IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-1498

**ANTHONY SPANN,**

Appellant,

vs.

**STATE OF FLORIDA,**

Appellee.

**********
**
ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA
(Criminal Division)
**********
***

# ANSWER BRIEF OF APPELLEE


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## PRELIMINARY STATEMENT

Appellant, defendant in the trial court below, will be referred to as "Appellant", "Defendant" or "Spann". Appellee, the State of Florida, will be referred to as the "State". References to the record will be by the symbol "R", to the transcript will be by the symbol "T", to any supplemental record or transcript will be by the symbols "SR" or "ST", and to Spanns' brief will be by the symbol "IB", followed by the appropriate page numbers.

## STATEMENT OF THE CASE AND FACTS

At trial, Appellant agreed that Lamar Miller ("Miller") was an expert who could render an opinion with regards to the authenticity of documents and/or identification of signatures or handwriting (T. Vol. 25 p. 2548). Appellant never claimed that handwriting analysis did not satisfy Frye, he objected to Miller's testimony that Spann had intentionally disguised or distorted his handwriting when giving exemplars(T. Vol. 25 p. 2565). In the instant case, after hearing Miller's proffered testimony, the trial court followed Frye and found that (1) Miller's testimony would assist the jury in determining a fact in issue; (2) that Miller's testimony was based on scientific principles which had gained acceptance in the field of forensic document examination, and (3) that Miller was qualified to

render an opinion on the subject. (T. Vol. 25 p. 2583). The record reflects that Miller testified that the distortion aspect is not a new or recently developed area of document examination, rather it has been a part of the literature since the early 1900's. (T. Vol. 25 p. 2554-2555).

At trial the state proved that Miller's testimony is based upon scientific principles accepted in the forensic field. Miller testified that document examiners are certified by a national organization called the American Board of Forensic Document Examiners (T. Vol. p. 2556). He stated that this organization proscribes the training and that the identification of distorted and disguised handwriting is recognized by this organization (T. Vol. 25 p. 2560-63). In support of his testimony, Miller relied upon the Harrison textbook which is cited with approval by the American Board of Forensic Document Examiners (T. Vol. 25 p. 2561-2563).

Philmore testified that Spann had written him a letter while they were in jail, encouraging him to testify that Spann had nothing to do with the murder of Kazue Perron (T. Vol. 26 p. 2700). Philmore also detailed the pawn robbery and explained that Spann was not satisfied with the money Philmore and Sophia Hutchins were able to get (T. Vol. 26 pp. 2657-2668). Spann and Philmore decided to rob a bank the next day and to carjack a

female, kill her and take her car use it as a getaway (T. Vol. 26 p. 2668). The following day, November 14, 1999 they two men car jacked Kazue Perron, drove to a remote location, and killed her so she could not identify them and took her gold Lexus to use as a getaway after the bank robbery (T. Vol. 26 p. 2669-2676). Philmore testified that Kazue Perron begged for her life and that he shot her because Spann told him to do it(T. Vol. 26 p. 2681-2682). Philmore testified that he and Spann robbed the bank and used the Lexus as a getaway (T. Vol. 26 pp. 2689-2694). The two men picked up Keyontra Cooper and Toya Stevens, and were spotted by the police, and fled at high speeds (T. Vol. 26 pp. 2689-2694). It was Philmore's testimony that he originally was not going to cooperate but had heard that Spann had told men in jail that Philmore would do whatever he wanted because he was dumb (T. Vol. 26 p. 2699).

In this case, on May 25, 2000 defense counsel Little informed the court that Spann wanted to waive the presentation of mitigating evidence. (T. Vol. 30 p. 3161). The trial judge asked counsel if after investigation he reasonably believed that there was evidence that could be presented and counsel answered yes (T. Vol. 30 p. 3161). The judge asked what the statutory and non-statutory mitigators were (T. Vol. 30 p. 3161). Little stated that there was evidence to support the statutory

mitigator that Spann was an accomplice with a relatively minor role in the murder (T. Vol. 30 p. 3161). With respect to non-statutory mitigation, Little stated that he and Udell had contacted Spann's mother, brother, and sister, all of whom would testify that he was a good son, and sibling, when he was a young man. The only negative testimony would be that when he reached a certain age he began to hang around with a bad crowd. Counsel also intended to present, through prison records, an argument that Appellant would be capable of living in an open prison environment without being a threat to himself or anybody else (T. Vol. 30 p. 3162). Udell informed the court that Appellant was initially examined by Dr. Patrillo who administered the WAIS test and some standardized intelligence and neurological tests. However, at his second appointment, Appellant refused to be examined by Dr. Patrillo (T. Vol. 30 p. 3163). Udell advised the court that counsel had investigated school records, social records, met with other family members in West Palm and Tallahassee, and reviewed the criminal records of Spann and Philmore (T. Vol. 30 p. 3164). The judge asked if they found any mitigation with respect to school and social records, meeting with the other family, and in the criminal history and Little answered that there was none (T. Vol. 30 P. 3164). Little told the judge that he found no other mitigating evidence

and that he told Spann that they can and are willing to present mitigation. Spann was advised by Little that in the absence of mitigating evidence, the court would have nothing but aggravating factors to consider and would most likely recommend death. Even knowing this Appellant still did not want them to go forward (T. Vol. 30 p. 3165).

The following colloquy occurred between the trial judge and Spann:

> THE COURT: And Mr. Spann, the mitigating evidence that's been discussed on the record by Mr. Little, that's been discussed with you sir?
>
> THE DEFENDANT: Yes Ma'am
>
> THE COURT: And would you concur that your counsel has recommended that you present this evidence, please, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Mr. Spann, you understand that the law provides that in the penalty phase, first it is determined whether any sufficient aggravating circumstances exist that would justify the death penalty. And Second, whether there are any mitigating circumstances to outweigh the aggravating circumstances?
> Mr. Bakkedahl, could you state on the record for my benefit as well as the defendant's, the statutory aggravating circumstances the state intends to rely upon, please?
>
> MR. BAKKEDAHL: Yes Ma'am. I'm looking for my death penalty memorandum. I have it here somewhere. Mr. Colton hid it on me. Your Honor, the state would be intending to rely

on the following aggravating circumstances: The Defendant has previously been convicted of a violent felony. For the record, those offenses would include homicide conviction,–manslaughter, conviction out of Tallahassee, that is; shooting a deadly missile; possession by a convicted felon, conviction out of Palm Beach County. And then out of Orange County, an escape with a battery. And that's Orange County. We would also be relying on the witness elimination aggravator, cold–we would be relying on the cold, calculated and premeditated aggravator. We would be relying on the pecuniary gain aggravator. We would be relying on the "in the commission of a felony" aggravator. I believe that's it.

THE COURT: Mr. Spann, hearing these statutory aggravators on which the state intends to rely, and knowing what the law is, that I've just explained to you, it is my understanding that notwithstanding your counsels' recommendation that you present mitigators, again knowing that the law would require a weighing of the aggravating factors, mitigating factors, that it is your wish to waive your right to present any mitigating evidence?

THE DEFENDANT: Yes, it is.

THE COURT: And, Sir, are you on any medication today, please?

THE DEFENDANT: Presently, no.

THE COURT: And, sir, have you been on any medication throughout the trial.

THE DEFENDANT: No.

THE COURT: Mr. Spann, I am sure, sir, that you are disappointed with the verdict. This oftentimes happens with defendants. And

> based on that disappointment they make a decision not to present mitigating evidence. Once that waiver is made, if you decide not to continue with your waiver, that would not be the basis of a reason to overturn the case, or an issue on appeal. The appellate courts have found that those waivers are valid. Do you understand that, please?
>
> THE DEFENDANT: Yes, Ma'am.
>
> THE COURT: Oftentimes, sir, when Defendants make this decision, they regret it. Once we go through the penalty phase, there's no mitigation presented, sentence is impose, you will have to live with this decision, sir.
>
> THE DEFENDANT: Yes, Ma'am.
>
> THE COURT: It's one that you need to think about and don't make in a reaction of disappointment. Do you understand, please.
>
> THE DEFENDANT: Yes, I thought about it since I came to jail in '97.
>
> THE COURT: Okay, sir. Thank you very much. Court's prepared to rule on the defendant's requested waiver of mitigation.

(T. Vol. 30 pp. 3165-3168)

At this point, the state asked defense counsel if they had uncovered any evidence of head injuries, physical illness or mental illness in Appellant's background and defense counsel informed the court that Appellant had been in a car accident and that he went to the emergency room but was not admitted to the hospital (T. Vol. 30 p. 3169). Defense counsel stated that there were no records of who treated Appellant and Appellant

said that he did not think it was a serious injury and had not complained of a head injury (T. Vol. 30 p. 3169). The state asked if any family members indicated that there was a behavioral change in Appellant after the accident and defense counsel said no (T. Vol. 30 p. 3170. The state asked if there were any significant childhood illnesses and defense counsel said no (T. Vol. 30 p. 3170).

The Appellant was sworn in and the judge asked him if he wished to waive and instruct counsel not to present any mitigating evidence and Appellant said that was his wish (T. Vol. 30 p. 3170). The trial court found that Appellant had given a free and voluntary waiver with regards to the presentation of mitigation evidence (T. Vol. 30 P. 3177).

