IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. Case No. SC13-1826

JACOB JOHN DOUGAN,

Appellee.

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

REPLY / CROSS-ANSWER BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

Cases

Statutes

Rules

Treatises

PRELIMINARY STATEMENT

This case encompasses more than 40 years of litigation among the trial court, Florida Supreme Court, and United States Supreme Court. This appeal is the 23rd appellate claim addressed by either this Court or the United States Supreme Court. As a result, the record in this case is complex and voluminous.

Undersigned counsel was not responsible for the 3.850 proceedings in the trial court and the initial appeal filed by the State in this action. Accordingly, undersigned counsel has made best efforts to keep the record citations and specific references to persons uniform throughout the Initial Brief of Appellant and this Reply/Cross-Answer. When feasible this Reply/Cross-Answer has used the same citation references from the trial court and the defense brief. Therefore citations within this brief will be as follows:

"(DB at ##)" – defense brief – Answer/Cross Appeal – with corresponding page number;

"(SB at ##)" – state brief – Initial Brief on Appeal – with corresponding page number;

"(DATT: Vol. at ####)" – direct appeal trial transcript with corresponding volume and page number;

"(PCR ##: ####)" – post-conviction record with corresponding volume and page number;

"(SPCR ##: ####)" – supplemental post-conviction record with corresponding volume and page number;

"(ReSentTT: Vol. ####)" – resentencing trial transcript with corresponding volume and page number.

This brief will refer to the Defendant by proper name, e.g., "Dougan." The State of Florida, was the prosecution below; the brief will refer to the State as such, or the prosecution.

SUMMARY OF ARGUMENT

I. Although the argument was not properly preserved below, Dougan should be barred from litigating the issue of whether or not William Hearn gave false testimony during the 1975 guilt phase trial under the common law doctrine of *res judicata*. Additionally, the trial court confused the standard for evaluating a violation of a *Brady* and *Giglio* violation, thereby tainting her ruling which granted Dougan relief. During the trial the jury was aware that William Hearn received a benefit in exchange for his testimony and had yet to be sentenced on his reduced charge. Accordingly, Dougan has failed to establish a *Giglio* violation and therefore, this Court should reverse the ruling from the trial court and deny Dougan relief.

II. Dougan has not proven that an actual conflict of interest existed between himself and Mr. Jackson, his 1975 trial counsel. Despite his argument, Dougan has proven that Mr. Jackson had only one client during the 1975 trial – Jacob Dougan. In addition, an actual conflict of interest does not result from Mr. Jackson's extra-marital affair with Dougan's sister. An actual conflict of interest only occurs when an attorney represents conflicting interests. An attorney's private affairs may be relevant for a claim of ineffective assistance of counsel, but are not relevant for a claim of a conflict of interest.

III. Mr. Jackson presented the defense that Jacob Dougan wanted during the 1975

trial – actual innocence. As a result, Mr. Jackson was forced to craft his defense around the testimony of his client. Regardless of Dougan's argument, outside opinions pertaining to an attorney's effectiveness are irrelevant in evaluating a claim for ineffective assistance of counsel under *Strickland*. Dougan was in no way prejudiced by Mr. Jackson's representation because all of the physical evidence, tape recorded statements, witnesses' testimonies, and forensic evidence established Dougan as the shooter and leader of the group responsible for the murder of Stephen Orlando.

IV. This Court has previously rejected claims of ineffective assistance of counsel when the defense has simply presented a more favorable expert during post-conviction proceedings. Dougan's resentencing counsel presented twenty-six witnesses during the 1987 penalty phase and went to great lengths to establish Dougan as a leader in the community. Despite post-conviction counsel's efforts, Dougan has only shown that he suffers from depression, a fact which was heard by the jury in 1987.

V. Dougan's argument presents a direct constitutional attack regarding the propriety of Fla. Stat. § 960.001, which requires the prosecution to consult with a victim's family. Direct constitutional claims are procedurally barred in post-conviction proceedings because they should have been raised on direct appeal.

VI. Dougan has failed to present any evidence of racial discrimination by the State

Attorney's Office for the Fourth Judicial Circuit in his case, and therefore is not entitled to relief. As this Court has previously held, random statistics are not enough to show a discriminatory purpose. Additionally, this issue is presented as a direct constitutional attack which is not appropriate in post-conviction proceedings because it should have been raised on direct appeal.

VII. The notes from the selected juror interviews following the 1987 penalty phase are unreliable as they consist of summarized responses. Dougan may not impeach the verdict from the 1987 penalty phase by investigating matters which inhere in the verdict. This Court has repeatedly upheld the constitutionality of Fla. R. Crim. P. 3.575, and Dougan has not presented a new argument or authority to encourage this Court to recede from its position.

VIII. This Court has previously upheld the proportionality of Dougan's death sentence during his initial appeal from the 1987 resentencing. Accordingly, Dougan may not challenge the 1987 trial court's findings as to mitigation, as this Court's ruling constitutes law of the case.

IX. The United State Supreme Court decision of *Lackey v. Texas* does not create a substantive right to which Dougan may claim relief. Moreover this Court has repeatedly refused to grant relief under similar claims, especially when a significant portion of the delay has been a result of the defendant's appeals.

X. The United States Supreme Court decision in *Ring v. Arizona* is not retroactive

and therefore does not entitle Dougan to relief. In addition, Florida's Capital Sentencing structure has been consistently upheld by the United States Supreme Court. Finally, this claim presents a direct constitutional challenge to Florida's Capital Sentencing structure which is not appropriate in post-conviction proceedings.

ARGUMENT

I. DID CIRCUIT JUDGE JOHNSON ERR IN (1) RULING THAT IN VIOLATION OF *BRADY* AND *GIGLIO*, WILLIAM HEARN GAVE FALSE TESTIMONY IN THE 1975 TRIAL'S GUILT PHASE AND THE PROSECUTOR KNEW IT WAS FALSE AND (2) IN RULING THAT A PROSECUTOR'S OPINION, PRIOR TO THE 1987 RESENTENCING, THAT HEARN WAS "HOSTILE" CONSTITUTED *BRADY* MATERIAL? (REPLY)

a. The Doctrine of *Res Judicata* Estopps Dougan from Obtaining Post-Conviction Relief on a Claim of False Testimony from William Hearn.[1]

Under the common law doctrine of *res judicata* "a judgment on the merits bars a subsequent action between the same parties on the same cause of action. *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003) (citing *Denson v. State*, 775 So. 2d 288, 290 (Fla. 2000)). "*Res judicata*, however, prohibits not only relitigation of claims raised but also the litigation of claims **that could have been raised in the prior action**." *McBride*, 848 So. 2d at 290 (emphasis in original) (citing *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001)).

In this case, during the initial direct appeal, Dougan and his co-defendants

[1] Undersigned counsel acknowledges this argument was neither preserved in the trial court nor presented in the State's initial brief on appeal to this Court. Nevertheless, counsel has a duty of candor to this Court which requires presentation of all facts and law both favorable and unfavorable in order to place this Court in the best position possible to arrive at a correct and just decision. *See* Fla. R. Pro. Conduct 4-3.3, Candor Toward The Tribunal (2014); *Boca Burger, Inc., v. Forum*, 912 So. 2d 561, 573 (Fla. 2005) (quoting "the heart of all legal ethics is in the lawyer's duty of candor to a tribunal") (internal citation omitted).

claimed they were denied a fair trial because the State did not "reveal on direct examination complete details of a plea bargain agreement" with William Hearn. *Barclay v. State*, 343 So. 2d 1266, 1270 (Fla. 1977). This Court disagreed, and in its opinion held:

> No false testimony was given in this regard as is suggested by appellants. During the motion for new trial, appellants charged that the State willfully refused to disclose the full plea bargain agreement on direct examination.
>
> . . .
>
> Although completely aware of the agreement, defense counsel never inquired of the subject State witness [sic] as to any bargain or deal or representations made to him by the State Attorney's office, nor did he on cross examination attempt to shake the credibility of this witness because of the plea bargain agreement mentioned on direct examination. Defense counsel, on cross examination, did not even mention the agreement that had been elicited on direct examination. **As is clearly evidenced by the record, without question, defense was fully aware of the full plea bargain agreement**.

Barclay, 343 So. 2d at 1270 (emphasis added).

Subsequently, in *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984), this Court granted Dougan a new appeal on the grounds that his appellate counsel was ineffective. *Dougan*, 448 So. 2d at 1006. Then in *Dougan v. State*, 470 So. 2d 697 (Fla. 1985), this Court again affirmed Dougan's conviction for the murder of Stephen Orlando. *Dougan*, 470 So. 2d at 701. However, in his new appeal Dougan did not claim that William Hearn presented false testimony pertaining to his plea bargain. *Dougan*, 470 So. 2d at 699 – 701. Accordingly, Dougan's appeal

in *Dougan v. State*, 470 So. 2d 697 (Fla. 1985) is silent on any matter pertaining to William Hearn.

Therefore this Court has not rendered a decision as to the merits of a claim of false testimony from William Hearn. But, as this Court has previously held, *res judicata* prohibits Dougan from raising the issue because it could have been presented to this Court in his new appeal in 1985. *McBride*, 848 So. 2d at 290; *Youngblood v. Taylor*, 89 So 2d 503, 505 (Fla. 1956) (acknowledging that *res judicata* not only bars a later suit between the same parties but also upon matters that "could have been raised" while under the doctrine of estoppel by judgment) (citing *Gordon v. Gordon*, Fla., 59 So. 2d 40, 44 (Fla. 1952)).

Dougan previously claimed the testimony from William Hearn was false based on the nature of the plea bargain, and this Court emphatically disagreed. *Barclay*, 343 So. 2d at 1270. When given a second chance at his appeal, Dougan did not again present the same issue presumably because of the prior language and finding from this Court regarding Hearn's testimony. *Dougan*, 470 So. 2d at 699 – 701. Therefore, Dougan should be estopped from asserting a claim of false testimony from William Hearn because the issue could have been presented to this Court in 1985 as was initially in 1977. *McBride*, 848 So. 2d at 290. Accordingly, the ruling from the trial court which granted Dougan a new trial based on false testimony from William Hearn should be reversed because *res judicata* bars Dougan from

raising an issue which could have previously been presented to this Court.

b. The trial court confused the Standard for *Brady* and *Giglio* Violations.

In its order granting relief the trial court stated:

> A thorough review of the record and evidence presented support that Mr. Hearn was the State's key witness and the only witness who testified to personal knowledge of the offense. His testimony about his agreement with the State was not corrected at trial. Defendant was entitled to know of this false testimony, and the State was obligated under *Brady* to provide this information.

(PCR12: 2222). Here, the trial court mistakenly confused the standards and tests for violations of *Brady v. Maryland*, 373 U.S. 83, 1196 – 97 (1963) and violations of *Giglio v. United States*, 405 U.S. 150, 153 – 54 (1972). *See Guzman v. State*, 868 So. 2d 498, 505 – 06 (Fla. 2003) (noting that trial courts have confused and improperly merged the materiality prong of *Brady* and *Giglio*). Then in its concluding sentence pertaining to this claim, the trial court again said:

> A cumulative analysis weighing the undisclosed, favorable information implicating *Brady* concerns in conjunction with the misrepresentations to Defendant's jury involving *Giglio* violations presented at Defendant's trial and resentencing bolsters this Court's conclusion that Defendant was prejudiced.

(PCR12: 2223).

In confusing the standards for *Brady* and *Giglio*, the trial court has confused the proper test to evaluate Dougan's claim. A *Brady* claim asserts the state withheld evidence from the defense. *Brady*, 373 U.S. at 1196 – 97. A *Giglio* claim asserts the state knowingly presented false testimony and allowed it to go uncorrected

before the jury. *Giglio*, 405 U.S. at 153 – 54. Although a *Brady* claim is easier for a defendant to prove, its standard for materiality is much more difficult as the defendant bears the burden to show a reasonable probability that the undisclosed evidence would have produced a different result. *Guzman*, 868 So. 2d at 506 (citing *Strickler v. Greene*, 527 U.S. 263, 281 n. 20, 289 (1999)).

By contrast, a *Giglio* violation is more difficult to prove because it is based on the "prosecutor's knowing presentation at trial of false testimony against the defendant." *Giglio*, 405 U.S. at 154 – 55. But, *Giglio*'s materiality standard is more defense friendly. Once it is proven the prosecutor used or failed to correct false testimony, the question becomes whether there is any reasonable likelihood that the false testimony could have affected the verdict. *Guzman*, 868 So. 2d at 507 – 08. It is the state's burden under *Giglio* to prove that any false testimony was harmless beyond a reasonable doubt, and there is no cumulative analysis. *Guzman*, 868 So. 2d at 508.

