IN THE SUPREME COURT OF FLORIDA

BOBBY EARL LUSK,

APPELLANT,

-VS- CASE NO. **67,335**

STATE OF FLORIDA,

APPELLEE.
_____/

APPELLEE'S ANSWER BRIEF ON APPEAL

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

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BRIEF OF APPELLEE

STATEMENT OF THE CASE AND FACTS

Bobby Earl Lusk murdered fellow inmate Michael Hall on Thanksgiving day, 1978. The details of this vicious sneak attack are set forth in Lusk v. State, 446 So.2d 1038 (Fla. 1984), on which the State shall rely.

Mr. Lusk was in prison on multiple life sentences for armed robbery and first degree murder. He was no stranger to the criminal justice system. Indeed, being dissatisfied with the zeal of his public defender (Shon Saxon), Lusk filed a pro se civil rights (§1983) action in federal court, forcing Saxon to withdraw as counsel shortly before trial (R 1155-58).

Mr. Saxon was replaced by Mack Futch, esq., whom Lusk described as "the best lawyer ever provided to him", (R 990), despite being convicted and sentenced to death.

As is usual death cases, Mr.Lusk came into the hands of new counsel who proceeded to file the now automatic claim of ineffective assistance of trial counsel. "The best lawyer" Lusk ever had became, under tutelage, "the worst."

An extensive motion for post conviction relief was filed on January 3, 1985 (R 1-17). The motion contained the usual litany of perceived errors and omissions, and a remarkable ad hominem attack on Mack Futch which sought to portray him as a drunken wastrel who lurked about the courthouse in hopes of securing "handout" appointments (R 402).

On February 21, 1985, a motion to disqualify Judge Fagan was filed (R 343-351). The motion to disqualify was denied as facially defective, if not waived (R 360). That decision has not been appealed, although Lusk's brief does try to reargue the alleged "merits" of the motion.

Lusk was granted an evidentiary hearing on his petition. Lusk proffered an F.D.L.E report on Mr.Futch's alcohol problem many years prior to this trial, but when asked to provide evidence of alcohol abuse in 1979, during trial, so as to render the report relevant, Lusk could not do so (R 900-9906, 968-977). Lusk was permitted to attempt to prove that Futch's alcohol abuse in the early 1970's affected his 1979 trial, but all Lusk could contend (R 969) was that Futch had the "residue of a problem."

Mr. Lusk then proceeded to call witnesses on the issue of Mr. Futch's performance at trial. They testified as follows:

(1) Michael Radelet, a sociologist, proffered the statistical odds of a Futch inmate-client losing his case. (R 1001)

(2) Wilma Ellenburg (R 1010) testified that she could have corroborated Lusk's own sentencing phase testimony about his troubled youth.

(3) Steven Pillow testified that the victim had a bad reputation at a different prison. He did not testify that he could or would have testified in 1979 at Lusk's trial. (R 1036)

(4) Jesse Wolbert, (R 1045) a disbarred lawyer, to testify as to Futch's personal habits.

(5) William Sheppard esq., as an "expert witness." (R 1175)

Mr. Lusk and Mr. Futch also testified.

In addition to attacking Futch's personal habits, Lusk's attorney argued that Futch was "unfit" to defend anyone because:

> (1) He had been a prosecutor and had since returned to the State Attorney's office.
>
> (2) He (Futch) refused to "roll over" and permit his client to escape execution by not contesting the charges of drunken incompetence. (R 888-90)

The only witnesses to testify regarding Futch's performance were Mr. Futch, Mr. Lusk and Mr. Sheppard.

Mr. Futch testified to his extensive trial and homicide-trial experience in Bradford County. (R 980-90) Futch noted the sophistication of local jurors regarding inmate-on-inmate crime (almost to the point of defense bias as long as no guards were hurt) (R 981); and their disdain for "lawyer games" and attempts to "put the system on trial." (R 980-1) Futch also testified to being assisted by an inmate (Sperling) who located witnesses (R 982) whom Futch brought to court. (R 982) Futch chose not to file a meritless motion to suppress. (R 988)

Mr. Lusk admitted that he failed to advise Mr. Futch of possible defense witnesses, claiming he did not volunteer any information for which Futch did not specifically ask. (R 1086) Lusk conceded that every witness he did tell Futch about was brought to court. (R 1112)

The third witness was William Sheppard.

