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Florida v. Nixon 125 S. Ct. 551 (2004)

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I. Facts

Assistant public defender Michael Corin was assigned to represent Joe Elton Nixon on the charge of first-degree murder and associated offenses including kidnapping, robbery, and arson. Corin filed a not guilty plea and proceeded to depose the State's witnesses. Certain that Nixon's guilt was not seriously in doubt, Corin initiated plea negotiations with the hope that prosecutors would take the death penalty off the table. The prosecutors refused, and negotiations broke down.[1]

The evidence, as revealed at trial, weighed heavily against Nixon.[2] On Monday morning, August 13, 1984, a motorist discovered Jeanne Bickner's charred body near a dirt road outside of Tallahassee, Florida.[3] The following day, police arrested Nixon after they received word from his brother and girlfriend that Nixon had confessed to the killing.[4] When questioned by police, Nixon related in detail the chronology of events leading up to and including Bickner's murder.[5] Additional evidence linking Nixon to the murder included witnesses who placed Nixon in a parking lot with Bickner prior to the murder and who identified Nixon as the man driving in Bickner's MG following the murder.[6] Police also matched a palm print found on the trunk of the MG to Nixon, and prosecutors entered into evidence a pawn shop receipt, signed by Nixon, for two of Bickner's rings.[7]

Given the weight of evidence against Nixon, Corin concluded that the only way to save Nixon's life was to concede guilt at trial in order to preserve credibility with the jury at sentencing.[8] On at least three occasions, Corin attempted to explain this decision to Nixon.[9] Nixon, consistently reticent in his interactions with Corin, neither approved of nor protested Corin's proposed defense strategy.[10]

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1. Florida v. Nixon, 125 S. Ct. 551, 556–57 (2004).
2. *Id.* at 555–58.
3. *Id.* at 555.
4. *Id.* at 556.
5. *Id.*
6. *Id.*
7. *Nixon*, 125 S. Ct. at 556.
8. *Id.* at 556–57.
9. *Id.* at 557.
10. *Id.*

On the second day of voir dire, Nixon refused to enter the courtroom.[11] Defense counsel informed the judge that Nixon had stripped down to his underwear and was insisting upon a black judge and attorney.[12] Nixon refused to attend his trial because, according to a court officer, he was not going to let them "railroad" him.[13] The trial court conducted a hearing in Nixon's cell and concluded that, if Nixon failed to appear in court that afternoon, his decision would constitute a " '[knowing], voluntary and intelligent waiver of his right to be present during the course of the trial.' "[14] Nixon did not return to the courtroom, and the judge ruled that the trial could proceed in absentia.[15]

In his opening statement, Corin remarked, "In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt."[16] However, consistent with his proposed defense strategy, Corin also indicated to the jurors that they would learn in the penalty phase the reasons why Nixon should not receive death.[17] During the trial, Corin conducted little cross-examination, questioning the State's witnesses only as needed for clarification.[18] He did not otherwise present a guilt-phase defense.[19] In his closing argument, Corin again conceded guilt and reminded the jurors that he would present, in the second phase, "reasons[,] not that Mr. Nixon's life be spared . . . , but that he not be sentenced to die."[20] Nixon was convicted on each of the crimes charged.[21] The jury recommended, and the trial court imposed, the death penalty.[22]

On direct appeal and represented by new counsel, Nixon argued that Corin's concessions of guilt " 'were the functional equivalent of a guilty plea' "

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11. Brief for Respondent at 4, Florida v. Nixon, 125 S. Ct. 551 (U.S. July 21, 2004) (No. 03-931); *see* Nixon v. State, 572 So. 2d 1336, 1346 (Fla. 1991) [hereinafter *Nixon I*] (affirming Nixon's conviction and death sentence).

12. Brief for Respondent at 4, *Nixon* (No. 03-931).

13. *Id.*

14. *Id.* at 5 (quoting *Nixon I*, 572 So. 2d at 1341); *see* FLA. R. CRIM. P. 3.180(c) (allowing a defendant to voluntarily absent himself from the courtroom). During the hearing, " 'Nixon repeatedly stated that he wanted to return to the jail-house and did not care if the trial proceeded without him.' " Brief for Respondent at 5, *Nixon* (No. 03-931) (quoting *Nixon I*, 572 So. 2d at 1341).

15. Brief for Respondent at 5, *Nixon* (No. 03-931).

16. *Nixon I*, 572 So. 2d at 1339.

17. Brief for Petitioner at 7, Florida v. Nixon, 125 S. Ct. 551 (U.S. May 14, 2004) (No. 03-931).

18. *Nixon*, 125 S. Ct. at 558.

