ORIGINAL

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

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BOBBY EARL LUSK,

Defendant, Appellant,

v.

THE STATE OF FLORIDA,

Plaintiff, Appellee.

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No. 67,335

(On Appeal from the Eighth Judicial Circuit)

APPELLANT'S INITIAL BRIEF ON APPEAL

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STATEMENT OF THE CASE AND OF THE FACTS

Introduction.

This is an appeal from an order of the Hon. Osee R. Fagan, Circuit Judge for the Eighth Judicial Circuit, denying a Motion for Post-Conviction Relief filed on behalf of Bobby Earl Lusk, a death-sentenced defendant.

On December 5, 1979, Lusk was convicted by a jury of first degree murder in the Eighth Judicial Circuit in and for Bradford County, Florida. On December 7, 1979, the jury returned a recommendation of life imprisonment. On February 5, 1980, Judge Fagan overrode the jury's recommendation and imposed a death sentence.

On January 26, 1984, this Court affirmed the judgment of conviction and sentence of death, Judges Overton and McDonald dissenting from the affirmance of sentence. Lusk v. State, 446 So.2d 1038 (Fla. 1984). Certiorari was denied October 1, 1984. Lusk v. Florida, ____ U.S. _____, 105 S.Ct. 229.

A. Summary of Trial Testimony

Bobby Lusk was tried, convicted and sentenced to die for the murder of Michael Hall. Lusk stabbed Hall to death

November 23, 1978 during the luncheon meal at Florida State Prison (F.S.P.), where both Lusk and Hall were inmates. According to Lusk's confession, he and Michael Hall, a "big wheel" in the prison and known as "Yard Dog," had been on bad terms for several weeks (T. 448-51)[1]. About a month before the killing, Hall had come for a haircut to the barbershop where Lusk worked cutting hair (T. 433). Hall told Lusk that he had read about his case[2] in a detective magazine, that he knew all about Lusk, and that "if you mess up my hair, I'm gonna kill you right here." (T. 447, 453) He then continued, "I'm gonna --we're gonna -- I'm gonna get you sooner or later anyway," and he ascertained that Lusk lived on K Wing (T. 453).

By Thanksgiving day, 1978, Hall himself had moved to K Wing (T. 448). That morning he and two companions pushed their way into Lusk's cell and demanded the key to his locker (T. 448-49). When Lusk said he had lost it, they stabbed at his mattress and told him: "We'll get in one way or another"... and warned him "not to go to the man [i.e. prison

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[1]Numbers preceded by "T." refer to the trial transcript; numbers preceded by "S." will refer to the sentencing transcript; numbers preceded by "R." will refer to the record on appeal.

[2]Lusk was serving three consecutive life sentences, one for first degree murder and two for armed robbery, all arising out of a single transaction, a robbery of three elderly women during which one of the victims died from asphyxiation after being gagged. (T.776-78).

officials]." (T. 449) Lusk went to breakfast, and when he returned, the lid had been pried off his locker and his money and several packs of cigarettes had been stolen. (T.449-50, 604).

When Bobby Lusk saw what they had done, he told himself, "I ain't gonna take it no more." (T. 450) He explained:

> And, if I had let him get by with that he would have just been back tomorrow morning and the morning after it. Maybe he would try to turn me into a homosexual or something and I had been under a direct threat ever since he had been on the wing, so, I just couldn't, you know, do nothing else but what I did. (T. 450)

When he went to the noon meal, Lusk took along a home-made knife that he had kept in the flap of a cardboard box for two years for protection (T. 451). Lusk testified at trial that he heard Hall say, referring to Lusk, "After dinner I got to take him out," meaning to kill him (T. 597). In his statement, Lusk recalled going up to where Hall was seated and stabbing him in the back several times (T. 451-52, 456). Hall stood up after the first blow and threw his tray at Lusk, but then fell to the floor (T. 456).

The prosecution called six eye-witnesses at the guilt-innocence phase of the trial, four correctional officers and two inmates. These witnesses described Lusk coming up behind

Michael Hall, who was sitting with three others, and stabbing him three times in the back with a knife (T. 267, 280, 297, 308, 317). Lusk then backed up, held up his knife, and yelled, "This is what will happen to anybody that decided to rob me." (T. 268). Sgt. Clyde Blevins, the supervisor over the noon feeding, approached Lusk and asked him to hand over the knife, which Lusk did without offering any resistance (T. 270, 334, 338). Several defense witnesses, including friends of the victim, testified that the stabbing was provoked by Hall, that a struggle ensued in which both men may have been brandishing knives, and that the victim was stabbed during the fight (T. 509-10, 538, 560-61, 579-80). Medical testimony indicated that Hall lost consciousness quickly and died within minutes (T. 422-23).

B. The Motion for Post-Conviction Relief

On January 3, 1985, pro bono counsel filed a Motion for Post-Conviction Relief and supporting memorandum of law on behalf of Mr. Lusk, an indigent, alleging ineffectiveness of counsel at the guilt, penalty and sentencing phases of trial and several Eighth Amendment violations. (R. 1-17).

In support of the ineffectiveness argument counsel made allegations, with supporting exhibits (R. 18-278), regarding both the personal background of Mr.Lusk's court-appointed

attorney, Mack Futch, and his preparation and conduct of the defense. Several specific bases for the ineffectiveness claim were proffered, and are discussed in greater detail throughout this brief. A primary argument for ineffectiveness at the guilt stage involved Futch's exclusive reliance on an all-or-nothing defense of self-defense, a reliance which was totally irrational given Lusk's existing status as a triple life sentencee and the availability of a far more convincing argument that the killing was motivated by fear or a "dominating passion," as explained in Forehand v. State, 126 Fla.401, 171 So. 241 (Fla. 1936) (R. 5).

Additionally, Lusk urged that, once the theory of self-defense was embarked upon, Futch displayed gross and prejudicial incompetence by not informing the jury at the guilt stage that Michael Hall had previously been convicted of the sexually related gang torture murder of an inmate at Sumpter Correctional Institution, and by not adducing other substantial evidence of Hall's recognized psychotic personality and bent towards sadistic violence (R. 4-5, 16-21).

The motion papers also asserted that Futch failed to support Lusk's claim that he believed the F.S.P. guards were either unable or unwilling to protect him from Michael Hall, even though there existed abundant evidence of the dangerous, deplorable prison conditions prevailing at the time, and of

the "leaks" which often put a prisoner complaining of intimidation in even greater danger. (R.5, 22-27) Nor did Futch show, as he could have, that Lusk, prior to encountering Hall, was working and living peaceably in the prison environment. (R.14-15)

Numerous substantial allegations were also made regarding Futch's performance during the penalty and sentencing phases. Although Lusk was facing a minimum of two, and possibly three or four aggravating circumstances, Futch spent a mere one and a half hours preparing for the penalty and sentencing phases. At the penalty phase he elicited the harmful and patently false testimony that Florida State Prison was not a violent place and that Michael Hall was not a violent person.

Additionally, he presented virtually none of the readily available and abundant mitigating evidence, except to establish, without explication, that Michael Hall had a previous conviction for murder in the second degree and that Lusk ran away from home and had been in three hospitals for mental observation. Yet, had Futch performed a minimal investigation, he could have found additional mitigating circumstances in Lusk's family background, his character, and his exemplary behavior at Florida State Prison before being threatened by Hall (R. 7-8).

Lusk asserted in his motion papers that, had the foregoing mitigating circumstances been in evidence, no override of the jury's life recommendation could have sustained analysis under Tedder v. State, 322 So.2d 908 (Fla. 1975) and Richardson v. State, 437 So.2d 1091 (Fla. 1983), since the omitted evidence undoubtedly would have provided a reasonable basis for the jury's recommendation.

Lusk also asserted that the ineffective assistance afforded him by Mr. Futch should be viewed in the context of appointed counsel's background. Futch had been an Assistant State Attorney from 1956 to 1974, when he ran successfully for Public Defender of Bradford County. His tenure as Public Defender ended in 1975, after an investigation by the Florida Department of Criminal Law Enforcement concluded that Futch had a serious drinking problem, was chronically absent, and had misappropriated state funds through the submission of false expense and travel vouchers (R. 236-238, 245-257). Prosecution was declined and Futch left the Public Defender's office and established a private practice.

C. The Motion to Disqualify

Shortly after filing his memorandum in support of post-conviction relief, counsel filed a motion to disqualify

Judge Fagan. (R. 343-351). The grounds for disqualification were that: 1) a judge should not preside over a motion seeking to determine the effectiveness of an attorney he, himself, appointed; 2) Judge Fagan had previously indicated a general prejudice against claims based on attorney ineffectiveness and a specific prejudice regarding this case and this defendant; and 3) Judge Fagan might be a material witness for or against one of the parties.

Oral argument of the motion was had on March 6, 1985. Judge Fagan denied the motion in a written opinion and order dated March 14, 1985. (R. 360-366). Counsel applied to this Court for a Writ of Prohibition, which was denied without opinion.

D. Notice to Depose Trial Counsel

Prior to a hearing on the merits, counsel noticed Mr. Lusk's previous attorney, Mack Futch, for a deposition. The State moved to quash, arguing there was no authority to take depositions in support of a motion under Rule 3.850. On April 24, Judge Fagan issued an order granting the State's motion to quash. (R.395-398).

E. Motion to Interview Jurors

Counsel moved for permission to interview the jurors, both to ascertain the "reason" for their life recommendation consistent with this Court's decisions in Tedder, Richardson and their progeny, and also because the jurors were virtually the only "neutral" observers of Mr. Futch's courtroom demeanor and performance. (R. 384-391). On April 24, 1985, Judge Fagan issued an order denying the motion. (R. 399-400).

F. Post-Conviction Hearing

Introduction

An evidentiary hearing on the defendant's post-conviction motion for relief was held before Judge Fagan on May 8 and May 9, 1985 in the Circuit Court of the Eighth Judicial Circuit at the Bradford County Courthouse in Starke, Florida.

Among the witnesses called by the defendant to establish counsel's ineffectiveness were: Mack S. Futch, who had represented the defendant at trial and sentencing (R.886); the defendant himself (R.1085); Jesse J. Wolbert, who had shared office space with Mr. Futch at the time of the trial (R.1046); Wilma Ellenburg, who had known Lusk since his

birth (R.1010); and William J. Sheppard, an attorney and expert in the preparation and trial of felony cases (R.1175). Additional evidence, both testimonial and documentary, bearing on specific aspects of Lusk's trial was presented by the defendant.[3] During its case the State also called Futch (R.1276), as well as two character witnesses (R.1133, R.1211) and Thomas Elwell, who had prosecuted Lusk's case (R.1295).

1) Counsel's Preparation and Trial of the Guilt Phase.

Mack Futch, assigned by the trial court to represent Lusk, testified at the post-conviction hearing that when he first assessed the case, "the evidence appeared almost overwhelming concerning his guilt," since there was a confession and numerous eyewitnesses. (R.988) The defense he chose to present was self-defense. (R.908) Apparently conceding a murder conviction, Futch claimed to have pursued this defense "to lessen the impact [of Lusk's act] in the eyes of the jury, in the hope of obtaining a recommendation of mercy." (R.908) Futch acknowledged, however, that Lusk could not have been sentenced to death if convicted of a grade of homicide less than first degree murder and that the

[3]The defendant had also subpoenaed Assistant Superintendent Richard Dugger of Florida State Prison. When Dugger failed to appear, the court refused to enforce the subpoena, or grant an adjournment, without proof that Dugger had been tendered the statutory witness fee, notwithstanding Lusk's indigency and the filing of the sheriff's return on the subpoena. (R.1147-1151)

defendant was already serving three consecutive life sentences. (R.907-8) Nevertheless, aside from insanity, Futch considered no strategy or theory of defense that might reduce first degree murder to a lesser offense. (R.908-9)

Inquiry into Futch's preparation for trial was impeded because he had destroyed the Lusk file.[4] (R.891) Futch's Motion for Payment of Attorney Fees and the supporting time sheets, which were introduced into evidence by the defendant, shed some light on this question. (R.827-28; 893) Prior to their introduction Futch stated that he kept hourly records of the time he expended on Lusk's case and that his records were reasonably accurate. (R.893) After their introduction, however, he claimed the time sheets included only a partial listing of the hours expended. (R.893) Among other things, those time sheets reflected no time spent on legal research (R.909) and only an hour and a half preparing for the penalty phase of the trial. (R.938).

