IN THE SUPREME COURT OF FLORIDA

GUY RICHARD GAMBLE,

Appellant, **Case. No. SC02-195**

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case. The issues contained in this brief are not complex and do not present novel or difficult legal issues. Moreover, some of the issues contained in Gamble's brief are insufficiently developed, and, as a result, Gamble has failed to carry his burden of proof. Since Gamble obviously cannot add to the facts he has already briefed, there is no point in expending the time necessary for oral argument because nothing will be gained thereby.

STATEMENT OF THE CASE AND FACTS

On direct appeal from his conviction and sentence, the Florida Supreme Court summarized the facts of Gamble's case in the following way:

> On December 10, 1991, Guy R. Gamble and Michael Love murdered their landlord, Helmut Kuehl, by striking him several times in the head with a claw hammer and choking him with a cord. (FN1) Gamble and Love also stole their victim's car and wallet. Within the wallet was a blank check which Gamble forged and cashed in the amount of $8,544. After cashing the check the men, accompanied by their girlfriends, drove to Mississippi in the stolen car. Gamble subsequently abandoned the group, but was later arrested.
>
> The jury found Gamble guilty of conspiracy to commit armed robbery, armed robbery, and murder in the first degree and recommended the death sentence by a ten-to-two vote. The trial court found in aggravation that the murder was cold, calculated, and premeditated and committed for pecuniary gain. Gamble's age (20) was a statutory mitigating factor.

In non-statutory mitigation, the court gave substantial weight to Gamble's abused and neglected childhood and severe emotional problems; and some weight to his drug and alcohol use, remorsefulness and voluntary confessions, and Love's life sentence. (FN2) The court gave little weight to his status as a single parent, his family's testimony, and a desire for rehabilitation. Based upon its findings, the trial court sentenced Gamble to death. Gamble appeals this sentence and raises the following issues: (1) the trial court erroneously found that the crime was cold, calculated, and premeditated; (2) his death sentence is disproportionate, excessive, inappropriate, and imposed upon him cruel and unusual punishment; (3) the trial court erred in denying his special requested penalty phase jury instructions; and (4) the death penalty is unconstitutional. The State's cross-appeal asserts that the trial court erred in prohibiting the State from introducing in the penalty phase: (1) victim-impact evidence; (2) Donna Yenger's testimony; (FN3) and (3) redacted portions of Gamble's police statement. Issues raised in the State's cross-appeal are rendered moot by our affirmance of Gamble's death sentence.

> (FN1.) The official cause of death was blunt head injury due to multiple blows to the head, with a neck injury as a contributing factor.
>
> (FN2.) Love plead guilty to conspiracy to commit armed robbery, armed robbery, and first-degree murder. He was sentenced to fifteen years for the conspiracy and life for the armed robbery and murder.
>
> (FN3.) The State asserts that Donna Yenger's proffered testimony is admissible penalty phase hearsay. Yenger, Love's girlfriend, would have testified that during a conversation between Gamble, Love and herself, Love stated that "Well, Guy hit the victim over the head. He didn't go down and so he hit him again and he hit him again.... [A] pulse was still detected, at

> which point Guy got a rope and then choked the man to make sure he was dead."

Gamble v. State, 659 So. 2d 242, 244 (Fla. 1995).

THE EVIDENTIARY HEARING FACTS

Gamble filed an initial 3.850 Motion to Vacate on March 17, 1997. (R610-650). He filed an Amended 3.850 Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend on September 20, 1999. (R995-1038). On July 20, 2000, Gamble supplemented his 3.850 Motion with claims XI and XII. (R1147-1157). An Order granting an evidentiary hearing on claims I-V, XI, and XII, and denying claims VI-X was filed on October 20, 2000, *nunc pro tunc* to February 10, 2000, and August 23, 2000. (R1198-1206). An evidentiary hearing was held before the Honorable G. Richard Singletary, Circuit Court Judge for the Fifth Judicial Circuit of Florida, in and for Lake County, on August 23-24, 2000. (R2372-2627). An Order denying Gamble's Motion to Vacate was issued on January 8, 2002. Gamble filed a Notice of Appeal on January 17, 2002. (R1270-1332).

Gamble's first witness was Bruce Duncan, one of Gamble's trial attorneys. (R2383-4). In 1991, he was working at the Public Defender's office. (R2383). Although he had done "ancillary work" on capital cases, and had tried "a number of

felony cases," he had never sat first or second chair on a capital case. (R2384). He was assigned to Gamble's case within twenty-one days of his arrest. He stated that it was the policy of the Public Defender's office at that time that two attorneys were assigned to try a capital murder case. (R2385). After Mr. Nacke was also assigned to the case, he and Nacke went to Indiana in the fall or winter of 1992 to interview and depose Gamble's family and friends. In addition, they interviewed Dr. Newberg, a psychologist (or counselor) that had seen Gamble. (R2385-6, 2391, 2440). Duncan left the Public Defender's Office in February or March 1993, approximately three months prior to the start of Gamble's trial. (R2386-7). During his representation of Gamble, he was not involved with decisions on what would be said during opening statements nor any decisions on trial strategy. (R2387-8). Although he was considered to be the "lead attorney" on this case, he shared responsibilities with Mark Nacke "fifty-fifty" as well as drawing on the experience of Michael Johnson, Chief Assistant Public Defender. Johnson advised them on how to handle certain matters. (R2389). Upon his departure from the Public Defender's Office, Mark Nacke took over as lead counsel. (R2389-90).