19. *Id.*

20. Brief for Petitioner at 7–8, *Nixon* (No. 03-931).

21. *Nixon*, 125 S. Ct. at 558.

22. *Id.*

entered without Nixon's express consent.[23] Counsel contended that under the standard set forth by *United States v. Cronic*,[24] Corin's trial strategy failed to subject the prosecution's case to any " 'meaningful adversarial testing.' "[25] Accordingly, counsel argued that Corin's concession should be presumed prejudicial and, therefore, ineffective.[26] The Supreme Court of Florida remanded for an evidentiary hearing on the issue but despite the hearing, the court ultimately declined to resolve the issue on what the court considered to be a still-inconclusive record.[27]

Nixon renewed his *Cronic* claim in a motion for postconviction relief.[28] In *Nixon v. Singletary*,[29] the Supreme Court of Florida equated Corin's opening and closing comments with a plea of guilty and held that a defendant must explicitly and affirmatively consent to an attorney's concession of guilt.[30] The court ruled that, without that consent, a defendant is constructively denied counsel and therefore, counsel's assistance is presumptively ineffective under *Cronic*.[31] The

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23. Brief for Respondent at 8–9, *Nixon* (No. 03-931) (quoting *Nixon I*, 572 So. 2d at 1338–39); *see* Boykin v. Alabama, 395 U.S. 238, 242–43 (1969) (concluding that reversible error occurred when the record did not show that the defendant voluntarily entered a guilty plea). Nixon's counsel consistently argued that *Brookhart v. Janis* extended the *Boykin* requirement of affirmative consent to "procedures that are the functional equivalent of a guilty plea in that they involve a surrender of the right to contest the prosecution's factual case on the issue of guilt or innocence." Brief for Respondent at 32, *Nixon* (No. 03-931); *see* Brookhart v. Janis, 384 U.S. 1, 6–7 (1966) (finding that defense counsel's agreement to a "prima facie" case was the "equivalent of a guilty plea").

24. 466 U.S. 648 (1984).

25. *Nixon*, 125 S. Ct. at 559 (quoting Unites States v. Cronic, 466 U.S. 648, 659 (1984); *see Cronic*, 466 U.S. at 658–59 (concluding that under certain narrow circumstances in which a defendant has been denied assistance of counsel entirely, a defendant need not satisfy the prejudice prong of *Strickland v. Washington* in order to succeed on an ineffective assistance of counsel claim); *see also* Strickland v. Washington, 466 U.S. 668, 687–96 (1984) (holding that to prove ineffective assistance of counsel a defendant "must show that counsel's performance was deficient" and that the deficiency prejudiced the defense to such a degree so "as to deprive the defendant of a fair trial").

26. *Nixon*, 125 S. Ct. at 559; *see Cronic*, 466 U.S. at 659 (stating that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable"). In the alternative, Nixon argued that Corin rendered ineffective assistance of counsel under *Strickland*. *Nixon*, 125 S. Ct. at 559 n.4.

27. *Nixon*, 125 S. Ct. at 559.

28. *Id.*; *see* FLA. R. CRIM. P. 3.850 (establishing the grounds and procedure for obtaining state postconviction relief).

29. 758 So. 2d 618 (Fla. 2000).

30. *Nixon*, 125 S. Ct. at 559; *see* Nixon v. Singletary, 758 So. 2d 618, 621 (Fla. 2000) [hereinafter *Nixon II*] (applying *Cronic*'s presumption of prejudice to Nixon's ineffective assistance of counsel claim); *Boykin*, 395 U.S. at 242–43 (concluding that reversible error occurred when the record did not show that the defendant voluntarily entered a guilty plea).

31. *Nixon*, 125 S. Ct. at 559. Justice Wells, dissenting in *Nixon II*, disagreed with the major-

court again remanded for an evidentiary hearing to determine whether Nixon tacitly consented to Corin's concession strategy.[32] On remand, the trial court found that Nixon consented to Corin's trial strategy, but the Supreme Court of Florida reversed and remanded for a new trial pursuant to its ruling in *Nixon v. Singletary*.[33] The United States Supreme Court granted certiorari to decide "whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt . . . automatically renders counsel's performance deficient, and whether counsel's effectiveness should be evaluated under *Cronic* or *Strickland*."[34]

