Case No. 03-931

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner*,

v.

JOE ELTON NIXON, *Respondent.*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER=S BRIEF ON THE MERITS

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Florida Supreme Court apply an incorrect standard, contrary to Strickland v. Washington, 466 U.S. 668 (1984), Bell v. Cone, 535 U.S. 685 (2002), and Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000), by finding defense counsel ineffective *per se* under United States v. Cronic, 466 U.S. 648 (1984), despite having found counsel=s strategy not to contest overwhelming evidence of guilt but to vigorously contest the sentence to be in the defendant=s best interest and reasonably calculated to avoid a death sentence?

2. Did the Florida Supreme Court err in concluding that Boykin v. Alabama, 395 U.S. 238 (1969), prohibited trial counsel from adopting a strategy, after fully informing Nixon, who acquiesced to the strategy, not to contest overwhelming guilt to protect the best interest of Nixon and more effectively contest the appropriateness of imposing the death penalty?

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OPINION BELOW

The opinion below is reported as Nixon v. State, 857 So.2d 172 (Fla. 2003) (hereafter, Nixon III), and is published in the Appendix at pp. 526-62.[1]

[1] Nixon I is the decision of the Florida Supreme Court affirming Respondent=s conviction and sentence on direct appeal, reported at Nixon v. State, 572 So.2d 1336 (Fla. 1990), and published in the Appendix at pp. 358-77. Nixon II is the decision of the Florida Supreme Court remanding for evidentiary hearing to determine whether Respondent had expressly agreed to trial counsel=s strategy, reported at Nixon v. State, 758 So.2d 618 (Fla. 2000), and published in the Appendix at pp. 393-427. Nixon III is the decision of the Florida Supreme Court following the Nixon II remand.

JURISDICTION

The decision below, resolving Respondent=s federal claim that he was denied the effective assistance of counsel at his original trial, was entered on July 10, 2003. On October 1, 2003, the Florida Supreme Court denied the State=s Motion for Rehearing (App. 563). Jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Sixth Amendment is applicable to the States through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Joe Elton Nixon was convicted of first-degree murder, kidnapping, robbery and arson, and sentenced to death on the first-degree murder conviction. The record shows that Nixon kidnapped the victim, Jeanne Bickner, from the Governor=s Square Mall in Tallahassee, Florida, took her in her own car to a wooded area several miles outside Tallahassee, tied her to a tree using jumper cables, and set her on fire (while she was still alive), burning away most of her left leg and arm, and almost all of her hair and skin.

The State presented extensive evidence of Nixon=s guilt. Eyewitness testimony established that Nixon approached the victim in the mall parking lot shortly after lunchtime on Sunday, August 12, 1984, and that she opened the trunk of her orange MG sports car and gave Nixon a pair of jumper cables (TR 1860-63, 1865, 1868-69, 1871-73).[2] Later that day, Nixon was seen driving an orange MG around Tallahassee, alone (TR 1879, 1881, 1883-84, 1977-80, 1982-83). He drove the car 15 miles to Havana, where he showed his sister and uncle two rings later identified as belonging to the victim (TR 1959-60, 1968).

He pawned the victim=s two rings, and made various attempts to sell the MG (TR 561-63, 2067, 2071-72, 2083-85). Nixon told his brother and Wanda Robinson he had killed a woman, and showed them the MG, the two rings, and a gas ticket with the victim=s name on it (TR 2057-58, 2065). Nixon described how he had met the victim at the mall, asked for a Aboost,@ forced her in the trunk of her car, took her down a Apipeline@ road and into the woods, used jumper cables to tie her up, and set her on fire after rejecting her offer to write him a personal check in exchange for her life (TR

[2] In this brief, such portions of the record not reproduced in the Joint Appendix will be cited as follows: the original trial record will be cited as ATR@; the Nixon II postconviction record is APCR.@

2059-60, 2066-67). Nixon predicted he would Aget the electric chair@ (TR 2065).

The victim=s body was discovered Monday afternoon (TR 1885-87). Early the next morning, Nixon told his brother and Wanda Robinson he was going to burn the victim=s car (TR 2061, 2062-68). The MG was discovered, on fire, at 7:35 a.m. Tuesday morning (TR 2002-03), and Nixon=s fingerprints were retrieved from various locations on the car (TR 2041-44). The missing keys and gas cap were recovered when, after his arrest late Tuesday morning, Nixon told police where they could be found (TR 946, 957, 967, 1926, 2015-16, 2043-44).[3]

Nixon gave a lengthy and detailed statement to the police.[4] In his statement he admitted the victim begged him not to kill her; however, he put a cloth bag over her head, and tied her to a tree with jumper cables. Nixon set fire to her purse and the contents of the trunk and glove compartment of her MG. As the fire burned, Nixon choked her and then threw a burning item from the car on her head. He returned to the mall that evening with ATiny@ Harris, to retrieve his uncle=s car. Nixon told police he burned the MG Tuesday morning after reading in the newspaper that the victim=s body had been found. (PCR 915-65).

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[3] Nixon had a flat tire Monday evening at a convenience store. (TR 1962-64). A piece of tire tread at the convenience store was later fracture-matched to the damaged tire found by police in the MG=s trunk (TR 2033-25).

[4] The record reflects that Nixon was properly advised of his rights, and knowingly, intelligently and voluntarily spoke to police (PCR 915-16, 964-65).

Nixon called his uncle James Nixon from jail, telling him, AI=ve done something real terrible. . . . I murdered a lady@ (TR 1970-71).

Pretrial

Nixon was indicted August 29, 1984 (TR 1-3). Attorney Michael Corin filed a written plea of not guilty[5] and an initial demand for discovery on Nixon=s behalf, and conducted extensive discovery (App. 2-3).[6] Corin did not challenge Nixon=s competence

[5] The record does not contain the written plea of not guilty; however, Corin testified that he Aprobably@ filed the plea Aas a matter of course,@ without any expressed direction from Nixon (App. 468-69).

