ORIGINAL

IN THE SUPREME COURT OF FLORIDA

No. 71,755

JACOB JOHN DOUGAN,

Appellant,

- v -

STATE OF FLORIDA,

Appellee.

On Appeal from the
Circuit Court for the Fourth Judicial Circuit
In and For Duval County

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE STATE ATTORNEY DENIED MR. DOUGAN EQUAL PROTECTION BY PEREMPTORILY EXCUSING PROSPECTIVE BLACK JURORS ON ACCOUNT OF THEIR RACE

The State cannot defend as racially neutral the prosecutor's reasons for peremptorily striking three black prospective jurors, Mr. Covan, Ms. Lester, and Ms. Sloan. The State is unable to argue that the supposedly nonracial reasons given by the prosecutor were in fact nonracial. Confronted with facts that establish a violation of the rights articulated in Batson v. Kentucky, 476 U.S. 79 (1986) and State v. Slappy, 522 So.2d 18 (Fla. 1988), the State could concede error or seek to divert the Court into a net-full of red herrings. It has chosen the latter course. Mr. Dougan urges the Court not to be diverted by the State's four red herring arguments.

The State first argues that the prosecutor's only asserted reason for excusing Mr. Covan, which was also one of the asserted reasons for excusing Ms. Lester and Ms. Sloan -- all three jurors' equivocation about their ability to recommend the death penalty -- was nonracial, because "Ms. Gilbert, the prospective juror who was not challenged for her similar equivocation," Appellee's Answer Brief, at 5, was also black. The State offers no further insight into how this fact shows that the "equivocation" reason was a legitimate, nonracial reason for excusing the three jurors. That it was applied to some black jurors but not to another to whom it was equally applicable does

not establish the "equivocation" reason as a legitimate, nonracial basis for excusing Mr. Covan, Ms. Lester, and Ms. Sloan.

In Slappy this Court agreed with the district court of appeal that "a challenge based on reasons equally applicable to juror[s] who were not challenged," will "tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext." 522 So.2d at 22. Significantly, the Court did not include in this reasoning "a challenge based on reasons equally applicable to juror[s] of the other race who were not challenged." Instead, the Court recognized that a reason given for the exclusion of a juror is pretextual or not genuinely supported by the record -- in short, is not a real reason for exclusion -- if it is not consistently applied to all jurors, irrespective of race or other characteristics, who share the assertedly objectionable quality.

Thus, it is wholly immaterial that Ms. Gilbert was black. The State has conceded that Ms. Gilbert's equivocation about her ability to recommend a death sentence was "similar" to the equivocation of Mr. Covan, Ms. Lester, and Ms. Sloan. Moreover, it has proffered nothing to explain why, if three excluded jurors were unacceptable for this reason, Ms. Gilbert was acceptable despite this reason. Because the reason given for the exclusion of Mr. Covan, Ms. Lester, and Ms. Sloan was equally applicable to Ms. Gilbert, therefore, Slappy teaches that the reason is pretextual. It cannot legitimately explain the exclusion of

these three black jurors. Accordingly, the prosecutor's decision to accept Ms. Gilbert, though she was black, cannot demonstrate in this context, any better than in any other context, that the exclusion of Mr. Covan, Ms. Lester, and Ms. Sloan was nonracial. Tillman v. State, 522 So.2d 14, 17 (Fla. 1988) ("it is of no consequence that the state accepted one black juror to serve on the panel ...[;] [i]f one juror has been improperly excused because of race, it does not matter that one juror was not so excluded").

The State next argues that Ms. Lester was legitimately excluded because, in addition to her equivocation on the death penalty, she indicated she would give considerable weight to the testimony of mental health experts. Appellee's Answer Brief, at 6. If the prosecutor had proffered this as a reason for striking Ms. Lester, it might have been properly accepted as a nonracial reason for the strike. See Appellant's Initial Brief, at 39 n. 13 (acknowledging that the excusal of prospective juror Daphne Henley may have been legitimate for a similar reason). However, the prosecutor did not proffer this as a reason for striking Ms. Lester.

