IN THE SUPREME COURT OF FLORIDA

JERRY WILLIAM CORRELL,

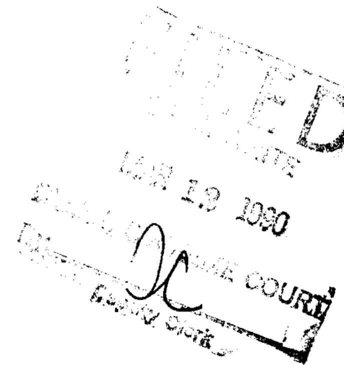
Appellant,

v. CASE NO. 75,664

STATE OF FLORIDA,

Appellee.

______________________________/



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STATEMENT OF THE CASE AND FACTS

Since this brief is being prepared in anticipation of appellant's brief, appellee sets forth the following statement of the case and facts upon which it will rely:

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. Following a response by the state, the trial court summarily denied relief on March 7, 1990.

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 following 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 gave 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 i his yard, nd 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 his 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 last 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 and 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).**

Appellee has also attached a copy of the pretrial psychiatric evaluation done on Correll by Dr. Pollack.

SUMMARY OF ARGUMENT

Claim **I:** The trial court properly denied the motion without an evidentiary hearing as Correll failed to allege specific facts which are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel.

Claim **11:** The claim that counsel was rendered ineffective by judicial rulings and prosecutorial improprieties is procedurally barred as it involves matters which either were or could and should have been raised on direct appeal, even though it is cast in the guise of ineffective assistance of counsel.

Claim **111:** The claim that involves an alleged violation of Correll's right to confront witnesses is procedurally barred as it is a matter which could and should have been brought on direct appeal.

Claim **IV:** Correll has failed to demonstrate that he received ineffective assistance of counsel at the guilt phase of his trial. Even if counsel possessed information that the locks on the doors to Mrs. Hine's home had been changed such information would not have changed the outcome of this trial as the means by which Correll obtained entry was not an issue. Correll has not demonstrated that counsel's performance was deficient in failing to set for hearing a moot motion for a bill of particulars for information counsel already possessed, nor can he demonstrate prejudice as there is no indication that such motion would have been granted, and if so, whether the response would have contained the date alleged by Correll. Counsel was not ineffective for failing to establish a chain of custody for the

lack of hair evidence as counsel was able to argue this point to the jury in closing anyway. Counsel was not ineffective for failing to request an intoxication instruction as the theory of defense was that someone else committed the murders. Counsel was not ineffective for failing to challenge pretrial the admissibility of the electrophoresis tests as he objected and the point was thoroughly addressed on appeal. Counsel was not ineffective for failing to move to suppress the statements Correll made to Lawrence Smith as Correll has failed to demonstrate that he was a government informant or how counsel was supposed to know this and the record refutes such allegations.

Claim **V:** The claim that the use of shackles perverted the judicial process is procedurally barred as it should have been raised on direct appeal. Even if cognizable it is without merit as the trial court conducted an inquiry and did not abuse its discretion in determining, based on the circumstances, that they were necessary to ensure the security of the proceeding and steps were taken to minimize prejudice.

Claim **VI:** The claim that exclusion of evidence material to Correll's theory of defense was fundamental error is a rehash of claims **11, 111,** and parts of IV which are procedurally barred and without merit, so fundamental error certainly did not occur.

Claim VII: The claim that Correll was denied his right to confront and cross-examine witnesses and his right to effective assistance of counsel because a conflict of interest existed is procedurally barred as it was raised on direct appeal.

Claim VIII: Correll's contention that he received ineffective assistance of counsel at the penalty phase because counsel failed to adequately investigate is refuted by the record. The record demonstrates that counsel conducted a thorough investigation, and the information proffered in post-conviction proceedings is contrary to the original statements of Correll and his family. Further, Correll cannot show prejudice, as life sentences would not have been imposed in any event.

Claim IX: The claim that the mental health expert appointed to evaluate Correll failed to conduct a professionally competent evaluation is procedurally barred as it could have been raised on direct appeal.

Claim X: The claim that the sentencing jury did not receive the limiting construction of the prior violent felony aggravating circumstance is procedurally barred as it could have been raised on direct appeal.

Claim XI: The claim that the judge and jury considered and relied upon victim impact evidence is procedurally barred as there was no objection below.

Claim XII: The claim that the jury did not receive a limiting construction of the committed during the course of a felony aggravating circumstance is procedurally barred as it should have been raised on direct appeal.

Claim XIII: The claim that the trial court erred in refusing to permit mitigating evidence to be presented by the defense except through the testimony of the defendant is procedurally barred as it should have been raised on direct appeal.

Claim XIV: The claim that Correll's trial resulted in the arbitrary and capricious imposition of the death penalty is procedurally barred as it should have been raised on direct appeal.

Claim XV: The claim that the trial court failed to find mitigating circumstances clearly set out in the record is procedurally barred as it was raised on direct appeal.

Claim XVI: The claim that the trial court erred in denying the defense's requested penalty phase jury instruction informing the jury of its ability to exercise mercy is procedurally barred as it should have been raised on direct appeal.

Claim XVII: The claim that the penalty phase jury instructions shifted the burden of proof is procedurally barred as there was no objection below and the issue was not raised on direct appeal.

Claim XVIII: The claim that the sentencing jury was improperly instructed on the especially heinous, atrocious, or cruel aggravating factor is procedurally barred as it should have been raised on direct appeal.

Claim XIX: The claim that the cold, calculated, and premeditated factor was improperly applied is procedurally barred as it should have been raised on direct appeal.

Claim XX: The claim that the jury was repeatedly misled by instructions and arguments which diluted their sense of responsibility is procedurally barred as it should have been raised on direct appeal. Counsel's effectiveness cannot be implicated on the basis of this claim.

Claim XXI: The claim that the death sentence rests on an automatic aggravating factor is procedurally barred as it should have been raised on direct appeal.

Claim XXII: The claim that the application of Rule 3.851 and the present death warrant violate Correll's rights to due process, equal protection and access to the courts is without merit.

ARGUMENT

CLAIM I

THE CIRCUIT COURT PROPERLY DENIED CORRELL'S MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING

No evidentiary hearing was required in this case. Correll failed to allege facts below which, if proven, would entitle him to relief and the files and records which are before this court conclusively show that he is not entitled to relief. See, Agan v. State, 530 So.2d 1254 (Fla. 1987). The majority of issues raised below should have been raised on appeal. Francis v. State, 529 So.2d 670, 672 n. 2 (Fla. 1988). A defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant. Kennedy v. State, 547 So.2d 912 (Fla. 1989).

CLAIM II

THE TRIAL COURT PROPERLY FOUND PROCEDURALLY BARRED THE CLAIM THAT COUNSEL FOR MR. CORRELL WAS RENDERED INEFFECTIVE AT BOTH THE GUILT-INNOCENCE AND PENALTY PHASES OF MR. CORRELL'S TRIAL IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS; ALTERNATIVELY, IT IS WITHOUT MERIT.

Correll contended that judicial rulings and prosecutorial improprieties impeded counsel's efforts and rendered him ineffective, as he was prevented from introducing highly compelling evidence essential to a viable defense. The rulings

Correll took issue with are when counsel was precluded from eliciting, on cross-examination of a state witness, the fact that Susan Correll had smoked marijuana on the night she was murdered, and when the state was permitted to redact from Correll's statement any reference to Susan's drug activities. Correll further contended that the trial court rendered counsel ineffective during the penalty phase proceedings by requiring counsel to proceed directly into the penalty phase despite repeated requests by the defense for a continuance to prepare and transport witnesses from Orlando to Sarasota.

Although cast in the guise of ineffective assistance of counsel, this claim involves nothing more than a dispute over several of the trial court's rulings, two of which were raised on direct appeal (redacting a portion of Correll's statement and denial of a motion for continuance of the penalty phase), and another which could and should have been raised on direct appeal (the preclusion from eliciting, on cross-examination of a state witness, the fact that Susan Correll smoked marijuana on the night she was murdered). Post-conviction relief is not authorized for issues which were originally raised on direct appeal, Clark v. State, 460 So.2d 886, 888 (Fla. 1984), nor are issues that could have been raised on direct appeal cognizable on collateral attack. Mikenas v. State, 460 So.2d 359 (Fla. 1984). This court has also refused to allow the use of different arguments to relitigate the same issues which were decided on direct appeal. Quince v. State, 477 So.2d 535, 536 (Fla. 1985). It is improper to attempt to raise claims not cognizable on their merits by casting them in the guise of ineffective assistance of counsel. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). Consequently, the instant claim is procedurally barred.

