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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant/Cross-Appellee, v. JACOB JOHN DOUGAN, JR., Appellee/Cross-Appellant.	Case No. SC13-1826 (Circuit Ct. No. 74-4139)

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

AMENDED INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

CASES **PAGE#**

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant, the State of Florida, was the prosecution below; the brief will refer to Appellant as such, the prosecution, or the State. This brief will refer to Appellee as such, Defendant, or by proper name, e.g., "Dougan." The following are examples of other references:

PCR/12 2174	Page 2174 of Volume 12 of the record on appeal in this appeal, SC13-1826, where the trial court's final Order starts; **this is the final order appealed here**;
ReSent/XXXIII 1171-77	Pages 1171 to 1177 of Volume XXXIII of the record on appeal of the 1987 resentencing proceedings in Florida Supreme Court case #71,755, where tapes recorded by Defendant Dougan were played;
GardnerR/I 121-57	Pages 121 to 157 of Volume I of the record on appeal from the resentencing due to Gardner v. Florida, 430 U.S. 349 (1977), where, in October 1979, trial court re-sentenced Dougan to death;
DATT/VI 1021-1047	Pages 1021-1047 of volume VI of the transcript of the 1975 trial in the record on appeal in Florida Supreme Court case #47,260, where tapes recorded by, and scripted by, Defendant Dougan were played for the jury;
DAR/I 137-43	Pages 137-43 of volume I of the record on appeal for the 1975 trial in the record on appeal in Florida Supreme Court case #47,260, where Dougan's counsel submitted voir dire questions.

"DE" or "SE" added to one of the citations designates a defense or State exhibit, respectively, followed by an exhibit number ("#").

The acronym of "IAC" is used for "ineffective assistance of counsel."

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

INTRODUCTION

Defendant Dougan has been sentenced to death three times, twice after jury recommendations of death, with votes of 10-2 and 9-3. About six trial court judges have presided over this case. In 2013, the last circuit judge to preside, Judge Jean Johnson, granted postconviction relief from Dougan's 1975 conviction as well as his 1987 resentencing in spite of the overwhelming evidence of Dougan's guilt and extremely weighty aggravators of HAC and CCP.

On the night of the murder, Dougan lead a group to find someone to kill based on race. Stephen Orlando was at the wrong place at the wrong time. After Dougan's group searched for a victim for a while, they picked up Mr. Orlando hitchhiking and drove him to a remote area where Mr. Orlando ran for it, but Dougan knocked him to the ground. Dougan's group stabbed the victim multiple times, the victim begged for his life, and at one point, Dougan put his foot on the victim's head or neck and shot him in the head twice, killing him.

Subsequently, Dougan admitted to multiple people that he killed the victim as the victim begged for his life. Dougan's voice was identified on tape recordings that Dougan made and in which he admitted to the murder and significant facts. Dougan scripted the tape, and others also recorded messages. Dougan directed one of the tapes to the victim's mother and others to media outlets.

Dougan also wrote an execution note that was left with the victim when Dougan's group drove away.

In the face of overwhelming evidence of his guilt and the clearly deserving death sentence, Dougan complained on postconviction about a number of matters that do not matter. Judge Johnson erroneously granted relief on four claims/sub-claims concerning the 1975 conviction as well as the 1987 resentencing. In this appeal, the State submits three issues and several sub-issues as grounds for its request that this Honorable Court reverse each of Judge Johnson's rulings granting relief to assure that Dougan continues to stand convicted and sentenced, as the evidence shows he deserves under applicable facts and law.

STATEMENT OF THE CASE AND FACTS

Case Timeline.

DATE	EVENT
6/1974	The body of victim Stephen Orlando was discovered. (See, e.g., DATT/I 169) The body had a note on it. (See, e.g., Id. at 173-74) There were "multiple wounds on the trunk" identified as knife or stab wounds and two bullet wounds, "[o]ne in the left ear, one in the left cheek." (Id. at 125-26)
9/1974	Jacob John Dougan, with others, indicted for the First Degree Murder of Mr. Orlando. (DAR/I 1-1A)
3/1975	Jury trial at which **Ernest Jackson and Deitra Micks** represented Dougan (See, e.g., DATT/I 1-12) and at which Dougan found guilty of First Degree Murder (DAR/I 179; DATT/XII 2301-2306) [See **ISSUES I & II**] and jury recommended the death penalty by a vote of 10 to 2 (DAR/I 185; DAR/II 225).

DATE	EVENT
4/1975	Trial court sentenced Dougan and co-defendant Elwood Clark Barclay to death. (DAR/II 218-47)
1977	Barclay & Dougan v. State, 343 So.2d 1266 (Fla. 1977), on direct appeal, affirmed Dougan's conviction and death sentence.
1978	Barclay & Dougan v. Florida, 439 U.S. 892 (1978), denied certiorari from 343 So.2d 1266.
1978	Barclay & Dougan v. State, 362 So.2d 657 (Fla. 1978), reversed the death sentence based upon Gardner v. Florida, 430 U.S. 349 (1977), and remanded for re-sentencing proceedings.
1978-1979	Ernest Jackson, after obtaining a number of continuances and having been hospitalized, was allowed to withdraw for health reasons, (See GardnerR/I 5-6, 10-12, 13-14, 17-18, 24-25) and successor counsel for Dougan, Mr. Fallin, and counsel for co-defendant Barclay were granted additional continuances (See GardnerR/I 22-23, 28, 126).
1979	Evidentiary Gardner-remand proceedings, in which Mr. Nursey, on Dougan's behalf, called about 26 witnesses. (GardnerR/III-IV)
10/1979	Judge Olliff again sentenced Dougan to death. (GardnerR/I 121-57; GardnerR/VI 524-34)
4/1981	Dougan v. State, 398 So.2d 439 (Fla. 1981), "affirm[ed] the sentence imposed by the trial judge," and on 6/4/1981, this Court denied rehearing.
10/1981	Dougan v. Florida, 454 U.S. 882 (1981), denied certiorari to the Supreme Court of Florida.
1984	Dougan v. Wainwright, 448 So.2d 1005 (Fla. 1984), found "Jackson's [appellate] representation of Dougan" deficient, "f[ound] a conflict of interest in [Ernest] Jackson's appellate representation," and granted a "petition for habeas corpus … to allow Dougan a new [direct] appeal."
5/1985	In the "new" appeal, Dougan v. State, 470 So.2d 697 (Fla. 1985), "affirm[ed] his [Dougan's] conviction, but remand[ed] for a new sentencing

DATE	EVENT
	hearing" "before a new jury," concluding that the "trial court … erred in allowing the state to present and argue to the jury the second indictment."
3/1986	Dougan v. Florida, 475 U.S. 1098 (1986), denied certiorari to the Supreme Court of Florida's decision at 470 So.2d 697.
3/16/1987	When Dougan's two pro-hac-vice counsel did not appear in court for the scheduled new penalty phase because they stated they were unprepared to proceed, Judge Olliff revoked the California attorney's pro hac vice status and appointed **Robert Link** as Dougan's counsel. (ReSent/III 485-87)
9/1987-12/1987	In the new penalty proceeding, the jury again recommended that Dougan be sentenced to the death, this time by a vote of 9 to 3 (ReSent/IV 681; ReSent/XXXVI 1820-23); Dougan's counsel at that time, Robert Link, submitted a memorandum in Support of Life (ReSent/V 683-880) and supplemental exhibits (ReSent/VI 1049-73); and, the trial court again imposed the death sentence on Dougan (ReSent/VII 1077-1104).[See **ISSUE I** (part) & **ISSUE III**]
1/1992	Dougan v. State, 595 So.2d 1 (Fla. 1992), "affirm[ed] the sentence of death" that had been re-imposed on Dougan; rehearing denied on 4/1/1992.
3/1992-7/1992	Volunteer Lawyers' Resource Center demanded public records from the State Attorney's Office (PCR/2 233-340; see also Id. at 236, 247).
10/1992	Dougan v. Florida, 506 U.S. 942 (1992), denied certiorari from 595 So.2d 1.
9/1994	Dougan v. Singletary, 644 So.2d 484 (Fla. 1994), denied a petition for writ of habeas corpus filed by Mr. Richard H. Burr III on Dougan's behalf and rejected an issue arguing Espinosa v. Florida, 505 U.S. 1079 (1992); rehearing was denied 11/14/1994.
10/1994	Dougan, "by" Mr. Olive, filed the initial version of his motion for postconviction relief. (PCR/1

DATE	EVENT
	30-161)
10/1994	Judge Aaron Bowden recused himself from presiding over the postconviction proceedings because he had prosecuted the case as an assistant state attorney.(PCR/1 162-63)
11/1994-12/1994	The Chief Judge in Duval County re-assigned the case from Judge Bowden's "Division CR-A" to CR-C and then amended the re-assignment to CR-F. (PCR/1 164-65)
5/1995	Trial court, Judge Olliff in Division CR-F, granted Dougan leave to amend his postconviction motion. (PCR/1 167-68)
2001-2002	Additional status conferences with, orders by, pleadings to, correspondence with, and hearings in front of Judge Arnold. (PCR/4 558-PCR/7 1110; PCR/14 2481 et seq.)
9/5/2002 & 9/6/2002	**Dougan's 224-page Amended Motion to Vacate Judgment of Conviction and Sentence** and Notice of Intent to Further Amend. (PCR/7 1115-PCR/8 1340)[this is the postconviction motion on which Judge Jean Johnson eventually granted postconviction relief]
9/25/2002	State's written Response to Amended Motion to Vacate and to Notice of Intent Further to Amend. (PCR/8 1343-68)
10/17/2002	Judge Arnold presided over Huff hearing (PCR/14 2544 et seq.), during which Dougan's counsel brought up Judge Arnold's representation of a prosecutor who handled the Gardner hearing (PCR/14 2567-68) and ultimately asked the Judge to recuse himself (Id. at 2571-72).
11/1/2002	Chief Judge's Order of Reassignment, indicating that Judge Arnold has recused himself from this case and reassigning the case to "Division CR-D in the Circuit Court." (PCR/8 1374-75; see also PCR/9 1640)
2003-2005	Judge Day conducted status conferences. (PCR/14 2580-87 et seq.)
2/6/2006	The Chief Judge's Order of Reassignment indicated that Judge Day was an assistant state attorney

DATE	EVENT
	during the re-sentencing phase of this case and re-assigned this case from Judge Day to Judge W. Gregg McCaulie. (PCR/8 1376-77)
3/16/2006	Judge McCaulie's Order of Recusal. (PCR/8 1378-79; see also PCR/9 1645-46)
4/26/2006	Chief Judge's Order of Reassignment, assigning this case to **Judge Jean M. Johnson**. (PCR/8 1380-81) [Eventually, Judge Johnson rendered the Huff order and the final order, which is appealed here.]
2010-2011	Correspondence, filings, and orders concerning whether Judge Johnson was qualified to handle a capital case and would continue to handle this case. (PCR/8 1385 et seq.)
11/15/2011	In this Court, Dougan filed a petition for a writ of prohibition, asserting that Judge Johnson was not qualified to handle this case because she had not taken requisite coursework. Subsequently, the State responded, opposing the Petition. (See SC11-2196 and its on-line docket)
2/02/2012	This Court denied the 11/15/2011 Petition.(See SC11-2196 and its on-line docket)
2/29/2012	Judge Johnson presided over a Huff hearing. (PCR/15 2669-70)
5/29/2012	Defendant's Unopposed Suggestion/Motion for Recusal, alleging that the prosecutor in this case "protected" Judge Johnson and prosecuted another case in which she (the Judge) believed that the suspect threatened to kill the Judge. (PCR/9 1538-1601)
6/27/2012	Judge Johnson's order denying the unopposed motion to recuse. (See PCR/9 1606)
8/2/2012	In SC12-1628, Dougan's petition for a writ of prohibition filed in this Court. (See SC12-1628 and its on-line docket; see also PCR/9 1650;)
10/26/2012 & 11/30/2012	In SC12-1628, this Court denied Dougan's petition for a writ of prohibition and denied rehearing. (See SC12-1628 and its on-line docket)
2/25/2013,	Evidentiary hearing at which witnesses testified

DATE	EVENT
2/26/2013, 2/27/2013, & 2/28/2013	and documents were submitted. (PCR/16; PCR/17; PCR/18 3135-3387)
5/9/2013 & 5/16/2013	State's 79-page "Post-Evidentiary Hearing Memorandum"(PCR/10 1687-1770) and Appendix (Id. at 1771-1873); Defendant's 200-page "Post-Hearing Brief"(PCR/11 1875-PCR/12 2093) and Appendix (PCR/12 2094-2173).
7/24/2013	Judge Johnson's "**Order on Defendant's Motion for Postconviction Relief**," granting relief on claims/subclaims III, XIA, XIBA, and XVIIIF, and denying relief on the other claims. (PCR/12 2174-PCR/13 2412)
8/8/2013 & 8/16/2013	State's Motion for Rehearing (PCR/13 2413-35), and Dougan's response (PCR/13 2436-46).
8/20/2013	Judge Johnson's **Order Denying the State's Motion for Rehearing**. (PCR/13 2447-48)
9/17/2013	State's Notice of Appeal (PCR/13 2451-52) and Dougan's Notice of cross-appeal (PCR/13 2466-68), **resulting in this appeal**.

Introduction to Significant Facts.

ISSUES I & II of this appeal contest Judge Johnson's 2013 ruling granting relief from Dougan's 1975 conviction for First Degree Murder. Since the State will argue, among other things, that there is no prejudice under any legal theory concerning the conviction, the next sections discuss the guilt-phase trial in some detail. These facts also provide the context for the State's contention that Mr. Jackson, as well Ms. Micks, were not deficient under Strickland v. Washington, 466 U.S. 668 (1984) or any other test. They also provide a foundation for understanding the very weighty aggravation that Robert Link faced in 1986-1987 at the

third sentencing proceeding, which is the subject of **ISSUE III** as well as part of **ISSUE I**.

The Murder and State's Case-in-Chief at the Guilt-Phase of the Trial.

When Stephen Orlando's body was recovered in a remote area (See, e.g., DATT/II 202-209, 279-82), he was "dressed in a green shirt and blue jeans. … The green shirt was bloodstained, especially in the front, and also had a patch of staining in the back." (DATT/I 125; see also DATT/I 130) "There were multiple [knife or stab] wounds on the trunk, both back and front, and there were two bullet wounds." One of the bullet wounds was in the left ear and one in the left cheek. (Id. at 125-26; see also DATT/II 286) He had an "execution" note on his body. (See, e.g., DATT/I 174; DATT/II 221)

The wounds on the victim's back were in two groups. (DATT/I 126) The knife wounds were deeper on the front of the victim's body, one wound damaging the lung and one injuring the liver. (Id. at 126, 128) There were a total of 12 "puncture wounds to on his sternum and stomach and back …." (DATT/VII 1318) There were also bruises on the victim's back. (DATT/I 126)

"[T]he more serious injuries were the two bullet wounds, one entering the opening of the left ear and penetrating …, [and] the other bullet enter[ing] through the cheek and lodg[ing] between the jaw and the base of the skull." (Id. at 126-27) The bullet

that entered through the ear was recovered (Id. at 127; DATT/VII 1325-28), and it was the cause of death (DATT/I 133).

The bullet wounds "were encrusted with sand and blood," with "powder stains about both the ear and the cheek." (Id. at 129) "[I]n general you get that type of powder staining [at] about seven or eight inches," perhaps up to 12 or 13 inches "or even a little further." (Id. at 131)

William Hearn testified that the gun that Dougan used to shoot the victim was his .22 pistol (DATT/VII 1355-56, 1358-59, 1382-86), and an expert testified that a .22 caliber pistol (SE #22), recovered from Thomas Creek (DATT/III 524—30, 533-35, 543-46), fired a .22 caliber shell casing (SE #M/32; DATT/VIII 1543-48) recovered near Stephen Orlando’s body (DATT/II 290-99). Bullet fragments recovered from the victim's body (SE #31; DATT/VII 1325-28; DATT/VIII 1538) "originated from a .22 caliber bullet" (DATT/VIII 1540-42).

Edred Black testified that Dougan and others had been to Vivian Carter's house where he had seen Hearn's .22 gun. (DATT/VI 1186-89) James Mattison also testified about seeing Hearn's .22 at Vivian Carter's house – as well as in Dougan's possession. (DATT/V 954-57) Vivian Carter testified that she found a gun similar to Hearn's .22 under a mattress in her house. To her knowledge they were not there before Dougan and his accomplices came to her house. (DATT/III 495-501) She knew Dougan, but she did not know

William Hearn. (DATT/III 490-94) She threw the gun and another gun into Thomas Creek. (DATT/III 496, 499-503)

As mentioned above, a note was recovered on the victim's body (DATT/I 174, 193-94; DATT/II 221, 258, 298-300). William Hearn testified that, shortly prior to the murder, Dougan wrote a note (DATT/VII 1359-60), and that the note he saw Dougan write was at the murder scene (DATT/VII 1387). A handwriting expert identified the handwriting on the note as Dougan's. (See DATT/III 588; DATT/VI 1081-1122) Dougan wrote in the note:

> Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer a slave. 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.

