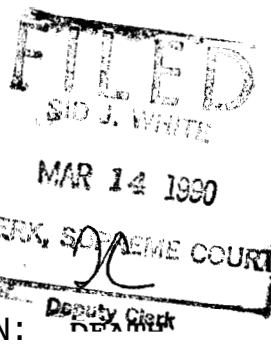
C



IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,664

JERRY W. CORRELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

EMERGENCY ACTION:
WARRANT SIGNED: ORAL
ARGUMENT SCHEDULED FOR
MARCH **15, 1990**

APPLICATION FOR STAY OF EXECUTION
PENDING APPEAL OF DENIAL OF MOTION
FOR FLA. R. CRIM. P. **3.850** RELIEF

JERRY W. CORRELL, Appellant in the instant action, through counsel, respectfully requests that the Court enter a stay of execution in order to allow him to provide the Court with a professionally presentable brief on appeal of the circuit court's denial of relief under Rule **3.850,** Fla. R. Crim. P., and because of the various errors in the circuit court's denial of an evidentiary hearing and Rule **3.850** relief. Given the time constraints involved in this case, and the tremendous overload which the Office of the Capital Collateral Representative (CCR) now faces, Appellant can only briefly refer to two of the claims for relief urged in this action. This is by no means a professionally presentable brief. All claims and supporting grounds presented below are fully incorporated and presented on this appeal, whether specifically discussed herein or not.

A. REQUEST FOR STAY OF EXECUTION

The circuit court refused to conduct an evidentiary hearing notwithstanding the fact that Mr. Correll presented, among other issues, a truly substantial claim of ineffective assistance of counsel, particularly at the penalty phase of his capital proceedings. On this basis alone a stay of execution is proper in order to allow Mr. Correll proper evidentiary resolution, for the files and records not only did not demonstrate conclusively that Mr. Correll was entitled to "no relief," **see** O'Callaghan V. State, 461 So. 2d 1354 (Fla. 1984); Lemon V. State, 498 So. 2d 923 (Fla. 1986), but the record supported Mr. Correll's claim.

The issues involved in this action are significant, and should be briefed for this Honorable Court's review. However, they cannot be properly briefed because of the impossible predicament faced by Mr. Correll's counsel, through no fault of Mr. Correll.[1] Mr. Correll's lower court pleadings and

---

[1] As this Honorable Court is well aware, the circumstances faced by the CCR office have reached crisis proportions. Thirteen (13) death warrants were outstanding in November and December, 1989, and eight (8) are outstanding now. The situation has gotten so out of hand that Appellant's counsel has not even had access to a photocopying machine this week -- the office's machine has been broken, and extensive repairs had to be undertaken. This past month, the machine has been out of service more than it has been in service, yet there is no funding for a new machine. The support staff has worked around the clock typing pleadings on these and other cases -- even so, we have not caught up. The circumstances facing the office's attorneys have been written up for this Court on a number of occasions and need

(footnote 1 continued on next page)

supporting documentary submissions have been provided to the Court. The lower court did not allow itself to hear the facts -- no evidentiary hearing whatsoever has been held. A stay of execution is proper.

B. THE COURT REFUSED TO CONDUCT *AN* EVIDENTIARY HEARING

The lower court refused to permit evidentiary resolution of the issues presented even though several of the claims involved facts not "of record" and even though some factual matters are in dispute. The lower court's order, which had been prepared by the State and signed by the Court prior to the filing of the State's response,[2] was incorrect in many areas, assumed the State's

---

(footnote 1 continued from previous page)

not be repeated here -- some attorneys have found it impossible to go on, and have therefore resigned. Mr. Correll's counsel has barely been in his office these weeks, having to attend to various matters throughout the state including an evidentiary hearing in a non-warrant case held March 12, 13 and 14, the time that this pleading was prepared. Without rehashing what has been provided to the Court before, it is respectfully submitted that a stay of execution in order to allow counsel to provide a proper brief on Appellant's behalf would be proper.

[2]It should be noted that counsel for Mr. Correll received the signed order denying relief by Facsimile Transmission on March 7, 1990, prior to receiving the State's response which had been mailed by United States Postal Service. This gave counsel no opportunity to point out to the judge the factual discrepancies such as the State's allegation that Dr. Pollack's report was a part of the record which is simply not the case. There are also other factual disputes and errors of law that plague the State's response. Without allowing any hearing at which it could ascertain the facts, however, the lower court

(footnote 2 continued on next page)

version of facts which are in conflict with the allegations pled in Mr. Correll's Rule 3.850 motion, assumed certain facts not in evidence and had no portions of the record attached that refuted the allegations. As this Honorable Court has often made clear, a Rule 3.850 movant is entitled to an evidentiary hearing **"unless** the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Areas, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1989); Gorham v. State, 521 So. 2d 1067 (Fla. 1988).

Recently, in a case in an identical posture as Mr. Correll's and with similar issues, this Court again recognized the need for hearing on Rule 3.850 pleadings.

> The governor recently signed Mills' death warrant, and the trial court summarily denied Mills' 3.850 motion.

(footnote 2 continued from previous page)

accepted the State's invitation and made findings of fact without any evidentiary support. The lower court erred. Had the State properly served its response on Appellant's counsel, these errors could have been pointed out. Mr. Correll vehemently asserted below that he should be allowed to present the facts supporting his claim at a hearing, and the circuit court acted improperly in refusing to conduct one and in making findings of fact without evidentiary support.

> In that motion Mills claimed that his counsel rendered ineffective assistance by not developing and presenting evidence of his mental impairment and deficiency in an attempt to mitigate his sentence. He now argues that the trial court erred in not holding an evidentiary hearing on this claim. Treating the allegations as true except to the extent rebutted by the record, Harich v. State, 484 So. 2d 1239 (Fla.), cert. denied, 476 U.S. 1178 (1986), we find that a hearing on this issue is needed. Therefore, we direct the trial court to hold an evidentiary hearing in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances. See Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Jones v. State, 446 So. 2d 1059 (Fla. 1984)

Mills v. State, No. 75,253 (March 1, 1990), slip op. at page 2.

An almost identical claim regarding counsel's deficiency at penalty phase has been presented by Mr. Correll in his Rule 3.850 pleading. Counsel at penalty phase told the jury:

> And some of the mitigating factors about Jerry Correll are that he had a lot to drink that night. And you've heard that from testimony during the trial. And Jerry smoked marijuana that night, and you heard that from his own taped statement. You're going to find out that Jerry has a history of drug and alcohol abuse.

(R. 1866-77)(emphasis added). Yet counsel then failed to present that history of drug and alcohol abuse, even though many of the people called to testify during the guilt-innocence phase of the trial could have attested to Mr. Correll's serious substance abuse problems had they been asked.

Guy Kettlehone, a friend of Mr. Correll's testified at trial

but was never asked about his knowledge of Jerry's long term addiction:

> Throughout our friendship Jerry was always telling about how he loved crystal meth and how easy it was to get a hold of. I never liked the stuff and never took Jerry up on his offers. However, I remember a night, about three weeks before he was arrested, Jerry broke out a stash of crystal meth and started snorting it up. Like always, once Jerry started he couldn't stop. Then he kept talking about how easy it was for Susan to keep him supplied with the stuff.
>
> Jerry used to hang out with a guy named John Kitchens. Whenever there would be a party those two would mainline cocaine. I remember, on several occasions, watching Jerry and John break out all of their supplies. First the cocaine, then the spoons and the needles. It was like a major production and then those who wanted to mainline headed into a bedroom and shot the cocaine into their veins. Of course they would get very high and spent most of the night sticking the needles in their arms.
>
> Jerry had a reputation for mainlining cocaine and skin popping crystal meth. He loved the instant rush and high a person gets from injection. Jerry was always talking about how high he got the night before or last weekend or whenever. The point is, he was out of control and always getting wasted.
>
> Using needles was something I never cared for but Jerry was never able to turn down a high regardless of the dangers or everlasting consequences. Like I said, if a drug was available, Jerry would be there every time. Additionally, Jerry was not one to sit back and wait for the dealers to find him. He was out looking for a connection and a fix. Whether it be cocaine, LSD, or crystal meth was depending on who Jerry ran into first.
>
> After Jerry was arrested I made myself

available to his attorneys. I also made it clear that I was willing to answer any questions about Jerry. No one ever asked me about Jerry's drug use. If asked I would have told them everything I know.

(Affidavit of Guy Kettlehone, proffered in Rule 3.850 motion).

