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IN THE SUPREME COURT OF FLORIDA

GERHARD HOJAN,

Petitioner,

vs. Case No. SC13-2422

MICHAEL D. CREWS,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

Gerard Hojan ("Hojan") was indicted on April 10 and arraigned on April 11, 2002. A grand jury indicted Hojan on: two counts of first degree murder for the deaths of Christina De La Rosa ("De La Rosa") and Willy Absolu ("Absolu"); two counts of attempted murder (premeditated and felony) of Barbara Nunn ("Nunn"); one count of aggravated battery; three counts of armed kidnapping; and two counts of armed robbery. [R. 12-17]

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 armed 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. 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).

Hojan appealed his convictions, raising five issues. In affirming the convictions and the sentence, the Florida Supreme Court found the following facts:

> Gerhard Hojan was charged with armed robbery, armed kidnapping, attempted murder, and murder arising out of the events of Monday, March 11, 2002. The evidence presented at Hojan's trial established that at approximately 4 a.m., Hojan and Jimmy Mickel entered the Waffle House where the victims, Barbara Nunn, Christina De La Rosa, and Willy Absolu worked. Hojan and Mickel had eaten at that Waffle House on several prior occasions, and the victims recognized and knew Hojan and Mickel. Mickel had also previously worked at that Waffle House. Additionally, Nunn knew Mickel and Hojan from attending a club where Mickel and Hojan worked and where they had previously admitted Nunn for free.
>
> After eating breakfast, Mickel exited the Waffle House. He returned with a pair of bolt cutters and went toward the employee section of the restaurant. Hojan produced a handgun and ordered Nunn, De La Rosa, and Absolu into the back of the kitchen, where he directed them into a small freezer and shut them inside. While Mickel cut the locks to various cash stores, Hojan returned to the freezer

> a total of three times. First, Hojan returned and demanded that the victims give him any cell phones they had. Next, he returned and demanded their money. Finally, he returned and ordered the victims to turn around and kneel on the floor. Nunn protested and tried to persuade Hojan not to kill them, but Hojan nevertheless shot each of the victims. Nunn was shot in the back of the head as she attempted to move away from the weapon. Absolu was shot twice, once through the arm and neck, in what appeared to be a defensive wound, and a second time in the head. De La Rosa was shot twice as she tried to hide under a rack in the freezer. One of the bullets pierced her spine, and the other gunshot to her neck caused massive blood loss. Hojan then left the victims for dead.
>
> Nunn survived and awoke later with Absolu's legs on top of her body. She crawled out of the freezer and went next door to a gas station. There, with the help of the night attendant, she called 911 and subsequently her mother and sister. Law enforcement officers arrived and arranged for Nunn to be taken by ambulance and then helicopter for treatment of her head wound. Prior to her helicopter flight, Nunn gave law enforcement officers a taped statement, in which she identified Mickel and Hojan as being involved. She described Mickel by name and as a former Waffle House employee, and referred to Mickel's friend as "a big Mexican" and also as "[t]he Mexican." Hojan was soon apprehended at his parents' house and he subsequently confessed.

Hojan v. State, 3 So.3d 1204, 1207-08 (Fla. 2009).

Following the Florida Supreme Court's affirmance, Hojan sought certiorari review, raising four questions before the United States Supreme Court. On November 30, 2009, certiorari was denied.

On or about November 24, 2010, Hojan filed his motion seeking postconviction relief under Florida Rule of Criminal Procedure 3.851. The State responded and the trial court summarily denied the motion on December 6, 2012. The appeal of the trial court's denial is currently pending before this Court in Hojan v. State, SC13-5.

On December 19, 2013, Hojan filed the instant petition for writ of habeas corpus.