Even if this claim was cognizable, it is clearly without merit. This court has already determined that the statement was properly redacted and that there was no error in the denial of counsel's request for more time to prepare for the penalty phase. Correll, supra at 564, 566. The same reasoning that applied to the redaction of the statement applies to the cross-examination of Ms. Valentine - the matters which Correll sought to bring out were irrelevant. Id. at 566. The state is not required to present Correll's defense, and just as with the redacted portion of the statement, even Correll must not have believed it was of great significance because he did not seek to introduce that material in his case-in-chief. A review of the record demonstrates just how insignificant this testimony was, for while Correll is now attempting to portray two of his victims as drug dealers, even the deposition testimony he quotes to support these allegations in fact refutes them.

Correll alleged that Ms. Valentine's deposition contains valuable information regarding Susan Correll's extensive drug dealing, but all that it reveals is that Susan used pot and speed and, that she never sold drugs except for a long time ago when she first married Correll and he dealt pot and she went along with it. Similarly, the fact that Susan may have smoked marijuana on the night she was murdered certainly does not go to show she was some drug kingpin. Correll also alleged that Mary Beth Jones was engaged in drug sales, as evidenced by Wendy Garrett's deposition, which in fact is Robert Garrett's deposition, and which in fact reveals nothing more than that Mary

Beth Jones sold pot five or six years ago. (R 2463-64). Further, the rest of the depositions refute the allegations that Susan sold drugs or that Mary Beth even used drugs, much less sold them.

Wendy Garrett actually stated that she never saw Mary Beth use or sell drugs, though she did see Susan use drugs that she had purchased from Garrett's ex-husband. Wendy Garrett did not know if Susan ever sold drugs (R 2694-96, 2699-700). Harold Witt, Gina Caldwell, Richard Schardt, and Ronald Frederick all stated that Mary Beth never used drugs (R 2590, 2628, 2755, 2719), while Donna Valentine stated that Mary Beth may have smoked marijuana once in her life, and did not deal. While there was general agreement among the deponents that Susan used drugs, there was no one who was aware that she was selling drugs (R 2592-93, 2628, 2694-96, 2756-57, 2799). Indeed, if Susan was such a high-level dealer, it is most unlikely that she would be purchasing or relying upon others, such as Henestofel, for small amounts of drugs.

Correll's claim as to ineffectiveness at the penalty phase due to lack of a continuance is legally insufficient as well as procedurally barred. Correll has alleged nothing that additional time would have revealed, and thus cannot demonstrate that confidence in the outcome has been undermined. There was no interference with Correll's efforts to present a defense. The simple fact is that such defense did not exist.

CLAIM III

THE TRIAL COURT PROPERLY FOUND PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS DENIED WHEN THE COURT LIMITED THE CROSS-EXAMINATION OF THE STATE'S WITNESSES; ALTERNATIVELY, IT IS WITHOUT MERIT.

Correll contended that his rights to present a defense and to confront and cross-examine the witnesses against him were denied when trial counsel was precluded from introducing evidence of Susan Correll's drug use and the theory of defense that this was a "drug deal gone bad". This claim includes the same ruling as in claim I, regarding the cross-examination of Donna Valentine, as well as an allegation that defense counsel was incapable of impeaching the testimony of Richard Henestofel when he denied purchasing cocaine the night of the murders and sharing it with Susan Correll, as this alleged impeachment again would have established Susan's involvement with drugs and established a viable defense.

Direct appeal is the proper time to allege a violation of confrontation rights, see Mills v. State, 476 So.2d 172 (Fla. 1985), and as this claim could and should have been raised on direct appeal it is procedurally barred. Mills v. Dugger, No. 75,037 (Fla. March 1, 1990); Mikenas v. Dugger, 460 So.2d 359 (Fla. 1984). Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989), provides no basis for bringing this claim, as that involved a claim under Booth v. Maryland, which this court determined is to be applied retroactively where there was an objection below. Jackson has no application to the instant claim.

Even if this claim was cognizable, it is without merit. Correll was never prevented from presenting a "drug deal gone bad" defense; he apparently chose not to do so, for as stated under Point 11, supra, no such defense existed. Nor was Correll denied his right to confront and cross-examine any witnesses. A criminal defendant states a violation of the Confrontation Clause:

> by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors... could appropriately draw inferences relating to the reliability of the witness.'

Delaware v. VanArsdall, 475 U.S. 673 (1986), quoting Davis v. Alaska, 415 U.S. 308 (1974). The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose the infirmities in a witness' testimony through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony. Delaware v. Fensterer, 474 U.S. 15 (1985).

Correll alleged that the trial court refused to permit him to go into areas of cross-examination that would implicate Susan in any drug use, **see** 3.850 p.40, but this is not the type of testimony that the Confrontation Clause requires on cross-examination. It has nothing to do with any "infirmities" in Valentine's testimony nor does it show any bias on the part of the witness which would call into question the reliability of the witness. In other words, it had no impeachment value, and thus was not "appropriate cross-examination." VanArsdall, supra. Even if it was error to preclude such cross-examination, though it clearly was not, it would have to be harmless at worst. **Id.** at 685. As stated under Point 11, supra, Correll offered no evidence of Susan's alleged drug activities in his case-in-chief,

no doubt because there was none other than Correll's own statement, which as demonstrated, was subject to thorough impeachment.

Correll also alleged that the defense was incapable of properly impeaching the testimony of Richard Henestofel when he denied purchasing cocaine Sunday evening and wanting to share it with Susan that night. Correll did not explain how he was prevented from doing this, and the record demonstrates that the page references actually are attempted impeachment. Correll in fact was permitted to impeach this testimony when he called as a witness Charlie Wood, and Wood testified that Henestofel had purchased cocaine that night and that Henestofel kept a small amount of the cocaine "to turn Susie on with"(R 1735-36). Such testimony clearly refutes Correll's allegations that he was precluded from presenting such testimony, and once again is somewhat inconsistent with the theory that the residence on Tampico Drive was a drug haven, as such a serious user and seller of drugs would no doubt have little use for less than a half a gram of cocaine.

CLAIM IV

THE TRIAL COURT PROPERLY FOUND THAT CORRELL WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL.

Correll first reargued claims I and 11. He next alleged **six** specific errors and omissions by defense counsel: 1) failure to utilize known evidence in support of the defense of reasonable doubt, specifically, that defense counsel had obtained and was in possession of information that would have neutralized testimony regarding Correll's possession of house keys; 2) failure to obtain a hearing and ruling on the motion for a statement of particulars in order to tie the state to a specific time; **3)**

failure to establish a chain of custody for the introduction of exculpatory evidence, i.e., none of the hair samples recovered from the house could be matched to Correll; 4) failure to obtain an instruction on voluntary intoxication; 5) failure to challenge pretrial the validity of electrophoresis process; 6) failure to move to suppress statements Correll made to a fellow inmate, as he was allegedly working as an informant.

Correll began by regurgitating the allegations set forth in claims I and 11, which as already has been demonstrated, are procedurally barred and without merit. Correll's allegations of ineffective assistance are likewise without merit, as will be demonstrated shortly. Since these allegations are either refuted or not supported by the record, or insufficient, an evidentiary hearing was unnecessary.

1. Failure to utilize known evidence in support of the defense of reasonable doubt

Correll contended that counsel was ineffective because he had information that the locks on Mrs. Hines' house had been changed and did not use it to refute the state's inference that Correll used keys that he had to obtain entry. Such evidence could have demonstrated that a forced entry was required and supported Correll's theory that someone else committed the crimes, or could have shown that entry was consensual and thus at odds with the state's theory that Susan was afraid of Correll.

To prevail on a claim of ineffectiveness, one must show both substandard performance and prejudice caused by that performance. Strickland v. Washington, 466 U.S. 668 (1984). The court must decide whether the identified acts or omissions were outside the wide range of professionally competent assistance, and if so, whether there is a reasonable probability that the

outcome would have been affected. Id. A defendant must demonstrate both substandard performance and prejudice. Id. Correll has shown neither.

The means by which Correll obtained entry into the house was certainly not a key issue in this case, and Correll's allegations are inconsistent within themselves. The fact is, there was no evidence of forced entry into the house, so this evidence would hardly support the theory that there was a forced entry. Further, the theory of a consensual entry is not at all at odds with the State's theory, for even though Susan may have been afraid of Correll, the evidence indicated that he was a frequent visitor at the home, his daughter lived there, and he himself had lived there until just a few weeks before the murders. Correll could easily have been let in the house, as he had been on numerous other occasions, keys or no keys. Further, the record demonstrates that counsel knew the locks had apparently been changed, as evidenced by Henestofel's deposition, but it appears that there was some doubt as to whether or not the lock on the Florida room, where Correll stayed when he lived there, had been changed (R 2810). This alleged omission on the part of counsel certainly would not have changed the outcome of the case, so Correll is entitled to no relief. Strickland, supra.

