IN THE SUPREME COURT OF FLORIDA

JACOB JOHN DOUGAN, JR.,

Petitioner,

v. CASE NO. 83,398

HARRY K. SINGLETARY,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW respondent, Harry K. Singletary, by and through the undersigned counsel, pursuant to Fla.R.App.P. 9.100(h), in response to Dougan's Petition For Writ of Habeas Corpus and Extraordinary Relief, filed on or about March 23, 1994, and this Court's Order to Show Cause, rendered March 28, 1994, and respectfully moves this honorable court to deny such petition, for the reasons set forth below.

PRELIMINARY STATEMENT

The procedural history of this case is tortuous in the extreme. Dougan, along with co-defendant Barclay, was originally convicted of first-degree murder and sentenced to death in Duval County in 1975, and this court affirmed such convictions and sentences in Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978). This court however, later vacated the death sentences, to assure that the dictates of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), had been followed. Barclay v. State, 362

So.2d 657 (Fla. 1978). Following a resentencing proceeding, Dougan was again sentenced to death, and this court once again affirmed, see Dougan v. State, 398 So.2d 439 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 367, 70 L.Ed.2d 193, (1981); this court separately affirmed Barclay's sentence, and the United States Supreme Court granted certiorari and affirmed such ruling as well. See Barclay v. State, 411 So.2d 1310 (Fla. 1981), approved, Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

Both Barclay and Dougan then petitioned this court for habeas corpus relief, contending that the single attorney who had handled their prior appeals had labored under a conflict of interest; this court agreed, and ordered new appeals ~~for each~~ defendant. Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984); Dougan v. Wainwright, 448 So.2d 1005 (Fla. 1984). In Barclay's subsequent appeal, this court reduced his sentence to one of life imprisonment. Barclay v. State, 470 So.2d 691 (Fla. 1985). In Dougan's subsequent appeal, this court affirmed the conviction, but remanded for a second resentencing. Dougan v. State, 470 So.2d 697 (Fla. 1985).

The 1987 resentencing proceeding was conducted pursuant to this court's mandate. During such proceeding, the defense submitted a total of twenty (20) proposed jury instructions, including two involving the heinous, atrocious or cruel aggravating factor. Requested instruction #5 read:

> With regards to Aggravating Circumstance (h), the following definitions apply: atrocious means outrageously wicked and vile; cruel means designed to inflict a high degree of

> pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. (R 663).[1]

The defense also submitted, requested instruction #17:

> Aggravating circumstance (h), that the capital felony was especially heinous, atrocious or cruel, applies only where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim (R 675).

At the charge conference of September 22, 1987, defense counsel objected, without elaboration, to the fact that the judge would be instructing on the heinous, atrocious or cruel aggravating factor (R 1615). Subsequently, the parties discussed defense-requested instruction #5 (R 1636-8). Defense counsel stated that the additional definitions were necessary, "otherwise, to the average layman any homicide seems to be that way." (R 1637). The requested instruction was denied, and defense counsel subsequently withdrew his request for instruction #17 (R 1638, 1642). Subsequently, the court instructed the jury, without objection, that they could consider in aggravation, whether "the crime for which the defendant is to be sentenced was

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[1] Citations are to the record on appeal in Dougan's most recent appeal in this court, Dougan v. State, Florida Supreme Court Case No. 71,755.

especially wicked, evil, atrocious or cruel" (R 1749); no objection was interposed at that time.

Subsequently, the jury, while deliberating, requested a dictionary to look up the definition of the terms, "heinous and atrocious" (R 1760). A lengthy discussion ensued between counsel and the parties, and it was decided that the court would give a portion of defense-requested instruction #5 (R 1761-1770); although defense counsel expressed a preference that the jury receive the entire requested instruction, including the last line, it cannot be said that Dougan's counsel specifically argued that the instruction, as given, was constitutionally defective (R 1765). Without objection, the judge then instructed the jury that they should not be concerned with the definition of the term, "heinous", as it was not part of the current instruction; the judge then advised them, as to the other terms,

> atrocious means outrageously wicked and vile; cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others (R 663).

The jury subsequently returned an advisory sentence of death, and, on December 4, 1987, Judge Olliff formally sentenced Dougan to death; a complete copy of the sentencing order (R 1077-1104) is contained in the Appendix to this Response (see Appendix). The judge found that three (3) aggravating circumstances applied - that the homicide had been committed during a kidnapping, under §921.141(5)(d), Fla. Stat. (1985), that the homicide had been especially heinous, atrocious or cruel, under §921.141(5)(h), Fla. Stat. (1985) and that the

homicide had been committed in a cold, calculated and premeditated manner, under §921.141(5)(i), Fla. Stat. (1985). After a lengthy discussion of the non-statutory mitigation proffered, the judge concluded that death was the appropriate sentence (R 1089-1104; see Appendix). As to the heinous, atrocious or cruel aggravating factor, the court found:

> FACT:
>
> Dougan, together with the other defendants, premeditatedly and deliberately stalked their victim and brutally murdered him.
>
> The victim's only crime was that he was of a different racial group than his murderers. He in no way offended them - except by being white - nor did he even know them before that fatal evening.
>
> The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed, taunted, and tortured. As he writhed in pain and begged for mercy, Dougan placed his foot on the 18-year-old boy's head and shot him dead.
>
> This was an unprovoked, premeditated murder and a declaration of war against a racial group - with the promise of more violence, death, and revolution to come.
>
> CONCLUSION:
>
> That the murder for which the defendant is to be sentenced was especially wicked, evil, atrocious, and cruel. This is an aggravating element. (R 1100-1; see appendix).

