IN THE SUPREME COURT OF FLORIDA

ANTHONY SPANN,

Appellant,

vs. APPEAL NO. 00-1498

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of 31 volumes. Volume numbers will be designated using Arabic numerals. Volumes 1-3 contain copies of documents from the court file, and are numbered pages 1 through 534. These volumes will be designated in the brief as

"R". Volumes 4 through 31 contain the transcripts of pretrial hearings and the trial, and are numbered pages 1 through 3267. These volumes will be designated in the brief as "T". The Appellant will be referred to as Mr. Spann.

STATEMENT OF THE CASE

On December 16, 1997, the Grand Jury for the Nineteenth Judicial Circuit, in and for Martin County, Florida, returned an

Indictment against Appellant, Anthony Spann and Lenard James Philmore, for the offense of First Degree Murder contrary to section 775.04(1)(a), 775.087 and 777.011, Florida Statutes (1997), for the death of Kazue Perron on or about November 14, 1997. (1,R3) Mr. Spann was also indicted for the offenses of Conspiracy to Commit Robbery with a Deadly Weapon contrary to section 812.12(1), 812.13(2), and 777.04, Florida Statutes (1997); Carjacking with a Deadly Weapon contrary to section 812.133(1),812.133(2)(a) and 777.011, Florida Statutes (1997); Kidnapping contrary to section 787.01,775.087, and 777.011, Florida Statutes (1997); Robbery with a Deadly Weapon contrary to section 812.13(2)(a) and 777.011, Florida Statutes (1997); and Grand Theft contrary to section 812.014, Florida Statutes (1987). (1,R3-4)

On January 2, 1998, Mr. Spann moved for a severance of his case from that of his co-defendant, Mr. Philmore. (1,R14-15,42-43) The motion was granted by the trial court on June 23, 1999. (1,R102)

A jury trial commenced on April 11, 2000. (1,R262) A mistrial was declared on April 17, 2000. Volumes 8 through 15 of the record contain the transcripts of the mistrial.

A second jury trial commenced on May 16, 2000, with the

Honorable Cynthia Angelos, circuit judge presiding. Volumes 16-

29 of the record contain the transcripts of this trial.

During the course of the trial, the trial court conducted hearings on the admissibility of expert opinion relating to handwriting. (21,T2104;25) Defense counsel requested that the state's handwriting expert be prohibited from testifying as to the causes of the different handwriting in the samples given by Mr. Spann because they had already agreed that the piece of evidence the state sought to admit had been written by Mr. Spann. (21,T2105-2132;24,T2374-76) On May 19, 2000, the trial court conducted a Frye hearing on the parameters of the expert's opinion. (24,T2370-2378)

Testimony at the Frye hearing was received on May 22, 2000. (25,T2545-2582) Lamar Miller testified that he is a handwriting examiner who was employed by the state to examine some letters purportedly sent by Mr. Spann to Philmore at the jail. (25,T2546-57) The question of distortion arose in the context of this examination. According to Miller, a known sample of Mr. Spann's handwriting showed distortion. Distortion is usually the result of some type of impairment or an intentional effort to disguise handwriting. (25,T2563) Defense counsel sought to prohibit Miller from testifying that in his opinion, Mr. Spann intentionally distorted his handwriting in order to disguise it. The trial court ruled that Miller was qualified as an expert. (25,T2583) The trial

court found that the evidence of distortion was relevant. The trial

court ordered that no mention be made that the samples were obtained pursuant to court order. The trial court also ruled that the expert could testify as to the differences in the handwriting and the possible reasons for it. The trial court ruled that Miller could not specifically render an opinion that the handwriting was intentionally disguised or testify that there was a deliberate intent to deceive on the part of Mr. Spann. (25,T2584-2585)

On May 22, 2000, defense counsel moved for a mistrial based on a violation of the trial court's ruling regarding the testimony of the handwriting examiner. (25,T2539-2545) The trial court denied the motion. (25,T2542)

Mr. Spann waived any jury instructions on lesser included offenses. (28,T2964-68; 29,T3054-3060) On May 24, 2000, the jury returned verdicts of guilty as charged on each count.(1,R303;318-319;29,T3152-3153)

Defense counsel advised the trial court following the verdict that Mr. Spann wanted to waive the presentation of mitigating evidence and waive a jury advisory recommendation. The trial court conducted hearings regarding these matters with Mr. Spann on May 25, 2000 and May 30, 2000. (29,R3161-3179;

30,R3183-3196) On May 30, 2000, the jury was discharged. (30, R3196-3198) A penalty phase without a jury was then conducted. (30, R3198-3222)

A Motion for New Trial was filed on June 5, 2000. (3,R345-346)

The motion was denied on June 13, 2000. (3,R347)

The state's sentencing memorandum was filed on May 31, 2000. (1,R320-336) Mr. Spann's sentencing memorandum was filed on June 1, 2000. (1,R337-339)

The trial court conducted a Spencer hearing on June 2, 2000. (31,T3223-3256)

The trial court sentenced Mr. Spann to death on June 23, 2000. (31,T3261-3268) The trial court also sentenced Mr. Spann to 15 years prison on Count VIII, conspiracy to commit robbery with a deadly weapon; life on Count IX, carjacking; life on Count X, kidnapping; life on Count XI, robbery with a deadly weapon; and five years on Count XII, grand theft. (3,R357-372;V31,T3265-3266) The trial court departed upward from the recommended sentence in the sentencing guidelines based upon the unscored capital conviction. (3,R373-377,390;V31,T3265)

The trial court's written sentencing order was contemporaneously filed during the sentencing on June 23, 2000. (3,R378-391) The trial court found that five aggravating

factors were established beyond a reasonable doubt: (1) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence based upon Mr. Spann's 1991 conviction for battery, his 1995 conviction for shooting into an occupied dwelling and his 1999 conviction for manslaughter; (2) the capital felony was committed while the defendant was engaged in the

commission of or flight after the commission of a kidnapping; (3)

the capital felony was committed to avoid or the prevent a lawful arrest or detection of a crime for which the defendant was convicted of; (4) the capital felony was committed for pecuniary gain; (5) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (3,R378-385)

The trial court considered and found none of the statutory mitigating factors. (3,R385-386) The trial court also considered non-statutory mitigating evidence. The trial court utilized the record, the Presentence Investigation (PSI), and the non-statutory mitigation proffered by Mr. Spann's counsel. (3, R387)

The trial court found that (1) Mr. Spann was a good son, brother, and student, assigned little weight; (2) Mr. Spann did

not fire the shots in the murder, assigned very little weight; (3) Mr. Spann had a good jail record, some weight; (4) Mr. Spann was a good husband and father, slight weight; (5) Mr. Spann's father was killed when Mr. Spann was between 2 and 4 years of age, moderate weight. (3,R388-389)

A Notice of Appeal was timely filed on June 26, 2000. (3,R392) An Amended Notice of Appeal was timely filed on July 11, 2000. (3,R398)

STATEMENT OF THE FACTS

The testimony presented at trial is summarized as follows:

Michael Buss is the owner of a pawn shop located in a strip mall in Royal Palm Beach. (22,T2180) On November 13, 1997, around 1:30 in the afternoon, he was robbed by Leonard Philmore and Sophia Hutchins. (22,T2181) Philmore and Hutchins entered the store and pretended that they wanted to look at some jewelry. (22,T2184) Philmore pulled out a gun and pointed it at Mr. Buss' face. (22,T2184) Hutchins locked the door. (22,T2185) Philmore demanded money. He then grabbed Mr. Buss and they wrestled. (22,T2186) Mr. Buss was knocked down. (22,T2187)

Philmore came behind him and tried to strangle him with a cord. (22,T2187) The phone rang and Mr. Buss said that it was his alarm. (22,T2187) Philmore grabbed some guns and Hutchins grabbed some jewelry from the safe.(22,T2188) Mr. Buss followed them outside as they fled. (22,T2182) He observed them go towards a dark compact car that was either gray or black or blue. (22,T2182) Neither Philmore or Hutchins got into the driver's seat. (22,T2189) The car drove away. (22,T2189)

Two handguns, a Taurus .380 and a Glock, were stolen from the store. (22,T2182) A small amount of money was also taken. (22,T2189)

Keyontra Cooper was a friend of Leonard Philmore. (22,T2192)

She was dating him at the time of this incident. She was arrested with him in an orange grove. (22,T2192) Cooper knew Mr. Spann through Philmore. (22,T2193)

On the evening of November 13, Mr. Spann and Philmore came to Cooper's home and picked her up. (22,T2194) They went to get something to eat, and then went to Sophia Hutchins' house. (22,T2194) While at Hutchins' house, Cooper saw Philmore and Mr. Spann in Philmore's bedroom. (22,T2196) She saw that they had two guns. Philmore had one of the guns and Mr. Spann had the other gun in his hand. Mr. Spann had the Glock, which was smaller than the gun that Philmore had. (22,T2196-7) Mr. Spann

and Philmore were talking, but they stopped when Cooper came into the bedroom. (22,T2197)

Cooper, Toya Stevenson, Philmore, and Mr. Spann left Hutchin's house and went to the Inns of America hotel, where they spent the night. (22,T2197) They used Mr. Spann's blue Subaru for transportation. (22,T2198) Mr. Spann drove the car because it had a standard transmission, and Philmore could not drive a stick shift. (22,T2199) Mr. Spann and Philmore both had guns. (22,T2200)

The next morning, Cooper received a page on her beeper from a friend, Ann Marie Border. (22,T2201) Ann Marie told her that the police were looking for Philmore. (22,T2201) Philmore told Mr. Spann that the police were trying to find him. Philmore said he
was broke and needed some money to leave town. (22,T2202,2210)

According to Cooper, Mr. Spann said to Philmore "You know what we got to do." (22,T2202;2210) There was some discussion about leaving town and Philmore asked Cooper if she would go with him. (22,T2203) Cooper agreed go. (22,T2203) Cooper and Toya were taken home so that they could get ready to go. Philmore and Mr. Spann left. (22,T2203)

Cooper testified that she did not hear any discussions between Philmore and Mr. Spann about robbing or killing anyone.