On cross examination, Duncan reiterated that Mike Johnson was available to him and Mike Nacke in preparing for Gamble's trial. (R2390). Both Duncan and Nacke, along with Investigator Mike Lupton, "spent extensive time" traveling in Indiana interviewing people in order to prepare mitigating evidence for Gamble. (R2391).

Assistant Public Defender Mark Nacke was Gamble's next witness. (R2392). Prior to 1991, he worked for a law firm that handled the conflict cases from the Public Defender's Office, so he did "quite a bit of defense work" at that time. (R2393). He did not recall the exact date when he was assigned to Gamble's case but remembered Bruce Duncan handled it initially. (R2395). He thought that he was lead counsel after being assigned because Duncan did not have any experience with First Degree Murder cases at that time. (R2396). Prior to Gamble's case, he sat second chair for one capital murder case but handled "many, many other felony, serious felony trials."[1] (R2396). He stated that the defense team,

> ... talked to Mr. Gamble. We also had investigators that ... talked to him ... got information from him ... deposed witnesses, State's witnesses ... pursuant to discovery ... talked to any witnesses

[1]The other death penalty case that Mr. Nacke had been involved in was the William Fredrick Happ case. That case mistried the first time, and was tried to completion about a year later. (R2448-9)

> that Mr. Gamble would have given us, or tried to track down witnesses that may have possibly testified.

Nacke and Duncan went to Indiana together to talk to potential mitigation witnesses. (R2397). He stated that it was a "standing rule" to have two attorneys on a First Degree Murder case because of the usual "complexity of them and difficulty in the amount of work" as well as the "number of witnesses." (R2397-8). He said that this case took approximately the same amount of time to get to trial as most First Degree Murder trials because " ... of the number of witnesses and preparation for two phases, and having to go out of state to talk to witnesses ... just getting everything done ... all the witnesses deposed ... talking to witnesses ... doing second phase investigation, getting psychologists ... just making sure that you've got everything done." (R2398-9). He and Duncan kept Gamble apprised of different aspects of the case, but that they did not always visit Gamble together all of the time. (R2399-2400). Nacke testified that he recalled filing a Motion to Suppress Statements but Gamble decided not to testify on his own behalf at the hearing so the motion was withdrawn. (R2401-2403, 2406). Nacke testified that Gamble, "... basically admitted to possibly a First Degree Felony Murder" when interviewed by the Indiana Police upon his arrest

for this case. (R2404, 2405). He did not concede guilt in his opening statement to the jury at Gamble's trial. (R2408). He testified that the defense team, " ... had decided as a strategy was to try and convince the jury of Second or Third Degree Murder, and that's what I am trying to do in my opening." (R2409). Nacke stated that, "We just made a decision in our own minds that there would be no way to have any hopes of prevailing, thinking a total not guilty across the board ... we had to ... give the jury a lesser included offense and just hope that the jury would agree to that ... third degree murder would possibly fit...that was our best case scenario and our second best ... a Second Degree Murder finding by the jury, if not Third." (R2416). They discussed these possibilities with Gamble and he told them to do whatever they thought was best. (R2416). Nacke said that they discussed the facts and strategy with the office attorneys, asked for opinions, but knew "the evidence was against us." He said, " ... it would have been great if the confession hadn't come in ... I'm sure our whole strategy would have changed ... but it did and we had to deal with it." (R2418). Gamble also relied on the defense attorneys' expertise regarding the concession of proof of pecuniary gain as an aggravating factor in the closing statement of the penalty phase. (R2420). Nacke stated

that Hugh Lee replaced Bruce Duncan as his co-counsel when Duncan left the Public Defender's Office. (R2422). He was not aware that Lee was on suspension from the Bar, and, although he could not practice as a lawyer, he assisted with research, drafted motions for review and interviewed witnesses. (R2423-4). Nacke and Lee decided that one attorney would handle the majority of the guilt phase of the trial and the other would handle the penalty phase. (R2425). He did not feel that Lee's suspension hurt their ability to prepare for Gamble's trial. (R2428). Gamble was evaluated by Dr. McMahon a forensic psychologist in Gainesville, Florida. (R2439, 2440). In addition, the Lake County, Florida, jail psychiatrist, Dr. Cunningham also interviewed Gamble and "may have prescribed some medication ... " (R2440).