This is determinative, for Batson requires that the prosecutor rebut the inference that he or she has discriminatorily excused a black juror. "This rebuttal must consist of a 'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for the state's use of its peremptory challenges." State v. Slappy, 522 So.2d at 22

(quoting Batson, 476 U.S. at 96-98 & n.20). Since the prosecutor is obliged to proffer whatever nonracial reasons he may have for excluding a black juror, it is those reasons and those reasons alone that bear upon the prosecutor's intent to discriminate or to excuse jurors for nonracial reasons. "It is the prosecution's responsibility to bring these circumstances to the trial court's attention. It is neither the function nor the duty of the trial courts, or the appellate courts on review, to speculate as to prosecutorial motivation for other peremptory challenges." People v. Trevino, 39 Cal. 3d 667, 692 n.26, 217 Cal. Rptr. 652, 666 n.26, 704 P.2d 719 (1985).

The State next argues that if the additional reasons proffered by the prosecutor for the striking of Ms. Lester and Ms. Sloan, beyond their equivocation on the death penalty, were inadequately developed in the record to determine their legitimacy, the defense bears responsibility for this inadequacy and cannot now complain that these reasons were inadequately explored or developed.[1] This argument turns Batson and Slappy upside down, for it is indisputably the state's burden to show that the reasons it proffers for striking a black juror are nonracial. As this Court explained, this means that "the state

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[1]In addition to equivocation on the death penalty, the prosecutor excused Ms. Lester because "[her] husband ... has been in trouble before," T. 472-73, and Ms. Sloan because she once testified in her brother's trial and she once worked for HRS, T. 600-601. As Mr. Dougan demonstrated in his initial brief, the record did not establish -- due to unexplored questions -- that these were legitimate nonracial reasons for striking these jurors. See Appellant's Initial Brief, at 32-38.

must be prepared to support its explanations with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself." State v. Slappy, 522 So.2d at 23. Any inadequacy in the record in support of the state's reasons is, therefore, the state's problem, not the defendant's. This is precisely why the state failed to establish in Slappy that its reasons for excluding black jurors were nonracial, see Slappy, 522 So.2d at 24 ("[b]y failing to ask any questions, the state failed to demonstrate that the alleged 'liberalism' of these two jurors actually existed"), and it is why the state has failed to establish here that its additional reasons for excluding Ms. Lester and Ms. Sloan were nonracial.

The final red herring offered by the State is the accusation that the defense excluded white jurors for racial reasons. The accusation is unfounded; the defense was neither required to justify, nor did it fail to justify, its exclusion of some white jurors on nonracial grounds. However, even if the accusation were true, it would be wholly immaterial. It could not excuse the State's racially-based exclusion of black jurors, for which, as demonstrated in our opening brief and confirmed in this brief, there was no legitimate excuse. It is the State's discrimination against black jurors that requires a new trial for Mr. Dougan.

II. IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, THE PROSECUTOR IMPERMISSIBLY APPEALED TO RACE BIAS IN URGING THE JURY TO SENTENCE MR. DOUGAN TO DEATH

Similar to its last argument on the Batson issue, the State seeks to excuse the prosecution's appeal to race bias throughout the remainder of Mr. Dougan's trial by arguing that Mr. Dougan's crime was racially-motivated. The State finds it "ironic that Mr. Dougan can organize a racially motivated crime and then complain to this Court that race was a factor in the imposition of his death sentence." Appellee's Answer Brief, at 8. What the State finds ironic is nothing more than the failure of the prosecutor to abide by the clear mandate of the Eighth and Fourteenth Amendments.

The State confuses Mr. Dougan's constitutional entitlement to be tried in a proceeding as free from racial bias as humanly practicable with a demand, never advanced by Mr. Dougan but only concocted by the State, that the racially-motivated aspects of the crime itself be kept out of the proceeding. Mr. Dougan acknowledges that his crime was in part racially-motivated, and he further acknowledges that evidence of its racial motivation was relevant and admissible in the State's case as well as in his defense. He does not now nor has he ever argued to the contrary.

It is for this very reason, however, that Mr. Dougan has rightfully been concerned that racial bias could play a role in the jury's and judge's ultimate decisions in his case. A racially-motivated crime carries great potential for evoking a racially-biased response from jury and judge. As the Supreme Court observed, not in relation to racially-motivated crimes but simply in relation to interracial crimes which present no

evidence of racial motivation, such crimes carry a very high potential for evoking the capital sentencer's racial prejudices and interjecting these prejudices into the sentencing process: "Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty." Turner v. Murray, 476 U.S. 28, 35 (1986). The risk of such a constitutionally impermissible intrusion is many times greater in cases involving an interracial crime which is also racially motivated.