(See DAR/II R 222; see also DATT/II 303-304) Dougan subsequently admitted in a tape recording that there was an "execution note found by Stephen's dead body." (DATT/VI 1022; see also DATT/VI 1017).

Soon after writing the note, Dougan said that he and his accomplices "would catch someone, catch a white devil and kill him and leave a note on him." (DATT/VII 1361) A little later, Dougan rejected the idea of using Karate to kill a victim, Dougan stating: "No, we want them to know we got guns and knife." (DATT/VII 1367) Dougan said they will kill someone "[t]o unite the black people … and to start a revolution." (DATT/VIII 1406-1407)

After Dougan wrote the note, Dougan and his accomplices picked up Mr. Orlando, who was hitchhiking (DATT/VII 1369-70) and took him to a remote dirt-road area (See DATT/VII 1371-80; see also DATT/II 208-209, 281). The victim tried to run away, but Dougan hit the victim in the back with Hearn's pistol and, with the assistance of two accomplices, grabbed the victim and threw him to the ground. (DATT/VII 1381-85) An accomplice then started stabbing Mr. Orlando (Id. at 1385; see also DATT/VI 1169), and Dougan "told Elwood to get back and then Jacob [Dougan] fired it twice," going down toward the victim ("indicating") and firing the gun twice (DATT/VII 1385-86). Dougan said he put his foot on the victim's head (or neck) when the victim tried to move and shot him twice. (See DATT/VII 1287; DATT/VIII 1388-89; DATT/VI 1140-41; DATT/VI 1169)

Edred Black testified that Dougan admitted that he wanted "Brad to stick the knife in his kidneys" instead of the chest and told others to move over "so he could put his foot on his neck and shoot him" (DATT/VI 1169) "in the head" (DATT/VI 1182). Otis Bess also testified about Dougan's statement about "put[ting] his foot on the boy's throat to keep him from screaming." (DATT/VII 1287)

Mr. Bess testified that Dougan said that an accomplice tried to put a knife in the victim, and another accomplice took the knife and put it in the victim's stomach. (DATT/VII 1257) Black testified that Dougan said that they did not use Karate on the

victim because that would have surely brought the police to the Karate Association (DATT/VI 1169), where Dougan and the others were located.

After the murder, Dougan said that they had gone out and "picked up this white devil and killed him and left a note on him …." (DATT/VII 1399)

Black testified that Dougan said that the murder was a "political killing" and that he wanted to put out "some reports" to educate "black people" and that it was actually "an execution." (DATT/VI 1155-56)

Within a few days after the murder, Dougan produced a tape recorder and said that he wanted to make some recordings to send out "various places," to "Mrs. Mallory" [the victim's mother], "and to the police station to tell them why the execution took place and what was the meaning of the execution." (DATT/V 958-59; DATT/VI 1007, 1160, 1162, 1181-82) Dougan was the main person carrying on the conversation and directed that others "would have to make a recording before they left." (DATT/VI 1136) Dougan initiated a script for the tape recording that "Elwood" may have supplemented. Dougan passed the script around, and he and others made several tape recordings describing the murder of Stephen Orlando and the motive. (DATT/VI 701, 714-19; DATT/V 806-814, 828-32, 837-41, 945-953; DATT/VI 1004-1008; DATT/VI 1136-39, 1182; DATT/VII 1282, 1285-87; DATT/VII 1397-99; DATT/VIII 1402-1403)

Dougan addressed and mailed[1] the tapes. (DATT/V 950; DATT/VIII 1403) The tapes were sent to television stations in the Jacksonville area, the victim's mother, and police stations (DATT/II 382—397; DATT/III 455-56; DATT/IV 659-61; DATT/V 950-53; see also DATT/VI 1162, 1181).

Dougan's fingerprints were identified on an envelope used to mail a tape (SE #I/11). (Compare DATT/II 334-40, 381-82, 386-90, 394-95, 399-to-DATT/II 406, 420-23, DATT/IV 618-19, 681-85, 774-75; DATT/VI 1010; with DATT/VIII 1512-18 & DATT/VI 1024-26; See also DATT/III 462-82; DATT/IX 1618-19 where Dougan testified to knowing that his fingerprints were identified on some envelops and tapes)

On the tapes, Dougan said:

> To the oppressive state: This is directed to enemy Mary Ann Mallory, Lt. E.A. Orlando and especially Pig Garrett. Stephen Orlando was not murdered, he was executed and made to pay for the political crimes that have been perpetrated upon black people. No longer will your crimes go unpunished. A revolution has begun and you are the enemy.
>
> You white America, because your nature is like that of a devil, can never do right. …
>
> Mary Ann Mallory, you should be proud that your son Stephen was the first to die for our black cause. Many more will follow until we are free. I know that Pig Garrett did not want to publicize the contents of the execution note found by Stephen's body, but he knows that revolution is very serious. …

---

[1] James Mattision testified that he and Dougan mailed the tapes. (DATT/IV 699)

> The reason Stephen was only shot twice in the head was because the gun jammed. He was stabbed in the back, the chest and stomach to symbolize the four hundred years of hangings, castrations, brutalities and rapings of my black people. He begged for mercy as did my people when you murdered them.
>
> …

(DATT/VI 1021-23)

In another tape, Dougan talked about "execut[ing]" the victim, "white racist Americans … like the devil," and how Ms. Mallory should be proud of her "son Stephen," (DATT/VI 1024-25) and continued:

> The reason Stephen was only shot twice in the head was because the gun jammed. He was stabbed in the back, chest and stomach to symbolize the four hundred years of han[g]ings, castrations, brutalities and rapings of my black people. He begged, oh yes, he begged for mercy as did my people when you murdered them, and we gave him no mercy. For every time I pulled the trigger, every time I saw the knife go inside his body, satisfaction came unto me because I knew that the people who died because of his ancestors and because of you, you now are being repaid.

(DATT/VI 1025-26; see also DATT/IV 641-70, 774-75)

A witness identified the name of victim Stephen Orlando's natural mother as "Mrs. Marion A. Mallory" (DATT/I 157) and the victim's natural father as "Everett S. Orlando" (DATT/I 157).

Tapes were played in court and transcribed at DATT/IV 737-66 and DATT/VI 1014—1043.

The Guilt-Phase Defense.

Dougan testified in his defense. He was 27 years old at the time of the trial. (DATT/IX 1607) He said he was at his father's house the night of the murder. (DATT/IX 1608-1609) He admitted

making the tapes "taking credit" for killing the victim, but he said he obtained the information from other sources and did not participate in the murder. (DATT/IX 1608) He said he obtained most of his information from Mr. Mattison, who also mailed the tapes. (DATT/IX 1614-15) Dougan denied writing the note found on the victim's body. (DATT/IX 1611) Dougan testified that he "respect[s] everybody." (Id. at 1613) Dougan said he heard the trial testimony from Mr. Mattison, Edred Black, Otis Bess, and William Hearn, and "in some respects" their testimony is "contrary to" his, (Id. at 1616) including Mattison's that it was Dougan's idea to make the tapes (Id. at 1616-18).

Dougan's defense counsel (Ernest Jackson & Deitra Micks) also called the following as witnesses in the 1975 guilt phase: **Bobby Langston** regarding the crime scene (DATT/IX 1621-42); **Dennis Terry Peters** concerning who was with the murder victim at about 10 or 10:30pm June 16, 1974, the victim's character, and the witness's ownership of a .22 semi-automatic rifle (DATT/IX 1643-90); **Thomas Beaver** concerning who was with the murder victim at about 10 to 10:15pm June 16, 1974, and the witness's ownership of a .22 rifle (DATT/IX 1689-1711); **Vincent Mallory** who testified that he did not recall if he told anyone in Tom Beaver's family about the victim's death (Id. at 1712-16); **William Clark** concerning some of the other defense witnesses he saw the night of the murder (Id. at 1715-26); **James Michael Ryan** concerning what other defense witnesses told

him about the murder victim's wounds (Id. at 1738-42); **James Wade Mattison** who testified about his whereabouts June 16-17, 1974; **Jacob John Dougan, Sr.**, Defendant Dougan's father, who testified that from 9:30pm June 16, 1974, until 8am the next morning, Defendant Dougan was at his (the father's) home (Id. at 1750-52); **Donald Kenneth Brown**, Undersheriff at the JSO, who did not recall any reports concerning some white persons who may have been in the area of the murder and had last-seen the victim alive and who did not recall who all was investigated for this murder (Id. at 1753-60); and **Karen Ferguson**, who testified about her whereabouts and companions June 16, 1974, until the next morning at about 3am (Id. at 1761-65). Dougan's defense counsel introduced several exhibits. (See DATT/IX 1766-77) The State called two rebuttal witnesses. (DATT/X 1865-85)

Dougan's defense counsel, Ernest Jackson, gave the closing argument for Dougan and, for example, emphasized the jurors' awesome responsibility in deciding to take away Dougan's life or freedom (DATT/XI 2054-55, 2071-72); simplified the state's case to a decision whether the State proved Dougan was at the crime scene and participating in the murder in contrast with Dougan's testimony (Id. at 2055-56); distinguished making distasteful tapes from killing the victim (Id. at 2072-76, 2094, 2096-97); argued other suspects inconsistencies constituting reasonable doubt (Id. at 2087-90; see also Id. at 2095-96); and promoted the trial

testimony of Dougan, who the State failed to show has any criminal record, that he was not at the murder scene (Id. at 2091-94).

The jury found Dougan guilty of First Degree Murder. (DATT/XII 2301-2305; DAR/I 179)

Original Penalty Phase.

This original penalty phase was superseded with a new full penalty phase in 1987.

Gardner Proceedings.

Barclay & Dougan v. State, 362 So.2d 657 (Fla. 1978), reversed the death sentence based upon Gardner v. Florida, 430 U.S. 349 (1977), and remanded for re-sentencing proceedings. After an Gardner-remand evidentiary hearing in which Mr. Nursey called about 26 witnesses on Dougan's behalf (See GardnerR/III-IV), Judge Olliff re-sentenced Dougan to death (GardnerR/I 121-57; GardnerR/VI 524-34).

Events Leading to Third Sentencing of Dougan to Death.

Subsequent to the initial 1975 sentence of Dougan to death and the 1979 Gardner-remand sentence of Dougan to death, Dougan v. State, 398 So.2d 439 (Fla.1981), "affirm[ed] the [Gardner-remand] sentence imposed by the trial judge" and the United States Supreme Court denied certiorari in Dougan v. Florida, 454 U.S. 882 (1981), but, subsequently, this Court, in Dougan v. Wainwright, 448 So.2d 1005 (Fla. 1984), found "[Ernest]Jackson's [appellate] representation of Dougan" deficient, "f[ound] a conflict of

interest in [Ernest] Jackson's appellate representation," and granted a "petition for habeas corpus … to allow Dougan a new [direct] appeal." In the resulting "new" appeal, Dougan v. State, 470 So.2d 697, 701 (Fla. 1985), affirmed the conviction, but remanded for a new jury penalty phase.

Judge Olliff conducted the third sentencing proceedings, resulting in Dougan being sentenced to death a third time.

Third Sentencing Proceedings.

The record for the 1986-1987 new penalty proceedings is voluminous, consisting of thirty-seven volumes. (See trial clerk's index at the front of ReSent/I)

Ultimately, in 1987 the jury again recommended that Dougan be sentenced to the death, this time by a vote of 9 to 3 (ReSent/IV 681; ReSent/XXXVI 1820-23), and, the trial court again imposed the death sentence on Dougan (ReSent/VII 1077-1104).

The new jury penalty phase began on September 17, 1987 (ReSent/XXXI 699) and ended on September 23, 1987 (ReSent/XXXVI 1823) In that period, the State called many of the same witnesses and introduced much of the same evidence as in the 1975 jury trial.

For example, the medical examiner, **Dr. Schwartz**, testified again [See **ISSUE III**]. (ReSent/XXXI 848-65) **William Hearn** also testified again. (ReSent/XXXII 900-954)

In 1987, Hearn testified again about Dougan's use of Hearn's .22 pistol (ReSent/XXXII 910, 924-25, 954), the note that Dougan wrote (Id. at 911-12, 952) and that was pinned to the victim's body (Id. at 925), and Dougan's purpose to "go out and find a white devil and kill him" (Id. at 913, 916, 931). Hearn testified that they picked up a 19 to 20 year old hitchhiker named "Stephen" and, at Dougan's direction, drove him past where the hitchhiker indicated he wanted to go. (Id. at 919-21) On a dirt road, Dougan ordered that the car stop and the victim broke and ran and Dougan hit the victim. (Id. at 922-23). When the victim was on the ground, Barclay stabbed the victim a few times, and Dougan went down with the gun and fired two shots. (Id. at 924-25) Hearn also testified about statements Dougan made after shooting the victim, including making the tape recordings. (See Id. at 926-30) Hearn testified about his plea to Second Degree Murder (Id. at 901, 944-45), sentence of 15 years, subsequent State Attorney letters to the Parole Board on his behalf, and serving less than five years (Id. at 948).

Otis Bess, who also testified in 1975, testified at the 1987 new penalty phase that Dougan made statements about problems using the knife to kill the victim (Id. at 1030).[2] Mr. Bess also

[2] Mr. Bess also testified that Dougan said that the victim was begging them not to hurt him and that he put his foot on the boy's

testified about the tape recordings made from a script that Dougan had (Id. at 1032-35) and Dougan indicating that he "would mail the tapes himself because he didn't trust none of us to mail them." (id. at 1037) He identified the voice on SE #36 and #37 as Dougan's. (Id. at 1038)

Edred Black's 1975 trial testimony was read to the jury due to his unavailability in 1987. (See Id. at 1065-66) It included testimony about Dougan stating that the victim's death was a "political killing" and an "execution" (Id. at 1077) and Dougan stating that he had to push "the guys aside" and he (Dougan} put his foot on the guy's neck and shot him in the head (ReSent/XXXIII 1093). Mr. Black testified that Dougan said that everyone must make a tape before they leave the room. (ReSent/XXXIII 1093), and he identified Dougan's voice on three of the tapes. (ReSent/XXXII 1072-75)

James Mattison, who testified in 1975, also testified at the 1987 new penalty phase. Mattison identified the .22 as Hearn's gun and as having been seen at Vivian Carter's. (Id. at 1170-71) Dougan indicated that they were going to make some tapes. (ReSent/XXXIII 1166-67) Dougan had a tape recorder. (Id. at 1169) Dougan wrote the script for the tapes (Id. at 1169, 1186), decided

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throat to where he wouldn't "holler," but on cross-examination he said that he knew that "Elwood" told "us" what Dougan did. (Id. at 1031; see also Id. at 1040-42, 1050-51, 1052)

to whom they would be mailed, addressed them, and mailed them (Id. at 1171). Mattison identified Dougan's voice on the tapes (Id. at 1171-72), which were played for the 1987 jury (at ReSent/XXXIII 1173-77). They included Dougan's statements that--

> the victim was "executed" (Id. at 1173);
>
> the victim was "only shot twice in the head" because the gun jammed (Id. at 1174, 1176);
>
> the victim was "stabbed in the back, chest, and stomach (Id. at 1174, 1176);
>
> the victim "begged for mercy … and we gave him no mercy" (Id. at 1174, 1176);
>
> "every time I pulled the trigger, every time I saw the knife go inside his body, satisfaction came unto me …" (Id. at 1174); and,
>
> "Pig Garrett did not want to publicize the contents of the execution note found by Stephen's body" (Id. at 1176).

As in the 1975 jury trial (DATT/IX 1608), the defense did not contest that Dougan's voice was on the tape recordings (ReSent/XXXV 1590-91).

As in the 1975 trial, evidence demonstrated that Dougan wrote the note found on the victim's body, as Hearn testified (ReSent/XXXII 911) and as confirmed by a handwriting expert (ReSent/XXXIII 1194-1211) and as uncontested by the defense in 1987 (ReSent/XXXIII 1195).

Dougan v. State, 595 So.2d 1, 2-3 (Fla. 1992), referencing the trial court's sentencing order as "accurate," provided a basic overview of the other incriminating evidence.

In Dougan's defense at the third sentencing proceeding, Robert Link [See **ISSUE III**] called as witnesses James Crooks (starting at ReSent/XXXIII 1216); Dr. Harry Krop (starting at Id. at 1251); William J. Tierney (ReSent/XXXIV 1309); Sister Helen Heart (Id. at 1316); Mary W. Stevens (Id. at 1326); Raiford Brown, Jr. (Id. at 1336); Bruce R. Seldon (Id. at 1342); George Hills (Id. at 1349); James E. Thompson (Id. at 1353); Moses Freeman, Jr. (Id. at 1358); Charles H. Simmons (Id. at 1374); Ellis Jones (Id. at 1385); Charlie L. Adams (Id. at 1390); Ronnie A. Bell (Id. at 1398); Delores Lewis (Id. at 1405); Margaret Bowden (Id. at 1409); Moses Davis (Id. at 1424); Ed Holt (Id. at 1438A); Eddie M. Steward (Id. at 1448); Lorenzo Williams (Id. at 1457); Connie Randall (Id. at 1471); Malachi Beyah (ReSent/XXXV 1492); Vaughn Ford (Id. at 1503); Jonathan W. May (Id. at 1514); Jacob J. Dougan, Jr., Defendant (Id. at 1525); Beverly Clark Bell (starting at Id. at 1591); and, Bishop John Snyder (Id. at 1599).

