Nixon, Jr. and Wanda Robinson -- who were paid money or promised favorable treatment in exchange for their testimony against Joe Nixon, and (2) the Mickens Memorandum, which documents an interview with a witness who saw Joe Nixon far from the Governor's Square Mall and Tram Road -- the principal sites in this case -- at about the time of the Jeanne Bickner murder. Both were material to Joe Nixon's defense.

a. The State's Witnesses and the Police

Although the prosecution did not disclose it, the State Attorney's Office and law enforcement agencies had relationships with John Nixon and Wanda Robinson, two key State witnesses, that may have substantially colored their testimony:

- John Nixon and Wanda Robinson received payments from the Leon County Sheriff's Office in exchange for furnishing information about Joe Nixon. See Affidavit of John D. Nixon Jr. at 7 (September 30, 1993); A-277.

- According to John Nixon, to obtain his cooperation against his brother Joe, the Sheriff's Office employed threats and put pressure on John, both with respect to a possible violation of probation charge and the possibility that John would be charged in the Jeanne Bickner murder. Id.

- The State promised John Nixon assistance with criminal charges in exchange for John's damaging testimony against his brother. A note from a State Attorney's file about charges against John Nixon for a 1986 kidnapping, assault and sexual battery on Wanda Robinson shows that the State, at the instance of Deputy State Attorney Anthony Guarisco, reduced charges against John in a subsequent criminal action for a kidnapping strikingly similar to that charged against Joe in the Bickner case. The note states that Mr. Guarisco had said that, because of John Nixon's testimony in the Joe Nixon homicide trial, the Office of the State Attorney should help John "if we can" as to the 1986 charges. 3.850R. 788; A-280.

- John Nixon had worked as an informant for the Office of the Leon Country Sheriff. Deposition of Wanda Robinson in Roberts v. Governor's Square, Inc., at 99; Rule 3.850 Motion at 247, n. 53, 3.850R. 652.

- A police report containing allegations of a May 30, 1986 robbery by John Nixon suggests that John Nixon also worked as an informant for the Florida Department of Law Enforcement. Rule 3.850 Motion at 247, n. 53, 3.850R. 652.

John Nixon stated:

> 18. When this whole thing happened, Major Larry Campbell offered Wanda and me money for information on Joe. I remember Wanda waving some money around; she had several hundred dollars which came from the sheriff's department.
>
> 19. When the sheriff's office questioned me about this case, they told me there was a warrant for my arrest for violation of probation and that I had better cooperate or they would make my life miserable. They also told me that they thought I was involved in this crime. They were trying to scare me and were saying they had stuff on me and would use it against me if I didn't cooperate.

Affidavit of John Nixon, Jr., September 30, 1993, at 7; 3.850R. 3467; A-277.

John Nixon thus had at least three independent reasons to testify adversely, though not necessarily truthfully: First, either he, Wanda Robinson, or both of them, had been paid by the sheriff's department. Second, he was vulnerable to prosecution for violation of probation. Third, he thought he might be subject to prosecution and the death penalty for the Bickner murder.

Disclosure of these relationships and inducements would have facilitated cross-examination of John Nixon and Wanda Robinson, two of the State's prime witnesses, diminishing their credibility. It certainly would have been fair for the defense to have known and pursued the fact that the State's key witnesses against Joe Nixon had secured income and other benefits from the State.

Giglio v. United States, 405 U.S. 150 (1972), confers due process protection against state concealment of evidence that impeaches prosecution testimony. This right "entitle[s]" the defense to know of evidence relevant to the credibility of a prosecution witness' testimony. 405 U.S. at 155. In addition, every witness' testimony impliedly asserts its veracity; therefore, the defense has due process protection against State nondisclosure, for whatever reason, of any legally admissible impeachment material known to the State.

Giglio and United States v. Bagley, 473 U.S. 667, 676 (1987), bring impeachment evidence potentially helpful to the defense into the ambit of Brady. Nondisclosure of evidence that "might" have helped the defense in cross-examination "amounts to a constitutional violation" if it deprives the defendant of "a fair trial." See Giglio, 405 U.S. at 153-55; Bagley, 473 U.S. at 676, 682-83. Cf. Napue v. Illinois, 360

U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.")

Under Giglio, Bagley and Napue, due process requires reversal of a conviction when the State fails to disclose evidence of "any understanding or agreement, including an 'informal understanding,'" with a key government witness as to future prosecution of the witness, if that disclosure would materially affect the outcome of the case. See Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir. 1985). Accord, Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986). Materiality is defined as a "reasonable probability" of a different result had the withheld information been provided to the defense. Kyles v. Whitley, 514 U.S. 419, 434 (1995). The standard is generous. In Brown v. Wainwright, the State's agreement merely might have enabled a witness to avoid capital prosecution, yet the court of appeals held that "the constitutional concerns address the realities of what might induce a witness to testify falsely." Id. at 1465 (emphasis added). Accord, Gorham v. State, 597 So.2d 782, 784 (Fla. 1992) (State's nondisclosure of key witness' informant status "dispositive" of the Brady claim).

In summarily rejecting the Brady/Giglio claims, the court below concluded that the second prong of the Kyles v. Whitley test -- a reasonable probability that the outcome would be different -- had not been met. October 22 Order at 13-14; A-330-31. However, the court below did not take into account the weaknesses of the State's case as

detailed here, and the likelihood that the confession would have been suppressed. Under Kyles v. Whitley, the court must look at the totality of the evidence, including that developed after trial. See 514 U.S. at ___, 115 S.Ct. at 1568.

In sum, Joe Nixon's life depended upon his lawyer being able to discredit the State's witnesses; he could not do so because the State never provided the information.

b. The Mickens Memorandum and Nixon's Possible Alibi

Joe Nixon also had a potential alibi of which the State was aware. Lamar Nixon, Joe Nixon's uncle, gave a statement to State investigator Mickens placing Joe Nixon in Woodville, far from either the Mall or the Tram Road site at the time of the crime. Mickens' Memorandum (A-212-14) details Lamar Nixon's statement. The distance between Woodville and the mall where Jeanne Bickner was kidnapped, and the Tram Road site where she was killed, casts serious doubt on the possibility that Joe Nixon could have been in Woodville at between 3:00 and 4:00 p.m. -- as the State had reason to believe from the Mickens Memorandum -- and at either the Mall or the Tram Road site at the time the kidnapping and murder took place. See Rand McNally Street Finder (1996 Ed. CD-ROM); A-216. The Mickens Memorandum preceded the trial by nine months. Assistant State Attorney Hankinson knew of its contents before trial, and no doubt other members of the prosecution team also knew about it.