Although his entire case was to rest on the self-defense theory, Futch neither subpoenaed the prison records of the victim, Michael Hall, nor ascertained prior to trial that

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[4]Futch was not sure when he had destroyed the file. At one point he said he destroyed it when he went back to work as an Assistant State Attorney in 1980 (R.891). At another point he said that he destroyed it after the direct appeal had been decided (R.891-2). He could not recall, however, when the appeal was decided (R.1292). (In fact, Lusk's appeal was not decided until January, 1984.)

Hall was extremely violence-prone and possibly a psychopath. (R.910-12) This was so even though Futch admitted that Hall's history of violence and psychotic disorders might be an important component of self-defense. (R.912)[5] Stephen Pillow, an investigator and a former correctional officer at Union Correctional Institution (U.C.I.), testified at the hearing that Hall's reputation among the prison staff was as a "very vicious and violent individual." (R.1041) Specifically, Hall had the reputation of "preying on the elderly, weaker, smaller inmates, tak[ing] their money away from them, forc[ing] them into homosexual activities and this sort of thing." (R.1044) Futch believed that Hall's prison disciplinary records, even if they reflected an infraction for carrying a knife, would not have been admissible. (R.914)

Futch also neither sought nor presented evidence at trial to establish the violent conditions at Florida State

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[5]Hall's prison records were entered into evidence at the hearing. (R.829-52) They document Hall's conviction for the sexually related gang torture murder of an inmate at Sumpter Correctional who had complained of being harassed by Hall and his cohorts. (R.832-4; 841) They also contain a diagnosis that Hall was psychotic and indicate that he was transferred to Florida State Prison because he was too dangerous to remain at U.C.I. (R.846, 850, 852). They further document Hall's several disciplinary adjudications, including one for possessing a knife at the U.C.I. barber shop. (R.851) This particular violation bore special significance since Lusk claimed Hall threatened him at the F.S.P. barber shop.

Prison.[6] (R.924) Nor did he obtain evidence to establish that an inmate who "snitches" or seeks protection from prison officials may be actually putting himself in greater danger. Futch stated that he was unwilling to vouch for such evidence since it came from other inmates and was therefore not credible.[7] (R.920-1) He did, however, secure a certified copy of Hall's conviction for murdering another inmate. (R.912) He did not introduce it at the guilt phase.

Futch testified on direct that Hall's conviction was important to show self-defense and agreed that the jury's awareness that Hall had previously been convicted of murder was a critical aspect of demonstrating self-defense. (R.911-12) At the hearing, it was Futch's uncertain, albeit erroneous, recollection that Hall's conviction had been introduced into evidence during the guilt phase of the trial. (R.1193) When cross-examined by the State, Futch shifted his

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[6]The hearing court barred the defendant's introduction of two reports on violent prison conditions and the system's inability toprotect prisoners at F.S.P. at the time of the offense. One was the report of the Advisory Commission created by Judge Green in the case of Graham v. Vann, 394 So.2d 180 (Fla.1st DCA 1981). The second was the Final Report of the Ad Hoc Subcommittee on Management Oversight of the House Committee on Corrections, Probation and Parole, issued in October, 1980. (R.924-5) (Defendant's Exhibits C (R.423-581) and D (R.582-602) for identification, repectively.) The reports were summarized in the motion papers at R.22-27.

[7]Lusk testified that inmates who could testify to prison conditions were available but not called by Futch. (R.1113) At his trial Lusk had protested he was denied the opportunity to present certain witnesses on his behalf. (T.765)

testimony regarding the critical importance of Hall's conviction to establish self-defense, and maintained that the 1973 conviction would have been inadmissible because of remoteness in time and, even if admissible during the guilt phase, would be given very little attention by the jury. (R.984,999)

2. Counsel's Preparation and Trial of the Penalty Phase

Although at the penalty phase of the case Futch had told the jurors that "I'm going to talk to you about one thing and one thing alone, and that is mercy for this defendant" (T.802), he testified at the hearing that he saw his goal at that phase as convincing the jury that mitigating circumstances outweighed aggravating circumstances and that he understood the judge could override the jury's recommendation if sufficient mitigating circumstances were not introduced. (R.935, 939)

Futch testified that in preparing for the penalty phase he spent more than the hour and a half that his time sheets indicated, although he could not say how much more time. (R.938) He did not obtain or examine the file of Lusk's previous conviction (R.919); or seek any help from outside advisors, such as a psychologist or investigator (R.942); or speak to anyone in Lusk's hometown regarding his background

(R.942); or discuss with the defendant his abuse as a child.[8] (R.943) Nevertheless, Futch did not believe he could have done any further work to develop mitigating circumstances (R.955), and that he gave all the mitigating circumstances he had to the jury (R.954). He could not remember, however, what those mitigating circumstances were. (R.961) The trial record reflects that during the penalty phase Futch simply introduced, for the first time, the bare fact of Hall's prior murder conviction and presented Lusk's brief testimony. (T. 779-82). He also elicited testimony that F.S.P. was not a generally violent place and that Michael Hall was not a violent person. (T.785-86) Futch never discussed with Lusk what his own testimony would be. (R.1127)

At the post-conviction hearing, the defendant called Wilma Ellenburg from Lusk's hometown of Hickman, Kentucky. (R.1010) Ms. Ellenburg had known Lusk since his birth and was thoroughly familiar with his family background and upbringing. (R.1012) She testified that his parents were Lois and Curtis Lusk, but that the latter was not his biological father. (R.1012) Lusk was the illegitimate offspring of Lois Lusk and Eldon Walker, who lived across the street from the Lusks in Hickman, a fact which was generally

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[8]In Futch's opinion, evidence of Lusk's troubled upbringing, including his abuse as a child, and his placement at age ten in the Kentucky Children's Home as a neglected child, might be more aggravating than mitigating. (R.944)

known around Hickman. (R.1012, 1014) Curtis Lusk made his wife leave home with the child when she first came home from the hospital, but she later returned. (R.1015-16) Bobby, however, was not permitted in Mr. Lusk's sight or allowed to eat at the same table as Mr. Lusk and his two legitimate sons. (R.1016-17) While still in diapers, he was given a cookie and a Coke and sent out to the porch. (R.1017)

Curtis Lusk, who frequently got drunk, would hit Bobby so that stripes the width of a belt would be on his body. (R.1018, 1022) The boy also stayed with the Walkers, across the street, but that didn't work either. (R.1018-19) He was a lost little boy who, at five, would ask Ms. Ellenburg, "Who is Bobby?" (R.1018-19) His schoolmates called him "bastard." (R.1019) He asked Ms. Ellenburg what that meant and why he wasn't ever given things like his brothers. (R.1023) She would explain that it was all because Curtis Lusk wasn't his real father. (R.1023)

Consequently, according to Ms. Ellenburg, as a young boy Bobby would often run away from home, both from the Lusks and the Walkers, and be afraid to return. (R.1023-24) One night Eldon Walker awoke the boy at two o'clock in the morning and told him to sing. (R.1024) The boy fled in the wet snow to the home of Ms. Ellenburg, who had to run off Walker with a baseball bat. (R.1024-25) Ms. Ellenburg also testified

that, by 11, Bobby had developed a problem with glue sniffing. (R.1025)

Lusk, testifying at the hearing, confirmed Ms. Ellenburg's report of the scandal and hardships attending his birth and childhood. (R.1086) He noted that the Lusk family called him Bobby Lusk, and the Walker family called him Bobby Walker. (R.1086) Each family told him how rotten the other was. (R.1091) When he was 11, he was judicially declared a needy and dependent child and sent to the Kentucky Children's Home.[9] (R.1093-94) He became addicted to glue sniffing and was later admitted to Western State Hospital in Kentucky to detoxify after overdosing on 17 pills. (R.1093, 1099; Defense Exhibit 6; R.861-73) Lusk testified that Futch wasn't attentive during their conferences and never inquired about his background. (R.1126) Lusk never complained to the court about Futch, because Judge Fagan had told him that, having changed lawyers once, he would not be able to change

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[9]The hearing court refused to admit Lusk's original case file from the Kentucky Children's Home, even though that record was accompanied by a notarized statement certifying its authenticity. (R.1094-97) That record set forth in detail the reasons Lusk was in the home, documented the problem with the Lusks and Walkers (R.1095), and noted the abuse to which Lusk had been subjected. (R.618-720) Judge Fagan refused to explain why he sustained the State's objection to these admissions. (R.1097) These records are summarized in the motion papers at R. 26-30.

It is significant that the Pre-Sentence Investigation Report had treated Lusk's stay at the Kentucky Children's Home under "Prior Arrests and Convictions." (Defense Exhibit 4, R.854-56)

lawyers again. (R.1150) But Lusk acknowledged that, following the jury's recommendation of life and Futch's assurance that the judge would go along with it, he had called Futch the best lawyer he ever had. (R.1130-3)

3. Counsel's Preparation And Presentation of the Sentencing Phase

From December 7, 1979, when the jury returned its recommendation of life, until February 5, 1980, when Judge Fagan imposed his sentence of death, Futch never visited Lusk. (R.1127) He was also unavailable to officials preparing the Pre-sentence Investigation Report (Defense Exhibit 4; R.855) and did not go over the completed report with Lusk.[10] (R.1030) Futch admitted that he did nothing to help Lusk prepare for the sentencing phase and that he didn't think he was permitted to submit a sentencing memorandum to the judge. (R.967) On the day of sentencing Futch arrived two minutes before court was convened and spoke with the defendant for a minute in the lobby. (R.1129) Futch did not recall what he argued to the judge at sentencing.[11] (R.962)

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[10]As already indicated, the report considered Lusk's stay at the Kentucky Children's Home, following his adjudication as a neglected child, under "Prior Arrests & Convictions." The report also erroneously stated that Lusk was born of the union of Curtis and Lois Lusk. (Defense Exhibit 4, R.854)

[11]The trial record indicates that Futch's statement, comprising two paragraphs of the transcript, did no more than ask Judge Fagan to abide by the jury's recommendation. (S.4)

4. Defense Counsel's Background

Futch testified that he was currently employed by the Office of the State Attorney in the Eighth Judicial Circuit (R.887). He had been admitted to the Florida bar in 1950, was in private practice until 1956 and had worked as a prosecutor in the same State Attorney's Office from 1956 until 1974. (R.887, 896, 986) Beginning in 1974 he served for approximately two years as Public Defender in the Eighth Judicial Circuit, during which time he tried "very few," that is, "two or three" cases. (R.898) Futch denied that he had actually tried no cases during that time. (R.898) He left the Public Defender's office "sometime in 1976 or '77" and claimed that he had adequately discharged his responsibilities as Public Defender.[12]

