

**IN THE SUPREME COURT OF FLORIDA**

STATE OF FLORIDA

Appellants,

v.

Case No. SC13-1826

Lower Court No. 74-4139

JACOB DOUGAN,

Appellee.

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**ON APPEAL FROM THE CIRCUIT COURT  
OF THE FOURTH JUDICIAL CIRCUIT,  
IN AND FOR DUVAL COUNTY, FLORIDA**

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**AMICUS BRIEF OF THE EQUAL JUSTICE INITIATIVE**

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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

The Equal Justice Initiative is a nonprofit civil rights law office and racial justice organization based in Montgomery, Alabama. In addition to providing legal representation to indigent clients for more than twenty-five years, EJI has launched a project focused on developing a more informed understanding of America's racial history and how it relates to contemporary issues.

This project has produced scholarship, educational resources, and memorials, including a review of racial discrimination in jury selection in Florida and other Southern states; three consecutive *A History of Racial Injustice* annual calendars; a report on American slavery and the domestic slave trade entitled *Slavery in America: The Montgomery Slave Trade*; and the installation of three historical markers in downtown Montgomery detailing that history; and two forthcoming reports on lynching in America and organized resistance to the civil rights movement.

EJI's work explores the legacy of racial bias in the United States and its continuing impact on modern policies and practices—particularly those related to the criminal justice system. Drawing from this study, as well as our extensive experience representing clients whose death sentences were influenced by racial bias, EJI as amicus curiae has direct knowledge and interest in assisting this Court to evaluate the racial context and community history vital in considering Mr. Dougan's case.

## **SUMMARY OF THE ARGUMENT**

Jacob Dougan was convicted and sentenced to death for an offense that occurred in Jacksonville, Florida, in 1974. The investigation, trial, and sentencing in this case was high profile and racially-charged, at a time that the nation, the state of Florida, and the Jacksonville community faced a past and present marred by racial bias, inequality, and violence. In that environment, racial division and hostility permeated the attitudes of institutional actors and impacted the judicial process.

This historical context and the way racial dynamics impacted the administration of justice in this case are key considerations in this Court's review of the lower court's grant of relief. This is especially true given the racially-charged nature of the offense, in which Mr. Dougan, a black man, was accused and convicted of killing a white man in an effort to spark violent racial conflict.

Race was a polarizing and incendiary trigger in the Jacksonville community at this time. The prosecutor, police, and presiding judge faced incredible political pressure to secure a conviction and the law's harshest penalty: death. Cases tried in these types of pressured political environments are vulnerable to prosecutorial misconduct such as that found as a basis for reversing Mr. Dougan's conviction and sentence in the lower court.

Similarly, the community's deeply-rooted racial inequality and biases

penetrated the proceedings. Racially-biased attitudes and behavior by officials charged with overseeing Mr. Dougan’s trial—namely presiding Judge Olliff—directly limited the court’s ability to fairly consider race-related trauma as mitigating evidence and undermined the reliability of the conviction and sentence.

Understanding the social context in which Mr. Dougan was tried more than forty years ago is central to evaluating the claims of error he alleges, and on which the lower court granted relief. The undersigned consequently offer this amicus filing.

### **ARGUMENT**

In 1974, the Jacksonville criminal justice system was still recovering from decades of racialized law enforcement and inequality that shaped the decisionmaking of court officials including the presiding judge and prosecutor. The long history of slavery, racial terror, and resistance to equal rights made a fair trial involving a provocative, racially-charged crime both necessary and unlikely in Jacksonville at that time. This context is a critical component of the case and central to recognizing the misconduct and bias that the lower court deemed reversible error. This Court’s analysis and review is more informed by recalling the Jacksonville community’s history and its impact on shaping the world in which Jacob Dougan stood trial forty years ago.