The Mickens Memorandum would have allowed Nixon to raise doubt about his participation in the crime, given the inability to be in two places at once. Under Kyles v. Whitley, the test is whether there is

a reasonable probability of a different result. 115 S.Ct. at 1566. Viewed cumulatively, the information withheld by the State, the information known to trial counsel but not used by him, and the newly discovered evidence, reveals such a probability.

c. Other Crucial Evidence Not Disclosed to or Obtained by Trial Counsel

Other evidence (see 3.850 Motion at 244-52; 3.850R. 649-57) suggests that Joe Nixon may not have acted alone in this crime, and may not have committed it at all. Furthermore, Brady error can be cumulative: when the State withholds various pieces of evidence that separately may be insignificant but that together with other evidence provide grounds for a serious defense, relief is in order. See Kyles v. Whitley, 115 U.S. at 1567. The Brady material -- mainly going to Joe Nixon's possible alibi and the paid State witnesses -- and the new evidence suggest more doubt in this case than anyone has previously thought. First, John Nixon committed at least three very similar abductions on his own, two before and one after the Bickner murder. See 3.850 Motion at 246-47; 3.850R. 651-52. The State may have known of the abduction before the murder; and trial counsel, by diligent investigation, should have learned of it. Second, if Joe Nixon was in Woodville on the afternoon of the crime, it is highly unlikely he was at the Governor’s Square Mall or out by Tram Road at the same time. Third, it appears that John Nixon and Wanda Robinson were paid to turn in Joe Nixon. 3.850 Motion at 244-52; A-649-57. Joe Nixon had a better defense than either he or his attorney imagined.

The combination of the Brady material, the Giglio material, and the evidence that may have been known to the State or should have been discovered by trial counsel warrant either relief or, at a minimum, an evidentiary hearing to determine the validity of the new evidence and the material previously withheld by the State and the interplay between these issues and Nixon's claim of ineffective assistance of counsel. Cf. State v. Gunsby, 670 So.2d 920 (Fla. 1996) (cumulative Brady error and ineffective assistance undermined confidence in the outcome of the case). The issue is not whether this Court believes or disbelieves the witnesses or evidence that Nixon has proffered; the issue is whether the evidence, taken as a whole, casts a reasonable doubt upon the reliability of the jury verdict; i.e., whether a reasonable juror could have a reasonable doubt. See Gunsby. Under this standard, Nixon is entitled to relief.

POINT II

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

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

! Joe Nixon is mentally retarded, he is not "borderline."[25]

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[25] The misnomer "borderline retarded" was discontinued in reference to mental retardation in 1983. See Grossman, H. (Ed.). Terminology and Classification Manual of the American Association of Mental Retardation (8th Edition, 1983). Washington, D.C.: AAMR. The term "moderate" mental retardation is also deceptive. Joe Nixon functions approximately at the level of a six-to-eight year-old child. See Keyes Report at 1, 6; A-144, 149. Consider the ability of such an individual, analogous to a second-grader, to understand the meaning and import of Miranda v. Arizona and to comprehend and cope with the complex and stressful bifurcated proceedings of a capital murder trial. The finding by trial counsel's expert, Dr. Ekwall, that Nixon had "adequate" intelligence (R. 802) was thus wrong and misleading. Terms like "borderline" and "moderate" may reduce the stigma of mental retardation, but thus far the terms have lulled two judges into the incorrect conclusion that Joe Nixon was a canny malingerer. For example, trial Judge Hall said:

> Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

Circuit Court Order dated October 3, 1989; SR3. 3-7, at 6; A. 343 (emphasis added).

Similarly, the Rule 3.850 Circuit Court Judge remarked:

> [W]ould you concede that there are numerous cases in which people no smarter than Joe Elton Nixon have intentionally acted in this manner for the purpose of delaying a trial, getting reversals, if they are tried, so that ultimately they can maybe get tried fifteen years later when the witnesses are gone or dead or doesn't have much jury appeal?
>
> They may not know all of the benefits that flow to them by doing what they do, but they know that just to sit there and cooperate and try to let their lawyers prevent the State from establishing their guilt isn't going to do them as much good as making scenes.

Comments of Hon. L. Ralph Smith, Jr. at December 11, 1996 oral argument; 3.850R. 3095-96 (emphasis added). See also 3.850R. 3103-04, at which Judge Smith opined that Joe Nixon was similar in intellect to his brother Paul, who had recently appeared before Judge Smith in an unrelated matter.

See Dee Report, 3.850R. 719-26; A-133-40; Keyes Report, 3.850R. 731-40; A-144-53; Whyte Report, 3.850R. 747-63; A-159-75.

- Nixon has organic personality disorder (brain tissue damage). See Dee Report at 6, A-138; Keyes Report at 7, A-150; Whyte Report at 2,4-6; A-160, 162-64.

- Counsel on both sides had concerns about Nixon's competency as early as February 1985, five months before the Bickner murder trial. See 3.850 Motion at 12-13; 3.850 R. 417-18. The State Attorney volunteered that "the real issue" in the case would "revolve around" Nixon's competency. R. 899. Even Nixon's trial counsel said that his client didn't "fit the usual criteria of somebody who is fully competent." R. 813.

- In February 1985, the Assistant State Attorney questioned Nixon's competency and requested a mental examination, which the Court erroneously refused to order.

- In May 1985, two months before the trial, Nixon wrote an incoherent letter to his lawyer demonstrating a severe mental imbalance. See 3.850R. 363; A-317.

- As trial approached, Nixon's mental condition worsened. He removed his clothing, refused to leave his cell, and refused to attend the trial. See, e.g., R. 328, 342-46.

- At a hearing held by the Court in Nixon's jail cell, Nixon was barely dressed, sat on the toilet, kept his back to the Judge, said he did not want to attend the trial, said he wanted another lawyer, laughed, whistled, and continued to act strangely and irrationally. See R. 333-41; A-288-96.

- Thereafter, Nixon continued to refuse to attend his trial. The deputy sheriff would usually find him hiding in his bed under his sheet. See R.354-55; A-303-04.

Trial counsel's own expert, Dr. Ekwall, made the same mistake, stating that Nixon's intelligence was "on the low side of normal, but it's adequate" (R. 802), an outright misdiagnosis given the IQ test results. These comments -- by the two jurists who have presided in this case, and one doctor who testified in it -- demonstrate an unfortunate ignorance about mentally retarded people like Joe Nixon, who are simply incapable of behaving in the manner in which Judge Hall, Judge Smith and Dr. Ekwall imagine.

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

The constitutional protection against trial while incompetent is as old as English common law and derives from the fact that a mental incompetent cannot cooperate with counsel in such crucial elements of a criminal trial as preparing and presenting the case, confronting and cross-examining witnesses, and testifying on his own behalf or making an informed decision not to testify. Drope, 420 U.S. at 171. Article I, Section 9 of the Florida Constitution provides similar due process protection. Even if the State has procedures sufficient on their face to protect the defendant's right not to be tried while incompetent, it violates the defendant's constitutional rights if it fails to follow those procedures. Pate, 383 U.S. at 385-86; Drope, 420 U.S. at 172-73.