2. Counsel's failure to obtain a hearing and ruling on the motion for statement of particulars

Correll alleged that if counsel had noticed his motion for statement of particulars and obtained a bill in response that the murders as alleged by the State in the indictment were committed

on the 30th of June Florida law would have required the State's proof to conform rather than deviate from the offense date of June 30. This claim is speculative at best, and devoid of merit. Appellee would first point out that the motion for statement of particulars was filed a month before the indictment was returned in the instant case (R 3800, 3820-21). It must also be remembered that extensive discovery was conducted in this case, so counsel was well aware of the time frame that the state would be proving. It certainly cannot be said that counsel was deficient in failing to set for hearing a moot motion to obtain information which he already knew. In light of all the information known to defense counsel, it is not even a foregone conclusion that such motion would have been granted, as such a statement was not even needed, and the court shall order one only when the indictment or information upon which the defendant is to be tried fails to inform the defendant sufficiently to enable him to prepare his defense. Fla.R.Crim.P. 3.140(n).

Nor can Correll demonstrate prejudice. Correll can only speculate that the motion would have been granted, and further, that such statement would have contained the date he now alleges. Indeed, had counsel pursued this issue, it no doubt would have alerted the state that there may be some discrepancy that it should immediately rectify, since it was quite obvious not only to defense counsel, but the metropolitan Orlando area, exactly when these murders occurred. Further, Correll has not even alleged that he was hampered in any way in the preparation of his defense. This court has recently held that time is not

ordinarily a substantive part of an indictment or information and there may be a variance between those alleged and those proved at trial. Tingley v. State, 549 So2d 649 (Fla. 1989). All parties knew the time frame to be proved, and Correll's defense was tailored to it. Correll has not demonstrated that counsel's performance was deficient, and his allegations of prejudice are speculative at best. He is entitled to no relief. Strickland, supra.

3. Counsel's failure to establish a chain of custody for the introduction of exculpatory physical evidence

No hair consistent with Correll's was found at the scene, and Correll contended that counsel's failure to establish a chain of custody for such lack of evidence rendered counsel's performance ineffective. A court considering a claim of ineffectiveness need not make a specific ruling on the performance component of the test when it is clear there has been no prejudice, and it certainly is not present in this claim. Such evidence was before the jury and argued by the defense in closing. Defense counsel specifically argued to the jury:

> Oh, oh, yes, one thing. The hair. This picture of a grieving man was taken on the 1st of July of 1985, by the police. Look at the length of his hair. It comes all the way down to his shoulders.
>
> The prosecution collected a lot of hair. They talked about it. They collected hair samples. They went over the bodies initially to get hair samples. David Baer had to wait to do some of his testing because they were taking hair samples off of things. There's no hair in evidence here. There's no expert coming in and saying that they found Jerry Correll's hair.

> Why not? Because no expert is going to say that.
>
> And if he had been in a fight with four people fighting for their lives, with hair that long, maybe they didn't pull it out, but I know if you have long hair, it's going to fall out in that kind of a brutal, fighting struggle. They didn't find any of his hair at all.

(R 1806). Correll would have been in no better position had a chain of custody been established, thus prejudice cannot be demonstrated. Strickland, supra.

4. Counsel's failure to obtain an instruction on voluntary intoxication

Correll contended that counsel was ineffective for failing to request an intoxication instruction. As Correll has noted numerous times throughout his motion, his theory of defense was that someone else committed the offense. Consequently, counsel cannot be deemed ineffective for failing to request a voluntary intoxication instruction. See Combs v. State, 525 So.2d 853 (Fla. 1988); Harich v. State, 484 So.2d 1239 (Fla. 1984).

5. Counsel's failure to challenge pretrial the validity of electrophoresis process

Correll contended that counsel was ineffective in failing to challenge pretrial the admissibility of the electrophoresis results, as it would have at least placed the burden on the State to demonstrate the test's reliability. This claim is legally insufficient, as Correll's allegation of prejudice, i. e., that the burden would have been placed on the state, does not amount to one that would undermine confidence in the outcome. Strickland, supra. Even if legally sufficient, it is without merit. The admissibility of the testimony was challenged on

direct appeal, and this court found that there was no error in the admission of the evidence. Correll, supra, at 567. Correll has set forth no new information that defense counsel could have obtained and presented pretrial that would have altered this ruling in any way. Counsel did object to the admission of the evidence and thereby preserved the issue for direct appeal where it was thoroughly argued, thus rendering his performance satisfactory. No prejudice has been demonstrated, so relief is not warranted. Strickland, supra.

6. Counsel's failure to move to suppress statements

Correll alleged that Lawrence Smith was a government informant, and that counsel failed to investigate this issue and unreasonably failed to move to suppress his statements. This claim is legally insufficient as well as Correll has failed to set forth any facts to support his allegation that Smith was a government informant. In fact, the record indicates just the opposite, and further indicates that counsel tried his hardest to get Smith to admit that he was an informant, without success. It also appears from the record that the only reason Correll came in contact with Smith was as a result of his having been placed in lockup due to his having fashioned a comb into a knife in an apparent escape attempt (R 3662, 3681). Due to Correll's lack of factual allegations to support this contention, he also cannot demonstrate prejudice, as he cannot show that the statements would have been suppressed.

Smith stated in his deposition that he had no contact with the State Attorney's Office prior to the time he sent a letter

there stating what he knew about Correll's case. Smith had no further contact with Correll after he spoke with people from the State Attorney's Office. (R 3683-85). See e.g. Dufour v. State, 495 So.2d 154 (Fla. 1986) Smith received nothing in exchange for this information, except a promise of protective custody. (R 3695, 1278). Nor did Smith receive anything in exchange for the information he provided in the Hodge case, and it is hard to imagine that he could have been since it involved out of state authorities. While Correll states that further investigation would have revealed that Smith was involved in a third case involving an escape, the record demonstrates that counsel obtained all of the details of this incident from Smith at a continuation of the deposition (R 3744-54). Again, Smith stated that he was promised nothing for this information, although he was offered a Coke, which he declined.

In sum, Correll has failed to set forth any information that should have put counsel on notice that Smith was a government informant, has failed to set forth any facts in support of his allegation that Smith was a government informant, and has thus failed to demonstrate the counsel's performance was deficient or that he was prejudiced. Strickland, supra. Summary denial is warranted.

CLAIM V

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT THE INTENSE SECURITY MEASURES IMPLEMENTED DURING CORRELL'S TRIAL IN THE JURY'S PRESENCE ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATES'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; ALTERNATIVELY, THE CLAIM IS WITHOUT MERIT.

Correll contended that the extreme security measures employed during his trial, in particular the imposition of leg shackles, destroyed any presumption of innocence and perverted the judicial process.

As the facts supporting this claim are contained in the trial record, this is an issue which could and should have been raised on direct appeal and is thus procedurally barred. Mikenas v. State, 460 So.2d 359 (Fla. 1984). Correll has cited no new authority to make this claim cognizable. Elledge v Dugger, 823 F.2d 1439 (11th Cir. 1987), being the decision of an intermediate court, breathes no new life into this claim. **See** Witt v. State, 387 So.2d 922, 930 (Fla. 1980); Teague v. Lane, 109 S.Ct 1060 (1989).

Even if this claim could be entertained no relief is warranted. While the Florida Supreme Court has recognized that shackling is an "inherently prejudicial practice," it reviews these 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). The State would first point out that although Correll refers to "extreme security measures," the only security measure that the record demonstrates is the use of leg shackles.

In the instant case, the trial court inquired into the necessity of the shackles, and was told 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. (More details of this incident are contained in the deposition of Larry Smith, R 3681). Court personnel indicated that Correll was a security risk as far as they were concerned, and that they would like to see him remain in shackle. The trial court stated that it had to rely upon court personnel for security recommendations and that they had requested that Correll be left in shackles. In light of Correll's previous incident and the fact that he was charged with four counts of first degree murder, the trial court did not abuse its discretion in requiring Correll to remain shackled. Stewart, supra. See ~~also~~ Dufour v. State, 495 So.2d 154 (Fla. 1986)(no abuse of discretion in determining shackles necessary for security reasons after inquiry, and attempts made to minimize any prejudice by concealing defendant's legs).