REASONS FOR DENYING THE PETITION

HOJAN WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL (Restated)

On December 19, 2013, Hojan filed a petition for writ of habeas corpus alleging that his appellate counsel was ineffective on direct appeal for various reasons. Specifically, Hojan contends that appellate counsel was ineffective for failing to raise on appeal his absence during the selection of the jurors as well as the lack of record for that selection process and for not seeking a reconstruction of the record. He also argues that appellate counsel should have raised the trial court's alleged error in admitting prejudicial and remote prior bad acts. For the penalty phase he contends that appellate counsel was ineffective for not challenging the CCP aggravator or the rejection of statutory mitigation as well as for not providing this Court with critical information of his co-defendant's appeal which he argues was relevant to the proportionality review. While a petition for writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel; Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995), this Court will find that the issues are without merit since Hojan has failed to prove that appellate counsel's actions were both deficient and prejudicial as required under Strickland v. Washington,

466 U.S. 668 (1984). Relief must be denied.

"The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland v. Washington standard for claims of trial counsel ineffectiveness." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). Given that the Strickland standard applies, this Court stated recently:

> Thus, the Court must consider first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. ... "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." ... Nor is appellate counsel "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue."... Additionally, this Court has stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. See, e.g., *Ferguson v. Singletary*, 632 So.2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper prosecutorial comments made during the penalty phase where trial counsel did not preserve the issues by objection).

Walls v. State, 926 So.2d 1156, 1175-76 (Fla. 2006) (citation omitted). See Armstrong v. State, 862 So.2d 705 (Fla. 2003).

Appellate counsel cannot be deemed ineffective for failing to raise issues

"that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle, 837 So.2d at 907-08 (citations omitted); See Rodriguez v. State, 919 So.2d 1252, 1282 (Fla. 2005). Further, appellate counsel is not ineffective for failing to raise non-meritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong, 862 So.2d at 718. See Jones v. Barnes, 463 U.S. 745, 751-753 (1983); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). This Court has reiterated that "the core principle" in reviewing claims of ineffectiveness raised in a state habeas corpus petition is that "appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success." Holland v. State, 916 So.2d 750, 760 (Fla. 2005). With these principles in mind, it is clear that Hojan has not met his burden and all relief must be denied.

A. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL ANY ISSUE WITH REGARD TO THE FASHION IN WHICH THE JURY WAS CHOSEN (Restated)

Jury selection in this case began on September 30, 2002. The next day, the trial court had to dismiss that first panel due to a comment by a prospective juror

which disparaged the defense counsel (ROA 465-75). The court and both sides then conducted extensive voir dire questioning of the new panel. Both sides then exercised their challenges for cause before the court which ruled on them. Hojan was present throughout all of these proceedings (ROA 480-1206). After that, the defense and the State agreed to the composition of the jury panel before either side ever exercised any peremptory challenges.

In his petition, Hojan argues that appellate counsel was ineffective for failing to take issue with the agreed fashion in which the State and defense opted to proceed in composing the jury panel after strikes for cause were addressed. Specifically, Hojan asserts that appellate counsel, on direct appeal, should have 1) raised the absence of a record of the selection, 2) raised his absence from "a critical stage of the proceedings", and 3) sought to reconstruct the record of the exchange between the State and defense wherein the agreement was made. Hojan cannot demonstrate that appellate counsel was ineffective in the handling of this issue.

To begin, as already stated, appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle, 837 So.2d at 907-08 (citations omitted). These claims were not only "not properly raised during the trial court proceedings", but affirmatively waived when Hojan

accepted the jury after his counsel and co-counsel explained to him "the positives, the negatives, and [counsel's] opinion of [the agreement]":

> THE COURT: (...) Mr. Hojan, the individuals whose names I've called out - - you've been sitting here since we started picking this jury last Tuesday; is that correct?
>
> DEFENDANT HOJAN: Yes, sir.
>
> THE COURT: And you had an opportunity Tuesday and Wednesday - - even though we dismissed the panel that were here Tuesday and Wednesday until we started again in the afternoon - - you've been here participating with your lawyers through every stage of the jury selection process; correct?
>
> DEFENDANT HOJAN: Yes, your Honor.
>
> THE COURT: And you've consulted with your lawyers as it relates to the challenges for cause that were raised by the defense?
>
> DEFENDANT HOJAN: Yes, your Honor.
>
> THE COURT: And you're aware that as of today we have twenty-seven individuals that have not been stricken for cause?
>
> DEFENDANT HOJAN: Yes, your Honor.
>
> THE COURT: From those twenty-seven, I read out a group of twelve, which includes Mr. Murphy, Ms. Dailey, Mr. Janowski, Ms. Mahoney, Ms. Yuran, Ms. Olson, Ms. Winburn, Mr. Fravel, Mr. Masur, Ms. Creveling, Ms. Coll and Mr. Demille as our twelve primary jurors; is that correct?