The prosecutor, Mr. Kunz, argued to the jury that it should recommend the death penalty. (See ReSent/XXXV 1657-ReSent/XXXVI 1719) He repeatedly focused upon the audio tape recordings that Dougan made, including playing an excerpt. (See Resent/XXXV 1670-72; ReSent/XXXVI 1691-93, 1697-1701, 1706)

Mr. Link's closing argument contended that Dougan deserves mercy (ReSent/XXXVI 1720). He argued that each juror's vote is important. (Id. at 1721) He attempted to minimize the significance

of Dougan's tape recordings and Hearn's testimony. (See Id. at 1721-23) He focused on the victim initially getting into the car voluntarily. (Id. at 1723-24) He attacked potential aggravating factors (See Id. at 1724-30) and argued in detail for over 25 mitigating circumstances. (See Id. at 1730-46) And, he closed by submitting that Dougan's life should be spared, "there is a lot of good in him that we've shown … worth saving," and he deserves life in prison as mercy and forgiveness. (Id. at 1746-47)

The jury recommended the death sentence by a vote of 9 to 3. (ReSent/IV 681; ReSent/XXXVI 1820-23); Mr. Link submitted a memorandum in Support of Life (ReSent/V 683-880) and supplemental exhibits (ReSent/VI 1049-73). He also argued Dr. Lipkovic's opinions (ReSent/V 683-880 & ReSent/VI 1049-1073).

The trial court, Judge Olliff, again imposed the death sentence on Dougan. (ReSent/VII 1077-1104) He found aggravating factors of HAC, CCP, and during a kidnapping. (Resent/VII 1099-1103)

The majority in Dougan v. State, 595 So.2d 1, 5 (Fla. 1992), summarized the aggravation the trial court found, the mitigation that the trial court considered, and their relative weights. The dissents in Dougan, 595 So.2d at 6-8, elaborated on the mitigation evidence that Robert Link produced at the 1987 resentencing.

Postconviction Proceedings.

In October 1994, an initial version a motion for postconviction relief was filed (PCR/1 30-161), which Dougan

amended in September 2002 through his 224-page Amended Motion to Vacate Judgment of Conviction and Sentence and Notice of Intent to Further Amend. (PCR/7 1115-PCR/8 1340) This is the postconviction motion on which Judge Jean Johnson eventually granted postconviction relief on four claims/sub-claims and denied relief on other claims and from which the State appealed and Dougan cross-appealed here.

In April 2012, Judge Johnson rendered her Huff order (PCR/8 1488-92), resulting in a multi-day evidentiary hearing in February 2013 (PCR/16; PCR/17; PCR/18 3135-3387). Dougan did not testify at the evidentiary hearing. (See PCR/16 2789-90) Subsequently, the State submitted its post-evidentiary hearing memoranda (PCR/10 1687-1770) and Appendix (Id. at 1771-1873), and the defense submitted its memorandum (PCR/11 1875-PCR/12 2093) and Appendix (PCR/12 2094-2173).

In July 2013, Judge Johnson rendered her order granting relief on claims/sub-claims III, XIA, XIBA, and XVIIIF, and denying relief on the other claims. (PCR/12 2174-PCR/13 2412) The State moved for rehearing (PCR/13 2413-35), Dougan's counsel responded (PCR/13 2436-46), and the Judge denied rehearing "not find[ing] any points of law or fact that were overlooked in deciding Defendant's Motion for Postconviction Relief." (PCR/13 2447-48)

SUMMARY OF ARGUMENT

In this appeal, the State presents three issues, with multiple sub-issues. The State submits that each of the issues and sub-issues support reversing the trial court's postconviction order granting Dougan relief from his 1975 conviction and his 1987 resentencing to death.

ISSUE I concerns Dougan's 1975 conviction and the trial court's erroneous ruling that there was a Brady/Giglio violation. ISSUE I supports reversing the trial court's determination that, for the 1975 guilt-phase trial, the State withheld information about the specific details of a deal it gave to witness William Hearn and allowed Hearn to testify falsely. The State submits several reasons for reversing the trial court, including, for example, the trial court's speculation that the deal contained additional details and the trial court overlooking the enormous other evidence amassed against Dougan, rendering any supposed Brady and Giglio violation non-prejudicial and harmless. In ISSUE I, the State "bullets" the overwhelming incriminating evidence and references the bulleted evidence throughout this brief. Concerning the 1987 resentencing, the trial court also erred in construing as relief-meriting Brady material a prosecutor's opinion that William Hearn was "hostile."

ISSUE II supports reversing the trial court's determination that Dougan's two 1975 attorneys were ineffective. They were not ineffective, and, actually they constructed mutually compatible

defense themes that they wove into their cross-examinations of State witnesses, into the presentation of their witnesses, and into their closing argument to the jury. Their defense themes were "guided" by Dougan's trial testimony that he was not at the crime scene. The trial court granting IAC relief from Dougan's 1975 conviction based on a supposed conflict-of-interest theory is not grounded in fact or law. The trial court also erred granting relief from Dougan's 1975 conviction based on Strickland's two-pronged test.

ISSUE III concerns Judge Johnson granting relief from the 1987 resentencing of Dougan to death. The trial court erred in ruling that Robert Link's massive efforts on Dougan's behalf were Strickland prejudicially deficient because he did not obtain a medical expert to contradict the medical examiner's testimony concerning the sequence of the wounds inflicted upon Mr. Orlando. Among the several reasons for reversing the trial court is the trial court's incorrect ruling that the medical examiner's 1987 testimony was critical to proving HAC. To the contrary, other evidence proved that Dougan's group drove the victim to a remote area and Dougan terrorized the victim as the victim ran for his life, Dougan struck him down, the victim begged for his life, and Dougan held his foot on the victim's head or neck and shot him in the head twice. The evidence of HAC was compelling without the

medical examiner's testimony regarding when the stab wounds were inflicted.

Each of the appellate issues and sub-issues merit the relief of reversing the trial court.

ARGUMENT

ISSUE I (BRADY/GIGLIO): DID CIRCUIT JUDGE JOHNSON ERR IN (1) RULING THAT, IN VIOLATION OF BRADY AND GIGLIO, WILLIAM HEARN GAVE FALSE TESTIMONY IN THE 1975 TRIAL'S GUILT PHASE AND THE PROSECUTOR KNEW IT WAS FALSE AND THE GIGLIO VIOLATION WAS NOT HARMLESS AND (2) IN RULING THAT A PROSECUTOR'S OPINION, PRIOR TO THE 1987 RESENTENCING, THAT HEARN WAS "HOSTILE" CONSTITUTED BRADY MATERIAL? (PCR/12 2220-23)

Concerning the 1975 guilt phase, Judge Johnson's final postconviction order reversibly erred in finding that there was an undisclosed State deal with William Hearn prior to when Hearn testified in 1975. To the contrary, there was no substantial competent evidence of any such deal. Instead, prosecutors engaged in the common practice of withholding a specific deal prior to testimony and subsequently, after the witness testified truthfully, attempting to assist the witness. Concerning the 1987 resentencing, the trial court also erred in its conclusions that a prosecutor's opinion that Hearn was "hostile" was Brady material and that this opinion was prejudicial.

A. Procedural Background.

The trial court erroneously granted relief (PCR/XII 2223) on CLAIM III of Dougan's 2002 Amended Motion to Vacate Judgment of Conviction and Sentence …" (PCR/7 1130-40). The claim alleged

"that the state led defense counsel and the jury to believe that Hearn would receive a lengthy prison sentence—that the state would seek life imprisonment—as a result of his guilty plea and agreement to testify as the state wanted," (PCR/7 1131) when actually there was "an understanding between Hearn, his defense attorney, and the state that the state would not ask for life imprisonment but instead would do exactly what the state did do," (PCR/7 24) which was to seek 15 years prison and Hearn's early release from prison (See PCR/7 1133-37). The claim also alleged that, prior to the 1987 re-sentencing, the State failed to disclose that Hearn was hostile to the state. (PCR/7 1138) The State's response denied that there was an undisclosed agreement with Hearn that "went 'far beyond' what he testified to" and denied that "any exculpatory evidence was suppressed by the State." (PCR/8 1355) "However, the State [did] not oppose an evidentiary hearing on this claim." (PCR/8 1355)

B. 1975 & 1987 Trial Testimony Concerning Hearn's Deal.

On February 28, 1975, (DATT/VII 1316) William Hearn testified in the State's case-in-chief. (DATT/VII 1348-DATT/VIII 1485) On direct-examination, Hearn testified that he has been charged with the murder of Stephen Orlando and that he has entered a plea of guilty to Second Degree Murder of the victim in this case. (DATT/VII 1349)

On February 28, 1975, Hearn was subjected to six cross-examinations and re-cross-examinations due to the multiple defendants being co-tried. (See DATT/VIII 1422-79, 1484-85) On cross-examination, Hearn repeated that he has pled guilty to Second Degree Murder, but he has not been sentenced yet, even though he "was to be sentenced today." (DATT/VIII 1461) In another cross-examination, Hearn again testified that he has pled guilty to Second Degree Murder and defense counsel read the language of the Second Degree Murder charge, which Hearn acknowledged. (Id. at 1463-65) Hearn admitted that he indicated to Judge Olliff that he is actually guilty, as a matter of law, of Second degree Murder. (Id. 1465-66) Hearn testified that his sentencing was continued until the day of his trial testimony, but he has not yet been sentenced. (Id. at 1466)

Hearn admitted that his pistol was used in the murder, and he drove Mr. Orlando to the murder scene in his car at another's directions. (Id. at 1467-68) Hearn again admitted that he entered a plea to Second Degree Murder and that he furnished the pistol used in the murder and drove the car. (DATT/VIII 1471-72)

In another cross-examination, Hearn indicated that life was the maximum penalty for Second degree Murder and death or life, for First Degree Murder. (DATT/VIII 1473) Hearn testified that, if given life for First Degree Murder, 25 years was the minimum time

to serve, and for Second Degree Murder, it was "[s]horter." (Id. at 1478)

On February 28, 1975, on re-direct examination, Hearn testified that he expected to receive life (DATT/VIII 1483). On re-cross-examination, Hearn testified that he did not mention anything about Mr. Orlando's murder until after he was charged with it. (Id. at 1484) Then, on another re-cross-examination, Hearn testified:

> Q. Mr. Hearn you said in answer to Mr. Bowden's [prosecutor's] question that you thought you would get a life sentence but your sentencing has been postponed past today. **Do you realize you could get anywhere from zero to life, don't you? You could get one year, two years, whatever**?
>
> Q. Yes. [DATT/VIII 1485]

At the 1987 resentencing, on cross-examination, Hearn reiterated that he plead guilty to Second Degree Murder, which carries anything from probation to life, and admitted that he could have been prosecuted for First Degree Murder, which carries a "mandatory 25 years." (ReSent/XXXII 901, 945) He admitted that he only received 15 years for the Second Degree Murder and that the State Attorney wrote letters to the parole board and he served less than five years. (ReSent/XXXII 948) On re-cross-examination, Hearn admitted that his car, his gun, and his bullets were used for the murder. (Id. at 954)

C. Trial Court's Ruling on CLAIM III.

Judge Johnson's "Conclusion" (Id. at 2220-23) ruled that Dougan was entitled to relief on CLAIM III (Id. at 2223). She found that

the State's post-trial letters to the parole board on Hearn's behalf shortened his sentence. (Id. at 2220) The trial court ruled:

> This Court interprets the State's acts in writing these letters on behalf of Mr. Hearn, which began the day he was sentenced [which the trial court found was on June 10, 1975, (PCR/12 2200)], to reflect the State's acts in writing these letters on behalf of Mr. Hearn, which began the day he was sentenced, to reflect the State or Mr. Hearn expected he would receive a more lenient sentence for his testimony, which was not accurately represented to the jury at Defendant's trial. … The jury was not aware of the facts that may have motivated Mr. Hearn's testimony at Defendant's trial. [PCR/12 2220]

Judge Johnson's order continued by concluding that the lack of accuracy concerning Hearn's trial testimony that he expected to receive a life sentence "calls his testimony as a whole into doubt." (Id. at 2220-21)

Judge Johnson concluded that the "prosecutor suppress[ed] … the agreement," "a promise of leniency in exchange for his testimony." (Id.) She concluded that "the prosecutor knew the testimony was false; and the statements made by Mr. Hearn were material as there is a reasonable likelihood that Mr. Hearn's testimony could have affected the jury's verdict to find a Giglio violation." (Id. at 2221) "Without Hearn's testimony, the State would not have been able to prove its case." (Id. at 2222)

The trial court accumulated its finding of a Brady violation of non-disclosure with its finding that the State failed to correct "misrepresentations to the jury … bolsters this court's conclusion that Defendant was prejudiced." (Id. at 2223)

The trial court speculated that because no plea agreement was in Hearn's file, Hearn might have testified falsely in 1975 that he had already pled to Second Degree Murder. (Id. at 2222)

Concerning the 1987 resentencing, the trial court ruled:

> Mr. Hearn was the State's key witness at Defendant's 1987 resentencing, but the record and evidence suggest more in favor of the State having knowledge prior to his testimony that Mr. Hearn was hostile to the State. This information could have contributed to Mr. Hearn's motivation to testify at Defendant's resentencing, of which the jury should have been made aware. [PCR/12 2221]

D. The Standard of Appellate Review.

Since Judge Johnson's order found compound Brady and Giglio violations, the State reviews the standards for each of them.

For a Brady, claim, State v. Knight, 866 So.2d 1195, 1201 (Fla. 2003)(parallel citations omitted), summarized the elements that a defendant must prove:

> The State is required to disclose to the defense evidence in its possession or control that is favorable to the accused or that tends to negate the guilt of the accused. *See United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963). The **defendant must prove** three elements to establish a *Brady* claim: '[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence has been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.' *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *see also Way v. State*, 760 So.2d 903, 910 (Fla. 2000). In assessing the prejudice element of a *Brady* claim, a court should determine whether the favorable evidence could 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' *Strickler*, 527 U.S. at 290 (*quoting Kyles v. Whitley*, 514 U.S. 419, 435 (1995)); *see also Occhicone v. State*, 768 So.2d 1037, 1041 (Fla. 2000).

Moore v. State, 2013 WL 6223205, *4 (Fla. 2013), summarized the elements and burdens for a claim under Giglio v. United States, 405 U.S. 150 (1972):

> In order to establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003). The evidence is considered material 'if there is any reasonable possibility that it could have affected the jury's verdict.' *Tompkins v. State*, 994 So.2d 1072, 1091 (Fla. 2008) (*quoting Rhodes v. State*, 986 So.2d 501, 508–09 (Fla. 2008)). 'The State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt.' *Guzman*, 868 So.2d at 506.

On appeal, "[w]here the postconviction court has conducted an evidentiary hearing, this Court will defer to the factual findings of the postconviction court so long as those findings are 'supported by competent, substantial evidence, but will review the application of the law to the facts de novo.' *Hurst v. State*, 18 So.3d 975, 988 (Fla. 2009)." Mungin v. State, 2013 WL 3064817, *3 (Fla. 2013). Here, Judge's Johnson's speculation fails to satisfy Dougan's burden of producing competent, substantial evidence that supports CLAIM III.

Subject to deferring to trial court factual findings that are supported by competent substantial evidence, "[t]he standard of review is de novo for the legal question of prejudice …," Pace v. State, 854 So.2d 167, 178 (Fla. 2003); Rogers v. State, 782 So.2d 373, 377 (Fla. 2001)("an independent review of the legal question of prejudice")(citing Stephens v. State, 748 So.2d 1028, 1032–33

(Fla. 1999) (mixed question of law and fact; independently reviewing legal questions ensures that the law is applied uniformly in decisions based on similar facts)).

E. The Trial Court Reversibly Erred.

The State respectfully submits that the trial court's ruling granting relief and its related conclusions are not supported by competent, substantial evidence. Instead, the trial court reversibly erred by engaging in compound speculation to reach for rulings that there were prejudicial Brady and Giglio violations concerning Hearn's deal. The trial court also erroneously applied the law, requiring reversal on CLAIM III.

1. The Trial Court erred in speculating that the "prosecutor suppress[ed] … the agreement" of "a promise of leniency in exchange for … [Hearn's] testimony" and that "the prosecutor knew the testimony was false. (PCR/12 2221)

The trial court erroneously speculated that because the State attempted to assist William Hearn months and years after his February 28, 1975, trial testimony, and Hearn was eventually released from prison after serving about five years, there was an undisclosed pre-trial-testimony State agreement with Hearn. The trial court's speculation is not competent substantial evidence. It should be reversed.