[6] Corin deposed 52 State witnesses, including Nixon=s brother and girlfriend, two uncles, numerous police officers and various eyewitnesses to Nixon=s possession of the victim=s car and other property (App. 53-8). In the defense discovery responses, Corin provided to the State the names of 60 potential defense witnesses (App. 22-32, 34-5) and a list of 49 defense exhibits (App. 47-52). Corin=s file in this case contains some 59 pages of handwritten notes of witness interviews, approximately 70 pages of Atrial@ notes, and a similar number of pages of Atrial and deposition notes@ (App. 470).

to stand trial because, upon expert finding and judicial determination, Nixon had been found competent in another case several weeks earlier. However, Corin did successfully move for the appointment of two mental health experts for use in mitigation (TR 90-93, 899-900, 909-10).[7]

Corin discussed a plea of guilty in exchange for a life sentence with the prosecutor, who rejected it due to the overwhelming evidence of guilt and the severity of the crime (App. 336-39). Corin saw Ano benefit . . . at all@ to entering a plea of guilty without a recommendation of life (App. 505). However, in Corin=s judgment, contesting the State=s overwhelming evidence of guilt would damage the credibility of otherwise plausible arguments he could make at the penalty phase for a life sentence. Believing as he did, he decided as a matter of strategy not to contest the State=s evidence at the guilt phase, but to contest the sentence vigorously (App. 457-59, 471-72). Corin testified post trial that his strategic decision was not one he would have made Alightly@ or without first discussing it with Nixon (App. 472). Nixon never affirmatively stated that he wanted a trial (App. 478), and never objected to Corin=s proposed concession-of-guilt strategy; had he objected, Corin would not have pursued that strategy (App. 477).

Trial-Guilt Phase

[7] The written reports of these experts, Dr. Doerman (a psychologist) and Dr. Ekwall (a psychiatrist), are reproduced in the Appendix at pp. 59-66 and 67-70.

Jury selection took three days (TR 1059-1257, 1261-1407, 304-436, 441-538, 1411-1606, 1610-1817). The guilt phase portion of the trial took another three days (TR 1825-2024, 2029-2092, 544-707). Nixon chose to absent himself from most of the trial.[8]

[8] Nixon was present in court the first day of jury voir dire, but disrobed to his underwear and refused to leave his holding cell the second day (TR 304, 344). The trial judge, noting that Nixon=s behavior had been Avolatile@ - one day behaving himself, and the next being highly disruptive (TR 306) - examined Nixon in his holding cell. Nixon demanded a black judge and a black attorney; somewhat contrarily, he stated that he cared nothing about the case and never did (TR 335, 337). A bailiff testified that Nixon had threatened to Aact up@ if forced to attend his trial (TR 343). After lunch, Nixon was again asked by a bailiff if he was Agoing to court@; Nixon answered that he was Anot going up there for them to railroad me@ (TR 355). Nixon was present in the courthouse on the first day of trial, but, after talking to Corin, decided to return to jail (TR 1990), and thus was not present in the courtroom during opening statements or any portion of the first day of trial. He chose to attend trial on the second day, and was identified by a witness as the person who had tried to sell the witness the victim=s MG (TR 562). Following a recess thereafter, Nixon decided not to return to court (TR 574). The trial court=s determination that Nixon=s absences were voluntary was

Corin told the jury in his opening statement that the real issue in this case was going to be sentencing; the State, he acknowledged, would be able to prove that Nixon had caused the victim=s death, but following the trial would be a penalty phase where the jurors would Alearn many facts about Joe Elton Nixon@ and, after they heard all the evidence, they would know the Areasons@ why Ahis life should be spared.@ (App. 71-2).

In his closing argument, Corin told the jury:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn=t caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case.
>
> In just a little while Judge Hall will give you some verdict forms that have been prepared. He=ll give you some instructions on how to deliberate this case. After you=ve gotten those forms and you=ve elected your foreperson and you=ve done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous.

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upheld on direct appeal. Nixon I (App. 366-68). It bears noting that Nixon did not state at the time of the trial, and has not testified since, that he absented himself as the result of, or as a means of protesting, his trial counsel=s concession strategy.

I think that what you will decide is that the State of Florida . . . has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged: first-degree premeditated murder, kidnapping, robbery, and arson.

Once you have arrived at those verdicts, there will by [your] decision be caused a second part of this trial. That-s something that we had discussed with you earlier prior to taking your oaths as jurors.

At that time, you indicated that regardless of your own personal beliefs in the death penalty, you would listen to the evidence. You would listen to the Judge-s instructions. You would weigh that evidence in arriving at an advisory recommendation of [sic] Judge Hall.

After today is over, we start the second part of this trial. The evidence and testimony that you-ve seen and heard will also become part of your deliberations at that point as well as other evidence that the State may introduce or I may introduce in Mr. Nixon-s behalf.

After you have heard all that evidence, the testimony, [the prosecution] and myself will be able to present additional arguments to you, and Judge Hall will give you instructions to guide your deliberations.

It will be at that point as difficult as it may seem at this point. I will hope to be able to argue to you and give you reasons not that Mr. Nixon-s life be spared one final and terminal confinement

> forever, but that he not be sentenced to die. Thank you.

(App. 73-4).

In closing, the State acknowledged that, notwithstanding any concessions by defense counsel, the burden remained on the State to prove its case to the satisfaction of the jury and beyond any reasonable doubt; what a lawyer says, the State reminded the jury, is not evidence and has no Alegal affect@ (App. 76-91).

On rebuttal, Corin again reminded the jurors that he planned to give them reasons why Nixon should not be sentenced to death, and emphasized that the trial was Anot over until it=s over, and it=s not near over yet@ (App. 92-94).

The trial court instructed the jury, *inter alia*, that the State bore the burden of proof beyond a reasonable doubt (App. 95-98). The jury found Nixon guilty on all counts.

Trial-Penalty Phase

In his opening statement, Corin told the jury it would be obvious that Nixon was Anot normal organically, intellectually, emotionally or educationally or in any other way@; based upon the testimony and documents the defense would present, it would be obvious that Nixon had Anever been normal or right,@ and that the jury should recommend a life sentence (App. 102).

The State=s evidence at the penalty phase was limited to judgments of conviction for two prior violent felonies (App. 103), and testimony (admitted over Corin=s objection) that Nixon had admitted removing the victim=s underwear to terrorize her (App. 104-07).

