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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-1826

Lower Court No. 74-4139

STATE OF FLORIDA,	)
	)
Appellant/Cross-Appellee	)
	)
v.	)
	)
	)
JACOB JOHN DOUGAN, JR.,	)
	)
Appellee/Cross-Appellant	)
_____	)

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

ANSWER BRIEF OF APPELLEE
AND INITIAL BRIEF OF CROSS-APPELLANT

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RESPONSE TO PRELIMINARY STATEMENT

The record will be referred to as follows: the 1975 trial is "ROA" and "T. ___;" the 1987 Resentencing is "ROA2" and "RT___"; the lower court post-conviction proceeding is "V__, at ___," for pleadings, orders, and the transcript of the evidentiary hearing, and "SV__, at ___" for the exhibits introduced below, the supplemental record; the lower court Order is "Order at ___" (the Order spans two volumes, V12 at 2174-2275, and V13 at 2276-2411). The State's Amended Brief of Appellant will be referred to as "SB__."

As shown in Argument I, Appellee agrees that the State's "DATT/VI 1021-1047" contains "tapes recorded by Defendant Dougan," but disagrees with the depiction of the tapes as "scripted by Defendant Dougan." SB at xi. Also, the State writes that it will refer to defense exhibits from the lower court hearing as "DE" (*id.*), but the exhibits were not in the record when the state filed its brief. After the state filed the Brief of Appellant, Appellee moved to supplement the record with the exhibits, this Court granted the motion, and exhibits are now in the SV record.

RESPONSE TO INTRODUCTION

The lower court granted Mr. Dougan a new trial. In its brief, the state is unusually, and highly, critical of the lower court judge. But her 238 page detailed, record-bound, tempered and considered order granting relief is amply supported by the record and documents that Mr. Dougan did not receive a fair trial in 1975 or a fair resentencing in 1987.

The state's main argument is that no matter what happened at trial, no matter how unfair the trial was, Mr. Dougan cannot show he was prejudiced under any standard because of the evidence of the crime. SB at 1. But the state's key evidence of what actually happened is the testimony of a co-defendant who, the lower court found, lied under oath pre-trial and at trial about what he was offered to plead guilty and testify. And Mr. Dougan's lawyer, known as "the Raiford Express," was so conflicted and ineffective that this Court, on habeas, vacated its own judgment on direct appeal after finding counsel's efforts on Defendant's behalf "only slightly better than...'no appellate representation...'" *Dougan v. Wainwright*, 448 So.2d 1005, 1006 (Fla. 1984)(citation omitted). These and other fundamental constitutional errors at trial and resentencing found by the lower court are amply supported by the record.

STATEMENT OF THE CASE AND THE FACTS

1. The lower court judge

With respect to the state's Case Timeline, Appellee agrees with the relevant dates and cites. SB 2-7. Regarding the state's inclusion of the litigation in this Court over whether the lower court judge had taken the necessary course work to preside in this capital post-conviction case, Appellee notes the following former statements by counsel for the state regarding the lower court judge's qualifications. In Case No. SC11-2196 (SB at 6), the state wrote:

> Judge Johnson "meets the level of expertise that the current rule requires;" p. 17
>
> "She intends to preside over Dougan's case now. She is qualified now;" P. 18
>
> "Here, where it is undisputed that Judge Johnson is a duly sitting circuit judge and meets the current Rule's level of expertise, *she should be allowed to move this case forward now*;" (p. 23)(emphasis added) and
>
> Judge Johnson should be "allowed (and *encouraged*) to proceed to move the postconviction proceedings toward resolution." p. 24.

Later, in Case No. SC12-1628 before this Court, the state wrote the following:

> "[I]t is noteworthy that due to Judge Johnson's conscientious efforts, this case was moving forward toward resolution." P. 2
>
> Judge Johnson's "efforts" noted. P. 2
>
> Lauding "Judge Johnson's good faith efforts" P. 8
>
> Thus, contrary to the current state criticism of the lower

court judge, the state earlier beseeched this Court to have her "move this case forward toward resolution" due to her "level of expertise" and her "good faith" and "conscientious efforts."

2. Relevant decisions

Because Mr. Dougan's 1975 trial attorney, Ernest Jackson, solicited, during trial, co-defendants Barclay and Crittendon as clients, and represented them and Mr. Dougan on appeal, some of this Court's decisions that affect Mr. Dougan's rights carry Mr. Barclay's name. For example, *Barclay v. State*, 343 So. 2d 1266 (Fla. 1977), is the opinion affirming Mr. Dougan's judgment. *Barclay v. State*, 362 So. 2d 657 (Fla. 1978), is the decision remanding for a *Gardner* hearing. While *Dougan v. State*, 398 So. 2d 439 (Fla. 1981), concerns the affirmance of Mr. Dougan's sentence after the *Gardner* remand, *Barclay v. Wainwright,* 444 So. 2d 956 (Fla. 1984)(hereinafter "*Barclay IAC*"), contains an extended discussion of Mr. Jackson's conflict of interest and ineffectiveness which directly impacts Mr. Dougan. *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984), adopted for Mr. Dougan the analysis of *Barclay IAC* resulting in a new direct appeal for Mr. Dougan. In *Dougan v. State*, 470 So. 2d 697 (Fla. 1985), this Court ordered a new sentencing proceeding, and in *Dougan v. State*, 595 So. 2d 1 (Fla. 1992), a new sentence of death was affirmed.

3. June, 1974: eight young men in Jacksonville

Over forty years ago, on the night of June 19, 1974, eight young African-America men met at the apartment of James Mattison in Jacksonville: Mattison, Eldred Black, Otis Bess, William Hearn, Jacob Dougan, Dwyne Crittendon, Brad Evans, and Elwood Barclay. After their meeting, cassette tapes they recorded--purportedly describing the killing of Stephen Orlando, a young white man, three nights earlier in (made-up) graphic detail, and warning of a (made-up) race war from the (made-up) Black Liberation Army ("BLA")--were mailed to the press and others, including the victim's mother. None of these young men were required to use the cassette deck that night, but Mattison, Black, Dougan, Barclay, and Crittendon did. Once the tapes were delivered by U.S. Mail and this group of **8** identified, they were all **murder suspects.**

Three (Black, Bess, and Mattison) more or less hurriedly sought to testify for the State. The fourth, Hearn, waited months, represented by counsel, until a trial for his life was imminent, and until he knew what the other three had to say, before he sought his own deal. State witnesses Black, Bess, and Mattison were each either not charged, or had very serious murder charges dismissed, in return for testifying.[1] Star state witness and defendant Hearn

[1]Mattison was charged with murder and mailing threatening communication. When he became a witness, the charges were dropped. T. 1187-88. Bess was on probation for felony child abuse, and his probation was not revoked. T. 1048. Black was told by prosecutors that even if he was involved in "any physical

went from facing the death penalty to, he swore, facing life in prison per his deal. So none of these state witnesses were disinterested. As counsel for Brad Evans argued:

> [T]hey lied to save their own skin. You heard Mattison say that he was charged with a crime concerning the tapes but that all charges were dropped. T. 2142
>
> When they saw the net closing in on them, when those tapes were sent and they knew they were involved in the tapes, what could they do? The three of them, I submit to you, could get together, compose this story to the law enforcement officers and ultimately to Mr. Bowden... T. 2143
>
> **I submit to you that as the police closed in on the tape makers and all of them, that the three of them and Hearn began to panic.** And what do they get out of all this? Freedom. You saw when they come and go, they come and go through the front doors, not like [the Defendant]. T. 2142.[2]

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crime...[he] stood a chance of not being persecuted [sic.]" T. 1233. Black testified that he "had no great love for [white people] at the time," and he thought that doing the tapes about "violence, race, slavery and white devils" and sending them to the victim's family and the community was the right thing to do. T. 1213. "I went along with everybody else." Id.

Co-defendant Hearn testified that he believed "white people are bad" and he "would lie to white people therefore in order to help himself." T. 1462.

[2]Counsel for Barclay argued that "It seems strange. Maybe the State had to do it, but they have associated themselves with some strange bed-fellows." T. 2184. He argued Mattison "made a tape just the same as the horrible tape and the quotes" repeated by the State in closing argument; "He made a tape but he's not charged with murder." T. 2184-85. If he was a defendant it would be an "admission against interest" like it is for the charged defendants. T. 2185. Mattison "bought the tapes...He bought the envelopes, he went out and got the addresses to send the tapes to the various media. It was at his home, his apartment, where the tapes were made...Yet there are no murder charges against him. There are no other charges pending against

And the State conceded their witnesses were scoundrels, or worse:

> Do you believe that the State of Florida is proud of Elwood Black? Do you believe that we are proud of Otis Bess and James Mattison? No. They're scoundrels. William Hearn is worse than that; he's confessed murder. We're not proud of it. But let me remind you that the State of Florida does not have the luxury of always having someone there observing the crime. ...**We believe that you should know what happened** to the best of our ability. **William Hearn was the one person who was able to give you that testimony.**

T. 2029 (emphasis added).[3]

Additional facts will be presented in the body of arguments.

SUMMARY OF ARGUMENT

ARGUMENT I: The State told the defense and jury its deal with star witness Hearn was he would receive a life sentence. The true deal, now sworn to by a prominent Jacksonville senior judge, was that, after he testified, Hearn's actual sentence would be *at the*

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him. None." T. 2186. And Black "made a tape just like the one you heard here ...yet he's not facing a murder charge." *Id*.

> And then Mr. Bess, what about him? Number one, his probation was not revoked. Number two, he was present when the tapes were made, the very same tapes you heard. No charges pending against him as an accessary or a principal. You've heard all about that regarding murder. They were there too. They could have been charged with the same offense. T. 2187 .

[3]A second murder–of Stephen Roberts–occurred later that same week. "[T]he evidence of Mr. Hearn's involvement in both murders is overwhelming. For instance, the record and evidence presented reflect his car and weapon were used; he was the only one to flee; and he was present for both murders. Defendant, by contrast, was not present at the Roberts murder." Order at 2222.

mercy of the state. True to this deal, after Hearn testified the prosecutor recommended, and Hearn received, a fifteen year sentence, and the prosecutor immediately began lobbying for Hearn's release. Hearn served less than five years–for two murders. The lower court correctly held this violated the Fourteenth Amendment under *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963), violations that infected the trial and resentencing.

ARGUMENT II: Mr. Ernest Jackson has been found by this Court, in this case, to be woefully ineffective and blind to conflicts of interest on appeal. *Dougan*, 448 So.2d at 1006.

As the lower court correctly found from the evidence, Mr. Jackson provided identical unconstitutional representation at trial. First, he solicited Mr. Crittendon and Mr. Barclay as clients before trial had even begun. With the resulting law-of-the-case conflict, he then, as on appeal, did not differentiate the defendants' relative culpability. He also started an adulterous affair with Mr. Dougan's sister, Thelma Turner, and their in-office sexual liaisons, endured by Jackson's wife and legal secretary, created an imbroglio that adversely affected preparation, disrupted the office and the defense, and denied Mr. Dougan his lawyer's loyalty. Granting relief, the lower court correctly applied *Cuyler v. Sullivan*, 446 U.S. 385 (1980) and other case law. Certainly the cumulative effect of multiple conflicts requires relief.

ARGUMENT III: There is no dispute--Mr. Jackson had a well-deserved reputation as a horrible criminal defense lawyer in 1975. He was found by this Court and other, trial courts, to have been ineffective during the period of Mr. Dougan's trial, and the lower court found his performance unreasonably prejudicial in this case under *Strickland*. The "defense" presented was disjointed, irresponsible, inconsistent, confusing, conflicting, and implausible. T. 1742 (addressing Mr. Jackson during witness exam: "THE COURT: Have you talked to these witnesses?"). Mr. Jackson attacked the character of the victim, repeatedly, with no factual support or legal basis. The record fully supports that "[t]rial counsel essentially presented no defense," Order at 2290, or worse, presented a counterproductive one. Defense counsel was also ineffective for having Mr. Dougan testify but not introducing copious, available, evidence of his character for truthfulness, allowing the victim's stepfather to testify contrary to Florida law and then insulting him and his deceased step-son, and for not differentiating the relative culpability of the co-defendants. The lower court erred by finding these actions did not violate *Strickland*.

ARGUMENT IV: Resentencing counsel was ineffective for erroneously not having an expert witness available to challenge the state's expert testimony regarding the sequence of the injuries to the victim, as the lower court found. The lower court also

correctly found that counsel's failure to present available mitigation evidence was, when considered cumulatively, prejudicial under *Strickland.* The lower court erred with respect to other mitigating evidence that was not presented. For example, virtually no evidence was presented to the jurors about twelve years of Mr. Dougan's life, years when after the crime he was an exemplary inmate deeply respected "as a peacemaker" by guards. He was also a trusted counselor to free-world colleagues who accomplished positive achievements (i.e., going to law school and graduate school) but would have failed without his counsel.

ARGUMENT V: A victim's survivor in a separate case prevented a plea agreement that would have removed the death penalty. In other cases, i.e., with a white defendant and a black victim, the prosecutor does not ask what victim's survivors think of a plea offer or keep them up-to-date with a case at all. This process is arbitrary and discriminatory and makes death sentences strike like lightning in violation of the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U.S. 238 (1972)

ARGUMENT VI: The sentencing judge in this racially charged case required that black men be demeaned, laughed about them in chambers, belittled crimes of violence between them, and did not want a black attorney in his courtroom. This biased decision-maker reflected the capital sentencing decisions in the Fourth Judicial Circuit where, "[a]fter controlling for the predictive effects of

all other variables, there is only one variable that has statistically significant effects in predicting a death sentence among black defendants: the victim's race." SV20, 3622 (Dr. Mike Radelet). This violates the Eighth and Fourteenth Amendments. *Furman, supra.*

ARGUMENT VII: The resentencing jurors considered inaccurate, inflammatory, and extraneous information in violation of the Eighth and Fourteenth Amendments. Not allowing jurors to be contacted and interviewed under the facts of this case violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT VIII: The resentencing judge believed Mr. Dougan was rehabilitated after thirteen years but did not consider this or other mitigation in his sentencing order, a violation of the Eighth and Fourteenth Amendments and Florida law. *Lockett v. Ohio*, 438 U.S. 586 (1978)

ARGUMENT IX: Forty years on Florida's death row is cruel and unusual punishment and does not serve the goals of retribution or deterrence. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J. joined by Breyer, J. dissenting from denial of certiorari).

ARGUMENT I: THE FALSE PROSECUTION EVIDENCE[4]

A. Hearn, charged with first-degree murder and facing the death penalty, accepts a deal and becomes state's witness on the eve of trial, after reviewing all discovery

The murder of Stephen Orlando occurred the night of Sunday, June 16th, or early morning hours of the 17th, 1974. Mr. Dougan was arrested September 18, 1974, and Mattison, Barclay, Crittendon and Evans were arrested over the next two days. They were all charged with murder. RT. 145.

Bess gave a sworn statement to prosecutors on September 24 as did Black on the 25th. Dougan, Barclay, Crittendon, and Hearn were indicted for murder on September 25. Mattison was freed from jail, and his murder and other charges dismissed, that same day. He gave a sworn statement to prosecutors October 8th.

Hearn was arrested in Texas September 27. After extradition he was arraigned, and appointed an attorney, Ed Dempsey, on October 17th. The statements of Bess, Mattison, and Black were provided to all counsel in October. ROA 29. A trial date was set for January 27, 1975. Depositions were taken of Bess (December 12), Mattison (December 17), and Black (January 12).

On January 14, 1974, the trial date was moved to February 18. On January 23, Hearn, "in a surprise move (RT. 158)," pled guilty

[4]Standard of review: *Giglio* and *Brady* claims present mixed questions of law and fact reviewed *de novo*. This Court defers to those factual findings supported by competent substantial evidence, but reviews de novo the application of the law to the facts. *Wyatt v. State*, 71 So.3d 86 (Fla. 2011).

to second degree murder and was immediately listed as a new witness for the state. ROA 122. Four days later, Hearn gave a sworn statement to prosecutors. He later testified that he agreed to testify for the state because he believed he would be convicted of first degree murder which he knew carried the death penalty. Deposition at 32, 131.[5]

Before he gave a statement to the prosecutors, he knew what the other witnesses had already said:

> Q. Did you ever read any statements by either Mr. Black or Mr. Mattison or Mr. Bess? You know what I'm talking about?
>
> A. Yes, I know what you're talking about. Yes.
>
> Q. You did?
>
> A. Yes.
>
> Q. Your attorney provided you with those, I assume?
>
> A. Yes.
>
> Q. You know what they said?
>
> A. Yes.

Deposition at 132. He also testified that his attorney told him "what the other witnesses had said" before he agreed to give a statement himself and escape a first degree murder charge. *Id*. at

[5]Hearn was initially indicted only for the first degree murder of Mr. Roberts. When he agreed to testify for the State, he admitted killing both Mr. Roberts and Mr. Orlando. In return for his testimony he was promised that the first degree murder indictment would be dismissed, he would only be charged with second degree murder for Mr. Orlando's death, and he would receive a life sentence. The death penalty was thereby taken off the table. Order, at 2182, n. 13.

32.[6]

B. The State was required to tell jurors the whole truth about what Hearn stood to gain from testifying

Deliberate deception of a court and jurors by the presentation of known false evidence violates rudimentary demands of justice under the Eighth and Fourteenth Amendments. *Pyle v. Kansas,* 317 U.S. 213 (1942); *Mooney v. Holohan,* 294 U.S. 103, 112, (1935). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois,* 360 U.S. 264, 269 (1959). Prosecutors may not allow witnesses to lie, especially when the lie if unexposed will tend to make the witness more credible in the jurors' eyes – "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." 360 U.S. at 269. *See also Giglio*, 405 U.S. at 153-54(discussing and following *Mooney, Pyle, Brady*, and *Napue*.)

C. The prosecutors presented lies

As the lower court held, "[a] thorough review of the record and evidence presented support that Mr. Hearn was the state's key witness who testified to personal knowledge of the offense."[7]

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[6]At a pre-trial hearing on January 10, 1975, shortly before the deal, Hearn's attorney discussed the statements of Black, Mattison, and Bess at length, in Hearn's presence. Pp. 16-19.

[7]Order at 2222. The lower court found that Hearn

> was more the nucleus of the state's case against Defendant than a peripheral component. Mr. Hearn was

Defense counsel and the jurors were "entitled to know" the truth about what Hearn was offered for his testimony.[8]

> 1. What was the deal for Hearn's testimony? Judge Bowden's sworn testimony below
>
> a. The state on direct appeal certified that Hearn's deal was a life sentence, according to **prosecutor** Bowden and Hearn

On direct appeal, counsel for the state certified that "the full agreement between the state and witness Hearn," "the complete plea agreement between the state and the witness Hearn," which "all defense counsel knew of," was contained in Hearn's January 31, 1975, deposition. Counsel for the state filed the deposition in this Court and wrote that "a reading of this deposition" will reveal "the full agreement." SB, Case # 47,260, pp. 34-36.[9] This

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> the only person who testified at Defendant's trial about personal knowledge of the Orlando murder and was the only one of all charged who admitted to being present for both the Orlando and the Roberts murders. Defendant, Mr. Barclay, Mr. Crittendon, and Mr. Evans, in addition to Mr. Hearn, were the only individuals charged in the murder of Stephen Orlando. With the exception of Mr. Hearn, they all denied being present and participating in the murder of Stephen Orlando. At trial, Defendant testified he was not with Mr. Hearn the evening Stephen Orlando was killed, but was at his house with his father; that the did not make the note that was found on Stephen Orlando's body; and was not present when the note was written.

Id. at 2230 (record citations omitted).

[8]Order at 2222.

[9]In its present brief before this Court, the state says there in fact was no plea agreement.

Court took the state at its word in 1978 and wrote that a deposition of Hearn was taken pre-trial "at which time Hearn testified fully to the details of the plea agreement thereby apprising the defense of the same." *Dougan I*, 343 So.2d at 1270. What Hearn testified fully to was:

> Q. Did anybody from the Prosecutor's office say that they would recommend a certain number of years for you to go to prison?
>
> A. Yes.
>
> Q. How many years?
>
> A. **Life sentence**.
>
> Q. **Life sentence**. And that was in exchange for what, you pleading guilty?
>
> A. Yes.
>
> Q. Do you feel that is a bargain?
>
> A. Yes.
>
> Q. Why?
>
> A. Because, first degree murder carries the death penalty, and also, you are not eligible for parole until twenty-five years later.

Order 2195 (emphasis added).[10]

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[10]Hearn testified that Mr. Austin and Mr. Bowden were present when one or the other told him "what the state would do if you testified for the state." Deposition at 129 Prosecutor Bowden heard this sworn deposition testimony. He made objections during the deposition (*i.e.*, pp. 19, 20), commented that the witness should only testify to what he was "positive of" (p. 20) and to "be truthful" (p. 30), corrected errors (p. 35), and told defense counsel: "We have laid it all out for you, counselor." P. 169.

At trial, Mr. Hearn testified that had been advised of the "difference between a life sentence under second degree murder which you have pled guilty to and a life sentence under a first degree murder conviction." T. 1474; see also RT. 946-47.[11] On *redirect by Mr. Bowden*, Hearn testified:

Q. Mr. Hearn, what sentence do you expect to get?

A **Life**.

Q Thank you.

T. 1483 (emphasis added); *see also* Order at 2198-99 (Hearn "testified he was advised he would get a life sentence."). This mirrored Hearn's deposition testimony. *Dougan I*, 343 So.2d at 1270.[12]

In closing argument, Prosecutor Bowden explained this was an agreement or a plea bargain, and defended it:

> The State of Florida, **out of absolute total necessity**, must **enter into contracts** with criminals and confessed murderers. We do it. We did it in this case. T. 2044

The State did not mention this deposition–which it adopted and credited on appeal--in its current brief to this Court.

[11]The jurors were present when Bowden objected to these questions and Evans' attorney responded: "The relevancy goes to his motivation for perhaps lying to this jury, and that's what I'm asking about because his testimony is critical to the State's case, Your Honor." T. 1475.

[12]There is absolutely no disclosure pre-trial or during trial that "prosecutors engaged in the common practice of withholding a specific deal prior to testimony and subsequently, after the witness testified truthfully, attempting to assist that witness." SB at 27.

> Is there something distasteful and wrong about offering **an agreement or a bargain** with a confessed murderer .... T. 2046
>
> > b. 2013: The truth–**Judge** Bowden swore Hearn was told his actual sentence would be whatever the prosecutor *later* recommended and the judge accepted "at their mercy"

In testimony before the lower court in 2013, *now* long time *Judge* Bowden swore under oath to something starkly different from what Hearn swore to pre-trial and during trial in *then Assistant State Attorney* Bowden's presence and in response to his questioning. *Judge* Bowden testified in 2013 that he negotiated a plea bargain with Hearn and "the plea was straight up to second-degree murder in return for truthful testimony."

> Q. So there was no offer of life?
>
> A. It was straight up. It was at the mercy of the state attorney and the judge.

Order at 2202; V18 at 3277.[13]

"Mr. Hearn's sentencing was continued from prior to the day he testified at Defendant's trial until after he had given his testimony against Defendant." Order at 2220. Thus, as Hearn sat on the witness stand the better job he did the more reward he could expect, but that is not what the jurors were told.[14] "The jury was

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[13]"Postconviction counsel questioned whether there was an offer of life to Mr. Hearn, to which Judge Bowden reiterated it was 'straight up.'" Order, at 2202.

[14]Mr. Hearn's actual sentence was "only a contingency dependent on the State's satisfaction with the end result, which only could have strengthened his testimony." Order at 2222. A

not made aware of these facts that may have motivated Mr. Hearn's testimony at Defendant's trial." *Id*.

> c. The lower court did not speculate about Hearn's sentence being secretly at the mercy of the state and the judge–it is in sworn, black and white, testimony from a sitting judge--and it proves a *Giglio* and *Brady* violation[15]

A sitting judge testified that his deal with the state's main witness at trial was that the witness would serve whatever time the state later recommended and the judge decided. Another sitting judge believed this sworn testimony, and concluded:

> Judge Bowden testified at the hearing that the plea was straight up–that Mr. Hearn's sentence was at the mercy of the State and the judge. Mr. Hearn's sentencing was continued from prior to the day he testified at Defendant's trial until after he had given his testimony against Defendant. The jury was not aware of the facts that may have motivated Mr. Hearn's testimony at Defendant's trial. *Based on a review of the record and the evidentiary hearing testimony of Judge Bowden, the statement by Mr. Hearn at trial that he would receive a life sentence was not true.* Mr. Hearn's lack of

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jury is entitled to know the "realities of what might induce a witness to testify falsely." *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir.1986). It makes no practical difference "whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal." *Duggan v. State*, 778 S.W.2d 465, 468 (Tex.Crim.App.1989). Moreover, a co-defendant who testifies with only a reasonable expectation or understanding of leniency, but not a formal agreement, has an even more powerful incentive to testify falsely in order to facilitate a conviction and curry favor with a prosecutor. *See Campbell v. Reed*, 594 F.2d 4, 7 (4th Cir.1979).

[15]The lower court understood *Brady* and *Giglio*, as its citation to and quotations from them demonstrate, as does its discussion of Florida law on the topic. Order at 2191-93.

> truthfulness in his testimony regarding the sentence he would receive calls the credibility of his whole testimony into doubt.

Order at 2221. There was nothing speculative about this.[16]

The lower court correctly ruled that because "Mr. Hearn gave false testimony; the prosecutor knew the testimony was false; and the statements made by Mr. Hearn were material as there is a

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[16]In its brief, the state claims the lower court judge granted relief only by rampant "speculation" and by not conducting an objective evaluation of the evidence. *See* Claim I,E, 1-5 (headings in table of contents, SB ii-iii). The lower court judge is referred to by her personal name throughout the state's brief and is repeatedly criticized. *See, e.g.*, SB at33 ("Judge's (sic) Johnson's speculation);" *id*. at 34 ("In contrast with Judge Johnson's speculation."). As this Court noted in granting relief under similar circumstances, it is difficult, but essential, for judges to toe the line, especially in cases like this one:

> It must be emphasized that in our American legal system there is no room for such misconduct, no matter how disturbing a crime may be or how unsympathetic a defendant is. The same principles of law apply equally to ***cases that have stirred passionate public outcry*** as to those that have not. *Cf. Jones v. State*, 705 So.2d 1364, 1367 (Fla.1998) (noting that although 'the rule of objective, dispassionate law in general [] may sometimes be hard to abide, the alternative—a Court ruled by emotion—is far worse'). In our system of justice, ends do not justify means. Rather, experience teaches that the means become the end and that irregular and untruthful arguments lead to unreliable results. Lawlessness by a defendant never justifies lawless conduct at trial. *See, e.g., United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Giglio*; *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Guzman v. State*, 868 So.2d 498 (Fla.2003). The State must cling to the higher standard even in its dealings with those who do not. Accordingly, we must grant relief.

Johnson v. State, 44 So.3d 51, 73 (2010)(emphasis added).

reasonable likelihood that Mr. Hearn's testimony could have affected the jury's verdict," there was a harmful *Giglio* violation. *Id*. "The State was required to affirmatively correct Mr. Hearn's testimony." *Id*.[17] And "[t]he state has not met its burden and shown the presentation of this testimony at trial was harmless beyond a reasonable doubt." *Id*. at 2223.[18]

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[17]When Hearn said during his deposition that the state's offer was life, Mr. Bowden did not say: "actually, counsel, we did not tell him a life sentence, we told him his sentence would be at the mercy of the state and the judge." When Hearn testified at trial and Mr. Bowden asked him what he expected to receive for his testimony and Hearn said "life," Mr. Bowden did not say: "wait a minute, don't you actually expect to receive whatever the state requests and the judge accepts?" "The State's presentation of false testimony and its failure to correct this testimony violates *Giglio* and presents a reasonable likelihood the false testimony could have affected the judgment of the jury." Order at 2223.

[18]The state overblows the significance of a brief passage in the lower court's order. *After* the court had concluded that Mr. Hearn was entitled to relief ("[t]he prosecution's suppression of the agreement with Mr. Hearn violated Defendant's due process rights," with specifics [V. 12, 2221, lines 8-20]), the Court began a new paragraph with the word "Further." *Id*. at 2221. Thus in addition to what the court had just found, and not explicative of it, there was something else the court wished to address.

And that was that something fishy was afoot. The entire, flimsy, court file in Hearn's case was introduced below. When Hearn testified at trial, he said that he had plead guilty to second degree murder in January 1974. However, Hearn's judgment and sentence in fact recites that he entered a plea of guilty on June 10, 1974. SV7, 1079. Order at 2204. Yet in the transcript of the sentencing hearing on that date no guilty plea is taken and the court notes that Hearn "previously entered a plea of guilty" and testified, SV 15, 2759, which the lower court acknowledged. V.12, 2216. Nevertheless, "[t]here is no document in the court file to show a plea was entered prior to Mr. Hearn's sentencing." Order at 2221. The court then wrote there is "absence of an agreement," "no plea agreement" (3x) evidenced in

The lower court also properly found a *Brady* violation: the post-conviction testimony evidence "casts a different light on the relationship between the state and Mr. Hearn, which was not revealed to the jury at Defendant's trial or resentencing." Order at 2223. Because there is a reasonable probability that the result in the case would have been different had the truth been know, the lower court's "confidence in the outcome of Defendant's case has been undermined." *Id*.[19]

d. Hearn's own attorney–in truth, Hearn expected less than 15 years in prison, not life

Ed Dempsey, Hearn's lawyer,[20] said his "understanding of his deal with State Attorney Bowden was that his client would not

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the court file, all of which is true. *Id*. The sentence the state seizes upon follows: "If, in fact, no plea agreement existed when Mr. Hearn testified at Defendant's trial, Mr. Hearn presented false testimony that he had pled to second degree murder..." *Id*. SB at 42. However, if the sentence simply read "If, in fact, no plea agreement existed when Mr. Hearn testified at Defendant's trial, Mr. Hearn presented false testimony," the state would have no complaint. At worse the court wrote a sentence awkwardly, but the sentence was irrelevant to the result already reached.

[19]The lower court concluded that these *Giglio* and *Brady* violations affected both "Defendant's trial and resentencing." Order at 2223

[20]Mr Dempsey stated these facts in 1993 and they were memorialized by attorney William Sheppard in a typed memorandum. Thereafter Mr Dempsey died. The lower court admitted and considered this evidence. Order at 2203-04. ("Mr. Dempsey 'volunteered that Judge Olliff had screwed his client by giving him 15 years.'"). The state's objection to this evidence was overruled below, which was not an abuse of discretion. The state ignored this evidence in its brief in this Court, and has waived any complaint about it. *See* note 86, *infra*.

receive anything approximating fifteen years, although he indicated it was not firmly established." Order at 2203; SV7, 1089.[21] And as Judge Bowden testified below, Mr. Hearn was upset when he received 15 years because he thought he was supposed to receive less of a sentence. V18, 3230. Indeed, "his lawyer had suggested five years and bargained heavily for it and we rejected it. And Mr. Hearn was upset." *Id*. If the deal was "life," how could a lawyer later bargain for five years?

2. The state's brief is silent on the difference between a life sentence recommendation vs. being at the state's mercy

One will search the state's brief in vain for an explanation of why the state's actions did not amount to a *Napue* violation. The closest the state comes is that Hearn acknowledged with the word "yes" on cross-examination that the law provided for the theoretical possibility of him being sentenced to less than life for a conviction of second degree murder. SB at 35. [22] But what the

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[21]This is strong impeachment evidence: "The fact that [the witness] was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment." *Campbell v. Reed,* 594 F.2d 4, 8 (4th Cir. 1979). Mr. Hearn's attorney was livid that the state even asked for 15 years because he believed he had a bargain for far fewer years. SV7, 1089. But the state then set upon a course of conduct designed to get Hearn out of prison altogether.

[22]The state won on appeal by convincing this Court that Hearn's agreement was in his deposition. The state, having prevailed on appeal by insisting that Hearn's deposition documented "the full agreement" cannot now be heard to say that the *actual* agreement with Hearn was something not contained in

law allows is irrelevant. Hearn was told what the deal was, whether the law allows something else or not. As one defense counsel argued in closing:

> [T]he State of Florida, by its officials [Austin and Bowden, listening to this argument]...allowed Mr. Hearn to plead guilty to an offense that he testified to, will punish him or will sentence him to life imprisonment he thinks.