On cross-examination, Nacke explained that Dr. McMahon had prepared a report based on her examination of Gamble. Nacke stated, " ... in her report, she indicted that she could not help us, could not give any statutory mitigators ... if she was pressed, ... she ... might actually hurt our case in some way." (R2441, 2442)[2]. In a telephone conversation, she indicated that Gamble was a sociopath. (R2443). Nacke

[2]Dr. McMahon said “something to the effect of ‘I don’t think you want me testifying.’” (R2422).

testified that he consulted with Mike Johnson, Chief Assistant Public Defender, "on a regular basis" as Johnson was "always available to any of the lawyers in the office" and was "a very good criminal attorney ... one of the better ones." (R2446, 2447).[3] He did not feel "over burdened" working as a single attorney on this case while Mr. Lee (who was a very experienced felony defense attorney (R2449)) was suspended, and he stated, "I would have probably asked someone in the office for help if I thought that ... I couldn't handle it." (R2452). He said it was a strategic decision to concede Second or Third Degree Murder due to Gamble's own statements regarding his involvement. (R2454). Nacke believed that concession was a way to retain credibility with the jury. (R2455).[4]

Hugh Lee was Gamble's next witness. (R2459). He is currently the Chief Assistant Public Defender, and had assisted Mr. Nacke with Gamble's case in 1993. (R2459, 2460). He stated that while he was under suspension by the Florida Bar, he "came on as an investigator, to do all the background,

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[3]Mr. Nacke had attended the “Life Over Death” seminar, presented by the Public Defender’s Association, at least once prior to this trial. (R2450).

[4]The most incriminating statement given by Gamble was not admitted after a defense objection. (R2456). In that statement, Gamble fully admitted the murder. (R2456).

the motions and things like that, not in the practice of law, but assisting Mr. Nacke in the preparation of the case. And then as an attorney throughout the defense of the case in the actual trial." (R2460-61). He was originally assigned to Sumter County, Florida, but was reassigned to Lake County, Florida, to work "solely on this case." (R2462, 2463). Three days before the start of Gamble's trial, his suspension was lifted and he sat second chair with Mr. Nacke during "all of the preparation, at trial" and "handled most of the penalty phase at the trial." (R2463, 2464). He had been involved, as counsel of record, in at least three prior capital cases. (R2464). He and Nacke discussed the case to "brainstorm the case" and "talk about theory," but Nacke's decisions controlled. (R2467).[5] It was decided "at the trial level" that he would be handling the penalty phase because of "the credibility issue of the guilt phase and penalty phase that another attorney would be handling it to the jury throughout." (R2467). Although Nacke was the only attorney that signed any pleadings, Lee stated that he and Nacke "brainstormed with other attorneys" in the office and "everyone was involved in it." (R2468). Lee said that they argued that "there was to be

[5]The facts were discussed with Gamble, and it was very clear that a defense of complete innocence was not an option. (R2466).

a theft as opposed to a robbery" and argued for “third degree Felony Murder, or Second." He and Nacke tried to "minimize what Mr. Gamble had done" in the hope of defeating the cold, calculated, and premeditated aggravating circumstance.[6] (R2473-74). He and Nacke felt they had a chance at getting a life recommendation for Gamble and he stated, " ... we worked for it." (R2477).

On cross-examination, Lee agreed that he had tried several hundred felony trials. He knew how important it was to maintain credibility with the jury and had discussed retaining credibility with Gamble during his strategy sessions with him. He would not have conceded an aggravating circumstance without first discussing it with Gamble. (R2484-85).

Guy Gamble testified next. (R2487). He said that his trial attorneys did not seek his approval regarding the trial strategy they used for his defense. (R2487-88). He had not approved or authorized the "type of opening statement" utilized by Mr. Nacke nor did he approve of conceding to the pecuniary gain aggravating factor mentioned at the close of the penalty phase. (R2488). He said that Mr. Nacke "never told me or informed me that I had a right to self-representation,

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[6]Defense counsel believed that there was substantial mitigation, and their objective was to limit the State to proving only one aggravator. (R2473).

or to bring that -- you know, to the Court's attention ... " (R2489).

On cross-examination, Gamble said that he spoke to his attorneys on a number of occasions. He trusted Mr. Nacke "to an extent" and relied upon his expertise as his lawyer. He said it was possible that he had agreed with either Mr. Duncan, Mr. Lee, or Mr. Nacke as to the trial strategy used, and that they spoke to him about "wanting to argue Second Degree" murder. (R2490-91). He testified that he understood that they wanted to argue Second Degree and that it was okay with him. He did not think that he "was going to walk free" and had agreed to a life sentence.(R2491, 2494). He said that he never discussed the pecuniary gain aggravating factor with Mr. Lee nor did he discuss conceding guilt. However, Gamble understood they would concede that what he had done amounted to Second or Third Degree Murder. (R2492). He said that he and his attorneys "communicated very little between the guilt and sentencing time." (R2493). When asked if he might have forgotten a conversation between himself and his attorney regarding concession of the pecuniary gain aggravator, he replied, "I can't say it's an impossibility." In addition, he said he sometimes has a problem with his memory. (R2493).