II. Holding

The United States Supreme Court held that the Supreme Court of Florida erred when it equated Corin's trial strategy to an unauthorized guilty plea and when it applied *Cronic*'s presumption of prejudice.[35] The Court determined that Corin's concession strategy did not fall within *Cronic*'s narrow exception to the *Strickland* standard, the situation in which counsel fails " 'to function in any meaningful sense as the Government's adversary.' "[36] When counsel, as in *Nixon*, "informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent."[37] Rather, if defense counsel's trial strategy satisfies the *Strickland* test, the defendant will fail in his ineffective assistance of counsel claim.[38]

III. Analysis

Unlike the Supreme Court of Florida, the United States Supreme Court declined to equate Corin's defense strategy with a guilty plea.[39] The Court

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ity's application of *Cronic*. *Nixon II*, 758 So. 2d at 629 (Wells, J., dissenting). Wells concluded that Nixon's ineffective assistance claim should be governed by *Strickland* and that "[n]o fair reading of the instant record can lead to the conclusion that Nixon was 'denied any meaningful assistance at all.' " *Id.* at 634 (quoting Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984)).

32. *Nixon*, 125 S. Ct. at 559; *see Nixon II*, 758 So. 2d at 624–25 (deeming Corin's concession of guilt to be an abandonment of the defense absent explicit consent and remanding for an evidentiary hearing to determine whether Nixon expressly consented).

33. *Nixon*, 125 S. Ct. at 559–60; *see* Nixon v. State, 857 So. 2d 172, 176 (Fla. 2003) (reversing and remanding based on Nixon's ineffective assistance of counsel claim).

34. *Nixon*, 125 S. Ct. at 560; *see* Florida v. Nixon, 540 U.S. 1217, 1217 (2004) (granting certiorari).

35. *Nixon*, 125 S. Ct. at 561–62.

36. *Id.* at 562 (quoting *Cronic*, 466 U.S. at 666).

37. *Id.* at 563.

38. *Id.*

39. *Id.* at 561. The Court first presented a list of landmark cases establishing that the decision of whether or not to plead guilty resides ultimately with the defendant. *Id.* at 560. *See Strickland*, 466 U.S. at 688 (noting that defense counsel must consult with the accused regarding important

distinguished Corin's concession of guilt from the truncated proceeding characterized in *Brookhart v. Janis*[40] as " 'the equivalent of a guilty plea.' "[41] In *Brookhart*, defense counsel agreed to a "prima facie" bench trial in which the "[s]tate need only make a prima facie showing of guilt" and defense counsel "would neither offer evidence on petitioner's behalf nor cross-examine any of the State's witnesses."[42] Thus, counsel effectively waived the defendant's right to challenge the prosecution's case on the factual issue of guilt or innocence.[43] In contrast, Nixon's defense counsel held the State to its burden of proof, retained the right to cross-examine the prosecution's witnesses, and preserved appealable issues.[44] On these facts, the United States Supreme Court concluded that the "full presentation to the jury in Nixon's case [did] not resemble [the] severely abbreviated proceeding" that the *Brookhart* Court equated to a guilty plea.[45]

Further, the Court concluded that the Supreme Court of Florida's erroneous conclusion that Corin's strategy amounted to a constructive guilty plea resulted in its application of the wrong legal standard to determine whether defense counsel were ineffective.[46] Because the Florida court determined that Nixon did not explicitly consent to the "guilty plea," the court improperly presumed prejudice under the standard set forth in *Cronic*, which is applicable only when defense counsel " 'entirely fails to subject the prosecution's case to meaningful adversarial

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decisions and overall defense strategy); *Brookhart*, 384 U.S. at 6–7 (holding that defense counsel could not enter the "equivalent of a guilty plea" without the client's knowing and intelligent agreement). *But see* Taylor v. Illinois, 484 U.S. 400, 417–18 (1988) (concluding that the obligation to consult with the defendant does not require counsel to obtain consent for "every tactical decision").

40. 384 U.S. 1 (1966).

41. *Nixon*, 125 S. Ct. at 561 (quoting *Brookhart*, 384 U.S. at 7); *see Brookhart*, 384 U.S. at 6–7 (finding that defense counsel's agreement to a "prima facie" case was the "equivalent of a guilty plea").

42. *Brookhart*, 384 U.S. at 7.

43. *Nixon*, 125 S. Ct. at 561.

44. *Id.*; *see Nixon II*, 758 So. 2d at 631 (Wells, J., dissenting) (noting that Nixon's trial counsel "actively engaged in the trial, including conducting an extensive voir dire, objecting to photographs as unduly gruesome, and moving for a mistrial . . . . In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses[,] . . . introduced substantial documentary evidence, including school, institution, and psychological reports"). In its closing, the State acknowledged that "notwithstanding any concessions by defense counsel, the burden remained on the State to prove its case . . . beyond any reasonable doubt; what a lawyer says . . . is not evidence." Brief for Petitioner at 8, *Nixon* (No. 03-931).

