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

Lower Court No. 74-4139

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

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

PROPOSED RESPONSE TO NEW ARGUMENTS IN STATE'S REPLY, AND REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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The Answer Brief Of Appellee and Initial Brief of Cross-Appellant will be referred to as: AB

The State's Reply Cross-Answer Brief of Appellant will be referred to as: RB.

ARGUMENT I: THE FALSE PROSECUTION EVIDENCE (proposed response to reply brief)

In its reply brief, the state argues for the first time that the facts found below–that the prosecutor allowed Hearn to provide false testimony that he was told he would receive a life sentence when in fact he was told his sentence would be at the mercy of the state–may not be considered because this issue was, or could have been, addressed on direct appeal. The state also contends for the first time in its reply brief that Appellee did not raise this as both a *Giglio* and a *Brady* claim below. Both belated arguments are without merit and waived.

A. The res judicata argument

1. Lacks merit

Mr. Hearn was arrested for the murders of Mr. Orlando and Mr. Roberts. According to Mr. Jackson's Brief of Appellants filed in this Court in 1977, before the trial in Mr. Orlando's case the state did not disclose that part of its agreement with Hearn was that charges in Mr. Roberts' case would be dismissed. 1977 Brief at 33. According to the Brief, the defense did not learn until after trial, and after Mr. Hearn's testimony, that part of Mr. Hearn's plea agreement was that he would not be prosecuted for Mr. Roberts' death. *Id.* at 35.

The state responded in this Court that in his January 31, 1975, deposition before trial Mr. Hearn stated that, as part of his

agreement to testify in Mr. Orlando's case, any charges concerning Mr. Roberts "'would be dropped.'" Brief of Appellee at 35. The state provided the Court with a copy of the deposition which "completely obliterates appellants' position" about not knowing the charges in Mr. Roberts' case would be dropped. *Id.* This Court thus held "[n]o false testimony was given *in this regard* as is suggested by appellants," *Barclay v. State*, 343 So.2d 1266, 1270 (Fla. 1977)(emphasis added), referencing the January pre-trial deposition.

The basis for relief on Appellee's claim below was not that the state failed to disclose that Hearn would not be prosecuted in Mr. Roberts' case. The basis for relief was that the state let Hearn lie in his deposition (and trial) when he said the prosecutor was going to recommend a life sentence which Hearn expected to serve. In fact, there was never an offer of a life sentence–Hearn's sentence was to be "at the mercy of the state,"[1] and he received a fifteen year sentence and was paroled in less than five.[2]

The state's new argument that *res judicata* bars consideration

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[1]The Amicus Brief of the Equal Justice Initiative ("EJI brief") provides context for why and how such misconduct occurred in Jacksonville 40 years ago. EJI brief at 11-13.

[2]AB at 12-17. The state does not mention in its Answer Brief the prosecutor's new words below–that the guilty plea "was straight up. It was at the mercy of the state attorney and the judge," AB at 14, or discuss how that could have been raised on direct appeal.

of this claim is incorrect. First, the state contends that the present claim should have been raised in 1985 in Mr. Dougan's second direct appeal ordered by this Court. RB at 9-10. There was nothing in the direct appeal record to suggest Hearn's sentence was to be at the mercy of the state, and was not life imprisonment, so there was no basis to raise the claim. The fact that Mr. Jackson raised a claim the state showed was "completely obliterated by the record" is no evidence of what valid arguments could or should have been raised on direct appeal. It is yet more evidence of Mr. Jackson's incompetence.

It is not clear, but the state may also be arguing this issue has already been decided because of the "completely obliterated" argument Mr. Jackson made in 1977. *Res judicata* requires four "identities," *i.e.*, identity in the thing sued for, identity in the cause of action, identity of persons and parties, and identity of the quality in the persons for or against whom the claim is made. *Yulee v. Canova*, 11 Fla. 9, 56 (1865). Identity in the cause of action turns on whether "the testimony produced in the second case is essentially the same as that which was, or would have been required to be, presented in the first action." *Gordon v. Gordon*, 59 So.2d 40 (Fla. 1952). *See also Tyson v. Viacom, Inc.*, 890 So.2d 1205, 1209 (Fla. 4th DCA 2005)(en banc and per curiam)(identity of the cause of action is a question of "whether the facts or evidence necessary to maintain the suit are the same in both

actions.")

Appellee did not argue, and the lower court did not decide, that the defense did not know at trial that Mr. Hearn had an agreement whereby he would not be prosecuted for Mr. Roberts' death, the issue this Court addressed on appeal. The lower court addressed what Mr. Hearn was told he would receive for testifying against Mr. Dougan--how much time he would be imprisoned--and how he lied about that. "For res judicata or collateral estoppel to apply, there must also exist in the prior litigation a 'clear-cut former adjudication' on the merits." *State St. Bank & Trust Co. v. Badra*, 765 So.2d 251, 254 (Fla. 4th DCA 2000)(quoting *Suniland Assocs. v. Wilbenka, Inc.*, 656 So.2d 1356, 1358 (Fla. 3d DCA 1995)). "[T]he party claiming the benefit of the former adjudication has the burden of establishing, with sufficient certainty by the record or by extrinsic evidence, that the matter was formerly adjudicated." *State St. Bank & Trust*, 765 So.2d at 254 (citation omitted). Appellant has failed.[3]

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[3]Furthermore, the legal "fiction" of *res judicata* should not be invoked to frustrate "the fair and proper administration of justice." *Universal Const. Co. v. City of Fort Lauderdale*, 68 So.2d 366, 369 (Fla. 1953). *See also State v. McBride*, 848 So.2d 287, 291 (Fla. 2003)("This Court has long recognized that res judicata will not be invoked where it would defeat the ends of justice."). To the degree that the State argued in 1977 before this Court that the full agreement with Hearn was before this Court, the lower court found that to be untrue. *Cf. Department of Revenue v. Allen*, 717 So.2d 130 (Fla. 4th DCA 1998)(*res judicata* does not apply when prior judgment procured by fraud.)