**I. THE UNIQUE HISTORY OF RACIAL INEQUALITY AND VIOLENCE PROVIDES AN IMPORTANT CONTEXT TO THE CRIME, PROSECUTION AND MISCONDUCT SURROUNDING JACOB DOUGAN'S CONVICTION.**

A “slave state” prior to the Civil War, Florida joined the Confederacy in efforts to preserve the system of bondage, and was the site of some of America’s most infamous incidents of lynching and racial violence in the generations after emancipation. James Oliver Horton & Lois Horton, Slavery and the Making of America 171 (2006); *see also* Equal Justice Initiative, Slavery in America: The Montgomery Slave Trade (2010). More than 300 black people were killed in documented lynchings in Florida between 1877 and 1950. Equal Justice Initiative, Lynching in America: Confronting the Legacy of Racial Terror (Forthcoming).

Duval County and the city of Jacksonville were directly shaped by this history of racial division and conflict. A 34-year-old black farmhand named Ben Hart, was lynched near Jacksonville on August 24, 1923, based on suspicion that he had peered into a young white girl’s bedroom window. According to witnesses, approximately ten unmasked white men came to Hart’s home around 9:30 p.m. claiming to be deputy sheriffs and informing Hart he was accused of being a peeping Tom. Hart professed his innocence and readily agreed to go to the county jail with the men, but did not live to complete the journey. Shortly after midnight the next day, Hart’s handcuffed and



bullet-riddled body was found in a ditch about three miles from the city. Hart had been shot six times and witnesses reported seeing him earlier that night fleeing several white men on foot who were shooting at him as several more automobiles filled with white men followed. Later investigation revealed Hart was innocent of the accusation against him, and at his home 12 miles away when the alleged peeping incident occurred. No one was ever prosecuted for his murder. NAACP Annual Report: A Summary of Work and an Accounting. (1923). 19.

At least twelve black people were lynched in Duval County between 1895 and 1926. Equal Justice Initiative, Lynching in America: Confronting the Legacy of Racial Terror (Forthcoming). When the NAACP urged passage of a federal anti-lynching bill in the 1930s, Florida legislators resisted reform efforts and Senator Claude Pepper filibustered the proposed bill. “We do not want a return to the shackles of Reconstruction days upon the backs of our people,” Senator Pepper declared on the Senate floor in 1937, “and we appeal to you Senators, as loyal Americans, not to pass this bill.” Walter T. Howard, Extralegal Violence in Florida During the 1930s 108 (2005) (quoting Arthur F. Raper, The Tragedy of Lynching, 472 (1933)). The bill did not pass. That same year, Florida led the nation in lynchings and did not arrest, indict, or convict a single perpetrator. Id. at 112.

In the 1940s—the decade in which Jacob Dougan was born—Jacksonville

remained a place where brutal racial violence and intimidation against African Americans was carried out with impunity. When the Civil Rights Movement reached the community following World War II, racial violence targeting black residents intensified.

“Ax Handle Saturday,” a violent conflict between peaceful civil rights protesters and violent white resisters, occurred in August 1960 when Jacob Dougan was 13 years old. Ax Handle Saturday, 1960: A day of defiance in black and white, The Florida Times Union: Jacksonville.com, Sep. 19, 2011.

In late August, 1960, civil rights activists had been holding a peaceful sit-in at Jacksonville’s segregated Woolworth’s lunch counter for several days. Id. Fed up, a group of white opponents gathered on Saturday, August 27th in nearby Hemming Park armed with ax handles, baseball bats, and waving confederate flags, and soon several thousand whites had joined in a seething rally of resistance. Why Fla. Sit-Ins ‘Exploded’ into Bloody Rioting, Chicago Defender, Sep. 10, 1960. When two African Americans attempted to walk through the park to join the Woolworths demonstration, the horde of three thousand whites attacked and chaos erupted. Id.

