IN THE SUPREME COURT OF FLORIDA

NO. 75,583

JERRY WILLIAM CORRELL,

Petitioner,

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

RESPONSE TO AMENDED PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS

Respondent, Richard L. Dugger, files the following response to Correll's amended petition for extraordinary relief, requesting the petition be dismissed or summarily denied, and as grounds therefor states:

I. PROCEDURAL HISTORY

Correll was indicted for four counts of first degree murder September 10, 1985 (R 3820-21). The case proceeded to jury trial before the Honorable J. James Stroker January 27, 1985 through February 5, 1985. A change of venue had been granted and the trial was moved from Orlando to Sarasota, Correll was convicted on all four counts, the jury returned an advisory sentence of death on all four counts, and the trial court imposed a sentence of death for all four counts on February 7, 1985 (R 4095-98).

Correll appealed *his* convictions and sentences to the Florida Supreme Court, raising sixteen claims of error. Correll's convictions and sentences were affirmed. Correll v. *State*, 523 So.2d 562 (Fla. 1988). Certiorari was denied by the United States Supreme Court on October 3, 1988. Correll v. Florida, 109 S.Ct. 183 (1988). On January 10, 1990, Governor Martinez signed a death warrant, and Correll's execution is currently scheduled for March 14, 1990.

On February 22, 1990, after receiving a ten day extension of time, Correll filed his 3.850 motion for post-conviction relief raising 21 claims, The motion was summarily denied by the circuit court on March 7, 1990. On or about February 22, 1990, Correll filed a petition for extraordinary relief, for a writ of habeas corpus *in* the Florida Supreme Court, raising fifteen claims.

II. FACTS

Jerry William Correll was convicted of the first-degree murders of his ex-wife, Susan Correll, her sister, Marybeth Jones, their mother, Mary Lou Hines, and the Correll's five-year-old daughter, Tuesday. The fallowing facts were found by the Florida Supreme Court on direct appeal:

> On the morning of July 1, 1985, the bodies *of* the four victims were discovered in Mrs, Hines's home in Orlando. All had been repeatedly stabbed and died from massive hemorrhages; the three older victims had defensive type wounds on their hands. A sheriff's department investigator was called to the crime scene and approximately an hour and a half after his arrival encountered

> Jerry Correll there. Correll was asked for a statement and subsequently went to the sheriff's department where he gavs first an oral and then a tape recorded statement. In his statement, Correll indicated that on the night of the murders he had been drinking and smoking marijuana with a woman, who later drove with him to Kissimmee. While at the sheriff's department, Correll consented to having his fingerprints taken and having pictures of the scratches, cuts and bruises on his hands and forearms taken. The next day, Correll was again interviewed and subsequently arrested. After being advised of and waiving his Miranda rights, Correll gave *another* statement after his arrest. Several. bloody fingerprints and palm prints found at the murder scene were later matched to Correll's. Evidence that he had previously threatened to kill his ex-wife was also admitted. In addition, he could not be ruled out as the person whose bloodstains were found at the scene and whose sperm was found in Susan Correll's vagina.

Correll v. State, 523 So.2d 562 (Fla. 1988).

At the penalty phase, Correll presented the testimony *of* his mother, Dora Correll, his brother, Charles Correll, his sister-in-law, Shirley Correll, Dr. Michael Radelet, and himself. Dora Correll testified that Jerry was a happy-go-lucky child who loved to fish, swim and play ball (R 1893). Jerry had a good relationship with his father and took his death very hard (R 1894). Mrs. Correll got along with Jerry very well, and he was going to paint her house (R 1894). Jerry loved his daughter dearly (R 1895).

Charles Correll has never seen Jerry violent (R 1897). Jerry helped him build a fence *in* his yard, and brought Tuesday over on Charles' birthday after Jerry had taken her to the store to buy Charles a card (R 1897). Charles built his house on his mother's property, so he was living right next door to Jerry (R 1896).

Shirley Correll, Charles' wife, has known Jerry around eight years, and seen a lot of him for the past three (R 1998). Jerry used to go over to their house, and once brought hi8 girlfriend to a barbecue there (R 1898-9). Jerry usually had Tuesday with him, and he would take her to the park or swimming or visiting (R 1899). She knows that Jerry has been involved in correspondent Bible studies, and these have been beneficial to him (R 1903-4). Dr. Radelet, *a* sociology professor, testified as to Correll's future non-dangerousness (R 1925-28).