2. Was repeatedly waived and cannot be raised for the first time in a reply brief

In addition to the state's argument lacking any merit, the state is triply barred from raising it. First, it is incorrect to ask "did circuit court Judge Johnson err (RB at 7)" by holding, when the state invited, a hearing on this claim.[4] Second, *res judicata* was not raised below as a ground to deny relief and is waived on appeal.[5] Third, this argument was not made in the State's Brief of Appellant and thus was waived. "An issue raised for the first time on appeal in appellants' reply brief, even though

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[4]The state advised the lower court it fully understood the claim being raised and had no objection to an evidentiary hearing on it. The state cannot "make or invite error at trial and then take advantage of the error on appeal." *Czabak v. State*, 570 So.2d 925, 929 (Fla 1990). *See also Tate v. Tate*, 91 So.3d 199 (Fla. 2d DCA 2012)("It is well settled that under the invited error rule a party cannot successfully complain about an error for which he or she is responsible or complain of rulings that he or she has invited the trial court to make.")

[5]"Contemporaneous objection and procedural default rules apply not only to defendants, but also to the state." *Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993). "A party may not argue on appeal matters which were not properly excepted to or challenged and, thus, were not preserved for appellate review." *Commission on Ethics v. Barker*, 677 So.2d 254, 256 (Fla. 1966). *See also Chung v. State*, 641 So.2d 942, 946 (Fla. 5th DCA 1994)("we also find that by agreeing to the *Allen* charge and to the jury's further deliberation, and also by supplying a new verdict form, the state waived any objection"); *Allstate Ins. Co. V. Gillespie*, 455 So.2d 617, 620(Fla. 2d DCA 1984)("A litigant may not sit on his hands, fail to voice his objections, and then claim prejudice when a final judgment is entered which may adversely affect him. Furthermore, he may not raise his objections for the first time on appeal. Procedural irregularities to which no objection is made are waived.")

properly preserved for appeal, will not be considered by this court." *Snyder v. Volkswagen of Am., Inc.*, 574 So. 2d 1161 (Fla. 4th DCA 1991). *See also Gen. Mortgage Assocs., Inc. v. Campolo Realty & Mortgage Corp.*, 678 So. 2d 431, 431 (Fla. 3d DCA 1996)("The fact that this issue was raised for the first time in the reply brief alone precludes our consideration of the matter."); *Pursell v. Sumter Elec. Co-Op., Inc.*, 169 So. 2d 515, 518 n.2 (Fla. 2d DCA 1964)(declining to consider an argument made for the first time in the reply brief).

B. The arguments that *Brady* was not raised below and that the lower court judge was confused are without merit and waived

The state contends for the first time in its reply brief that Mr. Dougan's claim is only a *Giglio* and not also a *Brady* claim and, as a result, "any references to *Brady* are improper and ultimately confused the decision of the trial court." RB at 11. This two page section of the reply brief begins with a subheading not contained in the state's Initial Brief: "b. The trial court confused the Standard for *Brady* and *Giglio* Violations." No one ever before said "any references to *Brady* are improper." *Id.*

Beginning with his Amended Motion to Vacate Judgment of Conviction and Sentence, this claim was based upon *Brady* and *Giglio*. V. 7, pp. 1137-1140. The state recognized and conceded at the final *Huff* hearing what this claim entailed: "that's an allegation that [there was] some sort of secret deal, *Brady*,

Giglio" and "the Court will determine whether he proves it." V15, 2694. In post-hearing briefs, both parties addressed *Brady* and *Giglio*, V,10, 1837-1942 (Appellee), V. 10, 1702 (state describing both *Giglio* and *Brady* Claims), 1711 (state arguing both *Giglio* and *Brady* claims).

And the State's Initial Brief of Appellant had no section about there only being a *Giglio* claim or that Judge Johnson was confused about the difference between *Giglio* and *Brady*. Instead, the Brief acknowledged: "[s]ince Judge Johnson's order found compound *Brady* and *Giglio* violations, the State reviews the standards for each of them"(SIB, 32); the lower court ruled there were prejudicial *Brady* and *Giglio* violations (*id*. at 34); and "the trial court erred in concluding that there was a *Brady* violation and *Giglio* lack of harmfulness." *Id*. at 45.

ARGUMENT III: MR. DOUGAN WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN 1975 IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

A. Defense attorney Jackson was, according to the 1975 prosecutors, "the Raiford Express" (proposed response to reply brief)

In its Initial Brief, the state did not address the scores of affidavits and documents attesting to Mr. Jackson's pervasive pattern of ineffective representation in criminal matters, affidavits and documents to which the state had not objected below

and which the lower court referenced in the order granting relief.[6] In the lower court the state conceded Mr. Jackson's "reputation in the legal community" is "minimally probative of *Strickland*'s deficiency prong." V.10, 1746.

For the first time in its reply brief the state argues –for three ½ pages (RB at 32-36)–that these un-objected to affidavits and documents form "the foundation" for Appellee's ineffectiveness argument, they are "hearsay," and they are "irrelevant to establishing deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984)." RB 32.[7] However, in the lower court counsel for the state advised the Court "I have read the affidavits. I understand they have been considered by other courts and they generally say. .. *this was the way Ernest Jackson ran his practice. I'm not contesting that fact."* V16, 2923 (emphasis added).[8]

The state's newfound, lengthy argument--that the manner in

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[6]*See* AB of Appellee at 65-68.

[7]During the evidentiary hearing, the state expressly waived objection to the testimony and affidavits regarding Mr. Jackson's ingrained pattern of ineffectiveness. V.16, 2923–2928 (no objections to affidavits and/testimony about Jackson); V. 18, 3246-3252 (same); V18, 3382 (affidavits admitted). *Cf. Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993)(objection rule applies to state as well as defense). In a *footnote* in the State's Brief of Appellant is a complaint about "affidavits," but no mention of the affidavits about Jackson's regular ineffective assistance. *See* SIB, p. 52, note 86.

