

IN THE SUPREME COURT OF FLORIDA

**GARY LAWRENCE,
APPELLANT**

**CASE NO.: SC00-2290
LOWER TRIBUNAL NO.: 94-397CF**

VS.

**STATE OF FLORIDA,
APPELLEE**

INITIAL BRIEF OF APPELLANT

**APPEAL FROM DENIAL OF 3.850 MOTION FOR POST-CONVICTION
RELIEF**

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PRELIMINARY STATEMENT

The parties will be referred to as they stood in the trial court and the following symbols used:

- T Transcript of Original Trial Testimony (Volume IV through VIII)
- TS Transcript penalty phase
- R (Record of appeal – Original Appeal) (Vol. I through IV)
- TT Transcript of 3.850 Amended Motion for Post Conviction Hearing
- RR Record of 3.850 Amended Motion for Post Conviction Hearing.
- SR. Supplemental to Appeal

Appendix

A Statement of Facts from the Trial is included, followed by a Statement of Facts pertinent to the 3.850 Motion Appeal.

A copy of the Supreme Court decision on the initial appeal appears in the Appendix. (Appendix 1)

STATEMENT OF THE CASE

The grand jury of Santa Rosa County indicted **GARY LAWRENCE** on August 8, 1994 for the murder of **MICHAEL DEAN FINKEN**. In addition, the indictment charged Lawrence with conspiracy to commit murder (Count 2); robbery with a deadly weapon (Count 3); and grand theft of a motor vehicle (Count 4). (R 1-4) The defendant entered a plea of not guilty to these charges.

The parties stipulated to the identity of the victim – Michael Finken. (R 200) After the trial, the jury found him guilty as charged in the indictment of first-degree murder, conspiracy to commit first-degree murder and theft of a motor vehicle. (R 201-202) On motion of Mr. Lawrence, the trial court granted a judgment of acquittal on Count 3 – robbery. (TR 624) As a consequence of this decision, the trial court also eliminated felony-murder as a predicate for conviction in Count 1. (TR 624) The trial court reduced the charge in Count 3 to petty theft (TR 624-625) The jury found Mr. Lawrence guilty of this as well.

Mr. Lawrence moved for a new trial on March 27, 1995 on a number of different grounds. (R 208-209) The motion was denied. (Vol. IV-612) After a sentencing phase hearing, the jury recommended the penalty of death on the first-degree murder conviction by a vote of 9 to 3 on March 27, 1995. (R 203) The trial judge entered a written order sentencing Mr. Lawrence to death on May 5, 1995. (R 239) In doing so, the judge found three aggravating factors – (1) the murder

was committed while Lawrence was under sentence of imprisonment; (2) the murder was heinous, atrocious or cruel; and (3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 231-234) While the trial judge found no statutory mitigating factors (R 234-235), he did find some nonstatutory mitigation while rejecting others. (R 236-238) The result was that in the opinion of the trial court, “The three statutory aggravating factors far outweigh the mitigating factor in the instant case, and the death penalty is the appropriate sentence in this case.” (R 238)

On Counts 2 and 4, Mr. Lawrence was sentenced to 5 years to run concurrent with each other. (R 245, 250) On Count 3, petty theft, Mr. Lawrence was sentenced to time served. (Vol. IV-615)

From these convictions and sentences, Mr. Lawrence filed a timely notice of appeal on May 11, 1995. (Vol. II-256)

The Supreme Court of Florida affirmed Defendant’s conviction and death penalty on August 28, 1997. (Appendix 1) The United States Supreme Court denied *certiorari* January 20, 1998.

STATEMENT OF THE CASE –

3.850 PROCEEDING

Mandate from the Florida Supreme Court was filed October 6, 1997. Notice of Affirmance of the Death Penalty was filed November 2, 1998. *Certiorari* to the United States Supreme Court was denied January 20, 1998. Conflict counsel was appointed November 5, 1998 and 3.850 Motion for Post Conviction Relief filed January 19, 1999. Amended Motion for Post Conviction Relief was filed April 22, 1999 (Appendix 2)

After a Huff hearing, the trial court set an evidentiary hearing for June 7, 2000. The court's order limiting issues on the 3.850 Motion was entered March 8, 2000. (Appendix 3)

Evidentiary hearing on the 3.850 Motion was held June 7, 2000 (TT 1-90) and Order Denying the motion entered October 11, 2000. (Appendix 4) Notice of Appeal was filed October 23, 2000.

STATEMENT OF THE FACTS

A complete factual finding appears in the Florida Supreme Court decision Lawrence vs State, 698 So. 2d 1219. (Fla. 1997) (A copy of the opinion appears in Appendix 1.) Defendant also submits a summary of facts herein and includes factual matters relating to the 3.850 post-conviction motion determination.