Following his resignation as Public Defender, Futch

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[12]The circuit court refused to permit Lusk's counsel to challenge this contention by inquiring of Futch about the circumstances under which he resigned as Public Defender, or to question him regarding the Florida Department of Criminal Law Enforcement investigation of his tenure at the Public Defender's office. (R.899-900) Counsel also argued unsuccessfully that Futch's dereliction of duty as Public Defender, as documented in the report of the Florida Department of Criminal Law Enforcement (F.D.C.L.E.) (not admitted in evidence) -- including his failure to handle a caseload, supervise his staff and explain his absences, as well as his filing false voucher statements -- was relevant to establish presumed ineffectiveness, or as bearing on his credibility. (R. 899-902; see also the F.D.C.L.E. report, at R.738-826.)

returned to the State Attorney's Office for less than a year and then, according to his testimony, entered private practice. (R.902-3) Donald Reid, an attorney called by the State as a character witness for Futch, testified, however, that he had heard Futch had an alcohol problem while Public Defender[13] and thereafter "had not seen him practice for a number of years." (R.1213) Then he heard that Futch "was back as an attorney and doing well, again." (R.1212) In September, 1979, Futch was appointed by Judge Fagan to represent Lusk. (R.906) Jesse Wolbert, a disbarred attorney with a criminal conviction in whose Starke office Futch occupied space in 1978, 1979 and 1980, testified that during this period Futch was under the influence of alcohol on almost every occasion while in the office, or was too drunk to come into the office at all. (R.1053) (Wolbert acknowledged that "sober and in his day" Futch was the best trial attorney Florida ever had. (R.1066)) Lusk testified that it was obvious Futch had been drinking before coming to see him (R.1121), but Thomas Elwell, the prosecutor and Futch's present boss, testified he never saw Futch under the influence of alcohol while representing Lusk. (R.1296)

Futch testified that during his career he had handled

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[13]Futch conceded he had an alcohol problem "in the early '70's," but claimed that it ended by 1975 or 1976. (R.975, 977) According to Futch, he was only drinking in moderation at the time he was representing Lusk. (R.909-910)

over a thousand felony cases and had tried several hundred of them, including 50 or more homicides. (R.987) He had handled 60 to 75 capital cases, taking 40 or 50 of them to trial. (R.987) He admitted, however, that Lusk's was the first capital case he had defended. (R.996) He later represented defendants in two other capital cases, both of which resulted in the imposition of death sentences.[14] Futch admitted that he enjoyed prosecuting cases more than defending them. (R.1286) Sometime early in 1980 he once again joined the State Attorney's Office. (R.1286)

Two of the State's witnesses, William Avera and Douglas Reid, both lawyers, testified that Futch had a reputation in the community as an excellent attorney. (R.1135, 1210) Avera, an acquaintance of Futch for 30 years, claimed that he had never heard anything negative about Futch and would not believe findings of misconduct in the Florida Department of Law Enforcement investigative report on Futch as Public Defender. (R.1134-38) Avera stated he had never known Futch

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[14]Futch's other death-sentenced clients were Richard Williams and James C. Agan, both of whom filed ineffectiveness claims. Williams has been re-sentenced to life imprisonment, consecutive with a previous sentence, pursuant to an offer made by the State. State v. Richard Williams, Case No. 80-240 CF. Agan's claim has been denied without a hearing, and an appeal is pending in this Court. State v. James Agan, Case No. 80-312 CF.

The court excluded evidence that, between 1978 and 1985, only five of 50 homicides of prisoners by prisoners in Florida had resulted in death sentences and that, of these five, Futch had been defense counsel in three of them. (R.611-17; 1004-6)

to have a drinking problem, although Futch himself had admitted to such a problem. (R.1140) Donald Reid also testified that Futch had an excellent reputation as an attorney, specifically from December, 1979 through February, 1980. (R.1210) Reid admitted that he based his testimony regarding Futch's reputation on conversations with Thomas Elwell, who had prosecuted Lusk, a number of sheriffs in the area, and one other attorney. (R.1214) He himself had no personal knowledge of Futch's conduct between December, 1979 and February, 1980.[15] (R.1214)

5. The Expert Testimony

William J. Sheppard was tendered, and accepted by the hearing court, as an expert in the preparation and trial of felony cases. (R.1181) He is a Jacksonville lawyer whose practice since 1975 has been limited to criminal defense and civil rights litigation. (R.1177) In 1985 he received the Tobias Simon Award for outstanding representation of indi-

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[15]The State also called Wiley Clark, an investigator for the State Attorney's Office, who testified that Jesse Wolbert had a reputation for untruthfulness. (R.1272-3) Wiley's testimony was not based on his own personal experience. (R.1274-5). His sources for Wolbert's reputation included Elwell, the prosecutor; Futch, the counsel under attack; Don Denton, the investigator from the Bradford County Sheriff's office, who had testified against Lusk at his trial; and Shon Saxon, against whom Lusk had once brought a civil rights suit. (R.1155; R.1274-75) Futch, when called by the State, testified that Wolbert was addicted to cocaine and was incapable of perceiving what was happening around him. (R.1277, 1282)

gents in the State of Florida. (R.1179) He is a member of the National Association of Criminal Defense Attorneys and the Florida Association of Criminal Defense Attorneys. He is vice-president of the northern region of the Florida Criminal Defense Lawyers Association. (R.1180) He has lectured on criminal law at Florida State University College of Law, the University of Florida and Nova Law School in Fort Lauderdale. (R.1180) He has also participated in several Continuing Legal Education Programs and lectured at a Practicing Law Institute Seminar; he has been a panel member discussing jury selection at an American Psychological Association national meeting and has made presentations before the American Society of Criminologists. (R.1180-81)

Prior to testifying Mr. Sheppard read the transcript of Lusk's trial and sentencing, the motion and supporting memorandum for post-conviction relief and the memorandum and exhibits in support of Lusk's clemency petition. (R.1181) He also reviewed Futch's affidavit of time expended on Lusk's case, attended the hearing and conducted independent legal research. (R.1181-82)

On the basis of his experience and his review of this case, Sheppard concluded that Lusk had not received effective assistance of counsel in several respects. (R.1181) According to Sheppard, the only valid objective in this case was to

save Lusk's life, since he was already serving consecutive life sentences. (R.1186) Therefore, Futch's failure to consider theories of defense -- such as homicide committed under the influence of a dominating passion -- which would negate the premeditation required for a first degree murder conviction, was an instance of ineffective counsel. (R.1187-88) So, too, was the mishandling of the self-defense theory, especially in Futch's postponing introduction of Hall's murder conviction until the penalty phase. (R.1189-93) According to Sheppard, the victim's conviction was "defense counsel's smoking gun" in establishing self-defense, and no conceivable strategy could justify omitting that evidence at the guilt-innocence phase. (R.1193)

During the penalty phase Futch was ineffective, according to Sheppard, in failing to introduce mitigating evidence. (R.1200) Sheppard was of the opinion that the jury recommended life as a result of finally learning about Hall's murder conviction. (R.1255) He pointed out, however, that Futch's failure to introduce other mitigating evidence not only prejudiced Lusk in the context of the judge's later sentencing decision, but also deprived Lusk of the benefit of a favorable "Tedder - Richardson analysis" by the reviewing court. (R.1200) Sheppard indicated that, had Futch introduced the extensive mitigating evidence of Lusk's background, the Florida Supreme Court might not have affirmed Judge

Fagan's override of the jury's recommendation. (R.1201)

Opinion Below

On June 10, 1985, Judge Fagan issued an order denying the motion for post-conviction relief. (R.401-9).

Judge Fagan began his substantive analysis with a personal defense of Mack Futch, lamenting what he considered the recent "custom" in post-conviction capital litigation of "la[ying] bare for public inspection and scrutiny" an attorney's personal background and life problems. (R. 402). He asserted as well that the only corroboration of Futch's supposed personal problems was provided by Futch's disbarred former office-mate, Jesse Wolbert, whose testimony he would not credit (R. 402-403). Judge Fagan also noted his own observations of Futch's conduct throughout the trial, and his previously-stated assessment of Futch's performance. (R. 403)

Regarding Mr. Futch's failure to develop the defense of dominating passion, Judge Fagan ruled that such a defense could have been used only if trial counsel were to "manufacture evidence or suggest testimony to defendant about his state of mind during and prior to the killing that was completely contrary to" Lusk's confession and the "boisterous" statements he made immediately after the killing. (R.403).

Judge Fagan did not discuss at all Futch's failure to use what expert William Sheppard called the "smoking gun" of Michael Hall's previous conviction for the gang torture murder of another inmate who had complained of being harassed by Hall, or to use the other evidence of Hall's psychosis and numerous additional acts of violence. Nor did Judge Fagan discuss whether Futch was ineffective for not utilizing available evidence of the dangerous conditions prevailing at Florida State Prison. He did, however, note the record references to Hall being called "yard dog," perhaps to show there was some evidence of Hall's personality. (R. 404). Judge Fagan added without elaboration that, while he respected expert Sheppard's legal ability, "his opinion cannot be regarded as an objective evaluation of performance." (R. 405).

Without explaining his reasoning, Judge Fagan also rejected Lusk's ineffectiveness arguments regarding Futch's failure to object to certain of the jury instructions, concluding that counsel's performance was not either "factually or legally unreasonable." (R. 406).

Finally, Judge Fagan concluded that Futch was not ineffective at the penalty and sentencing phases. Without discussing the evidence brought to light at the hearing, his

Honor found that the evidence "demonstrate[s] that nothing new or different is now suggested that should have been presented other than additional proof or evidence in support of matters previously presented." (R. 407).

ARGUMENT SUMMARY

The primary issues on appeal concern the effectiveness of the representation provided to Bobby Lusk at the guilt, penalty and sentencing phases of his trial. The trial record, considered with the testimony and the documentary evidence below, provides a shocking and unfortunate example of the harm which inures to an accused from a lawyer's lack of preparation and concern for his client's welfare.

As we urge in Point One, Lusk's court-appointed attorney inexcusably pursued an ill-fated "all-or-nothing" defense of self-defense, while not even considering the argument that fear or "dominating passion," which was all but established by the State's own evidence, negated premeditation. Just as inexplicably, he failed to research the deceased's record and therefore did not use as proof of self-defense, the "smoking gun" of Michael Hall's violent character and his previous commission of sadistic, violent acts, including a gang torture murder. Several other trial errors are noted in summary form in Point II.

In Point III we discuss counsel's utter lack of preparation for the penalty and sentencing phases and his consequent failure to present any of the abundant, readily available mitigating facts. Had counsel done his job, he could have

informed the jury and the court, among other things, of the pitiful conditions which helped to mold Lusk in his early years, the excellence of his behavior at Florida State Prison prior to crossing paths with Michael Hall, and the all too real prison conditions which made Lusk believe he was faced with a "him or me" decision. Moreover, counsel was not even available to the officials writing the pre-sentence report, did not know he could submit his own pre-sentence memorandum, did not review the erroneous and misleading pre-sentence report with his client, and presented no additional evidence or argument before imposition of sentence. Yet, had the cited facts been before the court, no override of the jury's recommendation of life imprisonment could have been sustained under the required Tedder-Richardson analysis.

The judge's refusal to abide by the jury recommendation was improper for the additional reason, discussed in Point IV, that he erroneously concluded that he could not incorporate any notion of mercy in his sentencing decision. This exclusion of a valid nonstatutory mitigating circumstance renders Bobby Lusk's death sentence arbitrary and violative of the eighth amendment to the United States Constitution.

A common thread running through the proceedings below is the Circuit Judge's refusal to disqualify himself, considered in Point V. Disqualification had been sought for several

reasons, including that his Honor was being called upon to judge the effectiveness of his own appointee, had previously expressed strong approval of that appointee's trial performance, and possessed personal knowledge of disputed facts. His Honor's inability to maintain the required objectivity, as sincerely as he may have tried to do so, is reflected in his many erroneous rulings. Among others, his Honor quashed an entirely proper subpoena seeking the deposition of Lusk's trial counsel, refused, without explanation, to admit into evidence properly authenticated and highly relevant records of Mr. Lusk's stay in the Kentucky Children's Home, and refused to enforce a subpoena of a state prison official because Lusk, an indigent, could not show pre-payment of the witness fee. Additionally, his Honor, who has previously emphasized a trial counsel's positive background and experience in denying an ineffectiveness claim, wrongly shielded Lusk's trial counsel from inquiry into a background which included substantial allegations and confessions of alcoholism, dereliction of duty, and larceny of state funds.

