IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1687

GERHARD HOJAN

Appellant,

v.

STATE OF FLORIDA

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Gerhard Hojan, was the defendant at trial and will be referred to as the "Defendant" or "Hojan". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the record on appeal will be by the symbol "ROA", to the transcripts will be by the symbol "T", to any supplemental record or transcripts will be by the symbols "SR" preceding the type of record supplemented, and to Hojan's initial brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Gerard Hojan ("Hojan") was indicted on April 10 and arraigned on April 11, 2002. He was charged with two counts of first degree murder, one count of first degree attempted murder, one count of attempted felony murder, three counts of kidnaping, and two counts of armed robbery. He filed a motion to suppress his statement on which the court held an evidentiary hearing on September 2, 2003. The trial court issued a written order denying the motion. (ROA 761-63).

On October 17, 2003 the jury convicted Hojan of two counts of first degree murder, one count of first degree attempted murder, one count of attempted felony murder, three counts of kidnapping, and two counts of armed robbery. (T:2479-

85). On November 13, 2003 Hojan informed the court that he forbad his attorneys to present mitigation evidence at the coming trial. (T:2502-2576). The penalty phase trial occurred on November 24, 2003 during which the defense presented no evidence or argument. The jury recommended death with a nine to three vote. (T:2648-49). The court appointed an independent attorney to prepare mitigation evidence for the Spencer hearing[1]. The court held the Spencer hearing on March 18 and April 14, 2004. On August 2, 2005 the court issued its order sentencing Hojan to death. The court found six aggravating factors: Prior violent felony; felony murder based upon the armed kidnapping; avoid arrest; financial gain; murder was heinous, atrocious, and cruel ("HAC"); and murder was cold, calculated, and planned ("CCP"). (T:3107-20, ROA:967-986). The court also found one statutory mitigator of no prior record and two non-statutory mitigators of Hojan being a good son and having good jail behavior, both of which it gave little weight. (T:3121-31, ROA:967-986). The court sentenced Hojan to death on both murder convictions then to life on the first degree attempted murder, three armed kidnapping, two armed robbery, and discharge of a gun convictions, all to run consecutive. (T:3133-35, ROA:967-986). On August 2, 2005 Hojan filed a notice

[1]See Spencer v. State, 615 So.2d 688 (Fla. 1993).

of appeal and then filed an amended notice on September 6, 2005. (ROA:987, 995).

The facts developed at trial establish that Hojan lived in a trailer with Jimmy Mickel ("Mickel") and Shannon Murphy ("Murphy"). (T:1821). Hojan was having money difficulties and was behind on his rent payments. (T:1839). On March 11, 2002 Hojan and Mickel drove Murphy's truck to the Waffle House, arriving shortly before 4 AM. Three employees were working that morning - Barbara Nunn ("Nunn") and Christina De la Rosa (" De la Rosa") as waitresses and Willie Absolu ("Absolu") as a cook. The two men ordered a waffle and drinks. (T:1835-36, 2143-46, 1396-1409). Nunn knew Mickel since he worked as a waiter at the Waffle House occasionally. She knew Hojan because he came in with Mickel on eight or nine occasions to hang out in the back office drinking tea. (T:1386-94, 1451-56, 1503-22, 1835-38). She also saw both men working at the Coliseum night club where she went at Mickel's invitation. (T:1403-07).

Mickel and Hojan discussed robbing the restaurant while they ate. After the two men finished eating, Mickel went out to the truck, retrieved a pair of bolt cutters, and brought them back into the restaurant. (T:1408-09, 2014-16, 2133-34, 2143-45). Hojan headed toward the register and paid the bill to De la Rosa at 4:37 AM. (T:1410-12, 1503-22). While Mickel clipped the padlocks off with the bolt

cutters, Hojan pointed a handgun toward the three employees and ordered them to the rear of the restaurant. (T:1410-142014-16). He directed them toward the refrigerated storage area and placed them in the freezer section. (T:1415-18, 2145-46). Hojan left for a moment, locking the three in the freezer. He returned after a minute and demanded their cell phones and left again. He returned a second time and demanded their money. De la Rosa gave him around $200 and Nunn placed $82 on the shelf. Hojan left again. (T:1414-23, 2143-46). He returned a third time, held the gun on them, and ordered all three to their knees. De la Rosa and Absolu complied but Nunn refused, begging him not to kill them. She jerked her head from side to side to avoid being shot. Hojan shot Nunn and then turns to the other two. (T:1424-25,2143-56). Hojan stood in the doorway while he shot the three. (T:1460). Police later recovered 5 shell casings from the freezer floor. (T:1591). A total of $1888.21 was missing from the Waffle House. (T:1518).

De la Rosa's body was partially under the freezer shelf where she had tried to hide from being shot. (T:1290, 1296, 1746-48, 2014-16, 2133-34, 2147-50). She had a gun shot wound to her neck, inflicted from 12 to 18 inches away, and a second wound to her left breast which severed her spine. She could move after the head wound and then would have lived for several minutes, unable to move, after the spinal injury. (T: 1752-55, 1773-74, 2090-91). Absolu also had two gunshot

wounds, one to the neck and a second to his head with a defensive wound on his arm. He too was shot from between 6 and 18 inches away. (T:1762-66, 2090-91).

Nunn regained consciousness, pushed Absolu's leg off of her, and crawled out of the freezer. She saw De la Rosa on the floor as she left. She exited the rear door and made her way to the Shell station next door where she told the attendant what had happened. (T: 1424-30). She had a gunshot wound to her head, was covered in blood, was in shock and in and out of consciousness. (T:1308-23, 1341-50, 1350-79). She told the responding officer that "Jimmy" did it but could not remember Hojan's name at the time although she described him as a "big Mexican." She explained that "Jimmy" was a former Waffle House employee and worked at the Coliseum. (T:1431-32, 1323-35, 1347, 1353). Later that day at the hospital, Nunn picked both Mickel's and Hojan's pictures out of photographic line-ups. (T: 1432-38, 1493-96).

After the robbery and shootings, Hojan and Mickel went to a 7-11 store at 6:40 AM. Hojan purchased two money orders, each for $411.56, using small bills. (T:1793-95, 1797-1800). Hojan had been leasing a truck from Enterprise Rental car and the payments were $411.56 every two weeks. He was late on his payments. (T:1913-26). He had tried to drop off a payment the morning after the shootings but the office was closed at the time. (T:2136-38).

Hojan returned to the trailer with Mickel and then left for his parents' home in Lehigh Acres. He later left with his father driving to the Lee County Sheriff's Station. He was stopped and arrested just before he reached the station. (T:1992-2006, 2146-58). He confessed to the shootings and other crimes during an interview that morning with Detectives Anton and Kiso.

Hojan possessed a gun that witnesses identified as, and he admitted was, the one used in these shootings. (T:1839-40, 1843-44, 1848, 1854-55, 1861-70, 2154-58). Mickel took police to the Coliseum parking lot where he had hidden the gun in some bushes. (T:1937-69). All the casings, recovered bullets, and recovered slugs were shot from that gun. (T:2073-82). The police recovered the bolt cutters used to cut the Waffle House padlocks from Hojan's truck in Lehigh Acres. (T:2020, 2085-88). Police also recovered a bag with change and the money orders from the truck. (T:2021-23).