Corin presented testimony from eight witnesses, including friends and family, police officers, and two mental health experts (a psychologist and a psychiatrist). Nixon=s mother testified that she loved her son, but he needed help; he had mental and emotional

problems (App. 108-11). Wanda Robinson testified that Nixon had been acting strangely at the time of the murder (App.114-18). Police officers testified that, on the night before Nixon had murdered Jeanne Bickner, he had been arrested for battery on Ms. Robinson, but released (App. 122-138). Defense psychiatrist Dr. Ekwall testified that, although Nixon was not psychotic, he did have psychotic episodes, especially when intoxicated (App. 144-45). In his opinion, Asomething [was] wrong@ with Nixon, and the two statutory mental mitigators applied (App. 143-47).[9] Defense psychologist Dr. Doerman testified that Nixon=s intelligence was Aborderline@ and that he had Asome@ brain damage, which he described as Aspotty@ and Adiffuse@ (App. 159-63). Dr. Doerman agreed with Dr. Ekwall that Nixon could break down under stress, and that the two Florida statutory mental mitigators applied (App. 163-65). Dr. Doerman testified that Nixon functioned relatively well in a structured environment such as prison; he did not think that death was an appropriate sentence for Nixon because he was not Aan intact human being@ (App. 171, 174).

Corin additionally introduced more than 40 defense exhibits, including school and institutional records and psychological reports dating back to 1972, describing, *inter alia*, Nixon=s ongoing behavioral problems and his Aseriously disturbed@ perception of reality.

In closing argument, Corin identified the mitigating circumstances he deemed established - Nixon=s low intelligence, his brain damage, his troubles in school, his age, and his emotional

[9] See Fla. Stat. Section 921.141 (6) (b) (AThe capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.@), and (f) (AThe capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law was substantially impaired.@).

disturbance and impaired capacity at the time of the murder (App. 196-98). He reminded the jury of Nixon=s cooperation with police following his arrest, of testimony that Nixon had been a Awild man@ when he committed the murder, and of testimony that Nixon had fallen through Acracks@ in the system (App. 198-202). Corin noted that, while Nixon obviously had difficulty living on his own, the evidence showed that he functioned well in the structured environment of prison; thus, a death sentence was not necessary to protect society (App. 206-08). Reminding the jury of the psychiatrist=s testimony, Corin argued that the death penalty might be appropriate for an Aintact human being,@ but Nixon was not, never had been, and never would be an intact human being.@ (App. 209). He concluded by saying (App 209):

> You know, we=re not around here all that long. And it=s rare when we have the opportunity to give or take life. And you have that opportunity to give life. And I=m going to ask you to do that. Thank you.

Direct Appeal

On direct appeal, Nixon complained for the first time about Corin=s trial strategy to concede Nixon=s guilt and seek leniency at the penalty phase, arguing that Corin=s statements were the functional equivalent of a guilty plea, requiring an on-record inquiry to determine if Nixon knowingly, voluntarily and intelligently consented to the defense strategy. Nixon I (App. 361). The Florida Supreme Court remanded to the trial court for a hearing on this issue. Nixon I (App. 363).

On remand, Corin testified that he had graduated from Florida State University law school in 1970; he had been an assistant state attorney general, an assistant federal public defender, and (since 1979) an assistant state public defender (App. 244-46). He had handled a number of capital appeals, had lectured at capital seminars, and had testified as a defense expert witness on claims of ineffectiveness of counsel (App. 246-50). Corin testified that he

had discussed the Avery, very strong@ evidence with Nixon and had explained to him that, should the State reject his plea offer, Corin=s goal would be to save Nixon=s life rather than to obtain an acquittal, and he would probably concede his guilt (App. 235-37, 253-54). Corin testified that Nixon did not expressly approve of this strategy (App. 238), but he was Aaware@ of the proposed strategy (App. 239), and was given Athe opportunity to express his displeasure or unhappiness@ with that strategy, and said nothing (App. 238, 255). Nixon never told him Anot to do that@ (App. 256).

The lead trial prosecutor testified that Corin=s guilt-phase strategy forced the State to be cautious; the State still had to prove its case, but also had to avoid being perceived by the jury as Aengaging in overkill@ (App. 339-40).

A board-certified criminal defense lawyer, called by the State, testified that, Aquite frankly, I don=t think that there was a better strategy that could have been employed in the defense of this case than the one that Mr. Corin employed@ (App. 355-56).

The trial court denied relief, finding that defense counsel had reviewed the strategy with Nixon, that although Nixon manifested no reaction to the strategy, he understood the strategy, and that Nixon had not protested or objected to the strategy. (App. 364, fn.1).

The Florida Supreme Court affirmed Nixon=s conviction and sentence on direct appeal, without deciding his claim that trial counsel was ineffective. Nixon v. State, 572 So.2d 1336 (Fla. 1990) (Nixon I) (App. 358-77).[10]

[10] Because Nixon invoked his attorney-client privilege to restrict the State=s cross-examination of trial counsel, the Florida Supreme Court ultimately declined to Adispose of this claim@ on direct appeal on the Apresent state of the record,@ and affirmed the convictions and sentences, including the death sentence, Awithout prejudice@ to Nixon raising the issue by way of a Rule 3.850 motion for postconviction relief (App. 364). In Florida, a claim that trial counsel was ineffective is not ordinarily reviewed on direct appeal. Kelly v. State, 486 So.2d 578 (Fla. 1986).

Postconviction

On October 7, 1993, Nixon filed a motion for postconviction relief alleging, *inter alia*, ineffective assistance of counsel in conceding guilt. The state trial court summarily denied Nixon=s motion, rejecting Nixon=s claim that Atrial counsel=s concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel *per se* under United States v. Cronic, 466 U.S. 648 (1984).@ The trial court also rejected Nixon=s alternative argument that his trial counsel was ineffective at the guilt phase under the two-part test of Strickland v. Washington, 466 U.S. 668 (1984). The trial court found that Adefense counsel=s concession of guilt@ was an Aacceptable defense strategy@ in the circumstances of this case, and that Nixon had failed to demonstrate prejudice.

The Florida Supreme Court reversed. Nixon v. State, 758 So.2d 618 (Fla. 2000) (Nixon II)(App. 393-427). The court deemed Corin=s concession of guilt to be an abandonment of the defense of his client unless Nixon Aexplicitly consented@ to it. Citing Boykin v. Alabama, 395 U.S. 238 (1969), the court reasoned that Corin=s comments were the functional equivalent of a guilty plea and held that Nixon=s claim of ineffective assistance of counsel Amust prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel=s strategy@ (App. 405). Emphasizing that A[s]ilent acquiescence is not enough,@ the court remanded for an evidentiary hearing to determine whether Nixon expressly consented; if not, he was entitled to a new trial (App. 405).

