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 is referred to as: the 1975 trial is “ROA” and “T.;” the 1987 Resentencing is “ROA2" and “RT;” the 3.850 proceeding is “V” for pleadings, orders, and transcripts, and “SV__” for exhibits; the lower court Order is “Order.” The State’s Amended Brief of Appellant is “SB.”

As shown in Argument I, Appellee agrees the State’s “DATT/VI 1021-1047" contains “tapes recorded by Defendant Dougan,” but disagrees that the tapes were “scripted by Defendant Dougan.” SB at xi. Also, the State wrote it referred 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 it’s brief, Appellee supplemented the record with the exhibits.

RESPONSE TO INTRODUCTION

The lower court granted Mr. Dougan a new trial. The state is bitterly critical of her. The state’s main argument is that no matter how unfair the proceedings were, Mr. Dougan cannot show prejudice under any standard because of the evidence of the crime. SB at 1. But the state’s key evidence is the testimony of a co-defendant who, the lower court found, was allowed to lie under oath about what he was offered to plead guilty and testify. And Mr. Dougan’s lawyer, “the Raiford Express,” was so conflicted and ineffective that this Court, on habeas, vacated its own judgment on direct appeal: counsel’s efforts were “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 are amply supported by the court's 238 page Order below.

STATEMENT OF THE CASE AND THE FACTS

1. The lower court judge

The dates/cites in the state's Case Timeline appear correct. SB2-7. The state's references to litigation over the qualifications of the post-conviction judge show that before she granted relief the state 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."[1]

2. Relevant decisions

Because during Mr. Dougan's 1975 trial, attorney Ernest Jackson solicited co-defendants Barclay and Crittendon as clients, and represented all three on appeal, some of this Court's decisions that affect Mr. Dougan carry Mr. Barclay's name. For example,

[1]In Case No. SC11-2196 (SB at 6), the state wrote: Judge Johnson "meets the level of expertise that the current rule requires;" "She intends to preside over Dougan's case now. She is qualified now;" "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*;"(emphasis added) and Judge Johnson should be "allowed (and *encouraged*) to proceed to move the postconviction proceedings toward resolution." p. 17, 18, 23, and 24. Later, in Case No. SC12-1628 the state wrote: "[I]t is noteworthy that due to Judge Johnson's conscientious efforts, this case was moving forward toward resolution;" Judge Johnson's "efforts;" and "Judge Johnson's good faith efforts" Pp.2, 8.

Barclay v. State, 343 So. 2d 1266 (Fla. 1977), affirmed Mr. Dougan's judgment. *Barclay v. State*, 362 So. 2d 657 (Fla. 1978), remanded Dougan's case for a *Gardner* hearing while *Dougan v. State*, 398 So. 2d 439 (Fla. 1981), affirmed the reimposition of death after that remand. *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984) has an extended discussion of Mr. Jackson's conflict of interest and ineffectiveness on appeal, and *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984) adopts that analysis 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. 1975: scoundrels testifying in Jacksonville

Forty years ago, 8 young African-America men met at James Mattison's apartment: Mattison, Eldred Black, Otis Bess, William Hearn, Jacob Dougan, Dwyne Crittendon, Brad Evans, and Elwood Barclay. They mailed cassettes--purportedly describing the murder three days earlier of Stephen Orlando, a young white man, in (made-up) graphic detail warning of a (made-up) race war by the (made-up) Black Liberation Army ("BLA")--to the press and the victim's mother. None of them had to record, but Mattison, Black, Dougan, Barclay, and Crittendon did. Once the tapes were delivered, all 8 were **murder suspects.**[2]

[2]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

Three (Black, Bess, and Mattison) 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 a deal. State witnesses Black, Bess, and Mattison were each either not charged, or had very serious murder charges dismissed.[3] Star state witness and defendant Hearn went from facing the death penalty to, he lied, facing life in prison per his deal. None of these witnesses were disinterested.[4] 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 ... what could they do? The three of them...could get together, compose this story...T. 2143
>
> **[A]s the police closed in on the tape makers and all of them, that the three of them and Hearn began to panic.**

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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.

[3]Mattison was charged with murder and mailing threatening communication but he became a witness and the charges were dropped. T. 1187-88. Bess was on probation for felony child abuse but his probation was not revoked. T. 1048. Black was told that even if he was involved in "any physical crime...[he] stood a chance of not being persecuted [sic.]" T. 1233.

[4]Black testified he "had no great love for [white people] at the time," and sending tapes about "violence, race, slavery and white devils" to the victim's family was the right thing to do. T. 1213. "I went along with everybody else." *Id*. Co-defendant Hearn testified "white people are bad" and he "would lie to white people therefore in order to help himself." T. 1462.

And what do they get out of all this? Freedom. T. 2142,[5]

The State said 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).

SUMMARY OF ARGUMENT

ARGUMENT I: The State told the defense and jury Hearn expected a life sentence. The truth, sworn to by a prominent Jacksonville senior judge, was Hearn's sentence would be *at the mercy of the state*. After Hearn testified the prosecutor recommended, and Hearn received, a fifteen year sentence. The prosecutor immediately lobbied for Hearn's release and Hearn served less than five years–for two murders. The lower court properly held this violated

[5]Counsel for Barclay argued "It seems strange. Maybe the State had to do it, but they have associated themselves with some strange bed-fellows." T. 2184. Mattison "made a tape just the same as the horrible tape and the quotes" from others "but he's not charged with murder." T. 2184-85. 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 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." T. 2187.

the Fourteenth Amendment. *Giglio v. United States*, 405 U.S. 150 (1972), *Brady v. Maryland*, 373 U.S. 83 (1963).

ARGUMENT II: Ernest Jackson was found by this Court, in this case, to be ineffective and blind to conflicts of interest on appeal. *Dougan*, 448 So.2d at 1006. The lower court correctly found Mr. Jackson provided identical unconstitutional representation at trial. First, while he represented Mr. Dougan 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/legal secretary, resulted literally in assaults that adversely affected preparation, disrupted the office and the defense, and denied Mr. Dougan his lawyer's loyalty. The lower court correctly applied *Cuyler v. Sullivan*, 446 U.S. 385 (1980) and other case law.

ARGUMENT III: Mr. Jackson had a well-documented 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" was disjointed, irresponsible, inconsistent, confusing, conflicting, and implausible. T. 1742. 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, *inter alia*, 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 not differentiating the culpability of the co-defendants. The lower court erred by not finding these *Strickland* violations.

ARGUMENT IV: Resentencing counsel was ineffective for unreasonably not having an expert witness available to challenge the state's expert about the sequence of 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 in violation of *Strickland*. For example, virtually no evidence was presented to the jurors about the twelve years after the crime when Mr. Dougan was an exemplary inmate deeply respected "as a peacemaker" by guards. He was a trusted advisor to free-world colleagues who made positive achievements (i.e., going to law school and graduate school) but who would have failed without his counsel.

ARGUMENT V: A victim's survivor in a separate case prevented

a plea agreement in this case. In other Jacksonville 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. This 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 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. Michael 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 in violation of the Eighth Amendment did not consider this or other mitigation. *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 X: The Florida capital sentencing scheme violates the Sixth and Eighth Amendments under *Ring v. Arizona*.

ARGUMENT I: THE FALSE PROSECUTION EVIDENCE[6]

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

Stephen Orlando's murder occurred Sunday night, June 16th, or early June 17th, 1974. Mr. Dougan was arrested September 18, 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, the same day Mattison was freed from jail and his murder and other charges dismissed. 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

[6]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).

17th. Bess', Mattison's, and Black's statements were provided to all counsel in October. ROA 29. A trial date of January 27, 1975, was set. Depositions were taken of Bess (December 12), Mattison (December 17), and Black (January 12).

On January 14, the trial was moved to February 18. On January 23, **Hearn, "in a surprise move** (RT. 158)," pled guilty to second degree murder and was immediately listed as a new witness for the state. ROA 122. Four days later, he gave a sworn statement to prosecutors.[7] He admitted that before his statement, he knew what Black, Mattison, and Hess had said in their statements because his attorney provided and he read them. Deposition at 132.[8]

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 presenting known false evidence violates rudimentary demands of justice under the Eighth and Fourteenth Amendments. *Pyle v. Kansas,* 317 U.S. 213

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[7]He later testified he did this because he believed he would have been convicted of 1st degree murder which he knew carried the death penalty. Deposition at 32, 131. Hearn was initially indicted only for the first degree murder of Mr. Roberts. When he agreed to testify, he admitted killing both Mr. Roberts and Mr. Orlando. In return for testimony, he was promised 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. Order, at 2182, n. 13.

[8]He also testified his attorney told him "what the other witnesses had said" before he agreed to give a statement. *Id*. at 32. At a pre-trial hearing 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.

(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)("[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *id*.) *See also Giglio*, 405 U.S. at 153-54(following *Mooney, Pyle, Brady*, and *Napue*.) 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."[9] Defense counsel and the jurors were "entitled to know" the truth about what Hearn was offered for his testimony.[10]

> 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,

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[9]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 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. *Id*. at 2230 (emphasis added)(record citations omitted).