Further, there is no indication that any of the jurors saw Correll in leg irons, and the record indicates they did not. It appears that boxes or something were placed in front of the table to block any view by the jury (R 14), as the shackles could only be seen from the side (R 62). Counsel then remedied that potential problem by pulling the table around. This all took place very early in voir dire, and only a few prospective jurors were called into the courtroom at by that time. It is interesting to note that four of the prospective jurors interviewed at that time remained on the jury, and defense counsel never made any inquiries regarding this nor challenged them as having seen Correll in shackles. It is thus obvious that

counsel determined that they either did not see the shackles, or that they would not be influenced by them.

The record demonstrates that defense counsel was satisfied with the arrangements, and there is no need to second guess anyone's judgment at this stage of the proceedings. Dufour, supra. As the only jurors who may have seen the shackles remained on the jury with no objection from counsel, and there is nothing anywhere else in the record to demonstrate that anyone else saw the shackles, prejudice cannot be demonstrated. Correll is entitled to no relief.

CLAIM VI

THE TRIAL COURT PROPERLY DETERMINED THAT FUNDAMENTAL ERROR DID NOT OCCUR.

Correll contended that he intended to introduce evidence that he could not have been at the scene at the time of the crime and evidence that two of the victims were heavily involved in selling drugs and that the killings were drug related, and every time he tried to introduce such evidence it was objected to and the objections were sustained. He further contends that the exclusion of the defense evidence deprived him of the chance to present a reasonable theory of defense and the instruction to the jury on the timing of the offenses diluted the remaining defense.

While framed as fundamental error, this claim is nothing but a rehash of claims I, 11, and parts of 111, which as demonstrated, are procedurally barred. As also demonstrated under those points, error did not occur, and even if by some stretch of existing caselaw it did, it was harmless at worst. Consequently, Correll has not and cannot demonstrate that fundamental error occurred, so this claim should not even be considered.

The fundamental error rule "is not an 'open sesame' for trial errors not properly preserved." Smith v. State, 240 So.2d 807, 810 (Fla. 1970). The rule has been applied in three types of cases: (1) a statute has been found unconstitutional, (2) the issue reached down to the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the alleged error, and (3) where a serious question exists as to the jurisdiction of the trial court. Moreover, fundamental error occurs only when the omission or error is pertinent or material to what the jury must consider in order to convict. Stewart v. State, 420 So.2d 862 (Fla. 1982).

As Correll states, the trial court ruled that any evidence concerning the drug habits of the victims had to be proffered prior to its introduction. See motion, p. 95. As Correll also states, whenever the defense tried to introduce evidence it was objected to and the objection sustained. See motion, p. 97. The key fact which Correll omits is that none of this evidence was proffered during his case-in-chief, and the objections were sustained because there is no requirement that the State prove the defense's theory of the case.

As this court noted, the trial court made it perfectly clear that Correll could have introduced the redacted portion of his statement that referred to Susan's drug activities, Correll, supra, and may well have permitted the introduction of other evidence related to the same matters during Correll's case. Correll certainly should not be heard to complain about a ruling he never required the trial court to make. It must also be

remembered, as demonstrated under point 11, supra, there was scant, if any, evidence that "two of the victims were heavily involved in selling drugs and that the killing could well have been drug related." See motion, p. 95. It is quite obvious that after counsel's attempts to introduce such evidence during the State's case were properly thwarted, he chose not to impugn the reputations and assassinate the characters of the two victims with readily rebuttable evidence, as such would have seriously undermined his credibility with the jury.

Correll's claim as to the trial court's response to the jury's question is likewise procedurally barred as it should have been raised on direct appeal, Clark, supra, and fundamental error did not occur. Smith, supra; Stewart, supra. In framing a response to the jury's question, defense counsel himself suggested telling the jury that the state did not have to prove the date shown in the indictment, but the jury could consider the time of the commission of the murders in its deliberations. Subsequently the jury was told that the state did not have to prove that the crimes were committed on any particular date (R 4229-30).

The trial court's answer was a correct statement of the law. Tingley v. State, 549 So.2d 649 (Fla. 1989). Correll has neither alleged nor demonstrated that he was prejudiced in the preparation of his defense in any way, and the record demonstrates that he was well aware of the time frame that the state would prove. The fact that the jury had a question related to a technicality in the charging instrument in no way affects the outcome of this trial. As the Tingley court stated:

> ...time is not ordinarily a substantive part of an indictment or information and there may be a variance between the dates proved at trial and those alleged in the indictment or information as long as: (1) the crime was committed before the return date of the indictment; (2) the crime was committed within the applicable statute of limitations; and (3) the defendant has been neither surprised nor hampered in preparing his defense.

Id. at 651. As Correll has failed to allege or demonstrate any of these, he certainly cannot demonstrate that the verdict would have in any way been affected. As Correll has not demonstrated fundamental error the instant claim should be summarily denied.

CLAIM VII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL WAS DENIED HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES, AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE PUBLIC DEFENDER'S OFFICE INITIALLY REPRESENTED BOTH MR. CORRELL AND AN INFORMANT-WITNESS AGAINST HIM, AND THIS CONFLICT OF INTEREST VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Correll contended that his rights were violated because the Public Defender's Office participated in a conflict of interest arising out of that office's mutual representation of both Mr. Correll and Lawrence Smith, a witness against Correll. Correll contended that Smith's waiver of his confidential privilege did not resolve the conflict which remained as to Correll, and that counsel felt constrained in cross-examining Smith and in calling Smith's lawyer to impeach him.

This claim was presented on direct appeal as error in the trial court's denial of counsel's motion to withdraw. See Initial Brief pp. 33-37; Correll, supra at 564. Post-conviction relief is not authorized for issues which were initially raised on direct appeal, Clark v. State, 460 So.2d 886, 888 (Fla. 1984),

nor are collateral attacks permitted based upon the use of different arguments to relitigate the same issues which were decided on direct appeal. Quince v. State, 477 So.2d 535, 536 (Fla. 1985). Consequently, this claim is procedurally barred.

CLAIM VIII

THE TRIAL COURT PROPERLY DETERMINED THAT CORRELL WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL.

Correll contended that counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings, i.e., he failed to ensure an adequate mental health evaluation, he failed to discover and use the available evidence of Correll's extreme intoxication, he failed to object to the medical examiner's opinion on crime reconstruction and the "emotional pain" experienced by the victim, he failed to utilize statutory and nonstatutory evidence he had in his possession, and he failed to present a compelling portrait of Correll's impoverished childhood. Correll stated that "had trial counsel conducted a reasonable investigation and imparted the results of that investigation to his mental health professionals in advance they would have been able to present a very powerful penalty phase and closing argument that not only would have portrayed Mr. Correll as a reasonable human being whose life had value, but also as a person who was entitled to mercy because he had suffered poverty, extreme child abuse, mental deficiencies that made it impossible for him to learn to read,[1] a history of severe alcohol and drug abuse and he was extremely intoxicated on the day of the offense." Motion, p.145.

The inquiry into counsel's performance is whether counsel's assistance was reasonable considering all the circumstances, and that performance should be evaluated from counsel's perspective at the time, without the distorting effects of hindsight. Counsel's conduct is to be judged on the facts of the particular case, and the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own

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[1] It is odd indeed that one who never learned to read could take a Bible correspondence class as well as write letters to his sister-in-law.

statements or actions. In particular, what investigation decisions are reasonable depends critically on such information, and inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. When a defendant challenges a death sentence, the prejudice inquiry is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland, supra at 692.

A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant. Id. at 698. While the performance prong will be analyzed shortly, appellee contends that inquiry can cease at a determination that Correll suffered no prejudice, even if it was determined that counsel's performance was deficient. This is particularly true in light of the trial court's statement in denying relief on this claim that it would not have been persuaded to impose a life sentence on the basis of any of the information contained in the motion for post-conviction relief. See Francis v. State, 529 So.2d 670, 673 n. 9 (Fla. 1988).

This was a quadruple murder. In imposing four death sentences, the court found a total of six aggravating factors: (1) committed during the course of a sexual battery; (2) committed during the course of a robbery; (3) heinous, atrocious and cruel; (4) cold, calculated and premeditated; (5) committed

for the purpose of avoiding arrest; (6) prior violent felony conviction. The now proffered evidence, which incidentally is contradictory to the evidence that counsel had in his possession and which was presented, would not have resulted in a life recommendation or sentence. See, Tompkins v. State, 549 So.2d 1370 (Fla. 1989); Lambrix v. State, 534 So.2d 1151 (Fla. 1988).