Because the requirement of competency is basic and fundamental to due process, a shared duty of inquiry rests with the trial court. See, e.g., Pate, 383 U.S. at 385. Accord Hill v. State, 473 So.2d 1253, 1259 (Fla. 1985) ("The significance of the Robinson decision is that it places the burden on the trial court, on its own motion, to make an inquiry into and hold a hearing on the competency of the defendant when

there is evidence that raises questions as to competency." (emphasis added))[26]

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

Competency may be raised at any time -- before, during or after trial. Lane v. State, 388 So.2d 1022, 1025 (Fla. 1980); State ex rel. Deeb v. Fabisinski, 152 So. 207, 211 (1933). For this reason, the court below erred in finding the competency claim procedurally barred. See Note 12 above and discussion in accompanying Petition for a Writ of Habeas Corpus, at __. Nor may an incompetent defendant "waive" his right to a competency hearing. Pate, 383 U.S. at 384 ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently waive his right to have a court determine his capacity to stand trial."); Cooper v. Oklahoma, 517 U.S. 348, ___, 116 S.Ct. 1373, 1377 n.4 (1996)("Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection even if

[26] Because lawyers are not trained to make psychiatric diagnoses, mental health experts, not lawyers, must evaluate competency. Hill v. State, 473 So.2d at 1253; Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978); Hull v. Freeman, 932 F.2d 159, 168 (3rd Cir. 1991). Thus, a trial judge may not rely on defense counsel's judgment in forgoing a competency inquiry, an error that occurred in this case. See R. 813.

the defendant has failed to make a timely request for a competency determination." (emphasis added)) Accord, Bundy v. Dugger, 816 F.2d 564, 567-68 (11th Cir.), cert. denied, 484 U.S. 870 (1987); Bruce v. Estelle, 483 F.2d 1031, 1037 (5th Cir. 1973); Kiebert v. Peyton, 383 F.2d 566, 569 (4th Cir. 1967).

Once a court finds a violation of Pate and Drope, a new trial is in order, as a court cannot engage in a retrospective review of the defendant's competency at the time of the original trial. Drope, 420 U.S. at 183; Pate, 383 U.S. at 387:

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

Hill v. State, 473 So.2d at 1259 (citations omitted). If Nixon was entitled to a competency hearing in 1985, he is entitled to a new trial, prior to which his present competency must be determined.

Alternatively, even if Nixon was not entitled to a competency hearing in 1985, i.e., if the trial court had reason to forgo a competency inquiry and therefore did not violate Pate, a proffer of present evidence that the defendant was incompetent requires a hearing to determine whether or not Nixon would have been held competent in light of the new evidence. Mason v. State, 489 So.2d 734 (Fla. 1986). If a new evaluation cannot be made that affords the defendant due process of law, a new trial is required. Id.

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

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

Fla.R.Crim.P. 3.210(b) requires that, if the court, counsel for the defendant, or the State has reasonable grounds to believe a defendant is incompetent at any material stage, the court shall immediately appoint no more than three and no less than two experts to examine the defendant. Fla.R.Crim.P. 3.211 set out the scope of the experts' examination and report.[27] It provided that they must consider "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him."[28] Fla.R.Crim.P. 3.212 set the procedure in

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

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

the competency proceeding and provided for treatment of an incompetent defendant so that he may become competent to stand trial.[29]

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

Second, independent of the procedural claim under Pate, Nixon's substantive due process rights were violated when he was tried while incompetent. As the United States Supreme Court observed in Cooper v. Oklahoma, "We have repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.' Nor is the significance of this right open to dispute." 116 S.Ct. at 1376 (citations omitted). Cooper holds that a state may not proceed with a criminal trial after a defendant has demonstrated that he is more likely than not incompetent, and thus reaffirms Pate, Drope, and Riggins -- an unbroken chain of holdings that competency is fundamental to the criminal fact-finding process. For example:

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

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

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

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

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

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

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

> [P]etitioner was absent for a crucial portion of his trial. Petitioner's absence bears on the analysis in two ways: first, it was due to an act which suggests a rather substantial degree of mental instability contemporaneous with the trial; second, as a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him.

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

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

examinations. Those overdue examinations uniformly confirm that Nixon was incompetent:

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

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

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

With these reports, all three elements of incompetency set out in Drope fall into place: irrational behavior, impaired demeanor, and expert opinion. It would be hard to envision a record more probative of mental incompetency than this one, yet despite concerns expressed even by the prosecutor five months before trial, the trial court did not order the mental examinations and reports required by Pate and the applicable Florida Rules. Now, to redress this error this Court should order both a new trial, and the necessary competency hearing that would precede such a trial. See Hill v. State, 473 So.2d at 1259. Alternatively, if the Court perceives factual issues, it should order an evidentiary hearing at which Nixon will establish the foregoing facts with even more certitude. See Jones v. State, 478 So.2d 346, 347 (Fla. 1984).

POINT III

Joe Nixon's Death Sentence Must Be Set Aside Because the Sentencing Phase of His Trial Lacked the Most Rudimentary Elements of Fair Procedure and Reliable Adjudication: Counsel Made No Effective Argument for Sparing Nixon's Life, and Presented Evidence that Hurt, Not Helped, His Client.[30]

Under Strickland v. Washington, a defendant claiming ineffective assistance of counsel must show deficient performance by counsel and prejudice as a result. Here, trial counsel's penalty phase performance was deficient in three ways: He failed to adduce and introduce freely available mitigation evidence that would spare his client; the evidence he did introduce devastated his client's case for mercy; and he permitted the State to introduce and argue improper aggravating circumstances. Trial counsel's deficient performance prejudiced Nixon because the evidence he could have used would have guided the jury to a finding of leniency, the evidence he did use guided them toward death, and, of course, the additional aggravating circumstances simply provided more unnecessary reasons for the jury to recommend death.

A. Acts Below a Reasonable Standard

[30] Joe Nixon did not attend the penalty phase of the trial. On direct appeal, this Court held that, under Peede v. State, 474 So.2d 808 (Fla. 1985), Nixon could waive attendance "at trial." 572 So.2d at 1342. Since the claim is exhausted, we do not address it here, though we disagree with the Court's ruling and preserve the claim for future review. By every textbook and manual on the subject, it is absolutely crucial to humanize the defendant if there is ever to be hope of securing a life sentence. See, e.g. Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U.L.R. 299, 330-332 (1983). Nixon's absence made this impossible.

Nixon's lawyer laid the groundwork for a death sentence from the outset. He abetted the determination of his client's guilt with guilt phase statements of personal belief that Jeanne Bickner "died a horrible, horrible death. Surely she did,..." (R. 1852), that this "horrible tragedy" was caused by Joe Nixon and that the jury would "find that the State has proved beyond a reasonable doubt each and every element of the crimes charged; first-degree premeditated murder, kidnapping, robbery, and arson." R. 641. By emphasizing the atrociousness of the killing, counsel gave the State a free ride on two statutory aggravating factors, "premeditation" and "especially heinous."[31] Throughout the trial, Nixon's lawyer made startlingly damning statements that could only hurt his client. The prosecutor's guilt phase closing even quoted defense counsel's description of Bickner's death. R. 649. Likewise, the prosecutor used Mr. Corin's own statements to show that there was no doubt about guilt. See R. 646-47.

Although the court below suggests a theoretical "strategy" by Nixon's lawyer to concede guilt and maintain "credibility" with the jury (see October 22 Order at 9-10; A-326-27), Nixon's counsel did nothing in the guilt phase to prepare the jury to consider a case for

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[31] Counsel also ineffectively failed to object to the instructions on the "prior violent felony" and "felony murder" aggravating factors, on the grounds that they had the effect of directing a verdict as to the existence of the aggravating factors. See 3.850 Motion, Claim VI. Additionally, if this Court finds, as did the court below, that defense counsel failed to preserve Nixon's claims under James v. State and Jackson v. State (see Point VII below), then counsel was ineffective in this regard as well.

the life of Joe Nixon. He then presented no meaningful case for life at the penalty phase; in fact, he did the opposite.