[8]The other courts to consider many of these affidavits include this Court in *Barclay v. Wainwright*, 444 So.2d 956 (Fla. 1983), and *Dougan v. Wainwright*, 448 So.2d 1005 (Fla. 1984).

which Mr. Jackson practiced criminal defense is irrelevant to whether he operated in this case contrary to professional norms--is incorrect. Under *Strickland*, it is elementary that "the performance inquiry must be whether counsel's assistance was reasonable considering *all* of the circumstances." *Strickland*, 466 U.S. at 688 (emphasis added). A relevant circumstance is apparent from the state's belated citation to *Provenzano v. Singletary*, 148 F.3d 1327, 1333 (11th Cir. 1998), in which petitioner's ineffectiveness claim was rejected where counsel "had earned the reputation in the Bar and the community as a leading criminal defense attorney." As the state's RB recites at 34, the "experience" a defense attorney has is relevant to the deficient performance inquiry, and Mr. Jackson's experience was abysmal.[9]

Finally, it is inaccurate, and a new argument in a reply brief, to write that these affidavits and exhibits are the "foundation" of Appellee's ineffective assistance of counsel claim. As the table of contents to the Answer Brief of Appellee and Initial Brief of Cross-Appellant at p. v illustrates, numerous specific instances of Mr. Jackson's failure to perform according to professional norms *in this case* were established below. For

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[9]It is not accurate to write that the affidavits contain only opinions. They state facts. For example, that Mr. Jackson: took on more cases than he could handle; did not prepare his cases; was not familiar with applicable law; did not prepare; did not file pretrial motions, and never undertook plea negotiations. AB of Appellant at 65-68

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

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

This theory drew repeated, sustained, objections and admonishments from the Court (in the jurors' presence), was doomed at the outset, and predictably, prejudicially, backfired on the defense. The co-defendants, who sought a severance from Mr. Jackson, did not endorse this theory. See AB of Appellee, pp. 70-81.

> B. Mr. Jackson unreasonably and prejudicially failed to present evidence of good character at trial (reply/cross appeal)

There was copious evidence of Mr. Dougan's good character available to trial counsel in 1975. Mr. Dougan testified he was innocent, but counsel did not introduce this admissible evidence of his reputation for truth and veracity. *See Chavers v. State*, 380

So.2d 1180 (Fla. 5th DCA 1980). Co-defendant Evans also testified to his own innocence, but his attorney did introduce evidence of Evans' character for truth and veracity. Mr. Dougan was convicted of first-degree murder; Mr. Evans was convicted of second-degree murder. The trial judge attributed these different outcomes to the "skill" of Evans' attorney. Mr. Dougan's attorney was prejudicially ineffective.

The state argues that the prosecutors did not pursue convictions based upon the "same theories of culpability" for Evans and Dougan and that is why Evans was convicted of a lesser offense. RP at 41. The jury instructions, argument, and evidence show otherwise. The co-defendants were expressly tried under "principal" law that "[a] person may commit a crime by his own personal act or through another person." T. at 2030. Thus, what any one defendant did each of the other defendants was "equally guilty." *Id.*

For example, the state introduced the testimony of Mr. Black who said Brad Evans said that he had tried to stab the victim in the chest and his knife kept closing up on him. T. 1183. The prosecutor cross-examined Brad Evans:

> Q. Was there joking over at the apartment about the knife closing up?
>
> A. No, sir. I don't remember.
>
> Q. When you were stabbing Steven Orlando in the back?

A. I don't remember.

T. at 1829. The state argued "Brad Evans pushed that small knife into the stomach" of the victim. T., 2031. He then argued from the law of "principals" that "[w]hen that pistol was fired it was fired by Brad Evans" and "[e]very time that Elwood Barclay stabbed in the back, Brad Evans...[was] stabbing in the back under the law." *Id.*,2030-2031. And the prosecutor made Mr. Dougan guilty because of what he argued Evans had done: "every time Brad Evans pushed that small knife into the stomach, Jacob Dougan ...[was] right there under the law doing the same thing." *Id.*

So the "theories of culpability" were expressly the same. What was different was evidence of reputation for truth and veracity. In its brief the state completely ignores this admissible evidence and incorrectly writes: "in this case the only question Mr. Jackson would have been lawfully permitted to ask [other witnesses] is, whether Dougan had a reputation in the community for non-violence." RB at 42. Lawfully, Mr. Jackson would have been entitled to ask scores of witnesses[10] about Mr. Dougan's reputation for truth and veracity. *Butler v. State*, 376 So.2d 937 (Fla. 4th DCA 1979). No reasonable attorney would have failed to present this evidence and Mr. Jackson's unreasonable omission undermines

[10]*See* Initial Brief of Cross-Appellant, notes 132, 135.

confidence in the result.[11]

C. Allowing the victim's step-father to testify and then insulting him (reply/cross appeal)

It was error for the step-father to testify and identify the victim from photographs and Mr. Jackson was found below to have been ineffective for allowing it. V13, 2321. The state does not disagree.[12]

The state argues that there was no prejudice because the "step-father's testimony was neutral in content and did not invoke any inappropriate emotions on behalf of the jury." AB at 45. The state did not respond to the following from the Initial Brief of Cross-Appellant at 88-89:

> Worse, Mr. Jackson antagonized and insulted Mr. Mallory, unreasonably increasing the jurors' sympathy, by calling the victim only by his last name: "Q. Was Orlando living in the home with you at the time of his death?" To which the witness responded: "A. I believe my stepson has a first name. I would appreciate it if you would use it." T. 162. But worse, after a discussion about an objection to the question, Mr. Jackson did it again, one page later: "Was Orlando living at home with you at the time of his death?" The stepfather then asked the Court for help: "Your Honor, could I ask the Defense Attorney to please refer to my stepson as Stephen?" T 164. The court

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[11]Continuing its focus on reputation for non-violence instead of truthfulness, the state argues that admission of such evidence on behalf of Mr. Dougan would have opened the door for "evidence of the additional murder charge not before this jury." AB at 41. Evans introduced such evidence and the state did not offer the other murder charge in response.

[12]The state writes that Mr. Dougan has not identified other non-family members who were available at trial to identify the body. The victim's friends, who had been with him the evening before the crime, testified at trial.