On May 30, 2000, a status hearing was held wherein the trial court gave Appellant the opportunity to change his mind about the waiver (T. Vol. 30 p. 3183). Defense counsel stated that Appellant had not changed his mind and wanted to be released from the courtroom because he did not want to participate in the case (T. Vol. 30 p. 3183).

The following colloquy occurred between Spann and the judge;

> THE COURT: Mr. Spann, it is my understanding obviously from your attorney that he has spoken with you again this weekend, as well as this morning. And again, you wish to waive your ability to present mitigating factors on your behalf during this phase of

the trial; is that correct, sir?

THE DEFENDANT: Yes, Ma'am.

THE COURT: And once again, just to confirm that you understand that the instructions would be given to the jury would be, they are to determine what if any aggravating factors there may be and then review the mitigating factors and do a weighing process. And as such their advisory sentence would be based through my instructions on whether the mitigating circumstances would be sufficient to outweigh the aggravating circumstances, if any. So, knowing the law, once again, sir, did you wish to waive the presentation of any mitigating factors?

THE DEFENDANT: Yes.

(T. Vol. 30 pp. 3183-3184).

At the status hearing held on May 25, 2000, defense counsel Little also informed the trial court that Appellant did not want a jury recommendation for his sentence, he wanted the judge to sentence him (T. Vol. 30 p. 3173). Little told the court that he had encouraged Appellant to seek and advisory verdict (T. Vol. 30 p. 3174).

The following colloquy occurred between the court and Spann:

THE COURT: Mr. Spann, what is your level of education, sir?

THE DEFENDANT: Ninth grade

THE COURT: How old are you , please?

THE DEFENDANT: Twenty-six.

THE COURT: Do you understand what is going on?

THE DEFENDANT: Yes, ma'am.

THE COURT: And, Mr. Little indicated that this is something you've thought about and talked to him about; is that correct, please?

THE DEFENDANT: Yes, Ma'am.

THE COURT: Sir, do you understand that the jury advisory sentence to be imposed is entitled by law and will be given great weight by this court in deciding what sentence to impose?

THE DEFENDANT: Yes, ma'am.

THE COURT: It is only under the rarest of circumstances that the Court would impose a sentence other than that which the jury recommended. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And I think what is key is that if the jury recommends life, then I must be–I must give that recommendation great weight. And again, only under the rarest of circumstances could I impose a sentence other than a life sentence. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And, sir, I have no idea what sentence this court would impose with regards to the penalty. I haven't heard any of the aggravating factors that are going to be argued. I haven't weighed them as required by law. But, again, if the jury were to recommend a life sentence, despite what I thought the law would require, the life sentence in all likelihood is that

which would be imposed. Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: Again, as you and I previously discussed, I'm sure you are disappointed with the verdict, and I don't want that to be the motivator for you to not ask for a jury advisory opinion in this case. I'm going to ask you about this again, but I want you to think about the fact that you don't know what a jury's going to do. A jury very well may make a life recommendation in this case. And, only if by clear and convincing evidence, reasonable men couldn't differ, only with that standard could I not go with what the jury's recommended. Do you understand please?

THE DEFENDANT: Yes I do.

THE COURT: Given that, and knowing what the status of the law is and what we've discussed, are you telling me that you wish to waive your right to a jury recommendation in this case, please?

THE DEFENDANT: Yes, I do.

THE COURT: Have you had the opportunity to fully discuss this with your counsel?

THE DEFENDANT: Yes, I have.

THE COURT: And with regards to both the mitigating evidence and the jury recommendation, are there any questions that you have of your attorney?

THE DEFENDANT: No.

THE COURT: Or of the Court?

THE DEFENDANT: No.

THE COURT: And you've had sufficient time to

> full discuss both these issues with Mr. Little; is that correct, please?
>
> THE DEFENDANT: Yes, ma'am
>
> THE COURT: Did you wish to be heard counsel?
>
> MR. BAKKEDAHL: No, ma'am.
>
> THE COURT: The Court finds the Defendant has given a free and voluntary waiver with regards to the –- an intelligent waiver with regards to the presentation of mitigating evidence, as well as to his right to a jury advisory recommendation with regards to a sentence.

(T. Vol. 30 pp. 3174-3177).

At the status hearing held on May 30, 2000, the judge again informed Appellant that the court would place great weight on the advisory recommendation and only under the rarest of circumstances would she impose a sentence other that which is recommended (T. Vol. 30 p. 3185). Appellant said that he still wished to waive the advisory jury verdict (T. Vol. 30 p. 3185). The Appellant signed a written waiver of the advisory jury verdict in court on May 30, 2000 (T. Vol. 30 p. 3194, Penalty Phase Exhibit 1).

On June 2, 2000, the Spencer hearing was held and both sides presented legal argument (T. Vol. 3 pp. 379). The trial court entered it's sentencing order on June 23, 2000. The trial court found the following five aggravators had been proven; (1)The defendant was previously convicted of another capital felony or

of a felony involving the use or threat of violence to the person, (2)The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or attempt to commit, or flight after committing or attempting to commit, kidnapping, (3)The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or detection for the crimes for which the defendant was ultimately convicted, (4) The capital felony was committed for pecuniary gain, (5) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (T. Vol. 3 pp. 379-382). The trial court found no statutory mitigation but found the following non-statutory mitigators had been proven; (1) the defendant had been a good son according to his mother, and a good brother according to his siblings, and was a good student up to a point (little weight), (2) The defendant was not the person who fired the fatal shots in the murder for which he is to be sentenced (very little weight), (3) The defendant is capable of living in a prison population without serious difficulty or doing harm to another (some weight), (4) The defendant's wife would testify that the defendant was a good husband and father (slight weight), (5) the P.S.I reflects that the defendant's father was shot to death when the defendant was 2 to 4 years old (moderate

weight) (T. Vol. 3 pp. 387-389). The court found that the aggravating circumstances far outweigh the mitigating circumstances and that the aggravating circumstances in this case are appalling (T. Vol. 3 p 390). The court found that the aggravating circumstances greatly outweigh the relatively insignificant non-statutory mitigating circumstances (T. Vol. 3 p. 390). The trial court sentenced the defendant to death (T. Vol. 3 p. 391)

## SUMMARY OF THE ARGUMENT

POINT I: The trial court properly admitted the expert testimony of Lamar Miller as the science of handwriting meets the Frye standard of admissibility.

POINT II: The trial court followed the dictates of Koon and properly found that appellant made a knowing and voluntary waiver of the presentation of mitigating evidence.

POINT III: The trial court properly found that appellant freely and voluntarily made a knowing and intelligent waiver of the advisory.

POINT IV: The record supports the trial courts finding of the aggravating factor that the appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person.

POINT V: The trial court properly found separate aggravating circumstances of, during the commission of a felony(kidnapping), pecuniary gain, and avoid arrest, as each aggravator is supported by separate and distinct aspects of the crime.

POINT VI: The trial court properly considered and weighed the mitigation proffered by appellant that was supported by the record as well as the information contained in the P.S.I

POINT VII: The trial court properly assigned weight to the mitigating factors.

POINT VIII: The death sentence is proportional.

## ARGUMENT

### POINT I

THE TRIAL COURT PROPERLY FOUND THAT THE HANDWRITING ANALYSIS SATISFIED THE FRYE STANDARD FOR ADMISSIBILITY.

The Appellant claims that the admission of the forensic document examiner, Lamar Miller's, testimony was error because the "science" of handwriting analysis does not meet the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) standard for admissibility. Appellant asserts that since some federal courts have excluded handwriting analysis as a science, under Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and that this analysis is less restrictive than Frye, then this Court should reject handwriting analysis as a science.

This issue is not properly preserved for appellate review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)). See also, Steinhorst v. State, 412 So. 2d 332, 338 (1982). At trial, Appellant agreed that Lamar Miller ("Miller") was an expert who could render an

opinion with regards to the authenticity of documents and/or identification of signatures or handwriting (T. Vol. 25 p. 2548). Appellant never claimed that handwriting analysis did not satisfy Frye, he objected to Miller's testimony that Spann had intentionally disguised or distorted his handwriting when giving exemplars(T. Vol. 25 p. 2565). Hence, the issue presented by Appellant is not properly before this Court and the Court should affirm Appellant's conviction.

However, should this court reach the merits, it will find no error as the trial court properly admitted Lamar Miller's expert testimony because it satisfied Frye. Further, the testimony relating to the Appellant's distorted handwriting was relevant to show his consciousness of guilt.

Application of a de novo standard of review is appropriate when a Frye issue is involved. Brim v. State, 695 So. 2d 268, 274 (Fla. 1997), Hadden v. State, 690 So. 2d 573, 579 (Fla. 1997), Stokes v. State, 548 So. 2d 188 (Fla.1989). Under the de novo standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. An appellate court's "principal mission" is to resolve questions of law and to refine, clarify, and develop legal doctrines. Elder v. Holloway, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., dissenting from the denial of a suggestion for rehearing en

banc), adopted by Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 1023, 127 L.Ed.2d 344 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed de novo on appeal).

Appellant claims that handwriting analysis has been under recent scrutiny and that some federal courts have found that handwriting analysis does not satisfy the less restrictive Daubert standard. Appellant cites to three federal district court cases to support his claim that handwriting analysis can not be regarded as scientific knowledge under Daubert and claims that it is time for Florida courts to reconsider the admissibility of handwriting identification.