Just before the penalty phase, counsel conceded, in statutory language, that "I will not now nor have I ever argued that this offense is not especially heinous, atrocious and cruel...manifestly spread upon the record before this jury by both physical evidence, testimony of all the witnesses that have previously been to Court, and not in the least part, Mr. Nixon's taped statement..." R. 743 (emphasis added). And, as if to ensure that there would be no weighing of factors between life and death, counsel conceded that this is a "totally uncontested aggravated circumstance..." R. 743. The words "totally uncontested" conceded this grave aggravating factor beyond a reasonable doubt.

Counsel opened the penalty phase by pointing out not only Nixon's two earlier felonies, but also a recent assault on a correctional officer while awaiting trial. R. 754-55. Defendant's Exhibits 1-51, submitted en masse and without explanation, documented his prior criminal record, including convictions wholly unsuitable as aggravating factors,[32] including this incredible example: Defendant's Exhibit 31, a February 20, 1976 Memorandum from the Dozier School for Boys, which remarked, "Two of the commitments to Dozier have been for Capital crimes (Arson)." This evidence, submitted by the defense, gave the completely false impression that Nixon had already committed a capital crime. The death sentence ought to be reversed for that reason alone.

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

Counsel began his penalty phase closing by telling the jury, "Each one of us has a job that we have to perform. The fact that I represent Joe Elton Nixon does not mean that I don't have normal human feelings." R. 1019. Each statement separated him further from the man he was supposed to represent and suggested that no circumstances could outweigh what Nixon had done. "[H]e's a danger, he should never get out, there can be no control over him.[33] And they're right. They're right. They're absolutely right." R. 1025. He is a person who the mental health experts "pretty much" concluded is not a "worthwhile human being." R. 1025. Defendant is perhaps a "devious person, with no responsibility," who did a "horrible deal" [the crime]. R. 1027. Referring to the confession, counsel said that Nixon confessed because "he's nuts." R. 1027. He said that Nixon "does atrocious things." R. 1027. "[H]e was actually a wild man." R. 1028. "[P]erhaps he is totally unremorseful....I can't explain it." R. 1031. "[I]n 1972, they predicted that...he probably [would] not ever be able to remain alive in society..." R. 1036. "Why," asks counsel, "should we recommend life, because all he's ever done is harm other people? He's obviously liable to harm somebody in the prison system....That is a concern...'If we give him his life, he might hurt someone else.' Well, I can't say that he will, and I can't say that he won't." R. 1037-38. It's "one of the most terrible crimes that can be committed." R. 1046. Counsel mulls the possibility of a death sentence: "Of course, I'm

[33] "[O]ur death penalty statute does not authorize a dangerousness aggravating factor." Kormondy v. State, 703 So.2d 454, 463 (Fla. 1997).

afraid that that's what you are going to do." R. 1040. A self-fulfilling prophesy.

After thoroughly demonizing his client, counsel next adduced evidence that destroyed any remaining chance for life. Mitigation evidence, comprised mainly of mental health opinion and family history, largely determines the outcome of a capital penalty phase. Counsel's performance here was deficient. Both defense mental health witnesses, crucial in a capital case, were a disaster, and Mr. Corin's questions played a key role. The witnesses expressed opinions that defendant was not psychotic or suffering from any serious mental illness, but simply "different," that his principal motivation was revenge, that he lacked remorsefulness and was untreatable and dangerous. For example, Dr. Ekwall's appraisal of Nixon was that "he's different" (R. 799); defendant is "not psychotic;" "[h]e doesn't have the disease" (R. 801). Dr. Ekwall found no psychotic or neurotic illness and stated that Nixon was competent. R. 804, 811. He believed that Nixon's intelligence is "on the low side of normal, but it's adequate," though adequate for what purpose the doctor did not opine. R. 802. When Dr. Ekwall observed that Nixon told different stories, counsel followed with the question, "life-long history of lying?" Dr. Ekwall replied, "Yes." R. 801. Dr. Ekwall testified that Nixon had an antisocial personality disorder and was not a "very good risk for society." R. 810, 812. Dr. Doerman testified, also for the defense, that Nixon had a "personality disturbance." R. 824. "I think revenge is a primary factor in the way he operates." R. 825. This witness found Nixon not to be psychotic (R. 821) but to have brain damage, though just "barely." R. 818-19.

All of this, and the following testimony, was on the defense's direct examination:

> Q. You find him to be an unremorseful person.
>
> A. Precisely.
>
> Q. You find him to be a person who, while not psychotic is what? Not normal?
>
> A. Not normal in several senses....
>
> Q. Is any of this treatable?
>
> A. I don't have much hope for remediation....[M]any people have tried to work with him...without much success.
>
> Q. You would conclude he is a dangerous person?
>
> A. Yes.

R. 822-23. Remorse is a non-statutory mitigating factor, but lack of remorse is not a statutory aggravator; thus, the prosecution may not argue that a defendant is unremorseful. Pope v. State, 441 So.2d 1073, 1078 (1983). As noted, in Florida future dangerousness is not an aggravating factor; thus, Nixon's lawyer introduced two impermissible aggravating factors into the sentencing calculus.

Other defense witnesses provided only more harm. Betty Nixon, Wanda Robinson and the four law enforcement officers failed to encourage understanding or mercy. R. 764-792. Defense counsel brought out, in but three pages of testimony, that Nixon's mother, Betty, only reluctantly appeared in court and that her son had "problems in school" and "didn't seem normal." R. 765-66. The State did not bother to cross-examine. See R. 767. Wanda Robinson's testimony offered little more than that Nixon may have had a fight with his girlfriend. R.

768-76. The law enforcement officers, apart from testifying that Nixon had what appeared to be a lover's spat with his girlfriend, confirmed that he was otherwise calm during most of the time they observed him. This testimony did not provide mitigation. Counsel did bring out that defendant had asked the police to arrest him prior to the murder. R. 783-85. This could have been important, had counsel connected it to Joe Nixon's history and mental condition, but he did not.

The 51 Defense exhibits, however numerous, helped only the State. The Rule 3.850 court relied on the pure volume of defense documents to reach its conclusion that counsel was not ineffective. See October 22 Order at 10: A-327. But measuring a trial lawyer's performance in pounds of paper entirely misses the point. The inquiry must determine whether the evidence did any good. Here, the exhibits not only did no good, they did harm; they one-sidedly portray Nixon as a "career criminal" from about the age of eleven.

As to Joe Nixon's persona -- which a capital defense lawyer must enhance at all costs -- the documentary evidence did the opposite, demonizing him at every turn. Exhibit 7, p. 2, indicates that he "feels little genuine remorse, is not completely convinced that what he did was wrong [breaking and entering an elementary school]." Exhibits 7, 26 and 45 indicate that he is a habitual offender, does not learn from his mistakes, and committed perjury at trial. Exhibits 3, 4, 7 and 8 say that he has no serious psychological problem, he is just delinquent. Exhibit 8, pp. 2 and 3, indicates that no "organic maladjustments" have been found and that "he was just a young boy who seemed to have a lot of anger and resentment in his past and he did not

appear to be psychotic," and that he "knows right from wrong." Exhibits 37, 40, 42, 44, 45, and 46 detail Nixon's extensive delinquency, and criminal history and propensity, including that "during the defendant's juvenile commitments, he was a problem." See, e.g., Exh. 44, page 3.