Upon this information, the jury convicted Hojan. It found him guilty of two counts of first degree murder, one count of first degree attempted murder, one count of attempted felony murder, three counts of kidnapping, and two counts of armed robbery. (T:2479-85, ROA:533-50). Following Hojan's conviction, the court held a penalty phase trial although Hojan refused to allow his attorneys to present any mitigation evidence, argue, or present any of the motions they had

previously filed. During the November 24, 2003 penalty phase trial the State presented victim impact testimony from Dieumene Absolu and Rene De la Rosa. The defense presented nothing. (T:2583-2652). The jury returned a recommendation for death by a vote of nine to three. (T:2648-49).

The trial court appointed special counsel to prepare mitigation evidence for the Spencer hearing. (T:2657, 2929-36, ROA:787). The court also ordered a PSI report, issued an SDT for Hojan's records over his objections, and appointed an additional mental health expert to assist with the mitigation presentation. ((T:2912-13, 2957, 2967, ROA:789-92, 822-27). Throughout the process, Hojan refused to cooperate with the appointed counsel or the expert and directed his friends and family to do likewise. (T:2929-36, 2953-54, 2979-82, 2993-98). The court held the Spencer hearing over the course of two days since the mitigation witnesses did not appear although they had been subpoenaed. On March 18, 2004 Dr. Michael Brannon ("Brannon") testified about reviewing previous mental health expert's reports and tests and about Hojan's medical history of head injuries, alcohol abuse, and difficulties in school. He could not review medical records since Hojan refused to allow their release. (T:2999-3067). On April 14, 2004 Hojan's parents, Gerhard and Pauline, finally appeared. Gerhard Sr. was reluctant to say anything and had been instructed not to cooperate or to testify. His testimony was vague and often

factually incorrect. He said that Hojan was a poor student, was injured in a can accident when 7 years old, and was a stubborn youth. (T:3082-95). Pauline refused to testify at all. (T:3096-99). Hojan told the court he wanted no mitigation presented at all. (T:3101). The court independently reviewed the evidence from the trial, the victim impact testimony, and the mitigation evidence presented by all sources and sentenced Hojan to death. The court found six aggravating factors, giving great weight to each: Prior violent felony; felony murder based upon the armed kidnapping; avoid arrest; financial gain; murder was heinous, atrocious, and cruel ("HAC"); and murder was cold, calculated, and planned ("CCP"). (T:3107-20, ROA:967-986). The court also found one statutory mitigator of no prior record and two non-statutory mitigators of Hojan being a good son and having good jail behavior, both of which it gave little weight. (T:3121-31, ROA:967-986). This appeal followed. (ROA:987, 995).

SUMMARY OF THE ARGUMENT

ISSUE I - The trial court properly admitted Nunn's statement to police regarding the identities of the perpetrators as an excited utterance. Since the State did not play the actual tape of Nunn's statement, there was no prejudice from undue emotional impact of hearing Nunn's voice while she was injured and afraid.

ISSUE II - Hojan waived the hearing and argument of his penalty phase motions on his own. The trial court did rule his waiver of mitigation evidence was a waiver of the penalty phase motions.

ISSUE III - The trial court properly found a knowing and intelligent waiver of Miranda by Hojan and properly denied the motion to suppress.

ISSUE IV - Ring v. Arizona has no impact on either Hojan's death sentence nor on Florida's capital sentencing scheme.

ISSUE V - Apprendi V. New Jersey does not apply to Florida's capital sentencing scheme.

ISSUE VI - The trial court both properly followed the procedures set out in Koon v. Dugger and did consider mitigation evidence in rendering its death sentence.

ISSUE VII - The sentence is proportional.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY ADMITTED NUNN'S STATEMENT AS AN EXCITED UTTERANCE. (restated)

Hojan contends that Nunn's recorded statement does not qualify as an "excited utterance" exception to the hearsay prohibition and, therefore, the trial court erred in allowing its admission. Hojan misreads the record which clearly demonstrates that the jury never heard the recorded statement; the State Attorney chose instead to have the officer testify about Nunn's statements. The court properly admitted those statements since it had ruled the taped statement itself was an excited utterance because Nunn made the statement while she was under the trauma of a recent gunshot wound to the head and was awaiting medical treatment. The court did not abuse its discretion. Furthermore, any error was harmless since previous witnesses had testified, without objection, to essentially identical statements by Nunn. This Court should affirm.

The standard of review for a court's ruling on the admissibility of evidence is whether it was an abuse of discretion. The admissibility of evidence is within the sound discretion of the court and its ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla.2000); Zack v. State, 753 So.2d 9, 25 (Fla.2000); Cole v. State, 701 So.2d 845, 854

(Fla.1997); Jent v. State, 408 So.2d 1024, 1039 (Fla.1981); General Elec. Co. v. Joiner, 522 U.S. 136(1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion"). Under this standard, the Court's ruling will be upheld "unless ... no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); See Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla.1990).

The record shows that the jury heard the following evidence, all without defense objection, before the issue of Nunn's recorded statement came up in the proceedings. Kahn, the Shell attendant, testified that Nunn came in bleeding from a head wound saying that a white guy and Mexican were trying to kill her. (T: 1310) Cacciola, the paramedic, testified that Nunn told him, while sitting on the floor in a pool of blood, that a "big fat Mexican" shot her and he was with Jimmy, an ex-employee of the Waffle House. (T: 1326, 1334). Caron, a Broward Sheriff deputy, testified that he was the first officer to respond to the Shell station. He said that Nunn was not in good shape and seemed to be in shock; he had doubts about her surviving. (T: 1342, 1348). Nunn told him repeatedly that Jimmy was responsible and that the restaurant manager knew him. He radioed that information to the other responding officers. (T: 1343-47). Donnelly, a Davie police officer, testified that

Nunn told him, before the taped statement, that an ex-employee and a big Mexican robbed the Waffle House and shot her. (T: 1352-53). On voir dire outside the jury's presence, Donnelly estimated that it was only 10 to 15 minutes until he taped her statements. (T: 1366-69).

The trial court listened to the testimony of these four witnesses which detailed both Nunn's physical condition and her statements to them about what happened. It also listened to the taped statement itself outside the presence of the jury. (T: 1356). The court found the statements on the tape were admissable as excited utterances.

> When you view the totality of circumstances in this case, especially in light of the testimony where there's been no inconsistencies, somebody who's shot in the head, who's bleeding in a pool of blood, that's certainly in a state of the shock, if that's not a startling event, I don't know what is. And I don't know if I want to go beyond that in determining what a startling event might be.

(T: 1376). Michael Satz ("Satz") the State Attorney then said, "Your Honor, in the [sic] abundance of caution, how about if I just ask the officer did she tell you who did this?" (T: 1377). The defense attorney apparently agreed with that strategy saying, "Not to cut you off, Mr. Satz. I was just going to say why don't we do it that way." Id.