Against this background, the gravamen of Mr. Dougan's complaint, which is wholly unaddressed by the State, is that the prosecutor affirmatively sought to evoke and sanction reliance upon racial bias, through the use of inflammatory evidence and through the presentation of argument which invited resort to racial fears and racial stereotypes. Had the prosecutor not done this, racial bias still might have played a role in Mr. Dougan's trial due to the very facts of the crime. If so, he would have had no basis for complaint. However, the prosecutor's active evocation of racial bias in a case like his, where the risk of racial bias interjecting itself is already great, presents an entirely different issue, one about which the Constitution is gravely concerned and for which there must be a remedy.

III. THE TRIAL COURT LIMITED THE JURY'S CONSIDERATION OF MITIGATING FACTORS AND FAILED TO INSTRUCT THE JURY CLEARLY THAT UPON A FINDING OF ANY MITIGATING CIRCUMSTANCES THEY COULD RECOMMEND LIFE IMPRISONMENT

A. The Instructions Created The Substantial Possibility That The Jury Could Not Give Effect To Its Consideration Of Mitigating Circumstances

With one exception, Mr. Dougan's argument in his initial brief is fully responsive to all of the State's arguments in relation to this issue. The exception concerns the State's misrepresentation of the record.

This issue focuses on the trial court's instructions concerning the jury's use of the verdict form and the language contained in the verdict form itself. As initially instructed, the jury was explicitly told that it could recommend a life sentence only if it found that aggravating circumstances were outweighed by mitigating circumstances. Mr. Dougan opposed this instruction through proposed alternative instructions, which were denied. R. 660, 662, 670, 672, 673, 679-80; T. 1635-36, 1640-42. When a juror asked explicitly whether a life sentence could be recommended even if the jury found that aggravating circumstances were not outweighed by mitigating circumstances, T. 1778, the instructions were ultimately revised. T. 1816-18. The revision, however, was insufficient, for a reasonable juror still could have believed that life could be recommended only if aggravating circumstances were outweighed by mitigating circumstances. See Appellant's Initial Brief, at 60-62. We have argued that such an instruction violates the Eighth Amendment. Id. at 52-62.

The State argues that defense counsel "agreed with the reinstruction given," Appellee's Answer Brief, at 10, and by implication, that any error has thus been waived. However, the

State has misrepresented the record. Throughout the colloquy leading to the reinstruction, defense counsel objected to any language that suggested to the jury that it could recommend life only if aggravating circumstances were outweighed by mitigating circumstances. See T. 1799-1800, 1803. Consistent with his position, defense counsel repeatedly offered an alternative verdict form. T. 1805-06, 1810, 1814. See R. 679-80. When the court ultimately rejected this request and decided to reinstruct the jury in a manner that still could be interpreted as limiting the jury's ability to recommend life based on its view of the mitigating evidence and the propriety of a life sentence, defense counsel objected, and objected specifically to the reinstruction that was given: "Based upon our prior motion and request, of course, we would have to object to the procedure." T. 1816. There is no waiver by defense counsel.

B. The Definition Of "Mitigating Circumstances" Was Not Sufficient To Inform The Jury Of Its Duty To Consider Mitigating Evidence Which Was Irrelevant To And Did Not Mitigate The Gravity Of The Crime

The State's answer to this argument is that the jury was adequately instructed and that the jury believed the crime was so offensive that even "Mother Theresa would get the death penalty" for it. Appellee's Answer Brief, at 10. This response merely begs the question, for if the jury believed that it could not consider positive character traits and contributions to the community as mitigating circumstances, then one cannot assume, as the State does, that no matter how weighty these mitigating

circumstances, death would have been the recommended sentence. The State's response thus provides even more incentive for the Court to examine the adequacy of the definition of mitigating circumstances. The inadequacy of that definition is, however, in no way addressed by the State. Accordingly, we rely upon our initial brief for the analysis of this question.