James Nagle, another friend of Mr. Correll's who testified at trial was also never asked about Jerry's drug problems:

> When I first met Jerry he was smoking a lot of marijuana. He was getting high everyday, both at work and after clocking out. As soon as Jerry met Susan his life style went through some drastic changes and he started experimenting with other drugs. From the time he started dating Susan and up until his arrest, I have known Jerry to use an unbelievable amount of crystal meth. Additionally, it was not unusual for Jerry to use LSD, quaaludes, and cocaine.
>
> When Jerry started using crystal meth he lost all self control. He was using it virtually everyday and it was clear to me that Jerry quickly passed through the experimental phase and slid into addiction. It all became very simple - if Jerry had crystal meth he would use it and he spent an incredible amount of time making sure that he used it and he spent an incredible amount of time making sure that he knew where a supply of the drug was located. I remember how I use to talk with Jerry and try to warn him about the dangers associated with the heavy use of crystal meth. However, Jerry was in real deep and all the warnings fell on deaf ears. All he could think about was getting more crystal meth. Jerry's drug use continued for years and it got to the point where Jerry would spend his last dollars on crystal meth as opposed to food and go hungry. In Jerry's mind, crystal meth had become his life line.
>
> * * *
>
> I was at Jerry's trial and was available

> to his attorney. No one ever asked me about Jerry's drug use and if asked, I would of told him everything I know about Jerry's past.

(Affidavit of James Nagle, proffered in **3.850**).

Additionally, Mr. Correll's family had been called to testify at penalty phase yet mysteriously they were never asked about the history of drugs and alcohol abuse that counsel had promised the jury would be forthcoming (See also part C of this pleading and Claim VII of the Rule **3.850** pleading). There is nothing of record to indicate why these omissions occurred and the court may not simply attribute a tactical reason where there is nothing in the record to support that. Here in fact the record refutes that any such tactical decision had been made to omit this evidence since counsel told the jury it would be presented and then failed to do so.

Counsel's deficient performance at penalty was only one of several issues which clearly warranted evidentiary resolution. Another was the failure of the mental health professionals to conduct a professionally competent evaluation (See also part D of this pleading and Claim VII of the **3.850** motion). **Ake** claims have traditionally been granted evidentiary resolution since evidence of mental health issues is clearly relevant to the guilt-innocence phase of a capital trial as well as to the penalty phase. Where, through counsel's or the expert's failure, evidence of brain damage, mental retardation and other mental health evidence relating to competency, sanity and mitigation, is

never presented, prejudice is clear. Evidentiary resolution of the facts surrounding this issue is warranted and the lower court's denial was in error.

In Mr. Correll's case, the lower court's order was simply wrong in many respects. This motion involved facts not of record and the State's response indicates many of those facts are in dispute. Since there is nothing in the record or attached to the court's order to refute Mr. Correll's allegations, they must be accepted by this Court as true and at the very minimum an evidentiary hearing should be ordered. Mills v. State, supra.

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance of counsel claim were not "of record." ~~See also~~ Vausht v. State, 442 So. 2d 217, 219 (Fla. 1983). This Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeigler v. State, 452 So. 2d 537 (Fla. 1984); Vausht, supra; Lemon, supra; Squires, supra; Gorham, supra; Smith v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc V. State, 415 So. 2d 721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Aranso v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Correll was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of the Rule 3.850 motion was erroneous.

This claim is by no means exhaustive of the need for hearing

or the errors in the Court's order. Full and professionally competent briefing could not be conducted under the time constraints imposed by the warrant situation.

C. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Once again, the lower court was incorrect in relying on **"facts"** provided by the State **-- "facts"** that are unsubstantiated in the record **--** and was misled as to the proper legal assessment of a claim of ineffective assistance of counsel. But the court never allowed evidentiary resolution. Mr. Correll pled a very substantial claim of ineffective assistance of counsel at sentencing. Trial counsel requested mental health assistance and yet never provided that expert with the necessary background information required for a competent mental health evaluation (**See** part D of this Application).

Contrary to the State's and the court's position, there was much the family could have said regarding Mr. Correll's serious drug problem had they been asked. The evidence is clearly mitigating, but none of it was presented to the jury. The failure to present this evidence denied Mr. Correll his right to an individualized capital sentencing determination. **See** Thomas V. Kemp, **796** F.2d 1322 (11th Cir. **1986);** Tyler V. Kemp, 755 F.2d 741 (11th Cir. **1985).** Here, as in Jones V. Thigpen, **"[d]efense** counsel neglected [and] ignored critical matters of mitigation at the point when the jury was to decide whether to sentence [Jerry

Correll] to death." 788 F.2d 1101, 1103 (5th Cir. 1986). Mr. Correll's allegations established deficient performance and prejudice. An evidentiary hearing and Rule 3.850 relief are appropriate.

The court cannot ascribe any tactical reason to counsel for failure to present the evidence of drug involvement since the defense opening at sentencing specifically said:

> And some of the mitigating factors about Jerry Correll are that he had a lot to drink that night. And you've heard that from testimony during the trial. And Jerry smoked marijuana that night, and you heard that from his own taped statement. You're going to find out that Jerry has a history of drus and alcohol abuse.

(R. 1866) (emphasis added).

That counsel was familiar with Mr. Correll's alcoholism and severe history of drug abuse from independent non-family witnesses, some of whom were actually hostile to Mr. Correll, is also established by the record itself.

Defense counsel conducted numerous depositions pretrial. Those depositions alone establish Mr. Correll's rampant and unchecked appetite for psychoactive substances. The depositions also provided a wealth of information regarding Mr. Correll's drug problems. Yet counsel did not use this information nor seek any more.

In addition to mitigation already in his possession, numerous witnesses known to defense counsel, some of whom

actually testified in the guilt-innocence phase, could have also provided extensive testimony regarding Mr. Correll's poly-drug abuse up to the time of the murders. Mr. Guy Kettlehone testified for the State at the guilt-innocence phase of Mr. Correll's trial. Had counsel merely asked, Mr. Kettlehone could have provided powerful evidence of Mr. Correll's drug addiction.

> My name is Guy Kettlehone and I live in Orlando, Florida. I have known Jerry William Correll since the early 1980's. I met Jerry through James Nagel and we all spent a lot of time running around together.
>
> Jerry was always a tight lipped person. He never put his personal problems onto others or was one to have "heart to heart" talks. I remember Jerry as being a trustworthy person who was easy to get along with. Jerry and I used to party together once in a while but it wasn't like we were together every day. Sometimes I wouldn't see Jerry for weeks at a time but when we were together we usually ended up getting high.
>
> There is no question as to whether or not Jerry used drugs. If he had a connection lined up, whether it be cocaine, LSD, crystal meth, or quaaludes, Jerry followed through and got high. Jerry would be out bar hopping every weekend looking for something to get him high.
>
> Within my circle of friends it was well known that the place to get crystal meth was Susan Correll. She was always selling the stuff and eager to make money.
>
> There was a while there when Jerry and I used quite a bit of cocaine together. Once Jerry started he didn't want to stop. If someone put cocaine in front of Jerry it would be gone. Jerry was like that with any type of drug. It was like he lived to get really high and screwed up and he would go to great lengths to score some drugs.

Throughout our friendship Jerry was always telling about how he loved crystal meth and how easy it was to get a hold of. I never liked the stuff and never took Jerry up on his offers. However, I remember a night, about three weeks before he was arrested, Jerry broke out a stash of crystal meth and started snorting it up. Like always, once Jerry started he couldn't stop. Then he kept talking about how easy it was for Susan to keep him supplied with the stuff.

Jerry used to hang out with a guy named John Kitchens. Whenever there would be a party those two would mainline cocaine. I remember, on several occasions, watching Jerry and John break out all of their supplies. First the cocaine, then the spoons and the needles. It was like a major production and then those who wanted to mainline headed into a bedroom and shot the cocaine into their veins. Of course they would get very high and spent most of the night sticking the needles in their arms.

Jerry had a reputation for mainlining cocaine and skin popping crystal meth. He loved the instand rush and high a person gets from injection. Jerry was always talking about how high he got the night before or last weekend or whenever. The point is, he was out of control and always getting wasted.

Using needles was something I never cared for but Jerry was never able to turn down a high regardless of the dangers or everlasting consequences. Like I said, if a drug was available, Jerry would be there every time. Additionally, Jerry was not one to sit back and wait for the dealers to find him. He was out looking for a connection and a fix. Whether it be cocaine, LSD, or crystal meth was depending on who Jerry ran into first.

After Jerry was arrested I made myself available to his attorneys. I also made it clear that I was willing to answer any questions about Jerry. No one ever asked me

about Jerry's drug use. If asked I would have told them everything I know.

(Affidavit of Guy Kettlehone, proffered in Rule 3.850 motion).

James Nagle was also known to the defense and was intimately familiar with Mr. Correll's drug history. His account demonstrates the depth of Mr. Correll's drug abuse and the extreme lengths to which Mr. Correll would go in order to satisfy his addiction.

> My name is James Nagle and I live in Orlando, Florida. I have been good friends with Jerry William Correll for the past eleven years. We met, in approximately 1979, while we both worked at Saber Marine as fiberglass workers. Jerry and I started hanging around one another and struck up a friendship. I was also at Saber Marine where Jerry met Susan. They quickly became interested in one another and after no time at all they were living together and eventually got married.
>
> When I first met Jerry he was smoking a lot of marijuana. He was getting high everyday, both at work and after clocking out. As soon as Jerry met Susan his life style went through some drastic changes and he started experimenting with other drugs. From the time he started dating Susan and up until his arrest, I have known Jerry to use an unbelievable amount of crystal meth. Additionally, it was not unusual for Jerry to use LSD, quaaludes, and cocaine.
>
> When Jerry started using crystal meth he lost all self control. He was using it virtually everyday and it was clear to me that Jerry quickly passed through the experimental phase and slid into addiction. It all became very simple - if Jerry had crystal meth he would use it and he spent an incredible amount of time making sure that he used it and he spent an incredible amount of time making sure that he knew where a supply

of the drug was located. I remember how I use to talk with Jerry and try to warn him about the dangers associated with the heavy use of crystal meth. However, Jerry was in real deep and all the warnings fell on deaf ears. All he could think about was getting more crystal meth. Jerry's drug use continued for years and it got to the point where Jerry would spend his last dollars on crystal meth as opposed to food and go hungry. In Jerry's mind, crystal meth had become his life line.