With the jury back in the courtroom, Satz elicited from Donnelly Nunn's statements made in the ambulance, the ones which were taped. Donnelly simply

told the jury that Nunn said an ex-employee Jimmy and a big Mexican guy were responsible for the robbery and the Mexican did the shootings. She gave general descriptions of them. (T; 1378, 1382). The jury never heard the taped statement; they only heard Donnelly testifying about her identifications, the same type of evidence they had already heard from Kahn, Cacciola, and Caron.

Section 90.803(2), Florida Statutes defines an excited utterance as, "a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The essential elements of an excited utterance are: an event startling enough to cause nervous excitement; a statement made before there was time to contrive or misrepresent; and a statement made while under the stress of excitement. Henyard v. State, 689 So.2d 239, 251 (Fla. 1996)(statements made to responding officers' questions were excitable utterances since was still under stress of crime).

The test regarding the time elapsed is not a bright-line rule of hours or minutes but where the time interval is long enough to permit reflective thought, the statement will be excluded in the absence of some proof the declarant did not engage in reflective thought. Rogers v. State, 660 So.2d 237, 262 (Fla. 1995)(finding that the victim had eight to ten minutes for reflective thought, but based on witness testimony regarding the victim's behavior during that time period,

the victim did not engage in reflective). “While the length of time between the event and the statement is a factor to be considered in determining whether the statement may be admitted under the excited utterance exception... the immediacy of the statement is not a statutory requirement.” Henyard, 689 So.2d at 251. The additional evidence tending to prove there was no reflection, even though hours had passed between the event and the statement, “is that at the time of the statement, the declarants were either ‘hysterical,’ severely injured, or subject to some other extreme emotional state sufficient to prevent reflective thought indicating they were still suffering under the stress of the event. Blandenburg v. State, 890 So.2d 267, 270 (Fla. 1st DCA 2004). See, Sliney v. State, 699 So.2d 662, 669 (Fla. 1997) (affirming admission of 911 call); Davis v. State, 698 So.2d 1182, 1190 (Fla. 1997) (same); Pope v. State, 679 So. 2d 710 (Fla. 1996) (holding that statements made by the victim of beating, who eventually died as a result of that beating, to neighbor and to police officer about the identity of her attacker, were properly admitted as an “excited utterance”); Turner v. State, 530 So.2d 45, 50 (Fla. 1987); State v. Jano, 524 So.2d 660 (Fla. 1988).

In Williams v. State, 967 So.2d 735 (Fla. 2007) the victim waited 20 minutes and possibly showered before calling 911. This Court held her statements to the 911 operator and later to the responding officer were excited utterances since

she was crying, in shock and pain from the stab wounds inflicted and she was in fear for her life. The fact that she was grievously injured, upset, and fading in and out of consciousness demonstrated that she did not engage in reflective thought. Id. at 748-49. The facts here are quite similar; Nunn had been shot in the head, was bleeding profusely, was in shock and fading in and out of consciousness. She was groaning and complaining about pain, as the court heard on the tape. Finally, she made the statement within 15 minutes or so of her arriving at the Shell station. The trial court properly allowed the statements. This Court has stated that "[f]actors that the trial judge can consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." Jano, 524 So.2d at 661.

Finally, Hojan claims it was the taped statements that were prejudicial since it was composed only of Nunn concurring with leading police questions. As stated before, the jury never heard the tape and, therefore, did not hear any statements by the police. Only Nunn's identification of the two men and her identification of the big Mexican as the shooter came before the jury. This was consistent with the testimony given by the previous witnesses and did not include additional information. Any error was harmless. Hamilton v. State, 547 So.2d 630 (Fla.1989);

State v. DeGuilio, 491 So.2d 1129 (Fla. 1986). This Court should affirm.

ISSUE II

HOJAN HIMSELF WAIVED HEARING OF PENALTY PHASE MOTIONS AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ACCEPTING SUCH A WAIVER. (restated)

In his next issue Hojan asserts that the trial court erred in determining that he waived consideration of various motions challenging the constitutionality of Florida's death penalty when he waived the presentation of mitigation evidence at the penalty phase trial. Contrary to Hojan's assertions, he himself specifically waived any challenges to the death penalty that his attorneys had filed. The trial court did not abuse its discretion when it accepted this waiver. This Court should deny relief on this claim.

On November 13, 2003 Hojan specifically stated that he did not want his attorneys to do anything during the penalty phase or he would seek to dismiss them from representing him. (T:2508-09). Hojan refused to allow his attorney, or any new attorney, to even proffer the mitigation evidence to the court since it might influence the court's decision. (T:2508-2516). His defense attorney, not the trial court, then broached the subject of the motions challenging the death penalty.

> Mr. Polay: ... Do you want us to pursue any of those motions that were filed pertaining to the constitutionality of any of the aggravators?
> Defendant Hojan: No.

(T:2534; see also 2539-40). The trial court then went through the various motions it had yet to rule on and Hojan stated that he wished to have the motions withdrawn.[2]

> THE COURT: I have been handed copies of the seventeen motions by the Defense for purposes of argument. Have you seen these?
> DEFENDANT HOJAN: Yes, sir.
> THE COURT: I'm going to go through them one by one and I just want you to tell me whether or not you have in fact seen the particular ones I'm referring to, and then whether or not you want your lawyers to argue that on your behalf.
> DEFENDANT HOJAN: Okay.
> THE COURT: You understand that these are all legal issues?
> DEFENDANT HOJAN: Yes, sir.
> THE COURT: Some of which depending upon the rulings of the Court could have an impact on what the jury sees, hears, or otherwise can deal with?
> DEFENDANT HOJAN: Yes, sir.

(T:2537-38). The court then went through the motions focusing on the jury instructions individually. Hojan waived or withdrew his challenge to Florida statute sec. 921.141(5)(h)(jury instruction on heinous, attrocious, and cruel ("HAC") aggravator). (T:2537, 2543-44). The court then warned him:

> The Court: Let me state that as an initial statement as it relates to each of the seventeen. Any of these legal arguments that you're waiving at the present time effectively will impact your ability to raise them at a later date on appeal.
> Defendant Hojan: Okay
> The Court: You understand that?

[2]As Hojan notes in his brief, the trial court had ruled pre-trial on a number of the motions, denying them. (ROA: 194-254; T: 2890-2904).

Defendant Hojan: Yes, sir.

(T:2538-39).

> The Court: What I'm looking to do and that's a good idea, but I'm looking to presently remove the specific objections related to the jury instructions, deal with the others. By the way, each of the motions that I'm going to review with the defendant that has been filed by the Defense which the indication that I'm getting is that the Defendant wishes to waive, the State in fact filed a written response to each; correct?
> Ms. McCann: Yes, your Honor.
> The Court: And that's all ready part of the record; correct?
> Ms. McCann: Yes, Your Honor. And, your Honor, for purposes of the record, the Defense had previously filed I think over thirty capital motions that we heard prior to the beginning of the trial.
> The Court: I thought we dealt with a lot of these, but certainly I left it so that the Defense had an opportunity to raise it again prior to the actual penalty phase if they so chose.