The defense demolished its theory of mitigation by its own documentary evidence and mental health experts. Indeed, the State made better use of the defense exhibits than the defense ever could, painting Nixon as manipulative: "[he] knew how to play the game," knew right from wrong, is a habitual criminal and always will be a danger. R. 1006, 1011-12. At sentencing, with no objection from the defense, the State asked the trial court to "consider the Defendant's prior history of criminal misconduct....The Defendant's history shows that he cannot be rehabilitated. The public needs to be protected from further criminal acts by the Defendant." R. 286. By that point all defense counsel could say was, "In my heart I wish the Court to do what I had requested last week when the jury recommended. In my mind I don't think that will be possible." R. 286-87.

Trial counsel's conduct was not based on a reasonable strategy. The evidence he submitted, his oral arguments, and his comments about Nixon were not likely to save this defendant's life, but instead devastated the case by dehumanizing him and thereby assisting the State in obtaining a death sentence.

B. Prejudice -- Compelling Mitigation Evidence Was Available

The second prong of the Strickland test requires a showing of prejudice resulting from his lawyer's deviation from accepted standards. The court below found no such result. We disagree.

Nixon's childhood history is a powerful but missing mitigator. Trial counsel had before him documents and deposition testimony indicating that a childhood background investigation would produce solid mitigating evidence.[34] Indeed, counsel mused aloud in his closing that there was likely "some organic problem in the family" (R. 1032); but even though he knew of Nixon's background of poverty and abuse, he did not investigate. A background investigation is key to the penalty phase of a capital trial, especially so here, where it was clear that the expert witnesses counsel had consulted would only hurt Nixon's penalty phase chances. The failure to investigate doubly harmed Nixon. It robbed him of first-hand mitigation evidence; and the poor prognosis by the experts was based on their inadequate knowledge and lack of understanding of Nixon's background.

The court below held no hearing on this claim. Yet it is vital to know just what went on between counsel and defendant in the days and months prior to the trial. "[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper

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

assessment of counsel's other litigation decisions..." Strickland, 466 U.S. at 691 (citations omitted).[35]

Lay witnesses, who were available to testify about defendant's life had they been asked to do so, will show at an evidentiary hearing that defendant suffered enormously from years of neglect and abuse:

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

(2) Nixon was likely poisoned by pesticides as an infant;

(3) Nixon, as an infant, was scalded when he fell into a tub of boiled water;

(4) Nixon received little attention at home except for whippings; he was beaten by his father frequently with belts, extension cords, switches, ropes, fan belts, sticks, and "whatever came to hand;"

(5) Nixon was often tied up for the beatings;

(6) Nixon was beaten by his mother and beaten by other relatives and at school and in jail;

(7) Nixon was slow and heard voices and saw things that did not exist;

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[35] See also Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence."); Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991) (where a defendant was noticeably morose and irrational, "(c)ounsel therefore had a greater obligation to investigate and analyze available mitigation evidence"); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) ("case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."), cert. denied, 503 U.S. 952 (1992); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) (Counsel failed to present additional, available mitigation evidence, which was not a reasonable strategy decision arrived at after a reasonable investigation of defendant's background).

(8) Nixon's family was poor and food was scarce, yet what little they had sometimes was withheld by his mother as punishment;

(9) Nixon, as a child, was put outside at night as punishment despite his terror of the dark; Nixon saw disembodied eyes in the dark;

(10) Nixon was subjected to the most brutal and disgusting sexual abuse not once or several times but frequently over many years, beginning when he was seven years old and continuing until he was a teenager;

(11) Nixon's brother and uncle told others of his being used sexually, taunted him and dressed him as a girl to parade him around the neighborhood; he was tormented and teased constantly by other children in the neighborhood;

(12) Nixon was and is subject to severe mood changes, from quiet and gentle to angry and agitated without any discernible reason;

(13) Nixon's mother drank heavily when pregnant;

(14) Nixon was given alcohol as a child of seven or eight years "to make him act crazy" for other people's entertainment, and he was "always drunk" by age twelve;

(15) with the exception of an older sister, Doris, who left the household as soon as she could due to sexual abuse practiced upon her, there was no love for Nixon in his home, even from his mother, who knew of the many severe beatings, inflicted some of them herself, knew of the sexual batteries and did nothing about them, and who joined his father and others in heaping verbal abuse on Nixon, calling him "stupid," "no good," "worthless" and "crazy;"

(16) Nixon was considered slow by everyone, he could not play and communicate like other children, and he would say he saw things (e.g., a human body with a goat's head) and people who did not exist;

(17) other children teased him for being "stupid;"

(18) Nixon tried to kill himself by hanging in a tree;

(19) Nixon was hospitalized for two weeks after being hit on the head with a lead pipe while he was in jail; he also hit his head and lost consciousness on two other occasions;

(20) Nixon was seen as being drunk and "beside himself" by several witnesses during a period of two days before the crime and the day afterwards;

(21) while awaiting trial in this case, Nixon would carry on conversations in his cell as if there was someone with him.

See 3.850 Motion at 138-55; 3.850R. 543-60.

The evidence proffered below also shows that Nixon was regarded as gentle, kind and protective, that he helped his mother with his earnings, and that he had a generally good behavior record in detention settings. 3.850 Motion at 95-96, 153; 3.850 R. 500-01, 558). And having erroneously permitted Nixon's confession to be admitted in evidence, defense counsel could at least have offered it as an act of remorse in the penalty phase; instead, he told the jury that defendant's confession proved "he's nuts." R. 1027.

With competent experts and a full clinical history of Joe Nixon, significant, sympathetic, compelling mitigating mental health evidence would have helped avoid the death penalty. For example, Dr. Dee found that Nixon could neither appreciate the criminality of his conduct nor have premeditated the murder, and that the statutory aggravators "require intention and cognitive abilities unachievable by Mr. Nixon at the relevant time period." Dee Report at 7; 3.850R. 725; A-139. He also determined that "[i]n addition to the statutory mitigating factors, Mr. Nixon's life history, mental retardation, and organic impairments give rise to myriad nonstatutory mitigation. Physical, sexual, and emotional abuse, poverty, lack of support structures, and many of the other experiences endured by this individual are critical

to understanding his psychological make-up." Dee Report at 7-8; 3.850R. 725-26; A-139-40. Dr. Dee's report shows:

> The pretrial mental health assessments of Mr. Nixon were fundamentally flawed in several ways. They were performed in the absence of crucial background material and life history information, which is a vital component of any forensics exam but is especially critical when mental retardation, cerebral dysfunction, or episodic psychotic disorder are suspected....Some of the most vital facts were unknown by the prior examiners, among them: Mrs. Nixon's alcohol ingestion during pregnancy, the high level of brutality, neglect, and hunger experienced in the Nixon home; the long-term rape and sexual abuse suffered by Joe Nixon; his lifelong adaptive functioning disabilities; and his numerous and longstanding psychotic symptomology.

See Dee Report at 8; 3.850R. 726; A-140.