The Circuit Judge characterized this action as another of the unfair attacks on trial counsel which, in his opinion, have become all too common in capital cases. We believe, however, that this case deserves individual consideration based on its own merits, and that, on the merits, Bobby Lusk received representation unacceptable in a misdemeanor

case, let alone a capital prosecution.

POINT I

COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE OF THE TRIAL WHEN, VIRTUALLY CONCEDING A CONVICTION FOR FIRST DEGREE MURDER, HE IGNORED EVIDENCE NEGATING PREMEDITATION, RELIED SOLELY ON A THEORY OF SELF DEFENSE, AND BLUNDERED IN PRESENTING THAT DEFENSE.

A defendant has been denied his state and federal right to effective assistance of counsel when his attorney's performance "fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 104 S.Ct. 2052, 2068 (1984); Knight v. State, 394 So.2d 997 (Fla. 1981). The acts and omissions of counsel during the guilt phase of Bobby Lusk's trial were both unreasonable and prejudicial to his client, thereby denying Lusk the effective assistance of counsel.

Counsel incomprehensibly pursued an all-or-nothing defense of self-defense, ignoring evidence negating premeditation, and incompetently presented even that defense by failing to utilize substantial evidence supporting it. Counsel's testimony at the evidentiary hearing indicated that he apparently failed to distinguish between the different purposes of the guilt and penalty phases. He conceded that

the only defense theory he seriously considered was self-defense, not to get an acquittal, but "to lessen the impact [of Lusk's act] in the eyes of the jury, in the hope of obtaining a recommendation of mercy." (R.908) See Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983).

A. Counsel Was Ineffective In Relying Solely On A Self-Defense Theory And Ignoring Any Theory Utilizing The Powerful Evidence That Negated Premeditation

Bobby Earl Lusk was already serving three consecutive life sentences. Consequently, while a conviction for first degree murder could expose him to the death penalty, a conviction for manslaughter or a lesser degree of murder would be nearly as advantageous as an acquittal. Additionally, such an alternative conviction would be far more palatable to a jury than an outright acquittal, given the nature of the offense and the State's proof.

The most minimally competent attorney would have recognized this and fully developed the compelling evidence and arguments negating the element of premeditation required for a first degree murder conviction. Instead, counsel presented an all-or-nothing theory based on self-defense, a theory which had to overcome the major obstacles of Lusk's confession and the prosecution's numerous witnesses.

The State's eyewitnesses maintained that Lusk stabbed an unwitting Michael Hall in the back, before numerous witnesses, during a busy Thanksgiving day meal, and then loudly and wildly shouted a warning to anyone else who would consider robbing him. Lusk, in his statement, maintained he stabbed Hall because Hall had threatened his life in the prison barbershop and had assaulted, robbed and threatened him the morning of the crime. The circuit court's contrary conclusion notwithstanding (R. 403), the prosecution's own evidence at the guilt phase therefore suggested that Lusk was animated by fear or a "dominating passion," sparked by the threats and violent felonies perpetrated against him by Hall. Such evidence alone could have negated premeditation.

First degree murder under Florida law requires premeditation. Fla. Stat. Ann. Section 782.04. Premeditation is the "one essential element which distinguishes first-degree murder from second-degree murder." Polk v. State, 179 So.2d 236, 237 (Fla.2d DCA 1965). See also Anderson v. State, 276 So.2d 17 (Fla. 1973). A "dominating passion" operates to exclude premeditation and reduce the crime to a lesser degree of murder or manslaughter. See Forehand v. State, 126 Fla. 401, 171 So. 241 (1936); Rivers v. State, 75 Fla. 401, 78 So. 343 (1918); Olds v. State, 44 Fla. 452, 33 So. 296 (1902).

In Forehand this Court stated:

> As the element of premeditation is an essential ingredient of the crime of murder in the first degree, it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based upon an adequate provocation must be established beyond a reasonable doubt before it can be said that the accused is guilty of murder in the first degree as defined by our statute. (171 So. at 243) (emphasis added)

Accordingly, the Forehand court reversed the defendant's first degree murder conviction because, in light of evidence that he may have acted in the heat of passion, it could not be said that premeditation was established beyond a reasonable doubt. Id.

Florida appeals courts have regularly applied the teaching of Forehand to reverse first-degree murder convictions and order them reduced to second-degree murder. For example, in Tien Wang v. State, 426 So.2d 1004 (Fla.3d DCA), petition for review denied, 434 So.2d 889 (Fla. 1983), the defendant attempted to effect a reconcilation with his estranged wife -- who had sought the protection of her stepfather -- chased the stepfather into the street and stabbed him to death. In reviewing Wang's first-degree murder conviction, the appeals court noted "the homicide climaxed a day of impassioned efforts by defendant to

persuade his wife not to leave him" and held:

> Even as the passion which was found to have motivated the defendants in Febre [v. State, 158 Fla.853, 30 So.2d 367 (1947)] and Forehand caused the court to invalidate the first-degree murder conviction in those cases, so too the evidence in this case, although not necessarily establishing that defendant acted 'in the heat of passion,' is as consistent with that hypothesis as it is with the hypothesis that the defendant acted with premeditated design. Accordingly, Tien Wang's conviction for first-degree murder is reversed.... (426 So.2d at 1007.)

Likewise, in Clay v. State, 424 So.2d 139 (Fla.3d DCA 1982), petition for review denied, 434 So.2d 889 (Fla. 1983), a woman's first-degree murder conviction for shooting a man named Hepburn in the chest was reversed, even though she made a statement to police officers that she had procured the firearm for the purposes of shooting him. She had a stormy relationship with Hepburn, and he had often beaten her. The appeals court, relying on Forehand, stated that "[i]t is clear from this record that Rosa Clay was under a dominating passion and in fear of Hepburn." 424 So.2d at 141 (emphasis added). See also State v. Pforr, 461 So.2d 1006, 1007 (Fla. 1st DCA 1984) ("a controlling or dominating passion or fear may, in a particular context, preclude the existence of premeditation").

According to well-established Florida law, therefore, counsel had nothing whatever to lose and everything to gain by arguing that Lusk should, at most, be convicted of a non-capital offense.

Lusk, like all defendants, had a right to the "reasonably effective assistance" of counsel. Strickland v. Washington, 104 S.Ct. at 2064. The required reasonableness inquiry must be made "considering all the circumstances." Id. at 2065. Here, the overarching circumstance to be considered was Lusk's three pending life sentences, which should have made the avoidance of a conviction of a capital offense the sole significant goal of the defense effort. Although at the hearing counsel acknowledged that Lusk could not have been sentenced to death if convicted of a grade of homicide less than first degree murder and that Lusk was already serving three consecutive life sentences (R. 907-908), at trial counsel seemed oblivious to these realities. Counsel's failure to give controlling weight to these compelling circumstances was inherently unreasonable.

Accordingly, counsel's failure to introduce at the guilt phase the fact of Hall's conviction for murdering another inmate is both inexplicable and inexcusable. This, and his failure to introduce other evidence known to him which would have convincingly negated premeditation, was utterly irra-

tional. Prior to putting on the defense case, counsel in fact disavowed any intention of using certain such evidence, saying:

> I can eliminate, and intend to eliminate from the list of witnesses that have been furnished, the majority of those witnesses who in the defendant's opinion and counsel's opinion would go only to the question of mitigation. I am -- the witnesses that I intend to have brought here in the morning will be witnesses as to the events that occurred in the dining hall with one possible exception, but directly related to the matter and not to the violent conditions that exist in the prison. I do not propose to attempt to put that on as part [sic] except as it may incidentally appear from other matters.... (T. 504).

Nor is there any excuse for counsel's failure to uncover other significant evidence relevant to lack of premeditation.

Undoubtedly, the most important of the unused evidence bore on Michael Hall's character and violent reputation. Counsel knew that Hall had previously been convicted of murdering another inmate. This fact was known to Lusk at the time of the stabbing (R.781). There is, of course, little more powerful evidence to support a claim of homicide influenced by fear or dominating passion than that the deceased was himself a vicious murderer who posed a threat to the accused and to others. As expert Sheppard put it, this was the defense's "smoking gun." The failure to use this evidence can only be explained by counsel's incompetence.

Similarly, counsel should have obtained and introduced readily available evidence elucidating the facts underlying Hall's murder conviction and further demonstrating his violent nature.[16] For instance, had counsel so much as looked through Hall's prison file, he would have found the following admissible evidence: Hall's prior murder conviction involved the sexually-related gang torture-murder of an inmate who had complained of being harassed. Hall had been disciplined twice for carrying knives in prison, including once when a knife was found in his jacket pocket at the U.C.I. barbershop. (Significantly, Lusk asserted that Hall had threatened him with a knife in the F.S.P. barbershop.) Hall was considered a psychopath by prison officials at U.C.I. and was transferred to F.S.P. because he was considered too dangerous for U.C.I., itself a maximum security institution.

Additionally, with minimal investigation, or even by speaking to Mr. Lusk, defense counsel would have learned -- and could have introduced abundant evidence demonstrating -- that Michael Hall was known at F.S.P. as a violent, unstable

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[16]Contrary to the trial court's instruction regarding character evidence (T. 733-34), a defendant need not be aware of the character or reputation evidence when such evidence is relevant to the deceased's conduct at the critical time. Banks v. State, 351 So.2d 1071, 1072 (4th DCA 1977). Counsel's failure to object is but another example of his ineffectiveness.

"sicko," who roamed the institution in a gang and posed a serious threat to others. (R.832-34, 841, 846, 850, 851, 852). Contrary to the circuit judge's apparent conclusion (R.404), the trial references to Hall's nickname, "Yard Dog", hardly substituted for this abundant irrefutable evidence demonstrating Hall's past violent acts and uncontrollably violent disposition.

There was, as well, substantial evidence to show the reasonableness of Mr. Lusk's belief that informing the prison guards of Hall's threats and assaults would only increase the danger to him, since Hall would likely learn of Lusk's complaint and "punish" him, just as he had his murder victim. Also, the guards themselves lived in fear and were unwilling or unable to provide meaningful protection in the face of threats by someone like Hall. (See Lusk's hearing testimony at R.1109-12, and the two reports on prison conditions which Judge Fagan erroneously excluded. R.423-581, 582-602).

All the foregoing evidence would have provided the jury with more than sufficient reason to convict Lusk only of a lesser grade of homicide than first degree murder. Indeed, the likelihood of such a result is overwhelming, given the jury's quick decision to recommend life imprisonment upon learning of Hall's previous murder conviction.

Neglecting to introduce meaningful evidence negating premeditation was not the only manifestation of counsel's failure to appreciate the critical goal of avoiding a first degree murder conviction. In his summation, counsel made no mention whatsoever of lesser included offenses. He argued only that Bobby Lusk acted in self-defense and was therefore not guilty at all. (T. 678ff) He did not point out to the jurors, as an alternate position, that even if the jury found Lusk did not act in self-defense, then it should find him guilty of manslaughter or second degree murder, but not murder in the first degree. The prosecutor, on the other hand, did not ignore the subject of lesser included offenses. He urged the jury to find that Bobby Lusk was guilty of first degree murder and not of manslaughter or a lesser grade of murder, even though defense counsel had made no such argument to them. (T. 719).