Crystal meth was so much a part of Jerry's life that it even dominated his relationship with Susan. She was selling a large amount of crystal meth and had a constant supply on hand. Of course this was critical to Jerry because he knew that as long as he was with Susan he had access to his high. Furthermore, Susan knew this and used her access to the endless supply to manipulate Jerry.

Jerry and Susan always had trouble getting along. For as long as I can remember their relationship was up and down. Susan was always getting angry with Jerry because of his heavy drug use and then she would keep right on selling him the crystal meth. Their relationship revolved around greed and addiction - Susan wanted Jerry's money and Jerry, in return, wanted Susan's drugs. Without that aspect of their relationship they would never have stayed together.

To make sure that Jerry kept coming back for more crystal meth, Susan refused to tell Jerry the name of her supplier. This continued her access to Jerry's money and made him dependent on her. There were many occasions when Susan would cut Jerry off. She would threaten to never sell him crystal meth and this would drive Jerry absolutely nuts.

Even after their divorce became official, the drug relationship continued. The scenario went as follows: Jerry would meet Susan at the ABC Lounge on the corner of

Lancaster and Orange Avenue. There Jerry would get a bag of crystal meth off of Susan. He would bring the drug by my house to divide it up into dime bags. Jerry would always snort some of the crystal meth while dividing it up. He would then take the dime bags back over to the bar and give to Susan so that she could sell them. As long as Jerry would help Susan with her transfer of the drug she would give him some for free. The amount that Susan let Jerry have for free was never enough and she would make him buy the rest.

When Jerry was on crystal meth he became a different person. He would become wired up and stressed out. He would get wide eyed and very nervous. After doing a couple of lines, Jerry would be moving around, unable to sit still, and just keep right on doing more of the crystal meth. The crystal meth also made Jerry very paranoid. He had trouble sitting still and was always looking around the room and out the windows. He could not be in a room with the doors closed and was uncomfortable around strangers. It was like he was always looking over his shoulder and watching his back.

Jerry did so much crystal meth that it was destroying his brain. He would have trouble remembering people's names. Even shortly after meeting them. I tried again and again to tell Jerry that he was going to blow out his mind, but you can't tell someone that. All Jerry wanted to do was get a hold of more crystal meth and get high.

I remember one occasion when Jerry was high on crystal meth for three straight days. He was really strung out and his eyes were real wide. He would be standing there and bust out into a cold sweat and start shaking. It was terrible. Jerry was in a real bad way and he just kept right on using drugs. He would get high on anything available to him. Jerry didn't care if it was LSD, cocaine, or quaaludes, he just had to get high. Crystal meth was his main drug but Jerry would take anything that was available. Simply put, Jerry was wreckless, out of control, and

unaware as to what he was doing to himself.

> About two weeks before Jerry was arrested, Susan came over to my house and tried to sell me and my wife some crystal meth. We don't use it and sent her away. She also invited us to her house for a party about two days before she was killed. There was no way that I was going to go because a party at Susan's house meant a house full of people using crystal meth.
>
> I was at Jerry's trial and was available to his attorney. No one ever asked me about Jerry's drug use and if asked, I would of told him everything I know about Jerry's past.

(Affidavit of James Nagle, proffered in Rule 3.850 motion).

Ineffectively, counsel failed to ask these people about the seriousness of Mr. Correll's addiction. Had he done so and then provided this information to a competent mental health expert, a proper evaluation could have been performed (See Drs. Kerman and Macaluso's reports, part D) and compelling mitigation could have been presented to the jury.

Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. Where counsel unreasonably flouts that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Stevens v. State, 522 So. 2d 1082 (Fla. 1989). See also Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Armstrong v. Dugger, 833 F.2d 1430, 1432-33 (11th Cir.

1987); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 748 F.2d 1462, 1463-64 (11th Cir. 1984); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986); Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

Mr. Correll's counsel failed in his duty. The wealth of significant evidence which was available and which should have been presented was not adequately presented. Much more evidence in mitigation was available yet never presented because counsel never investigated. Counsel operated through neglect. Here, as in Harris v. Dusser, 874 F.2d 756, 763 (11th Cir. 1989), "counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect." No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Nealy v. Cabana, supra; Kimmelman v. Morrison, supra. Here, Mr. Correll's sentence of death is the prejudice resulting from counsel's unreasonable omissions. See Harris v.

Dugger, **874 F.2d 756** (11th Cir. **1989).** In this case, as in Thomas v. Kemp,

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washington, **466** U.S. at **694.** The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, **428** U.S. **153 (1976).** Here the jurors were given no information to aid them in making such an individualized determination.

796 F.2d at **1325.**

Counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings. Counsel failed to discover and use the available evidence of Mr. Correll's extreme addiction -- mitigating evidence without which no individualized consideration could occur.

Furthermore, counsel failed to object to the **"expert"** testimony of Dr. Thomas Hegert, a medical examiner, when he testified regarding his opinion on crime reconstruction (R. **1884; 1535)** and the "emotional pain" experienced by the victims (R. **1878; 1879; 1880),** opinions that went well beyond his area of expertise and for which he was decidedly unfit to offer. Had counsel adequately prepared and discharged his sixth amendment duties, substantial mitigating evidence which would have precluded a sentence of death in this case would have been uncovered. Even more anomolous was the failure of counsel to

utilize statutory and nonstatutory mitigating evidence which counsel had discovered and was in his possession. That counsel was aware of the extensive mitigation available is unmistakable as evidenced by counsel's letter of November 13, 1985, to Dr. Robert W. Pollack.

> Robert W. Pollack, M.D.
> 1276 Minnesota Avenue
> Winter Park, Florida
>
> Dear Dr. Pollack:
>
> Enclosed is Judge Stroker's Order appointing you to examine Jerry Correll.
>
> The trial is December 9, 1985, so I would appreciate your report by November 26, 1985. If you cannot do that, please let me know.
>
> Since this is not only an extremely serious case, but is also the kind of case in which Jerry's mental state could be a critical issue in his sentencing, even if he is not incompetent and was not insane, please take as much time as you feel necessary to examine him. I do not believe that cost is a problem because of the seriousness of the case. If you feel that any other testing ought to be done, let me know and I will try to get it done.
>
> I have waited some time to ask this of you in hopes of getting records from Jerry's school and background that might assist you. Unfortunately, his school records indicate no problems with his emotions or behavior.
>
> Jerry used all kinds of druss for several years. He appears to me to have a somewhat flat affect due to his drus use.
>
> Of course, Jerry denies any connection with these murders. I enclose copies of police reports that will give you the facts in the case.

My specific questions are:

1. Is Jerry competent to stand trial?

2. Is it reasonably possible that Jerry was insane at the time of the murders - assuming that he committed them?

3. Does Jerry suffer from any brain damase or mental weakness that may have substantially impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (assuming he committed the murders)?

4. Is it possible that Jerry was sufferins from some extreme emotional and mental disturbance at the time the murders were committed (again assuming that he committed them)?

If you have any questions at all, please call me.

Sincerely,

Peter Warren Kenny
Assistant Public Defender

(Letter proffered in 3.850 motion). Clearly, counsel had no tactical or strategic basis for not utilizing information in his possession regarding Mr. Correll's history of chronic drug and alcohol abuse and his ingestion of drugs and alcohol on the night of the offense.

In addition to Mr. Correll's drug and alcohol abuse, counsel could have but failed to present a compelling portrait of Mr. Correll's impoverished and abusive childhood. As a result, Mr.

Correll was sentenced to die by a judge and jury who never knew that he grew up under appalling conditions and suffered a lifetime of abuse, rejection, abandonment, and drug addiction.

An active member of the Ku Klux Klan, Jerry's father was an alcoholic who promoted disharmony and planted the seeds to the family's destruction. Dora Woodrow Correll gave birth to her son Jerry Correll, the last of her four children, on January 9, 1956, just months after moving from rural Maryland to Miami, Florida. Jerry's chances in life were immediately impaired due to the overwhelming economic and psychological strains his severly handicapped older brother, Clyde, placed on the family.