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: And of course you were here during all of the questioning with those individuals; correct?

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: ls that an acceptable group of individuals to try your case?

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: And you understand your lawyers along with the State and yourself, have decided that Ms. Finan, Ms. Alcala, Mr. Ticknor and Mr. Yarnold would be our alternates in that order?

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: And they're acceptable to you; correct?

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: Now, you understand in the process of selecting a jury, in addition to challenges for cause, both the State and the Defense have what we call preemptory [sic] challenges, which you can utilize to strike individuals from the panel?

DEFENDANT HOJAN: Yes, sir.

THE COURT: Your side has ten and the State has ten for a total of twenty.

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: You understand that effectively we have not gone through the process of actually exercising the

strikes?

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: What you and your attorneys and the State have done is, you've looked as the initial group of twelve people, and from that you effectively struck Mr. Yarnold as a primary juror and Mr. Dadouch, and Ms. Alcala, Ms. Prince, Mr. Newman, Mr. Sing. They were taken out of the initial twelve that would be primary jurors in your case.

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: And from there, Mr. Masur was added, Ms. Creveling was added, Ms. Coll was added, Mr. Demille was added, and Mr. Favel was added making the group of twelve.

DEFENDANT HOJAN: Yes, sir.

THE COURT: So, effectively, without the exercise of preemptory [sic] strikes, effectively both sides were striking certain individuals to get us to the twelve primary, four alternates.

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: And these individuals are acceptable to you to try the case?

DEFENDANT HOJAN: Yes, your Honor.

THE COURT: Are you under the influence of any alcohol or drugs?

DEFENDANT HOJAN: No, your Honor.

> THE COURT: Do you need additional time or wish additional time with your lawyers to consult with them on this matter?
>
> DEFENDANT HOJAN: No, your Honor.
>
> THE COURT: And, in fact, you have had an opportunity, at this point its more like forty-five minutes, to sit, talk with your lawyers, to go through this process?
>
> DEFENDANT HOJAN: Yes, your Honor.
>
> THE COURT: And you understand the jury and the selection of the jury has to be acceptable to you?
>
> DEFENDANT HOJAN: Yes, your Honor.
>
> THE COURT: This is your case.
>
> DEFENDANT HOJAN: Yes, your Honor.
>
> THE COURT: And you've involved yourself and participated in this selection process; correct?
>
> DEFENDANT HOJAN: Yes, your Honor.
>
> THE COURT: And again, they are acceptable?
>
> DEFENDANT HOJAN: Yes, your Honor.

(T 1210; 1215-19). This record clearly shows not only was the issue not preserved for appeal but that Hojan himself actually ratified the procedure used and accepted the selected jurors to sit.

Nor can Hojan argue fundamental error with regard to the agreement

reached between the State and defense counsel as to the composition of the jury and his absence from the conversations which led to the agreed panel. It is without dispute that in order for an error to be fundamental and justify reversal in the absence of a timely objection, the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Miller v. State, 926 So.2d 1243 (Fla. 2006). No such error was committed.

Rule 3.180, Fla. R.Crim. P. directs the various proceedings for which a defendant shall be present. With regard to jury selection, the rule mandates a defendant's presence "at the beginning of the trial during examination, challenging, impaneling, and swearing of the jury". Rule 3.180(4), Fla. R.Crim. P. Although there were no peremptory challenges exercised for him to be present for, Hojan was present for the examination of the jury panel and for the cause challenges (T 1215-1219). Moreover, Hojan personally accepted the jurors who served and was present for the impaneling and swearing of the jury (T 1220-1224). As no procedural right was violated, there was no error to raise on appeal.