Correll testified that he had a pretty normal childhood, playing football, baseball and stuff like that (R 1984). He moved to Orlando in the ninth grade, but did not graduate from high school as he left *to* work (R 1935). He was real close to his father (R 1936). He began working in construction when he was seventeen, worked as a painter, and worked at a boat company *for* about five years (R 1937). He worked at two other boat companies for about a year each (R 1938). He also worked at Disneyworld for two years (R 1938 . He also got along real good with his mom (R 1939).

Correll started drinking when he was seventeen or eighteen, and drank on and off since then (R 1939). He first smoked *pot*

when he was seventeen, and also did crystal meth, cocaine, and various other drugs that were around at the time (R 1940). He did drugs on and off until the time he was arrested, but not on a regular basis (R 1940). Correll began skipping school, and his grades were pretty poor his lest year (R 1941). He went to church a lot, with his next oldest brother (R 1941). Though he had stopped going, he explained how he became reacquainted with God while in jail (R 1941-45).

Correll met Susan while he was working at Saber Marine, when she was about sixteen and he was 22 (R 1945). They lived together for about five years before they got married (R 1946). Tuesday was born about ten months after they married (R 1947). Correll and Susan attended Lamaze classes together and he was there when Tuesday was born (R 1950). The relationship began to break up when Correll was working a lot of overtime and Susan thought he was seeing other people (R 1947). Correll was doing cocaine, Susan was drinking heavily, and they just split up (R 1947). Susan was leaving Tuesday alone, so Correll asked Mrs. Hines to take care of her (R 1948). Correll and Tuesday did a lot of different things together (R 1948). Correll end Susan moved back in together quite a few times, then he moved into her mother's house and she (Susan) moved back in there about a month later (R 1949). They all lived there about eleven months (R 1949).

The jury recommended death by a vote of 9-3 for the murder of Susan Correll, and by a vote of 10-2 for the other three murders (R 2009-10). The trial court imposed four death

sentences, finding: that the murder of Susan Correll was committed during the course of a sexual battery, was heinous, atrocious and cruel, and that Correll had previously been convicted of a violent felony; that the murder of Mary Beth Jones was committed during the course of a robbery, was committed for the purpose of avoiding a lawful arrest, and that Correll had previously been convicted of a violent felony; that the murder of Tuesday Correll was especially heinous, atrocious and cruel, was committed for the purpose of avoiding arrest, and Correll had previously been convicted of a violent felony; that the murder of Mary Lou Hines was heinous, atrocious or cruel, and that Correll was previously convicted of a violent felony (R 4095-98).

III. GROUNDS ALLEGED FOR HABEAS CORPUS RELIEF

Habeas corpus is not to be used for additional appeals on issues that could have been, should have been, or were raised on direct appeal or in motions filed under Florida Rule of Criminal Procedure 3.850 or which were not objected to at trial. Clark v. Dugger, 15 F.L.W. S50 (Fla. February 1, 1990). A side by aide comparison of the instant petition with Correll's 3,850 reveals that all of the claims now presented were presented in the 3.850 motion, virtually word for word. Compare Claim I with 3.850 Claim II; Claim II with 3.850 Claim IV; Claim III with 3,850 Claim IX; Claim IV with 3.850 Claim X; Claim V with 3.850 Claim XI; Claim VI with 3.850 Claim XII; Claim VII with 3.850 Claim XIII; Claim VIII with 3.850 Claim XIV; Claim IX with 3.850 Claim XV; Claim X with 3.850 XVI (thia habeas claim even states that 3.850 relief is appropriate); Claim XI with 3.850 Claim XVII;

Claim XII with 3.850 Claim XVII; Claim XIII with 3,850 Claim XIX Claim XIV with 3,850 Claim XX; Claim XV with 3.850 Claim XXI. The presentation of these claims in the instant petition is clearly improper. Id.

Claims I. II, VI, VII, VIII, and IX also contain an allegation that appellate counsel was ineffective for failing to raise these claims on direct appeal. A6 a general rule, claims alleging ineffective assistance of appellate counsel are cognizable on a petition for writ of habeas corpus. Johnson v. Wainwright, 463 So.2d 207 (1985). However, Respondent contends that Correll's allegations of ineffective assistance of appellate counsel are legally insufficient.