> asked Mr. Jackson to do so, he agreed, and then asked if the witness had put the victim out his home at the time of his murder. An objection was sustained. T. 164.
>
> Two witnesses later the person who discovered the victim's body and who also knew him testified. On cross, Jackson asked if he knew "the reputation of Orlando at school?" **Counsel for a co-defendant rose**, "may I rise at this time, and I rise to say that, I too feel as though that Counsel should refer to the deceased as Stephen Orlando instead of Orlando, Your Honor." TT. 249. This was co-defendant's counsel agreeing with the victim's family.

As the lower court found, Mr. Jackson's cross-examination of Mr. Mallory "may have done more to evoke the sympathy of the jury..." *Id.* at 2322. It was prejudicially ineffective to insult the step-father and the victim.

D. Prejudicial evidence of another murder (reply/cross-appeal)

Mr. Dougan demonstrated in his brief that during the guilt/innocence portion of the trial Mr. Jackson asked – in the presence of the jury–what was on a tape made by state's witness Mattison. Mattison replied:

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

T. at 976. Thus, defense counsel introduced evidence of a murder other than the murder of Mr. Orlando. The state writes that this happened at the penalty phase. RB at 46. It happened at the guilt stage, and it was prejudicially ineffective.

E. Absence of plea negotiations (reply/cross-appeal)

The state does not deny: Mr. Jackson never sought plea deals for his many clients; he did not and would not seek a plea deal in this case; three people who said they only made tapes either were not charged or had serious charges dismissed; Hearn received a plea deal on the eve of trial; or that Crittendon was offered immunity. Pleas were available; Mr. Jackson was prejudicially ineffective.

F. No request for a severance (reply/cross appeal)

The lower court found that Mr. Jackson's failure to seek a severance, "would seem to go against the professional norms." Order at 2292. The reason he did not seek a severance when all other counsel did was his unreasonable actions in not preparing a separate defense and because he was conflicted, having solicited two other co-defendants as clients. AB at 91.

G. Cumulative error (reply brief)

The defense in this case:

was deeply conflicted in multiple ways;

delivered an objectionable opening statement, promising a "defense" that was later not presented;

insulted the victim's family and attacked the victim's character;

presented a horrible closing argument and theory about a parade of long haired children being responsible for the crime;

did not differentiate Mr. Dougan from the other defendants;

and

failed to present copious evidence of Mr. Dougan's reputation for truthfulness in support of his testimony.

This was how Mr. Jackson practiced criminal law. His unreasonable actions undermine confidence in the result.

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

A. The grant of relief

The lower court found that defense counsel at Mr. Dougan's 1987 resentencing proceeding provided ineffective assistance of counsel. The court's findings that counsel was ineffective (1) in rebutting aggravation and also (2) for presenting a false picture of mitigation are amply supported by the record.

The lower court found *vis-a-vis* aggravation, counsel was ineffective for failing to have a witness rebut the medical examiner's testimony. The state appealed this issue, and raised the matter in its brief. *See* SIB at 95. However, the state has not addressed the mitigating evidence resentencing counsel unreasonably failed to present that the lower court found "cumulatively....undermine[s] confidence in the resentencing outcome." V.13 at 2373.[13] Consequently, the state has waived any

[13]The lower court's findings on this mitigation are discussed in the Answer Brief of Appellee at 98-107. Appellee pointed out that the state had not disputed the lower court's findings and holdings hereon (*id.* at note 149); in its reply, the state *still*

appeal on that basis for relief below, and a resentencing proceeding is required.

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

1. Mr. Dougan had a major mental illness at the time of the crime

As demonstrated below, and found credible and accurate by the finder of fact, Mr. Dougan's natural mother and siblings suffer from mental illnesses, his adoptive mother was a serious alcoholic who used Mr. Dougan as a child as her source to obtain and conceal alcohol, his adoptive father was a serial philanderer who used young Mr. Dougan as his cover, and Mr. Dougan himself suffered from a serious mental illness at the time of the offense. Two statutory mitigating circumstances deriving from Mr. Dougan's illness were available. These are compelling circumstances in mitigation *never contested by the state*.

These facts unreasonably were not known to resentencing counsel, Mr. Link. He testified his plan in 1987–having not investigated--was to present Mr. Dougan as an intelligent person who had contributed to society and who was, while guilty of this crime, not likely to be violent and would rehabilitate.[14] He asked

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did not contest the lower court's holding.

[14]Unlike Dr. Krop at resentencing, Dr. Woods below testified that two statutory mitigating circumstances existed based upon Mr. Dougan's major mental illness. The state writes that these post-conviction proceedings are "Dougan's only acknowledgment of

Dr. Krop's help in this plan, and Dr. Krop provided it. Dr. Krop testified at resentencing Mr. Dougan was intelligent, was not a sociopath, and was not likely to be violent in the future.

The state contends this strategic decision by Mr. Link to present Mr. Dougan as not anti-social is insulated from review. RB at 55.[15] But the constitutional problem with Mr. Link's plan was he did not perform the necessary investigation before choosing and implementing it.[16] "It is unquestioned that under the prevailing

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responsibility for the murder." RB at 52. But Dr. Krop testified at resentencing that when he interviewed Mr. Dougan "[h]e did not deny his involvement ...and I presumed ...that he was guilty." RV34, 1298. Mr. Link unreasonably presented Mr. Dougan as a guilty person for whom statutory mitigation was unavailable.

[15]Dr. Woods agrees that Mr. Duggan is not antisocial. V. 18, 3321. But that does not mean Mr. Dougan did not have a mental illness relevant to mitigation in 1974.

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

With respect to Mr. Dougan's adoptive family, as the lower court recognized, the record produced at resentencing led this Court to conclude "that Defendant grew up with 'loving parents who provided him a stable environment...'" Order at 2352, quoting *Dougan*, 595 So.2d at 5-6. But "it does not appear that Defendant's adopted parents provided quite the stable environment that was presented at his resentencing." Order at 2352. "Mr. Link testified at the hearing that 'I and the jury were given a very different impression of his upbringing because as an adopted

professional norms at the time of [Petitioner's] trial, counsel had 'an obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 130 S.Ct 447, 453 (2009)(citation omitted); *see also Sears v. Upton*, 130 S.Ct 3259, 3264 (2010); *Wiggins v. Smith*, 539 U.S. 519 (2003).[17] Because Mr. Link performed unreasonably, he could not provide Dr. Krop with evidence that would have resulted in an adequate mental health evaluation and would have given the sentencers an *accurate* picture of Mr. Dougan.[18]

The state also contends that Mr. Dougan is arguing for relief

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child, most witnesses said he had very loving parents and had a terrific family.'" Order at 2351. In truth, this was "[s]adly a very dysfunctional family." V18, at 3357.