This court has said that "despite the federal adoption of a more lenient standard in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) we have maintained the higher standard

of reliability as dictated by Frye". Ramirez v. State, 651 So. 2d 1164 (Fla. 1995). Recently, in Hadden v. State, 690 So. 2d 573(Fla. 1997), this court reiterated it's stance that the question of the appropriate standard of admissibility of novel scientific evidence of any kind was resolved by this Court in favor of the Frye test. See, e.g., Stokes v. State, 548 So. 2d 188 (Fla. 1989). In Stokes, this Court specifically rejected a

balancing approach as being too impractical and difficult to apply, and stated that the Frye standard is the proper standard for admission of novel scientific expert testimony. Id. at 194-95. In reaching that conclusion, this Court found the following reasons for the continued use of the Frye test compelling:

> The underlying theory for this rule [Frye ] is that a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use. Id. at 193-94.

Furthermore, in U.S. v. Paul, 175 F.3d 906, 910 (11th Cir. 1999), the Eleventh Circuit found that handwriting analysis is admissible under Daubert and does qualify as reliable scientific evidence. The Eleventh Circuit reasoned that courts have long received handwriting analysis as admissible evidence, citing to U.S. v. Jones, 107 F.3d 1147 (6th Cir. 1997), and U.S. v. Velasquez, 64 F.3d 844 (3d Cir. 1995). Hence, Appellant's claim that it is time for florida courts to reconsider the admissibility of handwriting analysis is without merit.

Turning to the Frye analysis, "[u]nder Frye, it must be shown that a scientific principle or test is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" Frye v. United State, 293 F. 1013,

1014 (D.C. Cir. 1923). As this Court has opined:

> [T]he burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the Frye test must be established by a preponderance of the reasoning

Ramirez, 651 So. 2d at 1168. Before admitting the testimony of an expert witness concerning a new scientific principle, the trial court must determine: (1) whether such expert testimony would assist the jury in understanding the evidence or in deciding a fact in issue; (2) whether such testimony is based on a scientific principle which has gained general acceptance in that particular scientific community; and (3) whether the expert witness is sufficiently qualified to render an opinion on the subject. Id. at 1166.

In the instant case, after hearing Miller's proffered testimony, the trial court followed Frye and found that (1) Miller's testimony would assist the jury in determining a fact in issue; (2) that Miller's testimony was based on scientific principles which had gained acceptance in the field of forensic document examination, and (3) that Miller was qualified to render an opinion on the subject. (T. Vol. 25 p. 2583). Taking each Frye requirement in turn, this court will find that Lamar Miller's testimony satisfied Frye and was properly admitted.

Miller's expert testimony assisted the jury in understanding the evidence or in deciding a fact in issue in the instant case. The record clearly supports the fact that testimony about the variations and distortions of Appellant's handwriting would assist the jury in determining whether or not Appellant wanted to prevent the state from discovering that he wrote a letter to Philmore asking him to testify that Appellant had nothing to do with the murder. This fact bore on Spann's state of mind and consciousness of guilt.

The fact that Miller is an expert in the field can not be challenged since Appellant agreed that Miller was an expert and could render an opinion with respect to the authenticity of documents, and/or identification of signatures or handwriting. (T. Vol. 25 p. 2548). Moreover, the record reflects that Miller testified that the distortion aspect is not a new or recently developed area of document examination, rather it has been a part of the literature since the early 1900's. (T. Vol. 25 p. 2554-2555).

At trial the state proved that Miller's testimony is based upon scientific principles accepted in the forensic field. Miller testified that document examiners are certified by a national organization called the American Board of Forensic

Document Examiners (T. Vol. p. 2556). He stated that this organization proscribes the training and that the identification of distorted and disguised handwriting is recognized by this organization (T. Vol. 25 p. 2560-63). In support of his testimony, Miller relied upon the Harrison textbook which is cited with approval by the American Board of Forensic Document Examiners (T. Vol. 25 p. 2561-2563). Hence, it has been established that handwriting analysis is based on scientific principles which have gained general acceptance in that particular scientific community. As such, Miller was correctly permitted to opine about Spann's handwriting and the comparison between the letter sent to Lenard Philmore and the exemplars given by Spann.

However, should the court find that it was error to admit Miller's testimony, such was harmless. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id. Given the facts of this case, there is no reasonable possibility that the admission of the experts testimony affected the verdict.

At trial it was established that Spann wrote to Philmore in jail encouraging Philmore to falsely testify that Spann had

nothing to do with the murder (T. Vol. 26 p. 700). The record reflects that both men were disappointed with the money obtained in the pawn shop robbery so they conspired to carjack a woman and rob a bank the following day (T. Vol. 26 p. 2668). The plan was to abduct a woman because it would be easier, kill her and use her car as the getaway vehicle after the bank robbery (T. Vol. 26 p. 2669). The record reflects that the two men abducted Kazue Perron, killed her and used her car to escape after they robbed the first bank of Indiantown (T. Vol. 26 p. 2669-2676). It was Philmore's testimony that he originally was not going to cooperate but he had heard that Spann had told men in jail that Philmore would do whatever he wanted because he was dumb (T. Vol. 26 p. 2699).

From the foregoing, it is clear that there is no reasonable possibility that the admission of Miller's testimony affected the verdict. Without question, had this evidence been excluded, the result of the proceedings would not have changed. The evidence remained that Spann had written to Philmore telling him to say that Spann was not involved. Further, Philmore outlined Spann's complicity and leadership role in the murder and other felonies. As such, exclusion of the fact that Spann attempted to disguise his handwriting when giving exemplars would not have resulted in an acquittal at trial. This court should affirm.

## POINT II

### THE TRIAL COURT FOLLOWED THE PROPER PROCEDURE WITH RESPECT TO THE DEFENDANT'S WAIVER OF MITIGATION AT THE PENALTY PHASE.

Appellant challenges that the acceptance of his waiver of mitigation on several levels, alleging that the dictates of Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) were not met. First he asserts that his counsel failed to provide the trial court "with any details or substance regarding the mitigating evidence in this case", or to provide the trial court with available records (I.B. 51). Second, Spann maintains that the trial court erred in not compelling defense counsel "to provide an adequate proffer of what the mitigating evidence would be" (I.B. 51). This alleged failure, Spann Submits, precluded the trial court from evaluating whether Spann's waiver of mitigation was knowing and voluntary (I.B. 51). Third, Appellant claims the "inadequate proffer" by defense counsel makes "it impossible for this court to conduct [it's] proportionality review" (I.B. at 51-52). As his last argument, Spann submits that these errors carried over into the Spencer[1] hearing because the trial court did not conduct another Koon inquiry to determine whether Spann knew that mitigating factors could have been presented at this stage (I.B. 52). The relief Spann seeks is a new penalty phase.

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

This court will find that the record supports the trial judge's determination that the waiver was knowing and voluntary following a proper Koon hearing. The death sentence should be affirmed.

The standard of review is whether or not the trial court abused it's discretion by honoring Appellant's request to waive the presentation of mitigation. Muhammed v. State, 782 So. 2d 343, 361 (Fla. 2001). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an Appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

"When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence." Koon at 250. In Farr v. State, 621 So. 2d 1368,1369 (Fla. 1993) this court stated "[w]e repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence."

In Chandler v. State, 702 So. 2d 186, 199 (Fla. 1997), this court stated that "[w]e established the Koon procedure due to our concern with the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence. This court went on to state that it's primary reason for requiring this procedure was to

ensure that a defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of mitigating evidence." Id. Only then could the trial court, and this Court, be assured that the defendant knowingly, intelligently, and voluntarily waived this substantial and important right to show the jury why the death penalty should not be imposed in his or her particular case. Id. Chandler's attorney listed the penalty phase witnesses that he would call and noted that they would all say good things about Chandler and told the court that he had discussed this with Chandler. Id. The following colloquy occurred between the trial court and Chandler:

> Court: Okay. Mr. Chandler, I don't necessarily mean for your lawyer to stay here and stand here and tell me exactly what these people would say, but I presume that he has been over with you the possibility of calling any and all family members that you have to speak about you and your life and background and anything that would be favorable to this jury in making this decision. Has he gone over that with you?
>
> Chandler: Yes, he has, and I have made a decision, your Honor, to call no one.
>
> Court: And do you understand, sir, that I am obliged to tell you by law that this could be a mistake because these people could very well put some favorable information before this jury to persuade them to recommend a life sentence, as

> opposed to a death sentence? Do you understand that?
>
> Chandler: Yes, I do.
>
> Court: And you've had plenty of time to talk this over with your lawyer?
>
> Chandler: Yes.
>
> Court: And it is your decision that you have instructed your lawyer not to call these people. Is that correct?
>
> Chandler: That's correct.
>
> Court: Is there anything else we need to put on the record?

Chandler 702 So. 2d at 199-200.

This court found that the above colloquy demonstrated that the trial court acted fully in compliance with the Koon requirement that a defendant knowingly and intelligently waive the presentation of mitigating evidence on the record. Moreover, this court further found that defense counsel complied with his duties under Koon by investigating Chandler's background, having witnesses ready and available to testify, and adequately outlining the favorable character evidence that Chandler's witnesses would have presented. Accordingly, this court found no error in the trial court's acceptance of Chandler's waiver. Id. at 199-200.