On the morning of July 29, 1994 Charles Haney, a contractor, found a

charred body by the road in a new subdivision in Santa Rosa County. (T 191)

After investigating this murder, the sheriff's office arrested Gary Lawrence, and the state charged him with first-degree premeditated or felony murder, conspiracy to commit murder, armed robbery of less than \$300, and auto theft. (R 1)

According to the evidence produced at trial, Lawrence was released from prison on January 10, 1994. (R 455) He met Brenda Pitts shortly thereafter, and the two married in March. (Defendant's exhibit 4 at 4) They did not live together long, however, and at the time of the murder Lawrence was not living in Brenda's apartment. (T 630; 633; see also T 260) The victim moved into Brenda's apartment a couple of weeks before the murder. (T 260)

In his confession, Lawrence told Charles Grice of the Santa Rosa County Sheriff's Office that he and the victim drove Brenda to work in the victim's car on the morning of July 28. (T 423) They arrived at a friend's house around 10:30 to 11:00 a.m. (T 219) and left around noon to pick up Brenda. (T 220; 236) Lawrence, Brenda, and the victim came back to the friend's house before 3:30 p.m. (T 244) The victim was drunk and went inside to lay down on the couch. (T 221; 237) Brenda went in to check on the victim several times while the others stayed on the porch drinking. (T 223; 238) Lawrence said that he "was tired of seeing Brenda going in to Michael and talking to Michael" (T 239) and threatened to beat the victim and "sling him through the window." (T 240) Lawrence and Brenda

argued. (T 240) Lawrence and the victim talked, however, and shook hands. (T 241) When Brenda started in again, the friend told them to leave. (T 227; 241)

The trio arrived at Brenda's apartment around 5:00 p.m. (T 264) Just after arriving, Lawrence drew out a knife, threw it on the ground, and punched the victim, who did not fight back. (T 266-67) Brenda and her daughter separated them. (T 267; 311) Lawrence and the victim then walked around the yard and talked and "seemed like everything was all right." (T 267; 312) Lawrence, Brenda, and the victim came into the apartment about two hours later, and the victim lay down on the couch while Lawrence and Brenda sat together whispering. (T 268, 271; 315) Lawrence and Brenda told Brenda's daughter and her friend to go into the daughter's bedroom and stay there. (T 272, 276; 317) The adults gathered several weapons, including a metal pipe and a baseball bat. (T 274; 319) After the adults left the bedroom, the girls heard pounding noises and the victim asking Lawrence to stop hitting him. (T 277-278; 322-23) Lawrence told a neighbor that he beat the victim with the pipe until it bent and, when the victim said he could not move, got the baseball bat and beat the victim with it. (T 362-63) Brenda told the girls to go get Chris Wetherbee (T 281); when they returned, they saw that a mop handle had been stuck down the victim's throat. (T 282)

After the victim was dead, Lawrence and Brenda discussed how to get rid of the body, and Lawrence decided to burn it. (T 285; 333) They went through the

victim's pockets and belongings. (T 367-68) Brenda used bleach on the rug and sandpaper on the wood frame of the couch to remove the victim's blood (T 289; 335), and the couch cushions and the weapons were thrown into a pond behind the apartment. (T 289-90; 335)

The trial court granted Lawrence's motion for judgment of acquittal as to felony murder and robbery. (T 617) Thereafter, the jury found Lawrence guilty of first-degree murder, conspiracy to commit murder, theft of less than \$300, and motor vehicle theft. (R 201; T 751-52) At the penalty phase on March 17, 1995 Lawrence presented testimony from his brother, a psychologist, and a psychiatrist. The jury recommended that he be sentenced to death by a vote of nine to three. (R 203; 564) The court heard argument from the parties on April 27, 1995 (R 571) and set sentencing for May 5, 1995. (R 607) On that date, the court sentenced Lawrence to death, finding that the state had established three aggravators (under sentence of imprisonment; heinous, atrocious, or cruel; and cold, calculated, and premeditated) that outweighed the nonstatutory mitigators. (R 613; 227 et seq.)

Defendant raised fifteen separate grounds in his Amended 3.850 motion. (RR 21-36) (Appendix 2) The trial court summarily denied all but two issues (Ineffective Assistance of Counsel) without a hearing. (RR 102-158) Ground one Ineffective Assistance of Counsel also had fourteen sub-issues, all but two of which were denied. (Vol. I RR 102-158)

The issues permitted for evidentiary hearing were limited as follows:

“Issue 1 argues that trial counsel was ineffective by conceding the Defendant’s guilt to the lesser included offenses for the crimes charged, during his opening statement and closing argument of the guilt phase of the trial. He also argues that conceding guilt to the crime of the first degree murder during the penalty phase of the trial was IAOC. An evidentiary hearing will be required on this issue.”