T. at 2011 (attorney Stedeford). Prosecutor Bowden did not interrupt this argument to say: "hold on there. He lied. He's at my mercy. I might recommend 15 years. And defense counsel is free to bargain heavily later."[23]

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that deposition and it was know. The state should be "precluded from so contending." *McKinnon v. Blue Cross and Blue Shield of Alabama*, 935 F.2d 1187, 1192-93 (11th Cir. 1991). Having succeeded in having this Court "accept that party's earlier position," *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001), the state may not now "'rely[] on a contradictory argument to prevail in another phase,'" *id.* at 749 (citation omitted), of the case. This Court should stop Respondent "from playing fast and loose with the courts," *United States v. Owens*, 54 F.3d 271, 275(6th Cir. 1995)(*citing Edwards v. Aetna Life Insurance Co*., 690 F.2d 595, 598-99 (6th Cir.1982), and "from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 750 (citations omitted).

[23]See also T. 2147 (Hearn "plead guilty to second degree murder to avoid the possible grand jury indictment for the death of Stephen Orlando and to avoid the risk of death in the electric chair." (Closing argument of counsel for Brad Evans).

D. Corroboration that Hearn (but not the jurors) knew he was in fact at the mercy of the judge and the prosecutor

1. Sentencing hearing, promised mercy dispensed: 15 years for "gentleman" Hearn, not a life sentence

The following occurred at Hearn's sentencing:

> Your honor will recall that when Mr. Dempsey and I first talked to Your Honor in the early stages of this proceeding the agreement was at the time and *it was tentative* indeed that William Hearn should receive a term of life imprisonment. Now, *that was open* in the sense that his testimony – his appearance as a witness could change that to this extent, it could actually *increase* his jeopardy before the Court if he gave false testimony or did not cooperate.

SV15, 2778.

> Mr. Reeves and Mr. Owens[24] and I have had contact with William Hearn, *sometimes on a daily basis, sometimes for hours at a time*, just necessarily talking to him about the evidence and the testimony he would give,[25] and over a period of some months I have been able to observe William Hearn as I have not been able to observe any defendant before. As I say, I didn't encourage it, but it was one of the things that sort of came to each of us

[24]Mr. Reaves and Mr. Owens investigated the case for the state attorney's office. They testified on behalf of Hearn at this sentencing proceeding, going so far as to opine that Hearn "does not have a criminal mind." SV15, 2762. They testified that he just was a follower who got caught up with the wrong crowd, in their opinion. This is a far cry from the prosecutor seeking a life sentence. When Hearn got to prison, the prison evaluator had a different opinion: "It is this officer's 'personal' opinion that the subject is more involved in the offense than what other sources, including newspaper articles, seem to indicate." June 16, 1975, Classification and Admission Summary. Order at 2218.

[25]Neither defense counsel nor the jury were told about these daily meetings for "hours at a time," and the defense was not provided any discovery of these hours of statements from this defendant.

> that were exposed to him and I suppose that I was impressed, Your Honor, with the fact that he was not to me what I would call a person that is typical that comes before this Court. He did not strike me as a hard individual; he did not strike me as a militant individual. On the contrary, *he strikes me today as a gentleman*.

Id., pp. 2776-77 (emphasis added).[26]

The state then asked the court to impose a fifteen year sentence, not the previously testified to life sentence, and the court did impose a fifteen year sentence on June 10, 1975.

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[26]In front of the jury Hearn was not portrayed as a gentleman, but as "worse than a scoundrel." T 2029 (Mr. Bowden's argument). If the state had come to believe that it was appropriate to refer to this confessed murderer as "a gentleman" in order to assist him at sentencing, then the jurors were entitled to know it.

But Mr. Hearn was not a gentleman. When he got to prison in 1975, his MMPI profile was common in individuals with "borderline personalities or latent schizophrenics." "A borderline personality disorder is an extraordinarily unstable personality disorder. Borderline personalities are the most unstable...[and] are often psychotic, transient psychotic, and here, the differential is between borderline personality disorder and latent schizophrenia....So this is the MMPI of a fairly – a fairly impaired individual." V18,3327-28. (Woods' testimony). Also a psychiatric evaluation was conducted and Hearn was diagnosed with antisocial personality disorder. V18, 3325; Exhibits SV16, 2890-91.

> Q. And so where we are now is William Hearn is antisocial, right?
>
> A. That's the diagnosis he's been given.
>
> Q. And Mr. Dougan is not.
>
> A. That's correct.

V18, 3327(Dr. Woods). *See also* Order at 2206, 2219.

> 2. More mercy from the State: real sentence? less than five years based upon the state's unrelenting "commitment to Mr. Hearn and his lawyer" to do "everything possible to effect this man's release as soon as possible"

As the following chronology shows, the prosecution went to immediate and extraordinary lengths to get parole for Hearn beginning "the day Mr. Hearn was sentenced." Order at 2204. Even though the legal counsel for the Parole Commission, and the responsible staff at Hearn's prison, believed Hearn should not be paroled after serving less than five years in prison, these prosecutors succeeded by constant lobbying of the Commission. The lower court summarized the actions.

> Mr. Hearn testified at trial that he was going to get a life sentence. At his sentencing, the State recommended Mr. Hearn receive a fifteen-year sentence. The State's letters written to the parole board on Hearn's behalf were impactful in Mr. Hearn's early release from incarceration....**This Court interprets the State's acts in writing these letters on behalf of Mr. Hearn, which began on the day he was sentenced, to reflect the state or Hearn expected he would receive a more lenient sentence for his testimony, which was not accurately represented to the jury at Defendant's trial.**

Order at 2220. The following paper trail provides substantial competent evidence for the lower court's conclusions.[27]

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[27]The State's lengthy presentation of case law holding that a "deal" with a witness may not be proven solely by post-trial efforts by the prosecutor on that witness' behalf are irrelevant here. SB at 37-42. Bowden elicited testimony that Hearn's deal was "life imprisonment." The truth was Hearn would receive as punishment whatever Bowden asked and the judge accepted "at their mercy" and Hearn knew that. "'The thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the

On the date Hearn was sentenced–June 10, 1975--Bowden wrote DHRS and asked that Hearn not be imprisoned at FSP but "would be a good candidate for incarceration at the Apalachicola Correctional Institute." SV7, 1082. Judge Bowden testified below that "it could be that we agreed to minimize the impact on him, notwithstanding the 15-year sentence." V18, 3232. Order at 2204.

On August 5, 1975, Bowden wrote Chairman Raymond Howard of the Florida Parole Commission and stated "during extensive pre-trial proceedings, I was able to evaluate the character of William Lee Hearn." SV15-2754. Mr. Bowden instead "respectfully suggest[ed] that William Lee Hearn is an excellent candidate for early release." *Id*. This was after two months of prison. Order 2205.

Mr. Bowden forwarded Hearn's attorney, Mr. Dempsey, a copy of Chairman Howard's reply on August 25, 2014. SV16, 2862-63.

On September 9, 1975, Ed Austin personally spoke with Parole Commissioner Ray E. Howard and indicated that "in his judgment [Hearn] is a good risk for rehabilitation and perhaps early parole release." SV 18, 3205. *Id*.

On January 6, 1976, Ed Austin wrote a note to Ray Howard stating: "This man gave us 2 Elec chair cases & 2 199 yr sent–He is probably a very good risk. I would appreciate your taking a close look at him." SV18, 3208

On January 8, 1976, Ed Austin emphasized, in person, to Commissioner Howard, "that his interest in Hearn goes beyond Hearn's assistance in making the case against the individuals" and indicated that "he feels he would be a reasonable risk for parole supervision." SV15, 2793

On August 9, 1977, Mr. Bowden wrote to Charles Scriven, Chairman of the Parole Commission, said that he had

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prosecutor not fraudulently conceal such facts from the jury.'" *Routly v. State* 590 So.2d 397, 400 (Fla. 1992)(citation omitted). This prosecutor was found by the lower court to have fraudulently concealed such facts from the jury. This in and of itself, shows the *Giglio* violation. But how can one further prove that deal? By showing the exercise of mercy. The prosecutor's actions at Hearn's sentencing, and in letter after letter, prove the mercy.

learned that Hearn was taking educational courses and had no disciplinary reports,[28] and said: "I *earnestly implore* your recommendation that [Hearn] be released on parole as soon as possible." SV15, 2794 (emphasis added).

On August 12, 1977, Mr. Austin wrote to Mr. Scriven and requested "parole as soon as possible": he wrote: "This recommendation is not only *based upon my commitment to Mr. Hearn and his lawyer* but a strong conviction that he would represent a good risk for parole and would not be a threat to society if released under supervision. Any consideration you can give to this recommendation will be very much appreciated." SV15, 2786 Rather than being "worse than a scoundrel," Mr. Hearn was "genuinely motivated to rehabilitate himself and rejoin society as a useful citizen."

In July 1978, parole commissioner Ray E. Howard wrote a memo to Hearn's file stating that he had had a personal conversation with Mr. Austin and that "Mr. Austin is on record to do everything possible to effect this man's release as soon as possible." SV15, 2797

On August 11, 1978, Ed Austin wrote a letter to Commissioner Howard stating that "I would greatly appreciate anything you can do to be of assistance to" Hearn. SV15, 2798.

In December 1978, there was a progress review at Hearn's prison. Because of the seriousness of his offenses his team made no parole recommendations and concluded Hearn "should serve an additional period of time" first. SV18, 3241.

On January 1, 1979, an examiner determined that Hearn's offenses were "aggravated," he had been a "participant in multiple killings," and because the "gun in both killings was defendant's" no parole date was set but a presumptive parole date of August 7, 1984, was recommended. SV18, 3242.

On March 7, 1979, Ed Austin wrote a letter to Chairman

[28]"Judge Bowden testified that this information most likely came straight from Mr. Hearn; that it was not unusual to receive a letter from Mr. Hearn; and he responded to Mr. Hearn but did not initiate contact." Order at 2205.

Scriven, stated that he had learned that Hearn's case had been recently reviewed, and "respectfully urge[d] your reconsideration of Mr. Hearn's status." SV15, 2799.

On March 13, 1979, Scriven asked the Commissions whether they "want[ed] to reconsider their presumptive parole date in view of the prosecuting attorney's request." SV15, 2800.

On March 20, 1979, Michael Davidson, General Counsel to the Commission responded to Hearn's request for review of his presumptive date and denied it because Hearn had not identified an error in the decision, SV18, 3251.

In a memo to the Commissioner dated April 4, 1979, Mr. Scriven stated "I had submitted this case for reconsideration because of a letter from State Attorney Ed Austin." He wrote that "Mike Davidson" had denied Hearn's request "with a form letter." He concluded: "I am resubmitting the case to consider Ed Austin's letter." SV18, 3256

Hearn again requested that his case be reviewed. This request was very similar to his last request (SV15, 2799), with one important difference. It states:

> "I received copies of letters from the state attorney (Edward Austin), Assistant State Attorney (Aaron Bowden), the judge who sentenced me (Hudson Olliff), and my attorney Ed Dempsey all recommending that I receive early parole." SV18, 3267; SV15, 2805.[29]

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[29]Because this letter from Hearns referenced a letter written by Judge Olliff–and because it would be counter-productive at best for an inmate to lie about such a letter–it is more than likely that this letter was written, although it was never provided to undersigned counsel. Hearn testified below that today he does not remember having a letter from Judge Olliff but agreed that he would have remembered "at the time when I wrote the letter." V18, 3182. He did not remember receiving a letter from Ed Austin either, but "the way I wrote it, its like I did receive one." *Id*. 3183.

The lower court incorrectly concluded that the allegations about Judge Olliff's letter are insufficiently pled, i.e., "Defendant has neither made specific allegations nor presented

On April 17, 1979, General Counsel Davidson wrote a letter to Mr. Hearn stating that "This is your second request for review. It shows no more 'cause' for review that did your first." SV18, 3263.

On May 10, 1979, Ed Austin wrote to Scriven again and stated: "it is my understanding that [Hearn] will soon be before the Parole and Probation Commission for a review of his new presumptive release date. I am attaching some prior correspondence hereto for your ready reference. Any consideration you might give Mr. Hearn at this time will be appreciated." SV15, 2806.

At the next prison progress review meeting, it was determined that Hearn did not have exemplary prison adjustment: "Inmate Hearn was considered for parole. However, due to the seriousness of the offense, his lack of participation in recommended rehabilitative programs the team feels he has not earned any recommendations for parole from this team therefore none were made." SV18, 3269.

On August 15, 1979, the parole commission took over. A presumptive release date of September 11, 1979 was set, and Hearn was released on that date. SV18, 3271; SV15, 2808.[30]

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evidence or testimony to support this contention. Moreover, no letter from Judge Olliff written on Mr. Hearn's behalf has been produced by the defendant. *Doorbal*, 983 So.2d 483 (reminding "attorneys who represent capital defendants of the importance of compliance with minimal pleading requirements to allege a claim of ineffective assistance of trial counsel and repeating that insufficiently pled claims "may not receive an evidentiary hearing or be considered by the trial court on the merits."). Order at 2391. Counsel pled this claim with exacting specificity, the state agreed to a hearing on this claim, and counsel repeatedly attempted to obtain a copy of this important judge letter.

[30]The lower court found "[t]he state's letters written to the parole board on Mr. Hearn's behalf were impactfull in Mr. Hearn's early release from incarceration." Order at 2220.

E. 1987 Resentencing: Hearn was secretly hostile and untruthful, and the state still did not reveal the "at the mercy of the state" deal

The resentencing jurors heard Hearn recount his testimony about the murder. What the jurors did not learn was:

1. Hostile Hearn cannot be expected to help the state

After all that the state attorney did for him, when it came time for this "gentleman" to testify again he was "hostile," although the state attorney failed to disclose this fact. In a personal and confidential state attorney memorandum written by Assistant State Attorney Steven Kunz and discovered in post-conviction proceedings, the following was memorialized

> Key witness William Hearn is now hostile to the State of Florida and **cannot be expected to assist the State** in proving certain aggravating circumstances during the penalty proceeding.

SV8, 1281. This hostility, and how this witness came to be more cooperative at resentencing, was never revealed by the state. Mr. Link, resentencing counsel, was shown the Kunz memorandum which he had not seen until these post-conviction proceedings:

> Q. Did you know that the prosecutors in the cases believe that Mr. Hearn is now hostile and cannot be expected to assist the State. Did you know that?
>
> A. No, I did not know that.
>
> Q. Is that relevant?
>
> A. Well, yeah. The question arises, what did the State do to get him to assist them? Because *he certainly didn't appear hostile when he testified*.

V17, 3114 (emphasis added). What changed Hearn's mind?[31] That "Hearn was hostile to the state" at resentencing was a fact about "which the jury should have been made aware." Order at 2221.

2. No help from the state for four years–false

In addition to losing his hostility, Mr. Hearn did not tell the truth. The following exchange occurred during his cross-examination:

> Q. And you were aware that while you were serving your sentence, the State Attorney's Office wrote letters to the Parole Board on your behalf recommending early parole, weren't you?
>
> A. Yes, after four years.

RT. 948. This is not true but, as the lower court noted, "[t]he State did not attempt to correct this statement." Order at 2204. There were 11 letters or direct contacts by the State Attorney Office to or with the Parole authorities *before* Hearn had served

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[31] Hearn testified below:

> Q. So you were never hostile to them, and you never told them that you weren't going to help them.
>
> A. I don't remember.
>
> Q. So you might have done that.
>
> A. Possible.
>
> Q. Possible?
>
> A. Yeah.

V18, 3191-92.

four years.

3. Hearn had testified his bargain was “life” when it was “mercy”

The resentencing jurors did not know that when Mr. Hearn testified in 1975 he said he had made a plea bargain for which he would receive life but instead the bargain was that his sentence would be left to the “mercy” of the state and the court. Lies in 1975 under oath ought to be considered by decision-makers charged with assessing Hearn in 1987.

F. The State cannot prove the lies were harmless beyond a reasonable doubt

1. The state should be estopped from arguing harmless error having previously admitted, indeed, stressed, that Hearn was a critical witness

“The likely damage [of suppressed evidence] is best understood by taking the word of the prosecutor....” *Kyles. v. Whitley*, 514 U.S. 419, 444 (1995). At Hearn’s sentencing hearing, Prosecutor Bowden said:

> I state with absolute certainty that without the testimony of William Hearn the State could not have achieved the results that were achieved in the trial before this Court.

SV15, 2775. He also said: prosecuting this case without making a deal with Hearn “was an absolute impossibility;” “Mr. Hearn was a principle witness; Hearn was “highly instrumental in the state’s success;” and Hearn provided “substantial testimony.”[32] Assistant

[32]Order at 2213-14. “Judge Bowden testified at the hearing that he agreed that Mr. Hearn was critical to the State in

Attorney General Kunz prepared a memorandum regarding the pros and cons of seeking a death sentence on resentencing, and a "con" was that "***Key*** witness William Hearn is now hostile to the State of Florida and cannot be expected to assist the state in proving certain aggravating circumstances during he penalty proceeding." SV8, 1281. Order at 2214 (emphases added). He testified below that he agreed the state could not have had the results it achieved in the case without Hearn's cooperation and testimony. *Id.*[33]

> 2. Hearn was a critical witness–no one else testified about what happened
>
> As the lower court found:
>
> > Mr. Hearn's testimony was of vital importance to the State's case against Defendant–despite the state's Argument in its closing brief to the contrary (See e.g. State's P.C. Memo at 22). Without Mr. Hearn's testimony, the State would not have been able to prove it's case. The withholding of this information by the State precluded the Defendant from defending himself fully and fairly.

Order at 2222. The State argues here exactly what was rejected below–that Hearn was not an important witness because there was "overwhelming evidence of Dougan's guilt" including "multiple admissions" and the testimony of Mattison, Black , Bess, a medical examiner, and two expert witnesses. SB at 48-51. As will be shown, the testimony of suspects Mattison/Black/Bess about what occurred

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Defendant's 1975 case." *Id*. at 2202.

[33]State Attorney Ed Austin credited Hearn with giving the State "two electric chair cases and two 199-year sentences." Order at 2205, note 24.

after the offense is inconsistent, conflicting, and inconclusive; the experts, of course, cannot say who did what during the crime.

Thus, when it comes to the State writing about the crime as presented in the state's case-in-chief at trial, trial transcript pages 1347-1486 are repeatedly cited–eleven times in three paragraphs covering a little over a page. SB, pp. 10 (line 3 to page 11 line 14). *These are the transcript pages containing the trial testimony of Williams Hearn.*[34]

The lower court found that Hearn's lies rendered all of this testimony suspect. Since no other witness testified to being present at the killing, Hearn could actually have been the sole killer--it was his car, his gun, and he fled the state. As the following discussion of the other evidence shows, it is an "absolute certainty that without the testimony of William Hearn the State could not have achieved the results that were achieved in the trial before this Court." V15, 2775 (Bowden)

a. The uncharged tape-makers, who taped, and what was on the tapes

The State argues that there is significant evidence of Mr. Dougan's guilt "even if Hearn's testimony had been totally disregarded." SB at 48. But this "significant evidence" comes mainly from two sources: what was recorded by the witnesses on June 19, 1974, at Mattison's apartment, and what Mattison, Black, Bess,

[34]The brief on direct appeal treated Hearn's testimony as equally critical.

and Hearn said, or did not say, from the witness stand.

1. Barclay "scripted" that the victim begged

The State writes that the record contains ***"multiple admissions*** from Dougan's own mouth in **words he scripted, recorded, and sent**..." (SB at 48) According to the State, Mr. Dougan actually *made* Mattison, Black, Bess, and Hearn do the bad things that they did, *i.e.* he alone "scripted" notes and "direct[ed] others to make a recording" from the script "before they left." SB at xi, 1, 48.

The very first page in the State's brief--purporting to show extra-Hearn evidence of guilt–illustrates the State is wrong. The State wrote:

> Dougan admitted to multiple people that he killed the victim as the victim begged for his life.

SB, p. 1. The only place "begging" appears is in the tapes, it was included there because *Barclay* wanted to include it in the "script," and, according to Hearn, it was not even true!

> He started–Jacob said, "Do anybody have an idea of what would be our next approach?" And everybody, you know, sit around and was listening. And he said "Why don't we make some tapes." And he–**somebody said. "Yeah, that's a good idea."** And he explained why we was gonna make the tape in the first place and he said, "Do anybody– you know, **how do everybody feel about it," and *nobody disagreed* with it so went ahead and made the tapes.**

T. 1399 (emphases added)[35] Thereafter,

> Jacob had a note that he had made out and he read it off

[35]Hearn testified there had been no discussion about taping anything before Wednesday night.

> to everyone. **He asked us how do it sound, and I think Elwood said he need to put a little more info into it. And that's when he added some more on to it.** Then he came up with one note and so he said we'll put it on the tape then. And that's when Jacob made a tape, played it back, and Elwood [Barclay] made a tape, played it back, and Elred [Black] went in the bathroom and made a tape.

T 1402.[36]

> 2. All 8 Suspects chose to make, or not to make, a recording. Three did not

On Wednesday night at Mattison's apartment, all were free not to make a tape. Bess testified that "I didn't know exactly why we were there until after I seen the tapes and they told us that we were there to make tapes." T. 1282. He did not make a tape and, when first asked why, he said "Well, I have a problem talking and reading. I stutter every now and then." T. 1282. But then he testified that he was quiet Wednesday night and the others wanted to know "whether I was going to participate with the rest of them." T. 1283. Mr. Dougan said he wanted to hear "how we felt about it and our reaction to it." *Id.* Bess says he freely responded that he was fine with "letting the black people know there rights and everything," but that he "couldn't go along with the killing and *I*

[36]What Barclay added was that the victim "begged for mercy," but Hearn testified that was not true and it was "one of the things that **Elwood [Barclay**] had changed to make it seem more, you know, aggressive or something." T.1403 (emphasis added). The lower court judge correctly found that "the record does not reflect the Victim 'begged for his life' or that "blood gush[ed] from his eyes.'" *Id.* at 2371. Begging was "made up by Mr. Barclay" when in fact "the Victim did not beg for mercy." *Id*.

couldn't make no tapes." T. 1284 (emphasis added).[37]

Black testified that he made tapes because "getting the message to the people, in a way I thought it was right." Black "had no great love for [white people] at the time," and he agreed with doing the tapes about "violence, race, slavery and white devils" and sending them to the victim's family and the community. T. 1213. He said Dougan said "what we was gonna do," that "we was told that we was to make some tapes," T. 1136, and Jacob said "everyone was supposed to make a tape before they leave the room." T. 1182[38] Everyone did not.

Hearn testified that he was present Wednesday night and he, just like Bess and Evans[39], did not make a tape.

3. How notes for the taping were made–collaboratively

As Hearn testified, Dougan suggested making some tapes Wednesday night, someone said "yeah, that's a good idea," he then

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[37]Mr. Bess further testified that two days later Dougan asked him "was I gonna go along with them or just what I was gonna do." He said Dougan advised him "to go home and talk to your wife about it." T. 1290.

[38] *See* SB at 12 (Dougan "directed that others 'would have to make a recording before they left.'"); at 48 (Dougan "direct[ed] others 'to make a recording before they left.'"). Dougan told Bess to check with his wife first.

[39]Mr. Evans testified that he did not make tapes because "I didn't want no parts of it." T. 1822. "[O]nce I found out what they was fixing to do I just went on in the kitchen and proceeded to do what I said I was gonna do, and that was cook fish." T. 1824.

wrote down some notes of things to say on the tapes, asked for comments from others, and once he had comments he edited the notes. Black testified that the first time he heard about making tapes was Wednesday night. T. 1198. Mattison testified that on Wednesday night at his apartment (T. 994) "Jacob, you know, made some notes and we made a tape from the notes." T. 975. By Wednesday night, Black, Bess, and Mattison had all read newspaper clippings about the crime, T. 1199, 1296, 988, and there were news clippings and newspaper articles that "told about the murder" (T.988 [Mattison]) at the apartment while the note and tapes were made. T.1438 (Hearn); T.988 (Mattison); T.1198-99, 1202 ("It was some [news]-papers there.") (Black.); T. 1296 (Bess). Mattison testified what was written down came from "some information from reading [newspapers] and from some other source." T. 995.

Black says after the note was written, "[w]e was told to look over the note that was passed around to everyone." T.1137-38. He said Jacob "passed the note around," *id*., but that he did not know who wrote the note because "I wasn't there when *they* wrote it." T. 722 (emphasis added).[40] He said Jacob said "everyone was supposed to make a tape before they leave the room and that he would pass a note out for everyone to read it and prepare." T. 1182.

[40]Everyone else testified he was there when the note was written.

b. The actual tapes

1. Who purchased supplies, who looked up addresses, who mailed tapes? Mattison

Mattison testified that he was with Dougan, they went to a Pic N'Save, and Dougan paid for a tape recorder in "the afternoon." T. 985-86.[41] Mattison testified in his deposition that he, Jacob, and someone else purchased the tapes that were used. T. 977. The taping occurred in Mattison's apartment. During the evening Mattison left the apartment to get envelopes (T. 1207, 1287) and to get addresses for the delivery of the tapes (T. 977, 1286).[42] According to Black, once the envelopes were addressed some or all of them were not stamped because they didn't have the stamps: stamping had to wait for "stamps [to be] picked up at the shopping center." T. 834, 1207. Mattison and Dougan left, presumably picked up more stamps, and mailed the envelopes. T. 1207.

2. Tape-makers just made more things up "off-script"

With respect to tapes that do not relate to Mr. Orlando's murder, Mattison testified that he recorded a tape about a dead body that was found floating in the water near St. Augustine– "from a paper that we read–A newspaper," and Dougan had nothing to do with any "script" for this tape. T. 706-07; *see also* T. 823 ("we

[41]Mattison testified that he did not see the tape recorder in his car or see Dougan take it out of the car and take it into Mattison's apartment Wednesday night. T. 985

[42]Mattison "went to a telephone booth out by the pool at the hotel." T. 1286.

read about it and decided to make a tape"). Black also made a tape about this floating body-on his own. T. 723 ("It came out of the papers."). He listened to the tape in Court and said his voice is "on there." T. 849.[43]

With respect to the murder of Mr. Orlando, Black testified "most of the things that was written down are on all of the tapes. Some of the things that are not on all the tapes–*a few things are different from each tape was not written down*."; on some tapes "some things that was said that *wasn't written down*;" "some things *I* could have *added in.*" T. 720-21 (emphasis added).[44] Again, he testified he did not know who wrote the things down. T. 722.

3. Inconsistency about where the tapes were recorded

According to Hearn, after Barclay "put a little more into" the script (T. 1402), "that's when Jacob made a tape, played it back, and Elwood made a tape, played it back, and Elred went in the bathroom and made a tape." *Id*. According to Black, Dougan recorded "by himself" in the bathroom (T. 846, 850), not in front of Hearn or anyone else: "at two particular times I can remember Jacob

[43]This testimony was out of the presence of the jury but contradicts state's position about Dougan's influence on others. In the presence of the jury, Jackson had Mattison testify that he made a tape "in reference to a body that was found in St. Augustine." T. 976.

[44]Mattison testified *both* that "every word [that] was uttered on those tapes [was] written by Mr. Dougan" T. 705, 996, *and* that neither he, nor anyone else, read from "the note that was written by Jacob Dougan." T. 991.

Dougan went in the bathroom and recorded something, I myself went into the bathroom and recorded something, and other tapes that was made were made in the living room ...where everybody was." T. 852.[45] The tapes that contained everybody's voice were recorded in the living room. *Id*.[46]

4. Confusion about who made tapes

Mattison listened to a tape at trial and identified his own voice. T. 815. He testified that everyone except Bess made a tape. T. 698. Black testified that he played "the same [role] as everybody else" in making the tapes (T. 1202) and he himself said the same things the others said on the tapes. T. 1225. He testified that everyone but Hearn and Bess made tapes. T. 1225. Dougan, Barclay, and Crittendon all testified they made tapes; Bess, Evans, and Hearn testified they did not.

5. Were all tapes mailed?

Mattison testified that "all of the recordings were mailed" (T. 974). Black, however, said "I tore one up...I was on it." T. 835. Black testified two tapes were destroyed–"I destroyed part of one. I don't know who destroyed the other one." T. 730. And

[45]Mattison also testified that he saw Dougan make a tape and he was "present." T. 698. Black said Dougan made his tape "by hisself" in the bathroom. T. 846.

[46]If it is true that there were five tapes, and that at least three were recorded in the bathroom, then Bess was wrong to testify that "most of them were made right there in the living room." T. 1286

Hearn testified that all of the tapes were mailed except one and it was thrown "over a bridge." T. 1456

c. What the uncharged tape-makers said the defendants said and did pre-taping

1. Monday, June 17, 1974: at class people heard nothing or different things

Hearn was said to be present with Black, Mattison, and Bess with all of the defendants on Monday. Black and Mattison testified that Dougan made statements about the crime. Neither Hearn, nor anyone else, corroborated this testimony. According to Black, Dougan told everyone:

> a guy had got killed and that it was a political killing and that he wanted to do some–put out some reports to the black people to let them know that he was killed and to educate the black people to the fact that it was a political killing and it was not actually a killing but an execution. T. 1155-56.[47]

In his proffered testimony, Black had said that Dougan also said that "the police would find his body and the note would be attached to his body telling the black people why he was killed and everything." T. 1132.[48] This was not repeated before the jury.

Bess testified that he was at this Monday conversation and that Dougan said that "a killing had occurred Sunday" and "he would

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[47]In Black's deposition given three months after the events he did not say that Dougan said it was "an execution." T. 1191. He also testified in his deposition that this statement was made June 6, 1974, five days before the crime. T. 1192.

[48]Black testified Crittendon, Evans, Dougan, Barclay, Mattison, Hearn, and Bess were present so Jacob could "talk to us." T. 1155.

tell us more about it later. Wednesday night." T. 1275.[49] Neither in his testimony nor his proffer (T. 1252) did Bess say he heard what Black said he heard about a political killing, an execution, or a note.[50]

Mattison, who Black said was present for this Monday discussion, testified that "the first time [he] heard about the killing was the night they went to [his] apartment (T. 983)", Wednesday the 19th, and he agreed that there was "no discussion on the 17th of June, which was a Monday" about a killing. T. 984.[51]

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[49]At resentencing Black corrected himself: Dougan did "not exactly" say a killing, but "something had happened" the day before. RT. 1040.

[50]Black testified that on Tuesday afternoon he asked Dougan if the crime was in the newspapers yet and Dougan said no. T. 1157. However, according to Bess there was a newspaper article in the Tuesday morning edition of the Florida Times Union which Bess read on Tuesday that recited that Mr. Orlando had been killed near the beach area. T. 1297.

[51]Mattison first testified on direct that on Monday Dougan talked "about going out to my house and making some tapes...[i]n relation to the murder." T. 938. He had never said this before, and the prosecutor, at the bench, stated Mattison's "recollection is very bad as to any specific conversations." T. 940. Mattison later testified his testimony about Monday "must have been wrong" and the statements were on Wednesday. T. 984. He also admitted that he had said under oath earlier that he "don't really recall" where he had the conversation. T. 963. At trial, he said it happened before class and involved "a small group. Maybe three of us." T. 980. With respect to what was said, "I don't remember any, you know, certain remarks," T. 945, "I can't quote," "I can't recall, T. 981, T. 982, and "I don't recall." T. 982. And he was not even sure who said anything, but "I believe it was Jacob Dougan." T. 981. He admitted in his deposition that the "first time" he heard about the killing was the night when they all "went to your apartment." T. 983 ("I guess so."). No one else testified that the idea of tapes came

Hearn, who Black said was present for this discussion, did not say he heard Dougan say these things. None of the defendants testified this conversation ever happened.

2. Wednesday, June 19, 1974

a. After class: In a proffer, Black testified that after class on Wednesday, he asked Evans and Crittendon if they were present when the murder happened and they said yes. T. 1159 Immediately after this proffer, in his testimony before the jury, Black added that when Crittendon said "yes" he had been at the crime "[t]hen he also said that he wanted to use Karate on the guy but Jacob wouldn't let him." *Id.*[52] Black did not say that anyone else heard these conversations.

b. At Mattison's apartment

According to Black, Messrs Mattison, Bess, and Hearn, and the defendants went to Mattison's apartment after class. Mattison described his apartment as "very small (T. 960)." Bess said that the 8 people "was in the same room, about–within four or five feet of each other." T. 1259.