[17]Counsel's strategy can never be "reasonable" if the underlying investigation is not. *Strickland,* 466 U.S. at 690-91 ("strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation."); *Wiggins* , 539 U.S. at 522 ("counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision…because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background."); *Sears*, 130 S.Ct. at 3265 ("The [state] court's determination that counsel had conducted a constitutionally deficient mitigation investigation, should have, at the very least, called into question the reasonableness of this theory.").

[18]Dr. Krop testified below he conducted interviews of Jacob Dougan and his father, reviewed letters from "people who were familiar with Mr. Dougan back in the 1970s," (RT at 1295) and administered an MMPI. He testified that, unlike Dr. Woods, he "was not provided with any information that would suggest mental illness in the family." V18, 3266.

because he has presented "a more favorable mental health expert" (RB at 52, 57). Dr. Krop did not testify, favorably or otherwise, as a mental health expert regarding the time of the offense–he testified that Mr. Dougan "really doesn't have serious emotional problems," RT.33, 1275, in 1987, and was not a sociopath. But Dr. Krop did not know or ask anything about "*any emotional situation Mr. Dougan had back in 1975*." *RT* 34, 1294 (emphasis added). Thus, he could not testify about whether Mr. Dougan suffered from extreme emotional distress at the time of the crime. *Id.*

The lower court found Dr. Woods'

> testimony credible and supportive of Defendant having suffered from a psychiatric disorder around the time of the offense. Substantial evidence has been presented by Dr. Woods that Defendant suffered from major depressive disorder around the time of the offense, which was described as a major mental illness and one of the most severe... *Dr Woods provided the* ***only*** *explanation* thus far for Defendant's mental state and processes in regard to Defendant's involvement in the offense.

Order at 2346(emphasis added). The *only*, and *uncontested*, evidence *ever* about the mental status of Mr. Dougan at the time of the offense cannot fairly be dismissed as, simply, "more favorable mental health" testimony. Prior testimony on the matter on this critical question does not exist.

The state's only rejoinder is Dr. Krop testified Mr. Dougan "suffered from some depression" and that in post-conviction "Dougan was only able to produce a diagnosis of 'major depressive disorder' in addition to what Dr. Krop previously testified to in 1987." SB

at 57. This is misleading. Dr. Krop testified at resentencing that when he saw Mr. Dougan 13 years after the offense he was "depressed related to his father's illness." V.33, 1260. In an earlier meeting, "before he knew about his father's illness, the depression was not at that level." *Id.* Even with his father's illness factored in, the depression "had not reached a significant proportion." *Id.* at 1262.[19]

Dr. Woods' credible testimony was that in 1974 Mr. Dougan suffered from "major depressive disorder" which is not being "blue, depressed or sad," V. 18, 3343, like when your father is ill. It is not "having a bad day;" it is "a major mental illness" and Mr. Dougan had it in 1974. *Id.* at 3280. Mr. Dougan's mental health deteriorated significantly before the offense. As the lower court described it,

> Defendant presented evidence that at or around the time of the offense, Defendant was frantic, and the more he tried and failed, the more frantic he became, and everything was "spinning in an endless circle." Defendant presented testimony that described Defendant's behavior around the time of the offense as changing from a relatively level-headed person to an individual in a state of agitation and irritability. Dr. Woods stated this described someone with an agitated depression. Testimony at the hearing indicated around the time of the offense Defendant was isolated; he was running out of

[19]The state's summary of argument further illustrates the state's mistake: "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." SB at 4. The jurors were told Mr. Dougan was depressed because his father was ill in 1987. Dr. Woods' diagnosis was of major mental illness in 1974.

ideas; had become increasingly depressed; had decreased effective functioning; and was unable to complete things for himself.[20]

Order at 2354. As Dr. Woods testified, a person with major depressive disorder can experience paranoia(V.18, 3282), have decreased cognitive ability (*id*. at 3323), become isolated and withdrawn, and have decreased overall effective functioning. *Id*. at. 3312. He testified this was Mr. Dougan's condition before the offense; no such evidence was previously presented or considered. And the state does not even dispute it.

2. A third of Mr. Dougan's mitigating life history–his life from 1974 to 1987–was unreasonably and prejudicially kept from the sentencers

Mr. Link testified that he did not want the sentencers to know that Mr. Dougan had previously been sentenced to death, so he did not introduce any testimony about where Mr. Dougan had been or what he had been doing since his conviction in 1975. This action was unreasonable to begin with, but it was even more unreasonably implemented.[21]

Having decided not to have jurors know Mr. Dougan had been on

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

[21]Counsel could have had the court instruct witnesses not to say "death row" or similar terms. Or he could have admitted Mr. Dougan had been on death row. But he could not simply ignore the compelling mitigation that marked the 12 years Mr. Dougan had been in prison.

death row, Mr. Link then allowed a juror who knew Mr. Dougan had been on death row to serve–even though he could have excused him.[22] The lower court found that Mr. Link "erred in not using a peremptory challenge to excuse this juror" (V.13, 2391)[23] but it was not prejudicial because the juror stated he could be "impartial." V13, at 2391. The state also argues that to prevail Mr. Dougan must show an actual biased juror served on the jury. RB at 58.

The claim is not that the juror was biased. It is that counsel's "strategy" not to have jurors who knew Mr. Dougan had

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[22]The juror had read a three column newspaper article the day before jury selection. The headline to the article was: "Man sentenced to die in '75 *back* for second trial on fate." V.13, 2388 n.91. It had Mr. Dougan's photograph and described the crime and that Mr. Dougan had been sentenced to death–twice–in detail. AB, n. 181. The state argues that the juror only "skimmed" the article (SB at 58); the headline said it all, though. The article reminded the juror of what he already knew and he "was surprised, surprised it's *back*. This happened back in'74 and I was living here in Jacksonville at the time and I remember reading in the papers [then] and, of course, after a period of time it just skips your mind." RT 532.