[10]Order at 2222.

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.[11] This Court agreed and wrote that in this deposition "Hearn testified fully to the details of the plea agreement *thereby apprising the defense of the same*." *Dougan I*, 343 So.2d at 1270 (emphasis added). 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).[12]

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

[12]Hearn testified Mr. Austin and Mr. Bowden were present when one or the other said "what the state would do if you testified for the state." Depo at 129. Prosecutor Bowden heard

At trial, Mr. Hearn testified he had been told 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.[13] 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.[14]

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

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

[13]The jurors heard Bowden object to these questions and Evans' attorney respond: "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.

[14]There was no hint pre-trial or 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.

murderers. We do it. We did it in this case. T. 2044

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 below in 2013, *now* long time *Judge* Bowden swore 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 he negotiated a plea agreement with Hearn that "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.[15]

"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.[16] "The jury was

[15]"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.

[16]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 jury is entitled to know the "realities of what might induce 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–proving a *Giglio* and *Brady* violation[17]

A sitting senior judge testified his was the state's key 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 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.[18]

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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).

[17]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.

[18]In its brief, the state claims the lower court judge granted relief only by rampant "speculation" and by not

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 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*.[19] 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.[20]

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conducting an objective evaluation of the evidence. *See* Claim I,E, 1-5 (headings in table of contents, SB ii-iii). She 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."). Judges who decide cases such as these should be applauded. As this Court noted in granting relief under similar circumstances:

> 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.

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

[19]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?"

[20]The state overblows the significance of a brief passage in the lower court's order. *After* the court had concluded Mr.

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. The lower court's "confidence in the outcome of Defendant's case has been undermined." *Id*.[21]

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

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Dougan 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. Hearn testified he plead guilty to second degree murder in January 1975. However, Hearn's judgment and sentence recites he entered a plea of guilty on June 10, 1975. 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 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 an irrelevant sentence awkwardly.

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

Ed Dempsey, Hearn's lawyer,[22] said his "understanding of his deal with State Attorney Bowden was that his client would not receive anything approximating fifteen years, although he indicated it was not firmly established." Order at 2203; SV7, 1089.[23] As Judge Bowden testified, Hearn was upset when he received 15 years because he thought he was supposed to receive less. 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 vs. being at the state's mercy

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

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[22]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*.

[23]"The fact that [he] 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; he believed he had a bargain for far less. SV7, 1089.

conviction of second degree murder. SB at 35.[24] But what the law allows is irrelevant. Hearn was told what the deal was. As one defense counsel argued in closing: "[T]he State of Florida, by its officials [Austin and Bowden, listening]...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. 2011(attorney Stedeford). Prosecutor Bowden did not interrupt: "hold on there. He lied. He's at my mercy. I might recommend 15 years. And defense counsel is free to bargain heavily later."[25]

C. 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

At Hearn's sentencing, Prosecutor Bowden stated he had told Hearn that **life imprisonment was *the least*** he would receive:

> Your honor will recall that when Mr. Dempsey and I first talked to Your Honor in the early stages of this

[24]The state won on appeal by saying Hearn's "full agreement" was in his deposition. The state cannot now say the *actual* agreement was something not contained in that deposition. 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.

[25]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).

> 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. But Mr. Bowden said he had a change of heart:

> Mr. Reeves and Mr. Owens[26] and I have had contact with William Hearn, *sometimes on a daily basis, sometimes for hours at a time*...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....[I] was one of the things that sort of came to each of us 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).[27] Nowhere did Mr. Bowden say that

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[26]Mr. Reaves and Mr. Owens worked with the state attorney's office. They testified Hearn "does not have a criminal mind." SV15, 2762. He just was a follower who got caught up with the wrong crowd. Hearn's first 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 Summary. Order at 2218.

[27]In front of the jury Hearn was not portrayed as a gentleman, but as "worse than a scoundrel." T 2029 (Mr. Bowden's argument). 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;

the deal was "straight-up" all along. The state then asked for a 15 year sentence and the court imposed it on June 10, 1975.

> 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"

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 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, the prosecutors lobbied 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. Judge Bowden conceded below "it could be that we agreed to minimize the impact on him, notwithstanding the 15-year sentence." V18, 3232. Order at 2204.[28]

Exhibits SV16, 2890-91. Dr. Woods testified that Hearn was diagnosed as anti-social and Dougan was not. V18, 3327(Dr. Woods). *See also* Order at 2206, 2219.

[28]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

Messr Bowden and Austin campaigned for Hearn for three years.[29]

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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 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 is the *Giglio* violation. The lobbying for release is more, not the, proof.

[29]Here is a sampling of the prosecutors lobbying. See SV7, 1082 (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."); SV15-2754 (8/5/75: "during extensive pre-trial proceedings, I was able to evaluate the character of William Lee Hearn." Bowden"respectfully suggest[ed] that William Lee Hearn is an excellent candidate for early release." *Id*. Order 2205); SV 18 3205 (9/9/75: Ed Austin spoke with Commissioner Howard and "in his judgment [Hearn] is a good risk for rehabilitation and perhaps early parole release."); SV18, 3208 (1/6/76: Austin wrote note to Howard that "[T]his 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.") SV15, 2793 (1/8/76 Austin emphasized in person, to 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, 2794 (8/9/76: Bowden wrote Chairman of Parole Commission Charles Scriven that he had learned Hearn was taking educational courses and had no disciplinary reports, and said: "I *earnestly implore* your recommendation that [Hearn] be released on parole as soon as possible."(emphasis added); SV15, 2786 (8/12/77: Austin wrote Scriven requesting "parole as soon as possible;" "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."); SV15 2797 (7/78 In July 1978, Howard's memo that "Mr. Austin is on record to do everything possible to effect this man's release as soon as possible."); SV15, 2798 (8/11/78: Austin letter to Howard that "I would

Correctional officials were unmoved. In December 1978, after a prison progress evaluation there was no parole recommendations but a conclusion Hearn "should serve an additional period of time" first. SV18, 3241. On January 1, 1979, an examiner determined 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. *Id*.

Austin and Bowden begged reconsideration. SV15, 2799 (3/7/79: Austin to Scriven, "respectfully urg[ing] your reconsideration of Mr. Hearn's status."). Hearn's own request for reconsideration was denied.[30] 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

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greatly appreciate anything you can do to be of assistance")

[30] On March 20, 1979, Michael Davidson, General Counsel to the Commission responded to Hearn's own request for review of his presumptive date and denied it because Hearn had not identified an error in the decision. SV18, 3251. Meanwhile, Scriven had on March 13 asked the Commission whether they "want[ed] to reconsider their presumptive parole date in view of the prosecuting attorney's request." SV15, 2800. In a memo to the Commissioner dated April 4, 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.

parole." SV18, 3267; SV15, 2805.[31]

On April 17, 1979, Davidson denied reconsideration again. "This is your second request for review. It shows no more 'cause' for review that did your first." SV18,3263. But the parole commission was listening to Messr Austin and Bowden.[32] On August 15, 1979, it set a presumptive release date of September 11, 1979, and Hearn was released on that date. SV18, 3271; SV15, 2808.[33]

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

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[31]Because this letter referenced a letter by Judge Olliff –and because it would be counter-productive for an inmate to lie about that--it is more than likely that this letter was written, although it was never provided to undersigned counsel. Hearn testified 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 were insufficiently pled. Order at 2391. Counsel pled this claim with exacting specificity, the state agreed to a hearing, and counsel repeatedly tried to obtain a copy of this important judge letter.

[32]See SV15 2806 (5/10/79): Austin letter to Scriven "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.

[33]Prison officials disagreed. See SV18, 3269 (prison progress review meeting: "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.")

1. Hostile Hearn cannot be expected to help the state

After all that the state did for him, when it came time for this "gentleman" to testify again he was "hostile." A confidential memo written by ASA Kunz and discovered in post-conviction proceedings states: "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 Hearn came to be cooperative, was not revealed. Mr. Link, resentencing counsel, was shown the Kunz memorandum, said he had not seen it, and commented "what did the state do to get him to assist them? Because he certainly didn't appear hostile when he testified." V17, 3114. What changed Hearn's mind?[34]3 Hearn being hostile 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. He testified that the state did not write letters on his behalf until "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 four years.

[34] Hearn testified below it was possible he had been hostile and said he was not going to help. V18, 3191-92.

3. Hearn had testified his deal was "life"

The resentencing jurors did not know that when Hearn testified in 1975 he said he had made a plea bargain and he would receive life but in truth the deal was his sentence would be at 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. State cannot prove lies harmless beyond a reasonable doubt

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.

1. The state is estopped from arguing harmless error after previously stressed 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 said prosecuting 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."[35] ASA Kunz' memo labeled Hearn the

[35]Order at 2213-14. "Judge Bowden testified at the hearing that he agreed that Mr. Hearn was critical to the State in Defendant's 1975 case." *Id*. at 2202.

"***Key*** witness" and said below the state could not have had the results it achieved without Hearn's cooperation and testimony. *Id.*[36]

> 2. Hearn was a critical witness–no one else testified about what happened
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> 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.