A person seeking relief on the basis of ineffective assistance of appellate counsel must first demonstrate that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine the outcome, Id. at 209. A8 to each of the claims in which ineffective assistance of appellate counsel is alleged, the argument is as follows:

> Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and, prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Lockett, Eddings, supra. It virtually "leaped

> out upon even a casual reeding of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This claim of per se error required no elaborate presentation--counsel had only to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.
>
> No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So.2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Correll of the appellate reversal to which she was constitutionally entitled. See Wilson v Wainwright, supra, 474 So.2d at 1164-65; Matire, supra. Accordingly, habeas relief must be accorded now,

See petition, pp. 14, 24-25, 50-51, *55-60*, 63-64, 76.

Such conclusory allegations fall far short of facially indicating that the specific act or omission complained of was a substantial and serious deficiency falling measurably below the standard of competent counsel, and that such acts or omissions were substantial enough, when considered under the circumstances of the case, to prejudice defendant to an extent likely to have affected the outcome of the court proceeding. Strickland v. Washington, 466 U.S. 664 (1984); Johnson, supra. Consequently, summary denial or dismissal is appropriate. Out of an abundance of caution, respondent will briefly address each ineffectiveness claim.

Claim I

Apparently the allegation is that appellate counsel was ineffective for failing *to* argue that Correll's right to confront

the witnesses against him was denied when the court limited the cross-examination of the state's witnesses. It seems that appellate! counsel was supposed to argue that the trial court erred in not letting Correll present his theory of defense during the state's case-in-chief, when Correll did not even present that theory during his case.

Appellate counsel cannot be ineffective for failing to raise a claim that is without merit, and from a tactical standpoint it is more advantageous to raise only the strongest points on appeal. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). While appellate counsel's strategy is often difficult to ascertain, in the instant case it can be because appellate counsel initially filed a brief covering every conceivable issue, and was ordered by this court to edit,. revise and resubmit it. See appendix. While this, issue was presented in that first brief, it was omitted from the revised brief, as appellate counsel obviously concluded, and rightly so, that it had no merit whatsoever.

The testimony counsel attempted to elicit from Ms. Valentine on cross-examination concerning Susan Correll's drug use had no impeachment value so it was not appropriate cross-examination. It had nothing to do with any "infirmities" in Valentine's testimony nor did it show any bias on her part which would have called into question the reliability of her testimony. Davis v. Alaska, 415 U.S. 308 (1974). Since there was no error in the ruling below, appellate counsel was not ineffective for claiming there was. Even if it was error, it would have been

harmless at worst, as Correll neither attempted to nor offered evidence of Susan's alleged drug activities in his case-in-chief, and appellate counsel is not ineffective for failing to argue a point which, even if error, was harmless, Duest v. Dugger, 15 F.L.W. S41 (Fla. January 18, 1990), and appellate counsel certainly cannot be faulted for not arguing against a ruling the trial court was never asked *to* make,

As to Henestofel's testimony, Correll was permitted to impeach it. After Henestofel denied purchasing cocaine, Correll called as a witness Charlie Wood, who testified that Henestofel had purchased cocaine that night and that he kept a small amount of *it* "to turn Susie on with"(R 1735-36). This claim is clearly without merit.

Claim II

Apparently the allegation is that appellate counsel was ineffective for failing to argue that the intense security measures implemented during Correll's trial in the jury's presence abrogated the presumption of innocence, diluted the state's burden to prove guilt beyond a reasonable doubt, and injected misleading and unconstitutional factors into the trial and sentencing proceedings, in violation of the fifth, sixth, eighth and fourteenth amendments *to* the United States Constitution.

First, while Correll refers to ''intense security measures", the record demonstrates that the only security measure implemented was the use of leg shackles. Second, the trial court conducted an inquiry into the necessity of the shackles, was

aware of the fact that Correll had been involved in an incident at the Orange County Jail where he had fashioned a comb into a knife to use in an escape attempt, and was advised by court personnel that they considered Correll to be a security risk. Third, Correll was charged with four counts of first degree murder. Fourth, steps were taken to minimize any opportunities for the jurors to see the shackles. Fifth, while the record demonstrates that defense counsel was concerned, very early during voir dire, that some of the prospective jurors may have observed the shackles, no inquiry was made of those jurors, nor were any of them challenged for cause on the basis of having seen Correll in shackles, and in fact four of those jurors who came into the courtroom prior to *that* time remained on the jury.