A black woman named Syteria Williams and her four young daughters were trying to escape the violence in the park that day when a white man approached them “with his bat raised high,” then turned to attack an old man, “who slumped to the

pavement, blood gushing from his wound . . . ” Matt Soergel, Family narrowly escaped Ax Handle Saturday violence, The Florida Times Union: Jacksonville.com, Aug. 23, 2010. Ms. Williams held her daughters and fled, weaving their way through the park to avoid further attacks. Id. The family jumped onto a bus “slurs and insults still ringing in their ears” and “made their way to their customary seats...at the back of the bus.” Id.

Charlie E. Davis, a 27-year-old black man, was killed in the violence that erupted that day, while over seventy people were severely injured, and 150 were arrested. Study Race Violence at Rally, Chicago Defender, Sep. 5, 1960. Richard Parker, a white member of the NAACP arrested in the Ax Handle Saturday violence, was attacked by white segregationists inside the municipal courthouse. White Fla. Mob Beats White NAACP Member, The Chicago Defender, Sep. 10, 1960. Suffering a fractured skull and several knocked-out teeth, Mr. Parker was rushed to the hospital—and then sentenced to 90 days imprisonment. Id.

The NAACP soon halted the Jacksonville sit-ins to avoid further violence, but the Klu Klux Klan responded by strengthening their efforts, holding meetings throughout Jacksonville and burning crosses. Predicts Violence won’t halt ‘sit-ins, Chicago Defender, Sep. 10, 1960. When civil rights activists attempted to hold nonviolent sit-in demonstrations that October, the Klan immediately responded by

kidnapping a 16-year-old black boy, driving him outside of town, stripping him naked, beating him with a belt, and striking him on the right temple with a pistol. 3 Klansmen Pistol-Whip Florida Boy, 16: First Sit-In Staged After Race Violence, Daily Defender, Oct. 10, 1960. The Klan's mass support and entrenchment throughout Jacksonville ensured that African Americans were under continual threat, and that nonviolent advocacy for civil rights—in Jacksonville and elsewhere—regularly met with violent resistance.

Though commonly seen as the “end” of the national Civil Rights Movement, successful passage of the Civil Rights Act in 1964 and Voting Rights Act of 1965 did not heal the deep racial wounds in Jacksonville. Indeed, tensions between the Jacksonville Police and the local African American community increased throughout the 1960s and into the 1970s.

Until 1968, the Jacksonville police force was strictly segregated: black officers were prohibited from arresting whites; no black officers were admitted to the Fraternal Order of Police; and there were no uniformed black deputies. Florida Advisory Committee to the U.S. Commission on Civil Rights, “Toward Police/Community Detente in Jacksonville,” 5 (June 1975), <https://www.ncjrs.gov/pdffiles1/Digitization/53094NCJRS.pdf>. By 1970, while 26.6 percent of the Jacksonville population was black, only five percent of the police

force was black. Id. This disparity fueled tensions that often escalated into violence.

Following the assassination of Dr. Martin Luther King, Jr. on April 4, 1968, for example, Jacksonville’s black residents erupted in mass demonstrations and the overwhelmingly white police force responded with—in the words of a 1975 report by the Florida Advisory Committee to the United States Commission on Civil Rights—“profuse use of tear gas to control the desperate and despairing.” Id.

Community outcry over police brutality reached a fever’s pitch when, on June 10, 1971, a fifteen-year-old black boy named Donnie Hall was killed in Jacksonville by white Patrolman Frank Fouraker. After 5 years of reforms, Jacksonville erupts in riots, The Miami News, June 22, 1971. When the African American community mobilized to protest Donnie’s death, Jacksonville police sent out “the Monster,” the Florida Highway Patrol’s anti-riot tank, and twenty other police cars releasing suffocation gas grenades. Anti-riot tank used in Jacksonville patrol, Boca Raton News, June 18, 1971. Though Officer Fouraker was initially suspended from the force and charged with manslaughter, the charges were later nolle prossed and he was fully reinstated with back pay—walking free from Judge Hudson Olliff’s courtroom. Manslaughter Charges Withdrawn, Daytona Beach Morning Journal, Sep. 29, 1971. The black community reacted with outrage, as expressed by James Washington, President of the Jacksonville branch of the NAACP: “The blacks remember that 10

of theirs were killed by police in less than 10 years and nobody was punished for any of them...three of them were in the last four months . . . ” Downtown Problems put Jacksonville on Edge, The Ledger, Oct. 3, 1971.