Sheppard vacillated at length regardings his feelings and activities in the capital punishment area. (R1220-9). Sheppard alleged that he felt capital punishment was justified following an "error free" trial, (R 1221-2) and indicated that even his own competence (in the one death trial he ever conducted) could not be resolved without knowing the outcome of the case. (R 1220-24).

Sheppard alleged that he set aside his outcome-determinative standard and carefully reviewed Futch's performance under a Strickland[1] and Cronic[2] analysis. Sheppard proceeded to testify:

> (1) Two viable defenses existed (self defense or dominating passion) but the selection of either one could not, in his opinion, be a strategic decision. (R 1245-46)
>
> (2) Futch erred, in December of 1979, in not introducing into evidence a prison-conditions report written in September of 1980! (Vann v. Wainwright) (R 1233)
>
> (3) Futch's procurement of a jury recommendation of life was irrelevant, and the penalty phase evidence he (Sheppard) would have used should have been used even though said evidence would possibly provoke a jury recommendation of "death" (R 1252)

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[1] Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984).

[2] United States v. Cronic, ____ U.S. ____, 80 L.Ed.2d 657 (1984).

(4) Sheppard conceded no advantage to Lusk of being able to appeal a death sentence stemming from a jury override as opposed to one following a jury recommendation of death. (R 1252)

The court entered a detailed order denying the motion for post conviction relief. (R 401-9) Judge Fagan noted that the motion was facially meritless, but in the interests of fairness and a desire to revisit any mitigating evidence he granted the above referenced hearing. (R 401-2)

First Judge Fagan dismissed the vile ad hominem attack upon Mr. Futch as unsupported, (R 402) except by the testimony of (disbarred counsel) Jesse Wolbert, who was unworthy of belief. (R 402)

Second, Judge Fagan noted that to the extent any claims regarding voir dire were argued, all were legally meritless under Wainwright v. Witt, ___ U.S. ___,83 L.Ed.2d 841 (1985). Specific claims at (paragraph 9(h)) of the 3.850 petition were negated by the existence of a stipulation at pp.24-27 of the trial transcript, while the charge in (paragraph 9(i)) related to a strategic decision ultimately borne out by a life recommendation. (R 402)

Third, Judge Fagan noted that Lusk's claims of "trial" error were meritless. Claims raised in paragraphs g(j) through 9(v) were never supported by evidence or testimony and were deemed waived. (R 404) As to the false charge that Futch "never" told

the jury that Hall's nickname was "yard dog" or the significance thereof, Judge Fagan's order cited twenty-two (22) different trial references, including three by Lusk himself. (R 404)

Fourth, William Sheppard's fatuous (if not knowingly false) expert testimony was dismissed as unsupported and biased. (R 405)

Fifth, Futch's "all or nothing" strategy was deemed a strategic choice. (R 406)

Sixth, Lusk's jury instruction claims were rejected as having been available on appeal, but not appealed. (R 406) He also refused to find Futch ineffective for not raising objections as to unresolved legal questions. (R 406)

Finally, regarding the penalty phase (at which Lusk did testify as to his youth-thus disproving the claim that "no evidence was presented') the judge held that he heard no evidence which was significant enough to have prevented his jury override back at the time of sentence. (R 407) Thus, pursuant to Strickland, no errors or omissions were committed which would have affected the outcome. (R 408)

Lusk filed the present appeal, again waiving argument on many alleged "errors." In addition, Lusk failed to argue the propriety of any evidentiary rulings or any error reviewable on appeal by this Court.

SUMMARY OF ARGUMENT

The Appellant has failed to appeal any issue cognizable by this court. Ignoring the order appealed from, he has filed an 8 page diatribe on his version of the evidence, supported and enhanced by "facts" not in evidence, and how that evidence should have been applied under his outcome-determinative approach to the issue of attorney competence.