(22,T2210)

By November 1997, Toya Stevenson had known Mr. Spann for six or seven months. (23,T2342) On November 13, 1997, she spent the night with Mr. Spann, Philmore and Cooper at a local motel. (23,T2343) The next morning, Toya asked Mr. Spann for a ride back to Rockledge, where she lived. (23,T2346) Mr. Spann dropped Toya off at her aunt's house around noon. (23,T2346) Philmore and Cooper were in the car when Toya was dropped off. (23,T2346)

Toya was going to pack her things. Mr. Spann was going to pick her up later to leave. (23,T2347) Somewhere between 2:30 and 3:00, Philmore and Mr. Spann arrived in a gold Lexus. (23,T2347) Mr. Spann was driving. Toya got into the front seat. (23,T2348)

Cooper was picked up at a Burger King.(23, T2343) Cooper testified that she was picked up by a gold Lexus being driven by Mr. Spann. (24,T2384) They then went to Sophia's house. (23, T2349)

When Toya asked about the car, Mr. Spann told her not to worry
about it. (23,T2350) Toya saw a magazine with a mailing label on

it in the car. (23,T2350) The name on the mailing label was

"Kazue Perron". (23,T2350)

Cooper testified that she asked where the car came from. (24,T2386) Mr. Spann told her not to worry about it; we got it. (24,T2386) When Cooper pressed the issue, Philmore pointed at the keys. (24,T2387) This meant to Cooper that they had either bought the car or stolen it. (24,T2387)

While they were near Sophia's house a chase started. The chase eventually led to I95. (23,T2349;2351;24,T2388) When a tire on the Lexus blew out, they all ended up running through an orange grove. (23,T2352;24,T2390) Stevenson was eventually captured by the police in the grove. (23,T2352)

On November 14, 1997, Officer Willie Smith was working undercover for the West Palm Beach Police Department posing as a street level drug dealer. (24,T2396) At around 3:15 p.m., he saw Mr. Spann driving a gold Lexus. (24,T2397) Officer Smith knew that Mr. Spann had an outstanding warrant, so he signaled the surveillance officers that he had spotted Mr. Spann. (24,T2398) Smith saw Mr. Spann being pursued by the surveillance vehicles. (24,T2398)

Officer Jeffery Nathan began the pursuit. (24,T2400) After following the Lexus through a residential neighborhood, the chase reached I95. (24,T2404) On I95, the speeds were between 100 and
130 mph. (24,T2405) Nathan could not keep up with the Lexus and

lost them at Palm Beach Gardens. (24,T2407) A tape of Nathan's radio communications was played to the jury. (24,T2409-2411)

Edward Merten was traveling down I95 about 3:30 p.m. on November 14. (24,T2414) He was traveling about 100 mph on his motorcycle, when a gold Lexus went by him and almost hit him. (24,T2415) Merten was mad, so he chased the car. (24,T2417) The Lexus went off the road just at the Martin County line. (24,T2417) Merten saw four people jump out of the Lexus and run in to the orange groves. (24,T2418)

Mr. Merten called the police on his cell phone. (24,T2419) A tape of Merten's 911 call was played to the jury. (24,T2420-2429)

John Scarborough testified he is the owner of a grove bordering I95 in Martin county. (24,T2430) On November 14, he and his hired hand, Lucas Young, were trapping hogs in the grove when he saw some people come into the grove from the road. (24,T2432) Scarborough
and Young approached the black men to see what was going on. (24,T2433) Scarborough described one of the people as a tall, large man wearing a bunch of gold jewelry on his neck. (24,T2433) The other man was smaller and had gold teeth. (24,T2433) Both men were out of breath from running. (24,T2433) Mr. Scarborough identified Mr. Spann as the man with gold teeth.

(24,T2434)

The men said that they were being chased by the police for speeding. (24,T2435) When Mr. Scarborough questioned that, the men

said that they were being chased for drugs. (24,T2435) About this time two black women came over the creek. The sound of a helicopter was audible. (24,T2436)

Mr. Spann offered to pay Mr. Scarborough to get him out of the grove. (24,T2436) Scaraborough refused. (24,T2436) The black men then moved around the truck to the opposite side from the approaching helicopter. (24,T2436) Young saw two guns in Philmore's pants. He told Scarborough he had seen them. (24,T2437) Scarborough told the men to hide in the creek brush and that he would leave. (24,T2438) When they ran off, he eased out. (24,T2438) Scarborough then called 911 on his cell phone. (24,T2438)

Scarborough met with the troopers up by the road and tried to assist them in their search of the groves. (24,T2439) The search involved a bunch of dog teams and lasted all night. (24,T2439)

On Monday, Scarborough borrowed some metal detectors from a friend and used them in the ditches in the grove. (24,T2445) A pistol was found in about 12 inches of water.(24,T2446) A

Motorola beeper was also found. (24,T2446) Officer John Wright went to the grove and recovered the gun and beeper. (24,T2467) A further search of the same body of water yielded a second gun. (24,T2468)

Lieutenant John Wardle was in charge of the tracking investigation in the grove. (24,T2448) The manhunt lasted six hours and resulted in the arrest of Philmore, Mr. Spann, Cooper and

Stevenson. (24,T2445) Money in the amount of $464.12 and jewelry

was recovered from Philmore. (24,T2460) Money in the amount of $545.00 was found on Mr. Spann. (24, T2464)

Detective John Cummings interviewed Mr. Spann. (24,T2460) Mr. Spann said his name was James Anderson. (24,T2460) After being arrested, Mr. Spann was interviewed at the jail. (27,T2816) A tape of that interview was played to the jury. (27,T2816-2842) That interview is summarized as follows:

Mr. Spann stated that he had spent the previous night in a motel with Cooper and Stevenson. (27,T2818) After the girls were dropped off the next day, he and Philmore went to Sophia's house on Third Street. (27,T2818) Mr. Spann did not stay there long. He then went to his aunt's house on Adams street. (27,T2819) Mr. Spann drove his Subaru there. (27,T2819) Mr. Spann

estimated he got there between noon and 1:00 p.m. (27,T2819)

About an hour or two later, Philmore came to Adams Street driving a white Lexus. (27,T2820;2830) Mr. Spann asked how Philmore got the Lexus. Philmore did not give an explanation but did mention trading some dope. (27,T2820;2828) He and Philmore left to go pick up Stevenson and Cooper. (27,T2820) When the four of them were going to Sophia's house, they saw a van with police in it. (27,T2821) Mr. Philmore was driving. At this point the chase occurred. (27,T2822) Mr. Spann took off because he knew he had an outstanding warrant and so did Philmore. (27,T2833)

Mr. Spann stated that he had nothing to do with the carjacking
and that he had never seen Mrs. Perron. (27,T2822) Mr. Spann stated that Philmore can drive the Subaru. (27,T2825) Mr. Spann did not know how the Subaru ended up in Indiantown. (27,T2826) He let everyone drive it. (27,T2826) He thought Sophia might have taken it, because she had asked for the keys and he had given them to her. (27,T2832;2835)

The Lexus was tested for the presence of blood. (24,T2473) Suspected blood was found on the left front seat, the back of the driver's seat, and on the passenger door control panel.

(24,T2475)

Jean Claude Perron lives in West Palm Beach. (22,T2213) He was married to the victim, Kazue Perron. (22,T2214) On November 14, 1997, he as Mrs. Perron went to the Lexus dealership to have her car serviced. They then returned home and had lunch together. (22,T2216) After lunch, Mrs. Perron left to pick up an elderly Japanese friend, who lived on Elizabeth Street in the Square Lake development, and another person. She was going to take them to a mall. (22,T2217) Mrs. Perron left around 1:00 p.m. in her gold Lexus. (22,T2219) Mrs. Perron did not return home. (22,T2220) Mrs. Perron's body was eventually discovered in Martin County. (22,T2224) Mrs. Perron's wedding ring was missing . (22,T2224)

Martha Solis was employed as a housekeeper in the Square Lake development in Palm Beach County. (22,T2226) Solis was working on
November 14, 1997. (22,T2227) In the afternoon, she left to pick

up lunch for the lady she worked for and herself. (22,T2227) Solis left around 1:00. (22,T2227) As she was traveling down Elizabeth Street, Solis saw an old blue car in the driveway of a house. (22,T2229) The driver of the car was a slim, black man. He was not real dark. (22,T2230) Solis saw another man

running, who was really black. (22,T2230) The man who was were running was big, and wore a big, gold chain. (22,T2231) The man was running from a red house. (22,T2231) When Solis was about halfway down Elizabeth Street, the older, blue car pulled out in front of her. (22,T2231) She saw a Lexus behind her, but did not see who was driving it. (22,T2231) She saw a white or yellow woman in the Lexus. She had short, dark hair, and was wearing shorts. (22,T2231) The Lexus kept honking the horn. (22,T2233)

Detective Richard Carl showed pictures of Mr. Spann and Philmore to Carol Majerczak, a security guard at Lake Park. (278,T2875) Majercazk was also shown the photographs of Sophia, Stevenson, and Cooper. She was unable to identify them as being in the neighborhood at the time Mrs. Perron was kidnapped. (28,T2876) She saw two black males in a gold Lexus. (28,T2879) She saw a blue-gray Subaru right behind the Lexus. (28,T2879) She thought she saw two black females in the Subaru. (,T2880)

The body of Kazue Perron was discovered off New Caulkins Road in Martin County on November 21, 1997. (24,T2480) Caulkins Road

runs from Palm Beach through Indiantown and into Okeechobee.

(24,T2481) The body was found in a drainage canal in a remote, isolated, agricultural area. (24,T2482-85)

Dr. Frederick Hobin performed the autopsy on Mrs. Perron.

(25,T26114-2620;2634-35) The body was quite decomposed. Mrs. Perron was identfied by her clothing and dental records. (25,T2614) Mrs. Perron died of a gunshot wound to the forehead. (25,T2618;27,T2801)

A .380 shell casing was found at the edge of the canal. (24,T2485-2488) There appeared to be blood on the roadway. (24,T2490) A projectile was found embedded in the road. (24,T2494)

Earl Ritzline is a forensic criminalist at Indian River Community College. He performed PCR DNA testing on the suspected blood found in the area of the canal where the body was found, suspected blood found in the dirt on the roadway, and the suspected blood taken from the Lexus. (24,T2529-2523) All of the suspected blood samples were consistent with having come from Mrs. Perron. (24,T2523) One of the swabbings from the Lexus was a mixture of Mrs. Perron's DNA and some other DNA. (24,T2523)

Michael Kelly, a forensic firearm expert, examined the shell casing, the recovered projectiles, and the guns found in the grove. (25,T2594-2606) He deterimined that the Taurus had fired the bullet recovered from Mrs. Perron. (25,T2605)

Detective Gary Bach is the only investigative officer in Indiantown. (22,T2252) On November 14, 1997, at about 2p.m., he

received a call that the First Bank of Indiantown had been robbed. (22,T2253) Detective Bach was able to get a description of the robber from the witnesses. (22,T2254) Based on that information, Detective Bach prepared a photopak containing Philmore's picture. (22,T2254) The photopak was shown to the victim, Sandra Macguire, who was a bank teller. (22,T2254,2257) Macguire identified Philmore as the robber.(22,T2256)

Sandra Macguire was a teller at the First Bank of Indiantown on November 14, 1997.(22,T2259) She was getting money from a customer, when a man took it out of her hand. (22,T2261) The customer was Cathy Donnelly. She was making a deposit of approximately $1100.00 for Burger King (22,T2262;2266) The man took $1000. (22,T2262;2267)

Macguire described the man who took the money as black, 6'5" tall, heavy build, and wearing light colored clothing. (22,T2263) Donnelly described the man as being big, wearing a white muscle shirt and blue jeans. (22,T2267) The man was black. (22,T2268)

Donnelly saw the man leave the bank and get into the passenger side of a blue car. (22,T2268) There appeared to be another black male driving the car. (22,T2269)

In November 1997, Lyle Lindsey was living at the Indiantown Marina on his boat. (22,T2240) On November 14, he went to lunch with a friend. (22,T2241) About 2:00 P.M., he was headed home

on Famel Road. (22,T2241) As Mr. Lindsey turned onto Famel Road, a

car sped up and passed him on the median divider. The car was driving erratically and throwing up stones. (22,T2242) The car was a small grayish/blue Subaru. (22,T2242) Another car came up behind him. It was also being driven erratically. (22,T2243) Lindsey followed this car all the way to the Indiantown Marina. (22,T2243) Just before they reached the marina, the car pulled to the right and stopped. (22,T2243) The car turned around and drove off. (22,T2244) Mr. Lindsey identified the second car as being Mrs. Perron's Lexus. (22,T2246)