C. The Trial Court Precluded Presentation Of The Mitigating Circumstance "No Significant History Of Prior Criminal Activity" by Ruling In Advance Of Trial That The State Would Be Able To Rebut That Circumstance With Evidence Of An Unadjudicated Offense

The State argues in response to this claim that Mr. Dougan is seeking "a license to commit a fraud upon the jury" by gaining the ability to present evidence of no significant history of criminal activity, while precluding the State from rebutting that evidence with evidence of an unadjudicated, now dismissed murder charge. The gravamen of the State's argument, and its characterization of Mr. Dougan's position as a license to commit fraud, is based upon its view that Mr. Dougan is guilty of the unadjudicated offense. See Appellee's Answer Brief, at 11 ("[t]he fact that Dougan committed another murder..."). This, however, is the nub of the problem.

As we have argued in our initial brief, evidence of an unadjudicated prior offense interjects unreliable evidence into a capital sentencing proceeding. Because such an offense has never been subjected to a beyond-a-reasonable-doubt determination before an impartial fact finder, its introduction and

consideration as part of a capital defendant's prior criminal history -- which, as this Court has perceptively noted, is always how it will be considered -- is particularly unfair. To preclude the jury from considering it along with the defendant's previously adjudicated offenses, therefore, is not to perpetrate a fraud upon the jury. It is simply to recognize reality -- that a prior criminal history is a weighty factor in favor of the death penalty[2] -- and to decide that the need for reliability in capital sentencing is significant enough to limit the consideration of prior history to those crimes which have previously been adjudicated in keeping with Constitutional safeguards.

While Mr. Dougan has argued this issue fully in his initial brief, it may well be that the Court has already decided this issue in his favor. In reversing his previous death sentence due to the admission of evidence of this same unadjudicated offense as an aggravating circumstance in his first trial, Dougan v. State, 470 So.2d 697, 701 (Fla. 1985), the Court remanded for a new sentencing trial, citing Elledge v. State, 346 So.2d 998 (Fla. 1977). Elledge mandated a new trial "at which the factor of the [unadjudicated] murder shall not be considered." 346 So.2d

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[2]See Note, A Study of the California Death Penalty Jury in First-Degree-Murder Cases, 21 Stanford L. Review 1297, 1326 (1969) ("[t]he aspect of the cases with the greatest impact on the death penalty was the presence or absence of a prior criminal record[;] [d]efendants with such a record were considerably more likely to receive the death penalty on the basis of that attribute alone").

at 1003. This citation is particularly significant in light of the State's argument in Dougan that the evidence

> was perfectly proper in order to negate the existence of the mitigating circumstance of no significant history of prior criminal activity. Unless a mitigating circumstance is negated, then there would be a presumption that appellant had not engaged in any previous criminal activity. [Citation omitted.]

R. 584, 592 (excerpting the State's brief in Dougan v. State, No. 65,217).

In previously remanding Mr. Dougan's case for a resentencing at which the unadjudicated murder could not be considered, the Court may thus have decided -- in light of the State's argument therein -- that the unadjudicated murder could not be considered even as rebuttal to the "no significant criminal history" mitigating circumstance. If so, Mr. Dougan is entitled to another new sentencing trial. If the Court's decision did not reach this far, its present decision should, for the reasons set out here and in Mr. Dougan's initial brief.

IV. THE INSTRUCTIONS ON THE AGGRAVATING CIRCUMSTANCES FAILED ADEQUATELY TO INFORM THE JURY WHAT IT MUST FIND TO IMPOSE THE DEATH PENALTY, THUS FAILING TO GUIDE THE JURY'S DISCRETION AS REQUIRED BY THE EIGHTH AMENDMENT

A. Especially Wicked, Evil, Atrocious or Cruel

With one exception, Mr. Dougan relies entirely upon the argument as to this issue in his initial brief. The exception involves the State's misrepresentation of the record.

The State argues that "defense counsel invited the instructions given [concerning this aggravating circumstance] and Dougan should not be heard to complain on appeal." Appellee's Answer Brief, at 12-13. In fact, the opposite is true. Defense counsel sought in vain during the charge conference to have limiting instructions given for this circumstance. See R. 663; T. 1615-16, 1636-38. When the court finally did instruct the jury as to the meaning of the terms in this circumstance, defense counsel argued for further definition, which would have further limited the application of this circumstance in accord with Maynard v. Cartwright, __U.S.__, 100 L.Ed.2d 372 (1988). See T. 1763, 1765. When the court rejected defense counsel's proposal, counsel agreed with the court's intended instruction, but only after "reserving my objection, my previous objection which is that the Court supply the additional [limiting] sentence as requested." T. 1766. Accordingly, the State flatly misrepresents the record when it asserts that "defense counsel invited the instructions given...."