In dissent, Justice Wells disagreed with the majority=s application of Cronic to this case, stating:

> No fair reading of the instant record can lead to the conclusion that Nixon was >denied any meaningful assistance at all.= [Cronic]. This case must be analyzed in light of Florida=s death penalty

> procedure. Counsel=s performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given the evidence, which was to call no witnesses and emphasize the penalty phase.

(App. 425-26).

At the May 2001, evidentiary hearing before Judge Ferris (mandated by Nixon II), Corin once again testified that his strategy had been to save Nixon=s life and that he had explained that strategy to Nixon (App. 458).[11] Corin testified that he had talked to and deposed numerous witnesses, and had discussed Athe state of the evidence@ with Nixon.[12] He had explained to Nixon that his strategy would be to try to avoid the death penalty and not to affirmatively contest guilt. That strategic decision was not one he would have made Alightly@ or without first discussing it with Nixon. He Aowed it to my client to tell him what's going on.@ In Corin=s Aprofessional opinion,@ based on the evidence in this case, such strategy was the Abest way to proceed@ and possibly the only way to save Nixon=s life; if the question of guilt was not going to be a matter that could be the subject of Aany reasonable dispute,@ then it would be much more effective, he testified, to attempt to save Nixon=s life through mitigating circumstances at the penalty phase than Agoing through a trial and arguing things that were not going to

[11] Nixon himself has never testified on behalf of his Cronic claim.

[12] The defense investigator assigned to Nixon=s case testified that Nixon knew the State had some A60 or 70@ witnesses against him, and that it Alooked pretty bad@ (App. 515-16, 518).

make a whole lot of sense.@ Corin testified that he would not have pursued that strategy against Nixon=s wishes. (App. 469-77).

The trial court denied relief. The court found that Corin had prepared for trial, developed a strategy, and kept Nixon informed:

> The only conclusion that can be reached from this uncontroverted testimony is that the pattern of interactions in the attorney-client relationship between Mr. Corin and Mr. Nixon often involved information being provided by Mr. Corin, followed by silence from Mr. Nixon. Whether that pattern of interaction was constructive or helpful is not the issue; rather, Mr. Corin appears to have done all he could to carefully prepare the case for trial, consider the viability of various defenses, inform Mr. Nixon of what was happening with his case, and finally, tell his client what strategies he intended to pursue.

(App. 557-558). The court additionally found that Nixon had consented to Corin=s trial strategy, albeit not in words:

> His consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with Mr. Nixon, and Mr. Nixon would refuse to respond. The court finds that the fact that Mr. Nixon did not provide counsel with an affirmative, explicit consent <u>in words</u>, and in the manner that we ordinarily expect and presume is acceptable, does not mean that it was not given. Looking to Mr. Nixon=s manner of communicating with counsel and with the court during his jury trial alone, it is obvious that Mr. Nixon is often more comfortable communicating through his behavior rather than the spoken word. The lack of words cannot, and did not, render his communication any less clear or explicit.

(App. 560) (emphasis in original).

On appeal, the Florida Supreme Court once again reversed. Nixon v. State, 857 So.2d 172 (Fla. 2003) (Nixon III) (App. 526-62). Relying on Nixon II, the majority concluded:

> In Nixon II, we found that counsel=s comments at trial were the functional equivalent of a guilty plea. Since counsel=s comments operated as a guilty plea, in order to affirm the trial court=s ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel=s strategy. There is no evidence that shows that Nixon affirmatively, explicitly agreed with counsel=s strategy. The only evidence presented at the evidentiary hearing was Corin=s testimony, which indicated that Nixon neither agreed nor disagreed with counsel=s trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel=s strategy. Without a client=s affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel=s duty is to Ahold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt.@ Nixon II, 758 So.2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel=s strategy is not sufficient, we find that Nixon must be given a new trial.

(App. 533-34) (emphasis in original).

Rehearing was summarily denied October 1, 2003 (App. 563).

SUMMARY OF THE ARGUMENT

Nothing in Strickland authorizes the imposition of mechanical rules on counsel, which could Adistract counsel from the overriding mission of vigorous advocacy of the defendant=s cause,@ 466 U.S. at 689, nor does anything in Cronic contemplate presuming both components of the Strickland test for ineffective assistance of counsel, or presuming that trial counsel=s performance is constitutionally deficient even though he has conducted a reasonable investigation and chosen a reasonable trial strategy based upon that investigation.

Neither counsel nor Nixon pled guilty; instead, Nixon went to trial and counsel strategically challenged the State=s case. When counsel investigates, prepares for trial and discusses trial strategy with his client, Strickland is the sole analysis upon which to judge his performance. The issue is not whether a defendant had counsel in such circumstances, but rather whether counsel=s actions were effective. Here the concessions by counsel were the product of reasonable strategy developed to protect the best interest of a client.

Nixon acquiesced to counsel=s strategy. The Florida Supreme Court erred in holding that trial counsel could act in what he perceived to be Nixon=s best interests only with Nixon=s explicit, verbal consent, and by finding trial counsel ineffective *per se* absent such expressed consent, without regard to how reasonable or effective counsel=s strategy was.

ARGUMENT

THE FLORIDA SUPREME COURT ERRED IN CONCLUDING THAT NIXON=S TRIAL COUNSEL WAS INEFFECTIVE *PER SE* IN PURSUING AN EFFECTIVE STRATEGY ACQUIESCED TO BY NIXON AND REASONABLY CALCULATED TO AVOID A DEATH SENTENCE.

The Florida Supreme Court recognized that Nixon=s trial counsel Michael Corin, faced with a Avirtually indefensible@ guilt phase, decided not to sacrifice what he felt was Nixon=s Abest chance@ by making arguments the jury was going to reject anyway, and to pursue a strategy of candor at the guilt phase in an effort to maximize his chances of making a persuasive case for a life sentence at the penalty phase. Although a majority of the Florida Supreme Court concluded that Corin made a strategic decision which was effective and reasonably calculated to help Nixon avoid a death sentence (App. 409, 418-19), the court determined, nevertheless, that the reasonableness and effectiveness of that strategy was irrelevant. In its view Corin=s strategy was the functional equivalent of a guilty plea, and the waiver standards of guilty pleas, as set out in Boykin v. Alabama, 395 U.S. 238 (1969), should be applied. Nixon was the Acaptain of his ship,@ said the court, and, absent Aaffirmative, explicit consent@ by Nixon to his counsel=s trial strategy, Corin=s adoption of that strategy was ineffective *per se* under United States v. Cronic, 466 U.S. 648 (1984).