Dr. Russell Bauer was Gamble's next witness. He stated that he is "a professor of clinical and health psychology and the Director of the Graduate Program at the University of Florida in Gainesville." (R2509). He stated that he is "Board certified in clinical neuropsychology, which is basically a clinical study of individuals who have behavioral or emotional changes secondary to brain impairment." (R2510). Upon a request from defense counsel's office, Dr. Bauer conducted an evaluation of Gamble on July 29, 1999, at Union Correctional Institution. (R2513). He testified that Gamble was very cooperative, answered all of the questions that he asked, and, he "seemed to put forth his best effort." In addition, Dr. Bauer stated, "I did not see any gross evidence of neurological or psychological abnormalities." (R2516). It was Dr. Bauer's opinion that the results from the testing accurately reflected Gamble's neuro-psychological status at that time. (R2517). According to the tests administered by Dr. Bauer, Gamble's full-scale IQ was 113, indicating an "intellectual ability as measured in 1999, in the high average to above average range." (R2517-18, R2534). Dr. Bauer testified that Gamble had "a significant substance abuse problem" starting at the age of nine, and some of these substances produced "subtle long-lasting neuropsychological

deficits." Gamble also exhibited "features of anti-social personality disorder." (R2525). At the time of Dr. Bauer's examination of the defendant, Gamble had been on death row approximately six years and did not show any signs of "gross psychiatric problems." His report indicated that Gamble was "articulate, appeared to be socially skilled, no signs of serious psycho-pathology." The report also indicated that Gamble did not have "any obvious impairment in language or motor skills or memory." (R2533). Gamble was able to "effectively focus his attention on the various tasks ... under rather difficult circumstances for virtually the whole day ... " (R2534). When Dr. Bauer evaluated Gamble in 1999, it was his understanding that he was evaluating him for "fetal alcohol syndrome" and not to determine what his mental status was in 1991. (R2547).

Mark Nacke was recalled as the State's only witness. (R2554). He confirmed that there were plea negotiations offered to Gamble. In addition, there was an Order entered on March 17, 1992, appointing a confidential expert to evaluate Gamble's mental status, as well as a bill submitted by Dr. McMahon after the work had been completed. (R2556-7).

An Order denying Gamble's Motion to Vacate was issued on January 8, 2002. Gamble filed a Notice of Appeal on January 17, 2002. (R1270-1332).

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court properly denied relief on Gamble's claim that trial counsel was ineffective for not anticipating subsequent changes in the law with regard to the jury instruction given on the cold, calculated, and premeditated aggravating circumstance. No objection to the jury instruction was preserved under settled Florida law. In any event, the murder committed by Gamble was cold, calculated, and premeditated under any definition of that aggravator.

The collateral proceeding trial court correctly concluded that there was no error under *Nixon*. The court found, as fact, that Gamble had, in fact, **consented** to a limited admission of guilt in the hope of avoiding a first degree murder conviction.

The penalty phase *Nixon* claim for relief was also properly denied by the trial court. *Nixon* has not been extended to the penalty phase, and, as the trial court found, in the face of the jury having already returned a conviction for robbery, it would have been "preposterous" to argue that

pecuniary gain had not been proven. Counsel did no more than admit the obvious, a tactic that cannot amount to ineffectiveness of counsel.

The "inadequate preparation" claim is insufficiently briefed because Gamble has not identified either deficient performance or prejudice. Because of that deficiency, he has failed to carry his burden of proof under *Strickland.*

ARGUMENT

I. COUNSEL WAS NOT INEFFECTIVE WITH RESPECT TO THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR

On pages 8-15 of his *Initial Brief*, Gamble argues that the collateral proceeding trial court erroneously denied relief on his ineffective assistance of counsel claim regarding the cold, calculated and premeditated aggravating circumstance.[7] Specifically, Gamble argues that the collateral proceeding trial court was wrong when it held that "counsel cannot be ineffective for failing to predict the evolution of case law." *Initial Brief,* at 9. Gamble asserts a second error when the trial court "seiz[ed] upon this Court's ruling that

[7]This claim, and the facts underlying it, were decided on direct appeal to this Court in 1995. Florida law is well-settled that counsel is not required to predict evolutionary developments in case law, and the trial court did not abuse its discretion in so holding.

the CCP aggravator was applicable to the facts of the case." *id.,* at 12.[8]

In denying relief on Gamble's claims concerning the CCP aggravator, this Court stated:

> Gamble's first issue is divided into two separate challenges. The first challenge asserts that the cold, calculated, and premeditated aggravating factor is inapplicable. We disagree. This aggravating factor is properly found when
>
> > the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.
>
> *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted). A chronological review of the facts indicates that approximately six days before the murder Gamble told his girlfriend that he was going to "take-out" Kuehl. The day before the murder he instructed his girlfriend to pack their belongings because they would be leaving town. He also had her sit at a table pretending to write a rent receipt, whereupon he would sneak up behind her and practice choking her with a cord. The day of the murder Gamble picked up his final paycheck and returned home, where he and Love gathered money to use as a guise for rent payment. They approached

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[8]Of course, if *stare decisis* and *res judicata* have any meaning, the Circuit Court did nothing for which it can be criticized when it followed this Court's prior decision **in this case.**