To the extent that Hojan seems to argue error in the denial of his right to exercise peremptory challenges, again he is not entitled to relief. Both the United States Supreme Court and this Court have held that, while peremptory challenges

assist the parties in selecting an impartial jury, such challenges do not rise to the level of a constitutional guarantee. See U.S. v. Martinez-Salazar, 120 S.Ct. 774 (2000); Ross v. Oklahoma, 487 U.S. 81, 86-87 (1988); Jefferson v. State, 595 So.2d 38, 41 (Fla. 1992). The procedure used to choose a jury in this case did not violate Hojan's fundamental right to a fair trial or to participate in trial.

Nor can error be inferred even if trial counsel's acts amounted to a de facto exercise of peremptory challenges in Hojan's absence. In Carmichael v. State, 715 So. 2d 247, 248-49 (Fla. 1998), this Court stated that a defendant's "right" to be physically present at the bench conference where challenges are exercised is not an integral part of a defendant's constitutional right to participate in jury selection necessary to ensure fundamental fairness, but a procedural right granted by rule. Further, in Muhammad v. State, 782 So.2d 343, 353 (Fla. 2001), this Court found no constitutional or substantial violation of the defendant's right to be present for voir dire when Muhammad was not at the sidebar where the court was ***examining*** the jurors. Notwithstanding Muhammad's absence from the sidebar where the jurors were examined, this Court refused to find reversible error. Noting that Muhammad was present for the majority of the examination, could observe the demeanor of the potential jurors; and ratified the procedure and accepted the jury, this Court determined that Muhammad's rights under rule 3.180 were not violated.

Id. (citing to State v. Melendez, 244 So.2d 137, 139 (Fla. 1971) and Goney v. State, 691 So.2d 1133, 1135 (Fla. 5th DCA 1997)).

In his trial Hojan was present during the examination of the jury panel, observed the demeanor of the potential jurors and participated in the cause challenges. Hojan also ratified the procedure and accepted the jury after discussing "the positives, the negatives, and [counsel's] opinion of [the agreement]" (T 1210). Hojan cannot demonstrate that error, if any, was fundamental.

Even assuming that the issue had been properly preserved, Hojan would still not be entitled to relief. Again, appellate counsel cannot be considered ineffective for failing to raise non-meritorious claims. Rodriguez v. State, 919 So.2d 1252, 1282 (Fla. 2005). For the reasons explained above, the claim is devoid of any merit. As such, appellate counsel's performance cannot be deemed deficient for failing to raise it.

In addition to being unable to demonstrate deficient performance, Hojan is also unable to demonstrate appellate counsel's deficiency, if any, compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000). Here, Hojan was present for the questioning as well as the cause challenges themselves. His contention that the attorneys "bilaterally determined" a cause challenge is belied by

the record itself. He knew all the information about the prospective jurors and consulted with his attorneys about the panel before accepting it. Trial counsel for the defense and State merely proposed a solution to picking the jury; it was up to Hojan and the trial court to accept the proposal, which both did.

Hojan's assertion he was prejudiced where the prosecutor may have used racial motives in striking potential jurors with peremptory challenges in violation of Batson v. Kentucky, 476 U.S. 79 (1986) is not only bold speculation that a prosecutor would engage in racial profiling of potential jurors, but refuted by the fact that the attorneys agreed on acceptable jurors. The fact that defense counsel agreed to the proposed panel guards against that very evil. Indeed, if defense counsel, who would be the one to object to a peremptory strike, saw such a pattern emerging during the discussions, he would not have agreed to the proposed panel.