In this case, Dougan claims the state knowingly presented the false testimony of William Hearn and allowed that testimony to go uncorrected. Therefore, Dougan presents a claim of a *Giglio* violation. As a result any references to *Brady* are improper and ultimately confused the decision of the trial court.

c. William Hearn Pleaded Guilty to a Lesser Charge of Second-Degree Murder and the Jury was Not Mislead Based on His Testimony.

William Hearn's testimony should be evaluated based on a proper and

unencumbered application of *Giglio*. When viewed under the proper rubric of *Giglio*, Dougan has not shown that William Hearn's testimony was false, and indicates in his response that his contention of false testimony is based on speculation.[2] (DB at 17).

"A *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant." *Guzman*, 868 So. 2d at 507 (citing *Giglio*, 405 U.S. at 154 – 55). To establish a *Giglio* violation, the defendant "must show: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Guzman*, 868 So. 2d at 505. Should the first two prongs be met, the question then turns to materiality. "[F]alse evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Guzman*, 868 So. 2d at 507 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

Here, the trial court found the first two prongs based on speculation and inference from the post-trial actions of the State Attorney which does not establish

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[2] At the end of footnote 20, on page 17 of Dougan's brief, there is an open admission that Dougan's claim of false testimony is based on speculation. Dougan states "If, the sentence simply read . . .." (DB at 17 n. 20). This Court does not speculate on what could be in the record, only what is in the record. *McLean v. State*, 147 So. 3d 504, 512 (Fla. 2014) (citing *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000) (finding that post-conviction relief cannot be based on speculation or possibility)).

the foundation of a *Giglio* violation. *Giglio*, 405 U.S. at 153 – 54. In addition, the trial court assumed materiality without proper consideration of the evidence against Dougan. (PCR12: 2221). Accordingly, Dougan cannot meet the test for a *Giglio* violation and this Court should reverse the ruling of the trial court and deny Dougan post-conviction relief.

i. Dougan Has Neither Shown that William Hearn Presented False Testimony Nor that the Prosecutor Knew the Testimony Was False.

When William Hearn testified in 1975, the jury was made aware that he had pleaded guilty to a lesser charge of second-degree murder and was awaiting sentencing. (DATT: VIII at 1461). That information was repeated for the jury during Hearn's six cross-examinations and re-cross examinations. (DATT: VIII at 1422 – 79, 1484 – 85). In fact, William Hearn openly admitted at the time he testified that he had not been sentenced for the charge of second-degree murder. (DATT: VIII at 1466). Then, during cross examination, William Hearn acknowledged that while he expected to receive a life sentence, he was aware that the sentence he could receive was "anywhere from zero to life. . . ." (DATT: VIII at 1485). Therefore, the jury was aware that Hearn: (1) received a lesser sentence in exchange for his testimony; (2) had not yet been sentenced on his charge of second-degree murder; and (3) expected a life sentence, but could receive anywhere from zero to life in term of years. Although the direct question was

never posed to Hearn, that his testimony could affect his sentence, any reasonable juror would infer that Hearn was receiving a benefit in exchange for his testimony.

Both Dougan and the trial court assume that William Hearn's testimony was false, because of the post-trial actions of the State Attorney. (PCR12: 2220). However, such and assumption is improper because it does not show any affirmative misrepresentations by Hearn. (PCR12: 2220 – 22). Dougan must show that Hearn presented false testimony about his expected sentence, and the prosecutor knew the testimony was false, but the evidence of this claim simply does not exist.

In the seminal case of *Giglio v. United States*, the defendant was convicted of passing forged money orders. *Giglio*, 405 U.S. at 150. At trial the government presented the testimony of Taliento who affirmatively denied, more than once, that he had not been promised anything in exchange for his testimony. *Id*. at 151 – 52. After the trial it was discovered, that the original prosecuting attorney had in fact promised Taliento immunity in exchange for his testimony. *Id*. at 152. The original prosecuting attorney even admitted to the existence of the agreement. *Id*. Although *Giglio* turned on the question of materiality, it is the prime example of knowingly presenting false testimony.

In *Guzaman v. State*, David Colvin was found stabbed to death in a motel, and the police published a $500 reward for information about the case. *Guzman*, 868

So. 2d at 501. Following an arrest for prostitution charges, Cronin volunteered to testify about Colvin's murder in exchange for a deal in her own case. *Id.* Cronin then implicated Guzman, and stated he confessed to her that he murdered David Colvin. *Id.* Cronin was given a motel room which she used for prostitution and to consume crack cocaine, and the $500 reward money. *Id.* at 502. At trial, both Cronin and the officer who paid the $500 reward denied that Cronin received any deal in exchange for her testimony. *Id.* at 503. But, the court was told she was taken to a motel room and given the reward money. *Id.* On appeal, this Court found the testimony from both Cronin and the officer who paid her to be false, because Cronin had in fact received a benefit for her testimony. *Guzman*, 868 So. 2d at 503.

In *Guzman*, like in *Giglio*, the evidence of false testimony is clear and unambiguous. Cronin was taken to a motel room instead of the jail, and given $500 in exchange for her testimony, yet denied ever receiving a benefit. *Guzman*, 868 So. 2d at 503. In this case, there is no clear evidence of false testimony on the part of William Hearn. In both *Giglio* and *Guzman* the testifying witness actually knew their testimony was false. Here, there is no evidence to show that Mr. Hearn knowingly presented false testimony.

Although Dougan paints the picture of the State Attorney and Hearn in a conspiracy against him, he neglects to acknowledge the most reasonable

explanation for Hearn's testimony and sentence. (DB at 17). That being, Hearn agreed to testify for the State in exchange for a charge of second-degree murder, which he would plea directly to the trial court, being at the mercy of the trial court for his sentence. Such an agreement would require Hearn to acknowledge during his plea, that he could receive the maximum possible penalty of a life sentence. Then unbeknownst to Hearn the State would make a favorable sentencing recommendation based on his testimony. Regardless of Hearn's knowledge of the state's intent, Hearn was aware that his testimony could have an effect on the judge sentencing him, and the jury could infer as much as well.

The only piece of evidence Dougan has produced is a memo from 1993, consisting of second-hand information from William Hearn's attorney, Mr. Dempsey. (SPCR7: 1089). The memo states that Hearn's attorney did not expect his client to receive "anything approximating 15 years." (SPCR7: 1089). But, the memo is inherently ambiguous, and does not provide any context for Mr. Dempsey's statement, such as when he arrived at this conclusion. Moreover, the memo provides evidence that a deal with Hearn for a specific sentence "wasn't "firmly established." (SPCR7: 1089).

Despite Dougan's assertions, no other arrangement between Hearn and the State Attorney has been produced or proved outside of speculation resulting from the post-trial actions of the State Attorney. *See McLean*, 147 So. 3d at 512 (explaining

that post-conviction relief cannot be granted based on mere speculation). A *Giglio* violation is not proved based on speculation. *Giglio*, 405 U.S. at 153 – 54; *Guzman*, 868 So. 2d at 507; *McLean*, 147 So. 3d at 512. More than 30 years later, William Hearn's testimony regarding his understanding with the State Attorney remains the same. Accordingly, this Court should reverse the trial court's decision and deny Dougan post-conviction relief.

ii. Any False Testimony from Hearn Was Not Material, and Harmless Beyond a Reasonable Doubt.

The final prong under the *Giglio* test is whether any false testimony presented to the jury was material. *Guzman*, 868 So. 2d at 505. "[F]alse evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Guzman*, 868 So. 2d at 506 (quoting *Agurs*, 427 U.S. at 103). More easily stated, false testimony is considered material '"unless failure to disclose it would be harmless beyond a reasonable doubt.'" *Guzman*, 868 So. 2d at 506 (quoting *United States v. Bagley*, 473 U.S. 667, 679 – 80 (1985)).

Here, the alleged false testimony concerns whether or not there was a *quid pro quo* agreement between William Hearn and the State Attorney. William Hearn testified more than once, that in exchange for his testimony he received a reduced charge of second-degree murder, and expected to receive a life sentence. (DATT: VIII at 1461, 1466, 1484 – 85). When he was cross examined, Hearn acknowledged that his sentence could be anywhere from zero years to life in

prison, but he still expected to receive a life sentence. (DATT: VIII at 1485). During the post-conviction hearing, the state attorney testified that his recollection to the agreement was that Hearn was going to plea directly to the court, which meant Hearn's sentence would be at the mercy of the court.

Ultimately, the jury was aware that Hearn was receiving a deal in exchange for his testimony, and that his sentence could be affected by his testimony, because he was not yet sentenced. Therefore, it is unlikely that any false testimony would have affected the jury's verdict in this case.

Nevertheless, as beneficiary of any error from a *Giglio* violation the burden lies with the state to show the false testimony was harmless beyond a reasonable doubt. *Guzman*, 868 So. 2d at 507. Thus, if the permissible evidence was clearly conclusive of Dougan's guilt, then the error was not material. *See State v. Diguilio*, 491 So. 2d 1129, 1138 – 39 (Fla. 1986) (explaining the standard for harmless error analysis). In this case, the implication is that Hearn embellished his testimony in order to put himself in a more favorable light and receive a lesser sentence. But, regardless of Hearn's testimony, the evidence of Dougan's guilt is clearly conclusive.

First, the handwriting on the note attached to Stephen Orlando's body was identified as Dougan's. (DATT: III at 588; DATT: VI at 1081 – 1122; DAR: II at 222). That identification made by an FBI examiner has gone unchallenged since

1974. Second, Dougan confessed to three of the state's witnesses to committing the murder, namely Otis Bess, Edred Black, and James Mattison. All three of these witnesses gave similar accounts of Dougan's confession indicating Dougan was the main person directing the actions of others. (DATT: V at 958 – 59; DATT: VI at 1136, 1140 – 41, 1155 – 56, 1162, 1169, 1181 – 82; DATT: VII at 1257, 1287). Third, Dougan made multiple recorded confessions and sent them to Stephen Orlando's mother, television stations, and police stations. (DATT: II at 382 – 397; DATT: III at 455 – 56; DATT: IV at 659 – 61; DATT: V at 950 – 53). In each of the recordings Dougan not only gives details of Mr. Orlando's murder, but brags and boasts about his personal satisfaction in how Mr. Orlando was killed. (DATT: IV 641 – 70, 737 – 66; DATT: VI at 1014 – 43). In all, Dougan confessed to the murder of Stephen Orlando at least four times. (DATT: IV at 641 – 70, 774 – 75; DATT: V at 958 – 59; DATT: VI at 1021 – 25, 1136, 1140 – 41, 1155 – 56, 1162, 1169, 1181 – 82; DATT: VII at 1257, 1287). And Finally, Dougan's fingerprints were identified on an envelope used to mail one of the tape recordings; Dougan even acknowledged that his fingerprints were on some of the envelopes and tapes. (DATT: IX at 1618 – 19).

Although two other defendants were tried with Dougan, the evidence in this case only pointed to one person as the killer and leader of this group, Jacob Dougan. *Barclay v. State*, 343 So. 2d 1266, 1267 – 69 (Fla. 1977); (DATT: II at

382 – 397; DATT: III at 455 – 56, 588; DATT: IV at 659 – 61; DATT: V at 950 – 59; DATT: VI at 1081 – 1122, 1136, 1140 – 41, 1155 – 56, 1162, 1169, 1181 – 82; DATT: VII at 1257, 1287; DATT: IX at 1618 – 19). Even without the testimony of William Hearn, the state had a solid case against Jacob Dougan consisting of: (1) multiple confessions; (2) tape recorded statements; (3) fingerprints on key evidence; and (4) identified handwriting on the body of Mr. Orlando as Dougan's. (DATT: II at 382 – 397; DATT: III at 455 – 56, 588; DATT: IV at 659 – 61; DATT: V at 950 – 59; DATT: VI at 1081 – 1122, 1136, 1140 – 41, 1155 – 56, 1162, 1169, 1181 – 82; DATT: VII at 1257, 1287; DATT: IX at 1618 – 19). Therefore, any false testimony from William Hearn regarding his expected sentence was not material, and this Court should reverse the lower court's ruling and deny Dougan post-conviction relief.

d. A Prosecutor's Opinion as to a Witness' Willingness to Testify Does Not Constitute *Brady* Material.