A review of the record also indicates that counsel's performance was reasonable. Correll and his family surely knew the details of his background, yet no allegation is made that they revealed these details or that trial counsel refused to utilize such facts at the penalty phase, so the claim that counsel failed to investigate is not even legally sufficient on its face. Counsel, in fact, did conduct quite an extensive investigation, and based the information he acquired as well as the statements of Correll and his family, it cannot be said that his performance was deficient. Counsel had Correll examined, and imparted all the information his investigation produced to the expert. Indeed, he even waited in hopes of acquiring possibly helpful records.

Counsel also conducted numerous depositions, and as evidenced by his letter to Dr. Pollack, he was aware of the fact that Correll "used all kinds of drugs for several years." It must be remembered, that Correll denied committing the offenses, and also stated that he neither drank nor did drugs on a regular basis (see Dr. Pollack's evaluation; R 1939-49). Correll further claimed to have been raised in an intact family unit, had a good relationship with his family, and worked steadily over the years.

Id. (R 1937-39). Correll even worked at Disneyworld for two years! (R 1938). His normal upbringing and happy childhood were further attested to by his mother (R 1893). Correll helped his family, was not violent, and had a good relationship with his daughter and they did a lot of things together (R 1894-95, 1897, 1899). Correll was even living with his mother, and right next door to his brother, who had built a house on the mother's property. Correll related his marital breakup to his being away from home due to his job situation, and also mainly to Susan's problems, not his own. (R 1947); Dr. Pollack's report. As also is evidenced by counsel's letter to Dr. Pollack, counsel obtained Correll's school records, and being obviously aware of what information could be valuable in mitigation, stated "unfortunately, his school records indicate no problems with his emotions or behavior."

In sum, counsel's investigation was clearly reasonable, particularly when viewed along with the information it revealed. Just a counsel cannot be deemed ineffective for failing to present witnesses who do not want to testify , Cave v. State, 529 So.2d 293 (Fla. 1988), or for not interviewing witnesses where he has been instructed not to do so, Eutzy v. State, 536 So.2d 1014 (Fla. 1988), or been prohibited from doing so, Henderson v. Dugger, 522 So.2d 835 (Fla. 1988), counsel cannot be deemed ineffective for failing to obtain evidence totally contrary to what he has been told by the defendant, the defendant's family, the defendant's statements to police and the psychiatrist, and the defendant's testimony.

It must also be remembered that the now proffered evidence is not just additional, it is totally contrary to what was known to counsel after a thorough investigation, and also to what was known to and could have been obtained by the state to thoroughly impeach it. **See**, e.g. Cave, supra at **298;** James v. State, **489** So.2d **737** (Fla. **1986).** Correll's statement indicates he did not drink much that night, and certainly does not indicate extreme intoxication, and his ability to relate details clearly refutes any such allegation. Dr. Pollack's report indicates an individual with no mental dysfunction and an ability to appreciate the nature and consequences of criminal activity. Indeed, Correll's continued denial of committing these offenses is the strongest indicator of such.

The record demonstrates that after unsuccessful attempts at obtaining mental mitigating evidence, counsel chose to portray Correll as a person whose life was worth saving because he presented no future dangerousness and because life itself is sacred. In light of what counsel's investigation produced, it cannot be said his performance was deficient, for counsel certainly cannot be held to a standard of manufacturing nonexistent evidence. Nor can counsel be ineffective for failing to impart to a mental health expert information he could not acquire, and that was contrary to what Correll himself told such expert and counsel Further, in light of the circumstances of these murders and the record impeachability of the now-proffered evidence, it cannot be said that the presentation of such evidence would have resulted in either a life recommendation or sentence.

Correll's allegation that counsel was ineffective for failing to object to Dr. Hegert's testimony is legally insufficient for he has failed to demonstrate deficient performance, i.e, that such objection would have been sustained. Nor has Correll demonstrated that such testimony was inadmissible. Further, such testimony was clearly harmless, as any juror is going to be able to determine, from the evidence, that the victim suffered emotional pain. Correll is entitled to no relief.

CLAIM IX

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL WAS DEPRIVED OF HIS RIGHTS TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION BECAUSE THE MENTAL HEALTH EXPERT APPOINTED TO EVALUATE HIM AT THE TIME OF TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT EVALUATION AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE IN REGARD TO MENTAL HEALTH AND OTHER ISSUES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS; ALTERNATIVELY, IT IS WITHOUT MERIT.

Correll alleged he suffers from brain dysfunction and mental retardation, and has an incredible history of substance abuse of a wide variety of drugs. He further alleged that the only mental health assistance given to him consisted of a brief pretrial interview with no testing whatsoever, and neither counsel nor the expert conducted the necessary background investigation which would have established Correll's substance abuse history and intoxication at the time of the offense, and such investigation would also have revealed a history of head injuries. Correll also alleged a lack of investigation into his dysfunctional family life, i.e. his childhood was "a cold, non-nurturing environment that led him into a gradual downward spiral into the escape of alcoholism and drug abuse." Correll contended that had an adequate mental health evaluation been done, the judge and jury would have learned that he does indeed suffer from organic brain dysfunction, and that as a result thereof his capacity to conform his conduct to the requirements of the law was substantially impaired, and that he suffered from an extreme

mental disturbance at the time of the offense. Finally, Correll alleged that counsel should have obtained an expert regarding substance abuse and its effects on a brain damaged individual.

Correll's contention that he received an incompetent mental evaluation is procedurally barred as it could have been raised on direct appeal. Smith v. State, 15 F.L.W. S81 (Fla. February 15, 1990); Doyle v. State, 526 So.2d 909, 911 (Fla. 1988); Stano v. State, 497 So.2d 1185, 1186 (Fla. 1986). Correll's further allegations as to counsel's ineffectiveness are discussed under Point VIII, supra. Even if this claim was cognizable, it is without merit.

The record demonstrates that prior to having Correll evaluated, counsel first waited in hopes of getting records from Correll's school or background that would provide assistance. In counsel's own words, "unfortunately, his school records indicate no problems with his emotions or behavior." Correll himself told Dr. Pollack that he used alcohol several times a week, and though he experimented with drugs, he did not use them on a regular basis. Correll told Dr. Pollack he was raised in an intact family unit and his relationship with his family was fine. Correll told Dr. Pollack that he had no psychiatric history or treatment, no history of belligerent activity, and no severe altercations with any people. He also described his conduct the week prior to the offenses, and denied involvement with the offenses. Correll was 29 years old at the time.

Based on this information from Correll and counsel, Dr. Pollack concluded that Correll was not acting under any delusions, influence of exogenous substances or irresistible

impulse; that Correll did not suffer from any type of brain damage or impaired ability to appreciate the criminality of his conduct, nor was he suffering from any type of extreme emotional disturbance. Dr. Pollack further stated that if there were any statements available from family or friends describing Correll's behavior or change in behavior over the past several years, he would be happy to evaluate those. The record demonstrates, however, that any statements from family and friends merely corroborated Correll's statements, that he used drugs and drank, but not regularly, and also maintained good relationships with family and friends, as well as steady employment. Correll's mother did not know if he used drugs (R **3431**), and his employer never saw him do drugs (R **3493**).

Simply because Dr. Pollack's evaluation yielded different results does not mean that **it was** incompetent, particularly where it is based on entirely different information, which came form Correll himself. Dr. Macaluso states that in arriving at his opinion, some of the factors he considered were:

> (1) Correll continued to use alcohol and drugs in an obsessive compulsive manner despite adverse life consequences.
> But, Correll himself told Dr. Pollack he did not use drugs on a regular basis.
>
> (2) Correll's alcohol and drug taking resulted in partial and /or total blackouts.
> But, Correll told Dr. Pollack that his behavior and demeanor had been consistent throughout his life.
>
> **(3)** Correll has a strong family history of chemical dependency and

he was raised in an alcoholic environment.

But, Correll as well as family members indicated his family life was normal and happy.

(4) Correll's alcohol and drug taking resulted in grave financial difficulties, and he and his wife once went for over a month without electricity so Jerry could purchase marijuana.

But that was at least several years before the offenses, and again, Correll stated he did not use drugs on a regular basis.

(5) Correll was always seen by Wendy Garrett in an intoxicated state.

But again, that was many years prior to the offenses, the whole group was "a bunch of drug addicts," including Garrett, and Correll stated he did not use drugs on a regular basis.

(6) Correll told Smith he had used drugs throughout the night of the offense.