Hearn, who was in this room, testified that he heard Dougan

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up before Wednesday night at the apartment.

[52]This testimony led to the jury again being removed. Counsel for Crittendon complained that the State "must vouch for the credibility and the veracity" of Black "when the man evidently cannot tell a straight story." T. 1165. Counsel for Evans stated "frankly we don't know when he's telling the truth and when he's not." T. 1166.

state that “we had went out and picked up this white devil and killed him and left a note on him.” T. 1399. None of the other witnesses within six feet of both Dougan and Hearn testified that Dougan made this “white devil” statement before any taping started.

Black testified the “first thing that happened was Jacob brought a tape recorder in.” T. 1180-81. Bess testified that he was “not sure who had the tape recorder.” T. 1279. Mattison said he rode to his apartment with Dougan and did not see a tape recorder in the car. T. 985. He did not testify that Dougan left the car with a tape recorder and took it into Mattison’s apartment. Even though he said he was with Dougan when a tape recorder was purchased, he said “I’m not sure that it was his [tape recorder], but he’s the one that brought it in there.” T. 958. Bess, who was within 5-6 feet of everyone else, said “I’m not sure who had the tape recorder.” T. 1279. Hearn did not say who brought a tape recorder in.

Black testified that Dougan came in with “his own personal pistol” which he placed on a table[53] with the tape reorder. T. 1181. No other person noticed this, and several said it did not happen. T. 1406 (Hearn); T. 1282, 1289 (Bess “no pistols at all that night” and “no firearms”).

[53]The lower court at trial agreed that the pistol that belonged to Dougan was a .32 caliber and the court agreed that it was inadmissible: “if any gun was used at all it was the .22 caliber automatic pistol, and I cannot see that the .32 is relevant in any way.” T. 1418

Black testified that then Dougan said they were going to make some tapes about "the political execution" and "tell the people exactly why he was executed." T. 1181. Black then testified to statements made by all four defendants which apparently no one else in the group heard. First, Black described what he claimed Dougan said about the crime, with a caveat. He said "I couldn't quote him...nothing like that." T. 1172. Then he testified Dougan said at the scene he had to "push the guys aside, he put his foot on the guy's neck and shoot him in the head." T. 1182.[54] He testified that Crittendon said he had "wanted to use Karate on the guy" but Dougan stopped him. T. 1184. He testified that Brad Evans said he was trying to stick the knife in the victim's chest and it kept "closing up on him." T. 1183. Bess, supposedly also listening to Dougan, testified that Dougan said "he put his foot on the boy's throat to keep him from screaming" (T. 1287).[55] Bess did not say he

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[54]The state's cite on p. 50 (T. 1169) that Black said that Dougan said he wanted Evans to stab the victim in the kidneys was contained in a proffer and was not later repeated before the jury.

[55]Bess swore in 1974 shortly after the offense and before trial ("it was fresh on my mind" [ST 1042]) that **Dougan did not say anything about screaming, begging, or foot on throat**:

> Elwood [Barclay] said that Jacob had put – after the boy was begging, pleaded with him, they had knocked him down, Jake put his foot on the boy's throat to keep him from hollering." ST 11052.

And Hearn testified that Barclay simply added this falsehood to make the tape stronger.

heard what Black said Black heard--nothing about screaming, "pushing guys aside," putting his foot on the victim's head, or shooting him with a gun. T. 1182.[56]

Black testified Evans said that he was trying to "stick the knife in the guy's chest with the note but the knife kept bending up on him, closing up on him." T. 1183 Black testified that Barclay said he had to "tussle with the guy and knock him to the ground." *Id*.[57]

Bess said that he heard Barclay "kind of kidding about how Brad was trying to stick the knife in the boy's chest and that he had taken it from him and put it in the boy's stomach." T. 1280. This conflicts with what Black said Barclay said, yet at the time "everyone was still in a group." T. 1280. Bess also said that Brad Evans said the same thing about Barclay taking the knife from him and stabbing the victim. T. 1281. But Black did not say so. Again Mattison, five feet away, apparently did not hear these things. Or Hearn. Finally, Bess testified that Dougan saw a large knife on a dresser and said "they could have used that knife that night." T. 11284. No one else testified they heard this statement, five feet

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[56]Bess testified that there was no pre-taping conversation about Dougan having used a gun and "had there been a conversation about a gun being used he would have remembered it." T. 1294, RS. 1047.

[57]Black said that Crittendon said he "wanted to use Karate on the guy but Jacob told him not to." *Id*. Apparently Mattison, five feet away, heard none of this. Hearn, in the circle also, testified to none of this.

away.

d. What happened at Vivian Carter's–everyone had weapons

Vivian Carter had some trouble on her property – "shooting and burning and attacks, wire cutting, fires" (T. 507)–which she reported to the police department. After that, she sought the assistance of James Washington with the Southern Christian Leadership Conference ("SCLC") in Jacksonville and after that the defendants "came out to sit with me" and stayed there "more than a week" T. 502. [58]

According to Black, he and others started visiting Vivian Carter when they heard on the radio about problems she was having. They decided to help her by "[w]atching for anybody letting her livestock out or trying to do anything to her." T. 1217. He also testified that in July and August he saw Hearn, Mattison, Dougan, Evans, Crittendon and some more people at Vivian Carter's house. He said "we all had possession of weapons....Shotgun, this pistol was there and William Hearn's pistol was there." T. 1187. He said these weapons were kept at Carter's house. T. 1188-89; 1218 ("we had [weapons] in our possession"). He himself possessed Hearn's .22 "several times." T. 1188.

[58] According to Carter, the police offered no help after she contacted them. She contacted Mr. Washington who "asked the public for help." T. 509. A public meeting was held at the SCLC and after that the defendants came to her home. T. 511. She never saw Dougan armed. T. 514. The judge excluded this evidence as "irrelevant." T. 515.

Ms Carter testified that after the defendants were gone she found two pistols, one under her mattress and one somewhere else in her home. T. 506. She took them and threw them toward a river in September 1974. T. 496. She testified she did not know who the weapons belonged to but she had seen the weapons around the house during that time. T. 497.

e. The defendants' testimony–tapes, but no murder

Dougan testified that he had nothing to do with the murder of Mr. Orlando and had not seen the .22 caliber pistol before. T. 1607-08. He was at home with his father at the time of the offense. T. 1609. He admitted to making tapes and said the information for the tapes came from Mattison (including the gun jamming), from newspapers, and from talk on the beach. T. 1609, 1615. He was on the beach Tuesday afternoon and heard people talking about the circumstances of the murder, including that the victim was shot twice in the head. T. 1612-13. Dougan denied that he wrote the note found at the scene. T. 1611.

Barclay testified that he was not involved in the killing of Mr. Orlando and when he got to Mattison's apartment on Wednesday night Mattison "explained that he had heard about a killing on the beach that Tuesday and he asked would we make some tapes." T. 1773-4. He testified he had never seen Hearn's .22 or the knife found at the scene. T. 1774. On cross-examination he explained that the information from the tapes came from Mattison, Dougan, and

newspapers:

> Mr. Mattison said he had been on the beach and he had heard that somebody had been killed and that they were stabbed and everything and a note was left on them. So he said that maybe we could take advantage of it and do like the SLA did and send some tape --
>
> Q. You're saying that Mattison said that?
>
> A. Yes, sir.
>
> Q. What did Dougan say?
>
> A All Dougan said was that he had been on the beach - he had been down to Dairy Queen somewhere and he had heard about a killing. Some kids were talking and he had heard about it.

T. 1778. Barclay also testified there were three newspapers at the apartment with stories about the crime. T. 1779

Barclay testified that he read from a script prepared by Mattison and Dougan–Mattison "dictated what he wanted" in the script and Dougan wrote it down. T. 1782. Barclay said "Mr. Mattison was directing the taping session so I did as he asked." T. 1784.

Dwyne Crittendon testified he had nothing to do with the death of Mr. Orlando. The information on the tapes came from Mattison and newspapers–Mattison told them all about a note on the body, how many shots were fired, and that a the pistol had misfired. T. 1806. He testified that when he was first taken to the police station he was offered immunity for his testimony by Mr. Bowden. T. 1794. He did not understand what immunity was and he did not accept it. Barclay, Mattison, Crittendon, and Evans were all brought to the

police station at the same time. T. 1811.

Brad Evans testified that he had nothing to do with the murder and that he was home with his mother, father, and little younger brothers when the crime occurred. T. 1820 He was at Mattison's Wednesday night but did not make any tapes. T. 1821. He and others went there because there was a swimming pool. When they arrived Mattison told everyone what had happened and "I didn't want no part of it so I went in the kitchen and started cooking some fish." T. 1822. He heard others making tapes but he "was sort of frightened about it, about the whole situation" and he should have just walked out. T. 1823-24. Right after Dougan was arrested the "school was filtrated with detectives" and he went down to the police station to talk to detectives. T. 1825. He denied telling Black that he was present the night of the crime and denied that he was laughing on Wednesday while describing a knife closing up while he was trying to stab the victim. T. 1830

f. What was known at the beach and in the news about the killing?

The state argues that only the actual killer(s) would know the facts that were in the "script." However, a June 19 Jacksonville Florida Times Union Newspaper article included: the name and age of the victim, time of death, and where the body was found. It also recited an autopsy "revealed gunshot wounds and wounds from a knife found at the scene." RT 120. And "[a]lso found lying on the body was a page-long handwritten note which [police] said was a

'power to black people' type of note." *Id*.[59] The State introduced this article as rebuttal to the defendants' case, but the Judge stated that this article contained "[a]ll that has been testified to in the testimony...[I]t's just about as helpful to the defense as it would be to the state." T. 1872. The judge said again: "Nothing has been said therein that has not been testified to. There are some statements in there which I think –which appear to me might very well help the defense." *Id*.

The defendants testified that Mattison, originally charged with murder, provided the detail. Was he at the crime scene? The defendants also testified that there was talk on the beach after the crime. Friends of the victim, Michael Ryan and William Clark, testified that they learned about the crime on Monday the 19th because "everybody was talking about it" on the beach. T. 1719. Ryan stated "everyone that was at the beach" and "a bunch of people" were talking about what had happened. T. 1739. He heard that the victim was "stabbed, you know, a few times in the midsection, or something, and he was shot" twice. T. 1740.

3. The state's current contention of overwhelming evidence without Hearn is unsupportable

The State's recitation of the overwhelming evidence against Dougan is contained at SB 49-52. It is heavily reliant on what

[59]Another Jacksonville newspaper story on June 19 stated the same information and referred to this as a "shooting and stabbing death." RT. 192.

Mattison, Black, and Bess say, and also attempts to show that they, and other evidence, corroborate Hearn's testimony. As the previous discussion of the record shows, Mattison, Black, and Bess were not consistent with each other, much less with Hearn. And to the degree they were, Hearn had all their statements and had been told what they had said before he ever sought his deal.

The tape-recordings about the shots and the stabbings do not show Dougan was present for them. SB at 49. The information was in newspapers, was out on the street, and was reported by Mattison (as was the gun jamming). The medical examiner too says nothing that was not known from newspapers and from talk at the beach. *Id*. The note found on the victim's body had been mentioned in the press and made its way onto the tape. *Id*. at 50

None of this "evidence" is inconsistent with Hearn actually shooting the victim. He admits he was there; it is his car; it is his gun. The note on the victim's body does not change that, even if it was written by Dougan, which he denied.[60]

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[60]It is now known that handwriting comparisons are unreliable, have no basis in science, are misleading, and are not generally accepted in the relevant scientific or technical community. The National Academy of Science's National Research Council – as August a scientific body as there can be – has recently recognized the serious shortcomings in many forensic science disciplines, including handwriting comparison. National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (hereinafter "NAS Report"). The NAS Report noted significant shortcomings in the scientific underpinnings of handwriting comparison, and thus questioned the reliability of the conclusions reached by handwriting examiners. Because of what

G. The State has not proven beyond a reasonable doubt that the jurors did not consider Hearn's untruthful testimony, and confidence in the results is undermined

The lower court's conclusions were correct. The state did not reveal the "relationship between the State and Mr. Hearn...at Defendant's trial or resentencing." Order at 2223.

> Defendant has demonstrated a reasonable probability that had the evidence [in this claim] been disclosed to Defendant, the result of the proceeding would have been different; and therefore, this Court's confidence in the outcome of Defendant's case has been undermined. Moreover, the State's presentation of false evidence and its failure to correct this testimony violates *Giglio* and presents a reasonable likelihood the false testimony could have affected the judgment of the jury. The State has not met its burden and shown the presentation of this testimony at trial was harmless beyond a reasonable doubt. A cumulative analysis weighing the undisclosed, favorable information implicating *Brady* concerns in conjunction with the misrepresentation to Defendant's jury involving *Giglio* violations presented at Defendant's trial and resentencing bolsters this Court's conclusion that Defendant was prejudiced. *Id.*

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the NAS Report termed the "limited research to quantify the reliability and replicability of the practices used by trained document examiners," NAS Report at 167, handwriting comparison must fall into that category of forensic disciplines that "do not meet the fundamental requirements of science, in terms of reproducibility, validity, and falsifiability." *Id*. at 43.

ARGUMENT II: TRIAL COUNSEL HAD MULTIPLE ACTUAL CONFLICTS OF INTEREST WITH ADVERSE EFFECTS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS[61]

A. Representing three murder co-defendants

1. The law of the case: Mr. Jackson's joint representation of co-defendants was a conflict-of-interest that requires a new proceeding

On direct appeal, Mr. Jackson represented three co-defendants: Dougan, Barclay, and Crittendon.[62] This Court initially affirmed the Barclay and Dougan judgments, but then, on habeas corpus, found an actual conflict of interest and granted both a new appeal:

> In general an attorney has an ethical obligation to avoid conflicts of interest and should advise the court when one arises. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). An actual conflict of interest that adversely affects a lawyer's performance violates the sixth amendment and cannot be harmless error. *Id*; *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942)...
>
> The trial jury obviously differentiated between Barclay and his co-defendant Dougan because it recommended death for Dougan and life imprisonment for Barclay. This situation, therefore, would appear to be tailor-

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[61]Standard or review: Ineffectiveness is a mixed question of law and fact, reviewed *de novo*. *Evans v. State*, 946 So. 2d 1, 24 (Fla. 2006). As to fact-findings. this Court will not substitute its judgment for the trial court's so long as "competent substantial evidence" supports the findings. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997).

[62]Because Crittendon did not receive the death penalty, his appeal was to the First District Court of Appeal. That Court"dismissed Mr. *Crittendon's* appellant brief because Mr. Jackson failed to file it in accordance with the Florida Appellate Rules and prior court orders, and failed to file a record on appeal." Order at 2274.

> made for emphasizing the jury's apparent perception of the differences between the two appellants. Jackson, however, made absolutely no attempt to draw our attention to this difference or to emphasize the rationality of the jury's differentiation.
>
> .....
>
> We find that Jackson had a conflict of interest in representing both Barclay and Dougan and that Barclay must have a new appeal where he is represented by conflict free counsel.

Barclay v. Wainwright, 444 So. 2d 956, 958-59 (Fla. 1984). This Court continued: "We also find that Jackson did not provide Barclay with effective assistance of counsel."*Id*.[63] "Jackson's representation of Dougan suffered from the same major defects as did his representation of Barclay...[including] a conflict of interest." *Dougan IV*, 448 So.2d at 1006.

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[63]As was recognized at the evidentiary hearing below:

> THE COURT: ...[T]he Supreme Court did write a pretty strong order finding – [Mr. Jackson ineffective.]
>
> WITNESS KUNZ [Assistant State Attorney]: Yes.

V17, 2977-78. Mr. Kunz wrote in 1987, when deciding whether to pursue resentencing, the State was worried Mr. Jackson would be found ineffective at trial:

> The issue of ineffectiveness of trial counsel is one that may come back to overturn any new death sentence imposed. If that does occur in this case (the Supreme Court has already held that the defendant's attorney was ineffective *as a matter of law* for appellate purposes), any efforts by the State at this point to obtain a death sentence would be futile.

Ex. 26, SV8, 1280-82 (emphasis added).

2. The conflict of interest that spoiled the appeal was created before and during the trial proceedings and requires a new trial

a. Uncontradicted: Jackson solicited Crittendon and Barclay before and during trial

The uncontradicted testimony below is that Mr. Jackson actively solicited and created in the trial court the very conflict that spoiled the appeals in this case. First, Dwyne Crittendon testified that Mr. Jackson “came to me one day and said if I lose the case, that don’t worry about it. He was going to represent me and my other co-defendants on direct appeal.” V16, 2872. At that time he was represented by Mr. Stediford.

Q. When in the course of the criminal proceeding was it? Was it before the trial? During the trial? After the trial?

A. We was going through preliminary hearing.

Q. Do you remember where you were?

A. I was in my cell.

Q. Okay. And he came to your cell?

A. I was called out.

Q. So he called you out.

A. Yes, sir.

Q. Okay. And it was a meeting just between the two of you.

A. Yes, sir. In the hallway.

....

Q. Did you understand he would be your lawyer on direct appeal if you lost...

A. Yes, sir.

V16, 2872-73. On cross-examination, he was asked when Jackson approached him about representation "your trial hadn't even started" and he said "No, sir. It hadn't." V16, 2875; see Order at 2271.[64]

Mr. Barclay testified "[d]uring the course of the trial, he – we were in the court chute from time to time during recess and lunch breaks he came in and talked to me and said: don't worry about it. **We're** probably going to lose this, but I will handle your appeal for you." V17, 2993 (emphasis added). Mr. Jackson did not warn him of the conflict. V17, 2993-94.[65] Mr. Jackson said he

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[64] At a pre-trial hearing on January 24, 1975, Jackson conferred with Mr. Crittendon about a speedy trial waiver.

> (*Mr. Jackson* and Mr. Stedeford *conferring with defendant Crittendon*)
>
> THE COURT: Mr. Stedeford, would you and Mr. Jackson like to take Mr. Crittendon back in the back room?

Pp. 27 (emphasis added).

[65] As the lower court correctly held, the record reflects no waiver by the defendant of any conflicts. Order at 2269. *See Dougan v. Wainwright*, 448 So.2d 1005, 1006 (Fla. 1984)("[T]here is no evidence that Dougan knew of a possible conflict, knew the possible effect of a conflict, or effectively waived any conflict."); *United States v. Petz*, 764 F.2d 1390, 1392 (11th Cir.1985)("Objection to a conflict of interest may be waived by the client, but the waiver must be through 'clear, unequivocal, and unambiguous language.'") (citation omitted). If a conflict is writable, a lawyer may continue a conflicted representation only if, at a minimum, the "client gives informed consent, confirmed *in writing* or clearly stated on the record at a hearing." Rules Regulating Fla. Bar R. 4-1.7(b)(4) (emphasis added). None of this happened here.

would represent him without charge. Order at 2272.[66]

After the trial ended, Jackson filed a Motion to Appoint Counsel with respect to each defendant on April 15, 1975.[67] The court refused to appoint Mr. Jackson – "I have already appointed

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[66]The state argues "Dougan's postconviction claim only alleged that 'immediately after Mr. Dougan and his co-defendants were sentenced'(PCR/7 1161), Mr. Jackson solicited representation of co-defendants, [and] the claim therefore fail[s] to allege a basis for the trial court's ruling that the solicitation occurred 'before or during trial proceedings' (See PCR/12 2275)." SB 79. The state is incorrect:

> Petitioner alleges that Mr. Jackson fully intended to represent these defendants on appeal well before **he actually embarked on that mission and while the trial proceedings were ongoing**. His conflict of interest, which was open and notorious on appeal, was less apparent at trial, but it created the same violation of the Sixth, Eighth, and Fourteenth Amendments as the patent appeal conflict. V7, 1164-65 (Amended 3.850)(emphasis added).

Barclay and Crittendon both testified without objection from the state below. The state cross-examined both witnesses. The state did not move to strike the testimony of these witnesses. In its post-hearing memorandum filed below, the state did not argue that these witnesses' testimony should not be considered. The lower court considered their testimony and relied upon it. The state did not complain in its Motion for Rehearing below that these witnesses' testimony should not be considered. V.13, 2420-2427. Neither the lower court nor Appellee's counsel had notice of this argument by the state before the filing of the state's brief in this Court. The state must be deeded to have waived this argument, or, if the Court finds the state is correct, Appellee should be allowed to amend his 3.850 Motion.

[67]Because Mr. Jackson had un-notarized and undated copies of these defendants' requests in his file, and his calendar shows that on April 15, 1975, he was booked solid, it is likely these signatures were obtained before the 15th (during trial) and were notarized later. Exhibit 14, SV4, 627, 647-53)(un-notarized motion and Jackson desk calendar excerpt). Order at 2274, n. 63.

the Public Defender's Office to represent these defendants. I will not unappoint them unless the Public Defender's Office files an affidavit that they find there is a conflict of defenses. I do not see any justification for appointing private counsel and spending more of the taxpayer's money by appointing private counsel simply because that's who they want." Ex. 14, SV4, 642 Order at 2273. Then Mr. Jackson stated that he would represent all three of the defendants pro bono, and the Court stated:

> If that's what you want to do, Mr. Jackson, that's entirely up to you, but I cannot in good conscience spend the taxpayers' money appointing private counsel until and unless they advise me that there is a conflict of defenses. **I think there is a conflict of interest between Dougan and Barclay.** *Id*. (emphasis added).[68]

Mr. Jackson immediately filed a Motion to Release Public Defender's Office as Counsel for Defendants. Ex. 14, SV4, 469. A hearing was held on this motion April 18, 1975, and the Court stated that before he would allow Mr. Jackson to represent all three defendants the Public Defender had to "sign in writing they are relieved of any responsibility for it." *Id.* at 632. The judge then wrote on the Order the following:

> I, William Pierce White, assistant Public Defender, do hereby consent, on behalf of my office, that we be relieved of all responsibility herein and that the above named attorneys prosecute the appeal of the defendants named.
>
> I further state and acknowledge that my office has

[68]The defendants were not present for this hearing. SV4,638.

> received a copy of the Motion to Relieve Public Defender and a copy of this order dated April 18, 1974 [sic].

Mr. White signed this statement. V18,3172. Order at 2273.[76] Mr. White testified below that this was very unusual.[77]

Thereafter, while the appeals were pending, Jackson refused

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[76]On April 17, 1975, Mr. Jackson represented David Esser who pled guilty to sale of a controlled substance. On April 18, the date he was displacing the Public Defender in the Dougan, Barclay and Crittendon appeals, he was also in court for "David Esser Bond." Ex 14, SV4 at 628. He was later found to be ineffective for his representation of Mr. Esser during this exact time period. The allegations of ineffectiveness were that Mr. Jackson was "grossly deficient." Ex. 35, SV11 at 1976. The Motion was granted November 16, 1977. *Id.* at 1974. Samuel Jacobson, Esq., made the successful allegations of ineffective assistance.

Mr. Jackson's then ineffectiveness was known to the Public Defenders Office. Sandy D'Alemberte was co-counsel in Mr. Barclay's state habeas corpus proceedings and assisted in obtaining affidavits attesting to Mr. Jackson's ineffectiveness. He sought an affidavit from Lou Frost, Mr. White's boss:

> Lou Frost has looked into the facts of our case and has decided that he should not execute an affidavit on our behalf, the principle reason for his decision is that his chief assistant, Bill White, was required by Judge Olliff to execute a paper, handwritten by Judge Olliff on the passage of the file from the Public Defender's Office to Jackson and he fears that he will be vulnerable as a witness because **he did have some knowledge of Jackson's incompetence *at that time***.

Ex. 84, SV-19, 3379 (emphasis added).

[77]White testified that normally when private counsel agree to accept a Public Defender case, the judge "would either nod to the Public Defender and acknowledge that the Public Defender was being relieved or, you know, ask the Public Defender, do you move to withdraw on the basis of private counsel?" V18, 3172. It was not something that was done "in writing," and there was never any "ceremony about it." Order at 2273.

to communicate with Mr. Dougan (Ex. 14, SV4 at 621) but had time to do a will for Mr. Dougan, Sr., leaving property to Thelma Jackson, his new wife and Mr. Dougan's sister. *Id*. at 615. He also failed to communicate with Mr. Crittendon. *Id*. at 614. He filed virtually identical assignments of error for all three defendants (*Id*., 496-509) and the exact same briefs. Order at 101. When the case returned to the lower court in 1979 for a *Gardner* remand, it was agreed there would be a severance and separate hearings for Dougan and Barclay. Ex 17, SV4, 533.

b. The manifestation of the conflict: lumping defendants together

1. Cannot pit clients against each other

The lower court found that Jackson "approached and solicited Defendant's co-defendants ...concerning their appellate representation ... while representing Defendant during trial proceedings." Order at 2275. This was "inconsistent with his obligation to Defendant."

> For trial counsel to distinguish Defendant from his co-defendants at trial would necessitate placing one or the other in a more culpable light. Despite the nature of the trial, the charges, and the crime, *Defendant's trial counsel did not cross-examine either co-defendant at Defendant's trial. Defendant's trial counsel made no attempt to distinguish the culpability of Defendant and his co-defendants at trial. This resulted in a conflict of interest.* Defendant has identified specific evidence in the record to suggest his interests were impaired or compromised for the benefit of counsel or another party that adversely affected his performance. Therefore, this Court finds an actual conflict of interest adversely affected counsel's performance, and grants relief on this claim.

Order at 2276-77 (emphasis added).

Jackson had a conflict "'pitting his clients against each other.'" Order at 2274(quoting *Barclay*, 444 So.2d at 958). The lower court should be affirmed. What might unconflicted counsel have cross-examined co-defendants about? Co-defendant Barclay testified that when he made tapes he was only reading from a script and "Mr. Mattison and Mr. Dougan prepared the script." T. 1782. Mr. Jackson could have asked "isn't it true that you, yourself, added the part of the script about the victim begging?" And Barclay's testimony that he sounded the way he did on the tape because "*they asked* me to make it as gory as possible (T. 1784)(emphasis added)" could have been countered with "aren't you the one who believed it was not gory enough?" Finally, Barclay's testimony that he was not proud of making the tapes "at the time" could have been countered by "weren't you bragging at the time?"[78]

Barclay could also have been impeached because of his prior conviction and five year sentence for a felony – breaking and entering with intent to commit the felony of grand larceny. ROA 227, 236. See Earhardt's Florida Evidence 2012 Edition at 603-604. Jackson argued that Dougan did not have a record. T.

[78]"A close attention to Barclay's boastful remarks on the tapes will lead any listener to conclude that he was a major participant and proud of that participation." ROA 229 (sentencing Order); *id.* at 231 ("Barclay's repulsive but dramatic tape recording he made boasting of the murder.")

2094. He could have argued that Barclay did. Who was the criminal here? Who was leading whom? Order at 2270-71. As this Court noted, Mr. Jackson's job was to show the "differences between the" defendants and to "draw" the jurors' attention to this difference, which he made "absolutely no attempt" to do. *Barclay*, 444 So. 2d at 958-59

Other, unconflicted, counsel *did* distance their clients from other co-defendants. For example, counsel for Crittendon:

> What act, what word did Dwyne say or do that incited, that caused, that encouraged that assisted another person to actually commit the crime? And I say this: Absolutely nothing. He was a passenger in a car. Mr. Austin has said, "*Look at defendant Dougan*, observe his demeanor on the witness stand; *he is the leader." Look at my client*. Look at him. Is he a leader? Does he look like a leader? *He looks like a little mouse to me.*
>
> There's been mention of a car. We've had *Dougan's car, no mention of Crittendon's car*. Mr. Austin has said, "*In his fancy clothes, Mr. Dougan." Look at my client. He's sat in that same coat, tie, shoes, pants and shirt for two weeks.* Is that man the leader of the pack or is he a follower? If he's anything at all he's a follower.

T. 2202-03 (Crittendon's counsel)(emphasis added); *id*. at 2206 (Crittendon is "the only person I'm concerned with. He's my responsibility...")[79]

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[79]Crittendon's counsel continued:

> You further promised me that you would treat each defendant separately and that you wouldn't collectively look at them, that you would look at the evidence against Dwyne as opposed to the other three, and that you would look and treat him as one person, as though he was the only person on trial. T. 2008

2. Cannot plea bargain to testify against another client

As the lower court noted, "the record does not reflect Mr. Jackson considered or pursued plea negotiations." Order at 2268.[80] According to Mr. Jackson, he did not seek a plea agreement:

> When the time came to deal with the matter, when charges were brought Mr. Dougan said, "Well, I haven't done anything to anybody but made some tapes. I know this, I haven't killed anybody." So, no, he didn't plead guilty to killing anybody because he didn't, the same as Mr. Crittendon." T. 2094 (argument to the jury.)

> You promised me that you would look at Dwyne separately, so let's separate Dwyne. Let's assume for a moment that Dwyne and I are the only defendant and lawyer in this courtroom representing a defendant. And what is the evidence against Dwyne Crittendon alone? T. 2012.

Crittendon "alone" was convicted only of second degree murder. In closing argument Jackson actually argued that Crittendon was not guilty. T. 2094. Since Jackson had solicited Crittendon as a client, he "did not make an attempt to distinguish Defendant from" him. Order at 2275. Counsel for Barclay argued

> [Y]ou must decide and convict or find innocent for that matter each one as individuals, not as a group, not as an association...My point is you have to look at the evidence individually. T. 2002.

Counsel for Evans quoted jury instructions in argument: "'Each defendant and the evidence applicable to him must be considered separately. Whatever verdict you return as to one defendant must not affect your verdict as to the other.'" T. 2141 Evans was convicted of second degree murder.

[80]See Order at 2293 ("Mr. Robbins, who was an assistant state attorney from January 1973 until June of 1975, attested that Mr. Jackson ... 'never undertook to engage in plea negotiations on behalf of his clients.'")

Would effective counsel have sought a plea bargain in this case? According to the state any trial in this case was a hopeless cause: "the 1975 defense's burden was hopeless in light of the overwhelming evidence against Dougan." SB 67. So hopeless that any errors at trial "do not matter." SB 2. Overwhelming evidence is the mantra of the State's brief.[81]

If that is true, then any defense attorney would attempt to negotiate a sentence less than death.[82] Hearn–whose car and gun were used, and who fled the state--got a deal in January, 1975, on the eve of trial. Why did Jackson not seek a deal? He represented the only three people who did not deal.

B. Counsel's wife and office secretary caught Appellee's counsel *in flagrante delicto* with Appellee's sister in counsel's small law office, counsel vowed to divorce his secretary and marry the sister, and the resulting conflicts that adversely affected Appellee's trial

1. The disruptive, time-consuming, May-December adulterous, in office, affair

Jackson started an affair with Thelma Turner, Appellee's sister, within two months of beginning representation. The lower court found the following about these circumstances, none of

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[81]See SB at 1, 2, 25, 45 (2x), 47 (3x), 48, 52, 54(2x), 56, 60, 61, 62, 67 (2x) 81(2x), 83, 91, 92, and 99.

[82]See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 1989, at 111.("counsel must strive to convince a client to overcome natural emotional resistance to the idea of standing in open court and admitting guilt of what was charged as a capital offense if that will save the client's life.")

which was disputed, or mentioned, in the state's brief:

> !Defendant was arrested in September 1974. Ernest Jackson was 54 years old and married to his secretary, Lougenia Jackson, when 24 year old Thelma Turner (Defendant's sister) and Defendant's father arranged for Jackson to represent Defendant at trial. Order at 2261
>
> !"Mr. Jackson and Ms. Turner started a romantic relationship around December of 1974, which continued through Defendant's [February] 1975 trial and appeal." *Id*. at 2262.
>
> !Mr. Jackson and Ms. Turner had sex in Jackson's small office and Jackson's wife "saw Mr. Jackson and Ms. Turner one night in the office library having a 'sexual relationship.'" *Id.*[83]
>
> !This led to ongoing "scuffles," and "fracases," "attacks," and physical "fights" between Lougenia Jackson and Ms. Turner. *Id*.
>
> !This was while trial preparation was supposed to be occurring and while the actual trial was going on. *Id*. 2262-63.
>
> !"Ms. Jackson had worked for Mr. Jackson as his legal secretary for about ten years at this point. As his legal secretary, Mrs. Jackson drafted legal documents typed various legal motions based on Mr. Jackson's dictation, and accounted for the offices finances and

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[83]The State writes this is just a case about an attorney "dating a defendant's sister." SB at 68 (2x in 4 lines); *see also id* at 69 ("dating Dougan's sister"), 78 ("Mr. Jackson was dating Dougan's sister."). That is a free spirited way to put it.