Dougan has not presented any answer to the State's appeal, but instead simply restates the trial court's order. (DB at 25).

The trial court's order while not explicitly stated, seems to apply a *Brady* analysis to the opinion of the state attorney regarding William Hearn's willingness to testify at Dougan's 1987 resentencing. (PCR12: 2221). The trial court looks to Hearn's speculated "motivations" in testifying in 1987, which if Hearn was in fact "hostile" should have been disclosed to the jury. (PCR12: 2221).

Both the trial court and Dougan are left to speculate as to Hearn's motives, because in fact there were no alternative motives for Hearn in 1987. By the time Hearn testified in Dougan's resentencing, he had already been sentenced, served time in prison, been released on parole, and had his rights restored by the governor. (PCR12: 2204). The inner office memo between state prosecutors amounted to one word, "hostile" which simply was another way of saying Hearn did not want to testify.

Dougan's claimed *Brady* and *Giglio* violations are similar to those presented to this Court in *Hurst v. State*, 18 So. 3d 975, 991 (Fla. 2009). In *Hurst*, this court addressed claims of both *Brady* and *Giglio* violations related to the testimonies of specific state witnesses. Hurst was convicted of the first-degree murder of a co-worker at a Popeye's restaurant. *Hurst*, 18 So. 3d at 991. The state's case consisted of blood and DNA evidence, eye-witnesses who placed Hurst at the scene of the murder, a third-party confession, and bank deposit slips which also placed Hurst at the murder scene. *Hurst*, 18 So. 3d at 985 – 86. At trial Hurst claimed "some other young black men committed the murder." *Id*. at 989.

In post-conviction, Hurst raised a *Brady* violation claiming "that the State failed to disclose favorable, material evidence that State's witness David Kladitis saw several young black men in the parking lot of the Popeye's at around 7 a.m. on the morning of the murder." *Id*. This Court disagreed, finding the non-disclosed

statement "not exculpatory or impeaching and . . . of questionable relevance." *Id.* In reaching this conclusion, this Court stated "'[t]he prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality.'" *Hurst*, 18 So. 3d at 989 (quoting *Overton v. State*, 976 So. 2d 536, 562 (Fla. 2007)); *Wright v. State*, 857 So. 2d 861, 870 (Fla. 2003) (rejecting claim that "information contained in police files concerning other possible suspects and other criminal activity in the same neighborhood" was *Brady* material).

Hurst also alleged a *Brady* and *Giglio* violation occurred "in regard to the trial testimony of Anthony Williams by not disclosing that he was promised leniency by the prosecutor in exchange for his testimony at trial . . . [and] when the prosecutor argued falsely to the jury that there were no promises of leniency. *Hurst*, 18 So. 3d at 990. This Court's opinion summarizes the issue and testimony best:

> At the jury trial, Anthony Williams testified that he and Hurst were cellmates in the Escambia County jail, where they discussed the Popeye's murder. Williams testified that Hurst told him "[t]hat he had participated in it." At the evidentiary hearing, Williams, currently serving a life sentence for armed robbery, testified that he committed perjury at Hurst's trial when he testified that Hurst told him he participated in the crime. According to Williams, on the day of trial he told the prosecutor that he did not want to testify and the prosecutor said "that I knew to do the right thing and he would take care of me in the long run." Williams interpreted this to mean if he testified, he would get some leniency, but as it turned out he did not.
>
> The prosecutor, David Rimmer, testified at the evidentiary hearing that he never talked to Anthony Williams about his cases and that he

> "never made any promises to him about his pending cases." Rimmer said Williams' main concern was being kept apart from Hurst and "I told him I could take care of that: I could keep him separated from Timothy Hurst and any other inmates that he felt might try to harass him." Rimmer explained, "I never give them any indication that I'm going to do anything. I always, in fact, cut them off and tell them to start with, I can't make you any promises.... And the only promise I can make is that I'll keep them separated from the other inmates, from the defendant."

Id. at 991.

The post-conviction court denied Hurst relief, and this Court agreed finding that neither a *Brady* nor a *Giglio* violation had been proved based on the testimony from the recanting witness and the prosecutor. *Hurst*, 18 So. 3d at 991 – 92.

The opinion in *Hurst* is clear concerning what actually consists of a *Brady* violation. The state attorney is under no duty to disclose every aspect of their investigation, let alone inform the defense of which witnesses are cooperative and which witnesses are uncooperative. *Id*. at 991 – 92. Likewise, nothing prohibits a defense attorney from speaking with a witness prior to their testimony and gathering their motivations or proclivities for testifying. Therefore, any decision from the trial court finding a *Brady* violation for failure to disclosure Hearn's "hostility" should be reversed.

e. Dougan Uses William Hearn's Statements to Prove Key Witnesses Were Unreliable.

Dougan's primary claim to the trial court and asserted in his brief, is that William Hearn was in fact responsible for the murder of Stephen Orlando and lied

on the stand to save himself. (DB at 44). Throughout his brief Dougan repeatedly refers to the "lies" of William Hearn, and blames Hearn as the responsible party for the murder of Stephen Orlando. (DB at 9, 26, 44). But, Dougan also uses Hearn's testimony as the basis for pointing out discrepancies within other witnesses' testimonies. (DB at 28 (using Hearn's testimony to bolster claim that Elwood Barclay fabricated the idea of Stephen Orlando begging for his life); 33 – 34 (using Hearn's testimony to support claim of inconsistent statements within the tapes and who made the tapes); 34 (using Hearn's testimony to rebut testimony that Dougan expressed knowledge of the murder during Karate class); 38 (using Hearn's testimony to support claim that Barclay made up Stephen Orlando begging for his life to make the tape stronger); 43 (using Hearn's testimony as substantive proof that other witnesses were not consistent). This presents inconsistent theories to this Court and allows Dougan to distort Hearn's testimony.

The testimony of the James Mattison, Edrred Black, and Otis Bess are not word for word identical, but each is consistent with one another. (DATT: V at 958 – 59; DATT: VI at 1136, 1140 – 41, 1155 – 56, 1162, 1169, 1181 – 82; DATT: VII at 1257, 1287). In the same vein, the scripted tape recordings have slight variations, nevertheless each has the same message, specifically that Dougan and his colleagues were proud they committed the murder of Stephen Orlando. (DATT: IV 641 – 70, 737 – 66; DATT: VI at 1014 – 43). Moreover, Edred Black was

called to testify four times and James Mattison was called to testify three times. (DATT: IV at 711 – 31; DATT: V at 806 – 827, 828 – 852, 934 – 996, 998 – 1000; DATT: VI at 1002 – 1048, 1131 – 1199; DATT: VII at 1202 – 1240; Conversely, William Hearn only testified once. (DATT: VII at 1348 – 1400; DATT: VIII at 1402 – 1485). The inference made to the jury is that Black and Mattison's testimonies were more important than Hearn's because they were repeatedly recalled. Therefore, Dougan has not discredited any of the witness testimony by showing minor inconsistencies based on William Hearn's testimony.

f. Dougan Has Not Presented Any Evidence To Support The Claim That William Hearn Committed the Murder.

Dougan continues to claim he is innocent of Stephen Orlando's murder, and that William Hearn is the responsible party. (DB at 44). Yet, despite having almost forty years to produce evidence showing William Hearn's guilt, Dougan has not been able to produce anything other than conjecture and speculation. (DB at 44). Each witness, piece of physical evidence, and admission to the crime point to Jacob Dougan as the shooter and leader of the group responsible for Mr. Orlando's murder. (DATT: II at 382 – 397; DATT: III at 455 – 56, 588; DATT: IV at 659 – 61; DATT: V at 950 – 59; DATT: VI at 1081 – 1122, 1136, 1140 – 41, 1155 – 56, 1162, 1169, 1181 – 82; DATT: VII at 1257, 1287; DATT: IX at 1618 – 19). William Hearn's testimony was beneficial to the state, but was not pivotal to obtaining a conviction, as other evidence and witnesses established not only

Dougan's guilt, but his satisfaction in the murder of Stephen Orlando. As a result, the trial court ruling granting Dougan a new trial should be reversed.

II. DID THE CIRCUIT COURT ERR IN RULING THAT DOUGAN'S 1975 GUILT PHASE COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST? (REPLY)

Dougan maintains the trial court was correct in ruling that Mr. Jackson was ineffective during the 1975 guilt phase trial. (DB at 45). Regardless of Dougan's claims and arguments, Dougan has failed to prove an actual conflict of interest arising from Mr. Jackson's representation during the 1975 guilt phase trial. Accordingly, the trial court's ruling should be reversed and Dougan should be denied post-conviction relief.

a. Ernest Jackson Had One Client in the 1975 Trial – Jacob Dougan.

Dougan maintains that his 1975 trial counsel, Ernest Jackson, had an actual conflict of interest due to his multiple representations of Dougan's co-defendant's during the trial. (DB at 45). This theory is without merit.

Although Mr. Jackson did represent all three defendants on appeal, which was found to be a conflict of interest, Mr. Jackson had only one client during the trial, Jacob Dougan. Here, Dougan attempts to use this Court's ruling of an actual conflict of interest during the direct appeal, when Mr. Jackson jointly represented the defendants, as evidence of joint representation during the 1975 trial. (DB at 45 – 46). Yet, no evidence was presented showing Mr. Jackson taking any legal action on behalf of the co-defendants. Neither of the co-defendants identified Mr. Jackson as their attorney during the 1975 trial. And, Dougan himself went to

lengths within his brief to distinguish the quality of representation his co-defendants received as compared to Mr. Jackson's representation. (DB at 65 n.96, 84 – 87). Therefore, any claim that Mr. Jackson jointly represented Dougan's co-defendants during the 1975 trial should be dismissed as lacking all merit.

b. Mr. Jackson's Affair with Dougan's Sister Does Not Create an Actual Conflict of Interest.

The Sixth Amendment of the United States Constitution provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defense." Amend. VI, U.S. Const. Generally, "a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

However, in a very limited class of cases, a defendant is spared "the need of showing probable effect upon the outcome" and such an effect is simply "presumed" under the reasoning that "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *United States v. Cronic*, 466 U.S. 648 (1984); *see Geders v. United States*, 425 U.S. 80 (1976); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Supreme Court has unambiguously held, "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must

demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). However, "an actual conflict of interest" means "precisely a conflict *that affected counsel's performance*---as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S at 171 (emphasis in original).

"A lawyer suffers from an actual conflict of interest when he 'actively represent[s] conflicting interests.'" *Brown v. State*, 894 So. 2d 137, 157 (Fla. 2004) (citing *Cuyler*, 446 U.S. at 350). But, "the possibility of a conflict is insufficient to impugn a criminal conviction." *Cuyler*, 446 U.S. at 350. "To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests his interests were impaired or compromised for the benefit of the lawyer or another party. *Brown*, 894 So. 2d at 157 (citing *Herring v. State*, 730 So. 2d 1264, 1267 (Fla. 1998). And although a defendant who demonstrates an actual conflict of interest is not required to show prejudice, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler*, 446 U.S. at 350.

Unsurprisingly, a long line of this Court's precedent, relying on *Cuyler v. Sullivan* makes clear that an actual conflict of interest is necessary to impugn a criminal conviction as well. *See, e.g.*, *Bell v. State*, 965 So. 2d 48, 77 – 78 (2007);

Slinley v. State, 944 So. 2d 270, 279-80 (Fla. 2006); *Hunter*, 817 So. 2d 791 – 92; *Quince*, 732 So. 2d 1064 – 65.

Here, while Mr. Jackson's affair with Dougan's sister was unethical and unprofessional, it does not create an actual conflict of interest, because the affair did not result in a conflict of representation among the parties. The argument Dougan presents is premised on the affair disrupting Mr. Jackson's legal practice so much that his defense of Dougan was adversely affected. (DB at 53, 59 – 60). If that were true, then any extra-marital affair by Mr. Jackson could have created a conflict of interest, regardless of whether or not Dougan's sister was involved. Moreover, Dougan has not pointed out how exactly the affair affected his defense.