Lindsey later learned that the First Bank of Indiantown had been robbed. (22,T2248) Lindsey called law enforcement. He was later asked to look at a car found abandoned off Famel Road. (22,T2249) The car was the blue Subaru. (22,T2249)

Leo Gomez was also in Indiantown on November 14, 1997 around 2:00 in the afternoon. (23,T2280) He was right beside the bank when he observed a number of people standing outside. (23,T2281) As he was driving down Famel Road, he was almost struck by another car. (23,T2282) Mr. Gomez saw two black males in the car. (23,T2282)

Deputy Steve Wingate responded to the call from the bank, and

issued a BOLO at 1:58 p.m. (23,T2289) Deputy Wingate then went to the area of Booker Park. Later he went to Famel Road. (23,T2290) As he drove down Famel Road, he saw a gouge in the grass. (23,T2292) He got out of his car and went down the trail. He

discovered a black Subaru. (23,T2294) There was money in the area of the car. (23,T2294)

No fingerprints were found at the Indiantown Bank. (23,T2299-2307) Crime Scene Technician Rebecca Bagley went to the location of the Suburu. She recovered a white T-shirt from the roadway. It appeared to have blood on it. (23,T2308) She collected a ten dollar bill and the temporary tag from the car. (23,T2312) The name Folia Spann appeared on the title and registration to the Subaru. (23,T2319) A deposit slip from the First Bank of Indiantown from Fast Food Enterprises for $1100 was found inside the car. (23,T2324)

Folia Spann testified that she was married to Mr. Spann. (23,T2326) In October or November of 1997 she and Mr. Spann had purchased a 1986 Subaru in Broward County. (23,T2327) At the time the car was seized in Martin county by law enforcement, the title had not yet transferred to her. (23,T2328) The Subaru was a stickshift. (23, T2328)

Mrs. Spann knew Philmore was a friend of her husband.

(23,T2329) Mrs. Spann was not aware of Mr. Philmore ever driving the Subaru. (23,T2329) To her knowledge there was only one set of
keys to the car. (23,T2329)

When the robbery at Indiantown occured, Mrs. Spann was in Leon County. (23,T2330) She did not return to Martin County until December 6, 1997. (23,T2330)

Leonard Philmore testified that he had been convicted of the first degree murder of Mrs. Perron. (26,T2654) He was awaiting sentencing. (26,T2654)

Philmore knew Mr. Spann. He had known him for ten years. (26,T2654)

Philmore testified that on November 13, 1997, he and Sophia Hutchins robbed a pawn shop. (26,T2656) According to Philmore, Mr. Spann found the store the day before. (26,T2656) Philmore, Hutchins and Mr. Spann were going to split the proceeds of the robbery. (26,T2657) Mr. Spann drove the getaway car. The getaway car was Mr. Spann's Subaru. (26,T2662) Philmore could not drive the car because it was a stick shift. (26,T2660)

Mr. Spann was angry about the small amount of the proceeds from the robbery. (26,T2663) There was not enough money to leave town. (26,T2663) Because of this, Philmore and Mr. Spann made plans to rob a bank. (26,T2663)

Four guns were obtained in the robbery of the pawn shop. Philmore kept one of the guns. That gun was the murder weapon. (26,T2664) Mr. Spann kept a gun, Sophia kept a gun, and the other gun was sold to a pawn shop. (26,T2664)

After the pawn shot robbery, Philmore and Mr. Spann picked up their girlfriends and went to a hotel. (26,T2667) While the girls were out, Mr. Spann and Philmore discussed robbing a bank. (26,T2668) Mr. Spann said that they would need to get another car

to get away from the bank, and to use to go to New York. (26,T2669) They would use the Subaru to commit the bank robbery, and then ditch it because it would be hot. (26,T2670)

The next day, they dropped off the girls. The plan was to pick them up later and leave. (26,T2675) Mr. Spann and Philmore then discussed how to get a car. (26,T2676) They decided to get a car from a woman while she was getting out of her car. (26,T2676) Mr. Spann said that they would have to kill the person so that they could not be identified. (26,T2676)

They first went to the Palm Beach Mall, but were unsuccessful in gettng a car. (26,T2677) They rode around for awhile, and almost got another car, but the women got too far away from them before they could do anything. (26,T2678) They followed another car to North Lake shopping center, but could

not get it. (26,T2679)

Mr. Spann then said that he knew of a nice neighborhood, so they headed toward it. (26,T2679) At this point, they saw Mrs. Perron and the gold Lexus. (26,T2679) They followed her to the driveway of a residence. (26,T268)

Philmore ran up to the car as Mrs. Perron was getting out. (26,T2680) He asked for her phone. He then pointed his gun at her
and ordered her back into the car. (26,T2680) Perron and Philmore then got into the car and left. (26,T2680)

Mr. Spann was in the Subaru and Philmore was in the Lexus with Mrs. Perron. They then drove towards Indiantown. (26,T2681) During

the ride, Mrs. Perron was nervous and crying. (26,T2682) She offered Philmore her jewelry, because she did not have any money. (26,T2682) Philmore took her wedding rings. (26,T2683) Philmore later threw the rings away after Mr. Spann said that the jewelry would get Philmore in trouble. (26,T2683)

After driving through Indiantown two times, Philmore suggested that they go down a road he had seen. (26,T2683) Mr. Spann and Philmore drove down the road. They then stopped and got out with Mrs. Perron. (26,T2683) After they got out of the cars, Mr. Spann made a motion with his hand that Philmore

interpreted to mean "let's do it." (26,T2684)

Philmore asked Mrs. Perron to go to the edge of the canal. (26,T2685) She refused to do this and instead walked towards Philmore. (26,T2686) Philmore raised his arm and shot her in the forehead. (26,T2686) Philmore used the gun that he had kept from the robbery of the pawn shop. (26,T2686)

According to Philmore, Mr. Spann jumped out of the car and asked him what happened. (26,T2686) Mr. Spann had wanted to use his gun also. (26,T2687) Philmore then picked up Mrs. Perron's body and threw it in the canal. (26,T2687) Philmore got blood on
his shirt. (26,T2687)

As they headed back toward Indiantown, Mr. Spann said he was going to rob a bank. (26,T2687) Philmore's job was to go into the bank and get the money while Mr. Spann waited in the car.

(26,T2688) Mr. Spann gave Philmore his T-shirt. (26,T2687)

They went to the bank. (26,T2689) Philmore went in and snatched some money from the hand of a customer at the counter. (26,T2689) He got nine hundred and some odd dollars. (26,T2689)

He and Mr. Spann then drove away. They ditched the Subaru, picked up the Lexus, and went to get the girls. (26,T2690)

The money found on Philmore at the time of his arrest was from the bank robbery. (26,T2694)

While in the Martin County Jail, he and Mr. Spann would pass letters back and forth to each other. (26,T2695) Philmore identified Mr. Spann's handwriting. He also identified two letters that Mr. Spann sent to him. (26,T2697) Mr. Philmore read one of the letters to the jury. In the letter, Mr. Spann asked Philmore to testify that he was not present during the murder and robbery. (26,T2698-2699)

Philmore had not received anything from the state for his testimony. (26,T2699) Philmore said he testified because he felt bad about what had happened. (26,T2700) Philmore also said he testified because he heard that Mr. Spann was calling him a big dummy in the jail. (26,T2701) Mr. Spann was saying that Philmore would do what Mr. Spann wanted him to do because Philmore was dumb. (26,T2701)

Crime Scene Technician Rebecca Bagley traveled the routes between Southeast Elizabeth Avenue in Lake Park, New Caulkins Grove

Road (where the murder occured), the bank in Indiantown, and the pump station off Famel Road. (27,T2791) The distance from the site of the abduction to Caulkins Road was 31.2 miles with a driving time of thirty-three minutes. (27,T2793) The distance from Caulkins Road to the pump station was 3.8 miles with a driving time of seven minutes. (27,T2793) The bank was 4/10ths

of a mile from the pump station. (27,T2793) It was 30.6 miles from the pump station to Toya Stevenson's house. (27,T2794)

Tom Ranew, an investigator with the State Attorney's office, drove the distances between Adams Street and Stevenson's residence. It was 3.6 miles. (27,T2844) The distance from Sophia's house to Adams Street was 1.1 miles. (27,T2847) The distance from Sophia's house to the pump station on Famel Road was 35.6 miles with a driving time of 43 minutes. (27,T2847)

By joint stipulaton, the videotaped testimony of Willie Alma Brown was presented to the jury:

Mr. Spann is Mrs. Brown's grandson. (28,T2884-85) At the time of the trial, Mrs. Brown was living with her daughter in Tallahassee. In 1997, she had lived in a small house on Adam's Street in West Palm Beach. (28,T2886) According to Mrs. Brown, Mr. Spann did not visit or stay with her on November 14, 1997. (28,T2889) Mr. Spann would come there to get his mail. (28,T2889) He would never stay long. (28,T2990)

Mrs. Brown remembered that there was another small house

behind her house. (28,T2893) It was like a little apartment with a bathroom and kitchen. (28,T2894;2896) Mrs. Brown did not know if Mr. Spann was living there. If he did live there, she did not know about it. (28,T2894-95)

Lamar Miller is a forensic document examiner. (28,T2901)

He was asked to examine a letter, Exhibit 65, to determine if it was written by Mr. Spann. (28,T2907) Mr. Miller compared that letter to two other documents, which were requests to jail personnel that were written by Mr. Spann while he was in jail. (28,T2908) Mr. Miller also used several pages of handwriting samples that Mr. Spann had written for an investigator with the State Attorney's Office. (28,T2908) It was Miller's opinion that Mr. Spann was the author of Exhibit 65. (28,T2912)

When Mr. Miller compared the jail requests with the writing sample that Mr. Spann had written for the investigator, Miller noted that the handwriting was different. This indicated to Miller that Mr. Spann is capable of writing in different styles. (28,T2913)

Mr. Miller also went to the jail to obtain handwriting samples from Mr. Spann. (28,T2914) Miller felt that the upper case writing samples that Mr. Spann did in his presence were different from the
other samples. (28,T2915) Miller felt that Mr. Spann used more pen pressure and gripped the pen tighter. Mr. Spann seemed to be paying more attention to the actual act of writing as opposed to

what was being written. (28,T2916) Miller's opinion was that Mr. Spann seemed to be writing deliberately. (28,T2916) Miller

asked Mr. Spann to write more quickly and Mr. Spann replied that he was writing as fast as he could write. (28,T2916)

Over defense counsel's objection, Miller stated that in his opinion the samples done in his presence were distorted handwriting. Distorted handwriting is handwriting that is not characteristic of Mr. Spann's normal handwriting. (28,T2918) According to Miller, distorted handwriting is usually caused by illness, influence of alcohol or drugs, or as a result of a deliberate act. (28,T2919) Mr. Miller did not believe, based upon his observations, that Mr.Spann was ill, injured, or under the influence of drugs or alcohol. (28,T2920) Miller admitted that he did not know that Mr. Spann was taking the drug Elavil at the time Miller obtained the handwriting samples. (28,T1935)

SUMMARY OF THE ARGUMENT

The trial court erred in allowing the testimony of Lamar Miller, a forensic document examiner. The handwriting analysis performed in this case and the opinions rendered regarding this analysis do not meet the criteria for admissibility as scientific evidence under the Frye standard and should have been excluded. The error in admitting the testimony is not harmless, because it was evidence of other bad acts and put Mr. Spann's character in issue even though he had not testified.