This fundamentally erroneous approach is exacerbated by accompanying "appeals" of waived claims, court dicta, and at least one issue that cannot even be considered under Rule 3.850.

Since this Court does not conduct trial de novo, reweigh evidence, consider matters outside the evidence, reverse "dicta" as opposed to judgments or permit 3.850 proceedings to serve as substitutes for appeal, relief should be denied.

Finally, the record at bar amply supports the finding of reasonable tactical choices by counsel, well within the standards of Strickland v. Washington.

ARGUMENT: POINT I

THE APPELLANT HAS FAILED
TO ALLEGE OR SHOW ANY
BASIS FOR RELIEF

Despite leave to file an oversized brief, Mr. Lusk has failed to raise a single argument cognizable on appeal. Instead, Lusk has provided us with an 85 page jury argument "supported" by documents (such as the F.D.L.E. report) which were never admitted as evidence and the exclusion of which has never been appealed.

The Appellant is respectfully reminded that this is an appeal. As such, the facts and all inferences therefrom are taken in favor of the state. They are not subject either to reinterpretation nor reweighing. Tibbs v. State, 397 So.2d 1120 (Fla. 1981) affd. Tibbs v. Florida, 457 U.S. 31 (1982); see e.g. Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1982).

If we are to review the order denying 3.850 relief, therefore, we are limited to a search for sufficient evidence (i.e. any evidence which, if believed to the exclusion of all other evidence, supports the verdict) and legal error.

No errors of law have been alleged.

Turning to the evidence, we find

> (1) No evidence was proffered or admitted to the effect that trial counsel was having alcohol related problems in 1979. When pressed, present counsel stated that Lusk wanted

> the court to consider Futch's past problem and 'presume' or "suspect" a problem years later (i.e. trial by innuendo).
>
> (2) Mr. Futch testified to his experience with Bradford County jurors and his strategic decisions.
>
> (3) Mr. Lusk conceded both calling Futch the best lawyer he ever had and withholding the names of potential witnesses (whom Futch is now accused of not calling) from his lawyer.
>
> (4) As to trial strategy, defense expert Sheppard stated that Lusk had two possible defenses; "self defense" and "dominating passion," Sheppard admitted Futch used one of the two defenses but refused to describe the selection as "strategic."
>
> (5) As to to developing Hall's (the victim's) nickname (yard dog) and reputation, Futch brought out this point 22 different times during Lusk's trial, thus belying claims that he "never" revealed these points.
>
> (6) As to offering evidence of comparative character, or Lusk's past, defense expert Sheppard testified that had Futch done this he could have ended up with a jury recommendation of death (rather than the life recommendation Futch won for his client).
>
> (7) As to the so-called mitigating evidence that Futch "could have" used, the Court found it wholly unpersuasive and stated it would not have affected the sentence.

None of these factual determinations have been challenged and all are supported by direct testimony and allowable inferences therefrom. Given these facts, there is no basis for

any appeal.

Without abandoning the fact that Lusk has failed to prepare any appealable issue for review, the State would briefly note:

(A) Selection of Trial Strategy

Although paying lip service to Strickland v. Washington, ____ U.S. ____, 80 L.Ed.2d 674 (1984), Lusk has utilized a radical outcome-determinative test for assessing Mr.Futch's competence, i.e., "Futch ultimately lost so he was per se incompetent and none of his decisions can be labelled tactical". It was defense expert Sheppard's dogged adherence to this line that cost him his crediblity, for example:

(1) All or Nothing Defense

The defense expert testified that this defense cannot be tactically employed. That is not true. This defense can be very effective due to its tremendous coercive impact on the jury- particularly where, as here, there are conflicting eyewitness accounts of the crime. Under this theory, jurors must be "so willing" to reject half of the testimony at trial that they will convict on the maximum charge. There is no "easy way out," no "compromise" verdict on a lesser charge. The strategy is designed to win the case, not dump the client. It has been recgonized as proper in death cases. see Spaziano v.

Florida, ____U.S.___, 82 L.Ed.2d 340 (1984).