Most importantly, the sentencing judge was extremely precise as to was he did, and did not, consider:

> PROCEDURE USED IN 1987 SENTENCE DECISION
>
> Below herein I have set forth my consideration of the statutory aggravating and mitigating circumstances. In this 1987 resentence I have, of course, considered the elements anew - without regard to the

> consideration previously given them in the 1975 and 1978 sentences. I have also arrived at any new sentence decision independent of the 1987 jury advisory sentence. (R 1089); (See Appendix) (Emphasis supplied).

Dougan appealed his latest sentence of death to this court, and such appeal was styled Dougan v. State, Florida Supreme Court Case No. 71,755. In the Initial Brief, filed October 17, 1988, Dougan raised twelve (12) primary claims for relief. In addition to attacking the finding of the heinous, atrocious or cruel aggravating circumstance itself, Dougan also complained that the instruction given the jury on this aggravating circumstance had been deficient under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 371 (1988); it would not appear that Dougan expressly argued that the denial of any of his proposed jury instructions in this regard was error (Initial Brief, Dougan v. State, Florida Supreme Court Case No. 71,755, filed October 17, 1988, at pages 90-4, 72-6). In its January 2, 1992 opinion affirming the death sentence, Dougan v. State, 595 So.2d 1 (Fla. 1992), this court held that the finding of this aggravating circumstance had been proper,

> The facts also set this murder apart from the norm of killing by illustrating the victim's suffering and Dougan's indifference to the victim's pleas and support finding the heinous, atrocious, or cruel aggravator. Cf. Ponticelli v. State, 593 So.2d 483 (Fla. 1991) and cases cited therein. Dougan, 595 So.2d at 5.

In regard to the jury instruction claim, this court held,

> Several issues had been decided adversely to Dougan's contentions: (1) adequacy of instructions on aggravating factors, e.g., Sochor v. State, 580 So.2d 595 (Fla.), cert.

> granted, ___ U.S. ___, 112 S.Ct. 36, 116 L.Ed.2d 455 (1991). . . . Dougan, 595 So.2d at 3, n.3.

Dougan subsequently filed a petition for writ of certiorari in the Supreme Court of the United States, raising a claim for relief in regard to the penalty phase jury instructions, in light of the intervening decision of Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). The Court denied review on October 19, 1992. Dougan v. Florida, ___ U.S. ___, 113 S.Ct. 383, 121 L.Ed.2d 293 (1992).

Dougan has not yet filed a motion for postconviction relief in the trial court, pursuant to Fla.R.Crim.P. 3.850, but, on March 23, 1994, filed the instant petition in this court, raising a single claim for relief - that he is entitled to a new sentencing proceeding, because the jury instruction given at his penalty phase on the heinous, atrocious or cruel aggravating factor violated Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

ARGUMENT

> THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED; DOUGAN'S CLAIM BASED UPON ESPINOSA WAS NOT PROPERLY PRESENTED IN THE TRIAL COURT, AND WOULD NOT BE MERITORIOUS BECAUSE: (1) THE SENTENCING JUDGE AFFORDED NO WEIGHT TO THE JURY'S RECOMMENDATION AND (2) ANY ERROR WAS HARMLESS, UNDER THE FACTS OF THE CASE

As noted, Dougan presents a single claim for relief in the instant petition - that he is entitled to a new sentencing proceeding (which would be his fourth, in regard to this 1974 offense), due to the fact that the instruction given to his 1987 sentencing jury was allegedly defective under Espinosa v.

Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). The state initially contends that, under the standards set forth in James v. State, 615 So.2d 668 (Fla. 1993), this claim is not cognizable on collateral attack; indeed, the state would contend that this court found inadequate preservation of this claim in Dougan's last appeal. Dougan, 595 So.2d at 3, n.3. Further, to the extent that the merits must be reached, the state would contend that any jury instruction error was harmless because, as this court has found in comparable circumstances, this aggravating circumstance was established beyond a reasonable doubt "under any definition of the terms." Cf. Henderson v. Singletary, 617 So.2d 313 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993). Not only has this court twice affirmed the finding of this aggravating circumstance, Barclay, 343 So.2d at 1271, Dougan, 595 So.2d at 5, but the United States Supreme Court likewise noted, in co-defendant Barclay's case, Barclay v. Floprida, 463 U.S. 947-8, that application of this aggravating circumstance under the facts of this case was neither irrational nor arbitrary.

Most importantly, however, it is, under the particular facts and circumstances of this case, virtually impossible for any jury instruction error to constitute a basis for relief under Espinosa. In Espinosa, the United States Supreme Court concluded that a Florida sentencing jury's consideration of a vague aggravating circumstance could "taint" the resulting sentence of death, because it was "presumed" that the sentencing judge gave "great weight" to the jury's recommendation. Espinosa, 112 S.Ct.

at 2928. In this case, Judge Olliff specifically stated in his sentencing order that he had afforded the jury's recommendation no weight, and had made his sentencing determination "independent of the 1987 jury advisory sentence." (R 1089; see appendix). Thus, the facts of this case not only rebut the "presumption of error" enunciated in Espinosa, but also debunk the myth of the jury as "co-sentencer". Cf. Combs v. State, 525 So.2d 853, 857 (Fla. 1988). This case provides a perfect vehicle for this court to set forth a valid statement as to the true operation of Florida's capital sentencing structure.

(A) Dougan's Claim Under Espinosa Is Procedurally-Barred, As This Court Has Previously Found

Although this court has never expressly held that Espinosa v. Florida constitutes a change in law under Whit v. State, 387 So.2d 922 (Fla. 1980), it did hold, in James v. State, 615 So.2d 668 (Fla. 1983), that, in fairness, those defendants who had sufficiently preserved the issue at trial and on appeal could obtain review of an Espinosa claim in postconviction litigation. This court expressly held that claims that the instructions on the heinous, atrocious or cruel aggravating factor was unconstitutionally vague could not be considered on collateral attack "unless a specific objection on that ground was made at trial and pursued on appeal." James, 615 So.2d at 669. In James' particular case, it was deemed appropriate to review his claim, because he had "objected to the then-standard instruction at trial, asked for expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received." Id. Because Dougan, in contrast to James, did not

perform all of these actions, his claim is procedurally barred at this time. Cf. Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct.2, 120 L.Ed.2d 931 (1992).

The state recognizes that Dougan did attack, on appeal, the sufficiency of the jury instruction given as to this aggravating circumstance, and, as such time, specifically contended that such was unconstitutionally vague under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 371 (1988); appellate counsel, it should be noted, did not specifically contend, as a point of reversible error, that the court had erred in denying Dougan's proposed instructions (Initial Brief, Dougan v. State, Florida Supreme Court Case No. 71,755, at 72-6). Despite what could be considered appellate presentation, respondent would contend that this claim is procedurally barred because Dougan never specifically objected to the jury instruction given his jury, on constitutional or vagueness grounds, at the time of trial. Such contemporaneous objection is a prerequisite to consideration of this claim either on direct appeal or collateral attack, and its absence means that this claim is procedurally barred. See Kennedy, supra; Turner v. Dugger, 614 So.2d 1075 (Fla. 1992); Marek v. Singletary, 626 So.2d 160 (Fla. 1993); Roberts v. Singletary, 626 So.2d 168 (Fla. 1993); Stewart v. State, 632 So.2d 59 (Fla. 1993).

Indeed, it is the state's position that, when Dougan presented his Maynard claim in regard to this jury instruction in the latest appeal, this court found such claim procedurally barred, no doubt due to the absence of objection at trial. This

court stated that Dougan's jury instruction claim "had been decided adversely" to him in Sochor v. State, 580 So.2d 595 (Fla. 1991). Dougan, 595 So.2d 3, n.3. Of course, in Sochor, this court had found a claim, to the effect that this jury instruction was unconstitutionally vague, to be procedurally barred due to lack contemporaneous objection, Sochor, 580 So.2d at 602-3, and the United State Supreme Court later recognized, and honored, this procedural bar. See Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992). As in Melendez v. State, 612 So.2d 1366, 1369 (Fla. 1992), the mere advent of the Espinosa decision cannot lift this previously-imposed procedural bar. See Melendez, supra (where attack upon penalty phase jury instructions had been found procedurally barred in earlier appeal, such finding "dispositive" in later collateral attack based upon Espinosa). Relief must be denied, in accordance with Melendez.

To the extent that Dougan argues that his submission of various proposed jury instructions on this aggravating factor somehow can substitute for a contemporaneous constitutionally-based objection to the instruction actually given, such contention must be rejected. See, e.g., Griffin v. State, 372 So.2d 991 (Fla. 1st DCA 1979) (defendant failed to preserve claim that standard jury instruction was fatally defective, where, although counsel unsuccessfully proposed alternate instruction, he failed to articulate the basis for objection to instruction actually given; "general objection" to court's failure to give proposed instruction insufficient to preserve claim that

instruction given failed to sufficiently set forth essential elements of crime). The purpose of the contemporaneous objection rule is, of course, to provide the trial court with notice that an error may have been committed, and to afford the court an early opportunity to correct it. See Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Nothing Dougan's counsel did below, whether in regard to the proposed instructions or otherwise, put the trial court on notice that any constitutional infirmity allegedly lay in the standard jury instruction given as to this aggravating factor. Further, it should be noted that the proposed instructions, even if considered in their entirety, would not have constituted a "full" instruction under State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), in that no definition of "heinous" was provided. Cf. Atwater v. State, 626 So.2d 1325, 1328, n.3 (Fla. 1993) (setting forth full Dixon instruction). Because the proposed instructions themselves would not seem to be correct, it cannot be said that this claim has been preserved. Cf. Street v. State, 19 Fla. L. Weekly S159, S161 (Fla. March 31, 1994) (defendant failed to preserve Espinosa issue at trial, where he requested insufficient alternate instruction). This claim is procedurally barred under Kennedy, Melendez and Street.