In March 1974, a group of black plaintiffs filed a federal lawsuit against the Duval County Sheriff and other local government officials for unprovoked violence and racist attacks. Defense’s Post-Hearing Brief at 196. One of the plaintiffs, Fred Clark, alleged that he had been grabbed and beaten by police while attempting to walk away from a gathering where police had ordered people to disperse. Id. at 196-97. Dragged to the police car by his hair, Mr. Clark suffered multiple beatings on his way to jail, and arrived semi-conscious and covered in blood. Id. at 197-98. Another plaintiff, Leonard Dixon, a member of the U.S. Navy, alleged that he was merely attempting to board a bus to return to base when police officers punched him, kicked him, knocked his head against the cement, and repeatedly called him “nigger” and “boy.” Id. at 198. Another claim alleged that, after seven-year-old second-grader Stephen Durham got into a fight with another student at school, police handcuffed and assaulted the child, slapping him and giving him a bloody nose. Id. at 202-03. While the case eventually settled, the plaintiffs’ stories were characteristic of race relations between Jacksonville police and black residents during this era.

Though this was a time when communities throughout the entire nation felt the

impact of racism and oppression, Jacksonville, in particular, was a site of extensive resistance, violence, and frustration. Racism and threats—a regular experience for the city’s black residents—persisted past the perceived “end” of the Civil Rights Movement in America. This is the environment where Jacob Dougan was born and raised, the context in which the racially-charged crime for which he is imprisoned took place, and the courthouse setting that produced Mr. Dougan’s conviction and death sentence.

## **II. THERE WAS HEIGHTENED RISK OF AN UNRELIABLE CONVICTION AND DEATH SENTENCE DURING MR. DOUGAN’S TRIAL AND SENTENCING.**

Mr. Dougan stands convicted of orchestrating and participating in the murder of Stephen Orlando, leaving a racially-inflammatory note with his corpse, and later using the killing to urge a racial uprising. The victim was an 18-year-old white son of a police officer who Mr. Dougan and co-defendants encountered hitchhiking in June 1974.

The case, front-page news from its first reporting, bore all the features of a high profile and inflammatory narrative. As outlined above, in the 1974 Jacksonville community, racial polarization and hostility was widespread, incidents of police brutality against black residents were frequent and largely ignored, and the threat of violent race war was a sensational and feared possibility. Local officials faced

immense pressure to close the case quickly and punish the perpetrators harshly. Prior to sentencing, the Associated Press quoted Prosecutor Ed Austin advocating for Mr. Dougan's death using familiar rhetoric distinguishing between "us" and "them": "Here's where the gauntlet has got to go down," Austin said. "That's what our society has got to face up to. We've got to get the message out. We've got to tell them, 'you can't come to Jacksonville and stalk the streets and kill our innocent citizens because, if you do, we're going to kill you.'" Killers' Sentencing Date Set, Ocala Star-Banner, Mar. 6, 1975.

Experts widely agree that high-profile cases create the kind of pressure most likely to lead police and prosecutors to commit misconduct in order to achieve a conviction and maximum sentence:

That same pressure can also produce mistakes. If the murder cannot be readily solved, the police may be tempted to cut corners, to jump to conclusions, and – if they believe they have the killer -- perhaps to manufacture evidence to clinch the case. The danger that the investigators will go too far is magnified to the extent that the killing is brutal and horrifying, and to the extent that it attracts public attention – factors which also increase the likelihood that the murder will be treated as a capital case.

Samuel R. Gross, The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases, 44 Buff. L. Rev. 469, 478. (1996).