Recently, in Overton v. State, 26 Fla. L. Weekly S592 (Fla. September 13, 2001) this court found the following:

> Turning to the record before us, we note at the outset that the procedures required by Koon were satisfied. First, defense counsel informed the trial court that Overton did not wish to present any mitigating evidence. Counsel specifically advised the trial court that "over the past two years" Overton had been steadfast in his position that if he were convicted, he "did not want any mitigation being presented on his behalf in any manner whatsoever." Defense counsel added that the defense had prepared a memo for the court outlining "things that we could have brought out in mitigation."

The following occurred between the trial court and Overton when the trial court asked him if he wanted to present mitigation:

> Overton replied "No, I don't want any mitigation." The trial court explained to Overton the procedures that would take place during the penalty phase. The defendant stated on the record that his reasons for not wanting the presentation of mitigating evidence were: (1) "I didn't commit the crime"; (2) "I trust the appellate system. I figure I'm going to have a chance to have it reversed"; and (3) "I'm not going to put my family and friends though this stuff." The judge assured the defendant that: "[I]f you have any misconception that mitigation would somehow undermine your position on appeal, that's not so" and "[y]ou don't have to expose those people you choose to insulate from the stresses and pressures of this sort of proceeding. You can still insulate them and present mitigation through other forms of evidence." The defendant responded: "But if this had happened to some member of my family or some friends, I wouldn't care if the guy drank too much sugar or salt or what they said when he was a kid, there's no excuse for what

> happened...." Overton further affirmed that his attorneys had tried to convince him to present mitigating evidence, but that he had instructed his family and friends to not cooperate. Overton laughed when the judge asked whether someone had promised him anything to entice him to give up "this important right." He simply added: "I'll just take it to the appellate court." The judge again advised the defendant: "I just can't help but point out to you what I believe to be some of the fundamental flaws in your reasoning process, because you do not necessarily, again, compromise any appellate issues [by presenting mitigating evidence]." Overton added that he was "fully aware of what's going on" and that he "know[s] a lot about the process in the courts and what [he] didn't know, Mr. Smith and Mr. Garcia has [sic] explained it to me. They're not real happy with my decision, but it is my decision."

Overton, 26 Fla. L. Weekly S592.

This court found that when the trial court handled other related matters and again questioned the defendant as to his decision to not present mitigating evidence, and the defendant, once again, stated on the record that he did not wish to present any evidence in mitigation. The court ultimately concluded that the defendant had "made a knowing, voluntary decision even in the face of advice from competent counsel to the contrary. Overton, 26 Fla. L. Weekly S592. This court found no error and found that the post-guilt phase record was indicative of a judge who conscientiously and deliberately examined the information available while respecting the wishes of the defendant. Id.

In this case, on May 25, 2000 defense counsel Little informed the court that Spann wanted to waive the presentation of mitigating evidence. (T. Vol. 30 p. 3161). The trial judge asked counsel if after investigation he reasonably believed that there was evidence that could be presented and counsel answered yes (T. Vol. 30 p. 3161). The judge asked what the statutory and non-statutory mitigators were (T. Vol. 30 p. 3161). Little stated that there was evidence to support the statutory mitigator that Spann was an accomplice with a relatively minor role in the murder (T. Vol. 30 p. 3161). With respect to non-statutory mitigation, Little stated that he and Udell had contacted Spann's mother, brother, and sister, all of whom would testify that he was a good son, and sibling, when he was a young man. The only negative testimony would be that when he reached a certain age he began to hang around with a bad crowd. Counsel also intended to present, through prison records, an argument that Appellant would be capable of living in an open prison environment without being a threat to himself or anybody else (T. Vol. 30 p. 3162). Udell informed the court that Appellant was initially examined by Dr. Patrillo who administered the WAIS test and some standardized intelligence and neurological tests. However, at his second appointment, Appellant refused to be examined by Dr. Patrillo (T. Vol. 30 p. 3163). Udell advised

the court that counsel had investigated school records, social records, met with other family members in West Palm and Tallahassee, and reviewed the criminal records of Spann and Philmore (T. Vol. 30 p. 3164). The judge asked if they found any mitigation with respect to school and social records, meeting with the other family, and in the criminal history and Little answered that there was none (T. Vol. 30 P. 3164). Little told the judge that he found no other mitigating evidence and that he told Spann that they can and are willing to present mitigation. Spann was advised by Little that in the absence of mitigating evidence, the court would have nothing but aggravating factors to consider and would most likely recommend death. Even knowing this Appellant still did not want them to go forward (T. Vol. 30 p. 3165).

The following colloquy occurred between the trial judge and Spann:

> THE COURT: And Mr. Spann, the mitigating evidence that's been discussed on the record by Mr. Little, that's been discussed with you sir?
>
> THE DEFENDANT: Yes Ma'am
>
> THE COURT: And would you concur that your counsel has recommended that you present this evidence, please, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Mr. Spann, you understand that

the law provides that in the penalty phase, first it is determined whether any sufficient aggravating circumstances exist that would justify the death penalty. And Second, whether there are any mitigating circumstances to outweigh the aggravating circumstances?
Mr. Bakkedahl, could you state on the record for my benefit as well as the defendant's, the statutory aggravating circumstances the state intends to rely upon, please?

MR. BAKKEDAHL: Yes Ma'am. I'm looking for my death penalty memorandum. I have it here somewhere. Mr. Colton hid it on me. Your Honor, the state would be intending to rely on the following aggravating circumstances: The Defendant has previously been convicted of a violent felony. For the record, those offenses would include homicide conviction,–manslaughter, conviction out of Tallahassee, that is; shooting a deadly missile; possession by a convicted felon, conviction out of Palm Beach County. And then out of Orange County, an escape with a battery. And that's Orange County. We would also be relying on the witness elimination aggravator, cold–we would be relying on the cold, calculated and premeditated aggravator. We would be relying on the pecuniary gain aggravator. We would be relying on the "in the commission of a felony" aggravator. I believe that's it.

THE COURT: Mr. Spann, hearing these statutory aggravators on which the state intends to rely, and knowing what the law is, that I've just explained to you, it is my understanding that notwithstanding your counsels' recommendation that you present mitigators, again knowing that the law would require a weighing of the aggravating factors, mitigating factors, that it is your wish to waive your right to present any mitigating evidence?

THE DEFENDANT: Yes, it is.

THE COURT: And, Sir, are you on any medication today, please?

THE DEFENDANT: Presently, no.

THE COURT: And, sir, have you been on any medication throughout the trial.

THE DEFENDANT: No.

THE COURT: Mr. Spann, I am sure, sir, that you are disappointed with the verdict. This oftentimes happens with defendants. And based on that disappointment they make a decision not to present mitigating evidence. Once that waiver is made, if you decide not to continue with your waiver, that would not be the basis of a reason to overturn the case, or an issue on appeal. The appellate courts have found that those waivers are valid. Do you understand that, please?

THE DEFENDANT: Yes, Ma'am.

THE COURT: Oftentimes, sir, when Defendants make this decision, they regret it. Once we go through the penalty phase, there's no mitigation presented, sentence is impose, you will have to live with this decision, sir.

THE DEFENDANT: Yes, Ma'am.

THE COURT: It's one that you need to think about and don't make in a reaction of disappointment. Do you understand, please.

THE DEFENDANT: Yes, I thought about it since I came to jail in '97.

THE COURT: Okay, sir. Thank you very much. Court's prepared to rule on the defendant's requested waiver of mitigation.

(T. Vol. 30 pp. 3165-3168)

At this point, the state asked defense counsel if they had uncovered any evidence of head injuries, physical illness or mental illness in Appellant's background and defense counsel informed the court that Appellant had been in a car accident and that he went to the emergency room but was not admitted to the hospital (T. Vol. 30 p. 3169). Defense counsel stated that there were no records of who treated Appellant and Appellant said that he did not think it was a serious injury and had not complained of a head injury (T. Vol. 30 p. 3169). The state asked if any family members indicated that there was a behavioral change in Appellant after the accident and defense counsel said no (T. Vol. 30 p. 3170. The state asked if there were any significant childhood illnesses and defense counsel said no (T. Vol. 30 p. 3170).

The Appellant was sworn in and the judge asked him if he wished to waive and instruct counsel not to present any mitigating evidence and Appellant said that was his wish (T. Vol. 30 p. 3170). The trial court found that Appellant had given a free and voluntary waiver with regards to the presentation of mitigation evidence (T. Vol. 30 P. 3177).

On May 30, 2000, a status hearing was held wherein the trial court gave Appellant the opportunity to change his mind about

the waiver (T. Vol. 30 p. 3183). Defense counsel stated that Appellant had not changed his mind and wanted to be released from the courtroom because he did not want to participate in the case (T. Vol. 30 p. 3183).