Order at 2222. The State argues Hearn was not important because of "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. The testimony of suspects Mattison/Black/Bess about what occurred after the offense is inconsistent, conflicting, and inconclusive; the experts, of course, cannot say who did what.

So when the State writes about the crime as presented in the state's case-in-chief, 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.*[37]

> a. Testimony from uncharged tape-makers about who taped and what was on the tapes

The State says there is significant evidence of Mr. Dougan's

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[36]Ed Austin credited Hearn with delivering "two electric chair cases and two 199-year sentences." Order at 2205, note 24.

[37]The state direct appeal brief treated Hearn as critical.

guilt "even if Hearn's testimony had been totally disregarded." SB at 48. This "significant evidence" comes mainly from two sources: recordings on June 19 and what Mattison, Black, Bess, and Hearn said, or did not say, from the witness stand.

1. Barclay "scripted" that the victim begged

The State says 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 *forced* Mattison, Black, Bess, and Hearn to do the bad things 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 first page of the State's brief--purporting to show non-Hearn evidence of guilt –illustrates the State is wrong:

> 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). Thereafter,

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

> 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.

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*.

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

All were free not to tape. Bess testified "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 asked why, he first said "Well, I have a problem talking and reading. I stutter every now and then." T. 1282. He testified he was quiet and the others wanted to know "whether I was going to participate with the rest of them." T. 1283. Mr. Dougan asked "how we felt about it and our reaction to it." *Id.* Bess freely said he was fine with "letting the black people know their rights and everything," but he "couldn't go along with the killing

and *I couldn't make no tapes.*" T. 1284 (emphasis added).[38]

Black made tapes to "get[] 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 agreed to tapes about "violence, race, slavery and white devils" and mailing them. 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[39] Everyone did not. Hearn testified he was present Wednesday night and he, just like Bess and Evans,[40] did not make a tape.

3. How notes for the taping were made–collaboratively

Hearn testified Dougan suggested making some tapes, someone said "yeah, that's a good idea," he wrote down some notes of things to say on the tapes, asked for comments from others, and edited the notes. Black testified the first time he heard about making tapes was Wednesday night. T. 1198. Mattison testified on Wednesday night(T. 994) "Jacob, you know, made some notes and we made a tape

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

[39] *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 "directed" Bess to check with his wife first.

[40]Evans 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.

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/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 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).[41] 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.

b. The actual tapes

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

Mattison testified he was with Dougan, they went to a Pic N'Save, and Dougan paid for a tape recorder in "the afternoon." T. 985-86.[42] Mattison testified in deposition that he, Jacob, and someone else purchased the tapes. T. 977. The taping occurred in

[41]Everyone else testified he was there.

[42]Mattison testified he did not see the tape recorder in his car or see Dougan take it into Mattison's apartment. T. 985

Mattison's apartment. Mattison left the apartment to get envelopes (T. 1207, 1287) and to get addresses for the delivery of the tapes (T. 977, 1286).[43] According to Black, once the envelopes were addressed some or all of them were not stamped because they did not have enough. Stamping had to wait for "stamps [to be] picked up at the shopping center." T. 834, 1207. Mattison and Dougan left, may have picked up more stamps, and mailed the envelopes. T. 1207.

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

Mattison recorded a tape about a dead body that was found floating in water near St. Augustine--"from a paper that we read–A newspaper--" and Dougan had nothing to do with the "script" for this. T.706-07; *see also* T. 823 ("we read about it and decided to make a tape"). Black also made a tape about this 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.[44]

With respect to 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

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

[44]This testimony was out of the jurors' presence but illustrates the independence of the tape-makers.

added in." T. 720-21 (emphasis added).[45] 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 others: "at two particular times I can remember Jacob 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.[46] Tapes with everyone's voices were recorded in the living room. *Id*.[47]

4. Confusion about who made tapes

Mattison listened to a tape and identified his own voice. T. 815. He testified everyone except Bess made a tape. T. 698. Black testified he played "the same [role] as everybody else" in making

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[45]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.

[46]Mattison also testified 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.

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

the tapes (T. 1202) and he himself said the same things the others said on tapes. T. 1225. He testified everyone but Hearn and Bess made tapes. T. 1225. Dougan, Barclay, and Crittendon testified they made tapes; Bess, Evans, and Hearn testified they did not.

5. Were all tapes mailed?

Mattison testified "all of the recordings were mailed" (T. 974). Black said "I tore one up...I was on it." T. 835. Black said two tapes were destroyed–"I destroyed part of one. I don't know who destroyed the other one." T. 730. Hearn testified all tapes were mailed except one that was thrown "over a bridge." T. 1456

c. What the uncharged tape-makers said the defendants said and did pre-taping–no consistency

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.[48] 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.[49]

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[48]Black they gathered so Jacob could "talk to us." T. 1155.

[49]In Black's deposition three months after the tapes he did not say t"execution." T. 1191. In a proffer, Black said Dougan

Bess testified he was at this Monday conversation and Dougan said that "a killing had occurred Sunday" and "he would tell us more about it later. Wednesday night." T. 1275.[50] Neither in his testimony nor his proffer (T. 1252) did Bess say he heard what Black said about a political killing, an execution, or a note.

Mattison, who Black said was present, testified "the first time [he] heard about the killing was the night they went to [his] apartment (T. 983)", Wednesday the 19th, and he agreed there was "no discussion on the 17th of June, which was a Monday" about a killing. T. 984.[51] Hearn, who Black said was present for this Monday discussion, did not say he heard Dougan say these things.

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said "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, but this was not repeated before the jury.

[50]At resentencing Black said Dougan did "not exactly" say a killing but "something had happened" the day before. RT. 1040.

[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, said Mattison's "recollection is very bad as to any specific conversations." T. 940. Mattison later said he "must have been wrong" and the statements were on Wednesday. T. 984. He admitted he had said under oath earlier that he "don't really recall" where he had the conversation. T. 963. At trial, he said it was before class and involved "a small group. Maybe three of us." T. 980. "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. He was not sure who said anything, but "I believe it was Jacob Dougan." T. 981. He admitted in his deposition 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 up before Wednesday night at the apartment.

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 at the murder and they said yes. T. 1159. Immediately after this proffer with the jury back 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

Black said Messrs Mattison, Bess, and Hearn, and the defendants went to Mattison's "very small" apartment after class. (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 Dougan said "we had went out and picked up this white devil and killed him and left a note on him." T. 1399. None of the others within four feet said Dougan made any "white devil" statement before taping started.

Black testified the "first thing that happened was Jacob brought a tape recorder in." T. 1180-81. Bess testified 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

[52]The jurors were removed. Counsel for Crittendon said 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 said "frankly we don't know when he's telling the truth and when he's not." T. 1166.

car. T. 985. He did not testify that Dougan left the car with a tape recorder. 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 said Dougan came in with "his own personal pistol" he placed on a table[53] with the tape reorder. T. 1181. No other person noticed this; several said it did not happen. T. 1406 (Hearn); T. 1282, 1289 (Bess "no pistols at all that night" and "no firearms").

Black testified 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. About Dougan, Black said "I couldn't quote him...nothing like that." T. 1172. Then he testified Dougan said 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 Crittendon said

[53]The trial court agreed the pistol that belonged to Dougan was a .32 caliber and 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

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

he "wanted to use Karate on the guy" but Dougan stopped him. T. 1184. He testified 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 corroborate Black--nothing about screaming, "pushing guys aside," putting his foot on the victim's head, or shooting him. 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 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

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[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.

Hearn testified Barclay added this lie to make the tape stronger.

[56]Bess testified 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, also in the circle, testified to none of this.

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 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 said they heard this statement, five feet away.

c. 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 police. After that, she sought the assistance of James Washington with the SCLC in Jacksonville. Then 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 Carter when they heard on the radio about her problems. They helped 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 others at Carter's house. He said "we all had possession of weapons....

[58]According to Carter, police offered no help to her. 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.

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 had Hearn's .22 "several times." T. 1188.

Carter testified that after the defendants left she found two pistols, one under her mattress and one elsewhere in her home. T. 506. She threw took them and threw them toward a river. T. 496.

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

Dougan testified 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 he made tapes and information for the tapes came from Mattison(including the gun jamming), newspapers, and talk on the beach. T. 1609, 1615. He was on the beach Tuesday afternoon and people were talking about the facts of the murder, including that the victim was shot twice in the head. T. 1612-13. Dougan denied writing the note found at the scene. T. 1611.

Barclay testified he was not involved in killing Mr. Orlando and when he got to Mattison's apartment on Wednesday 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 had never seen Hearn's .22 or the knife found at the scene. T. 1774. He said the information on the tapes came from Mattison, Dougan, and

newspapers.[59] He testified there were three newspapers at the apartment with stories about the crime. T. 1779

Barclay testified he read from a script prepared by Mattison –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.

Brad Evans testified he had nothing to do with the murder and he was home with his mother, father, and little 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

[59]He testified "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." He said "[a]ll 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.