In contrast with Judge Johnson's speculation, Judge Aaron Bowden, who was a lead prosecutor in the trial, testified that there was no deal with Hearn prior to Hearn's testimony for any specific number of prison years. (PCR/18 3227-30, 3243) Hearn's

postconviction testimony also failed to prove that there was an agreement with the State for any specific number of years, but instead, if anything, it only reinforced that there were efforts on his behalf months and years after his February, 28, 1975, trial testimony and he was eventually released from prison after serving about five years. (See PCR/18 3178-89)[3]

Indeed, here, in his February 28, 1975, trial testimony, Hearn explicitly admitted to the scope of potential leniency, as he admitted that his sentencing was postponed until after his trial testimony and he could get "**anywhere from zero to life … could get one year, two years, whatever**." (DATT/VIII 1485) And consistent with Judge Bowden's and William Hearn's postconviction testimony, Hearn testified at the 1987 resentencing that the pre-trial plea bargain was for him to plead guilty to Second degree Murder, for which he could receive up to life imprisonment and ultimately he served about five years. (ReSent/XXXII 945-48)

Thus, for the 1975 trial, the scope of Hearn's potential reward was disclosed. There was no Brady failure to disclose nor was there any Giglio knowing-falsity. The trial court's speculation is

[3] The trial court's order, at one point, appears to support the State's position, as the trial court, stated that "Defendant failed to meet his burden to demonstrate the existence of an additional agreement between Hearn and the State …." (PCR/12 2190-91) However, in fairness, the trial court may have been restating the State's position, so the State has not highlighted this trial court statement in the body of this appellate argument.

erroneous and not grounded on competent substantial evidence. See also Phillips v. State, 608 So.2d 778, 781 (Fla. 1992)("Ambiguous testimony does not constitute false testimony for the purposes of Giglio"); Conahan v. State, 118 So.3d 718, 729 (Fla. 2013)(circumstantial evidence suggesting that trial testimony was not false; defendant failed to prove that trial testimony was false); compare Wickham v. State, 124 So.3d 841, 855-56 (Fla. 2013)(at trial, witness "was not questioned about the details of his crimes and did not volunteer the details, but that does not make his testimony false"). For example, Barwick v. State, 88 So.3d 85, 103-104 (Fla. 2011), held, in part, that ambiguous testimony concerning the meaning of "intact" concerning the position of a bathing suit did not support a Brady and Giglio claims. Here, a prosecutor's post-trial attempted assistance for Hearn unambiguously proves only that the prosecutor attempted to assist Hearn after the trial, and there is not even some ambiguous proof of an undisclosed pre-testimony deal that extended beyond what Hearn admitted-to at trial. And, Hearn's hope for a greater reward is not state action under Brady or Giglio.

Indeed, arguendo, a prosecutor's promise to attempt to **seek** an early release is of marginal utility in cross-examination where it was already disclosed to the jury, like here, that the witness was allowed to plead to a felony carrying up to life, but no minimum number of years, and could be released as early as in a year. To

the degree that prosecutors persisted over a number of years to seek Hearn's early release proves the point that they did not have the power to obtain Hearn's early release. Therefore, the trial court's speculation derived from post-trial prosecution efforts erroneously overlooks that those post-trial efforts were only just-that, efforts, not rising anywhere to the level of any pre-assured result. The inconsequential nature of any undisclosed deal to seek an earlier release not only demonstrates lack of prejudice under any standard, but also its lack of any threshold substance for Brady "favorableness" or for Giglio falsity. Indeed, Hearn did not even testify at the 1975 trial that the prosecution would not seek an early realease for him.

Hurst v. State, 18 So.3d 975, 990 (Fla. 2009), illustrates the trial court's error in speculating. There and here, the prosecution's after-trial assistance for a witness does not prove that there was a pre-testimony agreement. As Hurst suggests, it is common practice for prosecutors, prior to the witness actually testifying, not to promise the entirety of possible concession for testifying truthfully and yet, after the witness has testified truthfully, to attempt to assist the witness. As done here, competent defense counsel are able to marshal the witness's apparent hope of greater reward to impeach the witness on cross-examination.

State v. Knight, 866 So.2d 1195 (Fla. 2003), is instructive. Like here, Knight was a State appeal from a trial court ruling that the State failed to disclose a matter. Knight, 866 So.2d at 1210, unanimously reversed the trial court's ruling that a Brady violation had been committed. In Knight, 866 So.2d at 1201-1202, 1202 n.6, in addition to the trial court failing to discuss Brady elements, it also was "not clear from the evidence adduced at the evidentiary hearing that the State suppressed the letter and its attached statements, either willfully or inadvertently." In Knight, the defendant's attorney's potential lapse of memory and ambiguity in references to the documents supposedly constituting the Brady material rendered the evidence insufficient to prove the Brady claim.[4] Here, there were no such lapses and ambiguity, but instead, an absence of evidence that there was a non-disclosed broader pre-testimony deal and judicial speculation erroneously substituted for proof. As Knight reversed the trial court, so should this Court reverse Judge Johnson's ruling here.

State v. Riechmann, 777 So.2d 342, 363 (Fla. 2000), rejected a claim that there was an "Undisclosed Deal with Informant Smykowski" alleging that "the State withheld evidence of a deal offered by the State to Smykowski in return for his testimony."

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[4] Knight, 866 So.2d at 1202-1203, also held that the defendant failed to prove Brady prejudice.

There, like Hurst and here, the claim was "predicated" upon communication, requesting leniency, by the prosecutor made after the witness testified. In Riechmann, the prosecutor's letter to the parole board was written prior to the defendant's sentencing. Indeed, in Riechmann, there were also "handwritten notes discovered in the state attorney's file stating that the prosecutor was supposed to contact a federal magistrate so that Smykowski might be rewarded"; there, the prosecutor's postconviction testimony explained the note as not referencing a pre-testimony deal with the witness. There, competent, substantial evidence supported the finding of the trial court that there was no undisclosed deal between Smykowski and the State. Here, post-testimony efforts to assist the witness are not competent, substantial evidence of an aspect of a deal with Hearn that was not disclosed. Reichman affirmed the denial of the Brady claim. Here, Judge Johnson's Brady/Giglio ruling should be reversed.

Rodriguez v. State, 39 So.3d 275, 290 (Fla. 2010), rejected a Giglio claim "that the prosecutor presented false testimony and failed to disclose that Luis was promised assistance in obtaining parole if he testified against Rodriguez" because "Rodriguez has failed to sufficiently support his allegation as to an undisclosed agreement …." There and here, the witness "was initially charged with first-degree murder and was facing the death penalty, he avoided this potential penalty by accepting a plea deal with the

State in which he pled guilty to second-degree murder." There and here, the jury was informed of the plea agreement and cross-examined on it so the Jury knew about it. There, the witness testified at the evidentiary hearing "that he thought he would be receiving assistance in obtaining parole based on some conversations he had 'behind closed doors.' No specifics of these conversations were provided." Also, there the plea agreement failed to support the claim. There and here, the defendant failed to meet the applicable burden and was "not entitled to relief"

Moore v. State, __So.3d__, 2013 WL 6223205, *5-6 (Fla. Nov. 27, 2013), rejected a claim "that the State violated *Giglio* because the State failed to correct codefendant Clemons' false testimony at trial when [witness] Clemons stated that he did not have a plea deal with the State at the time of trial." There, the defense failed to prove the claim because Clemmons "was never asked to clarify whether he was referring to the plea agreement entered into before or after the Defendant's trial." There, as here, "the record does not support … [the] allegations." Here, there was no actual and unambiguous evidence of a plea deal that extended beyond the scope of what the witness admitted-to on the witness stand at trial.

Moore's, 2013 WL 6223205, *6-7, rejection of another Giglio claim is also instructive. It is aligned with other cases holding that the possibility and innuendo of a Brady/Giglio violation does

not prove the violation. Moore "affirm[ed] the denial of relief as to this subclaim because Moore has failed to establish that a *Giglio* violation occurred" because he "failed to show that false testimony was presented at trial." Fatal to Moore's claim was testimony during the evidentiary hearing that the witness could not recall the timing of an event that was the subject of the claim. In other words, there was no clear, specific evidence of the false trial testimony. In Moore, ambiguity and speculation concerning timing were insufficient to prove the claim. Here, a common practice of assisting a witness **after** the witness testifies fails to prove a **pre**-testimony deal; a claim predicated on this common practice is unambiguously deficient. Here, as in Moore, there was no false trial testimony for the State to know about, thereby negating an essential element of the Giglio claim.

The rationale of Shellito v. State, 121 So.3d 445, 459-460 (Fla. 2013), in upholding the trial court's rejection of a Brady/Giglio claim applies here and shows the error of Judge Johnson's ruling. There, concerning the Brady claim, "[c]ontrary to Shellito's assertion, the record reveals that there was no agreement entered into between Ricky Bays and the State whereby Bays' testimony in Shellito's murder trial was agreed to be offered in consideration for the State's disposition of Bays' armed robbery case." Shellito rejected the related Giglio claim "that Bays testified falsely at trial when he said he was not

receiving any benefit for his testimony." There, "the evidentiary hearing was devoid of evidence of a[n] [undisclosed] agreement," and here the record is devoid of evidence of a deal broader that what was disclosed.

The trial court's speculation is no substitute for competent substantial evidence. The trial court's ruling that there was an undisclosed materially broader deal should be reversed.

2. The trial court erred in its speculation that because no plea agreement was in Hearn's file, there had been no plea, which would have motivated Hearn to testify "favorably for the State." (PCR/12 2221-22)

There are five reasons why this trial court ruling is erroneous.

First, this ruling is inconsistent with the trial court's ruling that there was an agreement between the prosecution and William Hearn. The trial court found that the prosecution suppressed the full terms of its plea agreement with Hearn, yet this part of the trial court's order concluded that there was no agreement.[5]

The second reason is related to the first one. Other than this one paragraph in the trial court's order, the entire theme of the

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[5] Therefore, perhaps the trial court was not relying on its discussion at PCR/12 2221-22 in concluding that there was a Brady and Giglio violation (See PCR/12 2222-23). Therefore, as to the supposed absence of an plea agreement, there is no requisite finding specified on Brady's and Giglio's prejudice prong, which is yet-another reason to reverse the trial court.

trial court's "Conclusion" is predicated upon the claim that there was a plea agreement but its full scope was not disclosed. For example, the trial court's discussion of CLAIM III begins: Dougan "avers the State withheld the extent of its plea agreement with its key witness, William Hearn." (PCR/12 2189) Thus, the absence of a plea agreement does not appear to have been alleged in the amended postconviction motion. (See PCR/7 1130-40) To the contrary, the amended postconviction motion's statement of the claim (PCR/7 1130) explicitly states that it is based upon efforts on behalf of Hearn that went "far beyond" those in the disclosed "agreement." Accordingly, at the Huff hearing the claim was characterized as concerning a "secret deal" (PCR/15 2694), not in terms of no deal. As such, the trial court's ruling exceeded the pleading and created a new claim about 11 years after the postconviction motion. This was error. See, e.g., Hannon v. State, 941 So.2d 1109, 1140 (Fla. 2006)("Hannon must allege specific facts that, if accepted as true, establish a prima facie case").

Third, there is no competent substantial evidence that there was no agreement that allowed Hearn to plead guilty to Second Degree Murder. The absence of the form in a file does not necessarily mean that there was no agreement. Especially after decades, it is as likely that it was misplaced or misfiled as it was that there was no agreement. Or perhaps the plea agreement was not reduced to writing. Ambiguous "evidence" does not prove a

claim. See, e.g., Phillips, 608 So.2d at 781 ("Ambiguous testimony …"); Wickham, 124 So.3d at 855-56 (at trial, witness "was not questioned about the details of his crimes and did not volunteer the details, but that does not make his testimony false"); Barwick, 88 So.3d at 103-104 (ambiguous testimony concerning the meaning of "intact").

Fourth, assuming arguendo, that there was no agreement, as inferred from the absence of a plea form in the court file, it would have also been absent in 1975, when Hearn testified. As an official court file concerning a witness in this case, its "information" should be imputed to the defense, thereby negating any supposed non-disclosure.

Fifth, and perhaps most importantly, unambiguous evidence indicates that there was such an agreement for Hearn to plead guilty to Second Degree Murder, and therefore, the trial court's speculative ruling is not supported by competent substantial evidence. At the postconviction evidentiary hearing, Judge Bowden testified that the deal with Hearn was to plead "straight up to second-degree murder in return for truthful testimony." (PCR/18 3227) Accordingly, the trial court's order admits that "the clerk's chronological notation indicates a plea was entered that day." (PCR/12 2221) Hearn's postconviction testimony also failed to prove that there was no agreement whatsoever, indicating he did not recall the details of the charge to which he plead. (See

PCR/18 3180) Moreover, Hearn's 1975 trial testimony not only admitted to the plea concession to Second Degree Murder (See, e.g., DATT/VII 1349, 1463-64), but also on cross-examination on February 28, 1975, **a charging document for Second Degree Murder** was read in open court (DATT/VII 1464-65).

For each of the foregoing reasons, the trial court erred when it conditionally speculated "[i]f, in fact, no plea agreement existed … (PCR/12 2222), and to the degree that it granted relief on this rationale, it reversibly erred.

3. In contrast with the objective evaluation of the overwhelming evidence of Dougan's guilt and the cumulative nature of the supposed nondisclosed scope of the plea agreement, the trial court erred in concluding that "[w]ithout Hearn's testimony, the State would not have been able to prove its case" and that there was reasonable likelihood that Mr. Hearn's testimony could have affected the jury's verdict …." (PCR/12 2222-23)

The evaluation of Brady's and Giglio's prejudice prongs is an objective analysis that considers the claim's non-disclosed or misrepresented information in comparison with all of the evidence introduced at trial. See, e.g., Pace; Rogers; Stephens.

Here, the trial court erred in concluding that there was Brady prejudice and Giglio lack-of-harmlessness. Instead, the essence of Hearn's plea situation was disclosed to the defense and the jury, he was otherwise cross-examined at length, and the State's evidence of guilt was overwhelming without any of Hearn's testimony. Dougan failed to prove Brady prejudice, and Giglio harmlessness was demonstrated.

a. The trial evidence of the plea agreement and motivation for a lighter sentence.

As discussed above, the plea agreement allowing Hearn to plead guilty to Second Degree Murder (DATT/VII 1349, 1463-65, 1471-72) and the possibility of receiving as little as one year (DATT/VIII 1485) in prison in a subsequent (DATT/VIII 1461, 1466, 1485) sentencing was presented to the jury.

The jury knew that Hearn was afforded leniency and the possibility of additional leniency. Even though Hearn admitted to the jury that his pistol was used in the murder in his presence and that he drove Mr. Orlando to the murder scene (Id. at 1467-68, 1471-72), he was allowed to plead guilty to Second Degree Murder, which carries a maximum of life (DATT/VIII 1473) and the possibility of as little as one year (DATT/VIII 1485) versus First Degree Murder, which carries death or life with a 25-year-minimum (Id. at 1473, 1478). Hearn also admitted that he indicated to Judge Olliff that he is actually guilty, as a matter of law, of Second Degree Murder. (Id. 1465-66)

b. Multiple, extensive cross-examination.

In addition to the repetitive examinations that hammered Hearn's deal and motivations to testify, he was subjected to six cross-examinations and re-cross-examinations, on multiple topics, due to the multiple defendants being co-tried. (See DATT/VIII 1422-79, 1484-85) In addition to his plea deal, Hearn admitted to

the jury that he did not mention anything about Mr. Orlando's murder until after he was charged with it. (Id. at 1484)

In light of the examinations on the deal as well as other topics at the trial, juror knowledge of any intended State efforts to obtain a lenient sentence for Hearn would not have made any difference under any prejudice standard. Indeed, as discussed supra, to the degree that prosecutors, post-trial, continued to lobby for a more lenient sentence for Hearn, they demonstrated that their efforts had previously been ineffective; therefore, arguendo, any undisclosed agreement to seek an earlier release for Hearn would be inconsequential because of the prosecutor's problematic power to deliver a result for the witness. The same post-trial evidence that the trial court used to speculate on a pre-trial-testimony broader deal also shows that no post-trial leniency was assured, thereby undermining the significance of the supposedly broader deal. There was no Brady prejudice, and there was Giglio harmlessness.

c. The overwhelming evidence of Dougan's guilt.

Objectively evaluating the trial evidence against Dougan, it was overwhelming.[6] This is illustrated by the strength of the

[6] Interestingly, the trial court characterizes the evidence of Hearn's guilt as "overwhelming," but then the trial court's order summarily dismisses the much-more overwhelming evidence of Dougan's guilt. (See PCR/12 2222)

incriminating evidence against Dougan even if Hearn's testimony had been totally disregarded. However, Hearn's testimony should not be disregarded because it was corroborated with other evidence.

The overwhelming evidence against Dougan included **multiple admissions** from Dougan's own mouth in **words he scripted, recorded, and sent** to media outlets, the victim's mother, and the police (See section "The Murder and State's Case-in-Chief at the Guilt-Phase of the Trial," in the "STATEMENT OF THE CASE AND FACTS," supra).