Kuehl, who was sitting in his garage, engaged him in conversation, and asked for a rent receipt. When Kuehl went to his apartment to obtain the receipt, Love searched the garage for a weapon, found a claw hammer, and placed it on a counter. (FN4) When Kuehl returned to the garage, Gamble picked up the claw hammer and struck Kuehl in the head with such force that Kuehl fell to the floor. Gamble then got on top of Kuehl, held him down, and instructed Love to shut the garage doors. After shutting the doors, Love took the claw hammer and preceded to repeatedly strike Kuehl in the head. After the hitting ceased, Love wrapped a cord around Kuehl's neck and began choking him. Gamble stated that there was no reason to choke their victim and urged that they just leave him. Gamble then wrapped the hammer and cord in newspaper and left them lying on the floor. After cleansing themselves of their victim's blood, Gamble and Love stole Kuehl's car, picked up their girlfriends, went to Kentucky Fried Chicken, forged and cashed a check on Kuehl's account, and left town. **These facts, which speak for themselves, completely support the trial court's finding of cold, calculated, and premeditated.**

The second challenge asserts that the jury recommendation of death is unreliable due to inadequate jury instruction on the cold, calculated, and premeditated factor. The instruction stated:

> 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.

In *Jackson,* this Court found that the above instruction suffered from a "constitutional infirmity" but, in so doing we stated that "[c]laims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal." 648 So.2d at 90. Gamble asserts that his objection was essentially an objection to the trial court's

> instruction on cold, calculated and premeditated. We disagree. The record clearly shows that Gamble's objection was premised on his belief that the evidence was insufficient to prove premeditation. Since Gamble failed to raise the objection he now asserts, we find that this issue is procedurally barred.
>
> > (FN4.) Before entering the garage, Gamble and Love had discussed the need for securing an alternate weapon in case Gamble was unable to get the cord around Kuehl's neck.

Gamble v. State, 659 So.2d at 244-45. [emphasis added].

The claims pressed by Gamble on appeal are the functional equivalent of the claims that this Court decided in its 1995 opinion affirming Gamble's conviction and sentence. When the histrionics of this claim are stripped away, the fact remains that even if the CCP jury instruction issue **had** been preserved for appellate review, Gamble would not have been entitled to any relief under *Jackson* because the facts, which were found by this Court, establish that this murder was cold, calculated and premeditated under any definition of that aggravating circumstance. *See, Jennings v. State,* 782 So. 2d 853, 862 (Fla. 2001); *Monlyn v. State,* 705 So. 2d 1, 5-6 (Fla. 1997); *Larzelere v. State,* 676 So. 2d 395 (Fla. 1996); *Reese v. State,* 694 So. 2d 678, 684 (Fla. 1997); *Jones v. State,* 690 So. 2d 568 (Fla. 1996); *Foster v. State,* 654 So. 2d 112 (Fla 1995); *Fennie v. State,* 648 So. 2d 95 (Fla. 1994). Gamble's

claim has no legal basis, was not properly subject to evidentiary development, and was correctly decided by the Circuit Court. There is no basis for relief of any sort, and this legally invalid claim should be denied.

To the extent that any further discussion of this claim is necessary, the procedure required to preserve a *Jackson* challenge to the CCP aggravating circumstance jury instruction is well-settled, and was properly applied by this Court in denying relief on direct appeal. *See, Crump v. State,* 654 So. 2d 545, 548 (Fla. 1995) (specific objection must be made at trial and pursued on appeal -- objection must challenge the instruction as worded or submit a limiting instruction); *Walls v. State,* 641 So. 2d 381, 387 (Fla. 1994) (Same). In any event, as the trial court held, counsel cannot be ineffective for failing to pursue an objection based upon a change in the law. *Cherry v. State,* 781 So.2d 1040, 1053 (Fla. 2000) ("However, even if counsel should have objected to the wording of the statute, there is no prejudice shown because the trial court likely would have found the murder of Mrs. Wayne to be HAC under any definition."); *Rutherford v. Moore,* 774 So. 2d 637, 644 (Fla. 2000) *Francis v. Barton,* 581 So. 2d 583, 585 (Fla. 1991) ("*Slappy* is merely a refinement of *Neil*, not a major constitutional change in the law. That Francis now has

new counsel who thought of raising this issue does not save it from the imposition of a procedural bar.")[9]; *Nelms v. State,* 596 So. 2d 441, 442 (Fla. 1992) ("Defense counsel cannot be held ineffective for failing to anticipate the change in the law."); *Stevens v. State*, 552 So.2d 1082, 1085 (Fla. 1989) (same); *Darden v. State,* 475 So. 2d 214, 216-17 (Fla. 1985) (appellate counsel's performance not deficient for failing to anticipate a change in the law). Gamble can show neither deficient performance nor prejudice, and, for those reasons is not entitled to relief.

II. THE *"NIXON/CRONIC"* CLAIM

On pages 15-18 of his brief, Gamble argues that counsel's limited admission of guilt, which was made with the knowledge and consent of the defendant, was a denial of effective assistance of counsel under *Cronic v. United States,* which

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[9]The Federal Courts have resolved the issue in the same fashion:

> A counsel's pre-*Batson* failure to raise a *Batson*-type claim does not fall below reasonable standards of professional competence, and thus does not render counsel's assistance constitutionally ineffective. *See Poole v. United States,* 832 F.2d 561 (11th Cir.1987). While the ability to think creatively can be a great asset to trial lawyers, lawyers rarely, if ever, are required to be innovative to perform within the wide range of conduct that encompasses the reasonably effective representation mandated by the Constitution.

Pitts v. Cook, 923 F.2d 1568, 1574 (11th Cir. 1991).

triggered the presumption of ineffectiveness created in *Cronic* and applied in *Nixon v. Singletary,* 758 So. 2d 618, 623 (Fla. 2000).[10] The issue is whether the defendant consented:

> Under *Cronic,* a defendant need not show prejudice; prejudice is presumed. *See* 446 U.S. at 658-60, 100 S.Ct. 1932. *See also State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504, 507 ("[W]hen 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."). **On the other hand, if Nixon did consent to trial counsel's strategy, then it could not be said that trial counsel was ineffective, and Nixon would not be entitled to relief on this claim**.
>
> We recognize that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. **Of course, in such cases, the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy**. *See Francis v. Spraggins*, 720 F.2d 1190

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[10]Whether counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is reviewed de novo. *Stephens v. State,* 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. *Cade_v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland,* 466 U.S. at 698, 104 S.Ct. 2052 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

(11th Cir. 1983); *Wiley v. Sowders*, 647 F.2d 642 (6th Cir.1981); *Jones v. State*, 110 Nev. 730, 877 P.2d 1052 (1994); *State v. Anaya*, 134 N.H. 346, 592 A.2d 1142 (1991); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1995).

Nixon v. Singletary, 758 So. 2d 618, 623 (Fla. 2000) (emphasis added).[11]

Following the evidentiary hearing, the collateral proceeding trial court found the following facts:

> Having considered *Nixon* and having compared those facts to those presented here, this Court distinguishes the case at hand. In *Nixon*, defense counsel admitted that the defendant was guilty of the charged offense - - first degree murder. Such is not the case here. While trial counsel did admit that the Defendant was guilt of a lesser included offense of first degree murder, counsel never admitted that Defendant had committed first degree murder, the offense with which Defendant was charged. Counsel, in fact, stated that
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> > the evidence [would] show that [co-defendant],while [victim] was lying on the ground picked up a hammer himself and beat [victim] to death. [Co-defendant] then went through [victim's] pockets, retrieved his keys and wallet, briefly went through that wallet and handed it to [defendant]. [Co-defendant] was driving the car. [Co-defendant] we believe the evidence will

[11]In his brief, Gamble criticizes the trial court for "treating this case as simply one of first degree murder." That argument makes no sense -- Gamble does not disclose that the focus of the closing was to shift the blame to Gamble's co-defendant. The collateral proceeding trial court, on the other hand, did not overlook this distinction. (R1212). As the Court found, Gamble's counsel **never** admitted that Gamble had committed first degree murder. *Id.*

> show forged the check, [victim's] check, and the evidence wills how that [co-defendant] kept the car and continued on his way after [defendant] left.

(R. at 592)(emphasis added). Additionally, during the closing Defendant's counsel advised the jury that they "[would] concluded that Mr. Gamble [was] guilty of second or third degree murder but not first degree murder." (R. at 1421). This limited admission does not amount to the "complete concession of guilt" contemplated in *Nixon*, *Nixon v. Singletary*, 758 So. 2d 618, 623 (Fla. 2000) (quoting *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981)), and therefore des not create the *Cronic* presumption that effective assistance was denied.

Even were this Court to apply *Nixon* to the instant facts, it could not be shown that Defendant's counsel was ineffective. In the instant case, there was considerable focus at the evidentiary hearing on the strategy utilized by the defense counsel and whether it was appropriate despite the meager facts facing the attorneys. The strategy of defense counsel was to first show the jury that there was no premeditation on Defendant's part to rob or murder the victim and then urge the jury to find Defendant guilty of only a lesser included offense of first degree murder. The record is clear that trial counsel did admit the limited guilt of Defendant. *Nixon* holds, however, that the key is whether or not the defendant agreed to such an admission of guilt. Here that precise question was presented to Defendant at the evidentiary hearing. **On cross examination, Defendant stated that he had indeed given his consent to the strategy of admitting to second or third murder**. (Hr'g Tr. at 120-121). Defendant, himself, maintained no hopes of going free and was even prepared, had the Office of the State Attorney been willing, to plea to a life sentence. *Id*.

Finding *Nixon* to be an inappropriate standard by which to judge Defendant's instant claim, this Court applies *Strickland* where it is the duty of the court

to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). In *Strickland* the Supreme Court acknowledged that it was far too easy to criticize an attorney's performance after a verdict had been reached. To prevent such second-guessing, the Court made it clear that an evaluating court "must indulge a strong presumption that counsel's conduct falls within the range of professional assistance." *Id*. at 689.