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. He denied telling Black he was present at the crime and denied he was laughing on Wednesday while describing a knife closing up while he was trying to stab the victim. T. 1830

e. 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 Times Union article included: the name/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*.[60] The State introduced this article as rebuttal to the defendants' case, but the Judge stated 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

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

with murder, provided the detail. The defendants also testified to talk on the beach after the crime. In fact, friends of the victim, Michael Ryan and William Clark, testified they learned about the crime on Monday the 19th when "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 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 relies heavily on what Mattison, Black, and Bess, and also attempts to show they, and other evidence, corroborate Hearn. 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.[61]

> F. 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 [about Hearn] 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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[61]It is now known handwriting comparisons are unreliable, have no basis in science, are misleading, and are not generally accepted in the scientific community. See National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward*, 43 (2009)(due to "limited research to quantify the reliability and replicability of the practices used by trained document examiners," handwriting comparison falls into the category of forensics that "do not meet the fundamental requirements of science, in terms of reproducibility, validity, and falsifiability.")

ARGUMENT II: TRIAL COUNSEL HAD MULTIPLE ACTUAL CONFLICTS OF INTEREST WITH ADVERSE EFFECTS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS[62]

A. Representing three murder co-defendants

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

On appeal, Mr. Jackson represented three co-defendants: Dougan, Barclay, and Crittendon.[63] This Court affirmed the Barclay and Dougan judgments, but on habeas corpus found an actual conflict of interest and granted new appeals:

> 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....
>
> 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-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.

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[62]Standard or review: Ineffectiveness is a mixed question reviewed *de novo*. *Evans v. State*, 946 So. 2d 1 (Fla. 2006). On fact-findings. this Court will not substitute its judgment for the trial court's if "competent substantial evidence" supports the findings. *Blanco v. State*, 702 So.2d 1250(Fla. 1997).

[63]Because Crittendon did not receive the death penalty, his appeal was to the First DCA which "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.

.....

> 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, 444 So.2d at 958. This Court continued: "We also find that Jackson did not provide Barclay with effective assistance of counsel."*Id*.[64] "Jackson's representation of Dougan suffered from the same major defects as did his representation of Barclay. ..[including] a conflict of interest." *Dougan,* 448 So.2d at 1006.

> 2. The conflict of interest that spoiled the appeal was created before and during trial
>
> a. Uncontradicted: Jackson solicited Crittendon and Barclay before and during trial

Mr. Jackson actively solicited and created in the trial court the very conflict that spoiled the appeals. 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.

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[64]As was recognized at the evidentiary hearing below, "The Supreme Court did write a pretty strong order finding – [Mr. Jackson ineffective.]." V17, 2977-78 (lower court). Mr. Kunz wrote in 1987, when deciding whether to pursue resentencing:

> 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).

V16, 2872-73. On cross-examination, he was asked "your trial hadn't even started" then and he said "No, sir. It hadn't." V16, 2875; Order at 2271.[65]

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.[66] Mr. Jackson said he would represent him without charge. Order at 2272.[67]

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[65] At a hearing January 24, 1975, Jackson conferred with Crittendon about a speedy trial issue: "(*Mr. Jackson* and Mr. Stedeford *conferring with defendant Crittendon*);" and "THE COURT: Mr. Stedeford, would you and Mr. Jackson like to take Mr. Crittendon back in the back room?" Pp. 27 (emphasis added).

[66]As the lower court correctly held, the record reflects no waiver of any conflicts. Order at 2269. *See Dougan,* 448 So.2d at 1006 ("[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).

[67]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**." V7, 1164-65 (Amended 3.850)(emphasis added). Barclay and Crittendon both testified without objection, the state cross-examined both witnesses, and the state did not

After trial, Jackson filed a Motion to Appoint himself to represent each defendant on April 15, 1975.[68] The court refused: "I have already appointed the Public Defender's Office." Ex. 14, SV4, 642; Order at 2273. Jackson stated he would represent them pro bono, and the Court stated "that's entirely up to you" but "**I think there is a conflict of interest between Dougan and Barclay.** *Id*. (emphasis added).[69] Mr. Jackson immediately filed a Motion to Release Public Defender's Office as Counsel for Defendants. Ex. 14, SV4, 469. A hearing was held April 18, 1975, and the Court stated before he would allow Jackson to represent all three 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: "I, William Pierce White, assistant Public Defender, do hereby consent, on behalf of my office, that we be relieved of

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move to strike the testimony of these witnesses. In its post-hearing memorandum, the state did not argue 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 about these witnesses' testimony. V.13, 2420-2427. Neither the lower court nor Appellee's counsel had notice of this argument 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.

[68]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.

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

all responsibility herein and that the above named attorneys prosecute the appeal of the defendants named." White signed this statement. V18,3172. Order at 2273,[76] and testified below this was very unusual.[77]

Thereafter, Jackson refused 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 cases returned in 1979 for a *Gardner* remand, all agreed to a severance for Dougan and Barclay because of a conflict. 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

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[76]Lou Frost, Mr. White's boss, had "knowledge of Jackson's incompetence *at that time*." Ex. 84, SV-19, 3379 (emphasis added). For example, On April 17, Jackson represented David Esser who pled guilty to a drug offense. On April 18, the date he became pro bono counsel for Dougan, Barclay and Crittendon, he was also in court for "David Esser Bond." Ex 14, SV4 at 628. He was later found ineffective for his representation of Esser which were labeled "grossly deficient." Ex. 35, SV11 at 1974, 1976.

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

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 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 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 Dougan did not have a record. T. 2094. He could have argued that Barclay did. Who was the criminal here? Who was leading whom? Order at 2270-71. Mr. Jackson's job was to show the "differences between the" defendants and to "draw" the jurors' attention to it, which he made "absolutely no attempt" to do. *Barclay*, 444 So. 2d at 958-59

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

> 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....*
>
> Mr. Austin has said, "*In his fancy clothes, Mr. Dougan." Look at my client. He's sat in that same coat,*

[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.")

> *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(emphasis added); *id*. at 2206 (Crittendon is "the only person I'm concerned with. He's my responsibility...")[79]

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] Mr. Jackson did not seek a plea agreement:

> 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

Would effective counsel have sought a plea bargain in this

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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 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. Having 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. T. 2002. Counsel for Evans quoted jury instructions: "'Each defendant and the evidence applicable to him must be considered separately.' "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.'")

case? According to the state "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 true, a reasonable defense attorney would negotiate.[82] Hearn, whose car and gun were used, and who fled the state, dealt on the eve of trial. Deals were available–even immunity. Why did Jackson not seek a deal? He represented three people who did not deal.

B. Counsel's wife/secretary caught Appellee's counsel *in flagrante delicto* with Appellee's sister in counsel's small 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 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

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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.")

for Jackson to represent Defendant. 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.

!Jackson and Turner had sex in Jackson’s small office and his wife saw them “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. *Id*. 2262-63.

!“Ms. Jackson had worked for Mr. Jackson as his legal secretary for about ten years at this point...Mrs. Jackson drafted legal documents typed various legal motions based on Mr. Jackson’s dictation, and accounted for the offices finances and bills.” Id. at 2262.

!Gwandos Ward, another secretary, 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.

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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.” Ex. 15, Divorce Records, March 29, 1978 hearing at 172-73.

!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:

> 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 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 to find a conflict of

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[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 "if someone testifies, I don't think we have a problem with an affidavit coming along with them." V. 16, 2901.

interest on appeal. *Barclay*, 44 So. 2d at 958-59. The lower court 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]

!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]

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[85]The trial judge knew of the relationship. The following occurred at proceedings October 23, 1979 during *Gardner* remand proceedings: "I wondered about it at the time myself, but that's another matter for another court." Order at 2266-67.

[86]Over the years, Micks repeatedly spoke of the affair. *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

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. "'The right to effective assistance of counsel encompasses the right to representation free from actual conflict.'" Order at 2254 citing *Strickland*, 466 U.S. at 688 and *Cuyler v. Sullivan*, 446 U.S. 385, 349 (1980). The court explained this Court "has applied *Cuyler* to cases that venture beyond joint representation conflicts of interest." *Id*. at 2254-55.[87]

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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.").

[87]In *Mickens v. Taylor*, 535 U.S. 162 (2002), the Court held the letter of *Cuyler v. Sullivan* did not expressly cover non-concurrent multiple representation. 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 settings. *Mickens, 535 U.S at 175.* But *Mickens* is not an "express[] disapprov[al] of applying conflict of interest in" other situations. SB at 72. The lower court 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.

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). 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]

2009)("This Court has explained that *Florida follows the legal principles set forth in Cuyler*" for conflict of interest claims beyond joint 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 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 Jackson's actions created a "substantial risk" of limiting his

> 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 conflict of interest, only that the conflict had some adverse effect on counsel's performance." *McConico v. Alabama*, 919 F.2d

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representation of Dougan was error because there is no "substantial risk" standard (SB 78). There is. *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).

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...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 Jackson would work and which members of his small staff, including his then-wife/ secretary, would labor on his behalf and in how, should have been made solely based on concerns for Dougan. Working on the case, not arranging trysts, and not fighting with his wife/secretary about his client’s sister, had to be Jackson’s sole focus.