45. *Nixon*, 125 S. Ct. at 561.

46. *Id.*

testing.' "[47] Corin's concession of guilt, the United States Supreme Court concluded, did not constitute such a complete failure.[48]

The Court limited this conclusion to the unique circumstances of the capital case, noting that in the face of overwhelming evidence of guilt, the best result may be the avoidance of a death sentence.[49] The Court acknowledged that the pursuit of that goal is hindered if defense counsel send conflicting messages to the jury: first, that the defendant did not commit the crime, and second, that he is remorseful or mentally impaired.[50] Thus, when deciding upon the best possible defense strategy, counsel must take into account both the guilt *and* penalty phases of the capital trial.[51] If defense counsel informs the defendant of a concession strategy and the defendant fails to respond, counsel may proceed subject to retrospective scrutiny under the *Strickland* standard.[52] If counsel's conduct satisfies *Strickland*, his assistance will not be found ineffective.[53]

IV. Application in Virginia

For the above reasons, the *Nixon* Court rejected the argument that admitting guilt, via concession in the opening and closing arguments, is the functional equivalent of changing the plea to guilty.[54] However, the Court only reached cases in which the lawyer explained the concession strategy to the defendant and received no reaction.[55] The *Nixon* decision maintained the *Strickland* requirement that defense counsel consult with his client regarding important trial decisions and strategies but declined to assert that defense counsel must also gain explicit consent before proceeding with a concession strategy.[56] The Court did not reach the question of whether counsel would be ineffective, under *Cronic* or *Strickland*, if he adopted a concession strategy like Corin's in defiance of his client's wishes.[57]

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47. *Id.* at 562 (quoting *Cronic*, 466 U.S. at 659); *see also* Bell v. Cone, 535 U.S. 685, 686–97 (2002) (noting that counsel's "failure must be complete" for a court to apply *Cronic*'s presumption of prejudice rather than *Strickland*'s two-pronged test for assessing ineffective assistance of counsel claims).

48. *Nixon*, 125 S. Ct. at 562.

49. *Id.* The Court contrasted this to a non-capital case, noting that "[a]lthough such a concession in a run-of-the-mine trial might present a close question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus." *Id.*

50. *Id.* at 563 (citing Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 708 (1991)).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Nixon*, 125 S. Ct. at 561.

55. *Id.* at 561, 563.

56. *Id.* at 563.

57. *See* November 2, 2004 Oral Argument of Irving L. Gornstein on Behalf of the United

Nixon also does not decide the case in which counsel fails to consult with the client before conceding guilt.

The *Nixon* Court impliedly lends support to the converse of Nixon's ineffective assistance of counsel claim: that a lawyer's ill-considered attacks on unassailable evidence of guilt may themselves constitute ineffective assistance. At the same time that the Court noted that counsel in a capital case "*may* reasonably decide to focus on the trial's penalty phase," the Court relied on the developing consensus of the capital defense bar that in the face of overwhelming guilt, a " 'run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt can have dire implications for the sentencing phase.' "[58] Thus, the "*may* reasonably decide" language transforms into a statement that defense counsel "should reasonably decide."

In other words, given the Court's reliance on these sources, *Nixon* suggests that this form of attorney error—presenting inconsistent guilt and penalty phase defenses—may rise to the level of ineffective assistance of counsel in the capital case with overwhelming evidence of guilt. Failure to concede guilt in a capital case—or, at least, quixotic attacks on overwhelming evidence of guilt—may, under narrow circumstances, be found unreasonable under *Strickland.* With this suggestion, the United States Supreme Court again acknowledged that "death is different" and that the unique and irrevocable consequences of the capital case require an equally unique consideration of defense strategies.[59]

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States as amicus curiae supporting the Petitioner at 19–20, Florida v. Nixon, 125 S. Ct. 551 (U.S. Dec. 13, 2004), at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-931.pdf (arguing that *Strickland,* and not *Cronic,* would still apply if the defendant did not consent).

58. *Nixon,* 125 S. Ct. at 563 (emphasis added) (quoting Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty,* 83 CORNELL L. REV. 1557, 1597 (1998)); *see* Lyon, *supra* note 50, at 708 (noting the jury's proclivity for giving the death penalty in the situation in which defense counsel attacks guilt and then also presents a "he is sorry he did it" mitigation).

59. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (citing Furman v. Georgia, 408 U.S. 238, 313 (1972)) (recognizing "that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice"); *see also* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting that because death is "qualitatively different," capital cases require "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment").