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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-05

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). References to the post-conviction record will be “PCR” followed by the page number.

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[1]. The court held the Spencer hearing on March 18

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

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.[2] 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.

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[2] 1) Whether the surviving victim's statement to an officer at the scene was an excited utterance; 2) whether the trial court improperly treated Hojan's waiver of mitigation as a waiver of his motions challenging the death penalty; 3) whether his confessionshould have been suppressed; 4) whether Florida's death penalty statute is unsonstitutional; and 5) whether the trial court erred under Koon v. Dugger, 619 So.2d 246 (Fla. 1993) and Muhammad v. State, 782 So.2d 343 (Fla. 2001).

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.[3] 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. This appeal follows.

SUMMARY OF THE ARGUMENT

I. Hojan's contention that his trial counsel was ineffective in choosing the jury outside of his presence is without merit and insufficiently pled, as are the other three claims. Hojan was present for all the questioning and the cause challenges. He specifically ratified the procedure used to choose the jury and accepted it. The scientific evidence was admissible and trial counsel was not deficient for failing to raise a non-meritorious motion. Trial counsel was not ineffective for not putting on an mental health expert at the suppression motion and arguing the waiver was involuntary due to sleep deprivation. Counsel was

[3] Whether the instruction on the jury's advisory sentencing role was constitutional?

also not ineffective for failing to notify the German and Jamaican consulates about Hojan's case since he is an American citizen.

II. The claim that counsel was ineffective for allegedly not discussing the conditions of life on death row is procedurally barred, insufficiently pled, and without merit. The issue of Hojan's waiver of mitigation was raised on direct appeal and he was steadfast in his refusal to present any mitigation.

III. The trial court did not abuse its discretion in denying certain public records requests since they were overly broad and amounted to a fishing expedition.

IV. The 2009 NAS Report is not newly discovered evidence since it is inadmissible and was not created to challenge tool mark science.

V. Hojan's challenge to Florida rules about contacting jurors is procedurally barred and without merit.

VI. Florida's lethal injection protocol and procedures is constitutional.

VII. The claims in this last issue are only referenced without factual detail or legal argument and should be deemed waived. They are also without merit.

ARGUMENT

When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is 'legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record.' " Reynolds v. State,

99 So. 3d 459, 471 (Fla. 2012) (quoting Connor v. State, 979 So. 2d 852, 868 (Fla. 2007), *cert. denied*, 133 S. Ct. 1633 (2013); Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). This Court's review of a post-conviction court's decision on the grant an evidentiary hearing is *de novo*. State v. Coney, 845 So.2d 120, 137 (Fla. 2003). In determining whether an evidentiary hearing is required, this Court has stated:

> [A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden. However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record.

Hannon v. State, 941 So.2d 1109, 1138 (Fla. 2006) (quoting Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000)).

I

HOJAN'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE PROCEDURALLY BARRED, INSUFFICIENTLY PLED, AND/OR WITHOUT MERIT. (Restated)

Hojan argues that his trial counsel was ineffective in several areas during both his guilt and penalty phase trials to the extent that he must be granted a new trial. His first claim involves his attorney's actions in picking a jury by agreement with the

prosecutor. His next claim is based on his attorney's failure to ask for a hearing under Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) for the toolmark and firearm evidence. His third is based on a failure to challenge Hojan's understanding of the Miranda warning[4]. The ground for his final claim is that his trial attorney failed to investigate Hojan's German and Jamaican nationality. The trial court properly denied each of these claims since they are refuted by the record.

A. Counsel was not ineffective in choosing a jury by agreement. (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. Hojan asserts that process constitutes ineffective assistance of counsel by violating his fundamental right to be present during jury selection. He also argues that this process essentially prevents appellate review of the jury selection

[4]Miranda v. Arizona, 384 U.S. 436 (1966).

since there is no transcript of the discussions; this is the only prejudice he alleges. Contrary to Hojan's assertions, the procedure used in his case did not violate any of his rights at trial so counsel was not deficient. Furthermore, Hojan agreed to the selection which he affirmed on the record. Finally, he did not demonstrate any prejudice which is required for relief under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Hojan's claim is without merit because he has not established that his constitutional right to meaningfully participate in jury selection was violated. The Court began jury selection on September 30, 2002 and it continued through Friday, October 3, four full days, sometimes going into the evening hours. In open court and with Hojan present, the Court examined each of the jurors, as did the State and both defense attorneys. The Court heard and ruled on challenges for cause from both sides. The twenty-eight jurors at issue were from the group that survived the cause challenges. [See generally Vol. 8-9 of the trial transcript] At least eight of that group would end up on the jury panel for trial. Given that each side had ten peremptory challenges, the Court might have needed an additional eight potential jurors, assuming that each side used all of its challenges. Hojan was present throughout that process. [T. 1200-01] Thus, he was present and obtained direct first hand knowledge

of the juror's qualifications necessary for him to participate in the selection process. United States v. Washington, 705 F.2d 489, 497 (D.C.Cir.1983).

Initially, both the United States Supreme Court and the Florida Supreme Court have held that, while peremptory challenges assist the parties is 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.

Hojan cites to §3.180 Fla. R. Crim. P. as giving him a right to be present for all aspects of the jury selection. He argues that this is a substantial right which was violated when counsel chose the panel from the available venire without questioning any additional jurors. He claims that Coney v. State, 653 So.2d 1009 (Fla. 1995) requires the defendant must be physically present at the site where the challenges are exercised. This Court, however, clarified the meaning of the rule in Carmichael v. State, 715 So. 2d 247, 248-49 (Fla. 1998), stating 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.

Consequently, Hojan's alleged absence from the actual site of the selection of the panel does not involve a substantial or constitutional right.

This Court further reiterated the Carmichael holding in Muhammad v. State, 782 So.2d 343, 353 (Fla.. 2001) when it found no constitutional or substantial violation of the defendant's right to be present for voir dire when he was not at the sidebar where the court was examining the jurors. It also held that since Muhammad was present for the majority of the examination and could observe the demeanor of the potential jurors, his rights under rule 3.180 were not violated. Furthermore, the Court reasoned that "because Muhammad ratified the procedure and accepted the jury, we do not find that reversible error occurred in this case." 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). As Hojan acknowledges, he spent forty-five minutes discussing the procedure used to select his jury and its final composition with his attorneys. He then ratified both the process and the final composition of the jury when the trial court questioned him at length.

> 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 primaryjurors; 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 primaryjuror and Mr. Dadouch, and Ms. Alcala, Ms. Prince, Mr. Newman, Mr. Sing. They were taken out of the initial twelve that would be primaryjurors 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 at 1210; 1215-19) (emphasis added. Rather than answering *pro forma*, Hojan specifically answered the judge's questions and said that the jury panel was acceptable to him. There was no error, either fundamental or structural, and, therefore, trial counsel could not be ineffective.