- **James Mattison** testified that Dougan produced the tape recorder used to make the recordings. [DATT/V 958-59; DATT/VI 1007] **Edred Black** testified Dougan "came in with a tape recorder" [DATT/VI 1160; see also DATT/VI 1162, 1181-82]
- **James Mattison** testified that Dougan wrote the script for the tape recordings; [DATT/IV 700-701] **Edred Black** testified that the recordings were made by reading a piece of paper [DATT/IV 715-16], a note that Dougan passed around [DATT/VI 1137-38]; Black also testified that Dougan ordered that "everyone was supposed to make a tape before they leave that room and that he would pass a note out for everyone to read" for the tape recording; [DATT/VI 1182] **Otis Bess** testified that Dougan said we were "there to make tapes," which were then recorded. [DATTVII 1282, 1285-86]

Mattison's, Black's, and Bess' testimony was consistent with William Hearn's testimony that Dougan was the main person carrying on the conversation, directing others "to make a recording before they left" (DATT/VI 1136), and initiating a script for the tape recording (DATT/VIII 1402)

Dougan addressed and mailed the tapes (DATT/V 950; DATT/VIII 1403), and **Dougan's fingerprints** were identified on an envelope used to mail a tape (SE #I/11). (Compare DATT/II 334-40, 381-82, 386-90, 394-95, 399-to-DATT/II 406, 420-23, DATT/IV 618-19, 681-85, 774-75; DATT/VI 1010; with DATT/VIII 1512-18 & DATT/VI 1024-26)

Dougan admitted the following in his self-scripted tape recordings:

- "Stephen Orlando was not murdered, he was **executed**"; [DATT/VI 1021; accord Id. at 1024]
- "The reason Stephen [the victim] was only **shot twice** in the head was because the gun jammed"; [DATT/VI 1023; accord Id. at 1025]
- The victim "was **stabbed in the back, the chest and stomach**"; [DATT/VI 1023; accord Id. at 1025]
- The victim "**begged for mercy**"; [DATT/VI 1023; accord Id. at 1025]
- "For every time I pulled the trigger, every time I saw the knife go inside his body, **satisfaction** came unto me." [DATT/VI 1025-26]

The **medical examiner**, in essence, confirmed Dougan's statements concerning shooting the victim twice and the victim sustaining multiple stab wounds:

- "There were **multiple [knife or stab] wounds** on the trunk, both back and front," [DATT/I at 125-26; see also DATT/II 286] totaling 12 "puncture wounds on his sternum and stomach and back …" [DATT/VII 1318; see also stomach wound described at DATT/I 129]; and,
- "**[T]wo bullet wounds**," "[o]ne of the bullet wounds … in the left ear and one in the left cheek." [DATT/I at 125-26; see also DATT/II 286]

The medical examiner also testified to-

- **Bruises** on the victim's back [DATT/I 126].

This medical testimony corroborated William Hearn's testimony that the victim tried to run away, but Dougan hit the victim in the back with Hearn's pistol and, with the assistance of two accomplices, grabbed the victim and threw him to the ground. (DATT/VII 1381-85)

The medical examiner's testimony was also consistent with–

- **Edred Black**'s testimony that Dougan said that "[H]e **wanted Brad [Evans] to stick the knife** in his kidneys and Brad was sticking him in the **chest**" [DATT/VI 1169], and,
- **Mr. Bess**' testimony that Dougan said that an accomplice tried to put a knife in the victim, and another accomplice took the knife and put it in the victim's **stomach**. (DATT/VII 1257)

The evidence was also consistent with **Edred Black**'s testimony that–

- Dougan **rejected using Karate** to kill the victim [DATT/VI 1169].

Accordingly, Hearn testified that Dougan rejected the idea of using Karate to kill a victim, stating, "No, we want them to know we got **guns and knife**." [DATT/VII 1367]

Dougan's self-scripted tape recorded statement also referenced the **execution note** left at the victim's body:

- "I know that Pig Garrett did not want to publicize the contents of the execution note found by Stephen's body" [DATT/VI 1022; accord Id. at 1025].

Consistent with Dougan's recorded statement concerning the note–

- A note was recovered on the victim's body [DATT/I 174, 193-94; DATT/II 221, 258, 298-300].

Accordingly, William Hearn testified that, shortly prior to the murder, Dougan wrote a note (DATT/VII 1359-60), and Dougan said that he and his accomplices "would catch someone, catch a white devil and kill him and leave a note on him." (DATT/VII 1361) Hearn also testified that the note he saw Dougan write was at the murder scene (DATT/VII 1387). A **handwriting expert** identified the handwriting on the note as Dougan's. (See DATT/III 588; DATT/VI 1081-1122) Dougan wrote in the note, which was consistent with his recorded statement about the "oppressive state" (DATT/VI 1021, 1024):

> Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer a slave. 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. [See DAR/II R 222; see also DATT/II 303-304]

Additional evidence included the following:

- A **.22 caliber pistol** was recovered from a creek [DATT/III 524—30, 533-35, 543-46], and a witness testified she found a pistol that looked the recovered .22 at her house where Dougan and his accomplices had been located [DATT/III 495-503; See also DATT/VI 1186-89; DATT/V 954-57] and threw the pistol into the creek [DATT/III 496, 499-502];

Accordingly, William Hearn testified that Dougan used his (Hearn's) .22 pistol to shoot the victim (DATT/VII 1355-56, 1358-59, 1382-86), and **an expert** testified that a .22 caliber pistol (SE #22), recovered from the creek, fired a .22 caliber shell casing (SE #M/32; DATT/VIII 1543-48) recovered near Stephen Orlando’s body (DATT/II 290-99). Bullet fragments recovered from

the victim's body (SE #31; DATT/VII 1325-28; DATT/VIII 1538) "originated from a .22 caliber bullet" (DATT/VIII 1540-42).

- **Otis Bess** heard Dougan say that "he [Dougan] put his **foot on the boy's throat** to keep him from screaming"; [DATT/VII 1287] **Edred Black** heard Dougan say that "he put his [Dougan's] **foot on the guy's neck** and shot him in the head twice" [DATT/VI 1140-41; see also Id. at 1169, 1182].

Accordingly, Hearn testified that Dougan said that "he [the victim] tried to move and he put his foot on his head" and mentioned that the gun would only shoot two times. (DATT/VII 1388-89)

In sum, William Hearn's testimony was corroborated on multiple significant major points, and the other evidence of Dougan's guilt was overwhelming. The addition of more cross-examination concerning a deal would have made no difference under any possible standard of prejudice or harmlessness. The trial court erred, meriting reversal.

d. Applicable case law guiding the objective analysis of the prejudice prongs.

Several cases assist with the analysis.

Conahan v. State, 118 So.3d 718, 729 (Fla. 2013), rejected a Giglio claim, in part due to harmlessness demonstrated from substantial other evidence, as here. Indeed, here, the other evidence is substantially stronger than in Conahan, where it was primarily based on the relationship between the defendant and victim and Williams rule evidence, whereas here, among other compelling evidence, Dougan confessed multiple times to multiple

people, including on tapes that he recorded in his voice using words he scripted.

Zeigler v. State, 2013 WL 6017356, *1 (Fla. Nov. 13, 2013)(unpublished), affirmed the summary denial of a Giglio claim, pointing to harmlessness due to "significant evidence that Zeigler committed the murders, including the testimony of Williams that Zeigler lured him to the store that evening and tried to kill him, but was unsuccessful because his gun jammed." Here, as bulleted above and narrated in the STATEMENT OF THE CASE AND FACTS supra, the evidence was stronger than the "significant" level in Zeigler.

Wickham v. State, 124 So.3d 841, 856 (Fla. 2013), rejected a Giglio claim on alternative grounds, including harmlessness. There, the claim was "that the State committed a *Giglio* violation by failing to correct Moody's testimony that he had received the maximum sentence for his crimes when his sentence was amended as a result of his plea deal so that his ten-year sentences would run concurrently." There, "[t]he jury was made aware that he had entered into a plea deal and of the sentence he received." Wickham held that "there is no reasonable possibility that Moody's statement that he thought he received the maximum sentence affected the outcome. It was harmless beyond a reasonable doubt." Here, while Hearn had not yet been sentenced when he testified on February 28, 1975, the jury was repeatedly made aware that there was a plea deal and the magnitude of the deal reducing Hearn's

penalty exposure from possible death or life with a minimum of 25 years to life with no minimum 25 years, and the last cross-examination the jury heard indicated that Hearn could receive as little as a year in prison. See also State v. Knight, 866 So.2d 1195, 1202-1203 (Fla. 2003)(no prejudice; "the seven unattributed, unsigned, and undated statements contain limited and conflicting information regarding Muhammad's state of mind around the time of the murder"; the allegedly suppressed employee statements was cumulative to information from employee depositions"). And, here, evidence of guilt was overwhelming.

Here, as in Moore v. State, 2013 WL 6223205, *5 (Fla. 2013), there was other evidence of the defendant's guilt, including a witness "who heard Moore confess on multiple occasions and discuss significant details regarding the murder." Although in Moore, there was also an eyewitness, here Dougan confessed multiple times to multiple people and in his self-scripted recordings and the overlapping and mutually corroborating nature of the evidence remains overwhelming. Concerning the Giglio claim, Moore held "there was no reasonable possibility that this error in the chronological order pertaining to the battery on Brinkley and the altercation between Moore and Jackson could have affected the jury's verdict." Here, there is even less than "no reasonable possibility."

Moore, 2013 WL 6223205, *6, also held, concerning another Giglio claim, that "even if Clemons' statement at the evidentiary hearing could be interpreted to mean that a valid plea deal existed at the time of Moore's trial, the statement pertaining to the plea deal would not be material because there is no reasonable possibility that it could have affected the jury's verdict." In Moore, and here, the jury knew that the witness was "initially offered extremely favorable terms in the initial plea agreement" and was motivated to testify for the State, there because the plea deal might not have been finalized and here because, when Hearn testified, he had no assurance exactly what sentence he would receive for Second Degree Murder – anywhere from "one year, two years, whatever."

Rodriguez v. State, 39 So.3d 275, 289-90 (Fla. 2010), upheld the denial of a claim that "the State violated *Giglio* and *Brady* by suppressing information that in order to obtain Luis's cooperation in testifying against Rodriguez, Luis was provided with special accommodations, including unsupervised visits with his family and being permitted to have sexual relations with his wife while in jail." Concerning the prejudice prong, "even assuming the change of testimony that the police may have known about the sexual relations, the jury was already aware that Luis was being provided with special treatment and that the police knowingly permitted him to have some private time with his wife. Therefore, Rodriguez

cannot establish either materiality or prejudice." Here, the jury was already aware that Hearn was given a sweet deal, Hearn was otherwise cross-examined at length and repeatedly, and the evidence of guilt is overwhelming. See also Wickham v. State, 124 So.3d 841, 852 (Fla. 2013)(rejected Brady claim; no prejudice; other impeachment of the witness; "Moreover, other evidence supporting CCP would not have been affected by this impeachment").

The case law supports reversal of Judge Johnson's findings concerning the prejudice-related prongs of Brady and Giglio.

4. The trial court erred in its accumulation of its finding of a Brady violation of non-disclosure with its finding that the State failed to correct "misrepresentations to the jury … [thereby] bolster[ing] … [the] Court's conclusion that Defendant was prejudiced." (PCR/12 2223)

In its harmless ruling, the trial court's reasoning was erroneous in yet another way. The trial court weighed the supposed Brady violation of nondisclosure of the supposed additional scope of the plea deal on top of the supposed Giglio failure of the State to correct Hearn's testimony about the same supposed nondisclosure. Thus, the trial court improperly double-weighed the same supposedly undisclosed information and failed to properly analyze the relative significance of that information vis-a-vis the other evidence of impeachment and the other evidence of Dougan's guilt. See the preceding subsections. This was error. The trial court should be reversed.

5. The trial court erred by concluding that it was significant as a matter of law that the prosecutor opined at some point prior to the 1987 resentencing that Hearn was hostile to the State. (PCR/12 2221)

The trial court reversibly erred in its apparent ruling that Brady material warranting relief was based upon a prosecutor's opinion in a memorandum that Hearn was "hostile" prior to the 1987 resentencing (See CLAIM III at PCR/7 1138). There are four reasons, individually and cumulatively, supporting reversal of the trial court.

First, the state respectfully submits that the trial court's reasoning does not facially make sense. The order states that the information concerning the witness's hostility "could have contributed to Mr. Hearn's motivation to testify at Defendant resentencing, of which the jury should have been made aware." (PCR/12 2221) If anything, "hostility" would tend to show a motive for the witness not to testify in the State's case. In any event, the trial court's reasoning is speculation, not supported by competent substantial evidence.

The second reason is related to, and supports, the first reason. It also answers the question Dougan's 1987 counsel asked at the postconviction evidentiary hearing: "what did the State do to get him to assist them?" (PCR/17 3114) At the postconviction evidentiary hearing, Stephen Kunz, lead prosecutor at the 1987 penalty phase, and Hearn explained that Hearn did not want to attend the 1987 sentencing, not that his testimony had changed in

any way. More specifically, Mr. Kunz, explained that his reference to "hostile" in his memorandum to the State Attorney "may have just been nothing more than reluctant to come in and testify again …." Mr. Kunz continued: "[H]e [Hearn] was not anxious to come to testify at a retrial 13 years later." (PCR/17 2953-54) This desire not to testify says nothing about the truthfulness of his testimony in 1987. Indeed, by 1987, Hearn had already pocketed his plea to Second Degree Murder, and he had already been released from prison and had a job in Tampa. Mr. Kunz testified:

> He just did not want to. He did not -- not that he changed his story, not that he changed his testimony. My recollection at that time was he just did not want to be involved any further. He'd testified 13 years earlier. And he received a sentence. He'd done his sentence and he was not anxious to be involved. [PCR/17 2954]

Accordingly, Hearn testified that he now lives in Tampa and is self-employed in the "[f]ence business, real estate business." (PCR/18 3179) His parole was terminated in 1985. (PCR/18 3188) When asked whether he was hostile to the State about returning to testify gain in 1987, he responded, "I didn't want to testify" (Id. at 3190), but "[t]hey sent me a subpoena" (PCR/18 3190; accord id. at 3191). He continued: "And I talked to the lawyers, and they said I had to go." (PCR/18 3191) [It also appears that Hearn was not eager to testify at the postconviction evidentiary hearing. (See PCR/16 2791, 2866-70, 2928; PCR/17 3054-55)] See also Hurst v. State, 18 So.3d 975, 991 (Fla. 2009)(witness called at trial by the State, Anthony Williams, attempted to recant at

postconviction and indicated that "on the day of trial he told the prosecutor that he did not want to testify and the prosecutor responded "'that I knew to do the right thing and he would take care of me in the long run'"; affirmed trial court's ruling that no Brady or Giglio violation).

Third, the conclusory, general opinion of a prosecutor concerning a witness is not Brady (or Giglio) material. A general conclusion that a witness is "hostile" is less Brady-ish material than a prosecutor opining in a memorandum that "[t]he case is borderline on sufficiency of evidence, which is totally circumstantial,'" Duest v. State, 12 So.3d 734, 745-46 (Fla. 2009). Like Duest, here a general conclusion of "hostile" is "pure opinion." Indeed, if anything, Hearn's 1987 testimony incriminating Dougan would have been buttressed by knowledge that he testified in spite of his "hostility."

Fourth, the generality of the "hostile" opinion also negates Brady prejudice (and renders it well beyond Giglio's harmless), and, indeed, Hearn testifying in 1987 in spite of his desire not to attend another trial probably would have even buttressed his incriminating testimony. In any event, a prosecutor's opinion of "hostility" of Hearn pales in comparison with the totality of evidence amassed against Dougan. As discussed in the STATEMENT OF THE CASE AND FACTS supra, the evidence of Dougan's involvement in the murder introduced at the 1987 resentencing remained

overwhelming, including, for example, Dougan's tape recordings; Dougan's execution note left with the victim's body; and testimony from Dr. Schwartz, Hearn, Bess; Black (1975 testimony read), and Mattison. Moreover, Hearn's plea and less-than-five-year sentence were disclosed to the 1987 jury. The prosecutor's opinion of "hostility" was absolutely inconsequential in the 1987 resentencing under any legal theory.

F. Conclusion.

For the foregoing reasons, individually and cumulatively, the State respectfully submits that the trial court granting relief on CLAIM III should be reversed, and the trial court should be directed to enter an order denying CLAIM III. Dougan's 1975 conviction for the First Degree Murder of Stephen Orlando and Dougan's 1987 death sentence should be validated as lawful.

ISSUE II (IAC GUILT PHASE): DID THE CIRCUIT COURT ERR IN RULING THAT DOUGAN PROVED THAT HIS COUNSEL IN THE TRIAL'S 1975 GUILT PHASE WAS INEFFECTIVE UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION? (PCR/12 2269-70; PCR/12 2275-PCR/13 2277; PCR/13 2289-91)

CLAIM XI of Dougan's postconviction motion alleged IAC in the guilt phase and referenced the Sixth Amendment of the United States Constitution. (PCR/7 1156 et seq.) The trial court granted relief on two parts of CLAIM XI, each concerning IAC: (A) Two alleged conflicts of interest of Dougan's 1975 guilt-phase co-counsel, Ernest Jackson, primarily based on Mr. Jackson dating Dougan's sister and based on Mr. Jackson soliciting co-defendants

to represent on direct appeal to this Court (PCR/12 2269-70; PCR/12 2275-PCR/13 2277); and (B) Mr. Jackson's alleged prejudicial ineffectiveness because he "essentially presented no defense" (PCR/13 2289-91).