(T:2539-41).

Hojan is mistaken when he states that the trial court did not get a waiver of the penalty phase motions challenging the constitutionality of various aspects of the Florida death penalty statutes and practices. The court went through the motions challenging the jury instructions on the aggravating factors and read each standard instruction to Hojan, explained each motion, and received an explicit waiver from Hojan for each, including: objection to the HAC instruction; a request for an interrogatory verdict; a renewed motion (previously denied) objecting to the standard Florida jury instructions for penalty phase; a renewed motion for

statement of particulars for aggravating factors; a motion to video tape victim impact statements; a motion challenging Florida statute sec. 921.141(5)(I) (Cold, calculated, and premeditated ("CCP")); a motion challenging Florida statute sec. 921.141(7) (allowing victim impact statements); a motion to challenging Florida statute sec. 921.141(5)(h) (HAC); a motion challenging Florida statute sec. 921.141(5)(e) (avoid arrest aggravator); a motion challenging Florida statute sec. 921.141(5)(d) (murder during felony armed kidnaping or robbery); a motion challenging Florida statute sec. 921.141(5) (great risk of death to many people) (State did not seek); a motion challenging Florida statute sec. 921.141(5)(b) (prior violent felony); a motion challenging Florida statute sec. 921.141(5)(a) (State not asking) as unconstitutional facially and as applied; a motion to disclose mitigating circumstances; a motion to have victim impact before court alone; and a motion challenging Florida statute sec. 921.141(1) as unconstitutional; and a motion to bar use of hearsay at the penalty phase. Hojan specifically waived appellate review since he withdrew the motions. (T:2542-60). Hojan made it very clear that he did not wish the court to hear or to rule on the penalty phase motions his attorneys filed.

On November 24, 2003 the trial court again inquired of Hojan about his desire to participate in the penalty phase trial.

> THE COURT: Are you still instructing your lawyers to present no mitigation on your behalf?
> DEFENDANT HOJAN: Yes, sir.
> THE COURT: Are you still instructing your lawyers to present no argument on your behalf?
> DEFENDANT HOJAN: Yes, sir.
> THE COURT: Have you determined whether or not you wish this Court to give the jury any type of instruction on your position?
> DEFENDANT HOJAN: No, sir.
> THE COURT: You want me to say anything at all?
> DEFENDANT HOJAN: No, sir.
> THE COURT: Are you intending to take the stand and say --
> DEFENDANT HOJAN: No, I'm not going to say nothing.
> THE COURT: You understand that you do have the right to do that if you choose?
> DEFENDANT HOJAN: Yes, sir.

(T:2584-85).

Essentially, Hojan waived the entire defense participation in the penalty phase, as was his right. It is well established that a competent defendant may waive his right to present either mitigating evidence in the penalty phase of his first-degree murder trial or the entire penalty phase. Fla. Stat. § 921.141(1) (1991); See Durocher v. State, 604 So. 2d 810, 812 (Fla. 1992); Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992); Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988). The trial court did not abuse its discretion by accepting Hojan's withdrawal of the penalty phase motions. "Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'"

Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (quoting Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)). The record clearly demonstrates that Hojan withdrew or abandoned all pending motions for the penalty phase trial; the trial court did not rule the mitigation waiver also waived the motions.

Any error is also harmless and not fundamental. The Florida Supreme Court has consistently held that challenges to the death penalty statutes must be raised at trial by the defendant in order to be preserved. Such challenges cannot, therefore, be fundamental. In Farina v. State, 937 So.2d 612, 629 (Fla. 2006) this court reaffirmed that failing to obtain a ruling on a motion or an objection, fails to preserve it for appeal:

> As we have held, the failure to obtain a ruling on a motion or objection fails to preserve an issue for appeal. Armstrong v. State, 642 So.2d 730, 740 (Fla.1994) (holding that the defendant's pretrial request for a Magnetic Resonance Imaging (MRI) test was procedurally barred because the trial judge reserved ruling on the issue and never issued a ruling) (*citing* Richardson v. State, 437 So.2d 1091, 1093 (Fla.1983)).

Additionally, the trial court ruled on essentially the same motions in the pre-trial hearing held on September 2, 2003. Hojan has not demonstrated that any of his revised motions, filed a scant two months later, contained any additional facts or law which would have resulted in different rulings. It is reasonable to assume that the trial court would have made the same rulings denying the motions had Hojan

allowed the his attorneys to argue the motions and the court to rule on them. Any error by the trial court in not ruling on the revised motions is, therefore, harmless. See Caso v. State , 524 So. 2d 422, 424 (Fla. 1988)(determining that "[a] conclusion of decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Van Den Borre v. State, 596 So.2d 687,690 (Fla. 4 th DCA 1992)(it is well settled that a trial judge can be right for the wrong reason); Stuart v. State, 360 So.2d 406 (Fla.1978)(affirmance is required when the ruling is correct, albeit for the wrong reasons). Hojan has also failed to give this Court any additional information to show there are any constitutional infirmities with the jury instructions or other death penalty statutes. This Court should deny relief on this claim.

ISSUE III

THE TRIAL COURT PROPERLY FOUND A KNOWING AND INTELLIGENT WAIVER OF MIRANDA BY HOJAN AND PROPERLY DENIED THE MOTION TO SUPPRESS. (restated)

In his next claim, Hojan contends the trial court erred in not suppressing his March 12, 2002 statement due to police failure to memorialize the actual Miranda warnings and waiver in either a written or taped audio form. He argues that the time he spent in the Lee County Sheriffs department prior to the arrival of the

Davie police officer as well as the 40 minutes of untaped interview resulted in the detectives overcoming his free will thereby rendering his statement involuntary in violation of Miranda v. Arizona, 384 U.S. 436. (IB 25) He also erroneously states that the trial court issued no written order denying his motion to suppress. He further asserts that the *process* utilized by the Davie police in interviewing Hojan was unreliable and essentially a secret interrogation resulting in a false confession. This claim is without merit since the record shows the detectives fully advised Hojan of his Miranda rights which he knowingly and voluntarily waived. The State asks this court to affirm the trial court's written ruling.

The review standard is that "a presumption of correctness" applies to a court's determination of historical facts, but a *de novo* standard applies to legal issues and mixed questions of law and fact which ultimately determine constitutional issues. Smithers v. State, 826 So.2d 916 (Fla. 2002); Connor v. State, 803 So.2d 598 (Fla. 2001); Parker v. State, 873 So.2d 270, 279 (Fla. 2004). The trial court's ruling on the voluntariness of a confession should not be disturbed unless it is clearly erroneous. Escobar v. State, 699 So. 2d 988, 993-994 (Fla. 1997); Davis v. State, 594 So. 2d 264, 266 (Fla. 1992). Where the evidence is conflicting, the trial court's finding will not be disturbed. Thomas v. State, 456 So. 2d 454 (Fla. 1984); Calvert v. State, 730 So. 2d 316, 318 (Fla. 5th DCA 1999). See

Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (finding even though defendant's former lover encouraged defendant to confess, partly out of fear of prosecution as accomplice, as a whole, defendant's will not overborne by any official misconduct).