This case presents two questions: First, does Strickland or Cronic establish the appropriate standard of review of a claim of ineffective assistance of counsel in a capital case where defense counsel, as a matter of strategy in the face of overwhelming evidence, chooses not to contest guilt in order to enhance defense credibility at the penalty phase? Second, can trial counsel=s strategic opening and closing comments be characterized as the

functional equivalent of a guilty plea requiring the application of Boykin to this case and others like it?

The Florida Supreme Court answered these questions incorrectly; in so doing, the court improperly established Amechanistic rules governing what counsel must do,@ and improperly rejected the "circumstance-specific reasonableness inquiry mandated by Strickland." Roe v. Flores-Ortega, 528 U.S. 470, 478-79 (2000).

I

Corin=s trial performance should be reviewed under Strickland; Cronic=s presumption of prejudice cannot apply when counsel has investigated the case and has made a strategic decision designed to benefit the defendant; here, Corin=s guilt-phase concessions were reasonable trial strategy that cannot be deemed a Atotal@ failure to act as an advocate on Nixon=s behalf.

Claims of ineffective assistance of counsel generally require a showing: (1) that the attorney=s performance was deficient, falling below professional standards of competence; and (2) that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687-88, 694. The Court has stated Awhether we require the defendant to show actual prejudice . . . or whether we instead presume prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel.@ Roe v. Flores-Ortega, supra, 528 U.S. at 482. Prejudice may be presumed only if the defendant was B Aeither actually or constructively B denied the assistance of counsel altogether.@ Id. at 483. When a defendant *has* counsel, the Strickland standard governs a defendant=s claim that his counsel was constitutionally deficient, unless that counsel Aentirely fails to subject the prosecution=s case to meaningful adversarial testing.@ Cronic, 466 U.S. at 659. For Cronic=s presumed prejudice standard to apply, that counsel=s Afailure must be *complete*.@ Bell v. Cone, 535 U.S. 685, 696-97 (2002) (emphasis supplied). A trial

counsel=s failure to test the State=s case merely at Aspecific points@ is insufficient to relieve the defendant of his burden to prove both deficient attorney performance *and* prejudice. Ibid.

The Florida Supreme Court apparently viewed Corin=s guilt-phase concession strategy as having Aentirely fail(ed) to subject the prosecution=s case to meaningful adversarial testing.@ Nixon II (App. 400-02).[13] However, Corin=s reasonable strategic decision cannot properly be deemed a Afailure@ at all. In a capital trial, the most important issue may not be guilt but sentence.[14] In this capital

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[13] The court expressly found only that Corin=s opening statements and closing argument Araise a question@ as to whether Corin failed to subject the State=s case to meaningful adversarial testing, but the court implicitly answered the Aquestion@ in the affirmative. (App. 400-02).

[14] See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 329 (1983) (cited in Strickland v. Washington, supra, 466 U.S. at 662, fn. 32):

> In many capital cases, the evidence of guilt is overwhelming. Such cases go to trial either because the prosecutor will not bargain for a sentence less than death or because the defendant will not accept a sentence of life imprisonment without the possibility of parole. In these cases, although the defendant will almost certainly be convicted, the defendant has nothing to lose by proceeding with a trial on the capital charges. However, *if the guilt phase is virtually indefensible, inappropriate guilt phase advocacy could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase.*

See also: 1 Molly Treadway Johnson & Laural L. Hooper, Resource Guide for Managing Capital Cases 43 (2002) (AA noted capital defense attorney with whom we spoke pointed out that attorneys often view a capital case as a >penalty-phase case= and try the guilt phase of the case accordingly. During the guilt phase, a defense attorney does not want to make an argument that will be inconsistent with what he or she will argue at the penalty phase. For example, denying guilt outright in the guilt phase might be a strategic mistake if during the penalty phase the defendant wants to argue that certain factors (e.g., a deprived childhood, a mental illness) led him or her to commit

case in which the evidence of guilt was overwhelming, it was not unreasonable for Corin to have attempted to avoid a death sentence for Nixon by being candid with the jury about the sufficiency of the State=s evidence.[15]

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the crime. Several judges noted that such strategic decisions had apparently been made by attorneys in their death-penalty cases.@); Russell Stetler, Commentary on Counsel=s Duty to Seek and Negotiate A Disposition in Capital Cases (ABA Guideline 10.9.1), 31 Hofstra L. Rev. 1157, 1165 (Summer 2003) (AThe revised ABA Guidelines place proper emphasis on the need to take every possible step towards resolving capital cases for a sentence less than death, once counsel has independently evaluated the evidence supporting conviction.@).

[15] See Yarborough v. Gentry, 540 U.S. ___, 124 S.Ct. 1 (2003)

(quoting J. Stein, Closing Arguments Section 204, p. 10: A(I)f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate.@); People v. Mayfield, 852 P.2d 331, 343-44 (Cal. 1993) (defense counsel=s concession that defendant was guilty of murder in attempt to avoid death sentence not an abandonment of defendant or an unreasonable tactical choice, because Acandor may be the most effective tool available to counsel@); State v. Abshier, 28 P.2d 579, 594 (Okla. Crim. App 2001) (it was Aproper trial strategy@ for counsel to Acandidly concede guilt early in the trial in order to establish credibility with the jury@ in the hope that the jury could be persuaded to vote for a sentence less than death); Evans v. State, 725 So.2d 613 (Miss. 1997) (in capital case, concession that jury would likely find defendant guilty of murder was reasonable and permissible trial strategy of candor designed to help the defendant at the sentencing phase); State v. Scott, 800 N.E. 1133 (Ohio 2004) (counsel=s concession of guilt to all offenses in the face of overwhelming evidence enhanced counsel=s credibility with the jury to plead for defendant=s life).