Mr. Jackson's wife and secretary testified in her later divorce proceeding "I have seen them together several times. One afternoon I went up to the office and they were in the library together very close....[S]he was almost in his lap and he was laying down on the sofa. And the next time that I saw them together was one night I went up to the office and he and this lady were in the library and they were having sexual relationship ....both of them without any clothes on in the office." Exhibit 15, Divorce Records, March 29, 1978 hearing at 172-73.

bills." Id. at 2262.

!Gwandos Ward, another secretary in the office in 1974, knew of the affair "because of arguments between Mr. Jackson and Lougenia Jackson in the office." She swore that "Mr. Jackson began the affair with Ms. Turner before trial; that Ms. Turner came to the office regularly; and that there 'was tension between Mr. Jackson and his wife and they had arguments about his affair with Thelma [Turner] before and during the trial.'" Id.

!Moses Davis had known Mr. Jackson for thirty years before the trial. He attended the trial daily and had never seen Thelma before but "every break in court, – [Thelma] was in his presence." "[E]very time I saw him, she was with him." V17, 3109. During the trial, Mr. Jackson told Mr. Davis that his affair with Thelma "was a situation of a lifetime, that a person live a lifetime and things come along and some he have to take advantage of." V17, 3107. Jackson was "referring to the age and beauty of Ms. Turner." SV6, 1071. Mr. Davis testified Jackson "was talking about leaving his wife" for Thelma. *Id*. at 3109; see also Order at 2263[84]

!Deitra Micks assisted Mr. Jackson at trial. In 1984, co-defendant Barclay filed a Petition for Writ of Habeas Corpus in this Court. An Appendix to the petition contained affidavits and other documents. One of the affidavits was from Deitra Micks, and it recited, in part, the following:

> At the time of the preparation for the Dougan trial in 1974 and 1975, Mr. Jackson was married to Lougenia C. Jackson, his third wife, who was then employed as a legal secretary by Jackson & Micks. **During**

[84]*See also* SV 6, 1071("Ernest Jackson was enamored with Ms. Turner. Ms. Turner was approximately thirty years Jackson's junior and was extremely attractive.... During Mr. Dougan's murder trial in 1975 I was extremely concerned about Mr. Jackson's level of preparedness. He was spending all his time with Thelma Turner.")(affidavit). The state conceded below specifically with respect to Moses: "if someone testifies, I don't think we have a problem with an affidavit coming along with them." V. 16, 2901.

> **December, 1974, I learned that Mr. Jackson had become infatuated with Thelma L. Turner, Jacob Dougan's sister.** Mr. Jackson obtained a divorce from Lougenia C. Jackson which became final on December 18, 1975. On February 14, 1976, Mr. Jackson married Thelma Turner, the sister of Jacob John Dougan, Jr. Mr. Jackson had four children by his second wife. He subsequently adopted three of Thelma Jackson's children from another marriage. Exhibit 30, Appendix C, p, 4 (emphasis added).

This Court relied upon this and other affidavits to find a conflict of interest on appeal. *Barclay*, 44 So. 2d at 958-59. The lower court similarly relied upon Ms. Micks.

!Regarding Mr. Jackson's affair with Ms. Turner

> "Ms. Micks relayed that the atmosphere in the office before and during trial 'was very bad because of the affair. Mr. Jackson's wife knew about the affair and caught Mr. Jackson and Ms. Turner making love in the office. Ms. Turner was at the office very often during trial and pre-trial preparation and would come early and stay late with Mr. Jackson.'" Order at 2264.
>
> "Ms. Micks confronted Mr. Jackson about the affair and told him 'it was affecting his work on the case in a bad way. His mind was not on what he was supposed to be doing and he was not prepared. I believe that had he not been involved with Ms. Turner the case would have turned out differently. He ignored my concerns.'" Id.[85]

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[85]The trial judge knew of the relationship. The following occurred at proceedings before Judge Olliff on October 23, 1979 during *Gardner* remand proceedings:

> Insofar as your reference to Mr. Jackson representing both Mr. Dougan and Mr. Barclay on the appeal, I think you are right, there is no question about it that he did – was related to the defendant Dougan by marriage

> !Mr. Jackson divorced Lougenia Jackson on December 18, 1975, married Ms. Turner on February 14, 1976, and adopted three of Ms. Turner's children from another marriage. SV 8, 1411.[86]
>
> 2. The lower court correctly held the conflicted, dysfunctional, defense requires a new trial
>
> a. Mr. Jackson's dysfunction
>
> The lower court correctly applied the law to the facts.

> *at the time he took the appeal.* [This is actually not true. They weren't married at that time, but they were having a relationship.] I wondered about it at the time myself, but that's another matter for another court.

Order at 2266-67 (emphasis added).

[86]Over the years, Ms. Micks repeatedly told people about the affair between Mr. Jackson and Thelma. *See* SV 6, 1075 ("Hampton was a client when she worked w Jackson. Knew about relationship with Thelma, advised against it-was good friend of Jackson") (1988, conversation with Bob Link); SV 3482 ("said thinks Olliff knew it.")(1984 conversation with Barclay counsel). The state does not deny this.

In a short footnote in the state's brief, the state wrote that "[t]he 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)." SB 76, n. 7. The state thereby waived this argument. "The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." *Duest v. Dugger,* 555 So.2d 849, 852 (Fla.1990); see also *Long v. Florida*, 118 So.3d 798, 804 (Fla. 2013)("conclusory statements that reiterated arguments made before the post-conviction court" are "waived for appellate review."). Ms. Micks was unavailable below, the state knows that is true, and the lower court knew as well. V16, 2795 ("The Court: I frankly didn't realize she was still alive.") Like this Court, the lower court considered Micks' evidence.

"'The right to effective assistance of counsel encompasses the right to representation free from actual conflict.'" Order at 2254, citing *Strickland*, 466 U.S. 668, 688 (1984), and *Cuyler v. Sullivan*, 446 U.S. 385, 349 (1980).

> [In] order to establish an ineffectiveness claim premised on an alleged conflict of interest the defendant must "'establish that an actual conflict of interest adversely affected his lawyer's performance.'" *Hunter v. State*, 817 So.2d 786, 791-92 (Fla. 2002)(quoting *Cuyler*, 446 U.S. at 350). Counsel suffers from an actual conflict of interest when he or she actively represents conflicting interests. *Id.* at 792-93. To demonstrate an actual conflict, a defendant must identify specific evidence in the record that suggests his or her interests were impaired or compromised for the benefit of counsel or another party. *Bell v. State*, 965 So.2d 48, 78 (Fla. 2007).

Order at 2254. The lower court noted that this Court "has applied *Cuyler* to cases that venture beyond joint representation conflicts of interest." *Id*. at 2255.[87]

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[87]In *Mickens v. Taylor*, 535 U.S. 162 (2002), the Court held that the letter of *Cuyler v. Sullivan* did not expressly cover non-concurrent multiple representation scenarios. After *Mickens*, "whether *Sullivan* applies beyond multiple concurrent representation cases is 'as far as the jurisprudence of this Court is concerned, an open question.'" *Schwab v. Crosby*, 451 F.3d 1308, 1324-25 (11th Cir. 2006)(citation omitted). "[T]he language of *Sullivan* itself does not clearly establish, or indeed even support," its application in other conflict of interest cases. *Mickens, 535 U.S at 175.* But *Mickens* is not, contrary to what the State argues, an "express[] disapprov[al] of applying conflict of interest in" other situations. SB at 72.

Indeed, as the lower court correctly recognized, this Court "has applied *Cuyler* to cases that venture beyond joint representation conflicts of interest." Order at 2255. *See State v. Larzelere*, 979 So.2d 195, 208-10 (Fla. 2009)("This Court has explained that *Florida follows the legal principles set forth in Cuyler*" for conflict of interest claims beyond joint

At the time of trial, "the Code of Professional Responsibility, its Disciplinary Rules, and the Integration Rules of the Florida Bar governed the standards for Attorney Conduct. Canon 9 of the Code of Professional Responsibility encompassed the appearance of impropriety." Order 2256-57 n. 49. Rule 5-101(a) provided "A lawyer shall not accept employment if the exercise of his professional judgment may be affected by his financial, business, property *or personal interest*." *Id*. (emphasis added). The lower court found that under the unique circumstances of this case:

> "At the least, the testimony, evidence, and record *suggest* Mr. Jackson's relationship with Defendant's sister created *a substantial risk* his representation of Defendant was materially limited by his responsibility to Ms. Turner or by his own personal interest."[88]

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representation claims)(emphasis added); *see also Alessi v. State*, 969 So.2d 430, 432 (Fla. 5th DCA 2007)("the Florida Supreme Court continues to apply *Sullivan* to all types of conflict cases"). The State's extended discussion of *Cuyler v. Sullivan* not being applicable is wrong. SB 72-76.

[88]The State complains that by writing that the evidence and the record "suggest an actual conflict" the lower court's findings were "woefully insufficient to justify overturning a conviction for first degree murder." SB 78-79. If true, then the Eleventh Circuit and this Court are similarly "woefully insufficient." *See United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983)("We will not find an actual conflict unless appellants can point to 'specific instances in the record *to suggest* an actual conflict or impairment of their interests.'") (emphasis added); *Herring v. State*, 730 So.2d 1264, 1267 (Fla. 1998)(record must "*suggest*[] that his or her interests were impaired or compromised for the benefit of the lawyer or another party")(emphasis added).

The state also complains the lower court's finding that

> "Having Mr. Jackson's wife in the office and working on matters related to Defendant's case before and during trial while such hostility and tension existed between Mr. Jackson, his wife, and Ms. Turner, suggest an active conflict was present." Order at 2269.

Mr. Jackson's "personal interest" was to have a sexual relationship with Mr. Dougan's sister. He wished to divorce his wife, who was his legal secretary and a part of the defense team in Mr. Dougan's case. He also had a financial interest in pursuing Mr. Dougan's sister and marrying her as she would inherit from Mr. Dougan's father.[89]

In assessing whether an actual conflict adversely affected counsel's representation, "[a] petitioner need not show that the result of the trial would have been different without the

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Jackson's actions created a "substantial risk" of limiting his representation of Dougan was not based in law because there is no "substantial risk" standard (SB 78). The lower court knew the rules. *See* Rule 4-1.7(a)(2)("[A] lawyer must not represent a client if...there is a *substantial risk* that the representation of 1 or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by *a personal interest of the lawyer*.")(emphasis added).

[89]The lower court found how Mr. Jackson's plans bore fruit:

> The probity of Mr. Jackson's conduct in preparing Defendant's father's last will and testament, which bequeathed the majority of Mr. Dougan, Sr.'s, property and assets to Ms. Turner, who was at that time Mr. Jackson's wife, **creates a serious question about his interests** and ability to effectively represent Defendant, considering at that time Mr. Jackson was representing Defendant in an appeal from a conviction and death sentence.

Order at 2269 (emphasis added).

conflict of interest, only that the conflict had some adverse effect on counsel's performance." *McConico v. Alabama*, 919 F.2d 1543, 1548 (11th Cir.1990). These “scuffles,” “fracases,” “attacks,” and physical “fights,” “tension” and “arguments” in the law office,[90] reduced Jackson’s “level of preparedness” and “affected [Mr. Jackson’s] work” such that he was “not prepared” at trial.[91] These are adverse affects.[92]

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[90]As Dr. Woods testified before the lower court:

> These are the types of circumstances that I see in my practice and certainly have seen in employment law cases, where it’s a total disruption of the office. Its both an administrative disruption in terms of the office being able to function properly but its also an emotional disruption. **It would be different if perhaps the secretary were not his wife, but to have this occurring in the workplace is something that couldn’t help but impair the function of the office**.

V18,3329 (emphasis added).

[91]Decisions about when and where Mr. Jackson would work on the case and which members of Mr. Jackson’s staff, including Mr. Jackson’s then-wife and legal secretary, would labor on his behalf and in what capacities, should have been made solely based on concerns of Mr. Dougan. Working on the case, not arranging trysts, and not arguing with his wife about his client’s sister, had to be Jackson’s sole focus, if he was to be loyal to Mr. Dougan.

[92]The State argues that because the only other lawyer from Jackson’s office, Deitra Micks, helped on the case with Mr. Jackson, Appellee cannot prevail without showing “that her representation was also compromised.” SB at 82. The State provided no authority for this proposition and there is none. In fact, Micks had her own responsibility to advise Mr. Dougan of Jackson’s (and, thus, her) conflict and spread his consent, if any, onto the record. *See* Rules Regulating Fla. Bar R. 4-1.4 (“A lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client’s informed consent

There were avenues of defense that Jackson did not pursue.[93] He insisted to the bitter end that Mr. Dougan was innocent–even at sentencing where he blamed the jury for having made a mistake when he had some special knowledge of innocence. He openly made no attempt to obtain a plea bargain. He could admit Mr. Dougan was guilty of *something*, or insist Mr. Dougan was an innocent martyr and victim of racism. With Mr. Dougan's father and sister providing the "retainer," Mr. Jackson chose innocence.

If Jackson actually investigated Mr. Dougan's background he would have learned Dougan's actual mother was mentally ill, his adoptive mother had been an alcoholic who died of liver disease, and his father was a philanderer who used young Jacob Dougan to

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. . . is required by these rules."). She did not do so and was, herself, conflicted. A conflicted lawyer who associates with a non-conflicted lawyer will not cure the conflict--the non-conflicted lawyer will become conflicted by imputation. Fla. Bar. R. 4-1.10(a). *See Scott v. State*, 991 So. 2d 917 (Fla. App. 2008) (court must disqualify public defender whose office represented the state's informant against defendant); *Metcalf v. Metcalf*, 785 So. 2d 747, 749 (Fla. App. 2001) ("The rule of imputed disqualification is intended to 'give effect to the principle of loyalty to the client as it applies to lawyers who practice in the same firm.'") Micks knew the conflict affected Jackson adversely and did nothing to correct that.

[93]*Porter v. Wainwright*, 805 F.2d 930, 940 (11th Cir. 1986)("In addition to showing an actual conflict of interest, Porter must also show that the conflict adversely affected his lawyer's representation. In other words, Porter must show that *another defense strategy that could have been employed by another lawyer would have benefitted his defense.*")(emphasis added); *Hunter v. State*, 817 So.2d 786, 793 (Fla. 2002)("To show actual conflict, one must show that a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefitted the defense.").

cover for his affairs. He of course knew all about Mr. Dougan's sister–she was married and he was having an affair with her. If he had investigated Mr. Dougan's mental condition he would have discovered Mr. Dougan was mentally ill, had been deteriorating at the time of the offense, and had become unfocused, confused, and irrational.

The chosen defense was Mr. Dougan took public credit for a murder he did not commit. Why would he do that? Because he was mentally unstable. The defense was entitled to show that his "confession" was unreliable based upon his mental condition. This is not a diminished capacity defense, or an insanity plea. When the veracity of admissions or confessions is at issue, a defendant is entitled to present evidence contesting the reliability of the statements. *See, e.g., Shellenberger v. State*, 150 N.W. 643 (Neb. 1915), a case involving a defendant with familial and personal mental health issues who was convicted of murder after volunteering his guilt to authorities. In reversing because of the exclusion of evidence relevant to the reliability of the confession, the court observed, "[t]here are numerous cases upon record where men have voluntarily confessed themselves to be guilty of atrocious crimes, where investigation has proved their innocence, and the confession could only be attributed to a defective or abnormal mentality." *Id*. at 647. The court then "emphasize[d] the necessity of extreme care to allow the accused

a full opportunity to make his defense." *Id*. The court was of the opinion "that evidence as to any fact occurring during the life of this defendant which is in any way calculated to throw light upon the credibility of his confession is material to the issues, should have been submitted to the jury, and that it was prejudicial to his rights to exclude it." *Id*. See also *State v. Granskie*, 77 A.3d 505, 507 (N.J. Super. 2013) ("settled precedent uphold[s] a defendant's right to present expert testimony designed to explain to the jury why a particular defendant's psychological condition would make that defendant vulnerable to giving a false confession.")

Here, the mental illness explanation would expose Jackson's girlfriend and her family to scrutiny and public embarrassment.

b. Mr. Jackson's then-wife/secretary had a serious conflict

If Mrs. Jackson were a lawyer, she would have been barred under the Florida Rules of Professional Conduct from working on the case of a man whose sister was ruining her marriage and threatening her job and livelihood. The discovery of the affair, indeed witnessing it *in flagrante delicto*, materially limited her ability to provide effective representation, *see* Rules Regulating Fla. Bar R. 4-1.7, and created an intolerable appearance of impropriety. That Mrs. Jackson was a legal secretary is immaterial. A secretary, no less than a lawyer, may cause grave harm to a client when she works in the office despite a serious

personal conflict of interest.[94]

The Rules of Professional Responsibility recognize that a secretary's conflict may be imputed to a lawyer and thus bar him or her from representation. Here, Mrs. Jackson's conflict was imputed to Mr. Jackson, who himself was governed by the Florida Rules. Under Rule 4-5.3 "a lawyer [is] responsible for conduct of [a nonlawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer . . . has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." Rules Regulating Fla. Bar R. 4-5.3(b)(3).

Mrs. Jackson had reason to despise Mr. Dougan and his family. She had every reason to sabotage any defense. Yet she

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[94]The ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases emphasize the critical role that legal secretaries play in ensuring a lawyer's provision of competent and adequate legal services. *See* Guideline 4.1 cmt.; 9.1 cmt. n.135; 10.4 cmt. ("[T]he provision of high quality legal representation in capital cases requires a team approach, [which] . . . increases efficiency by allowing attorneys to delegate many time-consuming tasks to skilled assistants . . . ."). Two Florida courts have emphasized that secretaries should be treated as "agents" of lawyers, subject to "the same disability lawyers have" under the ethics rules. *First Miami Sec. Inc. v. Sylvia*, 780 So. 2d 250, 254 (Fla. 3d Dist. Ct. App. 2001) (internal quotations omitted); *Koulisis v. Rivers*, 730 So. 2d 289, 291 (Fla. 4th Dist. Ct. App. 1999). A third Florida court has criticized one party for "downplay[ing] the importance of secretaries by describing secretarial functions as primarily 'clerical.'" *Esquire Care v. Maguire*, 532 So. 2d 740, 740 (Fla. 2d Dist. Ct. App. 1988).

was intimately involved in his representation as the secretary for his lawyer. Her involvement tainted the representation, caused Mr. Jackson to violate Florida's ethics rules, and adversely affected the representation.

C. Cumulative Conflicts

Conflicts between clients, and conflicts with a client, together, require a new trial.

ARGUMENT III. MR. DOUGAN WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN 1975 in Volation of the Fifth and Fourteenth Amendments[95]

The state contends "[t]here was no reasonable path that any competent defense attorney could have taken that would have changed the result" in this case. V. 10, 1694. "Nothing...would have made any difference." *Id*. "No attorney could have saved Dougan from the 1975 guilty verdict or the 1987 death sentence." Id. at 1727. But four defense attorneys *did* make a difference –counsel for Hearn, Barclay, Crittendon, and Evans. And they did it by admitting guilt, or arguing lesser culpability. Mr. Jackson did none of that, in the face of, according to the state, "overwhelming evidence against Dougan." SB 67.

When he sentenced Crittendon and Evans, Judge Olliff said why their lawyers made a difference:

> The degree of your individual involvement in this murder and **the skill of your respective attorneys has led the jury find each of you guilty of the lesser**

[95]For standard of review, *see* note 61, *supra*.

crime of murder in the second degree.

ROA 208 (emphasis added). Mr. Dougan's lawyer did not have skill.

A. Defense attorney Jackson was "the Raiford express"

By all accounts, Ernest Jackson was a very good lawyer in the 1950s in Jacksonville. But by 1975–as recognized by judges, prosecutors,[96] and defense attorneys–he was incompetent, grossly ineffective, and severely burdened in criminal cases.[97] This Court found him to be so in the appeals he filed after the 1975 trial; a lower court found him to have been so *on the day he was appointed to handle those appeals*.

The evidence of Mr. Jackson's pattern of incompetency was not disputed in the lower court and has not been disputed before this Court.[98] The lower court found the following based upon substantial competent evidence, much of which this Court relied

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[96]*See* Exhibit 18, Affidavit of former prosecutor David Rogers (Mr. Jackson "consistently failed to file pretrial discovery requests of criminal cases … never undertook to engage in plea negotiations on behalf of his clients prior to trial … [and] failed to undertake meaningful pretrial preparation in his criminal cases.")

[97]Appendix A is a chart containing excerpts from sworn, admitted, affidavits regarding Jackson's incompetence.

[98]As counsel for the state put it:

> I have read the affidavits. I understand they have been considered by other courts and they generally say .. *this was the way Ernest Jackson ran his practice. I'm not contesting that fact.*

V16, 2923 (emphasis added).

upon in *Barclay*:

> At the evidentiary hearing, Defendant presented testimony and evidence that during the time period surrounding Defendant's trial and appeal, Mr. Jackson had a reputation in the community for incompetence as an attorney. (P.C. Vol. I 124; Exs. 18, 20-24.) As support for this claim, Defendant presented affidavits and testimony of prominent and premier criminal defense lawyers in the Jacksonville legal community that attested to Mr. Jackson's performance as an attorney at this time. (P.C. Vols. I, III 124, 465; Exs. 18-24.) William Sheppard undertook the capital murder appeal and postconviction representation of Charles Vaught and capital rape case of Ethelbert Worrell. (P.C. Vol. I 121-23; Exs. 32, 33.) Mr. Jackson was Mr. Vaught's and Mr. Worrell's trial counsel in 1977 and 1976, respectively. (P.C. Vol. I 121-23; Exs. 32, 33.) Mr. Sheppard secured a new trial for Mr. Vaught based on ineffective assistance of trial counsel and improper closing argument. (P.C. Vol. I 123.)[99]
>
> At the hearing, Mr. Sheppard testified that "Ernest Jackson had a reputation in the community of being a horrible lawyer, ineffective, and I don't think that was the case in his entire career, but at the point in his life that these two cases: Vaught and Worrell came along, they were mishandled." (P.C. Vol. I 124.) As part of his work on the Vaught and Worrell cases, Mr. Sheppard "gathered as many high quality lawyer affidavits to shed light on that ineffectiveness and that reputation. . . . It was not difficult to find people that had a strong opinion and based on their knowledge and observation of Jackson over the years." (P.C. Vol. I 124-25; Ex. 18.) Regarding the affidavits gathered on Mr. Jackson's reputation at that time as a lawyer, Mr. Sheppard stated he selected attorneys throughout the state who were the "cream of the crop" with a "very strong reputation in the legal community" who "by and large . . . were all very reputable A/B-type lawyers." (P.C. Vol. I 125; Ex. 18.)

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[99]*See Vaught v. Dugger*, 442 So.2d 217, 219 (Fla. 1983)(execution stayed and case remanded to allow Vaught to present his evidence that "at the time of his trial [Jackson] was an inept lawyer").

Mr. Sheppard testified at the hearing that in his opinion Mr. Jackson's reputation in the legal community in l974 and 1975 was that he was ineffective. (P.C. Vol. UI 462.) Mr. Sheppard said this opinion was based on his observations of criminal defense lawyers in the felony divisions, of which Mr. Jackson was; and what he heard from other lawyers who observed Mr. Jackson' s actions as well. (P.C. Vol. III 463.) Mr. Sheppard went through some examples of lawyers who attested through affidavits to Mr. Jackson's ineffectiveness, including Albert Datz ("premier criminal defense lawyer by reputation then"),[100] Barry Zisser ("legend in the Fourth Circuit"),[101] H. Randolph Fallin,[102] David Fletcher, Joseph Farley,[103] Thomas Treece,[104] William Maness, John Paul Howard,[105] Sandy D'Alemberte[106] and Robert Josefsberg. (P.C. Vol. III 463-65; Exs. 19- 24.) Regarding Mr. D'Alemberte and Mr. Josefsberg, Mr. Sheppard stated, "I have a high regard for them. I'm in the American College of Trial Lawyers with them, and they are premier criminal

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[100]Datz attested that Jackson had a "frequent tendency to take on more cases than he could handle in a competent manner." SV 7, 1096.

[101]Zisser attested that Jackson "did not have a reasoned approach to the cases he handled and he did not take the time to get prepared. I had the impression that he was constantly beleaguered." SV7, 1152.

[102]Fallin attested Jackson was "consistently below average, due to his procrastination, unfamiliarity with the applicable law, and lack of due diligence" SV7, 1101.

[103]Farley attested that Jackson "was thought to be incompetent, especially in his representation of criminal defendants." SV7, 1172

[104]Treece, a prosecutor on 1973, attested that Jackson "had the reputation of being a very ill-prepared attorney." SV7, 1176

[105]Howard attested that Jackson "was unable to represent criminal defendants in a competent manner." SV7, 1185

[106]D'Alemberte attested "the consensus in the legal community [was] that Mr, Jackson was not a competent attorney during the relevant time periods, including during Mr. Barclay's and Mr. Dougan's 1975 trial." SV7, 1210.

> defense lawyers. And I share the same opinion that they've expressed in those affidavits." (P.C. Vol. UC 465.) Mr. Sheppard stated he had not reviewed the record in this case to be able to express an opinion directly about Mr. Jackson's competence, but if he were effective, it would be an aberration. (P.C. Vol. III 465-67.)
>
> One of the attorneys who represented Mr. Barclay in his postconviction proceedings attested that State Attorney Ed Austin confirmed Mr. Jackson was known as "the Raiford Express" throughout his office during the time period of Defendant's trial in l975, because Mr. Jackson's ineffectiveness sent his clients quickly to prison. (Ex. 20.) Defendant also presented evidence that Mr. Jackson's failure to perfect an appeal filed for David Thomas Esser on April 17, 1975, resulted in its dismissal.(Exs. 25, 35.)[107] Mr. Esser's conviction was vacated in 1977 based on the granting of Mr. Esser's motion that his conviction resulted from an involuntary plea "and from legal counsel which was so grossly deficient as to be deprivative of his right to due process and effective representation of counsel." (Exs. 25. 35.)
>
> At the [evidentiary] hearing, Stephen Kunz testified about a memorandum he wrote as an assistant state attorney to Mr. Austin on August 4, l987, regarding Defendant's sentencing proceeding in 1987 and the decisions of the State of Florida in seeking the death penalty. (P.C. Vol. ll 160-62, 186; Ex. 26.) One of the reasons for not seeking the death penalty mentioned in the memorandum to which Mr. Kunz testified about at the hearing states, "The issue of ineffectiveness of trial counsel is one that may come back to overturn any new death sentence imposed. If that does occur in this case (the Supreme Court has already held that the defendant's attorney was ineffective as a matter of law for appellate purposes), any efforts by the State at this point to obtain a death sentence would be futile." (P.C. Vol. l1 186-87;

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[107]April 17, 1975, is the same date that Mr. Jackson's initial request to be appointed on appeal to represent three of the four defendants in this case was denied by the trial court judge. The next day, the day the Public Defender allowed Jackson to be substituted as counsel on appeal, the Public Defender believed that Jackson was ineffective. SV-19, 3379.

Ex. 26.)

V13, 2278-2281.[108]

B. The lower court's finding of prejudicial incompetence

1. Underfunded

As Gwandos Ward testified, "Mr Jackson did all of the investigation in the Dougan case" (V. 17, 3042; SV 6, 1077) and did not hire an investigator.[109] With respect to whether and how Mr. Jackson was compensated for the Defendant's representation, the evidence is "conflicting." In *Barclay* this Court found that Mr. Jackson was "apparently" paid $3,000.00 by Mr. Dougan's father, who said that that amount "represented only a fraction of the total legal fees" that were necessary. Order at 2265. However, Ms. Micks swears she did not believe Jackson was ever paid and "'I know that I was never paid for representing Jacob Dougan.'" *Id.* Secretary Gwandos Ward did not see any money come into the office on the Dougan case. V17, 3044. There is no

[108]During the evidentiary hearing below, the state expressly waived objection to the testimony and affidavits regarding Mr. Jackson's ingrained pattern of ineffectiveness. V. 16, 2923–2928 (no objections to affidavits and/or testimony regarding Jackson); V. 18, 3246-3252 (same); V18, 3382 (affidavits admitted). In its post-hearing brief, the state wrote that "much of Dougan's 'evidence'" of Jackson's ineffectiveness was "submitted through inadmissible hearsay." (V10, 1746). That is not correct, but the state had already expressly waived that objection, thereby obviating the need to have all of the affiants testify. *Cf. Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993)(contemporaneous objection rule applies to state as well as defense).

[109]The investigation Mr. Jackson did was taking depositions and then speaking to witnesses the morning they testified.

indication of when any payment was made. “Mr. Jackson’s divorce records from Lougenia Jackson indicate trial counsel borrowed and owed money to Defendant’s father during this time frame.” *Id*. at 2266. The lower court concluded the evidence suggests

> trial counsel borrowed money from Defendant’s father and may have received a payment from Defendant’s father at some point after trial, although no record exists of any payment being made; and may have received a form of payment for his representation through his relationship with Ms. Turner...

Order at 2268; *see also* Order at 2265 (“‘Thelma’s sexual favors could have been payment.’”)(Micks)

2. Other unqualified co-counsel was “helping out”

With respect to Micks’ participation, Ms. Micks was licensed to practice law in 1972. *See* Referee report, *The Florida Bar v. Deitra Micks*, SC# 80,236. This Court relied upon her affidavit in 1983 in *Barclay v. State*. Her affidavit stated that she went to work with Mr. Jackson in September 1973. While she worked with Jackson, she was employed full-time as a teacher at the University of North Florida College of Business Administration. “I practiced law with Mr. Jackson on a part-time basis until the birth of my daughter in May 1975, when I left the practice of law.” She had only civil experience before working with Jackson and was simply “helping out.” Order at 2264.[110]

[110]Micks swore that “Mr. Jackson accepted nearly every client who came to his office without regard to the client’s ability to pay. As a result of this he had far more cases than he could handle properly and was often unable to fulfill his obligations

3. The ineffective, prejudicial, theory

The defense devoted time, energy, and argument to an absurd and highly insulting–to the judge, the prosecutor, the victim, the victim's family, and surely to the jurors–argument and theory. The theory was:-

> Argument #1: The victim was a heroin pushing hothead and all around lazy lout who got murdered by his white, high school, friends–including his best friend--because he was in a dangerous business and did not get along with people. These friends of the victim then decided to write a note and leave it on the victim's body blaming it on the Black Liberation Army.
>
> Argument #2: Argument #1 necessarily requires that Hearn have had nothing at all to do with the crime. Thus, the jurors would have to believe that Hearn was lying about his own guilt as well as the guilt of the other defendants and was going to prison for life for something some white teenage high school students had done.

This theory drew repeated, sustained, objections and admonishments from the Court (in the jurors' presence), was doomed at the outset, and predictably, prejudicially, backfired on the defense.[111] The co-defendants, who sought a severance from Mr. Jackson, did not endorse this theory. Indeed, how *anyone*

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to his clients. When I took over his practice in January, 1979, Mr. Jackson was responsible for approximately 2500 open matters of cases." SV19-3375.

[111] See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") § 10.10.1., Commentary (rev. ed. 2003), 31 Hofstra L. Rev. 913(2003) ("Formulation of and adherence to a persuasive and understandable defense theory are vital in any criminal case.")

would hatch and promote this theory is difficult to fathom.[112]

a. Objectionable, ineffective, opening statement

Objections and court admonishments peppered the defense thirteen page opening statement. After having said nothing during voir dire, Micks introduced herself to the jurors and stated "the night before Stephen Orlando's body was found he was seen in the company of some white youths" some of whom "lived approximately one-half mile of where Stephen Orlando's body was found." T. 94 "Some of these white youths possessed and owned .22 caliber pistols and rifles" and there was a .22 caliber cartridge at the crime scene. *Id*.

Three straight objections followed, in one page, all of which were sustained and two of which resulted in admonishments. First, defense counsel stated "that Stephen Orlando neither worked or attended school."[113] Objection sustained. Second, counsel stated that "when Stephen Orlando's body was found there were narcotics on his body." The objection "that is a misstatement" was sustained and the Judge directed Micks "Don't pursue it." *Id*. at 95.[114] Third, counsel stated "[w]e believe any

[112]The theory included calling the prosecution racist: "at no time did the police investigate any of these white youths." The investigation "was limited to black folk once the police had received the tapes." T. 103 (Micks opening statement).