“Issue 3 argues that the trial counsel was ineffective for not advising the Defendant he could testify in his own behalf and tell the jury about his history of alcohol and drug abuse and his intoxication on the day of the murder. An evidentiary hearing will be required.” (Appendix 3)

Evidentiary hearing was held June 7, 2000 in Santa Rosa County. (RR 2 Volumes and SR) The court took judicial notice of the original trial and record, including guilt and penalty phases. (SR Page 4, 5)

Defendant, Gary Lawrence testified that he was forty-two years old and had a seventh grade education. (SR 8, 9) He was “kicked out” of school for drinking (SR – 10) Mr. Lawrence testified that to his knowledge he did not consent to his court appointed attorney’s, Mr. Miller, concession of guilt. (SR 13, 14, 15)

During the penalty phase Mr. Miller argued as follows:

Q “We have never at any time in this case disputed Gary Lawrence’s guilt, and we have never at any time in this case disputed the fact or we have never suggested to you that Chris Wetherbee should be held to

the same degree of accountability as Gary Lawrence. We have never told you that.” (TS 129 R 554) (Appendix 6)

“ Did you authorize him to say that in the penalty phase?”

A Not that I can remember, no. (SR-55)

Mr. Lawrence recalled no discussion concerning his testimony at first between him and Mr. Miller or the court. (SR 17) Had he testified, he would have been able to outline his educational background and drinking habits. (SR 17-18) The trial record also shows that there was no record waiver of defendant’s not testifying or agreeing to a concession of guilt.

Defendant’s trial attorney, John Miller testified that the case was his first first-degree murder case. (SR 30) Based on his conversations with the Defendant, he felt Lawrence was “apathetic” about the representation. (SR 33) Miller stated he obtained Defendant’s consent to pursue intoxication as a defense to first-degree murder. (SR 34)

Miller testified he did not want the defendant to testify in the guilt phase and did wish him to testify in the penalty phase. (SR 36) He stated Lawrence refused to do so. (SR 36, 37) Miller further stated that Lawrence acquiesced in his trial strategies. (SR 40)

Miller testified regarding defendant’s right to testify as follows:

Q In either case, at the guilt phase, when you rested, or in the penalty phase there was no discussion on the record about his right to testify; was there?

A I don't recall any discussion either in the guilt phase or the penalty phase on the record about his right to testify. (SR 50-51)

Mr. Miller, in describing Mr. Lawrence said:

Q The statement I believe you used a couple of different times, that Mr. Lawrence was not intellectually gifted.

A Correct.

Q That strikes me as kind of unusual. What is -- not intellectually gifted is kind of negative. What was his intelligence?

A It was very, very low.

Q Low?

A It was in the low -- I believe the lowest fifth percentile.

Q Almost retarded?

A Well, as far as reading, and writing, and things like that he was very, very slow.

Q Are you determining he had a lack of education?

A Absolutely. And there was more to it than that. I mean, in addition to the environmental factors, his -- the way he was raised at home. He was given acid at age 10 years old that I'm sure didn't help a whole lot. And that combined with a lack of education. He was very, very slow. (SR 56, 57)

Q In view of that factor wouldn't you think it necessary to present to the Judge that problem of, "I have a man here that's of very limited intelligence, not intellectually gifted and, Judge, would you mind making an inquiry about him

testifying or not testifying?”

A I didn't see the need to do that at the time because Mr. Lawrence was so clear with me from day one and every time I talked to him that he was not going to take the stand. He was adamant about it. And for that reason I did not see a need to make an inquiry like that.

Q In spite of his lack of intelligence?

A Right, because I thought that he understood what I meant when I discussed testifying with him. And he clearly understood that, because he said he was not going to do it.

Q But if he's pleading guilty to the offense, he would have to do that same thing in open court; correct?

A I'm sure the Judge would conduct a plea colloquy at the time.

Q Sure. And the same thing in giving a statement to officers if there's a Miranda warning--

A Sure. (SR 58)

Judge Rasmussen denied Defendant's 3.850 motion by Order entered October 11, 2000. (Vol. II; RR 192-198) (Appendix 4) Notice of appeal to the Florida Supreme Court was filed October 27, 2000 (Vol II; RR 324)

The 3.850 Motion also raised the issue that the state's argument to the jury was a burden shifting argument on comment as to defendant's failure to testify. The state argued evidence was "uncontroverted" numerous times. (Vol. VII P. T 685) (Appendix 5) The Trial court in its order denying post conviction relief found the arguments to be permissible and that no hearing would be given.

One of the aggravators presented to the trial jury was that defendant was under a sentence of imprisonment and the trial court granted an instruction as to this claim. The state offered testimony of the witness Colleen Poole, a Department of Corrections employee. (R 454-457; TS 29-32) Ms. Poole testified Mr. Lawrence was released on parole at the time of the homicide.