[92]The State argues because the only other lawyer from Jackson’s office, Deitra Micks, helped, 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. Micks had her own responsibility to advise 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 . . . 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 is 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

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. *See* Argument III, *infra*. 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 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 cover for his affairs. *Id.* 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. *See* IV, B, 2 (a-d), C1a,

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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 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)("one must show that a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefitted the defense.").

infra.

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. *Id*. The defense was entitled to show that what the state says is a "confession," the tapes, were false based upon his mental condition. This is not a diminished capacity defense, or an insanity plea. A defendant is entitled to present evidence contesting the reliability of statements. *See, e.g., Shellenberger v. State*, 150 N.W. 643, 647 (Neb. 1915)("[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." A court must "take extreme care to allow the accused a full opportunity to make his defense." *Id*. "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" and "should have been submitted to the jury." *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.")

But the mental illness evidence would expose Jackson's

adulterous lover and her family to scrutiny and 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, and 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 conflicted secretary, no less than a lawyer, may cause grave harm to a client.[94]

The Rules recognize that a secretary's conflict may be imputed to a lawyer and thus bar him or her from representation. 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

[94]The ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases emphasize the critical role legal secretaries play in ensuring a lawyer's provision of competent legal services. *See* Guideline 4.1 cmt.; 9.1 cmt. n.135; 10.4 cmt. 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).

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." Rule 4-5.3(b)(3). Mrs. Jackson had reason to despise Mr. Dougan and his family and to sabotage any defense. Yet she was intimately involved in his representation. This adversely affected the representation and caused Mr. Jackson to violate Florida's ethics rules.

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 VIOLATION OF THE SIXTH 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,

[95]For standard of review, *see* note 62, *supra*.

"overwhelming evidence against Dougan." SB 67.[96]

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,[97] and defense attorneys–he was incompetent, grossly ineffective, and severely burdened in criminal cases.[98] 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*.

Mr. Jackson's pattern of incompetency is uncontested.[99] The lower court found the following based upon substantial competent evidence, much of which this Court relied upon in *Barclay*:

> At the evidentiary hearing, Defendant presented

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[96]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 crime** of murder in the second degree." ROA 208 (emphasis added). Mr. Dougan's lawyer did not have skill.

[97]*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.")

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

[99]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.

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.)[100]

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.)

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

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

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"),[101] Barry Zisser ("legend in the Fourth Circuit"),[102] H. Randolph Fallin,[103] David Fletcher, Joseph Farley,[104] Thomas Treece,[105] William Maness, John Paul Howard,[106] Sandy D'Alemberte[107] 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 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

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[101]He swore Jackson had a "frequent tendency to take on more cases than he could handle..." SV 7, 1096.

[102]He swore 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.

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

[104]He swore Jackson "was thought to be incompetent, especially in his representation of criminal defendants." SV7, 1172

[105]A prosecutor on 1973, he swore Jackson "had the reputation of being a very ill-prepared attorney." SV7, 1176

[106]He swore Jackson "was unable to represent criminal defendants in a competent manner." SV7, 1185

[107]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.

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.)[108] 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.)
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> 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.... 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; Ex. 26.) V13, 2278-2281.[109]

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[108]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.

[109]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

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.[110] Evidence about whether and how Mr. Jackson was compensated is "conflicting." In *Barclay* this Court found that Mr. Jackson was "apparently" paid $3,000.00 by Mr. Dougan's father, who said **that amount "represented only a fraction of the total legal fees" that were necessary**. Order at 2265 (emphasis added). Micks swears she did not believe Jackson was ever paid and "'I know that I was never paid for representing Jacob Dougan.'" *Id*. Ward did not see any money come into the office on the Dougan case. V17, 3044. There is no 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.[111]

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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).

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

[111] 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

2. Other unqualified co-counsel was "helping out"

With respect to Micks' participation, she was licensed to practice law in 1972. *See* Referee report, *The Florida Bar v. Deitra Micks*, SC# 80,236. This Court relied on her affidavit in 1983 in *Barclay*. Her affidavit stated she went to work with Mr. Jackson in September 1973 while 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.[112]

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:-

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> 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)

[112]Micks swore "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 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.

> 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 did.

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.[113] The co-defendants, who sought a severance from Mr. Jackson, did not endorse this theory.[114]

a. Objectionable, ineffective, opening statement

Objections and court admonishments peppered the defense 13 page opening statement. After saying nothing during voir dire, Micks introduced herself 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

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[113] See 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.")

[114]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).

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 "Stephen Orlando neither worked or attended school."[115] Objection sustained. Second, counsel stated "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.[116] Third, counsel stated "[w]e believe any 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.*[117]

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

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[115]Jackson introduced testimony that the victim did work.

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

[117]Micks could not follow opening statement rules, 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* T 97, same objection and admonishment, and a trip to the bench; page 101 (same).

company of Stephen Orlando the night before he was killed."[118] 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.[119]

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

After the victim's step-father testified about identifying 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": unprepared, and attacking the victim's character

The defense called Dennis Peters, one of the young white men from opening statement. He 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

[118]No evidence was introduced about this.

[119]Evidence about this was excluded by the court. After this comment, counsel tried to discuss law but the judge said she could discuss proof 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.

Clark, and Tom Beaver. T. 1645-1647.[120] 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 Jackson asked "To your knowledge did he sell heroin?" An objection was sustained, the state said "counsel should be instructed as to those type of questions, and the Court said "I'm sure Mr. Jackson knows, I'll sustain any similar type questions." T. 1653-54. Mr. Jackson requested a bench conference and explained he 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 said this information was contained in depositions, but 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.[121]

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

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

[121]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*.

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, he first contradicted the opening statement by establishing the victim worked. T.1658. He then asked: "Were you familiar with his temperament?" The state said: "Your Honor, this is irrelevant, immaterial, incompetent, and I object on all three grounds;" objection sustained. Jackson then asked: "Did you ever have a chance to know about his general character in the community--"; and the state said "Your honor, I object. The character of the deceased is not at issue." Objection sustained. Jackson persisted: "Mr. Peters, during the time that you have known Mr. Orlando, did you have a chance to observe his conduct?" The state responded "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.... [I]t's improper questioning and Stephen Orlando is not on trial in this case." The jury was excused. T. 1658-59.

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 ...**that is the most irresponsible statement I have heard a lawyer make.** He has grossly misrepresented the facts that came out on deposition." 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 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.[122]

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 argued with the witness about the time, was told to stop, and gave up on when he learned of the death. She established the witness owned a .22 caliber rifle. She asked about who the witness told about the death and in response to an objection said "based upon our

[122]This was not the first claim of surprise. The defense called witness Langston and, before the jury, claimed "we are caught by surprise" with his answer of when he saw blood on the victim's body. 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.

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" before 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 he knew Stephen Orlando from school. He testified the same as others about the evening before the crime and the next morning he went to the beach and people were talking about the crime. T. 1721 When Micks asked 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 called James Ryan. He testified he had

known Mr. Orlando four years. He testified 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 thought he was shot once, Jackson said "the answer is a surprise to me," and the Court responded: "Let me ask you, **have you talked to these witnesses since the deposition was taken?"** T. 1742. Jackson said he had: "This morning." Id. Shown his deposition, the witness 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 Dougan, Sr., who testified that he was at home the night of June 16 and he remembered because it was Father's day. On cross, the State had Mr. Dougan, Sr., admit he had earlier said he remembered June 16th from a check he had written, not because it was Father's day. T. 1752.[123]

Under-sheriff Brown was called and testified he did not recall whether he received reports 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

[123]In his deposition he had not mentioned Father's Day.

investigated." *Id*. On cross, he said he did not direct anyone not to investigate white persons. T. 1756. Jackson then attempted to introduce evidence another person 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:

> **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.[124] And when we asked Captain Williams, 'Captain Williams, did you 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

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

> 9:00 o'clock that morning and told him about the death.[125] 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?[126] 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.[127]

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 (emphasis added)

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

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

[126]No one had that information or testified to it.

[127]His best friend from high school?

> 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 the theory by "present[ing] eleven witnesses." Id. 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.[128] After taking depositions, he next spoke to witnesses "this morning." Id.

These unreasonable actions were not "sound trial strategy"

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

and "the errors in total were so serious as to undermine confidence in the outcome." Order at 2291.[129] Having promised to show "white youth" should have been investigated rather than "black folk," and having not delivered on that promise during its case,[130] it was fair for the lower court to conclude "[t]rial counsel essentially presented no defense." Id.[131] Worse than

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[129]The defense, in opening statement, promised to show 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. *McAleese v. Mazurkiewicz*, 1 F.3d 159,166 (3rd Cir. 1993)(The failure of counsel to produce evidence which he promised is "damaging failure"); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (counsel "primed the jury" to hear evidence, failed to present it, and "the jury likely concluded that counsel could not live up to the claims made in the opening").

[130]The state introduced extensive evidence that the police had investigated white people. 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....").

[131]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. In his brief he claimed the state had unconstitutionally failed to provide all of Hearn's sworn statement until after trial and that violated the constitution. Brief, pp. 33-38. And the state was required to respond. State's Brief at 25-36. And he

presenting no defense, the attempted defense was nonsense.