The following colloquy occurred between Spann and the judge;

> THE COURT: Mr. Spann, it is my understanding obviously from your attorney that he has spoken with you again this weekend, as well as this morning. And again, you wish to waive your ability to present mitigating factors on your behalf during this phase of the trial; is that correct, sir?
>
> THE DEFENDANT: Yes, Ma'am.
>
> THE COURT: And once again, just to confirm that you understand that the instructions would be given to the jury would be, they are to determine what if any aggravating factors there may be and then review the mitigating factors and do a weighing process. And as such their advisory sentence would be based through my instructions on whether the mitigating circumstances would be sufficient to outweigh the aggravating circumstances, if any. So, knowing the law, once again, sir, did you wish to waive the presentation of any mitigating factors?
>
> THE DEFENDANT: Yes.

(T. Vol. 30 pp. 3183-3184).

The court then listed the possible mitigation as follows: 1) defendant was an accomplice with a relatively minor role, 2) they would have called his mother, brother, and sister to testify that he was a good son and brother, but later in life

got in with a bad crowd, 3) his mother would testify that he was a good student in school, 4) the defense would present a prison record that reflects Appellant could live in a prison environment without doing harm to others, 5) Appellant met with Dr. Patrillo who reached no conclusions with respect to Appellants mental state because of Appellant's unwillingness to be evaluated but that there were no competency issues, 6) social records could have been presented, 7) defendant had a head injury though not a significant injury, and 8) Folia Spann would have testified that Spann was a good husband and that they had a four year old child (T. Vol. 30 pp. 3188-3190). Hence, in comparison to Chandler and Overton, the instant record establishes that the trial court more than satisfied the dictates of Koon. Spann was made aware of his right to present mitigation and the record is indicative of a judge who conscientiously and deliberately examined the information available while respecting Spann's wishes. In this case defense counsel satisfied Koon and informed the court what mitigation would have been presented. Spann fails to explain how this proffer is inadequate. Moreover, Spann unequivocally stated that he had thought about this waiver since he was put in jail in 1997 and he wished to waive mitigation. Furthermore, Appellant was given a second opportunity to decide to present

mitigation and he refused. Hence, there was no error and the death sentence should be affirmed. [2]

POINT III

THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED THE ADVISORY JURY.

Appellant argues that the trial court's finding that Appellant freely and voluntarily made a knowing and intelligent waiver of the advisory jury is not supported by the record (IB at 54). Appellant also claims that the colloquy conducted by the trial court was inadequate and incomplete because Appellant's participation was limited to affirmations and he was not told that the trial court could reject his waiver (IB 54-59). As his last point, Appellant asserts that the trial court erred by not exercising it's discretion and requiring an advisory jury. This claim is meritless as the record reflects that Appellant freely and voluntarily waived the advisory jury and the trial court's colloquy was proper. The

[2]While the state recognizes this court's decision in Muhammad v. State, 782 So. 2d 343 (Fla. 2001) (requiring preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty or refuses to present mitigating evidence), this decision is not applicable to Spann because he was sentenced prior to the date the opinion was issued, it is notable that the trial court's decision to order the preparation of a PSI in this case is consistent with this court's decision in Muhammad. See Also Overton v. State, 26 Fla. L. Weekly S592 (Fla. September 13, 2001).

trial court did not abuse it's discretion by failing to inform the Appellant that it did not have to accept his waiver because, implicit in the fact that Appellant has to ask to waive the advisory jury is that the trial court may reject his waiver.

The standard of review is abuse of discretion. State v. Carr, 336 So. 2d 358 (Fla.1976). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

With respect to Appellants waiver of the advisory sentence,

the record must affirmatively show that he voluntarily and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of the death penalty. Lamadline v. State, 303 So. 2d 17, 20(Fla. 1974) See Also Carr, 336 So. 2d at 359 (Fla.1976)(where defendant entered a written waiver which the trial judge found was freely, intelligently, and voluntarily made). The trial judge, upon a finding of a voluntary and intelligent waiver, may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such advisory jury recommendation. Carr at 359; See also Palmes v. State, 397 So. 2d 648, 656 (Fla.1981), Sireci v. State, 587 So. 2d 450 (Fla. 1991), Muhammad v. State, 782 So. 2d 343, 361(Fla. 2001).[3]

In the instant case, at the hearing held on May 25, 2000, defense counsel Little informed the trial court that Appellant did not want a jury recommendation for his sentence, he wanted

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[3]Appellant cites to State v. Arthur, 374 S.E.2d 291 (S.C. 1988), to illustrate the principle that the acceptance of a jury waiver must be based on a written record and that this can be accomplished only through a searching interrogation of the accused. However the decision in Arthur, was modified by State v. Orr, 403 S.E.2d 623 (S.C. 1991), holding that the waiver may be established by a colloquy between the court and the accused or between the court and defense counsel or both. Moreover, Arthur is inapplicable to the instant case because the trial court in Arthur conducted no colloquy and there was no written record. Arthur, 374 S.E.2d at 293. Hence, Appellant's reliance on Arthur is misplaced.

the judge to sentence him (T. Vol. 30 p. 3173). Little told the court that he had encouraged Appellant to seek and advisory verdict (T. Vol. 30 p. 3174).

The following colloquy occurred between the court and Spann:

> THE COURT: Mr. Spann, what is your level of education, sir?
>
> THE DEFENDANT: Ninth grade
>
> THE COURT: How old are you , please?
>
> THE DEFENDANT: Twenty-six.
>
> THE COURT: Do you understand what is going on?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And, Mr. Little indicated that this is something you've thought about and talked to him about; is that correct, please?
>
> THE DEFENDANT: Yes, Ma'am.
>
> THE COURT: Sir, do you understand that the jury advisory sentence to be imposed is entitled by law and will be given great weight by this court in deciding what sentence to impose?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: It is only under the rarest of circumstances that the Court would impose a sentence other than that which the jury recommended. Do you understand?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And I think what is key is that if the jury recommends life, then I must

be–I must give that recommendation great weight. And again, only under the rarest of circumstances could I impose a sentence other than a life sentence. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And, sir, I have no idea what sentence this court would impose with regards to the penalty. I haven't heard any of the aggravating factors that are going to be argued. I haven't weighed them as required by law. But, again, if the jury were to recommend a life sentence, despite what I thought the law would require, the life sentence in all likelihood is that which would be imposed. Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: Again, as you and I previously discussed, I'm sure you are disappointed with the verdict, and I don't want that to be the motivator for you to not ask for a jury advisory opinion in this case. I'm going to ask you about this again, but I want you to think about the fact that you don't know what a jury's going to do. A jury very well may make a life recommendation in this case. And, only if by clear and convincing evidence, reasonable men couldn't differ, only with that standard could I not go with what the jury's recommended. Do you understand please?

THE DEFENDANT: Yes I do.

THE COURT: Given that, and knowing what the status of the law is and what we've discussed, are you telling me that you wish to waive your right to a jury recommendation in this case, please?

THE DEFENDANT: Yes, I do.

> THE COURT: Have you had the opportunity to fully discuss this with your counsel?
>
> THE DEFENDANT: Yes, I have.
>
> THE COURT: And with regards to both the mitigating evidence and the jury recommendation, are there any questions that you have of your attorney?
>
> THE DEFENDANT: No.
>
> THE COURT: Or of the Court?
>
> THE DEFENDANT: No.
>
> THE COURT: And you've had sufficient time to full discuss both these issues with Mr. Little; is that correct, please?
>
> THE DEFENDANT: Yes, ma'am
>
> THE COURT: Did you wish to be heard counsel?
>
> MR. BAKKEDAHL: No, ma'am.
>
> THE COURT: The Court finds the Defendant has given a free and voluntary waiver with regards to the –- an intelligent waiver with regards to the presentation of mitigating evidence, as well as to his right to a jury advisory recommendation with regards to a sentence.

(T. Vol. 30 pp. 3174-3177).

At the status hearing held on May 30, 2000, the judge again informed Appellant that the court would place great weight on the advisory recommendation and only under the rarest of circumstances would she impose a sentence other that which is recommended (T. Vol. 30 p. 3185). Appellant said that he still

wished to waive the advisory jury verdict (T. Vol. 30 p. 3185). The Appellant signed a written waiver of the advisory jury verdict in court on May 30, 2000 (T. Vol. 30 p. 3194, Penalty Phase Exhibit 1).[4]

The record affirmatively shows that the colloquy thoroughly established Spann's knowing and voluntary waiver of the advisory jury. The record reflects that the trial court did not simply acquiesce to Spann's request rather the judge explained the role of the advisory jury and warned Spann against making this decision because he was disappointed with the guilt phase verdict. Spann was told that the trial court was still going to conduct the penalty phase with or without the jury. Spann told the judge he understood the law and still wished to waive the advisory jury. Hence, it is apparent from the record that there was a valid waiver of the advisory jury. Acceptance of a valid waiver of the advisory jury is reasonable and is not an abuse of discretion.

Moreover, Appellant's claim that the trial court abused it's discretion by failing to tell him that a judge does not have to accept his waiver is without merit, as it is implicit in the fact that Appellant has to ask to waive the jury, that it is

[4] See Amended Order Supplementing the Record Dated January 22, 2002.

discretionary to the trial court. In essence what Spann argues is that he should have been told that the trial court had the discretion to reject his waiver, and absent that knowledge, his waiver cannot be deemed to be knowing and voluntary. Spann has not explained how the trial court's discretion to reject the waiver affected his decision to waive the advisory jury, he simply states that the record reflects that after Spann had made a valid waiver on May 25, the trial court had the jury return on May 30 in case Spann changed his mind, not in case the trial court decided to exercise it's discretion and require the advisory jury. This claim is wholly unsupported by the facts in this case, rather it is apparent from the colloquy that the trial court exercised her discretion and found that Spann validly waived the advisory jury. A trial judge has the inherent authority to control her courtroom and implicit with all court requests is the fact that they may be denied. Hence, the trial court did not abuse it's discretion by failing to inform Spann that she could deny his request to waive the advisory jury.