In sum, Hojan has patently failed to demonstrate either the necessary deficient performance or prejudice under Strickland in support of his claim of ineffective assistance of appellate counsel based on the fashion in which the jury was determined so appellate counsel was not ineffective for failing to raise any issues arising therein.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A NON-MERITORIOUS CLAIM OF A WILLIAMS RULE VIOLATION (Restated)

Hojan next argues that his appellate counsel was ineffective for failing to raise the trial court's allegedly erroneous denial of an oral motion in limine made by defense counsel. At trial, defense counsel sought to exclude the testimony from three witnesses that Hojan had been in possession of a firearm similar to the one used during the crime between one and two months before the crime. According to Hojan, this evidence should have been excluded as a violation of the Williams[1] rule and irrelevancy. The testimony was relevant and was not Williams rule so appellate counsel was not ineffective for failing to raise this non-meritorious issue.

The witness's testimonies of having previously seen Hojan in possession of a firearm resembling the one used in the crime was not Williams rule evidence nor was it evidence of prior bad acts. Indeed, it was not admitted as Williams rule evidence at all (T 1851-1852). Williams rule evidence is similar fact evidence of prior crimes or bad acts of the defendant presented by the State under section 90.404(2)(a) The Williams rule is codified in section 90.404(2)(a), Florida Statutes (2001), as follows:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of

[1] Williams v. State, 110 So.2d 654 (Fla. 1959); §90.404(2), Florida Statutes (2009).

> motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Here, the State's witnesses did not testify that Hojan had committed a prior crime or bad act similar to the one for which he was being prosecuted to implicate Williams rule proceedings. Indeed, Hojan's possession of a firearm was not illegal or even a bad act.

Instead, the evidence was relevant because it showed that Hojan had possession of or access to a gun like the one used to shoot the three victims. As it was considered relevant evidence, the State had to demonstrate that the witness' testimony was not only probative of an issue but not outweighed by the danger of unfair prejudice. §90.402, Florida Statutes; §90.403, Florida Statutes (2012). At bar, the fact that Hojan had access to a gun which looked like the gun used in the crime between 1 to 2 months before the crime was certainly relevant to the proceedings. The relevance was not outweighed by undue prejudice as the State never suggested that carrying a gun was a crime in and of itself or that "Mr. Hojan was [a] violent man who carried a gun". Petition, 30. The trial court did not err or abuse its discretion in allowing the testimony of Hojan's possession of the gun. See Ray v. State, 755 So.2d 604, 610 (Fla. 2000) (admissibility of evidence is within the sound discretion of the trial court, and standard of review on appeal is abuse of

discretion) As this issue would have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise it cannot render appellate counsel's performance ineffective. Armstrong, 862 So.2d at 718.

Furthermore, Hojan cannot establish that the alleged deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000). Assuming that appellate counsel had raised this issue, and also assuming that this Court determined that the trial court abused its discretion in admitting the testimony, there exists no reasonable possibility that his appellate outcome would be different. This Court stated in Hojan's direct appeal:

> In this case, there was substantial testimony by other witnesses that duplicated Nunn's statement from the ambulance that "[t]he Mexican" was the shooter. Gas station attendant Kahn testified that Nunn told her that he should not open the door to the gas station because "two guys ... want to kill me.... One Mexican and one White." Paramedic Steven Cacciola testified that Nunn told him in the gas station that a Mexican who was with Jimmy had shot her. Officer Donnelly testified that Nunn stated in the gas station—prior to and separate from Nunn's statements to him in the ambulance—that an ex-employee and a Mexican had robbed the Waffle House. Nunn herself also testified in court that Hojan shot her and the two other victims. Nunn stated that she previously identified Hojan as the shooter in a photo lineup, and JoAnn Carter, a Davie police detective, also testified that Nunn identified Hojan as the shooter in a photo lineup at the hospital. Finally, Hojan confessed in

> his taped statement that he shot the victims, and that confession was played for the jury.

Hojan v. State, 3 So.3d 1204, 1210 (Fla. 2009). In light of this, even assuming appellate counsel was deficient for not raising this issue on appeal, Hojan cannot show the prejudice required under Strickland to be entitled to relief.

C. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PLACE THIS COURT ON NOTICE OF THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IN MICKEL V. STATE, 929 So.2d 1192 (FLA. 4th DCA 2006), HOJAN'S CO-DEFENDANT'S CASE (RESTATED)

Hojan next contends appellate counsel was ineffective for failing to place this Court on notice of the Fourth District's decision in Mickel v. State, 929 So.2d 1192 (Fla. 4th DCA 2006). According to Hojan, this opinion would have called into question the trial court's finding of CCP as well as it's rejection of the mitigating factor that he was "under the substantial domination of another person" §921.141(6)(e), Florida Statutes since the same trial court had admonished Mickel for being the mastermind of the robbery and for manipulating Hojan to do his bidding. Hojan argues that the trial court's CCP determination and rejection of the statutory mitigator cannot be reconciled with its pronouncements made to Mickel. Had appellate counsel placed this Court on notice of the Mickel opinion, he surmises, there exists a reasonable probability that this Court would have struck the

CCP aggravator as well as found error in the trial court's rejection of the statutory mitigating factor. Finally, Hojan suggests that since this Court's review of proportionality included the CCP aggravator and did not include the improperly rejected statutory mitigator of substantial domination, this Court should revisit its proportionality analysis. Again, Hojan's claims are unavailing.

The Mickel opinion had absolutely no bearing on Hojan's sentence. If anything, the Mickel opinion supported the trial court's findings with regard to Hojan's death sentence. Although the court, in Mickel, did admonish Mickel for being the mastermind of the robbery and for manipulating Hojan into committing the murders, that did not make Hojan's killings any less cold, calculated, and premeditated. Indeed, these were the trial court's specific words to Mickel:

> There is no question having sat through both Mr. Hojan's trial and your trial that you were the mastermind behind this entire thing. You manipulated Mr. Hojan. He was there, he did your bidding, and the three times that he left that freezer and went back to your location, there was no question what was going on at that point. ***You were telling him, no witnesses, no witnesses, no witnesses, and he went back and he went forth, and he went back, and he pulled the trigger and that pull of the trigger was a cold, calculated, premeditated act that was precipitated by your direction***. No question about that.

Mickel, 929 So.2d at 1195 (emphasis added).

Moreover, contrary to Hojan's stance, the contention that he was

manipulated into killing the victims does not direct a finding that he was under the substantial domination of Mickel pursuant to §921.141(6)(e), Florida Statutes. That section provides for the statutory mitigating circumstance of "the defendant acted under the extreme duress or under the substantial domination of another person". In order to demonstrate domination, the domination must be substantial and evidence that the defendant was easily led is insufficient, in and of itself, to establish this mitigator. Lawrence v. State, 846 So.2d 440, 448-450 (Fla. 2003). There must be evidence of threats, coercion or intimidation. Id. at 449. Manipulation is not synonymous with "threats, coercion or intimidation" but, rather, it is the act of skillfully managing or influencing another in an unfair manner. "manipulation." *Dictionary.com*. 2014. http://www.merriam-webster.com. 28 February 2014. Manipulation is more subtle than an outright threat or use of force. Hojan may have been manipulated by Mickel but there is no evidence that Hojan was dominated by him. Accordingly, any suggestion that the trial court's findings in Mickel might have had some bearing in this Court's review of Hojan's sentence is without support. Therefore, appellate counsel was not ineffective for failing to raise this meritless claim.

In sum, this record is absolutely devoid of any evidence that appellate counsel was ineffective in their representation of Hojan. Hence, this petition must

be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court deny all relief based on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Response to the Petition for Writ of Habeas Corpus has been furnished electronically to Todd Scher, Assistant CCRC-South at schert@ccsr.state.fl.us and Jessica Houston, Staff Attorney at houstonj@ccsr.state.fl.us on March 4, 2014.

__/s/ Lisa-Marie Lerner_____
LISA-MARIE LERNER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 14 point Times New Roman, a font that is not proportionally spaced.

s/ Lisa-Marie Lerner_____
LISA-MARIE LERNER