Correll told Smith that he was going to concoct an insanity defense by saying he used LSD and drugs all night, and that nobody would kill his own daughter (R 3705). Not only self-serving, but again, contrary to Correll's statements of what he did that night.

(7) Deputy Parks recovered a syringe from Correll's room.

But Correll told Smith he took it from Susan's.

(8),(9),(10) Brenda and James Nagles' and Guy Kettlehone's observations.

Again, contrary to Correll's statements, family observations, and observations of others as to Correll's daily activities.

Correll's first strategy, employed after a thorough investigation, did not work, so now he is attempting to get the opportunity top try a new and different one. This is not the purpose of post-conviction proceedings. The record demonstrates that Correll received effective assistance of counsel and a competent mental evaluation. Correll is entitled to no relief.

CLAIM X

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S RIGHT TO A RELIABLE CAPITAL SENTENCE WAS VIOLATED WHERE HIS SENTENCING JURY WAS IMPROPERLY INSTRUCTED AND DID NOT RECEIVE INSTRUCTIONS EXPLAINING THE LIMITING CONSTRUCTION OF THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE.

Correll contended that under Maynard v. Cartwright, 108 S.Ct. 1821 (1988), the jury must be instructed correctly regarding the aggravating circumstances, and in his case, the jury was incorrectly instructed and did not receive instructions in accord with the limiting and narrowing construction of the prior violent felony aggravating factor adopted by the Florida Supreme Court.

This is a claim which could and should have been raised on direct appeal and is thus procedurally barred in post-conviction proceedings. Smith v. State, 15 F.L.W. S81 (Fla. February 15, 1990). Correll did in fact challenge this aggravating factor on direct appeal and any argument on this issue should have been made at that time. Jones v. Dugger, 533 So.2d 290, 292 (Fla. 1988). Maynard is not a change in the law but is based on a reading of Godfrey v. Georgia, 446 U.S. 420 (1980), and even if it is, Correll has not demonstrated that it is entitled to retroactive application. See Teague v. Lane, 109 S.Ct. 1060 (1989). In any event, the claim is without merit because Maynard

does not apply to this aggravating factor, Jones, supra, nor does it affect Florida's sentencing procedure. Clark v. Duqqer, 15 F.L.W. S50 (Fla. February 2, 1990). Further, the trial court judge stated in his order that upon eliminating this aggravating factor and reweighing the aggravating and mitigating factors he would still impose death sentences.

CLAIM XI

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S JUDGE AND JURY CONSIDERED AND RELIED ON THE VICTIMS' PERSONAL CHARACTERISTICS AND THE IMPACT OF THE OFFENSE IN VIOLATION OF MR. CORRELL'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH v MARYLAND, SOUTH CAROLINA v GATHERS, JACKSON v DUGGER, AND SCULL v STATE; ALTERNATIVELY THE CLAIM HAS NO MERIT

Correll alleged that the State took every opportunity to remind the jury that one victim was a little child and one an elderly lady, and that he was sentenced to death based on impermissible "victim impact" evidence and argument.

The record demonstrates that there were no objections to any of the comments cited by Correll, so this claim is procedurally barred. Clark v. Duqqer, 15 F.L.W. S50 (Fla. February 9, 1990). Even if this claim was cognizable, Correll would not be entitled to relief. Neither Booth v. Maryland, 482 U.S. 496 (1987) nor South Carolina v. Gathers, 109 S.Ct. 2207 (1989) preclude victim impact statements that relate directly to the circumstances of the crime, and the comments referred to by Correll do exactly that.

Appellee would first point out that the comments referenced by Correll occurred during the guilt, as opposed to the penalty

phase. See Smith, supra. The fact that the victims were all female, one was a five-year-old child, one a grandmother and the other two young women is nothing more than the identity of the victims which was presented to the jury in any event. Again, the fact that Mary Lou Hines was a 58-year-old grandmother and the former mother-in-law of Correll goes to identity, and was before the jury through virtually all of the evidence. The fact that Mrs. Hines was a responsible employee was relevant to demonstrate why her fellow employees went to look for her and discovered the murders when she did not show up for work that morning.

As to the prosecutor's penalty phase closing argument, again, there was no objection, so the claim is barred. Further, on direct appeal Correll argued as cumulative error that the argument constituted prosecutorial overkill, which claim was rejected. There was no reference to the specific characteristics or traits of the victims, and certainly no reference to the impact the crime had on surviving family members, as Correll assured there were none left. Further, any such comments by the prosecutor were invited by defense counsel's opening statement on the sacredness of life. See e.g. Darden v. Florida, 477 U.S. 168 (1986). Further, the trial court judge specifically stated in his order denying post-conviction relief that no such evidence was considered or relied upon in imposing sentence. Correll is entitled to no relief.

CLAIM XII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S RIGHT TO A RELIABLE CAPITAL

SENTENCE WAS VIOLATED WHERE HIS SENTENCING JURY DID NOT RECEIVE INSTRUCTIONS EXPLAINING THE LIMITING CONSTRUCTION OF THE "COMMITTED DURING THE COMMISSION OF A FELONY" AGGRAVATING CIRCUMSTANCE.

Correll contended that the jury was incorrectly instructed as it was not told that the underlying felony had to be proven beyond a reasonable doubt, and it did not receive instructions in accord with the limiting and narrowing construction of the committed during the course of a felony aggravating factor adopted by the Florida Supreme Court.

The validity of this aggravating circumstance was raised on direct appeal and any argument on this issue should have been raised at that time. See Jones v. Dugger, 533 So.2d 290 (Fla. 1988). Issues which could have been raised on direct appeal or were raised on direct appeal are not cognizable in post-conviction proceedings. Mikenas v. Dugger, 460 So.2d 359 (Fla. 1984); Clark v. State, 460 So.2d 886, 888 (Fla. 1984). Collateral attacks based upon different arguments to relitigate the same issues raised on direct appeal are not permitted. Quince v. State, 477 So.2d 535, 536 (Fla. 1985). Maynard is not a change in the law, and even if it was, Correll has not demonstrated that it is entitled to retroactive application. Witt, supra; Teague, supra.

Even if this claim was cognizable, it is without merit. Maynard dealt with the aggravating factor of heinous, atrocious, or cruel, and further, does not affect Florida's sentencing procedure. Clark v. Dugger, 15 F.L.W. S50 (Fla. February 2, 1990). Appellee would also point out that this aggravating factor was found only as to the murders of Susan Correll and Mary Beth Jones, and the trial court judge stated in his order that

even upon elimination of this factor, in reweighing the aggravating and mitigating factors he would still impose a sentence of death.

CLAIM XIII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM 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; ALTERNATIVELY, THE CLAIM IS WITHOUT MERIT.

Correll contended that the trial court "virtually" forced him 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 admission 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. Correll also alleged that counsel was ineffective for failing to litigate this issue.

This is in issue which could and should have been presented on direct appeal and is thus procedurally barred. Suarez v. Duqqer, 527 So.2d 190, 192 n. 3 (Fla. 1988). In any event, the claim is without merit as the trial court's ruling was correct. Appellee fails to see how a statute which permits the state to present hearsay evidence as long as the defendant has the opportunity to rebut it also permits the introduction of irrebuttable hearsay by the defendant. Indeed, a literal reading of the statute cited by Correll would mean that the defense could not present hearsay under any circumstances. Even if the trial court's ruling was erroneous, it was harmless error at worst, as the witness was permitted to testify as to Correll's new-found relationship with his God (R 1982-84), so Correll was not "forced to choose" between the exclusion of evidence and testifying.

Correll's allegation that counsel was ineffective for "failing to litigate'' this claim is legally insufficient, as it fails to allege the specific act or omission of counsel that was unreasonable, nor has he alleged prejudice. Strickland, supra. Nor can Correll demonstrate prejudice, for as stated, the witness was permitted to testify as to what was contained in the letter, and in fact expand upon it, *so* Correll was not forced to take the stand to put this evidence before the jury, and quite obviously had planned on testifying all along, as his testimony was more extensive than just referring to his religion. He is entitled to no relief.

CLAIM XIV

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S TRIAL 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 contended that the State's presentation of and the consideration of nonstatutory aggravating circumstances, i.e. lack of remorse, prevented the constitutionally required narrowing of the sentencer's discretion, and defense counsel was ineffective for failing to object to it.

