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.

----------X

No. 67,335

(On Appeal from the Eighth Judicial Circuit)

APPELLANT'S REPLY BRIEF ON APPEAL

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INTRODUCTION

This brief is respectfully submitted in reply to certain of the points in Appellee's answering brief. For the most part, Appellee's misstatements of the facts[1] and of the law are so glaringly evident that they need not be dwelled upon; others, however, warrant reply. Additionally, it is important to note the strangely selective nature of Appellee's brief and the significant concessions implicit in Appellee's apparent decision not to address the basic arguments raised on Mr. Lusk's behalf.

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.

In Point I of Lusk's opening brief, we urge trial counsel's ineffectiveness on the basis of his pursuit of an "all or

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[1] Appellee's factual errors begin on page one. Appellee contends that Lusk "described [trial counsel] as 'the best lawyer ever provided to him,' (R. 990) despite being convicted and sentenced to death." This statement was not made following sentence, but rather was made following the jury's recommendation of life and after trial counsel assured Lusk that the judge would not override the recommendation (R. 1130-33).

More to the point, a defendant's assessment of his attorney's performance is obviously irrelevant to the objective determination of effectiveness.

nothing" defense of self-defense, to the needless exclusion of one based on fear or "dominating passion," and his deficient development of even the chosen defense. Appellee answers, first, that exclusive reliance on self-defense was "reasonable" because that defense provides the jury "no way out," no "compromise," and is therefore a strategy "designed to win the case, not dump the client." (Appellee's Brief at 11)

By conceding that the chosen strategy left the jury "no way out" Appellee re-inforces a major point of our argument: that where a client is already serving three life sentences an attorney has nothing at all to lose, and everything to gain, by providing the jury an alternative to a conviction for a capital offense. What is styled a "no way out" or "no compromise" strategy was, therefore, inherently unreasonable.

Appellee further argues that the alternative theory was not supported by the evidence, since the fear or "dominating passion" defense (which Futch admitted he never even considered [R. 908-09]) requires that the "defendant must act in a moment of rage without time to cool off or reflect ..." (Appellee's brief at 13). This is simply a misstatement of the law. In fact, in Clay v. State, 424 So.2d 139 (Fla. 3d DCA 1982), the defense was found to have been established as a matter of law even though the

defendant admitted having procured a firearm for the specific purpose of shooting the victim. Here, the fact that four hours passed between the time Hall robbed Lusk and the time Lusk killed Hall, therefore, in no way weakens the defense, particularly since Lusk was trapped in a dangerous prison environment where future encounters with Hall were inevitable.

In attempting to refute Appellant's argument regarding counsel's failure to raise the defense of fear or dominating passion, Appellee seeks to distinguish Quintana v. State, 452 So.2d 8 (Fla. 1st DCA 1984), cited in Appellant's Brief at 48. (See Appellee's brief at 13). Appellant, however, did not cite Quintana in support of the dominating passion argument; rather, it was cited as evidence that trial counsel should have utilized evidence of Michael Hall's reputation and prior violent acts, in support of self-defense. Appellee's focus on an inapposite case to the exclusion of the cases actually relied upon by Appellant in the discussion of fear or dominating passion is revealing.

Appellee concedes that Lusk feared Hall (Appellee's Brief at 14) and the record unquestionably establishes that Lusk was totally animated by this fear when he stabbed him. To deny under these circumstances that the defense of dominating passion was available is simply to ignore the record and the law.

Appellee tries to excuse trial counsel's failure to introduce Hall's prior sexually related gang torture murder of another inmate by asserting it was cumulative and would have opened the door to introduction of Lusk's prior murder conviction. (Appellee's Brief at 16) The evidence of which it was cumulative, contends Appellee, are the mere, unadorned trial references to Hall's nickname "Yard Dog" and the fact that Hall had robbed Lusk the morning of the stabbing. The absurdity of equating a nickname or a jail cell robbery with Hall's mutilation and murder of an inmate who had complained to guards of being harassed by Hall is self-evident.

Furthermore, introduction of Hall's prior conviction would not have "opened the door" to using Lusk's prior conviction, the admissibility or inadmissibility of which was governed by principles entirely independent of whether Hall's prior conviction was introduced. Appellee provides no support whatever for its contrary proposition. Moreover, Appellee mischaracterizes the record in arguing that trial counsel made a tactical decision not to "pit the character of an 'old woman' killer against a 'convict' killer." (Appellee's brief at 16) Trial counsel initially testified at the hearing that he <u>did</u> think Hall's prior was critical to proving self-defense and that he <u>had</u> used it at trial (R.1193). When he later did an about-face, he asserted that he had not used the prior conviction at the

guilt phase because it was too remote in time, an argument which Appellee has, for obvious reasons, abandoned on appeal.