The state argued in the penalty phase as follows:

The State brought forward evidence of Colleen Poole, the probation officer that testified. She indicated and provided you the documentation which indicated that the defendant, Gary Lawrence on July 28 of 1994 was under the supervision of the Department of Corrections. That he had been sentenced to five years in the state penitentiary for offenses. And that he committed this particular act while under a sentence of imprisonment.

An aggravating circumstance, ladies and gentlemen, that is proven beyond any reasonable doubt.

And we can talk about the psychological testimony that went on and on with respect to this case but the bottom line is regardless of the psychological evidence and that type of stuff Gary Lawrence, beyond any reasonable doubt was committing a crime while under a sentence of imprisonment. Colleen Poole basically said all that needs to be done if he violates or does anything is an administrative parole. He was under a sentence of incarceration in the state penitentiary. (R 524; TS 99)

Defense counsel did not object to this instruction or argument.

During the guilt phase, the prosecutor argued numerous times that evidence was

uncontroverted. (T 685-687) (Appendix 5)

SUMMARY OF ARGUMENT

Defendant, Gary Lawrence, asserts six issues for review of denial of his 3.850 Motion for Post Conviction Relief.

The first issue relates to the court's denial of an evidentiary hearing as to whether his trial counsel provided sufficient mitigation as to his mental state and excessive use of alcohol. Although the trial judge permitted evidence as to two issues involving ineffective assistance of counsel, it summarily ruled that trial mitigation was sufficient. The 3.850 motion clearly framed deficiencies in trial preparation in that regard, and the law requires an evidentiary hearing on that alone.

Defendant asserts that he should be granted a new trial as to his counsel's concession of guilt in both penalty and death phases. The trial judge in denying 3.850 relief found that the evidence established a tactical decision to argue for less than 1st Degree Murder and found that counsel's concession of guilty in the penalty phase to be "out of context". In any event, there was no on-record waiver of defendant's rights as to any concession of guilt by trial counsel.

In a similar vein, defendant, at trial, did not testify and there was no on-record waiver of that right. The trial judge in denying 3.850 relief held there to be no due process violation for failure to conduct an on-record inquiry although both trial evidence and evidence in the 3.850 hearing revealed that Defendant Lawrence

was severely mentally deficient. It was established that he functioned at a level of a 10 to 11 year old child.

Defendant further urges this court, in death cases, to adopt a requirement of co-counsel. Defendant's trial attorney tried his first capital case solo. One attorney cannot possibly meet the standards of adequate preparation of a bifurcated guilt-penalty trial.

Defendant also asserts error in failure to secure a limiting instruction as to the under sentence of imprisonment aggravator as well as failure of trial counsel to object to prosecutorial argument as "uncontroverted". Such reference was a burden shifting due process argument as well as a comment on defendant's failure to testify.

ISSUE I

THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING AS TO ISSUES INVOLVING INEFFECTIVE ASSISTANCE OF COUNSEL CONTRARY TO THE V, VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 9 FLORIDA CONSTITUTION

(STANDARD OF REVIEW—INDEPENDENT STANDARD—3.850 ALLEGATIONS NOT CONCLUSIVELY REBUTTED)

One of the fundamental tenets of post-conviction law is that an evidentiary hearing should be granted to a 3.850 movant wherein allegations of effective assistance of counsel are not conclusively rebutted by the record.

The trial court below denied hearing on a number of assistance of counsel issues after engaging in his own evidentiary evaluation of the trial. (RR 102-158) (Appendix 4)

Ground A 1 (3) alleged failure of counsel to sufficiently prepare for the guilt or penalty phases as to defendant's excessive use of intoxicants. Sub-paragraphs 2, 4 and 6 of the Amended 3.850 motion alleges defense counsel's failure to pursue adequate expert testimony in either the guilt or penalty phases (RR 21-36) (Appendix 2)

Defendant's 3.850 Motion specifically alleges:

2. Defendant's counsel did not sufficiently prepare for the guilt or penalty phase of the trial and presented inadequate evidence on Defendant's mental deficiency and long standing use of intoxicants and drugs. The defense of intoxication was ineffectively presented.

Defendant's counsel further failed to establish his excessive use of intoxicants at the time of the homicide and failed in getting testimony or records of nurse Carol Ann Thomas presented to the jury as to his use of intoxicants. This evidence was critical to the intoxication defense and counsel should have correctly pursued its admission or proved up the amount of intoxicants through other witnesses or defendant's own testimony.

* * *

4. Defendant's counsel was inadequate for failure to pursue or utilize adequate expert testimony in the guilt or penalty phase of his trial as to defendant's impairment from intoxicants or drugs.