This is a claim which could and should have been raised on direct appeal and is thus procedurally barred in post-conviction proceedings. Armstrong v. State, 429 So.2d 287 (Fla. 1983); Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989). In any event, the claim is not supported by the record and is totally without merit. Even though Correll alleged that the prosecutor made this argument in the penalty phase, the evidence and argument pointed to by

Correll were presented in the guilt phase, where Correll claimed his innocence. Cf. Clark v. State, No. 75,208 (Fla. February 15, 1990)(alleged victim impact evidence during guilt, not penalty phase of trial). The evidence was clearly probative of guilt during that phase. For this reason, it cannot be said that counsel was ineffective for failing to object, as any objection would no doubt have been overruled, so prejudice cannot be demonstrated. Strickland, supra. There is nothing in the record to demonstrate that this carried over into the guilt phase, and a review of the State's argument in the penalty phase and the trial court's sentencing order demonstrates that such considerations were neither urged nor considered. Correll is entitled to no relief.

CLAIM XV

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT THE SENTENCING COURT'S FAILURE TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

Correll contended the record reveals that substantial and significant mitigation was before the court and the court failed to fully consider this mitigation.

Correll raised this issue on direct appeal (see Initial Brief, pp. 106-7) so he is procedurally barred from relitigating it in post-conviction proceedings. Smith, supra. Nothing in the record indicates that all evidence offered in mitigation was not considered in mitigation by the trial judge, and his order specifically states that he considered statutory mitigating factors, and all other known circumstances pertaining to the

Defendant's character and the case. Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain and reversal is not warranted simply because a defendant draws a different conclusion. Stano v. State, 460 So.2d 890, 894 (Fla. 1984). As the trial court's order states, the judge did consider all evidence offered in mitigation.

CLAIM XVI

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT THE TRIAL COURT'S DENIAL OF THE DEFENSE REQUESTED PENALTY PHASE JURY INSTRUCTION INFORMING THE JURY OF ITS ABILITY TO EXERCISE MERCY DEPRIVED MR. CORRELL OF A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Correll contended the trial court's refusal to give his requested jury instruction pertaining to mercy undermined the reliability of the sentencing determination and prevented the jury from assessing mitigation. Correll concluded that this issue must be belatedly considered on the basis of Penry v. Lynaugh, 109 S.Ct. 2934 (1989), which has been declared retroactive and which holds that a capital sentencing jury must make a reasoned moral response to the defendant's background, character and crime and that a capital defendant should not be executed where the process runs the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

This claim is procedurally barred as it should have been raised on direct appeal. Smith, supra. Penry, supra, does not provide a basis for bringing this claim as it is not applicable to Florida, Porter v. Dugger, 15 F.L.W. S78 (Fla. February 15, 1990), and even if it was, it does not represent a change in the law entitled to retroactive application. The Penry Court specifically noted that the rule Penry sought - that when such mitigating evidence (his mental retardation) is presented, Texas

juries must, upon request, be given instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed - was not a new rule under Teaque v. Lane, 109 S.Ct 1060 (1989), because it was dictated by Eddinqs v. Oklahoma, 455 U.S, 104 (1982), and Lockett v. Ohio, 438 U.S. (1978). Furthermore, Penry is inapposite. See Saffle v. Parks, S.Ct , (No. 88-1264 March 5, 1990).

It is also quite clear that at the quilt phase a verdict of not guilty should not be based on mercy but on reasonable doubt. The sentencing instructions actually encompass the broadest exercise of a jury's discretion in recommending a life sentence. Adams v. Wainwright, 764 F.2d 1356, 1369 (11th Cir. 1985). Mercy is almost never extended to the merciless and the question of who in their right frame of mind would extend mercy to a slaughterer begs to be answered. A proportionality analysis did not reveal that this was a case calling for less than death. No basis is even hypothesized upon which the jury could have exercised its discretion to afford Correll mercy. Mercy does not exist in a vacuum. No reason is given why the trial judge would have been compelled to follow such a recommendation. Correll is entitled to no relief.

CLAIM XVII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. CORRELL TO PROVE THAT DEATH WAS

INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. CORRELL TO DEATH; ALTERNATIVELY, IT IS WITHOUT MERIT.

Correll contended that the penalty phase jury instructions shifted the burden to him to prove that death was inappropriate. He contended that under Hitchcock, supra, and its progeny no bar applies, because Hitchcock, which was decided after his trial, worked a change in the law.

Such claim should have been raised at trial and on direct appeal on the basis of Mullaney v. Wilbur, 412 U.S. 684 (1985), and Arango v. State, 411 So.2d 172 (Fla. 1982), and is procedurally barred as there was no objection at trial and the point was not raised on direct appeal. Jones v. Dugger, 533 So.2d 290, 293 (Fla. 1988). In fact, the instruction at issue was given pursuant to defense counsel's request and over the State's objection. (R. 1956-59). Although Correll cites a plethora of cases, they are inapplicable. He has identified no change in the law making such claim cognizable collaterally by further citation to the decisions of intermediate federal courts. **See**, Witt v. State, 387 So.2d 922, 930 (Fla. 1980); Clark v. Dugger, 15 F.L.W. S50 (Fla. February 1, 1990). Hitchcock does not provide a basis for bringing this claim, as it is not a pure Hitchcock claim, which is one in which either (1) efforts to introduce nonstatutory evidence were thwarted, or (2) both the judge and the jury were under the impression that nonstatutory evidence could not be considered. Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989). In addition, while Hitchcock decided after Correll's trial, it was decided during the pendency of his direct appeal and no supplemental briefing on this issue was requested.

Even if this claim was cognizable, Correll is not entitled to relief. The instructions given to the jury must be looked at as a whole and the focus must be upon the manner in which a reasonable juror would have interpreted the instructions. California v. Brown, 107 S.Ct 837 (1987); Francis v. Franklin, 471 U.S. 307 (1985). The jury in the instant case was instructed:

> * * *
>
> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment, without possibility of parole for 25 years.
>
> * * *
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that counteract or outweigh the aggravating circumstances.
>
> * * *
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching tour conclusion as to the sentence to be imposed. A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant, if you are reasonably convinced that a mitigating circumstance exists you may consider it as established. This sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances. And your advisory sentence must be based on those considerations. The procedure you are to follow is not a mere counting process

> of aggravating and mitigating circumstances. But rather you are to exercise a reasoned judgment as to what factual situations require the imposition of death and which situations are satisfied by life imprisonment in light of the totality of the circumstances.

(R 2003-05). As such, the jury was first informed that sufficient aggravating circumstances must exist to impose death. They were then told that insufficient aggravating circumstances demand a life sentence. Thus, the jury could (1) find no factors at all in aggravation and recommend life or (2) find factors in aggravation that they consider weak and recommend life without weighing mitigating factors at all or (3) be inclined on the facts of the case toward a life recommendation and find even strong factors in aggravation insufficient.

This is the only view that can be taken of this instruction since the jury was also instructed that aggravating circumstances must be proven beyond a reasonable doubt, thus, the requirement of "sufficient" aggravating circumstances doe not refer to an aggravating factor being proven or to the fact the circumstance is statutorily enumerated as aggravating but must necessarily speak to the jurors own subjective idea of what acts mandate sentences of death and life. At this point in time, the onus is clearly on the state for the jurors are examining the sufficiency of the state's case in aggravation and can *ab initio* opt for a life recommendation without even undertaking a weighing process.

The jury was then instructed that even if they find sufficient aggravating circumstances, they may be outweighed by

mitigating circumstances. This is no more than telling the jury that even sufficient aggravating factors may not be enough to impose death and the onus is still on the state. The jurors were then told to give the mitigating circumstance whatever weight they felt they deserved. If "weighing" may be equated with "burden of proof", then under these circumstances the jury was given carte blanche to return a life recommendation and if any presumption at all was created, it was in favor of a life recommendation.

Correll's argument is simply a semantic quarreling over where the word "outweigh" should be placed; which argument is baseless since the weight accorded each circumstance in aggravation and mitigation is predeterminative of the "weighing" outcome and the result would be no different if the jury was instructed that the "aggravating factors must outweigh the mitigating." Considering the fact that heavy weight may be placed on mitigating factors, the instruction is slanted toward a life recommendation. In this case the jury was last instructed: "You should weigh the aggravating circumstances <u>against</u> the mitigating circumstances" (R 2005) and no reference to "outweighing" was even made.

This case is wholly distinguishable form <u>Adamson v. Ricketts</u>, 865 F.2d 1011 (9th Cir. 1988). Arizona Revised Statute 13-703(E) reads, in relevant part: "the court ... shall impose a sentence of death if the court finds one or more of the aggravating circumstances ... and that there are no mitigating circumstances sufficiently substantial to call for leniency."