"When, as here, a defendant challenges the voluntariness of his or her confession, the burden is on the State to establish by a preponderance of the evidence that the confession was freely and voluntarily given." DeConingh v. State, 433 So.2d 501 (Fla. 1983). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer, 561 So.2d at 281.

Essentially, Hojan is challenging the veracity of Anton's statement that he gave the full Miranda warnings and Hojan waived his rights. The trial court held an evidentiary hearing on the suppression motion on September 2, 2003 and denied the motion. On November 13, 2003[3] the court memorialized its factual findings

[3]The court nunc pro tunc'd the order to the date of the oral ruling, September 9, 2003.

and rulings in a written order denying the motion to suppress, contrary to Hojan's assertions. (IB 25) In finding that Hojan was read and waived his rights, it implicitly found Anton credible.[4]

> ...[Detective Anton] testified that he read the Defendant his Miranda rights, item by item. Detective Anton then testified that the Defendant understood each right he was giving up. Detective Anton stated that he did not threaten or coerce the Defendant into making a statement nor did he make him any promises or inducements. The Defendant never asked for an attorney or declined to speak. The Defendant made incriminating statements on tape to Detective Anton.
> ...On the tape, the Defendant was responsive and gave detailed answers. He answered the questions without hesitation, in a relaxed and natural manner. The Defendant's conduct during the interview was consistent with someone who had waived his rights. He did not sound afraid or overly tired. He never asked for an attorney or declined to speak.
> ...Based on the totality of the circumstances, which include, but are not limited to: the witnesses' testimony at the hearing, four depositionis entered into evidence and the Defendant's taped statements this Court finds that the Defendant's waiver of his rights, "was voluntary, in the sense that it was the product of free and deliberate choice rather than by intimidation, coercion or deception." Additionally, this Court finds that the record reflects that the waiver of the Defendant's Miranda rights "was executed with [the Defendant's] full awareness of the nature of the rights being abandoned and the consequences of their abandonement. ... The record establised that the Defendant was advised of his Miranda rights before questioning and the taping of his statement. At no time did the Defendant request cessation of the question, or an attorney. The Defendant responded calmly and naturally to the questions he was asked and gave detailed answers. The Defendant's conduct during the interview was consistent with someone who had waived his rights. The State has shown, by a

[4]In bears noting that Hojan refused to testify at the suppression hearing so there was no evidence before the trial court refuting Anton's statement. (T:2881-83).

> preponderance of the evidence, that the statements, confessions, and admissions were freely and voluntarily given.
> This Court further finds sufficient probably cause for the Defendant's arrest. The surviving victim, Barbara Nunn, identified the Defendant and Jimmy Mickel based on prior knowledge and observationi. In the hospital, Ms. Nunn positively and immediately identified the suspects. Ms. Nunn's identification and the substantial information developed by Davie police provided sufficient and substantial probable cause for the arrest. The Defendnat was properly and legally arrested.

(ROA:761-63) (Citing State v. Sliney, 699 So.2d 662, 688 (Fla. 1997)).

There was competent substantial evidence supporting the court's findings. Deputy Hamilton of the Lee County Sheriff's Office testified that he was the supervisor conducting the felony stop of Hojan in Lehigh Acres. He was present when Hojan was secured and patted down for weapons. His only statement to Hojan was that he, the officer, would respect Hojan if Hojan showed respect for the police. He asked no questions of Hojan. Hojan's only comment was that he did not know what was going on. (SRT:24). Once at the sheriff's station, Hamilton placed Hojan in an interview room. No one interrogated him pending the arrival of the officers from the Davie police department, who arrived an hour after Hojan had been stopped. Hamilton also said that Hojan was coherent, did not seem under the influence of alcohol or drugs, never asked to speak with an attorney, and never asked about the crime. (SRT:25-27). Lee County Sheriff's deputy Gregory Kircikyan ("Kircikyan") was the officer who handcuffed Hojan. Hojan told him

that the television news had his picture so he was going to the station to find out why. Kircikyan's only words to Hojan were asking whether he wanted something to eat or to drink once he was in the interview room. During the 30 to 40 minutes he was with Hojan, Hojan behaved normally and did not smell of alcohol. (SRT:50-54).

John Stokes ("Stokes") of the Davie Police Department testified about that agency gathering identifying information Hojan and contacted Lee County Sheriff's Department to assist in locating and monitoring him. (T:2803-12, 2817). Robert Anton ("Anton"), an officer with the Davie PD testified that he went to Lee County and began to interview Hojan at the sheriff's station at 1:40 AM. The interview room was 10 feet by 12 with normal florescent lights. Hogan gave him written consent to search his truck; the offense listed at the top of the consent form was "Robbery/ Homicide." (T:2827-30). Anton stated that he read Hojan his complete Miranda rights from a standard form. He went through them one by one and Hojan waived them. At no time did Hojan request an attorney or to end the interview. Anton initially did not tape the first 35 minutes of the interview although he had a tape recorder in his car. (T:2831-35). It was Anton's practice, and Davie procedure, to read the Miranda form but not get a signed waiver. Anton did not begin by taping an interview since he wanted to build rapport with the

individual. He built rapport with Hojan in a few minutes but did not want to interrupt Hojan's story. (T:2866-75).

Around 2:15 AM Anton asked Hojan if he could use a tape and Hojan said yes. He offered Hojan a bathroom break before the taped portion of the interview but he refused. (T:2831-35). Once the taped interview began, Anton referred back to Hojan's waiver of rights and that Anton had neither threatened or promised anything. Throughout the entire interview Hojan was calm and cooperative. The taped interview ended at 2:48 AM. (T:2836). Toward the end of his confession, Hojan confirmed that the police neither threatened or coerced him, nor did they make him any promises. He gave the statement of his own free will. The police had offered him food and water but he had declined. (T:2853-55).

The court's findings are supported by the record and its legal conclusions are proper. Moran v. Burbine, 475 U.S. 412 (1986) (finding constitution does not require suspect know and understand every possible consequence of Miranda waiver); Oregon v. Elstad, 470 U.S. 298, 316-17 (1985). Once Miranda warnings are given, official silence cannot cause a suspect to misunderstand the nature of his rights. See U.S. v. Washington, 431 U.S. 181, 188 (1977). As noted in Washington, a defendant who has been advised he has the right to remain silent is in a curious position to complain his statement was compelled. Id. There is no

constitutional requirement a suspect be given all the information he may feel useful in making his decision or "might...affect his decision to confess." Moran, 475 U.S. at 422. The police have never been required to help a suspect decide whether or not to talk. Id. It has never been a constitutional requirement the police make sure the defendant's waiver was a prudent decision. None of the evidence at the suppression hearing showed any coercion or undue pressure on Hojan. He sat in an interview room, essentially alone, for almost an hour awaiting the arrival of the Davie officers. Prior to Anton's interview, the only comments made by officers to him were that he would be treated with respect if he acted respectfully and inquiries about food. Anton interviewed him for under 40 minutes before he went to get the tape. Hojan confessed to the crimes both during the initial untaped interview and in the taped portion. Hojan's ominous and vague allegations of secret police actions coercing confessions does not comport with the evidence presented in this case. Nor is there any evidence at all that Hojan suffers from cognitive limitations similar to those present in Townsend v. State, 420 So. 2d 615 (Fla 4th DCA 1982). This Court should deny relief on this claim.