4. Mr. Jackson did not differentiate between the defendants

Whether a conflict of interest, or as an unreasonable and prejudicial omission by counsel, counsel's "lumping" of the defendants 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 (cross appeal)

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 he was present when the tapes were made but did not participate. T. 1824. Counsel for Brad Evans introduced evidence Evans had a good reputation in the community, a

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made other arguments that required responses.

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

reputation as a peaceful and law-abiding citizen, and a good reputation for truth and veracity–eight (8) witnesses. T 1831-53. The judge pointed out in jury instructions Evans, and Evans alone, introduced evidence of good character, and "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 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.[132] After this testimony and instruction, Evans was convicted of second-degree murder and Petitioner was convicted of first-degree murder.[133] This was prejudicially ineffective assistance.[134]

The lower court fully recognized the plenary evidence of good character that was available for Mr. Dougan in 1975.[135] The

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

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

[134]*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)(same); *Commonwealth v. Glover*, 619 A.2d 1357 (Pa. Super. Ct. 1993)(same); *State v. Aplaca*, 837 P.2d 1298 (Haw. 1992)(same); *Warner v. State*, 729 P.2d 1359 (Nev. 1986)(same)

[135]See e.g. S13, 2223-24("an honest and honorable man who was highly respected in the community;" "'one of the kindest, most

court wrote nothing in the record indicates why trial counsel did not introduce the evidence at guilt/innocence. Order at 2324. But neither Barclay's nor Crittendon's counsel introduced good character evidence, so "it has not been demonstrated that a failure to do so [by Jackson]...was unreasonable..." *Id*.

But Barclay could not have introduced good character evidence,[136] 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.

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.[137] This is especially true here where

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thoughtful young men I knew. We considered him a member of our family;'" "a man of high moral character and integrity." "a very good reputation for truth, veracity, and honesty;" "'was a much respected member of the black community" and he was "widely admired as a very honest individual and a man of integrity;"S13, 2223-24. It is not disputed Dougan was "a leader in the black community" and "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).

[136]Barclay, a convicted felon with "an extensive criminal record of seven prior arrests," ROA 226, could not introduce such evidence. *Id.* (Barclay's arrests, forgery conviction and probation revocation, and five year sentences for breaking and entering and grand larceny).

[137]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

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 agreed to represent, Barclay and Crittendon, which, as this Court earlier found, he was want to do. *See* Argument II,A,2,b *supra*.[138]

But not introducing this evidence at guilt/innocence makes no sense 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.[139] He did not do this as mitigation–he did not seek a life sentence based upon mitigation. He did it to criticize the jurors for not believing Mr. Dougan's testimony.

Mr. Jackson then argued he would not seek mercy for an innocent man. He said the tapes had blinded the jurors so that they "ignore[d] the fact that Mr. Dougan did not kill the deceased." 1975 Sentencing, p. 140. He went back through his guilt/innocence argument accusing "some youth," and then said he

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counsel not presenting such available evidence. *Id*. at 133.

[138]Or, as the lower court said, "[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. Aligning antagonistic defenses is "mind-boggling." *Groseclose v. Bell*, 130 F.2nd 1161, 1170 (6th Cir. 1997).

[139]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.

was better than the jurors: "**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."[140] This, a bizarre course of conduct, shows Jackson made the unreasonable and prejudicial decision not to introduce at guilt/innocence the very evidence that he hoped would convince the jurors of innocence.

D. Allowing the victim's stepfather to testify and then insulting him (cross appeal)

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 identify the deceased including friends. The prosecutor's unnecessary use of a family witness naturally evoked the jurors' sympathy in violation of Florida law. *Melbourne v. State*, 51 Fla. 69, 40 So. 189 (1906). This Court recognized trial counsel failed to invoke this long-standing protection.[141]

Worse, Mr. Jackson antagonized and insulted Mr. Mallory, unreasonably increasing the jurors' sympathy, by calling the

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[140] *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.

[141] 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.

victim only by his last name: “Q. Was Orlando living in the home with you at the time of his death?.” To which the witness responded: “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?” T 164. The court asked Mr. Jackson to do so, he agreed, and then asked if the witness had put the victim out his home at the time of his murder. An objection was sustained. T. 164.

Two witnesses later the person who discovered the victim’s body and who also knew him testified. On cross, Jackson asked if he knew “the reputation of Orlando at school?” Counsel for a co-defendant rose, “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.” TT. 249. This was co-defendant’s counsel agreeing with the victim’s family.

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 could certainly have affected one juror.

E. Prejudicial evidence of another murder (cross appeal)

Out of the juror's presence, evidence was developed that some of the state's witnesses and some defendants had made a tape or tapes about an unrelated murder 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. Specifically Jackson asked what was on a specific tape and the witness responded: "It was in reference to a body that was found in St. Augustine." T. 976.T. 976. Telling jurors about another dead body is prejudicially ineffective. What could be more prejudicial? *Cf. Wong v. Belmontes*, 130 S. Ct. 383 (2009) (per curiam)(effective to exclude evidence of a second murder).

F. Absence of plea negotiations (cross appeal)

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 (cross appeal)

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.[142] The co-defendants' motions were denied. During closing argument, counsel for Barclay, Crittendon, and Evans each emphasized the distinct and arguably lesser roles of their clients. T. 1995-2004, 2183-2193 (Barclay)[143]; 2004-2015, 2193-2211 (Crittendon)[144]; 2138-2157 (Evans).[145] Jackson unreasonably did not because he did not prepare a separate defense. This was prejudicially ineffective.

H. Trial in an incorrect venue (cross appeal)

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

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[142]"This was a case in which a competent attorney would wish for severance." *Groseclose,* 130 F.2nd at 1170.

[143]*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.")

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

[145]*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.")

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..." 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*.

ARGUMENT IV: RESENTENCING COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF MR. DOUGAN's SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS[146]

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. A reasonable investigation into a client's life and social history is necessary to make informed decisions about what to present at a capital sentencing proceeding. It is a hugely time-consuming task. *Williams v. Taylor*, 529 U.S. 362, 396 (2000)(Counsel must "conduct a thorough investigation of the defendant's

[146]For standard of review, *see* note 62, *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

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 other clients.[147] But Mr. Link accepted Mr. Dougan's case *knowing* he had significant limitations on his time. First, Mr. Link represented Don Gaffney in what 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 here "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 4½ months. Then came another case for Mr. Link–in August of 1987 he represented two people who testified against Carlos Lehder. Mr. Link testified 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

[147]Link had never done a capital resentencing. V17, 3066.

Tampa....and I had to be in court when they were testifying, of course." V17, 3072. Modestly, this took at least a week. So Mr. Link had just over four months to prepare for a case that had spanned thirteen years.[148]

In his testimony, Mr. Link agreed 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. Link testified this was a "marathon session" while trial was occurring and counsel was "cramming." V17, 3079. 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

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

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 that were presented to the judge only at the later sentencing hearing. *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" life was proper such that "confidence in the outcome" is undermined. Order at 2373. The court's findings that counsel was ineffective regarding rebuttal to aggravation and also for presenting a false picture of mitigation are amply supported by the record.[149]

1. Ineffective assistance and aggravation

Mr. Link believed the medical examiner (ME) 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

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

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 ME 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 ME in 1975 was not sufficient to establish the aggravating circumstance of heinous, atrocious or cruel: "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 (Kuntz memo). When the ME was found alive, 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 then 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.[150]

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 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.[151]

Mr. Link was asked 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

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[150]Mr. Link said the ME testified differently in 1975: "that the stab wounds to–the potentially fatal stab wounds had occurred prior to the gunshot wound to the head." V17, 3089.

[151]Mr. Link also reviewed a report from Dr. Utley-Bobak, M.D., an ME who reviewed Dr Swartz's testimony and all of the available evidence from autopsy and from the crime scene. Her opinion was "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 this sort of evidence would have been helpful in Defendant's case. Order at 2365-66.

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.[152] It was unreasonable for counsel not to be prepared for the state’s ME.

2. Ineffective assistance and mitigation

a. 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

[152]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 argues the claim should have been summarily denied (SB 96), but the State “did not oppose an evidentiary hearing on this claim.” V. 7 at 1363 (Response to Amended Motion).

Dougans adopted Jacob when Mrs. Dougan was 38 and she retired from teaching. “Mrs. Dougan was a severe alcoholic.” V18, 3297.[153] 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.” *Id*. at 3297.[154] 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*.[155]

In high school, “his mother is dying of cirrhosis of the liver. She’s bleeding out. Her eyes have turned yellow from the

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[153]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.

[154]See SV18, 3162, 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.” Mr. Dougan’s 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 accounts at local stores where she bought her liquor. Mr. Dougan would discover them and shut them down. “But she promptly found another location and started another account.” Mr. Dougan described feeling “embarrassed, ashamed and always frightened about the effect the alcohol had on his mother.” *Id.*

[155]“The father, before he died, acknowledged that his wife had been an alcoholic.”V18, 3302.

jaundice of her disease. She's continuing to drink."[156] And Mr. Dougan "facilitated" this drinking. V18, 3412. "I hate to use that word but yes. He's a child you know." *Id*.[157] He would "keep children away from the house" because "her personal hygiene became very bad." SV15, 2693.[158]

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[156] 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.