In ISSUE II, the State respectfully submits that in each aspect of the ruling granting relief in the guilt phase on IAC claims/sub-claims, the trial court erred, thereby requiring reversal.

As a threshold, but very important, matter, the State disputes the trial court's conclusion that Mr. Jackson "essentially presented no defense" (PCR/13 2289-91). The record does not support the finding, and therefore, a foundation for the trial court's ruling is fatally flawed, requiring reversal of its grant of relief on CLAIM XI. Therefore, next, the State covers Dougan's co-counsels' efforts in the guilt phase of the trial to refute the trial court's erroneous conclusion of "essentially … no defense" and to lay the factual groundwork for its argument that, if there was any judicially cognizable conflict of interest, it caused no harm. Coverage of trial counsel's efforts also provides a major component of the factual basis for the State's contention that there was no deficiency or prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

For its position that there was no harm or prejudice, the State also relies on the overwhelming evidence of guilt bulleted under

ISSUE I's "The overwhelming evidence of Dougan's guilt" sub-section and narrated under "The Murder and State's Case-in-Chief at the Guilt-Phase of the Trial" in the STATEMENT OF THE CASE AND FACTS supra.

THE TRIAL COURT ERRED IN FINDING THAT MR. JACKSON "ESSENTIALLY PRESENTED NO DEFENSE." (PCR/13 2290)

The trial record shows that Mr. Jackson did most of the on-the-record defense work, but Ms. Deitra Micks assisted. (See, e.g., DATT/I 104-105, 108; see also PCR/17 3074) Indeed, Ms. Micks delivered the opening statement for Dougan. (DATT/I 92-105)

Although guilt-phase co-counsel, Mr. Jackson, was deceased at the time of the 2013 postconviction evidentiary hearing, the trial record demonstrates that Mr. Jackson and his co-counsel, Deitra Micks, in fact, presented a competent defense, especially given the strength of the State's case, through their cross-examinations, presentation of defense evidence, and Mr. Jackson's closing argument that built upon their work on cross-examination and defense evidence. On cross-examination, through defense evidence, and in defense closing argument, defense themes stressed alibi, alternative suspects, and reasonable doubt.

Mr. Jackson's **cross-examination** elicited testimony that when the victim's body was first discovered, the witness did not see Dougan or any of the other defendants at the crime scene (DATT/I 195), a theme that he repeated in other cross-examinations (See DATT/I 140; DATT/II 368; DATT/VII 1213-14) and a theme that co-

counsel pursued in her cross-examination of Otis Bess (See DATT/VII 1304).

Mr. Jackson cross-examined the medical examiner about the shallow depth of a number of the stab wounds (DATT/I 136-37) and suggesting that the victim was not struck "with full force" (Id. at 138).

Mr. Jackson's cross-examination of Captain Williams highlighted what could be a glitch in the chain of custody (DATT/II 353) and in the witness disturbing the crime scene by turning over the body (Id. at 356).

His cross-examinations elicited testimony that witnesses did not see anything that appeared to be blood on the note. (DATT/II 368-70; DATT/VI 1056) Mr. Jackson's cross-examination of the medical examiner followed-up that there would have been blood on the note if it had been pushed on to the victim with a knife during the attack. (See DATT/VII 1338-43) Mr. Jackson's cross-examination elicited testimony that Dougan's fingerprints were not found on the handwritten note. (See DATT/VIII 1519-20, 1528-29) And, Mr. Jackson's cross-examination competently attempted to plant doubt in the handwriting expert's identification. (See DATT/VI 1121-28)

Mr. Jackson used witnesses' prior depositions and other prior statements to impeach them (See DATT/III 537-39; DATT/V 961-64, 965, 974-75; DATT/VI 1190-93; DATT/VIII 1431-32, 1436-37, 1442-43,

1455-56), demonstrating that there was extensive pre-trial discovery. In one of the instances, Mr. Jackson cross-examined a witness who said she saw a note at the crime scene, using her deposition testimony that she did not get very close to the body and did not initially see the note. (DATT/I 175-76) Ms. Micks also used a deposition in her cross-examination of Mr. Bess. (See DATT/VII 1299-1300)

Mr. Jackson's cross-examination of Vivian Carter elicited testimony that she did not know how long she kept the weapons in her home before she threw them in the creek, and she admitted that she could not recall seeing Dougan with any of the weapons. (DATT/III 505-506) She said that when the police came, she did not recall Dougan or his companions with any pistols. (DATT/III 511) On Jackson's cross-examination, the witness suggested that Dougan and his companions were in her home to protect her because she could get no assistance from the police. (See Id. at 506-510) Mr. Jackson proffered evidence that when the police did not respond to her demand that they leave her house, she tussled with them, but Dougan and his companions did not. (DATT/III 514-16) In front of the jury, on Jackson's cross, Ms. Carter clarified that she did not know if the gun she threw in the creek was a .32, a .22, or a .38, and she could not identify the gun, nor did she know who brought it there. (DATT/III 519) And, on Mr. Jackson's cross of the firearms expert, he ensured it was clear that the parts of a

bullet recovered from the victim's body were not identified as being fired from the recovered gun. (DATT/VIII 1561)

When the prosecutor attempted to have a witness display weapons recovered from the creek, Jackson's objection that they were not then in evidence was sustained. (DATT/III 528)

In another instance, Mr. Jackson crossed the medical examiner about a mistake on the death certificate regarding time of death. (See DATT/VII 1329-30) On another cross-examination, Mr. Jackson developed a conflict between two witnesses concerning whether everything on the tapes was written down. (Compare DATT/IV 705 with 720) Mr. Jackson was able to elicit from another witness that he was "confused" (DATT/IV 769) and suggest that other witnesses' memories were fuzzy (See DATT/V 842-43, 907-908, 911-12).

In Mr. Jackson's cross-examination of William Hearn, Hearn admitted that he rendezvoused with the prosecutor at the crime scene. (DATT/VIII 1435) At one point, Hearn admitted on cross-examination that he could not see the body of the victim and that he did not actually see Dougan fire the weapon. (DATT/VIII 1451-52) Hearn admitted to Jackson that he did not mention this killing to anyone except his companions until after he was charged with it. (DATT/VIII 1484) Hearn "never saw him [Dougan] use anything except as far as aspirin." (DATT/VIII 1457)

Mr. Jackson's cross-examination covered the defense theme that information in the tape recordings was covered in the media. (See

DATT/V 994-95; DATT/VI 1198-DATT/VII 1203; DATT/VIII 1438-39) Ms. Micks continued this theme in her cross-examination of Otis Bess. (See DATT/VII 1296-97)

Therefore, through his (and his co-counsel's) cross-examinations, Mr. Jackson set-up Dougan's defense that he was not at the murder scene, but rather at his father's house, he made the tapes based on information he obtained from others, and there are flaws in the State's case and alternative suspects constituting reasonable doubt.

Defense witnesses that Dougan' co-counsel called in the guilt phase built upon themes established through their cross-examinations. In the trial's 1975 guilt phase, Dougan took the stand, and in response to Mr. Jackson's direct-examination questions, he said he was at his father's house the night of the murder. (DATT/IX 1608-1609) He admitted making the tapes "taking credit" for killing the victim, but he said he obtained the information from other sources and did not participate in the murder. (DATT/IX 1608, 1614-15) Dougan denied writing the note found on the victim's body. (DATT/IX 1611)

Mr. Jackson called Dougan's father to the stand and the father supported Dougan's alibi. (See DATT/IX 1750-51)

The defense also elicited testimony that someone had moved the body (DATT/IX 1632-33) and called witnesses whose testimony suggested others who were in the area and had .22 caliber weapons

and therefore could have committed the murder (See DATT/IX 1643-90, 1689-1711, 1715-26, 1738-42, 1753-60). He also followed-up on the possibility of available news or word-of-mouth about the murder. (See Id. at 1712-16).

Mr. Jackson's closing argument was built upon the groundwork he laid through cross-examination and defense witnesses, including Dougan himself, that Dougan was not at the crime scene and there was reasonable doubt. (See DATT/XI 2053-2097) Defense counsel attacked the significance of the tapes, arguing that it was made out of "frustration of young black Americans" not because Dougan murdered someone. (Id. at 2074) He tied-in his voir dire:

> … I asked you before you took your seat as a juror would you conscientiously make an effort to make a distinction between the making of a tape and the alleged killing, and you promised me that you would … we are not here being tried for making tapes or making obscene statements.

(Id. at 2074-75)

He highlighted that the State failed to show that Dougan, as a witness, has any criminal record. (See Id. at 2091-97). He also impressed upon the jury its serious responsibility in deciding whether to take away Dougan's life and freedom. (See ATT/XI 2054-55, 2071-72)

In spite of Mr. Jackson's competent efforts, as assisted by Ms. Micks, the 1975 defense's burden was hopeless in light of the overwhelming evidence against Dougan, which also negates any judicially cognizable prejudice. See facts bulleted in ISSUE I's sub-section entitled "The overwhelming evidence of Dougan's

guilt"; "The Murder and State's Case-in-Chief at the Guilt-Phase of the Trial" in the STATEMENT OF THE CASE AND FACTS.

The jury finding of guilty in this case does not reflect a deficiency on the part of Mr. Jackson and Ms. Micks, but rather it is the result of the strength of the State's case. The trial court erred in finding that "[t]trial counsel essentially presented no defense." (PCR/13 2290) There was no competent substantial evidence for such a finding. The trial court's finding should be reversed and therefore its CLAIM XI rulings granting relief should also be reversed.

Trial counsels' competent defense of Dougan negates each of the two theories on which the trial court granted relief, which the State discusses next.

IIA. (IAC GUILT PHASE, CONFLICT OF INTEREST): DID CIRCUIT JUDGE JOHNSON ERR IN RULING THAT DOUGAN'S 1975 GUILT-PHASE TRIAL COUNSEL HAD "AN ACTUAL CONFLICT OF INTEREST [THAT] ADVERSELY AFFECTED COUNSEL'S PERFORMANCE"? (PCR/12 2269-70; PCR/12 2275-PCR/13 2277)

The trial court erred in its ruling that a new guilt-phase trial is required because Dougan's 1975 trial co-counsel, Ernest Jackson, was dating Dougan's sister during the trial (PCR/12 2269-70) and because Mr. Jackson solicited appellate representation of co-defendants during the 1975 proceedings (PCR/12 2275-PCR/13 2277). Dating a defendant's sister and, at some point prior to an appeal, wanting to represent co-defendants **on appeal** did not create a judicially cognizable actual conflict of interest **at the**

trial. There also was no showing of a link between Mr. Jackson dating Dougan's sister or his interest in representing other defendants on appeal and deficient performance during the trial. Instead, as summarized in the preceding section, Mr. Jackson, assisted by Deitra Micks, vigorously cross-examined state witnesses, argued objections, put on several witnesses in Dougan's defense, including Dougan, and vigorously advocated in closing argument. Their performance was not cognizably deficient for either conflict-of-interest harm or Strickland prejudice.

1. Trial Court's Ruling.

Dougan raised a conflict sub-claim as part "A" of CLAIM XI of his amended postconviction motion (PCR/7 1156-65). The trial court's order indicated that "[a]t the least, … Mr. Jackson's relationship with Defendant's sister created a substantial risk" of "limit[ing]" his representation of Dougan, and the presence of Mr. Jackson's wife in the office while Mr. Jackson was dating Dougan's sister "suggests an active conflict was present" due to "hostility and tension." (PCR/12 2269) The trial court then indicated that evidence "suggest[ed]" that "Mr. Jackson's interests were impaired or compromised for the benefit of counsel that adversely affected his performance. Therefore, this Court finds that an actual conflict of interest adversely affected counsel's performance, and grants relief on this claim." (PCR/12 2269-70) Judge Johnson also stated that Dougan's 1975 co-counsel,

Mr. Jackson, preparing Defendant's father's will "create[d] a serious question" about Dougan's co-counsel's "interests and ability to effectively represent Defendant" at the time of Dougan's appeal. (PCR/12 2269)

The trial court also ruled that Dougan proved a judicially cognizable conflict of interest due to Ernest Jackson soliciting co-defendants to represent on appeal. (PCR/12 2275-PCR/13 2277) The trial court found that Mr. Jackson intended to represent co-defendants on appeal "before and during trial proceedings" (PCR/12 2275), moved to be appointed as appellate counsel for the co-defendants "within five days of Defendant's sentencing" (PCR/13 2276) and, concerning the supposed harm, faulted defense counsel for not "distinguish[ing] Defendant from his co-defendants at trial" (PCR/12 2275).

2. The Standard of Appellate Review.

Because the claim is allegedly based upon the Sixth Amendment of the United States Constitution (See PCR/7 1156), decisions of the United States Supreme Court apply.

Although for an actual conflict, the conflict must have "significantly affected counsel's performance," once that "significant" causal effect is demonstrated, Strickland prejudice for IAC is presumed. Mickens v. Taylor, 535 U.S. 162, 173 (2002).

Hunter v. State, 817 So.2d 786, 791-92 (Fla. 2002), cited to a leading case of Cuyler v. Sullivan, 446 U.S. 335 (1980), and

reviewed aspects of a conflict-of-interest claim and the standard for reviewing a ruling on it on appeal.

Herring v. State, 730 So.2d 1264, 1267 (Fla. 1998)(citing Buenoano v. Singletary, 74 F.3d 1078, 1086 n. 6 (11th Cir. 1996); Porter v. Singletary, 14 F.3d 554, 560 (11th Cir. 1994); Oliver v. Wainwright, 782 F.2d 1521, 1524-25 (11th Cir. 1986)), explained that "[t]o demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party." Herring continued: "Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under *Cuyler*, 446 U.S. at 350, 100 S.Ct. 1708, such a conflict is 'insufficient to impugn a criminal conviction.'"

Holloway v. Arkansas, 435 U.S. 475 (1978), involved a single defense counsel representing three co-defendants over his objection. Cuyler, 446 U.S. at 345, however, explained Holloway's application was limited "[g]iven the trial court's failure to respond to timely objections." Cuyler, 446 U.S. at 348, continued: "*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest."

Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), also involved attorneys representing multiple co-defendants, and stated:

> The Court of Appeals granted Sullivan relief because he had shown that the multiple representation in this case involved a possible conflict of interest. We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Subsequently, Mickens v. Taylor, 535 U.S. 162, 174-76 (2002), clarified that Holloway and Sullivan are limited to multiple representation situations, where one attorney represents multiple clients. Thus, Mickens, 535 U.S. at 174-75, expressly disapproved of applying conflict of interest in situations involving "a book deal," "a job with the prosecutor's office," "the teaching of classes to Internal Revenue Service agents," "**a romantic 'entanglement' with the prosecutor**," "or fear of antagonizing the trial judge."

Mickens, 535 U.S. at 175, emphasized that "'[U]ntil' … 'a defendant shows that his counsel **actively represented conflicting interests**, he has not established the constitutional predicate for his claim of ineffective assistance.' 446 U.S. at 350, 100 S.Ct. 1708 (emphasis added)." Mickens, 535 U.S. at 175, continued by explaining the significance of concurrent active representation of defendants:

> Both *Sullivan* itself, *see* id., at 348-349, 100 S.Ct. 1708, and *Holloway*, *see* 435 U.S., at 490-491, 98 S.Ct. 1173, stressed the high probability of prejudice arising from **multiple concurrent representation**, and the difficulty of proving that prejudice.

Mickens, 535 U.S. at 176, reserved ruling on successive representation: "we do not rule upon the need for the *Sullivan* [Cuyler] prophylaxis in cases of successive representation."

Accordingly, Nix v. Whiteside, 475 U.S. 157 (1986), reversed Whiteside v. Scurr's, 744 F.2d 1323, 1330 (8th Cir. 1984), application of the conflict-of-interest principle of Cuyler v. Sullivan, even though Whiteside entailed counsel's belief that the defendant's intended testimony would constitute perjury, counsel's intent to testify against the defendant at trial, and implicated the defendant's "Whiteside's constitutional right to testify in his own behalf by conditioning continued representation and confidentiality on Whiteside's limiting his testimony," 475 U.S. at 181. The United States Supreme Court explained, 475 U.S. at 176: "This is not remotely the kind of conflict of interests dealt with in *Cuyler v. Sullivan*."