Dora became pregnant and used her marriage as an opportunity to escape a horror filled childhood centered deep in the rural farming region of Maryland. She was one of thirteen children raised in a household without a mother and left to run by an abusive and alcohol driven father. Dora and her siblings lived in extreme poverty and withstood continual beatings, neglect and abandonment. The abuse Dora absorbed was so severe that the continual blows to the head deafened her left ear. Additionally, the isolation from mainstream society which Dora endured was so extreme that it left her without an understanding of, or participation in, the monetary system until after her marriage. Thus Jerry's mother was never provided the opportunity to develop much beyond that of a child. When she was thrown into the demanding life of parenthood, her perceptions of what a parent

should be were greatly distorted. Dora had a myriad of personal problems including that of an alcoholic husband and mental instability. She herself was a victim of a marriage riddled with extensive neglect and poverty. Her husband, Jacob Fisher Correll, deprived Dora of virtually all contact with the world outside of their house seated deep in the Maryland country side. Dora was never provided with the opportunity to explore life outside of the confines of the home consisting of the young and ever demanding children. This further distorted his wife's pathetic understanding of the responsibilities of adulthood and parenting.

Jacob's alcohol consumption accelerated at an alarming rate and resulted in further complicating Dora's attempt to provide a successful and healthy environment for her children. Simultaneously, any compassion Jacob felt toward his children completely vanished and when he was present, he viciously abused them for even the most minor infractions.

Dora experienced a difficult delivery with her third child (Clyde Correll) and after an extensive and financially exhaustive testing process, Clyde was diagnosed as having suffered from anoxia during the birth. The result of the deprivation was cerebral palsy and severe mental retardation. Experts at John Hopkins Medical Center encouraged the family to place Clyde in an institution and erase his birth from their memory. But Jacob Correll immediately revolted and refuted the medical findings and

announced that Clyde would enter the Correll household and live far past any so-called expert predictions. Prior to this event Jacob Correll's presence in the household was virtually non-existent. Dora, a deprived and damaged person herself, had thus been required to provide the care, nurturing, and day to day guidance equal to that of not only a mother but also a father. This resulted in the two oldest sons, Jack and Charlie, being raised in a household without an adequate male role model. When present, however, Jacob was a fierce task master that damaged the self-esteem of his sons by viciously attacking their imperfections. This continual violation coupled with the fact that Jacob's primary role within the family was disciplinarian prevented him from ever developing an intimate relationship with any of his sons. Both Jack and Charlie describe how their father was so much of a perfectionist that they were never able to feel close to or comfortable with him. The two oldest sons remember their father as the parent who was feared and who applied torturous and merciless punishment. Not only was Jacob brutal with his children, he also used cruel and perverse tactics to keep his wife in a submissive state. Jacob further alienated Jack and Charlie through his unprecedented display of loyalty, devotion, patience, flexibility, and genuine love towards Clyde. Both of them describe their parents as being so preoccupied with Clyde that it drained the family's financial resources and dominated their entire existence. This treatment of Clyde, as

described by Dora, was Jacob's attempt to have Clyde appear as "normal" and to keep the household, in Jacob's eyes, free of imperfection. This created such a burden that both Jack and Charlie ran away as young teenagers after realizing that their father was forcing them to live a dead end existence. The feelings of desperation soared to a level where the youngsters were eager to explore the unknown and dangerous frontiers as opposed to continuing their life in the predictable and demented home run by their father. Jack used the armed services as an escape while Charlie hitchhiked across the country.

The Correll family moved to Miami, while Dora was carrying Jerry, in an attempt to provide Clyde with the best possible climates. After Jacob insisted that Clyde be raised at home, John Hopkins suggested that the family move south for the cold northern winters would surely hamper Clyde's chances. With a vow to never again seek medical assistance for Clyde, Jacob led the trek south. The move devastated the family economically. In order to have the medical insurance cover the costs of Jerry's birth, Jacob had to remain within the same labor union providing the insurance coverage. This union had very few positions available and Jacob took a job that paid the mere pittance of one dollar an hour. Dora clearly recalls how the family was forced to cut costs at every opportunity such as living on the subsistence diet of beans and rice.

While still a young boy, Jerry's family moved to Kissimmee,

Florida, in an attempt to fight the poverty stemming from his father's inability to secure an income capable of providing for the endless needs of Clyde and the family. Jacob was never sure where the employment opportunities were going to be available in the state of Florida at that time. Therefore, he insisted that the family purchase a trailer and be prepared to live on the move. After a six year period of working on the "Space Coast" the family moved back to the Miami area, again out of economic necessity. Throughout this period, the majority of the family's limited resources continued to be funneled towards the care of Clyde. Just as was the case with Jack and Charlie, Jerry's well being was being sacrificed for the betterment of Clyde. Jacob continuously deprived Jerry of the love and understanding that every young boy must have to successfully proceed through the normal socialization process. Without this love and outward sign of affection and approval, Jerry's view and understanding of human interaction was severely crippled.

As if Jerry's struggle with the mass neglect and abandonment he experienced at home was not punishing enough, the racial violence taking place at school further complicated Jerry's disrupted childhood. A fellow classmate was seriously shot, within Jerry's view, during a recess period. Because of the lack of communication at home, Jerry was unable to discuss this incident in any meaningful way. The idea of approaching his parents for support and insight was completely foreign to Jerry

and any discussion of this incident was shallow and dismissed as a problem created by the negro race. Jacob further warped Jerry's understanding of human interaction and positive reasoning abilities when the Correll's left Miami because a black family moved into their neighborhood. Dora describes how the neighborhood "fell apart" and no longer provided a safe and secure environment for raising white children. Jacob moved his family to Orlando in hopes of ridding his family of the perceived threat created by minorities.

Following the move north, Jacob became an active member in the Ku Klux Klan. Jerry's oldest brother Jack describes how his father was a body guard for one of the highest ranking KKK members in the state of Florida. He goes on to describe how his father's involvement reached the level where the FBI was keeping a watchful eye on the Correll residence and tapping phone conversations. Jacob, in hopes of strengthening the racial bigotry, insisted that Jerry become involved with the junior klansman. He took his son to a farm owned by the white supremacist group and insisted that Jerry spend as much time with the KKK family to ensure his "purity". By forcing this savage-like doctrine upon his son, Jacob completely smashed any hopes of Jerry's developing a clear and functional understanding of social interaction. Instead, Jerry was brainwashed into accepting the racially biased notions upon which the Klan was founded. Dora explains that the only time Jerry and his father were able to

form any type of bond was during his indoctrination into the world of prejudice, brutality, and vicious racial division. As soon as Jerry failed to show a continued interest and explained his desire to stop active involvement in the Klan, Jacob's involvement in Jerry's life abruptly halted. However, Jacob played a key role in Jerry's removal from the Orlando public schools during his junior year. The school Jerry was attending consisted of multiple races and the tensions often flared out of control. After several bomb threats and near riot situations, Jerry dropped out of Oak Ridge High School at the earliest opportunity -- his sixteenth birthday.

After trying his hand at numerous occupations, Jerry secured a job at Saber Marine where he worked with fiberglass boat molding. Shortly after striking up a friendship with Larry Griffith he was introduced to Susan Hines. Not only did Larry introduce Jerry to his soon-to-be-wife, but provided him with access to the altered world of illegal drugs. The overall effect of these introductions was to further separate Jerry from his family and launch him into a confusing and overwhelming world of drug addiction. Initially, Jerry's fascination with Susan was based on his hope that she would provide him the satisfaction and happiness he had been missing throughout his life. Growing up within the framework of a dysfunctional family had taken its toll on Jerry and his newly discovered mate provided him with the perfect opportunity to participate in and create the type of

family he never had. Additionally, the warping of his mind over the years made it very easy for Jerry to accept the incredibly peaceful and carefree feelings he found from taking the likes of LSD, cocaine, quaaludes, and crystal meth. Susan was not only using a large quantity of crystal meth but also distributing it throughout the community. The ready access to crystal meth made it easy for Jerry to increase his use and eventually reach the level of addiction.

From the very beginning it is reported by several of Jerry's friends and family members that his relationship with Susan was stormy. Of course Jerry's family background failed to provide him the tools necessary for him to succeed in a complex relationship. Jerry and Susan's marriage was based superficially around the notion of forming a family but the real bedrock of the relationship was of drug buyer and supplier -- Jerry being the buyer of crystal meth and Susan being the endless source.

Rather than an organized and cogent presentation of Mr. Correll's childhood and family life, counsel squandered this valuable mitigation by haphazardly calling Mr. Correll's family members without any prior preparation or knowledge as to what mitigating circumstances could be established by these witnesses.

None of this evidence was developed and presented to the jury. However, if counsel had developed the mitigation and tried to present it, but was not allowed to do so because the trial court ruled it inadmissible, under Penry v. Lynaugh, 109 S. Ct.

2934 (1989), Skipper v. South Carolina, 476 U.S. 1 (1986), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Mr. Correll would be entitled to a new sentencing proceeding because his death sentence would be unreliable. The same conclusion must follow here since the evidence did not reach the jury because of counsels' deficiencies -- Mr. Correll's death sentence is still unreliable.

In Strickland v. Washinston, the Supreme Court noted:

> [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

466 U.S. at 696 (emphasis added).

In Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), the Eleventh Circuit noted the interplay between Lockett and its progeny and the prejudice prong of Strickland v. Washinston:

> Certainly [petitioner] would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the state's showing of aggravating circumstances. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here, [counsel's] failure to seek out and prepare any witnesses to testify as to mitisating circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not

> to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure--albeit prompted by a good faith expectation of a favorable verdict--to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome.