The trial court committed reversible error by failing to adequately follow the procedures with respect to Mr. Spann's waiver of mitigation in the penalty phase of the trial. The trial court failed to obtain an adequate proffer from defense counsel of the available mitigation, and as a result Mr. Spann's personal waiver of this mitigation was also inadequate.

The trial court committed reversible error in finding that Mr. Spann had freely and voluntarily made a knowing and intelligent waiver of the advisory jury in the penalty phase of the trial, where the trial court's colloquy with Mr. Spann was inadequate. The trial court also abused its discretion by allowing Mr. Spann to waive the advisory jury. The trial court should have excersised its discretion and required Mr. Spann to have an advisory jury.

The trial court improperly found and considered Mr. Spann's

conviction for misdemeanor battery as an aggravating factor pursuant to Section 921.141(5)(b), Fla. Stat. A misdemeanor conviction cannot be used as an aggravating factor. This was reversible error.

The trial court committed reversible error in considering separate aggravating factors for during the commission of a felony (kidnapping), pecuniary gain and avoid arrest. These aggravating factors involve the same aspect of the crime, and therefore cannot all be considered as separate aggravating factors.

The trial court committed reversible error by failing to consider and weigh all the mitigating evidence contained in the record. Even though Mr. Spann waived the presentation of mitigating evidence, the trial court in its sentencing order made the determination that it would consider the non-statutory mitigation proffered by defense counsel and the non-statutory mitigation found in the P.S.I. The trial court failed to consider and weigh nineteen areas of mitigation contained in the proffers by defense counsel and the P.S.I.

The trial court abused its discretion with respect to the weight assigned to the mitigating factors. Because the trial court relied on an inadequate proffer regarding the non-

statutory mitigating factors, the trial court abused its discretion in the weight assigned to this mitigation.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN RULING THAT HANDWRITING ANALYSIS SATISFIES THE FRYE STANDARD FOR ADMISSIBILITY AND IN PERMITTING THE STATE TO INTRODUCE TESTIMONY THAT CERTAIN HANDWRITING SAMPLES SHOWED EVIDENCE OF INTENTIONAL DISTORTION OF THE HANDWRITING IN AN ATTEMPT TO DISGUISE THE HANDWRITING SO AS TO PREVENT COMPARISON.

One of the issues in this case revolves around a letter that was written by Mr. Spann that he sent to the co-defendant, Philmore during their incarceration in the jail. The discovery of this letter was the reason the trial court ordered a mistrial in the first trial. Following the mistrial, the parties sought to determine if Mr. Spann authored the letter. Defense counsel ultimately stipulated that Mr. Spann wrote the letter. Defense Counsel then sought to exclude the state's presentation of the testimony of Lamar Miller, a foresic document examiner. Defense counsel sought to exclude this testimony for three reasons: the "science" of handwriting analysis did not meet the Frye standard for admissibility; defense counsel had stipulated that Mr. Spann

authored the letter; and any testimony relating to "distortion" was impermissible evidence of bad acts.

The admission of Mr. Miller's testimony was error. The use of handwriting analysis and its acceptance as a "science" has come under scrutiny by the judicial system in recent years. A number of

courts have rejected the use of handwriting analysis. This Court must now determine whether handwriting analysis meets the Frye test for admissibility in the Florida courts.

A. THE STANDARDS FOR ADMISSIBILITY UNDER *FRYE* AND *DAUBERT*

The courts of this country have adopted one of two standards by which the admissibility of scientific evidence is determined. The first of these standards was enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)(hereafter referred to as Frye). Under Frye, in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery " must be sufficiently established so as to have gained general acceptance in the particular field in which it belongs." Frye, 293 F. at 1014. In Ramirez v. State, 651 So. 2d 1164 (Fla. 1995), this court reaffirmed that the Frye standard will be utilized by the courts in Florida. Ramirez also set forth a four step process for trial judges to use in

applying Frye.

According to Ramirez, the trial judge must first determine whether such testimony will assist the jury in understanding the evidence or determining a fact in issue. Second, the trial judge must decide whether the expert testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." The third step in the process is for the trial judge to

determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise. It is then up to the jury to determine the credibility of the expert's opinion. The jury may either accept or reject the expert's opinion. Ramirez, 651 So. 2d at 1167 (citations ommitted).

The second of these standards was enunciated by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)[herafter referred to as Daubert]. Under Daubert, the trial judge must determine: (1) whether the expert is proposing to testify to scientific knowledge and (2) the testimony will assist the trier of fact to understand or determine a fact in

issue. According to Daubert, the trial court will have to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the fact in issue." *Id*.at 592-593.

In Daubert the Court listed certain factors which the trial court can consider when making the assessment regarding admissibility, such as whether or not the methodology has or can be tested, whether it is subject to peer review and publication, the known potential rate of error and whether the technique has been

generally accepted in the relevant community.

The Frye test is, by definition, a conservative test. Courts should not accept scientific evidence unless the general scientific community has tested underlying principles or theories, as well as the techniques or applications of those principles. The primary distinction between Daubert and Frye is the requirement under Frye that there be general acceptance within the scientific community. The Frye test is considered to be a more stringent standard than the Daubert standard. It is more difficult to meet the requirements of Frye than Daubert.

B. THE STANDARD OF REVIEW

In reviewing the admissibility of scientific evidence this Court has employed a de novo standard of review as a matter of law. Brim v. State, 695 So. 2d 268, 274 (Fla. 1997) ("This means that the trial judge's ruling will be reviewed as a matter of law rather than by an abuse of discretion standard... The latter standard would prohibit an appellate court from considering any scientific material that was not part of the trial record in its determination of whether there was general acceptance within the relevant secientific community. We find that the abuse of discretion standard is incorrect..."). According to Ehrhardt, "Under this standard of review (de novo), the appellate court may examine scientific progress and evidence not considered by the trial

court." Charles Ehrhardt, Florida Evidence, Sec. 702.3, p. 596 (2001). In conducting this review, this Court "... may examine expert testimony, scientific and legal writings, and judicial opinions in making its determination." Hadden v. State, 690 So. 2d 573, 579 (Fla. 1997).

C. THE INADMISSIBILITY OF HANDWRITING IDENTIFICATION

Handwriting identification falls into the category of forensic identification that seeks to establish

individualiztion. Individualization is the process by which an object is determined to be distinct from all others in the world. Individualization attempts to answer questions such as whether or not a bullet can be traced back to the one and only barrel that fired it, whether the bitemark was made by one and only one mouth, and whether or not only one person wrote something. The ability to make individual determinations depends on the validity of several premises: that entities exist or contain unique, one-of-a-kind forms, that they leave unique traces; and that the techniques of observation, measurement, and inference employed by the forensic scientists are adequate to link these traces back to the person or object that produced them. Handwriting identification attempts to fall within this category of individualization. The application of Frye and Daubert to handwriting analysis demonstrates that handwriting

identification should be rejected as a scientific field capable of individualization.

In the early 1900's, the value of handwriting identification was seriously questioned by the courts, as exemplified by the New York Appeals Court in the case of Hoag v. Wright,

> The opinions of experts upon handwriting, who testify from comparison only, are regarded by the courts as of uncertain value, because in so many cases where such

> evidence is received witnessess of equal honesty, intelligence, and experience reach conclusion not only diametrically opposite, but always in favor of the pary who called them.

It was not until the 1930's that handwriting identification gained any measure of respectability. This change of events is attributable to the publication of a book, Questioned Documents, by Albert Osborn and the trial of Bruno Hauptmann, wherein Mr. Osborn rendered the opinion that Hauptmann was authored the ransom notes sent to the Lindbergh family after the abduction of their child. For sixty years following the affirmance of Hauptmann's conviction, no appellate court opinions have challenged the acceptance of handwriting identification. Handwriting identification became universally accepted as scientific and dependable.

A re-evaluation of handwriting identification has been underway in recent years. The federal courts in particular have undertaken a review of handwriting identification that has dramatically altered the previously unquestioned acceptance of this

type of identification. The judicial treatment of handwriting identification has moved from blanket acceptance to complete exclusion in certain cases. In one instance, during the trial of Timothy McVeigh, the court prohibited the use of handwriting

analysis unless the government could establish through a Daubert hearing that their evidence rested on a scientific foundation. The government declined to do so, and no testimony from document examiners was presented at trial. See, United States v. Hines, 55 F. Supp. 2d 62, 69-70 (U.S. District Mass., 1999). It is now time for this Court to reconsider the admissibility of handwriting identification in the Florda courts.

In U.S. v. Starzecpyzel, 880 F. Supp. 1027 (S.D. New York, 1995), a Daubert hearing was conducted to determine the admissibility of forensic document examination with respect to the questioned signatures on two documents that were integral pieces of evidence in a forgery and fraud trial involving over 100 works of art that were sold at Sotheby's and Christie's auction houses. According to this opinion, the Daubert hearing established that forensic document examination, "which clothes itself in the trappings of science, does not rest on carefully articulated postulates, does not employ rigorous methodology, and has not convincingly documented the accuracy of its determinations. The court might well have concluded that forensic document examination constitutes precisely the sort of junk science that Daubert

addressed." *Id*., at 1028.

In Storzecpyzel, it was established at the hearing that

forensic document examination and determination rests on two assumptions: no two people write exactly the same (inter-writer differences) and no person will write exactly the same way when repeating (natural variation). There are only a few published studies regarding these two underlying principles of document analysis and there is little data to support a claim that FDE (forensic document examiners) are able to detect forgeries or differences in handwriting. There is little to no statistical data concerning the occurrence of certain handwriting characteristics.

In Starzecpyzel, it was also noted that there are relatively few studies and, only a handful of articles, that compare the relative skills of FDEs with lay people. Each of the studies noted that additional studies were required before any conclusions could be drawn as to the abilities of FDEs to perform better than lay persons at detecting a forgery or matching handwriting. These studies, which had been prepared by FDEs, did not lend themselves to "rigourous(quantifiable) analysis". Any known information about the error rates of FDEs was "sparse, inconclusive, and highly disputed, particularly as regards to the relative abilities of forensic document examiners and lay examiners." *Id.*, at 1037.

In Starzecpyzel, it was concluded that if Daubert were applied

to the current techniques of handwriting identification, the

testimony would have to be excluded. While the court acknowledged that handwriting identification has general acceptance within their own community, the community was devoid of fincancially disinterested parties. *Id.*, at 1038. Handwriting identification simply could not be regarded as "scientific knowledge". *Id.*, at 1038.

In Starzecpyzel,it was determined that the testimony could be admitted as nonscientific expert testimony or "skilled" testimony under Rule 702, of the Federal Rules of Evidence, because the FDEs had a specialized knowledge that could assist the trier of fact. The testimony, however, could not be presented to a jury unfettered: the jury must be instructed that the testimony is not expert testimony and that an FDE offers practial, rather than scientific expertise. A jury instruction would be required to that effect, as well. Restrictions were placed upon the testimony of an FDE in that they were not allowed to state with what degree of certainity they were expressing their opinions. Lastly, the credibility and expertise of FDEs could be challenged. Thus, handwriting identification, which had always been considered a scientific discipline, was downgraded to being only an area of practical application.