The California Supreme Court's decision in In re Saunders, 2 Cal.3d 1033, 472 P.2d 921 (Cal. 1970), bears remarkable similarity to this case. The attorney in Saunders was aware of the existence of evidence relevant to the diminished capacity defense recognized by California law. Yet he never pursued the matter, and his client was convicted of capital murder. The attorney later explained that he did not develop the diminished capacity defense because he had

made a strategic choice to preserve that argument for the clemency hearing. The California Supreme Court, in overturning the conviction, found that, first, a reasonable attorney would have recognized that the diminished capacity defense held promise and, second, that a reasonable attorney would not have relied upon the weak defense used to the exclusion of the diminished capacity defense.

As in Saunders, Bobby Lusk's counsel postponed evidence of mitigation to the penalty phase of the proceedings (T. 504). Instead, he relied at trial exclusively on the weaker and less attractive theory of self-defense. Thus his attorney's reliance solely on self-defense to the exclusion of any alternative argument based on fear or dominating passion, when viewed in the totality of the circumstances -- that is, that a conviction for a non-capital offense would have had only minimal consequences for Bobby Lusk, but a conviction of capital murder could be deadly -- was unreasonable and rendered counsel's performance deficient.

Young v. Zant, 677 F.2d 792 (11th Cir. 1982), provides strong support for this conclusion. There the Eleventh Circuit reversed the defendant's Georgia conviction and death sentence for malice murder. The court held that Young had been denied effective assistance of counsel when his attorney adopted unsupportable defenses and ignored obvious defenses

to malice murder because he believed this course necessary in order to make a strong plea for mercy. (Counsel was unaware of Georgia's bifurcated procedure in death penalty cases.)

Charlie Young had gone to the house of a bank official to arrange a new payment plan for two loans the bank had made to him. Young was dissatisfied with the new arrangement proposed by the official. He went to his car, retrieved a .22 caliber pistol, returned to the house and resumed his discussion with the bank official. A fight ensued. Young hit the official several times with the butt of the pistol, then shot him four times at close range. He removed a billfold from the official's pocket and left. When arrested, Young confessed to this chain of events. Nevertheless, in reversing Young's conviction, the Eleventh Circuit held that Young's confession "provided the defense with strong evidence that the homicide was committed in the heat of passion and was not malice murder but manslaughter." 677 F.2d at 799. The court pointed out:

> It is not within the district court's or our province to say whether on this record Young was guilty of malice murder or some lesser included offense. But it is our duty to determine whether Young received legal representation that passed constitutional muster. In this case, given the evidence the State produced, we have no difficulty at all concluding that Young's counsel neglected a very strong argument that Young killed Flynt in the heat of passion and thus was guilty,

> if at all, of voluntary manslaughter. Id.

Surely Bobby Lusk was as entitled as Charlie Young to "a very strong argument" that he killed Michael Hall under the influence of a dominating passion and thus was guilty, if at all, of voluntary manslaughter or a lesser grade of murder. But Lusk's counsel, it seems apparent, never fully understood the totality of the circumstances, or the consequences of his ill-conceived strategy, assuming he strategized at all. As the court stressed in Young v. Zant,

> Where defense counsel is so ill-prepared that he fails to understand his client's factual claims or the legal significance of those claims...., we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar. (Id. at 798) (emphasis added).

Bobby Lusk's counsel either failed to understand the legal significance of his client's factual claims or unreasonably chose to ignore them during the guilt phase of the trial.

The "prejudice" prong of the Strickland analysis is obviously satisfied, since there certainly is a "reasonable probability that, but for counsel's unprofessional errors, the result...would have been different." Strickland v. Washington, 104 S.Ct. at 2068. Although this assessment will

necessarily be speculative in most cases, it is not so here. Once the jurors learned that Michael Hall had himself killed another inmate, they had little difficulty returning a verdict recommending against death. Undoubtedly, this recommendation reflected the jurors' understanding that Lusk acted from a deep-seated fear of Hall. Thus a very sound basis exists for concluding that, had the jurors been exposed to evidence and argument challenging premeditation during the guilt phase, there is a reasonable probability that the outcome of that proceeding would have been different. The jury may very well have determined that Bobby Lusk's fear of Michael Hall obscured his reason -- that is, that he acted under a dominating passion -- thereby creating a reasonable doubt of premeditation. Therefore it is reasonably probable that, but for counsel's default, the jury would not have convicted Lusk of a capital offense.[17]

But in order to establish counsel's ineffectiveness we need not rely solely on his failure to develop the lesser offense option for the jury. Counsel was also ineffective in grievously mishandling his chosen theory of self-defense. We turn to this failure in the next section.

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[17]This conclusion is strengthened by the Supreme Court's holding in Strickland v. Washington that a defendant need not show that counsel's deficient conduct "more likely than not" altered the outcome of the case. 104 S.Ct. at 2068. As the Court explained, "The result of a proceeding can be rendered unreliable...even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id.

B. Counsel Was Ineffective In Failing To Utilize At the Guilt Phase Important Evidence Relevant To Self-Defense

Whether or not counsel exercised sound judgment, or any judgment, in relying exclusively on self-defense, he was nevertheless obligated to present that defense competently. Counsel's failure to introduce facts, known to him, which gave powerful support to this defense is stark evidence of his ineffectiveness.

Much of the evidence negating premeditation also supported self-defense. Yet, as already mentioned, counsel expressly declined to introduce this evidence, including evidence of "the violent conditions that existed in the prison." (T. 504) His most serious blunder, however, was the inexplicable failure to introduce during the guilt phase the fact of Hall's murder conviction. Competent counsel would not only have introduced the conviction, of which Lusk was aware at the time of the stabbing, but would also have ascertained and introduced the facts underlying it, as well as other evidence of Hall's violent character and reputation. This evidence would be admissible because Hall's conduct just prior to his death was in issue and also because Lusk believed Hall posed an imminent threat to him:

> Evidence of a deceased's violent character is admissible when self-defense is asserted if there is an issue as to either the conduct of the deceased or the reasonableness of the defendant's belief as to imminent danger from the deceased. Garner v. State, 28 Fla. 113, 9 So. 835 (1891); Fine v. State, 70 Fla. 412, 70 So. 379 (1915); Copeland v. State, 41 Fla. 320, 26 So. 319 (1899); Williams v. State, 252 So.2d 243 (Fla. 4th DCA 1971). (Banks v. State, 351 So.2d 1071, 1072 (4th DCA 1977) (emphasis added.))

In fact, in Quintana v. State, 452 So.2d 98 (1st DCA 1984), a prisoner's conviction for the first degree murder of a fellow prisoner was reversed because the trial court had excluded the very type of evidence that counsel failed to even offer here. There the victim, while on his way to breakfast, went to the cell of Quintana, a slightly built inmate, and slapped him. The victim then went to breakfast and returned to the cell block 30 minutes later accompanied by two of his friends. As he passed Quintana's cell, Quintana ran out, shouted something in Spanish, and fatally stabbed the victim. In reversing Quintana's conviction, the District Court of Appeal held that it was error to exclude evidence of the victim's reputation and prior acts of sexual assault to show his propensity for violent conduct and the likelihood that he was the aggressor.

At the evidentiary hearing in the instant case, it was brought out by a former corrections officer that Hall had a

reputation as a "very vicious and violent individual" and specifically that he preyed on the elderly, weaker, smaller inmates, took their money and forced them into homosexual activity. (R. 1041, 1044) But defense counsel neither subpoenaed Hall's prison records nor ascertained prior to trial his extremely violent reputation. At the hearing, defense counsel maintained that in his opinion much of this evidence would be inadmissible. Indeed Futch went so far as to assert that evidence of Hall's conviction would have been inadmissible at the guilt phase! (R. 984)[18] Such profound ignorance of the law is further evidence of ineffective assistance of counsel.

These acts and omissions of counsel -- particularly his failure to introduce Hall's murder conviction during the guilt phase -- fell below any objective standard of reasonableness. But for these errors there is a reasonable probability the jury would have concluded that Lusk acted in self-defense, especially since the jury's sentencing recommendation reflects that great weight was probably given the fact of Hall's conviction.

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[18]At the hearing Futch at first testified that the jury's awareness of Hall's murder conviction was a critical aspect of demonstrating self-defense. (R.911-12) When cross-examined by the State, however, Futch, apparently having recalled or learned that he never introduced Hall's conviction during the guilt phase, shifted his testimony, downplayed the significance of this evidence, and finally questioned its admissibility. (R.984, 999)

POINT II

COUNSEL'S NUMEROUS OTHER ERRORS SEPARATELY AND CUMULATIVELY DEPRIVED THE DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS TRIAL.

In addition to the substantial errors discussed in Point I, counsel's representation throughout the guilt phase of the trial was characterized by numerous unprofessional acts and omissions.[19] The cumulative effect of these errors was to deprive Bobby Lusk of meaningful legal assistance.

Counsel failed to challenge jury selection proceedings, in which prospective jurors who could not impose the death penalty were removed for cause, on any of the following available grounds: 1) Removal of such jurors deprived Mr. Lusk of his right to a jury representative of a cross-section of the community, in violation of the sixth and fourteenth

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[19]To the extent counsel's ineffectiveness resulted in the violation of defendant's fundamental rights, the substantive violations are asserted as independent grounds for relief cognizable in a 3.850 proceeding. Specifically, Lusk's claims challenging voir dire go to the heart of his fundamental right to a fair trial by an impartial jury and are therefore cognizable in a Rule 3.850 motion. Nova v. State, 439 So.2d 255 (3d DCA 1983); his other claims, implicating the right to present a defense, the right effectively to confront his accusers, and the right to have access to possibly exculpatory evidence, all involve fundamental rights properly raised in these collateral proceedings. See Dozier v. State, 361 So.2d 727 (4th DCA 1978); French v. State, 161 So.2d 879 (1st DCA 1964).

amendments to the United States Constitution; 2) Removal deprived petitioner of his right to a fair and impartial determination of guilt or innocence by creating a "guilt prone" jury, in violation of the sixth and fourteenth amendments to the United States Constitution (see Grigsby v. Mabry, 758 F.2d 226 (8th Cir.) (en banc), cert. granted sub nom Lockhart v. McCree, 106 S.Ct. 59 (No.84-1865, Oct. 7, 1985)); 3) Removal is not supported by Florida law respecting removal of jurors for cause; 4) Removal is not justified under the Florida capital punishment system, in which jurors only render an advisory verdict to the trial judge, and in which that advisory verdict is based on a majority vote.

Counsel further failed to object that the questioning of prospective jurors about their attitudes towards the death penalty, and the removal of those with reservations about its imposition, infects the jurors' minds with the belief, before any evidence has been presented, that the defendant is guilty and deserves a death sentence; hence, the very process of conducting such voir dire violates defendant's right to a fair trial and due process of law. See Grigsby, 758 F.2d at 234. He also failed to see that, even if the effects of such questioning were deemed to be the unavoidable by-product of a process necessary to secure juries willing to impose capital punishment in the proper case, such justification is unavailable in Florida, where the jury's recommended sentence

is only advisory and based on majority vote, and he did nothing to limit those effects when he failed to object to the group examination of prospective jurors.

Counsel also failed to object that removal for cause of prospective jurors based on their attitude about capital punishment cannot be justified in light of the availability to the prosecutor of peremptory challenges to be used as he sees fit; at least part of the prejudicial effect of such questioning would be removed if jurors were not excused for cause specifically because they could not vote to execute Mr. Lusk.

Moreover, counsel was ineffective in failing to adequately investigate the case or prepare for trial,[20] and this failure contributed to numerous additional instances of ineffectiveness during the guilt phase of the trial.