B. Cold, Calculated, and Premeditated, Without Any Pretense of Moral Justification

Mr. Dougan has argued that his crime was committed with a pretense of moral justification: he committed the crime in order to free black people from racist oppression, and he hoped that the crime would spark a revolution that would lead to genuine freedom for black people. The evidence was uncontradicted that he believed this and that the crime was committed for no other

reason. The only response of the State is that if Mr. Dougan believed this, he should have picked out "an avowed segregationist" or a member of "white power group." Appellee's Answer Brief, at 13. Manifestly, the wisdom of a capital defendant's motivation or its effectuation cannot undermine the moral pretense if it is there. As this Court has explained, the basis for the belief in the morality of one's actions need only be slight. Banda v. State, __So.2d__, 13 F.L.W. 451, 452 & n.2 (Fla. 1988). If there is even a slight basis, however, and if the evidence is uncontradicted that the defendant believed his actions were morally justified, the "cold, calculated" circumstance cannot be found. Id.

Mr. Dougan was entitled to instructions which guided the jury's consideration of this circumstance in accord with these principles. As we have demonstrated in our initial brief, the trial court's failure to provide them violated the Eighth Amendment's mandate that the capital sentencer's discretion be limited and guided.

C. Murder in the Course of Kidnapping

Mr. Dougan relies entirely on his initial brief with respect to this issue.

V. IN SENTENCING MR. DOUGAN TO DEATH, JUDGE OLLIFF FAILED TO CONSIDER IN MITIGATION THE MITIGATING CIRCUMSTANCES THAT WERE ESTABLISHED BY THE EVIDENCE, AND CONSIDERED IN AGGRAVATION AGGRAVATING CIRCUMSTANCES THAT WERE NOT ESTABLISHED BY THE EVIDENCE

A. The Judge's Failure to Consider in Mitigation the Mitigating Circumstances Established by the Evidence

The State characterizes Mr. Dougan's argument as attacking "the province of the trial judge to decide whether a particular mitigating circumstance has been proven and the weight to be given that factor." Appellees' Answer Brief, at 16. The State's characterization is only partially accurate and is inaccurate in its implication that deference must be given here to Judge Olliff's determination that no mitigating circumstances had been established.

Mr. Dougan challenges Judge Olliff's failure to find the existence of mitigating circumstances, nothing more. Had Judge Olliff found these circumstances to exist but then determined that they were outweighed by properly found aggravating circumstances, Mr. Dougan's only complaint could be that the decision to impose death was a decision to impose a disproportionate punishment. However, this is not what Judge Olliff did.

While it is the trial judge's duty to find the existence or not of mitigating circumstances, and appropriate deference must be given to those fact findings, as to any other fact findings, the findings as to the existence of mitigating circumstances are not beyond review. Where, as here, there is no contradictory evidence as to the existence of the mitigating circumstances, they must be found, and if they are not, the reviewing court must grant relief. See Magwood v. Smith, 791 F.2d 1438, 1448-50 (11th

Cir. 1986). As the lower court explained in Magwood, the Eighth Amendment itself requires such relief, for "'[t]o find that mitigating circumstances do not exist where such mitigating circumstances clearly exist returns us to the state of affairs which were found by the Supreme Court in Furman v. Georgia to be prohibited by the Constitution.'" 608 F.Supp. 218, 228 (M.D. Ala. 1985) (quoted with approval in Magwood v. Smith, 791 F.2d at 1448).

Here, there is no dispute by the State that Judge Olliff found that the mitigating circumstances did not exist. In arguing for the proportionality of the death sentence, the State has characterized the findings of Judge Olliff as revealing "the existence of three valid statutory aggravating circumstances and no mitigating circumstances." Appellee's Answer Brief, at 18. Further, the State has several times referred to Mr. Dougan's case an "unmitigated case." See id., at 3, 19. The Constitution cannot tolerate such factfinding in this case.