[113]Jackson later introduced testimony that the victim did work.

[114]Jackson later asked a witness if the victim sold heroin, drawing serious rebuke before the jurors.

of these white youths in or around the Beaches areas who were last seen in the company of Stephen Orlando could have–." Objection sustained and admonishment "[l]et's confine ourselves to the evidence that you believe it will produce, not what you think personally." *Id.*[115]

Counsel returned to the white friends of the victim theme and concluded with "at no time did the police investigation suspect any of these white youths who were last seen in the company of Stephen Orlando the night before he was killed."[116] She also stated that the evidence would show that there were "white people who had knowledge of and used the letter BLA or the words Black Liberation Army besides Jacob John Dougan on the tapes." *Id* at 103.[117]

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[115]Micks continued to be unable to avoid stating her beliefs, i.e. "We are saying that he did not commit the murder." Objection sustained, and another admonishment, four pages into the opening statement. T. at 96. *See also* page 97, same objection and admonishment, and a trip to the bench; page 101 (same objection sustained).

[116]No evidence was introduced about this.

[117]Evidence about this was excluded by the court. After this comment, counsel started to discuss the law but the judge admonished her that she could discuss what the proof would be but a discussion of "what the law is that they must apply at the close of the case [is] not proper in opening statement." T. 105. Counsel averaged a sustained objection every 1.8 pages during opening statement.

b. Ineffective, prejudicial cross-examination of victim's step-father

After the victim's step-father testified about having to identify the victim's body, Jackson asked him "Had you put him out of the home." An objection was sustained. T. 164. Jackson asked another witness if he knew "the reputation of Orlando in school?" An objection was sustained. T. 249 Jackson did establish through the cross-examination of a police officer that "a marijuana cigarette" was found in the victim's shirt pocket. T. 363.

c. The defense "case": attacking the victim's character

The defense called witness Langston and, in the presence of the jury, claimed "we are caught by surprise" with his answer of when he saw blood on the victim's body when compared to his deposition. The Court said "you bring your deposition and show me where the surprise is and I'll be happy to proceed from there." T. 1633. Out of the jurors' presence the Court said "I don't think that's a surprise." T. 1635. When jury proceedings resumed, the deposition was not used during this witness' examination.[118]

The defense then called Dennis Peters, one of the young white men that had been identified during opening statement. He

[118]The Court did, however, sustain an objection to "leading" in the jurors' presence: "This is your witness and the same rules apply to both State and defense." T.1638 Another leading question was asked, the judge told Jackson the exact question to correctly ask, and Jackson did. *Id*.

was a classmate of the victim and met him in school in 1974. He was with him until around 10:30 the night of the crime, as were Taren Ferguson, Chip Ferguson, Billy Clark, and Tom Beaver. T. 1645-1647.[119] After he last saw the victim that night, he drove Taren and Chip Ferguson home which, as it turned out, is in an area not far from where the body was found. T.1648. Then he took Billy Clark home and Tom Beaver home. T.1651. The next afternoon he learned of Stephen Orlando's death when Tom Beaver told him.

Then Mr. Jackson asked "Did you ever have any trouble with [Stephen Orlando] or any problems with him," and the judge sustained an "it's not at all relevant" objection. Then the following occurred:

> Q. To your knowledge did he sell heroin?
>
> MR. BOWDEN: Objection, your honor.
>
> THE COURT: Sustain the objection.
>
> MR. BOWDEN: Your Honor, counsel should be instructed as to those type of questions.
>
> THE COURT: Well, I'm sure Mr. Jackson knows, I'll sustain any similar type questions.

T. 1653-54. Mr. Jackson then requested a bench conference and there explained that the was "trying to show that the deceased was engaged in a dangerous business, that the got in altercations with other people," and this was relevant to "how the deceased died." T. 1655. Jackson stated this information was contained

[119]Multiple objections were sustained throughout this witness' testimony.

in depositions, whereupon Mr. Austin replied:

> Your Honor, this is one of the grossest misstatements of facts for the totality of these young peoples' testimony that I have ever heard in my life. There is one or two sentences in there that this boy had a temper.

T. 1655.[120] Jackson responded "we contend that the deceased was killed by some unknown person. We are contending that the kind of business he was in would lead him to be killed or make him subject to such a death." T. 1656. The State responded that out of all the hours of deposition there was "no place in there other than a little bit of hearsay ...that was related to his character." *Id*. The state said that the depositions provided "no predicate" for what Jackson said he wanted to do. T.1657. The judge ruled that Jackson try to lay a predicate.

When Jackson attempted to lay the predicate, he first contradicted the opening statement by establishing the victim worked. T.1658. He then asked:

> Q. Were you familiar with his temperament?
>
> MR. BOWDEN: Your Honor, this is irrelevant, immaterial, incompetent, and I object on all three grounds.
>
> THE COURT: I sustain the objection.
>
> BY MR. JACKSON:

[120]Mr. Bowden added "this is obvious and its been obvious through deposition that they are calculatedly trying to malign the character of the decedent when they do not have the defense of self-defense." *Id*.

Q. Did you ever have a chance to know about his general character in the community--

MR. BOWDEN: Your Honor–

MR. AUSTIN: Your honor, I object. The character of the deceased is not at issue. There's been no predicate laid and Stephen Orlando is not on trial here, and I object to the question, the form of the question. The predicate has not been laid to ask the question.

THE COURT: I sustain the objection.

BY MR. JACKSON:

Q. Mr. Peters, during the time that you have known Mr. Orlando, did you have a chance to observe his conduct?

MR. AUSTIN: Your Honor, I'm going to object and I'm going to respectfully move this Court to instruct this lawyer not to pursue this line of questioning. There's been no predicate laid, it's improper questioning and Stephen Orlando is not on trial in this case.

THE COURT: Ladies and gentlemen of the jury, step back to your jury room. T. 1658-59.

With the jury now out, the Judge said: "Now, Mr. Jackson, would you kindly explain what the theory of the defense is at this time on this questioning?" T. 1660. Jackson responded:

The deceased was engaged in traffic–narcotics traffic, sales; that he had a high temper, that he was involved in many altercations with people that he –were around, and because this is a high risk type of business that he was in and because of his temperament, it is the kind of setting which this defendant (sic) lived that would possibly subject this defendant (sic) to the kind of mysterious death that he died

T. 1660. The State responded:

MR. BOWDEN: Your Honor, based upon the depositions taken by Mr. Jackson and the statement of this–that

> this lawyer just made to this Court, I can tell this Court that in my opinion **that is the most irresponsible statement I have heard a lawyer make.** He has grossly misrepresented the facts that came out on deposition. There has been no suggestion that Stephen Orlando was a wholesale dealer in narcotics traffic. That simply is not true.

T. 1660-61(emphasis added). Mr. Austin added that "the references to his temper was more or less asides" and "his character is not at issue in the trial of this lawsuit." T. 1662. The Court sustained the state's objection but allowed a proffer. T.1665.

The witness then testified that the victim did not have a temper (T. 1666), Jackson sought a recess, and the judge said since "he is your witness and you called him...I will assume that you are prepared to proceed." T.1668. After a short break, Jackson stated "he has given me surprise answers and I'd like to ask him about his deposition." T. 1671. After reading deposition questions and answers to the witness Jackson reiterated his theory of the case as "[h]is death was indeed caused by some mysterious person other than the defendant and he was in line–or he was involved in a kind of work that he was of a certain character that could provoke a person to do the kind of thing that did happen to him." T. 1676. The Court held "if not getting along with people well and joking and quitting jobs were basis for someone being killed all of us would be in dire peril."

With the jury back in, Jackson asked Mr. Peters if he owned a .22 rifle and he said he did. T. 1681. His testimony made it

appear he did not own the weapon at the time of the crime. T. 1682. Jackson claimed surprise. T. 1687.

The next witness, Thomas Beavers, was called by Ms. Micks. He testified he was "very good friends" with Stephen Orlando and had been with him the evening before the crime. T. 1691. He testified that he last saw Mr. Orlando around 10:30 and then he went to take Terry and Chip home. His testimony showed that that route took him near where the victim's body was found, T. 1694, although he did not know that. T. 1697.

He learned from Mr. Mallory about Mr. Orlando's death around 3:30 p.m. the next day. T. 1703. Ms. Micks said "this [*i.e.*, "my"] witness has taken me by surprise" T. 1704. She then argued with the witness about the time, was told to stop, and gave up on when the witness learned of the death. Micks established that the witness owned a .22 caliber rifle. She then asked about who the witness told about the death and in response to an objection stated "based upon our defense, we feel that the death of Stephen Orlando was known about in the beaches areas on the morning of June 17th," which the judge found "irrelevant" in the presence of the jury. T.1710.

Next Ms. Micks recalled the victim's stepfather to repeat that he "had to go to St. Augustine to identify the body." T. 1713. Micks unsuccessfully attempted to have the witness testify he told Tom Beaver about the death that day. T. 1713.

Micks next called William Clark who testified that he knew Stephen Orlando from school. He testified the same as others about the evening before the crime and then testified that the next morning he went to the beach and people were talking about the crime. T. 1721 When Micks asked about what was discussed a hearsay objection was sustained. Micks then had great difficulty getting any questions out about "how Mr. Orlando had been killed." T.1726. Finally Clark said he did not learn that morning how Mr. Orlando had been killed and Micks gave up. Jackson approached the bench and said the defense was surprised by this because in deposition the witness had said "I heard he got stabbed" and "I heard he got shot" and "I hear he got both." T. 1728. The judge said "apparently the defense is attempting to impeach their own witness by prior deposition, declaring surprise" but "I have contrary interpretation of what the deposition says." T. 1729. The Court allowed no further questions.

Mr. Jackson next introduced the testimony of James Ryan. He testified that he had known Mr. Orlando around four years. He also testified that the day after the crime at the beach people were talking and he heard that "he was stabbed, you know, a few times in like the midsection or something and he was shot." T. 1741. He said he thought he was shot once, Jackson said "the answer is a surprise to me," and the Court responded:

> THE COURT: Let me ask you, **have you talked to these witnesses since the deposition was taken?**
>
> MR. JACKSON: Yes, sir.
>
> THE COURT: And is what they have just said a surprise to you?
>
> MR. JACKSON: Yes, sir.
>
> THE COURT: You mean you've talked to them since the deposition?
>
> MR. JACKSON: *This morning*. This morning, yes, sir.

T. 1742. The witness was shown his deposition and said he had heard the victim was shot twice "I guess." *Id*.

Jackson then recalled Jim Mattison to testify and established he was home he "supposed" at the time of the crime and he had been stationed in the Navy in Jacksonville. He tried to introduce testimony that there had once been "maybe one white" member in the karate class, but an objection was sustained.

Jackson then called Jacob John Dougan, Sr., who testified that Jacob Dougan was at home the night of June 16 and he remembered that because it was Father's day. On cross-examination the State had Mr. Dougan, Sr. admit he had earlier said he remembered June 16th from a check he had written and not because it was Father's day. T. 1752.[121]

Under-sheriff Brown was called by Jackson and testified that he did not recall whether he had received any reports from

[121]In his pre-trial deposition, he had not mentioned Father's Day.

investigators about white persons in the area where the deceased was found or about the last persons the victim had been with. T. 1755. "I don't recall who all we investigated." *Id*. On cross-examination he testified that he did not direct anyone not to investigate white persons. T. 1756.

Jackson then attempted to introduce evidence that another person other than Dougan had been indicted for a murder in which BLA was carved on the victim's body. This was excluded as irrelevant. T. 1758.

Jackson's last witness, Karen Ferguson, testified that she drove herself home around 3:00 a.m. on June 17th after going to a bar with Terry Peters. T. 1764.

d. Closing arguments: the parade of long haired children

The defense closing argument about this "defense" was the following:

> **Mr. Hearn say he did it. I don't know whether he did or not. He could have; I don't know.** But then I also mentioned an investigation on behalf of the defendant and myself and I found some very strange things happening in my investigation and I felt it was my duty and responsibility to investigate these people because of the strangeness of the matters. One was that we finally discovered that on June–on Monday, June the 17th, 1974, by 9:30 in the morning after the unfortunate death of Mr. Stephen Orlando some of the people who had been with him that night were out there talking about his death, 9:30 on the beach.[122] And when we asked Captain Williams, 'Captain Williams, did you

[122]What these witnesses said was people at the beach were talking about it.

see any of these people down to the crime scene?'

"No I didn't see them down there."

Asked him, "Captain Williams, did you tell Mr. Mallory about this before 9:00 o'clock?"

"No, I told him around–sometime after 10:00 o'clock, between 10:00 and 12:00 o'clock."

One of the witnesses testified–Mr. Peters testified that Mr. Mallory came over to his house at 9:00 o'clock that morning and told him about the death.[123] I don't know. Mr. Mallory got up on the stand and say [sic], "I didn't do that." Well, somebody is not saying the truth; I don't know who it is. But I want to ask you a question, now when you gonna ask how in the world and under what circumstances could people who saw the deceased at 11:00 o'clock–10:30 or 11:00 o'clock that night would be up the next morning at 9:30 talking about how he passed, how he died. Where did he get the information?[124] And when I asked Captain Williams, "Did you investigate any of these people that I have reference to," and called their names, he said no, he investigated other people, but not these people. How come? And remember that these people passed within–pass within approximately twenty feet, where the people–body that night–twenty yards, I'm sorry, of where it was found that night. I'm not saying they did the killing, I'm simply saying there were other persons who could have done the killing.[125]

The state derided this defense and argument:

Mr. Jackson parade[d] a group of children up here on the stand. I think he proved they had long hair. If he proved any other single factor I admit that it got by me. T. 2175.

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[123]In Peters' trial testimony – presented by the defense–he said he learned, not at 9:00 a.m., but "early afternoon." TT 1652.

[124]No one had that information or testified to it during the trial.

[125]His best friend from high school?

e. The lower court's findings

The lower court found that, as in his other criminal cases, Mr. Jackson prejudicially failed to reasonably investigate and prepare to determine whether and how to present a defense to the charges against Mr. Dougan. "In trial counsel's opening statement, claims were made that the defense would show...that[:] 'white youths' in and around the beaches area were in the company of the victim the night before his body was found and knew about his death prior to it becoming public knowledge[;]...the victim's death was related to narcotics and drugs[;]...that the original investigation by the police concluded the note found on the Victim's body was a cover-up for the real motive of the killing; and the police did not investigate any of the 'white youths.'" Order at 2282-83. "Defendant's trial counsel's stated theory was that the deceased was engaged in the sale of narcotics, had a high temper, and was involved in many altercations with people he was around; and because this was a high risk type of business and because of his temperament, it was the kind of setting in which the Victim lived 'that possibly would subject him to the kind of mysterious death he died.'" Order at 2283. At trial, counsel "attempted to elicit testimony" to support this theory by "present[ing] eleven witnesses." *Id*.

In his performance, however, Jackson "made statements about times and dates in which people were talking about the Victim's

murder, which were inaccurate, contradicted by the testimony, or not supported by the evidence presented at trial." Order at 2289. "With exception of the testimony of Defendant and Mr. Dougan, Sr., trial counsel claimed surprise as to the testimony of the witnesses he called on defendant's behalf; tried to impeach his own witnesses, which the court denied; and presented testimony that was contrary to his stated theory of defense." *Id*. at 2290.[126] After taking the depositions of witnesses, he next spoke to them "this morning," the morning of their testimony. Order at 2290.

These unreasonable actions were not "sound trial strategy" and "the errors in total were so serious as to undermine confidence in the outcome." Order at 2291; *see also Strickland*, 466 U.S at 686 (Counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.")[127]

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[126]The state belittles the lower court's order by saying the grant of relief here is based upon "9 snippets of transcript" SB at 92. That is incorrect; still, 9 snippets are a lot of snippets.

[127]The defense, in opening statement, promised to show that some friends of the deceased may have killed him because they knew about his death before it was public knowledge. No defense evidence of this theory was introduced. During closing argument, the State mocked defense counsel's efforts. This is prejudicial ineffectiveness requiring relief. *McAleese v. Mazurkiewicz*, 1 F.3d 159,166 (3rd Cir. 1993)("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffective assistance of

Having promised in opening statement to show "white youth" should have been investigated rather than "black folk," and having not delivered on that promise during its case,[128] it was fair for the lower court to conclude "[t]rial counsel essentially presented no defense." *Id*.[129] Worse than presenting no defense, the attempted

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counsel."); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (granting habeas relief as trial counsel's opening statement "primed the jury" to hear certain evidence, counsel failed to present that evidence, and "the jury likely concluded that counsel could not live up to the claims made in the opening"); *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002)(counsel ineffective for promising the jury four times in the opening to call the defendant as a witness, but then failing to keep those promises).

[128]The state introduced extensive evidence that the police had investigated white individuals. See e.g. T at 330-31 (Monday afternoon two young white persons in the beach area, Tuesday morning seven more in the beach area); *id* at 364-67 (names and race ["white"] of people interviewed); *see also* "Whites Probed in BLA Case, Jury Told, Florida Times Union February 25, 1975, B-1 ("More than a dozen white youths, residents of the Beaches area were investigated as possible suspects" according to Capt Williams "*knocking a hole in the contention* ..that police only interviewed young blacks as suspects....").

[129]The State repeatedly describes these six words from the lower court's order as a "flat-out wrong" conclusion that was a "foundation finding" of the grant of relief that is "fundamentally flawed." SB at 95, 91; see also 61(3x), 62, 68, 82, 86. It is "flat-out wrong" because Micks and Jackson were present in court and did things.

The lower court simply mirrored this Court's word-choice. On direct appeal Jackson did things. He filed a brief and argued the case on appeal. In his brief he claimed that the state had unconstitutionally failed to provide all of Hearn's sworn statement to the defense until after the trial and that violated the constitution. Brief on Appeal, pp. 33-38. And the state was required to respond. State's Brief at 25-36. And he made other arguments that required responses.

Doing things is not enough. This Court found that "*[i]n*

defense was nonsense.

4. Mr. Jackson did not differentiate between the defendants

Whether as a conflict of interest, or as an unreasonable and prejudicial omission by counsel, argument, counsel's "lumping" of the defendants together requires relief. Order at 2294. *See* Argument II,A,2,b, *supra*.

C. Mr. Jackson unreasonably and prejudicially failed to present evidence of good character at trial

Mr. Dougan testified at the guilt-innocence proceeding that he had participated in writing notes and recording tapes but had not been involved in a homicide. T. 1607-1609. Jackson did not introduce readily available, abundant, admissible evidence at the guilt phase that Mr. Dougan had a reputation for truthfulness. Brad Evans testified that he was present when the tapes were made but did not participate. T. 1824. Counsel for Brad Evans introduced evidence that Evans had a good reputation in the community, that he had a reputation as a peaceful and law-abiding citizen, and that he had a good reputation for truth and

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essence, due to the conflict of interest and Jackson's ineffectiveness, Barclay had no appellate representation." *Barclay*, 444 So. 2d at 959 (emphasis added). The lower court came to the same conclusion with respect to the trial proceedings--"[t]rial counsel *essentially* presented no defense." *Id*. (emphasis added). Just as this Court did not mean *literally* there was "no appellate representation," the lower court did not mean literally that there were no defense attorneys in court doing things. *This Court and the lower court meant the things that were done were, "in essence" and "essentially," not meaningful defense presentations*.

veracity–eight (8) witnesses. T 1831-53. The judge pointed out in the instructions to the jury that Evans, and Evans alone, introduced evidence of good character, and that "such good reputation should be considered by the jury along with all other evidence in the case in determining whether or not the defendant is in fact guilty as charged." T 2220. This effectively presented the defendants in sharp contrast and stressed that one had good character but Mr. Dougan did not. This was highly prejudicial, and, in fact, not true–there were many people available to testify to his good character.[130] After this testimony and instruction, Evans was convicted of second-degree murder and Petitioner was convicted of first-degree murder.[131] This was prejudicially ineffective assistance.[132]

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[130]Appendix B to this Brief is a chart reflecting that to which witnesses could have testified.

[131]Judge Olliff credited this conviction of a lesser offense to the "skill" of Evans' attorney. ROA 208.

[132]*See Peterkin v. Horn*, 176 F. Supp. 2d 342 (E.D. Pa. 2001), amended on reconsideration, 179 F. Supp. 2d 518 (E.D. Pa. 2002)(counsel ineffective for not following up on character witnesses); Commonwealth v. Gillespie, 620 A.2d 1143 (Pa. Super. Ct. 1993)(Counsel ineffective in simple assault case where key issue was credibility for failing to call defense character witnesses.); *Commonwealth v. Glover*, 619 A.2d 1357 (Pa. Super. Ct. 1993)(Counsel ineffective in murder case for failing to call character witnesses where the evidence was close call and defendant's good character is always admissible to create reasonable doubt.); *State v. Aplaca*, 837 P.2d 1298 (Haw. 1992)(counsel ineffective for failing to investigate and present good character evidence); *Warner v. State*, 729 P.2d 1359 (Nev. 1986)(Counsel ineffective for not presenting witnesses in support of defendant's character where credibility was the key issue.)

The lower court fully recognized the plenary evidence of good character that was available for Mr. Dougan in 1975.[133] The court also noted that nothing in the record indicates why trial counsel did not introduce the evidence at guilt/innocence. Order

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[133]At the hearing below, Defendant

> presented testimony and evidence of witnesses that could have testified at the guilt phase of Defendant's trial as to his good character. Specifically, Cheryl Coffee and Levy Wilcox testified they knew Defendant at the time of his trial, and knew him to be an honest and honorable man who was highly respected in the community; and if asked, they would have been willing to testify to Defendant's character and reputation in the community at the 1975 proceedings. ...
>
> Loretta Johnson attested knowledge of defendant since he was sixteen years of age and that he was "one of the kindest, most thoughtful young men I knew. We considered him a member of our family." If asked, Loretta Johnson would have testified at Defendant's 1975 trial regarding his character and reputation, and stated "it would have been a privilege to do so. I would have testified that Jacob Dougan is and was a man of high moral character and integrity." Arnett Girardeau's affidavit states knowledge of Defendant for many years prior to his conviction, and if asked in 1975, Arnett Girardeau would have testified to Defendant's reputation for truthfulness and honesty in the community; and that Defendant had a very good reputation for truth, veracity, and honesty. Meltonia Jenkins May DuBois attested knowledge of Defendant since the early 1970s, and stated that Defendant "was a much respected member of the black community" and he was "widely admired as a very honest individual and a man of integrity. If asked to I would have testified to these facts during his 1975 trial."

S13, 2223-24 (citations omitted). It is not disputed that Mr. Dougan was "a leader in the black community" where he "was respected" and had extraordinary "socially redeeming values." *Dougan*, 595 So. 2d at 7-8 (McDonald, J., joined by Shaw, C.J., and Barkett, J, dissenting).

at 2324. The court concluded that because neither Barclay's nor Crittendon's counsel introduced good character evidence, "it has not been demonstrated that a failure to do so [by Jackson]...was unreasonable..." *Id*.

But Barclay could not have introduced any good character evidence,[134] and Crittendon, unlike Dougan, was not a prominent, recognized, trusted leader in the black community. No one else had available for defense evidence the quality and quantity of proof that Jackson could have presented.

Thus, contrary to the lower court's holding that Jackson's failure "could be considered sound strategy (Order at 2328)," no attorney acting reasonably would have failed to introduce this powerful character evidence at guilt innocence.[135] This is especially true here where one defendant had demonstrated his good character and since Dougan did not do so he must have bad character. But Mr. Jackson–were *he* to have done so–would have been separating himself from the two other defendants he had

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[134]Barclay, a convicted felon who "has an extensive criminal record of seven prior arrests," ROA 226, did not introduce evidence of good character. *Id*. (Barclay's arrests, forgery conviction and probation revocation, and five year sentences for breaking and entering and grand larceny). Neither did Dwyne Crittendon.

[135]When credibility of witnesses is "of utmost importance... character evidence is vital to the jury's determination of credibility." *Commonwealth v. Gillespie*, 423 Pa. Sup. 128, 132 (Pa. 1992). There is "no objectively reasonable basis" for counsel not presenting such available evidence. *Id*. at 133.

agreed to represent on appeal (Barclay and Crittendon), which, as this Court earlier found, he was want to do. *See* Argument II,A,2,b *supra*.[136]

But not introducing this evidence at guilt/innocence makes no sense at all when one considers that *after* the jurors had rejected Appellee's testimony of innocense, Mr. Jackson–at sentencing–introduced the testimony of five people that Appellee had a good reputation for honesty.[137] Mr. Jackson did not do this as mitigation–he did not seek a life sentence based upon mitigation.[138] He did it to criticize the jurors for not believing Mr. Dougan's testimony and to bolster Mr. Dougan's credibility.

First, Mr. Jackson said he would not seek mercy:

> A plea of mercy in a case where a defendant has constantly said and entered a plea of not guilty, that he didn't do it, is a very awkward plea at this stage of the proceedings because obviously you didn't believe him, you found him guilty.
>
> And no man, not a man, can ever beg for mercy, not from his

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[136]Or, as the lower court characterized Defendant's argument, "[c]ounsel made decisions based on what was good for all [three] co-defendants, rather than focus exclusively on Defendant's interests." Order at 2294. "This was a case in which a competent attorney would wish for severance." *Groseclose v. Bell*, 130 F.2nd 1161, 1170 (6th Cir. 1997). Aligning antagonistic defenses is "mind-boggling." *Id.*, 130 F.2d at 1170.

[137]The witnesses were James Thompson, ST 59, Sylvester Farrell, *id*. at 62; Jonathan May, *id*. at 65, Bruce Seldon, *id*. at 68, and David Roberson, *id*. at 71.

[138]The jurors were not asked to vote for life based upon mercy or Mr. Dougan's good qualities notwithstanding his conviction.

adversary, because that–because let mercy be your conscience.[139]

I notice that you thought of the tapes that were said and you didn't like it and you willing, I believe, to ignore the fact that Mr. Dougan did not kill the deceased and is not on trial about the tapes.[140]

He then went back over his guilt/innocence closing argument and told the jurors one day

when this is all over...you gonna ask yourself some little questions that I raised right here on this floor[141]

like "how is it that some youth who are on the beach at 9:30 the next day talking about the deceased ...when the officer said no one was told about it"[142]

"one day when these tapes are not playing and when you can sit down and calmly examine what is before you."[143]

"You found Mr. Dougan guilty of murder in the first degree. He said he's not guilty. But you have found him guilty."

"**I don't believe I am just like you because you brought back a verdict against the defendant. I know you're wrong.** I know more things than you do, but I think you will–you were blinded by the tapes."[144]

This is a bizarre course of conduct but it at least

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[139]1975 Sentencing,139. Apparently the jury was the adversary.

[140]*Id.* at 140.

[141]*Id*.

[142]*Id*. at 141.

[143]*Id.*

[144]*Id*. at 151 Mr. Austin responded if "there's something that he knows that you don't"...then "he had a duty to tell the Judge." ST at 164.

illustrates that Mr. Jackson made the unreasonable and prejudicial decision not to introduce at guilt/innocence the very evidence that he hoped would convince the jurors of Mr. Dougan's innocence.

D. Allowing the victim's stepfather to testify and then insulting him

Without objection, the victim's step-father, Mr. Vincent T. Mallory, was called by the state to identify the victim's body. He did so by reviewing "pictures of the body you identified" at a funeral home. Order at 2320. Non-family members were available to do so including friends who had been with him on the evening before his death. The prosecutor's unnecessary use of a family witness naturally invoked the jurors' sympathy in violation of settled rules of Florida law. *Melbourne v. State*, 51 Fla. 69, 40 So. 189 (1906); *Rowe v. State*, 120 Fla. 649, 163 So. 22 (1935). This Court recognized that trial counsel failed to invoke this long-standing protection.[145]

Worse, Mr. Jackson antagonized and insulted Mr. Mallory, unreasonably increasing the jurors' sympathy, by calling the victim only by his last name

Q. Was Orlando living in the home with you at the time of his death?

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[145] While "members of a victim's family should not identify a victim at trial ... Dougan's failure to make a specific contemporaneous objection to this testimony ... forestalls appellate review." *Dougan*, 470 So. 2d at 699.

A. I believe my stepson has a first name. I would appreciate it if you would use it.

T. 162. But worse, after a discussion about an objection to the question, Mr. Jackson did it again, one page later:

Was Orlando living at home with you at the time of his death?

The stepfather then asked the Court for help:

Your Honor, could I ask the Defense Attorney to please refer to my stepson as Stephen?

THE COURT: I wonder if you would mind doing that. He said he'd like you to refer to him by the name Stephen Orlando rather than just Orlando

MR. JACKSON: I will do so.

Q. Was the deceased, Stephen Orlando, living in the home with you at the time of his death?

A. At the immediate time of his death, no.

Q. Had you put him out of home?

T. 164. The prosecutor's objection to this question was sustained. Two witnesses later the person who discovered the victim's body and who also knew the victim was testifying. On cross-examination, the following occurred:

Q. [Mr. Jackson] But did you know the reputation of Orlando at school?

MR. AUSTIN: Your Honor, I object.

THE COURTS: Sustain the objection.

MR. STEDEFORD [Counsel for Mr. Crittendon]: Your Honor, also may I rise at this time, and I rise to say that, I too feel as though that Counsel should refer to the deceased as

Stephen Orlando instead of Orlando, Your Honor.

THE COURT: All right, thank you very much.

TT. 249. This was co-counsel agreeing with the victim's family that Jackson was acting improperly.

The lower court found that Mr. Jackson's performance "was deficient in failing to object to the prosecutor calling the Victim's stepfather as a witness to identify the body." Order at 2321. Furthermore, Mr. Jackson's cross-examination of Mr. Mallory "may have done more to evoke the sympathy of the jury..." Id. at 2322. Nevertheless, the lower court found no prejudice. Such disparaging remarks and lack of respect could certainly have affected one juror.

E. Prejudicial evidence of another murder

Out of the juror's presence, evidence was developed that some of the state's witnesses and some of the defendants had made a tape or tapes about a murder which the defendants had not committed, and for which the facts were not written out by Mr. Dougan as a script. The lower court wrote that because that fact was not revealed to the jury, there was no prejudice. Order at 3411. But it was revealed by Jackson to the jurors:

A. Are you asking me what was on the tape?

Q. Yes, sir.

A. It was in reference to a body that was found in St. Augustine.

MR. BOWDEN: Your Honor, I'm going to –

Q. No, I'm talking about the 17th of June, 1974.

T. 976. Telling the jurors about another dead body is prejudicially ineffective. What could possibly be more prejudicial? *Cf. Wong v. Belmontes*, 130 S. Ct. 383 (2009) (per curiam)(effective to exclude evidence of a second murder).

F. Unreasonable/prejudicial absence of plea negotiations

Three people who said they made tapes or were present when they were made were either not charged or charges were dismissed. Hearn got a plea deal. Crittendon was offered immunity. It appears that anyone who wanted a deal would get one. Even on the eve of trial. It was prejudicially unreasonable not to try.

G. No request for a severance

All defense counsel except Mr. Jackson moved for a severance of defendants. ROA 178, 81, 89. They argued that the State would be calling witnesses who would testify to statements of each co-defendant that would be self-incriminating and implicate each co-defendant. The lower court held that Jackson's failure to seek a severance "would seem to go against the prevailing professional norms." Order at 2292.[146] The co-defendants' motions were denied. During closing argument, counsel for Barclay, Crittendon, and Evans each emphasized the distinct and

[146]"This was a case in which a competent attorney would wish for severance." *Groseclose v. Bell*, 130 F.2nd 1161, 1170 (6th Cir. 1997)

arguably lesser roles of their clients. T. 1995-2004, 2183-2193 (Barclay)[147]; 2004-2015, 2193-2211 (Crittendon)[148]; 2138-2157 (Evans).[149] Jackson unreasonably did not because he did not prepare a separate defense. This was prejudicially ineffective.

H. Trial in an incorrect venue

According to Mr. Crittendon, Mr. Jackson believed that this case would be reversed because venue was wrong:

> When Mr. Jackson approached me about representing me in April 1975, he said he thought he could get my conviction overturned in the Florida Supreme Court on the ground that the case should have been tried in St, Johns County and not Duval County. He was very strong in his view on this point. He never discussed any other issue with me, and I never had another meeting with him to discuss his plan for my case. SV8, 1404

This was one of the only points briefed by Mr. Jackson on direct appeal. Brief of Appellant, No. 47-260, pp. 29-32. This was a prejudicially unreasonable theory.