In 1999, another federal district court questioned the use of handwriting identification. In United States v. Hines, 55 F. Supp.
2d 62 (U.S. District Court, Massachusetts, 1999), the court found

that handwriting identification had serious admissibility problems under Daubert. At issue in Hines was whether or not the FDE would be allowed to testify on two questions: (1) the similarities between the known writings of the defendant and the questioned robbery note and (2) the FDE's testimony that the defendant was the author of the robbery note.

In Hines, the court found that handwriting identification suffers a lack of credibility because it has never been subject to meaningful reliability or validity testing. Also, there is no peer review by a competitive, unbiased community of practitioners and academics. Handwriting identification has been generally accepted only within its own community. It is not a financially disinterested community, such as an academic community. There have been no comparison or control tests which document a need for expert testimony on handwriting analysis because it has never been shown that lay people do not do it as well.

In Hines, the court determined that the FDE would be allowed

to testify as to the similarities or dissimilarities between the defendant's handwriting and the robbery note, but would not be permitted to render an opinion on the ultimate conclusion of who wrote the questioned robbery note. The Hines court noted that "This is not rocket science, or higher math". *Id*., at 69.

Handwriting identification was also reviewed in U.S. v. Fujii,
152 F. Supp. 2d 939 (U.S. Dist. Ct., N.D. Ill. 2000). In this case

the government sought to present the testimony of an FDE to identify the defendant as the writer of certain documents used in the attempted immigration fraud involving two Chinese nationals. The Fujii court noted that since Daubert a number of federal courts had been reviewing the admissibility of handwriting identification and that most of these courts have been limiting or excluding the testimony. In Fujji the questioned handwriting was handprinting by a native Japanese writer. The court completely excluded the testimony of the FDE based upon the questions regarding handwriting analysis under Daubert and the lack of any evidence relating to the ability of a FDE to analyze handprinting.

D. APPLICATION TO THE INSTANT CASE

Nothing in the record in the instant case alters the findings of the federal courts regarding the unreliability of handwriting identification. The state presented no evidence which contradicts the testimony and evidence recited exhaustively in the federal opinions. During the Frye hearing the sole witness called by the state was their propsed "expert" and paid witness, Lamar Miller. Mr. Miller came to the hearing without his professional manual. He could only recall testifying one time previously on the issue of distortion in the last three or four years.(25,T2557-2559) Miller admitted he was aware of no studies concerning the potential rate

of error in connection with rendered expert opinions as to distorted handwriting and its causes. (29,T2563)

Mr. Miller's training to be an FDE consisted of a one year school and various seminars. Mr. Miller admitted that document examination is "part art and part science". (29,T2934-5)

Mr. Miller provided no testimony as to peer review or independent accredidation of the discipline. Mr. Miller could not testify as to the general acceptance in the scientific community outside of the FDEs themselves, who obviously have a financial stake in the acceptance of their service. The self-

serving statements of the paid witness attesting to the credibility of his testimony and trustworthiness of his "scientific" field, and the absence of any evidence of outside peer review and independent validation studies is not sufficient to meet the Frye standard.

While not binding on this Court, each of the above-cited decisions is persuasive authority that this Court may follow. The rationale and reasoning set forth in each of the Federal cases presents a compelling case for the rejection of handwriting identification under Frye by this Court. Clearly, as evidenced by the paucity of decisions that are rejecting handwriting identification, this Court should also determine that handwriting analysis is inadmissible.

As specifically noted, each of the Federal courts applied the

Daubert test for admissibility and found that handwriting analysis

failed to satisfy that standard. Since Frye is a more restrictive test requiring a higher degree of proof of admissibility, the logical conclusion must be that if handwriting identification fails under Daubert it must also fail under the more stringent Frye standard.

The cases relied upon by the trial court should not be

relied upon by this Court. The trial court cited two cases: Clark v. State, 443 So. 2d 973 (Fla. 1984) and Hyer v. State, 462 So. 2d 488 (Fla. 2d DCA 1984). In neither case had a Frye analysis been done. Neither of these cases stands for the proposition that handwriting identification meets current standards for admissibility. Thus, neither case is controlling and should not be persuasive authority for admissibility.

In Clark, the alleged error was the testimony of a handwriting expert as to the unusual length of time it took the co-defendant to complete a writing sample and the possibility that the co-defendant had tried to disguise his handwriting. The objection related to possible spill over to the defendant in that if the co-defendant was trying to hide something the defendant was also trying to hide something. This contention was rejected because of the adequate cross-examination on that issue.

In Hyer, the defense argued that it was error to prohibit a witness from testifying about the difference between two samples of the defendant's handwriting. The Second District upheld the

exclusion, finding that the jury could properly determine the differences between the two samples and that the proper person to call for such testimony would be an expert and not a lay

person. There is no discussion in the opinion as to whether or not handwriting analysis meets current accepted standards for admissibility, particularly with respect to this type of determination.

The trial court erred in finding that handwriting identification satisfied the Frye standard because it had gained acceptance in the field of Forensic Document Examination. (25,T2583) Frye requires general acceptance in the scientific community, not just acceptance by a group that has a financial stake in the outcome. No testimony was presented which would substantiate a finding of general acceptance under Frye. Thus there is no competent, substantial evidence that supports a finding of that nature. Acceptance in the document identification field is not enough.

The next question which must be addressed is whether or not the erroneous admission of Miller's testimony was harmless error or reversible error. The state has the burden, as the beneficiary and proponent of the error, to demonstrate beyond a reasonable doubt that the error did not influence the jury's verdict. Chapman v. California, 386 U.S. 18, 23-24 (1967); DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986). The state cannot meet their burden in this

case.

The state, through Miller's testimony, sought to show that Mr. Spann authored the letter in question and that he tried to conceal his handwriting to prevent identification of his authorship. Miller was permitted to testify as to the four reasons distorted handwriting is likely to occur. Although the court had precluded Miller from using the magic words that in his opinion Mr. Spann intentionally distorted his handwriting, Miller was allowed to testify that he did not observe any evidence of the other three causes for distorted handwriting. The only cause left was that Mr. Spann sought to intentionally disguise his handwriting. (24,T2375-76)

In the instant case defense counsel had stipulated that Mr. Spann wrote the letter. Defense counsel argued that Mr. Spann's letter was not an attempt to persuade Philmore to lie for him. Instead, defense counsel argued that Mr. Spann in his letter was exhorting Philmore to tell the truth, which was that Mr. Spann had not participated in the abduction and murder of Mrs. Perron. Given the stipulation by defense counsel as to authorship, there was no purpose for the state to use Miller's testimony other than to portray Mr. Spann as devious because he sought to intentionally disguise his handwriting, to impugn his honesty, and to attribute other uncharged bad acts to him. The jury could easily conclude, at the state's urging, that based on Miller's testimony, Mr. Spann

wrote the letter in an attempt to get Philmore to lie for him, and then tried to cover up his authorship, and then only when he was caught admit to writing the letter.

The state's case against Mr. Spann depended heavily upon the testimony of Philmore. There was no physical evidence that linked Mr. Spann to the abduction and murder. He was not identified as being present at the pawn shop robbery, the scene of the abduction, or the subsequent bank robbery. Without Philmore's testimony, the only evidence linking Mr. Spann to these crimes was that he had possession of a car similar to one observed at the various locations, he was driving the stolen Lexus, and he had cash on him at the time of his arrest. The jury had to believe Philmore in order to convict Mr. Spann. They had to believe Philmore, who was the person identified as the robber of the pawn shop, the person who was the kidnapper of Mrs. Perron, the person whose gun killed Mrs. Perron, the person whose shirt was stained by Mrs. Peron's blood, the person who was identified as the robber of the bank in Indiantown, and the person who was convicted of the murder and waiting to see if he would receive the death penalty. The credibility of Philmore was crucial. Miller's testimony was such that the jury could easily infer that Mr. Spann tried to distort his handwriting to prevent the identification of his authorship of the letter. This

was an attack on Mr. Spann's credibility and showed him to be deceitful. Miller's testimony enhanced Philmore's

testimony and gave it a stamp of credibility and veracity. Under the circumstances, the admission of Miller's testimony was not harmless.

This Court should reject the handwriting identification testimony in this as inadmissible under Frye. The judgment and sentence should be reversed and a new trial granted.

ISSUE II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ADEQUATELY FOLLOW THE PROCEDURES WITH RESPECT TO MR. SPANN'S WAIVER OF MITIGATION IN THE PENALTY PHASE OF THE TRIAL.

The trial court in the instant case failed to adequately follow the procedures with respect to Mr. Spann's waiver of mitigation in the penalty phase of the trial. This was reversible error.

On May 24, 2000, Mr. Spann's attorney advised the trial court that Mr. Spann did not want his attorneys to present a penalty phase. This matter was deferred until the next day. (28, T3156-3157)

On May 25, 2000, prior to the penalty phase of the trial, Mr. Spann's attorney again advised the trial court that Mr. Spann did not wish his attorneys to put on a mitigating case. (29, T3161; 3164-3165) The trial court then asked defense counsel if based on their investigation was there a reasonable belief that there was evidence that could be presented and defense counsel responded in the affirmative. (29, T3161) The trial court then asked defense counsel what statutory mitigators

they would be relying on and defense counsel responded "that the guilt phase evidence would support an argument that Mr. Spann was an accomplice with a relatively minor role in the capital murder." (29, T3161) The trial court then asked defense counsel about non-statutory

mitigators and defense counsel provided a proffer of the non-statutory mitigating factors. Defense counsel's proffer of the nonstatutory mitigating factors was very cursory and bare-bones, to-wit: "good son, good brother" and "capable of living in an open prison environment without being a threat to him or anybody else." (29, T3162) Defense counsel also went through various aspects of their investigation that in defense counsel's opinion did not result in any mitigating evidence. (29, T3162-3164, 3168-3170) The trial court then conducted a colloquy with Mr. Spann, that included a confirmation by Mr. Spann that his attorney had discussed this mitigating evidence with him, and that despite his attorney's recommendation, he wished to waive the presentation of penalty phase evidence. (29, T3165-3168, 3170) The trial court found that Mr. Spann freely and voluntarily made an intelligent waiver with respect to the presentation of mitigating evidence. (29, T3177)

On May 30, 2000, defense counsel informed the trial court that Mr. Spann had not changed his mind regarding his waiver of

mitigation. (30, T3183) The trial court then asked Mr. Spann if he wished to waive the presentation of any mitigating factors, and Mr. Spann answered in the affirmative. (30, T3183-3184) The trial court indicated it would honor Mr. Spann's request regarding the waiver of mitigation. (30, T3185) The state made the request that defense counsel advise the state of the possible mitigation defense counsel might raise in their sentencing memorandum, so that the

state could address this mitigation in their sentencing memorandum. (30, T3187-3188) Defense counsel in conjunction with the trial court made another bare-bones and cursory proffer of the mitigation, to-wit: "an accomplice with a relatively minor role"; "good son and sibling"; "good student in school up to a point"; "the defendant could live in a prison enviroment without doing any harm to others"; age, "twenty-three, I believe"; "good husband and father". (30, T3188-3191) Pursuant to Mr. Spann's request, defense counsel did not call any witnesses in the penalty phase of the trial. (V.30, T3222)

On May 31, 2000, the state filed a sentencing memorandum. In the state's sentencing memorandum the following statutory mitigating factors were addressed: accomplice with relatively minor role and age. The state addressed the following non-statutory mitigating factors: the defendant was not the shooter,

good son, good sibling,good prison record, good father and husband, initially a good student, and minor head injury. (3, R331-336)

On June 1, 2000, Mr. Spann's attorney filed a sentencing memorandum. With respect to mitigation the following bare-bones and very cursory proffer was made:

> "If the Defendant were to permit his counsel to present mitigating evidence on his behalf, the court should consider that: (a)he was a relatively young man at the time of all of his relevant prior and current offenses: (b)had been a good son and student, according to his mother, and a good brother according to his siblings; (c)was not the person who fired the fatal shots in the murder for which he is to

> be sentenced; and (d) is capable of living in a prison population without serious difficulty." (3. R338)

On June 2, 2000, the Spencer hearing was held. At that hearing Mr. Spann's counsel stated that Mr. Spann still did not want to present any mitigating evidence, and that other than the two previous proffers of mitigation there were not any other mitigating factors. (31, T3225) During the state's argument, the state addressed the following statutory mitigating factors: accomplice with relatively minor role and age. (31, T3246-3252) With respect to non-statutory mitigation the state also addressed in general defense counsel's proffer of "approximately five issues in mitigation, " and specifically adressed that Mr.

Spann was not the shooter and good jail record. (31, T3252-3255) During defense counsel's argument, the credibility of the co-defendant was attacked, it was pointed out that Mr. Spann had previously been convicted of manslaughter and not murder, and it was pointed out that Mr. Spann "was 21, I believe, at the time of the shooting at the other person." (31, T3256-3259)

In the sentencing order the trial court stated that "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 as set forth in the P.S.I." (3, R386) The trial court also stated that "The Court accepted as

true through the proffer and/or the evidence and/or P.S.I. that non-statutory mitigating circumstances have been established as discussed above." (3, R389)

In Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), this Court established the rule to be followed in situations where a defendant wants to waive the right to present any mitigating evidence. This rule is as follows:

> "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 in-

> vestigation, 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."

619 So. 2d at 250.

In the instant case, Mr. Spann's trial counsel did inform the trial court on the record of Mr. Spann's refusal to permit the presentation of mitigating evidence in the penalty phase against his counsel's advice. This requirement of Koon was met.

Mr. Spann's trial counsel also indicated that based on investigation there was a reasonable belief that there was mitigating evidence that could be presented. This requirement on Koon was met.

Although these two requirements of Koon were met, a major breakdown in the procedure occurred with respect to Mr. Spann's counsel indicating to the trial court what the mitigating evidence would be. As noted above, Mr. Spann's counsel throughout the proceedings provided only a bare-bones and very cursory proffer of what the mitigation would be. Mr. Spann's counsel failed to provide the trial court with any details or substance regarding the mitigating evidence in this case. Mr.

Spann's counsel presented the broadest generalities possible, and at no time provided any specific information regarding the mitigating factors. Mr. Spann's counsel failed to provide the trial court with any of the records that were available in this case. This is especially troubling in light of the mitigation that was contained in the Presentence Investigation (PSI) that defense counsel did not proffer to the trial court. (See Issue VI) The trial court committed reversible error by failing to require Mr. Spann's counsel to provide an adequate proffer of what the mitigating evidence would be. Without an adequate proffer of mitigating evidence it is impossible for the trial court to evaluate whether or not the waiver was knowingly and intelligently made. In a case such as this, where the trial court considers and accepts as true the proferred non-statutory mitigation in the sentencing order, without an adequate proffer of mitigating evidence it is impossible for the trial court to properly weigh the mitigating factors. (See Issue VII) Without an

adequate proffer of mitigating evidence it is impossible for this Court to conduct proportionality review.

Because of the major breakdown regarding the proffer of what the mitigating evidence would be, Mr. Spann's personal waiver of mitigating evidence is also inadequate. Mr. Spann's confirmation

that his counsel had discussed the proffered matters with him is merely a confirmation of something that was inadequate. A knowing and intelligent waiver of a right must be based on adequate information. The trial court committed reversible error by finding a knowing and intelligent waiver of mitigation based on the inadequate proffer.

This error was further compounded at the Spencer hearing. The trial court failed to conduct a Koon inquiry at the Spencer hearing, and merely relied on the representations of Mr. Spann's counsel that Mr. Spann did not want to present mitigation at the Spencer hearing. The trial court should have conducted a Koon inquiry at the time of the Spencer hearing. During a Koon inquiry at the Spencer hearing, the trial court could and should have advised Mr. Spann about what a Spencer hearing was, and how mitigation can be presented at this proceeding as well. An adequate Koon inquiry at this stage of the proceedings could and should have addressed the inadequacies that occurred during the Koon inquiry at the time of the penalty phase proceedings. The trial court committed reversible error by failing to conduct a Koon

inquiry at the time of the Spencer hearing.

Because the trial court committed reversible error by failing to adequately follow the procedures with respect to Mr.

Spann's waiver of mitigation in the penalty phase, Mr. Spann is entitled to a new penalty phase. At the new penalty phase proceeding Mr. Spann would be entitled to present mitigating evidence, since the waiver of mitigation in this case was legally improper.

ISSUE III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT MR. SPANN HAD FREELY AND VOLUNTARILY MADE A KNOWING AND INTELLIGENT WAIVER OF THE ADVISORY JURY IN THE PENALTY PHASE OF THE TRIAL AND ALSO ABUSED ITS DISCRETION BY ALLOWING MR. SPANN TO WAIVE THE ADVISORY JURY IN THE PENALTY PHASE OF THE TRIAL.

In the instant case, the trial court allowed Mr. Spann to waive the advisory jury in the penalty phase of the trial. The trial court committed reversible error in finding that Mr. Spann had freely and voluntarily made a knowing and intelligent waiver of the advisory jury. The trial court abused its discretion by allowing Mr. Spann to waive the advisory jury.

On May 24, 2000, Mr. Spann's counsel raised the issue of Mr. Spann wanting to waive the advisory jury in the penalty phase. The issue was deferred until the next day. (28, T3156-3157)

On May 25, 2000, Mr. Spann's counsel again raised the issue of Mr. Spann wanting to waive the advisory jury in the penalty phase. (29, T3171-3174). The trial court then conducted a colloquy on this issue with Mr. Spann. The sole focus of the colloquy was on the fact that if the jury recommended a life sentence, the trial court would be required to give this recommendation great weight and in only the rarest of circumstances could the trial court impose a sentence other then life. (29, T3174-3175) Following this colloquy, the trial court

found that Mr. Spann freely and

voluntarily made a knowing and intelligent waiver of his right to an advisory jury in the penalty phase. (29, T3177) Mr. Spann then asked the trial court if he could be sentenced that day. The trial court advised Mr. Spann that he could not be sentenced that day, because the trial court was still required to conduct a penalty phase hearing even though Mr. Spann had waived the advisory jury. Mr. Spann advised that he understood this and still wanted to waive the advisory jury. (29, T3177-3179) Even though Mr. Spann had waived the advisory jury in the penalty phase, the trial court decided to still have the jury return in case Mr. Spann changed his mind. (29, T3177-3179) At no point during these discussions did the trial court ever advise Mr. Spann or acknowledge that under these circumstances the trial court in its discretion could still require an advisory jury recommendation. The trial court treated this situation as though it was Mr. Spann's right to waive the advisory jury, and not something over which the trial court had the final say, including the right to override Mr. Spann's request and require an advisory jury.

On May 30, 2000, Mr. Spann's counsel advised the trial court that he had spoken with Mr. Spann over the weekend and that Mr. Spann had not changed his mind about anything. (30, T3183) The

trial court then conducted a colloquy with Mr. Spann on this issue. The focus of this colloquy was the same as the colloquy on May 25, 2000. Mr. Spann again affirmed that he wanted to waive the

advisory jury in the penalty phase. (30, T3183-3185) The trial court then indicated that it would honor Mr. Spann's waiver of the advisory jury sentence. (30, T3185) A written waiver of the advisory jury in the penalty phase was read and signed by Mr. Spann. The written waiver was filed for the purposes of the penalty phase as Court's exhibit 1. (30, T3194) At no point during these discussions did the trial court ever advise Mr. Spann or acknowledge that under these circumstances the trial court in its discretion could still require an advisory jury recommendation. In fact, the trial court during the discharge of the jury told them that "...the Defendant in this case, Anthony Spann, has elected to waive his right to a jury advisory recommendation." (30, T3196)

Soon after this waiver of the advisory jury by Mr. Spann, the trial court discharged the jurors. (30, T3195-3198) The trial court then conducted a penalty phase proceeding without a jury during which the only witnesses and evidence were presented by the state. (30, T3199-3222)

In Lamadline v. State, 303 So. 2d 17 (Fla. 1974), this Court

recognized that a defendant could waive the advisory jury in the penalty phase of the trial provided that the record showed that the defendant voluntarily and intelligently waived the advisory jury. In Lamadline this Court cited Boykin v. Alabama, 395 U.S. 238 (1969). In Boykin, the U.S. Supreme Court held that a waiver of jury trial is valid only if the record affirmatively shows that the

waiver is "an intentional relinquishment or abandonment of a known right or privelege." Id. at 243 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Other cases since Lamadline have made it clear that a defendant can waive the advisory jury in the penalty phase of the trial. See, State v. Hernandez, 645 So. 2d 432 (Fla. 1994); Sireci v. State, 587 So. 2d 450 (Fla. 1991); Palmes v. State, 397 So. 2d 648 (Fla. 1981); Holmes v. State, 374 So. 2d 944 (Fla. 1979); State v. Carr,336 So. 2d 358 (Fla. 1976)

In Arthur v. State, 374 S.E. 2d 291 (S.C. 1988), the court held that a defendant's waiver of a jury for a resentencing proceeding in a capital case was not knowingly and voluntarily given. In Arthur, defense counsel informed the trial judge that the defense had agreed to waive the jury during the penalty phase "with the Defendant's full knowledge." Id. at 293. The judge inquired whether the defendant was in agreement and

whether he had any questions. Id. The defendant indicated his agreement and said he had no questions. Id. On appeal the court held that the trial court's inquiry was "patently insufficient." Id. The court stated, "We hold that acceptance of a jury trial waiver must be based upon a written record clearly demonstrating that it was made knowingly and voluntarily. This can be accomplished only through a searching interrogation of the accused by the trial court itself." Id.

In Carr, this Court held that even though a trial court

finds that a defendant made a voluntary and intelligent waiver of the advisory jury in the penalty phase of the trial, the trial court in its discretion may require an advisory jury recommendation, or may proceed to sentence the defendant without an advisory jury recommendation. In Carr, as a courtesy and accommodation to the trial court, this Court relinquished jurisdiction for the purpose of allowing the trial court to exercise its discretion.

In Hernandez, this Court dealt with a situation in which the trial court allowed the defendant to waive the advisory jury because the trial court determined that the defendant could do this as a matter of right and that the trial court could not compel the defendant to have an advisory jury. This determination by the trial court in Holmes was made prior to

this Court's pronouncement in Carr that the trial court in its discretion could require an advisory jury. In Holmes, this Court did not follow the procedure in Carr regarding the relinquishment of jurisdiction for the purpose of allowing the trial court to execrise its discretion since the trial judge in Holmes was now deceased thus making this procedure impossible and immateral.

In the instant case, the record does not demonstrate that Mr. Spann's waiver of the advisory jury was knowingly and intelligently made. The trial court's colloquy with Mr. Spann regarding the waiver of the advisory jury was inadequate in that it was

incomplete. Mr. Spann's participation in the waiver colluquy was inadequate in that it was limited to an affirmation of statements being made by the trial court.