This court reviews shackles claims on the standard *of* the trial court's discretion in ensuring the security and safety of the proceeding. Stewart v. State, 549 So.2d 171 (Fla. 1989). From its "lofty stance of appellate review" it will generally not second-guess the considered decision of the trial judge, Dufour v. State, 495 So.2d 154, 162 (Fla. 1986). As stated, appellate counsel cannot be deemed ineffective for failing to raise a point that has little merit. Suarez, supra. Nor can appellate counsel be deemed ineffective for failing to raise an issue where controlling case law is adverse to his position. Herring v. Dugger, 528 So.2d 1176 (Fla. 1988). Further, this court has found that a defendant cannot show prejudice where the decision of the trial judge was within the parameters of his discretion. Tompkins v. Dugger, 549 So.2d 1370 (Fla. 1989)(admission of photographs).

In the instant case, as in Dufour, supra, there had been an inquiry, the trial court found the shackles necessary *for* security reasons, and the court attempted to minimize any prejudice accruing to Correll by placing something in front of the table in order to hide the shackles. Consequently, appellate counsel cannot be faulted for failing to allege as error a ruling that was within the trial court's discretion and where the controlling case law was adverse *to* his position. Herring, supra; Tompkins, supra.

Claim VI

Apparently the allegation is *that* appellate counsel was ineffective for failing to argue that the trial court erred in refusing to permit mitigating evidence to be presented by the defense except through testimony of the defendant, thereby forcing him to testify. The underlying contention is that the trial court "virtually" forced Correll to choose between testifying in his own behalf or not having certain evidence come before the jury at all when it sustained the state's objection to the admiasion of a letter written by Correll to his sister-in-law, on the basis that the state had no way to cross-examine the Letter, which made reference to Correll's new-found spiritual relationship with his God,

No such argument was ever presented to the trial court, and appellate counsel cannot be faulted for failing to raise a claim that has not been preserved. Suarez v. Dugger, 527 So.2d 190 (Fla. 1988). Nor can appellate counsel be faulted for failing to raise a claim that is without merit, as the instant one surely

is. Atkins, supra. Correll's sister-in-law was permitted to testify concerning Correll's religious activities-she just was not permitted to read the letter, which at best would merely have been cumulative. Further, respondent fails to see how a statute which permits the state to present hearsay evidence as long as the defendant has an opportunity *to* rebut it also permits the introduction of irrebuttable hearsay by the defendant. Finally, the record demonstrates *that* Correll was not forced to testify, but planned to all along as he did not just testify about the letter.

Claim VII

Apparently the allegation is that appellate counsel was ineffective for failing to argue that the prosecutor's arguments to the jury concerning impermissible nonstatutory aggravation pervaded Correll's trial such that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the eighth and fourteenth amendments of the United States Constitution.

Correll states that the prosecutor in his closing argument on penalty referred to Correll's lack of remorse by asking the jurors to recall the testimony of Diane Payne. Petition, p. 53. This atatement was actually made during guilt phase closing. And even though Correll has stated that no procedural bar precluded review of this issue, the record demonstrates that there was no objection below (R 1814), and Correll is obviously aware of this as he argued on 3.850 that counsel was ineffective for failing to do so. Since the issue was not preserved and the comment was not

even made during the penalty phase, appellate counsel cannot be faulted for not arguing it. Suarez, supra; Atkins, supra.

Claim VIII

Apparently the allegation is that appellate counsel was ineffective for failing to argue that the trial court's failure to find the mitigating circumstances clearly set out in the record violated the eighth and fourteenth amendments.

Appellate counsel did argue this on direct appeal, *see* Initial Brief pp. 106-8, and this court specifically found no error with respect to the lack of mitigating factors. Correll, supra at 568.

Claim IX

Apparently the allegation is that appellate counsel was ineffective for failing to argue that the trial court's denial of the defense requested penalty phase jury instruction informing the fury of its ability to exercise mercy deprived Correll of a reliable and individualized capital sentencing determination, in violation of the eighth and fourteenth amendments.

Appellate counsel was not deficient for raising this claim as it is without merit. Smith v. State, 15 F.L.W. S81 (Fla. February 15, 1990).

CONCLUSION

For the aforementioned reasons, respondent requests this court deny the instant petition in all respects. Most *of* the claims are barred due to their improper presentation, and the remaining claims alleging ineffective assistance of appellate counsel are insufficiently pled. Even if this court determines

that the allegations are legally sufficient, Correll has failed to demonstrate that he merits relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Amended Petition for Extraordinary Relief, for a Writ of Habeas Corpus has been furnished by U.S. Mail to Jerome H. Nickerson, Assistant Capital Collateral Representative, Office of the Capital Collateral Representative, 1533 south Monroe Street, Tallahassee, Florida 32301, this 8th day of March, 1990,

Of Counsel