Applying *Strickland* to the instant claim, this Court finds that defense counsel's limited admission of Defendant's guilt was strategy falling within the acceptable range of reasonable professional assistance. It is clear to this Court that defense counsel did not adopt this strategy without carefully considering all of its options, limited as they were. (Hr'g Tr. at 44-48). Any hopes of preventing Defendant's multiple confessions from being offered were dashed when Defendant refused at the last minute, to testify at the scheduled suppression hearing. (Hr'g Tr. at 31-33). In addition to Defendant's own statements, was other overwhelming evidence against Defendant, including detailed testimony by Defendant's girlfriend of Defendant's plan to "take out" the victim, a window blind cord which Defendant used in a trial run on his girlfriend before actually strangling the victim with it, and clothes recovered from Defendant stained with the victim's blood. Defense counsel also had to deal with the looming possibility of a death sentence if Defendant were convicted of first degree. In this regard, Defense counsel recognized the importance of maintaining a degree of credibility with the jury if and when the case proceeded to the penalty phase. (Hr'g Tr. at 44-45). In light of the evidence against Defendant and the lack of defense options, admitting to a lesser offense of first degree murder was a reasonable decision on the part of defense counsel.

(R1212-14). [emphasis added]. Trial counsel clearly made a strategic choice, **after consultation with his client,** to admit the obvious and try to save his client's life. Under these facts, Gamble's consent obviates any claim for relief under *Nixon.*

This Court most recently stated, with regard to ineffective assistance of counsel claims:

> Pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), in order to establish a claim of ineffective assistance of counsel during the guilt phase, a defendant must prove two elements:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.
>
> *Valle v. State*, 778 So. 2d 960, 965 (Fla. 2001) (quoting *Strickland*, 466 U.S. at 687). A claimant is not entitled to relief if the claim merely expresses disagreement with trial counsel's strategy. (FN6)
>
> > FN6. *See*, *Occhicone v, State*, 768 So. 2d 1037 (Fla. 2000) ("Moreover, strategic decisions do not constitute ineffective

> assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.")

Marquard v. State, 2002 WL 31600017 (Fla., Nov. 21, 2002).

Because that is so, the trial court properly denied relief. As the Circuit Court found, defense counsel had very little to work with, and the course of action taken at trial can be described as a tactical retreat, not the complete surrender portrayed by Gamble. *See, Messer v. Kemp,* 760 F.2d 1080, 1090 n.6 (11th Cir. 1986) ("There is a distinction between a statement which constitutes a tactical retreat, and one which amounts to a 'surrender of the sword.'"). *See also, Clozza v. Murray*, 913 F.2d 1092, 1099 (4th Cir. 1990). Since this course of action was taken with the consent of the client (with the result that it was clearly an informed choice of trial strategy), the *Cronic* standard does not come into play. *See, Lawrence v. State*, 27 Fla. L. Weekly S877, S880 (Fla. Oct. 17, 2002). Counsel made a reasonable strategic decision, and, under controlling case law, that decision is not subject to being second-guessed. Gamble cannot establish that no reasonable attorney would have taken this course of action, and, because that is so, he has not carried his burden under *Strickland v. Washington,* 466 U.S. 668 (1984) of demonstrating

not only deficient performance, but also prejudice. *See, Waters v. Thomas,* 46 F.3d 1506 (11th Cir. 1995).[12] Gamble has shown neither of the two prongs, and is not entitled to relief.

III. THE PENALTY PHASE *NIXON/CRONIC* CLAIM

On pages 19-22 of his brief, Gamble argues that he received ineffective assistance of counsel at the penalty phase of his capital trial when counsel conceded the existence of the pecuniary gain aggravating circumstance. As with the preceding issue, Gamble attempts to cast this claim as a *Nixon/Cronic* presumptive prejudice claim. The collateral proceeding trial court rejected this claim, noting that *Nixon* has not been extended to apply to a penalty phase proceeding where guilt is no longer an issue,[13] and further pointing out

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[12]Of course, "[i]t is not good trial tactics to attempt to persuade a jury of the verity of a proposition when it is manifestly impossible to do so." *Alvord v. Wainwright,* 725 F.2d 1282, 1290 n.15 (11th Cir.), *modified*, 731 F.2d 1486 (1984). Gamble would have this Court hold that counsel must try to do exactly that, without recognizing the overwhelming evidence against Gamble, which included his own statements. Gamble refused to testify at the suppression hearing, thus insuring the admission of those statements. *See,* R1214.

[13]Because guilt is not an issue at the penalty phase, the analytical basis of *Nixon* does not exist -- under the facts of this case, the jury had already found the pecuniary gain aggravator by convicting Gamble of robbery. Counsel had no chance at all of convincing the jury that the pecuniary gain aggravator did not exist, and to try and do otherwise (much less

that "it would have been preposterous for the defense attorney to argue in the penalty phase that pecuniary gain was not proven when only the day before, a unanimous jury had found that the evidence proved beyond a reasonable doubt that the defendant had committed armed robbery of the victim." (R1220).

As discussed in connection with the preceding issue,[14] it is not good trial tactics to attempt to convince the jury of a proposition that cannot be proven. *Alvord, supra.* Far from being ineffective, counsel's recognition that the pecuniary gain aggravator had been established (which was done with the knowledge and consent of the defendant(R1220)) was "simply a

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to require counsel to do otherwise) is to elevate form over substance.