B. The Judge's Consideration of Aggravating Circumstances Not Supported by the Evidence

1. Especially heinous, atrocious or cruel

Mr. Dougan has argued in his opening brief that his liability for this aggravating circumstance can be measured only by the acts he personally committed and that he cannot, therefore, be held responsible for the multiple stabbing of the victim by Elwood Barclay. See Appellant's Initial Brief, at 91-92. The State counters by arguing that "all acts of the agents

are attributable to the principal" and that Mr. Dougan is the principal. Appellee's Answer Brief, at 17. The State cites no authority for its argument, because there is none. The authority is to the contrary.

As we argued in our initial brief, the Eighth Amendment requires that the sentence in a capital trial be determined on the basis of the defendant's own conduct. See Enmund v. Florida, 458 U.S. 782, 798 (1982). Indeed the Supreme Court's insistence on accurately measuring "the personal culpability" of the defendant in capital sentencing trials, see, e.g., Franklin v. Lynaugh, ___U.S.___, 101 L.Ed.2d 155, 172 (1988) (O'Connor, J., joined by Blackmun, J., concurring); Tison v. Arizona, __U.S.__, 95 L.Ed.2d 127, 143-45 (1987); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), can mean nothing else.

This Court has recognized and adhered to this very principle in Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984). In Copeland, the defendant was not the actual killer; his liability rested upon the felony murder rule. Recognizing that the appropriateness of the death sentence, however, had to be measured by the defendant's own conduct, the Court carefully reviewed each aggravating circumstance found by the trial court to be certain that Copeland himself had participated in the acts underlying each aggravating circumstance. Id. Critically, when reviewing the especially heinous, atrocious or cruel circumstance, the Court noted that "[t]he validity of this aggravating factor rests not on the actual method of killing--

the victim was shot three times in the head with a pistol -- but rather on the additional acts setting this crime apart from the norm of capital felonies." Id. Only after satisfying itself that "[t]he evidence showed that appellant was an equal participant in the perpetration of these additional acts," id., did the Court sustain the finding of this circumstance.

The teaching of Copeland for Mr. Dougan's case is plain. In contrast to Copeland, the finding of the especially heinous circumstance in Mr. Dougan's case rests upon the actual method of killing. See Appellant's Initial Brief, at 90-91. Under Copeland's analysis, Mr. Dougan's liability for this circumstance must therefore be measured by his participation in the actual method of killing. The stabbing, committed entirely by Barclay on his own and not at Dougan's request, cannot be attributed to Mr. Dougan. Accordingly, his liability must be measured in the very way we have argued it in our initial brief, at pages 90-94.

2. Cold, calculated, and premeditated

Mr. Dougan relies upon his initial briefing of this issue, together with the new analysis set forth at pages 13-14, supra.

3. Murder in the course of kidnapping

Mr. Dougan relies entirely upon his initial briefing of this issue.

IV. DEATH IS A DISPROPORTIONATE SENTENCE FOR MR. DOUGAN

The State has distorted Mr. Dougan's position that death is a disproportionate punishment for his offense. It has argued that death is of course proportionate "for the ring leader trigger-man" in a case in which there are "three valid statutory aggravating factors and no mitigating circumstances." Appellee's Answer Brief, at 18. While death would be proportionate in such a case, the State is wrong in arguing that this is that case. We have demonstrated there are no valid statutory aggravating circumstances, and that there are uncontradicted mitigating circumstances of extraordinary weight which the record establishes but which the jury may not have believed it could consider, and which the trial judge refused to consider.

The State has further argued that Mr. Dougan has killed two people. Appellee's Answer Brief, at 18, 19. For the same reasons that the sentencer could not reliably find that Mr. Dougan had killed a second person, the proportionality equation cannot fairly factor in a second murder.