Clearly, there were potential benefits to Nixon in having a trial, even if Corin did not contest guilt: First, the State was put to its burden of proof, and there was always a possibility that the State, through carelessness or inadvertence, would fail. Second, there was a possibility that the State would commit some reversible error at trial, and the State could well have been more amenable to a plea for life if faced with a second trial. Third, by having a trial, all the State=s Abad stuff@ would come in at the guilt phase instead of the penalty phase; while the State would likely remind the jury that it could consider the guilt-phase evidence while deciding a recommended sentence, nevertheless, the temporal separation arguably would dilute the impact of the aggravation and allow for a stronger focus on mitigation. Finally, Corin=s guilt-phase Acandor@ could (and probably did) enhance his credibility at the penalty phase. The strength of these potential benefits might be debatable among reasonable attorneys, but they are not so hopelessly phantasmagorical as to compel a *per se* rejection of Corin's strategy.[16]

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[16] See Scott E. Sundby, Symposium: The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L. Rev. 1557 (September 1998) (where defendant is the sole actor in the crime, mounting a denial defense in hopes of creating Alingering doubt@ sufficient to sway a jury towards a life sentence at the penalty phase Amay actually increase the likelihood that the jury will reach a sentence of death@; moreover, even when presenting an Aacceptance of

responsibility theme . . . it is often strategically unwise to enter a guilty plea and thereby move the trial directly into the penalty phase,@ as that Aconcentrates all of the aggravating evidence into the penalty phase rather than allowing to hear at least the crime evidence at the guilt stage, which may help diminish its impact by the time the penalty phase takes place@; A[d]epending on the nature of the evidence, the most effective defense at the guilt-innocence phase might be as simple as a tacit guilty plea that *expressly establishes a theme of accepting responsibility*@) (emphasis supplied).

There is a strong presumption that, when counsel has Afocused on some issues to the exclusion of others, he did so for tactical reasons rather than through sheer neglect.@ Yarborough v. Gentry, supra. Here, it is undisputed that Corin=s Afocus@ was the product of a deliberate tactical choice, adopted because Corin deemed it to be Nixon=s best chance of avoiding a death sentence. Corin was not the equivalent of Ano lawyer@; after fully investigating the possibilities, he developed a reasonable strategy designed to benefit his client. Nixon simply was not Adenied any meaningful assistance of counsel at all,@ and thus Corin=s performance should not have been deemed presumptively prejudicial under Cronic.[17]

Where, as here, trial counsel=s concession is the product of a strategic choice made in the defendant=s best interest after full investigation and preparation, counsel=s concession of guilt should be analyzed under the two part test of Strickland, to determine whether trial counsel=s performance was (a) deficient and (b) prejudicial.[18]

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[17] In effect, the Florida Supreme Court concluded that Corin was effective under Strickland, but ineffective under Cronic. Nothing in Strickland or Cronic supports such a result.

[18] The record shows that counsel prepared extensively for Nixon's trial. This is not a case in which trial counsel's strategic choices are invalid because counsel failed to conduct a reasonable investigation, as in Wiggins v. Smith, 539 U.S. 510 (2003). Moreover, even in such cases, whether a defendant has received competent representation by his counsel must be analyzed under Strickland.

II

Counsel is not required to obtain a client=s affirmative, explicit consent to trial strategy.

Notwithstanding any general presumption against a defendant's acquiescence in the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 464 (1938), fundamental rights may be forsaken if not asserted. Nixon never objected to Corin's strategy, never chose another strategy, never showed that Corin failed adequately to consult with Nixon, and never showed that Corin otherwise was guilty of such overbearing conduct as to unfairly override Nixon's expressed wishes. On the contrary, Nixon fully acquiesced to counsel=s strategy. The Florida Supreme Court erred in forbidding counsel from pursuing that strategy, no matter how reasonable under the circumstances, absent explicit, verbal acceptance of that strategy by Nixon.[19]

[19] Petitioner has always maintained that Nixon consented by his acquiescence to the strategy proposed to him by his trial counsel. The Florida Supreme Court, however, insisted on *affirmative* and *explicit* consent, and rejected Judge Ferris= conclusion that Nixon had consented to counsel=s strategy, albeit not in words (App. 533-34, 560).

In Strickland, the Court rejected Aspecific guidelines@ to Aexhaustively define the obligations of counsel,@ 466 U.S. at 688, observing: ANo particular set of detailed rules for counsel=s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.@ 466 U.S. at 688-89. Generally, an attorney appointed to represent an indigent criminal defendant Ahas B and must have B full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval.@ Taylor v. Illinois, 484 U.S. 400, 418 (1988). The Abasic thesis@ of decisions according criminal defendants the right to counsel is that Athe help of a lawyer is essential@ to a fair trial because the defendant Alacks the skill and knowledge@ to identify or present his most effective defense. Faretta v. California, 422 U.S. 806, 832-33, and fn. 43 (1975) (internal cites omitted). In recognition of the Asuperior ability@ of Atrained counsel@ to evaluate the strengths and weaknesses of a case, and to advocate the client=s cause, the Court has rejected a *per se* rule that Athe client, not the professional advocate, must be allowed to decide what issues are to be pressed.@ Jones v. Barnes, 463 U.S. 745, 751 (1983). Otherwise, counsel is reduced to standby status. McKaskle v. Wiggins, 465 U.S. 168, 177-78 (1984) (role of standby counsel is limited; standby counsel cannot override defendant=s tactical decisions, control the questioning of witnesses, or speak in place of the defendant on any matter of importance).[20]

[20] See United States v. Taylor, 933 F.2d 307, 312 (5th Cir. 1991) (AThe very definition of full-fledged counsel includes the proposition that the counselor, and not the accused, bears the responsibility for the defense; by contrast, the key limitation on standby counsel is that such counsel not be responsible - and not be perceived to be responsible - for the accused=s defense.@).

While an attorney generally has the right to make tactical decisions regarding trial strategy, the Court has addressed four fundamental areas reserved to the defendant personally: A[T]he 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 own behalf, or take an appeal.@ Jones v. Barnes, supra, 463 U.S. at 751.[21] However, the Court has not expanded this list, and in fact has rejected opportunities to do so. See Jones at 753-54 (attorney may reject defendant's request to argue nonfrivolous issue on appeal; *per se* rule adopted by court below was Acontrary to all experience and logic@ and would Adisserve the very goal of vigorous and effective advocacy that underlies@ Court=s recognition that the Arole of the advocate >requires that he support his client=s appeal to the best of his ability.=@)(internal cites omitted); Taylor v. Illinois, supra (APutting to one side the exceptional case in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.@). None of the fundamental decisions addressed in Jones is at issue here.