The trial Court's colloquy with Mr. Spann was incomplete. On May 25, 2000, and May 30, 2000, the trial court's focus with respect to Mr. Spann's waiver of the advisory jury was on the fact that if the jury recommended a life sentence, the trial court would be required to give this recommendation great weight and in only the rarest of circumstances could the trial court impose a sentence other then life. The trial court did not inform Mr. Spann that the trial court in its discretion could

still require an advisory jury. The trial court failed to conduct a "searching interrogation" of Mr. Spann. Because the colloquy was incomplete, Mr. Spann's waiver was invalid.

The trial court's colloquy with Mr. Spann was also inadequate in that Mr. Spann's participation was limited to an affirmation of statements being made by the trial court. During the trial court's inquiry, Mr. Spann made no statements, general or specific, indicating his knowldege of the penalty phase proceedings with respect to the advisory jury. Mr. Spann made no statements, general or specific, indicating his knowledge of the consequences of the waiver. Mr. Spann only responded affirmatively when the trial court asked him if he understood what the trial court was saying. As a result, a determination of whether or not Mr. Spann

acted knowingly and intelligently turns on the incomplete statements by the trial court that Mr. Spann affirmed that he understood. Mr. Spann's waiver was invalid for these reasons.

The trial court also erred by failing to exercise its discretion and require an advisory jury. The trial court abused its discretion in allowing Mr. Spann to waive the advisory jury in the penalty phase of the trial. A complete review of the record of the May 25 and May 30, 2000 proceedings shows that the trial court acted in total deference to the defendant's request

to waive the advisory jury. The trial court in effect treated this as something Mr. Spann was entitled to do as a matter of right. The trial court, in fact, stated that it was Mr. Spann's right to waive a jury recommendation. At no point in the proceedings did the trial court ever advise Mr. Spann that even though he wished to waive the advisory jury that the trial court could still compel him to have an advisory jury. At no point did the trial court ever acknowledge that under these circumstances the trial court in its discretion could still require an advisory jury recommendation.

Instead, the record reflects that the trial court simply acquiesced to Mr. Spann's request. Even after Mr. Spann waived the advisory jury on May 25, 2000, the trial court had the advisory jury return on May 30, 2000 in case Mr. Spann "changed his mind." The trial court gave no indication on the record that the reason for having the advisory jury return on May 30, 2000 was in case

the trial court decided to exercise its discretion and require an advisory jury.

The record also reflects the importance the trial court placed on the need for an advisory recommendation in this case. In the May 25, 2000 colloquy with Mr. Spann, the trial court told Mr. Spann that "A jury very well may make a life

recommendation in this case." (V.29, p.3175) The trial court also noted if the jury were to recommend a life sentence, despite what sentence I thought the law would require, the life sentence in all likliehood is that which would be imposed." (V.29, p.3175)

In addition to the above, the trial court at the conclusion of the discussion of this matter on May 30, 2000 made a very compelling statement that clearly shows the trial court deferred to Mr. Spann instead of exercising its discretion in making the decision. On May 30, following a discussion regarding a written waiver of the advisory jury, the trial court stated "...and, Mr. Spann, I've honored your request with regards to a waiver of mitigation and waiver of the advisory jury sentence." (V.29, p. 3185) The fact that the trial court "honored" the request shows the trial court's acquiesence to the defendant's request, as opposed the trial court exercising its sound discretion regarding this matter. The fact that the trial court included the waiver of the advisory jury sentence with the waiver of mitigation shows that the trial court was improperly treating both of these issues as

something a defendant could do as a matter of right.

Evan after the trial court stated that it would honor Mr. Spann's request, the trial ocurt advised Mr. Spann that the jury

was there in case he had "a change of heart."

The trial court erred in finding a knowing and intelligent waiver of the advisory jury. The record in this case shows that the trial court erred in finding Mr. Spann knowingly and intelligently waived the advisory jury. The record in this case shows that the trial court abused its discretion in allowing Mr. Spann to waive the advisory jury in the penalty phase of the trial. Based on the facts in this case, the trial court should have exercised its discretion to require an avisory jury. Because of these errors, Mr. Spann is entitled to a new penalty phase before a jury.

ISSUE IV

THE TRIAL COURT IMPROPERLY FOUND AND CONSIDERED MR. SPANN'S CONVICTION FOR MISDEMEANOR BATTERY AS AN AGGRAVATING FACTOR PURSUANT TO SECTION 921.141(5)(b), FLA. STAT.

In the sentencing order, the trial court found and considered Mr. Spann's conviction for misdemeanor battery as an aggravating factor pursuant to Section 921.141(5)(b), Fla. Stat. This was improper.

During the penalty phase proceedings that were conducted before the trial court without a jury, the state presented the testimony of Robert Sharp regarding a misdemeanor battery that was committed on him by Mr. Spann in 1991. (V.30, T3199-3205) The judgment and sentence reflecting the conviction for a misdemeanor battery was entered into evidence as State's Exhibit 1 to the penalty phase. (V.30, T3204-3205) At the Spencer hearing the state noted that the battery conviction was a misdemeanor. (V.31, T3232) Despite this fact, the trial court found and considered the battery in the sentencing order as an aggravating factor. (3, R379-380)

Section 921.141(5)(b), Fla. Stat. creates an aggravating factor where "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Section 921.141(5)(b), Fla. Stat. does not make any provision for misdemeanor offenses.

Because the trial court found and considered Mr. Spann's

conviction for misdemeanor battery as an aggravating factor, reversible error occurred. Because there was reversible error in the sentencing order a new sentencing before the trial court is required.

ISSUE V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONSIDERING SEPERATE AGGRAVATING FACTORS FOR DURING THE COMMISSION OF A FELONY (KIDNAPPING), PECUNIARY GAIN AND AVOID ARREST.

The trial court committed reversible error in considering separate aggravating factors for during the commission of a felony (kidnapping), pecuniary gain and avoid arrest. In the instant case these aggravating factors refer to the same aspect of the crime, and thus it was improper to consider each of these agravating factors.

In the sentencing order, the trial court found the following aggravating factors: during the commission of a felony (kidnapping), pecuniary gain and avoid arrest. (3, R380-382) In its analysis of these aggravating factors in the sentencing order, the trial court discussed the factual basis for these aggravating factors.

In Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), this Court held that improper doubling occurs when aggravating factors refer to the same aspect of the crime.

In Cherry v. State,544 So. 2d 184, 187 (Fla. 1989), this

Court found that it was improper doubling where the trial court considered murder during the commission of a burglary and pecuniary gain whee the sole purpose of the burglary was pecuniery gain. 65

In Green v. State, 641 So. 2d 391 (Fla. 1994), this Court found that it was not improper to find both during the commission of a felony (kidnapping) and pecuniary gain (robbery) where the kidnapping had a broader purpose than just to provide an opportunity for a robbery. Also, see Foster v. State, 679 So. 2d 747(Fla. 1996).

In the instant case, the state argued that the trial court could consider during the course of a felony (kidnapping) and pecuniary gain seperately based on Green and Foster. The state argued that the kidnapping had a broader purpose then just to provide the opportunity for a robbery. What the state did not take into consideration is that the broader purpose for the kidnapping was the same aspect of the crime that provided the basis for the avoid arrest aggravating factor. Thus, the trial court erred in considering each of these aggravating factors seperately.

An examination of the sentencing order shows that the trial court relied on the same aspect of the crime in finding the during the commission of a felony (kidnapping) aggravator and the avoid arrest aggravator. The trial court in its discussion

of the during the commission of a felony (kidnapping) aggravator stated that Mr. Spann and the co-defendant planned to carjack a vehicle, abduct the driver, and then kill the driver so they could not be identified. (3, R380) These are the same facts that the trial court relied on in finding the avoid arrest aggravator. (3, R381) Thus, the trial

court erred in considering each of these aggravating factors seperately.

It should also be noted that the trial court in the sentencing order with respect to pecuniary gain relied on the fact that "The occupant of the vehicle was to be killed so they could not be identified." (3,R382) Killing the occupant of the vehicle so they could not be identified was an aspect of the crime that was relied on for the during the commission of a felony (kidnapping) aggravator and the avoid arrest aggravator. This was improper.

The trial court committed reversible error in considering separate aggravating factors for during the commission of a felony (kidnapping), pecuniary gain and avoid arrest. A new sentencing hearing before the trial court is required.

ISSUE VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONSIDER AND WEIGH ALL THE MITIGATING EVIDENCE CONTAINED IN THE RECORD.

In the sentencing order, the trial court failed to consider and weigh all the mitigating evidence contained in the record. It was reversible error for the trial court not to consider and weigh all of the mitigating evidence contained in the record.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990) this Court established the standard for evaluating mitigating factors:

> "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 nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established

> by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." 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. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record.""

571 So. 2d at 419-20.

In Trease v. State, 768 So. 2d 1050 (Fla. 2000), this Court modified the Campbell standard in one respect:

> "We hereby recede from our opinion in Campbell to the extent it disallows trial courts from according no weight to a mitigating factor and recognize that there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight. 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. Nevertheless, these cases do not preclude the sentencer from according the mitigating factor no weight. We therefore recognize that while a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for

> additional reasons or circumstances unique to that case. For example, while being a drug addict may be considered a mitigating circumstance, that the defendant was an addict twenty years before the crime for which he or she was convicted may be sufficient reason to entitle the factor no weight."

768 So. 2d at 1055.

In Farr,621 So. 2d 1368 (Fla. 1993), this Court stated the following:

> We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and un-controverted. 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.

619 So. 2d at 250.

In Blanco v. State, 706 So. 2d 7 (Fla. 1997), this Court discussed the well-settled standards of review governing mitigating factors:

> The 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 to 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.

706 so. 2d at 10.

In the instant case, the trial court stated in its sentencing order that it considered the proffered non-statutory mitigation as well as all mitigation in the record including any and all mitigation as set forth in the P.S.I. even though Mr. Spann waived the presentation of mitigating evidence. The trial court considered and weighed the following non-statutory mitigating factors: relatively young at time of prior and current offenses, good son, good brother, good student,not the shooter, good husband, good father, and his father was shot to death when he was 2 to 4 years old. The trial court also considered and weighed under the

heading " d) The defendant is capable of living in a prison population without serious difficulty or doing harm to another," the fact that he was a good inmate in the county jail while awaiting trial.

Although the trial court in its senencing order stated that it considered and weighed the proffered non-statutory mitigation and any and all mitigation as set forth in the P.S.I., there was a significant amount of mitigation in the proffers and in the P.S.I. that the trial court did not consider and weigh. It was reversible error for the trial court not to consider and weigh

this mitigation.

The first area of mitigation that the trial court did not consider and weigh was that Mr. Spann was capable of living in a prison population without serious difficulty or doing harm to another. The record shows that on May 25, 2000 and May 30, 2000 Mr. Spann's counsel proffered this mitigating factor to the trial court. Mr. Spann's attorney also advised the trial court that there were prison records that inferentially supported this mitigating factor. (29, T3162; 30, T3189) Although the trial court in a heading in the sentencing order referenced this mitigating factor, the mitigating factor that was actually considered and weighed by the trial court was that the defendant was a good inmate in the county jail while awaiting trial. This is a different mitigating factor than the person's potential to be a good prisoner in state

prison. Also, the trial court did not review the prison records referred to by Mr. Spann's counsel for the purpose of determining
if other mitigating evidence was contained in those records, and, if any, weighing it.