Schwab v. Crosby, 451 F.3d 1308, 1324-25 (11th Cir. 2006), explained that, while the possible scope of Cuyler is unclear, Id. at 1327, Cuyler "itself covers only **active legal representation** of conflicting interests." Schwab, 451 F.3d at 1319, explained that "[o]n direct appeal Schwab argued that he had been denied effective assistance of counsel because his attorneys 'were placed in the unenviable position of discharging their duty of advocacy on behalf of their client at the risk of perhaps alienating those persons with whom they work on a daily basis.'" It then noted that

this Court "held that Schwab had failed to meet his burden of showing 'substantial prejudice' from the public defender's office's continued representation of him. *Schwab*, 636 So.2d at 5-6." Schwab, 451 F.3d at 1325, characterized "the [United States] Supreme Court's analysis in *Mickens* of whether its *Sullivan* [Cuyler] rule applies to conflict of interest situations other than the one involved in the *Sullivan* case" as "dicta" and therefore an "open question in Supreme Court jurisprudence." "However," the Eleventh Circuit reasoned, "there is dicta and then there is dicta, and then there is [United States] Supreme Court dicta." Collecting cases, Schwab continued, "'dicta from the Supreme Court is not something to be lightly cast aside.'" Schwab, 451 F.3d at 1328, held that the facts of its case do not satisfy the federal habeas standard of "'contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.'"

In sum, as guided by the United States Supreme Court's applications of the Sixth Amendment, as well as the Eleventh Circuit's interpretation of applicable United States Supreme Court cases, applications of conflict-of-interest are limited to narrow situations where one attorney represents multiple conflicting clients, and other potential applications should be rejected. See State v. Larzelere, 979 So.2d 195, 208-210 (Fla. 2008)("Florida follows the legal principles set forth in *Cuyler v. Sullivan*").

Compare Alessi v. State, 969 So.2d 430, 432, 435-37 (Fla. 5th DCA 2007)(explaining that this Court continues to apply Cuyler to various types of cases; collecting cases). See also Dennis v. State, 109 So.3d 680, 698 (Fla. 2012)("'work load' related to his other clients … overly speculative and hypothetical," insufficient); Chavez v. State, 12 So.3d 199, 210-11 (Fla. 2009)(rejected a postconviction claim based upon an alleged "conflict between the attorneys concerning the proper mitigation strategy").

Accordingly, a number of this Court's cases have analyzed alleged reasons for alleged attorney deficient conduct applying standard Strickland burdens. Bryan v. State, 748 So.2d 1003, 1009 (Fla. 1999), using standard Strickland analysis, rejected a claim concerning counsel's alcohol use. The use of alcohol did not rise to the level of a conflict. Subsequently, defendant Bryan raised the issue again through a motion to "open and release confidential records pertaining to his trial counsel's treatment for alcoholism." Bryan v. State, 753 So.2d 1244, 1247, 1249-50 (Fla. 2000). Bryan (2000) rejected the argument that "additional evidence concerning trial counsel's substance abuse would show why trial counsel conducted the defense as he did, thus undermining the perception that his conduct was based on trial strategy." This Court discussed and emphasized that the test under Strickland focuses on ineffectiveness and prejudice, not intoxication or

under-the-influence. Compare Barclay v. State, 444 So.2d 956, 958 (Fla. 1984)("'a codefendant whom counsel **is** also representing'"; quoting Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975)).

Indeed, if a postconviction defendant can pose a plausible reason for his counsel's performance and the reason is construed as "conflict," **it would erroneously lead to the Cuyler-Sullivan conflict principle swallowing, and making obsolete, much of Strickland jurisprudence**. Such a rationale and expansion of Cuyler v. Sullivan is not supported by the law or the policies on which Strickland jurisprudence is grounded.

3. The Trial Court Reversibly Erred.[7]

The trial court erred in ruling that there was an actual conflict on each of the matters it discussed in its "Conclusions." (PCR/12 2269-70; PCR/12 2275-PCR/13 2277) Under Mickens v. Taylor, Cuyler v. Sullivan, Holloway v. Arkansas, Nix v. Whiteside, Schwab v. Crosby, Dennis v. State, and Chavez v. State, none of them concerned a judicially cognizable relationship

[7] The State continues to object to any reliance upon affidavits. They are inadmissible and non-probative hearsay. See 90.801, 90.802, Fla. Stat.; Cf. Blackwood v. State, 777 So.2d 399, 411-12 (Fla. 2000)(hearsay regarding penalty phase). For example, the State continues to object to any use of the trial court of the hearsay of Deitra Micks' affidavit. (Compare PCR/12 2264-65 with, e.g., PCR/17 3007-3008)

constituting an actual conflict. None of them involved "multiple concurrent representation," Mickens, 535 U.S. at 175.

It is unclear if the **preparation of a will** is a material part of the trial court finding a conflict. (See PCR/12 2269) The trial court's finding of a "serious question" on the matter may not be a ruling that it constituted a conflict. For purposes of this appeal, the State assumes that it was a finding of cognizable conflict and thereby constituted error.

As a threshold matter, the will-preparation does not appear to have been alleged as an explicit ground in the amended postconviction motion (See PCR/7 1157-61), thereby making it improper to base a conflict ruling on it. Assuming that there was an underlying allegation for this ruling, it still remains erroneous. Given the proper scope of the Cuyler-Sullivan conflict principle, the trial court reversibly erred in any "**suggest[ion]**" that Cuyler-Sullivan applies to Mr. Jackson's representation of Dougan **during the guilt-phase trial** due to preparing Defendant's father's will **at the time of Dougan's appeal**. (PCR/12 2269) A ruling of "suggest[ion]" itself means reversible speculation, and the trial court's concern over a "serious question" does not rise to the level of Cuyler-Sullivan at all. Indeed, preparing a will for the family member facially fails to demonstrate a cognizable conflict. Further, even if somehow will-preparation were construed as conflicting representation, the trial court itself found that

the will preparation was not concurrent with the guilt-phase trial, thereby negating the application of actual conflict theory. See, e.g., Mickens, 535 U.S. at 175 ("multiple concurrent representation"). As such, no causal nexus has been demonstrated between the supposed conflict and a supposed harm during the guilt phase of the trial.

Likewise, the trial court's order that "[a]t the least, … Mr. **Jackson's relationship with Defendant's sister** created a substantial risk" of "limit[ing]" his representation of Dougan (PCR/12 2269) fails to apply the requisite standard of "multiple concurrent representation," and there is no "[a]t the least" or "substantial risk" in the standard. Indeed, Mickens expressly rejected "a romantic 'entanglement' with the prosecutor" as a basis for actual conflict, See 535 U.S. at 174-75. A fortiori, as a matter of law, "a romantic 'entanglement'" with a defendant's sister is not a ground for conflict.

Similarly, concerning the **presence of Mr. Jackson's wife in the office** while Mr. Jackson was dating Dougan's sister (PCR/12 2269) does not demonstrate "multiple concurrent representation." Indeed, here again, the trial court's conclusion that this "suggests an active conflict" (PCR/12 2269) is an erroneous ruling that speculation is a basis of a finding, which is itself error. A "suggest[ion] [of] an active conflict" (PCR/12 2269) is woefully

insufficient to justify overturning a conviction for First degree Murder.

The trial court's ruling of a conflict of interest due to **Ernest Jackson soliciting co-defendants to represent on appeal** (PCR/12 2275-PCR/13 2277) is also erroneous. As a threshold matter, Dougan's postconviction claim only alleged that "[i]mmediately after Mr. Dougan and his co-defendants were sentenced" (PCR/7 1161), Mr. Jackson solicited representation of co-defendants, the claim thereby facially failing to allege a basis for the trial court's ruling that the solicitation occurred "before and during trial proceedings" (See PCR/12 2275).

Furthermore, discussions concerning possibly representing co-defendants **in the future** do not demonstrate "multiple concurrent representation," Mickens, 535 U.S. at 175.[8] Instead, under the federal case law discussed supra, the conflict must be concurrent and must be actual, not just possible, under discussion, or anticipatory. Accordingly, the trial court's reliance upon Mr. Jackson moving to be appointed as appellate counsel for the co-defendants "within five days of Defendant's sentencing" (PCR/13 2276) was an event or status after the trial and thereby not the

[8] Indeed, even if actual conflict is construed to include the successive representation, the successive nature of it would apply to the subsequent representation, that is, to the appeal, not to the previous trial.

basis of a conflict during the trial or its preparation, and, also it was an attempt at post-trial representation, not itself "multiple concurrent representation."

Concerning Dougan's burden to show harm incurred from an actual conflict, the trial court also reversibly erred. As mentioned above, "suggest[ion]" of harm or a "substantial risk" of harm are not proof of an actual harm.

A supposed harm of not "distinguish[ing] Defendant from his co-defendants at trial" (PCR/12 2275) is also erroneous. This ruling reversibly overlooks the lack of causal link between an actual co-representation of co-defendants and concurrently harmed trial performance: A result during trial could not have flowed from a future co-representation on appeal. There also is no proved causal link between will-preparation, dating, or office-presence and not distinguishing Dougan from other defendants. Arguendo, even if future representation and other supposed conflicts were cognizable conflicts, the trial court's critique of trial counsel's trial strategy is itself unreasonable and overlooks the reasonable trial strategy guided by Dougan's alibi trial testimony that he was not at the crime scene. Given Dougan's self-chosen defense of alibi, it would have been incredulous to then argue that Dougan's actions at the murder scene were less culpable than the others present at the murder scene.

Thus, following Strickland's prohibition of the use of hindsight, a defendant's hindsighted desire for the defense to have pursued another path at trial does not demonstrate harm caused by conflict. See also Larzelere, 979 So.2d at 208-210 ("Larzelere failed to show that any interest her attorney may have had in minimizing costs was an actual, not merely potential, conflict that adversely affected her representation"; "Larzelere did not demonstrate that this act was adverse to her representation because the evidence shows that Wilkins and Howes hired another investigator, Don Carpenter, to continue McDaniel's work").

Given Mr. Jackson's and Ms. Micks performance at the trial and given the overwhelming evidence of Dougan's guilt, there was no cognizable reduction in the quality of the defense. Defense counsel presented a competent defense through cross-examination, defense evidence, and closing argument. Undoubtedly, the defense was not perfect, but the absence of perfection cannot be equated with harm; otherwise, harm could be found in every case, therby erroneously setting the conflict prnciple adrift beyond its moorings. Indeed, whatever imperfections in the defense were not proved to have been caused by the supposed conflicts. And, indeed, whatever imperfections in the defense pale in comparison with the overwhelming evidence of Dougan's guilt and Jackson-Micks' competent defense, rendering them inconsequential.

The State also disputes that the guilt-phase defense of Dougan was limited to Mr. Jackson's interests and efforts. In addition to Dougan's trial testimony obviously setting the parameters of the defense, Ms. Micks was co-counsel. Ms. Micks' status as co-counsel required Dougan to show that her representation was also compromised by Mr. Jackson's status and interests and that she did not play an active role in compensating behind the scenes for any supposed Jackson conflict. Here, Dougan might have attempted to meet this burden by testifying at the postconviction evidentiary hearing, but he did not take the stand. (See PCR/16 2789-90)

Because Dougan did not testify at the postconviction evidentiary hearing, the State also disputes any trial court rulings that Dougan was "unaware" and did not "waive[]" any conflict of interest" (PCR/12 2269; PCR/13 2276; see also Order at pp. 77, 86, 94, 96). There is no competent substantial evidence to support any findings concerning Dougan's awareness or discussions with his attorneys or attitudes concerning Mr. Jackson's situation.

ISSUE IIB (IAC GUILT PHASE): DID CIRCUIT JUDGE JOHNSON ERR IN RULING THAT, IN VIOLATION OF THE SIXTH AMENDMENT, 1975 GUILT-PHASE TRIAL DEFENSE COUNSEL WAS PREJUDICIALLY DEFICIENT BY "ESSENTIALLY PRESENT[ING] NO DEFENSE"?

The State's argument on this sub-claim relies on many of the same facts as in the conflict sub-claim. Although trial counsel did not testify at the evidentiary hearing, including the deceased co-counsel Mr. Jackson, his and Ms. Micks' trial performance

negates both of Strickland's prongs, especially given the overwhelming evidence of guilt that they faced.

1. The Applicable Standard.

Because Dougan failed to prove a cognizable conflict of interest claim, he bore the burden of proving the full measure of Strickland's prejudice prong. See, e.g., Mickens, 535 U.S. at 173 (2002).

For ineffective-assistance-of-counsel ("IAC") claims, Strickland, 466 U.S. 668, and its progeny impose upon the defendant rigorous burdens of demonstrating that defense counsel was deficient and that this deficiency was prejudicial. "[T]he *Strickland* standard requires establishment of both [the deficiency and prejudice] prongs …." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

For the **deficiency prong**, the standard for counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." Stein v. State, 995 So.2d 329, 335 (Fla. 2008)(quoting Strickland) "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight."

Strickland, 466 U.S. at 689. "[A]n attorney is not ineffective for decisions that are a part of a trial strategy that, in hindsight, did not work out to the defendant's advantage." "[O]missions are inevitable." Chandler, 218 F.3d at 1313. "[T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Id. at 1313. The standard also is not whether counsel would have had "nothing to lose" in pursuing a matter. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1411, 1419 (2009).

Dougan must establish that his counsel's performance was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997).

A defendant's claim that his trial counsel did not pursue a defense vigorously enough should be summarily denied if, in fact, evidence supporting the defense was actually submitted to the jury. See Davis v. State, 928 So.2d 1089, 1119-20 (Fla. 2005).

For Strickland's **prejudice prong**, Dillbeck v. State, 964 So.2d 95, 99 (Fla. 2007)(quoting Strickland, 466 U.S. at 694), summarized: "To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

For any claim on which an evidentiary hearing is granted, the determinations of Strickland's prongs are not measured by the volume of the postconviction evidence but rather how it measures up to the specific Strickland criteria. See, e.g., Hannon v. State, 941 So.2d 1109, 1136 (Fla. 2006).

"Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo." Hurst v. State, 18 So.3d 975, 996 (Fla. 2009)(citing Sochor v. State, 883 So.2d 766, 771-72 (Fla. 2004).

2. The Trial Court's Ruling Reversibly Erred.

The trial court's ruling concerning this sub-claim, which it labeled as "Conclusions," discussed various defense actions throughout the trial, including attacking the note, lack of fingerprints, attacking the significance of the tape recordings, attacking Mr. Hearn, and inconsistency concerning the alleged use of the .22 pistol. (PCR/13 2289-90) The trial court then criticized defense counsels' failure to corroborate Dougans' and his father's trial testimony "by a disinterested source." (PCR/13 2289-90) The trial court also faulted defense counsels for calling a witness who testified "contrary to his stated theory of defense." (Id.)

The trial court then concluded that "[t]rial counsel essentially presented no defense" and that Defendant met his burdens of overcoming "the presumption of … sound trial strategy" and of prejudice" and granted relief "as it relates to the guilt phase of Defendant's trial." (Id. at 2290-91)

As discussed at length in the section "THE TRIAL COURT ERRED IN FINDING THAT MR. JACKSON "ESSENTIALLY PRESENTED NO DEFENSE" supra, the trial court erred in concluding that "[t]rial counsel essentially presented no defense." Indeed, the first paragraph of the trial court's "Conclusions" contradict this ruling. Therefore, a foundation finding for the trial court's grant of relief on this sub-claim is fundamentally flawed, indicating that it does not properly analyze the record and properly apply the law.

Moreover, the two supposed deficiencies on which the trial court relied for its ruling -- failing to call more corroborating witnesses and surprise and attempted impeachment of a defense witness -- erroneously overlook the extensive performance-proving actions of defense counsel throughout the guilt phase of the trial, as summarized in the section "THE TRIAL COURT ERRED IN FINDING THAT MR. JACKSON "ESSENTIALLY PRESENTED NO DEFENSE" and narrated in the Statement of the Case and Facts. Contrary to the trial court's ruling, defense counsels established a theme in multiple cross-examinations that stressed deficiencies in the State's case, suggested that there were alternative suspects,

attempted to explain Dougan's tape recordings, and emphasized that no one other than Hearn actually saw Dougan at the scene, thereby buttressing the alibi testimony from Dougan and his father.

Concerning the trial court's ruling that defense counsels were deficient due to a failure to corroborate Dougan's alibi other than his father, the trial court failed to find that any specific evidence was available for the 1975 trial that any reasonable attorney should have found then and used at the trial. (See PCR/13 2290) Specific facts demonstrating deficiency cannot be assumed; they must be proved. Since the trial court failed to find any specific evidence that might have been presented at trial, it did not even engage in erroneous speculation. The trial court's ruling palpably violated the presumption of non-deficient performance. The trial court's ruling should be reversed. See, e.g., Morris v. State, 931 So.2d 821, 831 (Fla. 2006)("Because Barfield did not testify at the evidentiary hearing to establish what testimony he would have offered at the guilt phase of Morris's trial, we cannot determine how Barfield's testimony at trial would have affected the verdict"); Gore v. State, 24 So.3d 1, 14 (Fla. 2009)(failure to show "any other available witness that counsel should have presented at the *Spencer* hearing that would undermine our confidence in the outcome of his penalty phase … meritless"); Nelson v. State, 875 So.2d 579, 583-84 (Fla. 2004)(prima facie proof of a claim includes "what testimony defense counsel could

have elicited from witnesses and how defense counsel's failure to call, interview, or present the **witnesses who would have so testified** prejudiced the case."); cf. Reed v. State, 875 So.2d 415, 421-28 (Fla. 2004)(extensive analysis of multiple items of postconviction scientific evidence, including holding that "circuit court correctly noted that Reed failed to present evidence indicating that Scott's identification of the print was in error").