This Court has made it clear that "[t]o demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised." *Hunter v. State*, 817 So. 2d 786, 791 – 92 (Fla. 2002) (citing *Herring*, 730 So. 2d at 1267). In *Quince v. State*, 732 So. 2d 1059 (Fla. 1999), this Court considered the precedent from the United States Supreme Court in addressing the difference between a possible conflict and an actual conflict:

> In illustrating the difference between a possible conflict and an actual conflict, the Supreme Court cited its previous decision in *Glasser v. United States*, 315 U.S. 60, 62 (1942), and *Dukes v. Warden*, 406 U.S. 250 (1972). *See Cuyler*, 446 U.S. at 348-50. The Supreme Court reversed the defendant's conviction in *Glasser* because the record revealed omissions by defense counsel which were intended to

> diminish the jury's perception of a codefendant client's guilt. *See Cuyler*, 446 U.S. at 348-49. In contrast, the Court did not grant habeas corpus relief in *Dukes* on a claim that the lawyer's conflict of interest infected the defendant's plea because the defendant could not identify any actual lapse in representation in the record. *See Cuyler*, 446 U.S. at 349.

Quince, 732 So. 2d at 1064 – 65.

Dougan's argument and the trial court's conclusion are based on a possible or speculative conflict arising from Mr. Jackson's representation, which is not a basis for relief. *McLean*, 147 So. 2d at 512. The entire conclusion of the trial court is premised on a theory that had it not been for Mr. Jackson's affair, more time would have been spent on Dougan's defense. This theory is undercut by the nature of Dougan's defense - actual innocence because of an alibi - and presumes there was another defense strategy to which Dougan would have consented. But, no evidence was presented to the trial court to establish any of Dougan's claims.

Because Dougan failed to show that an actual conflict of interest was present in Mr. Jackson's representation, the ruling of the trial court should be reversed and Dougan should be denied relief.

III. DID THE CIRCUIT COURT ERR IN RULING THAT DOUGAN'S 1975 GUILT PHASE COUNSEL WAS INEFFECTIVE? (REPLY)

Dougan contends the trial court was correct in ruling that his trial counsel during the 1975 guilt phase trial was prejudicially ineffective. (DB at 64). In an attempt to prove his claim and justify the trial court's ruling, Dougan uses the improper and outside opinions of area attorneys as support. Dougan also overlooks the fact that Mr. Jackson pursued the defense Dougan wanted – actual innocence – and was hamstrung by what Dougan wanted to testify to at trial. Accordingly, the trial court's ruling which found Mr. Jackson ineffective is not supported by the record and the evidence adduced at trial and should be reversed.

a. Outside Opinions Regarding Mr. Jackson's Effectiveness As an Attorney are Irrelevant.

Dougan claims his attorney was referred to as "the Raiford Express" and repeatedly uses the hearsay statements from non-testifying attorneys as support for his claim. (DB at 65; Appendix A). Regardless, the outside opinion of an attorney, no matter how well respected within the community, is irrelevant to establishing deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984).

Because Mr. Jackson has been deceased for some time, no testimony can be taken regarding his trial strategy, and therefore Mr. Jackson is entitled to a presumption of reasonable professional judgment in all decisions. *Gore v. State*,

964 So. 2d 1257, 1269 – 70 (Fla. 2007). Dougan is attempting to use outside opinions to collaterally attack and impeach Mr. Jackson's credibility and thereby deny him that presumption. (DB at 65 n. 98, n. 99, 66 – 69; DB at Appendix A). This is an improper means of proving deficient performance and should be rejected.

To establish deficient performance, a defendant must show that counsel made specific errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. 668; *Pietri v. State*, 885 So. 2d 245, 252 (Fla. 2004). '[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. "Judicial scrutiny of counsel's performance must be highly deferential and must be conducted in a manner that eliminates the 'distorting effects of hindsight' and considers the conduct in light of the circumstances facing the attorney at the time." *Johnson v. State*, 921 So. 2d 490, 500 (Fla. 2000) (internal citations omitted) (citing *Strickland*, 466 U.S. at 689 – 690). " . . . [T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

"Counsel is strongly presumed to have rendered adequate assistance and made

all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000); *see Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (stating "Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel"). "[A]n attorney is not ineffective for decisions that are a part of trial strategy that, in hindsight, did not work out to the defendant's advantage." *Mansfield v. State*, 911 So. 2d 1160, 1174 (Fla. 2005). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y Dept. of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007) (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983).

In the absence of testimony regarding trial counsel's strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. *Gore*, 964 So. 2d at 1269 – 70 (finding the defendant did not meet his burden of deficient performance when his lead counsel was not called to testify during the hearing, and defendant only presented testimony from co-counsel which criticized the strategy of lead counsel); *see Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005).

While courts may not indulge in *post hoc* rationalization, they also cannot insist that counsel "confirm every aspect of the strategic basis for his or her actions." *Harrington v. Richter*, 131 S.Ct. 770, 794 (2001). "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" *Richter*, 131 S.Ct. at 791 (citing *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (*per curiam*).

Here, Dougan distorts the test for deficient performance by using the opinions of attorneys within the area as the foundation for a claim of deficient performance. (DB at 65; Appendix A). Nothing within the *Strickland* analysis allows for a claim of deficient performance to be proven in such a manner. Regardless of someone's opinion as a terrible or terrific attorney, it is irrelevant for purposes of evaluating effectiveness under *Strickland*. Additionally, prior instances where an attorney has been found ineffective are also non-starters. *Young v. Runnels*, 435 F.3d 1038, 1043 (9th Cir. 2006) (holding that prejudice is not to be presumed even where the trial lawyer was subject to disciplinary proceedings while representing a client and was subsequently disbarred because such circumstances do "not mean that he is presumptively incapable of providing effective assistance"). Each claim of ineffective assistance of counsel is evaluated on a case-by-case basis, and an attorney's record whether good or bad is not considered within the analysis. Therefore, any mention to the opinions of Mr. Jackson's effectiveness or prior

cases where he was found ineffective should be disregarded as irrelevant.

b. Mr. Jackson Presented the Defense that Jacob Dougan Wanted – Actual Innocence Due to An Alibi.

The trial court ruled that Mr. Jackson "essentially presented no defense" during Dougan's 1975 trial. (PCR13: 2289 – 91). But this ruling, and Dougan's claims of "no defense" ignore the most basic explanation for Mr. Jackson's trial tactics, namely it was the defense that Jacob Dougan wanted.

Dougan maintained his innocence from the moment he was arrested and continued to assert that innocence when he testified at trial. (DATT: IX at 1607 – 09). Dougan admitted to the evidence which was undeniable, his voice and fingerprints on the tape recordings taking credit for the murder, yet claimed he was at home with his father the night of the murder. (DATT: IX at 1608 – 09). In order to solidify that alibi, Mr. Jackson presented Jacob Dougan's father to confirm that Jacob was home with him the night of the murder. (DATT: IX at 1750 – 52).

The only aspect of the defense that Mr. Jackson could not control was whether or not Jacob Dougan testified at trial. To date, Dougan has not come forward and stated or even suggested that he was forced to take the stand in his own defense. That being the case, this Court should infer that Mr. Jackson's defense was predicated on and based around Dougan's testimony. *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8)).

Both Dougan and the trial court focused on Mr. Jackson's supposed failure to

distinguish his client's culpability from the other co-defendants, but such a tactic would have clashed with Dougan's stated defense . . . actual innocence. Mr. Jackson did not waste his time with culpability or character issues because Dougan wanted to argue innocence. (DATT: IX at 1607 – 09). In the absence of testimony regarding trial counsel's strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. *Gore*, 964 So. 2d at 1269 – 70. Mr. Jackson is entitled to a presumption that his attention to certain issues to the exclusion of others reflects his trial tactics. *Richter*, 131 S.Ct. at 791 (citing *Gentry*, 540 U.S. at 8).

The trial court ignored this presumption in finding Mr. Jackson ineffective. Mr. Jackson could only be as effective as his client would let him. Arguing actual innocence was probably not the best option, but it was the only option for Mr. Jackson, because Jacob Dougan was going to take the stand and testify that he had an alibi for the night of the murder.

c. The Trial Court Correctly Ruled That The Omission of Dougan's Character Evidence Was Not Prejudicial. (CROSS ANSWER)

Dougan asserts on cross-appeal that the trial court erred in finding that he was not prejudiced by Mr. Jackson's failure to present evidence of his good character during the 1975 trial. (DB at 84). Dougan's claim is based on the trial tactics of one of his co-defendants, Evans, who did present evidence of good character and was ultimately convicted of second-degree murder. But, Dougan ignores the fact

that all of the evidence presented at trial established him as the leader and actual shooter in the murder of Stephen Orlando. *Barclay*, 343 So. 2d at 1267 – 69; (DATT: II at 382 – 397; DATT: III at 455 – 56, 588; DATT: IV at 659 – 61; DATT: V at 950 – 59; DATT: VI at 1081 – 1122, 1136, 1140 – 41, 1155 – 56, 1162, 1169, 1181 – 82; DATT: VII at 1257, 1287; DATT: IX at 1618 – 19). Accordingly, this claim should be denied.

iii. Standard of Review

Claims of ineffective assistance of counsel present a mixed question of law and fact and are therefore subject to de novo review. *Patton v. State*, 878 So. 2d 368, 372 (Fla. 2004) (citing *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001)). The trial court's legal conclusions are subject to an independent review, but the factual findings must be given deference. *Patton*, 878 So. 2d at 373.

The Test for a Claim of Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must satisfy a two progon test, establishing both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a defendant must show that counsel made specific errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 466 U.S. 668; *Pietri*, 885 So. 2d at 252.

"[A]n attorney is not ineffective for decisions that are part of trial strategy that,

in hindsight, did not work out to the defendant's advantage." *Mansfield v. State*, 911 So. 2d 1160, 1174 (Fla. 2005). In the absence of any testimony regarding trial counsel's strategy, a court presumes trial counsel exercised reasonable professional judgment in all decisions. *Gore*, 964 So. 2d at 1269 – 70 (finding the defendant did not meet his burden of deficient performance when his lead counsel was not called to testify during the hearing, and defendant only presented testimony from co-counsel that criticized the strategy of the lead counsel); *see Callahan*, 427 F.3d at 933.

To establish prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Rutherford v. State*, 727 So. 2d 216, 219 (Fla. 1998). "To assess that probability, we consider 'the totality of the available mitigiation evidence – both adduced at trial, and the evidence adduced in the . . . [post-conviciton] proceedings' – and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

In the present case, Dougan must show that but for his counsel's alleged errors, he probably would have received a life sentence during the 1987 penalty phase, and an acquittal during the 1975 guilt phase trial. *Gaskin v. State*, 822 So. 2d

1243, 1247 (Fla. 2002) (citing *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995)). Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687.

iv. Dougan Was Not Prejudiced By The Failure to Present Character Evidence

Dougan was tried at the same time as two co-defendants, Mr. Evans and Mr. Barclay. (PCR13: 2324); *Barclay*, 343 So. 2d at 1267 – 69. In prosecuting the murder of Stephen Orlando, the state focused its efforts first on Dougan as the actual shooter and leader; second on Mr. Barclay, and third on Mr. Evans. (PCR13: 2325; *Barclay*, 343 So. 2d at 1267 – 69). "[T]he state did not make a case against Mr. Evans as having been a cause of the actual murder of the Victim as it did against [Dougan] and Mr. Barclay." (PCR13: 2325).

During the trial Mr. Evans presented evidence of his good character and reputation within the community, and was convicted of a lesser sentence of second-degree murder. (PCR13: 2324 – 25). Neither Dougan nor Mr. Barclay presented evidence of good character and were convicted as charged of first-degree murder. (PCR13: 2325); *Barclay*, 343 So. 2d at 1267 – 69.

While Dougan claims his counsel's failure to present evidence of good character is the reason for the different convictions between himself and Mr. Evans, he fails to acknowledge the difference is attributable to the different

theories of culpability pursued at trial. As the trial court recognized, "[b]ecause Mr. Evans was the only defendant to present evidence of his good character during the guilt phase, it has not been established that a failure to do so by [Dougan's] trial counsel was unreasonable considering the circumstances at that time." (PCR13: 2325).

In addition, Dougan's claim does not account for the downside of character evidence, specifically any introduction of good character evidence would open the door to rebuttal evidence of bad character – in this case, evidence of the additional murder charge not before this jury. Dougan also fails to show how all of his evidence of good character would have been obviously admissible so that any reasonable attorney in 1975 would have presented it.

"Character is distinct from reputation, the latter being merely evidence of the former; but reputation is merely what is reported or understood from report to be the community's estimate of the person's character. *Fine v. State*, 70 So. 379 (Fla. 1915). The admissibility of character evidence in Florida is limited. "In order to be a reliable assessment of character, the reputation must be based on a broad-based section of the community or the person's associates." 1 Fla. Prac. Evidence § 405.1 (2014 ed.). "[R]eputation must be based on discussion among a broad group of people so that it accurately reflects the person's character, rather than the biased opinions or comments of two or three persons or of a narrow segment of the

community." 1 Fla. Prac. Evidence § 405.1 (2014 ed.).