Hojan also failed to prove prejudice in the composition of the jury or how the process used prejudiced his trial. This situation is similar to the one in Muhammad where the cause challenges were conducted at the bench where the defendant could not hear them. This Court found no substantial or constitutional right was injured in that situation. 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 it was accepted. Trial counsel for the defense and State merely proposed this solution to picking the jury; it was up to Hojan and the trial court to accept the proposal, which both did.

Hojan attempts to cure his failure to show prejudice by raising fear of two specters. He claims that his trial counsel should have questioned Juror Fravel more extensively in order to presumably prevent a biased juror from sitting. The record contains no information which supports such a contention. Fravel's battery arrest,

which was *dismissed*, came to light during voir dire itself; since it was dismissed and the State had asked if he had any lingering feelings about it, more questioning would not have revealed any new information on which to base a challenge. Hojan also failed to show how the presence of Fravel on the jury resulted in prejudice to him, even it there had existed any statutory reason to exclude him from the jury. Finally, Officer Kilpatrick did not testify in the trial so Fravel's acquaintance with him had no bearing on the trial. He next brings up the possibility that 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). Besides being rank speculation that a prosecutor would engage in racial profiling of potential jurors, the fact that the attorneys agreed on acceptable jurors would guard against that very evil. 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 agree to the proposed panel. Hojan failed to demonstrate the necessary prejudice under Strickland and the trial court properly summarily denied the claim.

B. Counsel was not ineffective for failing to make a meritless challenge to the scientific evidence. (Restated)

Hojan next argues that his trial counsel was ineffective for a failing to request and/or obtain a Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) hearing with

respect to the tool mark linking the bolt cutters to the locks at the restaurant and the firearm and bullet identification. He uses a report from the National Academy of Science to argue that all such evidence is suspect and, therefore, inadmissable in Florida. Defendant points to the 2009 report of the Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (NAS Report), to no avail because not only is it inadmissible hearsay evidence,[5] but the Committee was neither formed nor its report completed at the time of Hojan's trial. The report cannot form the basis for a Frye hearing, which is designed to vet new and novel science. Consequently, its conclusions do not establish either deficiency or prejudice under Strickland as an attorney's performance must be evaluated based on the circumstances at the time of trial, which was in 2003. This claim was insufficiently pled and without merit; the trial court properly denied it summarily.

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[5]This Court has held that inadmissible information does not constitute newly discovered evidence. Williamson v. State, 961 So. 2d 229, 234 (Fla. 2007); Jones v. State, 709 So. 2d 512, 521 (Fla. 1998); Johnson v. Singletary, 647 So. 2d 106, 110-11 (Fla. 1994). Also, the Court has held that it has never recognized new opinions or new research studies as newly discovered evidence. Schwab v. State, 969 So. 2d 318, 326 (Fla. 2007). It has rejected repeatedly claims that governmental studies, such as this one, constitute evidence at all, much less newly discovered evidence. Power v. State, 992 So. 2d 218, 220-23 (Fla. 2008); Tompkins v. State, 994 So. 2d 1072, 1082-83 (Fla. 2008); Diaz v. State, 945 So. 2d 1136, 1145-46 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006).

The statute governing expert testimony, § 90.702, Florida Statutes (1999), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

The trial court is required to make two factual determinations before an expert may testify in the form of an opinion: first, the court must determine whether the subject matter is proper for expert testimony, i.e., that it will assist the trier of fact in understanding the evidence or in determining a fact in issue and second, the court must determine whether the witness is adequately qualified to express an opinion on the matter. See generally Charles W. Ehrhardt, Florida Evidence section 702.1 (citing Ramirez v. State, 651 So.2d 1164 (Fla. 1995). In making the first determination, the court looks to whether a reliable body of scientific or other specialized knowledge has developed to support the opinion testimony. Id.

The purpose of the report in question was to highlight deficiencies in certain forensic fields, such as toolmark analysis and firearms identification, and to suggest improvements to existing protocols. It was not designed to address issues of admissibility of forensic evidence. See United States v. Rose, 672 F.Supp.2d 723, 725

(D.Md. 2009) (quoting Hon. Harry T. Edwards, Statement Before U. S. Senate Judiciary Committee (March 18, 2009) for the statement that "nothing in the Report was intended to answer the 'question whether forensic evidence in a particular case is admissible under applicable law"'). Hojan reliance on it to argue ineffective assistance of counsel is misplaced.

Hojan argues that trial counsel was ineffective for failing to voir dire firearm and tool mark expert Haemmerle and for not seeking to preclude his testimony which, he argues, would have ruptured the link between Hojan, the bolt cutters, and the murder weapon. Hojan did not allege what facts or information would have been elicited during voir dire that would have required the exclusion of Haemmerle as an expert. Thus, his claim was factually insufficient and was properly summarily denied. The factual allegations must be specific and not mere conclusions. Reaves v. State, 593 So. 2d 1150 (Fla. 1st DCA 1992). For instance, if the claim is that counsel was ineffective for failing to call witnesses, the names of the witnesses and their potential testimony must be alleged to constitute a facially sufficient claim. See Sorgman v. State, 549 So. 2d 686 (Fla. 1st DCA 1989). Conclusory allegations are legally insufficient on their face and may be denied without a hearing. Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (opining that a summary or conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the

record"); Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989)(opining that "[a] defendant may not simply file a motion for post-conviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing"). See, Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988) (finding claim legally insufficient where defendant asserted that undisclosed photographs might have proven another person was responsible for crime).

Furthermore, the State submits that even had a Frye hearing been requested, that request would have been denied and the evidence admitted since no new or novel scientific theory was being presented by the expert nor has Hojan pointed to admissible evidence to suggest the science is no longer valid. As provided in Rodgers v. State, 948 So.2d 655, 666 (Fla. 2006): "The Frye test is used to determine the admissibility of expert scientific opinion by ascertaining whether new or novel scientific principles on which an expert's opinion is based 'have gained general acceptance in the particular field in which it belongs.' Frye, 293 F. at 1014; see also Castillo v. E.I. Du Pont De Nemours & Co., Inc., 854 So.2d 1264, 1268 (Fla. 2003)." Frye is utilized in Florida only when the science at issue is new or novel. See Brim v. State, 695 So.2d 268, 271-72 (Fla. 1997). See Spann v. State, 857 So.2d 845 (Fla. 2003); Hadden v. State, 690 So.2d 573, (Fla. 1997).

Use of tool mark analysis is not new or novel scientific evidence necessitating a Frye hearing. Florida, and other jurisdictions, have long allowed evidence of tool mark comparisons, under which fall both the bolt cutter and rifling marks.

> The theory underlying tool mark evidence, which is explained below, is generally accepted in the scientific community and has long been upheld by courts. The term "tool mark" refers to the mark left by a hard material when striking a softer material, and such a mark generally falls into one of two classes, i.e., (1) an impression marking, or (2) a striation marking:
>
> > A toolmark may be described briefly as the mark left by an instrument or an object composed of a hard substance coming in contact with and leaving some characteristic mark or impression on a relatively softer medium.
> >
> > Toolmarks may show one of two things: (1) a negative reproduction of the tool itself-size, shape, and contour-which is a true impression; (2) a series of parallel striations [or lines] caused by dragging the tool across the surface of the softer medium.
> >
> > The basic principle in toolmark comparison is the reproduction of similar marks with the suspected tool or instrument, simulating as nearly as possible the conditions under which the original marks were made.
>
> Leland V. Jones, *Locating and Preserving Evidence in Criminal Cases*, in 1 Am.Jur. Trials 555, 616 (1964).

Ramirez v. State, 810 So.2d 836, 844-45 (Fla. 2001). Additionally, the toolmark examination and evaluation done in comparing a spent bullet with a particular gun has long been upheld against Frye and even Daubert v. Merrell Dow, 509 U.S. 579, 113 S.Ct. 2786 (1993) (which Florida did not follow at the time). For example, no federal court has ever held the evidence inadmissable. U.S. v. Monteiro, 407

F.Supp.2d 351, 366 (D.Mass. 2006). Even recent challenges to this evidence have found it admissible. "Accordingly, although the process of rendering an opinion is primarily subjective and based on the expertise of the examiner, the existence of the requirements of peer review and documentation ensure sufficient testability and reproducibility to ensure that the results of the technique are reliable." Id. at 369. Given this, no deficiency is shown. See McDonald v. State, 952 So.2d 484, 488-95 (Fla. 2006) (agreeing with court that counsel was not ineffective in failing to request Frye hearing on evidence that was neither new or novel scientific evidence). Counsel is not ineffective for failing to raise a nonmeritorious issue. King v. State, 555 So.2d 355, 357-58 (Fla. 1990); Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999). Hojan takes exception to Haemmerle's testimony that the marks were made by the specific bolt cutter or gun "to the exclusion of all other" bolt cutters or guns. The expert explained the basis for that statement and was questioned about it; a Frye hearing would not have prevented the testimony. Since Hojan has failed to establish the deficiency prong, this court need not reach the prejudice prong. Strickland, 466 U.S. at 697, 104 S.Ct. 2052.

Further, Hojan's comment that trial counsel did not adequately investigate Haemmerle's qualifications does not put forth what, if anything, he would or should have uncovered to challenge his scientific expertise. This conclusory statement does

not establish that his expertise or methodology or analysis was new or novel, as required under Frye.. He has not shown the need for a Frye hearing or ineffectiveness arising from the decision not to seek such a hearing. Similarly, Hojan may not rely on the NAS Report as proof of deficiency as it was not available at the time of trial and newly developed theories do not undermine the decision made by counsel at the time of trial. Cf. Power v. State, 992 So. 2d 218, 220-23 (Fla. 2008)(finding government reports do not establish admissible evidence).

Finally, Hojan cannot establish the necessary prejudice, even if he could demonstrate deficiency, in order to prevail under Strickland. There was overwhelming evidence of Hojan's guilt and he would have been convicted even if the State had not presented the toolmark evidence. Hojan lived and hung out with Mickel. Nunn, an eyewitness and a victim, knew both men and had seen them numerous times in the restaurant. (T:1386-94, 1451-56, 1503-22, 1821, 1835-38). She testified that Hojan and Mickel were the two who committed the robbery and Hojan did the shooting. Nunn saw Mickel with the bolt cutters as he took the locks off the doors. (T: 1413-14) A pair of bolt cutters were recovered by the police from Hojan's truck. (T:2020, 2085-88) Hojan cooperated with the police and confessed to the crimes and the shootings. He said that the gun found by the police was his and was the one he used to shoot the three people. (T: 2014-16, 2133-34, 2140-58) Haemmerle's phrase about

"to the exclusion" was not materially different for the jury than the phrase "it matched within a reasonable degree of scientific certainty" and certainly did not result in a different verdict given the evidence against Hojan. Hojan did not met his burden of showing either ineffective assistance of counsel or prejudice as required under Strickland. This Court should affirm the summary denial of the claim.

C. Counsel was not ineffective when he did not assert that Hojan was incapable of understanding his Miranda rights at the suppression hearing. (Restated)

In his third ineffective assistance of counsel claim, Hojan argues that he counsel failed to challenge his Miranda waiver as being unknowing and involuntary due to his mental state. He asserts that he was so sleep deprived that he could not think clearly and could not appreciate the consequences of his waiver. He contends that counsel should have put on Dr. Ribbler at the suppression hearing to testify about the sleep deprivation and, if he had done so, the trial court would have granted the suppression motion. The State disagrees. This claim is without merit, procedurally barred, and insufficiently pled. Summary denial was warranted.

This claim was procedurally barred. This Court addressed the waiver issue on direct appeal and upheld the trial court's finding that Defendant was advised of his constitutional rights and knowingly and voluntarily waived those rights. Hojan, 3 So. 3d at 1212-13. The specific issue in the direct appeal was whether he knowingly and

intelligently waived his rights, the same issue he raised as a post-conviction claim. Hojan is relitigating that issue as ineffective assistance of counsel but he is procedurally barred from doing so. See, e.q,, Henry v. State, 937 So. 2d 563, 572 (Fla. 2006) (stating that "relitigation of old issues under new arguments is prohibited"); State v. Riechmann, 777 So.2d 342, 353 n.14 (Fla. 2000) (finding claims procedurally barred because defendant was couching them in terms of ineffective assistance when they had been raised and rejected on direct appeal); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (holding "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal").

Hojan voluntarily went to the police department. He was not picked up by the police, but was driven there by his father. It was the defendant who chose the time to turn himself into the police, knowing that he would be questioned at that time about the crimes. Part of Hojan's statement to the police was, in fact, recorded. The trial court heard that recording. At the beginning of it Detective Anton specifically asked Hojan if he were under the influence of alcohol or drugs and if he was impaired in any way. Hojan said no. Anton also asked him if his judgement was impaired in any way. Again, Hojan said no. The trial court was also able to hear Hojan's voice while he made those statements and, presumably, any indication of impairment or

inattention would have been apparent. Trial counsel questioned Anton on whether Hojan complained of a lack of sleep or seemed sleepy during the interview. (T: 2876, 2880-81) Hojan chose not to testify at the motion to suppress. (T: 2882) During the police interview Anton asked Hojan if he needed a break and if he was okay, to which Hojan replied he was fine. (T: 2835) Hojan's demeanor during the interview was calm and cooperative. (T: 2836) The trial court was alerted to this subject as a potential issue in the suppression motion and found the waiver was knowing and intelligent. Trial counsel was not ineffective for failing to present Dr. Ribbler given the evidence of Hojan's physical and mental state in the record. See Davis v. State, 990 So.2d 459, 463-64 (Fla. 2008)(counsel was not ineffective for failing to call an expert to testify about sleep deprivation affecting defendant's Miranda waiver given detectives testimony about his condition at the time of the interview). Hojan has failed to establish that his trial counsel was ineffective so this claim was properly summarily denied. Strickland, 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one."). See also Chandler, 218 F.3d at n. 44; Reaves v. State, 826 So. 2d 932, 939 N.10 (Fla. 2002) ("Since Reaves fails to establish the deficiency prong which is a prerequisite under Strickland, it is

not necessary to address whether he has made a showing of prejudice.); Waterhouse, 792 So.2d 1176, 1182 (Fla. 2001).

Additionally, the State respectfully incorporates the prejudice analysis above here. Even assuming Hojan's confession were suppressed, there was substantial competent evidence of his guilt so that the result of the trial would not have changed. Nunn knew him and identified him as the shooter. A gun identified as matching his was found and discovered to be the murder weapon. Neither prong of the Strickland test have been established so this Court should affirm the denial of this claim.

D. Counsel was not ineffective for not investigating Hojan's parents' nationality. (Restated)

In his final claim Hojan asserts that trial counsel was ineffective because he did not investigate his parents' nationalities since both were immigrants. While acknowledging that Hojan himself was born and raised in the United States and is a citizen, he contends that Article 36 of the Vienna Convention on Consular Relations somehow applies to him because he visited his family in foreign countries during vacations. He likens arrested foreign nationals, isolated from their family and friends in a strange land, to his situation where he asked his father to drive him from his family home to the police station so he could turn himself in for shooting three people. The trial court properly denied this claim as without merit and insufficiently pled.

Hojan is an American citizen. He was born and educated in the United States and grew up speaking English. The Vienna Convention does not apply to him, given that he was arrested in his own country for a crime committed in his home state. Consular assistance from Germany or Jamaica would not be available to him nor could they provide him with a "cultural bridge" given his American cultural background. Hojan also was provided with legal assistance from the court and the consuls would have provided nothing in addition even if he had been eligible for their help. His unfounded speculation that Hojan could have become a German citizen after his arrest for a double murder, attempted murder, and multiple counts of kidnapping and robbery is simply absurd and without factual support. As the trial court noted: "It is even more far-fetched to assume that he could have become a citizen of either country in time to benefit from assistance from the German or the Jamaican government during the guilt and penalty phases of the trial." (PCR 771) He has shown no ineffectiveness, denial of any right, nor any articulable prejudice. "Allegations that counsel was ineffective for not pursuing meritless arguments are legally insufficient to state a claim for postconviction relief." Owen v. State, 986 So. 2d 534, 543 (Fla. 2008) (*citing* Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992) for the proposition that "counsel cannot be deemed ineffective for failing to make meritless argument").

The claim is also conclusory and was properly summarily denied. Conclusory allegations are legally insufficient on their face. Also, Hojan never stated that he would have sought consular help even if it were available for him. See Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001) (stating "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Freeman, 761 So. 2d at 1061 (opining "defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Ragsdale, 720 So. 2d at 207 (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record"). The denial should be affirmed.

II

THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR NOT COUNSELING HOJAN ABOUT THE DEATH ROW CONDITIONS WHEN HE WAIVED THE PRESENTATION OF MITIGATION IS PROCEDURALLY BARRED AND WITHOUT MERIT. (Restated)

In his next claim Hojan argues that his trial counsel was ineffective for not advising him about the consequences of waiving the presentation of penalty phase evidence of mitigation. He contends that if counsel had explained the harsh

conditions of death row and the process of lethal injection to him, he would not have waived the mitigation evidence. He asserts that his waiver was equivocal and he relied on his counsel's advice in making his decision to waive mitigation. He asserts without analysis that the jury would have recommended life if the mitigation evidence had been presented. In his amended claim, Hojan contends that his counsel was ineffective for hiring an inexperienced mental health expert, for insufficiently trying to dissuade him from waiving mitigation, and for not using a competent mental health expert knowledgeable about mitigation to convince Hojan to present mitigation. This claim is procedurally barred, insufficiently pled, and without merit.

Hojan's waiver of mitigation was an issue on direct appeal. This Court stated:

> In this case, defense counsel John Cotrone informed the trial court that he had conducted an investigation of mitigation and had presented the information found to Hojan. Cotrone stated, "We have a number of witnesses here, we filed a Defense witness list and we have statements of those individuals as well." Cocounsel Mitchell Polay then stated:
>
> > Mr. Cotrone and myself have spoken to Mr. Hojan countless times. I have spoken to his family, I've spoken to family friends....
> >
> > We've discussed every aspect of what mitigation is. I've explained to Mr. Hojan that he has an absolute right to present mitigating circumstances. 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; however, he has ordered both myself and Mr. Cotrone ... not to present any mitigation in any way, shape or form, not to present testimony. That's where we're at, Judge.

> Additionally, I just want to point out one thing. As soon as I got wind as soon as Mr. Hojan told me that he does not wish to present any type of mitigation, I had the Court order an evaluation [of his competency].

The trial court then asked if Hojan had reviewed that competency report, and Hojan stated that he did not disagree with the report's finding that he was competent.

Next, the trial court engaged in a lengthy evaluation under *Koon* of whether Hojan's waiver of mitigation was knowingly, voluntarily, and intelligently made. The court noted that Hojan had filed a document stating that he waived mitigation and that, prior to waiving it, he had been made "aware of my Penalty Phase Lawyer's efforts to properly prepare for any penalty phase proceeding. Such efforts have included, but not limited to, interviews with my mother, and other family members, interviews with childhood friends, interviews with county jail employees, as well as various document searches and relevant records."

The court then asked defense counsel to proffer, pursuant to *Koon*, what evidence they had discovered, and Hojan stated that if the court made counsel proffer evidence, he would fire his attorneys immediately. Hojan stated that "even if you appoint somebody else, sir, I'm going to ask you to relieve them again." Defense counsel then stated that they had all of the mitigating evidence in hand at the proceeding, that Hojan had reviewed it and they had discussed mitigating evidence possibilities, and that counsel was ready to file that proffer with the court. Hojan, however, insisted that the mitigation packet not be filed with the court in any form. Hojan repeatedly affirmed that he had reviewed the packet and did not want it presented in any form-not to the jury, not to the court in camera, and not to this Court in his appeal.

Nevertheless, significant information about the defense's preparation for presenting mitigation exists in the record. Defense counsel stated that they had "discussed every aspect of what mitigation is.... 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...." Hojan also signed a statement that noted defense counsel's efforts "included, but [were] not limited to, interviews with [Hojan's] mother, and other family members, interviews with childhood friends, interviews with county jail employees, as well as various document searches and relevant records."

> The State also proffered that it had previously provided to the defense a packet addressing Hojan's education records, employment records, financial records, statements to the police, his parents' statements, Hojan's divorce papers, a deposition from his ex-wife, and other documents. The State read into the record the names of the witnesses from the defense's four witness lists that were filed at various points during the proceedings. Hojan stated on the record that he had an opportunity to review all of this information with his attorneys.
>
> Attorneys for the State and for Hojan also read into the record the names or identities of nine witnesses who were in court and ready to testify on Hojan's behalf. Defense cocounsel Polay also stated that he had additional individuals-including three expert witnesses-ready to testify on Hojan's behalf if Polay called them and told them that Hojan was no longer refusing to present mitigation. Based on these facts within the record, we find no error in the trial court's determination that the defendant knowingly, intelligently, and voluntarily waived his right to mitigation, and we deny relief on this claim.

Hojan, 3 So.3d at 1214-15. The trial court made an explicit finding that Hojan's waiver was knowing and intelligent which this Court affirmed. Since he is here asserting the same issue, that the waiver was not knowing and intelligent, but under the guise of ineffective assistance of counsel, the claim is procedurally barred. Those "issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992); Henry, 937 So. 2d at 572 (stating that "relitigation of old issues under new arguments is prohibited" and finding that the defendant could not relitigate on postconviction the waiver of his rights to present mitigation, where the Supreme Court of Florida had addressed that very issue on direct appeal); Harvey v. Dugger,

656 So. 2d 1253, 1256 (Fla. 1995) (stating that issues that could have been but were not raised on direct appeal or issues that were raised and rejected on direct appeal are not cognizable through collateral attack).

Not only is this claim procedurally barred, it is without merit as Hojan cannot show either that his counsel was ineffective nor that he suffered prejudice as required by Strickland. The penalty phase trial was scheduled to begin on November 24, 2003. Trial counsel Polay filed the first of four witness lists on October 24, 2003. On the same date he filed motions to appoint an expert to examine Hojan for competency and an expert to testify at the penalty phase. [R. Vol. 4 p. 566-69] The reason for the competency examination was due to Hojan's refusal to allow his attorney to present any mitigation evidence. Hojan maintained that stance throughout the remaining proceedings, including up to and through the Spencer hearing.

The court held a hearing on October 28, 2003. Trial counsel Polay told the court how he had prepared for the penalty phase for the seventeen months he had been Hojan's counsel. He and his investigator spoke to family members, other witnesses, and visited Jamaica in search of mitigation evidence. Hojan, after the guilty verdicts, refused to see or to cooperate with any of his attorneys or the psychological expert hired to evaluate his competency when he announced that he wished to not present any mitigation. They spoke to him "countless times" to try to

change his mind. [T. 2912] His attorneys indicated that they continued to work on the mitigation case and had been trying to convince Hojan to allow them to present the evidence. [T. 2913] In fact, they filed additional witness lists and continued to prepare to present their case the entire time before the penalty phase began, including preparing experts to testify at the trial. [R. Vol. 4 p. 570-75, 707-8, 764] The trial court inquired of Hojan as to why he was refusing to cooperate. Hojan replied, "I don't want my lawyers to do any mitigation defense ... because it is just my feelings right now. ... That's my feelings period." The trial court told him it was a mistake and that he would eventually change his mind. [T. 2914-15] Hojan was unswayed, replying to the Court's comment about long range implications that it sounded like his attorneys. Essentially, he admitted that his attorneys had discussed all the negative aspects of waiving mitigation. [T. 2923-24] He told the court that "it has been something that has been through my mind since the beginning." [T. 2925]

The defense expert appointed to evaluate Hojan's competency after the guilt phase trial was Dr. Block-Garfield. She wrote a report saying that he was not incompetent but had his own agenda with regards to the penalty phase based on his personal feelings and interpretation of his situation. [R. Vol. 6 p. 901]

A month later, on November 13, 2003, the court held the hearing pursuant to Koon v. Dugger, 619 So.2d 246 (Fla. 1993). Hojan still refused to allow any

mitigation evidence to be presented. 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." Hojan signed a directive, filed with the court, outlining his refusal to present mitigation or have his counsel assist in providing it. He specifically acknowledged that he was ignoring his counsels' strenuous advice and he knew he could be sentenced to death because of his decision. 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. He also acknowledged that his counsel wanted to present the evidence and had tried to convince him to do so but he refused. (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 consistently and 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 on ***ten*** *different dates*. (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). The court conducted the Koon colloquy where Hojan formally waived his right to present mitigation.

Hojan's refusal to allow mitigation evidence continued. At the penalty phase trial on November 24, 2003 he again waived mitigation. [T. 2583-96] He did not want any preparation done for the Spencer hearing [T. 2655-56] He refused to cooperate with counsel appointed by the Court for the Spencer hearing and told the Court so on numerous occasions in December and January 2003. [T. 2929-30, 2938, 2946-47, 2953-54, 2970-72] At the January 14, 2004 status hearing attorney Moldof explicitly said: "If he thinks this is going to be a quick trip to death row and he'll get executed, he's sadly mistaken. Your average time is fifteen years there and your twenty-three hours a day in a cell, you're basically doing life just like the people outside in UCI." [T. 2971] Even being told that, albeit after the trial, did not dissuade Hojan in refusing to present mitigation at the Spencer or any other sentencing hearing. When Dr. Brannon, the experienced and qualified expert according to Hojan, was appointed, Hojan refused to cooperate with mitigation although he did comply with the doctor's

tests. [T. 2941-57]Hojan consistently refused, over a course of months from December 2003 through April 2004, to allow his attorneys to present mitigation or to assist Moldof, the attorney the court appointed for the Spencer presentation, in discovering mitigation. [T. 2655-57, 2929-36, 2941-57, 2979-82, 2993-98] He told his parents not to come and not to say anything to the court; he refused to allow his mother to even testify about anything. [T. 3096] Given this undisputed record and the factual findings of this Court, both the trial court and counsel attempted many, many times, using a variety of arguments, including at one point the one he now advances, to convince Hojan to allow mitigation evidence to be presented, first to the jury and then to the Court. Each and every time Hojan refused. After steadfastly maintaining his position in the face of intense pressure over approximately six months from three attorneys, the judge, and several mental health experts, Hojan's allegations that he might have changed his mind had he been told about life on death row ring hollow. Not only can he not demonstrate deficient performance by his trial counsel, he cannot meet the prejudice prong since clearly the result, either him changing his mind or the court sentencing him to death, would not likely change if his original two counsel had told him that he would get his food through a slot, spend most of his time alone, or that death would eventually come. Hojan's trial attorneys told the court that there was substantial mitigation The fact that he now details that his parents had him in day-care

while they worked, that he had separation anxiety as a young child, that he went to multiple boarding schools, or that his father verbally abused and beat him those times he was at home would have naturally been part of that mitigation evidence the attorneys wanted to present if Hojan had allowed them to do so. See Waterhouse v. State, 792 So.2d 1176, 1184 (Fla.2001) (Koon requirements were met when defendant made it "abundantly clear" that he was waiving mitigation); Chandler v. State, 702 So.2d 186, 200 n. 19 (Fla.1997) (as long as it was demonstrated that waiver was made knowingly, intelligently, and voluntarily, defense counsel was not required to go into explicit detail about what the favorable mitigation evidence would be); Boyd v. State, 910 So.2d 167, 188 (Fla. 2005) (Defendant allowed minimal mitigation evidence and trial court aware of potential mitigation evidence).He has not met his burden under Strickland and the summary denial should be affirmed.

III

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING CERTAIN PUBLIC RECORDS REQUESTS. (Restated)

In the next issue, Hojan asserts that the trial court abused its discretion when it denied his public records requests from the Broward County Sheriff's Office ("BSO") and from the Florida Department of Law Enforcement ("FDLE") and thereby denied him his due process and equal protection rights. He simply asserts that the requested records were relevant but fails to explain how. He also fails to show

how the records would result in a colorable claim for relief in the post-conviction proceedings. The lower court properly denied the records requests and relief should be denied.

Hojan cannot show how the denial of the records requests violate his rights to due process and equal protection. A circuit court's ruling on a public records request filed pursuant to a post-conviction motion will be sustained on review absent an abuse of discretion. Geralds v. State, 111 So.3d 778 (Fla. 2010). "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." White v. State, 817 So. 2d 799, 806 (Fla. 2002); Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000). The circuit court has the discretion to deny public records requests by a movant for postconviction relief that are overly broad, of questionable relevance, and unlikely to lead to discoverable evidence. Valle v. State, 70 So.3d 530 (2011).

Hojan requested the personnel files and internal affairs investigations on twenty-seven employees of the BSO, including Haemmerle. He also requested the proficiency tests, credentials, and competency practice of both the BSO Crime Lab and Haemmerle. The request for FDLE involved *all* records on the members of the jury panel. The court gave a full hearing to the defense on its requests for records in

light of agency objections to producing specific records; simply because the court sustained certain objections does not mean it ignored the defense arguments but, rather, found the requests to be improper. For the BSO employee information, it found the request overly broad, irrelevant, and unduly burdensome. Indeed, Hojan never established that the information requested could be used for impeachment and, thus, did not prove the relevance necessary. Hojan wanted *all* the laboratory materials and Haemmerle's proficiency tests and credentials, not those limited to the time of the analysis and/or trial, again without showing that any of the material was proper impeachment.

As for the criminal history of the panel members, Hojan did not claim any specifically had criminal histories other than Fravel who told the court himself that he had an arrest which had been dismissed. Further, Hojan did not provide dates of birth, race, or even sex for some of the individuals listed, a situation where this Court has affirmed the denial for lack of specificity. Geralds, 111 So.3d at 802; Rodrigues v. State, 919 So.2d 1252, 1273 (Fla. 2005); *see also* Thompson v. State, 759 So.2d 650, 659 (Fla. 2000). Additionally, post-conviction counsel for Hojan admitted to the court that they had access to the criminal background of the jurors but wanted all information on the panel members' participation in the criminal justice system as witness, victim, or suspect. (Supp PCR Vol. I:11-12) That sort of request is by

definition a fishing expedition and overly broad and unduly burdensome. Hojan again failed to show how the requested material was relevant. The court's actions in determining these requests to be overbroad and irrelevant were proper and not an abuse of discretion. Rose v. State, 774 So.2d 629 (2000), rehearing denied; Geralds, 111 So.3d 778 .

IV

THE FEBRUARY 2009 NAS REPORT IS NOT NEWLY DISCOVERED EVIDENCE (Restated)

Hojan points to the NAS report and its various recommendations as newly discovered evidence supporting his claim that the forensic work conducted in his case was not reliable under the Eighth Amendment to the United States Constitution. However, the NAS report does not qualify as newly discovered evidence and Hojan has failed to show that he could not have raised these issues sooner. In fact, many of the arguments were those he raised in his first issue.[6] This Court should affirm the denial of relief.

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[6]The State incorporates it response to I©. The bulk of the evidence against Hojan was not the forensic evidence of the toolmarks made by the bolt cutter found in his car and the rifling marks on the expended bullets shot from his gun, but was the eyewitness testimony of Nunn who knew Hojan and saw him rob and shoot her and the other two individuals as well as his full confession.

Hojan insists that the NAS Report constitutes newly discovered evidence and cites to Trepal v. State, 846 So. 2d 405 (Fla. 2003), as allegedly showing that similar reports have been considered to be newly discovered evidence. However, in Trepal, this Court affirmed an order finding that the FBI report was not newly discovered evidence. Trepal, 846 So. 2d at 407, 424. Consequently, Trepal does not show that reports from governmental entities constitute newly discovered evidence. Moreover, this Court has held that it has never recognized new opinions or new research studies as newly discovered evidence. Schwab v. State, 969 So. 2d 318, 326 (Fla. 2007).

Hojan failed to show how this evidence was newly discovered. It is well established that "in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of due diligence.'" Jones v. State, 709 So.2d 512, 521 (Fla.1998) (quoting Torres-Arboleda v. Dugger, 636 So.2d 1321, 1324-25 (Fla.1994)); Robinson v. State, 707 So.2d 688, 691 (Fla.1998); Blanco v. State, 702 So.2d 1250, 1252 (Fla.1997). Second, to warrant relief, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Jones v. State, 591 So.2d 911, 915 (Fla.1991); see also State v. Spaziano, 692 So.2d 174, 176 (Fla.1997). The test of prejudice for newly discovered evidence is the most difficult for a defendant to meet

and in making this determination, the trial court must "consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial." Jones (II), 709 So.2d at 521 (quoting Jones, 591 So.2d at 916). Assuming the defendant's evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted if the evidence would not be admissible at trial. See Robinson, 707 So.2d at 691-92 (denying relief where statements made in affidavit did not expose affiant to criminal liability for perjury and lacked indicia of reliability for admission as statement against penal interest).

This Court has repeatedly rejected claims that governmental studies, such as the NAS Report, constitute evidence at all, much less newly discovered evidence. Power v. State, 992 So. 2d 218, 220-23 (Fla. 2008); Tompkins v. State, 994 So. 2d 1072, 1082-83 (Fla. 2008); Diaz v. State, 945 So. 2d 1136, 1145-46 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006). Instead, such reports have been characterized as "a compilation of previously available information ... and consists of legal analysis and recommendations for reform, many of which are directed to the executive and legislative branches." Rutherford, 940 So. 2d at 1117. The same is true for this NAS report where it recommends the executive branch employ independent laboratories

rather than doing the scientific examination and analysis in its own agencies. In determining whether the information in a report constitutes newly discovered evidence, this Court has actually looked at when the information in the report could have been discovered through an exercise of due diligence. See Diaz, 945 So. 2d at 1144 (newly published letter not newly discovered evidence when information underlying letter available since 1950); Glock v. State, 776 So. 2d 243, 251 (Fla. 2001).

Given this state of the law, Hojan's assertion that the report constitutes newly discovered evidence was properly rejected. Hojan does not cite to a single piece of information underlying the report that is new and not argued previously. However, he cannot meet the second prong of the newly discovered evidence test as he has not shown that the NAS report was available and would be admissible or that the result of his trial would have been different. He merely asserts that this information would have resulted in the trial court granting a Frye motion challenging this evidence but not that the evidence would have been excluded. He also argues that Haemmerle's conclusions were not phrased in the manner suggested by the report and were overly conclusive without acknowledging any limitations to the analysis which resulted in the jury being overly reliant on these conclusions in finding Hojan guilty.

Assuming only for argument that his position is accurate in terms of the Frye hearing and the wording of the opinions, he cannot demonstrate that he would have been acquitted if the jury had never heard the testimony concerning the tool and bullet marks. As the State argued previously and incorporates here, Hojan fails to acknowledge the other undisputed evidence found which demonstrates his guilt. The State respectfully reincorporates the prejudice analysis in the earlier claim into this one. Briefly, Nunn knew and had worked with both Mickel and Hojan, saw Mickel with bolt cutters taking the locks off, saw Hojan take the three victims (including herself) into the freezer, saw him rob each of them of their money and property, and saw him shoot each of them. Two other independent witnesses saw Hojan with a gun which looked like the one used in the shootings. The police found a pair of bolt cutters in Hojan's car. Hojan cooperated with the police, confessed to the crimes, and specifically admitted that the bolt cutters in his car was the tool used to cut the locks during the robbery. He also admitted that the gun found was his which he had used to shoot the three people. The import of this evidence would not have been diminished had counsel successfully excluded the challenged forensic evidence obtained from the tool marks on the cut locks or the rifling marks on the expended bullets. Hojan has failed to show how the outcome of his case would have been different. This claim is meritless and was properly summarily denied.

V

HOJAN'S CHALLENGE TO THE FLORIDA RULES ADDRESSING CONTACT WITH THE JURY IS PROCEDURALLY BARRED AND THE CLAIM IS MERITLESS AS THE RULES ARE CONSTITUTIONAL (Restated)

Without identifying any alleged juror misconduct or bias, Hojan asserts Rule 4-3.5(d)(4), Rules Regulating the Florida Bar is unconstitutional under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This claim is procedurally barred and meritless. Summary denial was appropriate.

This claim is procedurally barred since any constitutional challenge to this rule could/should have been presented on direct appeal. See Griffin v. State, 866 So.2d 1, 20-21 (Fla. 2003) (finding procedurally barred claim which asserted Rule 4-3.5(d)(4) was unconstitutional, as it was not raised on direct appeal, but could have been raised, and that the claim was without merit as Griffin "appears to be complaining about a defendant's inability to conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned"); Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000) (rejecting claim that rule 4-3.5(d)(4) is unconstitutional as procedurally barred since "[a]ny claims relating to [defendant's] inability to interview jurors should and could have been raised on direct appeal"); Vining v. State, 827 So.2d 201, 216 (Fla. 2002)(same).

Also, the challenge to the rule itself is without merit and has been rejected repeatedly. See Sexton v. State, 997 So.2d 1073, 1089 (Fla. 2008) (rejecting constitutional challenge to rule barring juror interviews "on a wider range of subjects than grounds for legal challenge to the verdicts" and noting "identical claim has been repeatedly rejected as both procedurally barred when brought on postconviction and on the merits." (citing Barnhill v. State, 971 So.2d 106, 116-17 (Fla. 2007)).

As explained by this Court in Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97, 100 (Fla. 1991), "juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings. This standard was formulated 'in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it.'" A jury interview is not warranted because Hojan has not made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings. Baptist Hospital, 579 So.2d at 100. See Devoney v. State, 717 So.2d 501, 502 (Fla. 1998) (describing the matters that may be inquired into as: that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and

in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner).

Moreover, this Court has "cautioned against permitting jury interviews to support post-conviction relief" for allegations which focus upon jury deliberations. Griffin, 866 So.2d at 20-21 (citing Johnson v. State, 593 So.2d 206, 210 (Fla. 1992) (stating that "it is a well-settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations"). Section 90.607(2)(b), Florida Statute, mandates that a "juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment." Matters that "inhere in the verdict" have been defined as "'those which arise during the deliberation process.'" Sconyers v. State, 513 So.2d 1113, 1115 (Fla. 2d DCA 1987). See Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988). Thus, the statute forbids judicial inquiry into the jurors' emotions, mental processes, mistaken beliefs, understanding of the applicable law, or other matter resting alone in the juror's breast. See Devoney, 717 So.2d at 502; State v. Hamilton, 574 So.2d 124 (Fla. 1991). "In short, matters that inhere in the verdict are subjective in nature, whereas matters that are extrinsic to the verdict are objective." Id.

Further, Florida Rule of Criminal Procedure 3.575 provides:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview

> of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview.

When adopting this rule, the Court stated: "In response to concerns raised about the effect of the new provision on rule 4-3.5(d)(4), we have added a commentary to the new rule explaining that the new procedure is not intended to abrogate the existing rule 4-3.5(d)(4) procedure." Amendments to the Florida Rules of Criminal Procedure, 886 So.2d 197, 199 (Fla. 2004) (footnotes omitted). As such, Hojan has an avenue available to him, he just has failed to meet the required criteria. Hojan merely speculates that some of the jurors were biased because of media coverage. All jurors were asked during the voir dire questioning about whether or not they had seen anything in the press and those who had informed the court; they were not seated on the jury. Furthermore, the court repeatedly instructed them to ignore any coverage; jurors are presumed to follow a court's instructions. U.S. v. Olano, 507 U.S. 725, 740 (1993) (finding presumption jurors follow instructions); Burnette v. State, 157 So.2d 65, 70 (Fla. 1963)(same). Hojan also speculates that Fravel may have been biased;

again, as noted earlier, Fravel specifically said the charge was dismissed and he harbored no bias because of the arrest. Hojan has not met his burden under the rule and there is no constitutional infirmity it. Based on the foregoing, this claim should be denied summarily.

VI

FLORIDA'S LETHAL INJECTION PROTOCOLS AND PROCEDURES ARE CONSTITUTIONAL AND HOJAN WAIVES THIS ISSUE. (Restated)

In his next issue, Hojan claims that Florida's lethal injection protocol and procedures violate the U.S. Constitution's Eight Amendment. He simply references the argument he made in the lower court buts fails to fully articulate and argue it in this brief. He acknowledges that this Court has rejected such claims in the past while noting that the protocol changed since the filing of his post-conviction motion. He states that he is raising it here in order to preserve it if the law changes.