Appellee labors hard to discredit expert William Sheppard, by asserting, without record reference, his "reknowned opposition to capital punishment," (Appellee's Brief at 12) by questioning his expertise, which had been conceded at the post-conviction hearing, by questioning his veracity and by misstating, or taking out of context, his testimony. The record, however, demonstrates that Mr. Sheppard's expert opinion that counsel was ineffective in failing even to consider the defense of fear or "dominating passion," and in failing to introduce the "smoking gun" of Hall's prior murder coviction in support of the sole defense of self-defense, was cogent and well supported.

Appellee sharply criticizes Appellant for proffering the Florida Department of Criminal Law Enforcement report regarding trial counsel's asserted alcoholism, larceny of state funds and absenteeism while at the Public Defender's Office (Appellee's brief at 2), asserting the report was irrelevant and that Lusk failed to show how trial counsel's drinking problem in 1975 influenced his behavior at trial in 1979. It is curious that, when an attorney charged with ineffectiveness has a glowing background, that background is deemed relevant, see, e.g., Griffin v. State, 447 So.2d 875 (Fla. 1984), yet when the

attorney has a history of debilitating personal problems and possibly criminal conduct, that background is not relevant. Indeed, Appellee emphasizes to this Court trial counsel's prior trial experience (Appellee's Brief at 4), no doubt to urge that counsel's numerous questionable decisions were reasoned tactical choices, yet does not want this Court to be aware of other, unsavory and unprofessional experiences which bely this position.

Second, present counsel's task of demonstrating the relevance of trial counsel's previous problems was made impossibly difficult by the Court Court's numerous admonishments to counsel not to delve beneath the surface of counsel's behavior prior to 1979. Counsel thus requested that the FDCLE report be marked for identification inter alia to make a record regarding what information would have been elicited had the court not insulated trial counsel from questions regarding his background. The erroneous rulings on evidentiary questions also form part of this appeal (see Appellant's Brief at 19, 41, 60 n.3, 79), Appellee's prostestations to the contrary notwithstanding (Appellee's Brief at 7, 20).

Finally, Appellee's assertion that "no errors of law have been alleged" in Point I (Appellee's brief at 9) is fatuous. Even if the Circuit Judge's rejection, without any meaningful explanation, of Jesse Wolbert's and William Sheppard's

testimony were considered "factual findings" worthy of a presumption of correctness, Appellant's argument remains, at its core, a legal one, and its merit before this Court remains unchanged. That issue is whether counsel was ineffective in relying exclusively on self-defense and in presenting that defense without utilizing highly favorable evidence the existence of which is not in dispute. This issue may and should be resolved in Appellant's favor even if the testimony of Messrs. Wolbert and Sheppard are entirely disregarded, since counsel's ineffectiveness is strikingly apparent on the face of the record.

POINT II

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

Appellee's assertion that counsel could not be deemed incompetent for failing to anticipate the jury selection claim now pending before the United States Supreme Court in Lockhart v. McCree ignores the long history of that claim in capital cases throughout the country. The Supreme Court virtually invited further studies on the conviction-proneness of death-qualified jurors in Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968), and several such studies had been conducted by the time of Lusk's

trial. See studies cited in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), aff'd, 758 F.2d 226 (8th Cir. 1985)(en banc); Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301 (1980); Keeton v. Garrison, 578 F.Supp. 1164 (W.D.N.C.), rev'd, 742 F.2d 129 (4th Cir. 1984), petition for cert. pending, No. 84-5187. Indeed, the Lockhart case itself was under way, with the jury selection argument raised and documented, in 1979, when Mr. Futch was preparing to try the Lusk case. Thus Mr. Futch certainly did not "lack[] the tools to construct [his] constitutional claim." Engle v. Isaac, 456 U.S. 107, 133 (1982).

Point III

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

Appellee asserts that the issue of trial counsel's ineffectiveness at the sentencing and penalty phases is moot because Judge Fagan "held that Sheppard's [sic] cumulative evidence, now revealed, would not have changed his sentencing decision." (Appellee's brief at 23-24) Additionally, Appellee contends that, in any event, the evidence was "cumulative" and that counsel's failure to use it was

"tactical."

The issue is hardly mooted by Judge Fagan's ruling, since -- assuming arguendo that his post hoc confirmation of his original sentencing decision is entitled to weight -- the question before this Court is whether there is a probability that admission of the excluded evidence would have changed the outcome. The outcome would have been changed had this Court determined that the additional evidence would have provided a rational basis for the jury's recommendation. This determination is properly made independently of the Circuit Judge's decision, since the Circuit Judge can hardly speak for this Court's intentions.

Appellee's contention that trial counsel omitted for tactical reasons the abundant mitigating evidence the Appellant has put in the record falls under the weight of trial counsel's admission at the post-conviction hearing that he was not aware of this additional evidence. To argue that evidence of Lusk's extremely troubled and scandal-ridden childhood, the beatings he suffered, his running away at an early age, his addiction to glue sniffing, and his excellent record at F.S.P prior to being tormented by Hall would have invited prejudicial rebuttal is speculative and unsupported by the record, and exposes the bankruptcy of Appellee's argument. Furthermore, to assert that the additional evidence was merely cumulative simply belies the

record. If Appellee believed otherwise, we expect it would have supported its conclusory statements with an appropriate discussion of the evidence trial counsel omitted.