I. Cumulative error and prejudice

The lower court correctly found prejudicial failures by Mr. Jackson. Per force, a new trial is required if one adds to that equation Mr. Jackson's other prejudicial errors identified *supra*.

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[147]*See, e.g.*, T. 2189 ("There is no single bit of physical evidence that puts Mr. Barclay at the scene of the murder. Any other evidence that you have seen is not against Mr. Barclay.")

[148]*See, e.g.*, T. 2008 ("look at the evidence against Dwyn as opposed to the other three").

[149]*See, e.g.*, T. 2149 ("[I]t's an easy thing to lump everybody together. It's too convenient, and it would be a tragic mistake on your part if you did that.")

ARGUMENT IV: RESENTENCING COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS[150]

A. Resentencing counsel conducted an unreasonable investigation on the eve of trial

Robert Link, appointed counsel at the 1987 resentencing proceeding, performed contrary to the firmly established norms in the legal profession for such proceedings. An adequate investigation into a defendant's life and social history in preparation for making informed decisions about what to present at a capital sentencing proceeding is a hugely time-consuming task. *Williams v. Taylor*, 529 U.S. 362, 396 (2000)(Counsel has the "obligation to conduct a thorough investigation of the defendant's background."); *Wiggins v. Smith*, 539 U.S. 519, 524 (2003).

Mr. Link agreed to represent Mr. Dougan on March 16, 1987, and the resentencing began September 17, 1987. Six months is an insufficient time to investigate and prepare for a capital sentencing proceeding, even if the attorney has no responsibilities to other clients.[151] But Mr. Link accepted Mr. Dougan's case *knowing* he had significant limitations on the time

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[150]For standard of review, *see* note 61, *supra*. Some of what follows is Appellee's answer brief, and some is Appellant's brief. The lower court denied relief on some omissions "standing alone," but granted relief on these omissions "when considered in the aggregate." Order at 2392

[151]Mr. Link had never conducted a capital resentencing proceeding. V17, 3066.

he could devote to it. First, Mr. Link represented Don Gaffney in what Mr. Link agreed "was a large and complicated prosecution" resulting in a "lengthy trial" under a "complicated statute." V17, 3068. From the day of his appointment to represent Mr. Dougan "there was a lot going on in the Gaffney case." *Id*. The Gaffney trial lasted a full month and Mr. Link was consumed by it "[t]o the exclusion of all other work." V17, 3069. "We were concentrating completely on it." *Id*. at 3070.

From June 11, 1987 until July 24, 1987, there was no work on the Dougan case. *Id*. This leaves roughly four ½ months for preparation. Then came another case for Mr. Link–in August of 1987 he represented two people who testified against Carlos Lehder. Mr. Link testified that this also "limited his ability to prepare in Mr. Dougan's case." Carlos Lehder was the cofounder of the Medellin Cartel and was the first Columbian drug-lord tried in the United States. Representing these two witnesses "took time–I had to debrief the clients and had to negotiate immunity from the U.S. Attorney in Tampa....and I had to be in court when they were testifying, of course." V17, 3072. Modestly, this must have taken at least a week. So Mr. Link had just over four months to prepare for a case that had spanned thirteen years.[152]

[152]Mr. Link could not rely on what prior counsel had done. Mr. Jackson refused to present mitigation and "beg for mercy."

In his testimony, Mr. Link agreed that he had spent six or seven hours (calculated generously) speaking to witnesses before "the eve of trial." V17, 3077. Jury selection began Monday, September 14, 1987, with general questions from the Judge to prospective jurors. On September 17, 1987, the State began presenting it's case. On September 20, 1987, a Sunday in the midst of trial, Mr. Link, "for the first time" (*Id*. 3078) interviewed people who would testify for Mr. Dougan. His files of these interviews were introduced, with his handwriting identified. Ex. 42-43 (22 files), SV12, 2125-2277, SV13.

> Q. And each of these witnesses that are noted on these folders testified and are not witnesses before the judge [at sentencing] but were witnesses before the jury. Is it your memory that you did these interviews in your office, with those witnesses coming to you, on or about the 20th of September, 1987, in preparation for sentencing?
>
> A. Yes.
>
> ....
>
> Q. Well, just to be clear, was this sort of a marathon session where you were speaking to one after another after another?
>
> A. Yes.
>
> Q. On the 20th or thereabouts?
>
> A. Yes. We were cramming for trial. No question.

V17, 3079. At this point, trial was already well under way.

It is inconsistent with norms in the profession to prepare for capital sentencing on the eve of or during that sentencing. *See Williams, supra*, 529 U.S. at 395 (counsel "did not begin to

prepare for that phase of the proceeding until a week before the trial"); *see also Bond v. Beard*, 539 F.3d 256, 289 (3rd Cir. 2008) ("Trial counsel may have had brief conversations with family members during an earlier proceeding, but the record before us shows that they did not prepare adequately for a capital penalty hearing.").

Counsel did even less to prepare the people who wrote letters or signed affidavits to be presented to the judge at sentencing but not the jurors. *See* Exhibits 44-45; SV14, SV15 2614-2638. He spent 1.3 hours on telephone calls with only four people. SV11, 2038-39. This was unreasonable.

B. The lower court finding of prejudicial ineffectiveness is amply supported by the record

The lower court found that defense counsel at Mr. Dougan's 1987 resentencing proceeding provided ineffective assistance of counsel:

> [f]ollowing a thorough review of the record and evidence presented, this court finds counsel's actions, cumulatively, demonstrated a reasonable probability that, absent counsel's error, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death to undermine confidence in the outcome.

Order at 2373. The court's findings that counsel was ineffective both with respect to rebutting aggravation and also for presenting a false picture of mitigation are amply supported by

the record.[153]

1. Ineffective assistance and aggravation

Mr. Link believed that the medical examiner who testified in 1975 had died and that the state would have to read his 1975 testimony to the 1987 jurors. He also believed that the 1975 testimony did not establish the aggravating circumstance heinous, atrocious, or cruel because there was no way to tell whether the victim was shot first and rendered unconscious before he was stabbed or was stabbed first and suffered. V.17 at 3087. Mr. Link had an expert, Dr. Lipkovic review the autopsy materials and deposed him September 11, 1987–four days before jury selection. SV11, 1899. Dr. Lipkovic testified that one could not tell the order of the injuries. Dr. Lipkovic was unavailable for trial, so Mr. Link intended to have his deposition read to the jury "safe in the knowledge that there was no medical examiner coming in to correct it:" "that was my belief." V.17 at 3089. But "[t]hen at trial, the deceased medical examiner walked in and testified against us, so I was mistaken," Link testified. *Id*. 3087. Order at 2365.

The state also believed that the testimony of the medical examiner in 1975 was not sufficient to establish the aggravating circumstance of heinous, atrocious or cruel:

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[153]In its brief the state does not discuss the mitigation that the lower court considered, cumulatively, with respect to this claim.

> The medical examiner who testified thirteen years ago is now deceased, and his testimony was not detailed enough to support the atrocious, heinous and cruel aggravating circumstance that the defendant has lined up medical testimony to rebut.

SV8 at 1281. When the medical examiner was found not to be deceased, Mr. Kunz spoke to him and "elicited additional testimony." V17, 2958. (Kunz). "The difference between the 1975 testimony and the 1987 testimony is that in 1987, Dr. Schwartz was asked for his expert opinion about the order of the wounds. Dr. Schwartz testified in his opinion the stab wounds in the chest of the Victim were inflicted before the gunshot wounds to the head." Order at 2368.[154]

Because "without eyewitness testimony, it is impossible to ascertain the order of the wounds," Order at 2369, expert testimony was critical. Dr. Lipkovic's opinion was "'that there is no medically accurate means of determining whether the gunshot

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[154]Mr. Link testified:

> Q. And when the non-dead medical examiner entered the courtroom and testified, do you remember whether he testified differently that he had in 1975?
>
> A. Yes, he did.
>
> Q. He added what?
>
> A. Well, he testified that the stab wounds to – the potentially fatal stab wounds had occurred prior to the gunshot wound to the head.
>
> Q. So the concern Mr. Kunz had in his memo had been remedied.
>
> A. Indeed. V17, 3089.

wound or the stab wounds were inflicted first" and "the medical evidence was consistent with the gunshot wound to the head occurring immediately before the stab wounds to the chest." Order at 2366. "Mr. Link did not have a live witness to testify about this at the sentencing proceeding." Order at 2366.[155]

Mr. Link was asked on cross-examination whether he chose not to submit Dr. Lipkovic's deposition to the jurors as a matter of strategy so as not to focus the jurors on the manner of death. "I was concerned that the use of a deposition to rebut a live witness was not going to be all that persuasive and would simply resurrect the details of the murder itself." V18, 3144. The lower court found that "it was error on the part of counsel to not have a witness to rebut the State's medical examiner's testimony at Defendant's 1987 resentencing." Order at 2372.[156]

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[155]Mr. Link also reviewed a report from Dr. Utley-Bobak, M.D., a medical examiner who reviewed Dr Swartz's testimony and all of the available evidence from autopsy and from the crime scene. Her opinion was that "Schwartz's 1987 trial testimony concerning the sequence order of the gunshots and the stab wounds was a significant overreach based on the evidence presented." Mr. Link indicated at the hearing this sort of evidence would have been helpful in Defendant's case. Order at 2365-66.

[156]The state writes that the Rule 3.850 motion only alleges that resentencing counsel was ineffective because he was "unprepared to cross-examine the medical examiner," not that "Mr. Link should have 'had a witness to rebut the state's medical examiner testimony.'" SB at 95 Thus, says the state, "the claim failed to allege the trial court's supposed basis for relief, requiring reversal." *Id*. The Rule 3.850 motion states counsel was ineffective for having not cross-examined the testimony effectively "or rebutted it." V7, 1227. The state also argue that the claim should have been summarily denied (SB 96), but the State "did not oppose an evidentiary hearing on this claim." V.

It was unreasonable for counsel not to be prepared with respect to the state's medical examiner.

2. Ineffective assistance and mitigation

a. Jacob Dougan's upbringing–embarrassed, ashamed, frightened

Dr. George Woods is a recognized expert in neuropsychiatry and he spent many hours evaluating Mr. Dougan, reviewing background materials, and interviewing other relevant individuals. The lower court qualified Dr. Woods as an expert and found him "credible." Order at 3411. Among other things, Dr. Woods testified about Mr. Dougan's life in his adoptive home, which the lower court credited. Order at 2351.

"[T]he superficial glance at the Dougan family would be one that was middle class, relatively well-to-do family that was able to provide certain material goods." V18, 3296 But when you look just a little closer, "it's a much, much different picture." The Dougans adopted Jacob when Mrs. Dougan was 38 years old and she then retired from teaching. "Mrs. Dougan was a severe alcoholic." V18, 3297.[157] While Jacob Dougan was in elementary school and high school, his mother would have him "steal from his father's wallet" and go to the liquor store to get liquor for her. She had him help to "hid[e] her liquor from the father."

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7 at 1363 (Response to Amended Motion).

[157]Dr. Woods testified that his "[b]irth mother was by all accounts a drinker as well. And its sad that he was adopted by a family that replicated that." V18 at 3300.

Id. at 3297.[158] The father made the mother stop driving after she, drunk, "backed out the driveway in a car, plowed into the neighbor's fence, shattered it and put the car in drive and kept driving." *Id*. at 3302. Yet "[t]his kind of thing became more frequent." *Id*.[159]

In high school, "his mother is dying of cirrhosis of the liver. She's bleeding out. Her eyes have turned yellow from the jaundice of her disease. She's continuing to drink."[160] And Mr. Dougan "facilitated" this drinking. V18, 3412. "I hate to use

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[158]See SV18, 3162 (Dr. Norton report, admitted without objection).

> One of the most difficult aspects of her drinking was the secrecy that Mr. Dougan felt bound to protect, and which pervaded his thinking and behavior. His father attempted to control his mother's drinking by limiting her finances. This ultimately resulted in her inducing her son to collude with her to steal money from his father in order for her to buy liquor....
>
> Mrs. Dougan kept an account at a local store where she bought her liquor. When Mr. Dougan, Senior, found out about it and how much she owed, he closed the account and told the proprietor not to sell her anymore liquor. But she promptly found another location and started another account. This pattern was repeated many times. Mr. Dougan described feeling embarrassed, ashamed and always frightened about the effect the alcohol had on his mother.

[159]"The father, before he died, acknowledged that his wife had been an alcoholic. So this wasn't just Jacob Dougan's recollection." V18, 3302.

[160] Mrs. Dougan was one of six children, all of whom died of alcoholism. "It's an amazing medical phenomenon to think that she and five of her siblings all died of one complication of alcohol or another." V18, 3297.

that word but yes. He's a child you know." *Id*.[161] He would "keep children away from the house" because "her personal hygiene became very bad." SV15, 2693.[162]

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[161]Jacob Dougan struggled in school and his mother was a retired school teacher but because of her drinking she was never able to help with his school work. "And so a tragic irony. Here is someone who has a mother, has resources. This is what she does and yet her son ....did not do well [in school.]" V18, 3299. 514.

> When he was beginning junior high school, more and more of his thoughts were preoccupied with worry about his mother and her safety. "We had a key to the front door to use when we came home from school. I would walk in and immediately look for my mother. She had a Barcolounger chair and I usually would find her there. She would be 'napping' – that was the word we used – and almost always there was a cigarette still burning in her hand. I can still smell the smoke, and see the ashes all over the floor around the side table. She would leave cigarettes burning in the ashtray so that there were dozens of oblong burn marks all over the top of the table. I was always afraid for her. No matter what I did, my mother was always in the back of my mind. I would get cold wash cloths and place them on her forehead to try to wake her up. Part of me was afraid that this would be the day that she didn't wake up."

SV15, 2694.

[162]Bob Link testified that he had evidence of this alcoholism, "but it was nowhere near as graphic as depicted here." V17, 3102. But his own expert's notes show the alcoholism: "mother died in 1966 (liver–she was an alcoholic);" "Admits she was a heavy drinker. She drinks mostly at home. Every one of her five siblings died of ETOH related disorders. She used to help Mr. Dougan at the shop–when she drank, stopped helping. Couldn't drive or she would have had an accident–he stopped her from driving. She started losing weight, then had stroke. Jacob was about 15 when she began drinking heavily. When he was 18 she was 'real bad.' She would sometimes lose her temper." SV15, at 2704, 2709. Mr. Link testified that he did not have Dr. Krop's notes at resentencing. V17, 3111.

His father had his own secrets. He was a philanderer.[163] He fixed televisions and radios around town and "would leave Mr. Dougan in the car while he went into the house" where he would have sexual "liaisons." V18, 3300-01. The result of at least one of these "liaisons" was "a half brother" who his father brought into the TV repair shop to help. Id.[164]

The mother's alcoholism and the father's behavior "really disrupted Mr. Dougan's life." *Id*. He was "parenticized." "On the one hand, [he is] involved with his mother's drinking and helping her get it and covering up, and on the other hand he's helping with his father's secrets and facilitating that and covering it up. *Id*. "[H]e was really the parent in many ways." *Id* at 3298. What does this do to a child?

> Well, there's a vast part of literature on the children of alcoholics, the adult children of alcoholics. And these children that often do not have a sense of self. They are used to taking care of others. They are used to providing for others. They are used to keeping secrets. <u>They have about a 40 percent greater incident</u>

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[163]Mr. Jackson in 1975 was not going to investigate and present this–he wanted to be a son-in-law.

[164]SV15, 2692:

> He told me that in addition to his mother's drinking he closely protected knowledge of his father's clandestine affairs. He remembered his father taking him to the homes of women whose televisions needed to be repaired. Mr. Dougan would often wait in the car while his father went inside. Later his father brought a young boy into the television repair shop. People remarked upon the boy's resemblance to Mr. Dougan's father. Mr. Dougan later learned that the boy is his half-brother.

of major psychiatric disorders, primarily depression.

V19, 3303-04(emphasis added).

As the lower court recognized, the record produced at resentencing led this Court to conclude "that Defendant grew up with 'loving parents who provided him a stable environment...'" Order at 2352, quoting *Dougan*, 595 So.2d at 5-6. "[I]t does not appear that Defendant's adopted parents provided quite the stable environment that was presented at his resentencing." Order at 2352. "Mr. Link testified at the hearing that 'I and the jury were given a very different impression of his upbringing because as an adopted child, most witnesses said he had very loving parents and had a terrific family.'" Order at 2351.[165] In truth, this was "[s]adly a very dysfunctional family." V18, at 3357.[166]

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[165]As the lower court noted, Judge Olliff took the mitigators presented at Defendant's resentencing and essentially used them as aggravators in his 1987 sentencing order. Order at 2352. For example, Judge Olliff wrote "The Defendant was adopted by fine, loving parents and was given a good home with many more advantages than most of his peers." ROA 1092; 1093 (devoted parents). This evidence "had an effect on the result reached by the Court" but it was "refuted by evidence presented at the hearing." Order at 2352-53.

The lower court held that while this post-conviction evidence "[t]aken alone" (Order at 2353) would likely not have resulted in a life sentence, considered "cumulatively" the court's confidence in the outcome was undermined. Order at 2373.

[166]In *Sears v. Upton*, 130 S.Ct 3259 (2010), the defense presentation led the state to observe that "'[w]e don't have a deprived child from an inner city; a person who[m] society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every opportunity that was afforded him.'" 130 S.Ct at 3262. But "the mitigation

b. Defendant appeared successful

> For many in the outside world, Dr Woods testified at the hearing, Defendant appeared to be doing pretty well–he was an Eagle Scout; played in the band; went to college for a short period at Florida A&M; went into the military; did volunteer work for Meals on Wheels; and was a paid director at the Robert F. Kennedy Center, a community center in Jacksonville. Yet, according to Dr. Woods, Defendant has an "almost" quality in so many things that he did that he failed to succeed in or complete. Dr. Woods described a prodromal phase of mood disorders present in Defendant after high school. The prodromal phase, as indicated by Dr. Woods, is a period where one's life starts to deteriorate–a period of time where a person changes and sees marked discrepancies between his or her external functioning and environmental functioning. "They may have had these early successes, but their life really starts to deteriorate." Dr. Woods testified this was certainly true once Defendant returned from the Air Force, and was not making a living and divorced his wife. Without some type of intervention, Dr. Woods testified, people will "continue to snatch defeat from the jars of victory;" and that is what Dr. Woods stated was evident in Defendant.

Order at 2353-54 (citations omitted). The lower court noted "the record does not reflect this evidence was presented at resentencing," but found the failure to present "this evidence," in and off itself, was not prejudicial. *Id*.

c. Being ostracized and discriminated against

Mr. Dougan's mental health deteriorated significantly before the offense. As the lower court described it,

Defendant presented evidence that at or around the time

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evidence that emerged during the post-conviction evidentiary hearing, however, demonstrates that Sears was far from 'privileged in every way." *See also Williams v. Allen*, 542 F.3d 1326, at 1340 (11th Cir. 2008).

> of the offense, Defendant was frantic, and the more he tried and failed, the more frantic he became, and everything was "spinning in an endless circle." Defendant presented testimony that described Defendant's behavior around the time of the offense as changing from a relatively level-headed person to an individual in a state of agitation and irritability. Dr. Woods stated this described someone with an agitated depression. Testimony at the hearing indicated around the time of the offense Defendant was isolated; he was running out of ideas; had become increasingly depressed; had decreased effective functioning; and was unable to complete things for himself.[167] Defendant provided testimony that Defendant had an internal conflict and conflicting relationships that started early in his life and continued through the time of the offense. Defendant provided testimony that months before the offense, Defendant's marriage fell apart and he became increasingly isolated from members of the political movement in which he was involved. Additionally, a relationship he had with a white woman was contrary to the bylaws of some of the organizations in which he wanted to be involved, further contributing to his isolation at this time. Dr. Woods stated superficially Defendant appeared to be successful, but in reviewing his comprehensive social history and symptoms, Defendant would be someone Dr. Woods would treat for major depressive disorder. Dr. Woods stated he would look at Defendant's family history, especially that his biological mother had a psychiatric disorder; the lack of support from his adoptive family; and his adoption records in consideration of a cause of Defendant's isolation and impairment of relationships at the time before the offense. Dr. Woods testified that around this time Defendant was deteriorating emotionally; he was agitated, and withdrawn. His method of treatment was stated as beginning with an antidepressant and perhaps psychotherapy.

Order at 2354-55.

While the failure to present "this evidence" was not, alone,

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[167] [note not in order]: "he would move away from people right in the middle of a sentence;" "he would just walk away in the middle of a conversation;" former colleagues "were hesitant about being associated with him." V18, 3320-23.

sufficient to show prejudice (Order at 2355), cumulatively it was. Order at 2373. In particular, the lower court found that "Defendant suffered racial discrimination from those in his race (he was biracial and both the white and black community discriminated against him)" which "contrasts with the facts presented at Defendant's resentencing." *Id*. For example, Mr. Dougan's African-American colleagues ostracized him "for dating a white woman," leaving him "without much support...He and his white girlfriend were largely isolated." V. 18 at 3316. He was "neither black now white" and had " an internal conflict that it would create, starting very, very young, manifesting in his home life, manifesting in his later relationships, both with his wife and his significant other, manifesting in his relationship in these–in these organizations." *Id.* at 3317.[168]

d. Familial mental illness

Based upon materials he reviewed and the statements of people he interviewed, Dr Woods testified

> Defendant's biological mother, Gloria, was fifteen when she married, had her first child, Sherry, at age 16,

[168]Levi Wilcox, a leader in the Black Front–a pacifist black organization in 1974 in Jacksonville–testified that Mr. Dougan was "dealing with a young lady that was–that was white, of course, and so we kind of stayed away from Dougan" and he was "ostracized from doing anything with the groups, the other black organizations." V17, 3300-01. "A person in that situation would not be a part of the group." Order at 2235.

and had her second child, Ricky, at age 18.[169]

She had great difficulty taking care of her children, drank a lot, and would disappear for periods of time. She told her children God would take care of them. Sherry reported that she and her brother were taken from their mother when they were found alone and abandoned as toddlers.[170] They were then divided between grandparents.

Gloria then joined a traveling burlesque company and met a Cajun man who was described as either Spanish or French and from New Orleans. Gloria became pregnant with Defendant.

Gloria's father would not let Gloria back in his home. She gave birth to Defendant, who had difficulty after the birth and was admitted to the hospital.

Gloria spent months at the Cleveland Clinic "in a psychiatric facility" V.18, 3356 trying to decide whether to give Defendant up for adoption.[171] She did after 8 months.[172]

Ricky reported that Gloria's chronic mental illness and long absences and criminal involvement made it impossible for her to raise her children. SV15, 2691

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[169]Dr. Woods testified very young parents "have a much higher incidence of psychiatric disorders in general and mood–certainly in terms of mood disorder." V. 18 at 3284.

[170]Sherry said "she and her brother were taken from their mother's custody when they were found alone and abandoned.... [T]hey found me eating stale pieces of bread to Rick, and there were maggots in his diaper.'" SV15, 2691.

[171]Records indicate she was "greatly upset," under a doctor's care, and was allowed no visitors. V.18, 3288. Lee Norton, a clinical psychologist, described Gloria as "severely mentally ill." SV15, 2691.

[172]While Sherry and Ricky were given to grandparents, "Mr. Dougan was not allowed to be given to either one of the grandparents and consequently was put up for adoption...[because] the other two children were white. Mr. Dougan was biracial." V. 18, 3284.

> Dr. Woods testified that psychiatric disorders can be generational and Sherry had symptoms of bipolar disorder like her mother and Ricky was a heavy drinker and lived alone. V18, 3287-89.

Order at 2347-2350.

Mr. Link had Mr. Dougan's adoption records–including the records of Gloria's behavior and hospitalization, and did not follow up on these records. He testified "I believe you have an obligation to investigate your client's mental health early and then make a decision as to whether you're going to use it or how you're going to use it." V17, 3124. But he "didn't know anything about [Mr. Dougan's mother's] background." V18, 3141. He testified "he would have liked to have known more about the half brother and half sister and more about the mother," V17, 3099, and the evidence he had not obtained "certainly indicates –anything but a loving parent in his background and a potential mental illness, as well." Order at 2349-50.

The lower court found that this evidence was not presented at sentencing but that "taken alone" it would not have changed the jury recommendation. *Id*.

e. Reduced aggravation and increased mitigation

The lower court was required to balance the aggravation against all of the mitigation, that from trial and that presented in post-conviction, in order to determine whether Mr. Dougan was prejudiced by his attorney's unreasonable omissions. Starting with aggravation, Mr. Link's unreasonable actions concerning the

medical examiner allowed that state to argue the victim was alive, conscious, and suffering psychological torture before he was killed by gunshot, and this supposed scientific evidence supported Hearn's testimony about the sequence of events. But for counsel's actions, the jurors would have heard that it is not possible to determine the sequence. We know this was an important issue–the state flagged it in a confidential memo and had their expert change his testimony from trial in order to prove HAC. There is an admission that "the medical examiner's testimony...was not detailed enough to support" HAC. SV8, 1281.

Had counsel reasonably eliminated any scientific basis for this aggravator,[173] then the balance would have tipped toward mitigation. The mitigation counsel failed to produce, identified *supra*,"in the aggregate" and "cumulatively demonstrat[es] a reasonable probability" of a different outcome sufficient to undermine confidence." Order at 2373. The lower court should be affirmed.

[173]The lower court also debunked a myth in this case about aggravation. It began with the trial judge's sentencing order that recited that the victim "begged for his life." Order at 2370. The lower court judge correctly found that "the record does not reflect the Victim 'begged for his life' or that 'blood gush[ed] from his eyes.'" *Id.* at 2371. Begging was "made up by Mr. Barclay" when in fact "the Victim did not beg for mercy." *Id* at 2371.

C. The lower court erred by denying relief on compelling claims of ineffective assistance

1. Mr. Dougan's mental state

a. Mr. Dougan suffered from a major mental illness at the time of the offense

After considering a "comprehensive social history" (V18, 3319[174]) and interviewing Mr. Dougan on four separate occasions, Dr. Woods "came to the conclusion that in the period of 1973 to 1974, certainly around the time of the offense, Mr. Dougan did suffer from a significant psychiatric disorder" i.e., "major depressive disorder." V18, 3277.[175]

> This Court finds Dr. Woods' testimony credible and supportive of Defendant having suffered from a psychiatric disorder around the time of the offense. Substantial evidence has been presented by Dr. Woods that Defendant suffered from major depressive disorder around the time of the offense, which was described as a major mental illness and one of the most severe...

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[174]See, e.g., Exhibits 49, 56, 52, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77.

[175]Dr. Krop was Mr. Link's expert at resentencing. He testified below that Mr. Link's focus was that, because of his reputation, Mr. Dougan would make a good prison adjustment and he was not a psychopath. V18, 3256. He testified that he reviewed adoption records, conducted interviews of Jacob Dougan and his father, reviewed letters from "people who were familiar with Mr. Dougan back in the 1970s," (RT at 1295) and administered an MMPI. He testified that, unlike Dr. Woods, he "was not provided with any information that would suggest mental illness in the family." V18, 3266. Counsel for the State had Dr. Krop stay in court after he testified to listen to Dr. Woods' testimony. V18, 3270. After Dr. Krop listened to Dr. Woods' testimony, the state did not call Dr. Krop as a witness to rebut anything Dr. Woods said. As the lower court found, "Dr. Woods provide[d] a better explanation" of Defendant's "mental state and processes" regarding the offense, and Dr. Krop was "not as compelling." Order at 2346.

> Dr. Woods provided an explanation as to why Defendant was depressed at that time, and that black individuals tend to react in a more agitated manner from depression, which is anger turned outward. This type of depression is externalized rather than internalized, with symptom presentations of greater degree of paranoia. This is in contrast to a withdrawn or melancholic depression as seen in white individuals. Dr. Woods testified that adult children of alcoholics have about a forty percent greater incidence of major psychiatric disorders, primarily depression. Dr. Woods provided the only explanation thus far for Defendant's mental state and processes in regard to Defendant's involvement in the offense.

Order at 2346. Dr. Woods was able to come to this conclusion because post-conviction counsel provided him with voluminous background materials about Mr. Dougan and because "Dr. Woods is a recognized expert in neuropsychiatry [and] had better tools available, and did more testing than Dr. Krop in evaluating Defendant." Order at 2346.

The lower court denied relief on this sub-claim for several unsupportable reasons.[176] First, the Court wrote that Dr. Woods' evidence "did not demonstrate how Defendant's mental state would have impacted his sentence at the time of his resentencing." Order at 2347. In fact, Dr. Woods testified Defendant's mental condition satisfied two statutory mitigating circumstances which focus on mental state at the time of the crime and directly relate to the proper sentence. Second, the Court wrote that Defendant did not demonstrate that "Dr. Woods would have been available to Mr. Link at Defendant's resentencing who would have

[176]Counsel considers this a cross-appeal issue.

testified to the same diagnosis..." *Id.* This is not required.[177] Nevertheless, Dr. Woods testified that Mr. Dougan's diagnosis was one that has well-known in psychiatry "for a millennium," including in 1974, so an expert provided with the proper tools would diagnose it. Third, Mr. Link admitted "I believe you have an obligation to investigate your client's mental health early and then make a decision as to whether you're going to use it or how you're going to use it." V17, 3124. But he "didn't know anything about [Mr. Dougan's mother's background.]" V18, 3141. He "would have liked to have known more about the half brother and half sister and more about the mother," and the evidence he had not obtained "certainly indicates–anything but a loving parent in his background and a potential mental illness, as well." Order at 2349-50. Finally, the lower court erroneously discounted entirely the effect Mr. Dougan's post-conviction expert's testimony might have had on the jury or the sentencing

[177]The issue is whether resentencing counsel provided sufficient information to his expert for that expert to arrive at an accurate diagnosis, and the lower court found he did not. As in *Rompilla v. Beard,* 545 U.S. 374, 392 (2005):

> While [trial counsel] found "nothing helpful to [Defendant's] case," their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of "red flags" pointing up a need to test further. When they tested, they found that [Defendant] "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions."

judge. *Porter v. McCollum*, 558 U.S. 30 (2009) (unreasonable to discount entirely expert and other mitigating evidence).

b. Statutory mitigating circumstances

Dr. Woods testified that at the time of the offense "others describing him with symptoms of agitation, irritability, impaired cognitive ability, and so that would be consistent with an emotional disruption." Order at 2357. Given Mr. Dougan's acts were "completely against what everyone believed to be his beliefs and what he believed, as well," and given his major mental illness, Dr. Woods concluded that at the time of the offense Mr. Dougan was under extreme emotional duress and was substantially impaired in his capacity to appreciate the criminality of his conduct. Order at 2357. The lower court's reduction of this evidence to irrelevance violates *Porter*.

c. Mr. Dougan's brain damage

Dr. Woods testified that he administered well-documented tests of brain functioning and determined the results "showed indications of right parietal brain dysfunction." Order at 2355. This portion of the brain "looks at being able to see the big picture, especially in being able to effectively weigh and deliberate and sequence one's behavior and apply it to a larger concept" and that such "right parietal lobe disorder can manifest itself in disassociation, or rather, changes in perception." *Id.* Dr. Woods testified that being on death row would not have any

effect on the parietal lobe which is “well-protected” and is “less amenable to changes of age and degeneration.” V.18, 3372

The lower court wrote from this that Dr. Woods “could not state with certainty Defendant had any organic brain injury that was not the result of being on death row for the past thirty years.” Order at 2356. “Thus, this subclaim is without merit.” *Id* at 2357. Defendant did not have to prove brain injury “with certainty.” Brain damage, even *possible* brain damage, is one of the most significant mitigating factors. *Jefferson v. Upton*, 130 S. Ct. 2217 (2010)(“permanent brain damage” that “causes abnormal behavior” over which he “has no or substantially limited control,” “impulsiveness,” “diminished impulse control,” “impaired social judgment”).[178] The lower court erred by reducing this mitigation to inconsequential proportions. *Porter, supra*.