758 F.2d at **535** (emphasis added).

Here, had trial counsel conducted a reasonable investigation and imparted the results of that investigation to the jury there would have been a very powerful penalty phase case and closing argument that not only would have portrayed Mr. Correll as **a** redeemable 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, a history of severe alcohol and drug abuse and his extreme intoxication on the day of the offense. Counsel should also have imparted this information to competent mental health professionals for their assistance in determining and testifying as to any statutory or nonstatutory mitigation they may have found as a result of their evaluation (***See*** also part D of this pleading and Claim VIII of the Rule **3.850** motion).

In considering whether a resentencing is necessary because of defense counsel's deficient performance, consideration must be given to the import of Lockett v. Ohio, **438** U.S. **586 (1978)** and its progeny:

> "In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the [sentencer] must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the [sentencer] is to give a "'reasoned moral response to the defendant's background, character, and crime.'" Franklin, 487 U.S., at --- (opinion concurring in judgment) (quoting California v. Brown, 479 U.S., at 545 (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson, 428 U.S., at 305, the [sentencer] must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.
>
> . . . Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605; Eddings, 455 U.S., at 119 (concurring opinion). When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605.

Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989) (emphasis added). The prejudice to Mr. Correll resulting from counsel's

deficient performance is also clear. Confidence is undermined in the outcome, and the results of the penalty phase are unreliable. An evidentiary hearing must be conducted, and, thereafter, Rule 3.850 relief must be granted and a new sentencing ordered.

D. FAILURE TO HAVE A PROFESSIONALLY COMPETENT MENTAL HEALTH EVALUATION PERFORMED

Mr. Correll suffers from brain dysfunction and mental retardation. Furthermore, Mr. Correll has an incredible history of substance abuse of a wide variety of drugs up to, and including, the time of the offense. None of this evidence was ever presented to the judge or the jury.

The court summarily dismissed the claim stating in part "the record demonstrates that Dr. Pollack conducted a competent evaluation of Correll, based on what he was told by counsel after counsel's investigation and based on the statements of Correll himself." (Order Denying, page 8, March 7, 1990). The court is wrong in its factual assessment and completely misses the point of what is called for in a professionally competent evaluation.

First, there is no "record" of Dr. Pollack's report or of counsel's contact with him except in the defense attorney's file. The only "record" of this information appears in Mr. Correll's Rule 3.850 pleading but does not appear anywhere "of record" in the court file. The lower court, in adopting facts not of record and particularly contested facts, is clearly wrong. This is, of course, precisely the reason a hearing is required on this issue.

Secondly, the court claims that the evaluation was competent based on what counsel and Mr. Correll told Dr. Pollack. Since Mr. Kenny's communication with Dr. Pollack had not been designed to provide information but rather to outline areas of questions for the doctor's inquiry, the only real source of information to Dr. Pollack had been self-report from Jerry Correll. The lower court is clearly unfamiliar with the standards of care within the mental health profession that require more than mere self report for a competent evaluation.

Dr. Sheldon Margules, M.D., J.D., a medical legal consultant, was asked to review the evaluation performed by Dr. Pollack in this case and to render an opinion as to its adequency.

> Thank you for asking me to review the medical and legal records of Jerry Correll and the psychiatric evaluation of Dr. Robert W. Pollack. At the time of the interview, which was performed on November 19, 1985, Dr. Pollack found Mr. Correll was not "laboring under any delusions, influence of exogenous substances or irresistible impulse which would render him incompetent or legally insane at the time of the alleged **offense."**
>
> Dr. Pollack's conclusions were based solely on an interview conducted by Dr. Pollack in Mr. Correll's jail cell. No outside sources were used to corroborate or discredit Mr. Correll's account of his past medical and drug history. A psychiatric evaluation in this setting is particularly suspect, because without outside sources, Dr. Pollack **had** to conclude that Mr. Correll "provided me with all the information required to do an adequate Psychiatric Evaluation and to assess his state of mind,

both at the present time as well as the time of the alleged offense." The fact is, however, that Mr. Correll may have been paranoid at the time of the interview or, more likely, under the impression that his drug addiction would only be used against him. (Two likely explanations for such paranoid ideation are amphetamine abuse or primary paranoid psychosis).

Dr. Pollack accepted at face value that Mr. Correll only "experimented with marijuana, cocaine and several other drugs, but not on any regular basis." Dr. Pollack recognized, or should have recognized, that Mr. Correll's account of his drug habit was woefully insufficient. Dr. Pollack was certainly on notice of Mr. Correll's drug environment when Dr. Pollack learned that Mr. Correll had been "quite angry with her (Susan Correll) (for) having been using and dealing in multiple drugs, especially amphetamines like congeners.... "

In my opinion, Dr. Pollack realized the inadequacy of a single interview, and was himself suspicious of Mr. Correll's heavy drug use, because at the end of his report, apparently having second thoughts, Dr. Pollack added the following addendum: "Should there be any statements of positions available from family or friends of Mr. Correll describing his behavior or change in behavior over the past several years, I would be more than happy to review these and evaluate whether or not this would imply any behavioral change or alter my present opinion." Despite this clear request, affidavits from family and friends, describing just the sort of behavior Dr. Pollack was referring to, were never provided.

The fact is that Mr. Correll engaged in extensive drug use, including LSD, crystal methamphetamine (both intranasally and intravenously), cocaine, marijuana, and alcohol. This drug use was addictive and often debilitating. Dr. Pollack would be the first to admit that he was deprived of

> sufficient information to make an adequate assessment of Mr. Correll's mental state at the time of the alleged offense. Clearly, without collateral information about Mr. Correll's heavy drug use, particularly his drug use on the day of the alleged offense, Dr. Pollack's report breached the standard of due care for a forensic psychiatrist. This is particularly glaring considering that Dr. Pollack asked for that additional information and never received it.
>
> The negligent failure to ground Dr. Pollack's medical and legal conclusions on essential collateral information deprived Dr. Pollack of the opportunity to properly judge Mr. Correll's mental state at the time of the murders. Had Dr. Pollack been able to consider the affidavits of Mr. Correll's family and friends attesting to his addiction to crystal methamphetamine, marijuana, cocaine, and alcohol, Dr. Pollack would likely have drawn two conclusions. The first is that Mr. Correll committed the alleged acts while under the influence of highly potent psychoactive drugs, particularly amphetamine, a drug known to cause acute paranoid psychosis. The second is that as a result of acting under the influence of such drugs, Mr. Correll was likely suffering an extreme emotional and mental disturbance that interferred with his knowledge of right and wrong.

(Report of Dr. Margulies).

Clearly, Dr. Pollack's evaluation was incomplete and professionally inadequate and counsel's failure to provide the available background materials necessary for a competent evaluation was deficient performance. Dr. Pollack's failure to conduct testing of any sort was also clearly substandard professional care.

Finally, neither counsel nor the expert did any

investigation into Mr. Correll's dysfunctional family life. Essentially, Mr. Correll had no nurturing relationships with his family. His father was either abusive to Jerry or completely absent. His mother was chemically depressed and self abusive. All the family resources went to Jerry's severely retarded brother. None of this was investigated or presented to the jury.

A professionally competent evaluation was recently conducted by Dr. Fred Kerman. Dr. Kerman summarized the materials reviewed and tests administered:

ASSESSMENT TECHNIQUES:

Clinical Interview
Bender Visual-Motor Gestalt Test and Recall
Human Figures Drawings
Luria-Nebraska Neuropsychological Battery
Wechsler Adult Intelligence Scale-Revised
Slosson Oral Reading Test
Booklet Categories Test
Rorschach Technique
Thematic Apperception Test
Minnesota Multiphasic Personality Inventory
Rotter Incomplete Sentences-Adult Form
Telephone interview with Dora Correll, mother
Telephone interview with Charlie Correll, brother
Telephone interview with Shirley Correll, sister-in-law
Telephone interview with Brenda Nagle, friend
Telephone interview with James Nagle, friend
Telephone interview with Guy Kettlehone, friend
Review of background materials prepared by the Office of the Capital Collateral Representative which

included excerpts of the trial transcript of the case of the State of Florida vs. Jerry Correll, depositions taken on the case, presentence report, psychiatric evaluation, investigator's interviews and other materials

BACKGROUND INFORMATION:

1. Statement of the facts from Appellant's initial brief

2. Circuit Court's Sentencing Order

3. Florida Supreme Court Opinion, No. 68,393

4. Trial testimony of Dr. Thomas Hegert

5. Penalty Phase testimony of Dr. Hegert

6. Trial testimony of Judith Bunker

7. Diagram of crime scene

8. Trial testimony of Detective of Diane Payne

9. Penalty Phase testimony of Jerry William Correll

10. Orange County Sheriff's Office interview of Jerry William Correll, 7-1-85

11. Orange County Sheriff's Office interview of Jerry William Correll, 7-2-85

12. Note's from the Public Defender's file

13. Notes from the interviews of family members and friends of Jerry William Correll

14. Dr. Pollack's psychological evaluation of Jerry William Correll, dated 11-19-85

15. Employment records

16. Post-sentence Investigation

17. Trial Testimony of Deputy Harry Park

18. Trial Testimony of Patricia Babcock

19. Trial Testimony of Guy Kettlehone

20. Deposition of Robert Garrett

21. Deposition of Wendy Garrett

22. Deposition of Donna Valentine

23. Deposition of Gina Caldwell

24. Trial Testimony of Lawrence Smith

25. Deposition of Harold Witt

26. Deposition of Richard Henestofel

27. Deposition of Det. Thomas McCann

28. Deposition of Teresa Gilletto Brooks

29. Deposition of Judith Hendrix

30. Deposition of Dora Woodrow Correll

31. Deposition of Charles Oliver Correll

32. Affidavit of Brenda Nagle

33. Affidavit of Guy Kettlehone

34. Affidavit of James Nable

35. School records of Jerry William Correll

36. Affidavit of Dora Woodrow Correll

37. Affidavit of Charles Oliver Correll

38. Report of Dr. Peter Macaluso

(Report of Dr. Kerman, proffered in Rule 3.850 motion).