For example, cross-examination of the State's witnesses was rambling and unfocused, and defense witnesses were poorly prepared and inartfully examined. Counsel failed prior to trial to show Lusk his statement or to move for suppression of the statement, and failed to make appropriate arguments

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[20]Although the trial record amply demonstrates this lack of preparation, further development of this point was impaired at the evidentiary hearing when the judge refused to allow inquiry into the circumstances under which counsel resigned from the Public Defender's office.

when that issue was finally raised in the course of the trial. Then counsel failed to object when the judge improperly informed the jury that certain "prejudicial" portions of the statement had been redacted.

Counsel never sought sanctions when he learned that the State had destroyed Brady material, namely Lusk's mattress, which he maintained Hall had stabbed. Nor did counsel offer available evidence to rebut the prosecution's inaccurate and damaging assertion that there was no holding cell in the prison infirmary.[21]

Several serious misinstructions in the jury charge went by without objection. These included misleading definitions of murder and manslaughter, repeated references to inapplicable felony-murder predicates, the instruction on the initial aggressor rule and the court's deleting from its supplemental charge the instruction on character evidence relating to Hall. Moreover, counsel waived the defendant's important right to have the jury instructed on the sentencing ranges of the charged offense and lesser included offenses.

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[21]To establish this fact at the evidentiary hearing the defendant had subpoenaed Assistant Superintendent Richard Dugger of Florida State Prison. When Dugger failed to appear, the court refused to enforce the subpoena or grant an adjournment. (R.1147-51)

But for these unprofessional errors -- separately and cumulatively -- there is a reasonable probability that the defendant would not have been convicted of first degree murder. Thus he was denied his state and federal right to effective assistance of counsel.

POINT III

BOBBY LUSK WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING AND PENALTY PHASES OF TRIAL.

The fate of a capital defendant often rests in his lawyer's hands. If sufficient mitigating facts exist, and the lawyer presents them, his client will live. If those facts exist, but the lawyer fails to present them, his client will be condemned to die.

In Bobby Lusk's case, facts of the sort previously recognized as mitigating by both the United States Supreme Court and by this Court abounded. They were sufficient in number and import to easily have provided the jury a "rational basis" for its life recommendation. Had these facts been introduced, no override of the jury's recommendation would have been countenanced. Tedder v. State , 322 So.2d 908 (Fla. 1975); Richardson v. State, 437 So.2d 1091 (Fla.1983). These facts were not introduced, however, largely because appointed counsel did nothing to find them. Since counsel's failure to do his job resulted in the override of the jury's life recommendation, Bobby Lusk was ineffectively represented. Strickland v. Washington, 104 S.Ct. 2052. Accordingly, the death sentence should be vacated and a sentence of life imprisonment substituted therefor.

In determining whether Mr. Lusk was denied effective assistance of counsel, the two-pronged test of Strickland v. Washington, 104 S.Ct. 2052, is controlling. First, the defendant must show that counsel's performance was "deficient," that is, "fell below an objective level of reasonableness." Id. at 2064, 2065. Second, the defendant need not show that counsel's deficient conduct "more likely than not altered the outcome of the case," but rather "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2068.

Considering first whether counsel's performance was deficient, we suggest that, as a matter of law and reason, no lawyer can do justice to the sentencing and penalty phases of a capital trial with 90 minutes' preparation. To conclude otherwise denies the uniqueness of each human being and the rich complexity of experience which shapes his or her life and actions.

However much time Futch may claim he spent preparing for sentence, the record is devoid of evidence that Futch did any meaningful preparation for what was, in fact, the most important hearing of Bobby Lusk's life. Indeed, by Futch's own admission, he spoke to none of Lusk's family members or friends, obtained no records which might shed light on Lusk's

background, did not obtain the file from Lusk's previous case, did not submit a pre-sentence memorandum (in fact did not know he could submit a pre-sentence memorandum), and employed neither an investigator nor other professional to help prepare for sentence. He was unavailable to officials preparing the Pre-Sentence Investigation Report for Judge Fagan, and failed to go over the completed report with Lusk, thus failing to correct inaccuracies in that report. Indeed, he barely spoke to Lusk himself in preparation for the penalty phase, and did not speak to him at all between the penalty and sentencing phases.

The consequences of appointed counsel's lack of diligence are shockingly apparent from the paucity of evidence presented at the penalty and sentencing phases. Moreover, the picture there presented of Lusk and the events underlying the offense was in nearly all material respects inaccurate or incomplete. Futch "established" that Michael Hall was not a violent person, thereby undercutting Lusk's contention that he acted out of fear engendered by Hall's past acts and reputation for violence. Futch "established" that Florida State Prison was not a violent institution, thereby undercutting Lusk's contention that prison guards could not or would not protect him from Hall.

Virtually no meaningful testimony was elicited at the

penalty phase from Lusk, who was asked to give only basic pedigree information and to proffer, without elucidation, that he had run away from home and had been hospitalized three times for observation. No further mitigating evidence of any kind, save introduction of Michael Hall's unadorned prior murder conviction, was presented.

From this evidence, then, the jury, and, more importantly for these purposes, Judge Fagan, may have concluded:

1. Lusk had no mitigating facts in his personal background;

2. Michael Hall was not a violent person; and

3. Florida State Prison was not a violent place.

Had counsel done his job, this is what the jury and Judge Fagan could have found <u>from numerous independent sources</u>:

1. <u>Lusk's family background</u>[22]

a. Lusk was the product of an extra-marital

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[22]See generally R.24-32. In discussing Lusk's background, we have included, with the suffix "K.C.H.", references to the records of the Kentucky Children's Home. Judge Fagan's refusal to admit these records was plainly erroneous. They were properly authenticated (R.1094), and were "ancient documents" not subject to the hearsay rules. Fla.R.Evid. 90.803(6). Furthermore, hearsay documents are admissible at the penalty and sentencing phases. <u>See</u> Fla.Stat. 921.141(1).

affair between two neighbors. He was rejected by his natural mother and step-father at birth and sent to live with his maternal grandparents (R. 77 (K.C.H.), 857-8, 1012-14, 1016, 1086-88);

b. When Lusk returned to his natural mother's and step-father's home at approximately age four, he was constantly and severely beaten by his step-father, a heavy drinker, to whom Lusk was a constant reminder of his wife's infidelity (R. 25 (K.C.H.), 77 (K.C.H.), 1017, 1018, 1022, 1024, 1090);

c. Lusk became the pawn in constant feuding between his natural mother's family and his natural father's family. At school and elsewhere, he was frequently called "bastard," was variously known at "Bobby Lusk" or "Bobby Walker" and soon had little idea who he really was (R. 1019, 1023, 1087);

d. The confusion and violence of his home environment dramatically altered his personality and impeded his academic performance. Beginning as early as age seven or eight, he ran away from home several times to escape the intolerable surroundings (R. 69 (K.C.H.) 1023-1024, 1093);

e. At age nine he began sniffing glue as a

means to escape, a habit which soon became an addiction (R. 1025);

f. At age ten he was placed in the Kentucky Children's home, after a judge declared him a needy and dependent child (R.72 (K.C.H.), 1093-1094);

g. After making substantial progress in the conflict-free environment of the Kentucky Children's Home (R. 84-85(K.C.H.), 94), he was returned to the Lusk family, but the same problems developed;

h. In March 1968, he was voluntarily admitted to Western State Hospital suffering from the chronic effects of seven years of glue sniffing and the ingestion of 17 tranquilizers (R. 861-873).

2. Florida State Prison[23]

[23]Additional documentation for the following facts is found in the two official reports concerning prison conditions, marked at the hearing as Exhibits C and D for identification (R. 423-581, 582-602). Defendant argued that the reports were admissible to demonstrate the prevailing prison conditions, a necessary step in showing that evidence of these conditions should have been introduced at Lusk's trial. Judge Fagan erroneously refused to admit these reports (R. 1109), and also refused to admit contemporary news articles regarding prison violence, proffered as further evidence of the then-existing prison conditions. (R. 721-737)

a. Florida State Prison in 1978 was perhaps the most dangerous penitentiary in the country. Prisoners routinely carried weapons, and violent crimes, including rapes and murders, were commonplace. Guards were underpaid, and underexperienced; morale had hit rock-bottom and employee turnover was exceedingly high. Guards were unable or unwilling to protect inmates from each other, and inmates who sought official protection were placed in extreme jeopardy. (R.1109-11).

b. Notwithstanding these conditions, Lusk was a model prisoner. He worked steadily, received excellent evaluations and got along well with guards and prisoners, until Michael Hall entered his life. (R. 874-875).

3. Michael Hall

a. Michael Hall was transferred to Florida State Prison from U.C.I. because U.C.I. personnel considered him too dangerous for that institution (R. 852);

b. Hall had been sent to U.C.I. following his conviction for the second degree murder of a Sumpter Correctional inmate who had complained to guards of being harassed by Hall. Hall and his gang sexually assaulted, tortured and murdered their prey (R. 841);

c. Prison evaluators concluded that Hall was a violent psychopath (R. 843, 850, 1041, 1043-45). He was disciplined twice for carrying knives in prison (R. 847-49, 851).

All the foregoing evidence was admissible in mitigation of sentence.[24] Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). It was, moreover, easily obtained by counsel from a variety of sources, including:

a. Conversations with Mr. Lusk;

b. Conversations with family members and neighbors;

c. Conversations and correspondence with school officials;

d. Records from the Kentucky Children's Home;

e. Hospital records;

f. Michael Hall's inmate file;

g. Legal research.

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[24]The circuit judge's bare conclusion that the foregoing mitigating evidence is merely cumulative of evidence at trial (R.407) finds no support in the record. In fact, virtually none of this new evidence, save the fact of Michael Hall's previous conviction, was before the circuit judge or the jury at trial.

Yet besides brief conversations with Lusk himself, Mack Futch pursued none of these sources, nor any others for that matter. Unless a lawyer who, in essence, prepares not at all for the single most important proceeding of his client's life is competently discharging his duties, then Futch's representational paralysis constitutes ineffectiveness in its pristine form. Cf. State v. Myles, 389 So.2d 12, 27-31 (La. 1979) (on rehearing) (death sentence vacated upon finding of counsel's incompetence at sentencing); People v. Bell, 425 N.Y.S.2d 57 (N.Y. 1979) (finding of incompetence at sentencing supported by counsel's failure to make statement on defendant's behalf); United States v. Daniels, 558 F.2d 122 (2d Cir. 1977) (sentence vacated upon finding of counsel's de facto failure to represent defendant at sentencing); United States v. Hammond, 425 F.2d 597 (D.C. Cir. 1970) (conviction and sentence reversed upon finding that defendant had been rendered ineffective assistance of counsel, inter alia, in counsel's failure to argue on defendant's behalf at sentence).

In Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 104 S.Ct. 3575, panel opinion reinstated, 739 F.2d 531 (11th Cir. 1984), the circuit court granted habeas relief to a defendant who alleged ineffectiveness at the penalty stage upon facts remarkably similar to these. There, defense counsel was

unfamiliar with his obligations at the penalty stage and failed to determine whether mitigating evidence might exist. After telling the judge that his client was "a bad boy" and confessing that all he could say on his client's behalf was that he was a "human life," counsel appealed to the jury for mercy.

The jury in Douglas, like Lusk's jury, recommended life imprisonment, but the judge overrode the recommendation. In granting habeas corpus relief the Eleventh Circuit concluded that counsel's "strategy" evidenced ineffectivenes under even the most demanding standard and analogized counsel's confession that mercy was his only argument to:

> one where the state presents its evidence, the defense presents none, but, rather than maintaining silence or arguing to the jury about reasonable doubt, defense counsel states: "You may have noticed we did not present evidence for the defense. That was because I couldn't find any." (714 F.2d at 1557).