(B) Under The Facts And Circumstances Of This Case, Dougan Is Entitled To No Relief On The Basis of Espinosa v. Florida

Assuming that preservation is found, the state would contend that Dougan is still entitled to no relief under Espinosa v. Florida, for at least two reasons. Initially, as noted, Espinosa holds that Florida has allegedly "split the weighing process in

two", with the jury as "co-sentencer" in capital sentencing, and that the state sentencing judge is "presumed" to give "great weight" to a jury's recommendation; if the jury has received a deficient jury instruction on an aggravating factor, such taint allegedly carries over into the judge's sentencing process, because he is "presumed" to weigh the jury's recommendation in his sentencing determination. Whatever can be said about the Espinosa decision in abstract, it is clear that the "presumption" enunciated therein has no application sub judice. Judge Olliff expressly stated in his sentencing order that he had arrived at his sentencing determination "independent of the 1987 jury advisory sentence" (R 1089; see appendix). Thus, in this case, one need not speculate as to what effect, if any, the deficient jury instruction might have had upon Dougan's ultimate sentence; any infirmity in jury instruction quite literally fell upon deaf ears, at least in terms of the actual sentencer. This sentencing was unquestionably carried out in full accordance with Florida law, §921.141(3), and with Florida precedent, see, e.g., Combs, supra, 525 So.2d at 857 ("Clearly under our process, the court is the final decision-maker and sentencer - not the jury."), and Dougan is entitled to no relief under Espinosa.

To the extent that any further argument is required (and it is presumed that, in a feat worthy of Harry Houdini, the jury instruction error somehow affected Dougan's sentence), petitioner cannot prevail. This court has consistently found Espinosa error to be harmless when the aggravating circumstance has been established beyond a reasonable doubt "under any definition of

the terms." See, e.g., Thompson v. State, 619 So.2d 261, 267 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993); Henderson v. Singletary, 617 So.2d 313 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993). Here, despite the arguments of opposing counsel in regard to Dougan's alleged good qualities (which neither the judge nor jury found convincing), the fact remains that, as this court found in Dougan's latest appeal, this crime was "set apart from the norm of killing", given, inter alia, the victim's suffering and Dougan's indifference to, if not positive enjoyment of, such suffering. Dougan, 595 So.2d at 5. The fact Dougan shot the victim while Barclay actually wielded the knife is not constitutionally significant, given the fact that this unquestionably a joint enterprise, and one in which Dougan has always been regarded as the leader; this case is identical to Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986), in which this court held that the fact that the defendant had merely shot the victim, whereas his co-defendant has slit his throat, did not bar application of this aggravating circumstance, given, inter alia, the victim's suffering, pleas for mercy, and the existence of a "joint operation". See also James v. State, 453 So.2d 786, 772 (Fla. 1984).

The victim in this case, Stephen Orlando, was kidnapped, taken to a remote area, taunted, tortured, stabbed and shot. The fact that he writhed in pain and begged for his life is uncontrovertible, as is the fact that Dougan later made a tape recording in which he regretted that the victim had only been

shot twice (because the gun had jammed), and described how "beautiful" it had been to see the victim suffering. Dougan, 595 So.2d at 3 ("He was stabbed in the back, in the chest and in the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes."). This aggravating circumstance, as this court stated in Dixon, was intended to apply to crimes whose actual commission was accompanied by such additional acts as to set the crime apart from the norm - those crimes which were "conscienceless or pitiless" or "unnecessarily torturous to the victim". Dixon, 283 So.2d at 9. This crime qualifies. See, e.g., Melendez, 612 So.2d at 1369 (Espinosa error harmless under virtually identical circumstances; Foster v. State, 614 So.2d 415 (Fla. 1992) (Espinosa error harmless, in case where victim beaten and stabbed to death, after begging for mercy, where a jury could not have been misled by inadequate instruction, and crime was especially heinous, atrocious or cruel "under any standard"); Davis v. State, 620 So.2d 152 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1205, 127 L.Ed.2d 552 (1994) (Espinosa error harmless where facts so indicative of heinous, atrocious or cruel aggravating factor that no reasonable possibility existed faulty jury instruction contributed to the sentence; under any instruction, on instant facts, jury would have recommended and judge imposed same sentence).[2] The instant petition for writ of habeas corpus should be denied in all respects.