* * *

6. Defendant's counsel failed to pursue or present adequate evidence of Defendant's extreme or emotional disturbance. Except for psychologist, James Larson, Jr. and psychiatrist, Dr. Galloway, Defendant's attorney did not attempt to present any witnesses or other evidence of defendant's mental or emotional disturbance.

That said experts failed to establish Defendant's severe inadequacy both with respect to waiver of his constitutional rights (Motion to Suppress) and level of alcohol impairment as to guilt and penalty phases.
(RR 23, 24, 25)

In Freeman v. State, 761 So. 2d 1055 (Fla. 2000) this Supreme Court held that facts alleged in the 3.850 are deemed admitted when determining entitlement to a hearing. The issue of effective assistance of counsel as to some issues cannot be determined by the court without an evidentiary hearing.

In Gaskin v. State, 737 So. 2d 509 (Fla. 1999) the court held:

In his postconviction motion Gaskin raised several claims of ineffective assistance of counsel. [FN10] He asserted that counsel rendered ineffective assistance *514 during the penalty phase by failing to present important mitigating evidence by failing to provide Dr. Harry Krop, the mental health expert, with sufficient background information to properly assess Gaskin's mental condition, by failing to specifically address aggravating and mitigating factors in his closing argument to the jury, and by failing to request a limiting instruction on the doubling of aggravating circumstances. Gaskin contends the trial court should have held an evidentiary hearing on these claims. We agree.

Footnote 10 in Gaskin addresses sufficiency of the 3.850 pleading and holds there is no requirement to "... allege the names and identities of witnesses in addition to the nature of their testimony in a post conviction motion."

The Gaskin court went on to hold that an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief.

See also Peede v. State, 748 So. 2d 253 (Fla. 1999) holding:

“To uphold the trial court’s summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. See Fla. R.Crim.P. 3.850(d). Further, where no evidentiary hearing is held below, we must accept the defendant’s factual allegations to the extent they are not refuted by the record. See *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989).”

The court below took it upon itself to review the trial testimony and made its independent judgment that defense counsel’s efforts were sufficient. That procedure does not comply with constitutional due process standards.

In summarily denying an evidentiary hearing on issues of ineffective presentation of alcohol and mental mitigation, the court made its own determination that trial counsel did enough (RR 103-104) and that defendant failed to provide persuasive argument as to how evidence (Fetal Alcohol) would have effected the outcome of the trial. (RR 104) Appendix 3)

The leading case in Florida on the issue of denial of the evidentiary hearing is *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000)

Freeman holds:

Freeman further complains defense counsel was ineffective in failing to produce a qualified expert witness to testify to his drug and alcohol problems. Despite the fact that Freeman had a substantial history of drug and alcohol abuse and admitted to smoking marijuana on the morning Collier was killed, the only expert defense counsel presented during the penalty phase was a clinical psychologist who was not qualified to give an opinion on

the effects of drug and alcohol abuse. The court also dismissed this claim, stating that more mitigation was not necessarily better. With Freeman's substantial history of drug and alcohol abuse, defense counsel may have been ineffective for failing to present an expert witness who was qualified to give an opinion on this issue. There is a reasonable doubt as to the effect such a witness might have had on the jury's recommendation. Therefore, the court should have held an evidentiary hearing.

ISSUE II

**THE TRIAL COURT ERRED IN DENYING
DEFENDANT’S 3.850 INEFFECTIVE COUNSEL CLAIM
BASED UPON COUNSEL’S CONCESSION OF GUILT IN
BOTH GUILT AND PENALTY PHASES WITHOUT ON
THE RECORD CONSENT BY DEFENDANT
(CONTRARY TO DUE PROCESS AND ASSISTANCE OF
COUNSEL PROVISIONS OF V, VI, AND XIV
AMENDMENTS OF THE UNITED STATES
CONSTITUTION AND SECTIONS 9 AND 16 FLORIDA
CONSTITUTION)**

**(STANDARD OF REVIEW—INDEPENDENT
STANDARD)**

The evidentiary hearing granted below was essentially a swearing contest between trial counsel and defendant as to whether defendant consented to the concession of guilt to lesser included offenses (guilt phase) or to an outright concession of guilt (penalty phase).

Trial counsel, at the 3.850 hearing, testified his decision was tactical and approved by defendant. (TT 29-62) Defendant claimed he didn’t discuss the issue to his knowledge. (TT 09-26)

Clearly, there was no record waiver of defendant or presentation to the court that defendant approved of counsel’s strategy. (TT 57-58) Trial counsel referred to Mr. Lawrence as “not intellectually gifted” or of limited intelligence.

From the penalty phase transcripts, Dr. Larson revealed that Mr. Lawrence was of low average intelligence. (TS 43, R 470)

“All of his standard scores fell in what is the borderline range of retardation.” (TS 47) (R 472)

His academic achievement math, factual knowledge, and 3R’s were all in the age 10 or 11 year old age group. (Penalty p. 47-49) (R 472-474)

In denying defendant’s claim on this issue, the trial court relied upon Brown v. State, 755 So. 2d 616 (Fla. 2000) which held that on the facts addressed at the 3.850 hearing defendant’s counsel was not ineffective in conceding guilt to lesser offenses. It is noteworthy that Brown did not testify at his 3.850 as did Mr. Lawrence. Likewise, it does not appear that the issue of an on record waiver was raised in Brown.

The problem with 3.850 issues of this nature is that the hearings often end up with testimonial disputes between learned counsel and a not so intellectually gifted defendant. Accordingly, as to a tactical decision so significant as conceding guilt due process must dictate an informed record waiver. If defendant had offered to plead guilty to second-degree murder, the court would conduct an extensive plea discussion with defendant and counsel. It should follow that a trial decision to concede guilt also be subject to court scrutiny. After all, it is defendant’s decision to plead guilty to any offense. Counsel cannot do that for him.

Contrary to the trial court’s assessment that the outright concession of guilt in the penalty phase is taken out of context, it is defendant’s position that counsel’s

concession is totally inconsistent with his theory of conceding lesser included offenses. It is likewise a massive tactical blunder for counsel to, in effect, say to the penalty jury, “I’ve always said my client was guilty,” when he previously conceded guilt only to lessers.

Also, the case here concerns Mr. Lawrence’s understanding of what went on at trial. To his knowledge, Mr. Miller did not discuss tactics with him. We cannot ignore that his understanding level is like the level of a 10 or 11 year old child.

In denying the 3.850 Motion, the trial court relied upon McNeal v. Wainwright, 722 F. 2d 674 (11th Cir. 1982) holding that counsel’s argument urging manslaughter instead of murder in the first degree was tactical and not ineffective assistance of counsel. Also cited was Brown v. State, 755 So. 2d 616 (Fla. 2000) (conceding guilt to a lesser charge.)

The trial court also ruled there was no due process requirement for an on-record inquiry whether defendant agrees to such a strategy citing Harris v. State, 731 So. 2d 802 (Fla. 4th DCA 2000), York v. State, 731 So. 2d 802 (Fla. 4th DCA 1999) and Geddis v. State, 715 So. 2d 991 (Fla. 4th DCA 1998).

Wiley v. Sowders, 647 F.2d 624 (6th Cir.) (Wiley I) seemed to hold a concession of guilt inquiry must appear on record consistent with Boykins v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). In Wiley v. Sowders 669 F. 2d 386 (6th Cir. 1982) (Wiley II) the same court said the “on record

requirement” was *dicta* and that, although recommended, it was not required by due process.

In summary, Florida cases permit a trial tactic of concession of guilt to a lesser included offense without an on record inquiry. Federal cases also lean that way, although squaring Wiley I and II is not all that clear.

However, Florida is very clear that a concession of guilt as charged cannot be condoned without client consent. Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000)

Nixon also holds:

Finally, in order to avoid similar problems in the future, we hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel’s strategy.

Nixon held:

“Although an attorney has the right to make tactical decisions regarding trial strategy, see *Faretta v. California*, 422 U.S. 806, 820, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the determination to plead guilty or not guilty is a matter left completely to the defendant. See *Jones v. Barnes*, 463 U.S. 745, 751 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (“It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her behalf, or take an appeal...”); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (stating that although an attorney can make tactical

decisions as to how to run a trial, the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a "not guilty" plea. By pleading "not guilty," Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged."

It is noteworthy that the language in Brookhart, Id. does not permit an attorney "...to admit facts that amount to a guilty plea..." without client consent. Nixon, Id. also states that a not guilty plea holds the State to strict proof... as to the offenses charged.

Accordingly, due process does dictate an on the record inquiry as would be done if defendant was pleading to a lesser included offense.

Defendant urges the court to rule that any concession of guilt as charged or to lesser included offenses be with client consent and on the record as any guilty plea would be accepted.

ISSUE III

**THE TRIAL COURT ERRED IN DENYING
DEFENDANT’S 3.850 INEFFECTIVE COUNSEL CLAIM
BASED UPON COUNSEL’S FAILURE TO ADEQUATELY
ADVISE DEFENDANT OF HIS RIGHT TO TESTIFY AND
FAILURE TO OBTAIN A RECORD WAIVER OF THIS
RIGHT (VIOLATION OF V, VI, AND XIV
AMENDMENTS UNITED STATES CONSTITUTION AND
SECTIONS 9 AND 16 OF FLORIDA CONSTITUTION)**

**(STANDARD OF REVIEW—COMPETENT
SUBSTANTIAL EVIDENCE—INDEPENDENT
STANDARD)**

Again, a conflict in testimony between trial counsel and defendant took place at the 3.850 evidentiary hearing. (TT 09-62) Defense counsel claimed he advised defendant of his right to testify and even recommended he testify in the penalty phase. (TT 57-58) Defendant, a 37 year old with a 10-11 year old intelligence level testified he did not remember being so advised to his knowledge. (TT 17) Neither the trial record or testimony at the 3.850 hearing reveal an on the record waiver of defendant’s right to testify.

Counsel concedes that this issue was addressed Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988) This supreme court held no record waiver to be constitutionally required and approved the Florida Second District opinion in Cutter v. State, 460 So. 2d 538 (Fla. 2nd DCA 1984).

The Colorado Supreme Court in People v. Curtis, 681 P.2d 504 (Colo.1984)

reached a contrary conclusion, holding that the right to testify is so fundamental that its waiver must be tested by some constitutional standards applicable to waiver of right to counsel. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)

The instant case points dramatically to the conclusion that Florida recede from Torres-Arboledo, Id. because 3.850 hearings will continue to result in testimony of learned counsel versus not intellectually gifted defendants. The playing field for death will never be level with such a disparity. Yet, the solution is fairly easy. A short, on record inquiry (a number of enlightened circuit judges already conduct this type inquiry) will assure that the defendant makes a knowing and understanding waiver.

The Colorado Supreme Court in People v. Curtis, 681 P.2d 504 (Colo. 1984) adopted a rule requiring the trial court to ascertain on the record that defendant knowingly waive his right to testify. The Court held:

“Initially, we affirm our adoption of the rule that the trial court has a duty to question the defendant on the record to ascertain whether waiver of the right to testify is made with a complete understanding of his rights.”

* * *

“By placing the elements of intelligent and competent waiver on the record at the time of trial, the trial court can accurately determine whether waiver was indeed intelligent and competent, and that determination will be readily reviewable on appeal. [FN19] The alternative not

only increases the chance of error, but is wasteful of judicial resources as well.”

ISSUE IV

**THE COURT ERRED IN DENYING DEFENDANT’S 3.850
MOTION UPON GROUNDS THE PROSECUTION
ENGAGED IN BURDEN SHIFTING ARGUMENT
(INEFFECTIVE ASSISTANCE OF COUNSEL) IN THE
PENALTY PHASE AND INDIRECT COMMENTS ON
DEFENDANT’S FAILURE TO TESTIFY IN THE GUILT
PHASE (UNITED STATES CONSTITUTION ARTICLES
V AND XIV, AMENDMENT SECTION 9 FLORIDA
CONSTITUTION)**

**(STANDARD OF REVIEW—COMPETENT
SUBSTANTIAL EVIDENCE—INDEPENDENT
STANDARD)**

The prosecution argued numerous times that evidence was “uncontroverted”. (T 685-687) In the penalty phase the state argued that all they needed to prove the aggravator of “under sentence of imprisonment” was the statement of Coleen Poole. (R 524) (TS 99) These arguments by the state are clearly burden shifting.

The Florida Supreme Court originally indicated that such arguments are acceptable. (See White v. State, 377 So. 2d 1149 (Fla. 1980) and Melton v. State, 638 So. 2d 927 (Fla. 1994) The trial court relied upon White, Id.

Defendant asserts that such rulings violate due process provisions of the United States and Florida Constitutions. Interestingly, a 1966 Florida 2nd District Court case, Osgood v. State, 192 So. 2d 64 (Fla. 2nd DCA 1966) addresses the identical issue holding that prosecutorial argument that evidence of Police Detective Mein was “uncontroverted.” The court found that this amounted to a

comment on defendant's failure to testify. See also Kolsky v. State, 182 So. 2d 305 (Fla. 2nd DCA 305 1966) ("unexplained") and Singleton v. State, 183 So. 2d 245 (Fla. 2nd DCA 1966) (unexplained, uncontradicted or undenied) holding such argument to be comments on defendant's failure to testify.

The Second District cases were not overruled, but appear to conflict with White and Melton, Id. The Supreme Court in Craft v. State, 300 So. 2d 307 (Fla. 1974) recedes from Singleton, Id. in holding a prosecutor may comment on a defendant's failure to testify about one aspect of the case if he chooses to testify about another aspect of the case. The Singleton, Id. case does not apply because in the trial below Gary Lawrence did not testify at all.

A logical analysis of use of those type words in argument to the jury is that defendant either did not testify or offer proof refuting the evidence. That is clearly a due process violation and trial counsel's failure to object thereto constitutes ineffective assistance of counsel.