[14]Whether counsel was ineffective under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is reviewed de novo. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the *Strickland* test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. *Cade_v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998); *Strickland,* 466 U.S. at 698, 104 S.Ct. 2052 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact).

sensible concession to the realities of the penalty proceeding in a capital case."[15] *Brown v. Dixon,* 891 F.2d 490, 499 (4th Cir. 1989).[16] It was clearly a reasonable trial strategy to admit the obvious, and argue that Gamble should not be punished more harshly than was his co-defendant. *See* R1378-1388. Had counsel been successful, his strategy might well have been regarded as brilliant -- however, the fact that he was not successful does not establish a violation of the Sixth Amendment.

Gamble was not sentenced to death because of anything that his trial attorneys did or did not do -- Gamble was sentenced to death because he committed a cold, calculated and premeditated murder during the course of a robbery. This Court has already determined that Gamble's sentence of death is not disproportionate, and that concludes the *Strickland*

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[15]Gamble did **not** testify that he did not agree to counsel conceding the pecuniary gain aggravator, as the trial court noted. (R1283). Gamble has not carried his burden of proof, even assuming that *Nixon* applies to the penalty phase of a capital trial, which is wholly different from the guilt phase of the proceedings.

[16]Stated in different terms, counsel had no chance of arguing, with any credibility at all, that the pecuniary gain aggravator did not exist. *See, Clisby v. Alabama,* 26 F.3d 1054 (11th Cir. 1994); *Clozza v. Murray*, 913 F.2d 1092, 1100 (4th Cir. 1990) ("To say that he had even a remote chance of success is simply to contest the inevitable.").

inquiry -- because the pecuniary gain aggravator was established (and is not contested here), and because this Court has affirmed Gamble's death sentence against a proportionality challenge, Gamble cannot, as a matter of law, establish the prejudice prong of *Strickland.* Under those facts, there is no basis for relief.

To the extent that Gamble argues that penalty phase counsel took positions that were inconsistent with those taken by guilt phase counsel, it is axiomatic that Gamble did not enter the guilt phase with a clean slate. "There is nothing unusual about arguing inconsistent or alternative theories of defense," *Singleton v. Lockhart,* 871 F.2d 1395, 1400 (8th Cir. 1989), and that observation applies with full force to the facts of this case. Gamble's attorneys made the best of a bad situation, and should not be faulted for failing to achieve the impossible.[17] Counsel used legitimate trial strategy, and Gamble cannot establish deficient performance or prejudice

[17]In the words of the Fourth Circuit, "Recalling that the same jury sat during both phases of [petitioner's] trial, we conceive of defense counsel as approaching the penalty phase necessarily cognizant that the jury is not, as at the beginning of the guilt phase, disposed in [petitioner's] favor." *Brown v. Dixon,* 891 F.2d 490, 499 (4th Cir. 1989).

under *Strickland.* Because that is so, he has not carried his burden of proof and is not entitled to any relief.[18]

IV. THE "INADEQUATE PREPARATION" CLAIM

On pages 22-25 of his brief, Gamble argues that he is entitled to relief on ineffective assistance of counsel grounds because his trial attorneys had little capital case experience. Apparently, Gamble also regards this claim as *per se* grounds for relief, because he has not identified what aspect of counsels' performance was deficient, nor has he identified how he was prejudiced by the unknown deficiencies. Despite the hyperbole of this claim, Gamble is not entitled to relief because he has not established (and has not even argued) deficient performance and prejudice as required under *Strickland.*[19]

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[18]Gamble does not claim that the pecuniary gain aggravator does not exist. That omission is critical, because he cannot prove *Strickland* prejudice unless that aggravator would not have been found but for counsel's argument. That claim has never been made, and, because that is so, the most that present counsel has done is establish that he would try this case in a different, though unspecified, fashion.

[19]Because this claim is insufficiently briefed, no true standard of review exists for it. In the absence of identified deficiencies in performance and resulting prejudice, it is not possible to apply the settled ineffective assistance of counsel standard.

It is axiomatic that "[e]very experienced criminal defense attorney once tried his first criminal case." *United States v. Cronic*, 104 S.Ct. 2039, 2050 (1984). Gamble, in his efforts to find a basis for relief, ignores that fact, and asks this Court to find a Sixth Amendment violation in the absence of even an identified claim of deficient performance, much less a claim of prejudice. Even attempting to frame Gamble's arguments for him, none of the alleged specifications of ineffective assistance of counsel contained in his brief can demonstrate prejudice to the defense. In the absence of such prejudice, Gamble has not carried his burden of proof. The collateral proceeding trial court properly denied relief on this claim, finding that there was no deficient performance or prejudice to the defense. That finding should not be disturbed.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that the Circuit Court's denial of Rule 3.850 relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Robert T. Strain**, Assistant CCRC - Middle, **Elizabeth A. Williams,** Staff Attorney, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, on this _____ day of November, 2002.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
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