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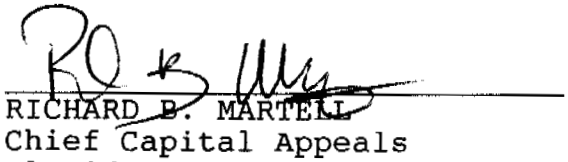
[2] To the extent relevant, the state would note that, despite the fact that the full Dixon instruction was not given, the jury was provided a definition of "cruel", which included a

CONCLUSION

WHEREFORE, for the aforementioned reasons, respondent respectfully moves this Honorable Court to deny the instant petition for writ of habeas corpus and extraordinary relief in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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COUNSEL FOR RESPONDENT

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description of this crime as one "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." (R 663); in their closing arguments, both sides drew the jury's attention to this language (R 1692, 1724-7). Accordingly, even without full elaboration, the jury had a rational basis to find this aggravating circumstance applicable, to the extent that they did. Cf. Occhicone v. Singletary, 618 So.2d 730 (Fla. 1993). Even without the heinous, atrocious or cruel aggravating factor, there would still remain two other valid aggravating circumstances, unchallenged in this proceeding, and no mitigation. Cf. Occhicone, supra; Ragsdale v. State, 609 So.2d 10 (Fla. 1992); Sims v. Singletary, 626 So.2d 980 (Fla. 1993). Under any harmless error analysis, Dougan is entitled to no relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Richard H. Burr III, Esq., Texas Resource Center, 3223 Smith Street, Suite 215, Houston, Texas, 77006 and Mr. James E. Ferguson, II, Esq., Suite 730, East Independence Plaza, 700 East Stonewall Street, Charlotte, North Carolina, 28202, this 9 day of May, 1994.

RICHARD B. MARTELL
Chief, Capital Appeals

IN THE SUPREME COURT OF FLORIDA

JACOB JOHN DOUGAN, JR.,

Petitioner,

v. CASE NO. 83,398

HARRY K. SINGLETARY,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

APPENDIX

Sentencing Order dated December 4, 1987.

STATE OF FLORIDA

v.

JACOB JOHN DOUGAN, JR.

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 74-4139CF

DIVISION S (now CR-A)

1987 RESENTENCE OF JACOB JOHN DOUGAN, JR.

The defendant, Jacob John Dougan, 40, hereafter referred to as Dougan and/or Defendant, was convicted on March 5, 1975, of the First Degree Murder of 18-year-old STEPHEN ANTHONY ORLANDO - and that jury recommended a sentence of death.

On April 10, 1975, I sentenced Dougan to death. Now, more than 12 years later he is back before this Court for resentence on that murder.

I. HISTORY OF CASE

Because this case is more than 12 years old, I have set forth below a chronology of events from the indictment to the date hereof.

Indicted on Two First Degree Murders

In the year 1974 Dougan and four co-defendants were indicted by a Duval County Grand Jury for the first degree murders of:

1. STEPHEN ANTHONY ORLANDO, 18, murdered on June 17, 1974, (Case 74-4139),

and

2. STEPHEN LAMONT ROBERTS, 17, murdered on June 22, 1974, (Case 74-4140).

HISTORY OF CASE cont'd.

Orlando Murder Prosecuted First

March 5, 1975. The State elected to prosecute the STEPHEN ANTHONY ORLANDO murder first. On March 5, 1975, the jury returned guilty verdicts against Dougan and his co-defendants, as follows:

1. Jacob John Dougan - guilty of first degree murder,
2. Elwood C. Barclay - guilty of first degree murder,
3. Dwyne Crittendon - guilty of second degree murder, and
4. Brad W. Evans - guilty of second degree murder.

Jury Recommended Death for Dougan

In its advisory sentence the jury recommended (by a 10 to 2 vote) that only Dougan be sentenced to death.

Dougan Sentenced To Death

On April 10, 1975, I sentenced Dougan to death. (That sentence is attached as pages 29 through 59 and is made a part hereof.)

Other Murder Case Nol Prossed

On April 14, 1975, the State nol prossed the Stephen Lamont Roberts murder case.

HISTORY OF CASE cont'd.

Florida Supreme Court
Affirmed Conviction and Sentence

On March 17, 1977, the Florida Supreme Court affirmed the first degree murder conviction and death sentence of Dougan.

Florida Supreme Court
Vacated Death Sentence

On September 7, 1978, the Florida Supreme Court vacated the Dougan death sentence and ordered the trial court to provide a hearing for Dougan to respond to, and/or rebut, any information in the presentence investigation report.

Certiorari Denied
By United States Supreme Court

On October 10, 1978, the United States Supreme Court denied certiorari in Dougan's case.

Full Hearing Held
To Respond/Rebut PSI

August 20-24, 1979. Because Dougan's attorney was fatally ill with cancer and due to several changes in attorneys - a hearing to respond and/or rebut the presentence investigation report was not held until the week of August 20, 1979. The hearing lasted four days, and

twenty-six witnesses testified. After that hearing, I scheduled the date of October 25, 1979, for resentence.

Resentenced To Death

On October 25, 1979, I again sentenced the defendant to death. (That sentence is attached hereto as pages 60 through 96 and is made a part hereof.)

Florida Supreme Court Affirms Death Sentence

On April 9, 1981, the Florida Supreme Court affirmed the death sentence I imposed on Dougan on October 25, 1979.

Certiorari Denied By U.S. Supreme Court

On October 5, 1981, the United States Supreme Court again denied certiorari in the Dougan case.