In *Buford v. State*, 403 So. 2d 943, 949 (Fla. 1981), this Court upheld the exclusion of a defense counsel's question of a witness concerning whether "he found defendant 'to be a quiet, non-violent person."' This Court explained that a "Defendant had a right to produce evidence of his non-violent character . . . he could only have elicited evidence of his general reputation in the community, not specific instances of non-violence." *Buford*, 403 So. 2d at 949 (internal citations omitted). Thus, in this case the only question Mr. Jackson would have been lawfully permitted to ask is, whether Dougan had a reputation in the community for non-violence. Such a question would have enabled the State to emphasize Dougan's other acts of violence at the time, including an additional murder charge which was not before this jury.

Therefore, Dougan has failed to establish either deficient performance or prejudice, as it is unlikely the introduction of any evidence concerning Dougan's good character would have affected the outcome of the trial. Accordingly, this Court should affirm the ruling of the trial court and deny Dougan relief on this claim.

d. Dougan Was Not Prejudiced When Mr. Orlando's Step-Father Identified the Body for the Jury. (CROSS ANSWER)

Dougan asserts his 1975 trial counsel was ineffective for failing to object when the victim's step-father was allowed to testify at trial and identify his step-son's

body before the jury. (DB at 88). The trial court determined that Mr. Jackson was deficient in failing to object to this testimony, but that Dougan was not prejudiced by its introduction. (PCR13: 2321 – 22). Accordingly, this claim should be denied because Dougan cannot meet the prejudice prong of *Strickland*.

i. Standard of Review

Claims of ineffective assistance of counsel present a mixed question of law and fact and are therefore subject to de novo review. *Patton*, 878 So. 2d at 372 (citing *Porter*, 788 So. 2d at 923). The trial court's legal conclusions are subject to an independent review, but the factual findings must be given deference. *Patton*, 878 So. 2d at 373.

ii. The Trial Court Was Correct In Finding No Prejudice.

Dougan claims the trial court erred in ruling that he was not prejudiced by Mr. Jackon's failure to object to the testimony from Stephen Orlando's step-father, which included the identification of Mr. Orlando. (DB at 88). In order to prevail on this claim, Dougan must show that but for the error, there is a reasonable probability that the result of the proceedings would have been different. *Gaskin*, 822 So. 2d at 1247 (citing *Hildwin*, 654 So. 2d at 109).

"As a general rule, members of a victim's family should not identify a victim at trial." *Dougan*, 470 So. 2d at 699 (citing *Welty v. State*, 402 So. 2d 1159 (Fla. 1981)). But, "[a]dmission of the identification testimony from a member of a

victim's family, however, is not fundamental error and may be harmless error in certain instances." *Welty*, 402 So. 2d at 1162 (citing *Malloy v. State*, 382 So. 2d 1190 (Fla. 1979). "The basis for this rule is to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." *Welty*, 402 So. 2d at 1162.

In this case, nothing within Mr. Orlando's testimony introduced or invoked any inappropriate emotions into the trial. (TT 47260/I 154 – 64). Moreover, Dougan claims other persons were available to identify the body of Stephen Orlando, yet has not identified anyone by name, let alone established their availability at the time of the trial. (DB at 88).

In order to satisfy the prejudice prong, Dougan must establish that but for the family identification of Stephen Orlando, he would have been acquitted at trial. *Gaskin*, 822 So. 2d at 1247 (citing *Hildwin*, 654 So. 2d at 109). This burden cannot be met. The state's evidence consisted of: (1) handwriting matching Dougan's on the body of Stephen Orlando; (2) multiple tape recorded statements made by Dougan confessing to the murder; (3) testimony from three witnesses who stated Dougan confessed to the murder; (4) testimony from an eye-witness who saw Dougan pull the trigger; and (5) fingerprints on key pieces of evidence. (DATT: II at 382 – 397; DATT: III at 455 – 56, 588; DATT: IV at 659 – 61; DATT: V at 950 – 59; DATT: VI at 1081 – 1122, 1136, 1140 – 41, 1155 – 56,

1162, 1169, 1181 – 82; DATT: VII at 1257, 1287; DATT: IX at 1618 – 19).

When viewed against the evidence presented by the state, it is unlikely any objection to Mr. Orlando's step-father's testimony would have produced an acquittal for Jacob Dougan at trial. The step-father's testimony was neutral in content and did not invoke any inappropriate emotions on behalf of the jury. Therefore, Dougan cannot satisfy the prejudice prong and the ruling from the trial court should be affirmed.

e. Dougan Was Not Prejudiced By The Proffer Concerning The Murder of Stephen Roberts. (CROSS ANSWER)

Dougan asserts Mr. Jackson was ineffective for introducing evidence concerning the murder of Stephen Roberts, which was unrelated to the crime for which he was on trial. (DB at 90).[3] In making this claim Dougan misstates the record and the substance of what was presented to the 1975 trial court as a proffer. (DB at 90; PCR13: 2316). Because the jury never heard evidence regarding the murder of Stephen Roberts during the 1975 guilt phase, this claim is without merit.

i. Standard of Review

Claims of ineffective assistance of counsel present a mixed question of law and fact and are therefore subject to de novo review. *Patton*, 878 So. 2d at 372 (citing

[3] Dougan attributes the trial court's ruling to page 3411, which is in error. Page 3411 of the post-conviction record is the final page of the entire record. The portion of the trial court's order covering this issue is PCR13: 2315 – 17.

Porter, 788 So. 2d at 923).

ii. The Jury Never Heard Evidence Regarding the Murder of Stephen Roberts During the 1975 Guilt Phase.

Dougan maintains that Mr. Jackson was "prejudicially ineffective" in alerting the jury to evidence of the murder of Stephen Roberts. (DB at 90). However, evidence of Stephen Roberts' murder was never presented to the jury during the 1975 guilt phase of the trial. (PCR13: 2316 – 17).

The trial court ruled, "[b]ecuase the record does not reflect the tape recording concerning other murders were played at trial before the jury in the guilt phase, and because [Dougan] received a new sentencing proceeding, [Dougan] has not established prejudice. . .." (PCR13: 2317).

Dougan now claims the trial court erred in its conclusion because evidence was presented to the jury, which therefore warrants reversal. (DB at 90). But, in order to make this claim Dougan erroneously attributes a comment made during the penalty phase, as occurring before the jury during the guilt phase. (DB at 90).

A clear reading of the trial court's order acknowledges Mr. Jackson's question and answer about the Roberts murder during the penalty phase. (PCR13: 2316 – 17). The trial court was aware of the issue in the 1975 penalty phase and specifically noted that Dougan already received the benefit of a new penalty phase, and was therefore not entitled to relief. (PCR13: 2317). Accordingly, Dougan cannot establish either deficient performance or prejudice under these

circumstances because his claim involves a matter which did not occur, and the ruling of the trial court should be affirmed.

f. Dougan Has Shown Neither Deficient Performance Nor Prejudice For Failure to Seek a Plea Negotiation. (CROSS ANSWER)

On cross-appeal Dougan claims the trial court erred in finding that Mr. Jackson was not ineffective for failing to seek a plea negotiation. (DB at 90). This claim is without merit, as Dougan has neither proven that a plea was available nor that Dougan was willing to accept a plea. *Frye v. Missouri*, 132 S.Ct. 1399, 1410 (2012); *Alcorn v. State*, 121 So. 3d 419, 430 (Fla. 2013).

i. Standard of Review

Claims of ineffective assistance of counsel present a mixed question of law and fact and are therefore subject to de novo review. *Patton*, 878 So. 2d at 372 (citing *Porter*, 788 So. 2d at 923).

ii. Dougan Has Not Presented Evidence Showing A Plea was Available to Him.

In order for Dougan to be entitled to relief on this claim he must first show the State Attorney was willing to negotiate and offer a plea to something less than his charge of first-degree murder with a penalty of death. *Frye*, 132 S.Ct. at 1410; *Alcorn*, 121 So. 3d at 430 (holding that in order to establish prejudice for failure to engage in plea negotiations a defendant must prove "(1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor

would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"). Yet, no evidence has been presented to establish that a plea was even available from the state. Dougan's claim is admittedly based on speculation, and speculative claims are not a basis for finding counsel ineffective. (DB at 90); *McLean*, 147 So. 3d at 512; *Butler v. State*, 100 So. 3d 638, 654 – 55 (Fla. 2012). Mr. Jackson's actions in not pursuing a plea negotiation can be neither deficient performance nor prejudicial because no plea offer was available for Dougan to accept.

In order to show prejudice Dougan must show that but for Mr. Jackson's actions in not seeking a plea deal, his outcome would have been different. *Rutherford*, 727 So. 2d at 219. In the context of a plea deal such a burden requires both the consent and acceptance of the state attorney and Dougan. *Frye*, 132 S.Ct. at 1410; *Alcorn*, 121 So. 3d at 430. But despite having the state attorney testify during post-conviction, the record is silent as to the availability of any plea deal. The record is also silent as to Dougan's willingness to accept any deal. Therefore, this claim should be dismissed as meritless as Dougan has failed to show either deficient performance or prejudice on the part of Mr. Jackson.

g. Dougan Has Shown neither Deficient Performance Nor Prejudice For Failure to Move For a Severance. (CROSS ANSWER)

Dougan asserts that Mr. Jackson was ineffective in failing to move for a

severance from his co-defendants in the 1975 trial. (DB at 90). This claim is meritless, as all other motions for a severance made by the co-defendants were denied by the trial court. (PCR12: 2243 n.40). Dougan also fails to develop any argument that there were grounds for such motions that would compel any reasonable attorney to file motion that would have resulted in a different trial outcome.

i. Standard of Review

Claims of ineffective assistance of counsel present a mixed question of law and fact and are therefore subject to de novo review. *Patton*, 878 So. 2d at 372 (citing *Porter*, 788 So. 2d at 923).

ii. Any Motion for a Severance by Mr. Jackson Would Have Been Moot.

As the lower court pointed out in denying Dougan relief, all motions for a severance were ultimately denied. (PCR12: 2243 n.40). Therefore, it is logical to infer that any motion for a severance made by Mr. Jackson would also have been denied. In addition, if any motion for a severance were to be granted, an additional motion from Mr. Jackson would have been unnecessary. Because both Evans and Barclay filed for a severance, had their motions been granted Dougan would have ended up in a separate trial anyway.

In order to establish deficient performance Dougan must show that the actions taken by his trial counsel would not have been taken by any reasonable attorney.

In this case, the additional motion by Mr. Jackson would have been unnecessary under two different theories. Moreover, in order to establish prejudice, Dougan must show that but for Mr. Jackson's actions in failing to request a severance, there is a reasonable probability he would have been acquitted at trial. *Gaskin*, 822 So. 2d at 1247 (citing *Hildwin*, 654 So. 2d at 109). Under this burden Dougan cannot establish prejudice, because the State's theory at trial was predicated on Dougan being the leader and actual shooter in the murder of Stephen Orlando. (DATT: II at 382 – 397; DATT: III at 455 – 56, 588; DATT: IV at 659 – 61; DATT: V at 950 – 59; DATT: VI at 1081 – 1122, 1136, 1140 – 41, 1155 – 56, 1162, 1169, 1181 – 82; DATT: VII at 1257, 1287; DATT: IX at 1618 – 19); *Barclay*, 343 So. 2d at 1267 – 69. A severed and separate trial would not have reduced Dougan's culpability. Accordingly, Dougan has failed to meet his burden under *Strickland*, and this Court should affirm the ruling from the trial court denying Dougan relief.

h. Any Claim of Improper Venue During The 1975 Trial Was Addressed By This Court in Dougan's Direct Appeal. (CROSS ANSWER)[4]

Dougan asserts that Mr. Jackson pursued an unreasonable theory of incorrect venue during the 1975 trial. (DB at 91). The trial court denied relief on this claim because "[t]he record does not demonstrate trial counsel believed the case would

[4] Claims of ineffective assistance of counsel present a mixed question of law and fact and are therefore subject to de novo review. *Patton*, 878 So. 2d at 372 (citing *Porter*, 788 So. 2d at 923).

be reversed due to incorrect venue before or during [Dougan's] trial." (PCR13: 2291).