Mr. Lusk's counsel did nearly precisely that which was condemned in Douglas: he presented virtually no evidence to the jury or judge at the penalty or sentencing phases and conceded he would speak only of mercy, since he had nothing else to talk about. And, as in Douglas, the trial judge overrode the jury's verdict, finding a lack of mitigation. Such sham representation is objectively unreasonable, thereby

satisfying the first prong of Strickland.

Turning to the second prong of Strickland, the resulting prejudice is obvious and devastating. In Richardson v. State, 437 So.2d at 1095, this Court, citing abundant precedent, said "It is well-settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." Similarly, in Tedder v. State, 322 So.2d at 910, this Court disapproved overrides of life recommendations unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ."

The jury's recommendation of life would unquestionably have had a more readily discerned basis in the evidence had the available mitigating facts been elicited. In fact, when Mr. Lusk's sentence was affirmed by this Court, two of its seven members dissented,[25] urging that the evidence which was presented supported the life recommendation since the jurors might have reasonably believed that Mr. Lusk had been threatened by the victim and feared for his life. 446 So.2d at 1045. Thus, had the additional mitigating evidence been

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[25]We assert, as well, a state and federal due process violation in applying the Tedder "no reasonable person" standard to affirm a jury override where two presumably reasonable Supreme Court Judges find a reasonable basis for the life recommendation.

before the jury, the outcome would have been different, either because Judge Fagan might have accepted the jury's recommendation or because two additional judges of this Court might have found the recommendation to have been grounded in reason. Given the Court's reversal of numerous, comparable override cases the showing made herein easily satisfies the prejudice prong of Strickland. See, e.g., Thompson v. State, 456 So.2d 444 (Fla. 1984) ("mildly retarded" defendant whose mother and wife testified he was a good son, husband, and father who attempted to provide for the welfare of the family; appellant's father suffered from mental illness and died in an institution; differential treatment accorded coconspirator; two aggravating circumstances); Herzog v. State, 439 So.2d 1372, 1378-81 (Fla. 1983) (heated argument between defendant and victim preceding death; preexisting domestic relationship; disposition of co-defendants' cases; one aggravating circumstance); Cannady v. State, 427 So.2d 723 (Fla. 1983) (mental or emotional disturbance; lack of significant criminal history; age); Gilvin v. State, 418 So.2d 996 (Fla. 1982) (no mitigating circumstances noted; two aggravating circumstances. See Boyd, J., dissenting); Stokes v. State, 403 So.2d 377, 378 (Fla. 1981) (lack of significant criminal history; dominant group member received immunity; two aggravating circumstances); McKennon v. State, 403 So.2d 389, 391 (Fla. 1981) (defendant age eighteen; one aggravating

circumstance); Barfield v. State, 402 So.2d 377, 382 (Fla. 1981) (murder's mastermind had died; defendant was middleman; state granted one participant immunity; one codefendant received five years; one aggravating circumstance); Burch v. State, 343 So.2d 831, 834 (Fla. 1977) (defendant mentally disturbed; two aggravating circumstances); Chambers v. State, 339 So.2d 204 (Fla. 1976) (possible emotional disturbance self-induced by drugs; one aggravating circumstance. See England, J., concurring); Jones v. State, 332 So.2d 615 (Fla. 1976) (defendant paranoid schizophrenic; three aggravating circumstances); Swan v. State, 322 So.2d 485 (Fla. 1975) (defendant age nineteen; two aggravating circumstances); Tedder v. State, 322 So.2d 908 (Fla. 1975) (defendant age twenty; two aggravating circumstances). See also McCray v. State, 416 So.2d 804 (Fla. 1982); Neary v. State, 384 So. 2d 881 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

Indeed, in Barclay v. State, 470 So.2d 691 (Fla. 1985) this Court reversed a jury override where there were two aggravating circumstances, but the "jury apparently distinguished between Barclay and his main co-defendant, Jacob John Dougan, as evidenced by its recommendation of life imprisonment for Barclay (the follower) and death for Dougan

(the leader)" 470 So.2d at 695. Certainly if this distinction required that the life recommendation in Barclay be respected, then the Lusk jury's similar recommendation would have been respected had the previously withheld mitigating evidence been introduced at the penalty phase.

Considering the numerous mitigating factors which could have been developed, together with this Court's adherence to the Tedder-Richardson formula, counsel's representation was ineffective even under the antiquated "farce and mockery" or "but for" analysis. Since the Supreme Court in Strickland v. Washington unequivocally rejected these stringent tests in favor of a substantially more lenient one, Mr. Lusk's entitlement to relief from his death sentence is unquestionable.

POINT IV

THE TRIAL COURT'S MISINTERPRETATION OF FLORIDA LAW TO PRECLUDE CONSIDERATION OF "MERCY" RENDERS PETITIONER'S DEATH SENTENCE ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court explicitly held that "The law in this State does not permit this Court to extend mercy to this Defendant or others convicted of a capital felony." (S.16) The judge made it clear that, in his opinion, the jury had recommended a life sentence solely because it was persuaded by counsel's plea for mercy. The judge made it equally clear that, as he understood the law in the State of Florida, the capital sentencer is precluded from allowing considerations of mercy to enter into the sentencing decision. It is respectfully submitted that the court was wrong, and that post-conviction relief must be granted.

Whether or not the trial judge was right in his assessment of what persuaded the jury to recommend a life sentence, his determination that Florida law precluded considerations of mercy was erroneous. In order to satisfy the eighth amendment, and to avoid arbitrary and capricious imposition of the death penalty, the sentencer not only may, but must, consider factors that might call for mercy but would be "too intangible to write into a statute." Gregg v. Georgia, 428

U.S. 153, 222 (1976) (White, J., conc.).

As Justice Stevens has explained, a Florida trial judge must go through a three-step analysis before imposing a death sentence. Barclay v. Florida, 103 S.Ct. 3418, 3430 (1983) (Stevens, J., conc.). He must find at least one statutory aggravating circumstance; he must find that the statutory aggravating circumstances are not outweighed by statutory mitigating circumstances; and finally he must determine that death is the appropriate penalty for this particular offender. Id. Judge Fagan not only omitted this third step, but actually denied that he had the right and power to make such a determination about the propriety of the death sentence for the individual before him. Judge Fagan's error may have resulted from an initial interpretation of Florida's statute to require a death sentence if the first two steps are satisfied. See Cooper v. State, 226 So.2d 1133 (Fla. 1976); Barclay, 103 S.Ct. at 3430 n.3 (Stevens, J., conc.). It is now established, however, that even when the first two criteria are met, it may nonetheless be appropriate to impose a life sentence if either statutory aggravating circumstances are not sufficiently weighty to support a death sentence, see e.g. Lewis v. State, 398 So.2d 432 (Fla. 1981); Williams v. State, 386 So.2d 538 (Fla. 1980), or nonstatutory mitigating circumstances render a death sentence inappropriate. See e.g. Buckrem v. State, 355 So.2d 111 (Fla. 1978); Halliwell

v. State, 323 So.2d 557 (Fla. 1975). One of the nonstatutory circumstances that must enter into the third stage of Florida capital sentencing is the notion that the defendant is deserving of mercy.

The trial court's refusal to allow any concept of mercy to enter into its sentencing decision not only misconstrued Florida law, but also denied petitioner the individualized sentencing to which he is entitled under the Constitution. See Eddings v. Oklahoma, 455 U.S. at 112; Lockett v. Ohio, 438 U.S. at 604-5. The court's position in effect limited mitigating circumstances, if not to those listed explicitly in the statute, at least to those articulable in terms other than those which involve notions of "mercy." This Court has made clear that a capital defendant is entitled to introduction of nonstatutory mitigating evidence in accordance with Lockett and Eddings, and that a death sentence imposed by a judge who believed he could not consider non-statutory mitigating circumstances must be vacated. Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981); Songer v. State, 365 So.2d 696 (Fla. 1978). Introduction of evidence is meaningless, however, if the evidence can only be considered in sentencing according to articulable, prescribed standards. The ultimate decision of whether a defendant is to live or die involves consideration of "a myriad of factors to determine whether death is the appropriate punishment." See California

v. Ramos, 103 S.Ct. 3446, 3456 (1983).

In the context of aggravating circumstances, the Supreme Court has warned that strict adherence to statutory definitions would transform capital sentencing into a "rigid and mechanical parsing of statutory aggravating factors." Barclay v. Florida, 103 S.Ct. 3418, 3424 (1983). The Court thus has permitted consideration of such factors as the sentencing court's World War II experience. Id. The Court has also allowed a capital sentencer to consider the possibility of release despite imposition of a "life-without-parole" sentence. Ramos, 103 S.Ct. at 3457. It has upheld as well a death sentence imposed by a jury instructed on the unconstitutionally vague aggravating circumstance of a substantial history of previous assaultive behavior. Zant v. Stephens, 103 S.Ct. 2733, 2742 (1983). Such ill-defined, subjective and hypothetical factors can, the Court has held, properly call for a death sentence.

Similarly, intangible notions of mercy cannot be barred from consideration of whether a life sentence might be appropriate. A jury's speculative assessment of the likelihood of a governor's commutation of a life-without-parole sentence and the defendant's likely behavior should he be released is an appropriate consideration at a capital sentencing proceeding. California v. Ramos, 103 S.Ct. at

3457. Likewise, a sentencer or jury should not be precluded from sparing a life based on a real but perhaps intangible feeling that a particular crime and defendant, despite the presence of sufficient aggravating factors, did not call for the ultimate penalty. Since a judge's subjective experience and views play a legitimate role in deciding that a defendant, even one for whom the jury recommended life, should be put to death, Barclay, 103 S.Ct. at 3424, subjective notions of what qualifies as a basis for extending mercy should also be admitted into the sentencing decision. And since it is constitutionally acceptable for a sentencer, once the category of possible death cases has been legislatively narrowed by the presence of at least one statutory aggravating circumstance, to exercise totally unbridled discretion when making the individualized determination that a defendant should die, Zant v. Stephens, 103 S.Ct. at 2742, then inclusion of the notion of mercy in the determination about whether a defendant should live or die is also appropriate under the Constitution.

The trial court here gave no weight whatever to such intangible, and perhaps even unarticulable, factors that may have convinced the jury to recommend a life sentence for petitioner. The court's insistence on traditional, legally classifiable categories of mitigation violates both Florida law and the eighth amendment. See Heiney v. Florida, 105

S.Ct.303 (1984) (Marshall & Brennan, JJ., dissenting from denial of certiorari); Stebbing v. Maryland, 105 S.Ct. 276 (1984) (Marshall & Brennan, JJ., dissenting from denial of certiorari). The trial court in effect used the Florida jury override system to impose, de facto, mandatory death sentences on certain classes of capital defendants. The judge failed to afford petitioner the truly individualized consideration, to which he is constitutionally entitled, of whether he deserved to die. That individualized determination can, and indeed should, include a decision about whether the exercise of mercy would be appropriate.

In a similar context, denigrating the role of mercy to a jury has recently been held to violate the capital defendant's eighth amendment rights. A prosecutor suggested in his summation at the penalty phase that mercy would be an inappropriate consideration under Georgia law, describing mercy as "sickly sentimentality" and "false humanity." Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) (en banc). The court, in holding this argument highly improper and prejudicial, noted that "the suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life." Id. The court reversed Drake's death sentence despite the fact that the trial judge had instructed the jury

that it could consider facts in mitigation, defined as facts which in fairness and mercy may be considered in extenuation. Id. at 1460-61, n.14.