Florida Supreme Court Grants New Appeal

Dougan filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court contending his attorney failed to provide effective assistance on appeal -

and asked the Court to grant a new appeal or to set aside his death sentence.

On April 5, 1984, the Florida Supreme Court entered its order leaving the conviction and death sentence in tact but granting Dougan a new appeal.

Florida Supreme Court Orders New Sentence Hearing With A New Jury

In due course, Dougan's new appeal was filed with the Florida Supreme Court.

On May 30, 1985, the Florida Supreme Court considered the new appeal and affirmed the 1975 first degree murder conviction but set aside the death sentence and ordered the trial court to hold a new sentence hearing with a new jury.

II. SUMMARY OF HISTORY OF CASE

Over the last 12 years this case has been before this court, the Florida Supreme Court, and the United States Supreme Court for more than 10 proceedings.

III. FACTS OF ORLANDO MURDER

Thirteen years have elapsed since the murder of Stephen Anthony Orlando on June 17, 1974. For the benefit of the reviewing court, the facts and circumstances of this murder are briefly summarized below.

The four defendants, Jacob John Dougan, Elwood Clark Barclay, Dwyne Crittendon, and Brad W. Evans, were part of a group that termed itself the "Black Liberation Army" (BLA), and whose apparent sole purpose was to indiscriminately kill white people and thus start a revolution and racial war.

DOUGAN WAS THE GROUP'S UNQUESTIONED LEADER AND IT WAS HE WHO CONCEIVED THE MURDEROUS PLAN. APPARENTLY HE DID NOT HAVE TO BREAK DOWN A WALL OF MORALITY TO INDUCE BARCLAY, CRITTENDON, AND EVANS TO PARTICIPATE - BUT IT WAS DOUGAN'S PLAN - AND HE PUSHED IT THROUGH TO MURDEROUS FINALITY. THE ACT OF DOUGAN IN FIRING THE FATAL SHOTS AND HIS LEADERSHIP WERE UNDOUBTEDLY REASONS THE JURY RECOMMENDED DEATH ONLY FOR HIM.

The trial testimony showed that on the evening of June 17, 1974, the four defendants and William Hearn (who testified for the State) all set out in a car armed with a pistol and a knife with the intent to kill a "devil" - the "devil" being any white person they came upon under such advantageous circumstances that they could murder him, her, or them.

As they drove around Jacksonville, they made several stops and observed a number of white persons as possible victims, but decided the circumstances were not advantageous and that they might be seen and/or thwarted by witnesses. At one stop, Dougan wrote out a note - which was to be placed on the body of the victim ultimately chosen for death.

Eventually, the five men drove towards Jacksonville Beach, where they picked up a white hitchhiker, 18-year-old Stephen Anthony Orlando. Against Orlando's will and over his protest, they drove him to an isolated trash dump, ordered him out of the car, stabbed him repeatedly, and threw him to the ground. As the 18-year-old youth writhed in pain and begged for his life, Dougan put his foot on Orlando's head and shot him twice - once in the chest and once in the ear - killing him instantly.

The evidence showed that none of the defendants knew or had ever seen Orlando before Dougan murdered him. The note, which Dougan had previously written, was stuck to Orlando's body with the stabbing knife. The note read:

> *Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people.*

in 7 and 98

FACTS OF ORLANDO MURDER cont'd.

Early the following morning Orlando's dead body was discovered; police were called to the scene, and the knife and note were preserved for evidence, and photos were taken of the dead body and surrounding area. An F.B.I. document and handwriting expert testified that the note stuck to Orlando's body was written by Dougan.

Subsequent to the murder, Dougan and Barclay - by their own admissions - made several tape recordings (scripted by Dougan) boastfully detailing the facts of the murder. The recordings were mailed to all media and also - cruelly and callously - mailed to Orlando's mother. All of the tapes contained much the same in content and intent. The following are excerpts of several tapes which were typical of all, as follows:

> *Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same black people who occupy 25 per cent of the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed ...*

> *If you want to know how to spell "Americans", just spell it with three K's instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so that black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us to Emancipation Proclamation.*

FACTS OF THE ORLANDO MURDER cont'd.

That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again'. Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like, once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods ...

Mary Ann Mallory (Orlando's mother), don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be enshrined when black people get their freedom...

You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with your tanks and your National Guards and you spray black people with all that tear gas and you just take advantage of black people...

We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offspring, those things, those stringy-haired things you call your kids...

You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain...

The reason Stephen was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes...

He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people...

We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla...

All of the tapes ended with the words "Signed, Your Black Liberation Army".

William Hearn, one of the five persons present at the murder of Orlando, testified that he witnessed the murder and told of the participation of Dougan, Barclay, Evans, and Crittendon - and he, together with witnesses James Mattison, Edred Black, and Otis Bess, Jr., stated that they were present when the boastful tapes were made and they identified the voices of Dougan and Barclay when the tapes were played to the jury.

1975 JURY RECOMMENDED DEATH ONLY FOR DOUGAN

The 1975 jury found Crittendon and Evans guilty of Murder in the Second Degree (because of their lesser participation in the murder) and found Dougan and Barclay guilty of Murder in the First Degree and in their advisory sentence recommended:

> Death for Dougan - by a vote of 10 to 2.
>
> Life Imprisonment for Barclay - by a vote of 7 to 5.