Finally, Appellant's claim that the trial court erred by not exercising it's discretion and requiring an advisory jury is without merit because a defendant having waived the advisory jury cannot complain after the fact about the failure of the

trial court to exercise its discretion and impanel a jury for the judge's benefit because Spann received that which he requested, a sentencing determination by the trial judge without the advisory recommendation of a jury. Holmes v. State, 374 So. 2d 944, 949 (Fla.1979).

There was no abuse of discretion in the instant case as reasonable men could not differ as to the propriety of the trial court's ruling. Hence, the trial court's ruling should be affirmed.

## POINT IV

### THE TRIAL COURT'S FINDING THAT THE PRIOR VIOLENT FELONY AGGRAVATOR EXISTS IS SUPPORTED BY THE RECORD.

Appellant claims that the trial court committed reversible error by considering his misdemeanor conviction for battery as an aggravating factor. He seeks a new penalty phase. This claims is meritless. In the sentencing order, the judge found that Appellant was convicted of battery on November 26, 1991, he was convicted of shooting into an occupied vehicle on August 10, 1995, and he was convicted of manslaughter with a firearm on October 1, 1999 (T. Vol. 3 p. 379). Hence, the requested relief should be denied and the death sentence should be affirmed

because the record supports the trial court's finding of the prior violent felony aggravator.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997).

On November 26, 1991, Appellant was convicted of Escape from a Juvenile Detention Center, Section 944.40, which is a felony, and Battery under Section 784.03 which is a misdemeanor (T. Vol. 2 p. 323, Exhibit # 3792). Robert Sharpe testified that he was a group treatment leader at the Orange House, the facility Appellant escaped From (T. Vol. 30 p. 3200). Sharpe testified that on May 23, 1991, Appellant punched him in the mouth, causing him a busted lip, Appellant then fled the facility (T.

Vol. 30 p. 3203). In it's sentencing memorandum the State argued that the escape from the facility involved the use of violence to another (T. Vol. 2 p. 323). Hence, the record reflects that the misdemeanor battery was the underlying violence of Appellants felony conviction for escape, therefore, the prior violent felony aggravator was proven.

However, should this court find that the trial court's reference to Appellant's battery conviction was error, any error was harmless in light of the two additional prior violent felonies that exist in Appellant's criminal history. Marshall v. State, 604 So. 2d 799, 805 (Fla. 1992).

In a direct appeal or collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court. Florida Statute §924.051(7). The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The

> test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. Id.

In the instant case, the trial judge found that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. In the sentencing order, the judge found that Appellant was convicted of battery on November 26, 1991, he was convicted of shooting into an occupied vehicle on August 10, 1995, and he was convicted of manslaughter with a firearm on October 1, 1999 (T. Vol. 3 p. 379). Even if it was error to consider the battery conviction, any error was harmless because two additional violent felonies still exist. See Mahn v. State, 714 So. 2d 391(Fla. 1998)(erroneous use of prior robbery conviction as a prior violent felony conviction aggravator was harmless as defendant's contemporaneous convictions for two homicides satisfied the aggravating circumstance); Franqui v. State, 699 So. 2d 1312 (Fla. 1997)(attempted murder convictions were reversed, hence the trial court's reliance upon them in finding the existence of this aggravator was error, however, the error was harmless beyond a reasonable doubt because the trial court also found that Franqui had been previously convicted of the

crimes of aggravated assault and attempted armed robbery).

Hence, there is no reasonable possibility that the error affected the sentence because two additional prior violent felonies existed for the court to consider. The sentence should be affirmed.

## POINT V

### THE TRIAL COURT'S FINDING OF THE FELONY MURDER(Kidnapping), PECUNIARY GAIN, AND AVOID ARREST AGGRAVATORS DID NOT CONSTITUTE IMPROPER DOUBLING.

Appellant argues that the trial court committed reversible error in considering as separate the aggravating factors of felony murder (kidnapping), pecuniary gain, and avoid arrest because these aggravators refer to the same aspect of the crime (IB 65-67).

This claim is not preserved for appellate review because no objection was made below. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985), Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). However, should this court determine otherwise, it will find this claim meritless.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to re-weigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997).

Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. Provence v. State, 337 So. 2d 783, 786 (Fla.1976), Rose v. State, 787 So. 2d 786, 801 (Fla. 2001), Banks v. State, 700 So. 2d 363 (Fla. 1997). However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other. Id. Hence, no improper doubling exists so long as independent facts support each aggravator. Morton v. State, 689 So. 2d 259, 265 (Fla. 1997).

In addition to finding the prior violent felony ("PVF") and cold, calculated, and premeditated ("CCP") aggravating factors, the trial court found that the felony murder (kidnapping), avoid arrest, and pecuniary gain aggravators also were proven beyond a reasonable doubt. With respect to the felony murder aggravator, the trial judge opined:

> The defendant was charged and convicted of committing a kidnapping on the victim of the homicide. The evidence shows that on November 13, 1997, the defendant and the codefendant planned to rob a bank the following day in order to get money to leave town. **That the plan was to carjack a car for a get away. According to the testimony of the codefendant, the defendant and codefendant planned to follow a vehicle being driven by a female ("they wanted a female because it would be easier to do what they wanted to do"), carjack the vehicle and abduct the driver**. The driver was then to be killed so they could not be identified.
>
> The evidence shows that the defendant and codefendant, while together in the defendant's car, which was driven by the defendant, spotted the victim's vehicle, and followed the vehicle until it stopped in a driveway. The codefendant then exited the defendant's vehicle and forcibly entered the victim's vehicle at gunpoint. The codefendant then drove the vehicle away with the victim, while the defendant followed in his vehicle.
>
> This evidence was adduced at trial by the testimony of the codefendant and corroborated through the testimony of Martha Solis, who testified that she saw a vehicle matching the description of the defendant's vehicle in the neighborhood where the victim

> was abducted being driven by a black male and being followed by the victim's gold Lexus.
>
> The evidence further shows that the vehicle was driven to a remote area. Both the defendant and the codefendant exited the respective vehicles along with the victim; at which time the defendant nodded to the codefendant and he shot the victim in the head. The medical examiner testified that the victim died of this gunshot wound. The evidence shows that the defendant and codefendant then proceeded to rob the bank after which time they hid the defendant's vehicle and attempted to leave town in the victim's vehicle. This aggravating circumstance was proved beyond a reasonable doubt.

® Vol. 3, 380-81) (emphasis supplied). Next, the trial court concluded that the avoid arrest aggravating factor was proven beyond a reasonable doubt based upon the following:

> The evidence of the facts of the case shows that there was only one reason to kill the victim and that was to avoid detection by police authorities, thereby avoiding arrest.
>
> **The codefendant testified that the defendant told him to kill the person whose car they would carjack so they could not be identified and would have enough time to get away with the car. He further testified that once the vehicle was car jacked the victim was taken to a remote area and upon exiting the vehicle the defendant nodded his head, whereupon the codefendant shot the victim in the head. The evidence was unrebutted that the elimination of the victim as a witness was the sole motive for the murder**. Additionally, there was no evidence whatsoever that reflected any other

> apparent motive for the killing. The physical evidence supported the testimony of the codefendant in this regard as well. The victim's body was discovered in an isolated location and the victim was shot in the forehead which is consistent with an execution style killing. The purpose of the abduction and killing was clearly to eliminate the only witness to the car jacking. This aggravating circumstance was proved beyond a reasonable doubt.

® Vol. 3, 381-82) (emphasis supplied). Also, the trial judge concluded that the murder was committed for pecuniary gain stating:

> The defendant was charged and convicted of the crimes of Conspiracy to Commit Robbery with a Deadly Weapon, Robbery with a Deadly Weapon and Grand Theft. The facts of the case suggest that the day before the commission of these offenses the defendant woke the codefendant indicating that he had located a pawn shop to rob. The codefendant testified that the defendant drove the codefendant and another individual to a pawn shop in the defendant's car. The defendant waited in his car while the two others committed the robbery. The murder weapon and three other firearms were taken, together with some jewelry. This was corroborated by the testimony of the victim of the robbery, Michael Bus. Mr. Bus testified as to what items were taken and his observation that when leaving the scene of the robbery the codefendant and the other individual approached the passenger side of a vehicle matching the description of the defendant's vehicle. **The codefendant testified that afterwards the defendant was upset with the outcome of the robbery, saying there wasn't enough money gotten to leave town. The codefendant testified that they then discussed robbing a bank. The**

> **plan was to rob a bank, but first carjack a vehicle with which to leave town after the bank robbery. The occupant of the vehicle was to be killed so they could not be identified. The killing clearly was an integral step in committing the car jacking an bank robbery**. The evidence is inconsistent with any reasonable hypothesis other than the existence of this aggravating factor. It was clearly established beyond a reasonable doubt.

® Vol. 3, 382) (emphasis supplied).