ISSUE IV

RING V. ARIZONA DOES NOT RENDER FLORIDA'S CAPITAL SENTENCING UNCONSTITUTIONAL. (restated)

Hojan challenges Florida's capital sentencing scheme arguing that Ring v. Arizona, 536 U.S. 584 (2002) rendered it unconstitutional. While he acknowledges that this Court has repeatedly rejected the challenges to Florida's capital sentencing statute, he claims those prior decisions erroneous. Hojan failed to preserve this issue for appeal by explicitly withdrawing the motion from the trial court's consideration. Furthermore, this Court has consistently held the Florida death penalty statute constitutional. Hojan's sentence should be affirmed.

As discussed in Issue II above, Hojan specifically withdrew all his penalty phase motions as part of his decision not to present any mitigation evidence and essentially not to participate in the penalty phase portion of the trial. (T:2534-59, 2567-72).While the trial court did consider the motions pre-trial and denied them (T:2890-2904), Hojan refused to allow the court to reconsider them or rule on any amended motions at the actual penalty phase trial. Consequently, he failed to preserve those motions for appellate review and, thus, waived them. See Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)(holding except for fundamental error, an issue will not be considered on appeal unless it was presented to lower court; to be cognizable, "it must be the specific contention asserted as legal ground for the

objection, exception, or motion below").

This Court has rejected both the Sixth and Eighth Amendment challenges to the death penalty statute. While questions of law, are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), Hojan has offered nothing new to call into question the well settled principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction, and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence. Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001); Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty and repeated rejection of arguments aggravators had to be charged in indictment, submitted to jury and individually found by unanimous jury). See Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002). Florida's capital sentencing is constitutional. See Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976) (finding Florida's capital sentencing constitutional under Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting Sixth Amendment does not require case "jury to specify the aggravating factors that permit the imposition of capital punishment in Florida"); Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla.

2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003). Moreover, Hojan has contemporaneous felony convictions (first degree attempted murder, first degree attempted felony murder, three counts of armed kidnapping, and two counts of armed robbery). This Court has rejected challenges under Ring where the defendant has a contemporaneous felony conviction. Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim). Relief must be denied.

ISSUE V

APPRENDI V. NEW JERSEY, 530 U.S. 466 (2001), DOES NOT APPLY TO FLORIDA'S CAPITAL SENTENCING SCHEME.

Appellant argues that Florida law violates the principles recognized in Apprendi, claiming that the jury advisory recommendation does not specify which, if any, aggravating circumstances were proven and that the maximum sentence allowed upon the jury's finding of guilt is life imprisonment. Once again, Hojan, by withdrawing his penalty phase motions from the trial court's consideration, failed to preserve the issue for appellate review. The issue is also without merit. Relief should be denied.

As discussed in Issue II above, Hojan specifically withdrew all his penalty phase motions as part of his decision not to present any mitigation evidence and

essentially not to participate in the penalty phase portion of the trial. (T:2534-59, 2567-72).While the trial court did consider the motions pre-trial and denied them (T:2890-2904), Hojan refused to allow the court to reconsider them or rule on any amended motions at the actual penalty phase trial. Consequently, he failed to preserve those motions for appellate review and, thus, waived them. See Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)(holding except for fundamental error, an issue will not be considered on appeal unless it was presented to lower court; to be cognizable, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below").

Apprendi does not apply; the death penalty is not an increase in the statutory maximum for first-degree murder, but is within the stated statutory maximum. Because death is a statutory sentence, the judge may determine the facts relating to a death sentence just as a judge does with other sentences within the statutory maximum. Apprendi concerns what the State must prove to obtain a conviction, not the penalty imposed for that conviction. Also, Apprendi does not effect prior precedent with respect to capital sentencing schemes such as Florida's. Apprendi, 120 S. Ct at 2366, citing Walton v. Arizona, 497 U.S. 639 (1990). In Walton, the United States Supreme Court noted that constitutional challenges to Florida's capital sentencing have been rejected repeatedly. See Hildwin v. Florida, 490 U.S.

638 (1989)(stating case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976). "Apprendi preserves the constitutionality of capital sentencing schemes like Florida's." Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001). This Court has also held that "a capital jury may recommend a death sentence by a bare majority vote." Card v. State, 803 So.2d 613, 628 n. 13 (Fla. 2001) citing Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994).The Apprendi decision is inapplicable, and there is no basis for relief.

To the extent that additional discussion of this claim is required, this Court explained the statutory maximum sentence for first degree murder:

> The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read *in pari materia* with section 921.141, Florida Statutes, **there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death.** (FN4) Both sections 775.082 and 921.141 clearly refer to a "capital felony." Black's Law Dictionary defines "capital" as "punishable by execution; involving the death penalty." Black's Law Dictionary (7th ed.1999). Merriam Webster's Collegiate Dictionary defines "capital" as "punishable by death ... involving execution." Merriam Webster's Collegiate Dictionary (10th ed. 1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum

> possible penalty described in the capital sentencing scheme is clearly death.
>
> (FN4.) Section 921.141, Florida Statutes (1979), provides:
>
> > Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082.
> >
> > ....
> >
> > (3) ... Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death....

Mills v. Moore, 786 So. 2d 532, 537-38 (Fla. 2001). [emphasis added]. Under Florida law a defendant convicted of a capital felony enters the penalty phase (or, in the phraseology of the United States Supreme Court, the selection phase) eligible for the death penalty. The version of § 775.082(1), Fla. Stat.(2003) in effect at the time of Hojan's trial refers to a sentence of death first and then to a sentence of life without parole. If the 1979 statute at issue in Mills made death an available sentence, as this Court held that it did, then the 2003 statute applicable to Hojan leaves no doubt that death is not an "enhanced sentence" under Apprendi. Because that is so, a death sentence is not an "enhancement" of the sentence -- it is a sentence that a defendant convicted of a capital felony is eligible to receive, and which can be imposed after the required penalty phase proceedings are conducted, the advisory verdict is rendered, and the sentencing court considers that advisory

sentence in accordance with Florida law.

The decisions of the United States Supreme Court interpreting Florida's death penalty act are in accord with the foregoing discussion -- a Florida capital defendant is "death eligible" based upon the jury's verdict of guilty of the capital felony (*i.e.*, first-degree murder). Unlike the statutory schemes in some states, Florida's statute determines the eligibility of a defendant to receive a death sentence at the guilt-innocence stage of the capital trial, not during the penalty (or selection) phase. See, Proffitt v. Florida, 428 U.S. 242 (1976).

In distinguishing between the eligibility and selection phases of a capital prosecution, the United States Supreme Court has stated:

> **The eligibility decision fits the crime within a defined classification.** Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to "make rationally reviewable the process for imposing a sentence of death." Arave, supra, 507 U.S., at 471, 113 S.Ct., at 1540 (internal quotation marks omitted). **The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.** The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time. See Romano v. Oklahoma, 512 U.S., at 6, 114 S.Ct., at 2009 (referring to "two somewhat contradictory tasks").

Tuilaepa v. California, 512 U.S. 967, 973 (1994). [emphasis added]. The distinction between the analytical basis of the two stages of a capital prosecution is

significant, and, under Florida law, no argument can be made that a capital defendant does not enter the "selection" phase eligible for a death sentence.

That the capital sentencing statutes in other states may not function in this way is not the issue, and is of no moment here -- Florida's statute answers the "eligibility" question at the **guilt** phase of a capital trial. Even if Apprendi is somehow applicable to capital sentencing, there is no basis for relief because of the manner in which Florida's death penalty statute operates. Hojan's argument that aggravators are "elements of the crime" has been expressly rejected by this Court. Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995); Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988), aff'd, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). Likewise, the argument that a unanimous jury sentence recommendation is required has been rejected. Evans v. State, 800 So. 2d 182 (Fla. 2001); Sexton v. State, 775 So. 2d 923 (Fla. 2000); Alvord v. State, 322 So. 2d 533 (Fla. 1975). These sub-claims are not a basis for relief, and, in any event, are procedurally barred for the same reasons that the Apprendi claim is procedurally barred.

Moreover, even if Apprendi is somehow applicable to Florida's capital sentencing scheme, that result would not help Hojan. One of the aggravating circumstances found by the sentencing court falls within the "prior conviction" class of aggravating circumstances, and, as such, is outside any possible reach of

the Apprendi decision. In other words, no matter how Apprendi might at some point be interpreted, the prior violent felony aggravator falls outside the scope of Apprendi, and, under the facts of this case, are sufficient to support a sentence of death even if the other two aggravators are not considered. Apprendi expressly **excluded** prior convictions from the matters that must be found by a jury before "sentence enhancement" is allowable. The State does not concede that a sentence of death, in Florida, is an "enhanced sentence" as that term is used in Apprendi.

To the extent that Hojan claims that he is entitled to "notice" of the aggravating circumstances upon which the State intends to rely, that claim has been consistently rejected by this Court, and Hojan has suggested no basis for revisiting settled Florida law. In rejecting this claim years ago, this Court stated:

> The aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in section 921.141(5), Florida Statutes (1987). Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove. Hitchcock v. State, 413 So. 2d 741, 746 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). Vining's claim that Florida's death penalty statute is unconstitutional is also without merit and has been consistently rejected by this Court. See Thompson v. State, 619 So. 2d 261, 267 (Fla.), cert. denied, --- U.S. ----, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993), and cases cited therein.

Vining v. State, 637 So. 2d 921, 927 (Fla. 1994); see also, Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Medina v. State, 466 So. 2d 1046, 1048 n. 2 (Fla. 1985) (State need not provide notice concerning aggravators). This claim is not a basis for

relief, and Hojan's sentence should not be disturbed.

ISSUE VI

THE TRIAL COURT BOTH PROPERLY FOLLOWED THE PROCEDURES SET OUT IN KOON V. DUGGER AND DID CONSIDER MITIGATION EVIDENCE IN RENDERING ITS DEATH SENTENCE. (restated)

Hojan next argues that the trial court failed to properly follow the procedures set forth in Koon v. Dugger, 619 So.2d 246 (Fla. 1993) by "allowing" the defendant to forbid his attorneys (John Cotrone ("Cotrone") and Mitch Polay ("Polay")) from giving the court a package of mitigation evidence. He asserts that since the jury did not hear any mitigation evidence and the court told the jury that its would give its verdict "due consideration," then the court improperly weighed the jury verdict in reaching its sentencing decision. Contrary to Hojan's assertion, the trial court did expend every effort to research and investigate the existence of mitigatioin evidence; its efforts are clearly documented in the record. This argument is without merit and should be denied.

On November 13, 2003 Hojan, through his defense counsel Cotrone, informed the court of his decision not to present mitigation evidence at the penalty phase trial. Cotrone said that Hojan reviewed the defense mitigation evidence and declined to have it presented in "any way, shape, or form." (T:2503). Polay and Cotrone discussed the decision "countless times" and "every aspect of what

mitigation is" with Hojan. "We've gone over these mitigating circumstances, we've gone over what each and every witness could say in front of the jury so that they can come back with a recommendation of life." Defense counsel had a psychological expert appointed to evaluate Hojan's competency after he announced his decision; the expert found him competent. (T:2504). Hojan signed a directive, filed with the court, outlining his refusal to present mitigation or have his counsel assist in providing it. Hojan refused to allow the attorneys to proffer the mitigation evidence to the court, threatening to relieve them if they attempted to do so; Hojan reviewed the proposed written proffer and refused to allow the court to see it. (T:2508-10). Hojan acknowledged that he reviewed the mitigation evidence, the proffer, and the witness list. (T:2512, 2516-19). The trial court made repeated inquiries to Hojan about his understanding about the mitigation evidence, its import, and his desire to waive it. Hojan consistentlyand repeatedly, on that date and *each* later court date, stated his refusal to allow mitigation evidence at any point in the trial or sentencing process when the trial court inquired. (T:2505-24, 2583-96, 2655-56, 2912-17, 2929-36, 2953-54, 2979-82, 2997-98, 3101). Hojan refused to allow the court to have even a sealed envelope with the information in it. (T:2523, 2532).

Before the trial court may grant a defendant's request to waive the

presentation of mitigation, the court is obligated to ensure that the defendant's waiver is knowing, uncoerced, and not due to defense counsel's failure to fully investigate penalty phase matters. Koon, 619 So. 2d at 250. The court did so here. The trial court did not abuse its discretion when it granted Hojan's request to waive presentation of mitigation. “Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (quoting Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)). The record supports the trial court's finding that Hojan acted knowingly and intelligently when he (repeatedly) waived presentation of mitigation, and that he did so on his own accord and not because his counsel failed to adequately investigate existing or available mitigation. The idea behind Koon was to ensure that “the defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of mitigating evidence.” Chandler v. State, 702 So. 2d 186, 199 (Fla. 1997); Allen v. State, 662 So.2d 323, 328-29 (Fla.1995). Hojan clearly understood and discussed the mitigation with his attorneys and waived it in court. The trial court met the requirements set forth in Koon.

The penalty phase took place on November 24, 2003 without the jury hearing anything from the defense, per Hojan's insistence. The jury recommended death by a vote of nine to three. (T:2583-2652).

The trial court, furthermore, recognized its duty to independently examine the record for any evidence of mitigation before sentencing Hojan, whether presented by the defendant or not. See Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Santos v. State, 591 So. 2d 160, 164 (Fla. 1991); Muhammad v. State, 782 So.2d 343 (Fla. 2001). To circumvent Hojan's obstreperousness, the trial court appointed an independent lawyer Hilliard Moldof ("Moldof") to prepare mitigation presentation for the Spencer hearing and ordered a presentence investigation (PSI). The State provided Moldof with mitigation information it has in its possession. 2657, 2929-36. Later, the trial court appointed a forensic psychologist, Michael Brannon ("Brannon"), to assist Moldof despite Hojan's continuing attempts to thwart the presentation of any mitigation. Hojan also refused to allow Moldof access to his medical records. 2941-57, 2979-82 Moldof presented the mitigation evidence at the Spencer hearing held on March 18, April1, and April 14, 2004; Hojan's family refused to cooperate, respecting his desire not to participate in presenting mitigation evidence to the court. The record clearly demonstrates that Moldof's investigation into mitigation evidence, whether getting medical records,

getting further mental health testing, or interviewing mitigation witnesses, was directly sabotaged by Hojan himself.

On August 2, 2005 the trial court issued it sentencing order, which it read in open court. Its order specifically detailed the basis for its decision. “This Court has carefully reviewed all the evidence, testimony, and additional materials received in contemplation of the sentencing of the defendant.” It specifically mentioned considering “the evidence presented in the guilt and penalty phases, the mitigation evidence presented by Mr. Moldof, the State’s sentencing recommendation, mitigation counsel’s memorandum in opposition to the imposition of the death penalty, and further argument in favor of and opposition to the death penalty.” (ROA:968-69, T:3107). It made detailed factual findings based upon the trial record, trial documents, and penalty phase and Spencer hearing evidence. Clearly, contrary to Hojan’s assertion, the trial court did in fact consider mitigation evidence and independently weighed all the evidence. There is no evidence that the trial court gave undue weight, or any at all, to the jury recommendation, unlike the court in Muhammad which specifically said it gave great weight to the jury recommendation made without mitigation evidence.

It was Hojan’s choice to have the court not consider the mitigation evidence prepared by Cotrone and Polay. The court was not empowered to order the

attorneys to disregard Hojan's instructions since it was his right to waive both mitigation and the entire penalty phase trial. Hojan decided his attorney's conduct with regard to the mitigation proffer. Nixon v. Singletary, 758 So. 2d 618, 625 (Fla.) ("The defendant, not the attorney, is the captain of the ship."), cert. denied, 531 U.S. 980 (2000); see also Rose v. State, 617 So.2d 291, 294 (Fla.1993)(when a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made); Henry v. State, 937 So.2d 563, 569 (Fla.2006) (defendant "was adamant that trial counsel not rely on any evidence of intoxication or addiction in Henry's defense, in either the guilt or penalty phases); Grim v. State, 971 So.2d 85 (Fla. 2007)(defendant refused to allow attorney to pursue certain course of action); Brown v. State, 894 So.2d 137 (Fla. 2004). Furthermore, it is well established that a competent defendant may waive his right to present either mitigating evidence in the penalty phase of his first-degree murder trial or the entire penalty phase. Fla. Stat. § 921.141(1) (1991); See Durocher v. State, 604 So. 2d 810, 812 (Fla. 1992); Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992); Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988).

The trial court did all it could to ensure that it received as much mitigation as possible, by appointing independent counsel, ordering a PSI, and appointing an additional expert. Its actions went beyond that required when a defendant waives mitigation. It did so to ensure that it considered the available mitigation evidence and independently weigh it. Grim v. State, 841 So.2d 455 (Fla. 2003)(court appointed special counsel to present mitigation evidence at Spencer hearing). In Hamblen, the Court held that where a competent *pro se* defendant pled guilty, waived his right to a jury's sentencing recommendation, and did not wish to present mitigating evidence, a trial court was not required to appoint counsel to present mitigating evidence on the defendant's behalf. Hamblen, 527 So. 2d at 804. Under such circumstances, it was sufficient that the trial court engaged in a "thoughtful analysis of the facts," which adequately protected society's interests in ensuring that the death penalty was not being abused. Id.; see also Pettit, 591 So. 2d at 620 (holding that one convicted of first-degree murder could waive his right to present mitigating evidence, but stressing that "the trial judge must carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate"). The situation here is similar to that in Ocha v. State, 826 So. 2d 956 (Fla. 2002) where this Court found the trial court did not abuse its discretion by not ordering followup mental health examination or testing where the defendant waived presentation of mitigation evidence. The court here

did not abuse its discretion for not holding Hojan's mother in contempt or for not directing the psychologist or special counsel to conduct additional research or review. Rather, "[t]he post-guilt phase record in this case is indicative of a judge who conscientiously and deliberately examined the information available to him, while at the same time respecting the wishes of the defendant." Overton v. State, 801 So. 2d 877, 905 (Fla. 2001). Relief should be denied.

ISSUE VII

THE SENTENCE IS PROPORTIONAL. (added claim)

Although Hojan did not address proportionality, this Court has the independent duty to do so. See England v. State, 940 So.2d 389 (Fla. 2006); Gore v. State, 784 So.2d 418 (Fla. 2001); Jennings v. State, 718 So.2d 144 (Fla. 1998). The instant capital sentence is proportional and should be affirmed.

Hojan was convicted of the execution-style murders of two victims, along with attempted murder and attempted felony-murder of a third victim, three counts of armed-robbery and three counts of armed-kidnapping. The court found six statutory aggravators: Hojan was previously convicted of another capital felony; the capital felony was committed while Defendant was engaged in the commission of, attempt to commit, or flight after committing the crime of armed-kidnapping; the capital felony was committed for the purpose of avoiding or preventing lawful

arrest; the capital felony was committed for financial gain; HAC; and CCP. It gave each great weight. In mitigation the court found one statutory mitigator, the defendant has no significant prior criminal history, to which it gave little weight, and two non-statutory mitigators (the defendant was a good son, parent and provider and he exhibited good behavior while in custody), to each of which it gave little weight. (ROA:967-986).

This Court has affirmed capital sentences under similar circumstances. See Walker v. State, 957 So.2d 560 (Fla. 2007) (affirming for execution-style killing committed during course of a kidnapping based on 5 aggravators, including prior violent felony, HAC and CCP, and 4 non-statutory mitigators); Ibar v. State, 938 So.2d 451 (Fla. 2006) (affirming sentence for execution-style killings based on 5 aggravating factors including HAC and CCP, measured against 2 statutory mitigators and 9 non-statutory mitigators); Pearce v. State, 880 So. 2d 561 (Fla. 2004) (affirming sentence for execution-style killing based on 3 statutory aggravators including CCP weighed against little mitigation); Rimmer v. State, 825 So. 2d 304 (Fla. 2000) (affirming sentence for execution-style death based on 6 aggravating factors, including HAC and CCP, along with no statutory mental mitigators and 5 nonstatutory mitigators); Alston v. State, 723 So. 2d 148 (Fla. 1998) (affirming sentence for the execution-style murder based on 5 aggravating factors including prior violent felony, HAC, and CCP weighed against no statutory

mitigation and 5 non-statutory mitigators); Henry v. State, 613 So. 2d 429, 430, 432 (Fla. 1992)(affirming sentence for the murder of two employees based on 5 aggravators including HAC, and CCP, one statutory mitigator and one non-statutory mitigator). The sentence is proportional.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Hojan's convictions and death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John G. George, Esq., The Advocate Building - First Floor, 315 Southeast Seventh Street, Ft. Lauderdale, Florida 33301 this 20th day of June, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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