A distinction between the cases could relate to whether the "uncontroverted" argument is urged when speaking about defendant's statement (emphasized) as opposed to other evidence. However, "uncontroverted" obviously means the defendant did not deny his statement or controvert evidence. It simply means a failure to dispute, to deny or attempt to disprove, all things he need not do under due process protection.

The case of Rodriguez v. State, 753 So. 2d 29 (Fla. 2000) has clarified White, Id. The court in Rodriguez, Id. held:

Relying on cases that held that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence, the Court upheld the conviction without mentioning whether the only person who could have contradicted the eyewitness was the defendant. *See id.*

[5] The problem with this analysis is that where the evidence is uncontradicted on a point that only the defendant can contradict, a comment on the failure to contradict the evidence becomes an impermissible comment on the failure of the defendant to testify. Notably, *White* was decided before *Marshall* and *DiGuilio* and our adoption of a harmless error analysis in those cases. We thus clarify that to the extent there is any tension between the approved-of remarks in *White* and the disapproved-of remarks in *Marshall*, we hold that the reasoning of Justice McDonald in *Marshall* should be followed.

Based upon Rodriguez, the record clearly demonstrates that the comments focus on defendant's failure to testify.

ISSUE V

THE COURT ERRED IN FAILING TO GRANT DEFENDANT’S 3.850 MOTION TO REQUIRE CO- COUNSEL IN A DEATH PENALTY CASE (VIOLATION OF V, VI AND XIV AMENDMENTS UNITED STATES CONSTITUTION, SECTION 9 CONSTITUTION OF STATE OF FLORIDA)

(STANDARD OF REVIEW—ABUSE OF DISCRETION)

Defendant’s counsel was engaged in his first capital case. This Florida Supreme Court has ruled that appointment of co-counsel in death cases is discretionary. (Lowe v. State, 650 So. 2d 969 (Fla. 1994) The court held:

We note that a trial judge is authorized by law to appoint co-counsel in the situation presented by the facts in the instant case. See § 925.035, Fla. Stat. (1993) (as to a public defender with a conflict on a capital case, “it shall be his duty to move the court to appoint one or more members of The Florida Bar ... to represent th[e] accused.”). Although we encourage trial judges to appoint dual counsel pursuant to this statute under the proper circumstances, we do not suggest that dual representation is mandated in every circumstance.

See also Jiminez v. State, 703 So. 2d 437 (Fla. 1997)

Single counsel cannot adequately try a death case. Due to its peculiar nature, a bifurcated death trial is so complex that the issues of guilt and penalty must be undertaken by separate counsel. Defendant urges this Court to adopt a co-counsel requirement in all death cases. However, in view of the mental health and alcohol

issues at trial, Defendant submits the court abused its discretion in failing to appoint co-counsel.

ISSUE VI

**THE COURT ERRED IN IMPROPERLY INSTRUCTING
THE JURY ON THE AGGRAVATOR UNDER SENTENCE
OF IMPRISONMENT – INEFFECTIVE COUNSEL
(VIOLATION OF V, VI AND XIV AMENDMENTS
UNITED STATES CONSTITUTION AND SECTION 9
FLORIDA CONSTITUTION)**

**(STANDARD OF REVIEW—COMPETENT
SUBSTANTIAL EVIDENCE—INDEPENDENT
STANDARD)**

The courts limited instruction of this aggravator does not account for defendant's being on lawful release.

Florida cases of Brown v. State, 473 So. 2d 1260 (Fla. 1985), Haliburton v. State, 561 So. 2d 248 (Fla. 1990), Trotter v. State, 690 So. 2d 1234 (Fla. 1996) and Davis v. State, 698 So. 2d 1182 (Fla. 1997) uphold that controlled release is a sentence of imprisonment and consequently a death penalty aggravator. However, the instruction does not distinguish between actual custody or unlawful release from custody. Rather, any type release (Parole, controlled release, and now by statute, probation) constitutes the aggravation.

Defendant urges this court to require instruction that the nature of the imprisonment be weighed appropriately in assessing the aggravator.

CONCLUSION

For the reasons and arguments herein, Defendant prays this Supreme Court of Florida reverse his case for new trial as to guilt and penalty or at least a 3.850 evidentiary hearing on the issue of mental mitigation.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to the Office of the BARBARA YATES, ASST ATTORNEY GENERAL, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050, and The Office of the State Attorney, JOHN MOLCHAN, ASA, Santa Rosa County, P O Box 645, Milton, Florida 32572 this the _____ day of March, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing INITIAL BRIEF OF APPELLANT complies with Rule 9.100(1) and Rule 9.210(a)(2), FLORIDA RULES OF APPELLATE PROCEDURE, and that this Brief has been submitted in **Times New Roman 14-point font**.

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