The second area of mitigation that the trial court did not consider and weigh was that at a certain age Mr. Spann came under the influence of a bad crowd. The record shows that on May

25, 2000 Mr. Spann's counsel proffered this mitigating factor to the trial court. (29, T3161; 30, T3188) The trial court did not consider and weigh this mitigation.

The third area of mitigation that the trial court did not consider and weigh was available mental health evidence based on the examination of Mr. Spann by the defense mental health professional in this case. The record shows that on May 25, 2000 Mr. Spann's counsel advised the trial court that Mr. Spann was evaluated by Dr. Fred Patrillo, who met with Mr. Spann once and did "some of the Wais tests, some of the standarized neurological tests." Mr. Spann's counsel went on to advise the trial court that Mr. Spann would not go forward with a second appointment with Dr. Patrillo, and that without the second test the doctor could not reach any firm conclusion. Defense counsel also stated that they "did the mental health evaluation and found it valueless." (29, T3162-3163) The record also shows that on May 30, 2000 the trial court confirmed through defense counsel that Mr. Spann met with Dr.

Patrillo, but that Dr. Patrillo did not reach any conclusions regarding mental state and had no concerns over competency issues.

(30, T3189) Even though the mental health evaluation and testing was not fully completed, and valueless according to

defense counsel, the trial court should have independently considered the available mental health evidence, and, if any, mitigating evidence was found, weigh it.

The fourth area of mitigation that the trial court did not consider and weigh was Mr. Spann's school records above and beyond his being a good student up to a point. The record shows that on May 25, 2000 Mr. Spann's counsel advised the trial court that as part of the investigation Mr. Spann's school records were obtained, but that they did not contain any specific mitigation. (29, T3163-3164) The record also shows that on May 30, 2000 the trial court confirmed through defense counsel that the defense would have presented school records had Mr. Spann not waived mitigation. (30, T3189) Even though defense counsel stated on May 25, 2000 that the school records did not contain any specific mitigation, defense counsel's evaluation of the school records is suspect in light of the fact that on May 30, 2000 defense counsel acknowledged that during the previous proffer on May 25, 2000 they had failed to raise the issue that Mr. Spann was a good student up to a point. (30, T3188) The trial court should have independently considered the school records to determine if there was mitigation in these

records above and beyond Mr. Spann being a good student up to a point, and, if any, weigh it.

The fifth area of mitigation that the trial court did not consider and weigh was Mr. Spann's social records. The record shows that on May 25, 2000 Mr. Spann's counsel advised the trial court that as part of the investigation Mr. Spann's social records wee obtained, but they did not contain any specific mitigation. (29, T3163-3164) The record also shows that on May 30, 2000 the trial court confirmed through defense counsel that the defense would have presented social records had Mr. Spann not waived mitigation. (30, T3189) Even though defense counsel stated on May 25, 2000 that the social records did not contain any specific mitigation, the trial court should have independently considered the social records to determine if there was mitigation, and, if any, weighed it.

The sixth area of mitigation that the trial court did not consider and weigh was Mr. Spann's criminal history records. The record shows that on May 25, 2000 Mr. Spann's counsel advised the trial court that as part of the investigation Mr. Spann's criminal history records were reviewed and that there was "Nothing in the way of mitigation there." (29, T3163-3164) Even though defense counsel stated that the criminal history records were reviewed and

did not contain any mitigation, the trial court should have independently considered the criminal history records to determine

if there was mitigation, and, if any, weigh it.

The seventh area of mitigation that the trial court did not consider and weigh was the co-defendant's criminal history records. The record shows that on May 25, 2000 Mr. Spann's counsel advised the trial court as part of the investigation that the co-defendant's criminal history records were reviewed. (29, T3163) The trial court should have considered the co-defendant's criminal history records to determine if there was mitigation, and, if any, weigh it.

The eighth area of mitigation that the trial court did not consider and weigh was that Mr. Spann was in a car accident in 1989 or 1990. The record shows that on May 25, 2000 Mr. Spann's counsel advised the trial court tht Mr. Spann was admitted to a hospital emergency room as a result of a car accident in 1989 or 1990. Mr. Spann's counsel also advised the trial court that Mr. Spann "didn't think it was a serious injury, that he hadn't complained afterward of head injury or consequences from it," and that defense counsel in their investigation did not discover any evidence of behavioral changes following the accident. (29, T3168-3170) The record also shows that on May 30, 2000 the trial court confirmed through defense counsel that Mr. Spann had a head injury in 1989 or 1990, although defense counsel did not find any evidence of any significant injury. (29, T3189) The

trial court should have considered and weighed this as mitigation.

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The ninth area of mitigation that the trial court did not consider and weigh was drug use during the episode. The record shows that on May 30, 2000 the trial court stated "I believe the evidence may tend to show that it may support an argument from drug use during the episode." The trial court then asked defense counsel if this was going to be raised or not and defense counsel stated "I don't believe so." (30, T3190) Because the trial court believed the evidence tended to show drug use during the episode, the trial court should have considered and weighed this mitigation.

The tenth area of mitigation that the trial court did not consider and weigh was Mr. Spann's low level of education. The Presentence Investigation (P.S.I.) reflects that the highest grade Mr. Spann completed was the 9th grade at Juniper High School in West Palm Beach, Florida. The trial court should have considered and weighed this as mitigation.

The eleventh area of mitigation that the trial court did not consider and weigh was Mr. Spann's occupational skills as a welder. The P.S.I. indicates that according to the FCIC, Mr. Spann's occupation is listed as a welder. The trial court should have considered and weighed this as mitigation.

The twelfth area of mitigation that the trial court did not consider and weigh was that Mr. Spann's current or most recent employer is unknown, the number of jobs in the past two years is unknown, the months unemployed in the last two years is unknown,

and according to prior Department of Corrections records, Mr. Spann has no verifible employment. The trial court should have considered and weighed Mr. Spann's unemployment history as mitigation. The trial court also should have reviewed the prior Department of Corrections records for the purpose of identifying other mitigating evidence, and, if any, weighed it. According to the P.S.I. prior Department of Corrections records were the basis for the information in the P.S.I. in the instant case regarding Mr. Spann's family history, marital history, and information regarding his physical and mental health.

The thirteenth area of mitigation that the trial court did not consider and weigh was that Mr. Spann left home at an early age. The P.S.I. reflects that Mr. Spann moved out of his mother's residence at age 16 to go live with his sister, Yolanda, who was 18 years old at the time. The trial court should have considered and weighed this as mitigation.

The fourteenth area of mitigation that the trial court did not consider and weigh was Mr. Spann's unstable residential history. The P.S.I. was unable to verify Mr. Spann's

residential history other then to note that he left his mother's home at a young age (see above), and that he has continued to move back to live with his mother at various times. The trial court should have considered and weighed this as mitigation.

The fifteenth area of mitigation that the trial court did not

consider and weigh was that Mr. Spann has two other children in addition to the child noted in the sentencing order with respect to

Mr. Spann being a good father. The P.S.I. reflects that in addition to the child by his wife, Mr. Spann has two other children, who reside with their mother, who is believed to be Gwen D. Gaston. The trial court should have considered and weighed this as mitigation.

The sixteenth area of mitigation that the trial court did not consider and weigh was Mr. Spann's health problems. The P.S.I. reflects that Mr. Spann in a prior juvenile PDR was noted to have sinus problems and hay fever. The trial court should have considered and weighed this as mitigation. The trial court should have reviewed the prior PDR for the purpose of identifying other mitigating evidence, and, if any, weighed it.

The seventeenth area of mitigation that the trial court did

not consider and weigh was Mr. Spann's unhealthy relationship with his mother. The P.S.I. refelcts that in the psychological section of the prior juvenile PDR it was indicated "that a psychological evaluation had been ordered, with a finding that as a result of debilitating disease suffered by the defendant's mother, dependency between the defendant, his mother, and siblings, had reached a point where the defendant and mother's relationship had become unhealthy. The recommendation was to have the defendant and mother
'detach' from each other." The trial court should have considered

and weighed this as mitigation. The trial court should have reviewed this psychological report for the purpose of identifying
other mitigating evidence, and, if any, weighed it.

The eighteenth area of mitigation that the trial court did not consider and weigh was that Mr. Spann needed an appropriate male role model. The P.S.I. reflects that this was also contained in the psychological section of the prior juvenile PDR. The trial court should have considered and weighed this as mitigation.

The nineteenth area of mitigation that the trial court did not consider and weigh was Mr. Spann's institutionalization as

a juvenile. The P.S.I. reflects that Mr. Spann spent some time in the Orlando area for a juvenile commitment. The trial court should have considered and weighed this as mitigation.

The trial court failed to fully consider and weigh the non-statutory mitigating factor contained in the proffers by defense counsel and the P.S.I. The trial court failed to consider and weigh nineteen areas of mitigating evidence contained in the record. The mitigating evidence contained in the record is uncontroverted and believable. The trial court committed reversible error for these reasons and a new sentencing hearing before the court must be ordered.

ISSUE VII

THE TRIAL COURT ABUSED ITS DISCRETION WITH RESPECT TO THE WEIGHT ASSIGNED TO THE MITIGATING FACTORS.

The trial court in its sentencing order assigned various weight to the mitigating factors. The trial court abused its discretion with respect to the weight assigned to the mitigating factors.

In its sentencing order the trial court considered and found

that none of the statutory mitigating factors existed. (3, R384-386) The trial court also considered and weighed the non-statutory mitigating factors proffered by Mr. Spann's counsel, as well as, one item of non-statutory mitigating factor that was set forth in the PSI and found as follows:

a) relatively young men at time of battery conviction (some weight)

b) good son, good brother, good student (little weight)

c) not the shooter (very little weight)

d) good jail record (some weight)

e) good husband and father (slight weight)

f) Mr. Spann's father shot to death (moderate weight)

(3, R386-389) - in the P.S.I.

Based on Campbell, the appropriate standard of review is that the abuse of discretion standard applies to the weight assigned to a mitigating factor. 706 So. 2d at 10.

In the instant case, the trial court abused its discretion

with respect to the weight assigned to b, d and e above. As noted in Issue II, the proffer by defense counsel regarding the non-statutory mitigating factors in b, d and e above was inadequate. The trial court should have required an adequate proffer of these non-statutory mitigating factors. The trial court abused its discretion by relying on an inadequate proffer

for the purpose of assignig weight to this mitigation.

The trial court also abused its descretion by relying on the limited amount of information in the P.S.I. with respect to f. Because the trial court relied on limited information in assigning weight to this mitigation, the trial court abused its discretion.

Because the trial court abused its discretion with respect to the weight assigned to these mitigating factors, a new senencing hearing before the trial court is required.

CONCLUSION

Based on the facts, the law, and the argument, Mr. Spann requests the following relief:

Issue I: Reverse the convictions and remand for a new trial.

Issue II: Reverse the sentence and remand for a new sentencing.

Issue III: Reverse the sentence and remand for a new sentencing proceeding with a jury.

Issue IV: Reverse the sentence and remand for a new sentencing proceeding with the court.

Issue V: Reverse the sentence and remand for a new sentencing proceeding with the court.

Issue VI: Reverse the sentence and remand for a new sentencing proceeding with the court.

Issue VII: Reverse the sentence and remand for a new sentencing proceeding with the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the

foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Assistant Attorney General Melony Dale, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33401, this _____ day of October, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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