Given Hojan's lack of argument in support of this claim, it should be deemed waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); See Shere v. State, 742 So.2d 215, 218 n. 6 (Fla.1999)(finding that issues raised in appellate brief which contain no argument are deemed abandoned); Cooper v. State,

856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Finally, this Court upheld the constitutionality of the procedures and protocol, both the previous ones and the current ones. See Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007); Valle v. State, 70 So. 3d 530 (Fla. 2011); Muhammad v. State, 2013 WL 6869010 (Fla. 2013).

VII

HOJAN WAIVED THE CLAIMS MENTIONED IN THIS SECTION AND HIS CONSTITUTIONAL CHALLENGES ARE WITHOUT MERIT. (Restated)

In the last issue Hojan lists three items he had raised in his post-conviction motion. He provides no elucidation or argument on any of them but merely states that he is raising them in order to preserve them for future review. The three are: § 119, Fla. Stat., and Fla. R. Crim. P. 3.852 are unconstitutional as applied to him and on their face; the time frames dictated in Fla. R. Crim. P. 3.851 violate his due process and equal rights protections under both state and federal constitutions; and Florida's death penalty scheme violates the United States Constitution under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002). He acknowledges that this Court has determined that none of these challenges are valid. Given Hojan's lack of argument in support of this claim, it should be deemed waived. Duest, 555 So.2d at 852(opining "purpose of an appellate brief is to present

arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); See Shere, 742 So.2d at 218 n. 6 (finding that issues raised in appellate brief which contain no argument are deemed abandoned); Cooper, 856 So.2d at 977 n.7.

This Court has rejected such challenges to former § 119 repeatedly. Rule 3.852[7] was promulgated to address the very narrow issue of public records production in capital cases. Sims v. State, 753 So.2d 66, 69 n.4 (Fla. 2000) (recognizing §119.19 "does not affect, expand, or limit the production of public records for any purposes other than use in a proceeding held pursuant to Rule 3.850 or Rule 3.851, Florida Rules of Criminal Procedure."). With respect to the instant constitutional challenges, this Court has rejected such recently in Wyatt v. State, 71 So.3d 86, 110-11 (Fla. 2011). There the Court concluded that §27.7081 and rule 3.852 "do not prevent a capital defendant from making postconviction public records requests. In fact, upon the issuance of this Court's mandate, records relating to a capital defendant's case are automatically required to be delivered to the postconviction repository." Wyatt, 71

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5 In Allen v. Butterworth, 756 So. 2d 52, 66 (Fla. 2000), the Florida Supreme Court found that Death Penalty Reform Act ("DPRA"), which purported to amend §119.19, was unconstitutional. That section has not been reenacted, thus, the 1998 version of the statute remains valid. The Court specifically did not invalidate §119.19(2), Fla. Stat. which provided for the establishment of the Repository and archiving of records. Id. at 66 n.6. It is of interest to note that following the enactment of DPRA, the Florida Supreme Court re-adopted the present version of Rule 3.852.

So.3d at 110. Should an agency object to an additional public records request, a hearing will be held where "the agency will advise the defendant as to why it cannot comply and what narrowing information would be required in order to comply with such a request." Id. Referring to both §27.7081 and rule 3.852, this Court has "held that a defendant must plead with specificity the outstanding public records he seeks to obtain" and that such could not become a "fishing expedition for records unrelated to a colorable claim for postconviction relief." Id. "Requiring that a capital defendant's additional request be timely made after a diligent search and that this request not be overly broad or unduly burdensome places a reasonable restriction on access to these records" as the state agencies have made initial deliveries of public records to the repository, thus, requiring a diligent search and narrow request "is reasonable in the context of capital postconviction claims." Id. Hojan has failed to allege a federal constitutional right to public records. The denial of this claim should be affirmed.

This Court has also repeatedly found the time frame to file the post-conviction motion set out in 3.851 is constitutional. See Vining v. State, 27 So.2d 201, 215 (Fla. 2002) (noting repeated rejection of claim that one-year time limitation for filing postconviction motion under Rule 3.851 was unconstitutional) (same); Arbalaez v. State, 775 So.2d 909, 919 (Fla. 2000); Remata v. Dugger, 622 So.2d 452, 456 (1993)

(same). Additional time is provided under rule 3.851 for the State to respond (60 days), for holding the Case management (90 days after the State's Response), and for holding the evidentiary hearing (90 days from the Case management Hearing, but that may be extended for another 90 days) which is all time during which Hojan could prepare for an evidentiary hearing. In fact, all totaled under rule 3.851, after the capital defendant files his motion, some 11 months may pass before the evidentiary hearing is commenced. Hojan cannot establish a constitutional violation with this rule. The denial of this claim should be affirmed.

The United States Supreme Court has reviewed and upheld Florida's capital sentencing statute for what is now approaching thirty years. 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"); Bottoson v. Moore, 833 So.2d 693, 695 (Fla. 2002) (quoting Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). This court has continued to abide by the United

States Supreme Court's caution against assuming what its future decisions may be. Evans v. Sec 'y, Dept. of Corr., 699 F.3d 1249, 1252 (11th Cir. 2012) (when a Supreme Court's decision with direct application to a case appears to rest on reasons rejected in a more recent line of decisions, we must follow the directly applicable decision and leave to the high Court the prerogative of overruling its own decisions). See also Evans v. State/McNeil, 995 So. 2d 933 (Fla. 2008).

Moreover, even if Apprendi were somehow applicable to Florida's capital sentencing scheme, that result would not help Hojan who has contemporaneous felony convictions (first degree attempted murder, first degree murder, armed robbery, and kidnapping). Hojan's jury made specific and unanimous findings on those charges (and hence the aggravator as well) when it convicted him on each one. 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 aggravators are not considered. Apprendi expressly excluded prior convictions from the matters that must be found by a jury before "sentence enhancement" is allowable. A sentence of death, in Florida, is not an "enhanced sentence" as that term is used in Apprendi. This Court has rejected challenges under Ring v. Arizona, 120 S.Ct. 2348 (2002) 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); Salazar v. State, 991 So.2d 364 (Fla. 2008) ("Ring is satisfied in this case because the trial court applied the prior violent felony conviction aggravator based on Salazar's conviction for the contemporaneous attempted murder of Ronze Cummings."); Duest v. State, 855 So.2d 33, 49 (Fla. 2003) ("We have previously rejected claims under Apprendi and Ring in cases involving the aggravating factor of a previous conviction of a felony involving violence."); Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). This Court should affirm the denial of relief on this claim.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of post-conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Todd Scher, Esq., CCRC-South, 1 East Broward Blvd., Suite 444, Ft. Lauderdale, Florida 33301 this 4th day of March, 2014.

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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