Among the grants of relief in this case, the lower court found that the State



committed prosecutorial misconduct by withholding from defense counsel information about an agreement in which co-defendant and key State witness William Hearn would (and did) receive more lenient sentencing in exchange for testimony favorable to the State's case at Mr. Dougan's trial. Jul. 24, 2013 Order at 47-50. The lower court further found that the State could not have proven its case without Mr. Hearn's testimony; the State knowingly permitted Mr. Hearn to offer false testimony, impeding the jury's ability to properly evaluate his credibility, and the State continued to conceal these material facts during Mr. Dougan's subsequent sentencing hearings and appeals. Id.

The historical context of 1974 Jacksonville, Florida is a central component in the significant pressure officials faced in investigating and trying this high-profile, racially-charged murder case. That pressure, in turn, explains why experienced prosecutors can and sometimes do violate clearly established and known standards of legal practice and ethics in order to guarantee a conviction and/or death sentence despite the risks involved. Through this lens, Mr. Dougan's case is precisely the kind in which misconduct such as that found by the lower court is most likely to occur—and in 1974, Jacksonville, Florida, was the kind of community in which it was least likely to be challenged or exposed.

**A. The Sentencing Court was Unable to Consider Past Experiences of Racism as Mitigation and Thus Unqualified to Evaluate Mr. Dougan’s Culpability.**

Born on July 11, 1947 to a white mother who abandoned him to return to live in an all-white community, and a black father he never knew, Jacob Dougan was raised by a black family in Jacksonville, where his race directly impacted the kind of life he could and would lead, where racism was all around him, and where he was heavily influenced by civil rights efforts. Prior to his arrest on these charges at age twenty-seven, Mr. Dougan’s sole criminal conviction arose from his participation in a sit-in protest of racial segregation.

Psychologist Craig Haney defines “biographical racism” as “the accumulation of race-based obstacles, indignities, and criminogenic influences that characterizes the life histories of so many African-American capital defendants.” Craig Haney, Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide, 53 DePaul L. Rev. 1557 (2003-2004). Haney further posits that victimization from racial bigotry constitutes a “profoundly important kind of ‘structural mitigation’” that, when properly investigated, presented, and considered, can effectively overcome the “empathic divide” that stands as a barrier between black defendants and white decisionmakers – both capital jurors and

judges. Id. at 1557-58, 1589.

Though Haney writes in the 21<sup>st</sup> century, as early as 1970—and prior to Mr. Dougan’s trial—“the Joint Commission on Mental Health decreed that racism is a more pervasive and serious menace to mental health than childhood schizophrenia, retardation, neuroses or any other emotional disorder.” Janis V. Sanchez-Hucles, Racism: Emotional Abusiveness and Psychological Trauma for Ethnic Minorities, 1 (2) Journal of Emotional Abuse, 75 (1998). Indeed, in past review, three members of this Court also acknowledged the mitigating power of past experiences of racism, and evaluated Mr. Dougan’s own life history as exhibiting sufficient mitigation to render death an inappropriate sentence.

This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation matured to taking the illogical and drastic action of murder. His frustrations, his anger, and his obsession of injustice overcame reason. The victim was a symbolic representative of the class causing the perceived injustices.

...

[A decision reducing Mr. Dougan’s sentence to life imprisonment, as the dissenting justices would impose] should aid in an understanding and at least a partial reconciliation of the wounds arising from discordant racial relations that have permeated our society. To a large extent, it was this disease of racial bias and discrimination that infected an otherwise honorable person and contributed to the perpetration of the most

horrible of crimes. An approval of the death penalty would exacerbate rather than heal those wounds still affecting a large segment of our society.

Dougan v. State, 595 So.2d 1, 7-8 (Fla. 1992).

This analysis stands in stark contrast to that which Mr. Dougan received from Judge Hudson Olliff at trial and in two subsequent resentencing hearings, all of which resulted in sentences of death. As approvingly reported in press coverage of Mr. Dougan's first sentencing in 1975, Judge Olliff's oral ruling invoked the Holocaust, Nazi Germany, and his own military service during World War II to characterize Mr. Dougan's crime and purported aspirations to initiate a race war as comparably evil examples of racial hatred and violence:

"I was among some of the first American combat infantry soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps," [Judge Olliff] said.