For Mr. Sheppard to testify that the decision to utilize this accepted defense was not strategic or tactical means only that his reknowned opposition to capital punishment interfered with his oath as a witness.

(2) Self Defense vs. Dominating Passion

Sheppard testified to the existence of two available defenses: self defense and dominating passion. Sheppard then proceeded to state:

> (A) "Dominating Passion" was so superior a defense as to make the selection of self defense per se incompetent.
>
> (B) "Self defense" would be a successful defense if presented in a little more detail.

Mr.Sheppard did not grace us with an explanation as to how "self defense" could be a successful, yet per se incompetent, choice. Again, Sheppard was using his outcome determinative approach.

The defense of self defense was chosen because Mr. Futch had eyewitnesses who would swear that Hall attacked Lusk. Futch, 22 times, brought out Hall's nickname ("Yard Dog") and his violent reputation and his strong arm robbery of Lusk in his cell. (Futch is only accused of not providing cumulative evidence).The "vastly

superior" defense of dominating passion is argued in Lusk's brief as it was below. Was it superior? The State submits it not only was not superior, it was wholly unsupported by the evidence and, as such, so weak that Lusk could not have even obtained a jury instruction thereon for want of evidentiary support.

In Sheppard's cited case of Forehand v. State, 126 Fla. 401, 171 So.241, 43 (1946) the defense of "dominating passion" is described as follows:

> "It is also true that a well defined purpose to kill may be induced, compelled or constrained by anger of such degree as for the moment to cloud the reason and momentarily obscure what might otherwise be a deliberate purpose." (emphasis added).

In every single cited case in Lusk's brief, an ongoing fight (combat) led to a total burst of rage by the defendant resulting in an emotionally charged killing. (Forehand, for example, got so carried away shooting at the victim that he shot his own brother in the process). Every single cited "passion" case makes clear that the defendant must act in a moment of rage without time to cool off or reflect, as opposed to the facts in Sireci v. State, 399 So.2d 964 (Fla. 1981) and Spinkellink v. State, 313 So.2d 666 (Fla. 1975).

The Appellant cites Quintana v. State, 452 So.2d 8 (Fla. 1st DCA 1984) as supportive. Lusk's brief omits relevant facts which show us that Quintana is inapplicable.

Mr. Quintana was the victim of threats and actual physical and sexual assaults by the victim and his gang. On the morning of the murder the victim (Harold) attacked and choked Quintana. Harold left but soon returned to Quintant's cell (cornering Quintana) with two friends, one of whom was armed. Harold gave a hand signed indicating the start of an attack by the three of them. Cornered and outnumbered, facing imminent attack, Quintana killed Harold. Harold was not, as represented by Lusk, simply "walking by" the cell when Quintana killed him.

The differences between the case at bar and Forehand, Quintana, et al are obvious.

Lusk was robbed by Hall around 9:00 A.M. Around 1:00 P.M., after having four hours to cool off, Lusk stalked and killed Hall by stabbing him three times in the back of the neck, using his own illegally possessed knife. There was no attack and no struggle (Had Hall been facing Lusk and fighting him he could not have received three stabs in the back of the neck). Lusk freely admitted this was a preplanned revenge killing.

Given the existence of time to "cool off" and the confession, there was no proof of "dominating passion." Fear? yes, Hatred? Yes. Perhaps if Lusk had killed Hall in his cell that morning that would have involved passion, but not this killing. Since there was no proof of dominating passion, Lusk might not have even been able to obtain a jury instruction on his

theory. See Pridgeon v. State, 425 So.2d 68 (Fla. 1st DCA 1982); Reyers v. State, 10 F.L.W. 2415 (Fla. 2nd DCA 1985).

Thus, even if we accept the notion that this defense was possible, no one can realistically allege that the use of self defense over "dominating passion" was a choice "beyond the wide range of professional and competent assistance."Strickland v. Washington, supra; Mulligan v. Kemp, 771 F.2d 1436, 1440 (11th Cir. 1985).