Dr. Keyes found that on the Stanford Binet Fourth Edition test battery Nixon consistently functioned below the intellectual cut-off level of mental retardation. In short term memory, he functions in the lowest percentile of the U.S. population. His adaptive skills are within the severe range of retardation in all skill areas. His actual adaptive functioning is estimated to be developed at the level of a child between six and eight years of age. His social development level is similar to that of a 6 year-old child. His mental capacities place him below the lowest 1% of the population. His adaptive behavior is so distorted as to place below the lowest .01 percent of the general population. Keyes Report at 5-7, 3.850R. 735-37; A-148-51. Dr. Keyes concluded that Nixon is mentally retarded and lacks the cognitive capacity to premeditate the cold, calculated murder of another person. His involvement in this crime cannot be considered heinous, atrocious,

or cruel in that he did not possess the intent to inflict a high degree of pain, nor did he derive any pleasure from the crime. Finally, due to his substantial cognitive and adaptive impairments, Nixon did not possess the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. Keyes Report at 9; 3.850 R. 739; A-152.

Dr. Whyte determined that Nixon suffers from moderate[36] mental retardation and organic personality syndrome. Whyte Report at 2; 3.850 R. 748; A-160. Dr. Whyte detailed the reasons why Joe Nixon could not have been death-penalty eligible:

- It is inconsistent with the finding contained throughout this report that Mr. Nixon could have performed a homicide in a cold, calculated, highly premeditated fashion. He did not possess the capacity to premeditate at all, and certainly would not have performed as the statute requires.

- [I]t is my opinion that Mr. Nixon did not intend to inflict a high degree of pain on the victim, as his profound impairments and specific mental state at that time precluded the formation of intent.

- [T]he pre-trial psychiatric examination of Dr. Merton L. Ekwall...is, in my opinion, substandard.

- [As to Dr. Allen L. Doerman], none of this evidence was given anything close to its appropriate diagnostic significance and was essentially dismissed. This dismissal, combined with [other] critical failures...fell below professional standards.

- In addition, Dr. Ekwall's reliance on an EEG as a diagnostic tool created the false impression that Mr. Nixon suffers no organic impairment.

[36] The euphemism "moderate" is misleading. See Note 25 above.

Whyte Report at 12-17; 3.850 R. 758-763; A-169-75.[37]

The mental health witnesses as presented by trial counsel were woefully inadequate.[38] They mistakenly caricatured Joe Nixon as an irredeemable sociopath when in fact reasonably informed experts like Drs. Dee, Keyes and Whyte reached completely different conclusions that would have spared Nixon's life. The substandard evidence and arguments advanced by trial counsel did nothing but harm Nixon's chances for a life sentence; they prejudiced his case.

C. The Dual Strickland v. Washington Test Has Been Met.

1. Deficient Performance

Because no evidentiary hearing has been held to consider the mitigation evidence counsel could have obtained, "the allegations of defendant's motion for post-conviction relief must be accepted as true, except to the extent that they are conclusively rebutted by the

[37] Nixon's background as developed by collateral counsel probably would have made a significant difference to Drs. Ekwall and Doerman; see 3.850 Motion at 157-160; 3.850 R. 562-65.

[38] Dr. Doerman, in his report, found evidence of organic brain impairment and indications of depression, phobias, autism. However, he did not explain these findings nor did trial counsel bring them out at the penalty phase. See June 4, 1985 Report of Dr. Alan L. Doerman, Ph.D. at 4-5; A-352-53.

record." Montgomery v. State, 615 So.2d 226, 228 (5th DCA 1993).[39] No such rebuttal exists here. The evidence proffered by Nixon below is neither cumulative nor hypothetical. It is material, solid, and it bespeaks mercy, but it has not been received by any court. It was available to trial counsel in 1985, and it remains available today.

This Court has remanded for evidentiary hearings several cases that mirror this case, procedurally and factually. In Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995), this Court found a prima facie case of ineffective assistance of counsel on the pleadings and ordered an evidentiary hearing:

> [b]ased on the volume and detail of evidence of mitigation alleged to exist compared to the sparseness of the evidence actually presented, we agree that Cherry is entitled to an evidentiary hearing on his claims that counsel was ineffective at the penalty phase. This case is similar to the situation presented in Harvey v. Dugger, 656 So.2d 1253, 1257 (Fla. 1995), where we ordered an evidentiary hearing on a similar claim.

Id. See also, Harvey v. Dugger, 656 So.2d at 1257; Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990) ("In view of these allegations, Heiney's claim of ineffectiveness of counsel during sentencing cannot be decided without an evidentiary hearing."); Hildwin v. Dugger, 654 So.2d 107, 109-10 (Fla. 1995), cert. denied, 516 U.S. 965 (1995); State

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[39] The refusal by the court below to hold a hearing was plain error. See Jones v. State, 446 So.2d 1059, 1062 (Fla. 1984) ("[W]e would encourage trial judges to conduct evidentiary hearings when faced with an [ineffective assistance of counsel claim]."); Robinson v. State, 637 So.2d 998, 999 (1st DCA 1994) ("[W]hen a court is confronted with a claim of ineffective assistance of counsel, a finding that some action or inaction by defendant's counsel was tactical is generally inappropriate without an evidentiary hearing.") (citations omitted)).

v. Lara, 581 So.2d 1288 (Fla. 1991); Rose v. State, 675 So.2d 567, 573 (Fla. 1996).

Like Joe Nixon, the defendants in the above cases could be pigeon-holed as undeserving of mercy because of their deeds. But capital sentencing must proceed from individualized assessments of the defendant, whatever the circumstances of the crime. Gregg v. Georgia, 428 U.S. 153, 206 (1976); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (A system of capital punishment should be "sensible to the uniqueness of an individual."); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held in this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.").

Not only did trial counsel fail to introduce good mitigating evidence, he actually introduced harmful evidence. "The most egregious examples of ineffectiveness do not always arise because of what counsel did not do, but from what he did do - or say....[A] vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person." Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983) (emphasis original), vacated, 468 U.S. 1206, adhered to on remand, 739 F.2d 531, 533 (1984), cert. denied, 469 U.S. 1208 (1985). Accord, Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988) ("A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an

effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction.") (citation omitted). Accord, Horton v. Zant, 941 F.2d 1449, 1463 (11th Cir. 1991) ("Horton's counsel's argument to the jury raises the distinct possibility that portions of the closing argument encouraged rather than discouraged the jury to impose the death penalty. [Counsel's] attacks on Horton's character and his attempts to distance himself from his client could only have hurt Horton's cause."), cert. denied, 503 U.S. 952 (1992); King v. Strickland, 748 F.2d at 1464 (counsel acted unreasonably by placing emphasis on the reprehensible nature of the crime and his "closing argument served only to dehumanize his client.").