Dr. Kerman found that Mr. Correll is of borderline intelligence and suffers from organic brain damage. The evaluation also showed that Mr. Correll's self report regarding his drug and alcohol abuse was unreliable due to his tendency to minimize his problems. Yet neither counsel nor Dr. Pollack made the kind of investigation required as Dr. Kerman's report makes clear.

Dr. Peter Macaluso, M.D., an expert in substance abuse problems was also recently retained by present counsel for Mr. Correll and reported the following after his extensive evaluation of Mr. Correll:

> As per your request, I have examined and evaluated Jerry William Correll in order to determine whether Mr. Correll suffers from the Disease of Chemical Dependency and if so, whether mitigating circumstances existed at the time of his alleged offense. I have reviewed various documents regarding the above captioned case. These include:
>
> 1. Statement of the facts from Appellant's initial brief
>
> 2. Circuit Court's Sentencing Order
>
> 3. Florida Supreme Court Opinion, No. 68,393
>
> 4. Trial testimony of Dr. Thomas Hegert

5. Penalty Phase testimony of Dr. Hegert

6. Trial testimony of Judith Bunker

7. Diagram of crime scene

8. Trial testimony of Detective of Diane Payne

9. Penalty Phase testimony of Jerry William Correll

10. Orange County Sheriff's Office interview of Jerry William Correll, 7-1-85

11. Orange County Sheriff's Office interview of Jerry William Correll, 7-2-85

12. Note's from the Public Defender's file

13. Notes from the interviews of family members and friends of Jerry William Correll

14. Dr. Pollack's psychological evaluation of Jerry William Correll, dated 11-19-85

15. Employment records

16. Post-sentence Investigation

17. Trial Testimony of Deputy Harry Park

18. Trial Testimony of Patricia Babcock

19. Trial Testimony of Guy Kettlehone

20. Deposition of Robert Garrett

21. Deposition of Wendy Garrett

22. Deposition of Donna Valentine

23. Deposition of Gina Caldwell

24. Trial Testimony of Lawrence Smith

25. Deposition of Harold Witt

26. Deposition of Richard Henestofel

27. Deposition of Det. Thomas McCann

28. Deposition of Teresa Gilletto Brooks

29. Deposition of Judith Hendrix

30. Deposition of Dora Woodrow Correll

31. Deposition of Charles Oliver Correll

32. Psychological report on Mr. Jerry Correll by Dr. Kerman

33. Affidavit of Brenda Nagle

34. Affidavit of Guy Kettlehone

35. Affidavit of James Nable

36. School records of Jerry William Correll

37. Affidavit of Dora Woodrow Correll

38. Affidavit of Charles Oliver Correll

Further, on February 2, 1990, I had the opportunity to evaluate Mr. Correll at the Florida State Prison in Starke, Florida. All of the materials are the types of materials routinely relied upon by experts in my field in order to form and express expert opinions regarding the questions that were asked. The following represents a summation of that evaluation, along with an extensive analysis of the records involved in this case.

Jerry William Correll is a thirty-three year old male born on January 9, 1956. He is the youngest child in a family with four siblings. He was raised in an alcoholic

environment and has a strong positive family history for alcoholism. His father was severely alcoholic and would often be incarcerated two to three times per week because of his intoxication. Further, a maternal uncle died from alcoholic cirrhosis and his maternal grandfather, as reported by Mr. Correll's mother, also suffered from the disease of alcoholism.

Mr. Correll was introduced to alcohol in early childhood when his father would give him beer when he was approximately five years old. By the time he was in the sixth grade, he would drink beer occasionally with friends and by the age of fourteen he was chronically drinking beer and alcohol on weekends and smoking marijuana on a daily basis. His daily ingestion of marijuana continued from the age of fourteen until he was incarcerated for his present alleged offense. Mr. Correll began using LSD (a strong hallucinogenic drug) when he was fifteen and would use this drug approximately twice per month. His alcohol intake increased throughout his early adolescence and at the age of 16 he was drinking alcohol on a daily basis, before and after school, often consuming a half a pint of alcohol per day. During this time his intake of LSD and hallucinogenic mushrooms increased, he would often skip class and have marked truancy and he eventually left school in the tenth grade.

At 18 years of age, Mr. Correll started using crystal methamphetamine (a potent, addictive amphetamine drug) which quickly became his drug of choice. Initially he began using this drug intranasally but this quickly progressed to intravenous use. During this period of time, Mr. Correll's poly-drug use esculated. He would often use marijuana, methamphetamine, on a daily basis. Mr. Correll would use his drugs throughout the work day and by the age of twenty he was injecting IV heroin. During this time he first began using cocaine after work, the amounts quickly increasing until his incarceration. From approximately the age of twenty, Mr. Correll was using alcohol,

crystal methamphetamine along with cocaine when it was available to him on a daily basis.

Significantly, Mr. Correll's relationship with Susan Correll began about this time. Susan Correll, at the time of the couple's meeting, as the depositions of Wendy and Robert Garret disclose, was already an experienced drug user. Their relationship and subsequent marriage together quickly became one in which drug use and its acquisition assumed primary importance, consuming a disproportional amount of the couple's energies and financial resources. As Donna Valentine's deposition notes, in order to facilitate their access and increasing demand for drugs the couple began to sell drugs from their mobile home. Mr. Correll's relationship with Susan was thus not only a source of emotional support but also became his primary source of drugs to satisfy his physiological addiction.

Although the marriage ultimately ended in divorce, the affidavits of James and Brenda Nagle indicate Susan's drug dealing continued and remained Mr. Correll's primary source of crystal methamphetamine. In large measure it was Mr. Correll's physiological dependence on methamphetamine with his ex-wife Susan serving as his main supplier of drugs which accounts for Mr. Correll's repeated attempts to reunite the couple despite Susan's consistent rejection of these overtures.

The above mentioned pattern of alcohol and drug taking continued up to the time of the incident with which Mr. Correll is charged. During the 24 hour period of time prior to the incident, Mr. Correll smoked marijuana throughout the day, from 9:00 to 11:00 p.m. consumed six drinks of whiskey and continued to smoke marijuana. When his marijuana supply was depleted he went to obtain more. He continued his alcohol and drug ingestion throughout the night. Prior to the incident in which Mr. Correll is charged he had approximately a total of ten marijuana cigarettes and an unknown quantity of

alcohol, crystal methamphetamine and cocaine.

Mr. Correll's alcohol and drug taking resulted in characteristic life problems. He lost a number of teeth, was involved in auto accidents, suffered from depressions and had characteristic disturbances in inter-personal relationships. His marriage eventually ended in a divorce. His school performance became poor as his alcohol and drug taking increased and he would often use drugs and consume alcohol in the work place. His tolerance to drugs and alcohol increased in a characteristic fashion and this was especially noted to his tolerance to crystal methamphetamine and cocaine. When Mr. Correll experienced withdrawal symptoms, he would often switch to another drug which was usually crystal methamphetamine.

This history was obtained from Mr. Correll during my extensive interview on February 2, 1990. I checked the veracity of his statements throughout the interview by paying close attention to his consistency to questions, his body language, eye contact, affect and the form and content of his speech. I concluded that his history was internally consistent, and that the pattern and progression of his drug and alcohol abuse history followed a familiar development often found in people that are reared and raised in an alcohol and drug laden environment. A number of the aspects of Mr. Correll's drug and alcohol abuse history are independently corroborated by the records and statements that I have reviewed.

Among the factors that I considered in arriving at my opinions are:

1. Jerry Correll continued to use alcohol and drugs in an obsessive compulsive manner despite subsequent adverse life consequences. His compulsivity and obsessiveness to drug and alcohol taking continued despite physical problems and accidents, despite significant depression and despite significant loss of inter-personal relationships and continued throughout school

and in the workplace.

2. Jerry Correll's alcohol and drug taking resulted in partial and/or total blackouts.

3. Jerry Correll has a strong positive family history of chemical dependency and was raised and reared in an alcoholic environment.