This claim is based on speculation resulting from Mr. Jackson's argument on direct appeal. (DB at 91 – 92). In fact, there is no evidence to support this claim, as Mr. Jackson did not even move for a change of venue. (PCR13: 2291). "Further, trial counsel's stated defense theory had nothing to do with venue." (PCR13 2291). Therefore, because there is no evidence suggesting that Mr. Jackson's strategy was that of improper venue, the trial court's ruling should be affirmed.

IV. DOUGAN FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE IN HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS 1987 RESENTENCING (CROSS APPEAL).

Dougan claims on cross-appeal that the trial court erred in denying his claim of ineffective assistance of counsel during the 1987 resentencing for failing to present additional evidence of mitigation. (DB at 108). This Court has previously rejected similar arguments and held that the presentation of a more favorable mental health expert does not satisfy the deficient performance prong as required under *Strickland*. Moreover, within this claim is Dougan's only acknowledgement of responsibility for the murder of Stephen Orlando, as he sought to apply two statutory mitigators during the evidentiary hearing.

a. Standard of Review

Claims of ineffective assistance of counsel present a mixed question of law and fact and are therefore subject to de novo review. *Patton*, 878 So. 2d at 372 (citing *Porter*, 788 So. 2d at 923).

b. The Trial Court's Ruling.

In Dougan's claim of ineffective assistance of counsel during his 1987 resentencing, the trial court granted Dougan's motion in-part and denied in-part. (PCR13: 2392). As discussed and addressed in the state's initial brief, the trial court found Dougan's resentencing counsel ineffective for failure to hire an independent medical examiner. (PCR13: 2392).

But, the trial court denied Dougan relief on every other claim of ineffective assistance of counsel arising from the 1987 penalty phase. (PCR13: 2392). Specifically the trial court found:

> Resentencing counsel presented a substantial amount of mitigation evidence of defendant's background and social history before the jury at the 1987 resentencing proceeding. In all **twenty-six defense witnesses** testified at defendant's resentencing in front of the jury. Collectively, the witnesses testified to the following information: [1] Defendant was placed for adoption because he was biracial; [2] defendant was adopted at a late age because of his skin color and was developmentally delayed in some aspects; [3] **defendant's adoptive mother was an alcoholic**; [4] Defendant's religious background growing up in the Dougan home; [5] Defendant's educational background; [6] **the racial aspects of the times and the effects of race in the community and on Defendant**; [7] Defendant's numerous commitments to community programs; [8] **Defendant's social status and popularity in the community**; [9] Defendant's character from the perspective of those in the community who knew him as a child, youth, and adult; [10] **Defendant's involvement in Boy Scouts and attainment of rank as an Eagle Scout**; [11] Defendant's participation in his high school band as a section leader; [12] Defendant's participation in the Youth Congress; [13] Defendant's initiative in getting programs started in the community such as Sickle Cell Anemia Detox; [14] his aid in the development of a housing redevelopment program that benefited black and white citizens; [15] initiated clothing drives for the underprivileged; [16] Defendant's involvement in the development of a free walk-in health clinic and recruitment of volunteer doctors and nurses; [17] racism in Jacksonville in the 1950s to 1970s; [18] Defendant's character in high school; [19] Defendant's asthmatic condition; [20] Defendant's employment as a lifeguard; [21] Defendant's background as a karate instructor; [22] **defendant's character in prison**; [23] Defendant's concern for neighbors and his actions during racial disturbances in looking out for others who experienced discrimination; [24] **Defendant's service in the Air Force**; [25] Defendant's physical characteristics in elementary school; [26] **Defendant's mental state in prison**; [27] class and race issues within the community in respect

> to the local police in the 1960s; [28] Defendant's civil rights activities; [29] **Defendant's development of the Head Start program from low income children in the community**; [30] **Defendant's development of a legal aid program** and bringing the service to the community; [31] Defendant's involvement with bringing a halfway house to the area; Defendant's work as a volunteer in the community; [32] Defendant's involvement in organizing citizens against an urban renewal/eminent domain project; [33] Defendant's involvement in developing Meals on Wheels for the community and soliciting donations; [34] Defendant's involvement in a Tenant's Association at the Kennedy Center; [35] **Defendant's character as a community leader**; [36] Defendant as a softball team coach; [37] Defendant's involvement in the development of low income rental apartments for the Eastside of Jacksonville; [38] Defendant's work at the Afro American Cultural Development Center at Stanton High School; [39] Defendant served on school board patrol in elementary school; [40] Defendant's involvement on the board of directors on the Greater Jacksonville Economic Opportunity Program; [41] Defendant's recruitment of youth for recreational and job finding services; [42] Defendant's difficulty with acceptance as a light-skinned individual and the social effects of having light skin in the black community at a young age; [43] Defendant's involvement in securing grants for the community; [44] Defendant's transportation of senior citizens to and from city council meetings; and [45] Defendant's involvement in bringing about a better relationship and understanding between the local police and the black youth.

(PCR13: 2385 – 86) (internal record citations omitted) (emphasis added). Although the trial court based its primary decision on the lack of deficient performance, it also found that Dougan failed to establish prejudice. (PCR13: 2386, 2391).

The trial court made a very specific finding in regards to each of Dougan's claims. First, in denying Dougan relief for the presentation of additional mental health mitigation evidence, the trial court found that Dougan "has not shown not

[sic] presenting evidence [Dougan] had a mental illness at the time of the offense was not a strategic decision on the part of resentencing counsel in his presentation of mitigating evidence." (PCR13: 2347).

More easily stated, Dougan failed to show deficient performance on the part of his resentencing counsel, and therefore the trial court did not reach the prejudice prong of *Strickland*. In reaching this conclusion the trial court was apt to point out that this Court previously found no mental deficiency within Dougan. (PCR13: 2347). "To the contrary, [Dougan] is intelligent and articulate and a leader among men." *Dougan v. State*, 595 So. 2d 1, 5 – 6 (Fla. 1992).

Second, Dougan failed to establish any claim of suffering from brain damage either at the time of the offense or at trial. (PCR13: 2355 – 56). Although Dr. Woods performed tests which examined mental flexibility in the frontal lobe of the brain, "no PET or CT scan or an MRI was performed on [Dougan] as part of the evaluation." (PCR13: 2156). More importantly, Dr. Woods "could not state with certainty [that Dougan] had any organic brain injury that was not a result of being on death row for the past thirty years." (PCR13: 2356). Specifically, the trial court made a factual finding that "[n]one of the evaluations provided at the evidentiary hearing demonstrate [Dougan] had brain damage at the time of the trial or at the time of the offense. (PCR13: 2357).

And third, Dougan also made a claim that his 1987 resentencing counsel failed

to present thirty percent of his social history and mitigation background to the jury in the 1987 penalty phase. (DB at 112). This thirty percent figure was an arbitrary number which simply means that post-conviction counsel presented *more* evidence of Dougan's history than his 1987 resentencing counsel. Primarily this claim focused on his resentencing counsel's decision to not present evidence of good conduct and behavior while incarcerated. *See Skipper v. South Carolina*, 476 U.S. 1 (1986) (finding that evidence of positive adjustment to life in prison must be considered if proffered in a capital sentencing proceedings). Regardless the trial court held:

> A thorough review of the record and evidence presented reflects that resentencing counsel conducted a reasonable investigation into Defendant's background and social history and made a reasonable decision not to introduce testimony presented at the evidentiary hearing to the jury or judge at resentencing because it could have opened the door and permitted the prosecution to show Defendant has been previously sentenced to death or that he had been indicted for another murder. Further, Defendant has not shown prejudice.

(PCR13: 2387).

c. Dougan Cannot Show Prejudice By Presenting a More Favorable Expert.

During the evidentiary hearing, Dougan presented the testimony of Dr. Woods for purposes of mental health mitigation. According to Dr. Woods, Dougan suffered from a "major depressive disorder" at the time of the crime. (PCR18: 3277). But, Dougan's 1987 resentencing jury also heard Dr. Krop testify that

Dougan suffered from some depression (ReSentTT: XXXIII at 1266). Nevertheless, this Court has previously held simply because a defendant is able to present more favorable mental health testimony at an evidentiary hearing than he did at trial does not render counsel ineffective. *Hoskins v. State*, 75 So. 3d 250 (Fla. 2011) (stating "[C]ounsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert'").

In this case, post-conviction counsel objectively pursued a different mitigation strategy than resentencing counsel. Even still, Dougan was only able to produce a diagnosis of "major depressive disorder" in addition to what Dr. Krop previously testified to in 1987. As such, the trial court determined that Dougan failed to show prejudice to the extent the new and additional information would have produced a different result at the penalty phase. Accordingly, the trial court's ruling should be affirmed.

d. Dougan Failed to Present a Showing of Actual Bias from Juror Kraft's Jury Service.

Dougan asserts the trial court erred in denying his claim of ineffective assistance of counsel during the 1987 resentencing for failure to strike Juror Kraft. (DB at 115). This claim is meritless as Dougan failed to present a showing of actual bias from Juror Kraft, and the record demonstrates that Dougan's counsel exhausted all peremptory challenges and was denied a cause challenge. This claim

is also an attempt to raise a direct appeal issue during post-conviction proceedings and should be dismissed.

In order to show prejudice for ineffective assistance of counsel for failing to exercise a peremptory challenge, a defendant must show than an actually biased juror served on the jury. *Owen v. State*, 986 So. 2d 534, 549 – 50 (Fla. 2008). "Actual bias means bias-in-fact that would prevent service as an impartial juror." *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). In this case, Dougan failed to show that Juror Kraft was actually biased.

Prior to voir dire for the resentencing, the Florida Times Union published an article which included a picture of Dougan and was entitled "Man sentenced to die in '75 back for second trial on fate." (PCR13: 2388). Dougan's resentencing counsel was concerned about how the article portrayed the evidence against Dougan and felt it contained prejudicial information. (PCR13: 2389). Because of the article, resentencing counsel "filed a motion for a continuance, change of venue, a sequestered individual voir dire, and additional peremptory challenges. . . ." (PCR13: 2389). Resentencing counsel did not want jurors who knew Dougan had previously been sentenced to death. (PCR2: 332; PCR13: 2388).

During the voir dire, Juror Kraft indicated that he had seen the article in the week prior to jury selection for the resentencing. (PCR13: 2390). Juror Kraft stated that he did not read the article, but simply "skimmed over it." (PCR13:

2390). Juror Kraft was individually questioned by the state, the defense and the court, and repeatedly stated that he had not formed any opinions regarding the case, could be fair and impartial, and would follow the court's instructions and apply the law to the facts presented in the courtroom. (PCR13: 2390).

Even still, resentencing counsel moved to strike Juror Kraft for cause, which the trial court denied. (PCR13: 2389). Knowing that all his peremptory challenges had been used, resentencing counsel filed a motion for additional peremptory challenges, which was also denied. (PCR13: 2389). Then during voir dire resentencing counsel "further renewed his motion for additional peremptory challenges" and explained that "he probably would have excused Mr. Kraft if he had additional peremptory challenges." (PCR13: 2389). Regardless of the use of peremptory challenges, the record conclusively shows that Juror Kraft was not biased against Dougan. "To the contrary, Juror Kraft's statements on the record [indicate] that he could remain impartial." (PCR13: 2390).

"To find a juror competent and impartial, the juror must be able to place any bias or prejudice aside and be willing and able to follow the instructions of the court to render a verdict solely on [the] evidence presented." (PCR 13: 2388; *Nelson v. State*, 73 So. 3d 77, 85 (Fla. 2011). Here, Juror Kraft indicated to the state, defense and the court more than once that he would remain fair and impartial and did not form any opinions about the case from the article in the Florida Times

Union. Accordingly, the trial court's ruling which denied Dougan relief on a claim of ineffective assistance of counsel for failure to excuse Juror Kraft during the 1987 resentencing should be affirmed as Dougan failed to present any showing of bias.

e. Dougan's Claim Pursuant to *Deck v. Missouri*, is Not Properly Before This Court.

As part of Dougan's claim for ineffective assistance of counsel during his 1987 resentencing, Dougan seems to make a claim for violation of *Deck v. Missouri*, 544 U.S. 622, 633 (2005). (DB at 117). This claim is based on the testimony of one defense witness in 1987, who described visiting Dougan in jail. (DB at 117). This claim is wholly without merit and not properly preserved before this court.