In petitioner's case, the sentencer was not merely given contradictory information about the proper role of mercy; here the trial judge consciously and explicitly determined that he was obligated to sentence petitioner to death because considerations of mercy could not form part of the sentencing decision. The death sentence imposed by a court under such misapprehension of the law cannot be permitted to stand.[26]

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[26]Petitioner's claim that his death sentence was imposed in an arbitrary and capricious fashion is properly before this Court in the present post-conviction proceedings. As this Court has held, the contention that Florida's capital punishment statute is unconstitutional as applied is cognizable in a 3.850 motion. Henry v. State, 377 So.2d 692 (Fla. 1979). The trial court's misinterpretation of Florida law to preclude imposition of a life sentence based on a finding that mercy would be appropriate renders petitioner's death sentence, imposed over a jury's recommendation of a life sentence, arbitrary and capricious. See Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985); Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir. 1985).

POINT V

PETITIONER'S MOTION TO DISQUALIFY THE TRIAL JUDGE SHOULD HAVE BEEN GRANTED, BOTH ON THE MERITS AND BECAUSE THE JUDGE ATTEMPTED TO REFUTE THE CHARGES OF PARTIALITY.

A. Judge Fagan Should Have Recused Himself From Petitioner's Post-Conviction Proceeding Because He Had Prejudged The Issue Of Mack Futch's Competence.

The main issue to be decided in petitioner's post-conviction motion was whether Mack Futch afforded Bobby Lusk effective assistance of counsel in the trial, penalty and sentencing phases of his capital murder trial. Concerning this critical question, Judge Fagan had played such a central role as to cast into serious doubt his ability to be impartial. Judge Fagan's previous conduct relating to Mr. Futch at the very least supported petitioner's claim that he was genuinely fearful that he would not receive a fair determination of his 3.850 motion, thereby requiring disqualification. See Livingston v. State, 441 So.2d 1083, 1087 (Fla. 1983); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (3d DCA 1977). Accordingly, petitioner's motion to disqualify the trial judge should have been granted.

Judge Fagan made several key decisions that contributed to petitioner's fear that he would not obtain an impartial

hearing of his ineffectiveness claim. First, Judge Fagan had ordered the initial appointment of Mack Futch, despite Futch's history of personal problems and resignation as Public Defender under questionable circumstances. Petitioner submits that Judge Fagan has a significant stake in justifying the propriety of his appointment. Since petitioner's claim of ineffective representation was based, in part, on a contention that Mack Futch's background rendered him per se incompetent, Judge Fagan's order assigning Futch itself constitutes an adverse ruling on that claim. Petitioner's fear that Judge Fagan was not likely to reverse himself by agreeing that Futch never should have been appointed to represent a capital defendant was indeed well-founded.

Second, at sentencing Judge Fagan made self-serving statements asserting that Futch's representation of petitioner was effective, statements going far beyond gratuitous remarks praising a trial lawyer. Judge Fagan stated that petitioner was "adequately represented" by "an extremely capable and experienced member of this Bar" (S. 8) who had obtained a life recommendation with his "ably presented and persuasive argument" (S. 10). Judge Fagan used his assessment of the quality of Futch's representation to bolster his decision to override the jury's recommendation of a life sentence.

Under these circumstances, Judge Fagan's expression of his views about counsel's competence constituted a specific finding that affected the outcome of the case, and therefore constituted a prejudgment of the post-conviction motion. Unlike the comments in Jones v. State, 446 So.2d 1059, 1061 (Fla. 1984), Judge Fagan's comments were not merely such general remarks about an attorney's handling of a case that this Court found "not that unusual" and not cause for disqualification. Id. Judge Fagan's particularized finding that Futch's closing argument persuaded the jury to recommend a life sentence, contrary to the requirements of Florida law, undermines Judge Fagan's impartiality on the question of whether petitioner was adequately represented at the penalty phase.

Third, in preparation for the hearing on petitioner's post-conviction motion, counsel requested an order allowing him to depose Mack Futch. Denial of this reasonable request[27] is indicative of Judge Fagan's assumption of a

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[27]The court's refusal to allow counsel to depose Mack Futch was particularly damaging in light of the fact that 1) Futch had returned to the State's Attorney's office shortly after petitioner's trial and death sentence, and following the sentencing to death of Futch's two other defendants in capital cases, 2) Futch spoke freely to the prosecution but refused to return defense counsel's calls (R.888) and 3) Futch had seen fit to destroy his file on petitioner's case (R.890-1).

Depositions are of course authorized in both civil and criminal cases in this State. See Fla. R. Civ. P. 1.310; Fla. R. Crim. P. 3.220. Nevertheless, Judge Fagan came to the erroneous conclusion that "this Court must rule that the

protective attitude towards Futch, an attitude further demonstrated during the hearing. The trial court precluded petitioner from questioning Futch about 1) his motivation for leaving the State Attorney's office to run for Public Defender (R. 897), 2) his conduct while Public Defender (R. 899), and 3) the extent of his problem with alcohol abuse. (R. 976-77).

Moreover, Judge Fagan's actions and rulings related to Mack Futch are entirely consistent with the views he has expressed publicly about ineffective assistance of counsel claims. Judge Fagan has berated attorneys for charging ineffective assistance "as a matter of course and routine in almost every case where a result is encountered unfavorable to an accused." Griffin v. State, 447 So.2d 875, 879 (Fla. 1984). Because of the perceived "chilling effect" of such claims on the willingness of counsel to accept appointment to capital cases, Judge Fagan asserted that he had the responsibility of adjudicating those claims from the perspective of ensuring that counsel would continue to be available for such appointments. Id. This self-proclaimed interest on the part of the trial court in maintaining a pool of lawyers

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discovery sought here cannot be allowed" in the absence of specific rules promulgated for 3.850 proceedings by the Florida Court. Order Granting Motion to Quash Subpoena for Deposition, at R.397. It is respectfully submitted that Judge Fagan had ample authority, some of which he cited, see McKenzie v. Wainwright, 632 F.2d 649 (5th Cir. 1980), to permit the deposition, and erred in failing to do so.

for capital cases, and the court's willingness to consider this need in assessing the merits of ineffectiveness claims, demonstrates such bias and partiality regarding ineffectiveness claims as to call for Judge Fagan's disqualification.

Judge Fagan's announced opinion about allegations of ineffective assistance injects into his evaluation of such claims irrelevant considerations that are highly prejudicial to petitioner. Judge Fagan's public statements are not merely expressions of views on a legal question; they constitute an admission that he will treat a particular legal question in a certain way because of concern about the impact of his decision on other problems. Review should be granted, according to Judge Fagan, only when there is a "substantial reason" for review, Griffin v. State, 447 So.2d at 879; each time a capital defendant ventures to assert his trial counsel's incompetence, other lawyers will become more hesitant to accept assignment. Judge Fagan's resulting aversion to ineffectiveness claims, and his stated concern about their effect on his ability to persuade attorneys to accept assignments, severely undermine his impartiality. His opinion in Griffin v. State is comparable to the hearing officer's opening statement to ticketed motorists informing them of what he considered to be frivolous defenses to traffic infractions in State v. Steele, 348 So.2d 398 (3d DCA 1977). Just as that judge's prejudgment of certain defenses

compromised his ability to be impartial, and interfered with the impression of impartiality upon anyone attending the court, id. at 401, so also Judge Fagan's statements berating capital defendants for raising "insubstantial" ineffectiveness claims called his neutrality into question.

Thus the basis for disqualification here is much more substantial than the basis relied upon in cases cited below by respondent such as State ex rel. Sagonias v. Bird, 67 So.2d 678 (Fla. 1953) (judge's statements at a meeting of state circuit judges that the state Supreme Court's recent search and seizure opinions would make enforcement of gambling laws difficult held not to warrant recusal in the absence of any showing that judge would not follow the law); Dade County v. Michigan Mutual Liability Co., 169 So.2d 483 (Fla. 1964) (recusal not required merely because judge, when serving as Attorney General, had rendered an opinion on one of the issues in litigation; judge had been Attorney General for fifteen years, during which time he rendered several thousand opinions) and Tafero v. State, 403 So.2d 355, 361 (Fla. 1981) (mere fact that judge was a highway patrol officer in distant past did not disqualify him from presiding at trial of defendant accused of killing state troopers).

In sum, petitioner had well-founded fears that his charge that Mack Futch rendered him ineffective assistance

would not be given a fair, impartial hearing by Judge Fagan. Accordingly, the disqualification motion should have been granted.

B. Judge Fagan's Order Deying Petitioner's Motion To Disqualify, Which Attempts To Refute The Charges Of Partiality, Itself Establishes Grounds For His Disqualification.

This Court has consistently held that disqualification must be granted when the judge to whom the motion is addressed responds by making factual findings and thus placing himself in an adversarial position. See Bundy v. Rudd, 366 So.2d 440, 442 (Fla. 1978); Dickenson v. Parks, 104 Fla. 577, 140 So.459 (1932); Department of Revenue v. Golder, 322 So.2d, 1,7 (Fla. 1975) (On Reconsideration). Like the response in Department of Revenue v. Golder, Judge Fagan's opinion was "couched in argumentative terms." Id. Judge Fagan went beyond an assessment of the legal sufficiency of petitioner's claims by addressing the merits and asserting his ability to be impartial. By attempting to refute the charges of prejudice, the judge exceeded his proper scope of inquiry and therefore should have been disqualified on that basis alone. Melbourne, Inc. v. Jackson, 473 So.2d 280 (5th DCA 1985).

Judge Fagan's order denying the disqualification motion

looks, at several points, beyond the legal adequacy of the motion. The judge asserted preliminarily:

> ...I now consider and determine whether actual prejudice has been demonstrated, and at the risk of being self-serving, I must and do conclude that there is no showing in any fashion whatsoever that the undersigned is prejudiced against defendant in any manner, on any issue, or involving any question, including those presented in his Motion for Post Conviction Relief.

Order Denying Motion to Disqualify Judge, at R.362. As to each of the bases named by petitioner, the judge then proceeds, in essence, to testify that he is indeed not prejudiced in the way petitioner fears that he is. Regarding petitioner's fear that Judge Fagan would not impartially assess an ineffectiveness claim against a lawyer whom he had praised as doing an outstanding job, Judge Fagan responded:

> At the conclusion of the trial where the evidence of guilt of first degree murder was overwhelming, and where, in the sentencing process involving aggravating circumstances which far outweighed mitigating circumstances, a jury was persuaded by defendant's counsel to recommend life instead of death, this Court expressed itself consistent with the results manifest from matters then known and observed by the Court. If there is reason to establish that such pronouncements by the Court were in error, as is sought to be established by the Motion for Post Conviction Relief, this Court stands ready to hear and consider them.

Id. at 4. Judge Fagan here insists that he can be impartial on an ineffectiveness claim despite his continued belief that the jury's life recommendation was the result of defense counsel's "persuasion." Regarding petitioner's fear based on Judge Fagan's statement in Griffin v. State, 447 So.2d 875, the judge insists that he has "no aversion to properly based motions of ineffective counsel, and, indeed, encourages such claims where there is a substantial basis to do so..." Id. And finally, regarding petitioner's claim that his sentence had been predetermined, Judge Fagan admitted preparing judgment and sentence before the sentencing hearing, but implied that he remained open to further argument in mitigation. Id. at 5-6.

In each of Judge Fagan's responses, he proceeded far beyond a decision as to the legal adequacy of petitioner's allegations of bias. Adoption of an adversarial position in trying to establish his impartiality has disqualified Judge Fagan from hearing petitioner's case. Gieseke v. Moriarty, 471 So.2d 80, 81 (4th DCA 1985).

CONCLUSION

For the reasons stated in Points I and II, Bobby Lusk's conviction should be reversed and a new trial ordered; for the reasons stated in Points III and IV, his sentence should

be reduced to life imprisonment or a new penalty hearing ordered; or, for the reasons stated in Point V, the cause should be remanded for a new post-conviction hearing before a different judge.

Respectfully submitted,

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