Thereafter, on April 10, 1975, I sentenced Dougan to death. (See copy of 1975 sentence attached as pages 29 through 59 .)

1975 ADVISORY SENTENCE NOT NOW PERSUASIVE

The fact that the 1975 jury recommended death for Dougan is not now persuasive, nor does it have any part in my consideration in the 1987 resentence. The coincidence that the 1975 and 1987 juries recommended death by almost the same vote count (10 to 2 and 9 to 3) is simply an historical fact of the case and has no significance whatsoever in my resentence of 1987.

IV.
1987 SENTENCE HEARING WITH NEW JURY

The new sentence hearing, with a new jury, was held from September 14 through September 23, 1987. At that hearing, STEPHEN KUNZ represented the State, and ROBERT LINK represented Dougan - both attorneys have vast experience in capital cases. The hearing lasted 9 days; 44 witnesses testified for the State and Defense - and 57 exhibits were received in evidence.

New Jury Recommends Death for Dougan

The jury then deliberated and rendered its advisory sentence that recommended (by a vote of 9 to 3) Dougan be sentenced to death.

V.

PROCEDURE USED IN 1987 SENTENCE DECISION

Below herein I have set forth my consideration of the statutory aggravating and mitigating circumstances. In this 1987 resentence I have, of course, considered the elements anew - without regard to the consideration previously given them in the 1975 and 1978 sentences. I have also arrived at my new sentence decision independent of the 1987 jury advisory sentence.

VI.

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES

The attorneys limited their testimony, evidence, and arguments to Aggravating Circumstances 4, 8, and 9, and to Mitigating Circumstance 8. The other aggravating and mitigating elements do not apply, I have considered them in reverse order, as follows:

Summarization of Mitigating Element 8

8. ANY ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD, ANY OTHER CIRCUMSTANCES OF THE OFFENSE

OFFERED AS MITIGATION;

The defendant presented a number of fine citizens who testified as to his character,

The defense attorney put on evidence and testimony of the defendant's civil rights

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

activities and his social, health, and welfare work which benefitted the community. He had been involved in scouting, band, coaching, and had established a Karate school where he gave free lessons.

FACT:

The evidence, however, shows that at the Karate school the defendant established himself as the leader of his students (who soon became his co-defendants in murder) and there he talked racial war, revolution - and planned the murder of Stephen Anthony Orlando.

It was at that school that Dougan and his co-defendants gathered after that murder and Dougan decided the next move (to make tape recordings boasting of the murder) in his efforts to start a racial war.

The defendant was engaged in an apparent social work - and yet, at the same time, he committed premeditated first degree

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

murder, preached violent revolution, and tried to start a racial war.

CONCLUSION:

The character witnesses, of course, knew none of the facts of the murder of Stephen Anthony Orlando - nor did they know of the defendant's activities at the time of the murder.

The defendant was a personality of extreme opposites. For every quality, he had a balancing fault - an overwhelming fatal fault.

OFFERED AS MITIGATION;

As a mitigating factor, the defense attorney pointed out that Defendant was an illegitimate child of an interracial relationship and was left in an orphanage by his mother; that he was discriminated against in the Black community because of his light complexion.

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

FACT:

Being born illegitimate of an interracial relationship and placed for adoption was not unique to Dougan - many have been born under similar or worse circumstances and became decent, law-abiding, and productive citizens who have refrained from slaughtering their fellow man. Listed among those born in similar circumstances are outstanding personalities in entertainment, the arts, politics, and other fields of endeavor.

The defendant was adopted by fine, loving parents and was given a good home with many more advantages than most of his peers.

The contention of Defendant that he was discriminated against by fellow Blacks because of his light complexion was belied by his witnesses who testified he was well liked in the school and community.

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

The defense attorney submitted his "Memorandum in Support of Life" on November 17, 1987, wherein he includes many letters of various people and the theme throughout is that the defendant was well liked by his peers. One affidavit, in particular, by Ms. Cheryl Coffey stated she had known Dougan for many years, that they grew up together, visited each other's homes, and went to school together. She further states that, in school:

"Jacob was very popular, very well liked."

CONCLUSION:

Any disadvantage of birth was more than offset by Defendant's adoption as an infant by devoted parents who provided him with a good home, material possessions, and many advantages.

There was no evidence Dougan was discriminated against, and, in fact, the testimony and letters (submitted by defense counsel) are to the contrary.

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

OFFERED AS MITIGATION;

Defense counsel notes that Dougan suffered from asthma as a child - which limited his ability to participate in some recreational activities. Defense counsel also suggests that because Dougan's adoptive mother was an alcoholic and he did not become an alcoholic or drug abuser that it indicated strength of character.

FACT:

From testimony at trial, it appears Defendant's adoptive mother developed into an alcoholic, but the testimony also showed she was a kind and caring mother who lavished Defendant with attention and affection and showered him with material possessions.

The testimony of a trial witness was that children of an alcoholic parent generally take one of two courses; become alcoholics themselves or abstain totally.