The record reveals that the trial court outlined the entire sequence of events when discussing each of the challenged aggravating factors. However, equally evident is the fact that trial court relied upon different aspects of the crimes in finding aggravation. The purpose of the kidnapping was to obtain a vehicle to use after robbing a bank and as transportation from the area. Spann's intent for killing the victim was to facilitate the escape with the vehicle and to "eliminate the only witness to the car jacking." Unquestionably, different aspects for the crime were used in support of each aggravator.

This comports with this Court's analysis presented in Green v. State, 641 So. 2d 391 (Fla. 1994).

> Improper doubling occurs when aggravating factors refer to the same aspect of the crime. *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). If the sole purpose of the kidnapping had been

> to rob Flynn and Hallock, we would resolve this issue differently. The evidence, however, supports a finding of both aggravating circumstances. The purpose of the kidnapping clearly was not to rob Hallock and Flynn because they were robbed before they were kidnapped. Thus, the kidnapping had a broader purpose than to provide the opportunity for a robbery.

Green, 641 So. 2d at 395. See also, **Rose v. State, 787 So. 2d 786, 801 (Fla. 2001), Banks v. State, 700 So. 2d 363, 367 (Fla.1997)**. Hence, this Court should conclude that there was no improper doubling of the felony murder (kidnapping) and avoid arrest aggravators.

Likewise. the trial court's finding of the pecuniary gain aggravating circumstance was not error. Henyard v. State, 689 So. 2d 239, 255 (Fla. 1996), Funchess v. State, 449 So. 2dc 1283 (Fla. 1984).

When discussing the facts surrounding pecuniary gain, the trial court noted Spann had been dissatisfied with a prior robbery feeling that an insufficient amount of money had been stolen to finance his and Philmore's trip out of town. Under these circumstances, a plan was conceived to rob a bank and the murder was an integral step in that plan. As identified above, the trial judge found that the killing was done in order to eliminate a witness and avoid detection by law enforcement. Hence, different facts from Spann's criminal activity

surrounding the murder were used to establish the aggravating factors. Morton, 689 So. 2d at 265 (Fla. 1997). No improper doubling occurred and Spann's death sentence should be affirmed.

Nonetheless, even if this Court concludes that the felony murder, avoid arrest, and pecuniary gain aggravating factors should have been merged into one, the Court will recall that two other valid aggravators remain; i.e. prior violent felony and CCP. Both of these are weighty aggravating factors. Porter v. State, 788 So. 2d 925 (Fla. 2001). In fact, having found no statutory mitigation, the trial court reasoned:

> This Court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are appalling, the defendant's previous convictions for violent crimes, the fact that the murder herein was committed for pecuniary gain, during the commission of a kidnapping, to avoid detection and the cold calculated and premeditated manner in which the murder was committed greatly outweigh the relatively insignificant non-statutory circumstances established by this record. Even in the absence of the cold, calculated and premeditated aggravator, the Court would still feel that the remaining four aggravators seriously outweighed the existing mitigators.

(R. Vol. 3, 389-90). Based upon this, there can be no question that a death sentence would have been imposed by the trial court. The sentence should be affirmed.

Therefore, in this case, it is clear from a complete review

of the trial court's findings that each aggravator was based on a separate and distinct aspect of the entire crime. Appellant claims that the trial court relied on the same aspect of the crime in finding the aggravators of during the commission of a felony (Kidnapping), and the avoid arrest aggravator (Initial brief p. 66). The Appellant claims that the court relied on the fact the Appellant and the co-defendant planned to carjack a vehicle and then abduct and kill the driver so they could not be identified (Initial brief p. 66). However, a review of the trial court's findings clearly establishes that the kidnapping of a female was committed for the broad purpose of easily being able to take the car and then to provide the defendant and the co-defendant with a getaway vehicle after they committed the bank robbery. This is not the same as the facts underlying the avoid arrest aggravator. A review of the judges findings reveals that the only purpose for murdering the victim was so that the perpetrators would not be identified.

Hence, the trial court properly considered the aggravators of during the commission of a felony (kidnapping), avoid arrest, and pecuniary gain.

## POINT VI

### THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED THE MITIGATING EVIDENCE.

Appellant claims that the trial court failed to consider and

weigh all the mitigating evidence contained in the record (IB 68). He lists nineteen mitigating circumstances that he alleges the trial court failed to consider and weigh (IB 71-79). However, he fails to explain how these factors are mitigating.

This Court in Campbell v. State, 571 So. 2d 415 (Fla. 1990), established relevant standards of review for mitigating circumstances: 1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See also, Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court); Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding that, though a court must consider all the mitigating circumstances, it may assign n" weight to an established mitigator); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (explaining that the trial court may reject a claim that a mitigating circumstance has been

proven provided that the record contains competent substantial evidence to support the rejection).

In Campbell, 571 So. 2d 415 this court stated:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature See Rogers v. State, 511 So. 2d 526 (Fla.1987), cert. denied, 484 U.S. 1020 (1988)... The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance.

Campbell, 571 So. 2d at 419 (emphasis supplied). This court stated that the United States Supreme Court has held that a sentencing jury or judge may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death. Trease, 768 So. 2d at 1055, See also Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). The trial court, during the penalty phase of a capital trial, is required to expressly find, consider and weigh in its written sentencing order all of the mitigating evidence urged by the defendant, both statutory and non-statutory, which appears anywhere in the record. Ellis v. State, 622 So. 2d 991 (Fla.

1993).

In Lucas v. State, 586 So. 2d 18, 24 (Fla. 1990), this Court recognized that at trial Lucas did not point out all of the non-statutory mitigation that he argued on appeal the trial court failed to consider. This court found that because non-statutory mitigation is so individualized, the defense must share the burden and identify for the court the specific non-statutory mitigation it is attempting to establish. Id.; see also Donaldson v. State, 722 So. 2d 177, 188 (Fla. 1998).

Here, like in Lucas, appellant suggests that there are mitigating circumstances that the trial court failed to consider and weigh. In resolving this issue, the Court must recall that Spann waived mitigation, but proffered certain factors as mitigation.

Overton v. State, 26 Fla. L. Weekly S592 (Fla. 2001), is directly on point to the instant case. At Overton's sentencing hearing, the trial court stated that it had considered the PSI solely for the purpose of uncovering mitigating factors. Id. at S600. The trial court went on to find that Overton did not request that the jury be instructed on any statutory mitigators, nor did he present any evidence or argument at the sentencing hearing to suggest that any statutory mitigators existed. Id. The trial court found that no statutory mitigation existed,

found two non-statutory mitigators and afforded them minimal weight. Id. at S601. This court found that the trial court committed no error with respect to it's consideration and evaluation of the available mitigating evidence and that the post guilt phase record indicates that the trial judge in fact considered whatever mitigation was present in the record, including the limited information contained in the PSI. Id. at S602.[5] This court stated that the record was indicative of a judge who conscientiously and deliberately examined the information available to him, while at the same time respecting the wishes of the defendant. Id.

In the instant case, the sentencing order states:

> On May 30, 2000, the defendant orally on the record reaffirmed the waiver of his right to present evidence in mitigation ... The Court then discharged the jury and evidence in support of aggravating factors was heard. The Court requested memoranda from both counsel for the state and counsel for the defendant. The memoranda were received from both sides on June 1, 2000. On June 2, 2000, the Court held a further sentencing hearing where both sides made legal argument.

(R. Vol. 3, 379). Turning to the mitigation in this case, the trial court noted that certain statutory mitigators were

[5] It is notable that in this case, as in Overton, 26 Fla. L. Weekly at S601, Spann refused to cooperate with DOC in preparation of the PSI.

identified by the defense either in its proffer or in the sentencing memorandum, however, the trial judge also considered those statutory mitigators not requested by the defense (R. Vol. 3, 384-86). Continuing, the trial court addressed those non-statutory mitigators raised below, opining: "The defendant has affirmatively waived all evidence of mitigation, hence none was presented. However, the Court will consider the proffered non-statutory mitigation as well as all mitigation in the record including any and all mitigation set forth in the PSI." (R. Vol. 3, 386). In its conclusion, the trial court announced, "The Court accepted as true through the proffer and/or through the evidence and/or PSI that non-statutory mitigating circumstances have been established, as discussed above." (R. Vol. 3, 389). From this, it is clear that the trial court considered all that was in the record.

Spann complains that the trial court failed to independently review the following; (1) Spann was capable of living in a prison population without serious difficulty or doing harm to another, (2) at a certain age Spann came under the influence of a bad crowd, (3)available mental health mitigation, (4) school records, (5) social records, (6) Spann's criminal history records, (7)Philmore's criminal history records, (8) Spann was in a car accident in 1989 or 1990, (9) Spann's drug use during

the episode, (10) Spann's low level of education as referenced in the PSI, (11) Spann's skills as a welder, (12) Spann's current or most recent employer is unknown, (13) Spann left home at an early age, (14) Spann had an unstable residential history, (15) Spann has two other children besides the one referenced in the sentencing order, (16) Spann has sinus and hayfever problems, (17) Spann has an unhealthy relationship with his mother, (18) Spann needed and appropriate male role model, and (19) he was institutionalized as a juvenile. (IB 71-78). However, as noted by the trial court, Spann waived mitigation and presented no evidence (R. Vol. 3, 386). As such, his prison, mental health, school, social, criminal history, and "prior juvenile PDR" records were not in the record for the trial judge's review. Additionally, Spann has not informed this Court how such records establish mitigation.