The court below found that trial counsel had a "strategic theme" (October 22 Decision at 10; A-327), and that his "legitimate, sufficient and able efforts could not establish mitigating factors sufficient to overcome the aggravating factors proven by the State" (id. at 11; A-328). But Mr. Corin was in no position to develop a "strategic theme," because he had developed no relationship with his client, nor had he conducted the kind of investigation necessary to present evidence that would lead to mercy for Joe Nixon. Indeed, in the very midst of the penalty phase Mr Corin complained, "I have an additional problem that I'm operating without a client." R. 742.[40]

[40] Mr. Corin had "an abiding fear that he [Nixon] will act out... Judge, I don't want to see anybody hurt." R. 331. He was afraid to sit next to Nixon in court or even visit him in jail; at one point he stated: "...[t]here's bars and I can assure you

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

Mr. Corin's evidence and argument portrayed Joe Nixon as a vengeful person, a life-long delinquent, a liar, someone likely to be dangerous in the future, even in prison -- untreatable and unrepentant. Such considerations could not be raised by the prosecution as reasons why Nixon should be put to death. While all these characteristics worked to defendant's disadvantage, they are not within the scope of the statutory list of aggravating factors. "The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." Miller v. State, 373 So.2d 882, 885 (Fla. 1979). Accord, Proffitt v. Wainwright, 685 F.2d 1227, 1266 (11th Cir. 1982)("consideration by the sentencer of nonstatutory aggravating factors violates the eighth and fourteenth amendments."), modified, 706 F.2d 311, cert. denied, 464 U.S. 1002 (1983). Yet, all of these nonstatutory aggravators were adduced by defense counsel from his own examination of his expert witnesses, from the exhibits he introduced, and in his own arguments.

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that I won't hang around if something untoward appears to happen." R. 332-333. All this would impede any background investigation. For his part, Nixon entreated counsel, "Please get off my case" (A-317), and told the Judge "I want another attorney." R. 335. Certainly, the fact that defendant attempted to dismiss counsel did not create a favorable relationship. The antipathy, Mr. Corin's distancing of himself from Nixon, and Nixon's absence from court throughout trial created a sense that the defendant was indifferent to the whole matter, and that the lawyer had little empathy for the client, little more, in fact, than the State.

The sort of complete surrender at the penalty phase that occurred in Joe Nixon's case is inexcusable. In Clark v. State, 690 So.2d 1280 (Fla. 1997), the lower court denied 3.850 relief without an evidentiary hearing. This Court focused on trial counsel's performance in the penalty phase, particularly his closing argument, in which lawyer attacked client in much the same way Mr. Corin attacked Nixon. This Court found:

> ...Clark's counsel failed to function reasonably as an effective counsel when he indicated his own doubts or distaste for the case and when he attacked Clark's character and emphasized the seriousness of the crime....When counsel virtually encouraged the jury to impose the death penalty, he assisted the prosecution in making its case. In so doing, he deprived Clark of adversarial testing of the prosecution's case. Accordingly, we find counsel's performance in his closing argument to be deficient.
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> * * *
>
> [W]e find that portions of counsel's argument had the effect of encouraging the jury to impose the death penalty. See Horton v. Zant, 941 F.2d 1449, 1463 (11th Cir. 1991). Additionally, counsel's attacks on Clark's character and counsel's attempts to distance himself from his client could only have hurt Clark's cause. Id. We find that counsel's deficiencies during the sentencing caused an unreliable result, and therefore counsel's deficient performance was prejudicial to Clark.

690 So.2d at 1282-1283.

The "arguments" and "strategies" of counsel in Joe Nixon's case were deficient in exactly the same way as those of the defense attorneys in the cases discussed above; and the facts of this case should offend this Court's sense of fairness the same way as in those cases. In each instance, trial counsel failed to act as a zealous advocate for his client, distanced himself from the very person he was supposed to humanize, failed to present constructive evidence, and

presented destructive evidence. In each trial, the client went to death row as a result, which, of course, brings us to the issue of prejudice.

2. Prejudice

"[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case....[T]he appropriate test for prejudice [is]...that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693-94. Accord, Deaton v. State, 635 So.2d 4, 8 (Fla.) ("Generally, prejudice is established by a finding that, but for the ineffective assistance of counsel, a reasonable probability exists that the outcome of the proceeding would have been different, or that, as a result of the ineffective assistance the proceeding was rendered fundamentally unfair."), cert. denied, 513 U.S. 902 (1994).

The profoundly injurious mental health testimony and the exhibits introduced by counsel, as well as his argument to judge and jury, all told a one-sided story without explanation and thus without mitigation. Trial counsel's actions thus prejudiced Joe Nixon. He failed to find Nixon's humanity and to present it to the jury. One commentator explains the importance of presenting childhood background evidence:

> Penalty phase investigation and preparation therefore are fundamental to effective advocacy in capital cases....The defendant will appear human to the sentencer, and his life

> of value, only if counsel treats the defendant as a valuable human being in the sentencer's presence. If counsel cannot understand the client or the reasons behind the death qualifying conduct, counsel will not be able to explain the behavior to the judge or jury.

"The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," supra, 58 N.Y.U.L.R. at 320-21. Had Nixon's jury seen the mitigation evidence his counsel missed, had they not seen the devastating evidence his counsel offered, and had they not considered needless aggravating circumstances at the instance of the defense, there can be little doubt that they would have acted differently. Even with counsel's deficient presentation, two jurors voted for life. R. 1053. The evidence described above would have won at least four more over, enough for a life sentence.

Joe Nixon is indistinguishable -- in terms of character or offense -- from the defendants in Clark, Cherry, Harvey, Heiney, Hildwin, Lara and Rose, cited above. We have gathered evidence providing a specific, detailed picture of Nixon -- far different from that presented at his trial. Rather than an "ogre" (R. 674) or "just pure mean" (R. 1010) -- as characterized by the defense and prosecution alike -- we can show through lay and expert witnesses that Nixon's environment, upbringing and organic deficiencies despoiled his ability to function properly.

Jurors respond to such circumstances as those in this case,[41] but the jurors in Joe Nixon's case had no opportunity to do so.

This case simply cannot be squared with the many similar cases in which this Court has required the Rule 3.850 court to consider what an effective trial lawyer would have presented by way of mitigation. Nixon should have an opportunity at an evidentiary hearing to present that evidence now.

POINT IV

Joe Nixon Was Denied a Competent Mental Health Evaluation in Violation of Ake v. Oklahoma

We have shown that trial counsel misused his two mental health experts so as to deny Nixon effective assistance. In addition to violating Nixon's Sixth Amendment rights under Strickland, this amounted to a violation of his Eighth Amendment rights under Ake v. Oklahoma, 470 U.S. 68 (1985):

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

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

470 U.S. at 83 (emphasis added). The Court in Ake noted the "pivotal role" of psychiatry in criminal proceedings, particularly when insanity is raised as a defense: "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense...the risk of an inaccurate resolution of sanity issues is extremely high." Id. at 82. Where circumstances call a defendant's sanity into question, the defense is duty-bound to seek the assistance of a mental health expert. Ake, 470 U.S. 68 (1985). Florida law requires at least two experts. Fla.R.Crim.P. 3.216(d). Rose v. State, 506 So.2d 467, 471 (Fla. 1st DCA 1987) (noting that Florida exceeds the Ake standard). Provision of just any mental health expert does not satisfy Ake; the examination provided must also be adequate. State v. Sireci, 536 So.2d 231, 233 (Fla. 1988)

Joe Nixon was an obvious candidate for competent Ake assistance because of his behavior contemporaneous with the crime and during the pre-trial and trial proceedings. Insanity was a logical consideration. The mental health experts were inadequate. Nixon is entitled to relief under Ake v. Oklahoma.