Davis v. State, 928 So.2d 1089, 1119-20 (Fla. 2005)(citing Patton v. State, 878 So.2d 368, 373 (Fla. 2004)), is instructive. There, "Davis's claim … is ultimately that the voluntary intoxication defense was not pursued as vigorously as it should have been because trial counsel failed to present additional witnesses who had knowledge of Davis's intoxication." Davis rejected the claim because evidence supporting the defense was, in fact, presented at trial. Davis held that "this claim was properly denied." Here, the trial court should have denied this claim because counsel did present an alibi defense. The trial court's requirement of cumulative evidence is erroneous. See, e.g., Diaz v. State, 132 So.3d 93, 109 (Fla. 2013)("counsel does not render ineffective assistance by failing to present cumulative evidence"); Victorino v. State, 127 So.3d 478, 500 (Fla. 2013)("trial counsel did not err by not calling Edwards because her testimony would have been cumulative to other penalty phase

witnesses"); Dennis v. State, 109 So.3d 680, 694 (Fla. 2012)("record demonstrates that trial counsel did present the arguments that Dennis now contends were inadequately presented due to trial counsel's failure to investigate other suspects"); Jones v. State, 928 So.2d 1178, 1186-87 (Fla. 2006)(evidence defense counsel presented through lay witnesses at trial versus postconviction expert testimony; "Counsel does not render ineffective assistance by failing to present cumulative evidence"; citing Cole v. State, 841 So.2d 409, 425 (Fla. 2003)); Brown v. U.S., 720 F.3d 1316, 1327-28 (11th Cir. 2013)("The central problem Brown faces is that much of the evidence he now offers is cumulative"; citing Ford v. Hall, 546 F.3d 1326, 1338 (11th Cir. 2008) ("Counsel is not required to call additional witnesses to present redundant or cumulative evidence"); Marquard v. Sec'y, Dept. of Corr., 429 F.3d 1278, 1307 (11th Cir. 2005)). Indeed, the trial court's ruling erroneously did not even point to specific available and admissible cumulative evidence of the alibi that was omitted.

In an analogous area, where the postconviction defense has managed to find another expert who could have testified more favorably than an expert that defense counsel used at trial, the defense fails to meet its Strickland burdens. See, e.g., Rivera v. State, 859 So.2d 495, 504 (Fla. 2003)("This Court has held that counsel's reasonable mental health investigation and presentation

of evidence is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert'"; quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)). Here, the trial court's ruling deficiently failed to even specify the "more favorable" evidence that was available at trial and that any reasonable attorney would have found and used.

The trial court's order is erroneously deficient, not trial counsel's performance.

The failure of the trial court's order to specify the omitted available evidence also fatally flaws its conclusion concerning Strickland's prejudice prong. There can be no meaningful evaluation of the prejudice prong without specifying the admissible and available evidence that was omitted so its weight relative to the other evidence in the case can be determined. See, e.g., Dillbeck; Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447 (2009). Thus, Lott v. State, 931 So.2d 807, 815 (Fla. 2006), evaluated the quality of a specific postconviction alibi witness's testimony and determined that "Our confidence in the verdict is not undermined by Jones's vague testimony." Accord Lott v. Attorney General, Florida, 594 F.3d 1296, 1302 (11th Cir. 2010)(denying a COA, "Jones of minimal value as an alibi witness").

Moreover, even if the trial court had specified available and admissible evidence supporting Dougan's alibi, the nature of this

evidence as cumulative would not have demonstrated Strickland prejudice. See, e.g., Diaz v. State, 132 So.3d 93, 111-12 (Fla. 2013)("defendant is not prejudiced by trial counsel's failure to present cumulative evidence"); Wyatt v. State, 78 So.3d 512, 531 (Fla. 2011)("defendant can show neither ineffectiveness nor prejudice by asserting that his counsel failed to present testimony that would have been cumulative to testimony the jury already heard"; citing Stewart v. State, 37 So.3d 243, 258 (Fla. 2010)); Ponticelli v. State, 941 So.2d 1073, 1098 (Fla. 2006)("our finding that Ponticelli has not established that counsel's deficient investigation prejudiced him is supported by the fact that the mental health expert testimony presented at the evidentiary hearing is largely cumulative to Dr. Mills' testimony presented at the penalty phase"); Cf. Ventura v. State, 794 So.2d 553, 567 (Fla. 2001)("the impeaching material from the interview which was not utilized by defense counsel can only be described as cumulative").

Indeed, here, the overwhelming nature of the incriminating evidence and defense counsels' obvious other efforts for Dougan at trial render any deficiency non-prejudicial. See incriminating evidence bulleted supra in "The overwhelming evidence of Dougan's guilt"; defense counsel's efforts discussed supra in "THE TRIAL COURT ERRED IN FINDING THAT MR. JACKSON "ESSENTIALLY PRESENTED NO DEFENSE." See also Hunter v. State, 817 So.2d 786, 796 (Fla.

2002)("Hunter's argument as to prejudice based upon trial counsel's failure to use the photographs overlooks the extensive trial testimony and evidence establishing Hunter's guilt").

Similarly, the overwhelming evidence of Dougan's guilt and defense counsel's other efforts for Dougan at trial render erroneous the trial court's ruling based upon defense counsel's examination of a witness then attempting to impeach him. (PCR/13 2290) At this juncture in the trial record, the interchange between the Judge and defense counsel indicated reasonable trial preparation that, in addition to deposing "these witnesses,"[9] defense counsel Mr. Jackson had personally[10] interviewed them prior to putting them on the witness stand that morning. (DATT/IX 1742) This event constituted neither Strickland deficiency or Strickland prejudice.

Judge Johnson's order cites to 9 snippets of transcript that she rules were contrary to the "theory of defense." (PCR/13 2290) The order, therefore, admits that there was, in fact, a theory of defense. Witnesses' deviation from what s/he was reasonably expected to say, especially where based on a deposition and interview, like here, does not demonstrate Strickland deficiency.

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[9] "These witnesses" is ambiguous, thereby failing to reach a level of Strickland deficiency or prejudice.

[10] Also, Mr. Jackson's response to the trial judge did not demonstrate that his co-counsel, or any others on the defense's behalf, failed to talk to witnesses any other time.

McCoy v. State, 113 So.3d 701, 722-23 (Fla. 2013), is instructive. There, the witness' failure to testify as counsel expected did not constitute Strickland deficiency. And, as here, "postconviction counsel failed to present any evidence to indicate that trial counsel was remiss or untimely in locating the witnesses."

Moreover, when the snippets cited in the order are examined, their subjects do not rise to the level requisite for Strickland deficiency or prejudice, given other defense counsel actions on Dougan's behalf and the State's evidence amassed against Dougan: Langston's testimony regarding turning the body over supported the defense and was not substantially inconsistent with the deposition (See DATT/IX 1632-36), thereby indicating that if defense counsel had been allowed to further highlight it through the deposition, it would have further supported the defense. Defense counsel's examination of Peters (Id. at 1658, 1665-79) was, under Strickland, a reasonable attempt to elicit negative aspects of the victim's character, Compare Parker v. Secretary for Dept. of Corr., 331 F.3d 764, 787-88 (11th Cir. 2003)(Florida case; "Creating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but "is perhaps the most effective strategy to employ at sentencing") with Rose v. State, 675 So.2d 567, 573 (Fla. 1996)("residual or lingering doubt, a claim which this Court has repeatedly held is not an appropriate matter to be

raised in mitigation during the penalty phase proceedings of a capital case"); defense counsel examination of Peters reasonably corrected her trial testimony to make it consistent with her deposition (See Id. at 1686) on a matter that is relatively inconsequential; use of Beaver's deposition reasonably refreshed his memory (See Id. at 1704-1706); a prosecutor objection to a defense question of Mallory was overruled (Id. at 1712-14), making the examination facially reasonable; questions of Clark (See Id. at 1722-30) reasonably attempted to emphasize the availability of information concerning the murder, which was consistent with Dougan's story that he made the tape based on information he received elsewhere; defense counsel's refreshing the memory of Mattison to emphasize a pro-defense point (See id. at 1740-42) was reasonable and allowed by the trial judge; and, defense counsel's questions of Brown (See Id. at 1754-55) were a win-win for the defense and therefore a reasonable strategy, where if he answered that other suspects were investigated then other suspects would be highlighted and if he answered that others were not investigated then there would be an appearance of sloppy police work. Therefore, the 9 instances do not demonstrate Strickland deficiency or Strickland prejudice. The trial court erred.

In sum, the trial court failed to support its ruling by showing competent substantial evidence that supported it. The trial court showed neither Strickland deficiency nor Strickland prejudice.

Indeed, a foundation for the trial court's ruling, that there was no defense, was flat-out wrong. The trial court's ruling granting Dougan a new guilt-phase trial should be reversed.

Yet further, the State also notes that it does not appear that these IAC sub-claims were specifically raised in Dougan's amended postconviction motion (See PCR/7 1165-75), and therefore, they cannot be the basis of relief. See, e.g., Kearse v. State, 969 So.2d 976, 989 (Fla. 2007)(claim insufficient where it in "conclusory fashion and without any argument," alleged "(1) that counsel was ineffective for failing to cross-examine or impeach witnesses"; overruled on other ground Wyatt v. State, 71 So.3d 86, 99-100 (Fla. 2011)).

ISSUE III (IAC 1987 PENALTY PHASE): DID CIRCUIT JUDGE JOHNSON ERR IN RULING THAT, IN VIOLATION OF THE SIXTH AMENDMENT, 1987 PENALTY-PHASE TRIAL DEFENSE COUNSEL WAS PREJUDICIALLY DEFICIENT IN NOT CALLING A MEDICAL EXPERT AS A WITNESS CONCERNING THE SEQUENCE OF WOUNDS? (PCR/13 2364-73)

The trial court also erroneously granted relief on CLAIM XVIIIF. The claim alleged that Robert Link, Dougan's counsel at the 1987 resentencing hearing in front of a jury, was unprepared to cross-examine the medical examiner. (PCR/7 1226-27) However, the trial court's order ruled on a different ground, that is, that Mr. Link should have "had a witness to rebut the State's medical examiner's testimony" (PCR/13 2372); the claim failed to allege the trial court's supposed basis for relief, requiring reversal. Moreover, the claim alleged no specificity concerning what

specific questions should have been asked of an expert that were not asked, rendering it facially deficient. See, e.g., Jennings v. State, 123 So.3d 1101, 1123 (Fla. 2013)("does not allege what specific information other experts would have been able to offer or how this presentation would have impacted the case. Without more specific factual allegations about how …, trial counsel cannot be deemed deficient"); Booker v. State, 969 So.2d 186, 196 (Fla. 2007)("clearly a lack of specificity as to the substance of the testimony that these witnesses would have offered").

Indeed, Dougan's postconviction motion failed to show how the medical examiner's 1987 testimony conflicted with his 1975 testimony, thereby requiring denial of this claim. See Butler v. State, 100 So.3d 638, 654 (Fla. 2012)("Because the statements are not inconsistent, trial counsel's failure to raise the issue during cross-examination was not deficient and did not result in prejudice to Butler").

Moreover, the supposed foundation that the trial court tendered for its ruling that there was no non-medical-examiner evidence of HAC was fundamentally flawed, thereby requiring reversal. Contrary to the trial court's conclusion that there was no evidence that the "Victim 'begged for his life," (PCR/13 2371) Dougan's taped confession explicitly admitted to this fact (ReSent/XXXIII 1174, 1176), thereby providing direct evidence of it. Dougan stated:

> He begged, oh yes, he begged for mercy as did my people when you murdered them, and we gave him no mercy. That's right, no

> mercy. For every time I pulled the trigger, every time I saw the knife go inside his body, satisfaction came unto me because I knew, I knew that the people who died because of his ancestors and because of you, were now are being repaid.

(RSent/XXXIII 1174) In another tape, Dougan stated, "He begged for mercy …." (Id. at 1176) Dougan said that the victim was "executed" (Id. at 1173), and the victim was "only shot twice in the head" because the gun jammed (Id. at 1174, 1176).

Bess testified that Dougan admitted that the victim begged for Dougan not to hurt him. (ReSent XXXII 1031)[11]

Hearn testified that he observed Dougan order the car to stop and the victim broke and ran and Dougan hit the victim. (ReSent/XXXII 922-23). Black testified that Dougan said that "he had to tussle with the guy and knock him on the ground." (ReSent/XXXIII 1094) After the victim was knocked to the ground, Hearn indicated that Barclay stabbed the victim a few times, and Dougan went down with the gun and fired two shots. (ReSent/XXXII 924-25)

Black testified that Dougan admitted that he pushed the others aside and held the victim's head down before he shot him twice. (Resent/XXXIII 1093)

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[11] On cross-examination, Mr. Link was able to elicit qualifications from Bess through the use of Bess' deposition. After referring to the boy "begging" and Dougan putting "his foot on the boy's throat," the deposition testimony indicated that Dougan did not say he "did that" (ReSent/XXXII 1041), that is, the witness did not hear Dougan say that he put his foot on the victim's throat (ReSent/XXXII 1052).

Judge Olliff, having actually observed pertinent witnesses testify in 1987, found that the victim was "knocked to the ground and repeatedly stabbed," the victim "begged for mercy," and Dougan "placed his foot on the 18-year-ol boy's head and shot him dead." (ReSent/VII 1100) Judge Johnson did not observe the witnesses testify and did not observe their 1987 demeanor and intonation.

Therefore, arguendo, even without the medical examiner's testimony concerning the order of the wounds, the evidence would still support the extremely weighty aggravation as the trial court found it (ReSent/VII 1077-1104), and as this Court upheld it:

> We likewise find no error in the trial court's holding three aggravators to have been established. The evidence fully supports finding this murder to have been committed during a kidnapping. 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. Finally, the planning and execution of this murder demonstrate the heightened premeditation needed to find it had been committed in a cold, calculated, and premeditated manner. *Cf. Cruse v. State*, 588 So.2d 983 (Fla. 1991); *Rogers*. As discussed later, Dougan had no colorable claim of any moral or legal justification for this killing.

Dougan v. State, 595 So.2d 1, 5 (Fla. 1992). See also "Third Sentencing Proceedings" in STATEMENT OF THE CASE AND FACTS supra; Hunter v. State, 817 So.2d 786, 796 (Fla. 2002)("Hunter's argument as to prejudice based upon trial counsel's failure to use the photographs overlooks the extensive trial testimony and evidence establishing Hunter's guilt"). This Court has often held that CCP

and HAC, found and factually supported here, are among the weightiest of aggravators in Florida jurisprudence.

Thus, the medical examiner's testimony at the 1987 resentencing was cumulative to other evidence clearly proving HAC. As such, Dougan failed to prove either Strickland deficiency or Strickland prejudice. Indeed, at postconviction, Dougan's ability to locate an expert also fails to demonstrate either Strickland prong. See, e.g., Diaz; Victorino; Brown; Rivera; Diaz; Wyatt; Ponticelli; Ventura.

Moreover, in 1987, counsel reasonably relied on his expert's representation that the medical examiner was deceased (PCR/17 3087) and reasonably attempted to create doubt through his cross-examination of Dr. Schwartz (See ReSent/XXXI 859-63). He also made a reasonable strategic decision not to use a deposition to impeach:

> I was concerned that the use of a deposition to rebut a live expert witness was not going to be all that persuasive and would simply resurrect the details of the murder itself. [PC2013 359]

In addition, Mr. Link's massive effort to save Dougan's life (See ReSent/XXXIII 1216 et seq.; ResentR71755/V 683-880 & ResentR71755/VI 1049-1073; "Third Sentencing Proceedings," supra) makes this claim pale on both Strickland prongs. Mr. Link's inability to prevail was substantially due to the facts that were available for him and the overwhelming case against Dougan.

Furthermore, to the degree that the trial court is relying upon a report and a memorandum of other doctors (See PCR/13 2365-66), it lacks competent substantial evidence to support it. Statements in the report and memorandum are inadmissible, non-probative hearsay, and, in any event, their hearsay nature renders any weight de minimis. See, e.g., Morris v. State, 931 So.2d 821, 831 (Fla. 2006)(failure to call witness-Barfield resulted in failure to prove deficiency or prejudice).

In ruling that both prongs were proved, the trial court erred twice. Each error requires reversal.

CONCLUSION

Based on the foregoing discussions, individually and cumulatively, the State respectfully requests this Honorable Court reverse the trial court's order granting postconviction relief. Dougan's 1975 conviction for the First Degree Murder of Stephen Orlando and Dougan's 1987 death sentence should be validated as lawful.

CERTIFICATE OF SERVICE

I certify that, on April 11th, 2014, the foregoing document has been furnished to the following by E-MAIL: Mark E. Olive, Esq. at meolive@aol.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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