First, Dougan cannot make a claim under *Deck* because the United States Supreme Court ruling in *Deck v. Missouri* does not apply retroactively. *Marquard v. Sec'y Dept. Corr.*, 429 F.3d 1278, 1310 – 12 (11th Cir. 2005) (explaining the ruling in *Deck* did not create a new rule or obligation upon State or Federal courts and until *Deck* the Supreme Court had not addressed the legal issue of shackling defendant's during a penalty phase of a capital trial). Dougan's resentencing was 18 years before the Supreme Court decision in *Deck* and therefore his counsel cannot be ineffective for failing to raise a meritless objection.

Second, *Deck* sought to prohibit the prejudice of a jury *actually viewing* a defendant in shackles during a trial or penalty phase. *Deck*, 544 U.S. at 633

(emphasis added). In this case, there is no evidence the jury actually saw Dougan in shackles. Dougan's entire claim is based on the testimony from one of the 26 defense witnesses who described visiting Dougan in jail. Accordingly, even absent a procedural bar, Dougan would not be entitled to relief under *Deck v. Missouri*, and the trial court's ruling should be affirmed.

V. DOUGAN'S SENTENCE WAS DETERMINED BY THE RESENTENCING JURY AND THE TRIAL COURT JUDGE. (CROSS ANSWER)

Dougan alleges that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated because the surviving victims in an unrelated homicide were vested with the authority to determine his sentence. (DB at 130). This claim lacks merit and should be denied.

a. Standard of Review

Mixed questions of law and fact are reviewed de novo, whereby this Court defers to the trial court on questions of historical fact, but assesses the law as applied to those facts anew. *See Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001) (citing *United States v. Bajakajian*, 524 U.S. 321, 337 n. 10 (1998)).

b. A Direct Constitutional Attack is Not Proper is a Post-Conviction Claim.

Direct constitutional claims are procedurally barred in post-conviction proceedings because they should have been raised on direct appeal. *See Lukehart v. State*, 70 So. 3d 503, 524 (Fla. 2011) (noting constitutional challenge to a procedural rule was barred because it should have been raised on direct appeal); *Jones v. State*, 928 So. 2d 1178, 1182 n. 5 (Fla. 2006) (refusing to consider direct constitutional claims because they should have been raised on direct appeal and were procedurally barred as a result).

Here, Dougan claims his constitutional rights were violated because the

victim's family had veto power over the State Attorney's office in negotiating a plea bargain. (DB at 132). This argument was available during Dougan's direct appeal and therefore is procedurally barred in this proceeding. *Israel v. State*, 985 So. 2d 510, 522 (Fla. 2008); *Jones*, 928 So. 2d at 1182 n. 5; *Robinson v. Moore*, 773 So. 2d 1, 5 – 6 (Fla. 2000).

c. Pre-Trial Input From the Victim's Family Does Not Violate Dougan's Right to Due Process

Dougan was suspected of murdering two people: (1) Stephen Orlando, for which he was convicted and sentenced to death; and (2) Stephen Roberts, which was nolle prossed following the death sentence for the murder of Mr. Orlando. During the pre-trial negotiations for Dougan's resentencing, the State Attorney began negotiations with Dougan for a plea of a life sentence. But when Mr. Robert's family was informed of the plea, they objected and subsequently the State decided to not extend a plea offer to Mr. Dougan.

Such actions by the State Attorney comport with the requirements of Florida Statute § 960.001 – Guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems. Consultation with a victim's family regarding a plea agreement is required by statue and routine practice for prosecutors.

Dougan infers that Mr. Robert's family had the ultimate say in the punishment because a plea agreement fell through. Yet, no evidence has been presented to

substantiate such a claim. (PCR12: 2189). Accordingly, this claim should be denied.

VI. DOUGAN HAS NOT SHOWN THAT THE DEATH PENALTY IN THE FOURTH JUDICIAL CIRCUIT WAS SOUGHT OUT WITH A DISCRIMINATORY PURPOSE IN THIS CASE. (CROSS ANSWER)

Dougan asserts the death penalty in the Fourth Judicial Circuit is sought out and imposed based upon race, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (DB at 134). But, Dougan has not presented any evidence of specific instances of racial discrimination in this case, and therefore is not entitled to relief on this issue. (PCR13: 2407). Moreover, this issue is presented as a direct constitutional attack which is not appropriate for an appeal in a post-conviction proceeding. Accordingly, the trial court's order denying Dougan relief on this claim should be affirmed.

a. Standard of Review

Mixed questions of law and fact are reviewed de novo, whereby this Court defers to the trial court on questions of historical fact, but assess the law as applied to those facts anew. *See Connor*, 803 So. 2d at 605 (citing *Bajakajian*, 524 U.S. at 337 n. 10).

b. A Direct Constitutional Attack is Not Proper as a Post-Conviction Claim.

Direct constitutional claims are procedurally barred in post-conviction proceedings because they should have been raised on direct appeal. *See Lukehart*, 70 So. 3d at 524 (noting constitutional challenge to a procedural rule was barred

because it should have been raised on direct appeal); *Jones*, 928 So. 2d at 1182 n. 5 (refusing to consider direct constitutional claims because they should have been raised on direct appeal and were procedurally barred as a result).

Dougan claims his Eighth Amendment right to be free from cruel and unusual punishment was violated because of the Fourth Judicial Circuit's racist use of the death penalty. (DB at 134). This argument was available during Dougan's direct appeal of his resentencing and therefore is procedurally barred in this proceeding. *Israel*, 985 So. 2d at 522; *Robinson*, 773 So. 2d at 5 – 6 (invoking a procedural bar to a constitutional claim of racial discrimination in the use of the death penalty in St. John's Co., Florida) (receded from on other grounds).

c. Statistics Alone are Not Sufficient to Show a Discriminatory Purpose.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the United States Supreme Court considered a petitioner's challenge to the use of the death penalty in Georgia. McClesky argued the Georgia death penalty statute violated the Equal Protection Clause because a study he cited demonstrated that African Americans convicted of murder were more likely to receive the death penalty than Caucasians convicted of murder. *McCleskey*, 481 U.S. at 291 – 92. The United States Supreme Court disagreed and stated that in order to show the existence of purposeful discrimination a petitioner "must prove that the decisionmakers [sic] in *his* case acted with a discriminatory purpose." *Id*. at 292 (emphasis in original).

This Court in *Foster v. State*, 614 So. 2d 455, 463 – 65 (Fla. 1992) adopted the rule pronounced by the United States Supreme Court in *McCleskey*, and in doing so denied a claim of racial prosecution of the death penalty. In *Foster*, the appellant cited to a statistical study conducted between 1976 and 1987 purporting to show that African American defendants in Bay Co. are more likely to receive a death sentence than Caucasian defendants. *Foster*, 614 So. 2d at 463 – 65. This Court held that Foster's challenge failed for the same reason as McCleskey's; simply, the use of statistics failed to show that the state attorney's office acted with purposeful discrimination in his case. *Id*. at 463 – 64.

Here, Dougan supports his claim of racial prosecution of the death penalty in the Fourth Judicial Circuit with the results of a statistical study conducted between 1976 and 1987. (DB at 134 – 36). Nevertheless, Dougan has failed to point out specific instances of purposeful discrimination in his case. (PCR12: 2407 – 08). Accordingly, Dougan's claim should be rejected because it fails to provide evidence of purposeful discrimination in his case. *Robinson*, 773 So. 2d at 5 – 6 (rejecting a claim of racial discrimination based on a showing of statistical data gathered between 1976 and 1987 in St. Johns Co., because such data did not provide proof that the decision makers in the case acted with a discriminatory purpose).

d. Dougan has Not Shown that The Trial Court Acted with a Discriminatory Purpose.

Dougan maintains the trial court judge acted with racial animus in pronouncing his sentence in 1987. (DB at 137). Yet, Dougan has failed to show any specific instances of racial discrimination from the trial court in *his* case. (DB at 137 – 141); *Foster*, 614 So. 2d at 463 – 65. Dougan's brief actually points to specific instances where the trial court noted it would be willing to accept a plea agreement to life in prison, a fact which cuts against his argument for racial discrimination.

In order to prevail on a claim of racial discrimination Dougan must provide exceptionally clear proof of racial discrimination on the part of the trial court judge, but Dougan cannot show one instance where the trial court acted with discriminatory intent in this case. *Foster*, 614 So. 2d at 463 – 65. Thus, the ruling from the trial court should be affirmed and Dougan should be denied relief.

VII. DOUGAN MAY NOT IMPEACH HIS 1987 SENTENCE WITH UNRELIABLE INFORMATION THAT INHERES TO THE VERDICT OR THE JURY'S DELIBERATIONS. (CROSS ANSWER)

Dougan asserts his resentencing jury considered extraneous and inflammatory information in reaching their verdict. (DB at 141). The basis for this claim lies in unreliable notes from juror interviews conducted by a third party. (PCR12: 2241). Regardless of the information contained in the notes from the interviews of select jurors, Dougan has not shown specific instances of juror misconduct to suggest his verdict is subject to legal challenge. (PCR12: 2240 – 41). As such, the ruling from the trial court should be affirmed.

a. Standard of Review

Mixed questions of law and fact are reviewed de novo, whereby this Court defers to the trial court on questions of historical fact, but assesses the law as applied to those facts anew. *See Connor*, 803 So. 2d at 605 (citing *Bajakajian*, 524 U.S. at 337 n. 10).

b. The Lower Court Determined The Information From the Juror Interviews was of Questionable Reliability.

Following the 1987 resentencing, a third-party researcher conducted interviews with three members of Dougan's resentencing jury. (PCR12: 2239 – 40). Dougan submitted the notes from those interviews as substantive proof of juror misconduct. (PCR12: 2240; DB at 141 – 44). The trial court disagreed, and specifically found

"the reliability of the juror interviews is questionable." (PCR12: 2241).

The trial court's finding is most likely tied to the fact that the notes from the juror interviews consisted of both direct quotes, and summarized responses. (PCR12: 2240). Additionally, the third-party researcher, Dr. Radlet, could not independently verify any of the information within the notes. (PCR12: 2240). Therefore, Dougan has based his claim on unreliable summarized notes from only a fraction of the entire resentencing jury, which could not be verified by the third-party researcher.

c. Florida Rule of Criminal Procedure 3.575 – Motion to Interview Juror – Has Been Consistently Upheld.

Dougan contends that Florida Rule of Criminal Procedure 3.575 violates his Fifth, Sixth, and Fourteenth Amendments rights under the United States Constitution and clearly established federal law. (DB at 144 n. 207). Fla. R. Crim. P. 3.575, outlines the requirements for a motion to interview jurors following a verdict, if a party has reason to believe the verdict is subject to legal challenge. Fla. R. Crim. P. 3.575 (2015).

This Court has consistently upheld the constitutionality of Fla. R. Crim. P. 3.575 and denied relief to defendants who claim that the restriction on their attorney's ability to interview jurors violated their constitutional rights. *Deparvine v. State*, 146 So. 3d 1071, 1105 (Fla. 2014); *Barnhill v. State*, 971 So. 2d 106, 1117 (Fla. 2007); *Power v. State*, 886 So. 2d 952, 957 (Fla. 2004); *Sweet v. Moore*, 882

So. 2d 1269, 1274 (Fla. 2002); *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001). Therefore, Dougan's claim that Fla. R. Crim. P. 3.575 is unconstitutional should be rejected.

d. Matters That Inhere to The Verdict Are Off Limits.

"It is a well settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations. *Van Poyck v. State*, 91 So. 3d 125, 128 – 29 (Fla. 2012); *Foster v. State*, 132 So. 3d 40, 66 – 67 (Fla. 2013); *Duckett v. State*, 918 So. 2d 224, 231 n.7 (Fla. 2005); *Reaves v. State*, 826 So. 2d 932, 943 (Fla. 2002); *Vining v. State*, 827 So. 2d 201, 206 (Fla. 2002); *Devoney v. State*, 717 So. 2d 501, 503 (Fla. 1998); *Mitchell v. State*, 527 So. 2d 179, 181 (Fla. 1988).

Florida Statue § 90.607(2)(b) codifies this principle stating "[u]pon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment." Fla. Stat. § 90.607(2)(b). This Court has interpreted that statute to "absolutely forbid any judicial inquiry into emotions, mental process, or mistaken belief of jurors." *Van Poyck*, 91 So. 3d at 128 – 29 (citing *Baptist Hosp. of Miami, Inc. v. Maler*, 579 So. 2d 97, 99 (Fla. 1991)). "In *Maler*, this Court further explained that 'the reasons why jurors reach[] a particular verdict clearly are subjective impressions or opinions that are not subject to judicial inquiry.'" *Van Poyck*, 91 So. 3d at 129

(quoting *Maler*, 579 So. 2d at 99).