[23]The state writes that Mr. Link "exhausted all peremptory challenges and was denied a cause challenge." SB at 57. The state also writes that "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 also was denied." RB at 59.

This makes it appear, incorrectly, that Mr. Link's hands were tied. The actual order of things was: Mr. Link moved to excuse this juror for cause and his motion was denied. RT. 30, 597. He then still had, and exercised, 5 peremptory challenges between pages 597 and 601, but did not excuse this juror. He could have; he did not. *Later*, he asked for additional challenges, and the request was denied.

been sentenced to death was unreasonably implemented. Resentencing counsel forewent presentation of significant mitigation about Mr. Dougan's contributions to the prison and society because he did not want jurors to know he had been on death row. Yet he seated a juror who knew.[24]

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

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

B. Resentencing, the family objected

The state misconstrues this claim. There is no allegation that the Roberts family had the ultimate say about punishment "[d]uring the pre-trial negotiations for Dougan's resentencing" in Mr. Orlando's case. RB at 63. The Orlando family had the ultimate say. *See* Initial Brief of Appellant at 131-132 (sub-section B). The

[24]The strategy was unreasonably and prejudicially implemented in another way. One of the few witnesses who saw Mr. Dougan near the time of resentencing testified that when he saw him in jail the witness "was **looking at the chains they had on him.**" RT 1396 (emphasis added). Not even the prosecutor could have placed Mr. Dougan in chains in court, but the defense attorney effectively did that. The state argues (RB at 57) this is a claim under *Deck v. Missouri*, 544 U.S. 622 (2005)(improper shackling during sentencing), but it is not. *Deck* simply recognizes what defense counsel unreasonably failed to: "as a matter of common sense," shackling implies to the jury that "authorities consider the offender a danger to the community ...[which] almost inevitably *affects adversely the jury's perception of the character of the defendant*." *Id.* at 633 (emphasis added). Inasmuch as Mr. Link's sole strategy was to present Mr. Dougan's positive character, portraying him as so dangerous that the sheriff had him in chains was prejudicially unreasonable.

state's brief does not address this.

The Orlando family did agree to a life sentence during *post-conviction* proceedings below. A member of the Roberts family objected; otherwise, Mr. Dougan would not be on death row. *Id.*, sub-section A, pp. 130-131. The state did not respond to these allegations.[25]

It violates the Eighth and Fourteenth Amendments for the State arbitrarily to decide who is executed based upon what a family member of the victim says.[26]

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[25]The state is correct that "no evidence has been presented to substantiate a claim that the Roberts family stopped a plea before resentencing." RB at 63-64. That is because there is no such claim presented.

Extensive evidence was proffered below, both by an assistant district attorney and the defendant, that an agreement had been reached in Mr. Orlando's case during post-conviction proceedings, but a member of the Roberts family objected and so it did not occur. *See* V15, 2689 [mis-cited in the Brief of Appellee as V15, 29]; *Brief* of Appellee at 130-31. The full proffer occurred during the Huff hearing (V. 15, 2673-2690)and immediately before the evidentiary hearing. V. 16, 2797-2802.

[26]As the lower court observed:

> [If] the parties have reached a determination that this matter should be settled and a sentence less than death shall be imposed, why are we here? ....I guess my question is an agreement with family is not required to reach a settlement, as I understand it. And if you have ethically reached a--if there is an ethical belief that the matter should be settled, then why are we here?

V.16, 2797-98.

C. Black families discriminated against

Defendant proffered below that when the defendant is white and the victim is black in Duval County, the prosecutors do not confer with the victim's survivors about anything, much less what the sentence should be. *See* AB, 132-134. Yet in Mr. Dougan's case with a black defendant and a white victim, the Orlando family stopped a plea at resentencing and the Roberts family stopped a plea during post-conviction proceedings. Allowing victims' families to decide is thus discriminatory, as well as arbitrary, in violation of the Eighth and Fourteenth amendments. The state also did not respond to this argument.[27]

ARGUMENT VI: THE DEATH PENALTY IN THE FOURTH JUDICIAL CIRCUIT IS SOUGHT AND IMPOSED BASED UPON RACE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Black life is cheap

The state does not dispute any of the evidence that demonstrates beyond cavil that for homicides in the Fourth Judicial Circuit "'there is only one variable that has statistically significant effects in predicting a death sentence among black defendants: the victim's race.'" Brief of Appellant at 136.[28] The

[27]The state did write that Florida Statute § 960.001 requires prosecutors to consult with victims. SB at 63. Prosecutors did not consult with the black victims mentioned in sub-section C, *supra*. And consultation does not mean abdicating responsibility.

[28]*See also* GAO, Report to the Senate and House Committees on the Judiciary; Death Penalty Sentencing 5 (GAO/GGD-90-57,

state writes it does not matter. RB at 65-68.

B. The sentencer's racial animus

The state writes that "Dougan has failed to point out specific instances of purposeful discrimination in his case." RB at 67. But the state does not deny or contest, and did not object to, any of the evidence produced below about the racial animus of the sentencer--the judge.

As the EJI brief explains, the record proves discrimination by the sentencer:

> Racially-biased attitudes and behavior by officials charged with overseeing Mr. Dougan's trial–namely presiding Judge Olliff–directly limited the court's ability to fairly consider race-related trauma as mitigating evidence and undermined the reliability of the conviction and sentence....
>
> Mr. Dougan presented evidence and testimony asserting that Judge Olliff, a white man born in 1925, openly exhibited racial bias in and around the time he presided over Mr. Dougan's three sentencing hearings by: permitting attorneys to tell racist jokes in his chambers and asserting it was alright as long as no black lawyers were present; requesting that a black public defender assigned to his courtroom be moved; referring to cases involving black perpetrators and black victims as "social interactions" that did not warrant tough sentencing; and instructing lawyers in his courtroom to refer to "blacks and children" by their first names while regularly referring to whites by titles like "Mr." and "Mrs."

1990)(82% of the 28 studies conducted between 1972 and 1990 found that race of victim influences capital murder charge or death sentence, a "finding ... remarkably consistent across data sets, states, data selection methods, and analytic techniques.") (cited/quoted in *Glossip v. Gross*, 546 U.S. ___, ___ (2015) (Breyer, J., joined by Ginsberg, J., dissenting).

> ...Judge Olliff was unwilling to engage in the kind of analysis necessary to evaluate racial trauma as a mitigator...Judge Olliff's ability to be the white Jacksonville judge who equates black adults with white children and permits the telling of racist jokes in his chambers, while simultaneously likening the black defendant to the Nazi and himself to the hero, relied on a narrative of self, reality, and history that ignored the truth.
>
> ...Judge Olliff concluded no mitigating factors existed and sentenced Mr. Dougan to death three times.... [T]hree Justices of this Court wholly disagreed. *Dougan v. State*, 595 So.2d 1, 7-8 (Fla. 1992).

EJI brief at 3, 17-18.[29]

ARGUMENT VII: RESENTENCING JURORS CONSIDERED INCORRECT, INFLAMMATORY, EXTRANEOUS INFORMATION IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Dr. Michael Radelet, a renowned researcher known, respected, and hired by this Court,[30] asked an associate (one he had relied

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[29]*See also* Argument VIII: The Sentencing Judge Failed To Consider Mitigating Evidence. Brief of Appellee, pp. 145-147.

[30]*See* EXECUTIVE SUMMARY: REPORTS & RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMMISSION, 1991, p. 15, Florida Supreme Court Webpage,http://www. floridasupreme court. org/pub_info/ documents.shtml#Reports ("The application of the death penalty in Florida is not colorblind, inasmuch as a criminal defendant in a capital case is, other things being equal, 3.4 times more likely to receive the death penalty if the victim is White than if the victim is an African-American."); *see also* Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981)(SV3, 373); Michael L. Radelet and Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985)(SV3, 384); Michael L. Radelet and Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FL. L. REV. 1 (1991)(SV3, 420); Michael L. Radelet, *Death Sentencing in Northeast Florida: The Mythology of Equal Justice*, (May 1, 1994) (Final Report to the Florida Bar) (on file with author)(SV20, 3544).

upon before) to interview the jurors after Mr. Dougan's resentencing. The associate had a set of typed questions provided by Dr. Radelet. These questions were preceded by a typed introduction explaining who Professor Radelet was, that he routinely conducted such research, and that the jurors were free to participate or not in his research.[31] SV2, 180. Each consenting juror was asked the same questions, and the associate hand wrote and then typed-up the responses. The associate swore 24 years later that she had "no reason to believe that the information contained therein was not faithfully and accurately recorded at the time of the interviews in 1989." SV2, 177. The handwritten and then typed

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[31]The questionnaires begin:

> Mr./Mrs. _____, my name is Rebecca Lynn. I am an associate of Michael L. Radelet, Ph.D. Dr Radelet is an associate Professor of Sociology at the University of Florida. Over the last decade Dr. Radelet has conducted several research projects relating to different aspects of capital punishment. Dr. Radelet routinely collects information on all capital cases in Florida. As you were a juror in the resentencing hearing of Mr. Dougan, Dr. Radelet is very interested in understanding your participation in this resentencing hearing
>
> You are under no obligation to submit to this interview. If you choose to be interviewed, you may chose not to answer any question(s) that you do not feel comfortable answering. Naturally, you may terminate the interview at any time.

SV. 2, 180. As Dr. Radelet testified below, this associate also conducted interviews of jurors in at least two other Florida capital cases. V.16, 2834-36, SV 2, 293-96.

notes are available for this Court to review. SV2, 176-263, 293-358.[32]

In Mr. Dougan's Initial Brief, he described many of the ways that the jurors' responses warranted a new resentencing or, at least, interviews of the jurors by counsel.[33] His requests to interview the jurors and/or subpoena them for an evidentiary hearing were denied. V.8, 1489. The judge then simply read the results of Dr. Radelet's interviews, refused to allow counsel to interview the jurors (a "fishing expedition"), and denied relief because, inexplicably, the reliability of Dr. Radelet's interviews was "questionable." Order at 2240, 2241.[34]

One example should convince this Court that if ever juror interviews are proper, they are here. Dr. Radelet's handwritten

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[32]Three of the resentencing jurors filled out questionnaires. The state writes that interviews of "select jurors" and of "only a fraction of the entire resentencing" jurors were presented below, without explaining how that matters. RB at 69. To the degree the state is suggesting that the associate chose between different available jurors, *i.e.* selected which jurors to interview, that is not true. *See* SV2, 243; 243 (juror did not "want to bring it up again"); 263 (contacts with jurors); 300 (jurors interviewed); 301 (explaining efforts to contact jurors).

[33]*See* Initial Brief at 142-43 (*i.e.*, jurors: knew of the prior death sentence [they were not supposed to]; knew there were two murders [not supposed to]; and had improper discussions with bailiffs about why there was resentencing).

[34]The court also ruled that the claims should have been raised on direct appeal. Direct appeal counsel did not know of Dr. Radelet's interviews until after the direct appeal concluded. (SV2, 304; V.16, 2838) Even with what post-conviction counsel knew, juror interviews were not allowed. Direct appeal counsel had no basis upon which to seek to interview jurors.

notes from a conversation with his associate after two completed interviews reveal:

They knew of other murders–rape of white ♀

SV2, 300 (emphasis added). The typed up notes of the "rape" interview say: "The jurors also knew during deliberations that a white girl had been picked up and raped." SV2, 183. The handwritten notes of this juror say: "White girl picked up and raped." *Id.* at 245. The fact that the jurors incorrectly (and prejudicially) believed this black defendant had picked up and raped a white woman is *documented **three** times.* There is nothing unreliable about that.[35]

The state claims that even this injection of incorrect, racially inflamed, extraneous information into the jury room cannot be asked about because it "inheres in the verdict." RB at 71. If that is true as a matter of Florida law, then it is contrary to federal constitutional law on the issue: "'the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of *the existence of any extraneous influence*, although not as to how far that influence operated upon his mind.'" *Mattox v.*

[35]The court below initially expressed concern about "who was telling them ...that there was a rape and there were two other murders and other things" because "that's–that's quiet serious actually." V15, 2714-15. A real hearing, not one without asking the jurors, should have been held.

United States, 146 U.S. 140, 149 (1892)(emphasis added)(citations omitted). *See also Tanner v. United States*, 483 U.S. 107 (1987)(juror testimony admissible regarding extraneous or outside influences improperly brought to bear on the jurors).

ARGUMENT IX: FORTY YEARS FROM ARREST--THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT FOR MR. DOUGAN

Any death penalty sentencing scheme that, for whatever the reason, lasts 40 years (and counting) violates the Eight and Fourteenth Amendments:

> These lengthy delays create two special constitutional difficulties. *See Johnson v. Bredesen*, 558 U. S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari). First, a lengthy delay in and of itself is especially cruel because it "subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement." *Ibid.; Gomez v. Fierro*, 519 U. S. 918 (1996) (Stevens, J., dissenting) (excessive delays from sentencing to execution can themselves "constitute cruel and unusual punishment prohibited by the Eighth Amendment"); *see also Lackey v. Texas*, 514 U. S. 1045 (1995) (memorandum of Stevens, J., respecting denial of certiorari); *Knight v. Florida*, 528 U. S. 990, 993 (1999)(Breyer, J., dissenting from denial of certiorari). Second, lengthy delay under mines the death penalty's penological rationale. *Johnson, supra*, at 1069; *Thompson v. McNeil*, 556 U. S. 1114, 1115 (2009) (statement of Stevens, J., respecting denial of certiorari).

Glossip v. Gross, 546 U.S. ___, ___ (2015) (Breyer, J., joined by Ginsberg, J., dissenting)

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

Since the grant of certiorari in *Hurst v. Florida*, federal district courts have stayed habeas proceedings in nearly 30 capital

habeas corpus cases in Florida.[36]

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[36]*See Byrd v. Sec'y Fla. Dept of Corr.*, Case No. 8:96-cv-771-T-23TGW ("The wise preservation of both public and private resources commends a cessation in these proceedings until the Supreme Court's determination in *Hurst*."); *Cherry v. Sec'y Fla. Dept of Corr.*, Case No. 6:08-cv-1011-Orl-41KRS ("Given the significance of the proceedings in *Hurst*, the Court finds that this case should be stayed pending final disposition of those proceedings."); *Buzia v. Sec'y Fla. Dept. of Corr.*, Case No. 12-cv-595; *Davis (Mark Allen v. Sec'y Fla. Dept of Corr.*, Case No. 8:07-cv-676-T-23TBM; *Derrick v. Sec'y Fla. Dept of Corr.*, Case No. 8:08-cv-1334-T-23TBM; *Diaz v. Sec'y Fla. Dept of Corr.*, Case No. 2:14-cv-91-FtM-29DNF("Given the significance of the proceedings in *Hurst*, the Court finds that this case should be stayed pending findal disposition of those proceedings."); *Douglas v. Sec'y Fla. Dept of Corr.*, Case No. 3:13-cv-346-J-39PDB("Because the resolution of the issue in *Hurst* will impact the present case, this Court orders...this case is stayed..."); *England v. Sec'y Fla. Dept of Corr.*, Case No. 6:14-cv-1627-Orl-41DAB("Given the significance of the proceedings in *Hurst*, the Court finds that this case should be stayed pending final disposition of those proceedings."); *Frances v. Sec'y Fla. Dept of Corr.*, Case No. 6:14-cv-1347-Orl-37GJK; *Johnson v. Sec'y Fla. Dept of Corr.*, Case No. 8:13-cv-381-T-23TGW; *Johnston (Ray Lamar v. Sec'y Fla. Dept of Corr.*, Case No. 8:11-cv-2327-T-23TBM; *Lebron v. Sec'y Fla. Dept of Corr.*, Case No. 6:14-cv-671-Orl-41TBS; *McLean v. Sec'y Fla. Dept of Corr.*, Case No. 6:14-cv-1463-Orl-40GJK; *Miller v. Sec'y Fla. Dept of Corr.*, Case No. 6:15-cv-950-Orl-40GJK; *Mungin v. Sec'y Fla. Dept of Corr.*, Case No. 3:06-cv-650-J-25JRK ("Because the resolution of the issue in *Hurst* will impact the present case, this Court orders that this case is stayed pending the outcome of ...*Hurst*."); *Peterson v. Sec'y Fla. Dept. of Corr.*, 8:14-cv-03237; *Stein v. Sec'y Fla. Dept of Corr.*, Case No. 3:09-cv-1162-J-34PDB ("Given the significance of the proceedings in *Hurst*, the Court finds that this case should be stayed pending final disposition of those proceedings."); *Trease v. Sec'y Fla. Dept of Corr.*, Case No. 8:11-cv-233-T-23TBM; *Turner v. Sec'y Fla. Dept. of Corr.*, 8:14-cv-885; *Valentine v. Sec'y Fla. Dept of Corr.*, Case No. 8:13-cv-30-T-23TBM; *Victorino v. Sec'y Fla. Dept of Corr.*, Case No. 6:14-cv-188-Orl-37DAB; and *Zommer v. Sec'y Fla. Dept of Corr.*, Case No. 6:15-cv-615-Orl-41KRS. Cf. *Woodel v. Sec'y Fla. Dept of Corr.*, Case No. 8:14-cv-2406-T-17TGW ("Having considered the filings, the Court is persuaded by Respondent's arguments opposed to the stay set out in the response; the Court adopts and incorporates those

CONCLUSION

Appellee/Cross-Appellant requests that this Court affirm the lower court's grant of relief and reverse any denial or relief.

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy hereof has been furnished to Patrick Delaney at Patrick.Delaney@ myfloridalegal.com and that Patrick Delaney at Patrick.Delaney@ myfloridalegal.com. is the e-mail address on record with The Florida Bar as of this date for Mr. Delaney pursuant to Rule 2.516(b)(1)(A).

I also certify that this Brief of Appellant was computer generated using Courier New 12 font.

Respectfully submitted and certified:

_____
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September 8, 2015

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arguments herein.").