Sheppard's contention (now Lusk's) that Mr. Futch picked the wrong viable defense and was therefore incompetent, was not a truthful, expert, statement of the law. Strickland states:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to "conclude that a particular act or omission of counsel was unreasonable. cf. Engle v. Isaac, 456 U.S. 107...." supra at 694

and

> "There are countless ways to provide effective assistance in any given cse. Even the best criminal attorneys would not defend a particular client in the same way." supra at 695

(3) Presentation of Self Defense

The victim, Hall, had a reputation for violence enhanced by his second degree murder of an inmate at U.C.I. This character, Lusk says, should have been more fully revealed than it was.

It is submitted that Lusk had no guarantee of success in any battle of reputations. Was he a model prisoner? Proof of that would open inquiry in Lusk's unlawful possession of a knife. Was Hall despicable for killing a criminal? Proof of that would open inquiry into Lusk's first degree murder (by asphyxiation) of an unarmed old woman! The list goes on.

In Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) the court held that counsel's tactical decision to introduce or refrain from introducing given evidence, especially character evidence, depends upon the posture of the case and the danger of "opening doors." see Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980); William v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982).

If Mr.Futch "erred" in tactically chosing not to pit the character of an "old woman" killer against a "convict" killer, that error cannot be said to have reduced Futch's representation to a level of incompetence. Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981); Winfrey v. Maggio, 664 F2d 550 (5th Cir. 1981); Mulligan v. Kemp, 771 F.2d 1436 (11th Cir. 1985).

Again, however, we return to the fact that Lusk has not

appealed the sufficiency of the evidence to support the court's findings of fact, nor has he couched his arguments in Stricklands' terms. Instead, he has given us the benefit of his view of the facts and his theory of the law in a protracted, meritless, jury argument. He is not entitled to relief.

POINT II

THE CUMULATIVE ERROR CLAIM IS UNSUPPORTED BY THE RECORD

Judge Fagan's order shows that Mr.Lusk never offered argument or evidence on many of his claims, thus waiving them. One would hope Lusk's "competent" and "prepared" new counsel, sitting in judgment of trial counsel, would not seek de novo trial in this court.

(A) Failure to object to Witherspoon exclusions under the "cross section of the community" rubric.

The Appellant asks us to find Mr. Futch incompetent for failing to raise a legal objection which, especially in 1979, was meritless. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978). Counsel is not expected to raise every possible constitutional claim, merited or not. Francois v. Wainwright, 423 So.2d 357 (Fla. 1982). The claim is meritless.

(B) Removal of biased jurors as creating a guilt prone jury.

Counsel is accused, in 1979, of not anticipating the (unresolved) claim currently before the Supreme Court in Lockhart v. McCree (case 84-1865).[3] Aside from the fatuity of this claim, in 1979 Futch would have been guided by Spinkellink v.

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[3]Also known as Grigsby v. Mabry, 758 F.2d 226 (8th Cir.) (en banc) cert. granted sub no---- Lockhart v. McCree, 106 S.Ct. 59 (1985).

Wainwright, 578 F.2d 582 (5th Cir. 1978) rejecting this claim, and Bumper v. North Carolina, 391 U.S. 543, 545 (1968) which said:

> "Our decision in Witherspoon does not govern the present case because here the jury recommended a sentence of life imprisonment"

and

> "The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily 'prosecution prone' and the materials referred to in his brief are no more substantial than those brought to our attention in Witherspoon."

Finally, the Grigsby decision is not accepted as correct or controlling in Florida. Witt v. State, 465 So.2d 510 (Fla. 1985).

Again, we have no proof of incompetence.

> (3) Failure to object to the State being granted challenges for cause during voir dire.

This claim was unsupported by evidence or testimony.

> (4) Failure to prepare for trial.

This argument is unsupported by factual assertions. Lusk's brief sloughs off the claim with a footnote reference to the trial court's 'refusal" to consider the F.D.L.E. report on Futch's drinking problems years before trial.

If this report was relevant Lusk would have said so. He did not. Lusk would have "linked it up" to Futch's courtroom performance. He did not and, upon inquiry from the bench - could not. All Lusk asked was for a finding of a "residual problem" in 1979.