[157]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.... Part of me was afraid that this would be the day that she didn't wake up." SV15, 2694.

[158]Link testified 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

His father had his own secrets. He was a philanderer.[159] 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.[160]

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? "[T]here's a vast part of literature on the children of alcoholics, the adult children of alcoholics....They have about a 40 percent greater incident of

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drinking heavily. When he was 18 she was 'real bad.' She would sometimes lose her temper." SV15, at 2704, 2709. Link testified he did not have Dr. Krop's notes at resentencing. V17, 3111.

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

[160]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.

major psychiatric disorders, primarily depression. V19, 3303-04 (Woods)(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.[161] In truth, this was "[s]adly a very dysfunctional family." V18, at 3357.[162]

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[161]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.

[162]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.[163] 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, sufficient to show prejudice (Order at 2355), cumulatively it

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[163][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.

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.[164]

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, and had her second child, Ricky, at age 18.[165]

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[164]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.

[165]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.

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.[166] 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.[167] She did after 8 months.[168]

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

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.

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[166]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.

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

[168]While Sherry and Ricky were given to grandparents, Jacob 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.

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 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, from trial and 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 before his death, 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.

Had counsel reasonably eliminated any scientific basis for this aggravator,[169] the balance would have tipped toward mitigation. The mitigation counsel failed to produce "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.

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[170]) 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.[171] The court found Dr. Woods'

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[169]The lower court found a long standing error in this case about aggravation. The trial judge's sentencing order recites the victim "begged for his life." Order at 2370. But "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" but"the Victim did not beg for mercy." *Id* at 2371.

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

[171]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

"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... 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.[172] 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."

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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. 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" about the offense, and Dr. Krop was "not as compelling." Order at 2346.

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

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 testified to the same diagnosis..." *Id.* This is not required.[173] 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

[173]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), [w]hile [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."

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 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").[174] 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

[174]*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").

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 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.[175] 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,"[176] the "entire,"[177] "cohesive,"[178] and "complete"

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[175]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 to the twelve years after conviction and the jurors missed fully 41% of Mr. Dougan's life.

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

[177]*Id*. at 236.

[178]*Id*. at 235.

mitigation story, rather than a "scattered"[179] 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*, 476 U.S. 1(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.[180] 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.

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

[180]RT 494 (motion for expert)(Defendant has "been confined...since 1974" which could be "a relevant consideration" under *Skipper v. South Carolina*, 476 U.S. 1(1986).

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 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 sentenced to death and other matters.[181]

Juror Kraft served on the jury. RT 532. During voir dire,

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[181]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.

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

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. He said he recalled reading about the case in 1974: "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.[182]

c. The little that was presented about this 30% of Mr. Dougan's life via lay witnesses did more harm than

[182]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 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.

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.[183] The first 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 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 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

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

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*.[184]

The third witness to mention the present day Dougan was Delores Lewis, the 11th witness. She detailed their growing up together and Mr. Dougan's community activities. RT 1407. She testified she had seen him several times recently (but not where) and 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

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[184]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*.

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

The fifth witness to the present day Jacob Dougan was Beverley Clark, the 21st witness. She said she was an officer at the Duval County Jail and 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"[185] 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 Mr. Dougan was not a psychopath and that he had good potential for rehabilitation. V18, 3256. He interviewed Mr. 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 the last 12 years, Dr. Krop said: "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:

[185]No other person had mentioned prison.

> 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 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 and 2013, however, Mr. Carter, the Court's former sentencing expert, had a different opinion.

> 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 below without objection. 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. V18, 3201. He wrote PSIs for Messrs Barclay, Hearn, and Crittendon, 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 because he had done so before. V19,

3204. Mr. Link could have had him do it again.

Mr. Carter testified 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:

> [T]he 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.

V18,3204.[186] In his experience, such comments from correctional

[186]On cross-examination, he 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 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

officials are unusual. *Id*.

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 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.[187]

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 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**

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about this by the State or defense counsel.

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

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 for her work in human development. "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....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. *Id*. at 2859.[188]

The lower court held Mr. Link decided not to present this evidence 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. Regarding the former, at least one juror already knew

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[188]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:

> 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 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.

another jury and judge–twice–had sentenced Mr. Dougan to death.

Regarding the latter, the record shows 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 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.

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.[189]

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

[189]As the lower court order shows, the mitigation presented was almost exclusively pre-offense. Order at 2385-2386.

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*.

ARGUMENT V: ALLOWING VICTIM’S SURVIVORS TO DETERMINE PUNISHMENT IS ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS[190]

A. A life sentence plea was agreed to by the state until a victim’s survivor in a different case objected

In post-conviction proceedings, considerable collaborative efforts were made to settle this case with a sentence less than death. Starting around 2000, undersigned counsel discussed with ASA Jon Phillips a guilty plea and a life sentence. These discussions were reduced to writing in 2001. SV1,7-9. ASA Steve Siegel was assigned the case next. With his and the agreement of State Attorney Shorstein, a defense representative visited with the victim’s family–the Orlandos-and reported to Messr Shorstein and Siegel the family’s questions and concerns about, and conditions for, a guilty plea. SV1, 13. Meetings with community leaders and Messr Shorstein and Siegal followed. SV1, 16-22.

Then “Mr. Shorstein and I [Siegel] communicated with the decedent’s next of kin in this case which would have been Steve

[190]No evidentiary hearing was allowed on this claim, but a proffer was. Summary denial is reviewed *de novo*.

Orlando's parents. In fact, I actually went over to where they lived and that with Mr. 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.

An agreement was reached between the state and the defendant to enter this plea.[191] But when counsel approached a court, it was suggested that the Roberts family needed notification. They were notified, they did not agree to the plea, and it did not occur. 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 disagreed with the state's and the family's decision that life was the proper punishment in Mr. Orlando's case.

B. Resentencing, the family objected

Before resentencing in 1987, State Attorney Ed Austin discussed with ASA Stephen Kunz the reasons for not seeking the death penalty again including the age of the case, loss of evidence, Hearns' hostility, and Jackson's ineffectiveness. SV9, 1280-82. Bob Link testified below 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

[191]There were two homicides, Mr. Orlando's and Mr. Roberts'. After the death sentence in Mr. Orlando's case the state dismissed the Roberts case. Mr. Dougan agreed he would plead guilty to both to end litigation and leave death row. *See* SV1, 23-25 (article "Killer may be spared death").

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 make a sentence less than death appropriate, 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 make that happen. The judgment of the local prosecutors directly involved in this case had been, at least since 1987, that a sentence less than death is appropriate. The death penalty strikes like lightning if it turns on the views of the victim’s family. *See Booth v. Maryland*, 482 U.S. 496 (1987)(victim’s family members opinions about the proper punishment inadmissible). This sort of arbitrariness was outlawed 43 years ago in *Furman v. Georgia*, 408 U.S. 238 (1972).

C. Black victims discriminated against

Such a process allows discrimination. Evidence was proffered below about *Ellis v. State*, 622 So.2d 991 (Fla. 1993). Mr. Ellis received the death penalty for three racially motivated attacks (two murders and an attempt). This Court described “racial tension” in Jacksonville in 1978 and Ellis, who is white, had been heard to say “[w]e’re going to kill a nigger” and he “had

killed a nigger." *Id.* at 994. Three black males were "lured into the cab of a truck under the pretense of giving them marujuana to smoke," and two were attacked with knives and killed. Ellis was convicted and this Court ordered a retrial due to joinder issues.

On remand, Ellis entered a negotiated plea to manslaughter. Arrested in 1989 , he was released in 1996. SV 19, 3535 (article "Killer once on death row could go free in 11 months"). Unlike in Mr. Dougan's case, in the Ellis case the prosecutors never gave the surviving victims any information about the case. And

> 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. SV 19, 3537.[192] Whether a person gets a death sentence cannot arbitrarily and discriminatorily be decided by the race of the surviving victims or the defendant.

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[192] *See also* Affidavits of Betty Felder ("I believe the fact that my brother, Willie Evans, was African-American, and Ellis is white, affected the way our family was treated throughout this process."); 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."); and 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. 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

A. Black life is cheap

No evidentiary hearing was allowed on this claim. The lower court did allow evidence on whether resentencing counsel was ineffective for not presenting evidence of racial discrimination.[193] Mr. Dougan presented the testimony of Michael Radelet, Ph.D.[194] Dr. Radelet described the methodology and

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[193]The summary denial of this claim is reviewed *de novo*.

[194]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. 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* 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

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: "given a felony homicide, those who killed whites are about three times more likely to be sentenced to death than those who killed blacks." *Id*. at 2858. He narrowed it more to victims who were strangers: "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...those who killed whites are about three times more likely to be sentenced to death." *Id.* And "[w]e found that when there's a female victim, nine percent of the

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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."); *see also* 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).

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.[195] This is true across Florida.[196] Had Dr. Radelet been asked to provide this data in 1987 he could have: "easily." *Id.* It shows the 4th Judicial Circuit and the State imposes death on an "unjustifiable standard," race. *McCleskey v. Kemp*, 481 U.S. 279, 291 n.8 (1987).[197]

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[195]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 80% of the death sentences imposed by Judge Olliff as of 1979, he overrode.