And finally, the State has argued that our proportionality argument rests upon a comparative analysis of Mr. Dougan's and Elwood Barclay's roles in the crime and the comparative proportionality of Mr. Dougan's death sentence and Barclay's life sentence. Appellee's Answer Brief, at 18. While we have noted this Court's difficulty with assessing Barclay's and Dougan's comparative culpability as evidence of the similarity of their culpability, we have not asked the Court to find death disproportionate for Mr. Dougan in light of its finding that

death was disproportionate for Barclay. We have simply argued that the apparent closeness of their culpability warrants a fresh look at the proportionality of the death sentence for Mr. Dougan, not in comparison to Barclay but in relation to his own life.[3]

To be sure that these distortions do not cloud the Court's analysis of Mr. Dougan's proportionality argument, we believe that it is necessary to reiterate briefly for the Court the contours of our argument:

(1) The legal framework for our argument is rooted in the Legislature's intent in enacting Florida's capital sentencing statute. As the Court has explained, "[T]he Legislature has chosen to reserve [the] application [of the death penalty] to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

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[3]The closeness of Barclay's and Dougan's culpability has not only been noted by this Court. The probation and parole officer who conducted the presentence investigation for Barclay, Dougan, and Hearn in relation to the first trial also recognized it. As Donald Carter informed Judge Olliff in Mr. Dougan's resentencing trial,

> This was not a situation where an alleged leader forced or mesmerized or otherwise led people of lesser intelligence or capacity to do something which they otherwise would have been unwilling to do. Barclay and Hearn certainly were mature, intelligent, articulate, well-read individuals. Based upon my professional experience, it is my opinion that to single out one of these men for a death sentence is inappropriate; there is no valid justification for disparity in sentencing these men, particularly that Hearn should be free and Dougan should be sentenced to death.

R. 862.

(2) When the aggravating circumstances are assessed in keeping with state law and federal constitutional requirements, there are fewer than three aggravating circumstances. We believe, and have argued, that there are none.

(3) When Mr. Dougan's homicidal intent is fairly evaluated, it is not the kind of homicidal intent that characterizes "the most indefensible of crimes." State v. Dixon, 283 So.2d at 8. A crime motivated purely by racial hatred might reflect such an intent.[4] However, this was not one, as

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[4]But even this kind of crime is seldom seen as deserving of the death penalty, particularly when the defendant is white and the victim black. See, e.g., King v. State, 355 So.2d 831, 835 (Fla. 3d DCA 1978) (according to the white defendant's confession, "[w]e were riding along and we wanted to shoot the shotgun off again and Brannon [Courtney, the codefendant] wanted to shoot some niggers with it," but King ended up doing the shooting -- randomly -- into a crowd of black people on a street corner, killing two people); State v. Scarborough, discussed at p.7 of Appellant's Initial Brief (a deliberate running down and killing of a black man by a white youth in an automobile who wanted to "kill me a nigger"). Indeed, tolerance for racially-motivated violence directed against black people by white people in Florida has a long history. As historian Jerrold Shofner has observed,

> As the possibility of United States intervention diminished in the 1880's and the doctrine of white supremacy became more firmly entrenched, violence as a means of repressing blacks increased. The brutal Savage-James lynching at Madison in 1882 went without a serious investigation. Another in Jefferson County in 1888 resulted in the arrest of five white men, but all of them were acquitted by all-white juries. Two especially repugnant lynchings in the mid-1890's led Governor William D. Bloxman to deplore the practice in his 1897 inaugural address, but he offered no remedy. the praise of white supremacy and persistent reminders of its alternatives from prominent men perpetuated a climate of tolerance for

demonstrated by the uncontradicted evidence at trial. See Appellant's Initial Brief, at 86-88. As Donald Carter, the officer who conducted Mr. Dougan's presentence investigation observed about Dougan, Barclay, and Hearn,

> Based on my professional experience, in my opinion they are not men who recklessly disregard human life. All of these men wrongly but sincerely believed that what they were doing would bring about a change in conditions for black and poor people. Because feelings about perceived injustices were very strong then and levels of frustration were very high, this incident could have happened in any group.

R. 862.

(4) Finally, Mr. Dougan's case is profoundly mitigated. Not only is his homicidal intent mitigated by its lofty but tragically flawed and misguided purpose; Jacob Dougan's life is an extraordinarily good life, punctuated at worst by "one explosion of total criminality," State v. Dixon, 283 So.2d at 10, which as this Court recognized, might not "warrant[] the extinction of life" in a particular case. Id. Fully sixty people testified,[5] provided affidavits, or provided letters[6] in order to describe Mr. Dougan's numerous positive traits of character, his enormous contribution to the well-being of his community, his extremely positive influence on and contribution

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violence by whites against blacks.