2. Thirty percent of Mr. Dougan’s mitigating background and social history was kept from the jurors

a. Resentencing counsel’s unreasonable decision not to show extraordinary prison adjustment to the jury–fear of juror knowledge Mr. Dougan had been on death row

The offense in this case was in 1974 and Mr. Dougan was

[178]*See also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 237 (2007)(constitutionally relevant mitigating evidence includes “**possible** neurological damage”); *Smith v. Texas*, 543 U.S. 37, 41(2004)(mitigating evidence that “he had been diagnosed with **potentially** organic learning disabilities and speech handicaps at an early age”); *Williams v. Taylor*, 529 U.S. 362, 370 (2000)(mitigating evidence included defendant “**might have** mental impairments organic in origin”); *Mills v. Maryland*, 486 U.S. 367, 370(1988)(“minimal brain damage” mitigating).

convicted in 1975. Resentencing was over twelve years later in 1987. The sentencers were told many things about Mr. Dougan's life before the crime. What about the thirteen years since? For fully a third of Mr. Dougan's adult life the jurors received virtually no information from lay witnesses.[179] What they did hear was mostly harmful.

"It is unquestioned that under the prevailing professional norms at the time of [Defendant's] resentencing, counsel had 'an obligation to conduct a thorough investigation of the defendant's background.'" Porter, 130 S.Ct at 453 (citation omitted); *see also Sears v. Upton*, 130 S.Ct 3259, 3264 (2010); *Cooper v. DOC,* 646 F.3d 1328, 1352 (11th Cir. 2011); *Ferrell v. Hall*, 640 F.3d 1199, 1226-27 (11th Cir. 2011); *Johnson v. DOC*, 643 F.3d 907, 931 (11th Cir. 2011); *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008). Counsel is required to present jurors with "the full picture"[180] of mitigation, the "entire,"[181] "cohesive,"[182] and "complete" mitigation story, rather than a "scattered"[183]

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[179]As will also be shown, the jurors heard almost nothing about Mr. Dougan's life from birth to age four either–the years before his adoption. Add these four years to the twelve years after conviction and the jurors heard little about fully 41% of Mr. Dougan's life.

[180]*Gray v. Branker*, 529 F.3d 220, 233, n.2 (4th Cir. 2008).

[181]*Id*. at 236.

[182]*Id*. at 235.

[183]*Williams, supra,* 542 F.3d at 1339.

narrative.

At the time of his resentencing, at least 30 % of Mr. Dougan's life history included his life in prison. The full, entire, cohesive, and complete mitigation picture of Mr. Dougan necessarily had to include this mitigation. *Cf. Skipper v. South Carolina*, 106 S.Ct. 1669 (1986)(evidence of good adjustment to incarceration is mitigation with must be considered in a capital sentencing proceedings if proffered). Resentencing counsel knew that prison adjustment was a relevant mitigating circumstance and stressed to the court the need to address and present the issue:

> The Defendant was convicted of a racially motivated homicide that occurred in 1974. ...It is submitted that a mental health expert is essential to the defense.... The Defendant has been confined in jail or prison since his arrest in 1974. *The effect of such lengthy incarceration could be a relevant consideration for the judge and jury in deciding what sentence the Defendant should receive. See Skipper v. South Carolina, 106 S.Ct. 1669 (1986)*.

RT 494 (motion for expert filed March 24, 1987)(emphasis added). Counsel unreasonably did not follow through.

Defendant was entitled to juror consideration of this mitigation under the Eighth Amendment. It was unreasonable for counsel not to have presented it to them. Counsel had a tactical decision to make–whether to admit that the defendant had been on death row, or request that the Court exclude that fact and have witnesses only speak about prison. The only option counsel did not have was to exclude from juror consideration the mitigation

that defined a third of the Mr. Dougan's life.

b. As the lower court found, counsel unreasonably allowed a juror to serve who knew Mr. Dougan had been on death row, contrary to counsel's stated plan

Mr. Link testified that he did not want jurors to know that Mr. Dougan had previously been sentenced to death. V17, at 3116. But a three column article was published the day before the resentencing began on the front page of the Metro/State section of the Jacksonville Journal with a picture of Mr. Dougan and the headline "Man sentenced to die in '75 back for second trial on fate." SV15, 2736. Anyone who read this article would learn Mr. Dougan had been previously sentenced to death in addition to other matters.[184]

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[184]The lower court described this article:

> The article started below the fold on the front page of the Metro/State section and continued to the inside, where it covered nearly half of the page. The article begins, "Jacob John Dougan is back in town." It goes on to state, "Thirteen years ago, Dougan and four friends hunted down an 18-year-old Jacksonville Beach man and killed him, stabbing him repeatedly and shooting him twice in the head." From there, the article states the twelve years since Defendant was put on Death Row, "Dougan repeatedly has dodged the electric chair. Although Circuit Judge R. Hudson Olliff has sentenced him to death twice." Further information is given that a second killing was linked to Defendant, and the Judge's decision to allow this in at Defendant's last sentencing prompted the new sentencing. This article goes on to describe that jurors will hear a story "this week ...of five men who terrorized Jacksonville for three months in the spring and summer of 1974." Throughout the article, a detailed account is given of the offense, the tape recorded messages, the note found on the Victim's body, arrest of defendants, and their convictions and sentences at trial.

Juror Kraft served on the jury. RT 532. During voir dire, Mr. Kraft stated he skimmed over the article (RT 531), that he "was surprised, surprised it's [the case] back. This happened back in'74 and I was living here in Jacksonville at the time and I remember reading in the papers [then] and, of course, after a period of time it just skips your mind." RT 532. Then:

> Q. Mr. Link: Yes, Sir. You said you recall reading about the case at that time?
>
> A. Oh, yes. **I think that everybody living in Jacksonville read it. I'm sure they did**.

Id. (emphasis added). Mr. Link moved to excuse Mr. Kraft for cause, which was denied. RT 597. Mr. Link then exercised five peremptory challenges, but did not excuse Mr. Kraft.

If Mr. Link's strategy was to not have jurors know that a prior death sentence had been imposed, he should have exercised a peremptory challenge on a person who two days earlier had read a headline about the "Man sentenced to die in '75 back for second trial on fate," a juror who, like everyone in Jacksonville in 1974, had read about the man whose fate would now be redetermined, and a juror who was "surprised its back." It was unreasonable for Mr. Link not to have done so, and the lower court so found. V.13, at 218.[185]

V. 13, 2388 n. 91 (citations omitted)

[185]The lower court found there was no prejudice to Defendant because the juror stated on voir dire that he could be "impartial." V13, at 217-18. The prejudice is that Mr. Link

c. The little that was presented about this 30% of Mr. Dougan's life via lay witnesses did more harm than good–the Sheriff had him in chains

Of the 22 defense lay-persons who testified before the jury at resentencing, only six discussed anything about Mr. Dougan post-1975.[186] The first one to do so was the seventh defense lay witness, Charles Simmons, M.D., who was a friend and had been in the boy scouts with Mr. Dougan. RT 1377. He said after many, many years, he again saw Mr. Dougan "two months ago" after he "found out he was coming here to Jacksonville." *Id*. at 1381-82. He did not say from where. He explained that Jacob Dougan's father was ill and Jacob Dougan wanted advice from Dr. Simmons about his father's medical condition, which he provided. *Id.* 1382-83. In meeting with Mr. Dougan, Dr. Simmons found him to be "unchanged" from the person he had known years before. *Id*. at 1383.

The next witness to mention the present day Jacob Dougan was Charlie Adams, defense witness number 9. RT at 1392. He has known Jacob Dougan since first grade. He testified that he had "seen him since he's been back at the Duval County Jail," RT 1396, but did not say back from where. He said that Mr. Dougan was more mature, philosophical, not hostile or bitter, but that "he hadn't

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forwent plenary mitigating evidence based upon a strategy he did not implement–not having jurors with knowledge that another jury (and judge) had sentenced Defendant to death–twice.

[186]As the prosecutor repeatedly pointed out, the rest of the witnesses knew nothing about Mr. Dougan beyond their 20 - 30 year ago experiences.

changed very much." *Id*. at 1396. Then he said:

"I was looking at the chains they had on him."

Id. Mr. Dougan was in court in a business suit, and through his own attorney the jurors were advised that the Sherif in 1987 thought Mr. Dougan was so dangerous–in a secure jail–that he had him *in chains*.[187]

The third witness to mention the present day Jacob Dougan was Delores Lewis, the 11th defense witness. She detailed their growing up together and Mr. Dougan's community activities. RT 1407. She then testified that she had seen him several times

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[187]The lower court wrote "this argument was taken out of context." V13 at 2377, n. 89. The context is, the witness testified: "As a matter of fact, one thing that sticks out in my mind, he hadn't changed a whole lot. And I was looking at the chains that they had on him and he asked me, as opposed to me asking him, about the chains, does this bother you." *Id*. This, the entire, context shows that Defense counsel injected prejudice the prosecutor would have been prohibited from injecting:

> The appearance of the offender during the penalty phase in shackles, however, almost invariably *implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community* – often a statutory aggravator and nearly always a relevant factor in jury decisionmaking*, even when the State dos not specifically argue the point.* It also almost *inevitably affects adversely the jury's perception of the character of the defendant*. And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations–considerations that are often unquantifiable and elusive–when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale."

Deck v. Missouri, 544 U.S. 622, 633 (2005)(citations omitted).

recently (but not where) and that he was “the same kind of person” he had always been. RT 1408.

The fourth witness to discuss the present day Jacob Dougan was Jon May who met Mr. Dougan in the early 1970s. He discussed Mr. Dougan’s community organizing. He then said “about two months ago I was able to have a visit with him in jail” (RT 1521) and “he seemed to be at peace with himself.” RT 1522

The fifth witness to the present day Jacob Dougan was Beverley Clark, the defense’s 21st witness. She testified that she was an officer at the Duval County Jail and that Mr. Dougan had no disciplinary reports (RT 1595) and “no problems, no infractions” in the jail. RT 1596.

The sixth and last witness to the present day Jacob Dougan was Bishop Snyder. He testified that he had a pastoral visit at the jail in May 1997. RT 1600. Mr. Dougan discussed with him his life growing up, and then “began to tell me about his experience when he was in prison”[188] and that he “had really found peace through reconciliation with God and with himself.” RT 1602

d. Expert testimony before jury was about aspirations, not accomplishments

Dr. Harry Krop testified as an expert psychologist. He testified below his assignment from Bob Link was to testify at resentencing that Mr. Dougan was not a psychopath and that he had good potential for rehabilitation. V18, 3256. He interviewed Mr.

[188]No other person had mentioned prison.

Dougan and his father, looked at adoption records, administered an MMPI, and looked at some supportive letters from “people who were familiar with Mr. Dougan back in the 1970s.” RT 1295.

With respect to what Mr. Dougan had been doing for twelve years, Dr. Krop testified: “Essentially he was coping quite well with his incarceration” RT 1266. He said “[h]e is intelligent, he is not bitter, he is a good teacher, he works with younger people both before he was arrested and also in jail.” RT at 1277. He testified:

> He has had the opportunity in the 12 years or so since this incident occurred to either use that constructively or use that and become bitter and resent society and the system. And he has made every effort to take advantage of the situation in the time that has lapsed. He has gotten in terms of reading a lot. He has tried to develop self growth, self disciple and I believe he’s been fairly successful at that.

RT 1287. And:

> Mr. Dougan certainly appears to have used the time constructively and still has some goals for himself in the future. He still would like to make a contribution to society in a positive way and that’s probably the most frustrating thing for him because he knows and has insight into how intelligent he is, and he recognizes that some significant mistakes were made over ten years ago and he very much is ready to prove he can contribute first to a prison population in an appropriate way, and then hopefully some day to society if he would ever get the chance.

RT 1289. But who was he helping?

D. The truth about the mitigation in prison

1. From trained, trusted, author of 1975 PSI

Bob Link had Dan Carter send an affidavit to the Judge after

the jury recommended the death penalty. Mr. Carter prepared the original pre-sentence investigation report about Mr. Dougan in 1975. In that report he wrote that Jacob Dougan was the catalyst for the offense. The Court relied upon his report and recommendations.

In 1987, however, Mr. Carter, the Court's former sentencing expert, had a different opinion.

> 2. From 1972 to 1976, I worked for the State of Florida, Parole and Probation Commission, as a Parole and Probation Officer.
>
> 3. In my capacity as a Parole and Probation officer, I supervised parolees and probationers, both felons and misdemeanants, men and women, who had committed offenses ranging from drunk driving to murder. Because of my skills, I had the largest supervisory caseload in the office....
>
> 5. For the pre-sentence reports [in this case], I investigated the character and background of each of the defendants....As was the customary practice, the information came primarily from the Sheriff's office and the State Attorney's office. It was customary also to gather information from the defense, but Ernest Jackson, counsel for Dougan, gave me only terse comments and no information. Had he given me the names of people in the community to talk with, I would have followed up on those leads.
>
> 6. This was not a situation where an alleged leader forced or mesmerized or otherwise led people of lesser intelligence or capacity to do something which they otherwise would have been unwilling to do. Barclay and Hearn certainly, were mature, intelligent, articulate, well-read individuals. Based upon my professional experience, it is my opinion that to single out one of these men for a death sentence is inappropriate; there is no valid justification for disparity in sentencing these men, particularly that Hearn should be free and Dougan should be sentenced to death....

> 8. In 1979, at the request of Dougan's new counsel, I conducted further investigation into Dougan's background which I would have done in 1975 had I been given appropriate information by Dougan's counsel at that time. I also went to the Duval County Jail and Florida State Prison to find out what Dougan's record had been since his conviction....
>
> 10. I interviewed corrections officers and inmates at Florida State Prison and the Duval County Jail. Based on those interviews, I concluded that Dougan has been a stabilizing factor in the institutions where he has been incarcerated these many years. He maintains good relationships with both officers and inmates. His presence can be beneficial to conditions in an institution. He encourages meaningful communication between officers and inmates and sets an example for constructive outlets for grievances.
>
> 11. My investigation leads me to conclude that Jacob Dougan has been and is a valuable member of society. The merits of Jacob Dougan's life weigh heavily against the crime of which he was convicted. Were I to make a recommendation, based upon the above considerations and upon my professional experience, I would recommend that he be sentenced to life imprisonment.

SV16, 2817-1916. This affidavit was signed November 17, 1987, well after the jury recommendation of death. This is one of the witnesses Mr. Link never talked to. SV11, 2038-39

Mr Carter testified before the lower court. The State did not object to the admissibility of his testimony had it been presented to the judge or jury. Mr. Carter testified he had been trained to investigate the background of defendants and their crimes and make a sentencing recommendation to the Court in his Pre-sentence Investigation Report.

> Q....They relied upon it [the PSI] and they trusted what you had to say.

A. That is correct.

V18, 3201. He wrote the PSIs for Messrs. Barclay, Hearn, and Crittendon as well, and he was "familiar with all these peoples' background ...and the circumstances of the crime." V18, 3200. He confirmed that he could have testified before the Court and jury in 1987 had he been asked. V18, 3203 And, in particular, he testified that he could have testified without mentioning death row:

> ...[Y]ou also say, if asked in 1987, I would have testified before the jury, to what's in your affidavit, and you would have spoken to any mental health professional about what you know about Mr. Dougan, is that true?
>
> A. That is true.
>
> Q. And you've testified many times?
>
> A. Yes, I have.
>
> Q. You said if instructed by the Court, not to mention that Mr. Dougan had been previously sentenced to death, you would have complied with those Court wishes?
>
> A. I would have.
>
> Q. Is that something you've done before.
>
> A. Yes.

V19, 3204 (emphasis added). Mr. Link could have had him do it again.

Mr. Carter testified that he had more information in 1987 than he had in 1975. The bases for his 1987 and 2013 opinions included his further investigation into Mr. Dougan's background

and discussions with corrections officials. V18, 3202. His new investigation left him in "a pretty unique situation in 1987" (V18,3201) and led him to different conclusions from the one he formed in 1975. For example, contrary to the way the State portrays Mr. Dougan – as the instigator – this expert testified that the other defendants knew what they were doing and were not "being led astray by Mr. Dougan." V18, 3214.

He also discussed how truly unique Mr. Dougan was:

> ...I would just reiterate that the impression I had that I've carried with me since the time I visited with him on death row and spoken to prison officials, just what an asset he has been to them. More than one official told me that they relied upon him as a peacemaker among the inmates. And that's the impression that I have, and that's the impression that I carry with me to this day.
>
> Q. And those are correctional officials, not friends or inmates, but correctional officials.
>
> A. Correctional officials, yes.
>
> Q. And you have a long –or a history of speaking to correctional officials.
>
> A. That is correct.
>
> Q. So that strikes you as unusual.
>
> A. Yes, sir.

V18,3204.[189]

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[189]On cross-examination, he also testified about the offense: "I don't think [Mr. Dougan] caused anything to happen that would not have happened had it not been for him." V18, 3207. He believed differently in 1975, but in 1987 he would have told the jurors and judge that Dougan was not the mastermind: "[I]t was not my conclusion that had it not been for Jacob that the crimes would not have occurred or that the other defendants would not

2. From people who submitted letters/affidavits after jury sentencing

Other people who submitted letters to the Court after the jury recommendation were contacted by post-conviction counsel and those who could be reached provided affidavits that stated they would have testified before the judge and jury, they would have said they knew Mr. Dougan in prison if so instructed, and they would have talked to a mental health professional for Mr. Dougan. Most of these people Mr. Link never spoke to. V13, 2381. A chart with what their testimony would have been is submitted as Appendix B, but a few quotes illustrate what was kept from the jury.[190]

First, Sandra Barnhill. She met Jacob Dougan while she was a law clerk and he was in prison. Her dream to be an attorney was "almost destroyed" when she failed the bar exam. She shared her experience with Jacob Dougan and "[h]is response was that I was capable of being and doing anything. . . . Jacob continued to

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have participated if he had not convinced them to. I don't think that's what happened." V18, 3210.

The affidavit of William Hearn was also submitted to the judge after the jury recommended death. He swore that "if anyone had disagreed, we all could have been saved, including Stephen....I believe each of us was waiting for the other to stop this from happening but didn't." SV15, 2618. Mr. Hearn testified before the jury but was not asked about this by the State or defense counsel.

[190]Several of these witnesses testified below, and the state stipulated to the admissibility of the affidavits of many others. V18, 3221

encourage me through cards and letters, gently reminding me that there was a need for committed, young black women in the legal field. **I will always be grateful for his advice and encouragement. I subsequently, passed the bar and have enjoyed a fruitful and rewarding legal career serving the disadvantaged and dispossessed**." SV14, 2607-2611 "While serving his sentence on death row, Jacob has been able to channel his energies in a productive way. Jacob **constantly provides support and guidance to people from all walks of life -- from inmates to professionals in the business world**." *Id.; see also* SV 16, 2838

Second, Aubrey McCutcheon. V18, 3223. Mr. McCutcheon is the senior resident director of the National Democratic Institute in Liberia. He is also a member of the State Bar of Michigan and former co-chair of the National Conference of Black Lawyers. In 2013 he writes: "Mr. Dougan **played a large role in inspiring me, as a graduate college student, to continue my studies and enter law school** and pursue a career in Law. I believe Mr. Dougan to be a man of great dignity and humane values." Mr. McCutcheon also affirmed his 1987 letter wherein he wrote that Mr. Dougan "continued to provide motivation and to serve such a positive and inspiring role in my life. . . . It is amazing that after all the circumstances of his life, and many years in prison, **he can still be inspired to give such positive guidance to the societal contributions of others**." SV16, 2857-59.

Third, Dr. Krop. Dr. Krop did not testify to the following before the jurors, but in a letter provided to the Judge he said:

> He is not a management problem and in fact contributes to the stability and functioning of the prison by assisting other inmates in a constructive manner. SV14, 2560

Fourth, Sherry Weinstein. Ms. Weinstein met Jacob Dougan while working with non-profit organizations in Gainesville. She states Jacob Dougan "**has been a tremendous inspiration to me personally and professionally, to recognize the value of my own life and to continue to dedicate myself to help others do that, too**." SV16, 2832; SV14, 2574-75

Fifth, Arlene Drexler. Ms. Drexler met Jacob Dougan when she volunteered in the prisons in Gainesville. She states: "Rarely have I met a human being who seemed to possess the inner strength, caring, and sensitivity of Jacob Dougan. . . . [H]e has shown the self-discipline necessary to persevere in his own transformation. **He has the skills to assist and inspire others**." SV14, 2572; SV15, 2848

Sixth, Loring Baker. Ms. Baker met Jacob Dougan when she visited prisons with her work in the human development area. "I was impressed with him as a human being. There was a recognition in him of the unacceptable nature of his crime. . . . He is someone who has learned, matured, and has faced the challenge of rebuilding himself after failing in a very fundamental way as a human being." SV16, 2836-43

Seventh, Elisabeth Massey. Ms. Massey stated:

> As a graduate student in social work I had the opportunity to meet Jacob Dougan at Starke in 1986. I was able to spend several hours talking with him and I was immediately struck by his very obvious sensitivity and intelligence. Here was a man who despite twelve years in a small cell was able to maintain immense dignity and pride.

SV14, 2561-62.

Eighth, Meltonia Jenkins May-Dubois. Ms. May-Dubois knew Mr Dougan in the early 1970s. She wrote that

> During the past twelve years Jacob has kept in touch with my husband and me. He has remembered us on holidays and has expressed his love and concern throughout the years.

SV14, 2563-64; V18, 3218.

Ninth, Jim Hardison. Jim Hardison is deceased. He was an Episcopal priest who visited inmates at their cells. In his letter to the Court, he stated he visited Jacob Dougan in prison. He wrote “He clearly has adjusted to life in prison without adopting the skewed value systems often associated with other inmates. I have observed a mutual respect in his relationships with the correctional officers.” He also wrote:

> One example of Mr. Dougan’s concern for the other inmates was his taking the time to use his calligraphic skills (self-taught in prison) to create a high school diploma, copy attached, for a young inmate I visit who was the only member of his family ever to complete the requirements of high school graduation.

SV14, 2565.

Tenth, Professor Michael Radelet. A letter from Dr. Radelet

was submitted to the Court after the jury recommendation. Dr. Radelet verified the content of his letter in his sworn testimony below. V16, 2849. Based upon empirical research on predicting future dangerousness by persons convicted of homicide, and Mr. Dougan's crime, age, and personal circumstances, Dr. Radelet concluded that "the chances of a repetition of violent criminality for Mr. Dougan are nearly zero," in or out of prison. SV14, 2555-57. Dr. Radelet testified that today we have "25 years of additional data. So my opinion about Mr. Dougan being–not being a threat to prison visitors or staff or fellow prisoners is even stronger today than it was in 1987." V16, 2849-50. Dr. Radelet was available to testify in 1987 had he been asked. *Id*. at 2859.[191]

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[191]Mr. Link testified that he wanted to show the jury that Mr. Dougan would not be a future danger by contacting Dr. Radelet (V18, 3139), but he did not have Dr. Radelet testify before the jury. At the hearing below, Mr. Link was presented a report from a correctional expert with wide experience working with prisoners. That report states:

> 5) I was requested by counsel to conduct an assessment of Mr. Jacob Dougan regarding his possible adjustment to long term imprisonment based on his confinement adjustment from 1974 to 1987. I have reviewed Mr. Dougan's Florida Department of Correction files.
>
> 6) Based upon my over 40 years-experience in the correctional field, having classified and managed thousands of inmates in all security levels to include the highest security designations, I provide the expert opinion that Mr. Dougan can be managed in a correctional facility without causing an undue risk of harm to staff, other inmates and

The lower court held that Mr. Link decided not to present this evidence of what Mr. Dougan had done in the twelve years since his conviction because "it could have opened the door and permitted the prosecution to show Defendant had been preciously sentenced to death or that he had been indicted for another murder." Order at 2387. With respect to the former, at least one juror already knew another jury and judge–twice–had sentenced Mr. Dougan to death.

With respect to the latter, the record shows that any concerns about the Roberts case were resolved before sentencing. Mr. Link filed a Motion in Limine Re: Evidence of Other Crimes and, citing this Court's decision, stating "[e]vidence of criminal conduct for which there has been no conviction is not admissible as an aggravating circumstance. *Dougan v. State*, 470 So.2d 697 (Fla.1985)"(reversing sentence because the Roberts crime was introduced.). ROA 503. The motion also stated "the Defendant specifically waives reliance on the mitigating

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> the general community. I had sufficient, extensive experience in 1987 to reach this same conclusion. Had I been contacted in 1987 and provided Mr. Dougan's files, I would have rendered this same conclusion and so testified.

SV15, 2678. The state did not object to the admission of this report. V18, 3160. Mr. Link testified he did not know there were experts in 1987 who could look at prison records and other factors and decide whether a person would adjust well to prison: "I didn't think of it, to be brutally honest." V17, 3093. "I wish I had known Mr. Aiken at the time" because he provides "significant mitigating evidence." Id, at 3094.

circumstances of no significant history of prior criminal activity before the jury, so evidence of the Roberts homicide is inadmissible. *Maggard v. Smith*, 399 So.2d 973 (Fla. 1981).” And “‘[e]vidence of crimes for which the defendant has not been convicted is not admissible to undermine the credibility of defendant’s character witnesses.’ *Robinson v. State,* 487 So.2d 1040 (Fla 1986).” *Id.*; *see also id.*, 583-588; Motion to Prevent Evidence of “Roberts” Murder to Rebut “No Significant Criminal History” Mitigating Circumstance. ROA 581. The state responded that it would not rely on the other murder in its case-in-chief but would if Mr. Dougan relied in mitigation on the statutory mitigating circumstances of no significant history of prior criminal record. RV 37, 1885. The trial court granted the motion as to the state’s case-in-chief but denied the motion if defendant relied upon the absence of a criminal record. Defendant waived reliance on that mitigating circumstance before the jury. ROA 686. Thereafter, the State introduced no evidence of the Roberts murder before the jurors.

Under theses circumstances, evidence of the Roberts crime was not admitted even though, according to the lower court, Mr. Link presented “a substantial amount” of evidence about “defendant’s character from the perspective of the community who knew him as a child, youth, and adult.” Order at 2385. The state characterized the presentation as if “he was to receive the

humanitarian of the City of Jacksonville award..." V. 17, 3132. None of this testimony allowed rebuttal with the Roberts homicide; and nothing proffered by Defendant below would have either.

The lower court also found no prejudice, but it cannot fairly be said that there is no reasonable probability that a juror could have changed their vote to life upon hearing that Mr. Dougan helped people get through law school, graduate school, and other worthwhile endeavors–from prison.[192]

3. Evidence of race discrimination

As shown in Argument VI, infra, evidence of the sentencing judge's racial attitudes and capital sentencing decisions in the Fourth Judicial Circuit was available for sentencer consideration. Mr. Link unreasonably and prejudicially failed to present it. Contrary to the lower court's findings, Dr. Radelet testified that his "material would have been available to resentencing counsel at that time." Order at 2361.

E. Cumulative error and prejudice

The lower court correctly found prejudicial failures by Mr. Link. Per force, a new trial is required if one adds to that equation Mr. Link's other prejudicial errors identified *supra*.

[192]As the lower court demonstrated in its order, the mitigation presented by counsel was almost exclusively pre-offense. Order at 2385-2386.

ARGUMENT V: ALLOWING VICTIM'S SURVIVORS TO DETERMINE PUNISHMENT IS ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS[193]

A. A guilty plea was agreed to by the state until a victim's survivor in a different case objected

In these post-conviction proceedings, considerable effort was expended by counsel for the parties to the end of settling this case with a sentence less than death. Starting around 2000, undersigned counsel had discussions with Assistant State Attorney Jon Phillips about terminating this litigation with a guilty plea from Mr. Dougan. These discussions were summarized in writing in 2001. SV1, 7-9. Thereafter Assistant State Attorney Siegel took over the case. A representative from the defense visited openly with the victim's family members–the Orlandos-with the state's approval, and reported to Mr. Shorstein and Mr. Seigel the family's questions and concerns about a guilty plea. SV1, 13 Meetings with community leaders followed, as summarized in Sandy D'Alemberte's letter of July 9, 2003, with letters to the community leaders as well. SV1, 16-22.

As Mr. Siegel advised the lower court, then "Mr. Shorstein and I communicated with the decedent's next of kin in this case which would have been Steve Orlando's parents. In fact, I actually went over to where they lived and that with Mr.

[193]No evidentiary hearing was allowed on this claim. A proffer was allowed. The summary denial of this claim is reviewed *de novo*.

Shorstein went over about six months to a year later and I think this was 2005 time frame." V16, 2798. They "had an agreement with them when he came back that they would agree to this life-on-life sentence." V15, 29.

Thus, an agreement was reached between the state and the defendant to enter this plea.[194] But when counsel approached a court about the matter, the court suggested that the Roberts family needed to be notified. They were, and they did not agree to the plea deal. V.16, 2797-2801. Thus, Mr. Dougan remains on death row because a family member in a case for which he has not been convicted or sentenced disagreed with the state's and the family's decision that life was the proper punishment in Mr. Orlando's case.[195]

B. Resentencing, the family objected

Before resentencing proceedings occurred in this case in 1987, State Attorney Ed Austin discussed with Assistant State

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[194]There were two homicides–Mr. Orlando's and Mr. Roberts'–and after the death sentence in Mr. Orlando's case, the state dismissed the prosecution in the Roberts case. Mr. Dougan agreed he would plead guilty to both charges to put an end to the litigation and to no longer be sentenced to death. *See* SV1, 23-25 (article "Killer may be spared death").

[195] The death penalty truly strikes like lightning if it turns on the views of the survivors, and this sort of arbitrariness in sentencing was outlawed forty years ago in *Furman v. Georgia*, 408 U.S. 238 (1972). *See Booth v. Maryland*, 482 U.S. 496 (1987)(victim's family members opinions about the proper punishment inadmissible); *South Carolina v. Gathers*, 490 U.S. 805 (1989).

Attorney Stephen M. Kunz the reasons for not seeking, and the reasons for seeking, the death penalty again. On August 4, 1987, Mr. Kunz typed a "PERSONAL AND CONFIDENTIAL MEMORANDUM" to Mr. Austin about this discussion. Mr. Kunz listed some "Reasons Not To Seek the Death Penalty" and instead to "plead" the case, including the age of the case, loss of evidence, Hearns' hostility, and Jackson's ineffectiveness. SV9, 1280-82.

Bob Link testified before the lower court that he believed that there would have been a plea agreement in 1987, but for the wishes of the victims. He described a meeting with Ed Austin and Steve Kunz where a plea was discussed and "it was not resolved at that time" but "the Orlando family was pretty adamant about a death sentence [then]." He testified that but for the family's wishes there would have been a plea and "the judge was amenable to that" and "it was clear." The "family was the obstacle." V18, 3153-3155.

If, in the judgment of local prosecutors, the facts and law in a case counsel in favor of a sentence less than death, then the prosecutor–who has a duty to seek justice, *see Berger v. United States,* 295 U.S. 78 (1935); *Kirk v. State*, 227 So.2d 40, 43 (Fla. 4th DCA 1969)--ought to resolve the case with a sentence less than death. The judgment of the local prosecutors directly involved in this case had been, at least since 1987, and until the current state attorney was elected, that, under the facts and

the law, a sentence less than death is appropriate. Before the resentencing the prosecutor decided that life imprisonment was a proper disposition but conditioned that sentence on the approval of the victim's survivors. The resentencing judge–who had presided at the trial and the *Gardner* remand–likewise decided and stated that a life sentence was sufficient under the facts and law. However, the victim's survivors objected to such a sentence, and resentencing went forward. Such arbitrariness violates the Eighth Amendment.

C. Black victims discriminated against

It is also a process that is capable of operating in a discriminatory manner. A case in point is *Ellis v. State*, 622 So.2d 991 (Fla. 1993), about which Mr. Dougan proffered evidence. Mr. Ellis received the death penalty, but this Court required a new trial due to improper joinder issues. The Ellis case involved three racially motivated crimes by white men against African-Americans during racially charged times in Jacksonville:

> In 1978, the City of Jacksonville experienced racial tension at Paxon High School. During this period of time, two black males–one of whom apparently was a student at Paxon–were found murdered in a broad area along U.S. Highway 1 in northern Jacksonville. Shortly thereafter, a third black male was attacked in the same general vicinity, but escaped after a struggle.

Ellis, 622 So. 2d at 991.