[196]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.

[197]Separate standards of review per the Florida Constitution have not been determined but ought to be the standard proposed by

B. The sentencer's racial animus

The lower court denied relief after finding that Mr. Dougan had failed to prove decision-makers in his case acted with 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's prejudice against blacks is relevant to this, and several of Mr. Dougan's other, claim for relief.[198]

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 below about the racial atmosphere in Jacksonville at the time of trial[199] and, in

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Justice Barkett in dissent in *Foster v. State*, 614 So. 2d 455 (Fla. 1992). Justice Barkett recognized the burden imposed by *McCleskey* and wrote when a defendant demonstrates "discrimination exists and that there is a strong likelihood it has influenced the State to seek the death penalty" that the burden shifts and the State must show absence of racial motivation. *Id*. at 467-68. The proffer here satisfies this standard.

[198]Such bias violates the Eighth Amendment by creating an unacceptable risk racial prejudice infects the sentence, *McCleskey* 481 U.S. at 308-09, the Sixth and Fourteenth Amendment right to impartial decisionmakers, *Turner v. Murray*, 476 U.S. 28, 36 (1986), and the Equal Protection right to be free from a sentencer with discriminatory purpose. *McClesky*, 481 U.S. at 292.

[199]In 1975

particular, the judge in this case. First, the judge had "archaic" feelings about race that effected him in several ways. First, he required black defendants in his courtroom to only be referred to by their first names. In Mr. White's very first jury trial he referred to his young African-American male client by his surname "[a]nd 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.'" In this courtroom, "African-American defendants, males were to be called by their first name like children are." 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).[200] Jim Crow etiquette "withheld

> 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 now. V19, 3165.

[200]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." *Packard* 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 163. These customs and mores are better known as the "etiquette" of Jim Crow, which became an "unbendingly enforced

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.[201]

Second, the sentencing judge entertained racist jokes. In 1975, Mr. White went into 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...a private attorney was telling a joke where the main character was a caricature of black people named Rastus." V8, 3166. White knew what "Rastus" meant,[202] so he left. Later in Court the judge asked "why?" "And I told him it

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system of social control." *Id*. at 164.

[201]The custom of withholding a courtesy title from black Americans prevailed in the written word as well as the spoken word. *Packard 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).

[202]"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.

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*.

Third, black life was not as important as white life for this sentencer. In violent crimes between African-Americans the judge "*would describe it as an Ashley Street social encounter*, Ashley Street being, at the time, a mostly African-American area of downtown Jacksonville," and he meant *it wasn't a serious offense because it was two African-Americans* involved. *Id*. at 3167[203]

Fourth, the sentencing judge did not want black assistant public defenders assigned to his courtroom. When White assigned a black attorney to his courtroom he objected although he did not even know the attorney. *Id*. at 3167-68.

White testified the judge's feelings and actions were *"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*

[203]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 is also reflected in Professor Radelet's Florida research. Again, the fundamental principle behind the Jim 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.

you say, the '50s or even earlier than that had not gone away by 1974." Id. at 3176. And they had an impact:

> [H]ow does race impact the sentencing? And you see the different views of the majority of the Court, minority of the Court. And you see [Justices] 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).

Mr. Dougan has shown the most important decision-maker acted with discriminatory purpose.[204] He showed 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: RESENTENCING JURORS CONSIDERED INCORRECT, INFLAMMATORY, EXTRANEOUS INFORMATION IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS[205]

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[204]An affidavit filed in the *Gardner* remand proceedings documented the judge 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.

[205]Findings of fact are reviewed under the substantial competent evidence standard; the application of law to facts and the decision not to allow juror interviews is reviewed *de novo*.

Challenges to convictions and sentences based upon constitutional violations attendant to jurors' actions are cognizable legal claims. *Tanner v. United States*, 483 U.S. 107 (1987)(juror testimony regarding extraneous influences improperly); *Parker v. Gladden*, 385 U.S. 363 (1966)(defendant "entitled to be tried by 12...impartial and unprejudiced jurors" [comments made bailiff]); *Mattox v. United States*, 146 U.S. 140 (1892) "[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). Mr. Dougan contends his resentencing jurors violated these constitutional rights.

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);"[206] b. a juror believed 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 the

[206]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.

reason the sentencing had to be redone was because evidence was introduced at the first sentencing that should not have been (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 service a waste of time since one appeal is enough and/or he should have been sentenced 20 years ago (bias); h. a juror stated 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 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); k. one juror “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 an evidentiary 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 the "hearing" was the 25 year old notes of researcher interviews.[207]

The lower court then denied relief because the very best witnesses–the jurors–were not questioned. The lower court held the claim should have been raised on direct appeal, but the facts were not known on direct 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. There is evidence of juror misconduct the court found sufficient to require a hearing. Finally, the judge wrote–without any explanation–that "the reliability of the interviews presented is questionable." Order at 2241. The

[207]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).

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.

ARGUMENT VIII: THE SENTENCING JUDGE FAILED TO CONSIDER MITIGATING EVIDENCE 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. He also did not consider evidence that he himself mentioned, in private, was mitigating.[208]

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 judge's 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.* Inasmuch as three members

[208]Factual determinations are reviewed under the substantial competent evidence test; the merits are reviewed *de novo*.

of this Court found this evidence not only mitigating, but sufficiently mitigating to call for a life sentence, it was unconstitutional not even to recognize the evidence as mitigating. But 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 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. It was "clear" to Mr. Link that the judge would have accepted a plea to life. *Id.*, 3153. During the trial the judge stated to Mr. Link off the record that "from the presentation of the evidence" Mr. Dougan "probably was rehabilitated." *Id*. 3154. The judge did not consider rehabilitation in the written sentencing order in violation of the state and federal constitution, and Florida law.[209] 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

[209]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.

judge gave it no consideration and did not remotely touch upon Mr. Dougan's post-incarceration rehabilitation.[210]

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. 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. 1995); *Spencer v. State*, 615 So.2d 688 (Fla.1993). Whatever ex parte actions went taken violated Mr. Dougan's due process rights and right of confrontation. Mr. Dougan was unable to prove why the state had the unsigned order below, Order at 2331, but there can be no constitutional reason.

[210]This Court held on appeal from resentencing that "It is apparent from the judge's written findings that he considered these matters....[but] 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.

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.[211] The Eighth Amendment prohibits cruel and unusual punishment. *Furman v.* 408 U.S. at 306. Given the extraordinary psychological duress and extreme physical and social restrictions that inhere in life on death row,[212] Petitioner's forty year confinement constitutes cruel and 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)(inmate on Texas's death row for 17 years).[213] 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,* 408 U.S. 238 at 312-313. The crime in this case occurred forty years

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[211]The summary denial of this claim is reviewed *de novo*.

[212]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, 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).

[213]See also *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).

ago.[214] There is no deterrence or retribution in action.[215]

ARGUMENT X: THE FLORIDA DEATH PENALTY SCHEME VIOLATES THE SIXTH AND EIGHTH AMENDMENTS[216]

Mr. Dougan was indicted for premeditated murder. R 1-1a. The jurors were instructed that the indictment would support a conviction of either a premeditated murder or a felony-murder. T. 2230. The jurors convicted Mr. Dougan of murder in the first degree, and the verdict form did not authorize the jurors to convict on the basis of felony murder. T. 2301. The resentencing jury was repeatedly told that there verdict was "advisory" and a "recommendation." RT 188-90, 197, 204-206, 216-18, 1660, 1713-15, 1748-49, 1752. The jury voted for death 9-3 with no unanimous finding on anything that made Mr. Dougan eligible for the death penalty. The judge on his own found three statutory aggravating circumstances and imposed death.

A person convicted of first-degree murder "shall be punished by life imprisonment" unless there is "a finding by the court

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[214]The passage of time has also undermined Mr. Dougan's efforts to prove his claims for relief. *See* SV 3713 (15 potential witnesses deceased or infirm).

[215]The norm against cruel, inhuman, or degrading treatment is 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* G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

[216]This claim was summarily denied, V13, 2333-34; the standard of review is de novo.

that such person shall be punished by death." Fla. Stat § 775.082, 921.141. Under *Ring v. Arizona*, 536 U.S. 584, 585 (2002), "[c]apital defendants, no less than non-capital defendants ...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Jurors did not find any such facts in this case. Thus, the Florida capital sentencing statute as applied to Mr. Dougan, and as written, violates the Sixth, Eight, and Fourteenth Amendments. *See Hurst v. Florida*, 14-7505, certiorari granted March 9, 2015 on questions of whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*? Under *Witt v. State*, 387 So.2d 922 (Fla. 1980), a decision in Hurst's favor would constitute a development of fundamental significance and be retroactive.

IV. CONCLUSION

Appellee requests that this Court affirm the judgment below granting a new trial/sentencing, and/or cross-Appellant requests that the Court reverse the parts of the judgment 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 generated using Courier New 12 font.

Respectfully submitted and certified:

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