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

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

6. Jerry Correll told Larry Smith that he had used drugs throughout the night of the alleged offense.

7. Deputy Harry Parks recovered a hypodermic syringe from Jerry Correll's room on July 2, 1985.

8. Brenda Nagle's observations of Jerry Correll's drug use and subsequent increase in that use after meeting Susan Correll.

9. Guy Kettlehone's observations of Jerry Correll's poly-drug use and IV cocaine addiction obsessive/compulsive use of of crystal meth and amphetamine.

10. James Nagle's observations regarding Jerry Correll's daily obsessive/compulsive poly-drug use and interpersonal relationship with his wife Susan.

11. Upon recent psychological testing by Dr. Kerman, it was demonstrated that Jerry Correll suffers from retardation and Organic Brain Syndrome.

After careful review and analysis of the pertinent records in this case and after a thorough evaluation of Jerry Correll, it is my expert medical opinion that:

A. Jerry Correll suffers from the Disease of Chemical Dependency, as defined as the continued obsessive-compulsive use of drugs despite ensuing adverse life consequences. (DSM-III-R) Psychoactive Substance Abuse Disorder, Psychoactive Substance-Induced Organic Mental Disorder.

B. Jerry Correll is poly-drug addicted. His drugs of choice being crystal methamphetamine (a potent synthetic amphetamine), marijuana (a hallucinogenic drug) and alcohol. These drugs taken in combination produce severe disorientation, panic paranoia, hysteria, depression and feelings of depersonalization and hallucinations, delusional states and psychosis. Jerry Correll's Disease of Chemical Dependency is severely advanced as to produce, while intoxicated, significant decreases in judgment, perception and insight, along with global cognitive impairment. Global impairment is the general overall impairment of higher mental functioning, i.e. impairment and inability to form adequate judgments, perceptions and insights, inability to make associations and to reason arbitrarily. These states would have occurred while he was under the acute (immediate) effects of alcohol and drugs.

C. Presently, Mr. Jerry Correll is suffering from Organic Brain Syndrome. This, within a reasonable degree of medical probability, is chemical and toxic in origin and is a direct result of his advanced and severe Disease of Chemical Dependency.

D. Jerry Correll's Disease of Chemical Dependency is severe and advanced as to produce partial and/or total blackouts while he is under the acute toxic effects of alcohol and drugs.

E. During the time of the incident for which Jerry Correll was charged, he was under the prolonged and acute toxic effects of massive amounts of the addictive drugs crystal methamphetamine, marijuana, cocaine and large quantities of alcohol.

F. The prolong and acute toxic effects of these addictive chemicals, within a reasonable degree of medical certainty, produced marked global cognitive impairment, along with marked diminution of his judgment, perception and insight, which predicated the state of partial/total blackouts.

G. As a direct result of Jerry Correll's advanced and severe Disease of Chemical Dependency and in conjunction with the marked global cognitive impairment, Jerry Correll was, at the time of the incident with which he is charged, in a state of involuntary intoxication. This resulted in Mr. Correll suffering from an extreme mental and emotional disturbance at the time of the incident for which he is charged.

H. Further, as a direct result of Mr. Correll's advanced and severe Disease of Chemical Dependency together with its accompanying state of involuntary intoxication and subsequent global cognitive impairment, Jerry Correll, at the time of the incident in which he is charged, was lacking the capacity to appreciate the criminality of his conduct or to conform his conduct to the standards of the law. Further, this constellation of Mr. Correll's Disease of Chemical Dependency, involuntary intoxication and marked global impairment resulted in Mr. Correll suffering from an extreme emotional and intellectual disorder at the time of the incident in which he is charged. This emotional and intellectual disorder rendered him substantially incapable of conforming his conduct to the standards of the law at the time of the offense. He was incapable of appreciating the long term consequences of his actions.

> These opinions are based within a reasonable degree of medical probability.
>
> It was a pleasure evaluating your client, Mr. Jerry William Correll and reviewing the records relevant in this case. If you desire an elaboration upon these opinions, I would be most willing to assist you.

(Report of Dr. Macalusa, proffered in Rule 3.850 motion).

Due to counsel's failure to investigate, significant aspects of Jerry Correll's background were never presented to the judge or jury. Jerry Correll was sentenced to die by a judge and jury who never knew that he suffered a lifetime of abuse, rejection and neglect. His parents not only neglected him emotionally but physically abused him as well. Mr. Correll's childhood was a cold, non-nurturing environment that led him into a gradual downward spiral into the escape of alcoholism and drug abuse.

Jerry Correll's sentencing jury should have heard that his life has been full of neglect, abuse, psychological terrorism, alcohol and drug abuse and brain damage. Yet the defense attorney failed to present this evidence to the jury (See part C of this pleading and Claim VII of the Rule 3.850 motion). He also failed to present a mental health expert who had a thorough and complete background study of Jerry Correll. A comprehensive review of the background data and first-hand reports of family members and numerous other witnesses was necessary in order for any expert to thoroughly discuss Mr. Correll's mental deficits. Yet none of this information was provided at the time of trial.

Powerful mitigating evidence was available for presentation at the penalty phase which would have reduced Mr. Correll's moral culpability. Such evidence would have permitted the capital sentencer to see, understand and sympathize with Mr. Correll because of the abuse and neglect that he was forced to endure throughout his childhood and that shaped him during the critical formative years.

The humanity of a person about to be sentenced for a capital offense is the critical question at the penalty phase of a capital case. Evidence bearing on who Jerry Correll is and where he came from would have shown that there was a Jerry Correll worth saving. It is precisely this kind of evidence the United States Supreme Court had in mind when it wrote Lockett v. Ohio and Eddings v. Oklahoma. The Lockett Court was concerned that unless the sentencer could consider "compassionate and mitigating factors stemming from the diverse frailities of humankind," capital defendants will be treated not as unique human beings but as a "faceless, undiferrentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is just the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). It would have made the difference between life and death in this case had trial counsel not failed in his duty to investigate, prepare and present this crucial and

relevant mitigating evidence and see that his mental health expert was provided with this information.

Under Florida law there is no question but that the background information and mental health mitigation that counsel did not pursue would have been admissible as evidence of available mitigating circumstances. The Florida Supreme Court has recognized that the kinds of information available through investigation of Mr. Correll's background were mitigating. For example, a deprived and abusive childhood is mitigating. Holsworth v. State, 522 So. 2d 348 (Fla. 1988)("Childhood trauma has been recognized as a mitigating factor"); DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988)(jury could have considered "deprived family background"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988)(jury could have considered "family history of physical and drug abuse"); Brown v. State, 526 So. 2d 903 (Fla. 1988)("family background and personal history . . . must be considered"); Livingston v. State, 458 So. 2d 235 (Fla. 1988) ("childhood . . . marked by severe beatings" as mitigating); see also Eddings v. Oklahoma, 455 U.S. 104, 107 (1982). Certainly mental and emotional deficiencies are similarly mitigating and clearly an expert's opinion on statutory and nonstatutory mental health mitigation was vital in a case where, as here, the defendant is brain damaged, retarded and suffered longterm debilitating drug addiction.

Dr. Robert Pollack diagnosed Mr. Correll based upon a brief

personal interview. However, as the recognized standards in the field make clear there are certain essential prerequisites to making a diagnosis:

> To diagnose a personality disorder, the psychiatrist needs to gather objection facts systematically. Because someone with a personality disorder rarely recognizes the need for treatment, and because he seldom complains of the difficulties that he causes others, the diagnosis can rarely be made by listening to the patient alone.
>
> As the first step in the diagnosis, careful medical and neurological examinations are required to rule out organic causation: it is the rule, not the exception, that organic defects of the central nervous system mimic facets of personality disorder. Second, objective records must be obtained from employers, courts, schools, and hospitals; neither the patient's bland minimizing nor the exaggerations of the outraged relative or agency worker who brought the patient to the clinic are reliable. Third, to distinguish a personality disorder from incipient psychosis must elicit a history of repetition of the disturbing pattern. Therefore, a past social history is a necessity. The past social history also helps the psychiatrist appreciate the anguish underlying the complaints.
>
> Alcoholism must always be considered in the differential diagnosis of personality disorder. Granted, personality disorders and polydrug abuse often go hand in hand and most chronic opioid abusers also exhibit personality disorders. However, the same cannot be said for the alcohol abuser. Although many persons with personality disorders abuse alcohol many alcoholics are premorbidly quite normal.

(See Kaplan & Sadock, Modern Synopsis of Comprehensive Textbook of Psychiatry IV, 4th Ed., pp. 364, 374).

Dr. Pollack's diagnosis, made prematurely and without sufficient data, failed to meet the recognized standards in the field. Despite the knowledge that Mr. Correll abused many different drugs, and that he exhibited a flat affect, and despite the fact that Dr. Pollack had been specifically asked to test for brain damage, **no** testing was done for brain damage.

The facts proffered demonstrate that counsel's failure to properly investigate and prepare and the expert's own failures were prejudicial. There can be no dispute that a capital defendant is entitled to the effective assistance of counsel at the penalty phase of a capital trial, **see** Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), nor that a criminal defendant is entitled to effective assistance of counsel with respect to mental health issues relevant to trial or sentencing. See Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988). Petitioner alleged facts demonstrating both deficient attorney performance and prejudice. **See** Strickland v. Washington, 466 U.S. 668 (1984).