[21] The American Bar Association=s most recent formulation assigns five specific choices to the accused personally (what plea to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf, and whether to appeal). Every other trial decision, strategic and tactical, is assigned to counsel. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.2 (3d ed. 1993)

Moreover, even Athe most basic rights of criminal defendants are...subject to waiver,@ Peretz v. United States, 501 U.S. 923, 936 (1991). AWhether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant=s choice must be particularly informed or voluntary, all depend on the right at stake.@ United States v. Olano, 507 U.S. 725, 733 (1993).

So, for example, while a defendant has the ultimate right to decide whether to take an appeal, the Court has never required an on-record waiver of that right, or insisted that an appeal be taken unless the defendant expressly agreed that no appeal should be filed. On the contrary, the Court recently held that counsel had no *per se* constitutional duty to file an appeal Awhen the defendant has not clearly conveyed his wishes one way or the other.@ Roe v. Flores-Ortega, supra.[22] Likewise, while the defendant himself has the final decision whether to testify, Rock v. Arkansas, 483 U.S. 44 (1987), the Court has never required an Aon-record@ waiver of that right, or insisted that an attorney summon his client to the stand unless the defendant expressly agrees with the attorney=s strategic decision not to call him. Put another way, the Court has never held that an attorney must put an uncooperative client on the stand and subject him to cross-examination merely because the defendant has declined to choose whether to testify.[23] And, while a defendant has the constitutional right to represent himself, Faretta v. California, supra, the Court has not forced a defendant to represent himself if he failed expressly to waive that right. Rather, the Court has

[22] Absent expressed instruction by the defendant to file an appeal, an attorney=s failure to file an appeal would be evaluated for reasonableness under the Strickland standard.

[23] The overwhelming majority of lower federal courts have rejected any requirement of an on-record waiver of a defendant=s right to testify. E.g., United States v. Brown, 217 F.3d 247, 258 (5th Cir.), *cert. denied* 531 U.S. 973 (2000). See also, Taylor v. United States, 287 F.3d 658 (7th Cir. 2002) (while defendant may not be prohibited from testifying, advice of rights and formal waivers are not essential to a voluntary decision not to testify).

required a hearing to determine whether a defendant=s waiver of his *right to counsel* is knowing, intelligent and voluntary, but has not required a hearing to determine if a defendant has voluntarily waived his *right to represent himself*. The latter right is deemed waived if the defendant acquiesces in the appointment of counsel.[24]

The Florida Supreme Court primarily focused on Nixon=s assumed right to reject Corin=s trial strategy, ignoring the potential impact of such a presumed right upon another important right of the defendant: his right to effective assistance of counsel. Indeed, the

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[24] In cases involving other possible Afundamental@ decisions arguably left to the defendant himself, lower federal courts have declined to require an attorney to obtain his client=s expressed permission before pursuing prudent trial strategy. See, e.g., United States v. Cooper, 243 F.3d 411 (7th Cir.), *cert. denied*, 534 U.S. 825 (2001) (defense counsel can waive his client's Sixth Amendment confrontation rights so long as the defendant does not expressly dissent); Dean v. Superintendent, 93 F.3d 58 (2nd Cir. 1996), *cert. denied*, 519 U.S. 1129 (1997) (assuming, *arguendo*, that the Constitution Aprohibits counsel from imposing an insanity defense on an unwilling defendant,@ such right would be Aderivative@ of the Aright to make a defense,@ citing Faretta, and thus would be subjected to practical constraints; a defendant who seeks postconviction relief on the ground that trial counsel imposed an insanity defense against the defendant=s wishes must show Athat he in fact objected@; a defendant who did not object at trial must show not only that he Adisagreed@ with counsel, but that his Awill was overborne@ by counsel).

court acknowledged that forcing Corin to contest guilt might have Aworked to Nixon=s detriment,@ but held that ANixon himself must bear the responsibility for that decision.@ Nixon II, (App. 406).

Nixon, however, *never made that decision*, and cannot, by his acquiescence, be deemed to have waived his right to effective assistance of counsel or his attorney=s obligation to provide the best representation possible under the circumstances, any more than Faretta could have been deemed to have waived his right to counsel by failing to expressly consent to counsel, or Rock could be deemed to have waived his right to silence by failing expressly to agree not to testify, or Flores-Ortega could be deemed to have waived his right to appeal by failing expressly to demand an appeal, or Boykin could be deemed to have waived his right to trial by standing mute when asked to plead. The Florida Supreme Court erred in holding that Corin could act in what he perceived to be Nixon=s best interests only with Nixon=s expressed, verbal consent.[25]

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[25] A[A] defendant's right to insist that a defense be presented at the initial phase of the trial will inevitably impinge on defense counsel's handling of the case.@ People v. Frierson, 705 P.2d 396, 404 (Cal. 1985). This may be a tolerable result if the defendant himself has actually so insisted, for at least

any impingement is by the defendant himself, not by a court. In this case, Nixon did not insist on any particular strategy at the guilt phase of trial, but one has nevertheless been imposed on trial counsel by the Florida Supreme Court, despite its acknowledgment that the strategy chosen by defense counsel was reasonable and effective, and despite its acknowledgment that expressly contesting guilt could have worked to Nixon's detriment at the penalty phase. In fact, under the logic of its opinions in Nixon II and III, the Florida Supreme Court would have deemed Corin ineffective *per se* if his strategy had succeeded and he had persuaded the jury to recommend a life sentence, even if that had been the most defendant-favorable result possible. See Traub, AThe Life Preserver@, The New Yorker, April 8, 1996 (discussing New York state capital defender Kevin Doyle-s representation of a capital murder defendant in Alabama, for whom he successfully obtained a life sentence by conceding guilt; noting that when the State seeks a death sentence for an obviously guilty defendant, a life-without-parole sentence is a defense Awin@).