Shofner, Custom, Law, and History: The Enduring History of Florida's "Black Code", Fla. Hist. Qtly. 277, 288 (Jan. 1977).

[5]T. 1260-89, 1327-1525 (testimony of twenty-one witnesses).

[6]R. 821-880, 1051-1073.

to the lives of others on death row, and his unusual capacity for rehabilitation. See Appellant's Initial Brief, at 9-17 (summarizing this evidence). Those who came forward on behalf of Mr. Dougan came from all walks of life -- street people, other death row inmates, those whom he helped and with whom he worked in Jacksonville, black community leaders in Jacksonville, the Catholic Bishop of St. Augustine, and the president of the National Council of Churches. This evidence may have best been summarized by two people, Donald Carter, the author of the PSI at the first trial, and Robert Teffeteller, a death row inmate. As Mr. Carter explained, in conducting a further investigation of Mr. Dougan's case,

> I interviewed corrections officers and inmates at Florida State Prison and the Duval County Jail. Based on those interviews I concluded that Dougan has been a stabilizing factor in the institutions where he has been incarcerated these many years. He maintains good relationships with both officers and inmates. His presence can be beneficial to conditions in an institution. He encourages meaningful communication between officers and inmates and sets an example for constructive outlets for grievances.
>
> My investigation leads me to conclude that Jacob Dougan has been and is a valuable member of society. The merits of Jacob Dougan's life weigh heavily against the crime of which he was convicted.

R. 863. And as Mr. Teffeteller, a white death row inmate, observed,

> In this situation, you can suffer and learn and endure and make the best of it or you can become desperate and give up. In a harsh environment of concrete and steel, to show kindness and compassion is very rare. Jacob

> does that. Some people learn only to be mean, vicious and scheming in prison. Jacob has deepened his compassion and care for others. He has reflected on how and why he has taken various paths and he has come to know himself; he has used the time for tremendous growth and reflection. Many in the same situation are simply waiting for a chance to get even, but Jacob has with tremendous personal effort used his time here to help himself and help others.

R. 846-47.

For these reasons, as well as those urged in the initial brief, we ask the Court to find that death is a disproportionate punishment for Mr. Dougan.

XII. THE PROSECUTOR IMPROPERLY DELEGATED THE DECISION TO SEEK THE DEATH PENALTY TO THE VICTIM'S FAMILY[7]

The decision whether to prosecute is the responsibility of the prosecutor; so, too, is the choice of the sentence to be sought. This Court has held that "[u]nder Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute." State v. Bloom, 497 So.2d 2 (Fla. 1986). Accordingly, this Court in Bloom held that a trial judge cannot make a pretrial determination that death would be an inappropriate penalty.

The fact that the Courts may not dictate how prosecutors carry out their responsibilities, however, does not mean that

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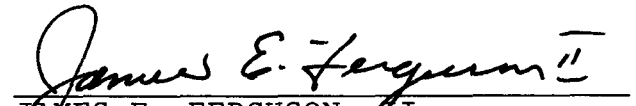
[7]Mr. Dougan relies entirely on his initial briefing of issues VII-XI, without further response to the State's briefing of these issues.

prosecutors' decisions are insulated from judicial review. Logic alone dictates this conclusion. The prosecutor must determine how a case will be prosecuted and what strategies will be employed; the courts, however, must intervene to evaluate whether the strategy is fair or whether it violates some statute or stricture of the state or federal constitution. Courts will likewise curb prosecutorial discretion over whether to prosecute when that discretion is being improperly exercised. Thus, for example, a prosecutor is precluded form basing such a decision on the defendant's race. State v. Bloom, at 3.

The issue then is whether the prosecution in this case exercised its authority in a manner that was impermissible. Allowing Stephen Orlando's family to decide whether Jacob Dougan deserves to be executed by the State of Florida not only violates the prosecutor's professional obligation to seek justice, but also increases the risk that a death sentence will be arbitrarily imposed and that race will play a role in this adjudication. For those reasons, this prosecutor abdicated the prosecutorial function that is mandated by state and federal law, and this Court has the right -- indeed the obligation -- to find that abdication impermissible.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the foregoing Appellant's Reply Brief upon counsel for the State by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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This 9th day of December, 1988.

ATTORNEY FOR APPELLANT