A criminal defendant, particularly in a capital case, is denied due process and equal protection of law when his mental health is at issue but he is not afforded a professionally

competent and adequate mental health evaluation. In Ake v. Oklahoma, 470 U.S. 68 (1985), the Supreme Court held that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition," when the defendant's mental health is at issue, id. at 70, and held that the right is enforceable through the defendant's "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Id. at 83 (emphasis added). This holding recognized the entitlement of an indigent defendant not only to a "competent" mental health expert (i.e., one who is duly qualified to practice), but also to an expert who performs competently -- one who conducts a professionally competent examination of the defendant and who on this basis provides professionally competent assistance to defense counsel. The rationale underlying the holding of Ake compels such a conclusion, for it is based upon the due process requirement that fact-findings be reliable in criminal proceedings. Id. at 77-83. Due process requires the state to make available mental health experts for indigent defendants, because "the potential accuracy of the jury's determination is . . . dramatically enhanced" by providing indigent defendants with competent mental health assistance. Id. at 81-83. In this context, the court clearly contemplated that the right of "access to a competent

psychiatrist who will conduct an appropriate examination . . .," id. (emphasis added), would include access to an expert who would conduct a professionally competent examination. To conclude otherwise would make the right of "access to a competent psychiatrist" an empty exercise in formalism.

In two cases decided after **Ake**, the Eleventh Circuit has recognized that **Ake's** guarantee encompasses the right to a professionally competent evaluation. In Blake v. Kemp, **758** F.2d 523 (11th Cir. **1985)**, the court recognized that Blake's right to effective assistance of counsel was impaired by the State's withholding of evidence "highly relevant, or psychiatrically significant, on the question of Blake's sanity" from the psychiatrist who was ordered to evaluate Blake's sanity. **758** F.2d at 532. Even though that evidence was disclosed to the psychiatrist on the witness stand at trial, **"[o]bviously,** he was reluctant to give an opinion when confronted with this information for the first time on the witness stand. . . . This was hardly an adequate substitute for a psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." Id. at 532 n.lO, 533.

Although the Blake court analyzed the impairment of the psychiatrist's ability to conduct a professionally adequate evaluation in terms of its impact on the right to effective

assistance of counsel, it recognized that its analysis was "fully supported" by Ake. In Mr. Correll's case, both rights are implicated. Indeed, in support of its conclusion, the Blake court gave emphasis to Ake's requirement that "the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 758 F.2d at 530-31 (quoting Ake, 470 U.S. at 83)(emphasis added by the Eleventh Circuit). Thus, Blake recognized that if an appointed mental health expert's ability to "conduct an appropriate examination" is impaired, due process is violated.

In another case decided after Blake, the Eleventh Circuit alluded to the right implicit in Ake to a professionally competent examination by an appointed expert. In Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), Martin relied on Ake to support his argument that he should have been allowed the appointment of a neuropsychologist in order to counter the opinion of a neurologist whose "conclusion was erroneous." Id. at 934. Noting that the challenged neurologist had been appointed at the request or with the approval of the defense, the court held that Ake did not entitle Martin to a second appointed expert "who would agree to testify in accordance with his wishes." Id. The court further noted that with respect to the neurologist, "Martin does not claim that [the neurologist] was

incompetent or biased." Id Martin would have had a valid claim under Ake if the neurologist had been incompetent or biased. Mr. Correll's claim is that Dr. Pollack's original evaluation was not professionally competent, as borne out by Drs. Kerman's and Margulies' subsequent conclusions.

In Mason v. State, 489 So. 2d 734 (Fla. 1986), the Florida Supreme Court recognized that the due process clause entitles an indigent defendant not just to a mental health evaluation, but also to a professionally valid evaluation. Because the psychiatrists who evaluated Mason pre-trial did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior," id. at 736, or his "history indicative of organic brain damage," id. at 737, and because the court recognized that the evaluations of Mason's mental status would be "flawed" if the experts had "neglect[ed] a history" such as this, id. at 736-37, the Court remanded Mr. Mason's case for an evidentiary hearing. Id. at 735.

In State v. Sireci, 502 So. 2d 1221 (1987), the Florida Supreme Court reiterated that the due process clause entitled an indigent defendant to a professionally competent and appropriate mental health evaluation, particularly as to issues relevant to the capital penalty phase. At trial, Sireci had been examined by two psychiatrists. During collateral proceedings, Sireci was examined by a third psychiatrist who, unlike the previous mental health examiners, took into account Sireci's past medical

history. Highly critical of the professional validity of the opinions of the two original experts, the third expert "reached a vastly different conclusion." Id. at 1222. The post-conviction evaluation found that Sireci suffered from a form of organic brain damage. The Florida Supreme Court affirmed the trial court's order setting an evidentiary hearing on the claim, reasoning that "a new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." Id. (emphasis added).

On remand, the state trial court vacated the death sentence and ordered resentencing. The Florida Supreme Court affirmed, accepting the trial court's finding that the original evaluation was professionally inadequate concerning mental health mitigating factors and that the defendant had thus been denied due process of law. State v. Sireci, 536 So. 2d 231, 233 (Fla. 1988).

While the State's substantive obligation to provide a competent mental health evaluation arises directly from the due process clause, its procedural obligation to provide a competent evaluation is also founded upon Mr. Correll's entitlement under state law to the assistance of a mental health expert. See Fla. R. Crim. P. 3.216(a). See also Fla. R. Crim. P. 3.210; 3.211; Mason v. State; State v. Sireci.

Pursuant to this rule, Florida has created a state law entitlement to the competent evaluation of mental status that is

protected by the due process clause of the fourteenth amendment. Upon defense counsel's informing the trial court that his client "may have been insane at the time of the **offense,"** or, in penalty phase terms, that there may be mitigating aspects to his client's mental status or character which a mental health expert could evaluate and help present, Rule 3.216(a) requires the appointment of an expert, and requires professionally adequate mental health assistance. See Sireci, supra. Such a scheme creates a liberty interest, which cannot be deprived without due process. As the Supreme Court reasoned in Hewitt v. Helms, 459 U.S. 460, 472 (1983), "the use of explicitly mandatory language in connection [with a right] that the state has created [establishes] a protected liberty interest." See ~~also~~ Vitek v. Jones, 445 U.S. 480, 488 (1980); Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Meachum v. Fano, 427 U.S. 215, 223-27 (1976); Wolf v. McDonnell, 418 U.S. 539, 557 (1974); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 10 (1979). In this case, both the state law interest and the federal right were denied to Mr. Correll, because of the deficiencies of counsel and the expert. An evidentiary hearing is warranted.

The right to expert mental health assistance is necessarily enforceable through the right to effective counsel -- what is required is competent mental health assistance, and it is up to counsel to obtain it. Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). Thus, when counsel unreasonably fails to properly

investigate and develop available mental health mitigating circumstances, Blake, supra; Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), ineffective assistance is demonstrated.

Florida law made Jerry Correll's mental condition relevant to capital sentencing in many significant ways: (a) statutory mitigating factors contained in Fla. Stat. Sec. 921.141(6); (b) aggravating factors (Fla. Stat. sec. 921.141 [5]); and (c) myriad nonstatutory mitigating circumstances. Mr. Correll is entitled to professionally competent mental health assistance on these issues. However, he never received the assistance to which he was entitled. Counsel and the expert failed in this regard. As a result, Mr. Correll's sixth amendment right to effective counsel, his eighth amendment rights to a reliable, individualized and meaningful capital sentencing proceeding, and his fourteenth amendment due process and equal protection right to competent mental health assistance were violated. A full and fair evidentiary hearing is required. The court's interpretation of the law was wrong and its understanding of what was "of record" was in error. An evidentiary hearing is the only proper way to determine the facts at issue. Thereafter relief is appropriate.

E. CONCLUSION

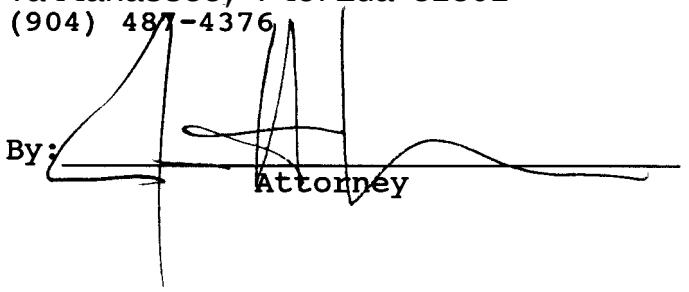
Based on his submissions below, which were previously provided to the Court and which are incorporated fully herein,[3] Mr. Correll respectfully submits that a stay of execution is proper and respectfully urges that the Court allow him the opportunity to file a professionally presentable brief.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JEROME H. NICKERSON
Assistant CCR
Florida Bar No. 0829609

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376



By: _____
Attorney

[3] All issues presented below are submitted to this Court on this appeal, although counsel has had no opportunity to brief them.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by RAX TRANSMISSION Both Notas, March 14, 1990 United States Mail, first class, postage prepaid, to Kellie Nielan, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 14TH day of March, 1990.

Attorney