865 F.2d 1042. What led the Ninth Circuit to conclude that the statute creates a presumption of death is the fact that under the statute, the death sentence will be imposed unless mitigating circumstances <u>outweigh</u> the aggravating circumstances. 865 F.2d 1042, n.50. This is not true of the instructions in this case which allow for a mercy or life recommendation on a simple finding that the aggravating factors do not justify death. There is no statutory directive to impose death under the instructions in this case for there is room for the jury to exercise its whim and find even statutorily enumerated aggravating circumstances "insufficient" to impose a sentence of death. Furthermore, there is nothing in these instructions to indicate that a reasonable juror would not understand the function of mitigating circumstances, or that a reasonable juror would not understand the burden of proof, or that a reasonable juror would not understand that a life sentence could be recommended. Correll simply cannot establish that the instructions given to the jury deprived him of due process or rendered the sentencing proceeding fundamentally unfair. **See**, Rose v. Clark, 106 S.Ct. 3101 (1986).

The granting of certiorari by the United States Supreme Court in Blystone v. Pennsylvania, 109 S.Ct. 1567 (1989), provides no basis for delay in this case, as Blystone's death sentence has been affirmed. Blystone v. Pennsylvania, ___ S.Ct (No. 88-6222 February 28, 1990).

CLAIM XVIII

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S SENTENCING JURY WAS IMPROPERLY

INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF MAYNARD v CARTWRIGHT, HITCHCOCK v DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Correll contended that the limiting construction of the aggravating factor heinous, atrocious or cruel set forth in State v Dixon, 283 So.2d 1 (Fla. 1973), has not been applied consistently and was not applied in his case and the jury in his case was never apprised of such a limiting construction.

This is a claim which could and should have been raised on direct appeal and is thus procedurally barred in post-conviction proceedings. Adams v. State, 543 So.2d 1244 (Fla. 1989); Harich v. State, 542 So. 2d 980, 981 (Fla. 1989). Correll did in fact attack this aggravating factor on direct appeal and any argument on this issue should have been made at that time. See Jones, supra. Maynard is not a change in the law, and even if it was, Correll has not demonstrated that it is entitled to retroactive application. Finally, the claim is without merit, as Maynard does not affect Florida's sentencing procedure. Clark v. Duqqer, 15 F.L.W. S50 (Fla. February 2, 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Smith v. State, No. 75,028 (Fla. February 15, 1990). Appellee would also point out that this aggravating factor was not found as to the murder of Mary Beth Hines, and the trial court judge stated in his order that even upon elimination of the factor upon reweighing the aggravating and mitigating factors he would still impose sentences of death.

CLAIM XIX

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT THE COLD, CALCULATED, AND PREMEDITATED

AGGRAVATING CIRCUMSTANCE WAS APPLIED TO CORRELL'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Correll contended that the sentencing jury never applied the "heightened premeditation" limiting construction of the cold, calculated, and premeditated aggravating circumstance as required by Maynard, supra, and that it is unconstitutionally vague, overbroad, arbitrary and capricious on its face. He further contended that because the judge and jury did not have the benefit of the narrowing construction set forth in Rogers v State, 511 So.2d 526 (1987), his sentence violates the eighth and fourteenth amendments.

This is an issue which could and should have been raised on direct appeal and is thus procedurally barred in post- conviction proceedings. Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988). Correll did in fact attack this factor on direct appeal and any argument should have been made at that time. See, Jones, supra. Maynard is not a change in the law, and even if it was, Correll has not demonstrated that it is entitled to retroactive application. Teague, supra. Further, Maynard is not applicable to the cold, calculated and premeditated factor, Jones, supra, nor does it affect the Florida sentencing procedure. Clark v. Dugger, 15 F.L.W. S50 (Fla. February 1, 1990). Finally, the holding in Rogers, supra, does not represent a fundamental change in the law requiring retroactive application. Eutzy v. State, 541 So.2d 1143, 1147 (Fla. 1989). The State would also point out that this aggravating factor was found only as to the murder of Tuesday Correll, and the trial court judge stated in his order the even if this factor was eliminated, upon reweighing the aggravating and mitigating factors he would still impose a sentence of death.

CLAIM XX

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO HITCHCOCK v DUGGER, 107 S.Ct. 1821 (1987); CALDWELL v MISSISSIPPI, 472 U.S. 320 (1985); AND MA" v DUGGER, 844 F.2d 1446 (11th Cir. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THAT CORRELL DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

Correll contended that the prosecutor's remarks at voir dire and closing argument and the judge's instructions to the jury diluted its sense of responsibility for the capital sentencing task, and counsel was ineffective for failing to object.

Substantive claims based on Caldwell can and should be raised on direct appeal, if preserved at trial, and are therefore procedurally barred in post-conviction proceedings. King v. Dugger, 15 F.L.W. S11 (Fla. January 4, 1990). Because, as will be demonstrated shortly, there is no merit to Correll's argument, counsel was not ineffective for not litigating this issue. Prejudice cannot be demonstrated since Caldwell is inapplicable to Florida and such statements do not denigrate the jury's role.

In Caldwell, the Supreme Court vacated a death sentence imposed after the prosecutor had suggested to the jury that its sentence was not final because it would be reviewed by an appellate court for correctness. The Court found it "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of

the defendant's death rests elsewhere.'' Id. at 328-29. Caldwell is not a change in law and is not applicable to Florida. Combs v. State, 525 So.2d 853 (Fla. 1988); Daugherty v. State, 533 So.2d 287, 288 (Fla. 1988). Unlike Caldwell, in Florida the judge rather than the jury is the ultimate sentencing authority. Ford v. State, 522 So. 2d 345, 346 (Fla. 1988). Caldwell is distinguishable from the Florida procedure which treats the jury's recommendation as advisory only and places the responsibility for sentencing on the judge. Advising the jury that its sentencing recommendation is advisory only and that the ultimate decision rests with the trial judge is an accurate statement of Florida law and does not improperly minimize the sentencing jury's role or misstate Florida law. Cave v. State, 529 So.2d 293, 296 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988).

CLAIM XXI

THE TRIAL COURT PROPERLY FOUND AS PROCEDURALLY BARRED THE CLAIM THAT CORRELL'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MAYNARD v CARTWRIGHT, LOWENFIELD v PHELPS, HITCHCOCK v DUGGER, AND THE EIGHTH AMENDMENT.

Correll contended that if felony murder was the basis of his convictions, then the subsequent death sentences are unlawful because the death penalties were predicated upon an unreliable automatic finding of a statutory aggravating circumstance-the felony murder that formed the basis for the conviction. He further contended that Hitchcock, supra, and its progeny excuse procedural default of penalty phase jury instruction error.

This is an issue that could and should have been raised on direct appeal and is thus procedurally barred in post-conviction

proceedings. Smith, supra. Hitchcock does not provide a basis to excuse this default as this is not a "pure" Hitchcock claim, which is one in which either (1) efforts to introduce nonstatutory evidence were thwarted, or (2) both the judge and the jury were under the impression that nonstatutory evidence could not be considered. Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989). Further, Hitchcock was decided while Correll's direct appeal was pending, and no supplemental briefing was requested. Finally, this claim has been previously rejected. Lowenfield v. Phelps, 484 U.S. 231 (1988); Bertolotti v. State, 534 So.2d 386, 387 n. 3 (Fla. 1988). Appellee also point out that this argument would only pertain to the sentences imposed for the murders of Susan Correll and Mary Beth Jones, as no such aggravating factors were found with respect to the murders of Tuesday Correll and Mary Lou Hines, and the trial court judge stated that even upon elimination of this factor, upon reweighing the aggravating and mitigating factors he would still impose death sentences.

CLAIM XXII

THE TRIAL COURT PROPERLY FOUND AS WITHOUT MERIT THE CLAIM THAT THE APPLICATION OF RULE 3.851 TO MR. CORRELL'S CASE WILL VIOLATE, AND THE PRESENT WARRANT HAS VIOLATED, HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHTS TO REASONABLE ACCESS TO THE COURTS.

This contention is without merit. Florida Rule of Criminal Procedure 3.851 does not deny equal protection and access to the courts by empowering the Governor to shorten the two year filing

deadline granted by Florida Rule of Criminal Procedure 3.850. Smith, supra; Cave v. State, 529 So.2d 293, 298-299 (Fla. 1988); In the absence of a showing that a meritorious basis for relief exists that needs to be further developed one can only conclude that there has been more than enough time for investigation and leave to amend and a stay of execution should be denied.

CONCLUSION

For the foregoing reasons, the trial court's order denying Correll's motion for post-conviction relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief 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 12th day of March, 1990.

Of Counsel