"I saw human corpses stacked like cord wood ... Those people had been murdered by starvation, torture, gassing or they were shot. They were murdered because they are all guilty of the same crime – they were different from the people who murdered them."

"This type of random, racial-hate murder is almost impossible to believe," he said.

...

"[The murder in this case] was a call for, and an attempt to start a racial war," Olliff said. "Such ravings could only be from a depraved and homicidal mind. Similar sentiments were violently uttered on another continent in our own recent history."

He said Jacksonville and the nation have made great progress in race relations and understanding in recent years.

“You who have committed this racial-hatred murder have done more to disrupt those good relations and progress than any other one factor in recent time.”

Florida killing compared to WWII Nazi atrocities, The Tuscaloosa News, Apr. 16 1975. Judge Olliff’s speech crosses oceans seeking a historic example of racialized dehumanization and violence to which Mr. Dougan’s offense can be linked, while ignoring the local, homegrown historical example to which it actually *is* linked: the enslavement of black people; the racial violence, terror, segregation, and oppression that lasted more than a century after emancipation; and the stark inequality and racism that remained a defining feature of Jacksonville, Florida, even as the judge praised the nation’s “great progress.”

In lower court proceedings on this petition, Mr. Dougan presented evidence and testimony asserting that Judge Olliff, a white man born in 1925, openly exhibited racial bias in and around the time he presided over Mr. Dougan’s three sentencing hearings by: permitting attorneys to tell racist jokes in his chambers and asserting it was alright as long as no black lawyers were present; requesting that a black public defender assigned to his courtroom be moved; referring to cases involving black perpetrators and black victims as “social interactions” that did not warrant tough

sentencing; and instructing lawyers in his courtroom to refer to “blacks and children” by their first names while regularly referring to whites by titles like “Mr.” and “Mrs.”

Indeed, as a product and perpetrator of the very racial order and “biographical racism” that had impacted Mr. Dougan’s life since birth, Judge Olliff was unwilling to engage in the kind of analysis necessary to evaluate racial trauma as a mitigator. He could only sit on the bench of a Jacksonville, Florida, courtroom in 1975 likening his role as a military liberator of Europe to his role in sentencing Mr. Dougan to death by choosing to ignore the racial history and present of his own backyard. Judge Olliff’s ability to be the white Jacksonville judge who equates black adults with white children and permits the telling of racist jokes in his chambers, while simultaneously likening the black defendant to the Nazi and himself to the hero, relied on a narrative of self, reality, and history that ignored the truth.

Viewing Mr. Dougan’s case and life through his own ideological obstructions, facing an empathic divide too wide to cross, Judge Olliff concluded no mitigating factors existed and sentenced Mr. Dougan to death three times. Nearly two decades later, three Justices of this Court wholly disagreed. Dougan v. State, 595 So.2d 1, 7-8 (Fla. 1992). Indeed, the highly racialized nature of this case intensified the mitigatory relevance of Mr. Dougan’s life experiences of racism and the racial trauma, at the same time that the historical and contemporary racism of 1970s

Jacksonville rendered Judge Olliff's courtroom a place where such evidence could not be properly considered.

### **CONCLUSION**

As presented above, this context increased the likelihood of official misconduct in the case, impeded unbiased consideration of racism as mitigating trauma, and is relevant to this Court's review of the lower court's grant of relief.

## CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy hereof has been furnished to Patrick Delaney at Patrick.Delaney@myfloridalegal.com, Mark Olive at meolive@aol.com, and Kenneth H. Haney at kenneth.haney@quarles.com on December 22, 2014. I also certify that these are the email addresses on record with the Florida Bar for Mr. Delaney, Mr. Olive, and Mr. Haney as of this date, pursuant to rule Rule 2.516(b)(1)(A).

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