Furthermore, in this case, the trial court found no statutory mitigation but specifically found the following non-statutory mitigation; (1) the defendant had been a good son according to his mother, and a good brother according to his siblings and was a good student up to a point(little weight), (2) the defendant was not the person who fired the fatal shots in the murder for which he is to be sentenced(very little weight), (3) the defendant is capable of living in a prison

population without serious difficulty or doing harm to another (some weight), (4) the defendant's wife would testify that he was a good husband and father (slight weight), and (5) the P.S.I. reflects that the defendant's father was shot to death when the defendant was 2 to 4 years old (moderate weight) (R. Vol. 3 pp. 388-389).

Hence, in this case, as in Overton, it is apparent from the record that the trial court considered and examined whatever mitigation was present in the record including the information contained in the PSI, while respecting Spann's wish to waive the presentation of mitigation. Spann has failed to show that any error was committed below and the death sentence should be affirmed.

## POINT VII

### THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION WITH RESPECT TO THE WEIGHT ASSIGNED TO THE MITIGATING FACTORS.

Appellant argues that the trial court abused it's discretion with respect to the weight assigned to the mitigating factors found to exist. Appellant complains that as he argued in Point II the trial court did not require an adequate proffer of the non-statutory mitigation (I.B. p. 81). Appellant also claims that the trial court abused it's discretion by relying on a limited amount of information in the P.S.I with respect to the

mitigator that Spann's father was shot to death. As relief, Spann seeks a new sentencing hearing. The state submits that the claim is without merit. The trial court did not abuse her discretion when assigning weight to the mitigation found in the record.

The standard of review is abuse of discretion. Campbell v. State, 571 So. 2d 415(Fla. 1990) Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

While aggravators must be proven beyond a reasonable doubt, Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), mitigating factors are "reasonably established by the greater weight of the evidence." Campbell, 571 So. 2d at 419-20 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990)(finding judge may reject claimed mitigator if record contains competent substantial evidence to support decision). In analyzing mitigation, the trial judge must (1) determine whether the facts alleged as mitigation are supported by the evidence; (2) consider if the proven facts are capable of mitigating the punishment; and if the mitigation exists, (3) determine whether it is of sufficient weight to counterbalance the aggravation. Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The trial court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factor, it is truly of a mitigating nature." Campbell, 571 So. 2d at 419. Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991), cert. denied, 503 U.S. 946 (1992); Stano v. State, 460 So. 2d 890, 894 (Fla. 1984).

Resolution of evidentiary conflicts is the trial court's duty; “that determination should be final if supported by competent, substantial evidence.” Id.

Also, the relevant weight assigned a mitigator is within the sentencing court’s province. Campbell, 571 So. 2d at 420. See, Alston v. State, 723 So. 2d 148, 162 (Fla. 1998)(finding sentence within court’s discretion where detailed order identified mitigators, and weight assigned each); Bonifay, 680 So. 2d at 416 (same). A weight assignment is reviewed under the abuse of discretion standard. Cole v. State, 701 So. 2d 845, 852 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998). Under Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000), the trial court may find a mitigator established but assign it no weight.

In this case, the trial court found no statutory mitigation but found the following non-statutory mitigation; (1) the defendant had been a good son according to his mother, and a good brother according to his siblings and was a good student up to a point(little weight), (2) the defendant was not the person who fired the fatal shots in the murder for which he is to be sentenced(very little weight), (3) the defendant is capable of living in a prison population without serious difficulty or doing harm to another (some weight), (4) the defendant’s wife would testify that he was a good husband and father (slight

weight), and (5) the P.S.I. reflects that the defendant's father was shot to death when the defendant was 2 to 4 years old (moderate weight) (R. Vol. 3 pp. 388-389).

Spann complains that the trial court abused it's discretion in assigning weight to the mitigating factors found proven. A review of the record shows that each of Spann's proffered mitigating factors were analyzed by the trial court and given a weight assignment from very little to moderate weight. This complied with Trease and Alston. Moreover, Spann also claims that the trial court improperly relied on a limited P.S.I to weigh the mitigator that his father was shot to death. However, this claim is not preserved as the trial court informed counsel that she had the P.S.I and asked if there were any objections and defense counsel told her no (T. Vol. 31 p. 3264). Spann has not shown that the weight assignment was arbitrary or unreasonable. As such this court should affirm.

## POINT VIII

## THE DEATH SENTENCE IS PROPORTIONAL.

Although Spann has not challenged the proportionality of his sentence, the Court is required to complete such a review. Gore v. State, 784 So. 2d 418, 438 (Fla. 2001) (recognizing even absent challenge, Court "has an independent duty to review the

proportionality of [the] death sentence as compared to other cases where the Court has affirmed death sentences."); Jennings v. State, 718 So. 2d 144 (Fla. 1998). Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin v. State, 714 So. 2d 411, 416-17; Terry v. State, 668 So. 2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6 (Fla. 1999).

The record reflects that Spann planned the car jacking, killing and abduction of the victim. Spann and Philmore were looking for a female to carjack, take to a remote location, and kill in order to escape detection. Spann told Philmore to abduct Ms. Perron and Spann directed Philmore to an isolated location. At Spann's direction, Philmore shot her once in the forehead. The death sentence is proportional based upon five aggravating factors: (1) prior violent felony, (2) felony murder (kidnapping), (3) avoid arrest, (4) pecuniary gain, and (5) CCP,

no statutory mitigators, and five non-statutory mitigators. The non-statutory mitigators are: (1) The defendant had been a good son according to his mother, and a good brother according to his siblings and was a good student up to a point (little weight), (2) the defendant was not the person who fired the fatal shots in the murder which he is to be sentenced (very little weight), (3) the defendant is capable of living in a prison population without serious difficulty or doing harm to another (some weight), (4) the defendant's wife would testify that the defendant was a good husband and father (slight weight), (5) the P.S.I reflects that the defendant's father was shot to death when the defendant was 2 to 4 years old (moderate weight), (R. Vol. 3 pp. 388-389).

In determining the sentence, the trial court found that the defendant in furtheranc3 of his own plan hunted down a defenseless woman and stood by with encouragement while the codefendant executed her in cold blood (T. Vol. 3 p. 385). The court stated:

> In weighing the aggravating factors against the mitigating factors, the Court understands that the process is not simply an arithmetic one. It is not enough to weigh the number of aggravators against the number of mitigators but rather the process is more qualitative than quantitative. The Court must and does look to the nature and quality of the aggravators and mitigators which it has found to exist.

> This Court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are appalling, the defendant's previous convictions for violent crimes, during the commission of a kidnapping, to avoid detection and the cold, calculated, and premeditated manner in which the murder was committed, greatly outweigh the relatively insignificant non-statutory circumstances established by this record. Even in the absence of the cold, calculated, and premeditated aggravator, this Court would still feel that the remaining four aggravators seriously outweigh the existing mitigators.

(T. Vol. 3 p. 390).

Based upon the circumstances of this crime along with the strong aggravation and weak mitigation, the sentence is proportional. Puiatti v. State, 495 So. 2d 128, 129 (Fla. 1986) (finding sentence proportional with avoid arrest, pecuniary gain and CCP, no mitigation, and where co-defendant Glock kidnapped and robbed victim, used her car to take her to orange grove where she was shot, and then drove to New Jersey); Cave v. State, 727 So. 2d at 229(affirming sentence based on felony murder (robbery-kidnapping), CCP, HAC, and avoid arrest, one statutory and eight non-statutory mitigators where defendant was the ringleader of the plan to rob a convenience store, he led the victim at gun point, and controlled her during the long ride to a remote location, where she was killed by accomplices); Pope v. State, 679 So. 2d 710, 712 n. 1, 716 (Fla. 1996) (deciding

sentence proportionate with prior violent felony and pecuniary gain aggravators, extreme mental/emotional disturbance and impaired capacity to appreciate criminality of conduct, and nonstatutory mitigation of intoxication, violence after domestic dispute, and under influence of mental/emotional disturbance); Bryan v. State, 533 So. 2d 744, 745 (Fla. 1988) (affirming sentence where victim kidnapped, robbed, transported, and killed at remote location, where there were six aggravators and two mitigators); Whitton v. State, 649 So. 2d 861, 864 n. 6, 867 (Fla. 1994)(affirming sentence with five aggravators, no statutory, but and nine nonstatutory mitigators). The Court has upheld death sentences with less aggravation than shown here. Sliney, 699 So. 2d at 662 (affirming sentence with felony murder and avoid arrest aggravators, two statutory mitigators, and several nonstatutory mitigators); Hayes v. State, 581 So. 2d 121 (Fla. 1991) (affirming death penalty with CCP and felony murder aggravators, one statutory and other nonstatutory mitigators). This Court should affirm.

## CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellee respectfully requests that this Court AFFIRM Appellant's conviction and sentence below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by U.S. Mail to: Robert A. Norgard, Esq. P.O. Box 811, Bartow, Fl 33831 on February 21, 2002.

_____

Melanie A. Dale
Assistant Attorney General

## CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____

Melanie A. Dale
Assistant Attorney General