The hearing testimony leaves little doubt that the compelling mitigating evidence now in the record was excluded at trial for one reason and for one reason only: trial counsel did virtually nothing to prepare for the sentencing or penalty phases and was therefore unaware of this evidence. This is evident from trial counsel's time sheets, from the paucity of evidence presented at trial and from the fact that trial counsel, obviously unprepared, elicited harmful testimony from the only witness he called besides Lusk. Under these circumstances, Appellee's present attempt to explain or excuse trial counsel's failure to protect his client's life is regrettable.

POINT IV

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

Appellee's contention that this argument was not made to Judge Fagan is incorrect. See R. 9, 35, 337.

On the merits, we respectfully direct the Court's

attention to the additional authority provided by People v. Brown, 38 Crim.L.Reptr. 2259 (Cal. 12/5/85), wherein the California Supreme Court reiterated its previously stated view that an anti-sympathy instruction at the penalty phase of a capital trial violates the Eighth Amendment's requirement of individualized sentencing. The Circuit Judge's belief in Lusk's case that he could not consider the element of mercy in deciding whether the jury's recommendation should be overridden is analogous to the prohibition disapproved in Brown.

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.

Appellee argues that Judge Fagan's refusal to disqualify himself has not been appealed and that, in any event, the disqualification motion was deficient and untimely. (Appellee's Brief at 25).

We are at a loss to understand Appellee's contention that Judge Fagan's denial of the disqualification motion has not been appealed, since the denial was a ruling necessary to the ultimate denial of Lusk's motion under Rule 3.850, from which this appeal is properly taken.

Appellee argues, without explanation, that "waiver is supported by the belated filing of the petition." (Appellee's Brief at 27.) The petition, however, was timely filed, a matter which was fully discussed in the papers Appellant previously filed in this Court in support of a Writ of Prohibition. In his Order of January 29, 1985, Judge Fagan directed undersigned counsel to file and serve motions not later than February 15, 1985 (R.280). As Judge Fagan noted in his Order of February 19, 1985, "On February 15, 1985, the Court received as had previously been ordered by the Court and as was requested by counsel for defendant a Memorandum of Law in support of Motion for Post Conviction Relief, and a Motion to Disqualify Judge because of the proceedings already in progress involving the presentation of defendant's previously filed Motion for Post Conviction Relief." (See A.15 of Appendix to Application for Writ of Prohibition). Thus the record demonstrates beyond question that the disqualification motion was timely filed, and Appellee proffers not a shred of evidence to suggest otherwise.

Regarding the merits of the disqualification motion, Appellee asserts that the Circuit Judge's comments in other cases and his prior "adverse rulings" do not establish the facial sufficiency of the motion. (Appellee's Brief at 27) However, Appellee ignores Appellant's additional arguments in support of disqualfication, including his Honor's attempt, in his Order

denying disqualification, to refute the charges of partiality, a tack which automatically requires disqualification under this Court's previous cases. Appellee ignores this aspect of appellant's argument because, we submit, it recognizes that plain error was committed.

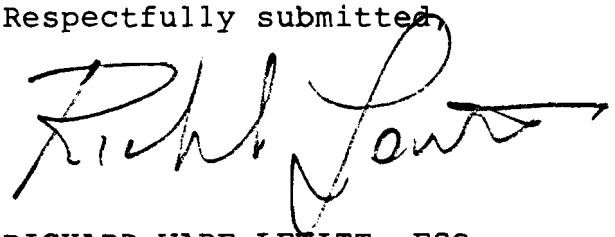
The fact remains that, however sincere the trial judge's confidence in his ability to be impartial, at the least the appearance of justice was unacceptably compromised when his Honor maintained control of the case despite Lusk's good faith belief that his post-conviction motion would not be objectively considered by a neutral jurist.

Conclusion

For all the foregoing reasons, the judgment of conviction should be reversed, or the sentence reduced to life imprisonment.

Dated: New York, New York
February 3, 1986

Respectfully submitted,



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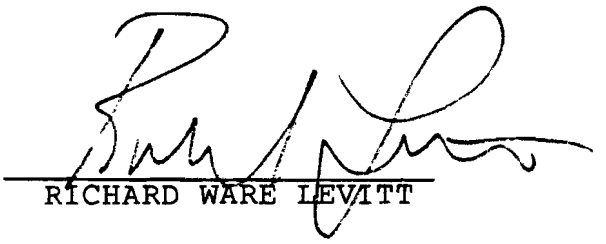
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was mailed to the Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, this 3d day of February, 1986.



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