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

However, (according to that witness) total abstinence is not unusual or extremely rare. It is simply that such children are so revolted by the experience that abstention is more compulsion than great strength of character.

The adoptive father early on enrolled Defendant in Karate classes to improve his health. It worked well and he gained robust health - which enabled him to participate in many activities (including teaching Karate). At the time Defendant committed murder, he was 27 years old and in good health - which he continues to enjoy.

CONCLUSION:

Having an alcoholic parent is not an unusual or rare experience. Defendant's mother was not abusive - as are many alcoholics. From witnessing her addiction, he learned abstinence - as have many children of alcoholic parents.

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

OFFERED AS MITIGATION;

The defense attorney asks "Equal Justice" for Dougan. He points out that of those involved in the murder only Defendant is facing death.

FACT:

Dougan, as proven by the evidence at trial, was the leader of the group; it was his idea to murder and start a racial war and revolution; it was Dougan who conceived the plan; it was Dougan who wrote the note to be pinned to the victim's body; it was Dougan who put his foot on the 18-year-old victim's head (as he begged for mercy) and shot him to death; it was Dougan who later wrote the script which he and others read onto the tapes sent to the media and to the victim's mother.

The co-defendants participated to a lesser degree, and the 1975 jury recognized that fact by finding two defendants (Crittendon and Evans) guilty

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

only of manslaughter and by recommending life imprisonment for Barclay. That jury further recognized Dougan as the leader and as the one who fired the fatal shots and recommended by a vote of 10 to 2 that he be sentenced to death. The 1987 jury apparently came to the same conclusion and recommended death by a vote of 9 to 3.

CONCLUSION:

The defense attorney's use of the hallowed term "equal justice" to suggest that the gang leader, the man who planned the murder and who actually fired the fatal shots, should receive no greater sentence than those who played a lesser part - defies legal reason and common sense.

OFFERED AS MITIGATION;

Defense counsel offered as mitigation the racial unrest at the time Dougan committed murder. He stated that the Defendant was frustrated because

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

of the pace of social progress; that the murder was comprehensible as a misguided notion that it was a way to achieve his goals,

FACT:

There was racial unrest and tempers among some blacks and some whites were short. It was a time of great change, and many were disturbed. However, of all the citizens of this city, only Dougan committed first degree murder and attempted to start a suicidal racial war. His was not just an act to hasten civil rights - it was much more, it was done (according to his own words on the tape recording) to bring about revolution and carnage.

CONCLUSION:

To suggest that the defendant had some lofty mission in life and that he could scoff at the law and slaughter an 18-year-old boy and not be held fully accountable because of the temper of the times - is nonsense.

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

Summarization of Aggravating Element 4

4. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS ENGAGED IN OR AN ACCOMPLICE IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT THE CRIME OF KIDNAPPING

FACT:

Stephen Anthony Orlando was hitchhiking and was picked up by the car in which Dougan and others were riding. The defendants refused to take Orlando to a place he requested. Instead they restrained him in the car and drove him to a trash dump where Dougan shot him in the head. The elements of kidnapping or false imprisonment are all present,

CONCLUSION;

This is an aggravating element,

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

Summarization of Aggravating Element 8

8. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY WICKED, EVIL, ATROCIOUS, OR CRUEL

FACT:

Dougan, together with the other defendants, premeditatedly and deliberately stalked their victim and brutally murdered him.

The victim's only crime was that he was of a different racial group than his murderers. He in no way offended them - except by being white - nor did he even know them before that fatal evening.

The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed, taunted, and tortured. As he writhed in pain and begged for mercy, Dougan placed his foot on the 18-year-old boy's head and shot him dead.

This was an unprovoked, premeditated murder and a

CONSIDERATION OF
AGGRAVATING AND MITIGATING CIRCUMSTANCES cont'd.

declaration of war against a racial group - with the promise of more violence, death, and revolution to come.

CONCLUSION:

That the murder for which the defendant is to be sentenced was especially wicked, evil, atrocious, and cruel. This is an aggravating element.

Summarization of Aggravating Element 9

9. THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

FACT:

The gang, under Dougan's leadership, premeditatedly planned to kill a white person - any white person. The victim was selected because of his vulnerability.

The plan was conceived long before the actual murder (at

least hours and possibly days). The defendants set out upon their task armed with a knife and gun - to be used solely to commit murder.

The defendants rode around the city for hours looking for a victim, during which time Dougan wrote a note to be attached to the dead body of the ultimate victim.

There was no pretense of moral or legal justification - only blood lust and an intent to start a racial war and revolution.

CONCLUSION:

The murder was cold, calculated, and premeditated without any pretense of moral or legal justification.

JURY RECOMMENDED DEATH

The new jury in the 1987 advisory sentence hearing recommended a sentence of death for Dougan by a vote of 9 to 3. I have reached my sentence decision independently of their advisory sentence after carefully considering all of the facts and circumstances set forth herein.

CONCLUSION OF COURT

The Court concludes that there are great and sufficient aggravating circumstances which outweigh any mitigating circumstances and that a sentence of death is justified.