Nixon was not deprived of any possible constitutional right to decide. If a defendant may be deemed to have accepted counsel by acquiescence, Faretta, supra, he should likewise be deemed to have accepted the strategic decisions of that same counsel by acquiescence. Instead of applying a *per se* presumption of deficient performance based on lack of expressed consent, the Florida Supreme Court should have reviewed Corin=s strategy for reasonableness under Strickland.[26]

Finally, Corin=s statements to the jury cannot be deemed the equivalent of a guilty plea. Boykin holds that a trial judge may not accept a defendant=s plea of guilty absent an on-record demonstration that it was intelligent and voluntary. 395 U.S. at 241-42. The Court emphasized, however, that a plea of guilty is Amore than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment.@ Id. at 242. A plea of guilty is thus a conviction *without proof*, since the plea Aserves as a stipulation that no proof by the prosecution need be advanced. . . . It supplies both evidence and verdict, ending controversy.@ Id. at 243 (fn. 4) (quoting Woodard v. State, 42 Ala. App. 552, 558, 171 So.2d 462, 469). Because a defendant who pleads guilty gives up an assortment of rights, including the right to a trial itself, an on-record waiver in accordance with what Justice Harlan described as Athe rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure,@ Id. at 245 (Harlan, J., dissenting), was deemed a necessary precondition to acceptance of a guilty plea.

[26] The trial-level judicial inquiry mandated by Nixon II (App. 406-07) introduces additional concerns of interference with, and judicial micro-management of, the attorney-client relationship in a manner that is utterly contrary to the Court=s Strickland decision.

Corin did not deprive Nixon of his right to trial, or any of the rights enumerated in Boykin. Although the Florida Supreme Court construed Corin=s statements as a concession of guilt, Corin never expressly conceded that Nixon was guilty of first degree murder.[27] More importantly, Corin=s statements were neither evidence nor stipulation, and did not relieve the State of its burden to present evidence or to prove guilt beyond a reasonable doubt, as the prosecutor himself expressly acknowledged to the jury in his closing argument, and as the trial court expressly charged the jury. Had the State responded to Corin=s opening statement by resting without presenting any evidence, the jury could not lawfully have convicted Nixon.[28] Likewise, had the State Alet down its guard@ because of the concession, and failed to present legally sufficient evidence supporting every essential element of the crime charged, the jury could not lawfully have convicted Nixon. Therefore beyond peradventure, the State was obliged to (and did) present evidence that was not merely legally sufficient to convict, but also sufficiently credible and weighty to convince the jury of Nixon=s guilt beyond a reasonable doubt.[29] The trial court did not direct a verdict, but instructed the jury, properly, that the State bore the burden of proof beyond a reasonable doubt. Thus, the State was

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[27] Corin acknowledged in opening that the victim had died and that Nixon had caused that death, and further acknowledged in concluding that he thought the jury would Aprobably@ find Nixon guilty beyond a reasonable doubt on all counts, but he did not explicitly admit or concede the elements of intent or premeditation, or suggest that the jury need not find that the State had met its burden of proof.

[28] The Florida Supreme Court automatically reviews all capital convictions for sufficiency of the evidence. Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981); Stano v. State, 473 So.2d 1282, 1288 (Fla. 1985).

[29] A defendant who pleads guilty waives review for sufficiency of the evidence; indeed; a defendant may plead guilty while expressly denying his guilt. North Carolina v. Alford, 400 U.S. 25 (1970). While the State must provide a factual basis of guilt at a plea hearing, under Florida law it does *not* have to prove guilt beyond a reasonable doubt, and the evidence is not reviewed for sufficiency on appeal. Koenig v. State, 597 So.2d 256 (Fla. 1992).

held to its burden of proof beyond a reasonable doubt, even if Corin did not expressly contest it.[30] In fact, a variety of issues were preserved for appeal notwithstanding Corin=s concession that would not have been preserved if Nixon had pled guilty, including appellate review for sufficiency of the evidence and appellate review of issues that trial counsel preserved for appeal, such as the introduction of allegedly inflammatory photographs and allegedly improper prosecutorial closing argument.[31]

Neither defense counsel nor Nixon entered a guilty plea to the charges and Nixon was not denied a jury trial. Defense counsel required the State to bear its burden of proof beyond a reasonable doubt, and defense counsel did not surrender any of Nixon=s other rights. See, e.g., United States v. Gomes, 177 F.3d 76, 84 (1st Cir. 1999) (A[Appellant's] cursory analogy to a guilty plea without safeguards (including the explicit consent and participation of the defendant and a good many formalities as well, Fed.R.Crim.P 11) is a false one. Counsel's concession was not a guilty plea, which involves conviction without proof, and is therefore properly hedged with protections. Here the government had to provide a jury with admissible evidence of guilt and did so in abundance.@).

The Florida Supreme Court erred in applying Boykin=s Arigid prophylactic@ rule to a claim that trial counsel was ineffective at a jury trial the defendant received.[32]

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[30] By contrast, defense counsel in Brookhart v. Janis, 384 U.S. 1 (1966), agreed to a Aprima facie@ bench trial at which the State would be relieved of its obligation to put on Acomplete proof@ of guilt or to persuade a jury of the defendant=s guilt beyond a reasonable doubt. Moreover, even in Brookhart, the Court did not require a personal waiver by the defendant; the Court granted relief because the Apetitioner neither personally waived his right *nor acquiesced* in his lawyer=s attempted waiver.@ 384 U.S. at 8 (emphasis supplied).

[31] On appeal, Nixon raised Aseven claims in connection with the guilt phase of the trial and eight claims in connection with the penalty phase.@ Nixon I (App. 361).

[32] Further, the decision below, which, in a postconviction proceeding,

effectively places the burden on the State to demonstrate that Nixon explicitly agreed with his trial counsel=s strategy, is inconsistent with the Court=s decision in United States v. Vonn, 535 U.S. 55 (2002) (absent plain error, defendant=s failure to object to plea procedures at trial is a waiver of objection; where a defendant fails to speak up Awhen a mistake can be fixed,@ the defendant bears the burden of proving prejudice).

In summary, Boykin and Strickland/Cronic are separate inquiries and should not be intermingled. Trial counsel did not plead his client guilty, and his guilt-phase strategy was not the functional equivalent of a guilty plea. Counsel neither relieved the State of its burden of proof nor deprived Nixon of a jury trial. Nixon=s acquiescence to counsel=s strategy was sufficient to foreclose any claim of a violation of Nixon=s right to decide strategy. The Florida Supreme Court erred by finding trial counsel ineffective *per se* regardless of the sufficiency of trial counsel=s investigation, preparation and performance, or of the soundness of his strategic decision.

CONCLUSION

The Florida Supreme Court=s judgment should be reversed.

Respectfully submitted,

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