Lusk has not bothered to appeal the Court's refusal to admit the report as evidence, because he knows the ruling was correct. His continued reference to the report even though it was not evidence, is regrettable[4] Fla. Bar Code of Prof. Resp. EC 7-25 states:

> "A lawyer should not make any perfunctory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence, a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him, and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider."

As trial "experts," Mr. Futch's accusers knew, and admitted, they could not link up the F.D.L.E. report with the performance of Mr. Futch years later. As "experts" they knew they could not even appeal the report's exclusion. While this is obviously the Supreme Court and not a jury, Lusk's tactic of "just having the

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[4] At the hearing Lusk had the report marked, apparently so he could appeal its exclusion, by thus polluting the record, Lusk seeks to do indirectly that which he could not do directly.

report marked," and sliding it into the record, and arguing "facts" therefrom, is no less questionable.

(5) Failure to file a motion to suppress.

Mr. Futch did not file what he correctly perceived to be a meritless motion to suppress. Again, no expert testimony or argument was raised on this point. In any event, Futch was not required to raise every conceivable issue, merited or not, Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983); Francois v. Wainwright, 423 So.2d 357 (Fla. 1982); Willis v. Newsome, 771 F.2d 1445 (11th Cir. 1985). and did not fall below the standards announced in Strickland.

(6) Failure to seek sanctions for the loss of "Brady" material.

Mr. Lusk owned a knife and was alone in his cell with it while planning Hall's murder and his excuse therefore. Mr. Hall was never shown to have had a knife. If Lusk's mattress had multiple, undatable, tears in it, that fact would not exculpate Lusk. Even if Hall slashed the mattress, Lusk took four hours to plan and murder Hall in a cold, calculated and premeditated manner.

"Expert" counsel for Mr. Lusk must assuredly be aware that mere defense evidence is not necessarily "Brady" material. It must be "sufficient to have altered the outcome of the trial." United States v. Brady, 473 U.S. ___,87 L.Ed.2d 481 (1985); United States v. Agurs 427 U.S. 97 (1976); Stone v. State,10 F.L.W. 621

(Fla. 1985).

The evidence Futch "failed" to produce has not been shown to have of such quali y At best it was speculative.

(7) Failure to properly cross examine witnesses.

No evidence was offered on this charge. Again, we have an allegation which was baseless and unsupported by any competent testimony.

Mr. Futch should not be deemed incompetent on the "strength" of baseless charges, unresearched claims, unadmitted "evidence" and issues waived in the Circuit Court.

POINT III

THE APPELLANT HAS FAILED TO ALLEGE OR SHOW ANY BASIS FOR REVERSAL OF THE COURT'S FINDING OF COMPETENT REPRESENTATION AT THE SENTECING AND PENALTY PHASES OF TRIAL

Mr. Futch, with fourty (40) jury trials under his belt (mostly in Bradford County) approached the sentencing phase in a manner calculated to produce a jury recommendation of life. Futch had Lusk take the stand and testify to his troubled youth, but was careful not to "open the door" to lethal rebuttal. Futch then requested mercy for his client. Futch won a life recommendation.

Mr. Sheppard felt Futch should have put on more, cumulative, evidence regarding Futch's past and Hall's character. Sheppard wanted to put the prison system on trial.

Mr. Sheppard conceded that his approach could have provoked a death recommendation, but testified that he could see no "disadvantage" to Lusk, on appeal, in attacking a death sentence supported by a jury recommendation and evidence as opposed to a death sentence from an override with a clean record.

This issue of tactical considerations is largely moot, since Judge Fagan held that Sheppard's cumulative evidence, now revealed, would not have changed his sentencing decision. Lusk has not (and indeed cannot) appeal that holding. Neverthless,

the decision not to pursue or adduce character or cumulative mitigating evidence is tactical and unreviewable. Francois v. Wainwright, supra; Stanley v. Zant, supra.

It is the province of Judge Fagan to assign weight to the evidence in mitigation, and this Court has refused to reweigh said evidence. Toole v. State, 10 F.L.W. 617 (Fla. 1985); Daughtery v. State, 419 So.2d 1067 (Fla. 1982).

In Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985) counsel was held to have been effective, even though mitigating evidence (and witnesses) went unproduced, when that failure was attributable to his uncooperative client. On top of everything else, we must recall that some witnesses were not called because Lusk never gave their names to Futch. Lusk's excuse? "He didn't ask." (This from the same Mr. Lusk who sued Futch's predecessor, Mr. Saxon, for not properly preparing the defense.).

This claim is wholly without meirt.

POINT IV

THIS ISSUE COULD AND
SHOULD HAVE BEEN RAISED
ON DIRECT APPEAL

If Lusk and his "experts" are indeed versed in the law, then they are well aware that an error (by the trial judge) of this kind could and should have been raised on direct appeal. It cannot be argued de novo on appeal, and it was not argued to Judge Fagan! Nor was Fagan subpoenaed as a witness!

In addition to Lusk's mishandling of the claim and subsequent appeal, he misapprehends the law.

Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) notes that Florida's capital sentencing system allows trial judges to weigh a fixed set of aggravating factors against an unlimited array of mitigating factors, thus creating "assymetry on the side of mercy."

Lusk wants to entice this Court into departing from this standard of "guided discretion," as upheld by Barcley v. Florida, 103 S.Ct. 3418 (1983) and declare that trial judges have the "unbridled discretion' to extend mercy no matter the evidence (or, conversely, to deny it). What this subtle ploy would do is render our sentences as "arbitrary and capricious" as those condemned by Furman v. Georgia, 408 U.S. 238 (1972). Can we imagine the stampede (to federal court) of death row inmates

grasping a Florida Supreme Court decision authorizing the capricious and whimsical extension of mercy?

The fact is Judge Fagan did not err. While "mercy" is a factor in allowing the argument of unlimited mitigating factors, Judges are not free to ignore the evidence and whimsically impose any sentence they desire.

POINT V

THE APPELLANT HAS FAILED TO APPEAL THE COURT'S ORDER

No matter what Judge Fagan stated in dicta regarding the false accusations of bias, the motion for recusal was properly denied, by Judge Fagan, as facially deficient and as waived.

Waiver is supported by the belated filing of the petition. In re: Estate of Carlton, 378 So.2d 1212 (Fla. 1980). Mr. Lusk has failed to appeal or even to argue this point and is estopped from doing so.

The comments by Judge Fagan in other capital cases and prior "adverse" rulings by him do not establish a facially sufficient petition. Therefore, he was free to deny the motion himself. Walton v. State, 11 F.L.W. 7 (Fla. 1985); Jones v. State, 446 So.2d 1059 (Fla. 1984). The facial defeciency of the motion has not been appealed.

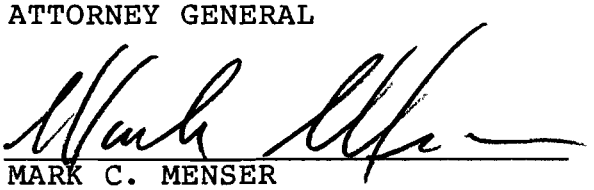
Since the holding of the court has not been appealed, this claim must be deemed irrelevant.

CONCLUSION

The Appellant has failed to allege or show any basis for releif.

Respectfully submitted,

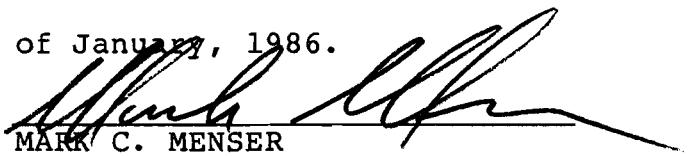
JIM SMITH
ATTORNEY GENERAL



MARK C. MENSER
Assistant Attorney General
Department Of Legal Affairs
The Capitol
Tallahassee, Florida 32301
(904) 488-0600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by U.S. Mail to Attorney For Appellant, Richard Ware Levitt, 148 East 78th Street, New York, New York, 10021, on this 10th day of January, 1986.



MARK C. MENSER
ASSISTANT ATTORNEY GENERAL