In *Devoney v. State*, this Court addressed a similar claim following the defendant's conviction for DUI manslaughter. *Devoney*, 717 So. 2d at 501. During the trial the jury was specifically instructed to ignore and not consider a reference to a speeding ticket the defendant received prior to the accident in question. *Id*. at 501 – 02. Following the verdict, the jury foreman contacted the defense attorney and told him the jury did discuss the speeding ticket during their deliberations. *Id*. at 502. On appeal, this Court denied Devoney relief stating "we are convinced that the discussions concerning the speeding ticket inhered in the verdict." *Id*. at 504.

In this case, each speculative issue presented by Dougan either inheres in the verdict or is a conclusory statement to which no real meaning can be ascertained. (DB at 142 a. "the jurors *knew* during deliberations that a white girl had been picked up and raped"). Regardless, Dougan's intent in attempting to interview the jurors amounts to nothing more than a search within the jury's deliberations and emotions as to the verdict and is not proper. *Devoney*, 717 So. 2d at 504 – 05. Accordingly, this claim should be rejected.

VIII. THE TRIAL COURT'S FINDINGS AS TO MITIGATION HAVE PREVIOUSLY BEEN AFFIRMED ON DIRECT APPEAL AND MAY NOT BE CHALLENGED IN POST-CONVICTION. (CROSS ANSWER)

Dougan asserts the trial court failed to consider mitigating circumstances, specifically his ability for rehabilitation, during the 1987 resentencing. (DB at 145). This argument should be dismissed as procedurally barred and lacking all merit, because this Court previously addressed the mitigation presented at resentencing during the direct appeal. *Dougan*, 595 So. 2d at 5. (Dougan VI).

a. Standard of Review.

Mixed questions of law and fact are reviewed de novo, whereby this Court defers to the trial court on questions of historical fact, but assesses the law as applied to those facts anew. *See Connor*, 803 So. 2d at 605 (citing *Bajakajian*, 524 U.S. at 337 n. 10).

b. Dougan May Not Raise a Challenge to The Trial Court's Finding on Mitigation

In his direct appeal to this Court, Dougan claimed the trial court did not consider and weigh the mitigating circumstances in sentencing him to death in 1987. *Dougan*, 595 So. 2d at 5. One of Dougan's specific claims was the trial court did not consider Dougan's potential for rehabilitation. *Id.* This Court disagreed and stated "[i]t is apparent from the judge's written findings that he considered these matters. Based on his evaluation of the evidence, however, he

decided that the facts of this case did not support Dougan's contention that these matters constituted mitigating circumstances." *Dougan*, 595 So. 2d at 5 (citing *Rodgers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988)).

Now, Dougan again presents an identical claim to his direct appeal claiming the trial court did not consider his potential for rehabilitation in evaluating the mitigating circumstances. (DB at 145 – 46). It is a well settled maxim of law that *res judicata* precludes claims which were already decided on direct appeal are from further consideration. *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992); *Denson v. State*, 775 So. 2d 288, 290 (Fla. 2000) (stating "the concept of fundamental error was never intended to provide litigants with a means to circumvent the type of procedural bar that occurs when the exact claim has already been decided on the merits and is thus res judicata"). "Thus, under *res judicata*, a judgment on the merits bars a subsequent action between the same parties on the cause of action." *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003). Therefore, Dougan's claim is procedurally barred and should be rejected as such.

c. Dougan's Claim That The State Authored The 1987 Sentencing Order is Based on Speculation.

Dougan also asserts the state authored the trial court's sentencing order during the 1987 resentencing. (DB at 147). Dougan's only evidence to support this claim consists of a single, unsigned copy of the sentencing order within the State Attorney's file. (DB at 147).

Dougan's claim is speculative and should be rejected as such. Dougan admits his claim is based on speculation by stating "*[i]f* 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." (DB at 147) (emphasis added).

This Court has repeatedly held that relief cannot be granted based on speculative allegations. *Gore*, 964 So. 2d at 1266 – 67 (rejecting a claim of an improper sentencing order based on speculation because no additional proof was offered by the defense); *Rodriguez v. State*, 919 So. 2d 1252, 1267 – 68 (Fla. 2005) (concluding that speculative assertions do not constitute evidence the prosecutor, and not the trial court, wrote the sentencing order); *Jones v. State*, 845 So. 2d 55, 63 – 64 (Fla. 2005) (finding claim unsupported where the defendant produced no direct evidence at evidentiary hearing that prosecutor in his resentencing, and not the trial court, wrote the sentencing order). Therefore, this claim should be rejected.

IX. THE FLORIDA SUPREME COURT HAS NEVER GRANTED RELIEF PURSUANT TO THE DISSENT IN *LACKEY v. TEXAS.* (CROSS ANSWER).

Dougan asserts his Eighth Amendment right to be free from cruel and unusual punishment is violated as a result of his status on death row for the past forty years. (DB at 148). This claim should be rejected as meritless because this Court has repeatedly refused to grant relief on similar claims.

a. Standard of Review

"A trial court's ruling on a pure question of law is subject to de novo review." *Demps v. State*, 761 So. 2d 302, 306 (Fla. 2000). This Court is to afford a strong presumption of correctness to the trial court's determinations of historical fact, but conducts an independent review of the application of law to those facts. *Connor*, 803 So. 2d at 607 – 08.

b. *Lackey v. Texas,* Does Not Create a Substantive Right for Relief.

Dougan points to the United States Supreme Court memorandum in *Lackey v. Texas*, 514 U.S. 1045, 1045 – 46 (1995) (Stevens, J., joined by Breyer, J. dissenting from denial of certiorari) as the basis for his claim of cruel and unusual punishment. But, *Lackey* does not create a substantive basis for relief. *Lackey* is the opinion of one justice and concurrence of another on a matter of granting certiorari. *Lackey*, 514 U.S. 1045 – 46. The memorandum in *Lackey* neither reached the merits of the argument nor was adopted by a majority of the court. *Id*.

Thus, Dougan's argument does not contain the legal foundation for which he seeks relief and should be denied.

c. The Florida Supreme Court Has Repeatedly Rejected Claims of Cruel and Unusual Punishment Under *Lackey v. Texas*.

This Court has consistently rejected claims of cruel and unusual punishment under *Lackey v. Texas*. *Carroll v. State*, 114 So. 3d 883, 889 – 90 (Fla. 2013); *Pardo v. State*, 108 So. 3d 558, 569 (Fla. 2012); *Ferguson v. State*, 101 So. 3d 362, 366 – 67 (Fla. 2012); *Gore v. State*, 91 So. 3d 769, 780 (Fla. 2012), *Valle v. State*, 70 So. 3d 530, 552 (Fla. 2011); *Elledge v. State*, 911 So. 2d 57, 77 (Fla. 2005); *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003); *Foster v. State*, 810 So. 2d 910, 916 (Fla. 2002); *Booker v. State*, 773 So. 2d 1079, 1096 (Fla. 2000).

Moreover, much of the delay within this case is attributable to Dougan's appeals, post-conviction motions and habeas petitions. In fact in this appeal alone Dougan filed no fewer than six motions for extension of time to file his answer/cross-reply brief.[5] Dougan "cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction[s] and sentence." *Carroll*, 114 So. 3d at 890 (quoting *Valle*, 70 So. 3d at 552 (quoting *Tompkins v.*

[5] Florida Supreme Court Docket, Case Docket, SC13-1826 – State of Florida v. Jacob John Dougan, Jr., www.floridasupremecourt.org, click "Docket Search" then enter case number SC13-1826.

State, 994 So. 2d 1072, 1085 (Fla. 2008))). Accordingly, this claim should be denied as lacking merit.

X. FLORIDA'S CAPITAL SENTENCING STRUCTURE HAS BEEN UPHELD AS CONSTITUTIONAL (CROSS ANSWER).

Dougan claims the Florida capital sentencing procedures violate his Sixth and Eighth Amendment rights in light of the United States Supreme Court decision in *Ring v. Arizona*. (DB at 149). This argument has been consistently rejected by this Court and Dougan has not presented any new or novel information which would require this Court to reconsider its position.

a. Standard of Review.

"A trial court's ruling on a pure question of law is subject to de novo review." *Demps*, 761 So. 2d at 306. This Court is to afford a strong presumption of correctness to the trial court's determinations of historical fact, but conducts an independent review of the application of law to those facts. *Connor*, 803 So. 2d at 607 – 08.

b. *Ring v. Arizona*, Does Not Apply Retroactively.

Dougan maintains the United States Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 (2002), is retroactive under this Court's decision in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). (DB at 150). Yet, both the United States Supreme Court and this Court have previously held that *Ring* **does not apply retroactively**. *Schriro v. Summerlin*, 542 U.S. 348, 357 (2004); *Johnson v. State*, 904 So. 2d 400, 409 – 12 (Fla. 2005).

In *Johnson*, this Court held the decision in *Ring v. Arizona* does not apply retroactively after analyzing *Ring* under the test developed in *Witt*. *Johnson*, 904 So. 2d at 409 – 12. This Court specifically held "[t]o apply *Ring* retroactively 'would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state . . . beyond any tolerable limit.'" *Johnson*, 904 So. 2d at 412 (quoting *Witt*, 387 So. 2d at 929 – 30).

This Court recently reiterated its position that *Ring* does not apply retroactively, and signaled no intent to recede from this position. *State v. Johnson*, 122 So. 3d 856, 865 (Fla. 2013) (noting that *Ring* does not apply retroactively as was also recognized by the United States Supreme Court). Therefore, Dougan's claim that *Ring v. Arizona* has a retroactive application should be rejected as meritless.

c. Florida's Capital Sentencing Structure Has Been Found Constitutional.

Dougan asserts the Florida capital sentencing structure violates his Sixth and Eighth Amendments rights under the United States Constitution and *Ring v. Arizona*. (DB at 150). This is a facial challenge to the constitutionality of Florida Statute § 921.141, which governs Florida's capital sentencing procedures. Dougan's argument has been repeatedly rejected by this Court.

In *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert denied*, 123 S.Ct. 662 (2002), this Court considered whether the holding in *Ring* applied to the Florida

capital sentencing structure. *Bottoson*, 833 So. 2d 694 – 95. This Court declined to extend *Ring* to Florida's capital sentencing structure and noted that for 25 years, the United States Supreme Court has reviewed Florida's sentencing procedures and specifically did not address any perceived conflict between *Ring* and Florida's sentencing procedures. *Id*. at 695.

In *King v. Moore*, 831 So. 2d 143 (Fla. 2002), *cert. denied*, 123 S.Ct. 657 (2002), this Court again rejected a claim that *Ring* should be extended to Florida's sentencing procedures. Most notably, this Court took into consideration the actions of the United States Supreme Court in deciding both *Ring* and *King* stating:

> The United States Supreme Court in February 2002, stayed King's execution and placed the present case in abeyance while it decided *Ring*. That Court then in June 2002, issued its decision in *Ring*, summarily denied King's petition for certiorari, and lifted the stay without mentioning *Ring* in the *King* order.

King, 831 So. 2d at 144. This Court inferred that the United States Supreme Court considered this specific issue and rejected it when it denied certiorari in *King*.

In addition, this Court has repeatedly rejected invitations to reconsider its opinion in *Bottoson* and *King*, noting that Florida's capital sentencing structure has been upheld as constitutional. *Peterson v. State*, 94 So. 3d 514 (Fla. 2012), *cert. denied*, 133 S.Ct. 973 (2012); *Baker v. State*, 71 So. 3d 803, 823 – 24 (Fla. 2011), *cert. denied*, 132 S.Ct. 1639 (2012); *Darling v. State*, 966 So. 2d 366 (Fla. 2007); *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007).

Finally, although the United States Supreme Court recently granted certiorari in *Hurst v. Florida*, 14 – 7505, on a question of "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of [the] decision in *Ring v. Arizona*," no decision has been rendered which actually holds Florida's capital sentencing structure as unconstitutional. Therefore, until a contrary holding from the United States Supreme Court, Florida's capital sentencing structure remains constitutional.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Honorable Court reverse the trial court's ruling which granted Jacob Dougan a new trial and a new penalty phase due to the ineffective assistance of counsel.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. E-MAIL/E-Service on 29 May 2015, to Mark Olive, Esq. at meolive@aol.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

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