> All three of the black males had been lured into the cab of a truck under the pretense of giving them marijuana to smoke. In each crime, the black male was seated in the truck between Ellis and Boehm and then

> was attacked with knives....
>
> One classmate, Randy Mallaly, told officers about an incident in which he had driven around with Boehm and Ellis. At one point, Ellis told Mallaly, "We're going to kill a nigger." Ellis then allegedly brandished a sawed-off shotgun. Mallaly had indicated he did not want to be part of such an incident, and nothing happened at the time.... Ellis had explained that 'he and Johnny [Boehm] had killed a nigger.'
>
> ....
>
> Mallaly also told police that, later that same year, Ellis had told him of a second murder involving a black male victim.
>
> Ellis also told Mallaly about a third incident in which Ellis and Boehm had attempted to kill a black male but had not succeeded because the man had struggled with them. During the struggle, Boehm accidentally cut Ellis with a knife. An emergency room doctor verified that he had treated Ellis on the same day the third incident had occurred along U.S. Highway 1.

Id., 622 So.2d at 994.

When the *Ellis* case was reversed and remanded for a new trial, the prosecutors stated that they would again vigorously seek the death penalty. They did not do so. This white person who the state contended was the racially motivated killer of two African-Americans, and who attempted to kill another, was arrested in 1989 and released in 1996 after entering a negotiated plea to manslaughter. SV 19, 3535 (article "Killer once on death row could go free in 11 months").

Unlike in Mr. Dougan's case, the State Attorney Office did not keep the victim's of Mr. Ellis up to date on the case and did not ask what they wanted the punishment to be or if they would be

satisfied with a sentence less than death:

> 3. Between 1978 and the time Ralph Ellis was arrested, no one ever gave me any information about the case. I was never told about the investigation or given any information about the case until Ellis was arrested, 11 years later.
>
> 4. After Ellis was arrested, the police came and got me and took me to the police station to make an identification. I also testified at the trial. No one from the State Attorney's Office or the police ever let me know what was happening after the trial.
>
> 5. No one from the State Attorney's Office or the police department ever talked to me about my feelings about the proper punishment, never discussed any problems with the case, never asked me what I thought about anything. They did not tell me anything about any decision to accept a guilty plea and not seek the death penalty again, I found out about the plea agreement when another victims' family member called and told me.
>
> 6. I was treated as if my life had little value to the State and I believe that the fact that I am African-American affected the way I was treated.

Affidavit of Allen Lamar Reddick.[196] Whether a person is offered a plea to avoid the death penalty cannot arbitrarily or discriminatorily be decided by either the race of the surviving victims or the defendant.

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[196] *See also* Affidavit of Betty Jean Felder ("I believe that the fact that my brother, Willie Evans, was African-American, and Ellis is white, affected the way our family was treated throughout this process."); Affidavit of Gwendolyn Roberts ("I feel that the fact that my husband, Howard L. Mincey, was African-American affected the way I was treated throughout this process."); Affidavit of James Evans ("I feel that the fact that my brother, Willie Evans, was African-American and the defendant was White affected the way our family was treated throughout this process.")SV19, 3537-3543.

D. The lower did not properly resolve the claim

The lower court wrote that sentencers recommended death, a judge imposed it, and this Court affirmed, thus death is "the appropriate penalty for Defendant." Order at 2189. This does not resolve the claim. Extra-record evidence shows victim's survivors get to choose the punishment when the State's representatives believe that decision is wrong–except when the victim is black. This violates the Eighth and Fourteenth Amendments.

ARGUMENT VI: THE DEATH PENALTY IN THE FOURTH JUDICIAL CIRCUIT IS SOUGHT AND IMPOSED BASED UPON RACE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

No evidentiary hearing was allowed on this claim. However, the lower court did allow evidence on whether resentencing counsel was ineffective for not presenting evidence about racial discrimination in capital sentencing.[197] Mr. Dougan presented the testimony of Michael Radelet, Ph.D. Dr. Radelet is a Professor at the University of Colorado in Boulder, Colorado. He is a former department chair, teaches Sociology and Criminology, and once every three semesters teaches a course on capital punishment at the law school. V16, 2828.[198] Dr. Radelet described the

[197]The summary denial of this claim is reviewed *de novo*.

[198]Dr. Radelet has received multiple awards for his work, has testified before Legislative bodies, both State and the US Senate and House of Representatives, and has performed work for this Court, i.e., the Racial and Ethnic Study Commission--he studied "race and death sentences in Florida." SV2, 176 (CV). *see*

methodology and results of a study he completed on race and the death penalty in Florida's Fourth Circuit between 1976 and 1987, the year of the resentencing here. SV2, 359. His study revealed that for all homicide cases:

> 4.1 percent were sentenced to death. But when a black kills a white it was 12.8 percent. White killing white, 6.7 percent. A black killing a black is .6 percent.

V16, 2856. To determine whether this demonstrated racial bias, he examined additional circumstances of the homicides. For example, did the crime include felony circumstances? He found:

> When a white person was killed with felony circumstances, 26.4 percent sentenced to death. When a black person was killed in felony circumstances, 7.1 percent. So still given a felony homicide, those who killed whites are about three times more likely to be

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EXECUTIVE SUMMARY: REPORTS & RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMMISSION, 1991, p. 15, Florida Supreme Court Webpage,http://www.floridasupreme court.org/pub_info/documents.shtml#Reports ("The application of the death penalty in Florida is not colorblind, inasmuch as a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if the victim is White than if the victim is an African-American.") Dr. Radelet is well-respected and well published in the area. The following was introduced at the hearing before the lower court. Michael L. Radelet, *Race and Death Sentencing in Florida's Fourth Circuit: 1976-1987* (June 21, 1993) (unpublished study, on file with author)(SV2, 359); Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981)(SV3, 373); Michael L. Radelet and Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985)(SV3, 384); Michael L. Radelet and Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FL. L. REV. 1 (1991)(SV3, 420); Michael L. Radelet, *Death Sentencing in Northeast Florida: The Mythology of Equal Justice*, (May 1, 1994) (Final Report to the Florida Bar) (on file with author)(SV20, 3544).

sentenced to death than those who killed blacks.

Id. at 2858. He narrowed it more:

> Then we went on and divided the cases to whether the victim was a stranger or a non-stranger. Pretty straightforward, and again, it made sense because 11.4 percent of those killing strangers were sentenced to death. Only about two percent of those killing family members. So it predicts.
>
> But lo and behold, when a white stranger was killed, 16.6 percent of the cases resulted in a death sentence. But when a black stranger was killed, 5.6 percent. So again, given the murder of a stranger those who killed whites are about three times more likely to be sentenced to death than those who killed blacks.

Id. And "[w]e found that when there's a female victim, nine percent of the cases where white victims were sentenced to death, one-and-a-half percent when a black victim was killed." V16, 2859.

For homicides in the Fourth Judicial Circuit, "[a]fter controlling for the predictive effects of all other variables, there is only one variable that has statistically significant effects in predicting a death sentence among black defendants: the victim's race." SV20, 3622.[199] This is true across Florida.[200]

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[199]Judge Olliff was on the bench the entire time covered by this study and his sentencing patterns would have been captured. As of 1979, Judge Olliff had sentenced five persons to death (Ernest John Dobbert, Walter Albert Carnes, Robert Fieldmore Lewis, Elwood Clark Barclay, and Jacob John Dougan, Jr.) Four of these persons had received recommendations of life imprisonment from the jury (Ernest John Dobbert, Walter Albert Carnes, Robert Fieldmore Lewis and Elwood Barclay). In the cases of Ernest John Dobbert and Walter Albert Carnes, the juries had recommended life imprisonment by the overwhelming majority of 10-2. Thus, in fully 80% of the death sentences imposed by Judge R.

Had Dr. Radelet been asked to provide this data in 1987 by Bob Link, he could have: "easily." *Id.*

This and other evidence shows the State bases its enforcement of the laws on an "unjustifiable standard," race. *McCleskey v. Kemp*, 481 U.S. 279, 291 n.8 (1987). The standard of review for such a case under the Florida Constitution has never been determined but should be the standard proposed by Justice Barkett in her dissent in *Foster v. State*, 614 So. 2d 455 (Fla. 1992).[201]

The lower court denied relief after finding that Mr. Dougan had failed to prove decision-makers in his case acted with

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Hudson Olliff as of 1979, he overrode.

[200]In Florida between 1976 and 1987, a death sentence was almost six times more likely in a case with a white victim; those killing whites in felony murders were about five times as likely to receive death sentences as those killing blacks in felony murders; blacks killing whites in a multiple murder have a high death sentence rate of 22.9%, while the death sentence rate is only 2.8% in homicides where blacks kill more than one black; and a black suspected of killing a white woman is 15 times more likely to be condemned than a black who is suspected of killing a black woman. SV3, 441-444. Taking all of the variables into account, a defendant suspected of killing a white was 3.42 times more likely to receive the death penalty than a defendant suspected of killing a black. *Id.* at 447.

[201]In Foster, Justice Barkett recognized the burden imposed by *McCleskey* and suggested that when a defendant "demonstrate[s] on the record that the discrimination exists and that there is a strong likelihood it has influenced the State to seek the death penalty...the burden then shifts to the State to show that the practices in question are not racially motivated. If the trial court determines that the State does not meet that burden, the State then is prohibited from seeking the death penalty in that case." *Id*. at 467-68. Mr. Dougan can satisfy this standard.

discriminatory purpose. Order at 234, n. 98. To the contrary, direct evidence of racial animus on the part of the sentencer was introduced. Judge Olliff presided over Mr. Dougan's trial and sentenced him to death three times–in 1975, 1979 (*Gardner* remand), and 1987(resentencing). The case involves a crime by black men against a young white man in a long segregated southern city. This judge was prejudiced against blacks and this prejudice is relevant to this, and several of Mr. Dougan's other, claim(s) for relief.[202]

Bill White became an assistant Public Defender in 1974, Chief Assistant to Lou Frost in 1976, and the Public Defender in 2004 in Jacksonville. He testified before the lower court about the racial atmosphere in Jacksonville at the time of trial and, in particular, the judge in this case. First, the judge in this case required that black defendants in his courtroom be referred to by their first names:

> A [In 1975] There were quite a few people still in the system who had one foot back in the pre civil rights days. There were Sheriff's officers who were still members of the Ku Klux Klan. There were judges who had attitudes that were -- you know, looking back, you'd say they were archaic then, but they certainly would be considered archaic

[202]Such bias violates the Eighth Amendment by creating an unacceptable risk that racial prejudice infected the sentence, *McCleskey v. Kemp*, 481 U.S. 279, 308-09 (1987), the Sixth and Fourteenth Amendment right to an impartial decisionmaker, *Turner v. Murray*, 476 U.S. 28, 36 (1986), and the Equal Protection right to be free from a sentencer acting with a discriminatory purpose. *McClesky*, 481 U.S. at 292-93.

now.

Q And is Judge Olliff included in that class?

A. Yes.

Q Do you have firsthand experience with that?

A. Yes.

Q. Could you describe any of your firsthand experiences with us?

A In my very first jury trial with Judge Olliff, I was representing a man in his 20s named Ponder. And Mr. Ponder took the stand, and when I began to question him, I addressed him as Mr. Ponder. And the judge called me up to the bench and said: "That we don't call blacks and children by their last name, by Mr.; you should call him by his first name."

And I said I wouldn't do that....

Q So African-American defendants, males were to be called by their first name like children are.

A Yes.

V18, 3165-66. Judge Olliff was expressing Jim Crow sentiments. Even after desegregation in the United States "countless white Southerners still clung ferociously to the hope that the old ways could, somehow, endure." JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW 161-62 (St. Martin's Press 2002).[203] Jim Crow

[203]The "old ways" were racial norms of the Jim Crow era. Jim Crow, a popular vaudeville character, became the general term for American racial segregation and discrimination in the twentieth century and represented the "legal, quasi-legal, or customary practice of disfranchising, physically segregating, barring, and discriminating against black Americans." *Id*. at 15. Throughout the South, Jim Crow was not only codified in laws but also ingrained in the "agonizingly real customs and mores." *Id*. at

etiquette "withheld from any black person the spoken or written titles of *Mr*., *Mrs*., or *Miss*. No Southern newspaper preceded the name of a black person with any of these seeming routine designations. No matter the importance, the skills, the honors, or the fame of an African-American . . . references would be by *first* name alone, and as *white* men were invariably identified as *Mr*. So-and-So, the contrast was stark and unavoidable." PACKARD, *supra* at 169.[204] Judge Olliff required in his courtroom that black defendants not be called "Mr."

Second, the sentencing judge entertained racist jokes:

> [I]n 1975, I came into chambers one day, in Judge Olliff's chambers. And everyone including the judge, they were all laughing, and I stayed there for about a minute, sat down and started to put my files down. And I realized that one of the senior lawyers, not a Public Defender or State Attorney, a private attorney was telling a joke where the main character was a

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163. These customs and mores are better known as the "etiquette" of Jim Crow, which became an "unbendingly enforced system of social control." *Id*. at 164. The "etiquette" of Jim Crow "maintained a cardinal rule: *Whites first*. Forgetting it or ignoring it almost always brought trouble - and it sometimes brought tragedy." *Id*. at 171.

[204]The custom of withholding a courtesy title from black Americans prevailed in the written word as well as the spoken word. *Packard, supra, at 169.* "The Jim Crow code for whites addressing blacks in person was even more humiliating than the conventions of the press. The greatest courtesy a black could reasonably expect from a white was to be address by his or her first name." *Id*. If a black person was addressed as "Mr.", the white person would likely say "Who? I never heard of him," or if pressed, the white person would eventually respond, "Oh, you mean that nigger, Sam Smith. Why didn't you say so?" Kennedy, Jim Crow Guide: The Way It Was 236 (Florida Atlantic University Press 1990) (1959).

caricature of black people named Rastus.

> And as a child and being up in Georgia where my relatives were, I had heard those. I recognized it right away for what it was, and I got up and walked out.
>
> And when we came into the courtroom, the judge asked me why I had left chambers. And I told him it was because of the joke. And he said: Well, there were no black attorneys in the room, so it shouldn't have been a problem. And I said, well, it was.

Id. at 3166-3167.[205]

Third, black life was not as important as white life for this sentencer:

> And from time to time, we would have a case that came before Judge Olliff where *two African-Americans were involved. It was a shooting or stabbing* or some other crime like that. And *he would describe it as an Ashley Street social encounter*, Ashley Street being, at the time, a mostly African-American area of downtown Jacksonville.
>
> Q. So by social encounter, that was belittling the incident?
>
> A. Yes, that *it wasn't a serious offense because it was two African-Americans* involved.

Id. at 3167.[206]

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[205]"Rastus" was used as a generic name by white people for black men, synonymous with the stereotype of the happy, carefree Southern black created by Southerners to justify continued racial repression.

[206]Bob Link testified to the same thing--that there was "an attitude of crimes against white people are more important than crimes against black people" and black victim crimes were often called "Ashley/Davis social encounters." V17, 3121-22. This notion that a black person being violent to another black person is not a serious offense also reflected in Professor Radelet's Florida research. Again, the fundamental principle behind the Jim

Fourth, the sentencing judge did not want black assistant public defenders assigned to his courtroom:

> Q. Did you have African-Americans on the staff at the Public Defender's Office as attorneys in 1975?
>
> A. I was in the division until July of 1976, when I became chief assistant in the office. And it then became my responsibility to assign the felony attorneys. And Ed Dawkins was an attorney in the office at the time. And I sat down with Ed and told him I was going to assign him to Judge Olliff's division. He didn't want to go there. But I felt it was important that we do that, and when I assigned him, Judge Olliff called me into chambers and asked me not to do that. And I said: No, he's going in this division....
>
> Q. Did Judge Olliff make it clear that it was a race issue?
>
> A. No. But it was clear to me. There was no other reason that I could think of for rejecting an attorney that I didn't think he knew at all.

Id. at 3167-68.

On cross-examination, Mr. White testified:

> Q. You are not calling Judge Olliff a racist, are you?
>
> A. You know, in terms of 1974-75, I would say his attitudes were not reflective of the entire bench, but they *reflected racist attitudes that pervaded some parts of the bench at the time and certainly pervaded large parts of the community*. ...
>
> Q. Was Judge Olliff old-fashioned? Was he myopic in terms of race relations?
>
> A. I don't think he was myopic. I think having been

Crow era was "that any white person was superior to every black person, and conversely, that any black person was inferior to every white person." PACKARD, *supra* at 87.

around a number of people at that time who shared those views, *I believe it was a fairly well thought-out but long-held view about African-Americans in terms of their abilities, in terms of their perceived morality, all of the things that were built into, as you say, the '50s or even earlier than that had not gone away by 1974.*

Jacksonville took from 1954 till 1968 to integrate its schools, and when the threat was that we were going to integrate swimming pools in town, the city pools, several of those were filled with concrete and covered over so that they wouldn't have to be integrated. So -- and that happened in the late '60s and early '70s.

So, you know, I think his attitudes reflected a -- I hope, looking back, that some of those views didn't just go underground, but it reflected a fact that we had a heritage that had not diminished enough by 1974 and that **he shared that heritage**.

. . .

Q. Is it your testimony or is it not your testimony that you have evidence or believe that somehow Judge Olliff's views with regard to race entered into the Dougan case and if so, how?

A. I couldn't say in a particular case that I could point to and say the outcome of the case was primarily due to his racist attitudes, no.

Q. And you would agree that the crime - - the Dougan crime for which he was convicted, the Black Liberation Army, the note, the tapes, the times are not an excuse for that crime.

A. I think you're right there. Of course, I think anyone would accept that, that -- that -- and it was interesting reading Justice McDonald's dissent in the '93 case- because it really raises the question of *how does race impact the sentencing? And you see the different views of the majority of the Court, minority of the Court. And you see McDonald and Barkett and Shaw recognizing that the -- what seemed to be very, very strong mitigation in the case could offset those horrible facts of*

> *the crime, and I think they did a better analysis of the aggravation and mitigation because I think their opinion was -- if you want to use the word more enlightened, you can use that. But it was more enlightened than Judge Olliff's.*
>
> ***And I think that's where you would find race might have a role to play. If the attitude of the judge starts out where his started, it could have an influence, I think, on the outcome of the case.*** *Id*. at 3175-77 (emphasis added).

Thus, Mr. Dougan has shown the most important decision-maker in his case acted with discriminatory purpose.[207] It shows much more than "some within the Court system were slow to embrace the changes that had begun in the community during the 1970s." Order at 2360.

ARGUMENT VII: THE RESENTENCING JURORS IMPROPERLY CONSIDERED INCORRECT, INFLAMMATORY, EXTRANEOUS INFORMATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS[208]

Challenges to convictions and sentences based upon constitutional violations attendant to jurors' actions are

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[207]Judge Olliff did not want to be around blacks in or out of court. An affidavit filed in the *Gardner* remand proceedings documented Judge Olliff belonged to at least three organizations that did not allow black membership in Jacksonville, the Morocco Temple of the Shrine ("no 'colored' person could become a member. ....[R. Hudson Olliff] is a good member and one of our judges here in town."), the Scottish Rite (there never had been a "colored" member and that a "colored" person could not join), and the Mandarin Lodge No. 343 F & AM. (all white and no black person could join.) *Gardner* remand, p. 82.

[208]Findings of fact are reviewed under the substantial competent evidence standard, but the application of law to facts and the decision not to allow juror interviews is reviewed *de novo*.

cognizable legal claims. *Tanner v. United States*, 483 U.S. 107 (1987)(juror testimony admissible regarding extraneous or outside influences improperly brought to bear on the jurors); *Parker v. Gladden*, 385 U.S. 363 (1966)(defendant "entitled to be tried by 12 . . . impartial and unprejudiced jurors" [involving comments made to jurors by bailiff]); *Mattox v. United States*, 146 U.S. 140 (1892)(same). "[T]he introduction to the jury of extraneous materials or evidence has consistently been held to mandate a new trial. *Jones v. Kemp*, 706 F.Supp. 1534 (N.D. Ga. 1989).

With these principles in mind, Mr. Dougan's counsel ought to be allowed to interview and/or depose the 1987 jurors. Jurors were interviewed by researchers after resentencing in 1987. According to notes of these interviews taken and transcribed: a. the jurors "*knew* during deliberations that a white girl had been picked up and raped (extraneous, false, evidence);"[209] b. a juror believed that his tax dollars had been wrongly spent for a ten year old case and for a defendant to sit in jail and watch TV and eat three meals a day (juror bias); c. a juror said "we were told beforehand by the judge" that there had been a prior death penalty recommendation (supposedly the jurors did not know this); d. the jurors were told by bailiffs that the reason the

[209]The defendants were black. Whether it is true that "[t]his [rape] was brought out in the transcripts that the jurors were able to review during their deliberations," as this juror said, or came from some other source, it was highly inflammatory.

sentencing had to be redone was because evidence was introduced at the first sentencing that should not have been introduced (improper contact with bailiffs and extraneous evidence); e. some jurors were told by third parties during the resentencing that the resentencing was due to some minor technicality, i.e., “a cousin of a cousin who knew a cousin of Mr. Dougan’s, or something like that.” (extraneous evidence) f. one juror was afraid, due to racial overtones, that the defendant might have friends who would blow people up, i.e., his wife, over the weekend (bias); g. jurors considered jury service to be a waste of time since one appeal is enough and/or he should have been sentenced 20 years ago (bias); h. a juror stated that after he was selected and “did not recollect during the trial” but “did however recollect later that this was a case that I had read about” (misconduct); i. one juror slept through a lot of the trial (misconduct); j. one juror said that the reason they were doing a sentencing “20 years later” was because there were two murders and at a second sentencing the second murder was introduced (extraneous evidence); k. one juror also “couldn’t figure out why we were there. We knew we had to give the judge a recommendation but none of us could figure out why he had never been sentenced;” and l. one juror thought this “was just a simple resentencing,” and “it was not as important as having to decide guilt“(bias). SV 2, 176-263, 293-358;

The lower court was concerned by "who was telling them ...that there was a rape and there were two other murders and other things" because "that's–that's quiet serious actually." V15, 2714-15. The lower court ordered a hearing on this claim but did not allow juror interviews by counsel or jurors to testify. V.8, at 1489 ("no interviews of jurors will be allowed"). Thus a hearing was held where the notes of jurors interviewed were introduced.[210]

The lower court then denied relief because the very best witnesses to federal constitutional violations–the jurors–were muzzled. The lower court held that the claim should have been raised on direct appeal, but the facts were not known on direct

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[210]A rule precluding questioning or testimony of jurors as to the effect of misconduct or inadmissible evidence on their deliberations, violates a defendant's Fifth, Sixth and Fourteenth Amt rights under clearly established federal law. *Doan v. Brigano*, 237 F.3d 722, 732 (6th Cir. 2001) (finding Ohio Rule of Evidence 606(B), which denied a court's ability to review evidence of juror misconduct unconstitutional). The court held that the Ohio rule was contrary to *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546 (1965) and *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468 (1966). "[W]e are by no means the first federal court of appeals to recognize that a state's 'aliunde' evidence rule cannot be applied to violate a defendant's constitutional right to a fair trial." *Doan,* 237 F.3d 734. (Citing *United States ex. Rel. Owen v. McMann*, 435 F.2d 813, 819 (2d Cir. 1970) (In an opinion by Judge Friendly, the court reversed stating that the "State could not seriously contend that even if [the defendant] were denied due process . . . New York law may independently foreclose him from challenging his conviction on federal constitutional grounds.")); *Durr v. Cook*, 589 F.2d 891, 892 (5th Cir. 1979) (remanding for an evidentiary hearing where the state court had precluded a juror from testifying based on a Louisiana statute prohibiting a juror from impeaching his verdict).

appeal by appellate counsel. The court also wrote that Defendant did not allege any specific facts to believe that the verdict may be subject to legal challenge, but just the judge's own concern "that-that's quiet serious actually," and the law and allegations set forth *supra*, raise cognizable challenges. This is not a "fishing expedition." Order, 2240. We have evidence from the jurors of violations. Finally, the judge wrote–without any explanation–that "the reliability of the interviews presented is questionable." Order at 2241. The interviews were conducted for research at the behest of Dr. Radelet and the answers to questions were handwritten. They ought to be sufficient to warrant further investigation.

This Court should allow such interviews. To deny them would violate Mr. Dougan's Eighth and Fourteenth Amendment rights to Due Process and would deny him of the ability to develop evidence showing he was denied a fair trial by 12 impartial jurors.

ARGUMENT VIII: THE SENTENCING JUDGE FAILED TO CONSIDER MITIGATING EVIDENCE, AND FAILED TO SET FORTH IN WRITING WHAT HE FOUND TO BE MITIGATING, IN VIOLATION OF THE PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

On appeal of resentencing, this Court was unaware that the sentencing judge's personal views kept him from considering evidence which three members of this Court found from the record to be mitigating and also that he did not consider evidence that he himself mentioned, in private, was mitigating. Under these

circumstances, resentencing is required.[211]

A. The sentencing judge's racial animus prevented consideration of racial injustices as mitigation

This Judge required that black men be demeaned in his courtroom, laughed about them in chambers, belittled crimes of violence between them, and did not want a black attorney in his courtroom. *See* Argument VI, *supra*. These character traits explain the judges rejection of mitigation offered by Mr. Dougan. As recognized in the sentencing order, Defense counsel offered as mitigation the racial unrest at the time Dougan committed murder: "He stated that the Defendant was frustrated because of the pace of social progress; the murder was comprehensible as a misguided notion that it was a way to achieve his goal." SV11, 3013-14. The judge called this "nonsense." *Id.* As Mr. White testified, inasmuch as three members of the Florida Supreme Court found this evidence not only mitigating, but sufficiently mitigating to call for a life sentence, it was an unconstitutional abuse of discretion not even to recognize the evidence as mitigating. We now known that this judge would not want Mr. Dougan to be called "Mr. Dougan," only "Jacob."

B. No consideration of rehabilitation

There was other mitigating evidence the judge did not

[211]Factual determinations on this claim are reviewed under the substantial competent evidence test, and the merits are reviewed *de novo*.

consider. The sentencing judge told counsel that "if the State chose not to pursue the death penalty in this case, there would be no complaints at all from him." V18, 3153.

> Q. So you took that to mean he would take the plea?
>
> A. Yes, it was clear to me. Yes.

Id., 3153. Mr. Link testified that the stumbling block for an agreed settlement was "the victims' feelings." *Id*. During the trial the judge stated to Mr. Link off the record that Mr. Dougan "probably is rehabilitated." *Id*. 3154.

> Q. ...Judge Olliff concluded from the presentation of evidence that Mr. Dougan probably was rehabilitated?
>
> A. Yes. *Id*. 3155.

The judge's failure in the written sentencing order to consider what he himself found to be mitigating violated the state and federal constitution, and Florida law.[212] A sentencer must consider relevant mitigating evidence and evidence of rehabilitation and further potential for rehabilitation is relevant mitigating evidence. *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986); *Simmons v. State*, 419 So.2d 316, 320 (Fla. 1982). But in the sentencing order the judge gave it no consideration and did not remotely touch upon Mr. Dougan's

[212]Inasmuch as the "rehabilitated" comment was made off the record, "Defendant has not provided a specific reference to the record" reflecting it. Order at 2330. Mr. Link testified without rebuttal the comment was made "during the trial." V18, 3154.

post-incarceration rehabilitation.[213] The remarks by Judge Olliff call into substantial question the adequacy of the written findings with respect to mitigation and call for resentencing.

C. The state was provided (or wrote) an unsigned copy of the sentencing order but not defense counsel

Pursuant to Public Records Act requests, post-conviction counsel found in the State Attorney files an *unsigned* copy of the sentencing order. Mr. Link was not provided an unsigned copy of the sentencing order, just the signed one distributed at sentencing. V17, 3115. He testified "I'd wonder how it got there and who actually wrote it." *Id*. at 3116. "I would have liked to have seen it, to have the same opportunity to rebut it as they did or criticize it." V17, 3316. Why would the state have an unsigned order and the defense not? Why was defense counsel not given the same opportunity the state was given? If the state wrote the order–or participated in its writing by getting a copy beforehand and offering (or not) comments and suggestions, a new sentencing is required. *See Card v. State*, 652 So.2d 344 (Fla.

[213]This Court held on appeal from resentencing that "It is apparent from the judge's written findings that he considered these matters. Based upon his evaluation of the evidence, however, he decided that the facts of this case did not support Dougan's contention that these matters constituted mitigating circumstances." *Dougan*, 595 So.2d at 4. The lower court found that because of this statement "this part of this claim is foreclosed." Order at 2329. This Court was unaware of the above information when it ruled on appeal.

1995); *Spencer v. State*, 615 So.2d 688 (Fla.1993).[214] Whatever ex parte actions went on they were unfair and violated Mr. Dougan's due process rights and right of confrontation. *Gardner v. Florida*, 430 U.S. 349 (1977). Mr. Dougan was unable to prove why the state had the unsigned order below, Order at 2331, but there can be no constitutional reason.

ARGUMENT IX: FORTY YEARS FROM ARREST--THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT FOR MR. DOUGAN

No evidentiary hearing was allowed on this claim.[215] The Eighth Amendment prohibits cruel and unusual punishment. *Furman v. Georgia,* 408 U.S. 238, 306 (1982) (Stewart, J. concurring); *Robinson v. California*, 370 U.S. 660, 666 (1962). Given the extraordinary psychological duress as well as the extreme physical and social restrictions that inhere in life on death row,[216] Petitioner's forty year confinement constitutes cruel and

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[214]*See Spencer v. State*, 615 So. 2d 688, 691(Fla. 1993)("It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed....[T]here is nothing more dangerous and destructive than a one-sided communication between a judge and a single litigant." *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992)).

[215]The summary denial of this claim is reviewed *de novo*.

[216]The psychological duress includes preparing (and then not) for execution, knowing the uncertainty of one's fate, living for years surrounded, confined, and surveilled by possible executioners, having friends executed, learning the horrors of botched electrocutions and lethal injections, living for decades in the harshest of conditions, and experiencing horrible nutrition and medical care. V7, 1236-1258 (Claim XXIII, Amended 3.850). *See also* SV16, 3014-15 (proffer); V.18, 3331 (Woods proffer).

unusual punishment under the Eighth Amendment. *Lackey v. Texas*, 514 U.S. 1045, 1045-1046 (1995)(Stevens, J., joined by Breyer, J. dissenting from denial of certiorari)(condemned inmate was on Texas's death row for 17 years); *Knight v. Florida*, 528 U.S. 990 (1999)(Breyer, J. dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998)(Breyer, J., joined by Stevens, J., dissenting from denial of certiorari)(condemned inmate on Florida's death row for 23 years).[217]

It also violates the Eighth and Fourteenth Amendment to execute Petitioner because the penalty no longer would serve a legitimate penological purpose. To comport with the Eighth Amendment, the death penalty must serve the goals of deterrence and retribution. *Furman v. Georgia*, 408 U.S. 238, 312-313 (1972)("the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes ...would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.") The crime in this case occurred forty years ago.[218] There is no deterrence or

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[217]Since *Lackey*, Justice Breyer has continued to assert its validity and the need to definitively review this aspect of the Eighth Amendment. *See Valle v. Florida*, 132 S.Ct. 1 (2011) (Breyer, J. dissenting from denial of stay and certiorari); *Smith v. Arizona*, 552 U.S. 985 (2007) (Breyer, J. dissenting from denial of certiorari); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J. dissenting from denial of certiorari).

[218]The passage of time also undermines Mr. Dougan's efforts to prove his claims for relief. *See* SV 3713 (15 potential witnesses deceased or infirm).

retribution in action.[219]

IV. CONCLUSION

Appellee requests that this Court affirm the judgment below granting a new trial and new sentencing, and/or cross-Appellant requests that the Court reverse the parts of the judgment below denying relief.

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy hereof has been furnished to Patrick Delaney at Patrick.Delaney@ myfloridalegal.com and that Patrick Delaney at Patrick.Delaney@ myfloridalegal.com. is the e-mail address on record with The Florida Bar as of this date for Mr. Delaney pursuant to Rule 2.516(b)(1)(A).

I also certify that this Brief of Appellant was computer

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[219]The norm against cruel, inhuman, or degrading treatment is now universally recognized as protected by international law. The Universal Declaration of Human Rights, article 5, provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Universal Declaration of Human Rights, *adopted* Dec.10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). *See also* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 16, *adopted* Dec.10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doe. A/39/51 (1984); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953); the American Convention on Human Rights, Art. 5, *opened for signature* Nov.22, 1969, O.A.S. T.S. No.36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (*entered into force* July 18, 1978); the International Covenant on Civil and Political Rights, Art. 7, *adopted* Dec.16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (*entered into force* Mar. 23, 1976); African Charter on Human and People's Rights, Art. 5, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (*entered into force* Oct.21, 1986).

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Respectfully submitted and certified:

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