POINT V

Nixon Is Entitled to Prove His Claims Under Johnson v. Mississippi

The court below refused to consider Nixon's claims, under Johnson v. Mississippi, 486 U.S. 578 (1988), that the two violent prior

convictions used as aggravating circumstances lacked validity. The court below denied the claim because the convictions have not yet been overturned. See October 22 Order at 6; A-323.

Nixon has not had an opportunity to move to overturn the convictions, one of which was in Georgia. Nixon has been represented by volunteer counsel in these proceedings. The Volunteer Lawyers Resource Center of Florida, which investigated the case, has closed, and the Collateral Capital Regional Representative has been unable to provide meaningful support. Since Nixon is entitled at a minimum to a hearing on the merits of his claims, he should be permitted to continue to assert his claim under Johnson v. Mississippi pending an opportunity to challenge the prior convictions.[42]

POINT VI

Joe Nixon Should Have the Opportunity to Prove That Race Discrimination Tainted His Conviction and Death Sentence

Joe Nixon, a black man, was tried and convicted for killing a white woman in a notorious crime in a small community. The court below denied the claim on the merits, stating that Nixon had failed to show purposeful discrimination. October 22 Order at 5; A-322.

[42] It is noteworthy that Nixon's public defender in the assault case, one of the violent priors, considered an appeal of that conviction based on Nixon's incompetency to stand trial. See Motion to Supplement Record on Appeal in Nixon v. State (Fla. 1st DCA, Case No. BF-33); A-371-75.

The 3.850 Motion details Nixon's claim that race discrimination played a role in his conviction and death sentence. 3.850 R. 667-83. The reliance of the court below on Foster v. State, 614 So.2d 455 (Fla. 1992), is misplaced. First, Nixon has pled very stark statistical facts that take the case out of the perhaps more questionable statistical analyses in Foster and McKleskey v. Kemp, 481 U.S. 279 (1987). For example, as of the filing of the 3.850 Motion, in no Leon County black-victim case had a jury recommended a death sentence. 3.850 Motion at 264; 3.850 R. 669. Second, Nixon has alleged systemic racial bias across-the-board in Leon County in the provision of municipal and police services. 3.850 Motion at 267; 3.850 R. 672. Nixon should have the opportunity to prove that these allegations demonstrate discrimination under Foster and McKleskey. Alternatively, we would urge the Court to review its decision in Foster and adopt, as a matter of Florida constitutional law, the reasoning of the dissent in that case. See 614 So.2d at 467-68 (Barkett, C.J., concurring in part and dissenting in part). See also, McKleskey, 481 U.S. at 324-25 (Brennan, dissenting), and 481 U.S. at 352-53 (Blackmun, dissenting).

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

POINT VII

Joe Nixon's Jury Weighed Invalid and Unconstitutionally Vague Aggravating Circumstances in Violation of James v. State and Jackson v. State

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

James v. State, 615 So.2d 668 (Fla. 1993), held Florida's "especially wicked, evil, atrocious or cruel" instruction (see, e.g., Florida Standard Jury Instructions (Criminal) (1981)) unconstitutionally vague. Cf. Espinosa v. Florida, 505 U.S. 1079 (1992). Jackson v. State, 648 So.2d 85 (Fla. 1994), invalidated the standard jury instruction on the "cold, calculated, and premeditated" aggravating factor for the same reason.

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

Similarly, without explanation or definition, the trial court instructed Nixon's jury in the language of the then-standard instruction on the "cold, calculated" factor: "Fifth: The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner, without any pretense of moral or

legal justification." R. 1042. This instruction was unconstitutionally vague. Jackson v. State, 648 So.2d at 90.

A Florida court must afford great deference to a jury recommendation (Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)), and this Court will assume that the judge accorded the jury recommendation the weight it deserved. James, 615 So.2d at 669. If a jury received the improper instruction, this Court will likewise assume it improperly considered the invalid factor. Id.

James and Jackson represent fundamental changes in Florida law. As such, they are retroactively applicable in post-conviction proceedings. Certainly the changes under James and Jackson reach the level required for retroactive application by Witt v. State, 387 So.2d 922 (Fla.) (retroactive treatment accorded a change in law (1) emanating from this Court or the United Sates Supreme Court, (2) constitutional in nature, and (3) of fundamental significance), cert. denied, 449 U.S. 1067 (1980).[43]

The appropriate analysis is harmless error. James, 615 So.2d at 669; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Cf. Chapman v. California, 386 U.S. 18 (1967); Stringer v. Black, 503 U.S. 222, 232 (1992) ("When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.").

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[43] The court below incorrectly found the James/Jackson claims procedurally barred. October 22 Order at 2-3; A-319-20. See Petition for Writ of Habeas Corpus at 17-18.

The nature of both the "especially heinous" aggravator[44] and the "cold, calculated" aggravator[45] make it nearly impossible for this Court to determine that the constitutional error was not harmless beyond a reasonable doubt. This Court must assume that the jury applied and relied on the invalid aggravating circumstance. James, 615 So.2d at 669. This Court may not guess that the errors "did not contribute to the verdict [of death] obtained," Chapman, 386 U.S. at 24, or that the sentence "was surely unattributable to the error," Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

Finally, in addressing whether the errors were harmless, this Court should look at the mitigation in the entire record. While the trial court did not find any mitigation, the record contains evidence that the jury could have relied on to recommend life and that led two jurors to vote for life. Given the statutory and non-statutory mitigating evidence, it can not be said "beyond a reasonable doubt that the errors complained of did not contribute to the verdict." Although woefully inadequate in comparison to what was available, mitigating evidence was introduced at trial. It related to Nixon's history of

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[44] This is particularly true with respect to the instruction on the "especially heinous" aggravating factor, because of the uniquely powerful nature of that aggravator. See Maxwell v. State, 603 So.2d 490, 493 and n.4 (Fla. 1992); Arave v. Creech, 507 U.S. 463, 472 (1993).

[45] The jury received no guidance on the "cold, calculated and premeditated" aggravating circumstance. It would be pure speculation to find that the jury did not automatically "assume" that this aggravating circumstance was established in Nixon's case, given the absence of any further instruction on the words "cold, calculated" and "premeditated."

psychological and emotional problems, "borderline" intelligence, and his alcohol and drug usage at and around the time of the offense. The non-statutory mitigating evidence presented to the jury was surely sufficient to support a life recommendation under Tedder v. State, 322 So.2d at 910. Had the jury been properly instructed and voted for a life sentence, the trial court could not have overridden that recommendation. See Id.

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

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

V. CONCLUSION

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

1. Vacating Nixon's conviction and sentence and ordering a new trial; or

2. Vacating Nixon's sentence and ordering a new sentencing proceeding; or

3. Remanding this case to the Circuit Court for a full evidentiary hearing on all issues raised on this appeal and the accompanying Petition for a Writ of Habeas Corpus; and

4. Directing such other relief as this Court may deem just and proper.

Dated: June 5, 1998

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Appellant has been mailed by first class mail to the Office of Attorney General, The Capitol, Tallahassee, Fl 32399-1050, Attention: Richard Martell, Assistant Attorney General, on June 5, 1998.

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Jonathan Lang, Attorney for Appellant

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